No. 11-0910

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

QUICKEN LOANS, INC.,

Defendant below,

Petitioner,

v.

LOURIE BROWN and **MONIQUE BROWN**,

Plaintiffs below,

Respondents

(From the Circuit Court of Ohio County, No. 08-C-36)

BRIEF OF PETITIONER QUICKEN LOANS, INC.

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred in finding that the loan to Plaintiffs was unconscionable, given its failure to address substantive unconscionability and the loan's inarguable benefits to Plaintiffs, including lower monthly payments, a reduced interest rate, and a cash payout of over $40,000.
2. The Circuit Court erred in finding that Plaintiffs proved fraud by clear and convincing evidence, when the only evidence was one plaintiff's uncorroborated, self-serving, and vague testimony, and there was no evidence at all of falsity or fraudulent intent.
3. The Circuit Court was without authority to void Plaintiffs' obligation to repay the principal of the loan.
4. To the extent any cause of action permitting punitive damages survives review, the award of over $2 million in such damages – in a case with actual damages of less than $18,000 – was error because the Circuit Court: (a) failed to apply the required factors under *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991); and (b) improperly and unconstitutionally inflated the award by adding attorney's fees and the principal of the loan to the "compensatory damages" amount it used as a multiplier in calculating the award.
5. The Circuit Court erred in failing to offset the award against Quicken Loans with the settlement amount paid to Plaintiffs by another defendant.

STATEMENT OF THE CASE

This case arises from a debt consolidation and refinancing loan made by Defendant Quicken Loans, Inc. ("Quicken Loans") to Plaintiff Lourie Brown Jefferson ("Mrs. Jefferson") in the amount of $144,800. The loan (the "Loan") provided Mrs. Jefferson a payoff of pre-existing debts totaling $95,441.51, along with a cash payout of $40,768.78, while reducing her monthly payments by $316 per month and lowering her interest rates. Mrs. Jefferson made only two of

the reduced monthly payments before going into default, then — when Quicken Loans pressed for further repayment — she and her daughter filed this lawsuit. After a bench trial, the Circuit Court not only invalidated the loan, but allowed Mrs. Jefferson to keep the recently advanced $144,800 principal amount, and awarded Plaintiffs $2,782,545.36 (of which all but $17,476.72 consisted of punitive damages and attorney's fees).

In arriving at this remarkable result, the Circuit Court failed to weigh the benefits of the loan to Plaintiffs before finding it unconscionable; failed to find the required elements of Plaintiffs' fraud claim; failed to identify a legal basis for cancelling the entire loan, including the principal; failed to explain why it imposed over $2.1 million in punitive damages on a $17,476.72 restitution award; and failed to consider offsetting Quicken Loans' liability with the amount of a settlement paid by a former defendant. In sum, the Circuit Court awarded Mrs. Jefferson an enormous windfall as a reward for failing to make monthly payments that had actually been reduced by Quicken Loans in Plaintiffs' fourth home loan refinancing.

A. Background

Mrs. Jefferson and Lena Brown, Mrs. Jefferson's mother, purchased the subject property, located at 118 12th Street in Wheeling (the "Property"), for approximately $35,000 in 1988. *See* Findings of Fact and Conclusions of Law entered Feb. 25, 2010 ("2/25/10 Op.") at 3 (A128).[1] On December 3, 1993, they deeded the Property to Plaintiff Monique Brown in exchange for Monique Brown paying off the then-existing loan, and Monique Brown remained the sole owner of the Property until June 2006. *See id.* at 4 (A129).

In 2003, Mrs. Jefferson began using the Property as security for loans. On August 2, 2003, Mrs. Jefferson borrowed $40,518 from CitiFinancial, using the Property as collateral. *See*

[1] Appendix pages are designated as "A__."

Quicken Loans Exhibit ("QL Ex.") 91 (A1302-45). Just four months later, on January 8, 2004, Mrs. Jefferson refinanced with CitiFinancial for $63,961. *See id.* On May 31, 2005, Mrs. Jefferson refinanced the Property for yet a third time with CitiFinancial for $67,348, at an interest rate of 9.75%. *See id.* Mrs. Jefferson also had other debts, not all of them secured. In November 2005, December 2005, January 2006, and April 2006, she took four separate, unsecured loans with CitiFinancial for $1,500, $3,060, $5,000, and $7,650 — a total of more than $17,000. Because they were unsecured, the interest rates on these debts were far higher than for her mortgage, ranging from 24.99% to 31.00%. *See id.* Finally, on February 1, 2006, Mrs. Jefferson obtained a $3,418 income tax Refund Anticipation Loan from Jackson Hewitt, at a staggering interest rate of 94.862%. *See* 2/25/10 Op. at 5 (A130). In short, from 2003 to 2006, Mrs. Jefferson secured nine loans from three different sources, much of it at extremely unfavorable interest rates.

B. Mrs. Jefferson Seeks Another Refinancing of the Property, and Begins Contact with Quicken Loans

In the spring of 2006, Mrs. Jefferson filled out an on-line application seeking to obtain another refinancing, and she began receiving calls from numerous prospective lenders, including Quicken Loans. *See* Testimony of Lourie Jefferson, Vol. II, p. 191 (A921); Testimony of Anthony Nuckolls, Vol. IV, pp. 111-113 (A1078-79).[2]

Mrs. Jefferson and Quicken Loans first spoke on the telephone on May 15, 2006, and the next day, she completed the Client Information Summary as part of the loan origination process. *See* QL Ex. 64 (A1295). Along with providing personal information, Mrs. Jefferson represented

[2] Ms. Jefferson's daughter, Monique Brown, executed a Power of Attorney appointing Ms. Jefferson with the authority to pledge the Property and use the loan proceeds in her discretion. QL Ex. 46. Monique Brown's involvement in this case stems solely from her partial ownership of the Property.

to Quicken Loans that the "Anticipated Property Value" was $250,000. *See id.*; Testimony of Anthony Nuckolls, Vol. IV, pp. 138-39 (A1085).

On May 23, 2006, Quicken Loans requested that TSI Appraisal Services ("TSI") arrange for a full appraisal on the Property. *See* Testimony of Michael Lyon, Vol. IV, pp. 219-222 (A1105-06). TSI is a vendor that handles the ordering of appraisals for many lenders across the country. *See id.* at 218 (A1105). TSI uploaded an appraisal request, which was accepted by former co-defendants Appraisals Unlimited, Inc., and Dewey Guida, and on May 26, 2006, Mr. Guida opined that the Property had a value of $181,700. *See* Plaintiffs' Ex. 1DD (A1536). Quicken Loans also ordered and reviewed Plaintiffs' Insurance Declaration Page, which showed that the Property was insured for $328,000. *See* Testimony of Michael Lyon, Vol. IV, pp. 229-230 (A1108); QL Ex. 26 (A1294). Quicken Loans reviewed and accepted the appraisal. *See* Testimony of Michael Lyon, Vol. IV, p. 292 (A1123).

In anticipation that the loan would ultimately close, Mrs. Jefferson — who had applied for a loan that would provide significant cash beyond what she needed to pay off her existing loans — deposited $500 for a new Toyota Avalon on June 17, 2006. The purchase price for this automobile was approximately $38,000. *See* Testimony of Lourie Jefferson, Vol. II, p. 228 (A958). In June 2006, Mrs. Jefferson became delinquent on her existing CitiFinancial mortgage. *See* Testimony of Michael Lyon, Vol. V, pp. 5-15 (A1137-39). Because she became a greater credit risk, Quicken Loans offered her a loan package with higher up-front costs. *See id.*; *see also* Plaintiffs' Ex. 4 at Q2688 (A1860). Prior to closing, Quicken Loans delivered the package of loan documents to Mrs. Jefferson, *see* Plaintiffs' Ex. 5, at B5078 (A1981), but she did not open or read the documents until the day of the closing. *See* Testimony of Lourie Jefferson, Vol. II, p. 201 (A931).

C. The Terms of the Loan

On July 7, 2006, Mrs. Jefferson closed on the $144,800 loan. *See, e.g.*, QL Exs. 1, 4, 9-11, 13 (A1273-88). Under the terms of the loan, Mrs. Jefferson paid off pre-existing debts of $95,441.51, and walked away with $40,768.78 in cash. *See* QL Ex. 10 (A1276). In addition, by consolidating her unsecured credit card debt into the refinancing, Mrs. Jefferson received a reduced interest rate of 9.15%. *See* Testimony of Margot Saunders, Vol. II, p. 158 (A888). Her previous CitiFinancial loan had a rate of 9.75%, and two other loans that were consolidated into the Loan were at 12% and 23.99%. *See* QL Ex. 91 (A1302-45); Testimony of Morgan Winfree, Vol. IV, p. 49-51, 54 (A1063-64). Moreover, Mrs. Jefferson's new monthly payments were $1,144, considerably less than the $1,460 per month that she had previously been paying. *See* QL Ex. 11 (A1279); Testimony of Lourie Jefferson, Vol. II, pp. 227 (A957). These monthly savings were locked in for at least three years. *See* QL Exs. 13, 14 (A1284-93).

To reduce her monthly payment, the loan included a balloon feature. Although the term of the loan was thirty years, payments were amortized over 40 years, which resulted in an amount due at the end of the term. The balloon was described in detail in the loan documents provided to Mrs. Jefferson before closing, including the "3/6 Adjustable Rate/Balloon Mortgage Disclosure" (QL Ex. 4 (A1274)), the "Adjustable Rate Rider" (QL Ex. 13 (A1284)), and the "Adjustable Rate: Balloon Note" document (QL Ex. 14 (A1289)). At closing, Mrs. Jefferson saw the term "balloon payment" and had some "concern" about it, but decided to proceed and signed these documents. *See* Testimony of Lourie Jefferson, Vol. II, pp. 203-04 (A933-34).

D. Mrs. Jefferson Defaults on the Loan

Mrs. Jefferson left the closing with a check from Quicken Loans for $40,768.78. QL Ex. 10 (A1276). On July 18, 2006, she used $28,536.90 of that money to purchase a new Toyota Avalon. *See* Testimony of Lourie Jefferson, Vol. II, p. 228 (A958). She then used much of the

remainder of the payout to retire other existing debts. *See* Testimony of Lourie Jefferson, Vol. II, p. 229 (A959). Mrs. Jefferson made her first two monthly installment payments to Quicken Loans in September and October 2006. QL Ex. 92 (A1349).

The third payment was due on November 1, 2006; however, Quicken Loans did not receive this payment until it was more than 75 days overdue, on January 16, 2007. *See id.* (A1348). Then, on or about January 19, 2007, Mrs. Jefferson became ill. *See* Testimony of Lourie Jefferson, Vol. II, pp. 208-209 (A938-39). Mrs. Jefferson alleged that because of this illness "and the unaffordable monthly payment on the subject loan," she was unable to meet her financial obligations. *See* Complaint ¶ 29 (A22). Mrs. Jefferson made only one other payment on the Loan before the commencement of this lawsuit. *See* QL Ex. 92 (A1346-48).

E. Plaintiffs File Suit Against Quicken Loans and the Appraisal Parties

Following Plaintiffs' default on the Loan, and Quicken Loans' demand for payment, Plaintiffs filed the instant lawsuit, alleging various claims against Quicken Loans, including: (1) unconscionability (W. Va. Code § 46A-2-121); (2) breach of the covenant of good faith and fair dealing; (3) unfair and deceptive acts (W. Va. Code § 46A-6-104); (4) fraud; (5) illegal appraisal; and (6) illegal balloon note (W. Va. Code § 46A-2-105). Plaintiffs also brought claims against Appraisals Unlimited, Inc., and Dewey Guida; these claims were resolved in a settlement in or around May 2009.

In October 2009, the case was tried to the Circuit Court. Plaintiffs argued that former defendant Guida's appraisal overstated the value of the property, and that Quicken Loans performed an inadequate review of the appraisal. Mrs. Jefferson also testified that Quicken Loans' representative had told her that her poor credit score required a higher interest rate and she could refinance at a lower rate after several months of payments on the loan: "what they could do would be to refinance the loan in three to four months, and then that I could get it at a

cheaper rate, but initially my credit scores weren't high enough; and that, once that loan was in place and I got – everything started to be paid off, then I would be able to refinance my loan." Testimony of Lourie Jefferson, Vol. II, p. 195 (A925). This testimony was the only evidence of the alleged promise to refinance, and both sides agreed that Mrs. Jefferson made only two monthly payments before defaulting. *See* Testimony of Margot Saunders, Vol. II, p. 13 (A742); Testimony of Morgan Winfree, Vol. IV, p. 57 (A1065).

F. The Circuit Court Decisions

On February 25, 2010, the Circuit Court issued findings of fact and conclusions of law. The Circuit Court held that Plaintiffs prevailed on all of their claims against QL except for breach of the covenant of good faith and fair dealing. 2/25/10 Op. at 18 (A143).

Specifically, on the claim for unconscionability, the Circuit Court held that the Loan "product in and of itself was unconscionable." *Id.* In so ruling, the Circuit Court stated that "[t]he Quicken loan converted the $25,000 in unsecured debt to secured debt and raised her secured monthly debt obligation from $578 to $1,114; thus, putting the plaintiffs' home at risk." *Id.* The Circuit Court did not indicate how this differed from other common situations (such as second mortgages) in which homeowners increase their secured debt so as to borrow money at favorable rates, and did not address what Plaintiffs received in exchange for the increase in secured debt: a reduced interest rate, improvement of their monthly cash flow by over $300, and a cash payout of over $40,000.

On the fraud claim, the Circuit Court, relying entirely on Mrs. Jefferson's own uncorroborated testimony, found that there was clear and convincing evidence of a fraudulent promise by Quicken Loans to refinance the Loan within three to four months. *Id.* at 21 (A146). The court did not mention that, by Mrs. Jefferson's own account, the supposed promise was *contingent* on making her loan payments, or her default on making those payments. For good

measure, the Circuit Court also deemed fraudulent the mislabeling of a loan discount on the HUD Settlement Statement, and Quicken Loans' disclosure of the balloon payment feature in a manner that differed from West Virginia statutory requirements. *Id.* at 21-22 (A146-47).

On the other claims, the Circuit Court found a violation of the balloon disclosure statute because the Note itself did not state the amount of the balloon payment and its due date. *Id.* at 25 (A150). The Circuit Court also found a violation of the appraisal statute on the basis that the Loan "exceeds the fair market value of their property," *id.* at 23 (A148), and Quicken Loans "[n]egligently conduct[ed] the appraisal review," *id.* at 17 (A142). The final violation, for "Unfair and Deceptive Acts," was derivative of the other purported claims, *i.e.*, the alleged false statements regarding the loan discount, the alleged failure to properly disclose the balloon payment, and the supposedly negligent appraisal review. *Id.* at 20 (A145).

The Circuit Court awarded several forms of relief: (1) restitution in the amount of $17,476.72 for payments made to Quicken Loans; (2) cancellation of Mrs. Jefferson's obligation to repay any part of the Loan — even the $144,800 principal she had received — and an injunction against any attempt to collect payments on the loan; (3) attorney's fees and litigation costs; and (4) punitive damages. *See id.* at 18, 20, 22, 24, 25 (A143, 145, 147, 149, 150).

At the subsequent hearing on attorney's fees and punitive damages, Plaintiffs conceded that they had few contemporaneous time records, *see* Sept. 1, 2010 Hrg. Tr., pp. 47-48 (A2415), and instead proffered an after-the-fact reconstruction of the time purportedly devoted to the case. Nonetheless, the Circuit Court, on February 17, 2011, fully "accept[ed] the billing records submitted by the Law Firm of Bordas and Bordas as being both reasonable and reliable in terms of the work performed and the time devoted to each of those tasks," 2/17/11 Op. at 2 (A310), and awarded $495,956.25 in attorney's fees.

As for punitive damages, the Circuit Court allotted two sentences to explain its award of over $2 million. The court referred to "the standards specified in Syllabus Point 3 of *Garnes*," 2/17/11 Op. at 3-4 (A311-12), but did not describe these standards or how they applied to this case. Instead, it stated, in full:

> Taking all of the *Garnes* factors into consideration, including applying a factor of three times the compensatory damages and attorney fees, is $2,168,868.75. This Court believes that this amount fairly applies the five standards in *Garnes* including the financial position of the defendant and as a matter of fundamental fairness, assuring that the punitive damage award bears a reasonable relationship to the compensatory damages which include the actual compensatory damages and the attorney fees.

Id. at 4 (A312). The court did not explain why it used a three-times multiplier or why it included attorney's fees and the value of the cancelled loan as compensatory damages to be so multiplied.

Quicken Loans moved to set aside the judgment in accordance with Rules 52 and 59 of the West Virginia Rules of Civil Procedure, challenging the Circuit Court's decision on both liability and damages. Quicken Loans also moved for an offset of the award based on the settlement of the claims against former defendants Appraisals Unlimited, Inc., and Dewey Guida. On May 2, 2011, the Circuit Court denied the motions without explanation. On June 1, 2011, Quicken Loans filed a timely Notice of Appeal in this Court.

SUMMARY OF ARGUMENT

In this case, the Circuit Court entered a $2.7 million judgment against Quicken Loans for lending Mrs. Jefferson $144,800 on lawful terms that reduced Mrs. Jefferson's existing interest rate and monthly debt payments, and that provided her with cash to buy a new car. There is no legal or factual basis for either the Circuit Court's principal findings of liability or for the draconian remedies it imposed.

To begin with, the Circuit Court found the Loan unconscionable without any basis for finding the Loan *substantively* unconscionable, as required by this Court's cases. The Circuit

Court noted that the Loan increased Mrs. Jefferson's secured debt, but that is a routine feature of countless refinancing and second mortgages. In return, Mrs. Jefferson received a payoff of pre-existing debts totaling $95,441.51, a cash payout of $40,768.78, a reduction in her monthly payments by $316 per month, and a lower interest rate. The increase in secured debt, absent usurious interest rates or some other extraordinary feature, cannot have made the loan so one-sided as to be unconscionable.

Second, the Circuit Court's finding of fraud rested heavily on Quicken Loans' supposed oral promise to refinance in the future *if* Mrs. Jefferson met specific requirements. Yet not only did she fail to meet those requirements, but Plaintiffs produced no evidence of Quicken Loans' allegedly fraudulent intent, and certainly not the clear and convincing evidence required for fraud. As for the Circuit Court's other bases for finding fraud – which involve the balloon payment and closing costs – the Court failed to find multiple required elements, and there is no evidence in the record to support the necessary findings.

In addition to these errors in finding liability, the Circuit Court made multiple errors in imposing a truly extraordinary set of remedies. As an initial matter, the Circuit Court erroneously freed Mrs. Jefferson from any obligation to return or repay the principal of the loan, in disregard of the express limits on cancellation of debts imposed by W. Va. Code §§ 46A-5-101(2) and 46A-5-105. The Circuit Court also imposed over $2 million in punitive damages without performing the *Garnes* analysis required by this Court. Moreover, the Circuit Court's $2 million punitive damages award is unconstitutionally excessive because Plaintiffs were awarded only $17,476.72 in damages that can properly be considered compensatory. The Circuit Court attempted to justify this greater-than-100-to-1 ratio of punitive to compensatory damages by treating attorney's fees and cancellation of the loan as "compensatory," but this approach is

impermissible. Indeed, fee-shifting and cancellation of principal are themselves punitive, and using them as a basis for *additional* punitive damages is excessive and improper.

Finally, the Circuit Court failed to offset the damages against Quicken Loans with the settlement against former defendant Dewey Guida. The offset was required as a matter of law, and the Circuit Court gave no explanation for its refusal to do so.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Quicken believes that this case should be set for argument under Rule 20 of the West Virginia Rules of Appellate Procedure because this case involves (1) issues of fundamental public importance, including whether a loan can be held unconscionable without considering the benefits of that loan to the debtor; (2) issues of first impression, over which courts in other jurisdictions have disagreed, regarding whether attorney's fees can be treated as compensatory damages in calculating punitive damages; and (3) an important constitutional issue as to whether a $2.1 million punitive damage award on a $17,476.72 restitution award violates due process.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT THE LOAN TO PLAINTIFFS WAS UNCONSCIONABLE.

The Circuit Court erred in finding that the Loan — which improved Mrs. Jefferson's interest rate and monthly payments, while providing her with cash to buy an expensive new car — was unconscionable.[3] In particular, the court failed to identify any basis on which the Loan could be said to be substantively unconscionable, as required by *Brown v. Genesis HealthCare Corp.*, --- S.E.2d ----, 2011 WL 2611327 (W. Va. S. Ct. June 29, 2011), and nothing in the record would support such a finding.

[3] This issue was presented to the Circuit Court in Quicken Loans' post-trial Motion for Amendment of Findings of Fact and/or Conclusions of Law, et al., at pp. 4-7.

As this Court recently held, a contract term is unenforceable for unconscionability only "if it is both procedurally *and* substantively unconscionable." *Brown*, 2011 WL 2611327, at *-- (emphasis added). "The question of whether a bargain is unconscionable is a question of law." *Id.* at *--. Accordingly, the Circuit Court's decision on this issue should be reviewed *de novo*. *See, e.g., State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 772, 613 S.E.2d 914, 920 (2005). Moreover "[t]he burden of proving that a contract term is unconscionable rests with the party attacking the contract." *Brown*, 2011 WL 2611327, at *--. Plaintiffs failed to satisfy this burden.

The Loan was not substantively unconscionable because it provided clear and undisputed benefits to Plaintiffs, which the Circuit Court failed to weigh in deciding whether the loan was unfair to Plaintiffs.[4] "[S]ubstantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party." *Brown*, 2011 WL 2611327, at *--. A bargain is unconscionable only when it is "so one sided as to lead to *absurd* results." *Troy Mining Corp. v. Itmann Coal Co.*, 176 W. Va. 599, 603, 346 S.E.2d 749, 752 (1986) (emphasis added; quotation marks omitted).

The Loan was not "one-sided," and it did not "lead to absurd results." Instead, it provided Mrs. Jefferson with what many consumers quite rationally want: a large cash payout, lower monthly payments, and a better interest rate. Mrs. Jefferson herself conceded that the loan helped her make ends meet. *See* Testimony of Lourie Jefferson, Vol. II, p. 228 (A958). And these savings were locked in for at least three years. *See* Testimony of Margot Saunders, Vol. II, p. 8 (A737); QL Exs. 13, 14 (A1284-93). Moreover, in exchange for consolidating her credit card debt into the mortgage, Mrs. Jefferson benefited from a significantly reduced interest rate of

[4] Quicken Loans also disputes the existence of procedural unconscionability, in that there was no evidence that Ms. Jefferson — who received calls from numerous prospective lenders, *see* Testimony of Lourie Jefferson, Vol. II, p. 191 (A921), and could have turned to others if Quicken Loans' terms were unreasonable — suffered from a lack of bargaining power in obtaining the Loan.

9.15%. *See* Testimony of Margot Saunders, Vol. II, p. 158 (A888). The CitiFinancial loan, by contrast, had a 9.75% interest rate, and two other loans which were consolidated into the Loan were at 23.99% and 12%. *See* Testimony of Morgan Winfree, Vol. IV, pp. 49-54 (A1063-64).

These undisputed benefits belie the idea that the loan was unconscionable. As Judge Copenhaver recently held, a loan is not unconscionable under West Virginia law where "plaintiffs have not alleged any reason why their previous mortgage loans would be more beneficial to them than the [new] loans, likely because the new interest rates compare favorably to the [prior] rates and the monthly payments were lower." *Croye v. GreenPoint Mortg. Funding, Inc.*, 740 F. Supp. 2d 788, 794 (S.D. W. Va. 2010). Likewise, here, the Loan provided clear benefits in a large cash payout, lower monthly payments, and a lower interest rate. Indeed, Plaintiffs' expert failed to cite any other lender that could have given Mrs. Jefferson these benefits on better terms. *See* Testimony of Margot Saunders, Vol. II, pp. 120-21 (A850-51). The Circuit Court did not weigh any of these benefits against the payment burdens on Plaintiffs, as would be necessary to establish that the loan was so one-sided as to be unconscionable. And any such weighing would show that the loan made good sense for someone who needed an immediate cash payout and wanted to reduce her monthly payments.

Instead of giving these benefits their due weight — or, indeed, any weight — the Circuit Court focused only on four factors that it contended made the loan unconscionable: (1) "The false promise of refinancing"; (2) "Introducing a balloon payment feature at closing" and "[f]ailing to properly disclose the balloon payment"; (3) "Falsely representing that the plaintiffs were buying the interest rate down"; and (4) "Negligently conducting the appraisal review." 2/25/10 Op. at 17 (A142).[5] But these factors concern only the *procedure* for making the loan.

[5] The Circuit Court also cited four supposedly "unconscionable terms" (2/25/10 Op. at 17 (A142)), three of which are duplicative of the four factors, *i.e.*, the discount and interest rate issue, the

None of the factors addresses the key issue of *substantive* unconscionability, which requires proof that the resulting bargain was so one-sided that the law cannot allow it. *See Brown*, 2011 WL 2611327, at *--. The Circuit Court should have asked whether, as a *matter of law*, a person may choose to receive the benefits of the Loan on the terms prescribed, or whether such a Loan is so one-sided as to be forbidden by law. The answer to that question should be self-evident.

In addition, each of the circumstances cited by the Circuit Court fails on its own terms:

First, Quicken Loans' supposed promise of a better deal through a future refinancing, even if it were made (which it was not) and broken (which it was not), would not render *this* loan unconscionable, because the loan's terms were not absurdly one-sided. In other words, the existence of a supposed promise outside the agreed-upon deal does not affect whether the deal itself is substantively unconscionable.

Second, although the form of the disclosure of the loan's balloon feature may not have strictly conformed to statute, it *was* disclosed (as discussed below). In any event, a failure to meet a statutory *disclosure* requirement does not render the entire loan substantively unconscionable. Moreover, balloon payments are a commonplace, perfectly legal feature in many home loans. Hence, the balloon itself cannot render the loan unconscionable. *See, e.g.*, *Mallory v. Mortgage Am.*, 67 F. Supp. 2d 601, 612-13 (S.D.W. Va. 1999) (plaintiffs failed to show that loan containing balloon payment was unconscionable).

Third, the trial record establishes that the amount of closing costs was reasonable because Mrs. Jefferson's credit rating placed her in a high-risk category. Mrs. Jefferson's recent

(continued...)

balloon payment issue, and the appraisal issue. The other one is that there were "excessive closing costs of $8,889" (*id.*), but the Circuit Court cited no evidence to support the idea that this amount on a loan of $144,800 is "excessive," and none was presented at trial. Moreover, at most, excessive closing fees could make *those fees* unconscionable; logically, they could not render the entire loan unconscionable.

delinquency on her existing CitiFinancial mortgage necessarily caused her to become a greater credit risk for Quicken Loans, and that greater risk required offering her a loan package with higher up-front costs. *See* Testimony of Michael Lyon, Vol. V, pp. 5-15 (A1137-39). Simply put, the charging of fees commensurate with the risk of a loan does not make the loan unconscionable. While the Circuit Court found that the higher costs at closing were inaccurately described in the HUD Settlement Statement, those higher costs would have been charged regardless. *See id.*; *see also* Plaintiffs' Ex. 4 at Q2688 (A1860). In any event, even if closing costs had been overcharged (and they were not), the law's remedy is a refund of that overcharge. *See* W.Va. Code § 46A-7-111. The entire loan is not *ipso facto* unconscionable.

Fourth, although it now appears that former defendant Guida's appraisal overstated the value of the property, inadequate collateral does not render a loan one-sided in favor of the *lender* – to the contrary, inadequate collateral greatly *disadvantages* a lender. Moreover, there is an entirely separate statute that deals with inflated appraisals, *see* W. Va. Code § 31-178(m)(8), and provides the appropriate remedies for a violation.

Finally, the Circuit Court stated that the Loan "converted the $25,000 in unsecured debt to secured debt and raised her secured monthly debt obligation from $578 to $1,114," and by "putting the plaintiffs' home at risk, . . . [t]he net effect of this conversion is unconscionable." 2/25/10 Op. at 18 (A143). However, the premise that increasing secured debt is *per se* unconscionable has no legal basis, and would call into doubt common situations (such as second mortgages) in which homeowners increase their secured debt to borrow money at favorable rates. Indeed, the court ignored the fact that Plaintiffs' *total* monthly debt obligation *decreased* from $1,460 to $1,114. *See* Testimony of Lourie Jefferson, Vol. II, pp. 227-228 (A957-58). This

substantial benefit to Plaintiffs – in addition to a reduced interest rate and a cash payout of over $40,000 – establishes that the Loan was not so one-sided as to be unconscionable.

II. THE CIRCUIT COURT ERRED IN FINDING THAT PLAINTIFFS PROVED FRAUD BY CLEAR AND CONVINCING EVIDENCE.

The elements of a common-law fraud claim are well established: "(1) that the act of fraud was committed by the defendant; (2) that it was material and false; (3) that plaintiff relied upon the misrepresentation and was justified in relying upon it; and (4) that plaintiff was damaged because he relied upon it." *Martin v. ERA Goodfellow Agency, Inc.*, 188 W. Va. 140, 142, 423 S.E.2d 379, 381 (1992). "These elements must be proved by clear and convincing evidence." *Bowling v. Ansted Chrysler-Plymouth-Dodge*, 188 W. Va. 468, 472, 425 S.E.2d 144, 148 (1992). The "clear and convincing standard" is "the highest possible standard of civil proof," which this Court has defined as "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *Moore v. Goode*, 180 W. Va. 78, 83-84, 375 S.E. 2d 549, 554-55 (1988) (quotation marks omitted). Plaintiffs fell far short of this stringent standard.[6]

A. There was no clear and convincing evidence of a promise to refinance, of the falsity of such a promise, or of Quicken Loans' fraudulent intent at the time of the supposed promise.

The Circuit Court found that Quicken Loans committed fraud primarily on the basis that Quicken Loans "[i]ntentionally promis[ed] Lourie Jefferson it would refinance her within 3 to 4 months from the date of the closing." 2/25/10 Op. at 21 (A146). This finding cannot be sustained. There is no clear and convincing evidence that such a promise was ever made. Moreover, by Mrs. Jefferson's own account, the alleged promise was contingent on her making

[6] This issue was presented to the Circuit Court in Quicken Loans' post-trial Motion for Amendment of Findings of Fact and/or Conclusions of Law, et al., at pp. 8-11.

her loan payments for "three or four" months, and she defaulted after two months. Finally, there was no evidence that Quicken Loans knew that such a promise was false when it was made.

Plaintiffs' only evidence of the supposed promise to refinance the loan came from Mrs. Jefferson's own self-serving testimony that the promise was made. Specifically, she testified that she was told she could refinance if she improved her credit rating by making her loan payments: "[Quicken Loans' representative] told me that what they could do would be to refinance the loan in three to four months, and then that I could get it at a cheaper rate, but initially my credit scores weren't high enough; and that, once that loan was in place and I got -- everything started to be paid off, then I would be able to refinance my loan." Testimony of Lourie Jefferson, Vol. II, p. 195 (A925).

This supposed promise did not appear in any written form, and Plaintiffs produced no evidence corroborating Mrs. Jefferson's testimony. Indeed, there was no documentation of any kind supporting this allegation, even though the record included numerous internal e-mails between Quicken Loans employees (*see* QL Exs. 74-83 (A1297-99)) and e-mails from Mrs. Jefferson herself to Quicken Loans (*see* Plaintiffs' Ex. 4 (A1741)). *See also* Testimony of Anthony Nuckolls, Vol. IV, pp. 101-102 (A1076).

Mrs. Jefferson's uncorroborated testimony does not meet the standard of clear and convincing evidence. This Court has held that a party's uncorroborated, sworn affidavit was insufficient even to satisfy the much lower standard of creating a dispute of material fact to survive summary judgment. *See Merrill v. Dep't of Health & Human Res.*, 219 W. Va. 151, 161, 632 S.E.2d 307, 317 (2006) ("In this case, [plaintiffs] have utterly failed to provide any supporting affidavits to corroborate their self-serving statements [which were made in sworn affidavits] . . . . Accordingly, they have not established the existence of a genuine issue of

material fact . . . ."); *see also Spaulding v. Spaulding*, 87 W. Va. 326, 104 S.E. 604, 606 (1920) (holding that where the only evidence is "the self-serving declaration" of one witness, then there is "no such clear and convincing evidence"). Indeed, if a self-serving statement alone could satisfy the "clear and convincing" standard, then that test would become meaningless. Anyone could claim fraud in contract negotiations, and if the factfinder credited his statement, then the contract would be set aside. Yet this facile means of "proving" fraud is precisely what the clear and convincing standard of proof is designed to prevent.

In addition, the Circuit Court erred as a matter of law in failing to explain its basis for accepting Mrs. Jefferson's self-serving assertions. "Where the determinative factor at trial is the credibility of the witnesses, this requires a trial court to specify what witnesses were not credited and why." *Brown*, 196 W. Va. at 570, 474 S.E.2d at 500. Here, the Circuit Court made no statement at all about the credibility of the witnesses, or why it accepted Mrs. Jefferson's version of the facts, all by itself, as *clear and convincing* evidence.

Furthermore, even if the promise had occurred, there is no evidence that the promise — as described by Mrs. Jefferson herself — was false, and no evidence that it was made with fraudulent intent. Where the claimed fraud is a breach of "a promise to be performed in the future," the plaintiff's proof must show that "the promisor, at the time of making the same, did not intend to keep" it. *Traders Bank v. Dils*, 226 W. Va. 691, 695, 704 S.E.2d 691, 695 (2010) (quotation marks omitted). Plaintiffs did not offer *any* evidence that Quicken Loans intended to refuse a refinancing even if Mrs. Jefferson had satisfied her end of the alleged bargain — which, of course, she did not.

In fact, the *only* evidence came from Quicken Loans, which established that. In if a client made timely payments, then a loan could be refinanced within four months. *See* Testimony of

Anthony Nuckolls, Vol. IV, p. 192-94 (A1098-99) ("Q. Under the right circumstances, could a client refinance a loan after the four-month period? A. Yes. Q. And what would they need to do, generally, to accomplish this? A. Generally, they would need to make timely payments, not delay payments subject to a judgment or collections, stay gainfully employed, just basic mortgage qualification things."). As discussed below, Mrs. Jefferson did not make timely payments for four months. Regardless, the point is that there is no evidence, let alone clear and convincing evidence, that if the promise had been made *and* if Mrs. Jefferson had made timely payments, Quicken Loans had no intention of honoring its supposed promise.

Indeed, the evidence does not even establish a breach of contract, let alone fraud, because Mrs. Jefferson breached the alleged bargain before Quicken Loans' "performance" was even required. She testified unequivocally that any promise by Quicken Loans was contingent on *her* making timely payments and improving her credit rating. According to Mrs. Jefferson, Quicken Loans promised that a refinancing would occur "in three to four months" once "everything started to be paid off," because "initially my credit scores weren't high enough." Testimony of Lourie Jefferson, Vol. II, p. 195 (A925).

This refinancing scenario never happened. Mrs. Jefferson did *not* make her loan payments for four months, as required under her own version of the supposed promise. She made just two timely payments, in September and October 2006. Thereafter, Mrs. Jefferson failed to make any additional payments until January 16, 2007 and February 5, 2007. *See* QL Ex. 92 (A1346-48). Her next payment arrived *thirteen months* later, on March 18, 2008, after this lawsuit had been filed. *Id.* In short, the key condition on which (according to her own testimony) the promise of refinancing was premised was never satisfied.

Finally, the promise, even if it existed, was far too vague for fraud. For a promise to give rise to fraud, it must "contain[] definitive and ascertainable terms." *Sayres v. Bauman*, 188 W.Va. 550, 554, 425 S.E.2d 226, 230 (W. Va. 1992). There was no specific date by which the refinancing would occur, let alone any specificity about the terms of the promise – including the amount of the new loan, the new interest rate, and the term of the new loan. Accordingly, even accepting Plaintiff's testimony, there was no enforceable promise.

B. There was no alternative basis for a fraud finding.

The Circuit Court's other theories of fraud are clearly deficient. The court posited that Quicken Loans committed fraud by "[n]ot disclosing to Lourie Jefferson prior to closing that her loan had an enormous balloon payment" and by "[r]epresenting to [her] that she was buying her interest rate down." 2/25/10 Op. at 21-22 (A146-47). Neither basis withstands scrutiny.

The balloon *was* indisputably disclosed, in several documents presented to Mrs. Jefferson, including the 3/6 Adjustable Rate/Balloon Mortgage Disclosure (QL Ex. 4 (A1274)), the Adjustable Rate Rider (QL Ex. 13 (A1284)), and the Adjustable Rate: Balloon Note document (QL Ex. 14 (A1289)), all of which Mrs. Jefferson signed. The Circuit Court found that these disclosures were insufficient to meet statutory criteria prescribed in W. Va. Code § 46A-2-105, *see* 2/25/10 Op. at 9-10 (A134-35), but the balloon was *in fact disclosed*, and Mrs. Jefferson was *actually* aware of it *before* she signed the note. These facts squarely negate the fundamental elements of fraud.

Mrs. Jefferson conceded that she received the loan packet containing the disclosures one to two days before the closing. *See* Testimony of Lourie Jefferson, Vol. II, p. 201 (A931). Then, at closing, she saw the term "balloon payment," had some "concern" about it, and decided to proceed nonetheless. *Id.* at 203 (A933). Indeed, Mrs. Jefferson signed two documents with the word "Balloon" in the *title*. *See* QL Exs. 4, 14 (A1274, 1289). Mrs. Jefferson's undisputed

awareness of the balloon payment feature prior to closing necessarily bars any fraud claim. *See Martin*, 423 S.E.2d at 380 ("If one, with knowledge of a fraud which would relieve him from a contract, goes on to execute it, he thereby confirms it, and cannot get relief against it."). There can be no fraud where the truth is disclosed, and the other party acts with knowledge of it.

Moreover, there is no proof at all of any fraudulent intent with respect to the balloon. Indeed, Quicken Loans' disclosure of the balloon feature in multiple documents is flatly inconsistent with an intent to defraud Mrs. Jefferson into believing there was no balloon feature. In addition, there is no evidence that Mrs. Jefferson relied on any supposed misrepresentation regarding the balloon payment. To the contrary, Mrs. Jefferson went ahead with the loan despite her knowledge and "concern" about the balloon. *See* Testimony of Lourie Jefferson, Vol. II, pp. 203-04 (A933-34). And again, the Circuit Court made *no finding* of reliance on this nonexistent misrepresentation. *See* 2/25/10 Op. at 21-22 (A146-47).

Finally, for the supposed fraud as to discount costs, there is also no evidence (let alone clear and convincing evidence) of reliance. The Circuit Court found that Quicken Loans "represent[ed] to Lourie Jefferson that she was buying her interest rate down and labeling the entire 4 points or $5,792 as a 'loan discount' on the HUD Settlement Statement, when at least 1.5 points or $2,100 was nothing more than pure profit to Quicken Loans." *Id.* In short, the purported misrepresentation related only to the *purpose* of some of the closing costs, *i.e.*, the contention is that $2,100 of the closing costs should have been labeled differently. But the Circuit Court offered no explanation of why a changed *description* of the closing fees — which would not change the total amount of such fees — would have led Mrs. Jefferson not to execute the loan. And the exact amount of closing costs was conspicuously disclosed on the Settlement Statement and the Itemization of Amount Financed documents. *See* QL Exs. 9, 10 (A1275-76).

In any event, the Circuit Court made no finding at all as to the materiality of, or reliance on, the supposed $2,100 discrepancy in closing costs, and such a finding would be impossible because Mrs. Jefferson did not testify about reliance. Instead, her only testimony on the subject was that she did not know how much she was paying for discount points. *See* Testimony of Lourie Jefferson, Vol. II, pp. 202-03 (A932-33) ("Q. Were you told anything about, if you paid a little bit more money on this closing costs, that your interest rate would come down; you remember that? A. Something like that. Q. If you don't remember the word 'points' being used? A. No. Q. Do you know how much you paid in points? You have any idea? A. No."). Because of the high risk of the loan, Mrs. Jefferson would have had to pay the $2,100 at issue however it had been labeled in the Settlement Statement. *See* Testimony of Michael Lyon, Vol. V, pp. 12-15 (A1138-39); Plaintiffs' Ex. 4 at Q2688 (A1860). And there is nothing to support the idea that she would have walked away from the loan if the closing costs had been differently described. *See* Plaintiffs' Ex. 4 at Q2647, Q2650 (A1819, 1822) (internal Quicken Loans e-mails noting "[c]lient is very anxious to close" and Mrs. Jefferson "is on board to close this week . . . she understands the costs and rate are more and that she is now very high risk"). Thus, there was no clear and convincing evidence of materiality or reliance here.

III. THE CIRCUIT COURT LACKED THE LEGAL AUTHORITY TO FORGIVE THE PRINCIPAL OBLIGATION OF A SECURED DEBT.

A. There is no legal authority to forgive the obligation to repay principal here.

The Circuit Court erred as a matter of law in granting Plaintiffs the extraordinary and punitive remedy of voiding the Note and Deed of Trust and cancelling the obligation to repay even the *principal* amount of the loan. West Virginia law strictly limits the circumstances under which such windfall relief is permissible, and those circumstances are absent here. The Circuit

Court failed to cite any specific source for the legal authority it purported to exercise, and failed to explain how it could ignore the plain terms of the applicable statutes.[7]

Under the West Virginia Consumer Credit and Protection Act ("WVCCPA"), there are only two circumstances in which cancellation of debt is a permissible remedy. First, cancellation of a debt is allowed for "regulated consumer loans." W. Va. Code §§ 46A-5-101(2). Here, because the interest rate was below eighteen percent, the loan at issue is not a "regulated consumer loan." *Id.* § 46A-1-102(38). Second, cancellation is permissible for "willful" violations of the WVCCPA, but *only* where "the debt is not secured by a security interest." *Id.* § 46A-5-105. Here, even if there had been willful violations – and there were not – the debt was undeniably "secured by a security interest."

Cancellation of the debt is not a permissible remedy for a violation that does not meet these narrow statutory conditions. This Court considered the issue in a case where debtors alleged that a lender "sold [them] credit life and property insurance without affording them the opportunity to buy insurance elsewhere in violation of W. Va. Code § 46A-3-109(2) . . . ." *Tomchin Furniture Co. v. Lester*, 172 W. Va. 575, 580, 309 S.E.2d 73, 78 (1983). While recognizing that such a violation could give rise to "an action for damages or an offset to their debt," the Court rejected the idea that it could cancel the debt, holding that "we are not aware of any decision that holds that such a claim defeats the creditor's right to repossess the property." *Id.* This Court explained that W. Va. Code § 46A-5-101 "provid[es] for civil liabilities and criminal penalties" under the WVCCPA, and "[t]here is no provision for cancellation of the security agreement." *Id.* Indeed, but for the narrow circumstances discussed above, the statute

[7] This issue was presented to the Circuit Court in Quicken Loans' post-trial Motion for Amendment of Findings of Fact and/or Conclusions of Law, et al., at pp. 13-15.

expressly rejects cancellation, stating that "'[e]xcept as otherwise provided, a violation of this chapter does not impair rights on a debt.'" *Id.* (quoting W. Va. Code § 46A-5-101(5)).

Notwithstanding the strict statutory requirements for cancellation of debt, the Circuit Court held that it could cancel the principal based on unconscionability, appraisal, unfair practices, and fraud. However, none of these supposed violations supports this remedy, let alone overrides the clear statutory restrictions discussed above.

1. Unconscionability

First, the Circuit Court held that unconscionability under § 46A-2-121 was sufficient to cancel Mrs. Jefferson's debt, but § 46A-2-121 does not mention the possibility of cancellation at all. Indeed, "damages for fraud or unconscionable conduct [under the WVCCPA] are limited to actual damages and, if the court so determines, a penalty of not less than one hundred nor more than one thousand dollars." *One Valley Bank of Oak Hill, Inc. v. Bolen*, 188 W. Va. 687, 692, 425 S.E.2d 829, 834 (1992). While the statute provides that a court may "refuse to enforce" an unconscionable agreement, *see* W. Va. Code § 46A-2-121, an unenforced agreement removes benefits and obligations of *both* parties. It would be one thing to unwind the loan and put Plaintiffs in the position they would have been in had there been no loan, but it is quite another to cancel Plaintiffs' obligations while leaving them in possession of the loan proceeds.

Moreover, any interpretation of § 46A-2-121 that would permit forgiveness of the principal of a loan cannot be reconciled with the other provisions of the WVCCPA. As Judge Copenhaver has accurately observed, "[t]he power of the court to render a provision unenforceable under § 46A-2-121 should be construed *in pari materia* with the remedial sections of Article 5 pertaining to unconscionable, fraudulent and illegal acts." *Byrd v. Option One Mortgage Corporation*, No. 2:04-cv-01058 (S.D.W. Va., April 12, 2007), slip op. at 22. Indeed, Article 5 specifically mentions a cancellation remedy for "unconscionable conduct," and limits

that remedy to "willful[]" violations where "the debt is not secured by a security interest." W. Va. Code § 46A-5-105. This provision "would be superfluous" if "§ 46A-2-121 authorized the courts not only to declare an agreement unenforceable but also to declare that the consumer had no obligation to tender back the goods or funds that were subject to that agreement." *Byrd*, slip op. at 23. Finally, as discussed *infra* Part IV, cancellation of the debt is punitive, and "punitive damages are not available under the fraud or unconscionable conduct provisions of [§§] 46A-2-121 . . . and 46A-2-102(5)." *One Valley Bank*, 188 W. Va. at 692, 425 S.E.2d at 832.

2. Appraisal Statute Violation

Likewise, a forfeiture remedy cannot rest on the Circuit Court's finding of a violation of the appraisal statute, W. Va. Code § 31-17-17(a). *See* 2/25/10 Op. at 24 (A149). First, that section applies only to a "willful" violation of the appraisal statute. W. Va. Code § 31-17-17(a). The Circuit Court's *own findings* make clear that the appraisal violation was merely a negligent violation. 2/25/10 Op. at 15 (A140) ("The negligently performed appraisal review facilitated the sale of this loan . . . ."); *id.* at 17 (A142) ("[T]he loan was induced by unconscionable conduct due to . . . Negligently conducting the appraisal review and failing to realize the highly inflated appraisal from Guida."); *id.* at 20 (A145) ("[T]he defendant engaged in unfair methods of competition and unfair or deceptive acts or practices in the following manners: . . . Conducting a negligent appraisal review . . . ."). In making these repeated findings, the Circuit Court did not once use the word "willful." Indeed, at a later hearing, the Circuit Court stated:

> There were all errors and omission and commission caused misleading and distorted report, and then the misleading appraisal, which was negligent - I mean, all that really takes in the whole question of the appraisal. It was, basically, a finding of negligence. . . . But all of that was really on the basis of pure negligence and, rather than a finding of willful, wanton disregard.

Sept. 1, 2010, Hearing Transcript, Hon. Arthur Recht, pp. 117-118 (A2433).

Lastly, even if there had been a willful violation, and § 31-17-17(a) applied here, it would provide only for the loan to be "canceled." As shown above in the similar context of § 46A-2-121, such a remedy means only the parties should be returned to the *status quo ante*. It does *not* mean that Plaintiffs can cancel their obligations while retaining the loan proceeds as a windfall.

3. Unfair Practices

The finding of a statutory "unfair practices" violation also provides no legal basis for a punitive forfeiture. Again, the statute concerning such violations does not mention forfeiture or cancellation of a loan; instead, it provides for "actual damages or two hundred dollars, whichever is greater" and "such equitable relief as [the court] deems necessary or proper." W. Va. Code § 46A-6-106. A forfeiture cannot represent "actual damages," since keeping the principal is simply a windfall for Mrs. Jefferson.

Also, the forfeiture is not permissible as "equitable relief." Cancellation of loan principal is a distinct remedy governed by a particular statutory provision, W. Va. Code § 46A-5-105. The general authorization of equitable relief in Article 6 (which governs sales and leases) cannot override the plain language of the WVCCPA that is specifically applicable to secured loans. Instead, as with unconscionability, the statutes must be read *in pari materia*, so that cancellation of the principal is limited to willful violations and unsecured debt. *See Byrd*, slip op. at 22.

In any event, forfeiture simply is not an *equitable* remedy. *See, e.g., Fraley v. Family Dollar Stores of Marlinton, West Virginia, Inc.*, 188 W. Va. 35, 38, 422 S.E.2d 512, 515 (1992) ("It is an elementary principle of equity jurisprudence that equity looks with disfavor upon forfeitures, and that equity never enforces a penalty or forfeiture if such can be avoided.") (quotation marks omitted). *Cf. Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 850 (N.D.W. Va. 2004) ("Although there is a provision in the WVCCPA giving courts discretion to award broad 'equitable relief,' that language does not support a finding that punitive damages are

available. As noted in *Haynes* [*v. Rhone-Poulenc, Inc.*, 206 W. Va. 18, 521 S.E.2d 331 (1999)], punitive damages are a legal, not equitable, remedy.").

Finally, an equitable remedy for a violation premised on a misrepresentation about closing costs must necessarily be limited to the closing costs themselves; it cannot properly be leveraged into a basis for forfeiture of the entire loan amount.

4. Fraud

The Circuit Court also purported to impose a forfeiture of principal as a remedy for fraud. However, just as for unconscionability, the remedy for fraud in connection with a loan is defined by statute and restricted to non-secured debt. *See* W. Va. Code § 46A-5-105 ("If a creditor has willfully violated the provisions of this chapter applying to illegal, *fraudulent* or unconscionable conduct or any prohibited debt collection practice, . . . the court may cancel the debt when the debt is not secured by a security interest.") (emphasis added). Furthermore, it is black-letter law that a party seeking to void a contract based on fraudulent misrepresentation must return any benefit received under the contract – here the $144,800 in principal that Quicken Loans paid to Plaintiffs on July 7, 2006. *See Nat'l Life Ins. Co. v. Hanna*, 122 W. Va. 36, 7 S.E.2d 52, 53-54 (1940) (where "the plaintiff seeks to cancel, on the ground of fraudulent representations," an insurance contract, he is "required to refund the premiums received on that policy" because "any person demanding the rescission of a contract . . . must restore or offer to restore to the other party whatever he may have received under the contract") (internal quotation marks omitted); *see also* Restatement (Second) of Contracts § 384 (party seeking restitution must "return[] or offer[] to return, conditional on restitution, any interest in property that he has received").

B. Forfeiture of the principal of the loan is plainly unjust in this case.

As discussed above, the Circuit Court had no equitable authority to order forfeiture of the principal of the loan, and the Court Circuit did not even purport to apply its equitable authority

here. In any event, the forfeiture here is fundamentally unjust. Equity does not bestow gratuitous windfalls, and there can be no doubt that forfeiting the principal is a windfall for Mrs. Jefferson. She received $144,800 from Quicken Loans that she no longer has to pay back. Even if some of the terms of the loan were improper, there would be no rationale whereby equity would bestow all of the benefit of that loan upon her, with no reciprocal obligation at all.

Equity does equity, and there is no basis for depriving Quicken Loans of the full value of the property for making a loan with lawful, agreed-upon terms. To the extent that the appraisal was incorrect or the balloon payment was not properly disclosed, remedies could be fashioned to fully address and cure those violations. But the extreme remedy of forcing Quicken Loans to forfeit all of the money that it gave to Mrs. Jefferson has no connection to the alleged violations; it is a baldly punitive measure grossly disproportionate to any actual harm in this case.

IV. THE PUNITIVE DAMAGES AWARD WAS UNSUPPORTED BY ANY VALID CLAIM, AND IN ANY EVENT THE AWARD WAS GROSSLY EXCESSIVE AND DEPRIVED QUICKEN LOANS OF DUE PROCESS.

The Circuit Court's award of punitive damages is subject to *de novo* review. *See State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 418 (2003). Here, the Circuit Court erred in three fatal respects. First, there is no valid claim on which punitive damages can be awarded. Second, the Circuit Court failed to apply the required factors in deciding punitive damages, outlined in *Garnes*, instead simply choosing a number with essentially no analysis. And third, it grossly inflated the compensatory/punitive multiplier by improperly treating as "compensatory" $740,000 in forgiven loan principal, attorneys' fees, and expenses – thereby turning a $17,476.72 restitution award into an ostensible basis for over $2 million in punitive damages.[8]

[8] These issues were presented to the Circuit Court in Quicken Loans' post-trial Motion for Amendment of Findings of Fact and/or Conclusions of Law, et al., at pp. 15-24.

A. The Circuit Court erred in awarding punitive damages because only the unsupported fraud claim supported punitive damages.

It is well-established that "the right to recover punitive damages in any case is not the cause of action itself, but a mere incident thereto." *Lyon v. Grasselli Chemical Co.*, 106 W. Va. 518, 521, 146 S.E. 57, 58 (1928). Thus, for Plaintiffs to recover punitive damages, there must be a viable underlying claim that could support such an award, and there is no such claim here.

None of Plaintiffs' statutory claims permit punitive damages. Quicken Loans' liability was premised on four statutory claims: (1) Unconscionability (§ 46A-2-121); (2) Illegal Balloon Note (§ 46A-2-105); (3) Unfair and Deceptive Acts (§ 46A-6-104), and (4) Illegal Appraisal (§ 31-17-8(m)(8)). Each statute provides an exclusive remedy. The Unconscionability and Illegal Balloon Note claims arise under Article 2 of the WVCCPA, and this Court has held that because Article 2 specifically sets forth the damages available to an aggrieved plaintiff, "punitive damages are not available." Syl. pt. 4, *Bolen*, 188 W. Va. 687, 425 S.E.2d 829. Plaintiffs are likewise limited to an exclusive statutory remedy for their Unfair and Deceptive Acts or Practices claim, W. Va. Code § 46A-6-104. Article 6 of the WVCCPA explicitly provides that a plaintiff's damages are "actual damages or two hundred dollars, whichever is greater." W. Va. Code § 46A-6-106. Because the statute does not contemplate punitive damages, a plaintiff is limited to her statutory remedy. *See Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832 (N.D.W. Va. 2004). Finally, for the Illegal Appraisal claim, the Circuit Court found only negligence, *see supra* at p. 25, and the law requires "more than a showing of simple negligence to recover punitive damages." *Bennett v. 3 C Coal Co.*, 180 W. Va. 665, 671, 379 S.E.2d 388, 394 (1989).

Thus, only Plaintiffs' fraud claim could legally support a punitive damages remedy. However, for the reasons stated above, the record does not support the Court's finding of fraud. Accordingly, the punitive damages award should be vacated.

B. The Circuit Court deprived Quicken Loans of procedural due process by failing to perform the required analysis of its punitive damages award.

The Circuit Court was bound to apply the factors listed in *Garnes*, 186 W. Va. 656, 413 S.E.2d 897, in deciding the punitive damages award. The consideration of these factors is necessary for "a meaningful and adequate review by the trial court using well-established principles," as well as a subsequent, *de novo*, "meaningful and adequate appellate review." *Id.*, 186 W. Va. at 667, 413 S.E.2d at 908. Indeed, the factors are a due process requirement because "[d]ue process demands not only that penalties be abstractly fair, but also that a person not be penalized without reasonable warning of the consequences of his acts." *Id.*, 186 W. Va. at 668, 413 S.E.2d at 909. Thus, where a circuit court does not "make the necessary findings required by *Garnes*," its decision to award punitive damages is "reversible error." *State ex rel. Harper-Adams v. Murray*, 224 W. Va. 86, 93-94, 680 S.E.2d 101, 108-09 (2009).

While the Circuit Court recognized that it was bound to apply the *Garnes* factors, it failed to actually do so. Instead, its entire "analysis" consisted of these two sentences:

> Taking all of the *Garnes* factors into consideration, including applying a factor of three times the compensatory damages and attorney fees, is $2,168,868.75.
>
> This Court believes that this amount fairly applies the five standards in *Garnes* including the financial position of the defendant and as a matter of fundamental fairness, assuring that the punitive damage award bears a reasonable relationship to the compensatory damages which include the actual compensatory damages and the attorney fees.

2/17/11 Op. at 4 (A312). The Circuit Court made no findings as to reprehensibility, the relationship of punitive damages to the harm, or any other *Garnes* factor. It also failed to explain its choice of a three-times multiplier, or why it included attorney's fees and cancellation of the debt in the amount multiplied.

Such a cursory treatment of the required *Garnes* analysis is woefully insufficient. As this Court held, a trial court's superficial application of the *Garnes* factors should be reversed where

"the circuit court made no findings regarding the reprehensibility of defendant's conduct . . . whether there was a reasonable relationship of the amount awarded to the actual harm . . . [and] . . . regarding the award of punitive damages in lieu of attorneys fees." *Harper-Adams*, 224 W. Va. at 94, 680 S.E.2d at 109. Here, as in *Harper-Adams*, there are no such findings. If a trial court can simply recite the factors without any analysis, then the factors become insignificant, appellate review becomes illusory, and the *Garnes* procedural due process guarantees become mere ritual.

The Circuit Court's error was so clear that even Plaintiffs, in their post-trial brief, *agreed* that the court had not satisfied the *Garnes* requirements, and urged the court to do so:

> While sitting as the trier of fact, the Court was required to and did consider the factors set forth in . . . *Garnes* but was not expected at that time to enter findings of fact and conclusions of law with the specificity necessary for appellate review of the punitive damage award. These findings and conclusions are not entered until the review of the punitive damage award is undertaken and completed.
>
> Turning to *Garnes*, . . . plaintiffs submit that now during the pendency of post trial motions is the appropriate time for the Court to complete its review of the punitive damage award. . . . For these reasons, the Court should issue additional findings of fact and conclusions of law.

Plaintiffs' Brief in Response to Defendant's Post-Trial Motions at 31-32 (A325-26). The Circuit Court, however, rebuffed the entreaties of both parties and summarily denied all post-trial motions. Accordingly, the punitive damages award must be vacated.

C. The Circuit Court's award of punitive damages was grossly excessive and deprived Quicken Loans of due process.

Even had the Circuit Court conducted a procedurally adequate *Garnes* review – and it did not – Quicken Loans has a further substantive due process right to be free of arbitrary punishment for which it had no reasonable notice. *See State Farm*, 538 U.S. at 416-417. In particular, when reviewing a punitive damages award, this Court looks at certain aggravating and mitigating factors. *See Perrine v. E.I. du Pont de Nemours and Co.*, 225 W. Va. 482, 553-54,

694 S.E.2d 815, 886-87 (2010). The punitive damages award here violates due process based on both the nature of the conduct at issue and the ratio of punitive damages to actual compensatory damages.

First, even apart from the extraordinary punitive-to-compensatory ratio in this case, none of the relevant aggravating factors justifies a large award. Those factors include "(1) the reprehensibility of the defendant's conduct; (2) whether the defendant profited from the wrongful conduct; (3) the financial position of the defendant; (4) the appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed; and (5) the cost of litigation to the plaintiff." *Id.*, 225 W. Va. at 553, 694 S.E.2d at 886. In this case, there is no reprehensible conduct that would support a $2 million punitive damages award on a $144,800 loan. The only supposed fraud concerned an alleged promise to refinance in four months, by which time Mrs. Jefferson had stopped making payments; a failure to disclose the balloon payment in one particular document when it was clearly disclosed in others; and a supposed mislabeling of $2,100 in closing costs. Also, Quicken Loans had a practice against making any promise of future refinancing, and mortgage bankers were trained not to make such promises. *See* Testimony of Anthony Nuckolls, Vol. IV, pp. 101-104 (A1076). Thus, if such a promise were made, it was one employee's outlier decision to act contrary to Quicken Loans policy, with no evidence that such conduct was approved at higher levels. As for the other factors, Quicken Loans gained no profit from the loan; a $2 million award will make settlements more difficult because of the unpredictability of this result; and Quicken Loans is already paying Plaintiffs' attorney's fees. The only factor remaining is Quicken Loans' financial position, and that alone is an improper basis for a multi-million dollar award. *See State Farm*, 538 U.S. at 427.

The application of the required mitigating factors further establishes that the punitive damages award is impermissible. The mitigating factors include, as relevant here, "(1) whether the punitive damages bear a reasonable relationship to the harm . . . ; (2) whether punitive damages bear a reasonable relationship to compensatory damages; [and] (3) the cost of litigation to the defendant." *Perrine*, 225 W. Va. at 555, 694 S.E.2d at 887. These first two factors are crucial because long-settled principles of federal due process require courts to ensure that punitive damages awards are "both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm*, 538 U.S. at 426.[9] The same is true under West Virginia law. *See Perrine*, 225 W. Va. at 547, 694 S.E.2d at 880 ("A proper measure of punitive damages begins with a determination of the proportionality between compensatory damages and punitive damages."). Thus, courts must determine whether the ratio of punitive to compensatory damages is appropriate. *See State Farm*, 538 U.S. at 425 ("Our jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").[10]

The ratio of punitive damages to the award of restitution exceeds 120-to-1, far more than the applicable West Virginia and federal standards. Specifically, the restitution award of $17,476.72 is the only actual compensatory damages. Thus, only this amount can be used in the

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[9] The third factor also supports Quicken Loans because Quicken Loans' cost of litigation was very significant, as should be obvious given Plaintiffs' attorney's fees of $495,956.25.

[10] This Court followed the same approach even before *State Farm*. *See TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 461, 419 S.E.2d 870, 874 (1992), syl. pt. 15 ("The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1.").

ratio of punitive to compensatory damages for due process purposes. And this $17,476.72 award simply cannot support a punitive damages award of over $2.1 million.

The Circuit Court's "ratio" analysis was a mirage because the denominator of the ratio was a fiction. The Circuit Court calculated the punitive award of over $2.1 million as "three times the compensatory damages and attorney fees." 2/17/11 Op. at 4 (A312). However, the Circuit Court erred under both West Virginia law and the U.S. Constitution, grossly inflating the punitive damages award by treating both the amount of debt forgiven (itself a punitive remedy) *and* the attorney's fees as compensatory damages.

1. The Circuit Court erred in treating its punitive cancellation of the note as compensation to be multiplied for punitive damages.

The amount of debt forgiven (amounting to $144,800 in principal alone) cannot rationally be included in the amount of compensatory damages for purposes of any comparison of punitive and compensatory damages. The relevant benchmark is the *harm* suffered by the particular plaintiff. *See State Farm*, 538 U.S. at 427 (ratio focuses on "proportionality to the harm"); *TXO*, 419 S.E.2d at 874, syl. pt. 13 (ratio is based on "the harm . . . from the defendant's conduct").

If cancellation of the promissory note were permissible, it would still function as a pure penalty to the lender and a pure windfall to the borrower. Because receiving $144,800 did not harm Plaintiffs, it cannot permissibly be included in the denominator of the ratio (or any similar proportionality analysis) under *TXO* or *State Farm*. Plaintiffs offered no explanation whatsoever for how they were purportedly "harmed" by receiving $144,800. Indeed, Mrs. Jefferson used the principal "to purchase a new automobile and payoff other existing debt" obligations, including numerous refinancings of her property with CitiFinancial, five separate loans from AmeriFirst Loan and CitiFinancial, and a Tax Refund Anticipation Loan from Jackson Hewitt. *See* 2/25/10 Op. at 5-7 (A130-32). Accordingly, the Circuit Court's decision to forgive the principal in its

entirety cannot be anything but a naked penalty. It was "intended to punish the defendant and to deter future wrongdoing," and it plainly did not compensate for any "concrete loss" suffered by Plaintiffs. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001).

The value of the underlying note therefore cannot properly provide any basis for calculating the punitive damages award in this case. A key purpose of looking at the ratio of punitive to compensatory damages is to ensure that "punitive damages awards are not grossly out of proportion to the severity of the offense," *Garnes*, 413 S.E.2d at 908 (internal quotation marks omitted), and this role is subverted when the "severity of the offense" is vastly inflated by including a cancellation remedy that does not represent actual harm to the plaintiff. Indeed, in *Perrine*, this Court recently emphasized that punitive damages must be related to damages that are truly *compensatory*, holding that "punitive damages may not be awarded on a cause of action for medical monitoring" because such claims do not involve any "actual compensatory damages." 694 S.E.2d at 880-81 (quotation marks omitted). Here, the cancellation of debt is even more clearly not compensatory. Payments for medical monitoring are at least designed to avert future harm. In contrast, Plaintiffs' receipt of $144,800 was not harm of any sort, and cancellation of their obligation to repay it cannot logically be called compensatory. *Cf. Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 489 (6th Cir. 2007) (recovery of the defendant's profits in a copyright infringement case is punitive, not compensatory). Accordingly, in analyzing a punitive damages award, a court should look to "the ratio of the punitive damages award and the *non-punitive* element of the compensatory damages." *Id.* (emphasis added). The Circuit Court should have done so here as well.

Furthermore, cancellation of an obligation, however inequitable in fact, could only be equitable in character. *See Dunn v. Rockwell*, 225 W.Va. 43, 54, 689 S.E.2d 255, 266 (2009)

("The first two causes of action – for rescission, cancellation and reformation of a deed, and for unjust enrichment – are both equitable causes of action."); Syl. pt. 3, *Laurie v. Thomas*, 170 W. Va. 276, 294 S.E.2d 78 (1982) ("Where a suit based on fraud . . . seeks to rescind a writing . . . it is not a common law action for fraud but is equitable in nature."). The equity courts did not award punitive damages, and such damages remain impermissible on equitable claims. *See, e.g.*, *Haynes v. Rhone-Poulenc, Inc.*, 206 W. Va. 18, 32, 521 S.E.2d 331, 345 (1999) ("Punitive damages . . . are encompassed in the term 'legal relief.'"); *Given v. United Fuel Gas Co.*, 84 W. Va. 301, 306, 99 S.E. 476, 478 (1919) ("No authority for jurisdiction in equity to award punitive damages has been cited or found."). Consequently, the Circuit Court's one-sided "rescission" of the underlying loan cannot provide any basis for a punitive damages award.

2. The Circuit Court likewise erred by including attorney's fees in compensatory damages to be multiplied for punitive damages.

The Circuit Court also multiplied an already massive award of attorney's fees by three and included *that* amount in its punitive damages calculation. *See* 2/17/11 Op. at 4 (A312). It is clearly impermissible to ground punitive damages on statutory attorney's fees here, because the statute pursuant to which the fees were awarded (the WVCCPA) *does not authorize punitive damages awards* in the first place. Any punitive damages must rest solely on Plaintiffs' fraud claim, but the fee award was expressly made pursuant to W.Va. Code § 46A-5-104. *See* 2/25/10 Op. at 20 (A145). Accordingly, there was no statutory authority for the Circuit Court to use attorney's fees under the WVCCPA to support punitive damages.

In any event, again, only *compensatory* damages can provide a proper basis for punitive damages. Because attorney's fees are not compensatory damages, there is neither a legal nor logical basis for the Circuit Court's award.

Courts have consistently refused to count attorney's fees as compensatory in calculating the permissible ratio of compensatory to punitive damages. For example, in *State Farm*, the Supreme Court did not consider the trial court's award of $800,000 in attorney's fees and costs when assessing the constitutionally permissible ratio. Rather, the Court compared the award of $1 million in compensatory damages to the $145 million punitive damages award, and never suggested that the award of attorney's fees was pertinent. *State Farm*, 538 U.S. at 426 ("The compensatory award in this case was substantial; the Campbells were awarded $1 million for a year and a half of emotional distress. This was complete compensation."). In addition, the Court explained that the relevant ratios for punitive damages purposes are similar to statutory ratios "providing for sanctions of double, treble, or quadruple damages to deter and punish." 538 U.S. at 425. Those ratios rarely, if ever, permit inclusion of attorney fees as part of the compensatory damages that may then be multiplied to produce a final award. *See, e.g.*, W. Va. Code §§ 17A-6A-16 (treble damages separate from attorney fees), 37-15-6a (same), 47-18-9 (same).

Several courts have held that attorney's fees should not be treated as compensatory damages for purposes of determining the punitive award. Most notably, on remand from the Supreme Court in *State Farm*, the Utah Supreme Court addressed this issue head on:

> While [the Supreme Court's] analysis may not have been different had the denominator been $1,939,518.10 (the amount of the compensatory damages, special damages, excess verdict, and attorney fees combined), and the ratio thereby reduced to 75-to-1, the considerable attention given by the Supreme Court to the issue of compensatory damages and the methodology for arriving at a constitutionally permissible ratio of compensatory to punitive damages convinces us that we would not be at liberty to consider a substitute denominator.

Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409, 419 (Utah 2003). Several other courts have followed suit. *See Duka, Inc. v. McRae*, 839 A.2d 682, 701 n. 24 (D.C. 2003) (holding that because fee awards "include[e] a certain punitive element," they "favor[] a lesser rather than greater award"); *Parrish v. Sollecito*, 280 F. Supp. 2d 145, 164 (S.D.N.Y. 2003) (same).

The reasoning behind these decisions is simple: only actual harm may be included as compensatory damages in any ratio analysis (*see State Farm*, 538 U.S. at 427; *TXO*, 419 S.E.2d at 874), and attorney's fees do not generally compensate for actual harm to the plaintiff. This Court has repeatedly emphasized that "[a]n obvious purpose of awarding attorney fees and costs in a case involving fraud is that intentional conduct such as fraud should be punished and discouraged." *Boyd v. Goffoli*, 216 W. Va. 552, 569, 608 S.E.2d 169, 186 (2004) (emphasis added); *see also Bartles v. Hinkle*, 196 W. Va. 381, 472 S.E.2d 827 (1996) (attorney's fees constitute a "penalty"). Indeed, this Court has held that – given their common punitive goal – simultaneous awards of attorney's fees and punitive damages may not be warranted at all. *See Boyd*, 216 W. Va. at 569, 608 S.E.2d at 186 ("Appellant has been sufficiently discouraged from future fraudulent conduct by the sizable punitive damages awarded by the jury. As a result, an award of attorney fees and costs is not necessary to perform this function."). In this case, the Circuit Court appeared to recognize that attorney's fees were not actually compensatory. *See* 2/17/11 Op. at 4 (A312) ("The punitive damage award bears a reasonable relationship to the compensatory damages which include the actual compensatory damages and the attorney fees."). Nonetheless, the Circuit Court failed to appreciate the importance of this point: only "actual" compensatory damages can be used to support punitive damages. Once again, the comparison to *Perrine*, 694 S.E.2d at 879-81, is useful because the attorney's fees here are certainly less compensatory than medical monitoring payments.

The few courts holding that attorney's fees should be included in a ratio analysis did so on the basis that the particular statute at issue was compensating the plaintiff for bringing the lawsuit. *See Willow Inn, Inc. v. Public Service Mutual Ins. Co.*, 399 F.3d 224, 236 (3d Cir. 2005) (deciding to "include awards of attorney fees and costs in the ratio" for calculating punitive

damages because under the statute at issue, attorney's fees "are awarded to compensate the plaintiff for having to pay an attorney to get that to which they were contractually entitled") (internal quotation marks omitted). However, there is nothing in the statute here that suggests a compensatory purpose, *see* W. Va. Code § 46A-5-104, particularly in light of the court's discretion to decline to award fees. *See Chevy Chase Bank v. McCamant*, 204 W. Va. 295, 305, 512 S.E.2d 217, 227 (1998) ("By using the word 'may' in conferring upon courts the power to award attorney fees [under W. Va. Code § 46A-5-104], the Legislature clearly made the granting of such awards discretionary."). Thus, the statute follows the usual West Virginia approach of reserving fee-shifting for punitive purposes. *See Boyd*, 216 W. Va. at 569, 608 S.E.2d at 186.

V. THE CIRCUIT COURT ERRED BY FAILING TO OFFSET COMPENSATORY DAMAGES AWARDED AGAINST QUICKEN LOANS WITH THE SUMS PREVIOUSLY PAID TO PLAINTIFFS BY SETTLING CO-DEFENDANTS

Quicken Loans is entitled as a matter of law to an offset of compensatory damages and the loan cancellation.[11] In May 2009, the Circuit Court dismissed all of Plaintiffs' claims against defendant Guida with prejudice based upon a settlement between those parties. Quicken Loans' cross-claim against Mr. Guida for contribution was thereby extinguished as a matter of law. Upon information and belief, the amount of the settlement was $700,000. Whatever its amount, not a cent of that settlement was applied to reduce Quicken Loans' liability.

A plaintiff is entitled to only one satisfaction for his or her injuries. *Bd. of Education of McDowell County v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990). Thus, where an injury is indivisible, a defendant against whom a verdict is rendered is entitled to a set-off of all sums paid in good-faith settlements by other parties who are also liable for the injury. *See* syl. pt. 7, *id.* Here, the injury is indivisible because all of Plaintiffs' alleged damages

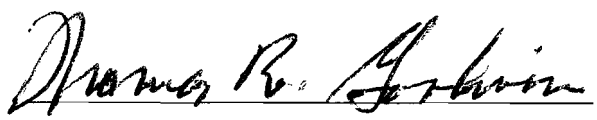
[11] This issue was presented to the Circuit Court in Quicken Loans' post-trial Motion for Offset of Judgment Pursuant to Settlement of Defendant Dewey V. Guida (A340).

flow from the existence of the Loan, and the allegedly inflated appraisal by Guida was a *sine qua non* for that loan. It does not matter whether Quicken Loans and the settling party were "joint tortfeasors." If they were liable for the same damages, Plaintiffs may recover the damages only once. *See Pennington v. Bluefield Orthopedics, P.C.*, 187 W.Va. 344, 419 S.E.2d 8 (1992).

Accordingly, while punitive damages cannot be offset, *see Burgess v. Porterfield*, 196 W.Va. 178, 185, 469 S.E.2d 114, 121 (1996), Quicken Loans is entitled to an offset of all compensatory damages. Hence, if the cancellation of the principal of the Loan were deemed compensatory, which would be necessary for the punitive damages award to be upheld, then the value of the cancellation would have to be offset along with the restitution. Indeed, this Court has recognized that such equitable remedies are subject to offset. *See Thomas v. Bd. of Educ.*, 181 W.Va. 514, 519, 383 S.E.2d 318, 323 (1989).

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be reversed as to liability for fraud and unconscionability, the award of damages should be vacated to eliminate punitive damages and cancellation of the Loan, and damages should be offset by the judgment as to former defendants.



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CERTIFICATE OF SERVICE

I, Thomas R. Goodwin, counsel of record on appeal for Petitioner Quicken Loans Inc., certify that on this 6th day of September, 2011, I served the foregoing "Brief of Petitioner Quicken Loans Inc." and "Appendix Record" by sending true and correct copies via Federal Express standard overnight and addressed as follows:

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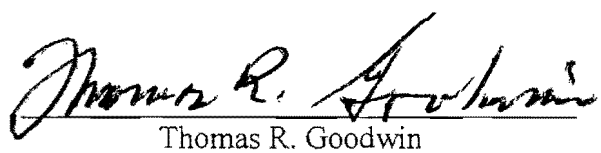

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