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

BRIAN FRYE,

Plaintiff Below, Petitioner,

v.

ERIE INSURANCE COMPANY,

Defendant Below, Respondent.

On Appeal from a final order of the
Circuit Court of Ohio County
(Civil Action No. 19-C-52)

BRIEF OF RESPONDENT ERIE INSURANCE COMPANY

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I. INTRODUCTION

Respondent Erie Insurance Company ("Erie") submits this response to the brief of Petitioner Brian Frye. The Circuit Court properly granted Erie summary judgment and denied Mr. Frye's motion to alter or amend the judgment. Erie did not breach its contract with Mr. Frye, did not breach the duty of good faith and fair dealing or common law bad faith, and did not violate the Unfair Trade Practices Act ("UTPA"), W. Va. Code § 33-11-4(9). The Circuit Court acknowledged that the mine subsidence insurance statutory scheme, W. Va. Code § 33-30-1, *et seq.*, permits claims against an insurer under certain circumstances but correctly held there are no genuine issues of material fact and as a matter of law none of those circumstances exist. In that holding, the Circuit Court did not opine on Mr. Frye's proffered evidence of mine subsidence.

In denying the motion to alter or amend judgment, the Circuit Court properly declined to address Mr. Frye's new constitutional argument. The Circuit Court further properly relied on its original holding that Erie could not be liable insofar as BRIM concluded that there was no evidence of mine subsidence and Erie had no authority to approve and pay Mr. Frye's claim. The Circuit Court also properly held that Mr. Frye's additional argument that under the summary judgment order there could never be a cause of action against an insurer misstated that order.

This Court should not reach Mr. Frye's new argument under the due process, equal protection, and certain remedy clauses of the state constitution, W. Va. Const., art. III, §§ 10, 17 because it has not been legally or factually developed or decided by the Circuit Court, and it is contrary to the evidence that BRIM has constitutionally applied the statutory scheme in adjusting Mr. Frye's claim. Mr. Frye's remaining arguments again misstate the Circuit Court's orders and are meritless. Therefore, this Court should affirm the Circuit Court's orders granting summary judgment to Erie and denying Mr. Frye's motion to alter or amend the judgment in all respects.

II. STATEMENT OF THE CASE

A. Statement of Facts

Mr. Frye's home is located at 10123 National Road in Valley Grove, West Virginia. A.R. 479. The home was originally built in 1900, although additions were made over the years. A.R. 63, 482. Mr. Frye purchased the home in 2001 for $42,000.00. A.R. 480. The assessed property value of the home in 2022 is $42,240.00. A.R. 516.

Erie issued Mr. Frye a homeowner's policy of insurance, Policy No. Q608100279, which included a mine subsidence endorsement. A.R. 308, 343. Mr. Frye claims to have noticed damage to the home in April 2017, citing to issues such as cracks in the foundation, windows and caulking shifting, doors not opening and closing right, and cracks in the kitchen tiled floor. A.R. 483. Mr. Frye believed that the damage was caused by underground mining. A.R. 484.

By letter dated November 21, 2017, Mr. Frye's attorney sent a letter to Paree Insurance Center. The letter requested a copy of Mr. Frye's insurance policy and stated that it was formal notice of a claim under the policy including but not limited to a claim for mine subsidence coverage benefits. A.R. 206, 485.[1]

Erie sent a general reservation of rights letter regarding the claim for property damage loss dated December 7, 2017, to Mr. Frye's attorney. A.R. 357.[2] On December 12, 2017, Erie sent a second letter to Mr. Frye's attorney specifically addressing the claim for mine subsidence loss that stated: "This letter acknowledges your representation of our Erie insured, Brian Frye,

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[1] Mr. Frye's attorney apparently also sent a letter to BRIM on November 21, and BRIM responded with a letter dated November 28, 2017, which acknowledged receipt of the letter to BRIM, advised Mr. Frye's attorney to contact Erie to request Mr. Frye's policy and make a claim (which Mr. Frye's attorney had already done), and explained that "BRIM's role [in the mine subsidence claims process] can be found at West Virginia Code § 33-30-1, *et seq.*, and West Virginia Code of State Rules § 115-1." A.R. 364.

[2] This letter relates to Mr. Frye's claim for property damage generally under his homeowner's insurance policy, which was adjusted by Erie. Mr. Frye does not dispute Erie's denial of the claim for property damage generally. Pet. Br. at 7 n.1.

for the potential damages to the insured property caused by mine subsidence. Please be advised that Erie Insurance Property & Casualty Company has submitted an assignment to BRIM to investigate the cause of loss to the insured property." A.R. 366.[3]

Erie received a letter from Irvine & Associates, independent insurance adjusters and appraisers, dated December 19, 2017. The letter advised Erie that BRIM had retained Irvine & Associates to investigate Mr. Frye's mine subsidence claim and requested information from Erie regarding Mr. Frye's mine subsidence endorsement. A.R. 418.

On January 19, 2018, Al Bragg of Romauldi, Davidson & Associates, independent engineers that Erie had retained, performed an inspection of Mr. Frye's home and property with Mr. Frye's attorney present. A.R. 368. In his subsequent report dated February 5, 2018, Mr. Bragg opined within a reasonable degree of engineering certainty based on his inspection of the home, his review of mining information, his experience, and his education that the conditions observed in Mr. Frye's home are not indicative of mine subsidence and that other explanations for the damages/conditions identified by Mr. Frye are more plausible. A.R. 373. In a second report dated February 13, 2018, Mr. Bragg elaborated on his opinion as follows:

> Based upon my inspection of the home, my review of mining information, my experience and my education, I have reached the following conclusion to within a reasonable degree of engineering certainty:
>
> - The conditions observed at the Frye home are, in my opinion, not indicative of mine subsidence. Other explanations for the damages/conditions identified by Mr. Frye are more plausible.

[3] While Mr. Frye's claim was pending, Erie sent letters *on at least a monthly basis* concerning the status of Mr. Frye's claim. A.R. 420–432. Mr. Frye confirmed receipt of those monthly letters and further confirmed his understanding that those letters from Erie conveyed that BRIM's investigation of the mine subsidence claim was still pending. Mr. Frye never personally followed up with Erie to request more information concerning his claim, and he is not aware that anyone else on his behalf responded to those letters. A.R. 493.

- No evidence of surface depressions (i.e. sinkholes or a trough) consistent with mine subsidence was observed on the Frye property or surrounding area that would indicate mine subsidence.

- I observed no evidence of distortion of the Frye home that would indicate that the structure has been subjected to mine subsidence. Mr. Frye indicated that he has experienced no difficulties opening doors and/or windows in the house. I observed no cracks in plaster, drywall or miter joints of wood molding at corners of windows or doorway openings.

- Cracks in the basement/foundation walls are consistent with settlement and/or response to earth, water and ice pressure acting on the walls/foundation. No large cracks were observed in the walls from gross movement that would be indicative of mine subsidence. The cracks observed in the foundation/basement walls at present do not affect the structural integrity of the concrete-block walls.

- The probable cause of cracks in the concrete slab of the back porch of the home is frost heave. Water from precipitation runoff flows toward the home from the steep hillside above. Infiltration into the soil beneath the porch would result in expansion/heave of wet, frost-susceptible soils upon freezing. Frost heaves would lift and cracks [sic] the concrete slab.

- I observed no evidence of floor movement in the home. Missing wood molding at the base of walls explains the exposure of unpainted wood at the floor-wall interface.

- The garage is built into a steep hillside. The structure appears to have been pushed forward by earth, water and ice pressures acting on the rear wall. The garage could not be entered to examine the interior surfaces of the walls.

A.R. 395, 399–400.

Also on January 19, 2018, Irvine & Associates sent a letter to Mr. Frye's attorney. A.R. 526. Thereafter, another independent engineer Robert Bloomberg of Bloomberg Consulting Engineers ("BCE"), performed an expert inspection of Frye's home on March 26, 2018 with Mr. Frye's attorney present. A.R. 540–541. Mr. Bloomberg's subsequent report to BRIM dated October 12, 2018 includes a detailed analysis of reported damages and concludes:

> The reported damages were not caused by mine subsidence. Although Mr. Frye reported the possibility of mine subsidence on his property, the distress in the structure was not consistent with differential settlement from underground mine

subsidence. There were no visible surface expressions in the form of sinkholes or subsidence troughs under or near the areas where the damage was observed consistent with stress/strain patterns of subgrade subsidence.

According to the available mining maps obtained from the WVGES, the structures were not located within the surface area potentially affected by various mining activities or the overburden depth of the coal seam was too deep.

No damages or unexplainable problems were reported to underground utilities. No damages were reported to the asphalt streets and no unexplainable changes to the yard or site were noted or reported along Mr. Frye's property.

The damages reported and observed were localized and consistent with unfavorable soil properties as noted in the Soil Survey Data in this report, moisture intrusion over an extended period of time from poorly controlled rain and site surface water management, soil erosion and consolidation, hydrostatic pressure on the foundation walls, construction defects, and ongoing soil creep. The reported damage can be found to varying degrees in houses built against hillsides on soils with unfavorable properties using the type of construction noted, without the presence of mine subsidence.

The northern regions of the state of West Virginia, including the western panhandle, have experienced unusually heavy and frequent rainstorm events over the last year, which has likely exacerbated the reported moisture related damages noted at the property.

Representative photos have been included to provide an indication of some of the typical conditions observed. If requested, additional photographs are available for your review.

All conclusions and opinions set forth in this report have been expressed to within a reasonable degree of engineering certainty, based on information available at the time of this investigation. In the event additional information becomes available, BCE reserves the right to review the additional information, and if warranted revise our conclusions and opinion.

A.R. 562.

Irvine & Associates sent Mr. Frye's attorney a copy of Mr. Bloomberg's report by email dated October 12, 2018. The email expressly stated: "If there is additional claim documentation that you would like to submit, please provide it to us within 30 calendar days." A.R. 539.

Erie sent a denial letter dated October 19, 2018, to Mr. Frye's attorney. The letter advised that Erie had completed its investigation of the claimed property damage and determined that the

damages to Mr. Frye's insured property were caused by wear and tear and deterioration, maintenance and earth movements, which are specifically excluded from coverage under the policy. Accordingly, Erie denied payment for the property damage claim. Erie's letter enclosed copies of the engineering reports prepared by Mr. Bragg and Mr. Bloomberg. A.R. 208–211.[4]

On November 18, 2018, Irvine & Associates sent an email to BRIM, which stated:

> *This insured's attorney, Jeremy McGraw has not responded to our 10/12/18 email so, presumably he has no further claim documentation to submit.*
>
> ...
>
> *It may be prudent to write Bordas Law indicating that, unless they intend upon submitting additional evidence as to the cause of loss, BRIM will make their coverage decision based on their investigation to date.*

A.R. 530 (emphasis added).

BRIM sent a denial letter dated February 27, 2019, to Mr. Frye and his attorney. The letter stated in pertinent part:

> As you are aware, Erie Insurance, your homeowners insurance company, advised us of your claim for damages due, allegedly to underground coal mine subsidence. Based on our investigation of this claim, including inspections of your property, inspection of the topographical and mining maps, engineering reviews, and a review of the mine subsidence insurance portion of your insurance policy, the West Virginia Board of Risk and Insurance Management has determined that the damage to your home at 10123 National Road, Valley Grove, WV, is not the result of collapse of an underground coal mine.
>
> The report of our consulting engineer is attached. *This is the same report which our adjusters, Irvine and Associates, first forwarded to your attorneys, Bordas and Bordas, on October 12, 2018. Since that time, we have been waiting to see if you or your attorney would present any contrary or additional evidence to dispute the report. A second copy of the report was sent to Bordas and Bordas on January 22, 2019. To date we have received no response taking issue with our findings.*

[4] Mr. Frye has not raised any issue on appeal relating to the denial of any coverage other than the mine subsidence endorsement. *See* Pet. Br. at 7 n.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.").

A.R. 594 (emphasis added).[5]

Mr. Frye asked BRIM for reconsideration, and BRIM assigned EEI Geophysical Damage Investigations ("EEI"). John C. Hempel, a registered professional geologist, Jennifer Boyle, an environmental specialist, and Kevin Boyle, a wildlife biologist, reviewed the Bloomberg report, among other things, and performed an on-site inspection with Mr. Frye's attorney present on March 12 and 13, 2020. A.R. 600–602. In a report dated July 31, 2020, EEI concluded:

> The home was undermined by the Valley Camp #1 mine prior to 1985. The home is located 373' above the Pittsburgh coal seam. The home is located over a section of double wide pillars that will resist mine subsidence collapse. The depth of the mine, 373' below the Frye home usually prevents subsidence collapse from reaching the surface when pillar collapse occurs.
>
> No evidence of mine subsidence was detected on the surface or in the home. The mine has not expressed itself on the surface with sinkholes or trough depressions. The hydrology of the site has not been effected by mining.
>
> The damages found at the Frye home are the result of geologic gravitational earth movements enhanced by saturated soils and poor construction and water management issues. The down slope earth movements in the rear hillside are causing lateral structural forces on the foundation.
>
> The soil movements are geologically shallow and not related to mine subsidence originating from either the Valley Camp No. 1 Mine or the Tunnel Ridge Mine. It is therefore our opinion that there is no merit in this mine subsidence claim.
>
> After an in-depth inspection of the home and garage and the environs EEI Geophysical LLC has concluded that there is no mine subsidence occurring at the claimants [sic] home. Further we concur with the conclusions sited [sic]by Bloomberg in his report.

A.R. at 616–617.

[5] The second page of the February 27 denial letter and a second denial letter dated August 28, 2020, were omitted from the record below but submitted with a motion to supplement the record and stamped A.R. 594B–594D.

B. Procedural History

Mr. Frye initiated this action by filing a complaint against Erie on February 21, 2019, in the Circuit Court of Ohio County. The complaint alleges breach of contract, (2) breach of the implied covenant of good faith and fair dealing inherent in the insurance policy (common law bad faith), and (3) violations of the UTPA, W. Va. Code § 33-11-4(9), and corresponding regulations promulgated by the West Virginia Insurance Commissioner.

Erie timely served its answer. The answer denies liability and raises affirmative defenses, including that pursuant to West Virginia Code §§ 33-30-8, 33-30-3(1) and West Virginia Code of State Rules § 115-1-4.1, *et seq.*, Erie is statutorily required to follow BRIM's determination that Mr. Frye's mine subsidence claim should be denied. A.R. 14–21.

Prior to the close of discovery, Erie moved for judgment on the pleadings on the basis that Mr. Frye could prove no set of facts to support his claims against Erie because BRIM, not Erie, pursuant to its statutory obligations investigated and denied Petitioner's claims for property damage allegedly resulting from mine subsidence. A.R. 23. The Circuit Court denied the motion for judgment on the pleadings, concluding that the complaint adequately set forth factual allegations to state the three claims pled. A.R. 184–89.

Following discovery, Erie filed a motion for summary judgment on February 10, 2022. A.R. 190. Mr. Frye filed his response to the motion for summary judgment on February 22, 2022, which attached as an exhibit an affidavit of Timothy D. Bechtel, PhD, PG dated that same day. A.R. 284, 440. Erie filed a motion *in limine* to exclude the testimony of Mr. Frye's experts on February 23, 2022. A.R. 629. Erie also filed a reply in support of its motion for summary judgment and a separate motion to strike Dr. Bechtel's affidavit on February 25, 2022. A.R. 795, 815. On March 3, 2022, the Circuit Court granted summary judgment to Erie, holding as follows:

In the case at bar, it appears clear to this Court that Plaintiff's breach of contract claims for *mine subsidence* coverage against Defendant Erie cannot be maintained. Only BRIM had the authority to investigate and approve Plaintiff's claim for mine subsidence coverage. BRIM concluded that there was no evidence of mine subsidence and denied Plaintiff's claim for mine subsidence coverage. Defendant Erie had no authority to approve and pay Plaintiff's claim for mine subsidence, even if determined to be valid, and as such, there can be no breach of contract by Defendant Erie. For as unfair as that may seem, this is the statutory scheme developed by the West Virginia Legislature and our Supreme Court of Appeals, at least in *Higginbotham* [*v. Clarke*, 189 W. Va. 504, 432 S.E.2d 774 (1993)], appears to have gone along with such a scheme.

...

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

...

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

...

In the case at bar, Plaintiff has presented insufficient evidence of potential violations of the UTPA by Defendant Erie. While it is true that Erie waited several months between receiving Mr. Bragg's engineering report and producing a copy of the report to the Plaintiff, the only evidence presented to this Court was that it was BRIM, not Defendant Erie, who controlled the investigation and coverage decision.

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

> approve and pay Plaintiff's claim for mine subsidence. There is no evidence that Defendant Erie violated any provisions of the UTPA in its handling of the claim while waiting for the results of BRIM's investigation and claim determination.

A.R. 837–841.

The next day following the Circuit Court's entry of its Final Judgment Order, Mr. Frye filed a motion to alter or amend judgment. A.R. 843. Erie filed a response, and Mr. Frye filed a reply. A.R. 857, 871. The Circuit Court denied Mr. Frye's motion to alter or amend judgment on April 18, 2022. The Circuit Court held that there is no clear error in its order granting summary judgment to Erie, reasoning as follows:

> Plaintiff advances two separate arguments of "clear error." First, Plaintiff asserts, for the first time, that the statutory scheme of W. Va. Code §§ 33-30-1 et seq. is unconstitutional "because it leaves plaintiffs without a remedy." (Plaintiff's Motion to Alter or Amend Judgment, p. 2) This argument was not plead in Plaintiff's Complaint nor argued in Plaintiff's Motion for Summary Judgment briefings. Regardless, as this Court found in its Order, Plaintiff presented no genuine issues of material fact for a jury to resolve, and no reasonable jury could have concluded based upon the facts, that Plaintiff's home sustained damage from mine subsidence.
>
> Secondly, Plaintiff argues that this Court erred in concluding that the relevant statutory scheme prevents an insured from filing suit against its insurer arising out of a mine subsidence claim. This is simply an incorrect interpretation of this Court's Order. (Plaintiff's Motion to Alter or Amend Judgment, p. 10) To the contrary, this Court's Order noted specific circumstances under which suit would be permissible, while noting that no such circumstances were present in this case.
>
> The remainder of Plaintiff's Motion is further attempt to re-litigate old matters already decided by this Court. Plaintiff has failed to demonstrate an intervening change in controlling law, new evidence, a clear error of law, or manifest injustice. As such. Plaintiff cannot establish entitlement to relief under Rule 59(e) of the West Virginia Rules of Civil Procedure.

A.R. 885–886.

Mr. Frye filed his notice of appeal on May 17, 2022.

III. SUMMARY OF THE ARGUMENT

The Circuit Court properly granted summary judgment to Erie and denied Mr. Frye's motion to alter or amend the judgment. There are no genuine issues of material fact and as a matter of law Erie did not breach its contract with Mr. Frye, did not breach the duty of good faith and fair dealing or common law bad faith, and did not violate the UTPA. The Circuit Court acknowledged that the mine subsidence insurance statutory scheme permits claims against an insurer under certain circumstances but after a thorough analysis correctly held as a matter of law that none of those circumstances exist in this action. In reaching that holding, the Circuit Court did not opine on Mr. Frye's proffered evidence of mine subsidence.

In denying the motion to alter or amend judgment, the Circuit Court properly declined to address Mr. Frye's new constitutional argument. The Circuit Court further properly relied on its original holding that Erie could not be liable as a matter of law insofar as BRIM concluded that there was no evidence of mine subsidence and Erie had no authority to approve and pay Mr. Frye's claim even if determined to be valid. The Circuit Court also properly held that Mr. Frye's additional argument that under the summary judgment order there could never be a cause of action against an insurer misstated the findings of fact and conclusions of law in that order.

This Court should affirm the Circuit Court's judgment without reaching Mr. Frye's new constitutional argument because it has not been legally or factually developed or decided by the Circuit Court. In any event, BRIM's application of the statutory scheme to Mr. Frye has not violated the due process, equal protection, or certain remedy clauses of the state constitution. Moreover, the statutory scheme provides an arbitration remedy that Mr. Frye has failed to acknowledge. Mr. Frye's remaining arguments again misinterpret the Circuit Court's orders and are meritless. Therefore, the Circuit Court's judgment should be affirmed in all respects.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and appendix record and oral argument would not significantly aid the decisional process. W. Va. R. App. P. 18(a)(4). For the same reason, the appeal is appropriate for disposition by memorandum decision under West Virginia Rule of Appellate Procedure 21.

V. ARGUMENT

A. Standards of Review

This Court reviews a circuit court's entry of summary judgment *de novo*. *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755, Syl. Pt. 1 (1994). "'This Court may, on appeal affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.'" *Milmoe v. Paramount Senior Living at Ona, LLC*, 875 S.E.2d 206, Syl. Pt. 2 (W. Va. 2022) (quoting *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466, Syl. Pt. 3 (1965).

The standard of review applicable to an appeal from a motion under West Virginia Rule of Civil Procedure 59(e) is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal is filed. *Miller v. WesBanco Bank, Inc.*, 245 W. Va. 363, 859 S.E.2d 306, 319 (2021). Where the issue on appeal is a question of *law* or statutory construction, this Court applies a *de novo* standard. *Id. See Vanderpool v. Hunt*, 241 W. Va. 254, 823 S.E.2d 526, 534 (2019) (applying Syllabus Point 3 of *Barnett* to affirm the Circuit Court's grant of a motion to dismiss and denial of a Rule 59(e) motion).

B. The Circuit Court Properly Granted Summary Judgment to Erie.

1. There are no genuine issues of material fact and as a matter of law Erie did not breach its contract with Mr. Frye, did not breach the duty of good faith and fair dealing or commit common law bad faith, and did not violate the UTPA.

The Circuit Court properly construed § 33-30-1, *et seq.* in its grant of summary judgment to Erie. West Virginia Code § 33-30-2 states: "The purpose of this article is to make mine subsidence insurance available in a reasonable and equitable manner to all residents of this State through the office of the State Board of Risk and Insurance Management." To this end, the Legislature established the Mine Subsidence Insurance Fund within BRIM to be funded with premiums for subsidence insurance collected on behalf of BRIM at rates established by BRIM. W. Va. Code § 33-30-4. *See* W. Va. Code § 33-30-9 (providing that the total subsidence insurance premiums collected by each insurer (net of a ceding commission) shall be remitted by the insurer to BRIM). Again, West Virginia Code § 33-30-6 provides in part:

> Beginning October 1, 1982, every insurance policy issued or renewed insuring on a direct basis a structure located in this state shall include, at a separately stated premium, insurance for loss occurring on or after October 1, 1982, caused by mine subsidence unless waived by the insured: ... The premium charged for coverage shall be set by the board. At no time may the deductible be less than $250 nor more than $500; and total insured value reinsured by the board may not exceed $200,000. In no event may the amount of mine subsidence reinsurance exceed the amount of fire insurance on the structure.

W. Va. Code § 33-30-6.

West Virginia Code § 33-30-8 directs that mine subsidence claims are adjusted by BRIM and ultimately paid by BRIM out of the fund, which also is to be administered by BRIM, as follows:

> All companies authorized to write fire insurance in this state shall enter into a reinsurance agreement with the board in which each insurer agrees to cede to the board one hundred percent, up to $200,000, of any subsidence insurance coverage issued and, in consideration of the ceding commission retained by the insurer,

> agree to absorb all expenses of the insurer necessary for sale of policies and any administration duties of the mine subsidence insurance program imposed upon it pursuant to the terms of the reinsurance agreement. The board is authorized to undertake adjustment of losses and administer the fund, or it may provide in a reinsurance agreement that the insurer do so. The board shall agree to reimburse the insurer from the fund for all amounts paid policyholders for claims resulting from mine subsidence and shall pay from the fund all costs of administration incurred by the board but an insurer is not required to pay any claim for any loss insured under this article except to the extent that the amount available in the mine subsidence insurance fund, as maintained pursuant to sections four and five of this article, is sufficient to reimburse the insurer for such claim under the section and without moral obligation.

W. Va. Code § 33-30-8.

West Virginia Code § 33-30-14 states: "The board 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." In order to effectuate the provisions of the statute, West Virginia Code § 33-30-15 authorizes BRIM to promulgate and adopt rules and regulations relating to mine subsidence insurance.

In *Higginbotham v. Clark*, 189 W. Va. 504, 432 S.E.2d 774, 775–79 (1993), an insured appealed BRIM's determination that the insured did not qualify for mine subsidence insurance coverage because he had mine subsidence prior to inception of the policy to the Insurance Commissioner. Following a hearing, the Insurance Commissioner dismissed the administrative appeal for lack of subject matter jurisdiction. The Circuit Court affirmed the Insurance Commissioner's dismissal of the administrative appeal. The question before this Court was whether the Insurance Commissioner has subject matter jurisdiction to review either BRIM's denial of a claim for mine subsidence damages or the insurer's subsequent cancellation of mine subsidence coverage. This Court answered the latter question and held that the retroactive

cancellation of an insured's coverage for one of the reasons set forth in West Virginia Code § 33-30-7 may be interpreted as a refusal to provide mine subsidence coverage that is subject to review by the Insurance Commissioner. *Id.*, 432 S.E.2d at 783. In reaching its holding, the Court examined the statutory scheme as well as the regulations promulgated by BRIM, and explained as follows:

> [T]he Board of Risk's jurisdiction extends to settlement questions and the adjustment of claims. Pursuant to regulations promulgated by the Board of Risk, claims are administered in the following manner:
>
> > 4.1 Administration of claims. All mine subsidence claims shall be reported to the Board for assignment to qualified independent adjusting firms in accordance with claim procedures as outlined on Appendix D. The selected adjusting firm will send all reports simultaneously to the insurer and the Board with all settlement authority, coverage questions and related matters being resolved by the Board. The Board will reimburse the insurer for all sums expended in accordance with the provisions of the reinsurance agreement.
>
> 115 W.V.C.S.R. 1-4.1.
>
> *This regulation makes it clear that the insurer acts merely as an agent of the State and is bound by the Board's decisions, because "all settlement authority, coverage questions and related matters" are to be resolved by the Board.* What is not at all clear, however, is what recourse an insured has if aggrieved by a Board of Risk decision.

Id. at 779–80 (emphasis added).

The Court continued in *Higginbotham*:

> Unfortunately, the administrative framework promulgated by the Board of Risk lacks any specific procedures which give insureds the opportunity to be heard or otherwise present evidence relevant to their claims. In this case, we can only assume the appellant had some open line of communication with the Board of Risk through his insurer, State Farm, and thus, that the Board was made aware of the evidence the appellant had which supported his position that his home had not sustained subsidence damage prior to the inception of his policy. Although the record indicates that the appellant submitted additional evidence to support a request for reconsideration of his claim, exactly how this was done is not at all clear. Given that the appellant stood to lose insurance coverage that he believed

> he was entitled to for over two years, we find a certain element of unfairness in the process by which the Board decided that even though he had paid premiums and received a mine subsidence coverage endorsement, he was, in fact, not qualified to receive such coverage.
>
> 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.

Id. at 780–81. *See* Syl Pt. 2.

In a separate concurring opinion in *Higginbotham*, Justice Miller expressed concern that although BRIM is charged with adjusting the mine subsidence claims of an insured, under the statute and regulations the insured was not granted direct contact with the Board. Justice Miller reiterated the majority's statement that "'[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.'" *Id.* at 784 (citation omitted). Accordingly, Justice Miller concluded that *BRIM* rather than the Insurance Commissioner should provide due process to Mr. Higginbotham. Neither opinion in *Higginbotham* suggested that Mr. Higginbotham had a remedy against his insurer after the Court's conclusion that "'*all settlement authority, coverage questions and related matters' are to be resolved by the Board.*" *Id.* at 780.

Recently, in *Patterson v. Westfield Insurance Company*, 516 F. Supp. 3d 557 (N.D. W. Va. 2021), the Northern District of West Virginia granted summary judgment to the defendant insurer on claims for breach of contract, common law bad faith, and violations of the UTPA arising from BRIM's denial of a claim for mine subsidence damages. With regard to the breach of contract claim, the court relied on *Higginbotham* as follows:

> West Virginia law mandates that only BRIM investigates and ultimately decides whether or not to pay mine subsidence claims in West Virginia. *See Higginbotham v. Clark*, 189 W. Va. 504, 432 S.E.2d 774 (1993) (finding that in cases of mine subsidence claims the insurer acts merely as an agent of the State and is bound by BRIM's decisions concerning the same).
>
> As such, while defendant is required by statute to include the mine subsidence endorsement in its insurance policies, it has no authority to decide whether or not such claims are paid. As previously noted by this Court in its Order Denying Westfield Insurance Company's Motion for Judgment on the Pleadings or, in the Alternative, to Certify Question [Doc 24], the aforementioned statutory provisions do not relieve defendant of its obligations to its insureds. *See Bettinazzi v. State Farm Fire and Casualty Co.*, 2014 WL 241694 (N.D. W. Va. Jan. 22, 2014) (Stamp, J.). However, while this Court denied defendant's prior motion for judgment based solely on consideration of the pleadings, consideration of the record as a whole demonstrates defendant is entitled to summary judgment with respect to plaintiff's breach of contract claim.

Id. at 464.

Patterson then quoted from BRIM's denial letter to the plaintiff dated February 27, 2019, which is substantially similar in all respects to the denial letter sent to Mr. Frye on that same date.[6] The court then concluded that while the defendant sent correspondence updating the plaintiff regarding the status of BRIM's investigation, the defendant had no authority whatsoever under the statutory scheme to influence, override, expedite, or reverse BRIM's decisions

[6] Mr. Patterson's home is located at 9929 National Road and Mr. Frye's home is located at 10123 National Road. In *Patterson*, the denial letter indicated that the report was forwarded to Mr. Patterson's attorney at Bordas and Bordas, the same law firm representing Mr. Frye in this action, on October 11, 2019, and that since that time BRIM had been waiting to see if Mr. Patterson or his attorney would present any contrary or additional evidence to dispute the engineer's report. The denial letter to Mr. Patterson also indicated that a second copy of the report was sent to Bordas and Bordas on January 22, 2019, but that as of February 27 BRIM had received no response taking issue with its findings. *Id.* at 464.

concerning the plaintiff's insurance claim. *Id.* The court rejected the plaintiff's argument that the defendant owed the plaintiff a continuing obligation under the insurance policy despite BRIM's statutorily required involvement and that the defendant's failure to pay damages under the mine subsidence endorsement constitutes a valid breach of contract, reasoning:

> Despite recognizing defendants continuing obligation to plaintiff throughout BRIM's investigation, this Court finds that defendant did not breach its insurance contract with plaintiff upon consideration of the record as a whole. Rather, the record demonstrates that (1) plaintiff submitted a claim for mine subsidence damage to defendant; (2) defendant referred the matter to BRIM as it was statutorily required to do so; and (3) BRIM conducted its independent investigation of the matter and determined that the claim would not be paid. Under these circumstances, defendant cannot be found to have breached its contract with plaintiff for an adverse decision rendered exclusively by BRIM as required by applicable statute. As such, defendant is entitled to summary judgment with respect to plaintiff's breach of contract claim.

Id. at 564–65.

Patterson further concluded that because the defendant did not breach its contract with the plaintiff the defendant was entitled to summary judgment on the plaintiff's claim for breach of the duty of good faith and fair dealing or common law bad faith. *Id.* at 565. Finally, the court held that the defendant had not violated the UTPA, reasoning as follows:

> Instead, the record indicates that defendant conducted its own investigation concerning plaintiff's insurance claim [Doc. 101-1] and did not compel plaintiff to file suit since both plaintiff and defendant were waiting for BRIM's decision with respect to the mine subsidence claim [Doc. 101-3]. In this regard, plaintiff appears to be challenging BRIM's denial of the mine subsidence claim seeking damages from defendant. However, as previously stated, the plain language of W. Va. Code § 33-30-8 vests the exclusive authority to affirm or deny mine subsidence claims with BRIM, rather than defendant. Still, the evidence indicates that defendant received monthly updates from BRIM regarding the status of BRIM's investigation. *See* [Doc. 101-3]. Given these circumstances, the Court cannot agree with plaintiff's assertion that defendant failed to undertake any investigation into whether the alleged property damaged should have been covered under the mine subsidence endorsement. Having found no misconduct committed with sufficient frequency as to indicate defendant's general business practice, defendant is entitled to summary judgment with respect to plaintiff's Unfair Trade Practices claim.

Id. at 566.

In this action, based on the mine subsidence insurance statutory scheme, regulations, and precedent, both controlling in *Higginbotham* and persuasive in *Patterson*, the Circuit Court granted summary judgment to Erie on Mr. Frye's claims for breach of contract claim, breach of the covenant of good faith and fair dealing or common law bad faith, and violation of the UTPA. The Circuit Court began its analysis with a summary of its holdings as follows:

> Once an insured notifies an insurer of a policy claim for mine subsidence damage and the insurer transfers the claim to BRIM for its handling pursuant to W. Va. Code § 33-30-1, *et. seq.*, and the regulations enacted pursuant thereto, may an insured maintain a valid breach of contract action against the insurer for BRIM's denial of the mine subsidence claim and/or for valid "bad faith" claims against the insurer (i.e., violations of UTPA, substantially prevailed, etc.)?
>
> This Court answers in the negative. Absent (1) fraud, (2) any wrongful contact 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 that regulation enacted pursuant thereto. In this case, because the Plaintiff has presented insufficient evidence which would create a genuine issue of material fact for a jury to decide on any of the above three scenarios, Plaintiff's breach of contract claims, as well as his extracontractual claims (as discussed further below) must be dismissed.

A.R. 834–835.

Mr. Frye does not dispute that similar to the defendant in *Patterson* when Erie received a claim for mine subsidence damages from Mr. Frye, Erie referred the matter to BRIM as it was statutorily required to do so. Within three weeks of Mr. Frye's mailing of a letter to Mr. Frye's insurance agency in Wheeling, Erie sent a letter to Mr. Frye's attorney from its claims office in Parkersburg that stated: "this letter acknowledges your representation of our Erie insured, Brian Frye, for the potential damages to the insured property caused by mine subsidence. Please be

advised that Erie Insurance Property & Casualty Company has submitted an assignment to BRIM to investigate the cause of loss to the insured property." A.R. 366.

Mr. Frye also does not dispute that BRIM conducted its independent investigation of the matter and determined that the claim for mine subsidence damages would not be paid. Indeed, BRIM sent two denial letters to Mr. Frye and his attorney. The first denial letter is dated February 27, 2019, and it explains the reasons for BRIM's denial of Mr. Frye's claim based on an independent investigation and report by BCE, and other information available on that date. The second denial letter is dated August 28, 2020, and it explains BRIM's reasons for denial of the claim following Mr. Frye's request for reconsideration, another independent investigation and report by EEI, and other information available on that date. Both denial letters conclude by asking Mr. Frye and his attorney for any additional information to support his claim, indicating that BRIM is willing to continue to adjust Mr. Frye's claim. A.R. 594–594D.

In addition, Mr. Frye expressly concedes that none of the three scenarios identified by the Circuit Court in the summary of its holdings are at issue in this action. Pet. Br. at 31.

Nonetheless, Mr. Frye disputes the inescapable conclusion that under the circumstances of this case there are no genuine issues of material fact and Erie is entitled to summary judgment. Mr. Frye's argument that the Circuit Court should have addressed the constitutionality of the entire statutory scheme and construed an unspecified provision to authorize these three claims against Erie based on BRIM's determination that the claim for mine subsidence would not be paid, or alternatively find the statutory scheme unconstitutional, is meritless for several reasons, which will be discussed in turn.

a. Mr. Frye did not properly raise or preserve a constitutional issue for the Circuit Court to decide on summary judgment.

First, Mr. Frye did not properly raise or preserve a constitutional issue in connection with the motion for summary judgment. It is undisputed that the briefing on summary judgment contains no constitutional argument. *See* Pet. Br. at 1 (referencing issues raised during the pretrial conference). During the final pretrial conference, Mr. Frye's attorney never used the word "constitution" let alone referenced any specific constitutional provision arguably violated by the mine subsidence insurance statutory scheme. Neither the phrase "due process" nor "equal protection" is located anywhere in the transcript. The Circuit Court used a variant of the word "constitution" in two instances. *See* A.P. 904 ("to me it sounds almost like a constitutional argument, is what you're arguing, that the legislature could not authorize by statute a delegation, constitutionally, of an insurer's duty of fair dealing with its insured, by handing some adjustment over to a separate outfit like BRIM"); A.P. 922 ("which goes back to my constitutional suggestion. Are you actually maybe suggesting that the manner in which this was written is unconstitutional, which is why I think [Erie's attorney] is saying, hey, let's pull the reins in here, I'm not arguing complete immunity, I'm trying to pin all this and keep the argument much more sustainable on appeal than what you guys are maybe throwing out."). Although Mr. Frye's attorney argued that under the statutory scheme as interpreted "BRIM can do whatever it wants and you got no remedy," A.R. 35, he never tied that argument to the state constitution.

In *Haynes v. Antero Resources Corporation*, No. 15-1203, 2016 WL 6542734, at *3 (W. Va. Oct. 28, 2016), in the context of a clumsy attempt to raise a constitutional argument, this Court found that the Circuit Court did not err in granting summary judgment to the respondent because existing cases relied on by the Circuit Court had not been overruled. The Court cautioned:

> [A] lawyer has a duty to plead and prove his case in accordance with the established court rules. As the United States Court of Appeals succinctly stated in *Teague v. Bakker*, 35 F.3d 978 (4th Cir. 1994), *cert. denied*, 513 U.S. 1153, 115 S. Ct. 1107, 130 L. Ed.2d 1073 (1995); "We would in general admonish all counsel that they, as officers of this Court, have a duty to uphold faithfully the rules of this Court." 35 F.3d at 985 n.5. Further "[a] skeletal 'argument', really nothing more than an assertion, does not preserve a claim.... Judges are not like pigs hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991); accord *Teague*, 35 F.3d at 985 n.5; *State v. Honaker*, 195 W. Va. 51, 56 n.4, 454 S.E.2d 96, 101 n.4 (1444).

Id. at *3.

Again, in *Haynes*, this Court made it clear that the rule that judges are not pigs hunting for truffles applies equally to issues not properly raised or decided by the Circuit Court:

> With regard to West Virginia Code § 55-2-1, *et seq.*, although petitioner mentions it in his opening brief to this Court and in his reply to Antero's response, he fails to cite to the record on appeal when or how he raised this issue before the circuit court. Further, neither the November 18, 2015, order, nor the March 24, 2015, order mention this statute. As we stated previously, we are not pigs hunting for truffles.

Id. at *5. *See BRG Assocs., LLC v. Hess*, No. 16-0338, 2017 WL 656999, at * 4 (W. Va. Feb. 17, 2017) (rejecting the petitioner's overarching argument that in denying an appeal from an agency decision the circuit court violated the equal and uniform taxation clause of the state constitution and the equal protection clause of the federal constitution because the petitioner failed to address that issue in its brief; observing that judges are not like pigs hunting for truffles buried in briefs).

Mr. Frye's reliance on *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005), is misplaced. *Louk* cautioned that courts should exercise restraint in considering the constitutionality of a legislative enactment in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. *See id.* at Syl. Pt. 1, in part. Although the Court held 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," *id.* at Syl. Pt. 2, that holding did not create a mandate that the Circuit Court must root out constitutional issues, especially in an area where this Court has already exercised restraint. *See Antero Resources Corp. v. Irby*, No. 20-0530, 2022 WL 1055446, at *5 (W. Va. Apr. 8, 2022) (declining to address constitutional issues because they were not addressed in the lower court's orders and there was an inadequate record to consider such claims).

In this action, the Circuit Court was not required to raise, develop, and answer a constitutional question that Mr. Frye's attorney was unable to articulate in briefing or argument on summary judgment. Mr. Frye's attorney did not ask for supplemental briefing on a constitutional issue or ask the Circuit Court to give notice to the Attorney General as required by West Virginia Rule of Civil Procedure 24(c). Although the burden in Rule 24(c) to give notice to the Attorney General is placed on the court, unequivocally Rule 24(c) provides that a court cannot rule on the constitutionality of a statute affecting the public interest unless such notice is given. *See* W. Va. R. Civ. P. 24(c) ("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."). If Mr. Frye desired a ruling on a constitutional issue, he should have briefed the issue at some point before the Circuit Court ruled on the summary judgment motion and requested the Circuit Court to notify the Attorney General so that his office could seek intervention to defend the statutory scheme. The Circuit Court properly declined to root around for a constitutional issue like a pig hunting for truffles and instead exercised restraint and relied on *Higginbotham*, which has not been overruled, as well as *Patterson*, which applied *Higginbotham* to similar circumstances, and granted summary judgment to Erie.

b. BRIM's application of the statutory scheme to Mr. Frye has not violated the constitution.

Second, the Circuit Court properly declined to address the constitutionality of the mine subsidence insurance statutory scheme because BRIM did not violate Mr. Frye's constitutional rights as the statutory scheme was applied in this case. As discussed above, the Court in *Higginbotham* recognized that the question of due process is generally handled on a case-by-case basis. 432 S.E.2d at 780.[7] In his concurrence, Justice Miller opined that the proper entity to provide due process to the plaintiff was *BRIM. Id.* at 785.

In this action, when the subject of a remedy was raised during the final pretrial conference, the Circuit Court professed ignorance and asked whether there is a remedy in administrative appeals, Erie's counsel answered candidly as follows:

> Your Honor, I don't know the answer to that, to tell you the truth. I will tell you in this case when Mr. Frye complained, BRIM came back out two years later and hired a second consultant, this time a geologist. Three people from EEI Geophysical came out. They again two years later independently concluded no evidence of mine subsidence. So there is some kind of procedure that BRIM was willing to hire a second consultant to come out and review, but the results were the same, no mine subsidence.

A.R. 923.

Mr. Frye's attorney argued in response:

> But the breach of contract claim, the only thing my client can do is file a claim for those benefits with Erie. They can't file it directly with the state. File it with Erie, and if those aren't paid, file a breach of contract claim. And that's the initial thing here, which is that my client still hasn't been paid any benefits or had an opportunity to be heard. And we have an expert to testify –

A.R. 925.

[7] The property right at issue in *Higginbotham* was the right to a mine subsidence policy provided in § 33-30-6, which was deprived when the plaintiff's policy was cancelled after BRIM denied a claim for damages determining that the mine subsidence on his property predated the statutory period. In this action, Mr. Frye's mine subsidence endorsement has not been cancelled, so the same property interest is not at issue.

This response ignores not only that BRIM has reconsidered its initial decision at Mr. Frye's request, but also several other instances in which BRIM has given Mr. Frye notice and an opportunity to be heard. Mr. Frye's attorney was notified and present during Mr. Bloomberg's inspection of the property. A.R. 540–541. Irvine & Associates sent Mr. Frye's attorney a copy of Mr. Bloomberg's report by email dated October 12, 2018, expressly inviting Mr. Frye's attorney to provide any additional documentation in support of his claim within thirty days. A.R. 359. When Mr. Frye's attorney did not respond, a second copy of the report was sent on January 22, 2019. BRIM's denial letter dated February 27, 2019, stated in part:

> The report of our consulting engineer is attached. *This is the same report which our adjusters, Irvine and Associates first forwarded to your attorneys, Bordas and Bordas, on October 12, 2018. Since that time, we have been waiting to see if you or your attorney would present any contrary or additional evidence to dispute the report. A second copy of the report was sent to Bordas and Bordas on January 22, 2019. To date we have received no response taking issue with our findings.*
>
> Therefore, your claim is respectfully denied.
>
> *If you wish to discuss the matter, or if you have any information contrary to our findings, please contact us at any time.*

A.R. 594–594B (emphasis added).

Significantly, following the February 27 denial letter Mr. Frye asked BRIM to reconsider its decision. BRIM assigned EEI to do another investigation. After another in-depth inspection with Mr. Frye's attorney again notified and present, EEI concluded that there is no mine subsidence occurring at Mr. Frye's home and concurred with the previous conclusions in Mr. Bloomberg's report. A.R. at 616–617. BRIM considered the EEI report as well as information submitted on behalf of Mr. Frye, including information regarding Mr. Frye's expert Dr. Terry Bechtel, and denied the claim for mine subsidence damage. BRIM's second denial letter states:

> We understand that you engaged an expert (Dr. Timothy Bechtel), whom you say *will testify* that the damages in this matter *are* due to mine subsidence. We further

> understand that Dr. Bechtel has neither physically inspected the property, nor written a formal report to outline any substantive basis for this perceived opinion. If our understanding of the extent of Dr. Bechtel's inspection approach is incorrect, kindly advise and provide us with Dr. Bechtel's report of his findings and conclusions.
>
> At this time, there are two reputable engineering and/or geological firms who have arrived at the same conclusion – that these damages were NOT the result of mine subsidence. Hence, we have determined that we lack any persuasive findings to sufficiently support an opposing position. Moreover, while we also reviewed the documentation supplied from Panhandle Cleaning & Restoration, we appreciate that while they may be qualified to assess and calculate the "damages" they may encounter, their expertise does not extend to the engineering or geological realms; such that they are unable to causally link the damages they found as being resultant from mine subsidence.
>
> Based on our analysis of the entirety of all investigative findings, we must reiterate our previous denial and respectfully decline to offer any remuneration on this matter. Should Dr. Bechtel be so inclined as to offer any scientific basis for his presumed opinions, of course we would welcome those [for review by the other firms who have been involved in analyzing the cause of this claimed loss].
>
> As always, should you need to discuss this any further, we may be reached at (304) 766-2646. My direct extension is 20244.

A.R. 594C–594D.

Thus, there was notice and opportunity to be heard during BRIM's claims adjusting process, including multiple invitations to contact BRIM to provide information. In fact, during the reconsideration process Mr. Frye provided information, including information regarding Dr. Bechtel. Although BRIM denied the claim a second time, it indicated a willingness to discuss the matter further and invited Mr. Frye to provide additional support for his claim, specifically including any scientific basis for Dr. Bechtel's proffered testimony. Mr. Frye is still able to provide additional information, which would include the affidavit of his expert, to BRIM and discuss the matter with BRIM at any time. Accordingly, BRIM has applied the statutory scheme consistent with Mr. Frye's constitutional rights, and the Circuit Court properly granted summary judgment to Erie without considering a facial challenge to the statutory scheme.

c. The statutory scheme provides a remedy not acknowledged by Mr. Frye.

Third, the Circuit Court properly declined to address the constitutionality of the mine subsidence insurance statutory scheme because the regulations have been amended several times since *Higginbotham*,[8] and they now provide a specific remedy on their face that Mr. Frye has failed to acknowledge.[9] West Virginia Code of State Rules § 115-1-3.4 requires insurers to issue mine subsidence insurance using coverage forms in the Appendix to the regulations. The coverage forms both have detailed arbitration provisions. For example, Appendix A states:

> (1) In the event that the Insured and the Company, through the West Virginia Board of Risk and Insurance Management (hereinafter BRIM), as called for by statute, are unable to reach agreement as to: (1) whether the insured STRUCTURE has sustained damage, in total and/or in part, during the effective policy dates, due to COAL MINE SUBSIDENCE; and/or (2) the cost of repair of COAL MINE SUBSIDENCE damage to the insured STRUCTURE; and/or (3) the method of repair of COAL MINE SUBSIDENCE damage to the insured STRUCTURE, then either the Insured or BRIM may request that such issue(s) in dispute will be submitted to binding arbitration.

W. Va. Code R. § 115-1, app. A.

In this action, Mr. Frye has not acknowledged this remedy against BRIM let alone attempted to justify his failure to request arbitration. Mr. Frye's reliance on BRIM's initial letter dated November 28, 2017, to argue that he believed that his only recourse was against Erie is specious. That letter, which was addressed to Mr. Frye's attorney, contains an accurate representation of the statutory scheme and regulations and provides citations to both. The statutory scheme and regulations provide any additional detail necessary for Mr. Frye and his attorney to understand the claims adjustment process. In any event, as discussed above, a

[8] The history of the regulations indicate that they were amended in 2002, 2007, 2016, 2017, and 2021.

[9] Mr. Frye does acknowledge the statutory remedies in West Virginia Code §§ 33-30-7 and 33-30-12. *See* Pet. Br. at 10, 26, 27. The statutory remedy in § 33-30-7 was discussed in *Higginbotham*. *See* 432 S.E.2d at 778–83 interpreting retroactive cancellation of the plaintiff's coverage for one of the reasons set forth in § 33-30-7 as a refusal to provide coverage subject to review by the Insurance Commissioner). Mr. Frye does not argue that he is entitled to a remedy against Erie under § 33-30-7. Section 33-30-12, which Mr. Frye relies upon, is discussed below.

subsequent letter from BRIM and multiple emails from its independent adjuster Irvine and Associates expressly invited additional documentation, evidence, or other information to support Mr. Frye's claim. Mr. Frye requested reconsideration of BRIM's decision, and BRIM conducted further investigation. Mr. Frye has not availed himself of the additional process offered by BRIM even after its second denial letter or the arbitration remedy that is provided for in the regulations.

Mr. Frye does not attempt to support his conclusion that instead of seeking additional process and a remedy from BRIM equal protection requires that he should be permitted to sue Erie under the common law and UTPA and that if Erie is found liable for mine subsidence coverage, thereby establishing that any contrary conclusion reached by BRIM was incorrect, Erie can then seek reimbursement from BRIM for at least the amount of such coverage. *Patterson* rejected an argument similar to Mr. Frye's, reasoning: "In this regard, plaintiff appears to be challenging BRIM's denial of the mine subsidence claim seeking damages from defendant. However, as previously stated, the plain language of W. Va. Code § 33-30-8 vests the exclusive authority to affirm or deny mine subsidence claims with BRIM, rather than defendant." 516 F. Supp. 3d at 566. Moreover, As discussed above, § 115-1-4.1 provides that BRIM alone has all settlement authority. Although § 115-1-4.1 goes on to say that "[t]he Board will reimburse the insurer for all sums expended in accordance with the provisions of the reinsurance agreement," the claims handling procedures provide: "5) All payment authorizations will come from the Board. No reinsurance will be available from claims paid by the Company without prior approval from the Board." W. Va. Code R. § 115-1, app. D.

In any event, contrary to Mr. Frye's argument, the regulations provide a remedy of arbitration against BRIM that Mr. Frye has failed to acknowledge. Accordingly, the Circuit Court properly declined to address a facial challenge to the statutory scheme.

2. The Circuit Court did not conclude that the mine subsidence insurance statutory scheme prohibits claims against an insurer for breach of contract, breach of the implied covenant of good faith and fair dealing or common law bad faith, or violations of the UTPA.

The Circuit Court did not conclude that the mine subsidence insurance statutory scheme prohibits claims against an insurer for breach of contract, breach of the implied covenant of good faith and fair dealing or common law bad faith, or violations of the UTPA. As discussed above, during the pretrial conference the Circuit Court understood that Erie was not arguing that insurers could never be liable for their own conduct relating to mine subsidence claims. The Circuit Court further noted that insurers could still be liable for fraud or delay before transferring the claim to BRIM. A.R. 922.

Accordingly, the order granting summary judgment determined that there are circumstances under which an insurer can be held liable in the handling of a mine subsidence claim, but the Circuit Court found that none of those circumstances exist in this case:

> Once an insured notifies an insurer of a policy claim for mine subsidence damage and the insurer transfers the claim to BRIM for its handling (pursuant to W. Va. Code § 33-30-1, *et seq.* and the regulations enacted pursuant thereto), may an insured maintain a valid breach of contract action against the insurer for BRIM's denial of the mine subsidence claim and/or for valid "bad faith" claims against the insurer (i.e., violations of UTPA, substantially prevailed, etc.)?
>
> This Court answers in the negative. Absent (1) fraud, (2) any wrongful conduct occurring between the time of receiving notice of a mine subsidence claim and transferring the claim to BRIM (e.g., delay in transferring the case to BRIM), and/or (3) any wrongful handling of claims *other than* mine subsidence, an action for breach of contract may not be maintained against insurer per W. Va. Code § 33-30-1, *et seq.* and the regulations enacted pursuant thereto. In this case, because the Plaintiff has presented insufficient evidence which create genuine issues of material fact for a jury to decide on any of the above three scenarios, Plaintiff's breach of contract claims, as well as his extra contractual claims (as discussed further below) must be dismissed.

A.R. 834–835.

Following this summary of its conclusion, the Circuit Court performed an extensive analysis of each of Mr. Frye's claims as follows:

> In the case at bar, it appears clear to this Court that Plaintiff's breach of contract claims for *mine subsidence* coverage against Defendant Erie cannot be maintained. Only BRIM had the authority to investigate and approve Plaintiff's claim for mine subsidence coverage. BRIM concluded that there was no evidence of mine subsidence and denied Plaintiff's claim for mine subsidence coverage. Defendant Erie had no authority to approve and pay Plaintiff's claim for mine subsidence, even if determined to be valid, and as such, there can be no breach of contract by Defendant Erie. For as unfair as that may seem, this is the statutory scheme developed by the West Virginia Legislature and our Supreme Court of Appeals, at least in *Higginbotham* [*v. Clarke*, 189 W. Va. 504, 432 S.E.2d 774 (1993)], appears to have gone along with such a scheme.
>
> ...
>
> Given that this Court has found that the Plaintiff cannot present his breach of contract claims on mine subsidence coverage ..., Plaintiff likewise cannot present a standalone claim for breach of the implied covenant of good faith and fair dealing. In other words, because Plaintiff's breach of contract claims have failed, so too must his claims for breach of the implied covenant of good faith and fair dealing.
>
> ...
>
> In the case at bar, Plaintiff has presented insufficient evidence of potential violations of the UTPA by Defendant Erie. While it is true that Erie waited several months between receiving Mr. Bragg's engineering report and producing a copy of the report to the Plaintiff, the only evidence presented to this Court was that it was BRIM, not Defendant Erie, who controlled the investigation and coverage decision.
>
> The evidence reflects that Defendant Erie waited for the results of BRIM's investigation before providing Mr. Bragg's report. The Plaintiff has not pointed this Court to any authority that Defendant Erie was required to produce a copy of its independent engineer's report to the insured while the investigation was still pending. Similarly, the fact that Defendant Erie asked its engineer to elaborate upon the potential "other causes" of the complained damage is not indicative of bad faith. The engineer had already opined that the damage was not caused by mine subsidence. It was reasonable for the carrier to further investigate what did cause the damage if not mine subsidence. The other bases upon which the Plaintiff alleges bad faith all relate back to Plaintiff's premise that his claim for mine subsidence should have been paid. As noted above, only BRIM could approve and pay Plaintiff's claim for mine subsidence. There is no evidence that

> Defendant Erie violated any provisions of the UTPA in its handling of the claim while waiting for the results of BRIM's investigation and claim determination.

A.R. 837–841.

Mr. Frye misconstrues two truncated phrases from two sections of the statutory scheme to support his argument. For example, § 33-30-12 provides that BRIM has a right of recourse for fraud by an insurer "and [that] the insurer may settle losses in the customary manner consistent with this article." Contrary to Mr. Frye's argument, the only manner that an insurer may settle losses consistent with the mine subsidence insurance statutory scheme is for the insurer to follow the procedures for administration of claims in § 115-1-4.1, including specifically the claims handling procedures in Appendix D, which provide as follows:

> 1) The insured should report the possibility of Coal Mine Subsidence damage directly to the Company or his/her Authorized Agent.
>
> 2) Upon notice of a potential Coal Mine Subsidence claim, the Company shall immediately forward a completed ACCORD claim form (or other appropriate Company claim form) to the Board at the address provided on the Board's website at http://www.brim.wv.gov.
>
> In addition to the claim form, the Company is required to furnish the Board with a copy of the policy declaration page or other documentation showing the amount of Coal Mine Subsidence Insurance purchased by the insured applicable to the damaged structure.
>
> 3) The board will then assign the claim to an independent adjusting firm for investigation. The adjusting cost of the independent firm will be paid directly by the Board.
>
> 4) The adjusting firm will report directly back to the Board with copies of all correspondence to the Company.
>
> 5) All payment authorizations will come from the Board. No reinsurance will be available for claims paid by the Company without prior approval from the Board.
>
> 6) After the Company has made an authorized payment to its insured, the Company should remit to the Board a copy of the draft ad settlement papers, including subrogation receipt, if available, for reimbursement from the West Virginia Coal Mine Subsidence fund.

W. Va. Code R. § 115-1, app. D.

Mr. Frye's reliance on § 33-30-10 is equally misplaced. Although § 33-30-10(b) provides in part that an "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," under the first part of that provision in § 33-30-10(a) all payments from the fund come through BRIM. *See id.* ("the board shall ... pay the insurer all amounts due out of the fund"); *see also* W. Va. Code R. § 115-1, app. D (5) ("All payment authorizations will come from the Board. No reinsurance will be available for claims paid by the Company without prior approval from the Board."). Mr. Frye essentially argues that the negative implication of § 33-30-10 is that an insured does not waive a cause of action for damages caused by subsidence to the extent not paid by the fund. Assuming arguendo that much is true, § 33-30-10 does not suggest that any such cause of action would be against the insurer instead of BRIM, which is the only entity that can authorize and approve payments to an insured. The only cause of action that § 33-30-10 could be read to authorize against an insurer would be for amounts due out of the fund paid by BRIM to the insurer but withheld by the insurer from the insured. Manifestly, § 33-30-10 does not support Mr. Frye's claims against Erie in this action.

Bettinazzi v. State Farm Fire & Casualty Co., No. 5:13cv116, 2014 WL 241694 (N.D. W. Va. 2014), also does not support Mr. Frye's argument. In *Bettinazzi*, which denied a motion to dismiss a breach of contract claim, the Northern District of West Virginia held:

> The plaintiffs asserted that they maintained an insurance policy with the defendant and paid the premiums for such policy to the defendant, thus, asserting the existence of a valid contract. The plaintiffs then argue that the defendant breached this insurance contract by failing to compensate the plaintiffs for damages, which they assert are covered under the policy. Accordingly, based on the plaintiffs' complaint, this Court finds that the plaintiffs have stated a valid claim for breach of contract. *While the defendant seems to argue that it was not*

the party to breach the contract, this Court finds based on the complaint, it cannot make such determination at this time.

Id. at *2 (emphasis added).

As discussed above, the Northern District of West Virginia rejected a similar argument regarding the reach of the holding in *Bettinazzi* in *Patterson*. In *Patterson*, the court relied on *Higginbotham* and explained that summary judgment for the defendant was entirely consistent with its prior decision in *Bettinazzi* because based on the record as a whole the defendant had no authority to decide whether or not claims were paid as a matter of law. *Patterson*, 516 F. Supp. 3d at 564. Because the plaintiff's claims were all premised on BRIM's denial of his mine subsidence claim, which the defendant could not control, summary judgment was appropriate for the defendant. *Id.* at 464–466.[10]

In this action, the Circuit Court individually analyzed Mr. Frye's claims for breach of contract, breach of the covenant of good faith and fair dealing or bad faith, and violations of the UTPA as it relates to Mr. Frye's mine subsidence coverage and also other coverages under his homeowner's policy. Mr. Frye does not dispute the holding with regard to other coverages. Pet. Br. at 7 n.1. Nor does he dispute the holdings that Erie committed no fraud and that Erie engaged in no wrongful conduct between the time of receiving notice of the mine subsidence claim and transferring it to BRIM. Pet. Br. 31. Mr. Frye has never suggested that BRIM paid moneys out of the fund to Erie that Erie withheld from Mr. Frye. Because Mr. Frye's only remaining claims at issue are premised on BRIM's denial of his mine subsidence claim, which Erie cannot control as a matter of law, the Circuit Court properly granted summary judgment to Erie.

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[10] Moreover, footnote 8 of *Honaker v. Mahon*, 210 W. Va. 53, 552 S.E.2d 788 (2001), which is cited by Mr. Frye, is inapposite. *Honaker* observed in *dicta* that an insurer's duty of good faith and fair dealing is not delegable to agents of the insurance company. *Id.*, 552 S.E.2d at 797 n.8. Regardless, *Higginbotham* held that under the mine subsidence insurance statutory scheme "the insurer acts merely as an agent of the state and is bound by the Board's decisions," 432 S.E.2d at 780, not vice versa.

3. The Circuit Court did not opine on Mr. Frye's proffered evidence of mine subsidence.[11]

The order granting summary judgment did not opine on Mr. Frye's proffered evidence of mine subsidence because such evidence was not relevant to the grounds upon which the Circuit Court based its decision as a matter of law. Erie filed a motion *in limine* to exclude Mr. Frye's expert witnesses. A.R. 629. During the final pretrial conference, the motion *in limine* was discussed as follows:

> MS NORRIS: To some extent it goes hand in hand with our motion for summary judgment. Plaintiff has designated two expert witnesses. One is Timothy Bechtel, I believe a geologist. And one is Mr. Bordas' brother-in-law, Bob Contraguerro, who works for Panhandle and does – I guess he does estimates for repair in addition to clean-up work. And Mr. Bechtel has been designated to offer testimony concerning the investigation of mine subsidence. So we have two objections to the presentation of Mr. Bechtel's testimony, the first of which is that he really is not qualified under Rule 702 because he has never been to Mr. Frye's home. He has never inspected the home or the yard. He is relying on his review of the three reports –
>
> ...
>
> MS NORRIS: ... The second basis for the objection, and it's the same as Mr. Contraguerro, is that any testimony by Bechtel that there is mine subsidence or by Mr. Contraguerro concerning how much it costs to fix the mine subsidence is completely irrelevant because the decision of mine subsidence should not be submitted to the jury.
>
> THE COURT: Well, we can handle that if and when I decide – if I decide that Erie can be sued for I guess BRIM's wrongful denial, then I would probably answer the question of relevancy ... So for now it's deferred.

A.R. 938–939. *See* A.R. 930 (making a similar argument in the discussion on summary judgment).

The Circuit Court properly deferred ruling on the admissibility of Mr. Frye's proffered evidence of mine subsidence because it granted summary judgment to Erie.

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[11] This argument addresses Mr. Frye's third assignment of error.

C. The Circuit Court Properly Denied Mr. Frye's Motion to Alter or Amend the Judgement.

The Circuit Court properly denied Mr. Frye's motion to alter or amend the judgment under West Virginia Rule of Civil Procedure 59(e). This Court has recognized that relief under Rule 59(e) is an extraordinary remedy that should be used sparingly. *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 56, 717 S.E.2d 235, 244 (2011). In *Mey*, this Court held:

> A motion under Rule 59(e) of the *West Virginia Rules of Civil Procedure* should be granted where: (1) there is an intervening change in controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice.

Id. at Syl. Pt. 2.

The Court explained as follows:

> A Rule 59(e) motion may be used to correct manifest errors of law or fact, or to present newly discovered evidence. *See In re Transtexas Gas Corp.*, 303 F.3d 571 (5th Cir. 2002). A motion under Rule 59(e) is not appropriate for presenting new legal arguments, factual contentions, or claims that could have previously been argued. *See Freeman v. Busch*, 349 F.3d 582 (8th Cir. 2003) ("Arguments and evidence which could, and should, have been raised at an earlier time in the proceedings cannot be presented in a Rule 59(e) motion."); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605–606 (4th Cir. 1999) (issue presented for first time in Rule 59(e) motion is not timely raised); *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998) (Rule 59(e) motion cannot raise arguments that were not raised prior to judgment); *Santiago v. Canon U.S.A., Inc.*, 138 F.3d 1, 3–4 (1st Cir. 1998) (new legal theory as to liability may not be raised in motion for reconsideration); *Stone v. Wall*, 135 F.3d 1438, 1441–1442 (11th Cir. 1998) (argument that law of other jurisdiction should have applied could not be raised in Rule 59(e) motion); *Global Network Techs., Inc. v. Regional Airport Auth.*, 122 F.3d 661, 665–666 (8th Cir. 1997) (evidence that could have been introduced prior to judgment may not be offered through Rule 59(e) motion).

Id., 717 S.E.2d at 243.

In this action, Mr. Frye filed a motion to alter or amend judgment raising two legal arguments: "I. The Court 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," A.R. at 843, and "II. 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." A.R. 852. The Circuit Court rejected both arguments, reasoning:

> First, Plaintiff asserts for the first time that the statutory scheme of W. Va. Code §§ 33-30-1 et seq. is unconstitutional "because it leaves plaintiffs without a remedy." (Plaintiff's Motion to Alter or Amend Judgment, p. 2)[.] This argument was not plead in Plaintiff's complaint nor argued in Plaintiff's Motion for Summary Judgment briefings. Regardless, as the 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*, the Plaintiff's home sustained damage from mine subsidence.
>
> Secondly, Plaintiff argues that this Court erred in concluding that the relevant statutory scheme prevents an insured from filing suit against its insurer arising out of a mine subsidence claim. This is simply an incorrect interpretation of this Court's Order. (Plaintiff's Motion to Alter or Amend Judgment, p. 10)[.] To the contrary, this Court's Order noted specific circumstances under which suit would be permissible, while noting that no such circumstances were present in this case.
>
> The remainder of Plaintiff's Motion is further attempt to re-litigate old matters already decided by the Court. Plaintiff has failed to demonstrate an intervening change in controlling law, new evidence, a clear error of law, or manifest injustice. As such, Plaintiff cannot establish entitlement to relief under Rule 59(e) of the West Virginia Rules of Civil Procedure.

A.R. 885–886 (emphasis added).

Mr. Frye does not directly challenge the finding in the order denying the motion to alter or amend judgment that Mr. Frye's constitutional argument was neither pled nor argued in the summary judgment briefs (instead arguing that the Circuit Court should have somehow reached the issue at the summary judgment stage). This finding alone is sufficient for affirmance of the Circuit Court's denial of the motion to alter or amend judgment on the constitutional issue raised for the first time. *See Mey*, 717 S.E.2d at 243. As Erie has explained above, the Circuit Court was

not required to answer a question – even a constitutional one – that Mr. Frye's attorney was unable to articulate in briefing or argument on summary judgment and never presented in the context of a complete record. *See Antero Resources Corp.*, 2022 WL 1055446, at *5; *BRG Assocs., LLC*, 2017 WL 656999, at * 4; *Haynes*, 2016 WL 6542734, at *3–5.

The second issue raised by Mr. Frye in his motion to alter or amend judgment is also discussed above in the context of the order granting summary judgment. The summary judgment order determined that there are circumstances under which an insurer can be held liable in the handling of a mine subsidence claim, but the Circuit Court found that none of those circumstances exist in this case. The Circuit Court individually analyzed Mr. Frye's claims for breach of contract, breach of the covenant of good faith and fair dealing or bad faith, and violations of the UTPA as it relates to Mr. Frye's mine subsidence coverage and also other coverages under his homeowner's policy. A.R. 834–841. Mr. Frye does not dispute the holding with regard to other coverages. Pet. Br. at 7 n.1. Nor does he dispute the holdings that Erie committed no fraud and that Erie committed no wrongful conduct between the time of receiving notice of the mine subsidence claim and transferring the claim to BRIM. Pet. Br. 31. Mr. Frye has never suggested that BRIM paid moneys out of the fund to Erie that Erie withheld from Mr. Frye. Because Mr. Frye's only remaining claims at issue are premised on BRIM's denial of his mine subsidence claim, which Erie cannot control as a matter of law, the Circuit Court properly granted summary judgment to Erie and denied Mr. Frye's motion to alter or amend judgment. Accordingly, the Circuit Court's properly denied the motion to alter or amend judgment on the second issue raised by Mr. Frye.

The crux of the issue Mr. Frye raises specific to the order denying the motion to alter or amend judgment relates to the third sentence: "Regardless, as the 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*, the Plaintiff's home sustained damage from mine subsidence." (Emphasis added.). That sentence is not an independent finding but an alternative reference to a prior finding in the order granting summary judgment. In the summary judgment order, the Circuit Court properly found that Mr. Frye presented *no genuine issues of material fact* for a jury to resolve and that *based upon those facts*, i.e., the relevant facts, no reasonable jury could have concluded that Mr. Frye's home sustained damages from mine subsidence. For example, with regard to the breach of contract claim for mine subsidence coverage, the order granting summary judgment explained:

> *BRIM concluded that there was no evidence of mine subsidence and denied Plaintiff's claim for mine subsidence coverage. Defendant Erie had no authority to approve and pay Plaintiff's claim for mine subsidence, even if determined to be valid, and as such, there can be no breach of contract by Defendant Erie.*

A.R. 838 (emphasis added).[12]

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[12] With regard to Mr. Frye's claim for breach of contract for other coverage under his policy, the Circuit Court found: "The Plaintiff has undertaken no discovery or depositions, and has produced no interrogatory answers, requests for admissions, or affidavits which would aid in establishing questions of fact for a jury to resolve on the issue of a wrongful denial of coverage on coverage other than on mine subsidence coverage." A.R. 839. Mr. Frye does not challenge that finding. Pet. Br. at 7 n.1. With regard to the UTPA claim, the order granting summary judgment states:

> The evidence reflects that Defendant Erie waited for the results of BRIM's investigation before providing Mr. Bragg's report. The Plaintiff has not pointed this Court to any authority that Defendant Erie was required to produce a copy of its independent engineer's report to the insured while the investigation was still pending. Similarly, the fact that Defendant Erie asked its engineer to elaborate upon the potential "other causes" of the complained damage is not indicative of bad faith. The engineer had already opined that the damage was not caused by mine subsidence. It was reasonable for the carrier to further investigate what did cause the damage if not mine subsidence. The other bases upon which the Plaintiff alleges bad faith all relate back to Plaintiff's premise that this claim for mine subsidence should have been paid. As noted above, only BRIM could approve and pay Plaintiff's claim for mine subsidence. There is no evidence that Defendant Erie violated any provision of the UTPA in its handling of the claim while waiting for the results of BRIM's investigation and claim determination.

A.R. 840–841.

Mr. Frye does not challenge this finding regarding the lack of evidence to support a claim for violations of the UTPA on appeal.

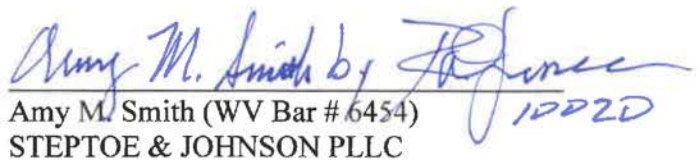
Thus, properly understood, the Circuit Court's statement regarding the lack of genuine issues of material fact and the absence of a question for the jury to decide is entirely consistent with the Circuit Court's grant of summary judgment to Erie. In any event, "[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." *Barnett v. Wolfolk*, 149 W. Va. 246, 246, 140 S.E.2d 466, Syl. Pt. 3 (1965). *See Vanderpool*, 823 S.E.2d at 534 (applying *Barnett* to affirm the Circuit Court's grant of a motion to dismiss and denial of a Rule 59(e) motion).

The Circuit Court properly concluded that under the mine subsidence insurance statutory scheme BRIM is the only entity that can adjust and authorize payment of Mr. Frye's claim for mine subsidence damages. Although BRIM has denied Mr. Frye's claim for mine subsidence damages, BRIM has indicated a willingness to discuss the matter further and has invited Mr. Frye to provide additional information to support his claim at any time, which would include the affidavit of Dr. Bechtel. Thus, BRIM has and continues to provide Mr. Frye an abundance of due process in the adjustment of his claim. If Mr. Frye is dissatisfied with BRIM's ultimate resolution of Mr. Frye's claim for mine subsidence damages, he should request the remedy of arbitration with BRIM.

VI. CONCLUSION

For all of the foregoing reasons, this Court should affirm the Circuit Court's grant of summary judgment to Erie and the Circuit Court's denial of Mr. Frye's motion to alter or amend the judgment, and the Final Judgment Order entered in this action in all respects.

Dated this 3rd day of October 2022.



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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October 2022, true and accurate copies of the foregoing Brief of Respondent Erie Insurance Company were deposited in the United States Mail postage prepaid addressed to the following counsel of record:

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