IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO: 24-ICA-331

ERIE INSURANCE PROPERTY & CASUALTY COMPANY,
Petitioners
Defendants below,

v.

TAMMY S. WRATCHFORD and MICHAEL W. WRATCHFORD,
Respondents,
Plaintiffs below,

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

RESPONSE BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. STATEMENT OF CASE WITH PROCEDURAL HISTORY

The Petitioner, Erie Insurance Property & Casualty Company, hereinafter "Erie" brought a singular Assignment of Error claiming that the Circuit Court erred, as a matter of law, by failing to reduce, credit, or set-off the contractual damages awarded in favor of the Wratchfords at trial by $168,723.90, the amount previously paid by Erie in satisfaction of the Wratchford mortgage.[1] Erie claims that the payment of the mortgage in favor of the Wratchfords at Summit Community Bank constitutes a duplication of coverage benefits under the Erie policy. The Assignment of Error brought by Erie is based upon Erie's Post-Trial Motion to the Circuit Court under Rule 59 (e), West Virginia Rules of Civil Procedure, hereinafter, "WVRCP", to Alter or Amend the Judgment Order entered by the Court on March 18, 2024, JA 692, following a sixteen (16) day jury trial which concluded on May 25, 2023.

Erie first raised its demands for set-off, discount, and credit from contractual property damages in its post-trial motion filed with the Circuit Court on April 1, 2024, JA 692, to alter or amend the judgement of the Court in its Judgment Order of March 18, 2024, JA 686, based upon the verdict of the jury entered May 25, 2023, JA 682. Erie premised its Motion to Alter or Amend the Judgment, to Reduce the Award of Damages made by the jury and as granted within the Judgment Order of the Court upon Rule 59 (e) of the West Virginia Rules of Civil Procedure (WVRCP). The Circuit Court entered its Order denying Erie's Motion to Alter or Amend the Judgment on July 22, 2024, which includes the relevant procedural history, factual basis, and legal support of the Circuit Court in denying the Motion of Erie to Alter or Amend the Judgment and denying the Motion of Erie to Reduce the Award of Contractual Damages, all of which are incorporated by reference herein. JA 816.

[1] In West Virginia, a "mortgage" is actually a Deed of Trust.

Plaintiffs filed their Original Complaint in this action on February 13, 2018, therein demanding a trial by jury upon damages suffered by the Plaintiffs resulting from the fire of February 20, 2017, and for a determination of liability of Erie and others for those damages suffered by the Plaintiffs. JA 1. Erie filed its Answer to Plaintiffs' Complaint on April 6, 2018, therein denying liability for the property damages suffered by its insureds as a result of the fire at their dwelling in Moorefield, West Virginia, and denying liability for any other damages sought by the Plaintiffs below in their Original Complaint. JA 37. Erie filed no Affirmative Defense or Counterclaim for set-off, credit, reduction, recoupment, payment, satisfaction, or any other notice of claim related to the mortgage payment made by Erie under its policy of insurance with the Wratchfords in its Answer to Plaintiffs' Complaint.

Plaintiffs below filed an Amended Complaint on July 5, 2018, bringing additional parties into the action below including the West Virginia State Fire Marshal's Office, hereinafter "WVSFMO", and Ronald C. "Mackey" Ayersman, in his capacity as an Assistant State Fire Marshal. JA60. Erie filed its Answer to the Amended Complaint on July 10, 2018, again denying liability for any property damages under its policy, or for any other damages alleged by the Plaintiffs within their Amended Complaint. JA 105. Erie made no counterclaim or affirmative defense within its Answer to Plaintiffs' Amended Complaint for set-off, credit, off-set, discount, or any other claim giving notice on behalf of Erie, citing payment of the insured's Deed of Trust, to base any motion to alter or amend any verdict of the jury for property damages or judgment entered against Erie, either at trial or following trial, in the action below. Erie did make a very general Affirmative Defense within its Answer to Plaintiffs Amended Complaint under paragraph Twenty-Second Defense, JA 128, stating:

Twenty Second Defense

> These Defendants assert the defenses of accord and satisfaction, payment, release, waiver and assumption of risk.

Among the twenty-four general Affirmative Defenses made in its Answer to Plaintiffs' Amended Complaint, Erie failed to make any counterclaim or defensive pleading giving notice of any claim of set-off, discount, reduction, or credit against the property damages claimed by Plaintiffs within their Original Complaint and as restated in Plaintiffs' Amended Complaint as required by Rules of Pleading.

The sole post-trial motion filed by Erie on April 1, 2024, JA 692, for relief from the verdict of the jury of May 25, 2023, or the Judgment Order of the Court of March 18, 2024, was based upon Rule 59(e), WVRCP. Plaintiffs below filed their Response to the Motion of Erie to Alter or Amend Judgment on April 28, 2024, JA 783. The Motion of Erie to Alter or Amend Judgment filed April 1, 2024, JA 692, includes a statement of facts and citations of law upon which Erie claims the right to have the Judgement Order of the Court altered or amended by the Court. The Response of Plaintiffs filed below to the Erie Motion to Alter or Amend Judgment filed April 28, 2024, JA 783, also cites relevant underlying facts, and argues the law upon which the Motion of Erie to Alter or Amend the verdict of the jury and judgment of the Court should be denied. The Response of Plaintiffs below to the Motion of Erie to Alter or Amend Judgment is incorporated herein by reference. The Order of the Circuit Court Denying Erie's Motion to Alter or Amend the Judgment and to Reduce the Award of Contractual Damages entered July 22, 2024, JA 686, should be affirmed by this Court in its entirety based upon the findings of fact and conclusions of law cited by the Circuit Court therein and as argued in this Response.

II. SUMMARY OF ARGUMENT

1. Rule 59 (e), WVRCP, does not support Erie's Motion to Alter or Amend the verdict of the jury and the Judgment Order of the Court. Syl. Pt. 1 of *McDaniel v. Kleiss*, 198 W.Va. 282, 480 S.E. 2d 170 (1996) states:

> 1. Upon a motion to alter or amend a judgment, the trial Court may not enter a new judgment in an action in which there has been a trial by jury.

Rule 59 (a) and (b), WVRCP, require a Motion for New Trial to be filed with the Court within ten (10) days following entry of a judgment in an action tried by jury. Rule 59 (f) WVRCP notes that if a party fails to timely file a motion for a new trial after a trial by jury, the party is deemed to have waived all errors occurring during the trial. *Williams v. Charleston Area Medical Center, Inc.,* 215 W.Va. 15, at 19, 592 S.E. 2d 794 at 797, at FN. 3, confirms that following a trial by jury, a Motion to Alter or Amend Judgment under Rule 59 (e) of WVRCP is not a proper request. The Circuit Court below had no authority under Rule 59 (e) of WVRCP to alter or amend the Judgment Order or the verdict of the jury. Because Erie failed to file any Motion for New Trial under Rule 59(a) or (b), Erie cannot now modify its Motion to Alter or Amend under Rule 59 (e) of the WVRCP. Erie has waived all errors which may have occurred during the trial by its failure to move for a new trial under Rule 59(a) and (b).

2. Claims for reimbursement or set-off in a lawsuit arising out of the transaction complained of by the Plaintiffs must be described in a pleading as a compulsory counterclaim under Rule 13(a), WVRCP, and under W.Va. Code § 56-5-4 (for any debt) and § 56-5-5 (for any contract). Failing to plead and give notice of claims for reimbursement, set-off, off-set, credit, or reduction of damages must be raised in writing and noticed specifically by a Defendant, in this case, Erie, and any efforts by Erie now to prove reimbursement, set-off, accord and satisfaction,

or reduction are inadmissible under *Wood Coal Company v. Little Beaver Mining Corporation*, 145 W.Va. 653, 116 S.E. 2d, 394 (1960) at Syl. Pt. 2 which states:

> 2. In absence of a plea or notice specifying the items claimed where counterclaims of set-off or recoupment are asserted by a Defendant in an action on a contract, proof thereof is inadmissible, under procedure in effect prior to July 1, 1960.

Under *Hoover-Dimeling Lumber Company v. Neill*, 77 W.Va. 470, 87 S.E. 855, and *Monongahela Tie & Lumber Co. v. Flannigan*, 77 W.Va. 162, 87 S.E. 161 (1915) any pleas for set-off or demands for reduction from contractual liquidated damages must be pleaded and proved with proper notice given by the Defendant in a pleading filed with the Court before trial. Otherwise, the claims for set-off are waived. Id.

3. Rule 8 (c) of the WVRCP requires all Affirmative Defenses for claims of set-off, credit, or reimbursement, to be timely made in writing and properly pleaded as an Affirmative Defense of set-off, otherwise the Defendant waives any claim of entitlement to a set-off or a reduction. *Regency Communications, Inc. v. Cleartel Communications, Inc*., 304 F. Supp. 2d 1 (2004). Erie filed no Affirmative Defense for set-off or reduction in its original Answer; Erie filed no counterclaim at all; and Erie failed to specifically plead or notice claims for set-off in any pleading prior to trial. Erie's claim for set-off is a compulsory counterclaim under Rule 13(a) and must be specifically pleaded as a "setoff" in an affirmative defense. Rule 8(c); *Regency Communications, Inc. v. Cleartel Communications, Inc*., supra, 304 F. Supp. 1, at 7. Erie has waived its claims for setoff, reduction, or credit against the verdict of the jury and the judgment of the court by failing to file a notice pleading.

4. Review of the Answers filed by Erie in the civil action below demonstrate that Erie made no affirmative defense for "set-off," and filed no counterclaim for set-off, credit, reduction, or reimbursement for payment of the mortgage debt of the Wratchfords upon which to have the

jury or the Court make any consideration thereof, and provided no notice to the Plaintiffs below that any claim was being made for set-off, credit, reduction, or discount. Erie filed its Motion to Alter or Amend the Judgment Order of the Court on April 1, 2024, pursuant to Rule 59 (e) of WVRCP, after the jury had rendered a verdict on May 25, 2023 in favor of the Plaintiffs for liquidated damages to the dwelling which was damaged by fire on February 20, 2017; after the Judgment Order was entered by the Circuit Court on March 18, 2024; and upon which suit was filed by the Plaintiffs below on February 13, 2018. The Motion filed by Erie for credit and set-off violates the provisions of Rule 59 of the WVRCP and the case law cited herein, and pursuant thereto, the relief requested by Erie from the Intermediate Court of Appeals, hereinafter "ICA", cannot be granted under the existing rules and the existing law of the State of West Virginia. Erie raised no issue of credit, duplication of benefits under the insurance policy, or set-off before the Court or before the jury at trial. Erie presented no claim or evidence for credit or set-off at trial. In Order for the Court or the jury to have considered these purported contractual claims of Erie for credit or set-off, the issue was required to be raised by proper pleading before the trial. Id. Erie has waived all claims for setoff or credit from the property damages found by the jury at trial and by the Judgment Order of the circuit court following trial.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral Argument is necessary under Rule 19. The issues on appeal involve challenges to findings of fact and conclusions of law and ultimate disposition in matters generally related to settled law, abuse of discretion and under a clearly erroneous standard, and questions of law involving interpretation of statute and application of existing law. The appellate court will benefit from insights of counsel and explanation of issues during oral argument.

IV. STANDARD OF REVIEW

Challenges to findings of fact and conclusions of law of the Circuit Court are reviewed using a two-prong standard. The Final Order and ultimate disposition is under an abuse of discretion standard, and the Circuit Court's underlying findings of fact are reviewed under a clearly erroneous standard. *Phillips v. Fox*, 193 W.Va. 657, 661, 458 S.E. 2d 327, 331 (1995). See Syl. Pt. 1; *Burnside v. Burnside*, 194 W.Va. 263, 460 S.E. 2d 264 (1995); *McCormick v. Allstate Ins. Co*., 197 W.Va. 415, 475 S.E. 2d 507 (1996), Syl. Pt. 1.

Where an issue on appeal from Circuit Court is clearly a question of law, a *de novo* standard of review is applied. Syl. Pt. 2, *State ex rel. Orlofske v. City of Wheeling*, 212 W.Va. 538, 575 S.E. 2d 148 (2002); *Fauble v. Nationwide Mut. Fire Ins. Co*., 222 W.Va. 365, 664 S.E. 2d 706 (2008). The *de novo* standard of review includes interpretation or application of law to findings of fact. Syl. Pt. 1, *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 470 S.E. 2d 102 (1996). Questions of law involving an interpretation of a statute are reviewed applying a de novo standard. Syl Pt. 2, *Richardson v. Kentucky Nat. Ins. Co*., 216 W.Va. 464, 607 S.E. 2d 793 (2004).

V. ARGUMENT

1. Erie Failed to Comply with the West Virginia Rules of Civil Procedure and Statutory Law in Failing to File Affirmative Pleadings to Recover the Relief Demanded Within Their Assignment of Error for Reduction or Set-Off, and Erie Failed to Make Any Claim for Set-off or Credit Under the Insurance Contract with the Wratchfords. Erie Has No Legal Basis Now to Claim a Credit or Set-Off from the Contractual Property Damages Under the Erie Homeowner's Policy Granted at Trial.

The Answers of Erie to Plaintiffs' Original Complaint and Amended Complaint failed to give notice of any specific Affirmative Defense, or Counterclaim for set-off, reduction, or credit

against the liquidated damages claimed by the Plaintiffs below within their Complaint and Amended Complaint. Rule 13 (a), WVRCP, requires claims for credit, reimbursement or set-off in a lawsuit to be described within a written pleading as a compulsory counterclaim. W. Va. Code § 56-5-4 requires that any claims by a Defendant in a lawsuit for payment or set-off in any action on debt to be described within a pleading to be filed by a Defendant to give notice to a Plaintiff of the nature of the claims made. W.Va. Code § 56-5-5 requires a special plea for set-off in any action on contract in order to be considered for recoupment of any damages claimed by Plaintiffs. *Monongahela Tie & Lumber Co. v. Flannigan*, supra, requires a set-off to be noticed as a counter demand in a written pleading and proved as a cross action against a Plaintiff claiming liquidated damages in a suit for any debt. W.Va. Code § 56-5-5 requires a Defendant to file a written pleading for set-off in any action on a contract. Syl. Pt. 2 of *Wood Coal Co. Little Beaver Mining Corp.* , supra, states:

> 2. In the absence of a plea or notice specifying the items claimed where counterclaims of set-off or recoupment are asserted by a Defendant in an action on a contract, proof thereof is inadmissible, under procedure in effect prior to July 1, 1960.

Petitioner's Sole Assignment of Error and the Statement of Case in Petitioners' Brief clearly states that the claims of the Wratchfords under their homeowner's insurance policy are contractual. Erie's claims that W.Va. Code § 56-5-5 is "inapplicable" are disingenuous at best. The analogy sought by Erie of "settlement" is equally mis-applied. Erie has paid nothing on Plaintiffs' liquidated property damages, found by the jury and upon which the Judgment Order was entered, and there has been no Release signed.

Hoover-Dimeling Lumber Co. v. Neill, supra, states in its Syllabus:

> In an action for a debt, Defendant may at the trial offer and have allowed against such debt any payment or set-off which is so described in his plea or in his account

> filed therewith before trial as to give notice of its nature, whether he acquired the account before or since the commencement of the action.

Because Erie failed to file any specific written Affirmative Defense, Counterclaim, or Cross-Claim for set-off, credit, or recoupment against the liquidated property damages sought by the Plaintiffs within their lawsuit against Erie, Erie has waived any such claims of set-off, reimbursement, credit, or reduction from the Judgment Order or for the award of damages stated by the jury in the verdict form at trial for liquidated damages owed to the Plaintiffs, Wratchford, as a result of the fire of February 20, 2017, under the insurance policy found by the jury to exist in favor of the Wratchfords on their home at the time of the fire through the Erie Insurance Company.

The Erie policy of insurance entitled "Ultracover HomeProtector Insurance Policy", PE 5, JA 709, was found by the jury to be valid and in effect at the time of the fire at the Wratchford home on February 20, 2017. Verdict Form, Page 4, Question 5, JA 669. The jury specifically found that the Wratchfords had a valid policy of insurance with Erie at the time of the fire on February 20, 2017; that the Wratchfords were entitled to benefits under the Erie Insurance policy but that Erie breached the policy and did not provide those benefits; and that Erie's breach of the policy provisions of the homeowners insurance policy covering the Wratchford home at the time of the fire resulted in damages to Tammy S. and/or Michael W. Wratchford. Id. Liability of Erie to the Wratchfords for the liquidated damages found by the jury within the Verdict Form has been established with a Judgment Order entered by the Court on March 18, 2024, confirming the verdict of the jury entered May 25, 2023. Plaintiffs introduced into evidence before the jury without objection Plaintiffs' Exhibit 74, JA 139, the preliminary value found by Mike Phillips to repair the Wratchford dwelling following the fire as filed with Erie on April 26, 2017, and Plaintiffs' Exhibit 75A, JA 756, the replacement value of the Wratchford dwelling as a result of the February 20, 2017, fire at the Wratchford home as of February 14, 2023. Erie presented no argument or counter

evidence to claim set-off, credit, recoupment, discount or reduction from the undisputed amounts admitted without objection or contest before the jury at trial. The first notice that Erie gave for their claims of set-off, credit, reduction, or recoupment from the liquidated damages found by the jury to the Wratchford dwelling resulting from the February 20, 2017, fire, was within the post-trial motion of Erie to alter or amend the judgment to reduce the contractual damages found by the jury in its Verdict Form at Page 15, Question 15, Part II-Damages, JA 682. The jury found liquidated damages to the Wratchford home under "Dwelling Coverage" of $590,542.57, the exact amount of the Estimate of damages to the residence found by Michael Phillips, expert of Plaintiffs, as of February 14, 2023, Plaintiffs' Exhibit 75A, JA 756, admitted before the jury without objection, contest, or argument by Erie. The homeowner's policy of Erie in effect at the time of the fire for the Wratchford dwelling guaranteed the replacement cost of the home in a value to be proven by the insureds. The jury accepted the exact amount of the replacement cost for the dwelling under Plaintiffs' Exhibit 75A, of $590,542.57, JA 756. There was no pleading, evidence, instruction or verdict form requested by Erie to be presented to the jury for set-off, off-set, credit, or reduction of the liquidated property damages to the Wratchford dwelling for payments made by Erie to Summit Community Bank on Plaintiffs' Deed of Trust as required by statutory law and by existing case law cited herein. Based thereon, the Circuit Court had no legal right or authority to alter or amend the Judgment Order entered by the Court or to otherwise reduce the award made by the jury to the Plaintiffs as liquidated damages for the dwelling coverage under the homeowner's policy. The Appellate Court also has no legal authority enter any Order altering or amending the Judgment Order of the Court as demanded by Erie insofar as Erie failed to give notice of any counterclaim or affirmative pleading for "set-off" or "credit" prior to trial in the Circuit Court, and because Erie failed to comply with provisions of Rule 59 (a) and (b), WVRCP, following the trial.

Erie cites no valid legal authority upon which to premise its claim for set-off or credit. In order for the Court to consider the claims of Erie for set-off or credit, the Court must consider the written terms of the insurance policy, and evidence would have been required to be presented to the jury independently by the Defendant, Erie, to rebut the evidence presented by the insureds below. Erie presented no evidence, argument, or instructions of law below to have the jury consider set-off, credit, or "duplication of coverage", and there was no pleading filed by Erie with the Circuit Court below giving notice to the Court or the insureds of claims finally raised after trial. Erie now requests this Court to consider conflicting terms and provisions of the insurance contract, first raised after trial below and after entry of the Judgment Order below. Erie has cited no valid legal authority to allow such a belated process.

2. Erie Failed to File an Appropriate Motion Under Rule 59 of the WVRCP to Request a New Trial Upon the Verdict of the Jury in the Action Below.

The Erie Motion to Alter or Amend the Judgment Order of the Court to Reduce the Award of Contract Damages for the dwelling coverage of the Plaintiffs found by the jury at trial is solely pursuant to Rule 59 (e) of the WVRCP. Erie filed no motion for new trial under Rule 59 (a) or (b). Syl. Pt. 1 of *McDaniel v. Kleiss*, supra, states as follows:

> 1. "[U] upon a motion to alter or amend a judgment under Rule 59 (e)[, the trial court] may not enter a new judgment in an action in which there has been a trial by jury[.]" Syl. Pt. 4, in part, *Investors Loan Corp. v. Long*, 152 W.Va. 673, 166 S.E. 2d 113 (1969).

Investors Loan Corp. v. Long, supra, at Syl. Pt. 4 mandates even more clearly:

> 4. Under the provisions of Rule 59 (a) of the Rules of Civil Procedure the Court, upon a motion for a new trial in an action in which there has been a trial by jury, may grant a new trial, and in an action tried without a jury, may open the judgment and direct the entry of a new judgment; but the Court upon such motion or upon a motion to alter or amend a judgment under Rule 59 (e) may not enter a new judgment in an action in which there has been a trial by jury; and a new judgment

> entered by the Court in an action in which there has been a trial by jury is erroneous and will be set aside upon appeal.

Rule 59 (f), WVRCP, notes the effect of the failure of a party to make a motion for new trial. Specifically, Rule 59 (f), WVRCP states:

> (f) Effect of Failure to Move for New Trial. If a party fails to make a timely motion for a new trial, after a trial by jury in which judgment as a matter of law has not been rendered by the Court, the party is deemed to have waived all error occurring during the trial which the party might have assigned as grounds in support of such motion; … [effective July 1, 1960. Amended effective July 1, 1978; April 6, 1998.]

Rule 59 (f) was affirmed by the West Virginia Supreme Court of Appeals in *West Virginia Dept. of Transp., Div. of Highways v. Newton,* 235 W.Va. 267, 773 S.E. 2d 371 (2015). Because Erie failed to file a motion for new trial under Rule 59 (a), WVRCP, Erie has waived any relief demanded within its Motion to Alter or Amend Judgment to Reduce the Award of Contractual Damages filed with the Circuit Court on April 1, 2024. Simply stated, Erie filed no motion for new trial under Rule 59 (a). The sole post-trial motion filed by Erie is specifically limited to a Motion to Alter or Amend the Judgment Order pursuant to Rule 59 (e). Based thereon, the Circuit Court had no legal authority to consider granting Erie's Motion to Alter or Amend the Judgment to Reduce the Award of Contractual Damages as filed by Erie. Further, due to the limiting language of the Motion of Erie to Alter or Amend the Judgment to Reduce the Award of Contractual Damages filed with the Circuit Court on April 1, 2024, the Intermediate Court of Appeals also has no legal authority under the West Virginia Rules of Civil Procedure to favorably consider the assignment of error filed by Erie in this action for reduction, credit, or set-off of the award of liquidated property damages found by the jury in favor of the Wratchfords at trial for the amounts paid by Erie to the Summit Community Bank in satisfaction of the Wratchfords' mortgage under the terms of the homeowner's policy of insurance. Any consideration of the post-trial motion filed by Erie is necessarily for a new trial under Rule 59 (a). Because Erie failed to make any motion for new trial whatsoever under

Rule 59 (a), Erie has waived all errors claimed to have occurred during the trial of this action. Rule 59 (f), WVRCP; *West Virginia Dept. of Transp., Div. of Highways v. Newton,* supra.

3. There is no Provision in the Erie Insurance Policy to Allow Erie to Claim Reimbursement from the Insureds for the Guaranteed Replacement Cost of Their Dwelling Damages Caused by the Fire for Payments Under the "Mortgage Clause" of the Policy. Therefore, there is no "Duplication of Coverage Benefits."

In the event that Erie could somehow get past the rule violations and statutory violations cited hereinbefore, Erie would have no right to make a claim for reduction, credit, or set-off from the liquidated property damages found by the jury as the "guaranteed replacement cost" of the Wratchford residence under the Erie homeowner's policy. The "mortgage clause" stated in the Erie Insurance policy, PE 5, JA 709, at Page 13, JA 725, is a separate provision from the "promise" of Erie to pay the guaranteed replacement cost of the dwelling under "Property Protection-Section I" of the Homeowner's policy at Page 6, JA 718. The "Mortgage Clause" is not mentioned in the policy until Page 13, PE 5, JA 725. While Summit Community Bank is recognized within the policy as the "mortgagee", in order for Erie to claim any set-off, credit, recoupment, or reduction for the mortgage payment by Erie to Summit Community Bank, Erie was required under the WVRCP and by statutory law to present written notice and file written pleadings to make the claim for set-off, credit, reduction, or recoupment under the terms of the Erie policy of insurance; Erie was required to place affirmative evidence before the jury to notice any claims for set-off, credit, reduction or recoupment; Erie was required to place evidence before the jury to affirmatively prove the claimed set-off, credit, reduction, or recoupment under the terms of the insurance policy; and Erie was required to provide to the Court and ultimately to the jury an instruction and a provision in the Verdict Form to allow consideration of the policy terms in evidence for set-off, credit,

satisfaction, or recoupment from the liquidated damages of the jury for the amounts paid by Erie to Summit Community Bank under the mortgage clause of the homeowner's policy. Erie presented no notice, pleading or written claim to the Plaintiffs, the Circuit Court, or the jury, of any claim of set-off, credit, satisfaction, or recoupment for payments made to Summit Community Bank by Erie under the mortgage clause of the homeowner's policy issued to the Wratchfords and which covered the fire at the Wratchford's dwelling on February 20, 2017. Erie was presented with notice of the mortgage balance due by the Wratchfords to Summit Community Bank on February 21, 2017. PE 94B, JA 143. Erie did not pay any portion of the mortgage due to the Summit Community Bank until September 5, 2017. PE 78, JA 142. The jury had evidence before it demonstrating the date of payment of the Deed of Trust by Erie as noted by the Petitioner in its Brief from the testimony of Tammy Wratchford. The jury clearly found that Erie violated the written terms of the insurance policy contract as issued to the Wratchford insureds and did not grant any reduction of the property damages found to the dwelling from the fire as the guaranteed replacement cost under the policy. Erie filed no motion for new trial, so any potential error is waived.

The Erie homeowner's policy issued to the Wratchfords, PE 5, JA 709, was found in effect by the jury at Question 5, page 5, of the Verdict Form, JA 671. Due to the nature of the language of the homeowner's policy, and the WVRCP and West Virginia law, the claims made by the Wratchfords against Erie were for liquidated property damages under the dwelling coverage for the guaranteed replacement cost of their dwelling. Erie would have been required to file a compulsory counter-claim or a declaratory judgment action with the Circuit Court to determine whether or not Erie was entitled to reimbursement, recoupment, credit, or set-off, for those amounts paid by Erie to Summit Community Bank under the policy terms for the outstanding mortgage owed by the Wratchfords as of the date of the fire, February 20, 2017. The undisputed

evidence presented to the jury in Plaintiffs' Exhibit 78, JA 142, demonstrates that Erie did not pay the mortgage balance to Summit Community Bank until September 5, 2017, over six and one half (6 ½) months following the fire, clearly in violation of loss payment conditions stated within the homeowner's policy at Page 12, PE 5, JA 724. Then, when Erie finally paid the balance of the mortgage to Summit Community Bank, Erie failed and refused to pay the additional out of pocket interest and expenses paid by the insureds, Wratchford, from the date of the fire, until the mortgage was finally paid off by Erie. PE 78, JA 142. Erie was clearly in violation of the homeowner's insurance policy to the Plaintiffs when Erie finally paid off the Wratchford mortgage to Summit Community Bank. The jury was apprised of these issues during the trial. The claims of Erie of arson, misrepresentation, and violations of the policy by the insureds, Wratchford, were clearly found in error by the jury in granting its verdict in favor of the Plaintiffs at Page 4, Question 5, of the Verdict Form, JA 671, and at Page 15, Question 15, of the Verdict Form, JA 682, finding the dwelling coverage liquidated damage loss in the exact amount established in Plaintiffs' Exhibit 75A, $590,542.57, JA 756, which was admitted into evidence without objection, and which was undisputed in the evidence presented to the jury. Neither the Circuit Court nor the jury were presented any claim or opportunity to consider evidence of any conflicting terms of the insurance policy contract or the claimed rights of Erie versus its insureds. Thereby, Erie cannot now claim a waiver of notice requirements or waiver of evidence necessary to prove and discern the terms of the policy contract as written by Erie.

Erie has no legal authority to claim any right under the homeowner's insurance policy to set-off or a "duplication of benefits", and the legal authorities cited by Erie do not support the claims now made by Erie in its Petition. Erie filed no declaratory judgment action below and filed

no pleading below noticing its demand for off-set as a conflicting term of the Erie insurance policy. Erie has waived any right to now claim setoff or duplication of coverage benefits.

4. Erie Has Failed to Plead or Otherwise Make a Legal Claim for Relief, and Erie has Failed to Demonstrate a Violation of Any West Virginia Law as "Double Satisfaction for a Single Injury".

Erie has no automatic right to claim a set-off, credit, reduction, or recoupment under the homeowner's insurance policy without a judicial determination of the respective rights of the parties under the policy. Erie failed to comply with the West Virginia Rules of Civil Procedure, Rule 13 in failing to affirmatively plead in a compulsory counterclaim; Rule 8, setting forth a specific written claim for relief; Rule 59 (a), a motion for new trial; statutory law under W. Va. Code § 56-5-4, requiring a written plea for set-off in any suit for debt, and/or W.Va. Code § 56-5-5, a written plea in any action on a contract, stated in a written counterclaim; and/or in a compulsory pleading for declaratory judgment and/or explicit pleading giving notice of an adjudication of the terms of the homeowner's insurance policy covering the fire at the time of the damage on February 20, 2017, for purposes of set-off, credit, reduction, or recoupment. Erie has no legal right to prosecute its Motion to Alter or Amend the Judgment Order of the Circuit Court, or to prosecute this appeal under the assignment of error as stated and/or from the Erie Motion to Alter or Amend the Judgment to Reduce the Award of Contractual Damages under Rule 59 (e) upon claims that the terms of the insurance policy may be conflicting as to the claimed rights of Erie for "set-off" versus its insureds and the "guaranteed replacement cost" coverage for their dwelling damaged in the fire. There has been no "double recovery of damages" by the Wratchfords under the Erie homeowner's policy. *Harless v. First Nat. Bank in Fairmont,* 169 W.Va. 673, 289 S.E. 2d 692 (1982), does support the Erie claims of "double recovery" and is distinguished by the

circumstances upon which the cited law is proposed by Erie. The Wratchfords rely on the express terms of the Erie policy and the pleadings filed in the action below. Erie's Assignment of Error explicitly states that Erie claims a credit or set-off from the contractual damages awarded to the Wratchfords by the jury and the Judgment Order of the court. Erie filed no such pleading or notice with the Circuit Court below. There was no "double satisfaction". Erie has yet to satisfy the judgment granted by the Court to the Wratchfords, found by the jury against Erie, in its Judgment Order of March 18, 2024, and there has been no release obtained from the insureds.

The belated Affirmative Defense asserted by Erie in the Answer to Plaintiffs' Amended Complaint is not sufficient to premise the claims of Erie to set-off or credit against the contractual damages awarded to the Wratchfords in the action below for all those reasons stated herein.

VI. CONCLUSION

WHEREFORE, upon the forgoing, Petitioners respectfully request the Court to affirm the Circuit Court *Order Denying Erie Insurance Property & Casualty Company's Motion to Alter or Amend the Judgment and to Reduce the Award of Contractual Damages and Vacate the Award of Non-Contractual Damages* entered July 22, 2024.

Tammy S. Wratchford and Michael W. Wratchford
Respondents/Plaintiffs Below

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CERTIFICATE OF SERVICE

The undersigned counsel for the Respondents, Tammy S. Wratchford and Michael W. Wratchford, does hereby certify that on the 11th day of December, 2024, the *Response Brief of Respondents* was filed electronically with the Court via West Virginia Fire & ServeXpress, which provided an electronic copy upon counsel of record.

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