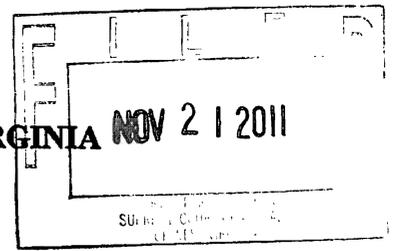


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



MOUNTAIN STATE COLLEGE,

Defendant/Petitioner,

v.

**APPEAL NO. 11-1203
(Civil Action No. 98-C-1497
Circuit Court of Kanawha County
Judge Tod J. Kaufman)**

**SHERYL HOLSINGER,
SANDRA R. CARPENTER, and
MARY J. YEATER,**

Plaintiffs/Respondents.

PETITIONER'S BRIEF

**MOUNTAIN STATE COLLEGE
*Defendant Below and Petitioner
Before This Court***

By Counsel

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I. INTRODUCTION AND ASSIGNMENTS OF ERROR

Years after attending Mountain State College (the "College"), several alumni facing student loan obligations decided that, because they had not become employed in their field of study, they should not have to pay back their federally insured loans. They wrote letters to one another, talked on the phone, and recalled, on reflection, that they had been promised jobs inducing their enrollment, and that the College must not have been a good school. (None of the purported promises of employment was in writing, and the students had made little or no complaint about any aspect of the College during their attendance.) One -- who did not even graduate -- filed administrative complaints, but failed to persuade the regulatory body overseeing the College to even initiate a formal hearing.

Five of the students (including the non-graduate, Ms. Tambra Shukla) then found counsel, who filed in the Circuit Court of Kanawha County six years after they left the College a civil action against not only the College, but the regulatory body and several financial institutions that (purportedly) had made or held the loans. However, counsel intentionally declined in the initial complaint and throughout the 12 years of pending litigation to name the Secretary of Education of the United States, the guarantor of all defaulted loans, and who had already come to hold some of the loans that Plaintiffs wished to have discharged. On the other hand, the action was delayed through various efforts of Plaintiffs' counsel to turn it into a judicially-directed rulemaking proceeding, and the case was allowed to languish for years at a time (over the College's objection).

By the time the case was finally brought to trial, it involved three College graduates as Plaintiffs, and the College as Defendant. Prior to the trial, the court entered several critically important, correct orders to preclude untenable legal theories and prohibit hearsay or otherwise

inadmissible evidence. But the College's reliance on those rulings was misplaced – from the outset of the trial, Plaintiffs' counsel repeatedly violated the court's pretrial orders, which the court inexplicably declined to enforce. Having been prepared to address at trial the claims based on the alleged promises of employment upon graduation, the College was forced to defend on the fly and without all the necessary witnesses the quality of its educational services that the court had ruled would not be addressed.

Under the flawed, misdirected legal theories that Plaintiffs were erroneously permitted to pursue, the court was required to reach its own assessment, informed (but not bound) by the jury's verdict. The findings and conclusions proposed by Plaintiffs, and then adopted by the court, bore scant resemblance to the evidence. The court's judgment, instead, was woven largely from legal and factual whole cloth.

Seven independent errors at the trial court level entitle the College to judgment as a matter of law:

1. Plaintiffs' claims were time barred;
2. There can be no "restitution" or other relief against the College for loans that the College neither made, held, nor attempted to enforce;
3. Plaintiffs' claims based on the quality of educational services were not actionable.
4. Plaintiffs' claims arising out of any loan were relinquished when they consolidated their loans after leaving the College;
5. Plaintiffs never pled a breach of contract claim, but even if they had done so, their contracts with the College were in writing and fulfilled by the College;
6. Plaintiffs failed to present evidence sufficient for the jury to have found any compensatory damages; and
7. Plaintiffs were not entitled to recover attorney fees from the College.

In the alternative, four errors below entitle the College to a new trial:

8. The trial court erred in admitting evidence of James Skidmore and Timothy Amos;
9. Plaintiffs' counsel intentionally violated the Court's pretrial order concerning Michael McPeck;
10. Unfair, arbitrary, and capricious limitations were placed on the College's surrebuttal evidence; and
11. The trial court erred in its instructions to the jury.

II. STATEMENT OF THE CASE

A. *Procedural History*

This appeal arises from a three-day trial that took place in May 2010 to resolve an action filed 12 years earlier, based on educational services rendered in 1990 through 1992.

The College, defendant below and petitioner before this Court, has been based in Parkersburg, West Virginia, since its founding in September 1888. Plaintiffs/Respondents Sandra Carpenter (*aka* Pingston), Sheryl Holsinger (*aka* Smeeks), and Mary Yeater (collectively "Plaintiffs") graduated from the College's legal assisting program in 1992.¹ With Tamara Shukla and Dale Hill, they sued in 1998, seeking cancellation and/or rescission of their guaranteed student loans, reimbursement of monies expended, and other damages for (i) the College's allegedly fraudulent representations inducing their enrollment and (ii) the College's alleged failure to provide good educational services. Plaintiffs also sued several financial institutions as makers or holders of the loans, which their counsel knew was not the case.² St.

¹ After initiating this action, Ms. Yeater married and changed her name to Murphy. To avoid confusion, she will be referred to as Ms. Yeater throughout this brief.

² Plaintiffs well knew but consistently failed to sue two actual holders of the loans -- the Secretary of Education of the United States and United Student Aid Funds, Inc. -- apparently because counsel did not wish to have Plaintiffs' claims adjudicated in federal court. *Cf. Tipton v. Sec. of Educ. of U.S.*, 768 F.

Paul Companies was sued on a \$35,000 bond that the College must maintain under West Virginia law. (There was no insurance coverage or other exposure for St. Paul, which tendered its defense to the College.) Finally, the West Virginia Council for Community and Technical College Education (“Council”) was sued for allegedly failing to appropriately regulate the College and other schools under W. Va. Code § 18B-2B-9. (*See generally* App. 6-25 (Amended Complaint)).³

Long before trial, the claims of Mr. Hill and Ms. Shukla were dismissed, on March 12, 2002, and March 11, 2003, respectively. (*See* App. 36, 38). The claims against the various financial institutions were also dismissed: two had no relationship to the subject loans, and the trial court granted summary judgment to Secondary Market Services, Inc. (“SMS”), on the basis of novation. (*See id.* at 41, 43, 35). Plaintiffs tried, but failed to bring the Secretary of State into the case to force the enactment of a rule. (*See id.* 47). The claims against the Council were settled. (*See id.* 429).

The claims ultimately to be tried were that the College violated Accrediting Council for Independent Colleges and Schools (“ACICS”) accreditation standards; that the College defrauded Plaintiffs; and that Plaintiffs’ student loan contracts were unconscionable or unenforceable. Prior to trial, the trial court entered several important orders limiting the evidence to be offered. First, the court limited Plaintiffs’ witnesses to themselves, Ms. Shukla, the Council’s James Skidmore, and the College’s Judith Sutton. (*See* App. 50). Thereafter, however, the court granted the College’s motion *in limine* concerning Mr. Skidmore, “which effectively preclude[d] his testimony at trial.” (*Id.* at 90). The court also ordered that “[n]either

Supp. 540 (S.D. W. Va. 1991) (involving similar action seeking cancelation of student loan obligations brought by counsel for Plaintiffs in this matter).

³ A second amended complaint was proposed, but never permitted, rendering the Amended Complaint the operative complaint at the time of trial. (*See* App. 2, line 67 (docket report)).

party shall introduce any evidence regarding or make any reference in *voir dire*, argument, or otherwise to [the College's part owner and former president, Alan Michael] McPeck." (*See id.* at 80). Finally, and most critically, the court prohibited the pursuit of claims sounding in "educational malpractice," barring all evidence regarding either the quality of the education provided by the College or any alleged breach of ACICS accreditation standards. (*See id.* at 83-88). As the court cogently explained in its order,

Evidence or argument to the effect that the College's curriculum faculty, etc., fell short of accreditation criteria or any other standard would turn a relatively straightforward case about alleged misrepresentations into an argument over how to best educate those seeking employment as legal assistants nearly 20 years ago. This is the essence of the "educational malpractice" quagmire that the courts noted above have appropriately avoided.

* * *

Plaintiffs' claims at trial must be limited to those based on a specific misrepresentation that they would, in fact, obtain employment upon completion of their program of study. Neither the quality of the education plaintiffs received nor whether the College violated any ACICS or other regulatory standard is pertinent to adjudication of those claims.

Accordingly, it is ORDERED that plaintiffs are precluded from arguing or presenting evidence to the effect that they received an inadequate education at the College or that the College violated any ACICS or other accreditation or regulatory standards.

(App. 87-88). As will be shown, the May 20-24, 2010 trial was conducted contrary to each and every one of these pretrial rulings.

At the close of Plaintiffs' case, the College moved for judgment as a matter of law. The trial court (i) granted the College judgment as to fraud, (ii) agreed to consider special interrogatories in its further consideration of equitable relief, and (iii) indicated that Plaintiffs could pursue a claim for breach of contract. (*See Trial Tr.* 225:24-226:4).⁴ The College's

⁴ The entire trial transcript, save *voir dire*, is included as Volume II of the Appendix, and will be cited as "Trial Tr." *See* W.Va. R. App. Proc. 7(b).

renewal of the balance of its motion for judgment at the close of evidence was unavailing. (*See id.* at 421:15-24). The jury's verdict found that the College had breached at least one, unspecified "duty" to Plaintiffs, and awarded each plaintiff the identical \$30,000 in "restitution for the student loans" and an additional \$20,000 in "compensatory damages." (App. 363-65). However, because the special interrogatories dealt with unconscionability, an issue to be decided by the court, the jury's verdict was largely advisory.

On October 25, 2010, the Court entered its Judgment Order, and on October 28, 2010, its Final Order Awarding Attorneys' Fees and Costs ("Fee Order"). (*See App* 431, 437). An Amended Judgment Order and Stay of Execution Pending Appeal ("Final Order"), eliminating prejudgment interest on Plaintiffs' tuition as redundant of the "equitable" relief awarded in the Judgment, was entered July 20, 2011. (App. 493). The College timely filed its notice of appeal on August 18, 2011.

B. Relevant Trial Facts

The trial took place over three days. For their case in chief, Plaintiffs called only themselves as witnesses. The College in its defense called its president, Ms. Sutton, and Jonelle Merritt, who served as the College's placement director from 1991 through 1994. (Trial Tr. 486:3-6). Plaintiffs were also permitted to call on rebuttal, over the College's objection, Timothy Amos, a lawyer from Parkersburg; and James Skidmore, chancellor of the Council (the governmental body overseeing the College), as well as recalling Ms. Yeater. The College called Ms. Sutton in surrebuttal.

1. Plaintiffs' Case

Each Plaintiff paid for her education with guaranteed student loans.⁵ Each testified that,

⁵ The subject loans were made pursuant to the Higher Education Act of 1965, *see* 20 U.S.C. §§ 1001, *et seq.*, and implemented by regulations of the United States Department of Education, *see* 34

prior to enrolling with the College, an individual associated with the College related that there would be great demand for legal assistants in the Parkersburg area when they graduated, that the College provided job placement assistance, and that they could make as much as forty thousand dollars upon graduation. The details of who made these alleged promises were fuzzy: Ms. Carpenter was unable to even remember the sex of the person, while Ms. Yeater recalled a “nice looking guy” named “Chris.” (See Trial Tr. 80:9-12, 168:1-21). Plaintiffs testified that, when they graduated in 1992, they were not able to find employment as paralegals in Parkersburg, they were not satisfied with the College’s placement services, and they could not repay their student loans – which as a result of deferral, nonpayment, and accrued interest, had substantially increased by the trial date nearly twenty years later. (See App. 222, 256, 257 (collection letters reflecting Plaintiffs’ respective outstanding loan obligations)). They also explained that they first complained to the Council (the state agency overseeing the College), and some years later filed this lawsuit in hopes of getting out from under their student loan obligations, (see, e.g., Trial Tr. 100:8-12; 161:5-17; 199:12-22)).

Each Plaintiff acknowledged that her enrollment agreement with the College, which each executed upon enrollment, contained no guarantee of employment and indeed reflected that the College had no placement data for graduates of the legal assisting program, as the program was started in 1990. (See Trial Tr. 92:18-24, App. 139 (Ms. Carpenter); Trial Tr. 152:17-153:9, App. 193 (Ms. Holsinger); Trial Tr. 190:2-8, App. 231 (Ms. Yeater); see also App. 266 (the College’s financial aid and handbook for 1990-91 award year, with which each Plaintiff was furnished,

C.F.R. §§ 600, *et seq.* Under that program, the loans were made by participant, authorized lending institutions, with payment thereof guaranteed by the federal government. By the time of the trial, each Plaintiff’s loan had been assigned at least once: Ms. Carpenter’s was held by the U.S. Department of Education, (see App. 257), as was Ms. Yeater’s, (see *id.* at 256), while Ms. Holsinger’s was held by United Student Aid Funds, (see App. 222). At no time over the two decades had the College ever held or attempted to collect on any of the subject loans.

indicating that 77% of the College's 93 graduates from 1989 were employed)).⁶ Plaintiffs also conceded that the College provided placement assistance in the form of updating and printing resumes, interviewing tips, supplying information about potential employers, and forwarding potential jobs advertised in newspapers. (*See, e.g.*, Trial Tr. 67:13-68:24; *see also* App. 155-56, 164, 166, 264 (relating to Ms. Carpenter); App. 203-04, 214, 221, 339 (relating to Ms. Holsinger); App. 224, 251-252 (relating to Ms. Yeater)).⁷

In direct violation of the pretrial order prohibiting such evidence, each Plaintiff opined on the quality of the education and facilities provided by the College. Ms. Carpenter was first to testify, and almost immediately after taking the stand, Plaintiffs' counsel elicited testimony about these matters. (Trial Tr. at 65:12-66:10 (testifying, among other things, that "[w]e weren't getting the skills we needed," and "the College didn't have an adequate library.")). The College immediately objected. (*See id.* at 66:11-13). Despite the obvious applicability of its pretrial ruling, the court overruled the College's objection without explanation. (*Id.* at 66:14). The College reiterated its objection outside the presence of the jury before the next witness was called, again drawing the court's attention to its pretrial order. (*See id.* at 111:10-119:16). Yet both Ms. Pingston and Ms. Yeater, too, were also permitted to testify at length as to their views of quality of education provided by the College. (*See e.g.*, Trial Tr. 129:21-22 (Ms. Pingston, "I just don't feel that [the classes] were adequate."); 186:14-15 (Ms. Yeater, "I had a worthless education.")).

2. The College's Case

⁶ Ms. Holsinger originally enrolled in the College's secretarial program before transferring to legal assisting. (Trial Tr. 124:2-17). The job placement data for graduates of the secretarial program reflect a fifty percent placement rate for the year before Ms. Holsinger's enrollment, 1989. (App. 139).

⁷ Additionally, the request for job placement assistance, which each Plaintiff signed when requesting placement assistance, obligated them to check in with the placement office on at least a biweekly basis to continue to receive placement assistance. (*See* App. 156, 203, 251).

For its defense, the College presented the testimony of Ms. Sutton and the College's placement director during Plaintiffs' attendance, Jonelle Merritt. Ms. Merritt described the placement assistance provided by the College. (*See, e.g.*, Trial Tr. 236:5-238:21). She explained that, as placement director, she conducted exit interviews prior to each student's graduation, assisted graduates in preparing and updating their resume, provided interview tips, and referred graduates seeking placement assistance to local business with job openings. (*Id.* at 238:1-9). Ms. Merritt testified without contradiction (i) that she never indicated to any student that he or she was guaranteed job placement and (ii) that she explained to each student that the placement office could only assist in the job search. (*Id.* at 240:11-241:6).

Ms. Sutton has been affiliated with the College since 1973, serving as its director when Plaintiffs attended, and currently serving as its president. (Trial Tr. 249:8-21). She explained that it was the policy of the College to never guarantee placement of its graduates or prospective students. (*Id.* at 261:5-18 (observing that "[i]t would be impossible" to make such a guarantee, as obtaining employment is profoundly influenced by factors outside the College's power like job availability and the student's individual characteristics)). In addition to testifying about the alleged misrepresentations that formed the heart of the trial, and in response to the testimony of Plaintiffs as to the purported subpar nature of the facilities of and education provided by the College – which, as noted above, was evidence expressly precluded by a pretrial order – Ms. Sutton succinctly defended the merits of the College's legal assisting program while Plaintiffs were students. (*id.* at 265:11-24 (Ms. Sutton expressing her view that Plaintiffs' negative characterization of the program was unfair and observing that "[a]t the time they were at the College, they never voiced any unhappiness concerning the program.")).

In its cross-examination of Ms. Sutton, Plaintiffs' counsel exacerbated the violation and disregard of the court's pretrial order by questioning Ms. Sutton extensively about matters unrelated to alleged misrepresentations made by the College that purportedly induced Plaintiffs enrollment. Moreover, despite the pretrial order prohibiting *any mention* of Mr. McPeek, the College's former president (who was facing wholly unrelated criminal charges at the time of the trial), Plaintiffs' counsel gratuitously named Mr. McPeek, even going so far as to have Ms. Sutton identify him by pointing out his presence in the gallery. (Trial Tr. 270:13-17).⁸ The bulk of Ms. Sutton's cross-examination was devoted to an attempt to demonstrate that the College somehow fell short of standards of its accrediting board, the ACICS (*see, e.g., id.* at 281:3-293:4), despite the pretrial order prohibiting such evidence, (*see* App. 83-89), and over the College's objection, (Trial Tr. 281:13). Finally, and in violation of yet another pretrial ruling, Plaintiffs' counsel questioned Ms. Sutton about an "investigation" undertaken by the Council's then vice chancellor, Mr. Skidmore, in response to several complaints lodged against the College by Plaintiffs and some other former students. That "investigation" culminated in a 1997 letter to the College from Mr. Skidmore, documenting the "findings of his inquiry," based entirely on hearsay. (App. 258-60). The College fruitlessly objected to the admission of the extremely prejudicial letter into evidence, noting the pretrial order granting the College's motion *in limine* concerning Mr. Skidmore, (*id.* at 90), and emphasizing to the court that the letter was simply based on the statements of a number of former students years after the fact. But the court nevertheless admitted the letter. (Trial Tr. 313:20-314:12.)⁹

⁸ At the first opportunity to do so outside the presence of the jury, the College moved for a mistrial in response to this blatant and intentional violation of the pretrial order, but the motion was summarily denied. (Trial Tr. 300:2-13).

⁹ After Mr. Skidmore's testimony, the College filed a written submission entreating the court to reconsider the admission of Plaintiffs Exhibit 12, the 1997 letter documenting the purported "findings" of

3. Rebuttal; Surrebuttal

In contradiction of yet another of its pretrial rulings, the court permitted Plaintiffs to call Mr. Amos and Mr. Skidmore in purported “rebuttal” to the College’s case. Mr. Amos, a real estate lawyer in Parkersburg who had been practicing law since 1998, recounted unfavorable experiences his firm had had with two graduates – whose names he could not definitively remember – from the College in the “late ‘90’s.” (Trial Tr. 316:11-317:10). He also opined that the College “had a bad reputation for turning out people who weren’t possessing enough skills.” (*Id.* at 318:7-9). The court overruled the College’s motion that Mr. Amos’s testimony be stricken on the ground that Mr. Amos had no information regarding any representations made to Plaintiffs and that he was not even practicing law until approximately six years after Plaintiffs graduated from the College. (*Id.* at 334:22-335:25).

Over the College’s objection and despite the pretrial order prohibiting his testimony (App. 90), Mr. Skidmore was also permitted to testify. Mr. Skidmore both regulates and competes against the College. (*See* Trial Tr. 346:20-348:8). However, he has no firsthand information about the College’s interactions with Plaintiffs, only learning of their complaints years later. (*See id.* at 353:5-354:8). Mr. Skidmore related that, in response to a complaint lodged in 1995 by a former student of the College’s legal assisting program (Ms. Shukla), he interviewed several former students and graduates of the College’s legal assisting program. (*See id.* at 352:20-354:24). After conducting those interviews, he recommended refunds or additional instruction at no charge. (*id.* at 340:13-341:1). The College disputed Mr. Skidmore’s findings, and no action was taken by the Council in response to Mr. Skidmore’s “investigation.” (*See id.* at 346:4-13).

Mr. Skidmore’s “investigation.” (App. 129-131). This motion was denied without discussion, and the court admonished defense counsel that “I won’t have too much time to be taking up very many motions at this point.” (Trial Tr. 367:6-11).

To rebut the sweepingly broad, irrelevant, and unfairly prejudicial statements of Mr. Amos and Mr. Skidmore – which had previously been forbidden by the court’s pretrial orders – the College recalled Ms. Sutton. The court refused, however, to admit any exhibits that the College proffered to rebut Mr. Amos and Mr. Skidmore. (Trial Tr. 395:7-396:10). The court also placed serious time limitations on the amount of time that Ms. Sutton would be permitted to rebut the irrelevant and unfair – yet damning – testimony of Mr. Amos and Mr. Skidmore. (*See e.g., id* 367:24-368:1 (the court indicating that Ms. Sutton’s surrebuttal would be limited to “five or seven minutes”); *id.* at 400:1-3). The College’s surrebuttal was thus limited to the brief additional testimony of Ms. Sutton alone. Ms. Sutton was left with only being able to recite the various law firms that had hired graduates from the College’s legal assisting program and explaining that the College had never even been called to defend itself before the Council, notwithstanding Mr. Skidmore’s “investigation.” (*See id.* at 410:11-412:24, 414:15-415:10).

Following Ms. Sutton’s surrebuttal, the court instructed the jury, closing arguments were offered by counsel, and the jury began its deliberations, ultimately rendering its largely advisory verdict that informed the judgment.

III. SUMMARY OF ARGUMENT

A. The College was entitled to judgment as a matter of law.

The College is entitled to judgment as a matter of law on several independent grounds. Most fundamentally, the only agreements between the College and Plaintiffs are the enrollment agreements. Plaintiffs’ stated objective of this action, however, was that their student loans be declared unenforceable. Such equitable relief cannot be had against the College, which has never held or attempted to enforce the loan agreements. Additionally, Plaintiffs proffered no evidence on which the jury could no rely in quantifying their respective damages independent of

the outstanding loan obligations. In any event, however, Plaintiffs' claims were time barred when filed, and just as one of the bank defendants was dismissed on the basis of novation because Ms. Holsinger had consolidated and reaffirmed her underlying obligations, the College was entitled to judgment for the same reason. Finally, the disputes in this case fall outside the scope of the West Virginia Consumer Credit and Protection Act (the "CCPA") and Plaintiffs were, therefore, not entitled to any relief thereunder – including attorney fees.

B. In the alternative, the College is entitled to a new trial.

The court, by its pretrial orders, limited the issues to be tried to specific misrepresentations that induced Plaintiffs' enrollment in the College – not the virtues of the College or its educational programs. Throughout the trial, however, Plaintiffs' counsel repeatedly and intentionally violated those pretrial orders and the court refused to enforce the same. As a result, the trial was polluted with irrelevant and unfairly prejudicial evidence that had absolutely nothing with any type of representation made by the College. Particularly through the purported "rebuttal" testimony offered by Mr. Skidmore and Mr. Amos, the trial evolved from a relatively simple case about who promised what into an ambush on the quality of the College's educational programs generally. Additionally, Plaintiffs' counsel violated the agreed order prohibiting any mention of Mr. McPeck, intentionally injecting evidence that the parties had earlier agreed was irrelevant and unfairly prejudicial. The admission of this evidence, irrelevant to what was promised to Plaintiffs prior to their enrollment, served only to distract the jury from the real issue to be tried – the alleged misrepresentations inducing Plaintiffs' enrollment – and unfairly prejudiced the College to the point that it is entitled to a new trial.

IV. STATEMENT REGARDING ORAL ARGUMENT

The errors of the trial court are so plainly apparent that this case may be considered appropriate for reversal by memorandum decision. *See* W. Va. R. App. Proc. 21(d). However, the College would prefer oral argument. Given the substantial number of issues, the College respectfully requests that it be afforded twenty minutes to argue its positions. *See* W. Va. R. App. Proc. 19(e).

V. ARGUMENT

A. The College was entitled to judgment as a matter of law.

1. Standard of Review

This Court reviews de novo an order denying a renewed motion for judgment as a matter of law after trial. *Fredeking v. Tyler*, Syl. Pt. 1, 224 W. Va. 1, 680 S.E.2d 16 (2009). In conducting that review “the evidence should be considered in the light most favorable to the plaintiff, but, if it fails to establish a prima facie right to recover, the court should grant the motion.” *First Nat’l Bank v. Clark*, Syl. Pt. 1, 191 W. Va. 623, 447 S.E.2d 558 (1994) (citation omitted).

2. Plaintiffs’ claims were time barred.

Plaintiffs Carpenter and Yeater graduated on December 17, 1992, and Holsinger on September 17, 1992. They did not sue until June 1998, more than five years after graduating. Claims based on an oral contract must be brought within five years. *See* W. Va. Code § 55-2-6. Claims for fraud must be brought within two years. *See* W. Va. Code § 55-2-12. Thus, only a claim based on a written contract can be deemed timely, and Plaintiffs’ action against the College was not timely brought. *See* W. Va. Code § 55-2-6.¹⁰

¹⁰ The College cannot be indirectly pursued through the court’s erroneous application of the CCPA and Plaintiffs’ related theory of “restitution.” The College is not a creditor. *See* W.Va. Code § 46A-5-

Moreover, “delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that a party has waived his rights,” estops such a claim. *Spahr v. Preston County Bd. of Ed.*, Syl. Pt. 5, 182 W. Va. 726, 391 S.E.2d 739 (1990) (internal quotation marks omitted); *see also Ara v. Erie Ins. Co.*, Syl. Pt. 2, 182 W. Va. 266, 387 S.E.2d 320 (1989); *Hunter v. Christian*, Syl. Pt. 2, 191 W. Va. 390, 446 S.E.2d 177 (1994). In the words of the Restatement:

(1) The power of a party to avoid a contract for incapacity, duress, undue influence or abuse of a fiduciary relation is lost if, after the circumstances that made it voidable have ceased to exist, he does not within a reasonable time manifest to the other party his intention to avoid it.

(2) The power of a party to avoid a contract for misrepresentation or mistake is lost if after he knows of a fraudulent misrepresentation or knows or has reason to know of a non-fraudulent misrepresentation or mistake he does not within a reasonable time manifest to the other party his intention to avoid it. The power of a party to avoid a contract for non-fraudulent misrepresentation or mistake is also lost if the contract has been so far performed or the circumstances have otherwise so changed that avoidance would be inequitable and if damages will be adequate compensation.

REST 2d CONTR § 381 (1), (2). Here, Plaintiffs’ failure to timely assert their claims against the College bars their claims, and on this basis alone the College is entitled to judgment in its favor.

3. *There can be no “restitution” or other relief against the College, especially for loans the College neither made, held, nor attempted to enforce.*

This case is unusual in that the verdict was largely advisory, informing the court’s extensive Judgment Order, awarding \$30,000 to each Plaintiff “in restitution for the student loans.” (App. 432). The relative importance of the Judgment Order in this case is because unconscionability is an issue for the court “as a matter of law.” W. Va. Code § 46A-2-121(1).

The Judgment Order contains numerous errors of both law and fact.

101(1) (spelling out civil liability “if a creditor has violated” the CCPA through, among other things, “fraudulent or unconscionable conduct”). Nor are the loans at issue consumer credit sales; consumer leases, or consumer loans as defined by the CCPA. *See* W.Va. Code § 46A-1-102(13)-(15). In any event, the College has never attempted to enforce the student loans, making § 46A-2-121 inapplicable.

No evidence supported the finding in ¶ 1 of the Judgment Order that “the disparity of bargaining positions between the Plaintiffs and Defendant Mountain State College was, and is, grossly unequal.” (App. 433). Each Plaintiff had reached the age of majority and graduated from high school. (*See id.* at 134, 186, 223) Indeed, the “bargaining position” between the College and Plaintiffs was no different than that between any institution of higher learning and prospective student.

Paragraph 2 of the Judgment Order stated:

The Court FINDS and CONCLUDES that the Defendant made misrepresentations that there *would be* a great demand for paralegals in the Parkersburg area, that they *would obtain* said jobs by use of Defendant’s placement office, and that they *would be* making an increased salary in those jobs sufficient to pay off the student loan debt for the tuition. [emphases added]

(App. 433 (emphasis added)). Paragraph 3 similarly stated that “misrepresentations” about what *would* happen upon graduation “fraudulently induced the Plaintiffs into the enrollment agreement.” (*Id.*) The future is simply not knowable, however, and as this Court has observed, “predictions as to future events are ordinarily regarded as nonactionable expressions of opinion on which there is no right to rely.” *Janssen v. Carolina Lumber Company*, 137 W. Va. 561, 570, 73 S.E.2d 12, 17 (1952) (internal quotation marks omitted). Fraud must be based on a misrepresentation of existing or past facts. *See Thacker v. Tyree*, 171 W. Va. 110, 113, 297 S.E.2d 885, 888 (1982).¹¹ This law cannot be subverted in the guise of “unconscionability,” which has routinely been equated with fraudulent conduct. *One Valley Bank of Oak Hill, Inc. v. Bolen*, 188 W.Va. 687, 691, 425 S.E.2d 829, 833 (1992) (citing *Orlando v. Finance One of W.Va., Inc.*, 179 W.Va. 447, 369 S.E.2d 882 (1988); *U. S. Life Credit Corp. v. Wilson*, 171

¹¹ Any relief arising from fraud requires clear and convincing evidence of: (1) an act of the defendant; (2) materiality and falsity; (3) justifiable reliance under the circumstances; and (4) consequent damage. *Schultz v. Consolidation Coal Co.*, Syl. Pt. 2, 197 W. Va. 375, 475 S.E.2d 467 (1996); *Bowling v. Ansted Chrysler-Plymouth-Dodge*, Syl. Pt. 2, 188 W. Va. 468, 425 S.E.2d 144 (1992); *Lengyel v. Lint*, Syl. Pt. 1, 167 W.Va. 272, 280 S.E.2d 66 (1981).

W.Va. 538, 301 S.E.2d 169 (1982)). Thus, even taking Plaintiffs' allegations about what the College represented their job prospects *would be* upon graduation (predictions of the future), they are not entitled to any relief, irrespective of the legal theory.

Paragraph 4 of the Judgment Order stated:

The Court FINDS and CONCLUDES that the enrollment agreement between the Plaintiffs and Defendants was grossly unfair. The Plaintiffs paid significant amounts for tuition and other educational expenses with the expectation that the Defendant would provide an education and job placement services to provide them a job in the paralegal field. The evidence showed that the Defendant did not provide the agreed upon services, making the agreement between the parties completely one-sided. The jury concluded that the agreement lacked consideration from the Defendant.

(App. 433-34). This finding and conclusion was erroneous for several reasons. It contradicted the pretrial ruling limiting the trial to claims of misrepresentation. (*Id.* at 88).¹² Plaintiffs' claims were that certain misrepresentations induced their enrollment, not that the underlying agreements were unfair. There was no evidence (or allegation) that "educational and job placement services" were not provided. To the contrary, there was ample evidence Plaintiffs attended classes, (*see, e.g., id.* at 133-183, 186-221, 223-266 (Plaintiffs' student files)), and were offered and provided placement assistance, (*See e.g., id.* at 155-56, 164, 166, 264 (relating to Ms. Carpenter); *id.* at 203-04, 214, 221, 339 (relating to Ms. Holsinger); *id.* at 224, 251-252 (relating to Ms. Yeater)). While Plaintiffs now contend they were not satisfied with that service, they did not contend none was provided. Additionally, the Judgment Order's finding that "[t]he jury

¹² As noted above, prior to trial the court ordered that:

Plaintiffs' claims at trial must be limited to those based on a specific misrepresentation that they would, in fact, obtain employment upon completion of their program of study. Neither the quality of the education plaintiffs received nor whether the College violated any ACICS or other regulatory standard is pertinent to adjudication of those claims.

(App. 88).

concluded that the agreement lacked consideration from the Defendant [College]” was simply untrue. Nowhere in the verdict form or special interrogatories was there mention of “consideration” or lack thereof. (*See id.* at 363-65).

Paragraph 5 of the Judgment Order misstated the law. A finding of unconscionability or unconscionable inducement only permits the Court “to refuse to enforce the agreement ... or ... enforce the remainder of the agreement without the unconscionable term or part, or may so limit the application of any unconscionable term or part as to avoid any unconscionable result.” W. Va. Code § 46A-2-121(1)(a), (b). No such relief can be had from the College because the only contracts susceptible to it were loan agreements. Indeed, the complaint about “Unconscionable Contract” sought “a *declaratory* judgment issue [*sic*] that the *loans* are *unenforceable*, and the defendants [the note holders] be *enjoined* from any *further attempt to enforce* the contracts or *assert liability* thereunder and that the contracts be declared *anceled.*” (App. 22 (emphasis added)). Similarly, for “Failure of Consideration,” the complaint sought “[t]hat the defendants be *enjoined* from any *further attempt to enforce* the contracts or *assert liability* thereunder and that the contracts be declared *anceled.*” (*Id.* at 23 (emphasis added)). Likewise, Plaintiffs’ special interrogatory addressed a “*defense* of fraudulent inducement.” (*Id.* at 365 (emphasis added)). The College simply has never attempted to enforce the student loans.

Importantly, the CCPA, as invoked by Plaintiffs, addresses the rights of lenders and borrowers. *See generally*, W.Va. Code §§ 46A-2-101, *et seq.* Section 46A-2-121 deals with unconscionable agreements or agreements induced by unconscionable conduct that give rise to a “consumer credit sale, consumer lease, or consumer loan.” “[C]onsumer credit sale,” “consumer lease,” and “consumer loan” are each defined by statute. W. Va. Code § 46A-1-102.¹³ Both the

¹³ For example, the CCPA defines a “consumer loan” as follows:

Plaintiffs and the trial court seem to have taken for granted (over the objection of the College) that the CCPA was somehow applicable to this case. (*See, e.g.*, App. 387-88). It is beyond dispute, however, that the only agreements between Plaintiffs and the College were the enrollment agreements, which the College has never attempted to enforce.

Paragraph 6 of the Judgment Order misstated the law by omitting that “the principle of unconscionability is one of prevention of oppression and unfair surprise and not the disturbance of reasonable allocation of risks or reasonable advantage because of superior bargaining position.” *Hager v. Am. Gen. Fin., Inc.*, 37 F. Supp. 2d 778, 786 (S.D.W. Va. 1999); *Knapp v. Am. Gen. Fin., Inc.*, 111 F. Supp. 2d 758, 764 (S.D.W. Va. 2000). There can be no equitable relief as against the College from student loans made by others and now held by the Secretary of Education of the United States and United Student Aid Funds, Inc., entities that Plaintiffs’ counsel have steadfastly refused to sue because they wanted not to be in federal court. (*See* App. 222, 256, 257 (collection letters reflecting Plaintiffs’ respective outstanding loan obligations)).¹⁴ In both *Hager* and *Knapp*, the court denied summary judgment in cases brought by a *borrower* against a *lender*. Plaintiffs are borrowers, but the College is not a lender.

Paragraph 7 of the Judgment Order plainly misapprehended the authority cited:

-
- (15) “Consumer loan” is a loan made by a person regularly engaged in the business of making loans in which:
- (a) The debtor is a person other than an organization;
 - (b) The debt is incurred primarily for a personal, family, household or agricultural purpose;
 - (c) Either the debt is payable in installments or a loan finance charge is made; and
 - (d) Either the principal does not exceed forty-five thousand dollars or the debt is secured by an interest in land or a factory-built home as defined in section two, article fifteen, chapter thirty-seven of this code.

W.Va. Code § 46A-1-102.

¹⁴ Plaintiffs’ counsel for 20 years has known how and where to bring such actions against the Secretary. *See generally Tipton v. Sec. of Educ. Of U.S.*, 768 F. Supp. 540, 545 (S.D. W. Va. 1991) (“Nearly all of the notes in question are now held by [the Higher Education Assistance Foundation] or the Secretary [of Education].”)

The disparity of bargaining positions in this situation was nearly identical to a circumstance the Supreme Court of Appeals of West Virginia concluded was “grossly unequal.” See *Arnold v. United Cos. Lending Corp.*, 204 W. Va. 229, 236, 511 S.E.2d 854, 861 (1998).

(App. 435). In *Arnold*, this Court answered a certified question about an arbitration agreement. 204 W.Va. at 234, 511 S.E.2d at 859. A loan broker came to the home of Mr. Arnold, 69 with a 5th grade education, and Mrs. Arnold, 63 with an 8th grade education, and talked them into borrowing from a national corporate lender. They were presented at closing with more than 25 documents by the lender’s counsel, including an arbitration agreement waiving their (but not the lender’s) access to the courts. *Arnold*, 204 W.Va. at 234, 237, 511 S.E.2d at 859, 862. This Court likened this to a contract among “rabbits and foxes” and held, among other things:

The relative positions of the parties, a national corporate lender on one side and elderly, unsophisticated consumers on the other, were “grossly unequal.”

* * *

[T]hat where an arbitration agreement entered into as part of a consumer loan transaction contains a substantial waiver of the borrower's rights, including access to the courts, while preserving the lender's right to a judicial forum, the agreement is unconscionable and, therefore, void and unenforceable as a matter of law.

Id. at 236-237, 511 S.E.2d at 861-862. In contrast, the College has about 120 students, (Trial Tr. 252:16), and neither buried Plaintiffs – each of whom was over eighteen and had graduated from high school, (See App. at 134, 186, 223) – with documents nor had a lawyer at a “closing.” Finding that these facts are “nearly identical” to those in *Arnold* was plainly erroneous.

Paragraph 8 of the Judgment Order stated:

The Court CONCLUDES the loan was induced by unconscionable conduct due to the following:

(a) The initial misrepresentation that there would be a great demand for paralegal jobs in the Parkersburg area; and

(b) The misrepresentations that the Defendant would place students in jobs as paralegals;

(App. 435). As noted above in respect of the Judgment Order's ¶¶ 2 and 3, this Court has equated "unconscionable" conduct with fraud and clearly held that fraud cannot arise from representations as to future events, such as employment or job demand. Additionally, as detailed above, the College *did* provide placement services.

Paragraph 9 of the Judgment Order stated:

The Court CONCLUDES that the agreement for enrollment was so one-sided insofar as the Defendant received the significant tuition from the Plaintiffs but provided no educational or job placement services in return. The agreement was so one sided that it shocks the conscience of the Court.

(App. 435). Finding that the College provided "no educational or job placement services" was not only contrary to the evidence, but the value or quality of the education was not even supposed to be tried. (*See id.* at 88). Nor was there evidence that the enrollment agreements were so one-sided as to be unconscionable. *Cf., Lang v. Derr*, 212 W. Va. 257, 569 S.E.2d 778 (2002) (finding unconscionable a \$100.00 sales contract for real estate worth over \$60,000.00 that the seller may not have fully comprehended). Plaintiffs never even suggested that the College's enrollment agreements are any different than those used by any other educational institution.

Paragraph 10 of the Judgment Order stated: "Having concluded that the loan was induced by unconscionable conduct, the Court CONCLUDES that the agreements were unenforceable as a matter of law." (App. 435 (emphasis in original)). It is not clear which "agreements" the court is referring to. Whether this referred to the enrollment agreements fulfilled nearly 20 years ago or to Plaintiffs' student loans, however, the College never attempted to "enforce" either. The

only contracts possibly susceptible to relief are the loan agreements between Plaintiffs and lenders or subsequent holders, not the College.

Plaintiffs cited no statute or case on “restitution,” and none is found in the Judgment Order.¹⁵ Clearly, however, claims in respect of the outstanding loan obligations are not actionable as against the College:

And always in cases seeking rescission and cancellation based upon alleged false and fraudulent representations of the defendant, it must appear that the representations were matters susceptible of approximately accurate knowledge on the part of the defendant, otherwise they should be regarded as expressions of opinion merely, which do not constitute proper bases for rescission. Things a defendant could not be expected to know should be regarded as mere expressions of opinion, and cannot be regarded as the bases for rescission of a contract.

Though a purchaser may rely upon particular and positive representations of a seller, yet if he undertakes to inform himself from other sources as to matters easily ascertainable, by personal investigation, and the defendant has done nothing to prevent full inquiry, he will be deemed to have relied upon his own investigation and not upon the representations of the seller.

Jones v. McComas, Syl. Pts. 3-4, 92 W. Va. 596, 115 S.E. 456 (1922). No equitable principle requires the College to pay the Plaintiffs’ loans. *Cf.*, *Absure Inc. v. Huffman*, 213 W. Va. 651, 653-654, 584 S.E.2d 507, 509-510 (2003) (likening equitable restitution related to unjust enrichment). Accordingly, Plaintiffs were not entitled to such equitable relief, and this Court should reverse the Judgment Order’s award of “\$30,000 for restitution” of Plaintiffs’ student loans. (App. 436).

4. *Plaintiffs’ claims based on the quality of educational services were not actionable.*

Inexplicably, throughout trial the court disregarded its own pretrial order limiting the issues to be tried to allegations “based on a specific misrepresentation that [Plaintiffs] would, in

¹⁵ Restitution is often invoked to require repayment of funds under mistaken belief of obligation. *See, e.g., Wolfe v. Kalmus*, Syl. Pt. 1, 186 W. Va. 622, 413 S.E.2d 679 (1992) (citing *Prudential Ins. Co. of Am. v. Couch*, Syl. Pt. 1, 180 W. Va. 210, 376 S.E.2d 104 (1988)).

fact, obtain employment upon completion of their program of study. Neither the quality of the education plaintiffs received nor whether the College violated any ACICS or other regulatory standard is pertinent to adjudication of those claims.” (App. 88). The court essentially allowed Plaintiffs to pursue a surprise attack of educational malpractice.

Claims of educational malpractice have been rejected on sound policy grounds by courts throughout the Nation. *See e.g., Dallas Airmotive, Inc. v. FlightSafety Intern., Inc.*, 277 S.W.3d 696, 699-701 (Mo. Ct. App. 2009); *Moss Rehab v. White*, 692 A.2d 902, 905 (Del. 1997); *Armstrong v. Data Processing Inst., Inc.*, 509 So. 2d 1298, 1299 (Fla. Dist. Ct. App. 1987); *see also* 68 Am. Jur. 2d Schools § 487 (“An action generally may not be brought against a private or parochial school for educational malpractice.”). The trial court observed as much in its pretrial order limiting Plaintiffs’ claims to those of specific misrepresentations. (*See* App. 83-88). Yet the court permitted the trial to be dominated by irrelevant, unfairly prejudicial evidence and argument relating only to the quality of education provided by the College and having nothing to do with alleged misrepresentations made by the College inducing Plaintiffs to enroll. (*See, e.g.,* Trial Tr. at 65:12-66:10 (Ms. Carpenter contending the College’s courses and facilities were inadequate); 318:7-9 (Mr. Amos testifying that the College had a bad reputation)). Given the pretrial order explicitly barring such claims, the trial was little better than an ambush.

5. *Plaintiffs’ claim arising out of any loan were relinquished when they consolidated their loans after leaving the College.*

Each Plaintiff’s consolidation of her loans deprived her of any claim in respect of those obligations based upon any interaction with the College. (*See* App. 185, 222, 256, 257, 333-335 (Plaintiffs’ loan documents); *see also* Trial Tr. 81:13-18). The Court granted summary judgment in favor of SMS on the ground of novation. (*See* App. 45). Similarly, “[i]f one, with knowledge of a fraud which would relieve him from a contract, goes on to execute it, he thereby confirms it,

and cannot get relief against it. He has but one election to confirm or repudiate the contract, and, if he elects to confirm it, he is finally bound by it.” *Martin v. ERA Goodfellow Agency, Inc.*, Syl. Pt. 1, 188 W. Va. 140, 423 S.E.2d 379 (1992) (citation omitted).

The power of a party to avoid a contract for incapacity, duress, undue influence or abuse of a fiduciary relation is lost if, after the circumstances that made the contract voidable have ceased to exist, he manifests to the other party his intention to affirm it or acts with respect to anything that he has received in a manner inconsistent with disaffirmance.

REST 2d CONTR § 380 (1). By consolidating and reaffirming their student loan obligations after graduating (at which point the purported misrepresentations – or, for that matter, lack of educational quality – of the College would have been apparent), Plaintiffs waived the very issues that were tried below.

6. *Plaintiffs never pled a breach of contract claim, but even if they had done so, their contracts with the College were in writing and fulfilled by the College.*

Plaintiffs never pled a breach of contract claim, but the court – after the close of their case – permitted them to pursue one.¹⁶ “It is the province of the Court, and not of the jury, to interpret a written contract.” *Toppings v. Rainbow Homes*, Syl. Pt. 1, 200 W. Va. 728, 490 S.E.2d 817 (1997) (internal quotations omitted). This Court resolves questions respecting the construction and interpretation of a contract. *See, e.g., Estate of Tawney v. Columbia Natural Res., LLC*, Syl. Pt. 1, 219 W. Va. 266, 633 S.E.2d 22 (2006). In this case, each Plaintiff signed a written contract with the College devoid of any guarantee or promise as to employment. (*See App. 133-183, 186-221, 223-255*).

Nor could Plaintiffs assert contractual rights beyond or in contradiction of their documented transactions with the College:

¹⁶ Plaintiffs did plead a number of *defenses* to the student loan agreements, but as previously discussed, the College is not a party to the loan agreements and has never attempted to enforce them.

Extrinsic evidence of statements and declarations of the parties to an unambiguous written contract occurring contemporaneously with or prior to its execution is inadmissible to contradict, add to, detract from, vary or explain the terms of such contract, in the absence of a showing of illegality, fraud, duress, mistake or insufficiency of consideration.

Cardinal State Bank, N.A. v. Crook, Syl. Pt. 1, 184 W. Va. 152, 399 S.E.2d 863 (1990) (citation omitted). The *only* one of these exceptions at issue in the instant case – fraud – was resolved in the College’s favor at the close of Plaintiffs’ case-in-chief. (See Trial Tr. 226:9-19). The College was thus entitled to judgment as a matter of law on Plaintiffs’ contract claim.

7. *Plaintiffs failed to present evidence sufficient for the jury to have found any compensatory damages.*

Speculative or uncertain damages are prohibited. *Oates v. Cont’l Ins. Co.*, Syl. Pt. 1, 137 W. Va. 501, 72 S.E.2d 886 (1952) (“[A] jury will not be permitted to base findings of damages upon conjecture or speculation”). Plaintiffs bore the burden of proving the amount of damages to a degree of reasonable certainty. See e.g., *Taylor v. Elkins Home Show, Inc.*, Syl. Pt. 5, 210 W.Va. 612, 558 S.E.2d 611 (2001). The only evidence upon which the jury could have relied in coming to its determination of \$20,000.00 per plaintiff in compensatory damages, independent and distinct from the student loans, was Plaintiffs’ vague testimony on damaged credit. No expert was called to help the jury quantify those damages. The verdict was entirely speculative in that regard, and cannot support the Judgment Order’s award of \$20,000.00 in compensatory damages to each plaintiff. See *City Nat. Bank of Charleston v. Wells*, 181 W. Va. 763, 772-74, 384 S.E.2d 374, 383-85 (1989) (concluding damage from impaired credit was “reduced to a reasonably certain sum” because plaintiff provided discrete examples of being denied financing and detailed the resulting damage).

8. *Plaintiffs had no right to recover attorney fees and costs.*

“As a general rule each litigant bears his or her own attorney’s fees absent a contrary rule of court or express statutory or contractual authority for reimbursement.” *Yost v. Fuscaldo*, Syl. Pt. 5, 185 W. Va. 493, 408 S.E.2d 72 (1991) (citing *Sally-Mike Properties v. Yokum*, Syl. Pt. 2, 179 W.Va. 48, 365 S.E.2d 246 (1986)). Neither the Fee Order nor the motion requesting it explained what entitled Plaintiffs to attorney fees. The only conceivable explanation is that the court believed that Plaintiffs were so entitled under the CCPA. *See* W.Va. Code § 46A-5-104. As explained above, however, the CCPA addresses the rights of lenders and borrowers. *See generally*, W.Va. Code §§ 46A-2-101 *et seq.* The College simply is not a creditor or lender, and the CCPA is not applicable to Plaintiffs’ claims against the College. Because the CCPA (and, in particular, its fee shifting provision) is inapplicable to the College, Plaintiffs were not entitled to attorney fees.

B. In the alternative, the College is entitled to a new trial.

1. *The trial court erred in admitting evidence of James Skidmore and Timothy Amos.*

The trial court had limited Plaintiffs’ claims “to those based on a specific misrepresentation that they would, in fact, obtain employment upon completion of their program of study” and held that “[n]either the quality of the education Plaintiffs received nor whether the College violated any ACICS or other regulatory standard is pertinent to adjudication of those claims.” (App. 88). But Mr. Skidmore and Mr. Amos were allowed to testify about both in purported “rebuttal” to the College’s case in chief, after Plaintiffs’ counsel had violated the pretrial limitation from the time they first took the witness stand.

As explained above, Mr. Skidmore both regulates and competes against the College, but has no firsthand information about the College’s interactions with Plaintiffs, only learning of

their complaints years later. (See Trial Tr. 353:5-354:8). After conducting interviews of Plaintiffs and others, he recommended a refunds or additional instruction at no charge. The College refused, and the Council determined to take no further action, notwithstanding Mr. Skidmore's recommendation. (*Id.* at 345:17-346:13). In any event, Mr. Skidmore's evidence was inadmissible hearsay. W. Va. R. Evid. 801, 802. His "investigation" consisted principally of interviews with former students of the College who hoped to be able to get out from under their student loan obligations. (See Trial Tr. 353:5-354:8). His personal opinions and corresponding findings were therefore based on and tainted by the inherently biased accounts of students hoping to be freed from loan obligations. This rendered Mr. Skidmore's opinions and findings entirely untrustworthy, and should never have been admitted. Indeed, it was for these very reasons that the court rejected before trial Plaintiffs' argument that Mr. Skidmore could testify pursuant to W. Va. Rule Evid. 803(8). (See App. 90); *cf. Hadox v. Martin*, Syl. Pt. 4, 209 W. Va. 180, 544 S.E.2d 395 (2001) (recognizing contents of public report or investigation inadmissible under Rule 803(8)(C) if established as untrustworthy).¹⁷ Plaintiffs' counsel violated that pretrial order, and the court refused to enforce it, resulting in the erroneous admission of unfairly prejudicial, entirely unanticipated evidence against the College.

Mr. Amos's "rebuttal," like that of Mr. Skidmore, violated the pretrial ruling limiting Plaintiffs' claims to those misrepresentations by the College. Moreover, even now, it is entirely unclear what Mr. Amos was called to rebut. His testimony was limited to disparaging the

¹⁷ The admission of Mr. Skidmore's inflammatory 1997 letter to the College concerning his "findings" was doubly erroneous. (See App. 258-260). The letter was not only redundant of his testimony, but unfairly elevated his testimony over that of the other witnesses. It blurred the distinction between those, like Ms. Shukla, who "attended Mountain State College and participated in the Legal Assistant Program" and those, like Plaintiffs, who "completed the legal assisting program." (*Id.* at 258, 260) It also unfairly aroused sympathy for "the students [who] have substantial student loan obligations that they are unable to repay. ... I am concerned that the majority of the students that met with me are unable to benefit from the education for which they paid." (*Id.* at 259).

reputation of the College, and his opinion about the quality of education provided by the College was informed not by any experience with Plaintiffs, but with two, much later graduates.

Although trial judges are afforded discretion on procedural and evidentiary issues, that discretion is not without limits:

Under Rule 103(a), to warrant reversal, two elements must be shown: error and injury to the party appealing. Error is harmless when it is trivial, formal, or merely academic, and not prejudicial to the substantial rights of the party assigning it, and where it in no ways affects the outcome of the trial. Stated conversely, error is prejudicial and ground for reversal only when it affects the final outcome and works adversely to a substantial right of the party assigning it.

Reed v. Wimmer, 195 W. Va. 199, 209, 465 S.E.2d 199, 209 (1995). In this case, neither Mr. Skidmore nor Mr. Amos provided any admissible evidence relating to the alleged misrepresentations made by the College. Mr. Skidmore simply relayed inadmissible hearsay, and Mr. Amos – who was not even practicing law until long after Plaintiffs graduated – offered only disparaging remarks about the College generally. Although irrelevant and inadmissible, the evidence offered by Mr. Skidmore and Mr. Amos was extremely prejudicial. It unfairly aroused sympathy for Plaintiffs while at the same time casting the College in an exceptionally negative light. This inadmissible evidence came to dominate the trial below, casting grave doubt on the jury’s verdict. Because this inadmissible and unfairly prejudicial evidence cannot have helped but to had a major impact on the jury’s deliberations and verdict, the College is entitled to a new trial. *See McDougal v. McCammon*, Syl. Pt. 1, 193 W.Va. 229, 455 S.E.2d 788 (1995)

2. *Plaintiffs’ counsel intentionally violated the trial court’s pretrial order concerning Michael McPeek.*

The Court’s March 16, 2010 order prohibited *any* mention of Mr. McPeek: “Neither party shall introduce any evidence regarding or make any reference in voir dire, argument, or otherwise to Mr. McPeek or to the pending criminal proceedings involving Mr. McPeek.”

Plaintiffs agreed to this language, and never sought relief from or clarification of the Court's order, which could be no plainer.

Mr. McPeek was uninvolved in any transaction at issue in this lawsuit and was neither deposed nor listed as a witness by any party. No mention was made of Mr. McPeek in the presence of the jury during the *voir dire* or at any other point before the cross-examination of Ms. Sutton by Plaintiffs' counsel. Then, without warning, counsel established that Ms. Sutton was an owner of the College and pointed to Mr. McPeek as the other owner seated in the courtroom *and identified him by name*. (Trial Tr. 270:13-18). While not susceptible to being included in the record, the trial court then stared in sheer disbelief at the College's counsel for a full five seconds. While not surprising under the circumstances, the jury cannot help but have noticed, thus underscoring the magnitude of the violation. The College orally moved for a mistrial, which motion was denied. The College resubmitted its motion in writing, detailing how unfairly prejudicial the mention of Mr. McPeek was to the College at the time of the trial, yet the motion for a mistrial was again denied. (*See App. 125-128*).

This Court does not tolerate willful violations of a trial court's ruling on a motion in limine, nor should it:

"A deliberate and intentional violation of a trial court's ruling on a motion *in limine*, and thereby the intentional introduction of prejudicial evidence into a trial, is a ground for reversing a jury's verdict. However, in order for a violation of a trial court's evidentiary ruling to serve as the basis for a new trial, the ruling must be specific in its prohibitions, and the violation must be clear." *Honaker v. Mahon*, Syl. Pt. 6, 210 W. Va. 53, 552 S.E.2d 788 (2001).

Jones v. Setser, Syl. Pt. 3, 224 W.Va. 483, 686 S.E.2d 623 (2009) (reversing trial court's denial of motions for mistrial, new trial). Additionally,

In deciding whether to set aside a jury's verdict due to a party's violation of a trial court's ruling on a motion *in limine*, a court should consider whether the evidence excluded by the court's order was deliberately introduced or solicited by the party,

or whether the violation of the court's order was inadvertent. The violation of the court's ruling must have been reasonably calculated to cause, and probably did cause, the rendition of an improper judgment.

Honaker, Syl. Pt. 6, 210 W. Va. 53, 552 S.E.2d 788. In *Honaker*, this Court awarded a new trial in circumstances very similar to the instant case. In that case, counsel for the defendant violated an order prohibiting questions about when the plaintiff hired an attorney. Counsel for the defendant made one brief reference in violation of that order during cross examination, and this Court – reviewing for plain error – remanded the case for a new trial. See *Honaker*, 210 W. Va. at 59-62, 552 S.E.2d at 794-97. Here, the order prohibiting any mention of Mr. McPeek could be no clearer, the College immediately objected to Plaintiffs' counsel's violation, and there can be little room for doubt that Plaintiffs' counsel intentionally solicited and identified Mr. McPeek in clear violation of the agreed order; the conduct was gratuitous and pointless, unless designed to play on the knowledge or curiosity of the jury about Mr. McPeek's unrelated, then pending and publicized criminal charges.

3. *Unfair, arbitrary, and capricious limitations were placed on the College's surrebuttal evidence.*

After Plaintiffs were permitted, over the College's objection, to call Mr. Skidmore and Mr. Amos, Ms. Sutton spent much of the weekend collecting documentary evidence to contradict their testimony. The Court denied admission of each of the College's Exhibit Numbers 16-20, apparently because Plaintiffs had presented no documentary evidence through Mr. Skidmore or Mr. Amos. (Trial Tr. 395:7-396:10).¹⁸ The Court also arbitrarily limited the time during which

¹⁸ The College's Exhibit Number 16 was a summary of lawyers who had hired graduates of the College's programs at issue. The College's Exhibit Number 17 was a compendium of their responses to surveys about their satisfaction with graduates of those programs. The College's Exhibit Number 18 was an example of a law firm's seeking qualified legal assistants from the College. The College's Exhibit Number 19 was a published example of a graduate utilizing her degree from the College as a credential. The College's Exhibit Number 20 summarized a 1996 telephone conversation with another graduate. At a minimum, the first three should have been admitted – they directly refuted the testimony of Mr. Amos.

Ms. Sutton was permitted to address with important, specific evidence the sweeping assertions of both Mr. Skidmore and Mr. Amos. (*See id.* at 367:24-368:1). These limitations on the College's surrebuttal were especially unfairly when coupled with the fact that Mr. Skidmore and Mr. Amos had previously been prohibited from testifying by the trial court and should never have been permitted to testify in the first place.

4. *The trial court erred in its instructions to the jury.*

A trial court has discretion in formulating its charge to the jury "so long as the charge accurately reflects the law." *Alley v. Charleston Area Med. Ctr.*, 216 W.Va. 63, 74, 602 S.E.2d 506, 517 (2004). "Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law." *Id.* A trial court's instruction "must be a correct statement of the law and supported by the evidence." *Id.* Furthermore, a trial court's refusal to give a requested instruction is reversible error if:

1) the instruction is a correct statement of the law; 2) it is not substantially covered in the charge actually given to the jury; and 3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense."

Alley, 216 W.Va. at 74, 602 S.E.2d at 517.

The trial court erred in refusing a portion of the College's Instruction A: "In determining whether the College fulfilled its obligations to Plaintiffs, you must base your decision solely upon what is set forth in those written agreements." (*See* Trial Tr. 368:23-369:17; App. 103). The rejected language is consistent with the principles of West Virginia contract law noted above.

Plaintiffs' Instruction Numbers 1, 2, 3, Special Interrogatory Numbers 1 and 2, and Verdict Paragraph 2 addressed "unconscionability," "fraud," "failure of consideration," and other

equitable bases for “restitution.” (See App. 105-107, 108-109, 110, 118-122). None should have been given because no such claim can be brought – nor can relief be granted – against the College for the student loans it did not make, and never attempted to enforce. Indeed, the court granted judgment in favor of the College on Plaintiffs’ fraud claims at trial. (See Trial. Tr. 226:9-19). There was no contract between the College and any plaintiff as to which the “defense of fraudulent inducement” could even apply. Put most simply, the College has not tried to enforce any agreement.

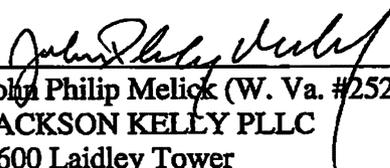
Plaintiffs’ Instruction Number 4 was erroneous. (See App. 115). As explained above, no evidence was offered of any damages other than loan obligations. Nor was there any basis for “nominal damages” under the authorities cited by Plaintiffs. (See *id.* at 113-114).¹⁹ As noted elsewhere, the jury should never have been instructed about “unconscionability” or “restitution.” The cumulative effect of these errors was that the jury was not accurately advised of the law, rendering the verdict completely unreliable and entitling the College to a new trial.

¹⁹ *Ashland Oil Co. v. Donahue*, 159 W.Va. 463, 223 S.E.2d 433 (1976), *K.M.C., Inc. v. Irving Trust Co.*, 757 F.2d 752 (6th Cir. 1985), and *City Nat’l Bank v. Wells*, 181 W.Va. 763, 772-73, 384 S.E.2d 374, 382-84 (1989) all involved claims under Article 2 of the Uniform Commercial Code. *State Nat’l Bank v. Farah Mfg. Co.*, 678 S.W.2d 661 (Tex. Ct. App. 1984) was a tort action brought by a debtor for damages against creditors, alleging fraud, duress, and interference with business relations. *Harless v. First Nat’l Bank*, 169 W. Va. 673, 289 S.E.2d 692 (1982) was a suit for retaliatory discharge and outrageous conduct brought by former bank employee. *Harper v. Consol. Bus Lines*, 117 W. Va. 228, 185 S.E. 225 (1936) reversed a demurrer granted to the defendant in a claim arising from an agreement to sell motor carrier rights, but the case has no bearing on how a jury is to be instructed as to “nominal damages.” *Id.* at Syl. Pt. 2 (“Where a complaint sets up a contract and alleges a breach thereof, a demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action, is not well taken, since plaintiff is entitled to nominal damages at least.” (internal quotations omitted)).

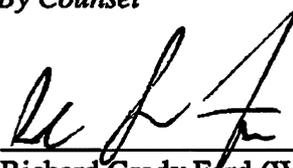
VI. CONCLUSION

For the reasons stated herein, the College requests that this Honorable Court redress the wrongs it has suffered and enter judgment in its favor, or in the alternative remand this case for a new trial to be conducted within appropriate limitations as to both the law and facts.

Respectfully submitted,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**SHERYL HOLSINGER,
SANDRA R. CARPENTER, and
MARY J. YEATER,**

Plaintiff/Appellee,

v.

**APPEAL NO. 11-1203
Civil Action No. 98-C-1497
Circuit Court of Kanawha County
Judge Tod J. Kaufman**

**MOUNTAIN STATE COLLEGE,
a corporation,**

Defendant/Appellant.

CERTIFICATE OF SERVICE

I certify that on November 21, 2011, I caused to be served copies of the foregoing
Petitioner's Brief, along with its associated Appendix, by hand delivery upon:

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