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 REPLY BRIEF

Matthew J. Perry, Esquire WVSB 8589
Jill E. Lansden, Esquire WVSB 12769
BURNS WHITE, LLC
720 Fourth Avenue
Huntington, West Virginia 25701
(304) 523-5400
mjperry@burnswhite.com
jelansden@burnswhite.com
Counsel for Petitioner

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(s)

Cases

Statutes

Rules

Other Authorities

ARGUMENT

The Wratchfords' Response Brief asserts three primary arguments for the proposition that they should be entitled to a double recovery in this case. First, the Wratchfords argue Erie waived its right to the requested credit by failing to assert an affirmative defense or counterclaim for the credit. Second, they argue that the judgment may not be altered or amended pursuant to Rule 59, and because Erie does not request a new trial, its request is waived. The Wratchfords finally attempt to recharacterize the plain terms of the Erie Policy and suggest that the Erie Policy provides multiple and separate dwelling coverages. In making these arguments, the Wratchfords seek to have this Court require Erie to satisfy their mortgage *and* also pay dwelling coverage benefits for the replacement cost of their house. For the following reasons, each of the Wratchfords' arguments fail.

As the West Virginia Supreme Court of Appeals held in syllabus point 2, *Doe v. Pak*, 237 W.Va. 1, 784 S.E.2d 328, 329 (2016), "When an insurer makes an advance payment to a tort-claimant upon condition that the advance payment will be credited against a future judgment or determination of damages, the damages recovered by the claimant on a subsequent judgment shall be reduced by the amount of the advance payment." Erie is entitled to its requested credit.

A. ERIE DID NOT WAIVE ITS RIGHT TO A CREDIT FOR PRIOR PAYMENT

I. Erie Specifically Pleaded Affirmative Defenses Entitling It To The Requested Credit

The Wratchfords first argue that Erie failed to file a specific, written affirmative defense, counterclaim, or cross-claim 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." *See* Response Brief of Respondents at p. 2. A simple review of Erie's Answer reveals the obvious error of the

Wratchfords' position.[1] In furthering their argument, the Wratchfords blatantly disregard Erie's specifically pleaded affirmative defenses of accord and satisfaction, payment, release, waiver, and assumption of risk in its Answer. [J.A. 128]. The Wratchfords additionally overlook that Erie expressly incorporated all affirmative defenses as provided for by Rule 8, Rule 9, and Rule 12 of the West Virginia Rules of Civil Procedure, including "all other applicable defenses." [*Id.*].[2]

In an effort to overcome the specifically pleaded affirmative defenses of Erie, the Wratchfords claim Erie was required to file an additional "notice" and offer evidence at trial with instruction to the jury pursuant to W.Va. Code § § 56-5-4 and 56-5-5. However, a plain reading of W.Va. Code § § 56-5-4 and 56-5-5 demonstrates that those statutory provisions are wholly inapplicable to this case. First, W.Va. Code § 56-5-4 involves lawsuits for the collection of a "debt" and no "debt" was owed in this case. Second, W. Va. Code § 56-5-5, while involving claims for breach of contract, addresses the assertion of specific types of defenses, including the defense that money is owed to the contracting party. Erie has never asserted that it was owed money by the Wratchfords – it simply seeks to avoid having to pay the Wratchfords twice for the same element of damage.

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. Enacted in 1868, the full text of W.Va. Code § 56-5-4 provides as follows:

---

[1] The Circuit Court's finding 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] is equally unsupported by the record.

[2] Erie's Twenty-Second Defense provided, "These Defendants assert the defenses of accord and satisfaction, payment, release, waiver, and assumption of risk. Erie's Twenty-Third Defense provided, "These Defendants further incorporate herein all affirmative defenses provided for by Rule 8, Rule 9, and Rule 12 of the West Virginia Rules of Civil Procedure." Erie's Twenty-Fourth Defense, "These Defendants incorporate herein all applicable affirmative defenses to this action. . .". [J.A. 128].

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

W. Va. Code Ann. § 56-5-4. Broadly, Black's Law Dictionary defines debt as "**1.** Liability on a claim; a specific sum of money due by agreement or otherwise. **2.** The aggregate of all existing claims against a person, entity, or state **3.** A nonmonetary thing that one person owes another, such as goods or services. **4.** A common-law writ by which a court adjudicates claims involving fixed sums of money." DEBT, Black's Law Dictionary (12th ed. 2024). While "debt" is not a defined term in Chapter 56, Article 5 of the West Virginia Code, it is a defined term in various other chapters of the Code. In W.Va. Code § 5A-3-10a, debt is defined as

> any assessment, premium, penalty, fine, tax or other amount of money owed to the state or any of its political subdivisions because of a judgment, fine, permit violation, license assessment, amounts owed to the Workers' Compensation Funds as defined in § 23-2C-1 *et seq.* of this code, penalty or other assessment or surcharge presently delinquent or due and required to be paid to the state or any of its political subdivisions, including any interest or additional penalties accrued thereon.[3]

In the Debt Management Act, W.Va. Code § 12-6A-1, *et seq*. debt is defined as "bonds, notes, certificates of participation, certificate transactions, capital leases, debentures, lease

[3] Chapter 5A, Article 3 governs the Purchasing Division of the Department of Administration in this State.

purchases, mortgages, securitizations and all other forms of securities and indebtedness obligations evidencing specific amounts owed and payable on demand or on determinable dates." W.Va. Code § 12-6A-4. In West Virginia's Consumer Credit and Protection Act, W.Va. Code 46A-2-101, *et seq*., "debt collection" is defined as "any action, conduct or practice of soliciting claims for collection or in the collection of claims owed or due or alleged to be owed or due by a consumer." W.Va. Code § 46A-2-122. "Claim" is "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or service which is the subject of the transaction is primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment. *Id*.

Clearly, the underlying case was not a case on "debt." At its core, the case against Erie centered on a coverage dispute following a fire loss that occurred on February 20, 2017 at the Wratchfords' home in Moorefield, Hardy County, West Virginia. By way of their Amended Complaint, the Wratchfords asserted the following causes of action 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. [J.A. 60-101]. As is evident by the Amended Complaint, there was never an effort by either Erie or the Wratchfords to collect on a "debt" of the Wratchfords. Plaintiffs' reliance on W.Va Code § 56-5-4 is misplaced and misconstrues West Virginia law.

W.Va. Code § 56-5-5 is equally inapplicable. Originally enacted in the Virginia Code in 1848, the full text of W.Va. Code § 56-5-5 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 credit 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. Moreover, the "may" necessarily implies the permissive nature of the statute. Erie seeks to have this Court recognize and apply a prior payment, or credit, towards the satisfaction of the judgment in this matter, as a matter of law. The Wratchfords' reliance on W.Va. Code § 56-5-5 is misplaced. Erie has plainly not waived its right to credit the judgment with amounts previously paid in satisfaction of the Wratchfords' mortgage. [4]

[4] Even assuming *arguendo* that the foregoing code sections were applicable, courts have held that when an insurer pays off its insured's mortgage under a mortgage clause, the insurer is *not* required to assert a compulsory counterclaim to collect on the note. *See McPheeters v. Community Federal Savings and Loan Association,* 736 S.W.2d 62 (Mo.Ct.App.1987), wherein the court ruled that an insurer's right to pay off its insured's mortgagee under a mortgage clause and then seek to collect on the note is not a right that must be asserted as a compulsory counterclaim in the defense of an earlier action initiated by the insured under the policy. *Id.* at 64.

II. The Court May Appropriately Consider Erie's Request For Credit Under Rule 59(e) As The Interpretation Of The Erie Policy Is A Matter Of Law

Next, the Wratchfords argue waiver on the basis that Erie's request for the credit at-issue here was made pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure.[5] As an initial matter, Rule 59(e) is the appropriate post-trial procedure through which the Circuit Court should have applied a credit for amounts previously paid in partial satisfaction of the judgment, because the application of the requested credit involves the interpretation of the insurance policy at issue, which the Court must do *as a matter of law*. Further, in opposing the application of a credit towards the judgment, the Wratchfords are clearly seeking a duplication of coverage benefits under the Erie Policy, in direct conflict with the terms of the insurance policy and well-settled West Virginia law. To allow the Wratchfords a double recovery would clearly result in an obvious injustice. ("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." Syllabus point 2, *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W.Va. 48, 717 S.E.2d 235 (2011)).

The Wratchfords argue Erie's requested credit is not appropriate under Rule 59(e) insofar as the underlying matter was tried by jury. In support of their position, the Wratchfords cite to the West Virginia Supreme Court of Appeals' holding *McDaniel v. Kleiss*, 198 W.Va. 282, 480 S.E.2d 170 (1996), wherein the Supreme Court of Appeals held that a judgment reflecting a jury award should not be altered under Rule 59(e). *Id*. at 285-286, 480 S.E.2d at 173-174. *McDaniel* is inapposite.

[5] Erie's request for a credit, or set-off, initially was made in conjunction with a request to vacate the jury's award of non-contractual damages and was not made solely on the issues presented in this appeal.

McDaniel involved claims for negligence arising from a motor vehicle accident. *Id*. at 283, 480 S.E.2d at 172. Following a two-day jury trial, the jury awarded the plaintiff damages in the total amount of $154,283.42. *Id*. Because the jury attributed forty-percent (40%) fault for the accident to the plaintiff, the circuit court reduced the damages award by 40% and entered judgment against the defendant in the amount of $92,893.80 plus pre-judgment interest. *Id*. The plaintiff timely filed a Motion to Alter or Amend the Jury's Verdict and argued that the circuit court's reduction for his attributable liability was made in error. *Id*. at 283-284, 480 S.E.2d 172-173. The plaintiff also filed a motion pursuant to Rule 60(b) and asserted mistake by the jury as a basis for his requested relief. *Id*. As grounds for both motions, the plaintiff relied upon discovery that the jury had deducted the 40% liability attributable to the plaintiff in making its award. After hearing arguments and taking evidence, the circuit court found that the "Plaintiff has suffered the deduction of 40% for his negligence twice" and increased the judgment to the sum of $154,823.42 plus prejudgment interest. *Id*.

On appeal, the West Virginia Supreme Court of Appeals reversed the circuit court's decisions on both the Rule 59(e) and Rule 60(b) motions of the plaintiff. *Id*. In reversing the plaintiff's Rule 59(e) motion, the Supreme Court held, with little discussion, that the circuit court improperly altered the jury's verdict under 0Rule 59(e) insofar as the case was tried by a jury. *Id*. at 285-286, 480 S.E.2d at 173-174. As to the circuit court's decision the judgment could be altered under Rule 60(b) on the basis of mistake, the Supreme Court of Appeals reasoned that the circuit court's decision to increase the jury's award was based on juror testimony, or a proffer of evidence, that the jury wrongly deducted the plaintiff's apportionment of fault in arriving at its damage award improperly invaded the deliberative process of the jury in violation of Rule 606(b) of the West Virginia Rules of Evidence. *Id*. at 286-290, 480 S.E.2d 174-178.

While the present case was decided by a jury, *McDaniel* is easily distinguishable because Erie does not seek to alter or amend the jury's award. Importantly, Erie in no way is seeking to alter or change the amount of the jury's verdict. Rather, Erie is simply seeking to receive a credit for amounts already paid towards that judgment. Erie requested the Circuit Court to interpret the Erie Policy and determine that the judgment, without credit for the prior payment made in satisfaction of the Wratchfords' mortgage, resulted in a duplication of coverage benefits under the Erie Policy. Interpretation of the Erie policy and the determination of whether there was a duplication of benefits is a question of law reserved to the Court. *See Allied World Surplus Lines Ins. Co. v. Day Surgery Ltd. Liab. Co.,* 451 F.Supp.3d 577, 582 (S.D. W.Va. Mar. 31, 2020).

Here, unlike in *McDaniel*, Erie does not seek to alter the jury's underlying damages award in the case. Rather, it seeks to have this Court recognize and apply a prior payment, or credit, towards the satisfaction of that damage award, as a matter of law. The relief sought by way of Erie's motion would not, in any way, alter or amend the jury's verdict. Erie does not dispute the award of $590,542.57 award for dwelling coverage under the Erie Policy. However, the terms of the Erie Policy – interpretation of which is a question for *the court* to decide – does not permit duplicative payment of benefits, and thus entitles Erie to a credit, or offset, of the amount owed towards the judgment. That distinction is critical as to why the relief sought by Erie is entirely appropriate under Rule 59(e) of the West Virginia Rules of Civil Procedure.[6]

Separately, Erie seeks to correct verdict inconsistencies as a matter of law by way of its Motion. On this point, the Court should look to the Federal Rules of Civil Procedure for guidance. It is well-established that the West Virginia Rules of Civil Procedure are patterned after the Federal

[6] Even so, some federal courts hold that Rule 59(e) can be used to alter or amend a judgment entered in a jury or bench trial. *See Brown v. Presbyterian Healthcare Servs*., 101 F.3d 1324 (10th Cir. 1996); *Atlantic States Legal Foundation, Inc. v. Karg Bros., Inc*., 841 F. Supp. 51 (D.C.N.Y. 1993); *Mumma v. Reading Co.*, 247 F. Supp. 252 (D.C.Pa. 1965).

Rules of Civil Procedure and thus substantial weight should be given to federal courts' interpretations of the federal counterpart to the West Virginia rule. *See Keplinger v. Virginia Elec. & Power Co.,* 208 W.Va. 11, 20 n. 13, 537 S.E.2d 632, 641 n. 13 (2000).("Because the West Virginia Rules of Civil Procedure are patterned after the Federal Rules of Civil Procedure, we often refer to interpretations of the Federal Rules when discussing our own rules; *see also Painter v. Peavy,* 192 W.Va. 189, 192 n. 6, 451 S.E.2d 755, 758 n. 6 (1994) ("Because the West Virginia Rules of Civil Procedure are practically identical to the Federal Rules, we give substantial weight to federal cases ... in determining the meaning and scope of our rules.").

As explained in the Litigation Handbook on West Virginia Rules of Civil Procedure, "Federal Courts hold that a Rule 59(e) motion, in its roles of correcting manifest errors of law, may be used to contest verdict inconsistencies." *See* Louis J. Palmer, Jr. and Robin Jean Davis, "Litigation Handbook on West Virginia Rules of Civil Procedure," § 59(e), pg. 1377 (2017) citing *Loughridge v. Chiles Power Supply Company, Inc*., 431 F.2d 12668 (10th Cir. 2005). Here, the Court may appropriately order the relief sought by Erie under Rule 59(e) in order to correct the verdict inconsistency which necessarily results in a duplication of coverage benefits, and ultimately, a double recovery by the Wratchfords.

III. The Court Can Also Grant Erie Its Requested Credit Under Rule 60(b)

Alternatively, the Court may also appropriately order the relief requested by Erie by virtue of Rule 60(b)(6) of the West Virginia Rules of Civil Procedure. Rule 60(b)(6) allows relief from judgments for "any other reason justifying relief from the operation of judgment." It is well-settled in West Virginia that Rule 60 grants the circuit courts with broad discretion to accomplish justice. *See Savas v. Savas,* 181 W.Va. 316, 382 S.E.2d 510, 512 (1989); *Rich v. Rich,* 178 W.Va. 791, 364 S.E.2d 804, 805 (1987). As to the Federal counterpart to West Virginia's Rule 60(b)(6), it has been observed that "the [trial] court has a broad legal discretion to grant or deny relief *in light of*

all the relevant circumstances . . .". Cruciotti v. McNeel, 183 W. Va. 424, 430, 396 S.E.2d 191, 197 (1990) quoting 7 J. Moore & J. Lucas, *Moore's Federal Practice* para. 60.27[2], at 60–273 (1990) (emphasis added). "Rule 60(b)(6) is the "catch-all clause in Rule 60 gives the [trial] court a 'grand reservoir of equitable power to do justice in a particular case.' " Cruciotti at 430, 396 S.E.2d at 197 quoting *Radack v. Norwegian America Line Agency, Inc.,* 318 F.2d 538, 542 (2d Cir.1963). Clearly, allowing the Wratchfords a duplication of coverage benefits and a double recovery would not do justice in this case. West Virginia law favors the application of Erie's requested credit.

B. THE SATISFACTION OF THE WRATCHFORDS' MORTGAGE WAS FOR THE BENEFIT OF THE WRATCHFORDS AND THUS ERIE IS ENTITLED TO ITS REQUESTED CREDIT

Lastly, the Wratchfords incorrectly assert that Erie's satisfaction of the Wratchfords' mortgage is not duplicative of the jury's award for dwelling coverage under the Erie Policy because it "is a separate provision from the 'promise' of Erie to pay the guaranteed replacement cost . . .". *Respondents' Response Brief* at p. 13. This position incorrectly assumes that the Erie Policy contains multiple dwelling coverages.

The terms of the Erie Policy reveal the fallacy of the Wratchfords' argument on this point. By its terms – each of which must be given effect -- 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.. [J.A. 725]. Importantly, the Erie Policy also 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. [J.A. 754]. The standard mortgage clause in Property Protection-Section 1 of the Erie Policy recognized the legal priority of Summit Community Bank, the mortgagee identified on the Erie Policy, to any loss settlement and/or loss payment made pursuant to the Erie Policy. [J.A. 726]. (*See* syl. pt. 3 of

Jones v. Wesbanco Bank Parkersburg, 194 W. Va. 381, 382, 460 S.E.2d 627, 628 (1995), "If a fire insurance contract between an insurer and a 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.")

At trial, the testimony and evidence presented was that the total replacement cost for the Wratchford's dwelling was $590,542.57, inclusive of the $168,723.90 paid by Erie to Summit Community Bank in September 2017. Summit Community Bank took priority to the $168,723.90 due under the Wratchfords' mortgage at the time of the fire. The payment to Summit was inclusive of the dwelling coverage afforded by the Erie Policy, *not in addition to it*.

"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." *Selby v. Union Auto. Indem. Ass'n*, 164 Ill. App. 3d 34, 35–36, 517 N.E.2d 687, 688 (1987). Through its payment to Summit in the amount of $168, 723.90, Erie partially satisfied the Wratchfords' dwelling coverage under the Erie Policy. Under these circumstances, allowing Erie the requested credit prevents any double recovery of contractual damages. *See* syllabus point 2, *Doe v. Pak*, 237 W.Va. 1, 784 S.E.2d 328, 329 (2016) ("When an insurer makes an advance payment to a tort-claimant upon condition that the advance payment will be credited against a future judgment or determination of damages, the damages recovered by the claimant on a subsequent judgment shall be reduced by the amount of the advance payment."). The Wratchfords'

suggestion that the Erie Policy contains separate promises to pay dwelling coverage under the Erie Policy makes little sense, and lacks any support within the Erie Policy or West Virginia law.

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 Wratchfords' assertion and the Circuit Court's determination, Erie clearly did not waive its right to the requested credit. Erie appropriately pleaded affirmative defenses pursuant to Rule 8 of the West Virginia Rules of Civil Procedure, including accord and satisfaction, payment, and release. Erie is entitled for amounts previously paid in satisfaction of the Wratchfords' mortgage. For the reasons set forth herein and more fully set forth in Erie's Opening Brief, 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.

/s/ Matthew J. Perry
Matthew J. Perry, Esquire WVSB 8589
Jill E. Lansden, Esquire WVSB 12769
BURNS WHITE, LLC
720 Fourth Avenue
Huntington, West Virginia 25701
(304) 523-5400
mjperry@burnswhite.com
jelansden@burnswhite.com
Counsel for Petitioner

CERTIFICATE OF SERVICE

The undersigned, counsel for the Petitioner, Erie Insurance Property & Casualty Company, does hereby certify that on the 31st day of December, 2024, the foregoing Petitioner's Reply 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
Matthew J. Perry WVSB 8589
Jill E. Lansden WVSB 12769