

11-1288 & 11-1604

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

VANDERBILT MORTGAGE AND
FINANCE, INC.,

Plaintiff,

v.

Civil Action No. 10-C-574-2
Thomas A. Bedell, Judge

TERRI L. COLE and
JAMES A. COLE,

Defendants.

ORDER AWARDING CIVIL PENALTIES

Pending before this Court is the issue of whether the award of civil penalties to the Defendant, Ms. Terri L. Cole, would be appropriate in the above-styled matter. This Court issues this order following a jury trial that began on June 27, 2011.¹ At the end of that trial, a unanimous verdict was returned finding that Vanderbilt Mortgage and Finance, Inc. ("Plaintiff") committed thirteen separate statutory violations of the West Virginia Consumer Credit Protection Act ("WVCCPA").

Having considered the Defendant's *Motion for Award of Civil Penalties* and the subsequent Plaintiff's *Response in Opposition to Defendant's Motion for Award of Civil Penalties*, this Court **FINDS** and **CONCLUDES** as follows:

1. In October of 1996, the Defendants purchased a manufactured home and financed that home through the Ford Consumer Finance Company. This loan was secured by a deed of trust, an instrument granting Ford a security interest on the home as well on as the property on which the home rested.

¹ This Court notes that the *Trial Order* incorrectly states on page one that the "Plaintiff rested its case-in-chief on Tuesday, January 12, 2010."

2. In April of 2005, the Plaintiff became the servicer of the Defendants' loan. Vanderbilt was responsible for collecting payments from the Defendants and for communicating with the Defendants regarding the status of their account.

3. The Defendants then fell behind on their loan payments.

4. Following the Defendants' repeated failure to furnish loan payments, both parties executed three loan modification and extension agreements allowing the Defendants to retain their home.

5. However, none of the modifications served to remedy the situation. The Plaintiff sued the Defendants for unlawful detainer, and this action was removed by the Defendants to Circuit Court in December, 2010.

6. Upon removal, Ms. Cole asserted a counterclaim against the Plaintiff. This counterclaim alleged 57 violations of the WVCCPA.

7. At the close of the Plaintiff's case-in-chief, this Court ruled that the Plaintiff's claim for unlawful detainer was a matter of law to be decided by this Court. On that claim, it ruled for the Plaintiff.

8. At the trial's conclusion, a unanimous jury found that the Plaintiff had committed 13 violations of the WVCCPA. The violations were as follows:

- a. One violation of section 46A-2-114 of the W. Va. State Code for failure to provide a statement of account upon written request. On August 23, 2010, Ms. Cole authored and sent a letter to the Plaintiff requesting a detailed statement of her account. She received confirmation that the Plaintiff received that letter on August 27, 2011. However, the Plaintiff

never responded to Ms. Cole. The Plaintiff's failure to respond to a request for accounting is in clear violation of the WVCCPA.

b. Ten violations of section 46A-2-125 of the W. Va. State Code for placement of repeated and unsolicited calls to the Defendant's mother and third parties despite requests to cease. While attempting to collect the debt that the Defendants owed it, the Plaintiff made repeated calls to Ms. Cole's mother and employers. It continued to do so after being repeatedly asked it to stop.

c. One violation of section 46A-2-125 of the W. Va. State Code for the use of language intended to unreasonably abuse the hearer. During a phone conversation with Vanderbilt regarding debt collection, Ms. Cole informed Vanderbilt that she could not make a payment because she had just bought school clothes for her child. The Vanderbilt representative replied, "Why didn't you go to Goodwill to save your money?" This remark offended Ms. Cole.

d. One violation of section 46A-2-126 of the W. Va. State Code for unreasonable publication of indebtedness to a third party. During Vanderbilt's attempt to collect its debt, it spoke to a James A. Cole, whom it knew was not the James A. Cole listed on the account. It spoke to this man at length regarding Ms. Cole's debt and the status of the Defendants' account in violation of 46A-2-126.

10. The jury also found that, although the Plaintiffs had committed 13 violations of the WVCCPA, the Defendants had suffered no actual damages.

11. "Each act of a debt collector which violates the WVCCPA creates a single cause of action to recover a single penalty." *In re Machnic*, 271 B.R. 789, 794 (Bankr. S.D.W.V. 2002) (citing *Sturm v. Providian Nat'l Bank*, 242 B.R. 599 (Bankr. S.D.W.V. 1999.)) Furthermore, actual damages are not a requisite for the award of statutory penalties. *W. Va. Code* § 46-A-5-101(1).

12. At its discretion, the Court may choose to mold statutory awards to reflect inflation, starting at the time that the WVCCPA became operative. *W. Va. Code* § 46-A-5-106; *Clements v. HSBC*, Case # 5:09-vcv-00086 (S.D.W.V. 2011)

13. The guidelines for the punitive statutory awards have been dictated by the West Virginia Supreme Court as follows:

(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that has actually occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be much greater.

(2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether / how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant.

Fleming Landfull, Inc. v. Garnes, 413 S.E.2d 897, 909 (1991).

14. Applying these factors and laws to the issues at hand, this Court finds that the Defendants are entitled to statutory damages, damages that reflect the reprehensibility of the Plaintiff's conduct while still bearing a reasonable relationship to the harm caused.

15. Pursuant to *W. Va. Code* § 46-A-5-106, this Court deems it appropriate to modify the statutory damages to reflect the inflation that has taken place since the enactment of the WVCCPA.

15. Accordingly, this Court hereby fixes civil penalties as follows:

a. One civil penalty at \$4,583.45 for failure to provide a statement of account upon written request. After considering the reprehensibility of the Defendant's refusal to provide account records, this Court wants to make it abundantly clear to the Plaintiff that every debtor has a right to access records pertaining to his or her account. In denying the Defendants their account records upon request, the Plaintiff acted with complete disregard for the Defendants' statutory rights. Without a proper statement of accounting, a debtor is left in the dark regarding amounts owed, and that lack of knowledge puts the debtor at a needlessly steep and easily avoidable disadvantage. This conduct of the Plaintiff is particularly disturbing to this Court. The attitude of the Plaintiff towards the Defendants and towards this Court during the debt collection process and even the trial process is one of unabashed arrogance. Simply stated, the

Plaintiff's attitude conveyed disrespect, saying "We know what the law is in the State of West Virginia, but we do not have to follow it." Therefore, this Court attaches the maximum penalty permitted by law for this violation.

b. Ten civil penalties at \$ 2,250.00 for each penalty, totaling \$22,500, regarding the placement of repeated and unsolicited calls to Ms. Cole's mother and third parties despite specific requests to cease. The deliberate phone calls to Ms. Cole's mother and employers were reprehensible and embarrassing. Keeping in mind that punitive damages should reasonably relate to the actual damages sustained here, this Court awards the Defendants a mid-range penalty for each violation.

c. One civil penalty at \$458.34 for the use of language intended to unreasonably abuse the hearer. Although this Court recognizes the need to balance one's accounts to pay for a child's needs *alongside* one's debt, it also recognizes respect. It recognizes common courtesy, and it recognizes that neither of those concepts were afforded to Ms. Cole when the Vanderbilt representative asked her why she hadn't shopped at Goodwill for her son's clothing. The representative speaking to Ms. Cole either knew or should have known that this statement was unduly crass. Citizens of this state deserve to be treated with dignity.

d. One civil penalty at \$4,583.45 for unreasonable publication of indebtedness to a third party. Vanderbilt's offering of specifics regarding Ms. Cole's accounts to a stranger is a significant violation of the

WVCCPA. When Vanderbilt discussed the property and nature of Ms. Cole's debt with the "James A. Cole" whom it knew not to be Ms. Cole's ex-husband, it engaged in a stronger violation of the WVCCPA than merely harassing third parties by phone. Accordingly, this Court finds that a stronger fine should be accorded to this violation.

THEREFORE, it is **ORDERED** that judgment is as follows:

1. Judgment is entered against the Plaintiff in the amount of \$32,125.24 for violations of the West Virginia Consumer and Credit Protection Act.
2. Interest at the legal rate shall accrue from the date of entry until paid.
3. Finally, the Clerk of this Court is **ORDERED** to deliver a copy of this Order to the following:

Matthew D. Patterson
Nelson Mullins Riley Scarborough LLP
Meridian, 17th Floor
Columbia, SC 29201

Jeremy C. Hodges
Nelson Mullins Riley Scarborough LLP
949 Third Ave., Suite 200
Huntington, WV 25701

Sara Bird
Mountain State Justice, Inc.
321 West Main St., Suite 620
Clarksburg, WV 26301

ENTER: August 15, 2011


Thomas A. Bedell, Circuit Judge

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18th
Family Court Circuit of Harrison County, West Virginia, hereby certify the
foregoing to be a true copy of the ORDER entered in the above styled action
on the 15 day of August, 2011.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 15 day of August, 20 11.

Donald L Kopp II
Fifteenth Judicial Circuit & 18th Family Court
Circuit Clerk
Harrison County, West Virginia

11-1604 - 11-1288

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

VANDERBILT MORTGAGE AND
FINANCE, INC.,

Plaintiff,

v.

Civil Action No. 10-C-574-2
Thomas A. Bedell, Judge

TERRI L. COLE and
JAMES A. COLE,

Defendants.

FINAL ORDER AWARDING ATTORNEY FEES AND COSTS

Pending before the Court is the *Defendant's Motion for Award of Attorney Fees and Costs*, filed on behalf of Ms. Teri Cole on September 7, 2011. Vanderbilt Mortgage and Finance Company ("Plaintiff") filed its *Response* to that *Motion* on September 22, 2011. Finally, Ms. Cole filed her *Reply in Support* of her *Motion* on September 28, 2011.

Having considered the Defendant's *Motion for Award of Attorney Fees and Costs*, the Plaintiff's *Response*, and the Defendant's *Reply*, the Court is now prepared to rule on this matter. Accordingly, it finds that the Defendant's *Motion* should hereby be **GRANTED**.

Relevant Procedural History

1. This action stems from a claim of Unlawful Detainer against the above-named Defendants. Although initially filed in Magistrate Court, it was removed by Ms. Cole to the Circuit Court of Harrison County in December of 2010.
2. Upon removal, Ms. Cole asserted a counterclaim against the Plaintiff. This counterclaim alleged 57 violations of the West Virginia Consumer Credit Protection Act ("WVCCPA").

3. At the close of the Plaintiff's case-in-chief, the Court ruled that the Plaintiff's claim for Unlawful Detainer was a matter of law to be decided by the Court. On that claim, it ruled for the Plaintiff.
4. At the trial's conclusion, a unanimous jury found that the Plaintiff had committed 13 violations of the WVCCPA out of the 57 alleged.
5. The jury also found that, although the Plaintiff had committed thirteen violations of the WVCCPA, the Defendants had suffered no actual damages.
6. The Court ultimately awarded Ms. Cole \$32,125.24 in civil penalties as a result of those thirteen violations.
7. In the pending *Motion*, Ms. Cole asks for attorney fees and costs associated with litigating the totality of this action. This demand totals \$48,852.00.

Applicable Law

W. Va. Code § 46A-5-104 (1994) states that:

In any claim brought under [the WVCCPA] applying to illegal, fraudulent, or unconscionable conduct or any prohibited debt collection practice, the court may award all or a portion of the costs of litigation, including reasonable attorney fees, court costs and fees, to the consumer. On a finding by the court that a claim brought under this chapter applying to illegal, fraudulent or unconscionable conduct or any prohibited debt collection practice was brought in bad faith and for the purposes of harassment, the court may award to the defendant reasonable attorney fees.

The overarching concern for the trial court is that the fees awarded, if any, must be reasonable. *Blanchard v. Bergeron*, 489 U.S. 87 (1989). The "lodestar calculation" is the benchmark in determining the reasonableness of fees, and this calculation is ascertained by multiplying the number of allowable hours invested in litigation by an

attorney's hourly rate. See Syl. Pt. 4, *Heldreth v. Rahimian*, 637 S.E. 2d 359 (W. Va. 2006).

The degree of success obtained by the party requesting fees is a crucial factor in determining the amount of fees to be awarded. *Hensley v. Eckerhart*, 461 U.S. 424 (1992). However, as articulated in *Aetna Cas. & Sur. Co. v. Pitrolo*, there a total of twelve factors to be considered when determining the reasonableness of the lodestar calculation:

Where attorney's fees are sought ... the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney's fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

See Syl. Pt. 4., *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W.Va. 190, 191-192 (W. Va. 1986).

Discussion

In the case at bar, the Ms. Cole's attorneys have submitted a lodestar calculation of \$48,852. This calculation is supported by accompanying affidavits from each of the attorneys and staff members from Mountain State Justice who worked on Ms. Cole's case.

Pursuant to *Aetna*, the Court finds the following:

1. The labor that went into the preparation and litigation of this case is well-documented. It does not appear that Ms. Cole's attorneys spent an excessive

amount of time preparing and litigating her case. Furthermore, the Plaintiff does not contend that its opposing counsel spent too much time on Ms. Cole's case. Therefore, the Court finds the hours submitted in Ms. Cole's lodestar calculation are reasonable under the circumstances and were submitted in good faith.

2. The questions of law and fact involved in this case were not excessively complex. Furthermore, the attorneys and staff at Mountain State Justice are rightly accustomed to dealing with fact patterns and legal issues such as the ones that were presented in this case. Accordingly, the difficulty in litigating this case should have been on par with similar cases upon which Mountain State Justice has worked.
3. The skill level needed to litigate this case is average. Although the initial claim of Unlawful Detainer was relatively straightforward, the assertion of dozens of counterclaims under the WVCCPA required more specialized and refined skills.
4. The Court sees no reason that the attorneys should have been precluded from other cases while defending Ms. Cole. Indeed, in Mr. Hedges's *Affidavit*, he states that, "at any given time, [he] is involved in at least a hundred consumer cases in the courts in this State." *Hedges's Affidavit*, p. 1. Although the Court does not mean to undermine the importance of the work done on behalf of Ms. Cole, that work was not so rigid as to demand counsel's sole focus.
5. The fees assessed in this case are not unreasonable. Given the scholastic and professional records of the Mountain State Justice attorneys who represented

Ms. Cole, the Court finds that the rates assessed were commiserate with the level of services that Ms. Cole received.

6. Ms. Cole was not charged for the services that Mountain State Justice provided.
7. There were no unusual or extraordinary time limitations imposed in this case.
8. The results obtained were mixed. Ms. Cole eventually lost her house. Her defense to the claim of Unlawful Detainer was wholly unsuccessful. On the other hand, Ms. Cole had thirteen successful claims surrounding violations of the WVCCPA. These claims ultimately led to Ms. Cole being awarded \$32,125.24 in civil penalties. While it is true that the jury only found the Plaintiff liable for 13 of the 57 alleged violations, the Court is hesitant to effectively penalize Ms. Cole for trying, in good faith, to allege all colorable violations of the WVCCPA.
9. The attorneys who worked on this case were very well qualified to do so. All possess considerable academic and professional accomplishments.
10. This case was undesirable. Typically, defending low-income clients in Unlawful Detainers is not a profitable venture for attorneys. It is not feasible for private attorneys to take on these sorts of cases, cases that usually have a limited, if any, recovery.
11. The Mountain State Justice attorneys have been involved with representing Ms. Cole for a significant, if not extraordinary, period of time.
12. The Court has considered awards in similar cases.

The Court finds that this case presents very few extraordinary circumstances. In awarding attorney fees to Ms. Cole, it focuses on the mixed degree of success that was achieved. It also notes that Mountain State Justice is a unique organization, and it survives based upon fees collected in these “undesirable” cases such as Ms. Cole’s.

With all of the *Aetna* factors considered, the Court believes it best to award Ms. Cole attorney fees. However, due to the mixed degree of success that was achieved, it will limit its award.

Order

For all the foregoing reasons articulated herein, the Court finds that a limited award of attorney fees is appropriate in this matter.

Therefore, it is hereby **ORDERED** that the Plaintiff shall hereby pay **\$30,000** (thirty thousand dollars) in attorney fees. The Plaintiff shall comply with this directive within thirty days of this *Order*.

Furthermore, pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, the Court directs entry of this *Order* as a *Final Order* upon an express determination that there is no just reason for delay and upon an express direction for the entry for judgment.

Finally, the Clerk of this Court is **ORDERED** to deliver a certified copy of this *Order* to the following:

Matthew D. Patterson
Nelson Mullins Riley Scarborough LLP
Meridian, 17th Floor
Columbia, SC 29201

Sara Bird
Mountain State Justice, Inc.
321 West Main St., Suite 620
Clarksburg, WV 26301

Jeremy C. Hodges
Nelson Mullins Riley Scarborough LLP
949 Third Ave., Suite 200
Huntington, WV 25701

ENTER: October 18, 2011


THOMAS A. BEDELL, Judge

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT:

I, Donald L. Kopp II, Clerk of the Fifteenth Judicial Circuit and the 18th
Family Court Circuit of Harrison County, West Virginia, hereby certify the
foregoing to be a true copy of the ORDER entered in the above styled action
on the 18th day of October, 2011.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix

Seal of the Court this 18th day of October, 20 11.

Donald L. Kopp II
Fifteenth Judicial Circuit & 18th Family Court
Circuit Clerk
Harrison County, West Virginia