



THE STATE OF WEST VIRGINIA  
In The Supreme Court of Appeals

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APPEAL FROM HARRISON COUNTY  
Circuit Court

Thomas A. Bedell, Circuit Court Judge

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**Appeal Nos. 11-1288 & 11-1604**

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Vanderbilt Mortgage and Finance, Inc., Plaintiff Below, ....      Petitioner ,  
v.  
Terri L. Cole, Defendant Below, .....      Respondent.

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**PETITIONER'S BRIEF**

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Assignments of Errors

- I. **The circuit court erred by improperly imposing a penalty that was not reasonably related to the actual harm caused to Respondent which was none.**
- II. **The circuit court erred by improperly increasing the penalty award because the penalty amounts awarded by the circuit court cannot be supported on this record and the penalties are not reasonably related to the actual damages found by the jury which were zero.**
- III. **The circuit court's penalty order must be vacated with respect to the 10 violations found by the jury for the calls to third parties despite the request for the calls to cease because Respondent lacks standing to recover for calls placed to third parties under a proper reading of the Code.**
- IV. **The circuit court erred in awarding Respondent more than one penalty for claims made pursuant to W. Va. Code § 46A-2-125(d) and the judgment should be altered in accordance with the language of the statute thereby reducing the penalty amount awarded.**
- V. **The circuit court erred in awarding attorneys' fees to Respondent because she was not the prevailing party in this action.**
- VI. **The circuit court erred in considering additional factors not provided for by the decisions of this Court in the order awarding attorneys' fees and the award must be vacated or reduced accordingly.**

### Statement of the Case

In October of 1996, Respondent Terri L. Cole (“Respondent”) purchased a manufactured home and financed that home through Ford Consumer Finance Company. (App. \_\_). A Deed of Trust on the manufactured home as well as the real property on which the manufactured home rested secured repayments of the loan. (App. 855). In April of 2005, Vanderbilt Mortgage and Finance, Inc. (“Vanderbilt”) became the servicer of Respondent’s loan, and began to collect payments from Respondent and communicate with her regarding the status of the account. (App. 828).

The servicing records in this case and the undisputed evidence presented at trial demonstrate that Respondent was perpetually behind on her monthly home payments. (App. 861-883; 892). Further, these records show that, for well over a decade, Vanderbilt and prior servicers diligently attempted to work with the Respondent and her husband in every imaginable way to allow them to keep the home. (App. 884). These efforts were often thwarted by an inability to communicate regularly with the Respondent. She did not have a home telephone number and often contacted Vanderbilt from various cell phone numbers or landlines owned by third-parties, including relatives. (App. 546-556; 586-636; 646-655; 1034-1576). Despite these hurdles, in 2005, 2007, and 2009 the parties were able to negotiate and execute three separate loan modification/extension agreements. (App. 884-891). Respondent benefited from each of these three loan modifications because they extended the maturity date of her loan and allowed her to remain in her home. (App. 884-891).

Ultimately, despite the modifications, Respondent defaulted on the terms of her loan and Vanderbilt lawfully foreclosed upon and purchased the collateral at a trustee’s sale, timely noticed in accordance with W. Va. Code §§ 38-1-4 & 38-1-8. (App. 903). Respondent never

challenged Vanderbilt's right to the take title to the collateral following her undisputed default on the terms of her loan obligation. However, Respondent refused to vacate the premises.

As a result, on November 23, 2010, Vanderbilt filed an unlawful detainer Complaint in an effort to recover the real property and manufactured home. (App. 60). Respondent asserted counterclaims against Vanderbilt alleging violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA"). (App. 64). Respondent based her counterclaims for statutory violations upon telephone calls that Vanderbilt placed to her or returned to her in the course of fulfilling its duties as servicer and in working toward modification terms with Respondent at various times. (App. 64-72).

On June 27, 2011, this case was tried before a jury in Harrison County, West Virginia. At trial, Respondent argued that Vanderbilt violated four provisions of the WVCCPA: W. Va. Code. § 46A-2-125(a); § 46A-2-125(d); § 46A-2-114; and § 46A-2-126. Respondent supported her claims by introducing Vanderbilt's call logs into evidence—materials Vanderbilt willingly provided to Respondent in discovery. (App. 1034-1576). During trial, Respondent argued that the jury should find Vanderbilt liable for 57 violations of the WVCCPA. The circuit court charged the jury that if it found violations of the WVCCPA it should find for Respondent and assess her actual damages. (App. 30; 688-691).

After deliberating, the jury returned a unanimous verdict as follows:

**Question 1: On the claim of unlawful debt collection for oppressive and abusive activity (use of language intended to unreasonably abuse the hearer), the jury finds:**

**X for the defendant, Terri L. Cole and determines that there were 1 violations and awards the defendant, Terri L. Cole, actual damages of \$ 0.**

**Question 2: On the claim of unlawful debt collection for oppressive and abusive activity (placement of repeated, unsolicited calls to third parties despite requests to cease), the jury finds:**

**X** \_\_\_\_\_ for the defendant, Terri L. Cole and determines that there were 10 violations and awards the defendant, Terri L. Cole, actual damages of \$ 0 \_\_\_\_\_.

**Question 3: On the claim of unlawful debt collection for failure to provide a statement of account upon written request, the jury finds:**

**X** \_\_\_\_\_ for the defendant, Terri L. Cole and awards the defendant, Terri L. Cole, actual damages of \$ 0 \_\_\_\_\_.

**Question 4: On the claim of unlawful debt collection for unreasonable publication of indebtedness to a third party, the jury finds:**

**X** \_\_\_\_\_ for the defendant, Terri L. Cole and determines that there were 1 violations and awards the defendant, Terri L. Cole, actual damages of \$ 0 \_\_\_\_\_.

**Signed: Tiffany Cunnan (Foreperson)      Date: 6-28-11**

(App. 30). As the verdict form shows, the jury found only 10 violations of the WVCCPA with respect to calls placed to third parties. (App. 30). The jury found one violation of the WVCCPA arising from the failure to provide Respondent a statement of account, one violation for use of abusive language in the collection of a debt, and one violation stemming from publication of indebtedness to a third party. (App. 30). The jury did not find that the violations were willful or malicious, and found that none of these violations caused Respondent any damage. (App. 30).

In sum, the jury found that Vanderbilt violated the WVCCPA only 13 times as opposed to the 57 times that Respondent alleged. (App. 30 *compare with* 64-72). The jury also found, contrary to Respondent's allegations, that Respondent suffered no damages. (*Id.*). The circuit court then entered judgment in favor of Vanderbilt on its unlawful detainer suit and Respondent did not appeal from that ruling thereby making it the law of the case. (App. 22).

Based on the jury's verdict, in its August 15, 2011 order, the circuit court awarded Respondent \$32,125.24 in statutory penalties under the WCCPA. (App. 14). The circuit court

then issued an October 18, 2011 order, awarding Respondent \$30,000 in attorneys' fees. (App. 3). Following these orders, on September 13, 2011, Vanderbilt timely filed a notice of appeal related to the order awarding penalties, and on November 15, 2011, Vanderbilt timely filed a second notice of appeal in connection with the order awarding attorneys' fees. On November 21, 2011, this Court issued a schedule and consolidated both appeals. Now, Vanderbilt timely perfects its appeal under the Rules of Appellate Procedure with the filing of this brief and the appendix.

### **Summary of Argument**

In this appeal, Vanderbilt challenges the circuit court's order awarding \$32,125.24 in penalties for 13 violations of the West Virginia Consumer Credit and Protection Act. Vanderbilt has also appealed the circuit court's order granting Respondent \$30,000 in attorneys' fees. In compliance with Rule 10(b)(5), the arguments contained herein can be summarized as follows:

Respondent and the circuit court relied on law requiring that statutory penalties would bear a relationship to actual damages. The circuit court relied on this law in charging the jury in that the circuit court informed the jurors that the law that required any award of statutory penalties should relate to the actual harm caused. Moreover, in the circuit court's August 15, 2011 Order assessing statutory penalties, the court cited to and relied upon the prior decisions of this Court which require that a penalty reasonably relate to the actual damages sustained. *See Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897, 909 (1991). However, the circuit court ignored this controlling law by awarding statutory damages when the jury found Respondent suffered no actual harm whatsoever. Under West Virginia law, the circuit court should not have awarded statutory penalties, because the jury concluded that Vanderbilt did not harm Respondent. The circuit court erred by maximizing the statutory penalties when they

should have been denied entirely. Reversal and vacation of the circuit court's penalty order is required.

If this Court does not vacate the award of penalties in its entirety, it should reduce the penalty award significantly. The circuit court erroneously increased the penalty amount from \$100-\$1000 to \$400-\$4000. The circuit court compounded its original error by maximizing penalties against Vanderbilt even though the jury found that Respondent suffered no actual damages. The circuit court did not reasonably relate the penalty amount to the actual damage suffered—none. Although Vanderbilt caused no harm to the Respondent and did not act willfully, the circuit court inexplicably increased the penalties awarded for Vanderbilt's purportedly "bad" conduct. The record does not support increasing any penalty award and neither does West Virginia law, and this Court should reduce the award accordingly.

West Virginia law requires reduction of the penalty award in this case because Ms. Cole did not have standing to recover for the calls her mother and/or other third parties received after requesting the calls cease—10 calls according to the jury's verdict. Respondent alleged that Vanderbilt violated the WVCCPA by making telephone calls to various third parties, including her mother and her employer, despite the third-parties' requests for the calls to end and argues that the telephone calls support a claim under § 46A-2-125(d). The legislature drafted section 46A-2-125(d) to protect the recipient of the telephone calls—not the "debtor" or "consumer." Here, Respondent was not the recipient of the calls answered by her mother, sister, or other people. These other individuals, who actually received the calls, are not parties to this action, and Respondent lacks the standing necessary to maintain a claim on their behalf. Vanderbilt was entitled to judgment as matter of law as to the calls received by Respondent's parents and others. The circuit court erroneously allowed the issue to go to the jury, the jury then found 10

WVCCPA violations arising from calls to third parties, and the circuit court erroneously awarded penalties for those calls.

Moreover, Ms. Cole should have only been awarded a single penalty for the different categories of violations of the WVCCPA. Under a clear reading of the West Virginia Code, Vanderbilt cannot be held liable multiple violations of W. Va. Code § 46A-2-125(d). Section 46A-2-125, hereinafter called the “Abuse Provision,” prohibits a debt collector from “[c]ausing a telephone to ring or engaging any person in telephone conversations *repeatedly or continuously* . . . with intent to annoy, abuse, oppress or threaten any person at the called number.” W. Va. Code § 46A-2-125(d) (emphasis added). Accordingly, a violation occurs only where there is a series or pattern of abusive calls or conversations. *See* W. Va. Code § 46A-2-125(d) (requiring a repeated or continuous course of abusive conduct to constitute a violation). Liability does not attach under the Abuse Provision on a per telephone call basis. Nor does it attach on a per conversation basis. Rather, a violation (singular) occurs where the debt collector engages in repeated or continuous calls or conversations with abusive intent. The statute thus aggregates the calls or conversations for purposes of setting a threshold for liability. The evidence shows that Vanderbilt placed multiple calls to Respondent’s home, place of employment, and relatives’ homes. These multiple calls result in only a single violation of section 46A-2-125(d). Therefore, the legislature did not authorize multiple penalties on these facts, and the circuit court erred in awarding more than one penalty. The award should be reduced accordingly.

The circuit court also erred in awarding attorneys’ fees for the following reasons:

(1) Vanderbilt prevailed on its unlawful detainer action and, therefore, Vanderbilt Mortgage was the “prevailing party” in this matter;

(2) In light of the low degree of success on her WVCCPA claims, the circuit court should not have awarded attorneys' fees in an amount almost as much as the penalty award;

(3) To the extent Vanderbilt prevails in the related appeal regarding the penalty order, attorney fees will either no longer be warranted or must be recalculated;

(4) The jury did not award actual damages and Vanderbilt's conduct was not egregious;

(5) The circuit court awarded fees for claims on which Respondent did not prevail. The circuit court stated that it did not want to "penalize" Ms. Cole the claims on which she was unsuccessful; and

(6) Finally, the circuit court abused his discretion in awarding attorneys' fees because the circuit court awarded fees on the basis that Mountain State Justice "survives" on fee awards in "undesirable" cases; and these are not a lawful factors for consideration in awarding fees under West Virginia law.

These summary grounds are more fully briefed herein and the supporting authorities for the grounds are cited in the below Argument section in accordance with Rules 10 and 38 of the West Virginia Rules of Appellate Procedure.

#### **Statement Regarding Oral Argument and Decision**

Pursuant to Rules 10, 18, 19, and 20 of the West Virginia Rules of Appellate Procedure, Vanderbilt states that it believes that oral argument on the issues presented herein will aid the decisional process of this Court. Pursuant to Rule 19, the issues presented and the assignment of errors argued touch upon the circuit court's misapplication of settled law and the circuit court's errors in setting penalties and awarding attorneys' fees. Further, as provided by Rule 20, Vanderbilt states that the case also touches upon issues of first impression for this Court related to the interpretation of the West Virginia Consumer Credit and Protection Act. Hence, the case

would appear to be proper for argument under both Rules 19 and 20. If the Court deems the case suited for argument under Rule 19, the case may be appropriate for a memorandum decision.

### Argument

**I. The circuit court erred by improperly imposing a penalty that was not reasonably related to the actual harm caused to Respondent which was none.**

The jury in this case found that Vanderbilt committed only a small fraction of the number of statutory violations that Respondent alleged, and specifically found that Respondent did not incur any actual harm. Pursuant to W. Va. Code § 46A-5-101 and under basic principles of due process, the improperly inflated penalty award must be reduced to an amount that bears a “reasonable relationship” to Respondent’s actual harm as determined by the jury. In this case, Respondent suffered \$0.00 in damages, i.e. no actual harm. Therefore, the statutory penalty award should be zero or at most a *de minimis* amount to comport with due process requirements.

Section 46A-5-101 permits a claimant to recover both actual damages and civil penalties if she can establish a violation of the WVCCPA. Where civil penalties are warranted, the trial court has discretion in determining the appropriate amount. As Respondent acknowledges, the court must consider the amount of actual harm suffered in exercising his discretion with respect to the penalty determination. (App. 244-258; Def.’s Mot. ¶ 5; W. Va. Code § 46A-5-101).

Respondent argued that statutory 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 actually has occurred*. If the defendant’s actions caused . . . only slight harm, the damages should be relatively small.” (App. 246; Def.’s Mot. ¶ 7) (emphasis added by Respondent) (quoting *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 668, 413 S.E.2d 897, 909 (1991) (reversing punitive damages award of \$105,000 where there were \$0.00 actual damages)). Respondent also argues that “[a]s a matter of fundamental fairness, punitive [or in this case, statutory] damages should

bear a reasonable relationship to compensatory damages.” (*Id.*). The circuit court agreed and relied upon the same decisions. However, the statutory penalties that the court awarded bear no “reasonable relationship” to the actual harm that the Respondent actually incurred, as determined by the jury. The circuit court, while citing to the decisions of this Court regarding the need for punitive judgment amounts to relate to the actual harm, failed to properly apply those decisions in awarding significant statutory penalties in the absence of the award of actual damages by the jury.

In this matter, under the applicable guideposts cited by the circuit court, an award of statutory penalties in this case violates the due process clause because the award is disproportionate to the actual harm suffered. *See Garnes*, 186 W. Va. at 668, 413 S.E.2d at 909; *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). While neither the Supreme Court of West Virginia nor the United States Supreme Court have established a bright-line rule, they have consistently held that “few awards exceeding a single-digit ratio between punitive and compensatory damages” will satisfy a due process analysis in the context of awards aimed at punishing a wrongdoer. *Campbell*, 538 U.S. at 425 (holding ratio of 145:1 was unconstitutional); *see also BMW of N. Am. v. Gore*, 517 U.S. 559, 585-86 (1996) (holding punitive damage award ratio of 500:1 unconstitutional); *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 194, 680 S.E.2d 791, 825 (2009) (holding that to bear a reasonable relationship to actual damages, “single-digit multipliers are more likely to comport with due process” and affirming award with a ratio of 1.13 to 1 (citation and quotation marks omitted)).

Here, the circuit court awarded \$32,125.24 in statutory penalties despite the fact that the jury awarded her no actual damages. Consequently, the circuit court’s award of statutory penalties resulted in a grossly excessive ratio of 32,125:0. Even if the Court imposes only \$100

per penalty under § 46A-5-101, the ratio would still be 1,300:0. These ratios are disproportionate to Respondent's actual damages and hundreds, if not thousands, of times higher than other ratios that the United States Supreme Court has rejected as excessive in cases awarding punitive awards aimed at deterring future behavior. *See e.g., Campbell*, 538 U.S. at 429 (145:1); *Gore*, 517 U.S. at 585-86 (500:1); *see also Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 442 (2001) (suggesting ratio of 90:1 was unreasonable); *Garnes*, 186 W. Va. at 668, 413 S.E.2d at 909 (105,000:0). As Respondent as argued, the penalties under the WVCCPA are imposed as a form of punishment to deter conduct in addition to the Code providing for actual damages. As a result, the penalties cannot be awarded as a form of compensation as a matter of law. *Perrine v. E.I. Dupont de Nemours & Co.*, 225 W. Va. 482, 566, 694 S.E.2d 815, 899 (2010) ("Punitive damages are not designed to compensate an injured plaintiff for his/her actual loss; such compensation is achieved through compensatory, not punitive, damages."). Therefore, the award must be vacated or reduced to a constitutionally permissible level given the non-egregious nature of Vanderbilt's violations and the fact that the circuit court and Respondent are fully cognizant that statutory penalties must bear a reasonable relationship to the \$0.00 in actual damages that Respondent was awarded. Fundamental fairness dictates that the nature of Vanderbilt's violations warrant either zero or *de minimis* statutory damages. *See Garnes*, 186 W. Va. 656, 668, 413 S.E.2d 897, 909 (1991).

**II. The circuit court erred by improperly increasing the penalty award because the penalty amounts awarded by the circuit court cannot be supported by this record and the penalties are not reasonably related to the actual damages found by the jury which were zero.**

The circuit court's decision to impose significant penalties cannot be supported based upon the jury's findings and the record in this case. While the language of section 46A-5-101 does not provide guidance on what a court should consider in exercising its discretion to award

civil penalties but its federal counterpart, the Fair Debt Collection Practices Act (“FDCPA”) provides the following three factors:

- (1) The frequency and persistence of noncompliance by the debt collector;
- (2) The nature of such noncompliance; and
- (3) The extent to which such noncompliance was intentional.

15 U.S.C. § 1692k(b)(1); *see also Sears v. Fed. Credit, Corp.*, No. 7:08cv499, 2009 U.S. Dist. LEXIS 73892, at \*12 (W.D. Va. Aug. 18, 2009). When applying these three factors, a court should award zero or nominal statutory penalties where the claimant suffered no actual damages. *See e.g., Lester E. Cox Med. Cent. v. Huntsman*, 408 F.3d 989, 994 (8th Cir. 2005) (holding where claimant suffered no actual damages, “we cannot say the district court abused its discretion in declining to award statutory damages” (citing *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 28 (2d Cir. 1989) (determining that the nature of defendant’s noncompliance did not warrant statutory damages); *Fasten v. Zager*, 49 F. Supp. 2d 144, 150 (E.D.N.Y. 1999) (holding the defendant’s noncompliance was minor and plaintiff was not entitled to statutory damages). “Other courts have noted that ‘the maximum statutory damage award is only assessed in cases where there [have] been repetitive, egregious FDCPA violations and even in such cases, the statutory awards are often less than \$1,000.’” *Thomas v. Smith, Dean & Assocs., Inc.*, No. 10-CV-3441, 2011 U.S. Dist. LEXIS 74656, at \*8 (D. Md. July 12, 2011) (citations omitted).

These three FDCPA factors overlap with the punitive damages guidelines that the circuit court purportedly followed in awarding penalties. *See, e.g., Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 668, 413 S.E.2d 897, 909 (1991). The Respondent also urged the circuit court to apply this framework stating that “[p]unitive 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 actually occurred.” (App. 244-258; Def.’s Mot. ¶ 7 (emphasis in original)). As the jury’s verdict form

shows, the jury found that Respondent suffered *no* actual harm. Thus, as set forth below, even under the guidelines proposed by Respondent and purportedly followed by the circuit court, this Court should award zero statutory damages, or, at most, it should award only a *de minimis* amount of statutory damages. The considerations relevant to setting a penalty award demonstrate that the circuit court's penalty award should be vacated in *toto* or, at a minimum, reduced significantly to comport with proper measures.

**A. The Frequency And Persistence Of Noncompliance By Vanderbilt.**

At trial, Respondent introduced Vanderbilt's call log into evidence. This documented the phone calls placed over the seven years Vanderbilt serviced the loan. (App. 1034-1576). Of the many calls that Vanderbilt made during the 7 years it served the loan, only 13 violated the WVCCPA despite Respondent's claims alleging 57 violations. (App. 64-72). Moreover, of those 57 calls, the jury found that Vanderbilt's action only contravened the WVCCPA 12 times. Additionally, the jury found that Vanderbilt violated the statute by failing to provide a statement of account. In the end, the jury found in favor of Respondent on less than 1/4 of her claimed violations. Additionally, the jury held that these 13 violations did not cause any actual harm to Respondent. Finally, the calls which formed the basis for the violations all took place *years ago*, with no significant contemporaneous complaints from the Respondent. Thus, Vanderbilt's noncompliance was neither frequent, continuing, nor persistent, and this factor weighs in favor of Vanderbilt and would warrant an award of zero statutory penalties or a *de minimis* amount. *See Huntsman*, 408 F.3d at 993-94.

**B. The Nature of Vanderbilt's Noncompliance.**

The jury did not make any findings as to the nature of Vanderbilt's noncompliance. However, the jury's verdict does confirm that Vanderbilt's violations did not cause Respondent

any actual harm, and from this it is clear that the jury did not decide Vanderbilt's conduct to be egregious. There was no evidence that Vanderbilt ever used profane or obscene language in any of the calls it placed to Respondent or to Respondent's relatives or employers. (App. 1034-1576). In fact, the testimony at trial from Respondent and her sister demonstrated that Vanderbilt's callers were typically polite and civil. (App. 546-556; 586-636; 646-655). Additionally, as discussed below, the only reason Vanderbilt placed *any* calls to third-parties at all was because Respondent did not have a home phone line, and Vanderbilt was merely trying to locate her or communicate with her by calling her back at the numbers from which she called Vanderbilt. (App. 546-556; 586-636; 646-655). Once the Respondent obtained a regular phone number in 2007, Vanderbilt did not call third-party numbers any longer. (App. 546-556; 586-636; 646-655).

As to Respondent's claim under § 46A-2-114 (failure to provide a statement of account), there has never been an issue over whether Respondent understood her account status with Vanderbilt. Respondent received monthly statements and never disputed the fact that she knew she was in default on her mortgage. Moreover, as with her other claims, the jury found that this violation did not cause any actual harm and awarded Respondent zero damages for her claim. Vanderbilt's technical violation of § 46A-2-114 does not warrant statutory damages, and it certainly does not warrant the maximum penalty sought by the Defendant.

In support of her request for significant penalties despite the jury's decision to award her no damages, Respondent cited and relied upon an order issued in *Reed v. Educational Credit Management Corp.*, No. 09-C-510 to support her contention that she should receive the maximum statutory penalty for each violation. (App. 246; 248; Def.'s Mot. ¶¶ 5 & 11(b)). However, *Reed* involved a default judgment, and therefore, the *Reed* court did not have the

benefit of a jury's verdict on actual damages. In fact, the Plaintiff in *Reed* voluntarily waived a determination on actual damages. In contrast, this Court has definitive guidance in the form of the verdict rendered by competent West Virginia jurors who were presented evidence on alleged damage suffered by Respondent. The jurors unanimously found that Vanderbilt's violations did not cause Respondent any actual harm. Additionally, in *Reed*, the claimant had fully satisfied her debt but was still receiving collection calls from that defendant in error. *Reed*, ¶ 2. In this matter, however, there has never been any contention that Respondent was not in default on the terms of her loan agreement nor that Vanderbilt had miscalculated Respondent's debt. In other words, it is undisputed that Vanderbilt had the right at all times to communicate with the Respondent about her account. By comparison, the creditor in *Reed* had no basis for doing contacting the debtor in light of the debtor's satisfaction of the loan in that matter.

Perhaps most significantly, even in the context of an uncontested default judgment, the *Reed* court *still declined to award the plaintiff the maximum statutory penalties* and instead awarded the plaintiff only \$2,000 for her accounting claim, \$1,500 for each violation, and \$1,000 for each of thirty-six calls made on Friday afternoons over the course of three months. Therefore, *Reed* is procedurally and factually distinguishable from the present case and it significantly undercuts the circuit court's basis for increasing the statutory penalties because the *Reed* court—in an uncontested case, where a creditor had no right to contact the consumer, with a much higher number of WVCCPA violations—refused to impose increased or maximum penalties. In this case, the circuit court erred in maximizing and increasing the penalties it awarded above a *de minimis* amount based on the record and the jury's verdict.

**C. The Extent to Which Vanderbilt's Noncompliance Was Intentional.**

Vanderbilt never intentionally set out to violate the WVCCPA, and none of the evidence at trial shows otherwise. Moreover, based on a call log that contained numerous of telephone calls over nearly seven years, the jury found that only 13 constituted violations, and it did not identify which calls constituted which violations. (App. 30). Therefore, it is impossible to conclude that Vanderbilt acted with willfulness or malice to violate the WVCCPA since the conduct that forms the basis of these violations is unknown.

The calls placed by Vanderbilt were initiated in an effort to locate and communicate with the Respondent and not to harass her about her failing to pay her debt. (App. 546-556; 586-636; 646-655; 1073-1576). The reason most of these calls were placed to third-parties was because Respondent did not have a home telephone number, which made it extremely difficult for Vanderbilt to fulfill its servicing duties and to communicate with Respondent about her requested loan modifications. (App. 546-556; 586-636; 646-655). Respondent repeatedly called Vanderbilt from numbers belonging to third-parties and informed Vanderbilt she could be contacted at various other telephone numbers. (App. 546-556; 586-636; 646-655). When Vanderbilt then tried to contact Respondent at the numbers she provided, a third-party would often answer, and now these calls formed the basis for the majority of the violations identified by the jury. (App. 546-556; 586-636; 646-655). This conduct does not support the proposition that Vanderbilt intentionally violated the WVCCPA. Since the 13 violations that the jury found Vanderbilt liable for were not intentional, this factor weighs in favor of awarding zero or *de minimis* statutory penalties.

#### D. Conclusion

Because the jury found in favor of Respondent on less than 1/4 of her claims, and it unanimously determined that Respondent did not suffer any actual harm from Vanderbilt's conduct, Vanderbilt respectfully asks this Court to reverse the circuit court's penalty order and award zero statutory damages because that is the only award that could bear a reasonable relationship to the actual damage (none). Alternatively, the Court should significantly reduce the amount to a *de minimis* amount.

#### III. **The circuit court's penalty order must be vacated with respect to the 10 violations found by the jury for the calls to third parties despite the request for the calls to cease because Respondent lacks standing to recover for calls placed to third parties under a proper reading of the Code.**

Respondent alleges that Plaintiff made telephone calls to her mother, father, and others regarding her indebtedness. (App. 64-72; Answer, Affirmative Defenses, & Counterclaim ¶¶ 12-13). Respondent's mother and father do not live in the same residence as Respondent. (*Id.*). Nevertheless, Respondent contends that the telephone calls placed to her mother, father, and/or employer support a claim under § 46A-2-125 for oppression and abuse. (*Id.* at ¶ 22). Contrary to Respondent's contention her oppression and abuse claim can only be supported by evidence of calls that **Respondent** received, and not by calls received by her mother and father or others such as her employer. *See* W. Va. Code § 46A-2-125.

Specifically, the statute states that oppression and abuse may be established only by showing a debt collector "[c]aus[ed] a telephone to ring or engage[ed] in telephone conversation repeatedly or continuously . . . with intent to annoy, abuse, oppress or threaten **any person at the called number.**" W. Va. Code § 45A-2-125(d) (emphasis added). Because Respondent did not reside with her mother or father, and because she does not allege that she was at her mother or father's home when the calls were placed or at work when calls were placed to that location,

(App. 64-72; Countercl. ¶¶ 12-13), she was not a “person at the called number” with respect to her relatives. As a matter of law, these calls would not establish or otherwise support the jury’s finding of 10 violations for this category of claims under the WVCCPA.

Moreover, Respondent does not have standing to assert claims or recover damages based on abuse or oppression that her relatives may have felt as a result of telephone calls placed to their residences. The circuit court ignored the well-reasoned decisions of this court requiring standing for a party to sue. *See State ex rel. Leung v. Sanders*, 213 W. Va. 569, 578, 584 S.E.2d 203, 212 (2003) (“In light of our clear and long standing precedent against third-party standing, the circuit court committed clear legal error in permitting Ms. Schell to litigate Dr. Wanger’s and Shenandoah’s potential rights.”). “Standing is defined as a party’s right to make a legal claim or seek judicial enforcement of a duty or right.” *Findley v. State Farm Mut. Auto Ins. Co.*, 213 W.Va. 80, 94, 576 S.E.2d 807, 821 (2002) (internal quotations omitted).

In order to even bring a claim, the plaintiff must be a “proper party to bring [the] suit.” *Raines v. Byrd*, 521 U.S. 811 (1997); *Warth v. Seldin*, 422 U.S. 490, 500 (1975). The Supreme Court has held that the standing requirement may be “perhaps the most important” condition of justiciability. *Allen v. Wright*, 468 U.S. 737, 750 (1984). Importantly, the Supreme Court test for standing focuses on a plaintiff asserting *his own* legal right: “a plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” *Warth*, 422 U.S. at 499. A plaintiff is required to establish that his claim rests on a legally protected interest and a “distinct and palpable *injury to himself*.” *Id.* at 501 (emphasis added). West Virginia follows the well-established reasoning set forth by the United States Supreme Court. West Virginia courts require a plaintiff “must assert *his own* legal rights and interests.” *Woodson v. City of Lewisburg*, 2008 U.S. Dist. LEXIS 26613 (2008)

(S.D.W. Va. 2008) (emphasis added). Moreover, this Court has noted that the injury complained of “must affect the plaintiff in a *personal and individual* way.” *Men & Women Against Discrimination v. The Family Protection Servs. Board*, 2011 W.Va. LEXIS 38 at 18 (filed May 26, 2011) (emphasis added).

Here, Respondent cannot satisfy this standing requirement of personal and individual harm. Contrary to Respondent’s contention, her oppression and abuse claim can only be supported by evidence of calls that *she personally* received, and not by calls received by her mother, father, or employer. Thus, the calls to third parties cannot support Respondent’s claim under § 46A-2-125 (d). Vanderbilt is entitled to judgment as matter of law as to the calls received by Respondent’s mother, father, sister, and/or other people, including her employer. The circuit court wrongly relied upon these third party calls in his August 15, 2011 Order awarding penalties to Respondent based upon 10 calls and assessing a penalty of \$2,250 for each violative call totaling \$22,500. (App. 14-21). Those 10 calls cannot be used to support or prove Respondent’s claims under § 46A-2-125 and should not have been submitted to the jury. The penalty award must be reduced accordingly.

**IV. The circuit court erred in awarding Respondent more than one penalty for claims made pursuant to W. Va. Code § 46A-2-125(d) and the judgment should be altered in accordance with the language of the statute thereby reducing the penalty amount awarded.**

Section 46A-2-125 prohibits “[c]ausing a telephone to ring or engaging any person in telephone conversations *repeatedly or continuously* . . . with intent to annoy, abuse, oppress or threaten any person at the called number.” W. Va. Code § 46A-2-125(d) (emphasis added). Respondent alleged that Vanderbilt placed numerous calls to her home, place of employment, and relatives’ homes. (See App. 64-72; Answer, Affirmative Defenses, & Counterclaim ¶¶ 8-13). Her counterclaims sought multiple violations of the WVCCPA under this provision related

to calls from Vanderbilt. (*See* App. 64-72; *id.* ¶¶ 22(a) & 25(a)). The circuit court allowed Respondent’s multiple claim theory to be submitted to the jury. The jury returned a verdict finding 11 violations of section 46A-2-125. Next, the circuit court awarded penalties based upon the jury’s findings in connection with these 11 calls amounting to \$22,958.34 of the penalties assessed.

However, the plain language of the Abuse Provision, a violation occurs only where there is a series or pattern of abusive calls or conversations. *See* W. Va. Code § 46A-2-125 (d) (requiring a “repeated[ ] or continuous[ ]” course of abusive conduct to constitute a violation). Stated otherwise, liability attaches only where there is proof that the debt collector acted with an abusive intent, and it caused the telephone to ring “repeatedly or continuously,” or engaged a person in telephone conversations “repeatedly or continuously.”

The language of the act establishes that liability does not attach under the Abuse Provision on a per telephone call basis. Nor does it attach on a per conversation basis. Rather, a violation (singular) occurs where the debt collector engages in repeated or continuous calls or conversations with abusive intent. The statute thus aggregates the calls or conversations for purposes of setting a threshold for liability. In such circumstances, the “repeated[ ] or continuous[ ]” calls or conversations may form the predicate for a “*violation*” (singular) of this provision. Multiple violations, however, are not statutorily authorized. Therefore, the circuit court’s order awarding multiple penalties for violations of the same provision must be vacated and the judgment amount reduced accordingly.

**V. The circuit court erred in awarding attorneys’ fees to Respondent because she was not the prevailing party in this action.**

This case was initiated by Vanderbilt solely as an action for Unlawful Detainer in November of 2010. In response to Vanderbilt’s Complaint, Respondent filed four counterclaims

for Illegal Debt Collection (Third Party Contacts), Illegal Debt Collection (Oppression and Abuse), Invasion of Privacy, and Failure to Provide Statement of Account each allegedly arising from the servicing of her mortgage loan. In May of 2011, Vanderbilt filed a motion for summary judgment on its claim for Unlawful Detainer which Respondent opposed. (App. 84; 119). On June 15, 2011, Respondent dismissed, with prejudice, her Invasion of Privacy claim.

Trial of this case commenced on June 27, 2011. Following the close of evidence, Respondent asked the jury to find Vanderbilt liable for 57 individual violations of the West Virginia Consumer Credit Protection Act and for an award of actual damages associated with those alleged violations. The jury returned a verdict of no actual damages and found only 13 violations of the WVCCPA. (App. 30). The circuit court ultimately awarded Respondent \$32,125.24 in civil penalties as a result of the 13 WVCCPA violations. (App. 14-21).

In addition, the Court determined that Vanderbilt's claim for Unlawful Detainer was a question of law to be decided by the Court, and as such, removed that issue from the verdict form. On July 18, 2011, the Court granted Vanderbilt judgment on its Unlawful Detainer claim. (App. 22-29; Order granting judgment on Vanderbilt's lawful detainer action). On October, 18, 2011, the circuit court issued an order awarding Respondent \$30,000 in attorneys' fees. (App. 3-10).

Based on the record in this case and Respondent having only prevailed on 13 of her 57 alleged violations—less than 1/4 of her claims—this Court should reverse the trial court's order awarding her attorneys' fees. W.Va. Code § 46A-5-104 (1994) provides as follows:

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.

(emphasis added). This Court held that “[b]y using the word ‘may’ in conferring upon the courts the power to award attorney fees, the Legislature clearly made the granting of such awards discretionary.” *Chevy Chase Bank v. McCamant*, 204 W.Va. 295, 305, 512 S.E.2d 217, 227 (1998).

The *McCamant* case is especially instructive in that, much like this case, it involved a debt collector bringing a collections action and the debtor filing counterclaims alleging violations of the debt collection provisions of the WVCCPA. Although the trial court found that the collector violated the WVCCPA and awarded a statutory penalty, it declined to award any attorneys fees. The borrower agreed that “the purpose and policies undergirding [the] WVCCPA demand mandatory awards of attorneys fees to successful litigants under the WVCCPA.” *McCamant*, 204 W.Va. at 304. However, the Supreme Court of Appeals reemphasized the discretionary language of the attorneys fee provision in WV Code § 46A-5-104 and upheld the lower court’s decision to not award fees even where violations of the WVCCPA were found and penalties were assessed.

As has been recognized by the United States Supreme Court, the most important factor in calculating a reasonable fee award “is the degree of success obtained.” *Hensley v. Eckerhart*, 461 U.S. 424 (1992); *Brodziak v. Runyon*, 145 F.3d 194 (4th Cir. 1998). When a party has achieved only partial or limited success on certain claims, then “the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount.” *Id.* When a party is only successful on some claims the “appropriate inquiry concerns whether the claims on which the [party] prevailed are related to those on which he did not.

When successful claims are unrelated to unsuccessful claims, it is not appropriate to award fees for the latter.” *Id.*; see also *Heldreth v. Rahimian*, 219 W.Va. 462, 467, 637 S.E.2d 359, 364 (2006) (noting that “those fees arising in connection with the unsuccessful claims are to be culled out” of the fee award).

The circuit court’s attorney fee order fails to consider the overall outcome of this case. The trial court awarded Respondent fees as if she fully and completely prevailed on every claim in the case. Simply put, Respondent did not prevail on the majority of the violations that she sought under the WVCCPA. Respondent asked the jury to find Vanderbilt liable for 57 individual violations of the Act. The jury declined to impose liability on the majority of the alleged violations. Instead, the jury found that Vanderbilt was liable for only 13 statutory violations. Thus, Respondent did not prevail on more than seventy-seven percent (77%) of the allegations leveled against Vanderbilt. Prevailing on less than twenty-three percent (23%) of her claims should not entitle Defendant to an award of significant fees. As a result, this Court should recognize that Respondent was not the prevailing party and vacate the award of attorneys’ fees.

**VI. The circuit court erred in considering additional factors not provided for by the decisions of this Court in the order awarding attorneys' fees and the award must be vacated or reduced accordingly.**

In its order awarding attorneys’ fees, the circuit court relied upon considerations not permitted by the relevant decisions of this Court. The circuit court cited to the factors outlined by this Court in *Aetna Cas. & Sur. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986). (App. 3-10). Despite the circuit court’s summary recitation of the factors provided by the *Aetna* case, the language of the circuit court’s decision demonstrates that his analysis was infected by other, improper, considerations not permitted by this Court.

First, the circuit court considered the livelihood of the lawyers representing Respondent. Specifically, the circuit court stated that “Mountain State Justice is a unique organization, and it survives based upon fees collected in these ‘undesirable’ cases such as Ms. Cole’s.” (App. 8). Nowhere in the decisions of this Court does such a factor exist. In fact, the very idea of such a consideration runs afoul of the decision of this Court noting that a statutory fee award belongs to a complainant, not the lawyer bringing the suit. *Heldreth v. Rahimian*, 219 W. Va. 462, 637 S.E.2d 539 (2006). Here, the circuit court considered the value of the fee to the lawyers representing Respondent and their sustainability as a unique business entity. This factor is not supported by West Virginia law and should not have been considered by the trial court in awarding attorneys’ fees. The circuit court clearly abused its discretion and relied upon the fact that Mountain State Justice represented Respondent in arriving at its attorney fee number. Reversal of the fee amount is required.

Second, the circuit court violated the guidelines of the *Aetna* case in seeking to avoid penalizing Respondent for pursuing claims she ultimately did not prevail on by awarding her fees for those claims despite her failure to succeed upon them. The circuit court made this fact clear in stating that “[w]hile 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.” (App. 7).

The law is clear, statutory fees cannot be awarded for unsuccessful claims and the court considering the request for fees should consider the percentage of success and account for that accordingly. *State of West Virginia v. West Virginia Economic Development Grant Committee*, 217 W. Va. 102, 617 S.E.2d 143 (2003) (accounting for the fact that a party was less than 50% successful on its claims and awarding attorneys’ fees in a proportion reflecting that level of

success). The rationale underlying this rule is derived from courts seeking to avoid shifting expense for losing claims to the winning party. *Brodziak v. Runyon*, 145 F.3d 194 (4th Cir. 1998).

The language of the attorney fee order makes it quite clear that the circuit court knows this rule but chose to ignore it. This is readily apparent from the face of his attorney fee order in that the circuit court declined to award Respondent fees in connection with her unsuccessful defense of her unlawful detainer action. (App. 6-8). However, the circuit court's order is internally inconsistent and violative of this Court's prior decisions in light of the fact that the order then fails to "cull out" the 44 claims under the WVCCPA for which she did not prevail because the circuit court did not wish to penalize her for pursuing those "colorable" claims. (App. 7). That is simply not how an award of statutory attorneys' fees works in West Virginia. It also runs contrary to common sense. One cannot be rewarded for her losses. Hence, this Court should vacate the attorney fee award and/or reduce it to an amount to reflect that Respondent only prevailed on less than 23 percent of her claims.

### **Conclusion**

Based on the above, Vanderbilt requests that this Court vacate the judgment entered against it in *toto* and similarly vacate the circuit court's order granting attorneys' fees in favor of Respondent. The judgment for penalties under the WVCCPA and the related fee award are not proper in this case. In the alternative, the Court should alter the amount of the judgment to reflect a judgment amount consistent with the plain language of the WVCCPA and eliminate the claims for calls received by third parties and permit only one penalty per category of statutory violations. Save the Court granting judgment for Vanderbilt or reducing the amount of the

judgment, this Court should reduce the amount of the attorneys' fees awarded by the Circuit Court to reflect the level of success attained by Respondent in the trial of this case.

Respectfully submitted,

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THE STATE OF WEST VIRGINIA  
In The Supreme Court of Appeals

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APPEAL FROM HARRISON COUNTY  
Circuit Court

Thomas A. Bedell, Circuit Court Judge

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**Appeal Nos. 11-1288 & 11-1604**

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Vanderbilt Mortgage and Finance, Inc., Plaintiff Below, .... Petitioner ,

v.

Terri L. Cole, Defendant Below, ..... Respondent.

**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that he served PETITIONER'S BRIEF upon the following individuals, via U.S. Mail, postage prepaid, on the 16th day of December, 2011:

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