WEST VIRGINIA SUPREME COURT OF APPEALS
DOCKET NO. 22-0378

BRIAN FRYE,

Appellant/Plaintiff Below,

v.

ERIE INSURANCE COMPANY,

Appellee/Defendant Below,

On Appeal from the Circuit Court
of Ohio County, West Virginia
(Civil Action No. 19-C-52)

BRIEF OF APPELLANT/PLAINTIFF BELOW

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2. The Circuit Court committed a clear legal error of law by denying the Plaintiff's motion to alter or amend its judgment on the basis that the Plaintiff had not presented any evidence in this civil action that his home had suffered mine subsidence damage when such ruling was not part of its Order granting summary judgment to Defendant and the Defendant did not file its own motion to alter or amend judgment to include such a ruling. Moreover, in addition to his own beliefs and opinions, the Plaintiff had presented an expert's opinions in support of his claim, and such expert had never been disqualified or the admissibility of his opinions otherwise limited by the trial court. Any other issues involving the expert's opinions would involve questions of weight or credibility that are for the jury to decide. It would constitute an obvious injustice to deny Plaintiff's motion to alter or amend the judgment on grounds that were neither relied upon by the

Circuit Court in its Order granting summary to Defendant that was the basis of its final judgment nor are accurate in light of the evidence of record.

3. Even if the Circuit Court's Order granting summary judgment to Erie could be reasonably construed to include as a basis for its ruling the failure of the Plaintiff to offer evidence of mine subsidence damages, the Court committed clear error of law in granting summary judgment and an abuse of discretion in interpreting the facts and evidence of record. In addition to his own beliefs and opinions, the Plaintiff had presented an expert's opinions in support of his claim, and such expert had never been disqualified or the admissibility of his opinions otherwise limited by the trial court. Any other issues involving the expert's opinions would involve questions of weight or credibility that are for the jury to decide. It would constitute an obvious injustice to grant summary judgment or deny Plaintiff's motion to alter or amend the judgment on grounds that were neither accurate in light of the actual evidence of record nor supported by adequate findings of fact and conclusions of law in the Court's Orders that would permit meaningful appellate review.

II. Statement of the Case.

Upon believing that his home had sustained damage due to mine subsidence (*see* Frye JA, at pp. 0483-87, 0496-97, 0499-500) and obtaining counsel for representation, the Plaintiff, through his attorneys, contacted both his insurer, Erie Insurance Property and Casualty Company ("Erie"), and the West Virginia Board of Risk and Insurance Management ("BRIM") in November 2017 concerning his claim for mine subsidence coverage. However, BRIM re-directed him to his insurer, Erie, as the party that would be responsible for handling and paying his claim. As expressly stated by BRIM:

> We are in receipt of your November 21, 2017 letter of representation of Mr. Frye for potential mining related damages to his property.

> We cannot provide you with a copy of Mr. Frye's insurance policy as we do not insure Mr. Frye and have no policy to provide. Based on the information contained in your letter, it would appear that Mr. Frye is insured through Erie Insurance Company. As such, you need to present a claim to Erie for consideration; and it is Erie that will need to provide you with a copy of the policy.
>
> While the West Virginia Board of Risk and Insurance Management (BRIM) does play a role in the mine subsidence claim process, it is not a direct insurer of Mr. Frye's property. BRIM's role can be found at W.Va. Code §33-30-1 *et seq.* and W.Va. CSR §115-1. BRIM basically serves as a reinsurer for Erie and any payment to Mr. Frye for mine subsidence related damages will come from Erie and not BRIM.
>
> I did note a copy of your letter being sent to Erie. Please submit your claim to Erie and they will present it to us with documentation that Mr. Frye does have mine subsidence coverage on his policy. We will hold your letter and place it with the claim information when received from Erie.

(Frye JA, at p. 0364). BRIM never offered the Plaintiff a hearing and an opportunity to establish a record for an administrative appeal under the West Virginia Administrative Procedure Act, W.Va. Code §§ 29A-5-1, *et seq*. In fact, no mention was expressed in the letter by BRIM about the insured being permitted to present evidence and to have a hearing on his claim for mine subsidence coverage before BRIM, Erie, or any other entity, or to seek administrative or judicial review of any determination made by BRIM or Erie pursuant to the West Virginia Administrative Procedure Act, W.Va. Code §§ 29A-5-1, *et seq.*, or otherwise. Based upon such representations by BRIM, the Plaintiff believed that his only recourse was against Erie, his insurer.

Similarly, on December 7, 2017, when Erie acknowledged by correspondence Plaintiff's claim for mine subsidence, nowhere in its letter did it state that it was not responsible for handling the claim or paying any benefits that may be owed under the policy. In fact, nowhere in its letter does Erie ever even mention BRIM or any other entity being responsible. (Frye JA, at pp.0357-62). The only initial mention of BRIM by Erie is when Erie sent correspondence to Mr. Frye,

dated December 12, 2017, advising him that it had "submitted an assignment to BRIM to investigate the cause of the loss to the insured policy." (Frye JA, at p. 0366).

The Plaintiff was eventually informed that his claim for mine subsidence coverage was being denied in October, 2018. On February 21, 2019, the Plaintiff filed a civil lawsuit seeking compensatory and punitive damages against Erie for breach of contract, breach of the covenant of good faith and fair dealing, i.e., bad faith, and for violations of the West Virginia Unfair Trade Practices Act, W.Va. Code §§ 33-11-1, *et seq.*, and corresponding Insurance Commissioner's Regulations. (Frye JA, at pp. 0008-13). On March 29, 2019, in its Answer to Plaintiff's Complaint, Erie asserted as its Seventeenth Defense the following: "Erie asserts that pursuant to W.Va. Code § 33-30-3, W.Va. Code § 33-30-3(1), and W.Va. C.S.R. § 115-1-4.1, et seq., it is statutorily required to follow BRIM's determination that the Plaintiff's mine subsidence claim should be denied. As such, there can be no bad faith or breach of contract on the part of Erie." (Frye JA, at pp. 0019-20).

Subsequently, on June 17, 2021, Plaintiff received Erie's motion for judgment on the pleadings wherein it alleged "Plaintiff can prove no set of facts that support his claims against Erie wherein BRIM, not Erie, investigated and denied Plaintiff's claims for property damage allegedly resulting from mine subsidence." (Frye JA, at p. 0023 (citing *Patterson v. Westfield Ins. Co.*, 5:19-cv-17 (N.D.W.Va. Jan. 29, 2021) (Bailey, J.))). After receiving Plaintiff's response (Frye JA, at pp. 0112-22) and Erie's reply (Frye JA at pp. 0173-76), the Circuit Court on July 8, 2021, entered an Order denying Erie's motion for judgment on the pleadings that held, in part:

> Plaintiff claims that such contractual and UTPA obligations by Defendant Erie cannot be delegated to BRIM and that Defendant Erie has its own obligations toward its insured despite an[y] statutory duties to investigate and cover claims per statute. This Court agrees with Plaintiff.

> "A claim for breach of contract requires proof of the formation of a contract, a breach of the terms of that contract, and resulting damages." *Sneberger v. Morrison*, 235 W.Va. 654, 669, 776 S.E.2d 156, 171 (2015).
>
> An insurance company owes its own policyholders a duty of good faith and fair dealing. [. . .] More importantly, these duties are not delegable[.]" *Honaker v. Mahon*, 210 W.Va. 53, 552 S.E.2d 788 (2001). Consistent with the decisions of West Virginia's state and federal courts, an insurer's delegating investigatory tasks to a third-party, by statutory mandate or otherwise, "does not relieve [an insurer] of its obligations to its insureds." *See Patterson v. State Farm*, CV No. 18-C-226 at 5 (W.Va. Dist.Ct. March 4, 2019) ("the allegations against [defendant insurer] in the Complaint stem from its obligations to its insureds in regard to the claims they have made under their homeowner's insurance policy – not merely the mine subsidence portion of the policy."); *Bettinazzi v. State Farm Fire & Cas. Co.*, 2014 WL 241694, at *2 (N.D.W.Va. Jan. 22, 2014); *Megale v. State Farm*, CV No. 18-C-290 at 8 (W.Va. Cir.Ct. July 26, 2019) (denying insurer's motion to dismiss) ([The defendant insurer's] "trying to state that its duties of good faith and fair dealing owed to its insureds are delegable . . . is in contravention to established principles and standards.").
>
> Defendant Erie's citation to *Patterson v. Westfield Ins. Co.*, 5:19-cv-17 (N.D.W.Va. Jan. 29, 2021) is misplaced. *Patterson* does not support judgment on the pleadings as the *Patterson* decision was rendered based upon "consideration of the record as a whole" after extensive discovery had taken place. *Id.*,at *11. *Patterson* did not suggest that a plaintiff could "prove no set of facts in support of his or her claim" merely by virtue of an insurer's delegating a mine subsidence investigation to BRIM. *See* Syl. Pt. 3, *Copley [v. Mingo County Bd. of Educ.*, 195 W.Va. 480, 466 S.E.2d 139 (1995).]
>
> 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.

(Frye JA, at pp. 0187-89).

During the course of the litigation, the parties engaged in discovery and Plaintiff retained an expert in geophysics/geology, Dr. Timothy Bechtel, PhD, PG, who examined the damages to Plaintiff's property and opined "to a reasonable degree of professional certainty that the subsidence from underground mining contributed to damages to the house and land compromising Mr. Frye's

property." (Frye JA, at p. 0441). Further, the Plaintiff's allegations against Erie stemmed not only from the denial of Plaintiff's claim under his homeowner's insurance policy and Erie's handling of the claim brought under the policy, but also, Erie's overall conduct as it relates to the Plaintiff's mine subsidence claim. Contrary to Erie's assertions that BRIM, not Erie, investigated and denied Plaintiff's claims for property damage, Plaintiff asserts that BRIM's participation in the mine subsidence investigation did not absolve Erie from complying with its obligations as Plaintiff's insurer under the standards articulated by common law, the West Virginia Unfair Trade Practices Act, and the Insurance Commissioner's Regulations. (*See* Frye JA, at pp. 0284-305).

On February 10, 2022, Erie filed a motion for summary judgment on all claims pursuant to Rule 56 of the West Virginia Rules of Civil Procedure. (Frye JA, at pp. 0190-204). Said motion was briefed by the parties (Frye JA, at pp. 0284-305 & 0795-813), and the motion was argued along with other motions during a pretrial conference held before the Court on February 28, 2022 (Frye JA, at pp. 0887-958).

During said conference, when the Court indicated that its interpretation of the statutory framework set forth in W.Va. Code §§ 33-30-1 *et seq.*, and supporting regulations, such as 115 W.V.C.S.R. 1—4.1, when read in conjunction with the West Virginia Supreme Court of Appeals' decision in *Higginbotham v. Clark*, 189 W.Va. 504, 432 S.E.2d 774 (1993), might lead the Court to conclude that the Plaintiff could not assert any of his claims concerning mine subsidence coverage against Erie, the issue of whether such a construction of the statute would render it unconstitutional due to a deprivation of the Plaintiff's right to a remedy was raised and discussed. Additionally, constructions of the statute that Plaintiff submitted would permit his lawsuit to proceed and provide him a remedy were also discussed. (Frye JA, at pp. 0903-07 & 0921-35).

By Order entered on March 3, 2022, the Circuit Court of Ohio County, the Honorable Jason

Cuomo presiding, granted summary judgment to Erie on the basis that Erie is only an agent of BRIM under W.Va. Code §§ 33-30-1, *et seq.*, and cannot be sued for any of the claims involving denial of mine subsidence coverage alleged by Plaintiffs. In its Order granting summary judgment, the Court held that its interpretation of the statutory framework set forth in W.Va. Code §§ 33-30-1 *et seq.*, and supporting regulations, such as 115 W.V.C.S.R. 1—4.1, when read in conjunction with the West Virginia Supreme Court of Appeals' decision in *Higginbotham v. Clark, supra*, led the Court to conclude that the Plaintiff could not assert any of his claims concerning mine subsidence coverage against his insurer, Erie. Importantly, for the purpose of this appeal, the lower court did not grant Erie summary judgment in this case on Plaintiff's claims concerning mine subsidence coverage because the Plaintiff did not present any evidence that his damages were caused by mine subsidence coverage. Rather, the lower court granted summary judgment to Erie on Plaintiff's mine subsidence coverage claims due to its conclusion that Plaintiff had no remedy against Erie, his insurer, for such claims because under the relevant statutory framework set forth in W.Va. Code §§ 33-30-1, *et seq.*, and supporting regulations, BRIM, rather than Erie, controlled all decisions as to such coverage. (Frye JA, at pp. 0834-41).[1]

Following the entry of a Final Judgment Order on March 29, 2022 (Frye JA, at p. 0842), the Plaintiff filed a motion to alter or amend the final judgment on March 30, 2022, arguing that the Court committed a clear error of law, the resolution of which is required to prevent obvious injustice, by failing to address the constitutionality of W.Va. Code §§ 33-30-1, *et seq.*, and by failing to interpret that statute in a manner that does not deprive the Plaintiff (and others similarly situated) of his constitutional rights to a remedy, due process, and equal protection of the law.

[1] While the Circuit Court did grant summary judgment on Plaintiff's claims concerning coverages other than mine subsidence coverage on the basis of a lack of evidence, *see* Frye JA, at pp. 0838-41, such rulings are not the subject of Plaintiff's motion to alter or amend judgment or this appeal.

(Frye JA, at pp. 0843-55). After said motion was fully briefed by the parties (Frye JA, at pp. 0857-69 & 0871-82), on April 18, 2022, the Court essentially entered the proposed order submitted by Defendant, with minor modifications, and denied the Plaintiff's motion to alter or amend the judgment; declining to address the constitutional issues and holding for the first time incorrectly that the Plaintiff had not presented any evidence that his home had been damaged by mine subsidence. (*See* Frye JA, at pp. 0884-86). Adding such a finding was totally inappropriate because it was not the subject of Plaintiff's motion to alter or amend judgment, and the Defendant did not submit its own motion to alter or amend judgment seeking the inclusion of such a finding and conclusion. Accordingly, such issue was not argued by the Plaintiff in its motion to alter or amend judgment or in its supporting reply brief. (*See* Frye JA, at pp. 0843-55 & 0871-82).

III. Summary of Argument.

A. Assignment of Error No. 1: The Circuit Court committed a clear error of law affecting substantial justice by failing to address the constitutionality of W.Va. Code §§ 33-30-1, *et seq.*, and by failing to interpret that statute in a manner that does not deprive the Plaintiff (and others similarly situated) of his constitutional rights to a remedy, due process, and equal protection of the law.

Erie's motion for summary judgment was discussed and argued during the pretrial conference held before the Circuit Court on February 28, 2022. (Frye JA, at pp. 0896-35). When Judge Cuomo indicated during the conference, in an apparent potential departure from his earlier ruling denying Erie's motion for judgment on the pleadings, that his interpretation of the statutory framework set forth in W.Va. Code §§ 33-30-1 *et seq.*, and supporting regulations, such as 115 W.V.C.S.R. 1—4.1, when read in conjunction with the West Virginia Supreme Court of Appeals' decision in *Higginbotham v. Clark*, *supra*, might lead the Court to conclude that the Plaintiff could not assert any of his claims concerning mine subsidence coverage against Erie, the issue of whether such a construction of the statute would render it unconstitutional due to a deprivation of the

Plaintiff's right to a remedy was raised and discussed. Additionally, constructions of the statute that Plaintiff submitted would permit his lawsuit to proceed and provide him a remedy were also discussed. (*See* Frye JA, at pp. 0903-07 & 0921-35).

By Order entered on March 3, 2022, the Court indeed held that its interpretation of the statutory framework set forth in W.Va. Code §§ 33-30-1 *et seq.*, and supporting regulations, such as 115 W.V.C.S.R. 1—4.1, when read in conjunction with the West Virginia Supreme Court of Appeals' decision in *Higginbotham v. Clark*, *supra*, led the Court to conclude that the Plaintiff could not assert any of his claims concerning mine subsidence coverage against his insurer, Erie. (Frye JA, at 0834-38). In so ruling, the Court failed to address the argument that such a ruling would be unconstitutional by depriving the Plaintiff of his rights to a remedy, due process, and/or equal protection. The Circuit Court also failed to address reasonable constructions of the statute that would permit Plaintiff's claims concerning mine subsidence damages to proceed and, thereby, sustain the constitutionality of the statute. These omissions by the lower court led the Plaintiff to file a W.Va.R.Civ.P. 59(e) motion to alter or amend judgment that after briefing was denied by the Court without discussing the substantive merits of such concerns. (*See* Frye JA, at pp. 0843-86).

Numerous cases of this Court establish a citizen's constitutional rights to a remedy, due process, and equal protection of the law. Further, this Court has recognized that the right to file a claim for breach of an insurance policy is a constitutionally protected property right. Indeed, nearly thirty years ago this Court in *Higginbotham* raised serious constitutional due-process concerns over the applicable statutory framework potentially depriving insureds of a right to a remedy. Despite these concerns, neither BRIM nor the West Virginia Legislature has taken effective actions to address such matters. This Court has also repeatedly stressed that canons of

statutory construction require courts when reasonably possible to interpret a statute in a manner that sustains its constitutionality.

While Plaintiff does not dispute that the Legislature desiring to ensure that insurance for mine subsidence damages is available for West Virginia residents was a legislative purpose designed to eliminate an economic problem, *see* W.Va. Code §§ 33-30-1 & -2, and, therefore, constituted a proper governmental purpose, doing so in a manner that deprives the insureds in most circumstances of any hearing or appeal process[2] and which also treats them differently than other insureds was completely unnecessary and neither a rational classification nor reasonable means by which such purpose could be accomplished.

The Circuit Court committed a clear error of law affecting substantial justice by failing in its Orders to address the constitutionality of W.Va. Code §§ 33-30-1, *et seq.*, and by failing to interpret that statute in a manner that does not deprive the Plaintiff (and others similarly situated) of his constitutional rights to a remedy, due process, and equal protection of the law. The resolution of these constitutional issues that are of substantial public importance is required in order to prevent an obvious injustice. The Orders of the Circuit Court granting summary judgment to Erie and denying Plaintiff's motion to alter or amend judgment must be reversed and the matter remanded for further proceedings and trial.

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[2] Only W.Va. Code §§ 33-30-7 & -12 provide for a hearing and appeal pursuant to article two of the chapter. Section 33-30-7 provides for such a hearing when an insurer refuses "to provide subsidence coverage (1) on a structure evidencing unrepaired subsidence damage, until necessary repairs are made; or (2) where the insurer has declined, nonrenewed or canceled all coverage under a policy for underwriting reasons unrelated to mine subsidence[.]" (Also requiring that "an insurer shall refuse to provide subsidence coverage on a structure which evidence a loss or damage in progress."). Section 33-30-12 provides for such a hearing and appeal when a dispute arises concerning BRIM requiring an insurer to attempt to recover amounts paid to a policyholder when in the judgment of BRIM such "policyholder was not entitled to the amounts paid because of fraud or violation of the policy conditions."

B. The Circuit Court committed a clear legal error of law by denying the Plaintiff's motion to alter or amend its judgment on the basis that the Plaintiff had not presented any evidence in this civil action that his home had suffered mine subsidence damage when such ruling was not part of its Order granting summary judgment to Defendant and the Defendant did not file its own motion to alter or amend judgment to include such a ruling.

Following the entry of a Final Judgment Order on March 29, 2022, the Plaintiff filed a motion to alter or amend the final judgment on March 30, 2022, arguing that the Court committed a clear error of law, the resolution of which is required to prevent obvious injustice, by failing to address the constitutionality of W.Va. Code §§ 33-30-1, *et seq.*, and by failing to interpret that statute in a manner that does not deprive the Plaintiff (and others similarly situated) of his constitutional rights to a remedy, due process, and equal protection of the law. On April 18, 2022, the Court essentially entered the proposed order submitted by Defendant, with minor modifications, and denied the Plaintiff's motion to alter or amend the judgment; declining to address the merits of the constitutional issues and holding for the first time incorrectly that the Plaintiff had not presented any evidence that his home had been damaged by mine subsidence. Adding such a finding was totally inappropriate because it was not the subject of Plaintiff's motion to alter or amend judgment, and the Defendant did not submit its own motion to alter or amend judgment seeking the inclusion of such a finding and conclusion. Accordingly, such issue was not argued by the Plaintiff in its motion to alter or amend judgment or in its supporting reply brief.

The Order also failed to address the evidence actually presented by the Plaintiff in opposition to Defendant's motion for summary judgment. In addition to his own beliefs and opinions (Frye JA, at pp. 0483-87, 0496-97, 0499-500), the Plaintiff had presented an expert's opinions in support of his claim (Frye JA, at pp. 0440-41), and such expert had never been disqualified or the admissibility of his opinions otherwise limited by the trial court. Any other issues involving the expert's opinions would involve questions of weight or credibility that are for

the jury to decide. It would constitute an obvious injustice to deny Plaintiff's motion to alter or amend the judgment on grounds that were neither relied upon by the Circuit Court in its Order granting summary to Defendant that was the basis of its final judgment nor are accurate in light of the evidence of record. It would further be unjust to add a finding to an Order in support of a party that had not filed a motion to alter or amend judgment seeking to add such a finding. The Orders of the Circuit Court granting summary judgment to Erie and denying Plaintiff's motion to alter or amend judgment must be reversed and the matter remanded for further proceedings and trial.

C. Even if the Circuit Court's Order granting summary judgment to Erie could be reasonably construed to include as a basis for its ruling the failure of the Plaintiff to offer evidence of mine subsidence damages, the Court committed clear error of law in granting summary judgment and an abuse of discretion in interpreting the facts and evidence of record.

As previously noted, in addition to his own beliefs and opinions (Frye JA, at pp. 0483-87, 0496-97, 0499-500), the Plaintiff had presented an expert's opinions in support of his claim (Frye JA, at pp. 0440-41), and such expert had never been disqualified or the admissibility of his opinions otherwise limited by the trial court. More specifically, Plaintiff retained an expert in geophysics/geology, Dr. Timothy Bechtel, PhD, PG, who examined the damages to Plaintiff's property and opined "to a reasonable degree of professional certainty that the subsidence from underground mining contributed to damages to the house and land compromising Mr. Frye's property." (Frye JA, at p. 0441).

Although Erie filed motions to exclude the testimony of Plaintiff's experts (Frye JA, at pp. 0629-35) and to strike Dr. Bechtel's affidavit (Frye JA, at pp. 0815-17), the Plaintiff did not even have a reasonable period of time to file a written response to such motions before the Court entered its Order granting summary judgment to Erie. The Circuit Court never ruled on such motions to exclude Plaintiff's expert or to strike his affidavit by written orders and certainly did not do so in

its Order granting summary judgment to Erie. However, during the pretrial conference, the Court did indicate that Defendant's arguments likely went to issues of credibility rather admissibility and deferred ruling on the motion *in limine* to exclude Plaintiff's experts. (Frye JA, at pp. 0938-42). Plaintiff indeed submits that Dr. Bechtel's report (and the CV attached thereto) clearly demonstrates his qualifications to testify as an expert on the above matters. Any other issues involving the expert's opinions would involve questions of weight or credibility that are for the jury to decide.

Obviously, it is inaccurate to state that the Plaintiff did not offer any evidence that mine subsidence caused damages to his property. Additionally, any order that contained such a blanket statement without any discussion or analysis of the actual evidence would not only be inaccurate but would fail to set forth sufficient findings of fact and conclusions of law to meet the requirements of West Virginia law to permit a meaningful appellate review. The Orders of the Circuit Court granting summary judgment to Erie and denying Plaintiff's motion to alter or amend judgment must be reversed and the matter remanded for further proceedings and trial.

IV. Statement Regarding Oral Argument.

Plaintiff/Appellant Brian Frye respectfully submits that this case should be scheduled for oral argument under Rule 20(a) of the West Virginia Rules of Appellate Procedure inasmuch as this appeal involves issues of fundamental public importance and constitutional questions regarding the validity of a statute. Plaintiff respectfully requests that each side be given twenty minutes for oral argument.

V. Argument.

A. Standards of Review

1. Summary Judgment

> A circuit court's entry of summary judgment is reviewed *de novo. See Drewitt v. Pratt,* 999 F.2d 774 (4th Cir.1993). Under Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is proper only where the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. In Syllabus Point 1 of *Andrick v. Town of Buckhannon,* 187 W.Va. 706, 421 S.E.2d 247 (1992), we reiterated the standard for granting summary judgment:
>
> " 'A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York,* 148 W.Va. 160, 133 S.E.2d 770 (1963)."
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> *See also Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). 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." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 213 (1986). We, therefore, must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Masinter v. WEBCO Co.,* 164 W.Va. 241, 262 S.E.2d 433 (1980). *Andrick,* 187 W.Va. at 708, 421 S.E.2d at 249.

Painter v. Peavy, 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994). *Accord Fravel v. Sole's Elec. Co., Inc.*, 218 W.Va. 177, 178, 624 S.E.2d 524, 525 (2005) (*de novo* review on appeal); *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995) ("In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as '[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]' *Anderson,* 477 U.S. at 255, 106 S.Ct. at 2513, 91 L.Ed.2d at 216. Summary judgment should be denied 'even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.' *Pierce v. Ford*

Motor Co., 190 F.2d 910, 915 (4th Cir.), *cert. denied,* 342 U.S. 887, 72 S.Ct. 178, 96 L.Ed. 666 (1951). Similarly, when a party can show that demeanor evidence legally could affect the result, summary judgment should be denied.").

> Although our standard of review for summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed.

Syl. Pt. 3, *Fayette County National Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997). *Accord Thompson v. Hatfield*, 225, W.Va. 405, 408, 693 S.E.2d 479, 482 (2010) (per curiam); Syl. Pt. 2, *Ayersman v. West Virginia Division of Environmental Protection*, 208 W.Va. 544, 542 S.E.2d 58 (2000) (per curiam); *Minshall v. Health Care & Retirement Corp. of America*, 208 W.Va. 4, 6, 537 S.E.2d 320, 322 (2000) (per curiam).

2. Interpretation and Constitutionality of Statute

> "Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrstal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).
>
> "The constitutionality of a statute is a question of law which this Court reviews *de novo*." Syl. Pt. 1 *State v. Rutherford*, 223 W.Va. 1, 672 S.E.2d 137 (2008).

Syl. Pts. 1 & 2, *In re Brandi B.*, 231 W.Va. 71, 743 S.E.2d 882 (2013). *Accord* Syl. Pt. 1, *Simpson v. West Virginia Office of Ins. Com'r*, 223 W.Va. 495, 678 S.E.2d 1 (2009).

It should also be acknowledged that even if constitutional arguments had never been raised before entry of judgment, the West Virginia Supreme Court of Appeals has acknowledged that "a constitutional issue that was not properly preserved at the trial court level may, in the discretion of this Court, be addressed on appeal when the constitutional issue is the controlling issue in the resolution of the case." Syl. Pt. 2, *Louk v. Cormier*, 218 W. Va. 81, 87, 622 S.E.2d 788, 794 (2005). Indeed, as noted by the Court in *Louk v. Cormier*, Justice Cleckley had previously explained:

> This case, however, is not one in which, by neglecting to raise an issue in a timely manner, a litigant has deprived this Court of useful factfinding. The issue raised here, but omitted below, is purely legal in nature and lends itself to satisfactory resolution on the existing record without further development of the facts.... *More importantly, the defendant's belated proffer raises an issue of constitutional magnitude, a factor that favors review notwithstanding a procedural default....* I believe this sensitivity is appropriately expressed by a frank recognition that, *when public, as well as institutional, interests are at stake, the case for the flexible exercise of this Court's discretion is strengthened and waiver rules ought not to be applied inflexibly.*

Louk v. Cormier, 218 W. Va. at 86, 622 S.E.2d at 793 (quoting *State v. Greene*, 196 W.Va. 500, 505-06, 473 S.E.2d 921, 926-27 (1996) (Cleckley, J., concurring)) (emphases added). *Accord Whitlow v. Board of Education of Kanawha County*, 190 W.Va. 223, 226-27, 438 S.E.2d 15, 18-19 (1993) ("In this case, we are confronted with very limited and essentially undisputed facts. The constitutional issue raised for the first time on appeal is the controlling issue in the resolution of the case. If the statute is unconstitutional, the case should not be dismissed. Furthermore, the issue is one of substantial public interest that may recur in the future...."). Accordingly, even if the constitutionality of the statute had not been raised during the pretrial conference or otherwise properly raised, this Court has the discretion to consider it inasmuch as an issue of constitutional magnitude favors review notwithstanding a procedural default.[3]

3. Motion to Alter or Amend Judgment

> The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which

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[3] These cases are also consistent with the jurisprudence surrounding the "plain error" doctrine. *E.g.*, Syl. Pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995) ("To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings."); *State v. LaRock*, 196 W.Va. 294, 316-17, 470 S.E.2d 613, 635-36 (1996) ("Of course, the raise or waive rule is not absolute. . . . To satisfy the plain error standard, a court must find: (1) there was error in the trial court's determination; (2) the error was plain or obvious; and (3) the error affected 'substantial rights' in that the error was prejudicial and not harmless. . . . If these criteria are met, this Court may, in its discretion, correct the plain error if it '"seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."'" (citations omitted)).

the appeal to this Court is filed.

Syl. Pt. 1, *Wickland v. American Travellers Life Ins. Co.*, 204 W.Va. 430, 513 S.E.2d 657 (1998). *Accord Mey v. Pep Boys-Manny, Moe & Jack*, 228 W.Va. 48, 56, 717 S.E.2d 235, 243 (2011); Syl. Pt. 1, *Harris v. Harris*, 212 W.Va. 705, 575 S.E.2d 315 (2002) (per curiam); *West Virginia Fire & Cas. Co. v. Mathews*, 209 W.Va. 107, 110-11, 543 S.E.2d 664, 667-68 (2000) (per curiam). Accordingly, because the underlying rulings of the Circuit Court set forth above all involve a *de novo* standard of review, this Court's review of the Circuit Court's denial of Plaintiff's motion to alter or amend judgment will also be *de novo*.

"Rule 59(e) of the West Virginia Rules of Civil Procedure provides the procedure for a party who seeks to change or revise a judgment entered as a result of a motion to dismiss or a motion for summary judgment." Syl. Pt. 4, *James M.B. v. Carolyn M.*, 193 W.Va. 289, 456 S.E.2d 16 (1995). *Accord* Syl. Pt. 7, *Rose v. Thomas Memorial Hosp. Foundation, Inc.*, 208 W.Va. 406, 541 S.E.2d 1 (2000) (same); *Riffe v. Armstrong*, 197 W.Va. 626, 636, 477 S.E.2d 535, 545 (1996) ("A Rule 59(e) is the proper motion by which a summary judgment may be timely attacked."); *Law v. Monongahela Power Co.*, 210 W.Va. 549, 555 n. 7, 558 S.E.2d 349, 355 n.7 (2001) (same). *See also* W.Va.R.Civ.P. 59(e) ("Any motion to alter or amend the judgment shall be filed not later than 10 days after entry of the judgment.").

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. *See, e.g.*, Syl. Pt. 2, *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W.Va. 48, 717 S.E.2d 235 (2011). 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)).

B. Substantive Issues

1. The Circuit Court committed a clear error of law affecting substantial justice by failing to address the constitutionality of W.Va.Code §§ 33-30-1, *et seq.*, and by failing to interpret that statute in a manner that does not deprive the Plaintiff (and others similarly situated) of his constitutional rights to a remedy, due process, and equal protection of the law.

a. The Lower Court Impermissibly Failed to Address Whether the Statutory Scheme Set Forth in W.Va. Code §§ 33-30-1 *et seq.* Establishing BRIM's Role in Mine Subsidence Cases is Unconstitutional.

First, despite arguments during the pretrial hearing discussing the motion for summary judgment that the statutory scheme establishing BRIM's involvement in mine subsidence cases is unconstitutional because it leaves plaintiffs without a remedy, *see* Frye JA, at pp. 0903-07 & 0921-35, the Court failed to address or otherwise consider it in its Order granting summary judgment, *see* Frye JA, at pp. 0829-41. Interestingly, in its response to Plaintiff's motion to alter or amend judgment, Defendant Erie did not argue the merits of whether the current statutory framework of W.Va. Code §§ 33-30-1, *et seq.*, as interpreted by the Circuit Court in its Order granting Defendant's motion for summary judgment, as well as by the United States District Court for the Northern District of West Virginia in *Patterson v. Westfield Ins. Co.,* 516 F. Supp.3d 557 (N.D.W.Va. 2021), deprives insureds of a remedy and their rights to both substantive and procedural due process as well as equal protection of the law by treating them differently than other insureds who can sue their insurer for breach of contract, bad faith, and violations of the West Virginia Unfair Trade Practices Act.[4] (*See* Frye JA, at pp. 0857-69). While interesting, this

[4] Erie did note in response to Plaintiff's motion to alter or amend judgment that the words "due process" or "equal protection" were not expressly stated during the hearing. However, as evident by the cases quoted and cited by Plaintiff herein and in his motion to alter or amend judgment, the respective tests for violation

lack of an argument on the merits of the constitutionality of the statute is perhaps not surprising in light of the failure of the Board or the Legislature to take action on the reservations expressed by this Court on the constitutionality of the Act over 29 years ago in *Higginbotham v. Clark, supra.*

As to the fundamental rights at issue in this appeal and which were similarly presented in *Higginbotham*, this Court has explained:

> "For every wrong there is supposed to be a remedy somewhere." *Sanders v. Meredith,* 78 W.Va. 564, 572, 89 S.E. 733, 736 (1916) (Lynch, J., dissenting). Indeed, "the concept of American justice ... pronounces that for every wrong there is a remedy. It is incompatible with this concept to deprive a wrongfully injured party of a remedy[.]" *O'Neil v. City of Parkersburg,* 160 W.Va. 694, 697, 237 S.E.2d 504, 506 (1977). *See also Gardner v. Buckeye Sav. & Loan Co.,* 108 W.Va. 673, 680, 152 S.E. 530, 533 (1930) ("It is the proud boast of all lovers of justice that for every wrong there is a remedy."); Syl. pt. 3, *Johnson v. City of Parkersburg,* 16 W.Va. 402 (1880) ("When the Constitution forbids a Damage to private property and points out no remedy, and no statute gives a remedy for the invasion of the right of property thus secured, the common law, which gives a remedy for every wrong, will furnish the appropriate action for the redress of such grievances."). . . "As for public policy, the strongest policy which appeals to us is that fundamental theory of the common law that for every wrong there should be a remedy." *Lambert v. Brewster,* 97 W.Va. 124, 138, 125 S.E. 244, 249 (1924).

Rohrbaugh v. Wal-Mart Stores, Inc., 212 W.Va. 358, 364-65, 572 S.E.2d 881, 887-88 (2002). *Accord, e.g., O'Neil v. City of Parkersburg*, 160 W.Va. 694, 697, 237 S.E.2d 504, 506 (1977); *Hannah v. Heeter*, 213 W.Va. 704, 710, 584 S.E.2d 560, 566 (2003); *Tanner v. Rite Aid of West Virginia, Inc.*, 194 W.Va. 643, 651 n. 12, 461 S.E.2d 149, 157 n. 12 (1995) ("'It is the business of the law to remedy wrongs that deserve it, even at the expense of a "flood of litigation," and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such

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of the certain remedy, due process, and equal protection clauses of the constitution are essentially identical with only slight variations in language. An express argument that the statutory framework is unconstitutional because it deprives the plaintiff of a remedy for his wrong should not be unduly limited or restricted by such mere technicalities when the remedy involves a property right such as a cause of action for violation of an insurance policy. Such property right and its due process implications were expressly discussed in the *Higginbotham* decision which was repeatedly referenced during the hearing at issue by the Court and/or parties. Moreover, as discussed herein, constitutional arguments may be considered on appeal even when they have not been properly preserved at the trial court level.

grounds.'" (quoting W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 12 at 56 (5th Ed. 1984)); *State ex rel. Affiliated Constr. Trades Found v. Vieweg*, 205 W.Va. 687, 701, 520 S.E.2d 854, 868 (1999) (Workman, J., concurring) ("As law students, we learn that in the law, for every wrong there is a remedy."); *In re West Virginia Asbestos Litigation*, 215 W.Va. 39, 43 n. 2, 592 S.E.2d 818, 822 n. 2 (2003) (holding that state-claim was preempted by federal law but concluding that no plaintiffs were left without a remedy because one existed under the federal law).

This right is so fundamental that it is engrained in the Constitution of West Virginia. As recently explained by the Supreme Court of Appeals:

> The implicit right of redress in the courts found in the Law and Evidence Clause, is expressly provided for in Article III, § 17 of the Constitution of West Virginia. Section 17 provides as follows:
>
> The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.
>
> The Certain Remedy Clause of Section 17 has been found to mean that "[t]he framers of the West Virginia Constitution provided citizens who have been wronged with rights to pursue a remedy for that wrong in the court system." *Bias v. E. Associated Coal Corp.*, 220 W.Va. 190, 204, 640 S.E.2d 540, 554 (2006) (Starcher, J., dissenting). See *O'Neil v. City of Parkersburg*, 160 W.Va. 694, 697, 237 S.E.2d 504, 506 (1977) ("[T]he concept of American justice ... pronounces that for every wrong there is a remedy. It is incompatible with this concept to deprive a wrongfully injured party of a remedy[.]"); *Gardner v. Buckeye Sav. & Loan Co.*, 108 W.Va. 673, 680, 152 S.E. 530, 533 (1930) ("It is the proud boast of all lovers of justice that for every wrong there is a remedy."); *Lambert v. Brewster*, 97 W.Va. 124, 138, 125 S.E. 244, 249 (1924) ("As for public policy, the strongest policy which appeals to us is that fundamental theory of the common law that for every wrong there should be a remedy."). In the leading treatise on the Constitution of West Virginia, the following is said,
>
> The second clause of section 17, providing that all persons "shall have remedy by due course of law" ... limits ... the ability of the government to constrict an individual's right to invoke the judicial process[.]
>
> Robert M. Bastress, *The West Virginia State Constitution*, at 124 (2011).

State ex rel. Workman v. Carmichael, 241 W.Va. 105, 119, 819 S.E.2d 251, 265 (2018).

In one of the first cases to discuss in significant detail the "certain remedy" provision of our Constitution, the Court explained after conducting a survey of the law of other jurisdictions:

> We decline to hold that the certain remedy provision in Article III, Section 17 of our Constitution has no meaning when it comes to legislative enactments. We begin with the premise that there is a presumption of constitutionality with regard to legislation. However, when a legislative enactment either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication of cases, then the certain remedy provision of Article III, Section 17 is implicated.
>
> The term "vested right," as used in the certain remedy provision, means that an actual cause of action which was substantially affected existed at the time of the legislative enactment. The United States Supreme Court has acknowledged that an accrued cause of action is a vested property right and is protected by the guarantee of due process. *See Gibbes v. Zimmerman,* 290 U.S. 326, 54 S.Ct. 140, 78 L.Ed. 342 (1933). On the other hand, where the cause of action has not yet accrued, the Supreme Court has held that due process principles do not prevent the creation of new causes of action or the abolition of old ones to attain proper legislative objects. *See Silver v. Silver,* 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929). *See also Burmaster v. Gravity Drainage Dist. No. 2,* 366 So.2d 1381 (La.1978); *Lamb v. Wedgewood [South Corp.*, 308 N.C. 419, 302 S.E.2d 868 (1983)] . . . .
>
> The second inquiry is whether the enactment severely limits existing procedural rights. . . . In determining whether there has been a severe limitation, the inquiry is directed at the reasonableness of the [restriction] imposed by the statute . . . . We follow much the same analysis that we made in the equal protection and due process discussion.

Gibson v. West Virginia Dept. of Highways, 185 W.Va. 214, 225, 406 S.E.2d 440, 451 (1991) (footnote omitted). *Accord Robinson v. Charleston Area Medical Center, Inc.*, 186 W.Va. 720, 727, 414 S.E.2d 877, 884 (1991).

Stated otherwise,

> "When legislation either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication, thereby implicating the certain remedy provision of article III, section 17 of the *Constitution of West Virginia,* the legislation will be upheld under that provision if, first, a reasonably effective alternative remedy is provided by the legislation or, second, if no such alternative remedy is provided, the purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic

> problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose." Syllabus Point 5, *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 408 S.E.2d 634 (1991).

Syl. Pt. 3, *O'Dell v. Town of Gauley Bridge*, 188 W.Va. 596, 425 S.E.2d 551 (1992). *Accord Robinson v. Charleston Area Medical Center, Inc.*, 186 W.Va. at 727, 414 S.E.2d at 884; *Pritchard v. Arvon*, 186 W.Va. 445, 449, 413 S.E.2d 100, 104 (1991).

Similarly, Plaintiff asserts in the present case that his due process and equal protection rights have also been infringed upon in addition to his rights to a certain remedy. Violations of equal protection and due process rights are analyzed under the same test for purposes of determining their constitutionality. As explained by the West Virginia Supreme Court of Appeals:

> In *Israel v. West Virginia Secondary Schools Activities Commission,* 182 W.Va. 454, 460, 388 S.E.2d 480, 486 (1989), we acknowledged that the precise "phrase 'equal protection' is not found in our constitution, [although] its principles are an integral part of our constitutional law." (Citations omitted). Moreover, we admitted that our cases "have not been uniform as to where [the equal protection] principle reposes in our constitution." 182 W.Va. at 460, 388 S.E.2d at 486. We also observed that the same problem exists in the United States Constitution because the words "equal protection" appear only in the Fourteenth Amendment, which applies exclusively to the states. Despite this omission, the United States Supreme Court "has traditionally found that the concept of equal protection is embodied in the Due Process Clause of the Fifth Amendment." 182 W.Va. at 460, 388 S.E.2d at 486. Thus, "to finally settle where our state's constitutional equal protection principle is located, we hold that it is a part of our Due Process Clause found in Article III, Section 10 of the West Virginia Constitution [.]" 182 W.Va. at 461, 388 S.E.2d at 487. (Footnote omitted).

Gibson v. West Virginia Dept. of Highways, 185 W.Va. at 218-19, 406 S.E.2d at 444-45 (footnotes omitted).

> " 'Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause.' Syllabus Point 7, [as modified,] *Atchinson v. Erwin,* [172] W.Va. [8], 302 S.E.2d 78 (1983)." Syllabus Point 4, as modified, *Hartsock-Flesher Candy Co. v.*

Wheeling Wholesale Grocery Co., [174 W.Va. 538, 328 S.E.2d 144 (1984).]

Gibson, 185 W.Va. at 219, 406 S.E.2d at 445. *Accord* Syl. Pt. 5, *Pritchard v. Arvon*, *supra*; Syl. Pt. 2, *O'Dell v. Town of Gauley Bridge*, *supra*; *O'Neil v. City of Parkersburg*, 160 W.Va. at 701-02, 237 S.E.2d at 508-09.

In *Higginbotham v. Clark*, *supra*, the only case of this Court that significantly discusses the role of BRIM in addressing whether insureds have insurance coverage for mine subsidence cases as established by W.Va. Code §§ 33-30-1 *et seq.*, the Court proclaimed:

> Fundamental principles of due process require that the Board of Risk set forth procedures whereby insureds may present evidence and establish a record upon which the Board can base any decision regarding a claim. "This Court in the past has required the application of due process standards in proceedings where governmental bodies have deprived a person of a property right." *North v. West Virginia Board of Regents,* 160 W.Va. 248, 255, 233 S.E.2d 411, 416 (1977). While this Court "has generally been content to approach the question of due process on a case by case basis ... certain fundamental principles in regard to procedural due process can be stated." *Id.* at 256, 233 S.E.2d at 416–17.
>
> First, the more valuable the right sought to be deprived, the more safeguards will be interposed. Second, due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise. Third, a temporary deprivation of rights may not require as large a measure of procedural due process protection as a permanent deprivation.
> *Id.* at syl. pt. 2, in part.

Higginbotham v. Clark, 189 W.Va. at 510-11, 432 S.E.2d at 780-81.

As also explained in *Higginbotham*:

> There is ample authority to support the proposition that a valid insurance policy is a property interest which cannot be taken without some procedural due process. *See, e.g., North v. West Virginia Bd. of Regents, supra; Campbell v. Kelly,* 157 W.Va. 453, 461–62, 202 S.E.2d 369, 375 (1974) ("For the average working person, the most valuable *property rights* ... consist of social security benefits, *insurance contracts,* union welfare fund benefits and private and governmental pensions." (Emphasis added).). *See also Lynch v. United States,* 292 U.S. 571, 577, 54 S.Ct. 840, 842, 78 L.Ed. 1434, 1439 (1934) ("[W]ar risk [insurance] policies, being contracts, are property and create vested rights."); *United States v. Bess,* 357 U.S. 51, 56, 78 S.Ct. 1054, 1058, 2 L.Ed.2d 1135, 1141 (1958) (the cash remainder value of a life insurance policy is a property interest); *Sims v. Order of United Commercial Travelers of Am.,* 343 F.Supp. 112, 115 (D.Mass.1972) ("[T]he

> purchaser of a life insurance policy makes an investment decision whereby he purchases a promise to pay.... That promise to pay is '*property*' of substantial value to the purchaser[.]" (Emphasis added).). Indeed, in most instances, the insured vindicates the property interest by suing the insurer in court to obtain coverage and damages for the denial of coverage. *See Smithson v. United States Fidelity & Guaranty Co.,* 186 W.Va. 195, 411 S.E.2d 850 (1991); *Thomas v. State Farm Mut. Auto. Ins. Co.,* 181 W.Va. 604, 383 S.E.2d 786 (1989); *Hayseeds, Inc. v. State Farm Fire & Casualty Co.,* 177 W.Va. 323, 352 S.E.2d 73 (1986).

Higginbotham v. Clark, 189 W.Va. at 514, 432 S.E.2d at 784 (Miller, J., concurring).

The *Higginbotham* Court was able to stop short of declaring the Statute unconstitutional by finding that under the facts of that case the insured should have been permitted to obtain a hearing on the particular claim at issue therein before the Insurance Commissioner pursuant to W.Va. Code § 33-30-7 of the statute. Accordingly, the Court remanded the case so that such a hearing and due process could be afforded the insured. *See* Syl. Pt. 3, *Higginbotham, id.*

However, as explained by Justice Thomas Miller in his concurring opinion, it is BRIM's obligation to provide such a hearing and opportunity to create a record for administrative or judicial appeal:

> Neither the statute (W.Va. Code, 33–30–1, *et seq.*) nor the applicable provisions in the West Virginia Code of State Rules (8 W.Va.C.S.R. 115–1–1, *et seq.*) delineate any procedure whereby an insured may present evidence supporting a claim brought pursuant to mine subsidence insurance coverage. Although the Board is the governmental entity charged with adjusting the mine subsidence claims of an insured, the insured, under the statute and the Code of State Rules, is not granted direct contact with the Board. As the majority correctly points out, "[f]undamental principles of due process require that the Board ... set forth procedures whereby insureds may present evidence and establish a record upon which the Board can base any decision regarding a claim." 189 W.Va. 507, 510, 432 S.E.2d 774, 780, *citing North v. W.Va. Bd. of Regents,* 160 W.Va. 248, 256, 233 S.E.2d 411, 416 (1977).
>
> * * *
>
> The majority, following its due process concept, orders that "procedures should be implemented to afford an insured the opportunity to present the Board with any evidence he may have in support of his claim[.]" 189 W.Va. at 511, 432 S.E.2d at 781. Unfortunately, the majority goes on to require that the appellee, the State

> Insurance Commissioner, and not the Board, should hold the hearing in this case to resolve the disputed issue. I believe that the majority's premise in ordering the Insurance Commissioner to hold hearings on this matter is erroneous.
>
> * * *
>
> I agree with the majority that the appellant's constitutional right to due process has not been met in this case and a remand is therefore necessary. However, for the reasons stated above, I believe that the Board, and not the Insurance Commissioner, should provide that due process to the appellant.

Higginbotham, 189 W.Va. at 514-15, 432 S.E.2d at 784-85 (Miller, J., concurring) (footnotes omitted).

Despite these proclamations of the Court, neither BRIM[5] nor the Legislature in the intervening 29 years have taken effective action to meet the requirements of due process by establishing clearly written procedures whereby insureds may present evidence at a pre-deprivation hearing and establish a record upon which BRIM can appropriately base its decision regarding a claim and upon which an insured can seek appropriate administrative or judicial review of such decision. Instead of following the Court's directive, BRIM re-directs[6] insureds to their insurer as the party that is responsible to the insured such as it did in this case, writing:

> We are in receipt of your November 21, 2017 letter of representation of Mr. Frye for potential mining related damages to his property.
>
> We cannot provide you with a copy of Mr. Frye's insurance policy as we do not insure Mr. Frye and have no policy to provide. Based on the information contained in your letter, it would appear that Mr. Frye is insured through Erie Insurance Company. As such, you need to present a claim to Erie for consideration; and it is Erie that will need to provide you with a copy of the policy.
>
> While the West Virginia Board of Risk and Insurance Management (BRIM) does play a role in the mine subsidence claim process, it is not a direct insurer of Mr. Frye's property. BRIM's role can be found at W.Va. Code §33-30-1 *et seq.* and

[5] BRIM "has the power, duty and responsibility to establish and maintain the fund and supervise in all respects, consistent with the provisions of this article, the operation and management of the mine subsidence insurance program established in this article and to do all things necessary or convenient to accomplish the purpose of this article." W.Va. Code § 33-30-14.

[6] Such redirection would appear to be misleading in light of the holdings in *Higginbotham, supra.*

> W.Va. CSR §115-1. BRIM basically serves as a reinsurer for Erie and any payment to Mr. Frye for mine subsidence related damages will come from Erie and not BRIM.
>
> I did note a copy of your letter being sent to Erie. Please submit your claim to Erie and they will present it to us with documentation that Mr. Frye does have mine subsidence coverage on his policy. We will hold your letter and place it with the claim information when received from Erie.

(Frye JA, at p. 0364). No mention is contained in the letter about the insured being permitted to present evidence at a pre-deprivation hearing or to seek administrative or judicial review of any determination pursuant to the West Virginia Administrative Procedure Act, W.Va. Code §§ 29A-5-1, *et seq.*, or otherwise. Based upon such representations by BRIM, the Plaintiff believed that his only recourse was against Erie, his insurer. *See also* W.Va. Code §§ 33-30-10 & -12 discussed in greater detail below. This is particularly true since an original insured party cannot typically maintain a direct action against a reinsurer because the original insured is neither a party to the reinsurance contract nor otherwise in privity with such reinsurer. *Higginbotham v. Clark*, 189 W.Va. at 510, 432 S.E.2d at 780 ("Where a typical reinsurance contract is involved, 'there is no privity . . . between the original insured and the reinsurer; as a result, it is generally recognized that the original insured cannot recover directly from the reinsurer.'" (internal citation omitted)).

The current statutory framework as interpreted by the Defendant and the Circuit Court, as well as the United States District Court for the Northern District of West Virginia in *Patterson v. Westfield Ins. Co., supra*, deprives insureds of a remedy and their rights to both substantive and procedural due process and further deprives them of equal protection of the law by treating them differently than other insureds who can sue their insurer for breach of contract, bad faith, and violations of the West Virginia Unfair Trade Practices Act. While Plaintiff does not dispute that the Legislature desiring to ensure that insurance for mine subsidence damages is available for West Virginia residents was a legislative purpose designed to eliminate an economic problem, *see* W.Va.

Code §§ 33-30-1 & -2, and, therefore, constituted a proper governmental purpose, doing so in a manner that deprives the insureds in most circumstances of any hearing or appeal process[7] and which also treats them differently than other insureds was completely unnecessary and neither a rational classification nor reasonable means by which such purpose could be accomplished. *See Higginbotham v. Clark*, 189 W.Va. at 510-11, 432 S.E.2d at 780-81; *Rohrbaugh v. Wal-Mart Stores, Inc.*, 212 W.Va. at 364-65, 572 S.E.2d at 887-88; *O'Neil v. City of Parkersburg*, 160 W.Va. at 697, 237 S.E.2d at 506; *State ex rel. Workman v. Carmichael*, 241 W.Va. at 119, 819 S.E.2d at 265.

In light of the unconstitutionality of the present statutory scheme as applied herein by the Circuit Court, insureds, such as the Plaintiff, should be permitted to sue their insurer just as any other insured can under the common law and statutory law of West Virginia. Should the insurer be found liable for mine subsidence coverage, thereby, establishing that any contrary conclusion reached by the insurer through BRIM was incorrect, it can then seek reimbursement from BRIM for at least the amount of such coverage.

b. The Court Committed an Error of Law in Concluding that the Relevant Statute and Regulations Expressly Prohibit an Insured from Suing Their Insurer for Breach of Contract, Bad Faith/Breach of Covenant of Good Faith and Fair Dealing, and Unfair Trade Practices.

Furthermore, such a lawsuit does not appear to be at odds with a reasonable construction of the language of W.Va. Code §§ 33-30-1, *et seq.* As will be further discussed below, courts are

[7] As previously noted, *supra* at fn. 2, only W.Va. Code §§ 33-30-7 & -12 provide for a hearing and appeal pursuant to article two of the chapter. Section 33-30-7 provides for such a hearing when an insurer refuses "to provide subsidence coverage (1) on a structure evidencing unrepaired subsidence damage, until necessary repairs are made; or (2) where the insurer has declined, nonrenewed or canceled all coverage under a policy for underwriting reasons unrelated to mine subsidence[.]" (Also requiring that "an insurer shall refuse to provide subsidence coverage on a structure which evidence a loss or damage in progress."). Section 33-30-12 provides for such a hearing and appeal when a dispute arises concerning BRIM requiring an insurer to attempt to recover amounts paid to a policyholder when in the judgment of BRIM such "policyholder was not entitled to the amounts paid because of fraud or violation of the policy conditions."

required if reasonably possible to construe the language of a statute in a manner that will avoid a conclusion of unconstitutionality. And, as argued during the hearing held in this case, *see* Frye JA, at pp. 0897-935, § 33-30-12 provides that "[e]xcept in the case of fraud by an insurer, the board does not have any right of recourse against the insurer and *the insurer may settle losses in the customary manner consistent with this article*." W.Va. Code § 33-30-12 (emphasis added). Moreover, it should also be noted that W.Va. Code § 33-30-10 provides, in part: "Upon payment of the claim of an insured from the fund, the insured *shall be deemed to have waived any cause of action for damages caused by subsidence* ***to the extent of the payment from the fund.***" W.Va. Code § 33-30-10 (emphases added). When the statute is read as a whole, including with these particular provisions,[8] insurers may settle losses in the customary manner and an insured only waives a claim for damages caused by subsidence to the extent of the payment from the fund. Accordingly, when there is no payment from the fund or where the damages exceed any payment from the fund, there is nothing expressed in clear and unambiguous terms of the statute that prohibits an insured from filing a lawsuit against its insurer for breach of contract, bad faith, or unfair trade practices when the insurer fails to settle losses in such customary manner and the

[8] "It is presumed the legislature had a purpose in the use of every word, phrase and clause found in a statute and intended the terms so used to be effective, wherefore an interpretation of a statute which gives a word, phrase or clause thereof no function to perform, or makes it, in effect, a mere repetition of another word, phrase or clause thereof, must be rejected as being unsound, if it be possible so to construe the statute as a whole, as to make all of its parts operative and effective." Syl. Pt. 7, *Ex parte Watson*, 82 W.Va. 201, 95 S.E. 648 (1918); Syl. Pt. 3, *Osborne v. U.S.*, 211 W.Va. 667, 567 S.E.2d 677 (2002). "A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute." Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999); Syl. Pt. 4, *Verizon Services Corp. v. Board of Review of Workforce West Virginia*, 240 W.Va. 355, 811 S.E.2d 885 (2018). "Each word of a statute should be given some effect and a statute must be construed in accordance with the import of its language. Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning." Syl. Pt. 6, in part, *State ex rel. Cohen v. Manchin*, 175 W.Va. 525, 336 S.E.2d 171 (1984); Syl. Pt. 2, *State v. Snodgrass*, 207 W.Va. 631, 535 S.E.2d 475 (2000); Syl. Pt. 4, *Osborne v. U.S.*, *supra*.

damages exceed the amount of the payment, if any, from the fund.[9] *Accord Bettinazzzi v. State Farm Fire and Casualty Co.*, Civil Action No. 5:13-CV-166, 2014 WL 241694, at *2 (N.D.W.Va. Jan. 22, 2014) (Stamp, J.) ("This Court, however, has not located, nor has the defendant alerted this Court to any provision in the West Virginia State Code of Regulations or any West Virginia statute that prevents the plaintiffs from asserting a claim against the entity with whom the plaintiffs maintained the underlying insurance policy.").[10]

While the Plaintiff agrees with Judge Stamp's conclusion in *Bettinazzi* that nothing in either the statute or regulations promulgated thereunder prohibit such a lawsuit, should this Court believe that some provision in the regulations does so, such as 115 W.V.C.S.R. 1 – 4.1, Plaintiff submits that any regulation that is inconsistent with or otherwise alters the intent of the legislation is invalid. Syl. Pts. 6, 7 & 8, *Simpson v. West Virginia Office of Ins. Com'r*, 223 W.Va. 495, 678 S.E.2d 1 (2009); Syl. Pt. 8, *Repass v. Workers' Compensation Division*, 212 W.Va. 86, 569 S.E.2d 162 (2002); Syl. Pt. 4, *Maikotter v. University of West Virginia Bd. Of Trustees/West Virginia University*, 206 W.Va. 691, 527 S.E.2d 802 (1999); Syl. Pt. 3, *Rowe v. West Virginia Department of Corrections*, 170 W.Va. 230, 292 S.E.2d 650 (1982).

As noted by the lower court in its Order granting summary judgment, Frye JA, at pp. 0836-37, said provision provides:

> 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

[9] As noted in Plaintiff's response to Erie's motion for summary judgment (Frye JA, at pp. 0292-97), the West Virginia Supreme Court of Appeals has also acknowledged that the contractual duties and the obligations of good faith and fair dealing that an insurer owes its insured are non-delegable. *See Honaker v. Mahon*, 210 W.Va. 53, 62 n.8, 552 S.E.2d 788, 797 n. 8 (2001).

[10] Contrary to the Circuit Court's conclusion, nothing contained in this portion of Judge Stamp's decision in *Bettinazzi* limited its rationale only to Rule 12(b)(6) motions to dismiss as opposed to Rule 56 motions for summary judgment. Either the statute and regulations prevent plaintiffs from asserting claims against an insuring entity or they do not. If they do, they will support a Rule 12(b) motion to dismiss as a matter of law just as well as a Rule 56 motion for summary judgment.

> 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.

The *Higginbotham* Court concluded that "[t]his 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. *What is not at all clear, however, is what recourse an insured has if aggrieved by a Board of Risk decision.*" *Higginbotham*, 189 W.Va. at 509-10, 432 S.E.2d at 779-80 (emphasis added).

Unfortunately, this Court did not address the potential conflicts or inconsistencies between the statute and regulations raised herein in *Higginbotham, supra.* It is long-past time for this Court to address all of these issues, particularly in light of the failures of either the West Virginia Legislature or BRIM to effectively address the due process and lack of remedy issues first raised by the Court 29 years ago in *Higginbotham*, 189 W.Va. at 510-11, 432 S.E.2d at 780-81.

In its Order granting summary judgment to Erie, the lower court held, in part:

> 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. . . .

Frye JA, at p. 0834 (emphasis in original).

Erie, relying upon such holding of the lower court in its response to Plaintiff's motion to alter or amend judgment, appears to argue that Plaintiff has ignored such limited instances where an insured might be able to sue its insurer and thereby has somehow improperly "recasted" the Court's Order. (*See* Frye JA, at pp. 0866-68). It is not clear what significance or effect Erie

attributes to this alleged recasting. However, what is clear is that Erie never addressed the Plaintiff's constitutional challenge on its merits. Moreover, it is clear that these three limited instances are not at issue in this lawsuit and do not provide a remedy, due process, and equal protection for the Plaintiff in this case or for other insureds similarly situated in other lawsuits currently pending or yet to come.

As explained by the West Virginia Supreme Court of Appeals, canons of construction require that every reasonable construction of a statute must be resorted to, if possible, in order to sustain the constitutionality of a statute.

> "When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment." Syl. Pt. 3, *Willis v. O'Brien*, 151 W.Va. 628, 153 S.E.2d 178 (1967).
>
> "'In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.' Syllabus Point 1, *State ex rel. Appalachian Power Company v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965)." Syl., *Johnson v. Bd. of Stewards of Charles Town Races*, 225 W.Va. 340, 693 S.E.2d 93 (2010).

Syl. Pts. 3 & 4, *Frazier v. McCabe*, 244 W.Va. 21, 851 S.E.2d 100 (2020). *Accord, e.g.*, Syl. Pt. 3, *State v. Connor*, 244 W.Va. 594, 855 S.E.2d 902 (2021); Syl., *Johnson v. Board of Stewards of Charles Town Races*, 225 W.Va. 340, 693 S.E.2d 93 (2010) (per curiam); Syl. Pt. 1, *State ex rel. Appalachian Power Company v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965); Syl. Pt. 1, *Louk v. Cormier, supra.*

Plaintiff's construction of the specific sections of the statute above are consistent with this

directive to avoid holding a statute unconstitutional if at all reasonably possible.

c. Plaintiff has not waived his right to challenge the constitutionality of the statute by failing to provide notice to the Attorney General.

At the outset it must be acknowledged that plaintiffs are not required to anticipate possible defenses when drafting a complaint. *E.g.*, *Gable v. Gable*, 245 W.Va. 213, 222-23, 858 S.E.2d 838, 847-48 (2021); *Judy v. Eastern West Virginia Community and Technical College*, ___ W.Va. ____, 874 S.E.2d 285, 290 (2022); *Doe v. Logan County Bd. of Educ.*, 242 W.Va. 45, 49-50, 829 S.E.2d 45, 49-50 (2019); *Hutchison v. City of Huntington*, 198 W.Va. 139, 150, 479 S.E.2d 649, 660 (1996). However, nonetheless, Erie disingenuously submitted in its response to Plaintiff's motion to alter or amend judgment that the Plaintiff has waived his right to challenge the constitutionality of the statutory framework by failing to provide notice to the Attorney General. (*See* Frye JA, at pp. 0863-64). In support of this argument, Erie quotes a portion of Rule 24 of the West Virginia Rules of Civil Procedure that governs intervention and provides, in pertinent part: "When the constitutionality of a statute of this State affecting the public interest is drawn in question in any action to which this State or an officer, agency, or employee thereof is not a party, *the court shall give notice* thereof to the attorney general of this State." W.Va.R.Civ.P. 24(c) (emphasis added). Clearly, Erie's argument is without merit.

First, Rule 24(c) indicates by its express and unambiguous terms that the Court, not the plaintiff, shall provide such notice. Plaintiff can find no case law discussing this particular provision of the Rule which by its express terms does not state when the Court must provide such notice or the consequences of a failure to do so. In Plaintiff's reply in support of his motion to alter or amend judgment, the Plaintiff informed the lower court that should it deem it appropriate to provide such notice to the Attorney General before ruling on this issue in order to determine whether the State wishes to intervene or otherwise provide its position on the issue, the Plaintiff

would not object to such decision or any delay it caused. (Frye JA, at p. 0877). But in any event, it is clear that such Rule neither indicates that the Plaintiff has such duty nor that the Plaintiff waives any such constitutional challenge by failing to do so. Moreover, particularly in light of its ruling denying Defendant's motion for judgment on the pleadings (*see* Frye JA, at pp. 0184-89), Plaintiff had no knowledge prior to the pretrial conference that the Circuit Court might ultimately determine that summary judgment should be granted to Defendant on a basis that raised such constitutional concerns.

Second, the case law from other jurisdictions cited by Erie are readily distinguishable because the rules at issue in such States, unlike W.Va.R.Civ.P. 24(c), clearly required the party challenging the constitutionality of the statute to provide such notice to the attorney general and such jurisdictions have case law that indicate that a failure to so constitutes a waiver. *See Petition of City of Clairton*, 139 Pa. Cmwlth. 354, 358, 590 A.2d 838, 840 (1991) (citing Pa.R.Civ.P. 235 and Pa.R.A.P. 521); *In re: Appeal of Penn-Delco School District*, 903 A.2d 600, 604 n. 6 (Pa. Cmwlth.2006) (citing Pa.R.A.P. 521 and *Petition of City of Clairton*).

2. The Circuit Court committed a clear legal error of law by denying the Plaintiff's motion to alter or amend its judgment on the basis that the Plaintiff had not presented any evidence in this civil action that his home had suffered mine subsidence damage when such ruling was not part of its Order granting summary judgment to Defendant and the Defendant did not file its own motion to alter or amend judgment to include such a ruling.

A thorough review of the Court's Order granting summary judgment to Erie establishes that it did not base any part of its ruling as to Plaintiff's claim for mine subsidence coverage and damages on the Plaintiff failing to produce any evidence in support of such claim. Rather, the Court granted summary judgment to Erie on the basis that Erie is only an agent of BRIM under W.Va.Code §§ 33-30-1, *et seq.*, and cannot be sued for any of the claims involving denial of mine subsidence coverage alleged by Plaintiffs. In such regard, the Court held that its interpretation of

the statutory framework set forth in W.Va.Code §§ 33-30-1 *et seq.*, and supporting regulations, such as 115 W.V.C.S.R. 1—4.1, when read in conjunction with the West Virginia Supreme Court of Appeals' decision in *Higginbotham v. Clark, supra,* led the Court to conclude that the Plaintiff could not assert any of his claims concerning mine subsidence coverage against his insurer, Erie. (Frye JA, at pp. 0834-41). Erie did not file a motion to alter or amend the judgment pursuant to W.Va.R.Civ.P. 59(e), within ten days of entry of the final judgment or otherwise, seeking to add such a finding and conclusion to the Court's rulings. Plaintiff's timely filed motion to alter or amend judgment was limited to the issues of the Court failing to address the constitutionality of the relevant statutory scheme and, if reasonably possible, to construe such statute in a manner that did not deprive the Plaintiff of his constitutional rights to a remedy, due process, and equal protection. For this reason, the Plaintiff did not even argue or reiterate in its motion or reply all of the evidence he had submitted in support of his claim for mine subsidence coverage and damages. (*See* Frye JA, at pp. 0843-55 & 0871-82).

Much to his surprise and chagrin, when entering its Order denying Plaintiff's motion to alter or amend judgment, the Court essentially, with slight modifications, adopted the proposed order submitted by Erie that failed to address the actual substantive merits of his constitutional and statutory construction arguments and instead included an inaccurate sentence that "[r]egardless, 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." (Frye J.A., at p. 0886.)[11] A review of the Order granting summary judgment to Erie (*see* Frye JA, at pp. 0829-41) and the Order denying Plaintiff's motion

[11] As noted *supra*, at fn. 1, while the Court did grant summary judgment on Plaintiff's claims concerning coverages other than mine subsidence coverage on the basis of a lack of evidence, *see* Frye JA, at pp. 0838-41, such rulings are not the subject of Plaintiff's motion to alter or amend judgment or this appeal.

to alter or amend judgment (*see* Frye JA, at pp. 0884-86) reveals that neither of these Orders even discuss the evidence that Plaintiff had introduced in support of his claim for mine subsidence damages. As will be discussed in greater detail *infra*, in addition to his own beliefs and opinions (Frye JA, at pp. 0483-87, 0496-97, 0499-500), the Plaintiff had presented an expert's opinions in support of his claim (Frye JA, at pp. 0440-41), and such expert had never been disqualified or the admissibility of his opinions otherwise limited by the trial court. Any other issues involving the expert's opinions would involve questions of weight or credibility that are for the jury to decide. It would constitute an obvious injustice to deny Plaintiff's motion to alter or amend the judgment on grounds that were neither relied upon by the Court in its Order granting summary to Defendant that was the basis of its final judgment nor are accurate in light of the evidence of record.

3. To the extent that the Circuit Court's Order granting summary judgment to Erie can be reasonably construed to include as a basis the failure of the Plaintiff to offer evidence of mine subsidence damages, the Court committed clear error of law in granting summary judgment and an abuse of discretion in interpreting the facts and evidence of record.

Even if the Court's Order granting summary judgment contained a sentence that stated the Plaintiff had failed to produce any evidence that mine subsidence caused him property damages, which it clearly does not, such mere sentence alone would be both an insufficient finding to support summary judgment and an incorrect statement of the evidence of record. As previously noted,

> A circuit court's entry of summary judgment is reviewed *de novo. See Drewitt v. Pratt,* 999 F.2d 774 (4th Cir.1993). Under Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is proper only where the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. In Syllabus Point 1 of *Andrick v. Town of Buckhannon,* 187 W.Va. 706, 421 S.E.2d 247 (1992), we reiterated the standard for granting summary judgment:
>
> " 'A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York,* 148 W.Va. 160, 133 S.E.2d 770

(1963)."

> *See also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). 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." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 213 (1986). We, therefore, must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Masinter v. WEBCO Co.*, 164 W.Va. 241, 262 S.E.2d 433 (1980). *Andrick*, 187 W.Va. at 708, 421 S.E.2d at 249.

Painter v. Peavy, 192 W.Va. at 192, 451 S.E.2d at 758. *Accord Williams v. Precision Coil, Inc.*, 194 W.Va. at 59, 459 S.E.2d at 336 ("In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as '[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]' *Anderson,* 477 U.S. at 255, 106 S.Ct. at 2513, 91 L.Ed.2d at 216. Summary judgment should be denied 'even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.' *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir.), *cert. denied,* 342 U.S. 887, 72 S.Ct. 178, 96 L.Ed. 666 (1951). Similarly, when a party can show that demeanor evidence legally could affect the result, summary judgment should be denied.").

> Although our standard of review for summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed.

Syl. Pt. 3, *Fayette County National Bank v. Lilly, supra. Accord Thompson v. Hatfield*, 225 W.Va. at 408, 693 S.E.2d at 482; Syl. Pt. 2, *Ayersman v. West Virginia Division of Environmental Protection, supra*; *Minshall v. Health Care & Retirement Corp. of America*, 208 W.Va. at 6, 537 S.E.2d at 322.

In addition to his own beliefs and opinions as the owner of the property (Frye JA, at pp.

0483-87, 0496-97, 0499-500),[12] Plaintiff retained an expert in geophysics/geology, Dr. Timothy Bechtel, PhD, PG, who examined the damages to Plaintiff's property and opined "to a reasonable degree of professional certainty that the subsidence from underground mining contributed to damages to the house and land compromising Mr. Frye's property." (*See* Frye JA, at p. 0441).

More specifically, the signed and sworn affidavit of Dr. Bechtel provided:

> I, Dr. Timothy D. Bechtel, being first duly sworn according to law, depose and state as follows:
>
> 1. I conducted an evaluation of property owned by Mr. Brian Frye for the purpose of determining whether the damages Mr. Frye identified were caused by mine subsidence.
> 2. I received a Bachelor of Science degree in Geology from Haverford College, PA in 1982; a Master of Science degree in Rock Mechanics from Brown University in 1984; and a PhD in Geophysics from Brown University in 1989.
> 3. I am a Certified Professional Geologist (PG) and a member of the American Geophysical Union, the Association of Engineering Geologists, Engineering and Environmental Geophysical Society, Geological Society of America, International Association of Hydrogeologists, Institute of Electrical and Electronics Engineers and the Society of Exploration Geophysicists.
> 4. I have experience performing services for geotechnical engineering, environmental, and oil and gas projects. My attached CV describes more fully my technical background. *See* **Exhibit A**.
> 5. I have over three decades of experience performing forensic studies and investigations involving mine subsidence, sinkhole formation, and other geologic phenomena, including mine subsidence events in the Appalachian coal regions encompassing West Virginia and Pennsylvania.
> 6. I am familiar with the geography and history of the region encompassing Mr. Frye's property, having performed other mine subsidence evaluations on properties neighboring Mr. Frye's home in Valley Grove, WV.
> 7. A common misconception among experts in my field is that deep mines, those existing at depths greater than 500 feet, do not pose a subsidence risk or

[12]*See, e.g., Evans v. Mutual Mining*, 199 W.Va. 526, 530-32, 485 S.E.2d 695, 699-701 (1997) (explaining that pursuant to Rule 701 non-expert witness may testify in the form of opinions or inferences "which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue"; acknowledging that owner of personal or real property may testify to the value of the property; also permitting owner to testify to cause of additional flooding).

manifest in surface property damage. In full extraction mining, surface subsidence occurs regardless of the depth of the mine. Although deeper mine workings lower the frequency of mine subsidence damage, depth is not a reliable factor for ruling out mine subsidence events. Simple visual inspections also cannot rule out mine subsidence effects.

8. Another misconception is that if no subsidence has occurred for many years after mining, there is no risk of future subsidence. Subsidence often occurs over mine[s] that have been closed for over a century.

9. In evaluating the origins of Mr. Frye's property damages, I have reviewed and/or relied upon the following materials:

   a. Photographs of the damages to Mr. Frye's real property;

   b. The home inspection report prepared by Richard A. Bragg of Romauldi, Davidson & Associates;

   c. The mine subsidence evaluation report prepared by Robert L. Bloomberg;

   d. The investigative report prepared by John C. Hempel of EEI Geophysical; and

   e. Materials exchanged in discovery by the parties to Mr. Frye's lawsuit.

10. It is my opinion to a reasonable degree of professional certainty that subsidence from underground mining contributed to damages to the house and land comprising Mr. Frye's property.

11. The type and characteristics of the damage evaluated at Mr. Frye's property, including the fact that a sinkhole was previously located on his property, is representative of the damage expected from a mine subsidence event.

12. The basis of my opinions described herein are supported by my review of the foregoing materials, my professional background, my experience evaluating mine subsidence damage, and my familiarity with the geographic region encompassing Mr. Frye's property.

(Frye JA, at pp. 0440-41).

Although Erie filed motions to exclude the testimony of Plaintiff's experts (Frye JA, at pp. 0629-35) and to strike Dr. Bechtel's affidavit (Frye JA, at pp. 0815-17), the Plaintiff did not even have a reasonable period of time to file a written response to such motions before the Court entered its Order granting summary judgment to Erie. The Circuit Court never ruled on such motions to exclude Plaintiff's expert or to strike his affidavit by written orders and certainly did not do so in

its Order granting summary judgment to Erie. However, during the pretrial conference, the Court did indicate that Defendant's arguments likely went to issues of credibility rather admissibility and deferred ruling on the motion *in limine* to exclude Plaintiff's experts. (Frye JA, at pp. 0938-42). Plaintiff indeed submits that Dr. Bechtel's report (and the CV attached thereto) clearly demonstrates his qualifications to testify as an expert on the above matters, and West Virginia law provides that

> where the evidence demonstrates, as in the present case, that the individual sought to be introduced as an expert witness is qualified by knowledge, skill, experience, training, or education as an expert and that the individual's specialized knowledge will assist the trier of fact, it is an abuse of the trial court's discretion to refuse to qualify that individual as an expert.
>
> * * *
>
> . . . Once a witness is permitted to testify, it is within the province of the jury to evaluate the testimony, credentials, background, and qualifications of the witness to address the particular issue in question. The jury may then assign the testimony such weight and value as the jury may determine. Furthermore, once introduction of an expert's testimony is permitted, the opposing party may exercise its right of cross-examination in which questions regarding the expert's credentials, training, experience, and qualifications may be raised and any perceived weaknesses may be revealed.

Cargill v. Balloon Works, Inc., 185 W.Va. 142, 147, 405 S.E.2d 642, 647 (1991). *Accord Gentry v. Mangum*, 195 W.Va. 512, 525-26, 466 S.E.2d 171, 184-85 (1995); *West Virginia Div. of Highways v. Butler*, 205 W.Va. 146, 152, 516 S.E.2d 769, 775 (1999).

Obviously, it is inaccurate to state that the Plaintiff did not offer any evidence that mine subsidence caused damages to his property. Additionally, any order that contained such a blanket statement would not only be inaccurate but would fail to set forth sufficient findings of fact and conclusions of law to meet the requirements of West Virginia law as set forth in the case law discussed above.

VI. Conclusion.

For all of the foregoing reasons, Plaintiff/Appellant respectfully prays that Your Honorable Court reverse the Final Judgment of the Circuit Court below and its Orders granting Erie summary judgment and denying Plaintiff's motion to alter or amend judgment. Plaintiff/Appellant requests any other further relief that this Court deems appropriate, equitable, and just.

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CERTIFICATE OF SERVICE

I hereby certify that on August 18th, 2022, I hand-delivered the foregoing *BRIEF OF APPELLANT/PLAINTIFF BELOW* with the Clerk of the Court and via regular mail to the following:

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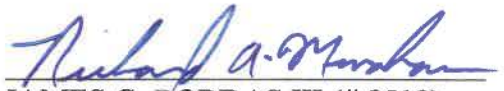

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