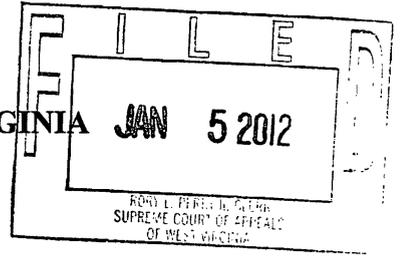


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



MOUNTAIN STATE COLLEGE,

**Defendant/Petitioner,**

v.

**APPEAL NO. 11-1203  
(On appeal from the Circuit Court  
of Kanawha County  
Civil Action No. 98-C-1497  
Honorable Tod J. Kaufman)**

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

**Plaintiffs/Respondents.**

**BRIEF OF RESPONDENTS SHERYL HOLSINGER, SANDRA R.  
CARPENTER, and MARY J. MURPHY,**

SHERYL HOLSINGER, SANDRA R.  
CARPENTER, and MARY J. MURPHY,  
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## STATEMENT OF THE CASE

Respondents offer 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 jury verdict and judgment orders entered by the Circuit Court of Kanawha County, West Virginia against the Petitioner, Mountain State College, a for-profit college that fraudulently induced students to enroll in a paralegal program it started in 1990. Mountain State College is an example of what has been identified by the federal government as a widespread abuse of for-profit colleges using deceptive and misleading statements to persuade students to enroll in the colleges. See Statement of Gregory D. Kutz, Managing Director Forensic Audits and Special Investigations, United States Government Accountability Office at 7, available at <http://www.gao.gov/new.items/d10948t.pdf>; Eric Litchblau, With Lobbying Blitz, For-Profit Colleges Diluted New Rules, The New York Times (Dec. 9, 2011), available at <http://www.nytimes.com/2011/12/10/us/politics/for-profit-college-rules-scaled-back-after-lobbying.html?pagewanted=all> (last visited January 4, 2012) (“[A] series of federal investigations portrayed [the for-profit college industry] as rife with abuse. They found that recruiters would lure students - often members of minorities, veterans, the homeless and low-income people - with promises of quick degrees and post-graduation jobs but often leave them poorly prepared and burdened with staggering federal loans.”).<sup>1</sup> This case was filed in 1998 when five students of Mountain State College sought

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<sup>1</sup> Media reports regarding Mountain State University – another West Virginia for-profit college receiving notoriety recently – make clear that the abuses of for-profit colleges are occurring here in West Virginia as well. See Amy Julia Harris, MSU President among Highest-paid College Presidents in the Country, The Charleston Gazette (available at <http://wvgazette.com/News/201112040079>) (“Polk's compensation eats up a sizable portion of MSU's overall budget -- about 3.5 percent, according to the report. Most colleges only spent about 0.4 percent of their budgets on their presidents.”).

to challenge the inadequate regulatory scheme applicable to for-profit colleges and the so-called education they received from Mountain State College. The litigation resulted in new legislative rules applicable to for-profit colleges, which were stonewalled by an unconstitutional legislative veto obtained by the college's lobbyist. Because the students' loans had been consolidated – in other words refinanced – the holders of their loans were dismissed from the action. Accordingly, the only recourse the students had was to obtain a judgment against the school, who was at bottom responsible for their massive student loan burdens.

### **Relevant Facts**

In 1990 Mountain State College began to offer a legal assistance program (hereinafter often referred to as “paralegal program”). To encourage enrollment in the paralegal program, Mountain State College solicited its current students and prospective students to enroll in the program through various means, including use of advertising materials delivered to individuals' homes. (See Tr. at 62 (postcard); 167 (flyer).) In this case, the Plaintiffs charged that Mountain State College's

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Charles H. Polk, who earned \$1.8-million as Mountain State's president in 2009, ranked sixth on this year's compensation list, ahead of the presidents of such places as Rensselaer Polytechnic Institute, Swarthmore College, and Yale University. Mr. Polk's pay constituted 3.5 percent of Mountain State's budget. No other college in the survey devoted such a substantial share of its resources to a president.

Mr. Polk breaks into the rankings of the nation's highest-paid presidents at a time when Mountain State is fighting to retain its regional accreditation with the Higher Learning Commission of the North Central Association of Colleges and Schools. In June, the commission placed Mountain State on “show cause” status, which is the final step before removal of accreditation. The college's nursing program also lost accreditation recently.

Jack Stripling & Andrea Fuller, On Campuses, the Income Gap Widens at the Top, The Chronicle of Higher Education (available at <http://chronicle.com/article/On-Campuses-the-Income-Gap/129980/>).

paralegal program failed to live up to the promises made by Mountain State College officials.

The Respondents case was a simple one. They alleged that Mountain State College lied to the students to induce them to enroll in the upstart legal assistance program. In the end, the promises were never fulfilled and the Respondents were saddled with massive student loans that they could not afford to pay back. All three Plaintiffs testified to common misrepresentations by the school: (1) Mountain State College officials represented that it had conducted a survey that indicated there was a great demand for paralegals in the Parkersburg area, (see Tr. at 64, 124-26, 134, 169); (2) graduates would be virtually guaranteed job placement – 95% of graduates could expect to be placed in a paralegal job, (see Tr. at 64, 88, 125, 168, 169); and (3) graduates could expect placement in positions earning up to \$40,000.00 a year. (See Tr. at 64, 126, 168.) The evidence at trial demonstrated that all three of these representations were false.

### **Bogus Survey**

In fact, Mountain State College commissioned a survey though Marietta College that concluded there was no demand for paralegals. (See Tr. at 271.) Undeterred, in 1989 the college hired a director of development, who conducted her own informal survey as to the need for paralegals in West Virginia. (See Tr. at 271-72.) Miraculously, the college's employee determined there was a need. (See Tr. at 272.) However, the college was unable to produce any data or documentation in support of the informal survey. (See Tr. at 273.)

### **Low Placement Rate**

It was undisputed at trial that the boasts of a 95% placement rate were fabricated. The students testified that they knew of no one they graduated with that obtained a job in the paralegal field. (See Tr. at 77, 136.) The Plaintiffs all completed their program in good standing. (See Tr.

at 67, 131, 171.) Sandra Carpenter graduated with a 3.94 G.P.A, (see Tr. at 67), and Mary Murphy (f.k.a. Yeater) was on the Dean's list numerous times. (See Tr. at 171.) Despite completing the course requirements – and earning the highest grades among their peers – none of the Plaintiffs were able to obtain a job as a paralegal. (See 69, 136, 173.)

A report issued by the Accrediting Council for Independent Colleges and Schools (“ACICS”) in 1994 concluded that graduates from the paralegal program were performing clerical functions. (See Tr. at 293.) The report noted that the college's own employee had stated that the local Parkersburg legal community was “closed” to the use of paralegals. (See Tr. at 292.) The accreditation council concluded that Mountain State College's paralegal program did not meet standards in a number of areas, including adequate placement of graduates. (See Tr. at 286, 290.)

Respondent alleged that several of its graduates obtained paralegal jobs; however, no graduates were called to testify to this fact. The college's president and co-owner, Judith Sutton, estimated that fifty percent of the graduates were employed in the field but failed to provide any evidence of this estimate. (See Tr. at 278.) However, this so-called fifty percent placement is still abysmal and far below the promised 95%. Of the three graduates that the college specifically discussed as being employed in the field, one was a lawyer who presumably obtained a law degree from somewhere other than Mountain State College, (see Tr. at 163), and another was already employed as a paralegal prior to his enrollment. (See Tr. at 143.)

### **Inadequate Job Placement Services or Skills for Paralegal Work**

The evidence at trial demonstrated that Mountain State College failed to provide students with adequate job placement assistance. Despite telling students that the college had contacted lawyers who indicated a demand for paralegals, the college did not arrange for one interview. (See,

e.g., Tr. at 68.) Rather, the school simply sent the graduates a list of local attorneys. (See Tr. at 67, 133.) Occasionally the college would send a student a clipping from the classified ads when there was a job opening. (See Tr. at 68.) In reality, the school's job placement services consisted of these minimal efforts and permitting students to print their resumes at the office. (See Tr. at 133.) However, even this minimal assistance was terminated if a student defaulted on her loans. (See Tr. at 184.)

It was apparent to the students that even when they could get an interview with a lawyer, they lacked the skills needed to perform paralegal work. (See Tr. at 66-67, 135.) Mary Murphy testified that one attorney literally laughed at her lack of skills:

I was – humiliating responses. I was told that I didn't have the skills necessary to work in an office. I had an attorney laugh at me. You know, I just never got it.

(Tr. at 173.) Local Parkersburg attorney Timothy Amos confirmed that (1) there is not a great demand for paralegals in the Parkersburg area, (see Tr. at 317), and Mountain State College had a reputation in the legal community “for turning out people who weren't possessing enough skills” to perform paralegal work. (Tr. at 318.)

### **Mountain State College's Defiance of Regulatory Action**

When it finally became clear to the graduates of the paralegal program that Mountain State College had failed to deliver its promises, they made complaints to the state agency that regulates Mountain State College, the West Virginia Council for Community and Technical College Education (“Council”). James Skidmore, then vice-chancellor for the Council, conducted an investigation in 1997. He interviewed numerous students, in addition to the Plaintiffs. His investigation revealed a number of disturbing shortcomings:

- (1) Of the fourteen students he interviewed, only one had a position as a legal assistant;<sup>2</sup>
- (2) Most of the students interviewed had significant loan obligations they were unable to pay;
- (3) The majority of the students were unable to benefit from the education for which they paid;
- (4) Students were prepared at a lower level than is normally required for paralegals;
- (5) Mountain State College had agreed with ACICS not to accept additional students into the paralegal program until it made significant changes; and
- (6) Mountain State College misled students during the recruitment and orientation process as to the availability of in the paralegal field in the Parkersburg area.

(Plf. Ex. 12, App. at 258-59.) Mr. Skidmore then made the following recommendations:

- ◆ Due to the poor placement rates and the program graduate's inability to find employment, my main concern continues to be the misrepresentation of the program to students. After changes are made in the program, there may be merit to conducting an on-site evaluation of the program to determine if the program is providing the level of education that will enable graduates to find employment and adequately perform the duties of a legal assistant.
- ◆ Sufficient evidence presently exists indicating that misrepresentation of the program to prospective students. As a result, I am requesting that Mountain State College make payment to Tandra Shukla for the student loan obligation incurred by Ms. Shukla while attending Mountain State College. I will ask that Ms. Shukla provide information to Mountain State College documenting her student loan obligation.
- ◆ In addition, please make a written offer to students who previously completed the legal assistance program to return to the College at no cost to complete courses that have been added to the curriculum.

(Id. at 259-60.) Mountain State College ignored these recommendations. (See Tr. at 303 (“Q. [T]he College did not follow those recommendations, correct? A. Absolutely not.”) Because the

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<sup>2</sup> During the investigation, Mountain State College gave Mr. Skidmore five names of individuals that purportedly were employed. (See Tr. at 489.) Of those names, Mr. Skidmore was only able to recall contact with two of them. Mr. Skidmore's request for the names of all graduates was denied by the college on privacy grounds. (See id.)

Council's only enforcement tool is revocation of the school's license – a drastic measure that is never employed, (see Tr. at 342) – the students were never provided a remedy for the college's violations. In the end, rather than make the changes to the paralegal program consistent with accreditation standards, the program was dissolved. (See Tr. at 289.)

### **Impact on Students**

Just as Mr. Skidmore's investigation had concluded, the Plaintiff's all incurred significant student loans , which they could not afford. (See Tr. at 69, 138, 175.) Ms. Carpenter's student loan at the time of trial amounted to \$42,319.00. (See Tr. at 69.) Ms. Holsinger's debt has reached \$56,685.52. (See Tr. at 138.) And Ms. Murphy's debt is approximately \$45,000.00. (See Tr. at 175.) All testified that they could not pay these loans based on their current income. (See Tr. at 69 (Carpenter explaining she worked at Holiday Inn after graduation); 138 (Holsinger explaining that she cannot afford to work because her wages would be garnished by student loan collection); 175.) In addition to the obvious impact on their credit, the students are also effectively precluded from pursuing other educational opportunities because they cannot obtain further student loans. (See Tr. at 140, 175.) And probably the biggest impact has been that the Respondents have all lost their dream of working in the legal field, engendering a lifelong sense of regret and missed opportunity. (See Tr. at 70 (“And then so now even twenty years later my credit is ruined. And back then still and even today the dreams – the dream's gone. They broke it too.”); 140 (“I could have had a better life for my kids. And, you know, my husband wouldn't have to work so hard to support all of us. And I can't even help him.”).)

### **Procedural History**

The Respondents, along with two other students who were dismissed prior to trial, then

brought this action against the school, the student loan companies, and the Council. By the time the case reached trial, all that remained were three claims against the school: (1) Unconscionable Contract; (2) Fraud; and (3) Lack of Consideration. The college never filed a motion to dismiss these claims; nor did it move for summary judgment. Rather, the college sought its day in court, expecting that it would be cleared of the charges leveled by the Plaintiffs. It moved for judgment as a matter of law for the first time at the close of Plaintiffs' evidence. The motion was, as is further explained below, justifiably denied. When the motion was renewed at the close of Defendant's case, it was again appropriately denied.

Before the case was submitted to the jury, the trial court concluded that the Plaintiffs could only maintain a claim for equitable relief on the fraud claim, because the statute of limitations had expired for any claim for actual or punitive damages. After a three day trial, the jury returned a verdict in favor of the Respondents and awarded each student \$20,000.00 in compensatory damages and \$30,000.00 in restitution. In special interrogatories submitted to the jury, the jury found that all three students were unconscionably and fraudulently induced into enrollment in the paralegal program. The college requested a new trial, which as also explained below, was rightfully denied. Subsequently, the trial court entered judgment against Mountain State College on Plaintiffs' Unconscionable Contracts claims and awarded Plaintiffs their reasonable attorney's fees and costs, slashing the Plaintiffs' request by more than twenty percent. The Defendant moved for judgment notwithstanding the verdict to set aside the judgment order and order awarding fees, and for a new trial. The post-trial motions were denied in relevant part and this appeal followed.

#### **SUMMARY OF ARGUMENT**

The Petitioner has appealed to this Court, complaining that Respondents' claims should never

have made it to the jury and that it received an unfair trial. As is more fully set forth below, the Plaintiffs' contract claims were not time barred as they were filed within ten years of the breach of the written enrollment agreement. Moreover, the Plaintiffs presented sufficient evidence on which the circuit court and the jury could have reasonably concluded the students were entitled to judgment on their contract claims and to restitution for their equitable claims. The Plaintiffs were also entitled to their reasonable attorney's fees pursuant to the West Virginia Consumer Credit and Protection Act ("WVCCPA") and the common law.

Respondent's alternative argument – that it is entitled to a new trial – is also without merit. First, the trial court was justified in permitting the Plaintiffs to call two rebuttal witnesses: Tim Amos and James Skidmore. Second, the brief mention of the co-owner of Mountain State College was not prejudicial to Petitioner. Third, Defendant was not entitled to introduce rank hearsay evidence in surrebuttal. And finally, the trial court properly instructed the jury. In short, there is no basis for a new trial.

Respondent made a calculated decision to await trial to vindicate itself. The strategy failed. In this appeal, Respondent fails to demonstrate it was entitled to judgment as a matter of law or that it is entitled to a new trial. The appeal should therefore be denied and the judgments of the circuit court below affirmed.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Respondents do not believe that this appeal presents any issue defined in Rule 20 of the West Virginia Rules of Appellate Procedure and that affirmance by memorandum decision is appropriate. See W. Va. R. App. Proc. 21(c). However, should the Court in its discretion determine that oral argument is necessary, Respondents request the right to present such argument and specifically

preserve the right to do so consistent with the Rules of Appellate Procedure.

## ARGUMENT

Petitioner's brief is a series of misunderstandings of the nature of Plaintiffs' claims and litany of straw men arguments that distract for the simple issues tried before the jury and the circuit court. As explained below, the appeal fails to demonstrate the Petitioner is entitled to judgment as a matter of law or that it is entitled to a new trial. The appeal should therefore be denied.

### A. Standard of Review.

The standards of review for Petitioner's appeal are well-settled. In reviewing the order of the circuit court denying a motion for judgment as a matter of law *de novo*,

it is not the task of this Court to review the facts to determine how it would have ruled on the evidence presented. Instead, its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the nonmoving party.

Fredeking v. Tyler, 224 W. Va. 1, Sy. Pt. 2, 680 S.E.2d 16, Syl. Pt. 2 (2009). The Court reviews a denial of a motion for a new trial for an abuse of discretion:

[T]he ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, [and] the trial court's ruling will be reversed on appeal [only] when it is clear that the trial court has acted under some misapprehension of the law or the evidence.

Estep v. Mike Ferrell Ford Lincoln-Mercury, Inc., 223 W. Va. 209, Syl. Pt. 2, 672 S.E.2d 345, Syl. Pt. 2 (2008) (quotations and citation omitted).

### B. Plaintiffs' Claims Were Timely.

Petitioner's first argument in support of judgment as a matter of law is that Plaintiffs' claims were not timely. In so arguing Petitioner relies on the statute of limitations applicable to oral

contracts and fraud. However, Plaintiffs' two contractual claims (Unconscionable Contract and Lack of Consideration) arise out of a written contracts – the enrollment agreements. (See Plf. Ex. 1, App. 133-34; Plf. Ex. 4, App. at 186-87; Plf. Ex. 6, App. at 223-26.) Accordingly, a ten year statute of limitations applies. See W. Va. Code § 55-2-6. There is no question that Plaintiffs filed their contractual claims within ten years of when the cause of action accrued.<sup>3</sup>

Petitioner argues, without explanation, that Plaintiffs' contractual claims arise out of an oral contract. However, the agreements to pay tuition, to enroll in the paralegal program, and to obtain financing to pay the tuition are clearly written. (See Plf. Ex. 1, App. 133-34; Plf. Ex. 4, App. at 186-87; Plf. Ex. 6, App. at 223-26.) Even assuming *arguendo* that the claims arise out of an oral contract, Plaintiff's claims would still be timely. Plaintiffs graduated in late 1992. They then attempted to find employment and sought the use of Petitioner's placement office. It was not until at least over a year later that they first could have become aware that the representations regarding the placement services that induced them to enroll in the paralegal program were false. Accordingly, the first time that the Plaintiffs could have reasonably been aware of their claims was the end of 1993 (September and December respectively). After they became aware of their claims, the Plaintiffs first pursued administrative remedies.<sup>4</sup> When they exhausted their administrative remedies they then filed

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<sup>3</sup> The statute of limitations for Plaintiffs' unconscionable contract claims arising under the WVCCPA provides that claims may be brought within one year of the last schedule payment of Plaintiffs' loans. See W. Va. Code § 46A-5-101. Here, the tuition was financed through a consumer loan or credit sale. Any claim arising out of violations in connection with the same are preserved until one year after the scheduled due date on the loans. There is no dispute that the last scheduled due date on the Plaintiffs' loans has not passed. Accordingly, Plaintiffs' claims under the WVCCPA are timely.

<sup>4</sup> The statute of limitations for Plaintiffs' claims should have been tolled during the period of time in which they pursued administrative remedies. Donoghue v. Orange County, 848 F.2d 926,

their claims before this Court in June 1998, less than five years from the earliest possible time the causes of action accrued. The question of when a plaintiff knew or should have known of her claims is a question of fact for the jury. See Stemple v. Dobson, 184 W. Va. 317, 320, 400 S.E.2d 561, 564 (1990) (“[W]here a cause of action is based on tort or on a claim of fraud, the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury, and determining that point in time is a question of fact to be answered by the jury.”).

Finally, Plaintiffs’ claims for fraud seek only equitable relief, which is not subject to statute of limitations, but only the doctrine of laches. See Dunn v. Rockwell, 225 W. Va. 43, 54, 689 S.E.2d 255, 266 (2009); Laurie v. Thomas, 170 W. Va. 276, 277, 294 S.E.2d 78, 79 (1982). The evidence demonstrated that Plaintiffs pursued administrative remedies after they first became aware of their potential claims. After the administrative process was unsuccessful, they filed this action. The jury could have reasonably concluded that Plaintiffs were diligent in pursuing their claim and that the claims were not barred by the doctrine of laches. Because Plaintiffs’ claims were timely, the judgments of the circuit court below should be affirmed.

**C. Plaintiffs’ Claims for Unconscionable Contracts Were Supported by the Evidence and Law.**

Defendant makes numerous attacks on the Court’s unconscionability finding, all of which lack merit. First, the evidence supported the finding that the bargaining position between the school and Plaintiffs was grossly unequal. The evidence showed the Plaintiffs were all young, unsophisticated women at the time of their enrollment. (See Tr. at 62-64 (Carpenter explaining she

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930-31 (9th Cir. 1987).

was a single mother working as a maid when she enrolled); 122-24 (Holsinger explaining she was a single woman working as a clerk at K-Mart at time of enrollment); 168 (Murphy explaining she was young and working minimum wage when she enrolled). The school on the other hand had significant experience in for-profit education and enrollment.

Second, Defendant's misrepresentations were not predictions as to future events. See Janssen v. Carolina Lumber Co., 137 W. Va. 561, 570, 73 S.E.2d 12, 17 (1952). The college represented that it had conducted a survey and learned firsthand from lawyers that there was a demand for paralegal services. (See Tr. at 64, 124-26, 134, 169.) However, the evidence showed that this survey was bogus and that a previous survey commissioned by Marietta College had shown there was no demand. (See Tr. at 271-72.) The college evidently knew there was no demand because its own placement officer stated the legal community was closed to paralegals. (See Tr. at 292.) The jury could have reasonably concluded on the evidence that the college knew that there was not a demand for paralegals and misrepresented that 95% of graduates would be placed in paralegal jobs.

Third, Petitioner's argument that there was no evidence to support the circuit court's conclusion that the enrollment agreements were grossly unfair completely ignores evidence presented on this issue. The students all testified that they were induced into the agreement by the promise of placement in paralegal jobs that could earn up to \$40,000.00. (See Tr. at 64, 124-26, 134, 169.) Even the president of the college stated that the primary purpose for an education at Mountain State College was job placement. (See Tr. at 293 ("Q. Do you believe it's important for a for profit business school to place students in their fields? A. Absolutely.")) And students had been promised placement based on the college's previous contact with local lawyers. However, the evidence demonstrated Mountain State College did not provide the most fundamental benefit of a degree –

job placement services. The students all testified that Mountain State College did not arrange for one interview for them. (See, e.g., Tr. at 68.)

The evidence also demonstrated that the school failed to provide the students with the skills necessary to be a paralegal. The Plaintiffs testified that lawyers laughed at their Mountain State College degree, (see Tr. at 173), and local attorney Timothy Amos testified that the school had a reputation of turning out graduates that could not complete basic work required of a paralegal. (See Tr. at 318.) This evidence supported the Plaintiffs' claims that the contract lacked consideration and was not the type of evidence of the quality of the education (e.g., adequacy of textbooks, quality of curriculum) that would have been applicable to the educational malpractice claim dismissed by the circuit court. The evidence went to the fundamental consideration of the enrollment agreement – why the students ever agreed to pay for classes at Mountain State College. Contrary to Petitioner's argument, the Plaintiffs did prove that no services were provided. When Mountain State College failed to arrange for even one interview for its graduates, it materially breached the agreement, rendering it completely one-sided. Accordingly, the jury concluded in the verdict form that the college breached its duty to the students to provide job placements services. (See Verdict Form, App. at 363.)

Fourth, Petitioner is simply incorrect when it states that the WVCCPA applies only to creditors. See W. Va. Code § 46A-1-103(3). The statute provides that claims for violations under the act may be brought against the “person” who violated the act. See W. Va. Code § 46A-5-101(1). This Court has previously construed the act broadly to achieve the remedial purposes of the act. See Barr v. NCB Management Services, Inc., 227 W. Va. 507, \_\_\_, 711 S.E.2d 577, 583 (2011); see also Thomas v. Firestone Tire and Rubber Co., 164 W. Va. 763, 768, 266 S.E.2d 905, 908 (1980).

Moreover, the unconscionability statute refers to transactions giving rise to consumer loans *and* credit sales:

(1) With respect to a transaction which is or gives rise to a consumer credit sale, consumer lease or consumer loan, if the court as a matter of law finds:

(a) The agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, the court may refuse to enforce the agreement, or

(b) Any term or part of the agreement or transaction to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, or may 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). The transaction – the enrollment agreement and financing – clearly falls under the definition of a consumer credit sale:

(13)(a) Except as provided in paragraph (b), “consumer credit sale” is a sale of goods, services or an interest in land in which:

(i) Credit is granted either by a seller who regularly engages as a seller in credit transactions of the same kind or pursuant to a seller credit card;

(ii) The buyer is a person other than an organization;

(iii) The goods, services or interest in land are purchased primarily for a personal, family, household or agricultural purpose;

(iv) Either the debt is payable in installments or a sales finance charge is made; and

(v) With respect to a sale of goods or services, the amount financed does not exceed forty-five thousand dollars or the sale is of a factory-built home as defined in section two, article fifteen, chapter thirty-seven of this code.

(b) “Consumer credit sale” does not include a sale in which the seller allows the

buyer to purchase goods or services pursuant to a lender credit card or similar arrangement.

W. Va. Code § 46A-1-102(13). There is no question that Mountain State College is the seller of services that are financed by credit – namely student loans. All three Plaintiffs signed enrollment agreement expressly stating they would obtain student loans to pay the tuition. (See Plf. Ex. 1, App. 133-34; Plf. Ex. 4, App. at 186-87; Plf. Ex. 6, App. at 223-26.) The services were for personal use and were not over \$45,000.00. Cf. Jackson v. Culinary School of Washington, 788 F. Supp. 1233, 1255 (D.D.C. 1992) (assuming that sale of educational services is a consumer credit sale). Just because the Plaintiffs initially sought to enjoin the enforcement of the loans does not absolve the college of its liability under the act.

Finally, the Petitioner makes the perplexing contention that it has never sought to enforce the enrollment agreements. It was undisputed that the College received the tuition. And the evidence established that it did not provide the job placement services that were the material consideration for the agreement. The college has the money, but the students did not receive the services. The agreement was indeed enforced when the college accepted payment for enrollment. Because the circuit court and the jury concluded that the enrollment agreements were unconscionable, induced by fraud, and lacked consideration, the Plaintiffs were entitled to restitution.

The basis of the doctrine of restitution is that, when the decree under which the money has been paid has been set aside, the party who received the money has no basis for retaining it. He has received money of another to which he was not entitled.

Simmons v. Simmons, 91 W. Va. 32, 36, 112 S.E. 189, 190 (1922). Here the evidence established, and the jury concluded that the college failed to provide services to the Plaintiffs. See Hamilton v. Harper, 185 W. Va. 51, 54, 404 S.E.2d 540, 543 (1991) (“It is axiomatic that a contract requires

consideration to be enforceable.”); First Nat’l Bank v. Marietta Mfg. Co., 151 W. Va. 636, 642, 153 S.E.2d 172, 177 (1967) (“That consideration is an essential element of, and is necessary to the enforceability or validity of a contract is so well established that citation of authority therefor is unnecessary.”). Accordingly, the college had received money to which it was not entitled. The doctrine of restitution therefore provides that the college may be required to repay the Plaintiffs’ student loans directly to the third party holders of the loans.<sup>5</sup>

Plaintiffs presented evidence upon which the jury and the circuit court could have found for Plaintiffs on their Unconscionable Contract, Fraud, and Lack of Consideration claims. Defendant has failed to demonstrate it is entitled to judgment as a matter of law and its appeal should accordingly be denied.<sup>6</sup>

**D. Plaintiffs Were Entitled to Present Extrinsic Evidence of the Terms of the Enrollment Agreement Because the Written Agreement Was Ambiguous, Induced by Fraud and Unconscionable Conduct, and Lacked Consideration.**

Petitioner argues that because the representations regarding job placement were not included in the enrollment agreement, Plaintiffs were prohibited from introducing extrinsic evidence as to the agreements’ material terms. While it is generally true that extrinsic evidence is inadmissible to explain the terms of a written contract, this prohibition is inapplicable when the agreement is ambiguous or the product of fraud, illegality, or insufficiency of consideration: “Fraud, together with

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<sup>5</sup> Assuming, *arguendo*, there was any error in the jury verdict regarding the restitution award, that error was harmless because the Plaintiffs were permitted to recover the amounts awarded as restitution as part of their actual damages under the WVCCPA. See W. Va. Code § 46A-5-101(1).

<sup>6</sup> Petitioner alternatively argues that it is entitled to a new trial because the jury was improperly instructed regarding Plaintiffs’ claims. The Petitioner does not contend that the instructions were incorrect statements of law, but rather that Plaintiffs were not entitled to relief for their claims as a matter of law. For the same reasons as stated above, the instructions provided were appropriate and the Petitioner is not entitled to a new trial.

a showing of illegality, duress, mistake, or insufficiency of consideration are among the well recognized exceptions to the parol evidence rule.” Cardinal State Bank, Nat. Ass’n v. Crook, 184 W. Va. 152, 156, 399 S.E.2d 863, 867 (1990). Here the enrollment agreement was clearly ambiguous as to its material terms. For example, the agreements themselves state nothing about the job placement services the college would provide. (See Plf. Ex. 1, App. 133-34; Plf. Ex. 4, App. at 186-87; Plf. Ex. 6, App. at 223-26.) The Defendant agreed at trial that job placement was the primary purpose of enrollment at Mountain State College. (See Tr. at 293.) Moreover, the evidence established both that the students were fraudulently induced to enter into the agreements and that the agreements lacked consideration. (See Special Interrogatories, App. at 363-65.) Accordingly, parol evidence to explain the terms of the agreement was admissible.<sup>7</sup>

**E. Plaintiffs’ Claims for Damages Were Supported by the Evidence.**

On Plaintiffs’ claims of unconscionability and lack of consideration, the jury could have reasonably concluded that Plaintiffs suffered actual damages for loss of employment opportunities and annoyance and inconvenience. The Plaintiffs testified that they loss the opportunity for jobs of up to \$40,000.00 a year. (See Tr. at 64, 126, 168.) Additionally, the students all have had damage to their credit when they could not afford to repay the loans. (See Tr. at 69, 138, 175.) Moreover the students effectively were precluded from pursuing other education opportunities because they cannot obtain further student loans. (See Tr. at 140, 175.) And probably the biggest impact has been that the Respondents have all lost their dream of working in the legal field, engendering a lifelong feeling of regret and missed opportunity. (See Tr. at 70 (“And then so now even twenty years later

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<sup>7</sup> Likewise, the circuit court’s rejection of Defendant’s proposed instruction, which would have prohibited the jury from considering parol evidence in its deliberation, was properly excluded.

my credit is ruined. And back then still and even today the dreams – the dream’s gone. They broke it too.”); 140 (“I could have had a better life for my kids. And, you know, my husband wouldn’t have to work so hard to support all of us. And I can’t even help him.”).) The evidence at trial was more than sufficient to support an award of economic damages, annoyance and inconvenience, and emotional distress of \$20,000.00 for each Plaintiff. See King v. JP Morgan Chase Bank, N.A., No. 3:09-0744, available at 2010 WL 2815729, at \*2 (S.D.W. Va. 2010) (observing damages for annoyance, inconvenience and emotional distress are recoverable under the WVCCPA); City Nat’l Bank of Charleston v. Wells, 181 W. Va. 763, 384 S.E.2d 374 (1989) (concluding consequential damages, including damage to credit that are reasonable foreseeable, are recoverable). If anything, the award of compensatory damages was exceedingly low based on the evidence.

**F. Plaintiffs Were Entitled to Recover Their Reasonable Attorney’s Fees and Costs.**

Petitioner contends that there was no authority for Plaintiffs to recover their attorney’s fees and costs of the action. However, as explained more fully supra at section C, the WVCCPA applied to the college’s credit sale of educational services. The act clearly provides that a circuit court has the discretion to award attorney’s fees and the costs of the litigation arising out of, among other things, a claim for unconscionable conduct. See W. Va. Code § 46A-5-104. Moreover, the circuit court has discretion to award attorney’s fees on a successful claim of fraud. See Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc., 188 W. Va. 468, 474, 425 S.E.2d 144, 150 (1992) (“[W]here it can be shown by clear and convincing evidence that a defendant has engaged in fraudulent conduct which has injured a plaintiff, recovery of reasonable attorney's fees may be obtained in addition to the damages sustained as a result of the fraudulent conduct.”).

**G. The Testimony of James Skidmore Was Properly Admitted.**

The circuit court permitted the testimony of James Skidmore on Plaintiffs' case in rebuttal. The circuit court had previously prohibited the testimony in Plaintiffs' case in chief. However, because the Defendant opened the door, the trial court properly admitted the testimony in Plaintiffs' rebuttal. In any event, assuming *arguendo* there was any error in admitting Skidmore's testimony, such error was harmless because the testimony should not have been excluded at the outset.

It is well-settled that a trial court has broad authority whether to admit evidence at trial:

Assessing the potential prejudice and how it should be weighed is generally within the broad discretion of the trial court, and such assessment will not be disturbed unless we find an abuse of discretion.

Hatcher v. McBride, 221 W. Va. 5, 9650 S.E.2d 104, 108 (2006). In order for evidence that is relevant to be excluded, its prejudicial effect must substantially outweigh its relevance. See W. Va. R. Evid. 403. Skidmore's testimony concerned his investigation of Mountain State College and his conclusions that (1) the college made misrepresentations in its recruitment and orientation of students, and (2) the college failed to adequately place graduates in paralegal jobs. (See App. at 258-60.) These conclusions were directly relevant to the Plaintiffs' claims, and accordingly should only have been excluded if their prejudicial value substantially outweighed the relevance. Skidmore's evidence was so highly probative it cannot be said that the circuit court was clearly erroneous in permitting its admissibility.

Witnesses are permitted to testify as to their personal knowledge regarding investigations they conduct pursuant to an authority granted by law. Rule 803(8) provides three types of information that may be admitted pursuant to the public records exception: (1) activities of the agency; (2) matters that were observed pursuant to a duty of law; and (3) factual findings resulting

from an investigation made pursuant to law. See W. Va. R. Evid. 803(8). Skidmore's testimony – and his letter communicating the results of the investigation – resulted from an investigation made pursuant to law. (See Tr. at 340.)

Defendant contended that the products of Mr. Skidmore's investigation should not be admitted because the information lacks trustworthiness. This contention is wholly without merit. Defendant carries the burden to demonstrate that Mr. Skidmore's factual findings are untrustworthy. See Hadox v. Martin, 209 W. Va. 180, 187, 544 S.E.2d 395, 402 (2001). The purpose of the untrustworthy requirement was to prevent prosecutors from introducing police investigations against criminal defendants without having an officer testify. See State v. Dilliner, 212 W. Va. 135, 141, 569 S.E.2d 211, 217 (2002). Here, Plaintiffs called Mr. Skidmore to testify directly as to his factual findings made pursuant to his investigation. Accordingly, there was no concern about out-of-court statements, which may not be cross-examined, being admitted against Defendant.

Moreover, these findings – essentially that the College failed to place legal assistants in actual legal assistant positions – were essentially not refuted. The college was sanctioned by the accrediting board for its failure to place students. (See Tr. at 286, 290.) In addition, the students corroborated that there were misrepresentations in the recruitment and orientation process. (See Tr. at 64, 124-26, 134, 168-69.) Defendant was unable to demonstrate that Mr. Skidmore's factual findings lacked trustworthiness.

Finally, the circuit court appropriately admitted Skidmore's testimony on rebuttal because the Defendant opened the door to the testimony in its case in chief. Judith Sutton testified (1) that she had not received complaints by students about the paralegal program, (see Tr. at 279-80 ), (2) that the paralegal program was adequate, (see Tr. at 281), and (3) that job placement was an

important factor in the college's mission. (See Tr. at 293.) Skidmore refuted Sutton's testimony that she was not aware of other complaints and that the paralegal program was adequate in placing students in paralegal jobs. Accordingly, the testimony was properly admitted.

**H. The Circuit Court Properly Admitted the Testimony of Timothy Amos.**

While the circuit court initially excluded the testimony of Mr. Skidmore and Mr. Amos from Plaintiffs' case in chief, the court never placed restrictions on the testimony as it related to rebuttal. Mr. Amos was called to rebut the Defendant's representations that it provided students with an adequate instruction and that there was a demand for paralegals in the Parkersburg area. (See Tr. at 317-18.) Mr. Amos testified as to his own personal experience with paralegals that graduated from Mountain State College and his knowledge of the local Parkersburg area. Defendant's objections about the quality of Mr. Amos's knowledge went to the weight of his testimony, not the admissibility. The circuit court's decision to permit this testimony, which was probative of the central claims in the trial, was not clearly erroneous.

**I. The Brief Mention of School Owner Michael McPeek Was Not Intentional and Did Not Prejudice Defendant.**

Mountain State College co-owner Michael McPeek had been involved in unrelated criminal proceedings months before the trial. Counsel for Defendant proposed an order that prohibited the parties from referencing the criminal proceeding in the instant trial. Plaintiffs agreed. However, in reading the agreed order counsel had mistakenly overlooked that the order prevented reference to McPeek *or* the criminal proceeding, (see App. at 80), and believed the intent of the order was to exclude only references to Mr. McPeek's criminal proceeding. In cross examination of Judith Sutton, Plaintiffs' counsel asked questions about the ownership of the school and Ms. Sutton stated

the name of Mr. McPeek. (See Tr. at 270.) Mr. McPeek had been sitting in the courtroom for the trial and clearly communicating with counsel and Ms. Sutton. Plaintiffs' counsel then innocently asked if Mr. McPeek was sitting in the gallery for no other reason than to satisfy the curiosity of the jury as to the identity of the individual who had been taking an interest in the litigation. No mention was made of the criminal proceeding, and there was no aspersions or other implication cast on Mr. McPeek. There is absolutely no evidence that this brief mention prejudiced the Defendant in any way.<sup>8</sup> The jury had no reason to know that Mr. McPeek had been involved in a criminal proceeding, no reason to believe that Mr. McPeek was involved in any of the allegations of misconduct leveled against the school, or that Mr. McPeek had any relation to the issues in the case aside from his being simply a co-owner of the school.

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 v. Mahon, 210 W. Va. 53, 61, 552 S.E.2d 788, 796 (2001). The Petitioner failed to demonstrate (1) that the violation of the order was intentional, and (2) it was reasonably calculated and probably did cause an improper judgment by the jury. Absent some show of prejudice to the Defendant, the trial court was correct in refusing to declare a mistrial.

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<sup>8</sup> Counsel for Defendant suggests that there was an awkward and perceptible pause in the proceedings during this exchange. Plaintiffs dispute this. Nor do Plaintiffs recall the circuit judge staring in "sheer disbelief" for an extended period as a result of the exchange. To be sure, the order limiting discussion about McPeek's criminal proceedings was an agreed order, and the trial judge likely had no knowledge about its significance and understandably, just like the jury, had no reason to think twice about the innocuous exchange.

**J. Defendant's Hearsay and Extrinsic Evidence Was Properly Excluded on Surrebuttal.**

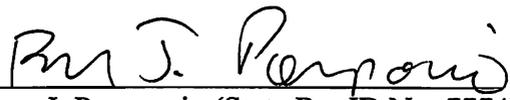
Defendant sought to introduce written hearsay evidence and oral testimony, outside of the witness's personal knowledge, about lawyers' employment and perceptions about the abilities of other graduates of the paralegal program. Defendant had ample opportunity to call witnesses who had personal knowledge about the matters at issue – whether they be the students themselves or their employers – but declined. No showing was made that such witnesses were unavailable, and Defendant made no showing that the evidence was admissible under some exception to the hearsay rule. The circuit court therefore was correct to exclude it.

**CONCLUSION**

The Petitioner has failed to demonstrate that it is entitled to judgment as a matter of law or that it is entitled to a new trial. The judgments of the circuit court and jury below should be affirmed and the 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

MOUNTAIN STATE COLLEGE,

Defendant/Petitioner,

v.

APPEAL NO. 11-1203  
(On appeal from the Circuit Court  
of Kanawha County  
Civil Action No. 98-C-1497  
Honorable Tod J. Kaufman)

SHERYL HOLSINGER, SANDRA R.  
CARPENTER, and MARY J. MURPHY,

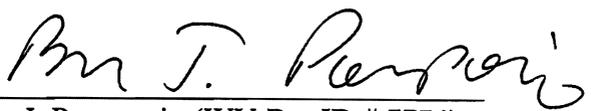
Plaintiffs/Respondents.

CERTIFICATE OF SERVICE

I, Bren J. Pomponio, do hereby certify that I have served a true and exact copy of the foregoing *Brief of Respondents Sheryl Holsinger, Sandra R. Carpenter, and Mary J. Murphy* upon counsel of record as listed below, via United States mail with postage prepaid on this the 5th day of January, 2012, addressed as follows:

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