No. 22-ICA-330

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

CIT BANK, N.A.,

Plaintiff/Counterclaim Defendant,

v.

CAROLINE COFFMAN, as Administratrix of the Estate of Shirley Bowen,

Defendant/Counterclaim Plaintiff.

From the Circuit Court of Hampshire County, West Virginia
Civil Action No. 16-C-97

REPLY BRIEF OF PETITIONER CIT BANK, N.A.

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Ms. Bowen's approach to this appeal is clear: raise every possible procedural hurdle—whether valid or not—to prevent the Court from addressing the merits of the case. However, Ms. Bowen's arguments misstate both the facts and the law to justify the outcome in Judge Williams' court below. Indeed, Ms. Bowen either misstates or entirely ignores (1) this Court's scheduling order, (2) the rule of finality, (3) punitive damages jurisprudence, (4) the American Rule, and (5) the plain error doctrine. Put simply, Ms. Bowen seeks to turn West Virginia jurisprudence on its head, and this Court should not allow her to do so.

First, Ms. Bowen argues—incorrectly—that CIT's compliance with this Court's scheduling order has rendered it unable to perfect its appeal of the May 6, 2022 Order Denying New Trial Motion ("May 6 Order"). Specifically, Ms. Bowen argues that CIT's appeal is now limited to the November 18, 2022, Order Following Post-Trial Review of Punitive Damages (the "November 18 Order") and the November 22, 2022, Order Granting Estate of Shirley Bowen's Motion for Attorney Fees (the "November 22 Order"). However, the opposite is true: had CIT briefed the errors from the May 6 Order—in violation of the scheduling order—it would have subjected itself to a dismissal of its entire appeal. It cannot be possible that CIT was supposed to adhere to the Court's scheduling order by briefing jurisdiction, while also ignoring it at the same time by briefing the substantive issues of the appeal of the May 6 Order.

Second, Ms. Bowen argues—contrary to West Virginia law that reaches back to its founding—that CIT should have ignored the rule of finality and submitted three separate appeals to two different courts. In fact, she goes so far as to argue that the rule of finality does not even apply to this case. Again, this is erroneous; CIT could not appeal this case until the entry of the circuit court's final order on November 22, 2022.

Third, Ms. Bowen argues that despite CIT's true and reasonably held belief that she was in default of the loan documents, it should be punished—through punitive damages—for its attempts to protect its property rights. In doing so, Ms. Bowen misstates that CIT had "actual knowledge" that she occupied the Property. The evidence shows that is not true. Regardless, West Virginia law is clear on this topic: a party acting pursuant to a bona fide claim of right is not subject to punitive damages, as is the case here.

Fourth, Ms. Bowen argues that CIT's vigorous defense of multiple contested issues subjects CIT to payment of her attorneys' fees. However, this argument does not square with the American Rule requiring all parties in litigation—except in exceptional circumstances involving bad faith conduct—to pay their own attorneys' fees.

Fifth, in the face of significant law to the contrary, Ms. Bowen argues that Judge Williams erred in reducing her award for punitive damages to avoid a double recovery based on the tort of outrage. Specifically, she argues that CIT waived its right to seek a reduction based on duplication because it failed to raise the issue during trial. West Virginia law—and specifically the plain error doctrine—requires this Court to reject that argument.

For those reasons, and the reasons set forth below, all of Ms. Bowen's arguments must fail.

ARGUMENT

1. CIT perfected its appeal based on this Court's directive in its February 10, 2023, Scheduling Order.

A. CIT perfected its appeal as both requested and required by this Court.

An appellate court is required to review the basis of its jurisdiction. *Basile v. Calwell Prac., PLLC*, No. 16-0117, 2017 WL 656993, at *4 (W. Va. Feb. 17, 2017) (memorandum decision) ("we have a responsibility *sua sponte* to examine the basis of our own jurisdiction"). Pursuant to that requirement, the Intermediate Court of Appeals entered a scheduling order requiring CIT to

address its jurisdiction over the May 6 Order before addressing the substantive issues of its appeal of that order.

Rule 5 of the West Virginia Rules of Appellate Procedure governs the logistics of an appeal, including both this Court's issuance of a scheduling order and the requirements for perfection. Rule 5(d) provides, "[a]s soon as practicable after the proper filing of the notice of appeal, the Intermediate Court or the Supreme Court will issue a scheduling order." W. Va. R. App. P. 5(d). "If a party fails to comply with a scheduling order, the Intermediate Court or the Supreme Court may impose sanctions, or dismiss the appeal, or both." W. Va. R. App. P. 5(e).

On January 20, 2023, the Clerk of this Court contacted counsel for CIT and advised him that there was some concern about the timeliness of the Notice of Appeal and that CIT should file a Motion for Consideration Out of Time. In that motion, CIT outlined the reasons why—based on the rule of finality—its appeal of the May 6 Order, the November 18 Order, and the November 22 Order was timely.

Three weeks later, and fifty-one days after CIT filed its Notice of Appeal, this Court entered its Scheduling Order wherein it granted "Petitioner's motion for the notice of appeal to be considered timely, *in part,*" and noted that "[t]his Court considers Petitioner's notice of appeal to be timely filed as to the order entered by the Circuit Court on November 18, 2022." In other words, the Court granted the motion for all appealable issues, except for those arising from the May 6 Order.

As to the issues relating to the May 6 Order, the Court instructed:

> On its own motion, this Court directs the parties, as part of their briefing, to address whether any of the issues resolved by the Circuit Court in orders entered prior to the November 18, 2022, order are preserved for appeal, and whether the Intermediate Court of Appeals has jurisdiction over each of those those [sic] issues.

The Court's Order is clear; in its brief, CIT was charged *solely* to address whether the issues in the May 6 Order were preserved for appeal, and whether the Court possesses jurisdiction over those issues.

Based on that instruction, CIT filed its March 20, 2023, opening brief wherein it briefed the Court's jurisdiction over the issues from the May 6 Order and the substantive issues arising from each of the November 18 Order and the November 22 Order. As such, CIT perfected the appeal in the way that this Court requested, and in compliance with Rule 5(f) of the West Virginia Rules of Appellate Procedure. While it is true that "[a]ssignments of error that are not argued in briefs on appeal *may* be deemed by this Court to be waived," that does not apply here. *Addair v. Bryant*, 168 W. Va. 306, 320, 284 S.E.2d 374, 383 (1981) (emphasis added). First, it would be nonsensical for the Court to ask a party to brief a specific issue—and omit others—and then penalize that party for doing so. Second, that rule simply *allows* a court to disregard an assignment of error, it does not require it. Again, having requested for CIT to brief the issues the way it did, it would be an injustice for the Court to now disregard all of CIT's assignments of error flowing from the May 6 Order. Third, it was Ms. Bowen herself that raised the issue of this Court's jurisdiction in her January 28, 2023, Response to Petitioner's Motion for Consideration Out of Time. In her opposition brief, Ms. Bowen cites to Rule 5 and its requirement that "an appeal must be perfected within four months." (Opp. Brief at 5). Citing her incorrect belief that CIT failed to perfect within the required four months, Ms. Bowen argued that "Petitioner's failure to follow the Rules raises a jurisdictional issue." (*Id.* at 7).

Remarkably, despite raising the jurisdictional issue herself, Ms. Bowen now argues that CIT should have ignored the Scheduling Order, ignored the Court's jurisdictional briefing request, and briefed the substantive issues arising from the May 6 Order. However, had CIT done so, it

would have violated the directive of the Scheduling Order and subjected itself to dismissal of its appeal. Indeed, Rule 5(e) of the West Virginia Rules of Appellate Procedure provides, "[i]f a party fails to comply with a scheduling order, the Intermediate Court or the Supreme Court may impose sanctions, or dismiss the appeal, or both." W. Va. R. App. P. 5(e). Thus, CIT had no choice but to comply with this Court's Scheduling Order. For that reason alone, CIT properly perfected its appeal of all three orders.

An additional problem under Ms. Bowen's theory is that it would foreclose all additional briefing after the four month window for perfection had run. To the contrary, it is not at all unusual for the Supreme Court of Appeals to request supplemental or additional briefing even after the parties file their briefs. *See, e.g., James v. Strader*, No. 15-0415, 2016 WL 1550650, at *1 (W. Va. Apr. 15, 2016) (memorandum decision) (noting that as to the appeal of a February 19, 2015 order "[t]he parties also filed supplemental briefs pursuant to an amended scheduling order, entered November 12, 2015"); *see also In re K.B.*, No. 21-0277, 2022 WL 1092826, at *2 (W. Va. Apr. 12, 2022) (memorandum decision) ("The mother perfected her appeal in accordance with this Court's scheduling order, response briefs were filed, and we requested supplemental briefing prior to hearing oral arguments in this case").

In *Specialized Loan Servicing LLC v. Ronald J. Stover, et al.*, No. 20-0125, the petitioner ("SLS") sought to appeal an order that found liability against SLS for three violations of the West Virginia Consumer Credit and Protection Act. *Specialized Loan Servicing LLC v. Ronald J. Stover and Patti A. Stover*, (No. 20-1025), 2021 WL 6135524 (W.Va.). SLS appealed that order on summary judgment, prior to the circuit court entering an order on those plaintiffs' entitlement to statutory damages, actual damages, and reasonable attorneys' fees—which may be awardable under the West Virginia Consumer Credit and Protection Act. *See generally, id.* After the appeal

was perfected and briefing on the assignments of error had concluded, the Supreme Court of Appeals issued an order requesting additional briefing on the finality of the judgment order that led to the appeal. *Specialized Loan Servicing LLC v. Ronald J. Stover and Patti A. Stover*, No. 20-1025 (W. Va. Jan. 6, 2022). Indeed, Rule 10(h) expressly provides that "[t]he Intermediate Court or the Supreme Court may, on its own motion or upon motion of a party, direct that supplemental briefs be filed addressing a particular issue or circumstance." W. Va. R. App. P. 10(h).[1]

Regardless, CIT perfected the appeal by invoking the May 6 Order throughout its opening brief. For instance, when discussing the May 6 Order in the procedural history section of its brief, CIT noted, "[t]his ruling is the subject of the jurisdictional issue in this brief." (Opening Brief at 8). CIT also specifically stated, "[t]his appeal focuses on the Circuit Court's rulings in three separate post-trial orders: (1) a May 6, 2022, Order Denying CIT Bank N.A.'s Motion for New Trial." (Opening Brief at 10). And CIT noted that "at this Court's request, this particular brief also focuses on this Court's jurisdiction to consider CIT's appeal of the May 6 Order, as well as CIT's substantive arguments regarding the errors in both the November 18 Order and the November 22 Order." (Opening Brief at 10).

Therefore, CIT made clear throughout the brief that it maintained every intention to pursue its appeal of the May 6 Order. CIT also made clear that it was solely addressing jurisdiction at the Court's request. It is for that reason that CIT stated that "[o]nce those issues are decided, CIT requests that this Court order briefing on the errors arising from the May 6 Order." (Opening Brief at 11). Accordingly, by invoking the May 6 Order and briefing the issues specifically requested in the Scheduling Order, CIT has properly perfected its appeal of all three orders.

[1] Interestingly, *Stover* is a mirror image of the issues in this case. There, an appeal was taken before the determination of attorney's fees. The Supreme Court of Appeals immediately flagged that the finality rule deemed the appeal premature.

B. West Virginia law provides for the perfection of an appeal from a final judgment only.

Rule 5(f) of the West Virginia Rules of Appellate Procedure requires perfection of an appeal within four months "unless otherwise provided by law." W. Va. R. App. P. 5(f) ("Unless *otherwise provided by law*, an appeal must be perfected within four months of the date the judgment being appealed was entered." W. Va. R. App. P. 5(f) (emphasis added)). West Virginia law does provide otherwise; specifically, the law in West Virginia does not require—nor does it even permit—the appeal of *any* non-final judgment within four months. Instead, the courts of appeals only have jurisdiction over "*[f]inal* judgments or orders of a circuit court." W. Va. Code Ann. § 51-11-4 (emphasis added); *see also State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot and Morris*, No. 21-0458, 886 S.E.2d 346, 350 (W. Va. Mar. 31, 2023) (quotation omitted) ("We have held that under W. Va. Code, 58-5-1 [1998], appeals only may be taken from final decisions of a circuit court"). Because there was no final judgment prior to November 22, 2022, CIT could not have legally appealed the May 6 Order before that date.

Ms. Bowen ignores the rule of finality in West Virginia and argues that without regard to anything else, CIT had four months—until September 6, 2022—to perfect its appeal of the May 6 Order. However, this position is at odds with both the Rules of Appellate Procedure and West Virginia law. Instead, because there was no final judgment until November 22, 2022, the clock for CIT's appeal of the May 6 Order did not begin to run until that date. Accordingly, based on Rule 5(f), CIT's appeal of all three orders—filed within thirty days of the November 22 Order—was timely.

C. There was no final order permitting an appeal until November 22, 2022.

The Supreme Court of Appeals of West Virginia reaffirmed its commitment to the rule of finality as recently as March 31, 2023, when it held that "under W. Va. Code, 58-5-1 [1998],

appeals *only* may be taken from final decisions of a circuit court." *State ex rel. W. Virginia Univ. Hosps., Inc. v. Gaujot and Morris*, 886 S.E.2d at 350 (emphasis added and quotation omitted). In doing so, the court noted that "[b]y limiting appellate consideration to final judgments, the finality rule serves to avoid piecemeal review of trial court rulings which do not end litigation regarding all or some claims or parties in a case." *Id.*

Under the mandate of the West Virginia Supreme Court of Appeals, a judgment in West Virginia cannot be final until the circuit court completes a review of punitive damages under *Garnes. Jordan v. Jenkins*, 245 W. Va. 532, 557, 859 S.E.2d 700, 725 (2021) ("After a jury returns a punitive damages award, *Garnes requires* that the trial court make a meaningful and adequate review of the award") (quotation omitted and emphasis added). Thus, where punitive damages are awarded, there can be no final judgment until after the court completes its review of the award.

While there is an exception that allows a permissive appeal before damages are determined, that only applies in cases where the remaining determination is solely ministerial in nature. *See C & O Motors, Inc. v. W. Virginia Paving, Inc.*, 223 W. Va. 469, 474, 677 S.E.2d 905, 910 (2009) (quotation omitted and emphasis added) ("Courts have recognized an exception to the prohibition against appealing an order that imposes liability only. Under this exception an immediate appeal from a liability judgment *will be allowed* if the determination of damages can be characterized as ministerial."). Accordingly, the exception is entirely permissive in that an immediate appeal "will be allowed" if the remaining damages determination is ministerial. Thus, even if the damages determination is ministerial, an immediate appeal is not required.

Here, Judge Williams did not complete his mandatory post-verdict *Garnes* analysis until November 18, 2022, and he did not rule on attorneys' fees until four days later, on November 22, 2022. Notably, those decisions are two of the subjects of this appeal, and on that basis alone, the

May 6 Order was not a final appealable order. However, under Ms. Bowen's theory, CIT should have appealed the May 6 Order to the Supreme Court of Appeals of West Virginia—since that was prior to the effective date creating the Intermediate Court of Appeals—and then separately appealed each of the November 18 Order and the November 22 Order to this Court. That would have led to three separate appeals in two different courts. Such piecemeal appeals is specifically the situation that the Supreme Court of Appeals said in *Gaujot* that is not permitted under the finality Rule.

This set of bifurcated appeals could have caused any number of jurisdictional problems that were simply untenable. In fact, it is conceivable that the Supreme Court of Appeals would overturn the verdicts on any of the claims addressed in the May 6 Order while the Intermediate Court of Appeals could affirm the punitive damages award flowing from those overturned claims. This is especially true here where the Supreme Court of Appeals would be examining the propriety of recovery for the tort of outage, while this Court would separately and concurrently examine the merits of punitive damages under that same claim. Put differently, it is entirely possible that had CIT acted as Ms. Bowen suggests, it would have been subjected to inconsistent judgments from two different courts.

This sort of piecemeal review is precisely what the rule of finality seeks to avoid. Accordingly, this Court should decline Ms. Bowen's invitation to turn decades of jurisprudence on its head and should instead adhere to the rule of finality.

D. Rule 72 of the West Virginia Rules of Civil Procedure does not obviate the rule of finality.

Rule 72 of the West Virginia Rules of Civil Procedure states:

> The time for filing an appeal commences to run and is to be computed from the entry of any of the following orders: Granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or

> make additional findings of fact, whether or not an alteration of the judgment would be required if the motion were granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; *or granting or denying a motion for a new trial under Rule 59.*

W. Va. R. Civ. P. 72 (emphasis added). However, under W. Va. Code Ann. § 51-11-4, this Court only has jurisdiction over final orders. Indeed, while the word "final" does not appear in Rule 72, the Supreme Court of Appeals of West Virginia has previously recognized the finality requirement as it relates to Rule 72. For instance, in *Riffe v. Armstrong*, the Court recognized:

> An appeal may be taken from a *final* order disposing of a motion under Rule 59(e) of the West Virginia Rules of Civil Procedure at any time within the appeal period provided by the entry of the order or within any proper extension of the appeal period.

Riffe v. Armstrong, 197 W. Va. 626, 631, 477 S.E.2d 535, 540 (1996), *holding modified by Moats v. Preston Cnty. Comm'n*, 206 W. Va. 8, 521 S.E.2d 180 (1999) (emphasis added). Accordingly, only a final order disposing of a motion under Rule 59(e) is appealable.

While there are exceptions to the rule of finality, Rule 72 is not one of them. Instead, "the statutory and rule-based exceptions to the finality rule include writs of prohibition, West Virginia Code § 53-1-1 (1923), certified questions, West Virginia Code §§ 58-5-2 (1998) and 51-1A-3 (1996), and judgments made pursuant to *Rule 54(b)* of the Rules of Civil Procedure." *Vaughan v. Greater Huntington Park & Recreation Dist.*, 223 W. Va. 583, 588, n. 10, 678 S.E.2d 316, 321 (2009) (emphasis added); *see also Credit Acceptance Corp. v. Front*, 231 W. Va. 518, 523, 745 S.E.2d 556, 561 (2013) (noting exceptions of "writs of prohibition, certified questions, or…judgments rendered under Rule 54(b) of the West Virginia Rules of Civil Procedure."). Therefore, Rule 54(b) is the only rule-based exception to the requirement of finality.

For instance, in *Wheeling Dollar Sav. & Tr. Co. v. Singer*, the Supreme Court of Appeals found that "the final order of the circuit court as contemplated by Rule 72, W.Va. RCP…was not

made until the court's order of September 27, 1977 … Until that final order, it was possible, though admittedly not likely, that [Appellant] could prevail." *Wheeling Dollar Sav. & Tr. Co. v. Singer*, 162 W. Va. 502, 506, 250 S.E.2d 369, 372 (1978).

Here, CIT's motion was filed pursuant to Rule 72, not Rule 54(b). Accordingly, no exception to the rule of finality applies to this case. Moreover, it was possible for CIT to prevail in its opposition to both punitive damages and attorneys' fees up until the Court decided both of those issues in the November 18 Order and the November 22 Order, respectfully. Thus, there would have been no need for CIT to appeal those issues. Regardless, Ms. Bowen's flawed theory that Rule 72 starts the clock for an appeal—without regard to finality—would have sweeping implications for all cases in West Virginia. In any instance where a court rules on a motion for new trial, while any other issue—including punitive damages—remains pending, the party would need to appeal before those additional issues were decided. Again, such a requirement would essentially nullify the rule of finality and force piecemeal review of circuit court orders and judgments. For that reason, the Court should reject Ms. Bowen's arguments.

E. Since there was no final order until after June 30, 2022, this Court maintains jurisdiction over this entire appeal.

The Intermediate Court of Appeals has appellate jurisdiction over "[f]inal judgments or orders of a circuit court in civil cases, entered after June 30, 2022." W. Va. Code Ann. § 51-11-4. Thus, "an appeal of a final order or judgment of a circuit court entered after June 30, 2022, shall be to the Intermediate Court of Appeals." W. Va. Code Ann. § 58-5-1.

"Where an appeal is properly obtained from an appealable decree either final or interlocutory, such appeal will bring with it for review all preceding non-appealable decrees or orders, from which have arisen any of the errors complained of in the decree appealed from, no matter how long they may have been rendered before the appeal was taken." *Riffe v. Armstrong*,

197 W. Va. 626, 638, 477 S.E.2d 535, 547 (1996), *holding modified by Moats v. Preston Cnty. Comm'n*, 206 W. Va. 8, 521 S.E.2d 180 (1999) (quotation omitted).

Ms. Bowen argues that because the May 6 Order was entered prior to June 30, 2022, this Court lacks jurisdiction to consider it. However, that argument ignores the word "final" in this Court's enabling statute. Here, Judge Williams did not enter a final judgment until November 22, 2022, which is approximately five months after the date on which this Court obtained jurisdiction. As such, and because the appeal of the final order brings with it all prior orders, this Court has jurisdiction over this entire appeal.

2. As a matter of law, CIT's conduct in protecting its bona fide property right cannot justify an award of punitive damages.

West Virginia law provides for punitive damages in very specific circumstances that are not present here. Specifically, the relevant statute provides:

> An award of punitive damages may *only* occur in a civil action against a defendant if a plaintiff establishes *by clear and convincing evidence* that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and outrageous indifference to the health, safety and welfare of others.

W. Va. Code Ann. § 55-7-29 (emphasis added).

Malice is demonstrated by willful or intentional wrongdoing and is assessed based on the actor's belief at the time it acts. *W. Virginia Div. of Nat. Res. v. Dawson*, 242 W. Va. 176, 190, 832 S.E.2d 102, 116 (2019) ("malicious conduct…is wilful [sic] or intentional wrongdoing") (quotation omitted); *see also Oppenheimer v. Triple-State Nat. Gas & Oil Co.*, 62 W. Va. 112, 57 S.E. 271, 271 (1907) (finding that where defendant believed an account was unpaid, its actions were without malice because it did so "under the belief that the account had not been paid."); *Truman v. Fid. & Cas. Co. of N. Y.*, 146 W. Va. 707, 708, 123 S.E.2d 59 (1961) ("In a civil action

for malicious prosecution, the question of probable cause…depends on the defendant's honest belief in such guilt on reasonable grounds").

"A wrongful act done under a bona fide claim of right and without malice in any form constitutes no basis for such damages." Syl. Pt. 4, *Gen. Motors Acceptance Corp. v. D.C. Wrecker Serv.*, 220 W. Va. 425, 427, 647 S.E.2d 861, 863 (2007). Thus, even though CIT may have been incorrect regarding Ms. Bowen's occupancy, that fact alone does not provide a basis for punitive damages.[2]

Ms. Bowen focuses heavily upon the idea that CIT foreclosed to "cut its financial losses." (Resp. Brief at 19-20). However, that idea is non-sensical when one considers that on nearly ten occasions CIT sent correspondence to confirm occupancy, attempted in-person inspections to confirm occupancy, sent correspondence to confirm Ms. Bowen's address, ultimately foreclosed, and then rescinded the foreclosure, all at significant expense to itself. Further, foreclosure would not "cut any losses" as CIT was only the "servicer" of the reverse mortgage; meaning, it was only paid a servicing fee if the loan remained active. The evidence presented at trial, including Koontz's testimony and the trial exhibits proffered by both Ms. Bowen and CIT, made this clear. [JA 200] ("On this particular loan, CIT made $30 a month to take care of Mrs. Bowen's loan. So it was in their best interest for Mrs. Bowen to stay in the home because they only make money as long as she is in the home."); [JA 2385-2403]; [JA 2835-2850].

The clear terms of the loan documents in this case required Ms. Bowen to "occupy, establish, and use the Property as Borrower's principal residence after execution of this Security Instrument." To that end, the Administration of Insured Home Mortgages Handbook—

[2] As previously noted in Petitioner's Brief, CIT sought approval from HUD to rescind the foreclosure after Ms. Bowen's occupancy was confirmed [JA 2723] and thereafter filed the Petition to Rescind that initiated this case. [JA 0001-JA0013]. The counterclaims at issue in this case were not brought until two years after the filing of the Petition to Rescind. [JA 0052-0072].

promulgated by HUD—expressly required reverse mortgage lenders to "provide a written certification for the mortgagor's signature, to the mortgagor annually." Thus, lenders and servicers widely require annual occupancy certifications to comply with HUD requirements for reverse mortgages, and CIT is no exception.

With that in mind, there is no evidence that CIT acted with malice in this case. Instead, there were ample reasons to believe that Ms. Bowen no longer occupied the Property as her primary residence. Therefore, there were also ample reasons to believe that without acting, CIT could not comply with its obligations to HUD. For instance, at the same time (1) Ms. Bowen stopped returning her annual occupancy verifications, she also (2) stopped paying her property taxes, (3) requested to change her mailing address to an address different from the Property address that she previously identified as her daughter's address, and (4) the post office began returning her mail from CIT as undeliverable.

While Ms. Bowen emphasizes that she has proven—after the fact—that she was literally in compliance with the occupancy requirement, that is irrelevant to a determination of whether CIT acted with malice. Instead, the focus is on CIT's actual belief at the time it acted, and there is no reason to believe that CIT did not—or could not—believe that Ms. Bowen was no longer occupying the Property. This is particularly true given both Ms. Bowen's refusal to return the occupancy certifications after three attempts to reach her, and her refusal to provide a valid written explanation for the change of address. It is also true in light of Ms. Bowen's accidental identification of 1207 Delray Road as her daughter's address; indeed, any reasonable person would likely believe that Ms. Bowen had moved in with her daughter. [JA 2635]. Though Ms. Bowen did send handwritten letters and made phone calls in an attempt to verify occupancy at 1207 Delray

Road [*see, e.g.*, JA 2654], she did not correct this misidentification of 1207 Delray Road as her daughter's address, leading CIT to believe Ms. Bowen had moved to her daughter's home.

Once CIT acted on its right to protect its property interest, it still provided every opportunity for Ms. Bowen to regain compliance. For instance, CIT sent a July 29, 2015, notice instructing that Ms. Bowen could "cure [her] default by reoccupying the property as [her] principal residence." [JA 1172]. Just a little over three months later, on November 2, 2015, CIT sent a second notice that instructed "[t]o cure the default, within 10 days of this notice, at least one of borrowers must move back into the property." [JA 1175]. Thus, Ms. Bowen was fully aware—or should have been—that she could avoid foreclosure by either re-occupying the Property or demonstrating that she already was. And CIT's efforts did not stop there. Instead, even after successfully foreclosing on the Property, CIT immediately acted to rescind the foreclosure once it received confirmation of occupancy.

While Ms. Bowen contends that CIT's records contain evidence that it knew she occupied the Property, that is not accurate. Rather, CIT's internal records simply show that CIT confirmed that *someone* occupied the Property; there is no evidence showing that CIT knew it was Ms. Bowen. [JA 1144]. In fact, the evidence shows that in 2015, CIT went so far as to investigate Ms. Bowen's possible death as a reason for her non-occupancy. [JA 2501].

Moreover, the statement that Ms. Bowen defaulted on the loan agreements contained with the rescission complaint is not evidence of malice; indeed, at the time it acted, CIT possessed a good faith belief that Ms. Bowen had defaulted. Additionally, while she may not have literally defaulted based on the occupancy requirement, she had defaulted on her obligation to pay her property taxes. Accordingly, that statement is not evidence of malice, and punitive damages are unwarranted in this case.

3. Ms. Bowen's award of attorneys' fees is not supported by the facts or the law in this case because there is no evidence that CIT acted in bad faith.

"[A]s 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." *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 50, 365 S.E.2d 246, 248 (1986). However, fees may be awarded "when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons," and bad faith "may be found in conduct leading to the litigation or in conduct in connection with the litigation." *Id.* at 249.

"Bringing or defending an action to promote or protect one's economic or property interests does not per se constitute bad faith….within the meaning of the *exceptional* rule in equity authorizing an award to the prevailing litigant of his or her reasonable attorney's fees." *Id.* (emphasis added). In considering whether conduct rises to the level for the imposition of costs and fees, "[p]arties whose interest in the legal process is to oppress or cheat others should be discouraged." *Yost v. Fuscaldo*, 185 W. Va. 493, 500, 408 S.E.2d 72, 79 (1991).

Judge Williams' decision on attorneys' fees turned 100+ years of West Virginia jurisprudence on its head. First, it obviated the need for either sanctions or curative instructions in litigation. Indeed, despite receiving (1) a curative instruction and (2) seeking sanctions in this case, Ms. Bowen also seeks attorneys' fees based partly on the conduct that led to the curative instruction. Second, Ms. Bowen's position opens the door to fee shifting in any instance of contested litigation. This is particularly true to the extent that Ms. Bowen relies upon her own strategic decision to compel discovery and engage in discovery disputes—which often occur in litigation—as evidence of bad faith.

Accordingly, this Court should re-affirm its commitment to the American Rule and overturn Judge Williams' decision on fees.

4. CIT's pre-litigation conduct does not demonstrate bad faith.

An honest look at CIT's pre-litigation conduct does not justify an award of attorneys' fees. First, had CIT wanted to act oppressively or with bad faith, it could have foreclosed at the first opportunity, and certainly would not have initiated an action to rescind the foreclosure. Specifically, it could have foreclosed after its first three rebuffed attempts to verify Ms. Bowen's occupancy in 2013, or the next three in 2014. Instead, CIT waited until after Ms. Bowen failed to certify occupancy for a third straight year.

Likewise, CIT could have foreclosed after her first failure—in 2014—to pay her property taxes. Again, instead of doing so, CIT advanced the tax payment and waited until the same non-payment occurred the next year as well. CIT also provided Ms. Bowen with several opportunities to provide a valid explanation—other than vacating the Property—for her change of address request.

If that were not enough evidence of lack of bad faith, once CIT made the decision to foreclose, it sent two separate notices—both of which provided instructions for Ms. Bowen to avoid foreclosure on the Property. [JA 2676, 2688]. Then, only after those notices went unanswered did CIT foreclose, with HUD's approval to do so.

Even after all that, once CIT completed the foreclosure and became aware that Ms. Bowen still occupied the Property, it took swift action to rescind the foreclosure. While Ms. Bowen takes issue with CIT's assertion in the complaint that she defaulted under the loan documents, that does nothing to prove that CIT acted either oppressively or in bad faith. Indeed, while Ms. Bowen may have continued to occupy the Property, it is undisputed that she failed to pay her property taxes for at least two consecutive years. Similarly, after mistakenly identifying her daughter's address as

her own address, Ms. Bowen failed to provide a written explanation for her sudden change of address to her daughter's residence.

Regardless, it defies logic that CIT would act to oppress or cheat Ms. Bowen through the foreclosure under which CIT (1) lost money and (2) later voluntarily rescinded. Moreover, it did so at significant expense to itself. Rather, the only logical explanation is that CIT actually believed that Ms. Bowen had vacated the Property. An incorrect belief, based on reasonable grounds, does not support a conclusion that CIT acted in bad faith. Therefore, an award of attorneys' fees is improper in this case.

5. CIT's litigation conduct does not demonstrate bad faith.

A. Counsel's reference to the HUD guideline does not necessitate a fee award.

The Supreme Court of Appeals of West Virginia has explained that it "will not consider errors predicated upon the abuse of counsel of the privilege of argument, unless it appears that the complaining party asked for *and was refused* an instruction to the jury to disregard the improper remarks, and duly excepted to such refusal." *Stephens v. Rakes*, 235 W. Va. 555, 574, 775 S.E.2d 107, 126 (2015) (quotation omitted and emphasis added) (finding that where curative instruction was given, "instruction was sufficient to cure any error"). The Court has also "long held that any error in the admission of improper testimony, subject to cure by action of the court, is cured…since the jury is presumed to follow the instructions of the court"). *State v. Corey*, 233 W. Va. 297, 310, 758 S.E.2d 117, 130 (2014) (quotation omitted).

Ms. Bowen largely justifies her fee award based upon counsel's reference to a HUD "regulation" that she believed to be a "guideline." First, she argues that CIT never produced the guideline in litigation; therefore, its use at trial was improper. However, she admits that CIT informed her and the court during a November 4, 2020 pre-trial hearing that the guideline was

publicly available. [JA 3831-32]. Moreover, the evidence shows that CIT referenced the guideline in at least one pre-foreclosure notice to Ms. Bowen. [JA 1048]. Regardless, CIT used the guideline while cross-examining and impeaching Ms. Bowen's expert on his knowledge of HUD regulations, which is evidence that CIT is not required to provide or disclose before trial. [*See, e.g.*, JA 3833].

Second, Ms. Bowen argues that referring to the "guideline" as a "regulation" improperly implied that the HUD requirement of lenders and servicers was binding upon Ms. Bowen. But even if that is true, Judge Williams twice read a curative instruction to the jury, which obviated any potential prejudice or error caused by the reference. [See, *e.g.*, JA 2242]. Accordingly, the curative instruction—and not attorneys' fees—was the proper mechanism for remedying this entire issue.

B. There is no evidence that CIT's prior counsel acted in bad faith during discovery or in missing the pretrial conference.

Rule 37(a)(4)(C) of the West Virginia Rules of Civil Procedure provides, as it relates to a motion to compel:

> If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

W. Va. R. Civ. P. 37(a)(4)(C). Thus, the rules provide a separate and distinct mechanism for handling discovery disputes.

As a general rule, an order of sanctions is the proper remedy for a discovery violation or abuse. *See Murthy v. Karpacs-Brown*, 237 W. Va. 490, 497, 788 S.E.2d 18, 25 (2016) (quotation omitted) (stating that "if a party fails to obey an order to provide or permit discovery or fails to supplement responses pursuant to Rule 26, the circuit court has the discretion to order the party at

fault to pay the reasonable expenses, including attorney's fees, caused by the failure"). Similarly, Rule 16(f) authorizes "the circuit court to require the payment of reasonable expenses, including attorney fees, incurred because of noncompliance with scheduling orders or pretrial conferences." *Id.*

However, "[t]he circuit court's discretion in this area…is not unfettered," and the civil rules "allow the imposition of only those sanctions that are just." *Id.* (quotation omitted). Finally, the court should not impose sanctions if "the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." *Id.* (quotation omitted).

Here, Judge Williams entered an order—citing discovery conduct and missed pretrial deadlines—providing a wholesale award of attorneys' fees to Ms. Bowen. Moreover, he did this despite both substantial justification and reasonable explanations for the conduct he cited. Notably, the conduct occurred under the representation of CIT's prior counsel, whose firm collapsed in the middle of this case and necessitated replacement by Nelson Mullins. What is worse is that the conduct cited occurred pursuant to a good-faith belief that the case had been stayed.

Indeed, the November 22 Order ignores that at the time CIT's prior counsel missed the pretrial conference and related filings, the matter had been continued. On March 18, 2019, the circuit court entered an order through which the case was "continued generally" pending the Court's ruling on CIT's Motion to Dismiss. [JA 0105]. Despite his continuance, Judge Williams held a June 27, 2019, pre-trial conference that Attorney Kuhnel did not attend. However, as explained in a letter to the circuit court, Attorney Kuhnel believed that the entire case—including that hearing—had been continued. [JA 0394]. This same belief accounts for Attorney Kuhnel's

failure to submit various pretrial filings. Put simply, Attorney Kuhnel believed he was abiding by the circuit court's prior order; he was not acting in bad faith.

During this same period, Attorney Kuhnel's law firm began the dissolution process, requiring CIT to retain Nelson Mullins as new counsel. From the very first day it appeared, Nelson Mullins spent a significant amount of time responding to discovery motions and related briefs. In fact, Ms. Bowen filed her August 13, 2019, Motion for Contempt and Sanctions a mere two hours after Nelson Mullins entered its appearance. Despite having to respond to these motions, Nelson Mullins worked diligently with CIT's prior counsel to quickly understand the status of discovery in the case, and to confirm that the necessary discovery had taken place.

Ms. Bowen now argues that she is entitled to attorneys' fees because CIT refused to produce documents and produced improperly redacted documents that contained information helpful to her case. In other words, she alleges that CIT tried to hide evidence. However, CIT produced in discovery the very documents of which she complains. Indeed, after he was replaced by Nelson Mullins, CIT's prior counsel signed an affidavit attesting to that fact. [JA 0331-332]. Additionally, the redacted documents were documents produced to CIT's expert and redacted of any personal identifying information, which is customary for productions to a third-party. [JA 0289, 0297]. At Ms. Bowen's request, these documents were produced to her in the exact way they were produced to CIT's expert; that is why they were redacted copies. Thus, there is no evidence that any discovery dispute arose from bad faith.[3]

Regardless, even if there was such evidence, the proper remedy would have been a Motion under Rule 37 during litigation; notably, despite the opportunity to do so, Judge Williams did not

[3] Thus, Plaintiffs received two sets of the same documents. One unredacted, and another set that had been sent to CIT's expert, which redacted personal information.

impose any sanctions. Having chosen not to do so, it was improper for him to award Ms. Bowen more than the attorneys' fees actually accrued during the totality of this matter.

C. The Supreme Court of Appeals' precedent in *Pitrolo* forecloses Ms. Bowen's contingency fee award.

"Where attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client…" *Aetna Cas. & Sur. Co. v. Pitrolo,* 176 W. Va. 190, 191, 342 S.E.2d 156, 157 (1986); *see also W. Virginia Dep't. of Transportation, Div. of Highways v. Newton*, 238 W. Va. 615, 626, 797 S.E.2d 592, 603 (2017) (acknowledging that while a party's "contingent fee contract with her attorney is clearly enforceable, it cannot be the sole basis for determining the amount of the attorney's fee award").

While there is precedent—such as *Hayseeds*—to support an award of a 33% contingent fee, that case is limited to the insured/insurer context. Indeed, in *Hayseeds*, the Court specifically limited its holding by stating, "we hold today that whenever a policyholder must sue his own insurance company over any property damage claim, and the policyholder substantially prevails in the action, the company is liable for the payment of the policyholder's reasonable attorneys' fees." *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 329, 352 S.E.2d 73, 80 (1986), *holding modified by Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997). Thus, in accepting a one-third fee, the Court noted it was doing so because, "reasonable attorneys' fees in this type of case are one-third of the face amount of the policy." *Id.*

In her brief, Ms. Bowen incorrectly cites case law to justify her one-third contingency fee award at CIT's expense. First, she cites *Cox v. Branch Banking and Tr. Co.*; however, that case is an inapposite federal court case wherein the court applied the common fund doctrine as one of the "earliest exceptions to the 'American Rule.'" *Cox v. Branch Banking & Tr. Co.*, No. 5:16-CV-

10501, 2019 WL 164814, at *3 (S.D.W. Va. Jan. 10, 2019). This case does not involve the common fund doctrine; therefore, *Cox* is inapposite.

Next, Ms. Bowen relies upon *F.S. & P. Coal Co. vs. Inter-Mountain Coals*; however, that case involved creditors' challenges to an attorney's fee to be paid by his own client that received a settlement. 179 W. Va. 190, 366 S.E.2d 638 (1988). CIT does not assert that a one-third fee is *per se* unreasonable if a client agrees to pay that; CIT is asserting that it is unreasonable to award attorneys' fees at one-third of the verdict when the paying party did not bargain for that contingency fee. Therefore, *Inter-Mountain Coals* is similarly inapposite. In short, while a one-third fee may be presumptively reasonable when a party and its counsel agrees to such a fee, it not presumptively reasonable when a party is awarded its fees. Accordingly, Ms. Bowen's argument is misplaced, and an order requiring a party to pay a one-third contingency fee award is unreasonable under *Pitrolo*.

6. Judge Williams had an obligation to reduce Ms. Bowen's duplicative award and did not commit error in doing so.

A. Failure to reduce the duplicative award would have constituted plain error, thus neither waiver or forfeiture are at issue.

"The 'plain error' doctrine grants appellate courts, in the interest of justice, the authority to notice error to which no objection has been made." *State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996) (quotation omitted). To trigger the doctrine, "there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7 *State v. Miller*, 194 W. Va. 3, 7, 459 S.E.2d 114, 118 (1995). "[M]ere forfeiture of a right—the failure to make timely assertion of the

right—does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is 'plain.'" *Id.* at Syl. Pt. 8.

"To be 'plain,' the error must be 'clear' or 'obvious.'" *In re K.L.*, 233 W. Va. 547, 553, 759 S.E.2d 778, 784 (2014) (quotation omitted). If the error is plain, the analysis turns to whether the error affected substantial rights such that "the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court...." *Id.*

Relatedly, "[i]t is error to give a jury instruction on an issue when there is no basis in the evidence for such instruction." *Warden v. Bank of Mingo*, 176 W. Va. 60, 65, 341 S.E.2d 679, 684 (1985). "Actual existence of damages as well as the amount thereof must be disclosed with reasonable certainty." *Jones v. Credit Bureau of Huntington, Inc.*, 184 W. Va. 112, 116, 399 S.E.2d 694, 698 (1990) (quotation omitted). Likewise, "[t]here must be some data established by proof from which the amount of loss suffered by the plaintiff may be determined." *Id.*

Had Judge Williams failed to reduce the punitive damages award, the resulting error would have constituted plain error. First, it was clear and obvious that Ms. Bowen did not seek medical treatment or accrue expenses for which compensatory damages could have been awarded. In fact, she did not even allege that to be the case. Thus, any award for the tort of outrage—as a matter of law—is duplicative.

While Ms. Bowen argues that the jury instructions made clear that the jury did not have to award punitive damages, and any such damages must be in addition to "damages which are necessary to compensate Plaintiff for injuries or losses," there is no proof from which any compensatory damages suffered by Ms. Bowen may be determined. Thus, as a matter of law, the jury cannot award compensatory damages. This is particularly true given that under West Virginia law, the amount of damages must be disclosed with reasonable certainty. *See, e.g.*, *Adams v.*

Nissan Motor Corp., 182 W. Va. 234, 241, 387 S.E.2d 288, 295(W. Va. 1989) ("[T]o ask the sitting jury in the initial trial to award prospective actual damages and damages for annoyance and inconvenience pending the outcome of a possible appeal is impermissibly speculative.").

The error also would have been prejudicial in that CIT would be required to pay the same damages twice. Despite paying $500,000 in punitive damages for the alleged emotional toll the foreclosure had taken, CIT would separately pay another $500,000 for the alleged tort of outrage. Thus, the error changed the outcome of the trial because it increased CIT's liability by a-half-a-million dollars.

Finally, as Ms. Bowen recognizes in her brief, Judge Williams has already considered and rejected the waiver issue when he reduced the punitive damages award. Therefore, the bell of plain error cannot be un-rung; Judge Williams already recognized the error and corrected it. Accordingly, Ms. Bowen is asking the Court to reverse Judge Williams' correction of the error, simply because she believes that CIT did not timely object. Such a result would be the epitome of unjust, and this Court should reject the idea.

B. Without evidence of physical trauma or concomitant medical or psychiatric proof, an award for tort of outrage is punitive; therefore, Judge Williams had a duty to correct the jury's legal error.

The Supreme Court of Appeals has been clear: without evidence of physical trauma or concomitant medical proof of trauma, an award for intentional infliction of emotional distress is presumed to be punitive in nature. The Court said it best in *Tudor*, where it stated:

> "In cases where the jury is presented with an intentional infliction of emotional distress claim, without physical trauma or without concomitant medical or psychiatric proof of emotional or mental trauma, i.e. the plaintiff fails to exhibit either a serious physical or mental condition requiring medical treatment, psychiatric treatment, counseling or the like, any damages awarded by the jury for intentional infliction of emotional distress under these circumstances necessarily encompass punitive damages and, therefore, an additional award for punitive damages would constitute an impermissible double recovery."

Tudor v. Charleston Area Med. Ctr., Inc., 203 W. Va. 111, 116, 506 S.E.2d 554, 559 (1997).

Moreover, "[i]f the circuit court determines that an impermissible double recovery has been awarded, *it shall be the court's responsibility* to correct the verdict." *Id.* at 575 (emphasis added). In correcting the verdict, the court is to reduce the punitive damages award by the amount of any recovery for the intentional infliction of emotional distress claim. As explained by Justice Davis in her treatise *Punitive Damages Law in West Virginia*, "[u]nder *Tudor*, if the trial court determines that an impermissible double recovery has been awarded, it should require a remittitur of some or all of the punitive damages." *Id.*(citing *Mace v. Charleston Area Med. Ctr. Found., Inc.*, 188 W. Va. 57, 422 S.E.2d 624 (1992) (vacating punitive damages award in intentional infliction of emotional distress case)).

Here, there is no allegation—let alone evidence—that Ms. Bowen suffered any physical trauma or sought any form of related treatment. Thus, there was nothing for which Ms. Bowen could receive any compensatory damages. Accordingly, any recovery was for punitive damages. By the plain language of *Tudor*, this constitutes an impermissible double recovery, and Judge Williams and the circuit court had a "responsibility" to correct the verdict. In correcting that award, Judge Williams properly reduced the punitive damages award by the value of the award for the tort of outrage. With that, this Court should disturb the remittitur of the punitive damages award.

CONCLUSION

For the foregoing reasons, based on the rule of finality, and this Court's mandate in its scheduling order, this Court has jurisdiction to address the substantive issues in CIT's appeal of the May 6 Order. Moreover, in its November 18 Order and its November 22 Order, the Circuit Court erred in its award of both punitive damages and attorneys' fees. Accordingly, this Court should reverse the decision of the Circuit Court and vacate the award of punitive damages, as well

as the award of attorneys' fees. With the jurisdictional and timeliness issues resolved, this Court should then order supplemental briefing on the errors related to the May 6 Order denying CIT's Rule 59 motion.

CIT BANK, N.A.

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

CIT BANK, N.A.,

Plaintiff/Counterclaim Defendant,

v.

CAROLINE COFFMAN, as Administratrix of the Estate of Shirley Bowen,

Defendant/Counterclaim Plaintiff.

From the Circuit Court of Hampshire County, West Virginia
Civil Action No. 16-C-97

CERTIFICATE OF SERVICE

The undersigned attorney certifies that the foregoing "***Reply Brief of Petitioner CIT Bank, N.A.***" was electronically filed using the File & ServeXpress system on the 2nd day of June, 2023, which shall send automatic notification to the following:

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