IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 24-ICA-331

ERIE INSURANCE PROPERTY & CASUALTY COMPANY,

Defendant Below,
Petitioner,

vs.

TAMMY S. WRATCHFORD AND MICHAEL W. WRATCHFORD,

Plaintiffs Below,
Respondents.

APPEAL FROM THE CIRCUIT COURT OF HARDY COUNTY, WEST VIRGINIA
THE HONORABLE H. CHARLES CARL
(CIVIL ACTION NO. 18-C-3)

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

The Circuit Court erred, as a matter of law, by failing to apply a credit or set-off to the contractual damages awarded in favor of Tammy S. Wratchford and Michael W. Wratchford at trial by the amount previously paid by Petitioner Erie Insurance Property & Casualty Company in satisfaction of the Wratchfords' mortgage ($168,723.90), allowing the Wratchfords to receive a duplication of coverage benefits under the Erie Policy.

STATEMENT OF THE CASE

This appeal to the Intermediate Court of Appeals of West Virginia arises from a fire loss that occurred on February 20, 2017 at the home of Respondents, Tammy S. Wratchford and Michael W. Wratchford (the "Wratchfords") in Hardy County, West Virginia. At the time of the February 20, 2017 fire, Petitioner, Erie Insurance Property & Casualty Company ("Erie") issued an Ultracover HomeProtector Insurance Policy, Policy No. Q536501730 (the "Erie Policy") to the Wratchfords, insuring the loss location. [J.A. 709]. The Erie Policy provides guaranteed replacement cost coverage for the dwelling, which was estimated to be $221,500.00. [J.A. 710]. The Erie Policy also provides personal property coverage in the amount of $166,125.00, and additional living expenses for a period not to exceed twelve (12) months.[1] [*Id.*]

By the terms of the Erie Policy, the most that will be paid for damages to the dwelling under the Erie Policy is the replacement cost of the dwelling, or the amount actually and necessarily spent to repair or replace the damaged dwelling.[2] The Erie Policy conditions any loss settlement payment for Dwellling Coverage through the following provision:

> **RIGHTS AND DUTIES—CONDITIONS—SECTION I**
>
> **(8) LOSS SETTLEMENT**
>
> The increased cost incurred to comply with any ordinance or law is not included under this condition, except for coverage that is provided under *What We Also Pay, Ordinance or Law Coverage*.
>
> Loss to *Dwelling Coverage, Other Strucutures Coverage* and *Personal Property Coverage* will be settled on a replacement cost basis, without deduction for depreciation.
>
> **Dwelling and Other Structures Coverage**

[1] The Erie Policy also provides Other Structures Coverage in the amount of $44,300.00, but the February 20, 2017 fire loss did not cause any damages to other structures on the Wratchford property.

[2] The Wratchfords could also recover separately for the costs of personal property. The jury's award related to the personal property coverage is not at issue in this appeal.

> Payment will not exceed the smallest of the following amounts:
>
> 1. the replacement cost of that part of the dwelling damages for the equivalent construction and use on the same premises; or
>
> 2. the amount actually and necessarily spent to repair or replace the damaged dwelling.
>
> **We**[3] will pay no more than the actual cash value of the damage until the actual repair or replacement is completed. However, when the loss is both less than $2500 and less than 5% of the amount of insurance applying to the loss, **we** will pay the replacement cost before actual repair or replacement is completed.
>
> **You** may disregard the replacement cost provision and make claim for loss or damage to buildings on an actual cash value basis. However, you still have the right to make a claim, within 180 days after the loss, for any additional amounts **we** will be required to pay under this *Loss Settlement* provision.

[J.A. 724].

The Erie Policy further provides that any loss payment made pursuant to the policy will be made to the person or entity named in the policy or to the person or entity legally entitled to receive payment. In pertinent part, the Policy Change Endorsement-West Virginia sets forth the following condition:

> **RIGHTS AND DUTIES – CONDITIONS – SECTION 1**
>
> **LOSS PAYMENT**
>
> ***This condition is deleted and replaced with the following:***
>
> **We** will settle any claim for loss with **you**[4]. **We** will pay **you** unless some other person is named in the policy or is legally entitled to receive payment. . .

[3] Terms appearing in bold in the Erie Policy are defined terms in the Erie Policy.

[4] "**You**", "**your**", or "**Named Insured**" is defined by the Erie Policy as "the **Subscribers** and others named on the **Declarations** under **Named Insured**. Except in the GENERAL POLICY CONDITIONS Section, these words include the spouse of Subscriber if a resident of the same household." [J.A. 717].

[Emphasis added, J.A. 753].

The Erie Policy contains a "mortgagee clause" in Property Protection-Section 1 and recognizes the legal priority of the mortgagee identified on the Erie Policy's Declarations to any loss settlement and/or loss payment made pursuant to the Erie Policy. Specifically, the Erie Policy provides,

> **RIGHTS AND DUTIES – CONDITIONS – SECTION 1**
>
> **(10) MORTGAGE CLAUSE**
>
> Loss under *Dwelling Coverage* or *Other Structures Coverage* shall be payable to mortgagees named on the Declarations, to the extent of their interest and in order of precedence.
>
> **Our Duties**
>
> **We** will:
>
> 1. protect the mortgagee's interests in an insured building. This protection will not be invalidated by any act or neglect of **anyone we protect**, any breach of warranty, increase in hazard, change of ownership, or foreclosure if the mortgagee has no knowledge of these conditions;
>
> 2. give mortgagee 30 days prior notice if **we** cancel or refuse to continue this policy.
>
> 3. give mortgagee notice if **you** cancel this policy.
>
> **Mortgagee's Duties**
>
> The mortgagee will:
>
> 1. furnish proof of loss within 60 days after receiving notice from us if you fail to do so;
>
> 2. pay upon demand any premium due if **you** fail to do so;
>
> 3. notify **us** of any change of ownership or occupancy or any increase in hazard of which the mortgagee has knowledge;

> 4. give **us** the right of recovery against any party liable for loss. This shall not impair the mortgagee's right to recover the full amount of mortgage debt;
>
> 5. after a loss, permit **us** to satisfy the mortgage requirements and receive full transfer of the mortgage and all securities held as collateral to the mortgage debt;
>
> 6. at our request, submit to examination under oath.
>
> Policy conditions relating to *Appraisal, Loss Payment* and *Suit Against Us* apply to the mortgagee.
>
> This condition shall also apply to any trustee named on the **Declarations**.

[J.A. 725].

The Declarations of the Erie Policy identifies the mortgagee on the Wratchford's property as Summit Community Bank, PO Box 179, Moorefield, WV 26836-0179. [J.A. 712]. In accordance with the foregoing Mortgagee Clause, Summit Community Bank is included as a loss payee on the Erie Policy to the extent of the Wratchfords' home mortgage. Summit Community Bank's interest as loss payee "[is] not [to] be invalidated by any act or neglect of **anyone we protect**, any breach of warranty, increase in hazard, change in ownership, or foreclosure if the mortgagee has no knowledge of these conditions . . ." [J.A. 725].

Coverage under the Erie Policy was denied by letter dated July 11, 2017. [J.A. 72, ¶ 34]. Erie's denial letter to the Wratchfords denied their claims arising from the February 20, 2017 fire based on various provisions of the Erie Policy, including the intentional acts exclusion, provisions regarding concealment, fraud and misrepresentation, and the failure to cooperate in Erie's investigation by providing incomplete and untruthful responses in an examination under oath. Although Erie denied the Wratchford's claim for insurance benefits, it paid off the Plaintiffs' mortgage held by Summit Community Bank in accordance with the terms of the Erie Policy.

Payment to Summit Community Bank was made on September 5, 2017, in the amount of $168,723.90. This amount represents the amount of the mortgage as of the date of the February 20, 2017 fire.[5]

On February 13, 2018, the Wratchfords initiated this lawsuit by Complaint against Erie, Chad Tuttoilmondo, Phillip Jones, Fire & Safety Investigation Consulting Services, LLC, Christopher Brent Harris, Forensic Consultants & Engineers, Inc. d/b/a Romualdi Davidson & Associates, Inc., Bert N. Davis, and Ronald "Mackey" Ayersman.[6] [J.A. 1]. On July 5, 2018, the Wratchfords filed their Amended Complaint and added the West Virginia State Fire Marshal's Office as defendant. The Amended Complaint asserted the following claims against Erie: (1) Breach of Contract, (2) Negligence, (3) Intentional Violations with Malice, (4) Tortious Interference with Employment, (5) Intentional Infliction of Emotional Distress, (6) Civil Conspiracy, (7) Malicious Prosecution and Abuse of Process, (8) Respondeat Superior, (9) Unfair Trade Practices Act, and (10) Punitive Damages. [7] [J.A. 60]. Erie filed its Answer to the Amended

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[5] On that point, Tammy Wratchford testified to the following at trial:

> Q. So what was the amount paid by Erie to Summit on September 5 of 2017?
>
> A. It was 168,723.90
>
> Q. How does that compare to the original amount of the outstanding balance in February?
>
> A. That was the outstanding balance in February.

[J.A. 542, lines 3 through 8.]

[6] The original Complaint also asserted claims against BDA Engineering, Inc. BDA Engineering, Inc. was voluntarily dismissed from the case prior to the filing of the Amended Complaint.

[7] The claim of Intentional Violations with Malice and the stand-alone claim for punitive damages were dismissed by Order dated May 18, 2018. [J.A. 842]. The claim of Tortious Inference with Employment was

Complaint on July 10, 2018. [J.A. 105]. In addition to generally denying the allegations asserted against in the Amended Complaint, Erie specifically asserted the affirmative defenses of accord and satisfaction, payment, release, waiver, and assumption of risk. [J.A. 128]. Erie further incorporated all applicable affirmative defenses provided by Rule 8, Rule 9, and Rule 12 of the West Virginia Rules of Civil Procedure and all other applicable affirmative defenses to the action. [*Id.*].

This case was tried before a jury from May 4, 2023 through May 25, 2023, when the jury returned its verdict. In support of their claims at trial, Plaintiffs offered testimony as to various claimed damages. One type of damage claimed by Plaintiffs was the amount they will have to expend to repair or replace the dwelling as a result of the fire. To that end, Plaintiffs asserted that the cost to rebuild the dwelling, *i.e.* the replacement cost under the Erie Policy, was $590,542.57. [J.A. 756-757]. The estimated cost to rebuild was admitted into evidence at trial through the testimony of the Plaintiffs' construction expert, Mike Phillips. Mr. Phillips did not discount his estimated cost to rebuild with amounts paid by Erie to Summit Community Bank in satisfaction of the mortgage. [*Id.*] While the Wratchfords disputed the timing of the mortgage payoff at trial, they did not dispute the fact that Erie satisfied the mortgage in their favor. Accordingly, the testimony and evidence presented at trial was that the total replacement cost for the Wratchfords' dwelling was $590,542.57, inclusive of the $168,723.90 paid by Erie to Summit Community Bank in September 2017.

At the conclusion of the fifteen-day trial, the jury found Erie liable only on the count for Breach of Contract. The jury returned a defense verdict as to all other counts in favor of Erie and the remaining defendants. [J.A. 668-685]. As a result of the jury's finding against Erie for Breach

dismissed by Order dated February 9, 2021. [J.A. 925]. The remainder of the claims were tried and decided by the jury.

of Contract, it awarded the Wratchfords damages in the total amount of $687,742.57 for replacement of the dwelling, personal property loss and loss of use. The breakdown for the award of contractual damages is, as follows:

QUESTION 15. If you answered "yes" to Question 5, please identify the amount, if any, of insurance benefits that Tammy S. Wratchford and Michael W. Wratchford have proven with reasonable certainty that they were entitled under their home insurance policy but were not provided (which are the contractual damages).

Contractual Damages:

- Dwelling Coverage $ 590,542.57
- Personal Property Coverage $ 90,000.00
- 12 Months' Rental Expenses $ 7,200.00
- Trees, Shrubs, Plants, and Lawn $ 0.00

As detailed by the foregoing excerpt of the Verdict Form, the jury award for Dwelling Coverage equaled the total replacement cost for the Wratchfords' dwelling as opined to by their construction expert, inclusive of the $168,723.90 previously paid by Erie in satisfaction of the Wratchfords' mortgage.[J.A. 682].

The Judgment Order was entered in this case on March 18, 2024 and included the foregoing damage awards made in favor of the Wratchfords against Erie. [J.A. 686-691]. In accordance with the jury's verdict, the Judgment Order rendered judgment in favor of the Wratchfords for "claims of breach of contract in the amount of $687,742.57." [J.A. 690].

Erie timely filed a Motion to Alter or Amend the Judgment, and following briefing, the Circuit Court held that Erie was not entitled to a credit, or set-off, to the award of contractual damages for amounts previously paid in satisfaction of the Wratchfords' mortgage. [J.A. 816]. In so holding, the Court concluded that a notice of set-off was required pursuant to W.Va. Code § § 56-5-4 and 56-5-5, and that Erie did not preserve its rights by way of a counterclaim, proper

pleading, or instruction to the jury. [J.A. 821-825]. The Circuit Court also found Erie did not make a claim for credit, or set-off, pursuant to Rule 8 of the West Virginia Rules of Civil Procedure and that it had no jurisdiction or authority to alter or amend the verdict under Rule 59(e) of the West Virginia Rules of Civil Procedure. [*Id*.] Accordingly, the Circuit Court held that Erie is not entitled to a $168,723.90 credit to the award of contractual damages. [*Id*.]

Erie timely filed its Notice of Appeal to this Court on August 21, 2024. By way of this appeal, Erie asserts that it is entitled to a credit, or set-off, to contractual damages awarded by the jury for amounts paid in satisfaction of the Wratchfords' mortgage in accordance with the terms of the Erie Policy and under West Virginia law.

SUMMARY OF THE ARGUMENT

As a matter of West Virginia law, Erie is entitled to a credit, or set-off, to the contractual damages for amounts previously paid in satisfaction of the Wratchfords' mortgage to avoid a duplication of coverage benefits under the Erie Policy. Insofar as the Court is required to interpret the Erie Policy to determine that there has been a duplication of coverage benefits, Rule 59(e) of the West Virginia Rules of Civil Procedure is the appropriate rule under which Erie's Motion to Alter or Amend the Judgment to Reduce the Award of Contractual Damages should be decided.

It is well-established in this State that the determination of coverage under an contract of insurance is a question of law reserved for the court. By the terms of the Erie Policy, Erie was obligated to protect Summit Community Bank's interest as mortgagee in the insured property. Erie was likewise obligated to satisfy the Wratchfords' mortgage pursuant to the West Virginia Supreme Court of Appeals' holding in *Jones v. Wesbanco Bank Parkersburg*, 194 W.Va. 381, 460 S.E.2d 627 (1995), despite its denial of coverage on separate bases. Erie fulfilled its contractual and legal obligations by issuing payment to Summit Community Bank in the amount of $168,723.90 and extinguished the Wratchfords' mortgage as of September 2017.

At trial, the jury determined that the Wratchfords were to be afforded Dwelling Coverage under the Erie Policy in the amount of $590,542.57. The award for Dwelling Coverage reflected the full replacement cost of the dwelling as estimated by the Wratchfords' construction expert at trial. The Erie Policy simply does not provide coverage for the mortgage amount *plus the full cost to replace the home*. The Circuit Court's denial of Erie's request for credit of $168,723.90 from the $590,542.57, allowed the Wratchfords to receive duplicative coverage benefits under the Erie Policy.

Without reaching a determination on the coverage afforded by the Erie Policy, the Circuit Court erroneously determined that Erie waived its right for a credit. In so holding, the Circuit Court

ignored affirmative defenses pleaded by Erie in its Answer to the Amended Complaint and misapplied W.Va. Code § § 56-5-4 and 56-5-5.

Erie's request for credit, or set-off, is analogous to West Virginia's practice of allowing defendants against whom a verdict is rendered to credit the damages to reflect settlements of joint tortfeasors prior to the West Virginia Legislature's abolishment of joint and several liability. Absent the requested credit, the Wratchfords will receive a double recovery for a single injury in contrast with established law.

For these reasons, the Petitioner Erie Insurance Property & Casualty Company, respectfully requests that a credit or set-off of $168,723.90 be applied to the contractual damages award set forth in the Judgment Order and that the Circuit Court's Order Denying Erie Insurance Property & Casualty Company's Motion to Alter or Amend the Judgment to Reduce the Award of Contractual Damage be reversed.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner, Erie Insurance Property & Casualty Company, submits that this case is appropriate for oral argument in accordance with Rule 19 of the West Virginia Rules of Appellate Procedure, as it involves an assignment of error in the application of settled law.

ARGUMENT

A. STANDARD OF REVIEW

Erie's Motion to Alter or Amend the Judgment to Reduce the Award of Contractual Damages was brought before the Circuit Court under Rule 59(e) of the West Virginia Rules of Civil Procedure. Erie asserts that Rule 59(e) is the appropriate rule by which its requested relief should be granted as Erie does not seek to alter the jury's underlying verdict in the case. Instead, Erie seeks to have this Court recognize and apply a prior payment towards the satisfaction of that judgment, as a matter of law.

When the issue on appeal involves a matter of law and the interpretation of an insurance contract, the Intermediate Court of Appeals' standard of review is *de novo*. ("Where the issue on an appeal from the circuit court is clearly a question of law ... we apply a *de novo* standard of review." Syllabus point 1, in part, *Chrystal R.M. v. Charlie A. L.,* 194 W.Va. 138, 459 S.E.2d 415 (1995)). *See also* syllabus point 2, *Riffe v. Home Finders Associates, Inc.,* 205 W.Va. 216, 517 S.E.2d 313 (1999).' Syllabus point 2, *Horace Mann Insurance Co. v. Adkins,* 215 W.Va. 297, 599 S.E.2d 720 (2004)." Syl. Pt. 3, in part, *Certain Underwriters at Lloyd's, London v. Pinnoak Resources, LLC,* 223 W.Va. 336, 674 S.E.2d 197 (2008) ("The interpretation of an insurance contract[ ] ... is a legal determination that, like a lower court's grant of summary judgement [*sic*], shall be reviewed *de novo* on appeal.")

B. ERIE IS ENTITLED TO A CREDIT OF THE $168,723.90 AS THE PAYMENT WAS MADE UNDER THE INSURANCE CONTRACT FOR THE BENEFIT OF THE WRATCHFORDS

I. The Determination Of Coverage Afforded By The Erie Policy Is A Question of Law

By its Motion, Erie moved the Circuit Court to recognize and apply a credit for the $168,723.90 prior payment towards its satisfaction of the judgment, as a matter of law. The relief

sought by Erie would alter or amend the judgment award, not the jury's verdict. Erie's request for a credit, or set-off, of the judgment award is a question of law insofar as it requires the Court to interpret the Erie Policy and determine that there has been a duplication of coverage benefits under the Erie Policy. Erie requested the Circuit Court interpret the Erie Policy and determine that the $168,723.90 payment made to Summit Community Bank is duplicative of amounts included within the $590,542.57 award for Dwelling Coverage made by the jury. The Circuit Court had authority to apply a credit to the award of Dwelling Coverage by the $168,723.90 payment to satisfy the Wratchfords' mortgage on the basis that the interpretation of the Erie Policy is a question of law and not an issue to be submitted to the jury.

In West Virginia, it is well-established that the "determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." *W. Va. Fire & Cas. Co. v. Stanley*, 216 W. Va. 40, 46, 602 S.E.2d 483, 489 (2004) (citing Syllabus Point 1, *Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10 (2002)). Interpretation of the policy and the determination of whether the policy provides or excludes coverage under circumstances where the material facts are undisputed is a question of law reserved to the Court. *See Allied World Surplus Lines Ins. Co. v. Day Surgery Ltd. Liab. Co.,*No. 2:17-CV-04286, 2020 WL 1545881, at *2 (S.D. W.Va. Mar. 31, 2020).

For purposes of determining the proper coverage of an insurance contract, the Court should give language in the policy its plain, ordinary meaning. Syllabus point 1*, Soliva v. Shand, Morahan & Co.*, 176 W. Va. 430, 345 S.E.2d 33 (1986). "Where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended. Syllabus point 1*, Christopher v. United States Life Ins.*, 145 W. Va. 707, 116 S.E.2d 864 (1960). Moreover, "[t]he contract should be read

as a whole with all policy provisions given effect. If the policy as a whole is unambiguous then the insured will not be allowed to create an ambiguity out of sections taken out of context." *Soliva v. Shand, Morahan & Co.*, 176 W. Va. 430, 432, 345 S.E.2d 33, citing *2 Couch on Insurance 2d §15:29*.

II. Disallowing Erie A Set-Off For Amounts Paid In Satisfaction Of The Wratchfords' Mortgage Constitutes A Duplication Of Coverage Benefits

Having established the Circuit Court's authority to set-off the award of contractual damages, the next step is to interpret the applicable provisions of the Erie Policy. By its terms, the Erie Policy obligated Erie to "protect the mortgagee's interests in an insured building." The Erie Policy further set forth that "[t]his protection [would] not be invalidated by any act or neglect of **anyone we protect**, any breach of warranty, increase in hazard, change of ownership, or foreclosure if the mortgagee has no knowledge of these conditions." [J.A. 726]. Separately, the Erie Policy provided that any loss settlement be paid to "**you** unless some other person is named in the policy or is legally entitled to receive payment." [J.A. 725].

In addition to the plain language of the Erie Policy, Erie was obligated to satisfy the mortgage pursuant to West Virginia law. In *Jones v. Wesbanco Bank Parkersburg*, 194 W.Va. 381, 460 S.E.2d 627 (1995), the West Virginia Supreme Court of Appeals held that an insurer must satisfy debt in favor of its insured despite its denial of coverage due to the alleged intentional acts of its insured when the policy at issue contains a standard mortgage clause. In so holding, the West Virginia Supreme Court of Appeals reasoned that the lender has priority in the debt and is therefore "deemed to be an insured to the extent of the balance due to it from the property owner." *See id*. at syllabus point 3 citing syllabus point 1, *Firstbank Shinnston v. West Virginia Insurance Co.,* 185 W.Va. 754, 408 S.E.2d 777 (1991)[8]

[8] In full, the syllabus point set forth the following:

The critical facts are not in dispute. Erie paid $168,723.90 to Summit Community Bank in satisfaction of the Wratchfords' mortgage in September 2017, in accordance with the terms of the Erie Policy and West Virginia law. At trial, the jury awarded contractual damages to the Wratchfords for the full amount of the replacement cost, in the amount of $590,542.57. This amount was the entire estimated cost to rebuild the dwelling as testified to by the Wratchford's construction expert, Mike Phillips, which necessarily included the $168,723.90 that Erie previously paid to Summit Community Bank. By its terms, the Erie Policy does not provide coverage for the mortgage amount plus the full cost to replace the home, and West Virginia law does not require otherwise. The Circuit Court's denial of Erie's request for set-off of $168,723.90 from the $590,542.57, allowed the Wratchfords to receive duplicative coverage benefits under the Erie Policy. The award of contractual damages should be credited as a matter of law.

A similar credit, or set-off, was upheld by the Fourth Circuit Court of Appeals in *State Farm Fire and Cas. Co. v. Barton,* 897 F.2d 729 (1990). In *Barton*, State Farm filed a declaratory judgment action in the United States District Court for District of South Carolina seeking a declaration as to its obligations under a homeowner's policy issued to its insured, Barton, following a fire at the insured dwelling. After a jury trial, the District Court entered judgment in favor of the insured inclusive of actual damages incurred as a result of the fire and punitive damages against State Farm. Following entry of the judgment, State Farm moved to offset the amount paid to the insureds' mortgagees in satisfaction of the insured's mortgages pursuant to its

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> If a fire insurance contract between an insurer and property owner includes a standard mortgage clause naming as mortgagee the lender under a deed of trust executed by the property owner to secure a debt owing on the property, the lender under the deed of trust pursuant to that clause has an independent and distinct contract with the insurer, as if the lender under the deed of trust had taken out a separate policy with the insurer, and is deemed to be an insured to the extent of the balance due it from the property owner.

obligations under the insurance policy. State Farm did not foreclose on the property and the insured remained as the legal owner. The District Court awarded State Farm an offset against the judgement for amounts paid to extinguish the insured's debt on the insured property. On appeal, the Fourth Circuit upheld the District Court's decision and determined State Farm was entitled to offset the judgment by the amounts previously paid in satisfaction of the insured's mortgages on the insured property. *Id*. at 733-734. In so holding, the Fourth Circuit reasoned that because the insured remained the legal owner to the subject property, "the insurer is entitled to recover the amount paid to the mortgagees." *Id*. at 733, citing *Selby v. Union Auto. Indem. Ass'n*, 164 Ill. App. 3d 34, 35–36, 517 N.E.2d 687, 688 (1987) ("The general rule is that an insurer is entitled to recover money paid to a mortgagee under a standard mortgage clause since it was made under the contract and for the account and the benefit of the insured.").

Here, the facts align with those in *Barton*. Erie extinguished the Wratchfords' debt on the insured property with its $168,723.90 payment to Summit Community Bank. Erie's payment was for the account and benefit of the Wratchfords. Erie did not foreclose on the property, and the Wratchfords remained the legal owners of the property following the fire. The amount awarded in favor of the Wratchfords for Dwelling Coverage was not discounted for the $168,723.90 payment. Erie is entitled to an offset for its $168,723.90 payment. By the terms of the Erie Policy, the Wratchfords are not entitled to duplicative payments of benefits, and Erie is entitled to a credit, or set-off, of $168,723.90 towards the judgment.

C. WEST VIRGINIA LAW DOES NOT PERMIT A DOUBLE SATISFACTION FOR A SINGLE INJURY

Separately, Erie is entitled to a set-off for amounts paid in satisfaction of the Wratchfords' mortgage to prevent a double satisfaction. "It is generally recognized that there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the

law does not permit a double satisfaction for a single injury. A plaintiff may not recover damages twice for the same injury simply because he has two legal theories." Syllabus point 7, *Harless v. First Nat. Bank in Fairmont*, 169 W.Va. 673, 289 S.E.2d 692 (1982).

In reliance on this well-settled principle of West Virginia law, Erie specifically pleaded the affirmative defenses of accord and satisfaction, payment, release, waiver, and assumption of risk in its Answer. [J.A. 128]. Erie further incorporated all affirmative defenses as provided for by Rule 8, Rule 9, and Rule 12 of the West Virginia Rules of Civil Procedure. [*Id.*].[9] Despite Erie's affirmative defenses, the Circuit Court erroneously determined that Erie was required to file a "notice" and offer evidence at trial with instruction to the jury pursuant to W.Va. Code § § 56-5-4 and 56-5-5. [J.A. 822]. The Circuit Court erroneously interpreted these statutes and determined that Erie had waived its right for set-off.

W.Va. Code § § 56-5-4 and 56-5-5 are inapplicable to this case. W.Va. Code § 56-5-4 provides the procedure for set-off in suits for "debt" as evidenced by the introductory clause of the code section ("In a suit for any debt . . ."). [10] This case was simply not a suit for debt as contemplated by § 56-5-4.

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[9] A simple review of Erie's Answer reveals the plain error in the Circuit Court's denial of Erie's request for set-off on the basis that Erie "never filed any counterclaim, affirmative defense, or pleading claiming or giving notice of any intent by Erie to file a request for 'set-off' . . .". [J.A. 822].

[10] Enacted in 1868, the full text of W.Va. Code § 56-5-4 contains the following:

> In a suit for any debt, the defendant may at the trial prove and have allowed against such debt any payment or setoff which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise. Although the claim of the plaintiff be jointly against several persons, and the setoff be of a debt, not to all, but only to a part of them, this section shall extend to such setoff, if it appear that the persons against whom such claim is, stand in the relation of principal and surety, and that the person entitled to the setoff is the principal. And when the defendant is allowed to file and prove an account of setoff to the plaintiff's demand, the plaintiff shall be allowed to file and prove an account of counter setoff, and make such other defense as he might have made had an original action been brought upon such setoff, and, in the issue, the jury or judge shall

W.Va. Code § 56-5-5 is equally inapplicable. In full, that section provides

> In any action on a contract, the defendant may file a plea alleging any such failure in the consideration of the contract, or fraud in its procurement, or any such breach of any warranty to him of the title to real property or of the title or the soundness of personal property, for the price or value whereof he entered into the contract, or any other matter, as would entitle him either to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or to relief in equity, in whole or in part, against the obligation of the contract; or, if the contract be by deed, alleging any such matter existing before its execution, or any such mistake therein, or in the execution thereof, or any such other matter, as would entitle him to such relief in equity; and in either case alleging the amount to which he is entitled by reason of the matters contained in the plea. Every such plea shall be verified by affidavit.

By requesting a set-off or offset for amounts previously paid under the Erie Policy, Erie does not allege that it is due money from the Wratchfords, as W.Va. Code § 56-5-5 contemplates. It is not alleging failure in the consideration of the contract, or fraud in its procurement, or any such breach of any warranty of the title of real property or the title or soundness of personal property. It is not alleging that it is due payment under the Erie Policy or any other matter which would entitle it to recover damages under law from the Wratchfords. The Circuit Court's reliance on W.Va Code §§ 56-5-4 and 56-5-5 was misplaced.

The relief sought by Erie is analogous to the right to set-off amounts paid by a settling co-defendant prior to the abolishment of joint and several liability in the State. Prior to the enactment of W.Va. Code § 55-7-13a-d, defendants in a civil action against whom a verdict was rendered were entitled to have the verdict credited, or set-off, by the amount of any good faith settlements previously made to the plaintiff by alleged jointly liable parties. *See Board of Education of*

> ascertain the true state of indebtedness between the parties, and judgment shall be rendered accordingly.

W. Va. Code Ann. § 56-5-4.

McDowell County v. Zando, Martin & Milstead, Inc., 182 W.Va. 597, 390 S.E.2d 796, 803 (1990) (superseded by statute). ("[W]e have developed, independently of any assertion or contribution, a practice of allowing the defendant against whom a verdict is rendered to reduce the damages to reflect any partial settlement the plaintiff has obtained from a joint tortfeasor." *Id*. citing Syllabus Points 1 and 2 of *Tennant v. Craig*, 156 W.Va. 632, 195 S.E.2d 727 (1973)[11] The practice of granting a settlement credit was premised on the principle that the law does not "permit a double satisfaction for a single injury." *Id*. at 608, 390 S.E.2d at 807 (internal quotations omitted).

By virtue of the executed Verdict Form, the award for Dwelling Coverage afforded by the Erie Policy was $590,542.57. [J.A. 683]. This amount was inclusive of amounts already paid by Erie in satisfaction of the Wratchfords' mortgage, as illustrated by the lack of discount for the mortgage payment in Mike Phillips' estimate to rebuild the insured dwelling. [J.A. 757-758]. Disallowing Erie a set-off for the $168,723.90 would provide the Wratchfords with an impermissible double recovery.

[11] Those Syllabus Points state, the following:

1. 'Where a payment is made, and release obtained, by one joint tort-feasor, the other joint tort-feasors shall be given credit for the amount of such payment in the satisfaction of the wrong.' Point 2, Syllabus, *Hardin v. The New York Central Railroad Company,* 145 W.Va. 676, 116 S.E.2d 697 (1960).

2. Partial satisfaction of the injured person by one joint tortfeasor is a satisfaction, *pro tanto,* as to all.' Point 5, Syllabus, *New River & Pocahontas Consolidated Coal Company v. Eary,* 115 W.Va. 46, 174 S.E. 573 (1934).

CONCLUSION

The Circuit Court erred, as a matter of law, by failing to credit, or set-off, the contractual damages awarded in favor of the Wratchfords by the amount previously paid by Erie in satisfaction of the Wratchfords' mortgage. In so holding, the Wratchfords received a duplication of coverage benefits under the Erie Policy and a double satisfaction for a single injury. Contrary to the Circuit Court's determination, Erie clearly did not waive its right to set-off, either. Erie appropriately pleaded affirmative defenses pursuant to Rule 8 of the West Virginia Rules of Civil Procedure, including accord and satisfaction, payment, and release. For the reasons set forth herein, Erie respectfully requests that the Court reverse the Circuit Court's order and hold that Erie is entitled to a credit to the judgment award for contractual damages by $168,723.90.

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CERTIFICATE OF SERVICE

The undersigned, counsel for the Petitioner, Erie Insurance Property & Casualty Company, does hereby certify that on the 22nd day of November, 2024, the foregoing Petitioner's Brief was filed electronically with the Court via West Virginia's File & ServeXpress which will provide an electronic copy upon counsel of record.

/s/ Matthew J. Perry
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