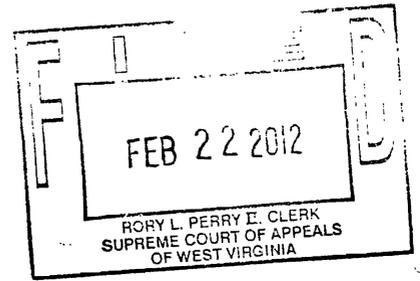


THE STATE OF WEST VIRGINIA
In The Supreme Court of Appeals



APPEAL FROM HARRISON COUNTY
Circuit Court

Thomas A. Bedell, Circuit Court Judge

Appeal Nos. 11-1288 & 11-1604

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

v.

Terri L. Cole, Defendant Below, Respondent.

PETITIONER'S REPLY BRIEF

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Introduction

The Statement of the Case in Vanderbilt Mortgage and Finance, Inc.'s ("Vanderbilt") initial brief properly sets forth the factual and procedural background for this matter. While Respondent Teri L. Cole ("Cole" or "Respondent") portrays her "statement of the case" as necessary to correct "inaccuracies" and "omissions" as permitted by this Court's Rules, the material contained at pages 1-6 of her brief are not-so-well disguised arguments. Rule 10. Many of the statements cast as "facts" are simply inflammatory rhetoric that do not accurately depict the record but represent her counsel's one-sided commentary on the events below. For example, Cole labels Vanderbilt's arguments as "weakly supported" and asserts that the violations of West Virginia Consumer Credit and Protection Act are "clear and undisputed." Those statements are not justified. Vanderbilt offers valid and detailed reasoning for why the circuit court's order should be vacated or significantly reduced because the issues presented are far from being clear or undisputed.

While Vanderbilt takes issue with the circuit court's penalty order and attorney fee order in many respects, the jury verdict itself is the best evidence that Vanderbilt's actions were not egregious given the jury's decision to award zero actual damages to Ms. Cole. Though the jury may have found 13 violations of the WVCCPA, these 13 instances occurred sporadically throughout a five year period. Further, 10 of the claimed violations were actions directed at third parties—not Ms. Cole.

A proper reading of the jury verdict and Record establish that if the award of any penalties is upheld, only three of the violations at a maximum could be lawfully claimed by Ms. Cole because she does not have standing for the 10 phone calls to her family and employer based on this Court's strict construction of penalty statutes. Three violations individually affecting Ms.

Cole over a five year time period do not warrant the excessive penalty award that the circuit court imposed in this matter. The cases Ms. Cole relies upon in her appellate brief demonstrate the type of outrageous behavior other that warrant severe sanction under the WVCCPA. See *Clements v. HSBC Auto Fin., Inc.*, No. 5:09-cv-86, 2011 WL 2976558 (S.D.W.Va. July 21, 2011) (finding over 821 violations of the WVCCPA in a seven month period). In contrast, here the jury correctly found that Vanderbilt's actions are not of a type to warrant extensive sanction. The circuit court committed legal error by handing down a large sanction, when the facts found by the jury required that any sanction imposed should be minimal. Nor should Ms. Cole be entitled to attorneys' fees due to Vanderbilt's success on its unlawful detainer claim.

Vanderbilt hereby timely files its reply brief within twenty days of receipt of Ms. Cole's brief. For the reasons stated herein and for those detailed in Vanderbilt's initial brief, this honorable Court should vacate or reduce the penalty and attorney fee awards.

Standard of Review

Ms. Cole encourages this Court to undertake a very narrow scope of review in this appeal, and to essentially "rubber-stamp" the circuit court's orders. But this Court's power to review the penalty order and attorney fee award is not nearly as limited as Ms. Cole suggests in light of the clear legal errors committed by the circuit court. This Court requires that "[t]he [lower] court's discretion must be exercised pursuant to the correct substantive legal standards." *Landis v. Landis*, 223 W. Va. 325, 328, 674 S.E.2d 186, 189 (2007). Thus, a lower court "commits an abuse of discretion if the correct legal standard is misapplied or if the underlying substantive law is misapprehended." *Burnside v. Burnside*, 194 W.Va. 263, 265 n.2, 460 S.E.2d 264, 266 n.2 (1995).

I. The circuit court abused its discretion in applying the law by penalizing Vanderbilt when the jury did not award actual damages under the West Virginia Consumer Credit and Protection Act because the Code necessitates that actual damages be awarded as do the relevant Constitutional considerations pertaining to punitive awards.

The circuit court erred by awarding the maximum available penalty in this matter, despite the fact the jury found that Ms. Cole suffered no actual damages. The circuit court's decision to award a significant penalties constitutes a misapplication of the law necessarily resulting in an abuse of his discretion. The plain language of the WVCCPA provides that a penalty can be assessed only "in addition" to actual damages. W. Va. Code Ann. § 46A-5-101(1). Therefore, actual damages are a precondition to a penalty under the WVCCPA. Moreover, the while circuit court properly cited to this Court's decision in *Garnes* and purported to analyze the penalty award under its guideposts, the circuit court failed to follow the law. The circuit court's failure to adhere to *Garnes* also constitutes a clear abuse of discretion.

A. *The circuit court erred by improperly imposing a penalty because Plaintiff suffered no actual harm.*

Ms. Cole contends that actual damages are not required in order to recover penalties under the WVCCPA. Her basis for this proposition is a tortured reading of the Code. Vanderbilt asks this Court to properly apply the express language of the WVCCPA in order to effectuate the intent of the legislature. The relevant section provides:

the consumer has a cause of action to recover *actual damages and in addition a right in an action to recover from the person violating this chapter a penalty* in an amount determined by the court not less than one hundred dollars nor more than one thousand dollars.

W. Va. Code Ann. § 46A-5-101(1) (emphasis added).

Penalty statutes must be strictly construed. *Reeves v. Ross*, 62 W. Va. 7, 57 S.E. 284 (1907); *see also State ex rel. Clark v. Blue Cross Blue Shield*, 195 W. Va. 537, 466 S.E.2d 388

(1995). Even though the WVCCPA has a remedial component (actual damages), this Court must read the penalty provisions of the act strictly. *See State ex rel. Dep't of Transp. v. Sommerville*, 186 W. Va. 271, 273, 412 S.E.2d 269, 272 (W. Va. 1991) (“[W]e too hold that where a statute contains provisions which are both remedial and penal, such statute should be considered remedial when seeking to enforce the purpose for which it was enacted, and should be considered penal when seeking to enforce the penalty provided therein.”).

Therefore, “[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” *Smith v. State Workmen’s Comp. Comm’r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). As a result, “[j]udicial interpretation of a statute is warranted only if the statute is ambiguous and the initial step in such interpretative inquiry is to ascertain the legislative intent.” *Ohio Cnty. Comm’n v. Manchin*, 171 W. Va. 552, 301 S.E.2d 183 (1983).

At trial, the jury in this case found that Vanderbilt committed only a small fraction of the number of statutory violations that Ms. Cole alleged, and specifically found that Respondent did not incur any actual harm. The unlawful penalty award must be vacated because the jury found that Respondent suffered \$0.00 in actual damages. As the language of section 46A-5-101 makes clear, the Code permits a consumer to recover actual damages and only then an additional civil penalty if that party can establish a violation of the WVCCPA. The statute provides that civil penalties may only be assessed “in addition” to, i.e. “on top of” any actual damages that the plaintiff incurs. In other words, a trial court can only utilize the assessment of a penalty if actual damages are awarded by the jury. Thus, because actual damages are a precondition to the addition of any penalty pursuant to the plain language of section 46A-5-101 which must be strictly interpreted, the penalty award must be vacated. Ms. Cole did not meet the statutory requirement of suffering actual damages prior to any award of the statutory penalty and she

cannot prevail in this action in light of the jury's unappealed findings as they are the law of the case.

B. The circuit court failed to adhere to this Court's decision in *Garnes* when setting the penalty award.

Ms. Cole should not be entitled to a penalty award in light of the jury's finding because this Court has held that in order for a plaintiff to obtain a punitive award (i.e. one designed to punish a party), the party must suffer some actual damage. *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 668, 413 S.E.2d 897, 909 (1991). Alternatively, should this Court disagree that actual damages are necessary, the penalty award must be reduced to a Constitutionally permissible level based on the prior decisions of this Court and the United States Supreme Court.

1. The jury did not award actual damages.

Previously, Ms. Cole 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 Ms. Cole) (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 further argued 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 correctly agreed and relied upon the *Garnes* decision. But the circuit court did not apply West Virginia law as set forth in *Garnes* despite its reliance on that case. Contrary to *Garnes*, the statutory penalties that the circuit court awarded bear no “reasonable relationship” to the actual harm that the Ms. Cole incurred—which is none.

Backpedaling away from her earlier reliance on *Garnes*, Ms. Cole now claims that *Garnes* does not apply at all to statutory penalty provisions such as the one at issue in this case. Relying on a 1919 case called *St. Louis Ry. Co. v. Williams*, Respondent boldly claims that the constitutional rigors developed by the United States Supreme Court and adopted by this Court in *Garnes*—70 years after the *Williams* decision—do not apply to statutory penalties, but only to punitive damages. Ms. Cole’s reliance on *Williams* is misplaced. In the *Williams* case, the defendant challenged the very constitutionality of a penalty statute. *St. Louis Ry. Co. v. Williams*, 251 U.S. 63 (1919). Here, Vanderbilt does not challenge the constitutionality of the WVCCPA itself, but rather the way in which the WVCCPA was applied. In *Williams*, the United States Supreme Court considered the fact that the penalty statute was designed, in part, for “punishment” and noted that due process considerations *do apply* when contemplating penalty statutes. *Id.* The Court in *Williams* may have concluded that the statute was constitutional but it did so because the penalty measure was within a range considered acceptable under the due process clause as it was understood at the time of that decision in 1919.

Relevant to this appeal, as the *Williams* Court noted, penalty statutes are designed “as a punishment for the violation of a public law” *St. Louis Ry. Co. v. Williams*, 251 U.S. 63, 66. Similarly, this Court has held that punitive damages are designed to punish and deter future violations of the law. *See Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 597, 490 S.E.2d 678, 684 (1997). Modern day due process considerations, as expressed in this Court’s *Garnes* decision, logically must be applied to both types of awards. Proper application of the prior decisions of this Court requires vacation of the entire penalty award because actual damages are unequivocally a pre-condition to any award that is punitive or penal in nature. *LaPlaca v. Odeh*,

189 W. Va. 99, 428 S.E.2d 322 (1993). *See also Garnes*, 186 W. Va. at 656, 413 S.E.2d at 897.

2. The penalty award is not set at a constitutionally permissible ratio.

Even if this Court declines to vacate the penalty award in full, when the Court turns the legal clock forward to present day, the guideposts set out in *Garnes*, show that the statutory penalties assessed in this case are unconstitutionally 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, both 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)).

The circuit court awarded Ms. Cole \$32,125.24 in statutory penalties despite the fact that the jury awarded her zero dollars in actual damages. The circuit court’s award of statutory penalties resulted in a grossly excessive ratio of 32,125:0. Such a ratio is grossly disproportionate to Respondent’s actual damages and significantly higher than other ratios that the United States Supreme Court has previously rejected as excessive in cases awarding punitive awards aimed at deterring future behavior.

The award must be vacated or reduced to a constitutionally permissible level given the non-egregious and obviously harmless nature of Vanderbilt's statutory violations. The circuit court was fully cognizant that statutory penalties must bear a reasonable relationship to the actual damages that Respondent suffered. *See Garnes*, 186 W. Va. 656, 668, 413 S.E.2d 897, 909 (1991). But the circuit court evidently ignored or misapplied this legal rule, and thereby abused its discretion.

3. Other considerations under *Garnes* as applied to this case.

When looking at the other considerations relevant to *Garnes* beyond the absence of actual harm, further support exists for reducing the award. The circuit court failed to adequately conduct the required analysis and this failure warrants this Court reducing the award downward. The Record in this case contains the call log which documents the phone calls placed over the five years Vanderbilt serviced the loan. (App. 1034-1576). Of the many calls that Vanderbilt made during the five years it serviced the loan, only 12 were found by the jury to have violated the WVCCPA despite Respondent's claims alleging 57 violations. (App. 64-72). Additionally, the jury found that Vanderbilt committed a single violation of the statute by failing to provide a statement of account. The calls which formed the basis for all but one of the WVCCPA violations all took place *years ago* without any level of repetitiveness. Thus, Vanderbilt's noncompliance was neither frequent or continuing and Vanderbilt did not try to conceal the behavior.

The jury did not find Vanderbilt's conduct to be egregious, and there was no evidence that would have supported such a finding. 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). The reason Vanderbilt placed *any* calls to third-parties at all was because Respondent did not have a home phone line, and Vanderbilt was 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). Further, while she claims to have been aggrieved by not getting a statement of account, Ms. Cole received monthly statements and never disputed the fact that she knew she was in default on her mortgage.

All calls placed by Vanderbilt were initiated in an effort to locate and communicate with the Respondent and not to harass her. (App. 546-556; 586-636; 646-655; 1073-1576). Ms. Cole repeatedly called Vanderbilt from numbers belonging to third-parties and informed Vanderbilt she could be contacted at various other telephone numbers to communicate with Respondent about her requested loan modifications. (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 overwhelming majority of the violations identified by the jury. (App. 546-556; 586-636; 646-655). The evidence does not show that Vanderbilt intentionally or systematically violated the WVCCPA, and therefore the circuit court erred in imposing a significant penalty. Since the 13 violations that the jury found Vanderbilt liable for were unintentional and isolated, and because Ms. Cole did not suffer any actual damage, West Virginia law as enunciated in *Garnes* requires an award of *de minimis* statutory penalties.

II. 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.

Ms. Cole alleged 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 with Respondent. (*Id.*). Nevertheless, Respondent contended 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, she can sue Vanderbilt only with respect to the calls that **Respondent** received from Vanderbilt, and not with respect to calls received by third parties such as Respondent's mother, father, or employer. *See* W. Va. Code § 46A-2-125.

Specifically, West Virginia Section 46A-2-125 (the "Abuse Provision") prohibits a creditor from "unreasonably" oppressive and abusive behavior. West Virginia Code Section 46A-2-125 states in full with respect to the pertinent language:

No debt collector shall unreasonably oppress or abuse *any person* in connection with the collection of or attempt to collect any claim alleged to be due and owing *by that person or another*. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section:

...

(d) Causing a telephone to ring or engaging *any person* in telephone conversation repeatedly or continuously, or at unusual times or at times known to be inconvenient, with intent to annoy, abuse, oppress or threaten *any person at the called number*.

W. Va. Code Ann. § 46A-2-125 (emphasis added).

Ms. Cole interprets the above introductory-clause section as allowing her to sue Vanderbilt for calls placed to third-parties because a creditor is broadly prohibited from abusing "any person . . . to collect any claim alleged to be due and owing by that person or another." Ms. Cole claims that it does not matter if the creditor placed the phone call to another person and that

person answers because “any person” can sue for the penalty, no matter if that person answered the call or was at the location of the called number. This makes no sense. Ms. Cole relies solely upon the word “any,” refusing to read it in context. Instead, Ms. Cole wants this Court to read the general language contained at the introduction of section 46A-5-125 in isolation without any regard to the language contained in subsection d which provides the limitation that the abuse must be directed at “any person at the called number.” W. Va. Code Ann. § 46A-2-125. Ms. Cole was not at the “called number” by her own admission for the third party calls for which she seeks to claim entitlement.

This Court has long recognized that penalty statutes must be strictly construed. *Reeves v. Ross*, 62 W. Va. 7, 57 S.E. 284 (1907); *See State ex rel. Dep’t of Transp. v. Sommerville*, 186 W. Va. 271, 273, 412 S.E.2d 269, 272 (W. Va. 1991) (“where a statute contains provisions which are both remedial and penal, such statute should be considered remedial when seeking to enforce the purpose for which it was enacted, and should be considered penal when seeking to enforce the penalty provided therein.”). But the circuit court failed to strictly construe the penalty provision at issue here by allowing Ms. Cole to pursue claims belonging to third parties. This not only runs afoul of basic standing principles, but also contravenes of long-standing decisions of this Court that prohibit a penalty action from being assigned to another person unless the assignment to another person is expressly provided for by the statute. *See Wilson v. Shrader*, 73 W. Va. 105, 79 S.E. 1083 (1913) (requiring that the “injured” party must be the party seeking the penalty). By allowing Ms. Cole to sue for calls made to others, the circuit court essentially eviscerated the long-standing precedent of this Court requiring the person suing for a penalty be the person claiming to have been aggrieved.

If this Court adopts Ms. Cole’s absurd interpretation, “any person” could sue for a penalty for abusive or annoying collection calls placed anywhere in the State of West Virginia, even if the penalty “seeker” was not “at the called number” nor would any association with the number, the debtor, the creditor, or the debt be required under her reading. This Court should not endorse such an absurd reading, particularly of a penalty statute, which must be strictly construed. The plain language of the WVCCPA states that oppression or abuse are established only where a debt collector evidences an 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 calls placed to third-parties. As a matter of clear statutory interpretation, these calls do not violate the WVCCPA, and therefore the circuit court erred by awarding penalties based on these calls.

The circuit court also 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.”). 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. 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. This Court must reduce the penalty award accordingly.

III. This Court should find that Ms. Cole is entitled to recover only a single penalty for the 11 calls found to be in violation of West Virginia Code section 46A-2-125 under the plain language of the Code.

If this Court determines that Ms. Cole has standing to recover for phone calls Vanderbilt placed to third parties, Ms. Cole should only be entitled to recover a *single* penalty for the 10 calls to third parties and the one call wherein Vanderbilt was found to have used abusive language because the circuit court's erroneously found that Vanderbilt's calls were repetitive or continuous as required by the WVCCPA. Vanderbilt placed the 11 calls the jury found to be violative of the WVCCPA over a five year period and those calls do not establish a pattern of continuous behavior or practice as is required by the Code.

The statutory scheme must be read as a whole in order to discern the intent of the Legislature. First, the plain language of W. Va. Code Ann. § 46A-5-101(1) states:

the consumer has a cause of action to recover actual damages and in addition a right in an action to recover from the person violating this chapter *a penalty in an amount determined by the court not less than one hundred dollars nor more than one thousand dollars.*

W. Va. Code Ann. § 46A-5-101(1) (emphasis added). Second, 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 over the objection of Vanderbilt. The jury returned a verdict finding 11 violations of section 46A-2-125. After trial, 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 despite the fact that the plain language of the Code provides for only a singular penalty.

Pursuant to 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 (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.” Thus, in this case, the jury’s verdict does not establish the requisite continuous pattern required by the Code and the circuit court erred in concluding the calls were repeated given the long time frame over which the calls were placed. The Record simply does not support the circuit court’s conclusion.

On appeal, Ms. Cole continues to push her multiple penalty theory before this Court. In her brief, Ms. Cole cites to 20 cases for the proposition that it is well-settled that a consumer may recover more than one penalty for each violation of the WVCCPA. Of those 20 cases, 17 of the cases cited arise out of Federal District Courts determining whether the amount in controversy has been met for removal purposes. None of those cases conclusively establish that a consumer will actually recover multiple penalties, only that the defendant could face liability in excess of the jurisdictional threshold under the theories the respective plaintiffs pled in the specific cases. This Court cannot rely upon a federal decision on a motion to remand as conclusively establishing Ms. Cole's multiple penalty theory because none of these decisions directly answered the question posed here: whether the WVCCPA in fact authorizes a penalty for each collection call made, or whether a systemic pattern of continuous or repeated calls is necessary to trigger liability. This Court is the final authority on this question of West Virginia law.

In one of the remaining three cases, this Court reversed the dismissal of a complaint filed by the State Attorney General on behalf of West Virginia Consumers and remanded the case to proceed as filed because the Attorney General had the authority to sue on behalf of the citizens under the WVCCPA. *See State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995) (remanding the matter after the trial court dismissed the case on the basis that the Attorney General had the authority to file suit). Thus, *Scott Runyan* also fails to support Ms. Cole's theory as it relates solely to the statutory authority of the Attorney General.

Finally, the two remaining cases cited by Ms. Cole actually support Vanderbilt's argument. *In re Machnic*, arises out of an adversary proceeding in bankruptcy court wherein the bankruptcy court found *two* violations of the West Virginia Consumer Credit and Protection Act but only awarded a single penalty. 271 B.R. 789, 794 (Bankr. S.D. W.Va. 2002) (emphasis

added). The bankruptcy court found the creditor's actions warranted only a singular penalty under the Code despite multiple actual (and alleged) violations. *Id.* As a result, *In re Machnic* does not support Ms. Cole's multiple claim theory and actually demonstrates why this Court should reduce the penalty award to allow for the recovery of a single penalty for the 11 phone calls of which Ms. Cole complains under Section 46A-2-125.

The last case relied upon by Ms. Cole is *Clements v. HSBC Auto Fin., Inc.* In *Clements*, the Federal District Court for the Southern District of West Virginia determined that the creditor in that case committed 821 violations of the WVCCPA related to phone calls because the calls rose to the level of repeated and continuous aggressive collection behavior intended to annoy and harass the consumer. *Clements v. HSBC Auto Fin., Inc.*, No. 5:09-cv-86, 2011 WL 2976558 (S.D.W.Va. July 21, 2011). The creditor in the *Clements* case placed 861 phone calls to the consumer in a seven month period. *Id.* *4 (emphasis added). The Southern District concluded that the *first 40* calls were not sufficient to establish a violation of the code because those initial calls were not continuous or repeated as to rise to the required level of harassment under the Code. *Id.* at *4-5.

Hence, *Clements* bolsters Vanderbilt's position that the circuit court erred in awarding multiple penalties for a the 11 phone call violations in this case because the Record does not support the circuit court's conclusion that Vanderbilt's actions rise to the level of "repeated" because the calls were placed to third parties and one call to Ms. Cole over a 5 year period. Thus, while *Clements* demonstrates that a party may obtain multiple penalties, it establishes that the Code requires the actions of the creditor be frequent and continuous enough to warrant a penalty. The facts of this case and the Record pale in comparison to the findings in *Clements*.

As established above, the plain language of the act establishes that liability does not attach under the Abuse Provision on a per telephone call basis. Therefore, the circuit court's order awarding multiple penalties for violations of the same provision must be vacated and the judgment amount reduced accordingly.

IV. The trial court abused its discretion in awarding attorneys' fees because Ms. Cole was not the prevailing party and the trial court relied upon improper considerations in making its attorney fee determination.

A. Prevailing party and the degree of success measurements.

This case was initiated by Vanderbilt as an action for Unlawful Detainer in November of 2010. In response to Vanderbilt's Complaint, Ms. Cole filed her counterclaims. The 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). During the trial, 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 despite the parties having tried the matter to the Court. Following trial, 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).

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). 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. Vanderbilt obtained a judgment on the “case-in-chief.” (App. 15 at ¶ 7). In doing so Vanderbilt became the prevailing party in the action. The value of the home and accompany real property were valued above the penalty award. Ms. Cole was awarded \$32,125.24 in statutory penalties—an amount that is less than the value of the recovery obtained by Vanderbilt on the unlawful detainer action given the value of the land and home. (App. 14-21). Thus, at the most basic level, the relief obtained by Vanderbilt in the case-in-chief outweighed the penalty award set by the trial court. As a result, this Court should recognize that Ms. Cole was not the prevailing party and vacate the award of attorneys’ fees.

B. The circuit court considered factors not provided for by the decisions of this Court in the order awarding attorneys’ fees.

In its order awarding attorneys’ fees, the circuit court relied upon improper considerations. The circuit court heavily relied upon the continued viability of the organization that employees the lawyers representing Ms. Cole. 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. *See Aetna Cas. & Sur. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986). 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). Courts should not concern itself with whether the particular law firm or lawyer before it will be able to “survive” in the future in deciding whether to award fees in a given case. The circuit court below cited no legal authority

indicating that this is a proper consideration in making a fee award, and Ms. Cole cites no such authority on appeal.

The only question the court must answer when making a fee award is whether the fee awarded is reasonable *in the case before it*, in light of all attendant circumstances, most importantly the degree of success obtained. The circuit court's decision to impose an attorney fee award upon Vanderbilt to aid Mountain State Justice's future sustainability is highly improper. In considering the value of the fee to the lawyers representing Respondent and their sustainability as a unique business entity, the circuit court clearly abused its discretion. Reversal of the fee amount is required.

The circuit court compounded his error 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). However, 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). This error warrants reversal of the attorney fee as well.

The fee award should be vacated or reduced based on the points above. Vanderbilt was the prevailing party in the case-in-chief and should not be required to pay Ms. Coles' attorneys'

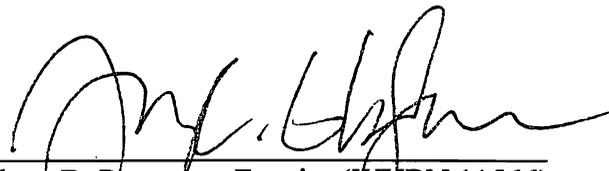
fees. Additionally, the circuit went beyond the factors provided by this Court in making a fee determination by paying fees to Mountain State Justice based upon the nature of its business and the circuit court's desire not to penalize Ms. Cole for losing on well over 3/4 of her claims.

Conclusion

As outlined in its initial brief and further explained herein, 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 and to eliminate the improper factors the circuit court took into account.

Respectfully submitted,

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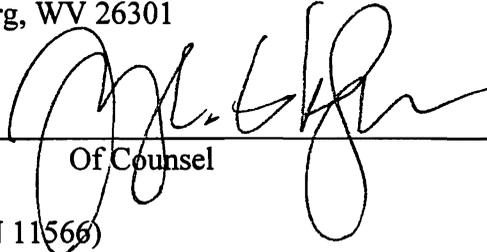
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Certificate of Service

The undersigned attorney hereby certifies that he served PETITIONER'S BRIEF upon the following individuals, via U.S. Mail, postage prepaid, on the 22nd day of February, 2011:

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