
INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

OAK POINT PARTNERS, LLC,

Petitioner,

v.

LARRY PACK, in his Official Capacity as
Treasurer of the State of West Virginia,

Respondent.

From the Circuit Court of Kanawha County, West Virginia
Civil Action No. 25-C-812

RESPONDENT'S BRIEF

LARRY PACK, in his official capacity as
Treasurer of the State of West Virginia,

By counsel,

JOHN B. MCCUSKEY
ATTORNEY GENERAL

Christopher Starr Etheredge (WVSB No. 13835)
Assistant Attorney General
State Capitol Complex
Building 1, Room W-435
Charleston, WV 25305
Telephone: (304) 558-2522
Facsimile: (304) 558-2525
ceetheredge@wvago.gov

Table of Contents

Introduction.....	1
Counterstatement of the Case	2
Summary of Argument.....	5
Statement Regarding Oral Argument and Decision.....	6
Argument	6
I. Standard of Review	6
II. The Circuit Court correctly found that Oak Point’s Complaint failed to state a claim for which relief could be granted because the Treasurer acted within his discretion in denying Oak Point’s claims.	6
(a) Oak Point waived its arguments regarding the appropriate standard of review because it did not raise it below.	7
(b) Oak Point’s insistence that the Act provides for a <i>de novo</i> review would render the Act unconstitutional.	8
(c) “Original action” means “original <i>appellate</i> action” under the Act.	13
(d) The Treasurer acted within his authority when demanding unredacted documents.	17
III. To the extent that the Circuit Court was required to conduct a <i>de novo</i> review, its failure to do so was harmless error because Oak Point cannot establish its claims as a matter of law.	19
Conclusion	21
Certificate of Service	22

Table of Authorities

	Page(s)
<i>Appalachian Power Co. v. State Tax Dep’t</i> , 195 W. Va. 573, 466 S.E.2d 424 (1995)	23
<i>Birchfield v. Zen’s Development, LLC</i> , 245 W. Va. 82, 857 S.E.2d 422	4
<i>City of Huntington v. State Water Commission</i> , 135 W. Va. 568, 64 S.E.2d 225 (1951)	15, 16, 17
<i>Danielley v. City of Princeton</i> , 113 W. Va. 252, 167 S.E. 620 (1933).....	1
<i>Equip. LLC v. City National Bank of West Virginia</i> , 244 W. Va. 508, 854 S.E.2d 870 (2020)	7
<i>Evans v. Bayles</i> , 237 W. Va. 269, 787 S.E.2d 540 (2016)	11, 12
<i>Fields v. Mellinger</i> , 244 W. Va. 126, 851 S.E.2d 789 (2020)	13, 14
<i>Hishon v. King & Spalding</i> , 467 U.S. 69, 104 S. Ct. 2229 (1984).....	7
<i>Hodges v. Public Service Com’n</i> , 110 W. Va. 649, 159 S.E. 834 (1931).....	1
<i>In re John T.</i> , 225 W. Va. 638, 695 S.E.2d 868 (2010)	21
<i>In re Stephen Tyler R.</i> , 213 W. Va. 725, 584 S.E.2d 581 (2003)	18
<i>Kirkpatrick v. Lenoir County Bd. of Educ.</i> , 216 F.3d 380 (2000).....	20
<i>Kopelman & Assoc., L.C. v. Collins</i> , 196 W. Va. 489, 473 S.E.2d 910 (1996)	7
<i>Lincoln County Board of Education v. Adkins</i> , 188 W. Va. 430, 424 S.E.2d 775 (1992)	23
<i>Martin v. Randolph Cnty. Bd. of Ed.</i> , 195 W. Va. 297, 465 S.E.2d 399 (1995)	22, 23
<i>Orphanos v. Rodgers</i> , 250 W. Va. 442, 903 S.E.2d 623 (App. 2024).....	25
<i>PITA, LLC v. Segal</i> , 249 W. Va. 26, 894 S.E.2d 379 (App. 2023).....	25
<i>Rucho v. Common Cause</i> , 588 U.S. 684, 139 S. Ct. 2484 (2019).....	5
<i>Sally-Mike Properties v. Yokum</i> , 179 W. Va. 48, 365 S.E.2d 246 (1986)	21
<i>Smith v. State Workmen’s Comp. Comm’r</i> , 159 W. Va. 108, 219 S.E.2d 361 (1975)	18
<i>State ex rel. Cohen v. Manchin</i> , 175 W. Va. 525, 336 S.E.2d 171 (1984)	18, 19
<i>State ex rel. Division of Human Services by Mary C.M. v. Benjamin P.B.</i> , 183 W. Va. 220, 395 S.E.2d 220 (1990)	20
<i>State ex rel. McGraw v. Burton</i> , 212 W. Va. 23, 569 S.E.2d 99 (2002)	13, 14

<i>State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.</i> , 194 W. Va. 770, 461 S.E.2d 516 (1995)	7
<i>State v. Epperly</i> , 135 W. Va. 877, 65 S.E.2d 488 (1951)	18
<i>State v. LaRock</i> , 196 W. Va. 294, 470 S.E.2d 613 (1996)	4
<i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114 (1995).....	20
<i>Twentieth Street Bank v. Jacobs</i> , 74 W. Va. 525, 82 S.E.2d (1914)	16
<i>W. Va. Dept. of Hum. Servs. v. David B.</i> , 251 W. Va. 217 911 S.E.2d 884 (2024).....	23
<i>W. Va. Health Care Cost Rev. Auth. v. Boone Mem'l Hosp.</i> , 196 W. Va. 326, 472 S.E.2d 411 (1996).....	23
<i>West Virginia Reg. Jail & Corr. Fac. Auth. v. A.B.</i> , 234 W. Va. 492, 766 S.E.2d 751 (2014)	11

Statutes

W. Va. Code § 17A-6-22	18
W. Va. Code § 36-8-15	2, 16, 23, 25
W. Va. Code § 36-8-16	passim
W. Va. Code § 36-8-29	16
W. Va. Code § 36-8-31	17
W. Va. Code § 36-8-15(b)	2, 21
W. Va. Code § 36-8-1	2, 17
W. Va. Const. art. 4, § 8	14
W. Va. Const. art. 5, § 1	13
W. Va. Const. art. 7, § 1	13

Rules

W. Va. R. Civ. P. 12(b)(6)	3, 7
W. Va. R. Civ. P. 13(g)	19
W. Va. R. App. 21	7

Regulations

W. Va. Code R. §112-05.....	2, 23
-----------------------------	-------

Introduction

The question presented in this action is whether the West Virginia Constitution permits circuit courts to engage in a *de novo* review of administrative decisions rendered by the constitutional officer to whom the Legislature has exclusively assigned the role of rendering such decisions in the first instance. For nearly a century, the Supreme Court of Appeals has said “no.” *See, e.g., Hodges v. Public Service Com’n*, 110 W. Va. 649, 159 S.E. 834 (1931) (“[Q]uestions of governmental or administrative policy [] are not of judicial cognizance, and jurisdiction over them, by appeal or otherwise, cannot be conferred upon the courts by statute.”) (citations omitted). In such circumstances, the court’s review is limited to one for an abuse of discretion. *See Danielley v. City of Princeton*, 113 W. Va. 252, 252, 167 S.E. 620, 622 (1933) (“[T]he court cannot substitute its discretion for that of the commission lawfully exercised . . . Whenever a subject is committed to the discretion of the legislative or executive department, the lawful exercise of that discretion cannot be controlled by the judiciary.”).

Recognizing its role in the constitutional structure, the circuit court below appropriately applied the abuse of discretion standard in a statutory appeal from the Treasurer’s decision to deny Petitioner’s unclaimed property claims. Finding that the Treasurer appropriately exercised discretion in accordance with his constitutional and statutory authorities, the circuit court appropriately dismissed the action below for failure to state a claim for which relief could be granted. On appeal to this Court, Petitioner argues for the first time and with limited support that it was entitled to a *de novo* review of the Treasurer’s decision. This Court should decline Petitioner’s invitation, as Petitioner’s view would render unconstitutional the very statute upon which Petitioner premises its claims. The circuit court below correctly and appropriately treated Petitioner’s claim as an appeal of the Treasurer’s decision, which is precisely what the Constitution requires. Accordingly, its decision should be affirmed.

Counterstatement of the Case

West Virginia's Unclaimed Property Act (the "Act") requires the Treasurer to take custody of and safeguard designated classes of abandoned property. *See generally* W. Va. Code § 36-8-1, *et seq.* The Act sets forth a statutory process that individuals and organizations claiming an interest in abandoned property must utilize to prove their ownership and take possession of such property. *See* W. Va. Code § 36-8-15. The claim process begins when a claimant "file[s] a claim on a form prescribed by the administrator and verified by the claimant." W. Va. Code §36-8-15. Claimants must accompany their claim forms with identification, an affidavit, and "any other evidence the [Treasurer] may require in order to allow [the] claim." W. Va. Code R. §112-05.

Once a claim has been filed, the Treasurer has 90 days either to allow it or deny it. W. Va. Code § 36-8-15(b). If the Treasurer denies the claim, he "shall inform the claimant of the reasons for the denial and specify what additional evidence is required before the claim will be allowed. The claimant may then file a new claim with the [Treasurer] or maintain an action under [W. Va. Code § 36-8-16]." *Id.*; *see* W. Va. Code § 36-8-16 ("A person aggrieved by a decision of the [Treasurer] or whose claim has not been acted upon within ninety days after filing may maintain an original action to establish the claim in the circuit court of Kanawha County, naming the administrator as a defendant."). If the claimant establishes the claim in court, the court may award the claimant reasonable attorney's fees. *See id.*

* * *

In the action below, Petitioner, Oak Point Partners, LLC ("Oak Point"), filed a complaint (Oak Point's "Complaint") against Respondent, Treasurer Larry Pack (the "Treasurer") in the Circuit Court of Kanawha County (the "Circuit Court"), alleging that the Treasurer wrongfully denied 113 claims for abandoned property that Oak Point filed between February 9, 2023 and June 27, 2025. *See* Compl. ¶¶ 9–15, App. 7–8.

Oak Point did not have any interest in the subject properties when they were abandoned; instead, it “became the owner of the unclaimed property by virtue of an asset purchase agreement (“APA” or “APAs”) with the prior owner.” *Id.* ¶ 10. Oak Point alleges that it provided the Treasurer “with proof of its ownership of the unclaimed property, including a copy of the [APAs].” *Id.* ¶ 13. However, Oak Point “redacted the purchase price paid to the prior owner on each [APA],” claiming “these amounts are confidential.” *Id.* According to Oak Point, “[t]he purchase price is the only term of the [APAs] [that it] redacted.” *Id.* Oak Point acknowledges that the Treasurer requested unredacted versions of the APAs, that Oak Point refused to provide them, and that representatives from the Treasurer’s office told Oak Point that the reason its claims were denied was due to its failure to provide unredacted versions of the APAs. *Id.*

The Treasurer moved to dismiss the Complaint pursuant to and in accordance with Rule 12(b)(6) of the *West Virginia Rules of Civil Procedure*, arguing that the Treasurer was authorized to request unredacted APAs and to deny Oak Point’s claims when it refused to provide them. *See* Mot. Dismiss (the Treasurer’s “Motion”), App. 15–22.¹ In response, Oak Point argued that “[t]o grant the Treasurer’s Motion would be to deny Oak Point the appeal right that the Treasurer acknowledges exists under the law.” Oak Point’s Resp. to Treasurer’s Motion (Oak Point’s

¹ The Treasurer also explained that Oak Point’s confidentiality concerns were unfounded because records of abandoned property are exempt from West Virginia’s Freedom of Information Act (the “FOIA”). *See* Treasurer’s Mot. 3–4. In its Response to the Treasurer’s Motion, Oak Point argued that the Act would not exempt the APAs from disclosure under the FOIA because the Act exempts only “records of abandoned property kept by the administrator.” Oak Point’s Resp. 8, App. 32. In his Reply, the Treasurer explained that while Oak Point was correct that “*some* records within the Treasurer’s purview are subject to FOIA, the records Oak Point refuses to provide are not.” Treasurer’s Reply, 2; *see id.* 5 (explaining that “if the property that forms the basis of Oak Point’s claim is *not* abandoned, then Oak Point has no claim at all, as only *abandoned* property qualified for a claim.”). Notably, Oak Point appears to have abandoned and has accordingly waived its FOIA arguments on appeal. *See Birchfield v. Zen’s Development, LLC*, 245 W. Va. 82, 94, 857 S.E.2d 422, 434 (2021) (“Although we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.”) (quoting *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996)).

“Response”) 5, App. 29 (asking the Circuit Court below [(the “Circuit Court”)] to determine “[w]hether [the Treasurer’s] denial was ‘proper’). In support, Oak Point argued that “[n]either the Act nor the Rules developed by the Treasurer permit the Treasurer to demand unnecessary or irrelevant documentation before allowing a claim for unclaimed property.” *Id.* 6.

In his Reply, the Treasurer agreed that W. Va. Code § 36-8-16 provided the Circuit Court with subject matter jurisdiction, but Oak Point could not state a claim for which relief could be granted under the Act because Oak Point refused to comply with the Treasurer’s lawful request for unredacted versions of the APAs. *See* Treasurer’s Reply 2–3, App. 38–39 (explaining that “judicial action must be governed by *standard*, by *rule*, and must be principled, rational, and based upon reasonable distinctions found in the Constitution or laws”) (quoting *Rucho v. Common Cause*, 588 U.S. 684, 718, 139 S. Ct. 2484, 2507 (2019)). The Treasurer also explained that unredacted versions of the APAs were relevant both to his determination of Oak Point’s claims and to his broader responsibility to effectively administer the Act. *See id.* at 3–4, App. 39–40 (explaining that the Treasurer requires unredacted documents in order to determine and verify who owns abandoned property, and his obligations as the Act’s administrator permit him to require unredacted documents in order to comply with his statutory obligations to make effective recommendations to the Legislature).

On October 28, 2025, the Circuit Court entered its “Order Granting Motion to Dismiss” (the “Order”). App. 57. In its Order, the Circuit Court found that “the Act sets forth the exclusive means by which Oak Point may establish its claims,” and “there is no basis to reverse or reconsider the Treasurer’s decision because the Treasurer denied Oak Point’s claims for reasons that the Act specifically permits him to deny claims when claimants fail to provide evidence that the Treasurer

requested.” Order, App. 61 ¶¶ 24–25. Accordingly, the Circuit Court granted the Treasurer’s Motion “for failure to state a claim for which relief may be granted.” *Id.* 62.

Summary of Argument

On appeal, Oak Point argues that the Circuit Court erred because (1) Oak Point pleaded a claim under the Act, (2) Oak Point was entitled to a *de novo* review as opposed to an appeal of the Treasurer’s determination; and (3) the Treasurer abused his discretion in denying Oak Point’s claims. *See* Pet. 4–5. Oak Point’s arguments are unavailing and largely unsupported, and this Court should affirm the Circuit Court’s decision for the following reasons:

First, the Circuit Court appropriately dismissed the action below because the Treasurer lawfully exercised his discretion to deny Oak Point’s claims. The “original action” to which Petitioner was entitled was an appeal the Treasurer’s determination, and there is no question that the Treasurer acted within his discretion in denying Oak Point’s claims. Accordingly, the Circuit Court correctly and appropriately dismissed the Complaint, and its decision should be affirmed.

Second, even if Oak Point was entitled to *de novo* review, the evidence upon which Oak Point relies is categorically insufficient to establish an interest in the subject properties as a matter of law. Oak Point’s refusal to provide unredacted versions of the APAs deprives the Treasurer, the Circuit Court, and this Court of any basis to determine that Oak Point has any interest in the subject properties, as the unredacted APAs do not exhibit any form of consideration. In the absence of proof of a valid and enforceable contract depicting a lawful transfer of the subject properties to Oak Point, the Circuit Court does not have any lawful authority to approve Oak Points claims.

At bottom, Oak Point has not and cannot establish its claims unless and until it produces unredacted versions of the APAs. Accordingly, the Treasurer was entitled to dismissal from the action below as a matter of law, and this Court should affirm the Circuit Court’s decision.

Statement Regarding Oral Argument and Decision

Pursuant to Rules 18(a)(3) and (4) of the *West Virginia Rules of Appellate Procedure*, oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process will not be significantly aided by oral argument. This appeal is appropriate for resolution by memorandum decision in accordance with Rule 21 of the *West Virginia Rules of Appellate Procedure*. Should this Court wish to hear oral arguments, oral arguments under Rule 19 would be the most appropriate.

Argument

I. STANDARD OF REVIEW

“Appellate review of a circuit court’s order granting a motion to dismiss a complaint is *de novo*.” Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995). The purpose of a Rule 12(b)(6) motion to dismiss is to test the “adequacy of the claims and the notice provided by the allegations in a pleading.” *Mountaineer Fire & Resc. Equip. LLC v. City National Bank of West Virginia*, 244 W. Va. 508, 520, 854 S.E.2d 870, 882 (2020). “[A]lthough the plaintiff enjoys the benefit of all inferences that reasonably may be drawn from the pleadings, a party’s legal conclusions, opinions, or unwarranted averments of fact will not be deemed admitted.” *Kopelman & Assoc., L.C. v. Collins*, 196 W. Va. 489, 493, 473 S.E.2d 910, 914 (1996) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 104 S. Ct. 2229, 2232 (1984)).

II. THE CIRCUIT COURT CORRECTLY FOUND THAT OAK POINT’S COMPLAINT FAILED TO STATE A CLAIM FOR WHICH RELIEF COULD BE GRANTED BECAUSE THE TREASURER ACTED WITHIN HIS DISCRETION IN DENYING OAK POINT’S CLAIMS.

In its first and second assignments of error, which this section will address together, Oak Point argues that the Circuit Court erred by finding that the Treasurer acted within his discretion when he denied Oak Point’s claims because “this case is not an appeal of the Treasurer’s

decision . . . Instead, this case is an action to establish Oak Point's Claims." Pet. 7. More particularly, Oak Point argues that "the Circuit Court appears to have viewed this case as an appeal of the Treasurer's decision to deny Oak Point's Claims, rather than an original action to establish Oak Point's Claims." *Id.* 8. As a preliminary matter, Oak Point's argument fails because it did not raise it below. More significantly, Oak Point's argument *must* fail because the standard of review it proposed would render the judicial review section of the Act unconstitutional.

Fortunately, this Court does not need to take such drastic action, as well-established law and the canons of statutory construction firmly support the Circuit Court's view that its jurisdiction below was limited to determining whether the Treasurer abused his discretion in denying Oak Point's claims. For reasons made clear *infra* and on the record below, the Circuit Court correctly concluded that "the Treasurer acted within his discretion and authority under the Act when [he] denied Oak Point's claims." Order ¶ 24, App. 54. Its decision should be affirmed.

(a) Oak Point waived its arguments regarding the appropriate standard of review because it did not raise it below.

West Virginia appellate courts do "not consider, for the first time on appeal, a matter that has not been determined by the lower court from which the appeal has been taken." *Evans v. Bayles*, 237 W. Va. 269, 275, 787 S.E.2d 540, 546 (2016); *see* Syl. Pt. 13, *West Virginia Reg. Jail & Corr. Fac. Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751 (2014) ("Courts cannot concoct or resurrect arguments neither made nor advanced by the parties."). This Court should not consider Oak Point's argument that it was entitled to *de novo* below because it did not raise that issue below. Indeed, Oak Point argued the *opposite* below, expressly treating the Treasurer's Motion as an appeal of the Treasurer's decision to deny Oak Point's claims.

In its response to the Treasurer's Motion to Dismiss, Oak Point explicitly acknowledged that the action provided by W. Va. Code § 36-8-16 is an "unambiguous" right to "appeal" the

Treasurer's decision. APP. 29 ("To grant the Treasurer's Motion would be to deny Oak Point the *appeal right* that the Treasurer acknowledges exists under law . . ."); *id.* (Oak Point arguing that its right to appeal the Treasurer's decision was grounded in "unambiguous statutory language"); *id.* 33 ("[T]he *Treasurer* has no basis to deny Oak Point's claims") (emphasis added); *id.* 31 (describing the action below as one "to *challenge* the Treasurer's evidentiary demands") (emphasis added); *Challenge*, *Black's Law Dictionary* (10th ed. 2014) ("An act or instance of formally questioning the legality or legal qualifications of a person, action, or thing"). Indeed, "[w]hether [the Treasurer's denial of Oak Point's claims] was 'proper' in some sense is essentially what Oak Point is asking this Court to decide." *Id.*

Oak Point expressly treated the action below as an appeal of the Treasurer's decision to deny Oak Point's claims and it did not raise any arguments to the contrary, so the Circuit Court neither ruled nor had occasion to rule on that question. Accordingly, Oak Point waived the argument, and the Circuit Court's decision should be affirmed.

(b) Oak Point's insistence that the Act provides for a *de novo* review would render the Act unconstitutional.

Courts in this state must "bear[] in mind that the Legislature is presumed not to have enacted an unconstitutional Act." *City of Huntington*, 135 W. Va. 568, 578 (1951)⁷. Accordingly, courts must, "if [they] can, interpret the statute in such a way as to render it constitutional." *Id.* If this Court accepts Oak Point's definition of "original action" as providing for a *de novo* review, it would render that section of the Act would be unconstitutional. *See id.* at 576 (vesting circuit courts with jurisdiction to conduct a *de novo* review of an administrative question would "necessarily" render the statute void). If, on the other hand, this Court accepts the Treasurer's interpretation of the Act as permitting only an appeal of the Treasurer's determination, then the Act is constitutional, and the Circuit Court's decision must be upheld.

A constitution is the fundamental law by which all people of the state are governed. It is the very genesis of government. Unlike ordinary legislation, a constitution is enacted by the people themselves in their sovereign capacity and is therefore the paramount law. This basic organic law can be altered or rewritten only in the manner provided for therein.

Fields v. Mellinger, 244 W. Va. 126, 129, 851 S.E.2d 789, 792 (2020).

The Constitution of West Virginia divides the state’s government into three branches whose powers “shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time” W. Va. Const. art. 5, § 1 (describing the doctrine of “separation of powers”). The Supreme Court of Appeals has described the doctrine of separation of powers as bearing two distinct aspects: (1) the “constitutional inability of the Legislature to define the powers and duties of the . . . other constitutional officers so as to deprive [them] of the inherent functions and purposes thereof”; and (2) “maintenance of the concept of an executive branch that is itself divided among the several constitutional offices provided for in the *Constitution*, each with a separate, distinct, and vital contribution to be made to the operation of the executive branch.” *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 32–33, 569 S.E.2d 99, 108–09 (2002) (constitutional officers’ duties are “to be implied from the nature of the office and of them he may not be deprived or relieved”).

The Constitution of West Virginia created the position of Treasurer as a public officer within the executive branch, but it did not specifically designate the Treasurer’s powers, providing instead that he or she “shall perform such duties as may be prescribed by law.” *See* W. Va. Const. art. 7, § 1 (“The executive department shall consist of a governor, secretary of state, auditor, treasurer, commissioner of agriculture and attorney general”). In turn, the Constitution provides that “[t]he Legislature, in cases not provided for in this constitution, shall prescribe, by

general laws, the terms of office, powers, duties and compensation of all public officers and agents” W. Va. Const. art. 4, § 8.

To ensure that constitutional officers can perform their “inherent constitutional functions” while maintaining the balance that the Constitution compels, the Supreme Court of Appeals has held that the Legislature may not adopt any statute, policy, rule, or practice that “operate[s], alone or cumulatively, to limit, reduce, transfer, or reassign the duties and powers of the [office] in such a fashion as to prevent that office from performing its inherent constitutional functions.” Syl. Pt. 6, *State ex rel. McGraw v. Burton*, 212 W. Va. 23, 569 S.E.2d 99 (2002).

Significantly, the “[t]he Legislature cannot commit to the judiciary powers which are primarily executive.” Syl. Pt. 1, *Danielly*. Indeed, the Supreme Court of Appeals has long recognized that the separation of powers requires the judiciary to show considerable deference to discretionary judgments by administrative officers, and “**whenever a subject is committed to the discretion of the legislative or executive department, the lawful exercise of that discretion cannot be controlled by the judiciary.**” *Id.* at 252 (emphasis added) (“This inhibition is so well established that it should be known even to the sciolist. Supine or usurpatory would be the court that would accept from a Legislature the feigned bestowal of power to override the lawful exercise of executive discretion.”).

In *Danielley*, the Supreme Court of Appeals held that statutes providing for judicial review of administrative decisions are unconstitutional when they permit circuit courts to “hear and consider any pertinent and relevant evidence and to determine all questions arising on the law and evidence and render such judgment or make such order upon the whole matter.” *Id.* Put differently, **judicial review of *judicial* questions is permitted, but judicial review of *administrative* questions is not.** See *City of Huntington v. State Water Commission*, 135 W. Va. 568, 575, 64

S.E.2d 225, 229 (1951) (“If the review contemplated by [the statute] is that of judicial, as distinguished from administrative, questions, [the statute] is constitutional; but if the review contemplates . . . the determination of administrative questions, to that extent at least [the statute] is unconstitutional.”).

Following *Danielley*, the Supreme Court of Appeals held that an “essential difference” between a constitutional statute and its unconstitutional predecessor was that “the original section . . . provides for the taking of evidence, [which] constitutes the circuit court as a tribunal to hear the case *de novo*”. *Id.* at 575 (permitting circuit courts to take and hear evidence on appeal of an administrative decision is an “inherent vice” that renders the statute unconstitutional).² In other words, the Constitution does not permit circuit courts to conduct “a trial *de novo*” of an administrative decision—that is, “jurisdiction to do everything which the [state agencies] were required to do under the statutes . . . which jurisdiction necessarily involved the exercise of administrative or legislative functions.” *Id.* at 574.

Here, the crux of Oak Point’s argument is that the Circuit Court erred because it treated Oak Point’s claims as an appeal of the Treasurer’s determination. *See* Pet. 4 (“[T]his is not an appeal from the Treasurer’s denial of Oak Point’s Claims. Rather, it is an action to establish oak Point’s Claims in the Circuit Court.”); *id.* 8 (arguing that “the Act does not require any judicial review of the Treasurer’s decision”). Indeed, Oak Point claims that “the Legislature created this cause of action to give an aggrieved claimant, such as Oak Point, the ability to establish its claim in circuit court, ***before a different fact finder.***” *Id.* (emphasis added).

² Importantly, the *City of Huntington* court did not vitiate *all* review of administrative determinations. *See* 135 W. Va. at 230 (“Wherever by a dearth in a statute there is given no statutory right to review, the writ of certiorari is available in order to obtain judicial review of the findings of an administrative board.”). In any case, the Act here *does* permit judicial review, it simply limits that review to an appeal of the Treasurer’s determination.

Tellingly, Oak Point does not cite any West Virginia cases in support of its position. Indeed, Oak Point does not cite any cases at all—it cites only a “guidebook” by the West Virginia Society of Public Accountants and drafter’s comments to the 1995 Uniform Unclaimed Property Act upon which Oak Point alleges the Act is based. *See* Pet. 8. But the guidebook plainly misstates the law (claiming the Act creates a “civil action” instead of the “original action” the Act permits), and the drafter’s comments do not appear anywhere in West Virginia’s version of the Act.³ Accordingly, this Court should disregard them. *See City of Huntington*, 135 W. Va. at 577 (Courts must interpret statutes, “if [they] can . . . in such a way as to render [them] constitutional,” and they will “uphold the statute as constitutional, if a reasonable interpretation thereof will so permit”).

Treasurer Pack is a constitutional officer, and courts must presume that the Legislature appreciates his role as a separate, distinct, and vital component of the executive branch. The Legislature designated the Treasurer as the Act’s administrator, and the plain language of the Act permits him to determine when and under what conditions claims have been established under the Act. *See* W. Va. Code § 36-8-15. The Act provides for an “original action to establish the claim in the circuit court of Kanawha County,” but it does not specify the standard of review the circuit court is to perform. For nearly a century, courts in this state have interpreted such statutes as providing only a review for abuse of discretion.

³ The Treasurer acknowledges that the Act has language stating that it “shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of [the Act] among states enacting it.” W. Va. Code § 36-8-29; *but see* Syl. Pt. 3, *Twentieth Street Bank v. Jacobs*, 74 W. Va. 525, 82 S.E.2d 320 (1914) (“In determining the meaning of a statute, it will be presumed, in the absence of words therein specifically indicating the contrary, that the Legislature did not intent to innovate upon, unsettle, alter, violate, repeal, or limit another general statute or statutory system, the entire subject-matter of which is not directly nor necessarily involved in the act.”). Paradoxically, it is *Oak Point*’s position that would result in disjunctive results—the Treasurer acknowledges that the Act permits an appeal of his determination, whereas Oak Point’s position would result in that section of the Act being deemed unconstitutional.

Oak Point asks this Court to adopt a reading of the Act that would require the Circuit Court to conduct a *de novo* review of Oak Point’s claims—to take and weigh evidence to determine whether Oak Point has or can establish a claim independently from the Treasurer’s determination. In other words, Oak Point suggests that the Legislature intended to reassign those duties from the Treasurer to the judiciary, which is *precisely* the type of executive second-guessing judicial review that the Supreme Court of Appeals has held unconstitutional for nearly a century. Thus, to the extent that the Act requires a *de novo* review, that section of the Act is unconstitutional.⁴

In *City of Huntington*, the Supreme Court of Appeals remanded the action with directions for the circuit court to “ascertain whether the [agency’s] finding . . . was based upon an abuse of its power, or that the [agency] exceeded its power, or exercised it in an arbitrary manner.” 135 W. Va. at 578. In other words, the appropriate level of review in such circumstances is one for abuse of discretion. That is precisely the standard that the Circuit Court applied below, and its decision should accordingly be affirmed.

(c) “Original action” means “original *appellate* action” under the Act.

The Act provides that claimants that are *aggrieved* by the Treasurer’s determination may “maintain an original action to establish the claim in the Circuit Court of Kanawha County, naming the [Treasurer] as a defendant.” W. Va. Code § 36-8-16. The term “original action” is not defined, but the Constitution of West Virginia, the plain language of the Act, and the canons of statutory construction all compel the conclusion that the Legislature did not intend the term “original action” to create an independent civil action in circuit courts—it intended only to provide a means to determine whether the Treasurer acted within his constitutional and statutory powers.

⁴ See W. Va. Code § 36-8-31 (severability clause providing that invalid provisions “do[] not affect other provisions or applications of [W. Va. Code § 36-8-1, *et seq.*] which can be given effect without the invalid provision or application.”).

When called upon to discern the meaning of a statute or regulation, West Virginia courts “resort[] to well-accepted rules of statutory construction.” *In re Stephen Tyler R.*, 213 W. Va. 725, 740, 584 S.E.2d 581, 596 (2003). Of course, “[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” *Id.* (quoting Syl. Pt. 1, *Smith v. State Workmen’s Comp. Comm’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975)). “Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” *Id.* (quoting Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951)). Where, as here, “a word employed in a statute is not specifically defined by the Legislature, [courts] resort to the commonly accepted usage of that term. Each word of a statute should be given some effect and a statute must be construed in accordance with the import of its language.” *Id.* “Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning.” *Id.* (quoting Syl. Pt. 6, *State ex rel. Cohen v. Manchin*, 175 W. Va. 525, 336 S.E.2d 171 (1984)).

The term “original action” appears six times elsewhere in code, and all such contexts make clear that the term “original action” simply means the first thing you file with someone or something with jurisdiction over the issue.⁵ See W. Va. Code § 17A-6-22 (creating original action with Motor Vehicle Dealers Advisory Board; § 29-12A-6 (distinguishing between an original

⁵ “Original action” is not defined in Black’s Law Dictionary, either, but analogous definitions suggest that it simply means a claim in *court* to reconsider the Treasurer’s determination. For instance, “jurisdiction” means “[a] court’s power to decide a case or issue a decree,” and the term “original jurisdiction” means “[a] court’s power to hear and decide a matter *before any other court can review the matter.*” *Black’s Law Dict.*, (10th Ed.) (emphasis added). In other words, adding “original” to “jurisdiction” simply means that some *courts* may hear and decide some matters before any other *courts* may do so. Similarly, “action at law”⁵ means “[a] *civil* suit stating a *legal cause of action* and seeking only a *legal remedy.*” *Id.* In turn, “civil law” means “the law of civil or private rights, *as opposed to . . . administrative law.*” *Id.* (emphasis added). In other words, “original action” for purposes of the Act simply means that the Circuit Court of Kanawha County is the first *court* with authority to provide a *legal remedy* when a claimant feels *aggrieved* by the Treasurer’s *administrative* decision. Thus, the Circuit Court’s review below was *definitionally* an “original action.”

action and other civil actions); § 33-10-35 (an order from the Insurance Commissioner “shall have the same force and effect, shall be entered and docketed and may be appealed from, *as if it were a judgment in an original action brought in the court in which the proceeding is pending*”); § 37-6-17 (rent attachment proceedings to be tried in circuit court “as if it were an original action brought in said circuit court,” which means that “original actions” can originate outside of circuit court); § 46-7-603 (UCC permits bailees to withhold delivery to determine validity of adverse claims to property held through an interpleader “either in defending the action for nondelivery of goods or by original action”); § 56-5-4 (permitting plaintiffs in suits for debt to respond to the defendant’s proffer of payment and or setoffs as if the defendant had filed an original action).

The *West Virginia Rules of Civil Procedure* use the term “original action” simply to refer to the original pleading (“A pleading may state as a crossclaim any claim by one party against a co-party if the claim arises out of the transaction or occurrence that is the matter of the *original action* or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action.”). W. Va. R. Civ. P. 13(g). Similarly, the Supreme Court of Appeals uses the term “original action” in *res judicata* cases to refer to the prior, separate action in which the claims were originally adjudicated, including original actions before administrative bodies. *See State ex rel. Division of Human Services by Mary C.M. v. Benjamin P.B.*, 183 W. Va. 220, 225, 395 S.E.2d 220, 225 (1990) (denying claim because “the mother and child were not in privity in the original action,” which occurred in another state); Syl. Pt. 4, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995) (setting forth the criteria by which an administrative decision will attach for *res judicata* purposes in a subsequent civil proceeding).

The Fourth Circuit Court of Appeals has also recognized that there is a distinction between “civil actions” and other “original actions.” *See Kirkpatrick v. Lenoir County Bd. of Educ.*, 216

F.3d 380 (2000) (finding that a federal statute permitting a person aggrieved by an administrative ruling to file a *civil claim* constituted an “original *civil* action” as opposed to an original *appellate* action). In reaching its conclusion, the *Kirkpatrick* court noted that its ruling was guided in part by the fact that the federal statute in question provided specific guidance regarding the evidence the federal district court could receive and the relief it could award. *See id.* at 384 (“Additionally, evidence received by the district court and the remedies are more akin to an original civil action.”). Furthermore, the federal statute expressly “authorizes district courts to exercise their discretion and grant such relief as the court determines is appropriate.” In *Kirkpatrick*, the Fourth Circuit held that its decision was guided “most importantly” by principles of federalism, noting that “[f]ederal district courts [have] no power to sit as appellate tribunals over state court or administrative proceedings.” *Id.*

Here, the “original action” created by the Act is only available when a person a person has been “aggrieved by a decision of the [Treasurer].” W. Va. Code § 36-8-15(b); *see Aggrieved*, *Black’s Law Dictionary* (10th ed.) (“(Of a person or entity) having legal rights that are adversely affected; having been harmed by an infringement of legal rights.”). Indeed, § 36-8-16 contemplates a lawsuit *against* the Treasurer (either as a result of his decision or his failure to reach one within 90 days). The Act is silent as to what evidence circuit courts may receive and—other than attorney’s fees—the relief they can provide. *See* W. Va. Code § 36-8-16. And the fact that § 36-8-16 permits an *aggrieved* party to recover *attorney fees* in a case *against* the Act’s *administrator* strongly suggest that the Legislature intended the “original action” the Act provides to be limited to an appeal of the Treasurer’s determination. *See In re John T.*, 225 W. Va. 638, 642, 695 S.E.2d 868, 872 (2010) (“This Court has long recognized . . . the “American” rule . . . the purpose of [which] is to allow ‘equal access to the courts for the resolution of *bona fide* disputes.’”); Syl. Pt.

3, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986) (noting that “[t]here is authority in equity to award to the prevailing litigant his or her reasonable attorney’s fees as ‘costs’ . . . when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.”). Indeed, it is *extremely* unusual under the American Rule that litigants are permitted to recover attorney fees in the absence of bad faith or needlessly protracted proceedings, and the fact that the Legislature permits recovery of attorney’s fees in original actions under the Act strongly suggests that the Legislature intended that action to be a limited appeal from the Treasurer’s decision, after which the circuit court *may* award attorney fees where they are warranted.

The canons of statutory construction uniformly compel the conclusion that the “original action” permitted by the Act is limited to an appeal of the Treasurer’s determination. Accordingly, the Circuit Court’s decision should be affirmed.

(d) The Treasurer acted within his authority when demanding unredacted documents.

Oak Point argues that “[i]t is extremely unlikely that the Legislature intended to grant the Treasurer broad power to demand any document, any evidence from any claimant, and to further permit the Treasurer to refuse to pay claims unless he receives whatever he demands.” Pet. 10. But the plain text of the Act suggests that that is *precisely* what the Legislature intended. *See Martin v. Randolph Cnty. Bd. of Ed.*, 195 W. Va. 297, 312, 465 S.E.2d 399, 414 (1995) (“Courts must presume that the Legislature says in a statute what it means and means in a statute what it says.”).

Oak Point argues that the Circuit Court erred by finding that “(1) neither the Act nor the legislative rules specify documents the Treasurer may request, nor do they prohibit the Treasurer from requesting specific types of documents or information; and (2) the Legislature has expressly permitted the Treasurer to require whatever documents he thinks are necessary before approving or denying a claim for unclaimed property.” Pet. 9 (quoting Order, APP.61). According to Oak

Point, “[n]either the Act nor the Code of State Rules [] permit the Treasurer to demand unnecessary or irrelevant documentation before allowing a claim for unclaimed property.” *Id.* Oak Point’s arguments fail because the Circuit Court correctly stated the law and because the information the Treasurer requested is neither unnecessary nor irrelevant to determination of Oak Point’s claims.

The Supreme Court of Appeals has observed that “[i]t is by now commonplace that when faced with a problem of statutory construction, the circuit court and [appellate courts] should give some deference to the interpretation of the officer who is charged with statutory implementation.” *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 313, 465 S.E.2d 399, 415 (1995). Indeed, “[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.” Syl. Pt. 7, in part, *Lincoln County Board of Education v. Adkins*, 188 W. Va. 430, 424 S.E.2d 775 (1992). And, “[o]f course, when there is more than one reasonable interpretation, the courts ordinarily should follow that of the administrative [official].” *Martin*, 195 W. Va. 297 at 313. This is especially true where, as here, the official “has some expertise in making these determination.” *Id.*

Under the Act, those claiming an interest in abandoned property must “file a claim on a form prescribed by the administrator and verified by the claimant.” W. Va. Code §36-8-15. The form must be accompanied by identification, an affidavit, and “any other evidence the [Treasurer] may require in order to allow [the] claim.” W. Va. Code R. §112-05; *see W. Va. Dept. of Hum. Servs. v. David B.*, 251 W. Va. 217, 228 911 S.E.2d 884, 895 (2024) (quoting Syl. Pt. 2, in part, *W. Va. Health Care Cost Rev. Auth. v. Boone Mem’l Hosp.*, 196 W. Va. 326, 472 S.E.2d 411 (1996) (“Being an act of the West Virginia Legislature, [a legislative rule] is entitled to more than mere deference; it is entitled to controlling weight.”). Indeed, “[o]nce a disputed regulation is legislatively approved, it has the force of a statute itself.” *Appalachian Power Co. v. State Tax*

Dep't, 195 W. Va. 573, 585, 466 S.E.2d 424, 436 (1995). If the Treasurer denies a claim, he “shall inform the claimant of the reasons for the denial and specify what additional evidence is required before the claim will be allowed.” W. Va. Code § 36-8-15. If the Treasurer either denies a claim or fails to act upon it within 90 days, then the claimant may “maintain an original action to establish the claim in the circuit court of Kanawha County, naming the administrator as a defendant. If the claimant establishes the claim in court, the court may award the claimant reasonable attorney's fees. W. Va. Code § 36-8-16.

The Act and its concomitant legislative rules unambiguously permit the Treasurer to ask for any evidence the Treasurer may require in reaching a determination, and they certainly permit him to require unredacted versions of documents the claimant is relying upon to establish ownership. Most significantly, the relevant legislative rule plainly permits the Treasurer to require “any evidence” he deems necessary to determine that a claim has been established, and Oak Point’s position would render that rule meaningless. Furthermore, as more fully developed below, Oak Point’s redactions make it impossible for the Treasurer to determine whether Oak Point has any ownership interest in the subject properties at all. Accordingly, this Court should affirm the Circuit Court’s decision below.

III. TO THE EXTENT THAT THE CIRCUIT COURT WAS REQUIRED TO CONDUCT A *DE NOVO* REVIEW, ITS FAILURE TO DO SO WAS HARMLESS ERROR BECAUSE OAK POINT CANNOT ESTABLISH ITS CLAIMS AS A MATTER OF LAW.

In its first and third assignments of error, which this section will address together, Oak Point argues that “if Oak Point were to establish its Claims to the satisfaction of the Circuit Court, then Oak Point’s claims must be allowed.” Pet. 9. But Oak Point cannot establish its claims in the Circuit Court as a matter of law because the unredacted APAs do not bear any evidence of consideration being exchanged, and thus they are insufficient to establish Oak Point’s ownership of the subject properties.

Error is harmless when it is trivial, formal, or merely academic, and not prejudicial to the substantial rights of the party assigning it, and where it in no ways affects the outcome of the trial. Stated conversely, error is prejudicial and ground for reversal only when it affects the final outcome and works adversely to a substantial right of the party assigning it.

Orphanos v. Rodgers, 250 W. Va. 442, 461, 903 S.E.2d 623, 642 (App. 2024).

The APAs, upon which Oak Point exclusively rely to establish its claims, are contracts. *See, e.g.*, Oak Point’s Resp. to Treasurer’s Mot. 9, App. 33 (arguing that the “specified purchase price contained in Oak Points *contracts* is not relevant to the establishment of its claims”) (emphasis added); *id.* (“[T]he Treasurer has no basis to deny Oak Point’s claims because Oak Point has not provided the specific purchase prices set forth in its *contracts*.”) (emphasis added). “It is basic contract law that there can be no contract without offer, acceptance and consideration.” *PITA, LLC v. Segal*, 249 W. Va. 26, 53, 894 S.E.2d 379, 406 (App. 2023).

As a preliminary matter, Oak Point’s claim that “[t]he purchase price is the only term of the [APAs] redacted by Oak Point,” *see* Compl., App. 7–8, ¶¶ 9–15, is both misleading and disingenuous; the redactions encompass a full *section* of the APAs, and the full *section* that Oak Point redacted simply happens to be *labeled* “Purchase Price.”⁷ The redacted section of the APAs clearly consist of more than more than a simple purchase price, and the size of the redacted section suggests that the redacted *section* of the APAs consists of additional contractual *terms*, any one of which could establish that Oak Point has only a limited or future interest in the subject properties.

If Oak Point has additional evidence in support of its allegations, then it is free to file a new claim. *See* W. Va. Code § 36-8-15. But because West Virginia law assigns the *administive* task of determining such claims in the first instance to the *Treasurer*, it is to the *Treasurer* to whom such claims must be submitted.

⁷ *See Treasurer’s Mot. Supp. App.* and related exhibit.

The fact that the APA's are not supported by consideration makes them unenforceable, and the Treasurer is not under any obligation to presume terms that are not apparent to him. Indeed, the absence of consideration, the sheer size of Oak Point's redactions, and the Treasurer's constitutional and statutory obligations to safeguard abandoned property for the benefit of its true owner compel the Treasurer to presume that the APAs are *not* supported by consideration, that Oak Point does *not* have any ownership interest in the subject assets, that its ownership could be premised upon future performance, or that the compensation scheme set forth in the APA is illegal, unlawful, or otherwise unenforceable. There is nothing in the APAs to counter those assumptions, and thus the Treasurer was entitled to dismissal below as a matter of law.

Conclusion

The Supreme Court of Appeals has consistently held for nearly a century that statutes providing for *de novo* judicial review of administrative and executive decisions are unconstitutional. The Court has reached that conclusion time and time again because the Constitution of West Virginia compels it to, and the issues on appeal in this action do not occasion a departure from such well-settled jurisprudence. The Treasurer acted well within his constitutional and statutory rights and responsibilities when he determined that Oak Point did not establish its claims in the administrative decisions below, and the Circuit Court appropriately affirmed his decision after concluding that West Virginia law permitted the Treasurer's actions. Accordingly, this Court should affirm the Circuit Court's decision below.

Certificate of Service

I, Christopher S. Etheredge, certify that I served the foregoing “Respondent’s Brief” upon all counsel of record by filing the same via the File & ServeXpress system, which will automatically generate a notice of such filing.

/s/ Christopher Starr Etheredge
Assistant Attorney General