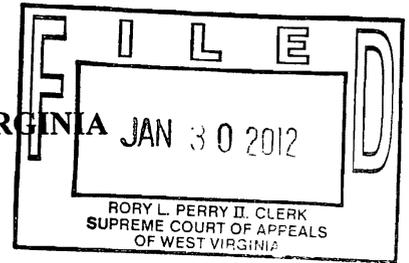


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**VANDERBILT FINANCE AND
MORTGAGE, INC.,**

Plaintiff/Petitioner,

v.

**APPEAL NOS. 11-1288 & 11-1604
(On appeal from the Circuit Court
of Harrison County
Civil Action No. 10-C-574-II
Honorable Thomas A. Bedell)**

TERRI L. COLE,

Defendant/Respondent.

BRIEF OF RESPONDENT TERRI L. COLE

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STATEMENT OF THE CASE

Ms. Cole offers the following statement of the case as necessary to correct inaccuracies and omissions in the statement of case provided by the Petitioner. See W. Va. R. App. Proc. 10(d).

This appeal arises out of the judgment orders entered by the Circuit Court of Harrison County, West Virginia against the Petitioner, Vanderbilt Mortgage and Finance, Inc., a manufactured home mortgage loan servicer that engages in abusive and illegal debt collection practices. Specifically, Petitioner does not appeal the jury verdict or any finding of fact. Instead, in a desperate attempt to avoid responsibility for its clear and undisputed violations of West Virginia law, it appeals the circuit court's post-trial orders, including (1) the order entered by the Circuit Court of Harrison County awarding Ms. Cole \$32,125.24 in statutory penalties pursuant to sections 46A-5-101(1) and -106 of the West Virginia Consumer Credit and Protection Act (WVCCPA) for the thirteen separate violations of various provisions of the WVCCPA found by the jury (see App. 14-21); and (2) the order entered by the Circuit Court of Harrison County awarding Ms. Cole \$30,000 in attorney's fees and costs pursuant to section 46A-5-104 of the WVCCPA (see App. 3-10). (See Pet'r Br. 5.) With complete disregard for settled West Virginia law, Petitioner throws half a dozen weakly supported (if at all) arguments against the wall with the hope that at least one will stick. Because the circuit court did not abuse its broad discretion in its post-trial orders, its orders should be upheld.

Relevant Facts

In or around October of 1996, Ms. Cole purchased a manufactured, which she financed through Ford Consumer Finance Company for \$46,670.22. (Note, App. 855.) In or around April of 2005, Vanderbilt began to collect on the mortgage loan. (Subservicer Agreement, App. 828.)

During the time period at issue, Ms. Cole worked as a home health aide caring for sick and elderly clients in their homes. (App. 560.)

Repeated Calls After Requests to Cease

Throughout the course of servicing Ms. Cole's mortgage loan, Petitioner placed multiple and repeated calls to Ms. Cole's mother and place of employment despite repeated requests to stop. Ms. Cole and her mother had repeatedly asked Petitioner to stop calling Ms. Cole's mother who lived in a separate residence. (See Resp't Test., App. 570-75.) On October 21, 2005, Ms. Cole's mother reminded Petitioner that Ms. Cole had repeatedly asked it to cease calling Ms. Cole's mother. (See Call Logs, App. 1295.) Despite these repeated requests to stop calling, Petitioner called Ms. Cole's mother once per day on October 26, 27, and 28 of 2005. (See Call Logs, App. 1294.)

On August 23, 2005, Ms. Cole called from her place of employment—the home of Ms. Cole's elderly and infirm clients—to make a payment arrangement. During this conversation, Ms. Cole specifically instructed Petitioner not to call her at her place of employment. (See Call Logs, App. 1300.) Despite Ms. Cole's specific instruction, on January 18, 2006, Petitioner telephoned Ms. Cole's place of employment and Ms. Cole's employer answered the phone. (Call Logs, App. 1289.) Again, despite Ms. Cole's clear instruction not to call, Petitioner called Ms. Cole's place of employment once per day on March 15, 17, 20, 21, and 25 of 2006. (Call Logs, App. 1286-87.) At some point Petitioner noted that Ms. Cole was not allowed calls at her place of employment and purported to take Ms. Cole's employer's number out of its system. (Call Logs, App. 1274.) However, on September 25, 2009, Petitioner once again called Ms. Cole's place of employment. (Call Logs, App. 1219.)

Disclosure of Debt to Third Party

During its process of harassing Ms. Cole through repeated communication with her

employers and family members, Petitioner disclosed details about Ms. Cole's debt to a complete stranger who it called repeatedly despite knowing that said stranger was not related to the account. On April 22, 2005, Petitioner telephoned a third party who happened to have the same name as Ms. Cole's husband. This third party explained that he was not the party whom Petitioner sought and Petitioner apologized for the call. (See Call Logs, App. 1329.) On April 27, 2005, Petitioner made an internal note in its collection records that this particular third party was not the proper party to be contacting and had no relation to the account. (Call Logs, App. 1327.) Nevertheless, on October 27, 2007, Petitioner telephoned this same third party who again explained to Petitioner that he had no mortgage at all, let alone with Petitioner. (Call Logs, App. 1214-15.) Once more, on March 5, 2009, Petitioner telephone the same third party and disclosed details about Ms. Cole's debt, including (1) the fact that Ms. Cole was delinquent; (2) the total amount due to cure; and (3) Ms. Cole's property address. (Call Logs, App. 1075; Pet'r Test., App. 532; Resp't Test., App. 577-78.)

Insulting and Demeaning Language

Not only did Petitioner harass Ms. Cole and disclose her personal information to a stranger, it also verbally abused and insulted her, including instructing Ms Cole to buy her sons' school clothes at second-hand stores to save money. (Resp't Test., App. 578-80; Call Logs, App. 1061.)

Failure to Provide Account Statement

By letter to Petitioner dated August 23, 2010, Ms. Cole requested a detailed statement of her account so that she could obtain a proper accounting of the loan prior to foreclosure. (See Letter to Vanderbilt, App. 1577; Resp't Test., App. 581-83.) Petitioner received Ms. Cole's written request on August 27, 2010, as evidenced by the return receipt requested. (Letter to Vanderbilt, App. 1577.) It is undisputed that prior to foreclosing on September 16, 2010, Petitioner failed to respond whatsoever to Ms. Cole's written request for detailed information regarding her account. (Resp't

Test., App. 583; Pet'r Test., App. 533-35; Call Logs, App. 932.)

Procedural History

Subsequent to the foreclosure, Petitioner filed an unlawful detainer action against Ms. Cole in the Magistrate Court of Harrison County, West Virginia on November 23, 2010. (Unlawful Detainer Action, App. 60.) On December 15, 2010, Ms. Cole filed her answer and counterclaim asserting the following counts:

- Count I for unlawful third party contacts, including (1) unreasonable publication of Ms. Cole's debt to a third party in violation of section 46A-2-126(b) of the WVCCPA; and (2) persistently calling third parties despite repeated requests to stop in violation of section 46A-2-125 of the WVCCPA.
- Count II for oppression and abuse, including (1) repeated telephone calls to Ms. Cole's work despite requests to cease in violation of section 46A-2-125 of the WVCCPA; and (2) using abusive, oppressive, and threatening language in its collection attempts in violation of section 46A-2-125 of the WVCCPA.
- Count III for invasion of privacy.¹
- Count IV for failure to provide a statement of account in violation of section 46A-2-114(2) of the WVCCPA.

(See Answer, Affirmative Defenses, & Counterclaim, App. 64-71.)

On June 27 and 28, 2011, a jury trial was held in the Circuit Court of Harrison County, West Virginia. At trial, Ms. Cole presented evidence and argued that Petitioner committed four separate categories of unlawful debt collection under the WVCCPA: (1) unreasonable publication of indebtedness to a third party (§ 46A-2-126(b)); (2) repeated calls to third parties and place of employment despite requests to stop (§ 46A-2-125); (3) abusive and oppressive language during a

¹ Count III for invasion of privacy was voluntarily dismissed by Ms. Cole early in the course of the litigation.

collection call (§ 46A-2-125); and (4) failure to provide a statement of account (§ 46A-2-114(2)).²

On June 28, 2011, the jury rendered a verdict in Ms. Cole's favor on each of her claims. (Verdict Form, App. 30-31.) The jury found Petitioner liable for on instance of "oppressive or abusive activity (use of language intended to unreasonably abuse the hearer)." (Id.) The jury found Petitioner liable for ten separate instances of "oppressive or abusive activity (placement of repeated, unsolicited calls to third parties despite requests to cease)." (Id.) The jury found Petitioner liable for "unlawful debt collection for failure to provide a statement of account upon written request." (Id.) Finally, the jury found Petitioner liable for one instance of "unlawful debt collection for unreasonable publication of indebtedness to a third party." (Id.) Although it found Petitioner liable on all four claims, the jury did not award Ms. Cole any actual damages, instead permitting the judge to provide Ms. Cole relief through statutory penalties. (Id.)

A trial order prepared by Petitioner's counsel incorporating the jury's verdict was entered on July 19, 2011. (Trial Order, App. 54-59.) The trial order set forth the briefing schedule for post-trial motions, including Ms. Cole's motion for statutory penalties pursuant to the WVCCPA for the liability found on all four claims and the thirteen separate violations found by the jury. (Id.)

On July 15, 2010, Ms. Cole filed a motion seeking \$63,089 in statutory penalties. (Motion for Statutory Penalties, App. 244-58.) Petitioner filed its response on July 22, 2011 (see App. 259-99), and on August 15, 2011, the circuit court entered an order slashing Ms. Cole's request by nearly

² Petitioner's assertion that "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" is inaccurate so far as it asserts that Ms. Cole brought claims under specific sub-sections of section 46A-2-125, which she did not, in either her Counterclaim, or in the ultimate charges to the jury on said claims. This reality is fatal to certain of Petitioner's arguments on appeal. (See discussion *infra* parts D and E.)

fifty percent and awarding \$32,125.24 in statutory penalties. (Order Awarding Statutory Penalties, App. 14-21.)

Shortly after entry of the circuit court's order awarding statutory penalties, Ms. Cole submitted a motion for an award of statutory attorney's fees and costs pursuant to the WVCCPA seeking \$48,852 in fees and costs. (Motion for Fees, App. 300-34.) Petitioner filed its response on September 21, 2011 (see App. 335-52), and Ms. Cole filed her reply in support of her motion for fees and costs on September 28, 2011 (see App. 353-60). On October 18, 2011, despite Ms. Cole's success on all four claims, the circuit court reduced Ms. Cole's request for fees by nearly forty percent and awarded only \$30,000 in fees and costs. (Order Awarding Fees and Costs, App. 3-10.)

Despite the circuit court's wide discretion and its significant reduction of Ms. Cole's requested statutory penalties and attorney fees and costs, Petitioner appeals the circuit court's orders.

SUMMARY OF ARGUMENT

Petitioner argues that the circuit court abused its discretion in awarding any statutory penalties pursuant to section 46A-5-101(1) of the WVCCPA, notwithstanding the clear provision of these penalties by the West Virginia legislature to discourage abusive and oppressive debt collection conduct, such as Petitioner's. Specifically, Petitioner argues that because the jury did not award Ms. Cole any actual damages, the circuit court abused its discretion in awarding any statutory penalties at all. Contrary to Petitioner's assertion, there is no settled law setting forth the formula by which statutory penalties pursuant to the WVCCPA are to be assessed. However, it is clear that there is absolutely no requirement that actual damages be awarded to trigger the right to recover statutory penalties. See W. Va. Code § 46A-5-101(1). The circuit court, thus, appropriately used available guideposts in rendering its award of statutory penalties in a well-reasoned order and, in so doing, did not abuse its significant discretion.

Petitioner goes on to argue that, because the jury awarded no actual damages nor found that Petitioner acted wilfully, the circuit court abused its discretion by increasing the range of statutory penalties from \$100 - \$1,000 to \$400 - \$4,000 pursuant to section 46A-5-106 of the WVCCPA. Petitioner's argument is without merit because there is no statutory requirement that actual damages be awarded in order to trigger a right to recover statutory penalties. Further, section 46A-5-106 of the WVCCPA provides simply that "a court may adjust the damages awarded . . . to account for inflation" W. Va. Code § 46A-5-106. There is no requirement whatsoever that a finding of wilfulness be made to adjust the statutory penalties awarded for inflation.

Next, Petitioner argues that Ms. Cole did not have standing to recover for her claim that Petitioner engaged in abusive and oppressive debt collection conduct by placing calls to Ms. Cole's mother and her place of employment after requests to cease calling were made. Petitioner asserts that only a party who receives the actual call—rather than the intended or affected recipient, i.e., the consumer—has standing to bring a claim pursuant to section 46A-2-125(d). Petitioner's argument is entirely misplaced because Ms. Cole did not bring her claim pursuant to section 46A-2-125(d) of the WVCCPA. Rather, as Petitioner acknowledged at trial, Ms. Cole brought her claim for abuse and oppression for repeated calls to her mother and her place of employment after requests to cease were made under the broad, non-exhaustive, general application provision of section 46A-2-125 of the WVCCPA. (See App. 665 ("rather, they are trying to collect [sic] under the more broad 46A-2-125 oppression and abuse section"); Counterclaim Count II & III, App. 69-70; Jury Charge, App. 689 ("You are instructed that under the general application of the statutory prohibition against unreasonable, oppressive or abusive tactics . . .").) Of course, a broad and liberal reading of the WVCCPA in line with its remedial purpose compels a conclusion that consumers have standing to bring claims pursuant to subsection 46A-2-125(d) of the WVCCPA, especially when the calls are

made to family members and employers. However, as explained herein, this issue is not raised in this case because Ms. Cole clearly did not bring her claims under subsection d of the provision prohibiting oppressive and abusive debt collection conduct.

Petitioner next argues, again mistakenly asserting that Ms. Cole brought her claims pursuant to subsection d, that the circuit court abused its discretion in awarding ten separate statutory penalties for the ten separate violations found by the jury of Petitioner's violation of section 46A-2-125 of the WVCCPA prohibiting abusive and oppressive debt collection conduct involving Petitioner's calls to third parties despite requests to stop. Petitioner seems to argue that although the jury, as the trier of fact, found that there were ten separate violations under this claim, the circuit court should have awarded only one single penalty for the ten separate violations. This argument flies in the face of the remedial intent of the WVCCPA as well as the commonly held application of section 46A-5-101(1) of the WVCCPA by numerous West Virginia courts that "each violation creates a single cause of action to recover a single penalty." Sturm v. Providian Nat'l Bank, 242 B.R. 599, 603 (Bankr. S.D.W. Va. 2002) (discussion *infra* part E). Accordingly, the circuit court did not abuse its discretion in assessing ten separate statutory penalties for the ten separate violations found by the jury.

Petitioner also argues that the circuit court abused its discretion in awarding attorney's fees and costs because, as it argues, it was the prevailing party because it was successful on its unlawful detainer action. However, as Petitioner itself argued below, its "Unlawful Detainer action was factually unrelated and legally distinct from [Ms. Cole's] claims under the [WVCCPA]." (App. 339.) It may not now reverse course on appeal. Instead, as Petitioner previously insisted, Ms. Cole's WVCCPA claims were adjudicated separately and based on facts unrelated to Petitioner's action for unlawful detainer. As such, it cannot be argued that Ms. Cole did not prevail when she obtained a

favorable verdict on all four claims presented to the jury as well as a finding of thirteen separate statutory violations.

Finally, Petitioner argues that the circuit court abused its discretion in awarding Ms. Cole's attorney's fees and costs because of the "low degree of success" and because the circuit court misapplied factors used to determine a fee award. These arguments are also without merit, given that the circuit court did in fact reduce Ms. Cole's request in light of the limited recovery and it properly applied settled factors in determining an appropriate fee award. As such, the circuit court did not abuse its wide discretion in awarding attorney's fees and costs.

In this appeal, Petitioner fails to demonstrate that the circuit court abused the broad discretion granted it in awarding statutory penalties and attorney's fees and costs pursuant to the WVCCPA. The appeal should therefore be denied and the judgments of the circuit court below affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Ms. Cole does not believe that oral argument is necessary in this case, as the lower court did not commit abuse of discretion in its award of statutory penalties and attorney's fees and costs to Ms. Cole. Nevertheless, if the Court determines that oral argument is appropriate, Ms. Cole urges the Court to place the appeal on the Rule 20 argument docket, as the appeal presents an opportunity for the Court to clarify certain aspects of the WVCCPA that have not previously been definitively addressed. See W. Va. R. App. Proc. 20. If the appeal is set for oral argument, Ms. Cole requests the right to present such argument and specifically preserves the right to do so consistent with the Rules of Appellate Procedure.

ARGUMENT

A. Standard of Review

This appeal raises no issue with any finding of fact or conclusion of law. Rather, Petitioner appeals the circuit court's orders awarding statutory penalties and attorney's fees and costs pursuant to the WVCCPA. Sections 46A-5-101(1) and -106 of the WVCCPA vest the circuit court with broad discretion to assess a range of statutory penalties for violations of the Act. W. Va. Code §§ 46A-5-101(1), -106. Section 46A-5-101(1) provides that a consumer has "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 § 46A-5-101(1) (emphasis added). Section 46A-5-106 provides that "the **court may adjust** the damages award pursuant to section one hundred one of this article to account for inflation" W. Va. Code § 46A-5-106 (emphasis added). Thus, the circuit court's assessment and award of statutory penalties pursuant to the WVCCPA is reviewed for abuse of discretion.

Likewise the circuit court's award of attorney's fees and costs pursuant to section 46A-5-104 of the WVCCPA, which provides that "a **court may award** all or a portion of the costs of litigation, including reasonable attorney fees, court costs and fees, to the consumer." W. Va. Code § 46A-5-104 (emphasis added). Further, "[t]he decision to award or not award attorney's fees rests in the sound discretion of the circuit court, and the exercise of that discretion will not be disturbed on appeal except in cases of abuse." Beto v. Stewart, 213 W. Va. 355, 359, 582 S.E.2d 802, 806 (2003); see also Sanson v. Brandywive Homes, Inc., 215 W. Va. 307, 310, 599 S.E.2d 730, 733 (2004); Syl. Pt. 2, Daily Gazette Co, Inc. v. West Virginia Dev. Office, 206 W. Va. 51, 521 S.E.2d 543 (1999).

B. An Award of Actual Damages is Not Required to Assess Statutory Penalties under the West Virginia Consumer Credit and Protection Act.

The circuit court was duly authorized by sections 46A-5-101(1) and -106 of the WVCCPA to assess statutory penalties for the thirteen separate violations found by the jury below. Petitioner argues that the circuit court abused its discretion in awarding statutory penalties because, although the jury found liability on all four counts, it did not award Ms. Cole any actual damages. Petitioner argues that Ms. Cole should have been awarded no statutory penalties at all or “a *de minimis* amount to comport with due process requirements.” (Pet’r Br. 9.)

However, there is no requirement whatsoever in section 46A-5-101(1) of the WVCCPA that actual damages be awarded in order for a court to assess of statutory penalties. Indeed, the only requirement triggering a right to recover statutory penalties is a finding of liability.³ Section 46A-5-101(1) of the WVCCPA provides:

If a creditor has violated the provisions of this chapter applying to . . . any prohibited debt collection practice, . . . 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 . . .**

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

It is clear from the plain language of the statutory provision that in addition to and distinct from a consumer’s right to recover actual damages, a consumer has a right to recover statutory penalties. This Court has definitively agreed:

³ Section 46A-5-101(8) of the WVCCPA provides that no liability can be found if a debt collector “establishes by a preponderance of the evidence that a violation is unintentional or the result of a bona fide error of fact notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation” W. Va. Code § 46A-5-101(8). Petitioner does not appeal the jury verdict finding liability on all four counts and for a finding of thirteen separate WVCCPA violations. Moreover, the jury was duly charged with an instruction on the bona fide error defense. (See Jury Charge, App. 688-91.)

Section 101(1) **unmistakably** reflects the legislature’s intent to eliminate those violations of the Act therein specified by giving the consumer **not only a private cause of action to recover actual damages, but in addition, a right to recover a penalty in an amount set by the court**

U.S. Life Credit Corp. v. Wilson, 171 W. Va. 538, 541-42, 301 S.E.2d 169, 173 (1982) (emphasis added). Because a West Virginia consumer has, in addition to a right to recover actual damages, a separate and additional right to recover statutory penalties, the award of statutory penalties need not bear any relation to any award of actual damages. The language “and in addition” clarifies that consumers have both a cause of action for damages and a separate cause of action to recover a civil penalties. This provision reflects the remedial nature of the WVCCPA, which was enacted with the express purpose of protecting consumers and deterring abusive behavior by debt collectors and creditors. See, e.g., Barr v. NCB Mgmt. Servs., Inc., 227 W. Va. 507, ___, 711 S.E.2d 577, 582-84 (2011). To that end, the statute requires that a civil penalty be imposed for each violation of the WVCCPA, whether or not actual damages are proven. See, e.g., Wilson, 171 W. Va. at 539-42, 301 S.E.2d at 171-73 (ordering lower court to award civil penalty under the WVCCPA for unconscionable term in a contract, without requiring proof of damages resulting from that term); In re Machnic, 271 B.R. 789 (Bankr. S.D.W. Va. 2002) (awarding civil penalty for violation of WVCCPA without award of actual damages); Stover v. Fingerhut Direct Mktg., Inc., No. 5:09-cv-00152, 2010 WL 1050426, at *7-*8 (S.D.W. Va. Mar. 17, 2010) (holding that WVCCPA permits recovery of civil penalties for each violation of the WVCCPA without requiring showing of actual damages); cf. Orlando v. Fin. One of W. Va., 179 W. Va. 447, 453, 369 S.E.2d 882, 888 (1988) (holding that the unfair and deceptive trade practices penalty provision, W. Va. Code § 46A-6-106, unlike the provision at issue in the instant case, requires a showing of an “ascertainable loss” such that injury must be shown to recover the civil penalty).

The provision of statutory penalties irrespective of an actual damage award is not limited to the WVCCPA; instead it applies to numerous consumer protection statutes. For instance, in Jones v. Credit Bureau of Huntington, Inc., 184 W. Va. 112, 339 S.E.2d 694 (1990), after reviewing the language of the Federal Fair Credit Reporting Act, which provided for the recovery of actual damages and punitive damages, as well as the holdings of other state and federal courts interpreting the same, this Court held that “the FCRA does not speak in terms of requiring actual damages; rather, it refers to actual damages as only one portion of any award or relief that might be granted.” Id. at 120 (quoting Ackerly v. Credit Bureau of Sheridan, Inc., 385 F. Supp. 658, 661 (D. Wyo. 1974)). Significantly, this Court went on to conclude that the federal statute provided a separate right to recover punitive damages and “[i]n such an action, it is not necessary that punitive damages bear a reasonable relationship to actual damages.” Id.

Similarly, courts have repeatedly and consistently held that the federal Fair Debt Collection Practices Act (FDCPA) does not require proof of actual damages. As one court explained, with logic that holds equally with section 46A-5-101 of the WVCCPA:

[T]he FDCPA allows a plaintiff to recover statutory damages despite the absence of actual damages; in other words, the “injury in fact” analysis is directly linked to the question of whether plaintiff has suffered a cognizable statutory injury and not whether a plaintiff has suffered actual damages. Courts have consistently interpreted the FDCPA to confer standing on plaintiffs who have suffered no actual harm, allowing them to sue for statutory violations.

Ehrich v. I.S. Sys., Inc., 681 F. Supp. 2d 265, 270-71 (E.D.N.Y. 2010) (internal citations omitted); see also Stover, 2010 WL 1050426, at *4 (finding FDCPA instructive interpreting equivalent provisions of the WVCCPA).

This same analysis applies here given the plain language of section 46A-5-101(1) of the WVCCPA providing for separate and distinct rights of recovery. To hinge recovery of statutory

damages on an award of actual damages would undermine the plain language of the provision as well as the overall remedial purpose of the WVCCPA. See Wilson, 171 W. Va. at 541, 301 S.E.2d at 172 (“As always in matters involving statutory construction, legislative intent is the dominant consideration.”). “Where an act is clearly remedial in nature, [the Court] must construe the statute liberally so as to furnish and accomplish all the purposes intended.” State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 777, 461 S.E.2d 516, 523 (1995); see also Barr, 227 W. Va. at ___, 711 S.E.2d at 583 (same); Wilson, 171 W. Va. at 541-42, 301 S.E.2d at 173 (citing Cardi, The West Virginia Consumer Credit and Protection Act, 77 W. Va. L. Rev. 401, 402 (1975) (discussing intent of WVCCPA to, among other things, protect consumers from “undesirable debt recovery and collection practices . . .”)); Thomas v. Firestone Tire and Rubber Co., 164 W. Va. 763, 770-71, 266 S.E.2d 905, 909 (1980). The West Virginia Legislature included this separate right to recover statutory penalties to further the remedial purpose of the WVCCPA, which is to provide protection and relief to consumers and to deter and punish abusive and illegal debt collection practices. Disallowing relief in the form of statutory penalties where violations have been found would not only fail to advance the remedial purpose of the WVCCPA, it would also effectively undermine the purpose of the Act.

Further, because actual damages are not required in order to award statutory penalties pursuant to section 46A-5-101(1) of the WVCCPA, Petitioner’s arguments that the circuit court’s award violates due process are unavailing. Petitioner relies on cases reviewing awards of general punitive damages in light of corresponding actual or compensatory damages awards, not cases reviewing awards of statutory penalties like those permitted by the WVCCPA. (Pet’r Br. 10 (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); BMW of N. Am. v. Gore, 517 U.S. 559 (1996).) The distinction is critical. There is no requirement when awarding statutory

penalties pursuant to section 46A-5-101(1) of the WVCCPA or provisions like it, that the penalty award be proportionate to the actual or compensatory damages award. W. Va. Code § 46A-5-101(1); see also Jones, 184 W. Va. at 120, 399 S.E.2d at 702.

Moreover, it is not appropriate to apply a Gore-like framework, i.e., a framework applied to punitive damage awards, to due process challenges of statutory penalty awards that are within proscribed ranges. See St. Louis, I.M. & S. Ry. Co. v. Williams, 251 U.S. 63 (1919). The U.S. Supreme Court of Appeals in Williams reviewed a Fourteenth Amendment challenge to a jury's award of a \$75 statutory penalty (\$50 - \$350 proscribed range) for a railroad company's violation of a fare limitation; the company charged two passengers sixty-six cents more than the statutory limit. See id. at 64. The U.S. Supreme Court rejected a challenge that the award was excessive (the award was 114 times the fare overcharge), holding that statutory remedies for "violations of a public law" are not required to "be confined or portioned to [the victim's] loss or damages" Id. at 66. Rather, the standard set forth in Williams provides that constitutional challenges to awards of statutory penalties must demonstrate that the award is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." Id. at 67. Petitioner has not and cannot demonstrate that the circuit court's award of statutory penalties issued in a well-reasoned opinion and which reduced Ms. Cole's request by nearly fifty percent meets the standard (discussion of circuit court's discretion *infra* part C).

To be sure, the circuit court in determining statutory penalty assessments—in addition to resting on the settled principal that the WVCCPA be interpreted to give full effect to its remedial purpose to protect consumers and punish and deter unlawful conduct—sought further guidance from Garnes v. Fleming Landfill, Inc., 186 W. Va. 656, 413 S.E.2d 897 (1991), which sets forth standards for considering a jury award of general punitive damages. However, this Court's holding in Garnes

that punitive damages may not be awarded without an award of compensatory damages is inapplicable here where Ms. Cole has a separate right to recover statutory penalties. See id. at Syl. Pt. 1. The circuit court reviewed the Garnes standards that it deemed helpful and applied them reasonably in making its award of statutory penalties pursuant to section 46A-5-101(1) of the WVCCPA (discussion *infra* part C.).

C. The Circuit Court Did Not Abuse Its Broad Discretion in Awarding Ms. Cole Statutory Penalties.

Petitioner next appears to assert that the circuit court abused its broad discretion in awarding statutory penalties because it failed to consider the factors set forth in the Federal Fair Debt Collection Practices Act (FDCPA) and because it adjusted the penalties to account for inflation pursuant to section 46A-5-106 of the WVCCPA. (Pet'r Br. 6, 11-17.) While the circuit court certainly could have looked to the factors provided in the FDCPA for guidance in making its determination of statutory penalties given some of its similarities to the WVCCPA, it was clearly not an abuse of discretion for the court to have declined to do so. As the U.S. Supreme Court held, abuse of discretion in awarding statutory penalties may be demonstrated where the award is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." , 251 U.S. at 67. As the following discussion demonstrates, Petitioner has not nor cannot show that the circuit court's award of statutory penalties that was squarely within the proscribed range and remedial purpose of the WVCCPA amounts to abuse of discretion. Accordingly, the circuit court's order should be affirmed.

Subsequent to entry of the unanimous jury verdict finding liability on all four claims as well as finding thirteen separate statutory violations of the WVCCPA's prohibitions on abusive and illegal debt collection practices, Ms. Cole moved for an award of statutory penalties seeking \$63,089.

(App. 244-58.) After the circuit court received Petitioner's response (App. 259-99), it entered a reasoned order awarding Ms. Cole only \$32,125.25, just over fifty percent of what she sought. (Order Awarding Statutory Damages, App. 14-21.)

In its order, the circuit court cited initially to authority granting it broad discretion in adjusting statutory penalties to account for inflation. (See Order, App. 17 (“At its discretion, the Court may choose to mold statutory awards to reflect inflation, starting at the time that the WVCCPA became operative.”) (citing W. Va. Code § 46A-5-106; Clements v. HSBC Auto Fin., Inc., Slip op., No. 5:09-cv-00086, 2011 WL 2976558, at 7 (S.D.W. Va. Jul. 21, 2011)).) Petitioner appears to assert that a court's discretion to adjust penalties under section 46A-5-106 of the WVCCPA is conditioned upon a finding of wilfulness. (Pet'r Br. 6.) However, it is clear by the plain language of the provision that the discretion is not qualified by any factor. See W. Va. Code § 46A-5-106. The circuit court was not unreasonable in adjusting a statutory penalty range to account for inflation nearly forty years after the remedial provision was enacted. As such, the circuit court was well within its discretion to adjust the statutory penalties awarded to account for inflation.

It should be noted at the onset of this discussion that Petitioner's reliance on the holding in Perrine v. E.I. Dupont de Nemours & Co., 225 W. Va. 482, 694 S.E.2d 815 (2010), that “[p]unitive damages are not designed to compensate an injured plaintiff” is unavailing because general punitive damages are distinct from punitive relief available under remedial acts like the WVCCPA. For example, this Court held that punitive damages “are an available form of remedial relief that a court may award under the provisions [of the Human Rights Act].” Haynes v. Rhone-Poulec, Inc., 206 W. Va. 18, 35, 521 S.E.2d 331, 348 (1999). This Court reasoned, “[i]t cannot be disputed that allowing plaintiffs to recover punitive damages in appropriate cases in circuit court is in keeping with the principle of liberal construction and with the broad remedial purpose of the Act.” Id. at 33.

Remedial provisions of the Human Rights Act and, likewise, of the WVCCPA (discussed *supra* part B), particularly when they permit courts to determine and award penalties, “empower courts to correct unlawful practices, make their victims whole, and deter other [unlawful practices].” *Id.* at 33 (quoting Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 64, 479 S.E.2d 561, 574 (1996)). Accordingly, to the extent the circuit court factored in the remedial effect of statutory penalties on Ms. Cole, it clearly acted within its discretion under the WVCCPA.

Indeed, in determining the statutory penalty award, the bounds of the circuit court’s discretion are defined by the settled principle that the WVCCPA must be construed broadly and liberally to give effect to its remedial purpose to protect consumers and punish and deter unlawful conduct. See Scott Runyan, 194 W. Va. at 777, 461 S.E.2d at 523; see also Wilson, 171 W. Va. at 541-42, 301 S.E.2d at 173. In its broad discretion, the circuit court sought further assistance from what it deemed to be relevant factors from the Garnes case and concluded that Ms. Cole was entitled to statutory penalties. As explained below, in each of the four categories where the jury found statutory violations, the circuit court acted well within its discretion in awarding statutory penalties while construing the WVCCPA to protect Ms. Cole, punish Petitioner, and deter it from committing further violations. Failure to Provide Statement of Account (§ 46A-2-114(2)) - One Violation

The circuit court awarded the maximum penalty allowed under sections 46A-5-101(1) and -106 of the WVCCPA for Petitioner’s violation of section 46A-2-114(2) of the WVCCPA for failing to provide a statement of account upon written request of the Ms. Cole. Petitioner takes issue with the circuit court’s assessment of the maximum penalty but cannot demonstrate that it exceeds the bounds of the broad discretion granted to the circuit court by the WVCCPA.

Rather, the circuit court properly construed the remedial provision of the WVCCPA liberally to give effect to the legislative purpose to protect consumers and to punish and deter unlawful conduct. First, looking to protect Ms. Cole, the circuit court considered the reprehensibility (a Garnes standard) of Petitioner's failure to provide a consumer an account statement upon request and concluded that in denying Ms. Cole's request, Petitioner acted with disregard for Ms. Cole's statutory rights. (Order, App. 18.) Then, the circuit court made a clear statement that Petitioner ought to be rightly punished for denying Ms. Cole her statutory right to a statement of account. (Id. (“[T]his Court wants to make it abundantly clear to [Petitioner] that every debtor has a right to access records pertaining to his or her account.”).)

It is clear in assessing the maximum statutory penalty for Petitioner's violation of the WVCCPA provision requiring that it provide Ms. Cole a statement of her account upon written request, the circuit court gave effect to the remedial purpose of the WVCCPA and, thus, did not abuse its discretion.

Repeated Calls After Request to Stop (§ 46A-2-125) - Ten Violations

For the ten violations of section 46A-2-125 of the WVCCPA found by the jury for repeated and unsolicited calls to Ms. Cole's mother and place of employment despite clear requests to stop, the circuit court did not award Ms. Cole the full amount she requested. Rather, it awarded “a mid-range penalty for each violation” of \$2,250. (Order, App. 19.) Again, the circuit court looked to give effect to the remedial purpose of the WVCCPA to protect Ms. Cole and to punish Petitioner and deter it from unlawful conduct. The circuit court looked at Petitioner's disregard for the requests to stop calling and the embarrassing effect of the calls on Ms. Cole. Ultimately, the circuit court reduced the amount requested by over fifty percent per violation. (Compare Motion for Statutory Penalties, App. 248 with Order, App. 19.) Clearly, Petitioner cannot show that the circuit court, in

awarding Ms. Cole a reduced statutory penalty, abused its discretion under the WVCCPA.

Use of Language Intended to Unreasonably Abuse the Hearer (§ 46A-2-125) - One Violation

It is unclear whether Petitioner appeals the circuit court's assessment of the minimum statutory penalty of \$458.34 as it tends to lump all of the thirteen separate penalty assessments into its discussion asserting that the circuit court should have applied FDCPA factors. Nevertheless, it strains credulity that a minimum statutory penalty assessment for a finding of liability for using abusive language would amount to an abuse of discretion as too severe, oppressive, or obviously unreasonable an assessment.

Unreasonable Publication of Indebtedness (§ 46A-2-126) - One Violation

Again, Petitioner does not appear to make any specific reference to the circuit court's assessment of the maximum statutory penalty for its violation of the WVCCPA's prohibition against disclosing details of a consumer's debt to a third party. Nevertheless, the circuit court articulated its rationale for assessing the maximum, giving full effect to the remedial purpose of the WVCCPA. (Order, App. 19-20.) Thus, it cannot be demonstrated that the circuit court abused its discretion under the WVCCPA by awarding the maximum statutory penalty for this violation.

In light of this discussion, the Court may be inclined to set forth standards by which assessments of statutory penalties pursuant to section 46A-5-101(1) should be determined. Ms. Cole urges that the Court refrain from acting on such an inclination. The federal district court in Clements provides a most compelling reason to refrain from setting forth a set of criteria by which statutory penalties ought to be determined stating: "The Court makes no effort to set any standard or precedent in assessing penalties (for any particular number of calls) since **the facts and circumstances of each case must dictate the applicable result.**" 2011 WL 2976558, at * 7 (emphasis added).

What is clear is that the circuit court's statutorily granted discretion is bound by its duty to construe the WVCCPA broadly to give effect to its remedial purpose to protect consumers and to punish and deter unlawful conduct. Petitioner clearly cannot show that the circuit court exceeded the bounds of its discretion in awarding Ms. Cole \$32,125.24 in statutory penalties when she sought \$63,089, and when the circuit court carefully articulated its reasoning for making such assessments. As such, the circuit court's order should be affirmed.

D. Ms. Cole Had Standing to Assert and Recover for Violations of Section 46A-2-125 of the West Virginia Consumer Credit and Protection Act.

Petitioner next argues that Ms. Cole did not have standing to assert and recover for violations of section 46A-2-125 of the WVCCPA for repeated and unsolicited calls to Ms. Cole's mother and place of employment despite clear requests to stop because Ms. Cole was not the recipient of those calls. (Pet'r Br. 17-19.) Section 46A-2-125 of the WVCCPA provides as follows:

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 forgoing**, the following conduct is deemed to violation this section:

- (a) The use of profane or obscene language or language that is intended to unreasonably abuse the hearer or reader;
- (b) The placement of telephone calls without disclosure of the caller's identity and with the intent to annoy, harass or threaten any person at the called number;
- (c) Causing expense to any person in the form of long distance telephone tolls, telegram fees or other charges incurred by a medium of communication, by concealment of the true purpose of the communication; and
- (d) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously, or at unusual times or times known to be inconvenient, with intent to annoy, abuse, oppress or threaten any person at the called number.

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

Petitioner's arguments rests solely on its incorrect assertion that Ms. Cole brought her claims pursuant to sub-section 46A-2-125(d). Petitioner is plainly wrong in asserting that Ms.

Cole brought her claim pursuant to subsection d. As is clear from her Counterclaim, Ms. Cole brought her claims in Counts I & II that Petitioner unreasonably oppressed or abused Ms. Cole in the course of attempting to collect mortgage payments from her by repeatedly calling her mother and her place of employment despite requests to stop under the broad, non-exhaustive, general application provision of section 46A-2-125 of the WVCCPA; she makes no reference whatsoever to subsection d. (Counterclaim, App. 68-69.) Indeed, at trial Petitioner admitted that Ms. Cole brought her claim “under the more broad 46A-2-125 oppression and abuse section.” (Petitioner’s Oral Arguments at Trial, App. 665.)

From the beginning, Ms. Cole asserted her claim that Petitioner violated the statute prohibiting oppressive and abusive collection tactics by engaging in repeated and unsolicited calls to third parties despite requests to stop under the broad, non-exhaustive, general application provision. On this claim, the jury was given the following charge:

The Court further instructs the jury that West Virginia law prohibits unreasonable, oppressive or abusive tactics in collection and/or attempting to collect a debt. You are instructed that **under the general application** of the statutory prohibition against unreasonable, oppressive or abusive tactics in collecting and/or attempting to collect a debt, placing repeated and unsolicited calls to third parties after a request has been made that the collection calls cease is a violation of state law.

(Jury Charge, App. 688-89 (emphasis added).) Because Petitioner’s argument that Ms. Cole did not have standing to assert or recover from her claim is predicated on the false assertion that she brought her claim pursuant to subsection d, it is wholly without merit.

Although this Court does not have to reach this issue, Ms. Cole submits that even if she brought her claim pursuant to subsection d, she would nevertheless have standing to assert and recover for violations thereunder. The “standing” provision of section § 46A-2-125 of the WVCCPA appears in the first line of the statute: “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.” W. Va. Code § 46A-2-125 (emphases added). Construing this section to give effect not just to the plain language, but also to the remedial purpose of the act compels the conclusion that **any person** has standing to bring a colorable claim under the general application provision and any of its sub-sections. See Syl. Pt. 2, Thomas, 164 W. Va. 763, 266 S.E.2d 905 (“The word ‘any,’ when used in a statute, should be construed to mean any.”); see also Barr, 711 S.E.2d at 583; Scott Runyan, 194 W. Va. at 777, 461 S.E.2d at 523; Wilson, 171 W. Va. at 541-42, 301 S.E.2d at 173. This is important to further the purposes of the WVCCPA because the Act seeks to deter debt collectors from harassing employers and families of consumers, which inevitably takes a toll on the consumers themselves when they are made aware of this behavior.

Finally, Petitioner’s challenge to Ms. Cole’s standing to assert and recover under section 46A-2-125—whether under the general application provision or sub-section -125(d)—of the WVCCPA is procedurally impermissible in this appeal challenging only the circuit court’s post-trial orders awarding statutory penalties and attorney’s fees and costs under the WVCCPA and not the verdict reached by the jury. The trial order entering the jury verdict was entered on July 19, 2011. Petitioner’s time to challenge the jury verdict and any finding of fact therein or any basis for any finding of fact therein in a proper appeal to this Court expired on August 18, 2011. W. Va. R. App. Proc. 5(b); see also Syl. Pt. 1, Morrison v. Leach, 75 W. Va. 468, 84 S.E. 177 (1915); Syl Pt. 1, Horner v. Life, 76 W. Va. 231, 85 S.E. 249 (1915); Grinnan v. Edwards, 5 W. Va. 111 (1872). Petitioner did not file an appeal until September 13, 2011, taking issue with the circuit court’s post-trial orders awarding statutory penalties and attorney’s fees and costs under the WVCCPA. Thus, because it did not appeal timely or at all the jury verdict, Petitioner is barred from now challenging the finding of facts by the jury or the basis for its findings.

Notwithstanding Petitioner's incorrect assertion regarding the specific claim under which Ms. Cole brought her claim, it is nevertheless clear that Ms. Cole had standing to bring her claim. Also, because Petitioner's standing challenge is an impermissible and misplaced attack on the circuit court's order awarding statutory penalties, the order should be affirmed.

E. The Circuit Court Properly Awarded Statutory Penalties for Each of the Eleven Violations of Section 46A-2-125 of the West Virginia Consumer Credit and Protection Act as Found by the Jury.

Again, Petitioner predicates its argument that Ms. Cole is not entitled to eleven separate statutory penalties for the eleven separate statutory violations found by the jury on the false assertion that Ms. Cole brought her claims pursuant to sub-section -125(d) of section 46A-2-125 of the WVCCPA when that was clearly not the case. (See Pet'r Br. 19-20.) Also, in its untimely and misplaced attack, Petitioner impermissibly challenges the jury's finding of fact with regard to the number of statutory violations found. (Id.) Moreover, Petitioner offers no authority for the conclusion that a consumer should only be awarded only one penalty when a jury has found multiple violations, likely because no such authority exists. Rather, the great weight of persuasive authority compels the conclusion that section 46A-5-101(1) provides for an assessment of a statutory penalty per each violation. See W. Va. Code § 46A-5-101(1).

Every West Virginia federal court—giving effect to the remedial purpose of the Act—has expressly stated each time the issue has been presented that “each act of a debt collector which violates the WVCCPA creates a single cause of action to recover a single penalty.” In re Machnic, 271 B.R. 789, 794 (Bankr. S.D.W. Va. 2002); Sturm, 242 B.R. at 603 (“[E]ach violation creates a single cause of action to recover a single penalty.”); see also Judy v. JK Harris & Co., LLC, Slip op., No. 2:10-cv-01276, 2011 WL 4499316, at * 6 (S.D.W. Va. Sept. 27, 2011) (same); Clements, 2011 WL 2976558, at *3-6 (citing Scott Runyan and giving effect to the remedial purpose of the

WVCCPA, found that even under sub-section -125(d), the plaintiff was entitled to 821 separate penalties for 821 separate calls); Credit Acceptance Corp. v. Long, Slip op., No. 5:09-cv-00152, 2010 WL 1050426, at *6 (S.D.W. Va. Mar. 17, 2010) ; Griffith v. G.E. Money Bank, NCO Fin. Systems, Inc., Slip op., No. 5:10-cv-00037, 2010 WL 2426006, at *2 (S.D.W. Va. June 11, 2010); Stover, 2010 WL 1050426, at *7 (“[T]here are important public policy reasons for finding that § 46A-5-101(1) allows for multiple civil penalties” as “evidence by the jurisprudence of the West Virginia Supreme Court of Appeals, which, as noted earlier, has written that the WVCCPA should be construed liberally to accomplish that statute’s purpose of ‘protecting consumers from unfair, illegal, and deceptive acts or practices by providing an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action.’”) (quoting Scott Runyan, 194 W. Va. at 777, 461 S.E.2d at 523); Jones v. Capital One Bank (USA), N.A., Slip op., No. 6:09-cv-00994, 2009 WL 3335350, at *3 (S.D.W. Va. Oct. 15, 2009); Countryman v. NCO Fin. Sys., Inc., Slip op., No. 5:09-cv-00288, 2009 WL 1506720, at *2 (S.D.W. Va. May 27, 2009); Dunlap v. Green Tree Servicing, LLC, Slip op., No. 2:05-cv-00311, 2005 WL 3177881, at *4 (S.D.W. Va. Nov. 28, 2005); McGraw v. Discover Fin. Svcs., Inc., Slip op., No. 2:05-cv-00215, 2005 WL 1785259, at *4 (S.D.W. Va. Jul. 26, 2005); Grubb v. Jos. A. Bank Clothiers, Inc., Slip op., No. 2:05-cv-00056, 2005 WL 1378721, at *4, fn 3 (June 2, 2005).

Other West Virginia courts have deemed the principle that each violation gives rise to a single penalty effectively settled when calculating amount in controversy for the purposes of establishing federal court jurisdiction. See, e.g., Settle v. One West Bank, FSB, Slip op., No. 5:11-cv-00063, 2011 WL 3055263, at *1 (S.D.W. Va. Jul. 25, 2011); Massey v. Green Tree Servicing, LLC, Slip op., No. 5:09-cv-01118, 2010 WL 454915, at *1 (S.D.W. Va. Feb. 1, 2010); Maxwell v. Wells Fargo Bank, N.A., Slip op., No. 2:09-cv-00500, 2009 WL 3293871, at *3-4 (S.D.W. Va. Oct.

9, 2009); Bowyer v. Countrywide Home Loans Servicing, LP, Slip op., No. 5:09-cv-00402, 2009 WL 2599307, at *1 (S.D.W. Va. Aug. 21, 2009); Lohan v. American Exp. Co., Slip op., No. 2:09-cv-00613, 2009 WL 2567853, at *3 (S.D.W. Va. Aug. 19, 2009); Adkins v. Wells Fargo Fin. W. Va., Inc., Slip op., No. 5:09-cv-00405, 2009 WL 1659922, at *3 (S.D.W. Va. June 15, 2009); Sloan v. Green Tree Servicing, LLC, Slip op., No. 2:05-cv-00558, 2005 WL 2428161, at *2 (S.D.W. Va. Sept. 30, 2005).

Despite this tremendous weight of authority, Petitioner asserts that the penalties are limited because subsection d of the statutory provision at issue prohibits repeated or continuous communications. W. Va. Code § 46A-2-125(d). First, as discussed above, Ms. Cole did not bring her claims under subsection d, so any limitation in that provision would not apply. Second, the jury's finding regarding the number of calls cannot be disturbed. Finally, as discussed above, every court to examine subsection d has found that multiple violations can be found, each with a separate civil penalty. See Clements, 2011 WL 2976558, at *3-*6.

In sum, whether she brought her claims under the general application provision of section 46A-2-125 or subsection d, Ms. Cole was entitled to recover eleven separate statutory penalties for the eleven separate statutory violations found by the jury. The circuit court did not abuse its discretion under the WVCCPA in properly construing it to provide for one penalty per violation. Accordingly, the circuit court's order award should be affirmed.

F. The Circuit Court Did Not Abuse Its Broad Discretion in Awarding Attorney's Fees and Costs When Ms. Cole Prevailed on Each of the Four Counts Given to the Jury.

Petitioner lastly argues that the circuit court inappropriately awarded attorney's fees and costs to Ms. Cole because Petitioner prevailed on its unlawful detainer action and because the circuit court misapplied the factors to be considered in determining an award of attorney's fees and costs. (Pet'r.

Br. 20-25.) As the discussion below demonstrates, the circuit court's order awarding Ms. Cole reduced fees was reasonable and clearly not an abuse of its broad discretion to award fees.

1. Ms. Cole Prevailed on Her WVCCPA Claims and Was Rightly Awarded Attorney's Fees and Costs.

First, Petitioner argues that the circuit court should not have awarded statutory attorney fees and costs to Ms. Cole because, it claims, she did not prevail, despite having obtained a jury verdict in her favor on all four of her claims. Petitioner relies solely on case law that explicitly provides that the trial court has full discretion to award or not award attorney fees in WVCCPA cases. Under Petitioner's own authority, the circuit court's award cannot be disturbed. See Chevy Chase Bank v. McCamant, 204 W. Va. 295, 512 S.E.2d 217 (1998).

Further, Petitioner's argument fails because Ms. Cole attempted to bring her WVCCPA claims as a "defense, counterclaim, or setoff" to the unlawful detainer action and the underlying foreclosure pursuant to section 46A-5-102, but was precluded from doing so by the circuit court. (See Resp. Mot. Summ. J., App. 129 (arguing that summary judgment for Petitioner on the unlawful detainer claim would effectively deny Ms. Cole her statutory right to assert her WVCCPA claims as a defense, setoff, and counterclaim to said action); see also Order, App. 27-28 (holding Ms. Cole could not assert her WVCCPA claims as a defense, setoff or counterclaim to the unlawful detainer action, but could assert them as a stand alone action).)

Indeed, Petitioner should be estopped from raising this argument, given that it argued the exact opposite below, that its "Unlawful Detainer action was factually unrelated and legally distinct from [Ms. Cole's] claims under the West Virginia Consumer Credit and Protection Act." (Resp. Mot. Fees, App. 339.) Petitioner should not be permitted to reverse its position now, on appeal.

As stated above, the circuit court was not persuaded that Ms. Cole had the right to assert her WVCCPA claims as a defense to the unlawful detainer action and the underlying foreclosure action and refused to allow her to use her WVCCPA claims as a defense to unlawful detainer action and instead allowed her WVCCPA claims to proceed to the jury as a separate stand alone action. (See Order, App. 27-28 (agreeing with Vanderbilt that “the remedy sought by Cole (i.e., the denial of Vanderbilt’s Unlawful Detainer claim and the equitable setting aside of the completed foreclosure and sale) **cannot be directly correlated to any of the actual claims which were pled by Ms. Cole in this case.**”) (emphasis added).)

Because the circuit court permitted Ms. Cole’s WVCCPA claims to proceed to the jury, not as a defense to the unlawful detainer, but as a stand alone action, unrelated to the unlawful detainer action, there is no question she prevailed because the jury decided in her favor on all four claims sent to it. Nevertheless, the circuit court, acting within its broad discretion, referenced the “mixed degree of success” and limited Ms. Cole’s award by nearly forty percent. (See Order Awarding Fees, App. 7-8.)

Petitioner also argues that because Ms. Cole alleged that there were fifty seven statutory violations altogether but only obtained a jury finding of thirteen statutory violations she did not prevail. Petitioner relies on settled case law that clearly shows the circuit court’s award is well within its broad discretion. Ms. Cole agrees that “the degree of success obtained” is of utmost importance in calculating a reasonable fee award. Hensley v. Eckerhart, 461 U.S. 424, 436 (1992). Petitioner argues that because Ms. Cole obtained a jury finding of only thirteen violations when she alleged that there were fifty-seven, her fee award should either be significantly reduced or vacated altogether. (Pet’r Br. 23.)

However, this percentage-reduction proposal is precisely what this Court found to be an abuse of discretion in the Heldreth matter. See Syl. Pt. 3, Heldreth v. Rahimian, 219 W. Va. 462, 637 S.E.2d 359 (2006) (“[T]he trial court is not permitted to apply a percentage reduction based on the ratio of claims pursued to claims prevailed upon when making such an award.”) This Court reversed the lower court’s award and the issue was remanded to allow the lower court to apply the “factors appropriate for calculation of a reasonable attorney fee award.” Id. at 362.

Moreover, Ms. Cole was successful in obtaining liability against Petitioner in each of the four claims for unlawful or abusive debt collection conduct. Ms. Cole obtained a finding of thirteen violations of the fifty-seven alleged under those four categories of conduct. Obviously, the remaining forty-four alleged violations not found by the jury were related to the thirteen violations so found. Contrary to Petitioner’s assertion, the circuit court was thus well within its discretion in not “penaliz[ing] Ms. Cole for trying, in good faith, to allege all colorable violations of the WVCCPA.” (Order, App. 7.) Indeed, “the appropriate inquiry concerns whether the claims on which the plaintiff 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.” Brodziak v. Runyon, 145 F.3d 194, 197 (4th Cir. 1997). In opting not to penalize Ms. Cole for not prevailing on all fifty-seven alleged violations obviously related to and arising out of the same set of facts and legal theories as the thirteen successful violations, the circuit court acted within its broad discretion. Still, it should be highlighted again, the circuit court reduced Ms. Cole’s award by nearly forty percent acknowledging the “mixed results.” (Order, App. 7-8.) The circuit court’s order awarding fees is not an abuse of discretion it should, therefore, be affirmed.

2. The Circuit Court Did Not Misapply Factors by Which Determination of Attorney Fee Awards are Made.

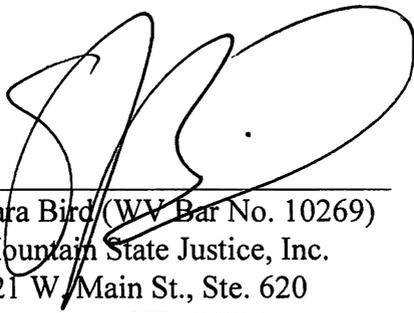
Finally, Petitioner argues that the circuit court abused its discretion in awarding statutory attorney fees to Ms. Cole by misapplying the factors by which such awards are determined. Specifically, Petitioner asserts that the circuit court considered an extraneous factor in determining its award in that it 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.” (Order, App. 8.) However, as is clear from the circuit court’s order and the factors set forth in syllabus point four of Aetna Cas. & Sur. Co. v. Pitrolo, 176 W. Va. 190, 342 S.E.2d 156 (1986), a trial court may consider the undesirability of the case at bar. Id.

Further, consideration of the nature of Ms. Cole’s counsel was certainly appropriate and within the circuit court’s discretion. Ms. Cole’s counsel’s employer, Mountain State Justice, Inc., is the sole legal services organization in West Virginia providing legal assistance at no cost to low-income consumers with complex consumer credit issues and claims. The enforcement of the WVCCPA, like the West Virginia Human Rights Act, “depends upon the action of private citizens who usually lack the resources to retain the legal counsel necessary to vindicate their rights.” Bishop Coal Co. v. Salyers, 181 W. Va. 71, 80, 380 S.E.2d 238, 247 (1989). This Court has agreed that adequate fee awards maintain these necessary services, and an adequate fee award is one that is reasonable. Id. at 248; see also Shafer v. Kings Tire Srvc., Inc., 215 W. Va. 169, 177, 597 S.E.2d 302, 310 (2004). Clearly, the circuit court was well within its discretion to consider the nature of Mountain State Justice’s services for clients like Ms. Cole. Accordingly, the award should be affirmed.

CONCLUSION

Petitioner has failed to demonstrate that the circuit court abused its broad discretion in awarding statutory penalties and attorneys' fees and costs pursuant to the WVCCPA. The award orders of the circuit court below should be affirmed and Petitioner's appeal denied.

**Respectfully Submitted,
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By Counsel.**



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**VANDERBILT FINANCE AND
MORTGAGE, INC.,**

Plaintiff/Petitioner,

v.

**APPEAL NOS. 11-1288 & 11-1604
(On appeal from the Circuit Court
of Harrison County
Civil Action No. 10-C-574-II
Honorable Thomas A. Bedell)**

TERRI L. COLE,

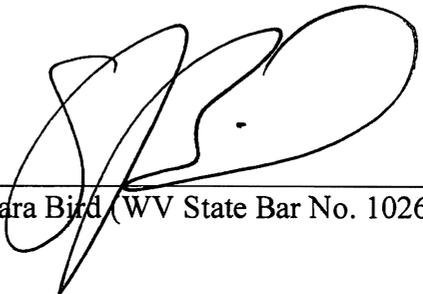
Defendant/Respondent.

CERTIFICATION OF SERVICE

I, Sara Bird, counsel for Respondent, do hereby certify that I have served a true and exact copy of the forgoing **Brief of Respondent Terri L. Cole** upon counsel of record as listed below, by U.S. Mail, postage prepaid, addressed as follows:

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This the 30th day of January, 2012.



Sara Bird, WV State Bar No. 10269