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)

REPLY BRIEF OF APPELLANT/PLAINTIFF BELOW

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I. STATEMENT OF THE CASE

For reasons set forth in "Appellant's Response in Opposition to Appellee's Motion to Supplement the Record and Motion to Strike Appellee's Response Brief," Appellant opposes the Appellee's motion to supplement the record with documents that were not submitted to the trial court for its consideration below, and strenuously objects to the Appellee filing a response brief that quotes or cites to such extraneous material before its motion is ruled upon. Appellant also stands by their Statement of the Case contained in his opening brief and will only address factual and procedural issues herein to the extent necessary to refute statements made by Appellee.

Appellee's statement of the case ignores the confusing and contradictory information provided to the insured and his counsel by BRIM and Erie. As explained in Appellant's opening brief, 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 confusing and contradictory nature of such information makes it difficult for an attorney, let alone an insured as a layman, to understand the process they are facing or any rights and options they might possess. The information contained in these letters was made additionally confusing because Erie did not simply choose to rely upon the reports of expert consultants

retained by BRIM but also hired their own expert consultants to investigate Appellant's claims, examine his property, and render findings and conclusions. If an insured is supposed to know and understand that BRIM is the only entity responsible for investigating the claim and determining whether the insured is entitled to mine subsidence coverage then such correspondence must clearly state so and these entities must not further act in a contradictory manner. If Erie knows that it is bound by any determination made by BRIM and that it has no independent responsibilities and obligations owed to its insured concerning a claim for mine subsidence coverage, then why did it hire its own expert consultants to investigate the matter and to render findings and conclusions? Further, in such situation, what would have occurred if BRIM and Erie's expert consultants reached contrary findings and conclusions concerning the Appellant's claim for mine subsidence coverage?

Erie also points to some letters from Erie and BRIM, issued around the same time this lawsuit was being filed, reporting the findings and conclusions reached by their expert consultants and asking whether the Appellant had any contrary opinions he would like to be considered. Are insureds supposed to spend possibly thousands of dollars in retaining and obtaining opinions from their own experts before they even know whether the opinions of BRIM and Erie's experts are going to find that their claims are caused by mine subsidence? The Appellant was then told that BRIM and/or Erie would reopen or reinvestigate the matter and send additional expert consultants for such purposes.[1] Is this the point at which insureds are supposed to spend possibly thousands of dollars in retaining and obtaining opinions from their own experts before they even know

[1] Two of these letters from BRIM are the subject of Appellees' motion to supplement the record that Appellant opposes because such documents were not presented to or considered by the Circuit Court in rendering its Orders at issue on this appeal.

whether the opinions of BRIM and Erie's additional experts are going to find that their claims are caused by mine subsidence?

All of the confusion and contradiction created in this case could have been very easily prevented by BRIM and Erie if they had merely sent correspondence containing clear and unambiguous language indicating the following information: that once a claim is submitted to Erie it is referred to BRIM who under W.Va. Code §§ 33-30-1, *et seq.*, as the reinsurer of claims for mine subsidence damages is solely responsible for investigating the claim, hiring experts, and rendering the findings and conclusions of whether damages actually caused by mine subsidence has occurred entitling the insured to insurance coverage for such damages. Erie's sole responsibility is to acknowledge whether the insured has coverage for such types of claims under a policy of insurance and to forward the claim to BRIM and to provide a check for damages to the insured should BRIM ultimately determine that covered mine subsidence damages have actually occurred. Such correspondence could further provide a date by which BRIM will reach its initial determination and then instruct the insured that should s/he disagree with BRIM's initial determination s/he may produce expert reports by a certain deadline for BRIM's consideration. Should BRIM still conclude that mine subsidence damages have not occurred, a date will then be set for a timely hearing at which evidence may be presented and a record created for any subsequent legal proceedings necessary should BRIM still conclude that mine subsidence damages have not occurred. Finally, such correspondence could explain what legal rights the insured has to appeal or otherwise contest the determination made by BRIM.

However, the correspondence sent by BRIM and Erie did none of these things. Erie now seeks to further muddy the waters by raising for the first time in its appellate response brief that binding arbitration was available for either BRIM or the insured if they could not agree on the resolution of Appellant's claim and chose to use it. Such alleged "right" to select binding

arbitration was not set forth in W.Va. Code §§ 33-30-1, *et seq.*, or in an actual regulation or legislative rule, but rather in Form A contained in the Appendix to the legislative rules set forth in W.Va.C.S.R. 115-1, *et seq.*[2] Additionally, as far as can be ascertained in the record, such alleged right to binding arbitration was not contained in any forms or correspondence provided to the Appellant by either Erie or BRIM. Indeed, such alleged right to binding arbitration was so well hidden that counsel for Erie, herself, did not raise it in Erie's motion for judgment on the pleadings (*see* Frye JA, at pp. 0023- 0032) or Erie's motion for summary judgment (*see* Frye JA, at pp. 0190-204) or when the lack of a remedy and the constitutional argument was raised during the pretrial hearing (*see* Frye JA, at pp. 0903-07 & 0921-35) or even in Erie's response opposing Plaintiff's motion to alter or amend the judgment (*see* Frye JA, at pp. 0857-69). Yet, Erie asserts that this Court should rely upon it to affirm the rulings of the Circuit Court below for alternative reasons than that relied upon by the Circuit Court.

As to those rulings of the Court below, Appellee admits that the Circuit Court did not base its ruling granting summary judgment on the Appellant's failure to submit evidence of mine subsidence damage, yet it somehow proclaims that the Court's Order denying the Appellant's motion to alter or amend judgment did not say otherwise despite its statement 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.)[3]

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[2] The applicable legislative rules were initially filed and became effective on June 12, 1987. However, since such enactment, they have been amended at least five times (2002, 2007, 2016, 2017, & 2021) with the last amendment becoming effective on August 1, 2021. The Appellee does not state with which amendment binding arbitration was added to Form A, and Appellant's counsel has not been able to make such determination via WestLaw as of this date. Accordingly, it is not even known at this time whether such alleged binding arbitration was available under the policy or enactment at issue in this case.

[3] 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.

Plaintiff will now turn to a discussion of the legal arguments raised in this appeal to the extent necessary to address Appellee's contrary assertions.

II. ARGUMENT

A. 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.

1. The Appellant did not waive the constitutional question before the Circuit Court and this Court has the authority to hear questions of constitutional significance even if not properly preserved below.

As noted in Appellant's opening brief, 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). As soon as the Circuit Court indicated during the pretrial hearing that, contrary to its Order denying Erie's motion for judgment on the pleadings (*see* Frye JA, at pp. 0187-89), it was concerned with the issue of whether the Plaintiff could pursue his claims against Erie due to the statutory framework set forth in W.Va. Code §§ 33-30-1 *et seq.*, and that Court's interpretation of this Court's decision in *Higginbotham v. Clark*, 189 W.Va. 504, 432 S.E.2d 774 (1993), counsel for Plaintiff raised the issue of lack of a remedy and the constitutional significance of such argument was discussed by the Court and parties. (*See* Frye JA, at pp. 0903-07 & 0921-35). Subsequently, counsel for Appellant also fully briefed the constitutional argument in connection with his motion to alter or amend judgment which was necessitated by the Court's failure to address the constitutional question in its Order granting summary judgment to Erie. (*See* Frye JA, at pp. 0843-55 & 0871-82).

Appellee admits in its response brief that the duty to provide notice to the Attorney General of a challenge to the constitutionality of legislation pursuant to W.Va.R.Civ.P. 24(c) rests with the trial court rather than the parties. However, Appellee continues to maintain that such notification should have been provided. Yet, Appellee neglects to inform the Court that 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 wished 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).

In any event, however, it must also be acknowledged that even if constitutional arguments had never been raised before entry of judgment, this Court 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,[4] this Court has the discretion to consider it inasmuch as an issue of constitutional magnitude favors review notwithstanding a procedural default.[5]

2. The statutory scheme set forth in W.Va.Code §§ 33-30-1 *et seq.* as currently enforced by BRIM and interpreted by the Circuit Court is unconstitutional.

Contrary to the assertions of the Appellee, BRIM and Erie's actions in this case and the Circuit Court's interpretation of the applicable statutory scheme as enforced by BRIM results in a deprivation of the Plaintiff's constitutional rights. The importance of the fundamental rights at issue in this appeal and which were similarly presented in *Higginbotham*, *supra*, cannot be overstated.

> "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.

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[4] Appellee's reliance upon the Memorandum Decisions in *Haynes v. Antero Resources Corp.*, No. 15-1203, 2016 WL 6542734, at *3 (W.Va. Oct. 28, 2016), and *BRG Assocs., LLC v. Hess*, No. 16-0338, 2017 WL 656999, at *4 (W.Va. Feb. 17, 2017), are misplaced because counsel for Plaintiff did clearly raise the issue of lack of a remedy in the pretrial hearing which led the Circuit Court to acknowledge what was essentially a constitutional argument and the constitutional argument was fully briefed in connection with the motion to alter or amend judgment.

[5] 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)).

> 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); *State ex rel. Affiliated Constr. Trades Found v. Vieweg*, 205 W.Va. 687, 701, 520 S.E.2d 854, 868 (1999).

This right is so fundamental that it is engrained in the Constitution of West Virginia. *State ex rel. Workman v. Carmichael*, 241 W.Va. 105, 119, 819 S.E.2d 251, 265 (2018). This Court has explained:

> 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); Syl. Pt. 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); *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. *Gibson v. West Virginia Dept. of Highways*, 185 W.Va. at 218-19, 406 S.E.2d at 444-45; 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 only 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).
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> 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.
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> * * *
>
> 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[6] nor the Legislature in the intervening 29 years have taken effective action to meet the requirements of due process by

[6] 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

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. As set forth above and in Appellant's opening brief, instead of following the Court's directive, BRIM re-directs insureds to their insurer as the party that is responsible to the insured such as it did in this case. (Frye JA, at p. 0364). No mention is contained in such redirection 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.*, 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 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

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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.

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.

Contrary to the Appellee's assertions, 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.

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[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."

3. The Court committed a clear 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.

Contrary to the assertions of Appellee, there is no reasonable question that the Circuit Court found that the Plaintiff could not proceed with its claims for violation of the implied duty of good faith and fair dealing or common law bad faith, or violation of the UTPA primarily because BRIM was solely responsible for the conclusion that no mine subsidence damages had occurred and that Erie was merely acting in a limited capacity as BRIM's agent. The mere fact that insureds can still assert very limited claims against an insurer under the Circuit Court's interpretation of the statute for fraud or for delay in submitting a claim to BRIM does not alter the fact that insureds who believe that their claim for mine subsidence damages has been wrongfully denied on a substantive basis has no remedy. (*See* Frye JA, at pp. 0834-41).

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 discussed in Plaintiff's opening brief, courts are required, if reasonably possible, to construe the language of a statute in a manner that will avoid a conclusion of unconstitutionality. Syl. Pts. 3 & 4, *Frazier v. McCabe*, 244 W.Va. 21, 851 S.E.2d 100 (2020); 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.*

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 damages exceed the amount of the payment, if any, from the fund.[9] *Accord Bettinazzi 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

[8] Contrary to the Appellee's argument, Appellant's interpretation of this language is not unreasonable or misplaced. "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*.

[9] As noted in Plaintiff's response to Erie's motion for summary judgment (Frye JA, at pp. 0292-97), this Court 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).

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 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*

[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 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.

4. The Appellee has waived any defense that binding arbitration is available as a remedy under the statutory scheme and such alleged remedy is invalid since it is not set forth in the statute itself or even in the regulation/legislative rule.

Appellee asserts that the Appellant has waived an argument that the statute as enforced by BRIM and interpreted by the Circuit Court is unconstitutional despite having discussed essentially such an argument during the pretrial hearing with the Circuit Court and having fully briefed it in his motion to alter or amend judgment. However, Appellee appears to believe that it can raise an argument that binding arbitration was available as a remedy in this case despite having never raised it before the Circuit Court and only asserting it now. Rather than the Appellant, it is the Appellee who is guilty of waiver in this case. *See Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 196 W.Va. 692, 700 & 703 n. 16, 474 S.E.2d 872, 880 & 883 n. 16 (1996) ("Although our review of the record from a summary judgment proceeding is *de novo,* this Court for obvious reasons, will not consider evidence or arguments that were not presented to the circuit court for its consideration in ruling on the motion. To be clear, our review is limited to the record as it stood before the circuit court at the time of its ruling."; "However, the law is clear in West Virginia that an appellate exhibit has no evidentiary value on appeal unless it was introduced in the circuit court or it is subject to judicial notice under Rule 201 of the West Virginia Rules of Evidence. Our rule remains steadfast that the record may not be enhanced or broadened on appeal except by the

methods discussed or by the stipulation of the parties. . . ."); *Thornton v. CAMC*, 172 W.Va. 360, 364, 305 S.E.2d 316, 320-21 (1983) ("This Court 'is limited in its authority to resolve assignments of nonjurisdictional errors to a consideration of those matters passed upon by the court below and fairly arising upon the portions of the record designated for appellate review.'" (citation omitted)); *O'Neal v. Peake Operating Co.*, 185 W.Va. 28, 32, 404 S.E.2d 420, 424 (1991) ("This court may only properly consider those issues which appear in the record before us.").

Moreover, counsel for Appellant has not located any authority supporting that the government may provide binding arbitration as a remedy in a situation such as this when that remedy is not set forth in a statute or even a regulation/legislative rule, but rather is merely mentioned in "Form A" contained in an appendix to a legislative rule. Additionally, as noted *supra* at p.5 n. 2, it is not clear that such a "remedy" was even set forth in such Form during one of the amendments to the legislative rules which would have rendered it effective during the time period at issue in this lawsuit.

B. The Circuit Court committed a clear error of law resulting in manifest injustice by denying the Plaintiff's motion to alter or amend its judgment on any of the bases asserted by that Court in its Order.

For all of the prior reasons set forth in this brief, as well as those set forth in Appellant's opening brief, the Appellant did not waive their arguments asserted in their motion to alter or amend judgment and the Circuit Court committed clear legal error resulting in a manifest injustice in failing to address or in rejecting the Appellant's arguments on their merits and denying such motion. Interestingly, the Appellee admits that the Circuit Court did not base its Order granting summary judgment on the Plaintiff failing to produce evidence of mine subsidence damages, yet it somehow proclaims that the Court's Order denying the Appellant's motion to alter or amend judgment did not say otherwise despite its statement 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). Appellee attempts to explain that such statement was merely referring to an earlier finding of fact that BRIM had made such a determination when reaching its decision. However, this argument fails because the Court's Order denying Plaintiff's motion to alter or amend judgment does not expressly make any such distinction. Rather, the Circuit Court incorrectly stated that "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), when the Court had not even considered or addressed the evidence actually presented to the Court by the Plaintiff in this lawsuit when ruling on the motion for summary judgment as set forth in Appellant's opening brief.

III. CONCLUSION

For all of the foregoing reasons, as well as those set forth in his opening brief, 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 the foregoing *BRIEF OF APPELLANT/PLAINTIFF BELOW* was had upon the parties herein by forwarding a true and complete copy thereof by First Class U.S. Mail, postage prepaid, to counsel of record at their last known address this 24th day of October 2022 as follows:

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