IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 22-ICA-330

CIT BANK, N.A,

Plaintiff / Counterclaim Defendant Below,
Petitioner,

v.

Appeal from order of the
Circuit Court of Hampshire County
Civil Action No. 16-C-97

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

Defendant / Counterclaim Plaintiff Below,
Respondent.

RESPONDENT'S BRIEF AND CROSS-ASSIGNMENT OF ERROR

Submitted on behalf of Respondent,

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of the Estate of Shirley Bowen, by:

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I. INTRODUCTION

This is an appeal of a jury verdict. CIT wrongfully foreclosed on and sold Ms. Bowen's home as part of a nationwide foreclosure campaign to cut its financial losses. CIT hid documents and other evidence in an attempt to cover up its wrongdoing. The case proceeded to jury trial on June 14, 2021. The jury found in favor of Ms. Bowen's Estate on all claims. [1]

During the post-trial litigation, the lower court reduced the compensatory award by $10,000.00, and after conducting a punitive damage review, reduced the punitive damage award by $500,000.00. Because of CIT's vexatious conduct, the lower court awarded Ms. Bowen's Estate its reasonable attorney fees and costs.

CIT appealed the lower court's failure to strike the jury's verdict regarding punitive damages and the lower court's assessment of attorney fees and costs. Both the entire punitive damage award and the lower court's assessment of fees and costs are warranted and proper. The lower court erred, however, in reducing the jury's punitive damage award, and the Estate cross-assigns the error.

II. STATEMENT OF THE CASE

In 2016, CIT foreclosed and sold Shirley Bowen's home without lawful basis and without proper notice. (J.A. 2284-2291, 2293-2298, 2309-2315). CIT's malevolent motives for selling Ms. Bowen's home arose out of CIT's nationwide foreclosure campaign aimed at cutting its financial losses. CIT sold Ms. Bowen's home, recorded a fraudulent deed conveying her home to a third party, hid inculpatory documents and information, and filed false pleadings before the lower court in an effort to obfuscate its wrongdoing. The jury found for Ms. Bowen's Estate on all claims.

[1] Shirley Bowen died on January 8, 2019, from complications associated with dementia. Ms. Bowen's daughter, Caroline Coffman, qualified as Administratrix of Ms. Bowen's Estate, and the Estate was substituted as the party.

Ms. Bowen, an elderly woman and longtime resident of Delray, Hampshire County, West Virginia, purchased her home in 1988. (J.A. 3369-3372, 3377). At the time of the foreclosure, she suffered from dementia. (J.A. 3385). She resided in her home for 28 years prior to the foreclosure.

In 2006, and to keep her home, Ms. Bowen entered into a loan with Financial Freedom, CIT's predecessor. (J.A. 2263, 2299). The loan was structured as a reverse mortgage. (J.A. 2299). The reverse mortgage required her to reside in her home, but did not require payments of principal and interest. (J.A. 2263). Ms. Bowen's daughter testified that Ms. Bowen's home meant a great deal to her, and often served as the site of their family gatherings. "My mom loved her home. It was her pride. It was – it was everything to her." (J.A. 3384).

In March, 2016, nearly ten years after entering into the reverse mortgage, Ms. Bowen discovered a written note on her door stating that her home had been sold and that she had to get out. (J.A. 3378-3379). CIT had foreclosed and sold her home. (J.A. 2294). Ms. Bowen was devastated. (J.A. 3385). She had received no notice of the foreclosure and had no idea why CIT had sold her home. (J.A. 2314, 2542).

Subsequent investigation revealed that CIT's unlawful foreclosure and sale of Ms. Bowen's home was only a part of CIT's much larger scheme to rid itself of underwater reverse mortgages and cut financial losses. (J.A. 2536, 2547). At the time of selling Ms. Bowen's home, CIT's rates of foreclosure had increased more than three-hundred percent (300%). (J.A. 4365). Though CIT had only 17% of the reverse mortgage loans in the United States, it accounted for almost 40% of reverse mortgage foreclosures. (J.A. 2541).

CIT's business records revealed that the reverse mortgage segment of CIT's business caused massive financial losses. (J.A. 2547). Forensic accountant, David Epperly, testified that, in 2016, CIT lost $210,000,000.00 in the reverse mortgage segment of its business. (J.A. 2547). The

same year, and just a few months after CIT foreclosed on Ms. Bowen's home, CIT published its own news release providing that CIT "had completed key strategic initiatives to simplify mortgage operations and reduce risk." (J.A. 2547). CIT later sold the segment of its business that included reverse mortgages. (J.A. 2547).

After learning of the sale of her home, Ms. Bowen's daughter, Caroline Coffman, frantically contacted CIT inquiring about why it foreclosed and sold Ms. Bowen's home. (J.A. 3377-3379). CIT misrepresented to Ms. Bowen's daughter that it had no confirmation that Ms. Bowen remained in the home. (J.A. 3377-3379). Ms. Bowen's family told CIT that their mother had resided in the home since 1988 without interruption. (J.A. 2320). At that time, CIT misrepresented to Ms. Bowen's daughter that the issue had been resolved. (J.A. 3389-3390).

Following the call, months passed without further contact from CIT. (J.A. 3386-3391). Ms. Bowen, ill with dementia, frightened and confused, worried daily whether she would be thrown out of her home. (J.A. 3385). Ms. Bowen's daughter testified that, after being notified to get out, "it really devastated her. It broke her, something broke, when she thought she was losing her house." (J.A. 3385). Ms. Bowen thought of it every day and did not know what she was going to do or where she was going to go. (J.A. 3385). She thought she lost her home. "Every day she was so worried about it. Something broke in her." (J.A. 3385).

In December, 2016, and without prior notice to Ms. Bowen or her family, CIT sued Ms. Bowen purporting to rescind the foreclosure, while also falsely claiming that Ms. Bowen had defaulted under the terms of her reverse mortgage. (J.A. 1). Despite its knowledge of Ms. Bowen's whereabouts, CIT failed to personally serve Ms. Bowen with the complaint. (J.A. 48). Thereafter, CIT sought default judgment against Ms. Bowen with a finding that Ms. Bowen had defaulted under the terms of the reverse mortgage. (J.A. 20, 48). The lower court directed and ordered CIT

personally to serve Ms. Bowen. (J.A. 48). Upon receipt of the documents, Ms. Bowen retained counsel and the litigation ensued. (J.A. 52, 3392).

CIT claimed that its foreclosure occurred because Ms. Bowen failed to return an occupancy certificate, and as a result, CIT could not confirm Ms. Bowen's residency of the home. (J.A. 131-136, 2921, 3515-3517). As a term of the reverse mortgage, the note and deed of trust required Ms. Bowen to "occupy, establish, and use the Property as Borrower's principal residence after execution of this Security Instrument." (J.A. 2263, 2299). None of the loan documents required Ms. Bowen to fill out a certificate of occupancy. (J.A. 2263, 2299, 3162).

CIT's contention turned out to be a pretext. In discovery, CIT failed to produce documents, necessitating an order compelling discovery. (J.A. 126-128). Despite an order compelling production, and CIT's representation that all documents had been produced, the Estate learned that CIT had withheld hundreds of pages of documents. When CIT finally produced the documents, it had redacted several sections of its in-house loan notes. Threatened with sanctions, CIT produced un-redacted and complete copies of the loan notes. (J.A. 247). The loan notes, including the previously withheld portions, proved CIT had actual knowledge, over several years leading up to the foreclosure, that Ms. Bowen continued to reside in her home, and that its claim of being unable to verify occupancy was false.

The complete loan notes revealed as follows:

1) On March 22, 2014, Ms. Bowen called Financial Freedom and confirmed she continued to reside in her home. (J.A. 2497).

2) On March 26, 2014, Ms. Bowen provided Financial Freedom with written confirmation that she continued to reside in her home. (J.A. 2497).

3) On March 28, 2014, and in response to Ms. Bowen's prior phone call and written correspondence, Financial Freedom notes its confirmation that Ms. Bowen continued to reside in her home. (J.A. 2497).

4) On April 2, 2015, Financial Freedom received an occupancy inspection noting that Ms. Bowen continued to reside in her home, which was verified by Ms. Bowen's neighbor. (J.A. 2501).

5) On May 14, 2015, Financial Freedom confirmed that Ms. Bowen's home was occupied. (J.A. 2501, 3163).

6) On May 22, 2015, Ms. Bowen sent Financial Freedom a hand-written letter providing, "To whom it may concern, I Shirley M. Bowen still live in my home." (J.A. 2318, 2501, 3379-3380).

7) On August 28, 2015, Financial Freedom received an appraisal from Scott See noting that the home was occupied by Ms. Bowen. (J.A. 2321, 2504).

8) On September 22, 2015, Financial Freedom ordered an occupancy inspection and received notification from the inspector that provided, "Property occupied per contact with mortgagor." (J.A. 2504).

9) On January 7, 2016, Financial Freedom received another appraisal from Scott See noting that Ms. Bowen was residing in her home.[2] (J.A. 2349, 2507).

CIT claimed that, in addition to occupancy, it had been unable to verify Ms. Bowen's address because Ms. Bowen had failed to provide a reason for a change in her mailing address. (J.A. 2924). The loan notes proved CIT's assertion to be false. The reverse mortgage loan documents provide that notice "shall be given to the Property address or any other address all Borrowers jointly designate." (J.A. 2263, 2299, 3169-3171). None of the loan documents required Ms. Bowen to provide a reason for a change in her address. (J.A. 2263, 2299, 3169-3171).

Despite the lack of a requirement to provide a reason, Ms. Bowen had actually provided CIT with the reason for the change in address. (J.A. 2495). The loan notes revealed that, on July 2, 2012, Ms. Bowen called and requested CIT to update her address to 1207 Delray Road, Augusta, West Virginia, because she could no longer afford her post office box. (J.A. 3377-3378). The loan

[2] The lower court's *Order Following Post-Trial Review of Punitive Damages* contains a clerical error with regard to the date identified in its item 8 as September 21, 2015. Review reveals the correct date as 1/7/2016.

notes further revealed that, on January 7, 2013, and March 29, 2013, Ms. Bowen provided CIT forms notifying it of her changed address. (J.A. 2319, 2380, 3160-3161).

As part of its larger foreclosure campaign, CIT frequently relied upon the same, false contentions to justify its unwarranted foreclosures. (J.A. 2536). Michael Scales, the Estate's expert regarding foreclosures, reported that a large number of CIT's unlawful foreclosures were based upon "inaccurate occupancy assessments," wherein CIT claimed that the borrower was no longer residing in the home when the borrower actually still resided in the home. (J.A. 2536).

In addition to the "occupancy certificate" and change of address notions, CIT set forth a separate, false basis in its foreclosure deed. (J.A. 2294). The slanderous foreclosure deed, recorded among the public land records in Hampshire County, stated falsely that Ms. Bowen defaulted in making payments of principal and interest. (J.A. 2294). The reverse mortgage did not require Ms. Bowen to make payments of principal and interest. (J.A. 2263).

CIT's bad conduct continued throughout the litigation. In addition to hiding and redacting documents, CIT failed to make pre-trial filings, failed to disclose witnesses, failed to timely mediate, and failed to attend a pre-trial hearing. (J.A. 126, 247, 285-287). Overall, CIT's pre-trial litigation conduct led to the filing of three separate motions for contempt and sanctions, which culminated in an evidentiary hearing in December, 2019. (J.A. 209, 247, 316, 691, 775).

Additionally, and months prior to trial, Ms. Bowen deposed CIT's expert, and the expert contended, as a basis for his opinions, that a HUD regulation required Ms. Bowen to return an occupancy certificate. (J.A. 2924, 4359). When asked to produce the regulation, CIT's expert indicated that he did not have the regulation, but would provide it. (J.A. 2082). As the trial approached, the Estate repeatedly requested the regulation from CIT to no avail. (J.A. 2198-2201).

At the final pre-trial hearing, days before the trial, the Estate again requested the regulation and moved the lower court to preclude CIT's expert from testifying about such a regulation. The motion was granted. (J.A. 1637-1638, 2198-2201). CIT contended that the regulation was publicly available and that it was not CIT's job to research and provide the law to the Estate. (J.A. 2198-2201). The Estate countered that it was entitled to the basis for expert opinions and that counsel had scoured the Code of Federal Regulations but could not locate any such regulation. (J.A. 2198-2201).

The jury trial began on June 14, 2021. On the first day, CIT cross-examined the Estate's foreclosure expert, Mr. Scales.[3] (J.A. 2215). During cross-examination, and over the Estate's objection, CIT produced an undisclosed document that its counsel referred to as a HUD regulation requiring Ms. Bowen to return a certificate of occupancy. (J.A. 2211-2212, 2224, 3246-3247). Following the testimony, the lower court ordered CIT to produce the purported regulation. During the evening recess, the Estate discovered that the purported regulation was, in fact, not a regulation. (J.A. 2211-2212, 3290-3299). Rather, it was a portion of a HUD handbook, not binding on the public or Ms. Bowen. (J.A. 3290-3299, 2212). As a result of CIT's misrepresentation to the jury, the lower court read a curative instruction directing the jury to disregard the guideline and CIT's misrepresentations. (J.A. 2211, 3299-3302). CIT did not object. (J.A. 2211, 3299-3302).

At the conclusion of the trial, the jury found for Ms. Bowen on each count and awarded her Estate $760,000.00 in compensatory damages. (J.A. 2253-2258). In addition to the compensatory damages, the jury awarded $1,500,000.00 in punitive damages. (J.A. 2253-2258).

The lower court entered a judgment order on August 13, 2021. (J.A. 2253-2258). CIT filed its *CIT Bank, N.A.'s Renewed Motion for Judgment as a Matter of Law or, in the Alternative,*

[3] Ms. Scales's written report outlining his findings concerning the foreclosure and CIT's practices is located at J.A. 2536.

Motion for a New Trial and *CIT Bank, N.A.'s Omnibus Motion on Punitive Damages* on August 27, 2021. (J.A. 3724, 3758). The Estate filed its *Estate of Shirley Bowen's Motion for Post-Trial Review of Punitive Damages Award* and *Estate of Shirley Bowen's Motion for Attorneys' Fees* on August 27, 2021. (J.A. 3868).

The lower court permitted briefing and conducted various hearings over several months on post-trial motions. (J.A. 3968, 4187, 4356, 4359, 4379). In support of its fee application, the Estate submitted the Report of Michael W. Carey, former U.S. Attorney for the Southern District of West Virginia. (J.A. 3976). CIT submitted the report of Webster Arceneaux. (J.A. 4064).

On May 6, 2022, the lower court entered its *Order: Denying CIT Bank NA's Motion for New Trial: Granting CIT Bank's Motion for Judgment as a Matter of Law as Regards to the West Virginia Consumer Credit Protection Act (WVCCPA) Claims; and Denying CIT Bank, NA's, Renewed Motion for Judgment as a Matter of Law as Regards to all Other Issues Raised in Said Motion*, reducing the compensatory award by $10,000.00.[4] (J.A. 4096). On November 18, 2022, the lower court entered its *Order Following Post-Trial Review of Punitive Damages*, reducing the punitive damage award by $500,000.00. (J.A. 4359). And on November 22, 2022, the lower court entered its *Order Granting Estate of Shirley Bowen's Motion for Attorney Fees*. (J.A. 4379). CIT did not file its notice of appeal until December 22, 2022.

On February 10, 2023, the Intermediate Appellate Court entered its *Scheduling Order*. As part of the order, this Court directed "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

[4] For ease of reference, the May 6, 2022, *Order: Denying CIT Bank NA's Motion for New Trial: Granting CIT Bank's Motion for Judgment as a Matter of Law as Regards to the West Virginia Consumer Credit Protection Act (WVCCPA) Claims; and Denying CIT Bank, NA's, Renewed Motion for Judgment as a Matter of Law as Regards to all Other Issues Raised in Said Motion* is referred to herein as the May 6, 2022 Order Denying New Trial Motion.

of those issues." The Estate will address the issues raised in CIT's untimely and inadequate filings and in this Court's *Scheduling Order* before addressing CIT's assignments of error.

III. CIT'S FAILURE TO PERFECT APPEAL OF MAY 6, 2022 ORDER

CIT did not perfect an appeal of any issues set forth in the May 6, 2022, Order Denying New Trial Motion because it failed to brief any issues relating to the order. Therefore, CIT has waived any purported errors with the lower court's rulings contained in the May 6, 2022, Order Denying New Trial Motion.

This Court directed the parties to address whether CIT had preserved any issues from the May 6, 2022, Order Denying New Trial Motion for appeal and whether the Intermediate Court of Appeals had jurisdiction over those issues. Because CIT failed, thereafter, to brief any issues from the May 6, 2022, Order Denying New Trial Motion, the issues have been waived and the timelines of such an appeal is no longer a question. W. Va. App. R. 5. Even if CIT had perfected an appeal of the May 6, 2022, Order Denying New Trial Motion, by briefing the issues, the appeal would have been untimely under W. Va. R. Civ. P. 72 and W. Va. App. R. 5. Further, the West Virginia Intermediate Court of Appeals lacks jurisdiction over an appeal of the May 6, 2022, Order Denying New Trial Motion under W. Va. Code § 51-11-4(b).

a. CIT did not perfect its appeal with regard to the issues resolved by the lower court's May 6, 2022, Order Denying New Trial Motion.

W. Va. R. App. P. 5(f) provides "unless otherwise provided by law, an appeal must be perfected within four months of the date the judgment being appealed was entered." Rule 5(g) says, "An appeal is perfected by timely and properly filing with the Clerk, 1) the Petitioner's brief prepared in accordance with Rule 10, and 2) the Appendix records prepared in accordance with Rule 17...." Rule 10(c)(7) requires the argument contain "appropriate and specific citations to the

record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented in the lower tribunal." W. Va. R. App. P. 10.

In its brief, CIT asked the Court to resolve the preservation and jurisdictional issues and then "order new briefing on the errors related to the May 6, 2022 Order." The Estate has found no authority or rules that permit CIT's request. The West Virginia Supreme Court of Appeals has made clear that errors not briefed will not be considered: "Because the errors, as assigned in the Appellant's petition for appeal, were neither assigned nor argued in the Appellant's brief, they are hereby waived." *In re Edward B.*, 210 W. Va. 621, 625, 558 S.E.2d 620, 624 (2001); see also Syl. Pt. 6, *Addair v. Bryant*, 168 W.Va. 306, 284 S.E.2d 374 (1981) ("Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.").

The Supreme Court has affirmed its strict adherence to the requirements of Rule 10:

> We recognize that an appellate lawyer operates within the constraints of a client's wishes and checkbook. However, those constraints do not obviate the Rules of Appellate Procedure. "As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Preamble, W. Va. Rules of Professional Conduct (2015) (emphasis added). Likewise, this Court is entitled to strict adherence to the Rules of Appellate Procedure; compliance with the Rules is essential to our ability to carefully review and fairly decide cases. Because the legal issues implicated by the parties were not addressed in a manner compliant with Rule 10, we decline to address them.

City of Martinsburg v. Cnty. Council of Berkeley Cnty., 880 S.E.2d 42, 45 (W. Va. 2022); quoted with approval in *Robinson vs. Robinson*, WV S. Ct. App. No 22-0016, Jan. 18, 2023 (Memorandum Decision). CIT has failed to perfect its appeal by not briefing any issues addressed by the lower court's May 6, 2022, Order Denying New Trial Motion.

Even though CIT did not perfect its appeal by briefing the issues addressed in the May 6, 2022, Order Denying New Trial Motion, in compliance with this Court's *Scheduling Order*, the Estate will address those issues.

b. Had CIT appealed the May 6, 2022, Order Denying New Trial Motion, it would have been untimely under W. Va. R. Civ. P. 72 and W. Va. App. R. 5.

The time for filing an appeal commences to run and is to be computed from the entry of an order granting or denying a motion for judgment under Rule 50(b) or granting or denying a motion under Rule 59. W. Va. R. Civ. P. 72. CIT failed to timely notice and perfect an appeal of the lower court's ruling on CIT's motion for judgment under Rule 50(b) and 59 as set forth in the May 6, 2022, Order Denying New Trial Motion.

After years of pre-trial litigation, the matter proceeded to jury trial on June 14, 2021. The jury heard all the claims set forth in the Estate's Counterclaims: Wrongful Foreclosure, Breach of Contract, Fraudulent Court Record, Slander of Title, Abuse of Process, Violations of the West Virginia Consumer Credit Protection Act, and Intentional Infliction of Emotional Distress. Following the three-day jury trial, the jury found in favor of the Estate on every claim. The lower court entered a judgment order on August 13, 2021. (J.A. 2253).

On August 27, 2021, CIT filed *CIT Bank, N.A. 's Renewed Motion for Judgment as a Matter of Law or, in the Alternative, Motion for a New Trial* under Rules 50 and 59 of the West Virginia Rules of Civil Procedure. CIT's new trial motion stayed the appeal period on the judgment order pending the lower court's ruling on the motion. *See* W. Va. R. Civ. P. 72.

CIT sought relief from judgment on each of the Estate's claims. On May 6, 2022, the lower court entered its order dispensing with all issues set forth in CIT's motion for a new trial, triggering Rule 72. CIT neither noticed an appeal from the May 6, 2022, Order Denying New Trial Motion until December 22, 2022, (230 days after entry of the order) nor perfected the appeal in its brief.

Rule 72 of the West Virginia Rules of Civil Procedure governs,

> The time for filing an appeal commences to run and is to be computed from the entry 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 finding 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).

CIT did not mention Rule 72 in its brief, but the West Virginia Supreme Court has addressed it: "A motion made pursuant to Rule 59(a) of the West Virginia Rules of Civil Procedure and filed within ten days of judgment being entered suspends the finality of the judgment and makes the judgment unripe for appeal. When the time for an appeal is so extended**, its full length begins to run from the date of entry of the order disposing of the motion**." *McCormick v. Allstate Ins. Co.*, 194 W. Va. 82, 83, 459 S.E.2d 359, 360 (1995) (emphasis added).

And W. Va. R. Civ. P. 5 provides, in part, "Within thirty days of entry of the judgment being appealed, the party appealing shall file the notice of appeal…." In addition, the rule requires, "[A]n appeal must be perfected within four months of the date the judgment being appealed was entered." *Id.* Reading the foregoing rules together with the Supreme Court's holding in *McCormick*, CIT was required to file its *Notice of Appeal* within thirty days of the May 6, 2022, Order Denying New Trial Motion, that being June 5, 2022; and CIT was also required to perfect its appeal of the May 6, 2022, Order Denying New Trial Motion on or before September 6, 2022.

Moreover, CIT did not seek relief to file out of time "on or before the deadline for perfecting an appeal" under W. Va. R. App. 5. CIT's first request to file out of time came on January 20, 2023, or 259 days after entry of the May 6, 2022, Order Denying New Trial Motion.

CIT relies upon the "rule of finality" to support its argument that all matters in controversy had not ended until the lower court's order of November 22, 2022, awarding the Estate its attorneys' fees and costs. The rule of finality does not apply in this instance because, under W. Va. R. Civ. P. 72, the time for appealing the May 6, 2022, Order Denying New Trial Motion

commenced to run and was to be computed from entry of the order. In *Robinson v. Pack*, 223 W.Va. 828, 679 S.E. 2d 660 (2009), the Supreme Court explained:

> The provisions of West Virginia Code § 58-5-1 (2005) establish that appeals may be taken in civil actions from "a final judgment of any circuit court or from an order of any circuit court constituting a final judgment." *Id.* Justice Cleckley elucidated in *James M.B. v. Carolyn M.*, 193 W.Va. 289, 456 S.E.2d 16 (1995), that "[t]his rule, commonly referred to as the 'rule of finality,' is designed to prohibit 'piecemeal appellate review of trial court decisions which do not terminate the litigation[.]'" 193 W.Va. at 292, 455 S.E.2d at 19 (quoting *U.S. v. Hollywood Motor Car Co.*, 458 U.S. 263, 265, 102 S. Ct. 3081, 73 L.Ed.2d 754 (1982)). Exceptions to the rule of finality include "interlocutory orders which are made appealable by statute or by the West Virginia Rules of Civil Procedure, or . . . [which] fall within a jurisprudential exception" such as the "collateral order" doctrine. *James M.B.*, 193 W.Va. at 292-93, 456 S.E.2d at 19-20; accord *Adkins v. Capehart*, 202 W.Va. 460, 463, 504 S.E.2d 923, 926 (1998) (recognizing prohibition matters, certified questions, Rule 54(b) judgment orders, and "collateral order" doctrine as exceptions to rule of finality) (emphasis added).

CIT's reliance upon the rule of finality is misplaced. Rule 72 mandates that the time for filing an appeal commences to run and is to be computed from the entry of an order granting or denying a motion for judgment under Rule 50(b) or granting or denying a new trial motion under Rule 59. W. Va. R. Civ. P. 72. In this case, the lower court's May 6, 2022, Order Denying New Trial Motion denied CIT's requested relief under Rule 50 and 59 and became appealable upon entry. Because CIT has neither perfected nor preserved any issues with the lower court's rulings set forth in its May 6, 2022, Order Denying New Trial Motion, the Estate respectfully submits that the lower court's May 6, 2022, Order Denying New Trial Motion has not been timely appealed.

c. The Intermediate Court does not have jurisdiction over the lower court's May 6, 2022, Order Denying New Trial Motion.

The Intermediate Court of Appeals has jurisdiction over "[f]inal judgments or orders of a circuit court in civil cases, entered after June 30, 2022." *See also* W. Va. App. R. 1(b). Jurisdiction may be raised at "any time or at any stage of the litigation pending therein." *Wolfe v. Welton*, 210 W. Va. 563, 565, 558 S.E.2d 363, 365 (2001); See *State ex rel. Universal Underwriters Ins. Co.*

v. Wilson, 239 W. Va. 338, 345–46, 801 S.E.2d 216, 223–24 (2017) (The Court "will take notice of lack of jurisdiction at any time or at any stage of the litigation pending therein."). Because the Intermediate Court of Appeals has jurisdiction over orders entered after June 30, 2022, and because the lower court entered its order denying CIT's motion for relief under Rule 50 and 59 on May 6, 2022, taken together with the reasons set forth in the preceding sections, this Court lacks jurisdiction over the lower court's May 6, 2022, Order Denying New Trial Motion.

Having addressed whether any of the issues resolved by the lower court in its orders entered prior to the November 18, 2022, are preserved for appeal, and whether the Intermediate Court of Appeals has jurisdiction over each of those issues, the Estate now turns to CIT's assignments of error relating to punitive damages and attorneys' fee and expenses.

IV. SUMMARY OF ARGUMENT

The lower court carefully reviewed and confirmed the jury's determination that a punitive damage award was warranted. Additionally, the lower court acted within its proper discretion to thoroughly consider and award the Estate its attorneys' fees and expenses.

CIT acted with actual malice and a conscious, reckless and outrageous indifference to Ms. Bowen's health, safety, and welfare. CIT targeted and preyed upon elderly folks, like Ms. Bowen, as part of its nationwide campaign to foreclose on reverse mortgages and cut its financial losses. After foreclosing and selling Ms. Bowen's home without proper notice or lawful basis, CIT took extreme measures to cover up and obfuscate its wrongdoing. CIT blamed Ms. Bowen, claiming that it could not verify occupancy and that Ms. Bowen failed to provide a reason for a change in address. CIT hid and redacted documents that revealed CIT had known, all along, that Ms. Bowen resided in her home, and further, that Ms. Bowen had changed her address because she could no longer afford her post office box.

CIT's claims about occupancy verification and change of address forms were nothing more than a sham to foreclose and sell Ms. Bowen's home. As the lower court concluded, "CIT attempted to justify its wrongful foreclosure of Shirley Bowen's home by falsely blaming her, a position that CIT maintained throughout the trial of this case without success. And CIT maintained its position even though its own loan notes from CIT's business records and Ms. Bowen's correspondence to CIT confirmed her continued residence in the home."

CIT's conduct caused Ms. Bowen to endure emotional distress exceeding the bounds of human decency. Ms. Bowen's daughter testified, "It broke her, something broke, when she thought she was losing her house … [e]very day she was so worried about it. Something broke in her." (J.A. 3385). The lower court correctly found and concluded that the jury's punitive damage awarded was supported by overwhelming evidence that CIT acted toward Ms. Bowen with actual malice and a conscious, reckless, and outrageous indifference to her health, safety, and welfare.

Though the lower court properly found that a punitive damage award was warranted and supported by the evidence, the lower court nonetheless erred in its reduction of the award based upon CIT's claim of duplication. CIT failed to raise its claim and objection until post-trial filings. Not only did CIT fail to raise any objection, CIT submitted filings, including instructions and a verdict form, to the lower court conceding Ms. Bowen's entitlement to seek an award of punitive damages on the intentional infliction claim. Because CIT did not timely raise any objection and invited the issue about which it now complains, CIT's argument has been waived.

Moreover, no duplication has occurred because the lower court properly instructed the jury that "any punitive damages that are awarded must be in addition to damages which are necessary to compensate Plaintiff for her injuries or losses." The lower court's instruction, together with the enactment of W. Va. Code § 55-7-29 changing the elements and burden of proof for an award of

punitive damages, further eliminated the risk that the punitive damages were duplicative of the compensatory award on the intentional infliction claim.

The lower court properly assessed attorney fees and expenses. CIT's conduct leading to the litigation and conduct in connection with the litigation in bad faith, vexatious, wanton, and oppressive. CIT preyed upon elderly folks to cut its financial losses. To carry out its mission, CIT foreclosed and sold Ms. Bowen's home without lawful basis and without proper notice. CIT's conduct during the litigation continued. CIT hid and redacted documents proving it knew that Ms. Bowen resided in her home and that CIT's claimed basis for the foreclosure was a pretext. During the trial, CIT misrepresented to the jury that a HUD regulation served as a requirement for Ms. Bowen to file occupancy certificates. CIT's misconduct required the lower court to instruct the jury to disregard CIT's misrepresentation; CIT did not object. The lower court did not abuse its discretion when it concluded that CIT's conduct leading to the litigation and conduct in connection to the litigation warranted an assessment of attorney fees and expenses.

The amount of the lower court's assessment of fees is reasonable under the *Pitrolo* factors. The lower court did not blindly adopt the contingency fee between Ms. Bowen and her counsel. Rather, the lower court analyzed all the *Pitrolo* factors to determine the reasonableness of the fees.

Because CIT acted with actual malice and a conscious, reckless and outrageous indifference to Ms. Bowen's health, safety, and welfare and because CIT acted in bad faith, and for vexatious, wanton, and oppressive reasons, in its conduct leading to the litigation and in connection with the litigation, the lower court's confirmation of the jury's punitive damages award is proper and supported by the overwhelming evidence, and the lower court acted within its proper discretion to award the Estate its attorneys' fees and expenses.

V. STANDARD OF REVIEW

CIT's first assignment of error claims that its conduct did not rise to the level of conduct required to assess punitive damages. "When reviewing an award of punitive damages in accordance with Syllabus point 5 of *Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991), and Syllabus point 5 of *Alkire v. First National Bank of Parsons*, 197 W.Va. 122, 475 S.E.2d 122 (1996), this Court will review de novo the jury's award of punitive damages and the circuit court's ruling approving, rejecting, or reducing such award." Syl. pt. 16, *Peters v. Rivers Edge Min., Inc.*, 224 W.Va. 160, 680 S.E.2d 791 (2009). Though the punitive damages review is plenary, the evidence will be viewed in the light most favorable to the prevailing party. *Jordan v. Jenkins*, 245 W. Va. 532, 552, 859 S.E.2d 700, 720 (2021).

CIT's remaining assignments of error relate the lower court's assessment of attorney fees and costs. "This Court reviews an award of costs and attorney's fees under an abuse of discretion standard." *Auto Club Prop. Cas. Ins. Co. v. Moser*, 246 W. Va. 493, 874 S.E.2d 295, 297 (2022). "The decision to award or not to award attorney's fees rests in the sound discretion of the circuit court, and the exercise of that discretion will not be disturbed on appeal except in cases of abuse." *Beto v. Stewart*, 213 W.Va. 355, 359, 582 S.E.2d 802, 806 (2003); see also *Sanson v. Brandywine Homes, Inc.*, 215 W.Va. 307, 310, 599 S.E.2d 730, 733 (2004) ("We ... apply the abuse of discretion standard of review to an award of attorney's fees."). The trial court "is vested with a wide discretion in determining the amount of ... court costs and counsel fees, and the trial [court's] ... determination of such matters will not be disturbed upon appeal to this Court unless it clearly appears that [it] has abused [its] discretion." *W. Virginia Dep't of Transportation, Div. of Highways v. Newton*, 238 W. Va. 615, 620–21, 797 S.E.2d 592, 597–98 (2017) citing syllabus point 3, [in part,] *Bond v. Bond*, 144 W.Va. 478, 109 S.E.2d 16 (1959).

VI. STATEMENT REGARDING ORAL ARGUMENT

The Estate believes that oral argument is unnecessary because the dispositive issues in this case have been authoritatively decided. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision because this case involves assignments of error in the application of well-settled law.

VII. ARGUMENT

CIT acted with actual malice and a conscious, reckless and outrageous indifference to Ms. Bowen's health, safety, and welfare. CIT targeted and preyed upon elderly folks to cut its financial losses. It foreclosed and sold Ms. Bowen's home without notice and without a lawful basis. CIT then hid records and took other actions to obfuscate its reprehensible conduct.

CIT's conduct leading to the litigation, together with its conduct in connection with the litigation, further demonstrates CIT's bad faith and vexatious, wanton, and oppressive behavior warranting the lower court's award of attorney fees and expenses.

a. The lower court properly found, upon its thorough review of the jury's punitive damage award, that clear and convincing evidence proved CIT acted with actual malice or a conscious, reckless and outrageous indifference to the health, safety and welfare of Ms. Bowen.

CIT's sole assignment of error relating to punitive damages is that CIT's conduct "failed to rise to the level of conduct required to assess punitive damages." With regard to punitive damage awards, a two-step process exists: "We should emphasize that our punitive damage jurisprudence includes a two-step paradigm: first, a determination of whether the conduct of an actor toward another person entitles that person to a punitive damage award, *see Mayer v. Frobe*, 40 W.Va. 246, 22 S.E. 58 (1895); second, if a punitive damage award is justified, then a review is mandated by *Garnes* to determine if the punitive damage award is excessive." *Alkire,* 197 W. Va. 122, 131.

CIT has not assigned error relating to the second step, which requires an analysis of each and every *Garnes* factor: "Upon petition, this Court will review all punitive damages awards. In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and ***all petitions must address each and every factor*** set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage. Assignments of error related to a factor not specifically addressed in the petition will be deemed waived as a matter of state law." *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 659, 413 S.E.2d 897, 900 (1991), holding modified by *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010) (emphasis added). Because CIT fails to address the factors set forth in *Garnes*, its sole assignment of error is related to the first step of the two-step paradigm: its bad conduct.

The record in this case is replete with evidence that CIT acted with "actual malice or a conscious, reckless and outrageous indifference to the health, safety and welfare of others." W. Va. Code Ann. § 55-7-29 (West). "In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16, 17 (2009) citing Syl. Pt. 5, *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983); see also footnote 21 *Jordan v. Jenkins*, 245 W. Va. 532, 552, 859 S.E.2d 700, 720 (2021).

The evidence proved that CIT preyed upon elderly folks, similar to Ms. Bowen, by dramatically and unjustifiably increasing its rates of foreclosures on reverse mortgages in an effort

to cut its financial losses. To fulfill its mission, CIT used "inaccurate occupancy assessments" wherein CIT claimed that the borrower was no longer residing in the home, when the borrower actually still resided in the home. (J.A. 2536).

When CIT sold Ms. Bowen's home, CIT had 17% of the reverse mortgage loans in the United States, but accounted for almost 40% of reverse mortgage foreclosures. (J.A. 2541). CIT's rates of foreclosure had increased, in the same time period, by 300%. (J.A. 4356). CIT did not dispute the evidence of its dramatic increase in foreclosures. CIT's business records revealed that CIT was losing large amounts of money in the reverse mortgage segment of its business. At trial, forensic accountant, David Epperly, testified that CIT had lost $210,000,000.00 in in the reverse mortgage segment of CIT's business in 2016. (J.A. 2547).

CIT targeted Ms. Bowen as part of its larger scheme to cut financial losses and used pretexts to justify its actions. Leading up to trial, during trial, and in this appeal, CIT blamed Ms. Bowen, claiming her failure to verify occupancy or provide a reason for a change in address. CIT claims it "acted pursuant to an undisputed and bona fide claim of right."

The jury disagreed. At the outset of the trial, the Estate provided the reverse mortgage loan documents to the jury, specifically the promissory note and the deed of trust securing the note. The loan documents provided that Ms. Bowen shall "occupy, establish, and use the Property as Borrower's principal residence after execution of this Security Instrument." (J.A. 2263, 2299). None of the loan documents required Ms. Bowen to fill out a certificate of occupancy.

The loan documents further provided that all notices "shall be given to the Property address or any other address all Borrowers jointly designate." None of the loan documents required Ms. Bowen to provide a reason for a change in her address.

At trial, the Estate proved that CIT's purported reliance upon certificates of occupancy and change of address forms was nothing more than a sham to foreclose and sell Ms. Bowen's home. The evidence proved that CIT had actual knowledge that Ms. Bowen resided in her home, both in the years leading to the foreclosure and at the time of the foreclosure.

Despite an order compelling production, and during the deposition of CIT's expert, the Estate discovered that CIT had withheld hundreds of pages of documents. The Estate demanded the missing documents. CIT produced the documents, but had redacted several sections of its in-house loan notes. Threatened with sanctions, CIT produced un-redacted and complete copies of the loan notes. (J.A. 247). The loan notes, including the previously withheld portions, proved CIT had actual knowledge, over several years leading up to the foreclosure, that Ms. Bowen continued to reside in her home, and that its claim of being unable to verify occupancy was false.

The complete loan notes revealed as follows:

1) On March 22, 2014, Ms. Bowen called Financial Freedom and confirmed she continued to reside in her home. (J.A. 2497).

2) On March 26, 2014, Ms. Bowen provided Financial Freedom with written confirmation that she continued to reside in her home. (J.A. 2497).

3) On March 28, 2014, and in response to Ms. Bowen's prior phone call and written correspondence, Financial Freedom notes its confirmation that Ms. Bowen continued to reside in her home. (J.A. 2497).

4) On April 2, 2015, Financial Freedom received an occupancy inspection noting that Ms. Bowen continued to reside in her home, which was verified by Ms. Bowen's neighbor. (J.A. 2501).

5) On May 14, 2015, Financial Freedom confirmed that Ms. Bowen's home was occupied. (J.A. 2501, 3163).

6) On May 22, 2015, Ms. Bowen sent Financial Freedom a hand-written letter providing, "To whom it may concern, I Shirley M. Bowen still live in my home." (J.A. 2318, 2501, 3379-3380).

7) On August 28, 2015, Financial Freedom received an appraisal from Scott See noting that the home was occupied by Ms. Bowen. (J.A. 2321, 2504).

8) On September 22, 2015, Financial Freedom ordered an occupancy inspection and received notification from the inspector that provided, "Property occupied per contact with mortgagor." (J.A. 2504).

9) On January 7, 2016, Financial Freedom received another appraisal from Scott See noting that Ms. Bowen was residing in her home. (J.A. 2349, 2507).

The clear and convincing evidence proved that CIT had actual knowledge that Ms. Bowen continued to reside in her home.

The loan notes also proved that CIT actually knew the reason Ms. Bowen had changed her mailing address, showing CIT's claim to be lie. The loan notes show that, on July 2, 2012, Ms. Bowen contacted CIT and notified CIT that she could no longer afford her post office box. (J.A. 3377-3378). As a result, Ms. Bowen requested that CIT send mail to her home at 1207 Delray Road, Augusta, West Virginia 26704. In addition, Ms. Bowen completed a written form notifying CIT of the change in her address. (J.A. 2319, 2380, 3160-3161).

The jury rejected CIT's misrepresentations regarding occupancy certificates and change of address forms. The jury found that CIT acted with actual malice and reckless disregard for Ms. Bowen, placing its own interests over that of Ms. Bowen to cut financial losses.

As the lower court noted when reviewing the punitive damage award, "CIT attempted to justify its wrongful foreclosure of Shirley Bowen's home by falsely blaming her, a position that CIT maintained throughout the trial of this case without success. And CIT maintained its position even though its own loan notes from CIT's business records and Ms. Bowen's correspondence to CIT confirmed her continued residence in the home." (J.A. 4359).

CIT's argument in this case is similar to the arguments that the West Virginia Supreme Court rejected in *Jordan*. In *Jordan*, the defendant contended that its conduct was, at best, a string

of mistakes. The plaintiff contended, however, that the defendant's conduct was maliciously motivated or carried out with a conscious, reckless, and outrageous indifference to the health, safety, and welfare of others.

The Supreme Court, upon its review, examined the facts in a light most favorable to the plaintiff and concluded that it would not disturb the jury's finding that the defendant acted with actual malice or a conscious, reckless, and outrageous indifference to the health, safety, and welfare of others. *Jordan v. Jenkins*, 245 W. Va. 532, 554, 859 S.E.2d 700, 722 (2021). The Court reasoned:

> [A]lthough Safeco characterizes the events leading up to the conversion as simply a string of mistakes or misunderstandings, the jury also heard evidence that Safeco attempted to shift the blame to other actors, even going so far as to falsify business records to further that narrative. "Credibility determinations are the prerogative of the jury and not an appellate court. Moreover, on review, this Court will not weigh evidence. Our review, conducted on a cold record, is not a tool to replace the finding of the jury with our own judgment." citing *State v. Vilela*, 238 W. Va. 11, 36, 792 S.E.2d 22, 25 (2016). We have held that "'[i]t is the peculiar and exclusive province of a jury to weigh the evidence and to resolve questions of fact when the testimony of witnesses regarding them is conflicting and the finding of the jury upon such facts will not ordinarily be disturbed.' citing Syl. Pt. 2, *Skeen v. C and G Corp.*, 155 W. Va. 547, 185 S.E.2d 493 (1971)." *Jordan v. Jenkins*, 245 W. Va. 532, 553–54, 859 S.E.2d 700, 721–22 (2021) citing Syl. Pt. 5, *Grimmett v. Smith*, 238 W. Va. 54, 792 S.E.2d 65 (2016).

Like the defendant in *Jordan*, CIT argues its conduct does not rise to the level of conduct required for punitive damages. The jury concluded otherwise. The evidence presented in this case supports the jury's conclusion that CIT acted with malice and reckless disregard toward Ms. Bowen. As the lower court noted, "The jury found that CIT's conduct in this case to be reprehensible, which was supported by the evidence. The evidence presented proved that CIT preyed upon elderly folks by dramatically increasing its rates of foreclosures on reverse mortgages in an effort to cut its financial losses." (J.A. 4359). Because CIT acted with actual malice and a conscious, reckless and outrageous indifference to the health, safety and welfare of Ms. Bowen,

the lower court correctly concluded that substantial and overwhelming evidence supported the jury's punitive damage award.

Having addressed the primary claim of error, the Estate will briefly address the series of additional points CIT mentions in its brief. First, the jury found that Ms. Bowen was in compliance with the terms of her reverse mortgage. Therefore, CIT's contention that Ms. Bowen had "dozens of chances to maintain compliance" (while Ms. Bowen was in actual compliance) is misplaced and flies in the face of the evidence. The lower court instructed the jury, with regard to the wrongful foreclosure claim, that, to find for Ms. Bowen, the jury had to find Ms. Bowen complied with the terms of the reverse mortgage. (J.A. 2243-2244). Because the jury found for Ms. Bowen with regard to the wrongful foreclosure claim, the jury necessarily found that Ms. Bowen was in full compliance with the terms of the reverse mortgage. Consequently, CIT's notion that Ms. Bowen had "dozens of chances to maintain compliance" in the face of a jury's determination that Ms. Bowen was in full compliance is without merit.

Second, CIT contends that it did not have a valid explanation for Ms. Bowen's change of address. As proven at trial, CIT had actual knowledge of the reason for the change of address, specifically that Ms. Bowen could no longer afford her post office box. (J.A. 3377-3378). The jury and lower court properly rejected CIT's argument because it is contrary to the evidence.

Third, CIT's reference to Ms. Bowen's nominal real estate taxes is misplaced. Non-payment of real estate taxes has never been asserted as the basis for the foreclosure. The loan documents demonstrate that, on its own accord, CIT could advance the property taxes and deduct the taxes from the total principal that could be withdrawn under the reverse mortgage, which is what appears to have occurred. At trial, CIT only referenced the property taxes to suggest that Ms. Bowen no longer resided in her home. Because CIT's loan notes and records prove that CIT had

actual knowledge Ms. Bowen resided in her home, the jury gave no weight to CIT's contention. Therefore, CIT's reliance upon the real estate taxes is without merit.

Fourth, CIT contends that it did not act maliciously because it sought to rescind the foreclosure. CIT's argument is disingenuous because CIT included in its Complaint for recission of the foreclosure the false claim that Ms. Bowen had defaulted. Paragraph 5 of CIT's complaint provides, "The Borrower defaulted upon the terms and conditions of the Note and Deed of Trust." (J.A. 1). Throughout the litigation, the Estate made clear that CIT's purported effort to rescind the foreclosure was a pretext because CIT continued to seek a judicial finding that Ms. Bowen had defaulted when she had not defaulted. CIT wrongly claims that Ms. Bowen rejected its efforts of recission. Ms. Bowen could not and would not agree to a recission which included a false claim that she defaulted on her reverse mortgage. As the lower court found, "CIT sued Shirley Bowen to rescind the foreclosure while still claiming that she had defaulted on her loan at a time when CIT knew that she had not defaulted under the terms of the Deed of Trust and Note." (J.A. 4359).

Fifth, CIT contends that it sought and obtained approval from HUD to proceed with foreclosure, which indicates that it was not a rogue and malicious lender foreclosing on homes. CIT's contention is another falsehood. The basis for HUD's approval to move forward with foreclosure was CIT's misrepresentation that it had not been able to verify Ms. Bowen's occupancy of her home. The evidence further proved that CIT was a rogue and malicious lender. The Estate presented evidence that CIT had engaged in similar conduct throughout the country. The United States Department of Justice, on behalf of HUD, investigated CIT regarding improper conduct surrounding reverse mortgages. The DOJ ultimately reached a settlement with CIT upon which CIT agreed to repay the federal government $89,000,000.00. (J.A. 2918-2919). Therefore, CIT's reliance upon HUD as being an overseer of CIT's conduct is without merit.

CIT also makes a policy argument that permitting the punitive damages award will encourage non-compliance by borrowers. CIT fails to acknowledge that the jury found Ms. Bowen to be in full compliance with the reverse mortgage. The lower court found "that the evidence presented to the jury supported a finding that Ms. Bowen did not default on her reverse mortgage." Accordingly, CIT's policy argument that the award in this case would encourage non-compliance, when Ms. Bowen fully complied, is without merit. The inverse argument, however, rings true: The punitive damage award will have the effect of discouraging lenders from foreclosing on borrowers not in default of their mortgages.

As demonstrated in the record, CIT's conduct was abhorrent. Both the jury and the lower court found, by clear and convincing evidence, that CIT acted with "actual malice or a conscious, reckless and outrageous indifference to the health, safety and welfare of others." W. Va. Code Ann. § 55-7-29 (West). The evidence proved CIT preyed upon elderly folks, including Shirley Bowen, by dramatically increasing its rates of foreclosures upon false pretenses, like inaccurate occupancy assessments, in an effort to cut its financial losses. CIT's conduct warrants punitive damages.

CIT's argument next turns briefly to duplication of damages under the intentional infliction claim. CIT did not set forth an assignment of error regarding duplication of damages. CIT's only assignment of error claimed that its conduct failed to rise to the level necessary for an award of punitive damages. *See Wilson v. Kerr*, No. 19-0933, 2020 WL 7391150, at *3 (W. Va. Dec. 16, 2020) (dismissing appeal for failing to set forth assignment of error). Additionally, CIT's brief mention of duplication fails to set forth any argument or analysis. Rather, it sets forth a premise and a conclusion. "A skeletal argument, really nothing more than an assertion, does not preserve a claim.... Judges are not like pigs, hunting for truffles buried in briefs." *State v. Kaufman*, 227 W. Va. 537, 555, 711 S.E.2d 607, 625 (2011).

CIT offers a conclusory statement that, because of duplication, "the punitive damages awarded in this case cannot bear a reasonable relationship to the harm that allegedly occurred." CIT offers no analysis for its position. "[A]ll petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage." *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 659, 413 S.E.2d 897, 900 (1991).

Because CIT has offered no analysis of the issue, the Estate addresses the relevant points here but more fully sets forth its argument with regard to duplication in the Estate's cross-assignment of error. CIT failed to raise its claim of duplication and objection until post-trial filings. And "post-trial motions are not appropriate for presenting new legal arguments, factual contentions, or claims that could have previously been argued." *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 56, 717 S.E.2d 235, 243 (2011).

Not only did CIT fail to raise any objection, CIT submitted filings, including instructions and a verdict form, to the lower court conceding Ms. Bowen's entitlement to seek an award of punitive damages on the intentional infliction claim. *See, State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996) (invited error doctrine). Because CIT did not timely raise any objection and invited the issue for which it now complains, CIT's argument has been waived.

Moreover, no duplication has occurred because the lower court properly instructed the jury that "any punitive damages that are awarded must be in addition to damages which are necessary to compensate Plaintiff for her injuries or losses." The jury knew when it made the compensatory damage award on the intentional infliction claim that it could, but was not required, to also award punitive damages. The lower court's instruction, together with the enactment of W. Va. Code § 55-7-29 changing the elements and burden of proof for an award of punitive damages, further

eliminated the risk that the punitive damages were duplicative of the compensatory award on the intentional infliction claim.

Because CIT waived any objection on the basis of duplication, because CIT invited the issue for which it now complains, and because no duplication actually occurred, the lower court erred in its reduction of the punitive damage award. The Estate's argument is more fully set forth in its cross-assignment of error. Having addressed CIT's assignment of error relating to punitive damages, the Estate will now address CIT's assignments of error relating to the lower court's award of attorney fees and expenses.

b. The lower court properly awarded the Estate its attorneys' fees and costs because of CIT's bad faith and vexatious, wanton, and oppressive conduct.

The lower court did not abuse its discretion in assessing attorney fees and expenses because CIT's conduct leading to the litigation and in connection with the litigation was vexatious, wanton, oppressive, and carried out in bad faith. And the fee awarded is reasonable for the reasons articulated in the lower court's careful analysis of the *Pitrolo* factors. *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986). Therefore, the Estate respectfully requests that this Court affirm the lower court's award.

"There is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as 'costs,' without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Syl. Pt. 3, *Sally-Mike Properties v. Yokum*, 179 W.Va. 48, 49, 365 S.E.2d 246, 247 (1986). Bad faith may be found in conduct leading to the litigation or in conduct in connection with the litigation. *Id.*

CIT's assertion that the lower court erred because there is no evidence CIT acted with bad faith, vexatiously, wantonly, or for oppressive reasons is contrary to the evidence. In its brief, CIT

fails to refute or address the substantial evidence the lower court relied upon in making its discretionary award of attorney fees.

With regard to the conduct leading to the litigation, the lower court found that Ms. Bowen, as a term of her reverse mortgage, was required to occupy her home. Despite her continued occupancy of the home, and CIT's actual knowledge that Ms. Bowen resided in the home, CIT, without notice to Ms. Bowen, foreclosed and sold Ms. Bowen's home.

In its brief, CIT seeks reprieve from this Court alleging that "it was CIT that sought to undo the foreclosure...." CIT's contention is a disingenuous half-truth because CIT's complaint for recission of the foreclosure included a false allegation that Ms. Bowen had defaulted under the terms of the reverse mortgage. At trial, the Estate proved, and the jury concluded, that CIT's actions and conduct were aimed at blaming Ms. Bowen in an attempt to cover-up its wrongdoing.

Despite the clear and convincing evidence to the contrary, CIT, in its brief, continues to blame Ms. Bowen for CIT's conduct, claiming that Ms. Bowen's failure to return an occupancy certificate or provide a reason for the change of her address led to CIT's bad conduct. As set forth in the punitive damages section, CIT had actual knowledge that Ms. Bowen resided in her home. Further, CIT had actual knowledge of the reason for the change of address. For the sake of brevity, the Estate will not again set forth the detailed evidence of bad conduct leading to the litigation, which has already been set forth. CIT's conduct leading to the litigation, as set forth in the lower court's detailed analysis, warrants an award of attorney fees and expenses under *Sally-Mike*.

CIT's bad conduct did not stop after the litigation ensued. CIT failed to answer discovery, necessitating an order compelling discovery; falsely represented to the lower court that it had produced all documents in its possession; failed to make pre-trial filings and attend a pre-trial hearing; produced redacted documents in the face of the lower court's order compelling full and

complete disclosure; and failed to disclose documents, including its loan notes demonstrating and proving CIT's knowledge that Ms. Bowen remained in her home. (J.A. 209, 247, 316).

As the lower court found, "[T]he record is clear that despite the representations of CIT that all discovery had been provided as early as July of 2019, it was discovered in October of 2019 during expert depositions that certain documents, including homeowners' insurance documents relating to the years at issue, were not provided in discovery." The lower court continued, "The Court FINDS that the loan documents were not produced by CIT until after nearly two (2) years of litigation; and, when those notes were produced, the records were replete with information relevant to Ms. Bowen's claims, to include records regarding the numerous attempts of Ms. Bowen to notify the loan servicer that she occupied her home and of her new address." (J.A. 4379).

CIT's pre-trial conduct led to the filing of three separate motions for contempt and sanctions, which culminated in an evidentiary hearing in December, 2019. (J.A. 209, 247, 316, 691, 775). CIT's pre-trial litigation conduct, as set forth in the lower court's careful analysis, further supports an award of attorney fees under *Sally-Mike*.

CIT's conduct continued into the trial of this case. As the lower court found:

> During depositions, one of CIT's experts (Mr. Koontz) indicated that he was relying on a HUD regulation in support of its contention that Ms. Bowen was to return a written certificate of occupancy. CIT never produced a copy of the same to Counsel for Ms. Bowen. Thereafter, Counsel for Ms. Bowen filed a Motion in Limine to preclude CIT's expert from referencing the same at trial. CIT misrepresented that the same was in the expert's deposition transcript. A review of the transcript of the deposition revealed that the expert did not specifically reference the purported HUD regulation in his deposition and/or his report. At the final pre-trial hearing, CIT was again asked about the HUD regulation two (2) days prior to the jury trial; and, CIT failed to produce a copy of the same and/or identify the same. The Court then precluded CIT from referencing any such HUD regulation, as the same had not been produced. However, at the trial, Ms. Bowen's expert witness, Michael L. Scales made reference to his familiarity with HUD regulations; and, the Court permitted CIT's Counsel to inquire of Mr. Scales regarding a purported HUD regulation. At that time, CIT's Counsel produced a document that Counsel represented was the 'entire HUD regulation.' After a brief recess, it was discovered

> that the purported HUD regulation was not, in fact, a HUD regulation, but rather it was merely a HUD Handbook. To correct CIT's misrepresentations that the document was a regulation, the Court provided a curative instruction to the jury, without objection. Despite having possession of the handbook, which CIT purported was a 'regulation,' CIT did not disclose a copy of the same to Ms. Bowen's Counsel prior to the day in which CIT introduced the same at the jury trial. (J.A. 4379).

CIT argues, in its brief, that the Estate's counsel was responsible for researching the law. CIT's contention is deceiving because, throughout the pre-trial proceedings, CIT and its expert indicated that CIT was relying upon a HUD regulation as a basis to claim that Ms. Bowen was required to file a certificate of occupancy. Ms. Bowen was entitled to the information as the basis of CIT's expert's opinion under W. Va. R. Civ. P. 26. The Estate's counsel combed through the Code of Federal Regulations governing HUD. The Estate could not locate any such regulation because, as the Estate later discovered, no such regulation exists. The Estate, on numerous occasions, inquired about a copy of the regulation or a citation. CIT intentionally misled the Estate, the lower court, and the jury with regard to the purported HUD regulation, as the HUD guideline was not a regulation and not applicable to the public and Ms. Bowen.

CIT's misrepresentations to the jury necessitated that the lower court to read a curative instruction. (J.A. 2211). Presumably recognizing its improper conduct, CIT did not object to the lower court's instruction. CIT's trial conduct, as set forth in the lower court's careful analysis, further supports an award of attorney fees under *Sally-Mike*.

CIT's policy argument that the attorney-fee award will vitiate the American rule is without merit. CIT's pre-trial conduct and its conduct in connection with the litigation provided a proper basis for a fee award. CIT hid inculpatory evidence demonstrating its lie that it was unaware whether Ms. Bowen resided in her home or the reason for her change of address; and CIT made misrepresentations to the lower court and the jury by presenting a HUD guideline as a regulation.

Affirmance of the lower court's award of attorney fees and costs will not vitiate the American rule. Rather the lower court's fee award fits the parameters set forth in *Sally-Mike* of deterring litigants from acting in bad faith, vexatiously, wantonly, and for oppressive reasons.

The lower court's award of attorney fees and expenses does not conflict with *Boyd v. Goffoli*, 216 W.Va. 552, 569 608 S.E.2d 169, 186 (2004). CIT's reliance upon *Boyd* to argue that the punitive damage award offsets or cancels out an award of attorney fees is misplaced. In *Boyd*, the Court held that an award of attorney fees is within the discretion of the trial court. The Court ultimately upheld the trial court's discretionary decision not awarding attorney fees in the case.

In other cases, however, the West Virginia Supreme Court has approved an attorney fee award in addition to punitive damage award. *See e.g. Capper v. Gates*, 193 W. Va. 9, 454 S.E.2d 54 (1994); *Persinger v. Peabody Coal Co.*, 196 W. Va. 707, 474 S.E.2d 887 (1996); Syl. Pt. 4 *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W. Va. 468, 425 S.E.2d 144 (1992). The cases make clear that an award of attorney fees is within the lower court's discretion.

Because CIT acted in bad faith, and for vexatious, wanton, and oppressive reasons, both in its conduct leading to the litigation and the conduct in connection with the litigation, because the lower court's award will deter litigants from acting in bad faith, and because the lower court acted within its discretion in making the fee award, the Estate respectfully requests that this Court affirm the lower court's award of attorney fees and costs.

c. In addition to the lower court's thorough analysis of CIT's bad faith, vexatious, wanton, and oppressive conduct, the lower court's award of attorney fees and expenses was also supported by statute under W. Va. Code § 38-6-501.

Ms. Bowen prevailed on each of her claims, which included a claim for fraudulent court record under W. Va. Code § 38-16-501. Under the statute, a prevailing party is entitled to an award of fees and expenses. The lower court noted the statute as an additional basis for a fee award.

In its analysis, the lower court briefly referenced the fraudulent court record claim as one of many factors supporting the award of fees and expenses. The lower court placed much more weight on CIT's bad faith, vexatious, wanton and oppressive conduct than it did on the fraudulent court record claim. The lower court set forth a detailed analysis, including six pages of detailed findings of CIT's bad faith and vexatious, wanton, and oppressive conduct. Only one sentence in the entire sixteen-page order references the fraudulent court record claim. (J.A. 4379).

The fraudulent court record claim also supported the fee award. Therefore, the Estate respectfully requests that this Court affirm the lower court's award in its entirety.

d. After detailed and thorough review of the *Pitrolo* factors, the lower court exercised proper discretion in assessing the amount of attorney fees, which took into account the extensive work, risk, results, and other considerations.

The lower court carefully reviewed the evidence in light of the multi-faceted *Pitrolo* factors, which is set forth at page 10 of the *Order Granting Shirley Bowen's Motion for Attorney Fees.* The lower court did not limit its consideration to the contingent fee agreement between Ms. Bowen and her counsel as a basis for the amount of the attorney fees.

The *Order Granting Shirley Bowen's Motion for Attorney Fees* details the lower court's consideration of the necessary elements in *Pitrolo.* (J.A. 4379). The lower court determined that Ms. Bowen had been unable to pay for hourly representation, and that she was unable get other counsel. The lower court's order notes, among others, that 1) the litigation spanned four years, 2) the time and labor involved was substantial, 3) since July of 2017, approximately seventy (70) motions and/or responses to motions were filed in the case, 4) there were approximately thirteen (13) substantive hearings with briefing, and 5) counsel had spent approximately 1,411 hours in the case at the time of filing the motion for attorney fees and expenses.

The lower court similarly reviewed the other *Pitrolo* factors finding that counsel had to analyze and simplify thousands of pages of discovery for presentation to the jury, employ experts, travel to depositions in Charleston, Romney, and Martinsburg, West Virginia. The lower court also noted that substantial trial preparation and skill were required to effectively present this case to the jury. Both law offices of Ms. Bowen's counsel are small offices, the lower court noted, so that the work necessarily precluded other employment.

The lower court found that, due to Ms. Bowen's financial position compared to CIT, it was unlikely Ms. Bowen could employ counsel and that a contingent fee was customary in such situations. The Court went on to note the experience, reputation and ability of the lawyers as well as the undesirability of the case. Ms. Bowen was unable to pay counsel out of personal funds and counsel expended more than $30,000.00 in costs.

The lower court, after giving careful consideration to all the *Pitrolo* factors, reviewed the amount involved and the results obtained and concluded that a fee of one-third of the total recovery was reasonable. CIT's argument that awarding attorney fees that exceeds counsels' regular hourly rates is unfair fails to account for CIT's bad faith conduct leading up to and during this litigation. The argument also fails to account for the delay and risk counsel have been compelled to endure in their successful representation of Ms. Bowen. Even a cursory review of the lower court's sixteen-page *Order Granting Shirley Bowen's Motion for Attorney Fees* demonstrates that the lower court correctly and carefully reviewed the evidence in light of the *Pitrolo* factors; the lower court did not solely base its decision on the contingent fee agreement.

CIT argues that the lower court's reference to *Hayseeds, Inc. vs. State Farm Fire & Cas.*, 177 W.Va. 523, 352 S.E.2d 77 (1986) was misplaced because it applies to protecting an insurance policy holder who buys peace of mind and security, not financial gain or to be embroiled in

litigation, citing *Miller v. Fluharty*, 201 W.Va. citing 685, 594, 500 S.E.2d 310, 319 (1997). The analogy to this case is obvious: Ms. Bowen entered into her reverse mortgage for peace of mind and security, not for financial gain or to be embroiled in litigation.

Furthermore, the one-third contingency fee is commonly recognized as a normal, often-used fee arrangement. In a recent federal district court case, Judge Berger wrote, "Both state and federal courts in West Virginia recognize the presumptive reasonableness of an attorneys' fee equal to one-third of a recovery." *Cox v. Branch Banking & Tr. Co.*, No. 5:16-CV-10501, 2019 WL 164814, at *5 (S.D.W. Va. Jan. 10, 2019). In *F. S. & P. Coal Co. vs. Inter-Mountain Coals*, 179 W.Va. 190, 194, 366 S.E.2d 638, 642 (1988), the Supreme Court approved the Circuit Court's reduction of an attorney fee from fifty percent "to 33 1/3 percent – the going rate for contingency awards in Nicholas County." Similarly, in *Erickson Constr. Co., Inc. v. Morey*, 923 F. Supp. 878, 881 (S. D. W. Va. 1996), (a dispute over an equipment supply contract, breach of warranty and fraud), Judge Haden wrote: "The Court notes a one-third contingency fee is presumptively reasonable in West Virginia. *See Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323, 352 S.E. 2d 73, 80 (1986). Nevertheless, a forty percent (40%) contingency fee is a common fee contract provision for cases that proceed to trial."

The amount of the lower court's assessment of attorney fees is reasonable under *Pitrolo*. "The trial court is vested with wide discretion with determining the amount of court costs and counsel fees . . . ." *Hollen v. Hathaway Electric, Inc.*, 213 W.Va. 667, 584 S.E.2d 523 (2005) (*per curiam*). The appellate courts in West Virginia will not disturb such rulings unless the lower court has abused its discretion. Syl. Pt. 3, *Daily Gazette Co. vs. W. Virginia Dev. Off.*, 206 W.Va. 51, 521 S.E.2d 543 (1999). In light of the evidence and its careful *Pitrolo* analysis, the lower court was well within its discretion in its *Order Granting Shirley Bowen's Motion for Attorney Fees*.

VIII. CROSS-ASSIGNMENT OF ERROR: The lower erred in its reduction of the punitive damage award by $500,000.00 because CIT waived any duplication argument to the jury's award, because CIT's post-trial duplication argument directly contradicted CIT's submissions to the lower court, and because the lower court's jury instructions, taken together with the enactment of W.Va. Code § 55-7-29, eliminated the possibility of duplication.

During post-trial litigation, and for the first time, CIT claimed the jury's punitive damage award duplicated the jury's compensatory award on the intentional infliction claim under the holding in *Tudor v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 111, 506 S.E.2d 554 (1997). In its November 18, 2022, *Order Following Post-Trial Review of Punitive Damages*, the lower court reduced the jury's punitive damage award by $500,000.00 to avoid the possibility of duplication.

The lower court erred in its reduction because CIT failed to timely raise the argument and contributed to and invited the issue about which it now complains. Further, no actual duplication occurred in light of the lower court's instructions to the jury and the Legislature's enactment of W. Va. Code § 55-7-29(a).

First, CIT failed to timely raise a claim of duplication. The first time that CIT raised a duplication objection appeared in CIT's post-trial filings. The lower court, in its review of the punitive damage award, found and concluded, "With respect to CIT's argument that the jury's award for punitive damages and the tort of outrage are duplicative, this Court would note that this issue was not previously raised by CIT prior to and/or during trial. The same was not asserted until the filing of post-trial motions." (J.A. 4359).

It is axiomatic that post-trial motions are not appropriate for presenting new legal arguments, factual contentions, or claims that could have previously been argued. *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W. Va. 48, 56, 717 S.E.2d 235, 243 (2011). *See Otto v. Catrow Law, PLLC*, 243 W.Va. 709, 850 S.E.2d 708 (2020).

Second, CIT submitted filings, including jury instructions and a verdict form conceding that the jury may award compensatory damages together with punitive damages on the intentional infliction claim. (J.A. 1564, 1635, 1710-1711). CIT's jury instructions provided, "Of the claims asserted, [Ms. Bowen] can only recover punitive damages for slander of title, breach of fiduciary duties, ***tort of outrage***, and abuse of process." (J.A. 1635) (emphasis added). The lower court, in its review of the punitive damage award, found and concluded,

> Therefore, the Court FINDS that the very argument CIT now asserts directly contradicts what CIT presented to this Court for instruction of the jury. Likewise, the proposed verdict form presented to the Court by CIT contradicts CIT's assertion that the tort of outrage and the award for punitive damages are duplicative. (J.A. 4359).

The West Virginia Supreme Court has stated:

> "Invited error" is a cardinal rule of appellate review applied to a wide range of conduct. It is a branch of the doctrine of waiver which prevents a party from inducing an inappropriate or erroneous response and then later seeking to profit from that error. The idea of invited error . . . to protect principles underlying notions of judicial economy and integrity by allocating appropriate responsibility for the inducement of error. Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences.

State v. Crabtree, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996); *In re Tiffany Marie S.*, 196 W.Va. 223, 233, 470 SE.2d 177, 187 (1996) ("[W]e regularly turn a deaf ear to error that was invited by the complaining party." (citation omitted); *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W.Va. 585, 599, 396 S.E.2d 766 780 (1990) (finding "the appellant cannot benefit from the consequences of error it invited").

The West Virginia Supreme Court also addressed the issue:

> The final matter which we address is Sheetz' request that this Court expend upon our recognition in *Mace v. Charleston Area Medical Center Foundation*, 188 W.Va. 57, 422 S.E.2d 624 (1992) and *Dzinglski v. Weirton Steel Corp.*, 191 W.Va. 278, 445 S.E.2d 219 (1994), that in those cases where emotional distress damages are sought and obtained without evidence of accompanying physical trauma, such

> awards "may assume the cloak of punitive damages." *Harless v. First Nat'l Bank*, 169 W.Va. 673, 690, 289 S.E.2d 692, 702 (1982). While the record in this case suggests that the evidence introduced regarding Appellee's suffering of emotional distress may indeed have been meager, **Sheetz agreed to the jury instruction on emotional distress damages and jointly submitted the verdict form which expressly allowed the jury to consider punitive and emotional distress damages**. Accordingly, we decline to consider this issue when Sheetz did not raise the issue below for the trial court's consideration in the first instance.

Vandevender v. Sheetz, Inc., 200 W.Va. 561, 490 S.E.2d 678 (1997) (emphasis added).

Third, the lower court's instructions, together with the enactment of W. Va. Code § 55-7-29, further eliminated the possibility of duplication. The lower court properly instructed the jury, in accordance with the West Virginia Pattern Jury Instructions, that it was "not required to award punitive damages and any punitive damages that are awarded must be in addition to damages which are necessary to compensate Plaintiff for her injuries or losses." (J.A. 2251). The jury was aware, at the time of making its consideration, that it had the ability to, but was not required to, render a separate and independent punitive element to its compensatory damages award.

"Where a case has been submitted to a jury, an appellate court cannot presume that the jury did not understand or follow the clear import of the instructions given." *Dustin v Miller*, 180 W. Va. 186, 189, 375 S.E.2d 818, 821 (1988). To the contrary, "a jury is presumed to follow the court's instructions." *Showalter v. Binion*, No. 18-0128, 2019 WL 6998319, at 4* (W.Va. Dec. 20. 2019) (memorandum decision).

Moreover, the enactment of W. Va. Code § 55-7-29 modified the elements required and heightened the burden of proof for an award of punitive damages. Because the statute delineated specific elements distinct from the elements for an intentional infliction claim and because the statute heightened the burden of proof, the statute further eliminated the possibility that any damages are duplicative. The lower court erred in finding that a duplication had occurred and in reducing the jury's punitive damage verdict by $500,000.00 on the intentional infliction claim.

Because CIT waived any argument or objection to the jury's award on the basis of duplication, because CIT's argument directly contradicts what CIT presented to the lower court and invited the its own duplication objection, and because the lower court's jury instructions, taken together with the enactment of W. Va. Code § 55-7-29, eliminate the possibility of duplication, the Estate respectfully requests that this Court reverse the lower court's determination that a duplication occurred and reinstate the full amount of the jury's punitive damage award.

IX. CONCLUSION

The clear and convincing evidence supports the jury's full award of punitive damages. In 2016, suffering from massive financial losses in the reverse mortgage segment of its business, CIT embarked on a nationwide foreclosure campaign; as part of its campaign, CIT foreclosed upon Ms. Bowen's home without cause and without proper notice. Following the foreclosure, CIT hid documents and inculpatory information showing the falsity of its assertions that Ms. Bowen failed to verify occupancy and provide a reason for a change in her address. A properly instructed jury, and the lower court after careful review, found that CIT acted with actual malice and a conscious, reckless and outrageous indifference to Ms. Bowen's health, safety, and welfare.

CIT acted in bad faith, vexatiously, wantonly, and for oppressive reasons in both its conduct leading to the litigation and conduct during the litigation, warranting an assessment of attorney fees and expenses. In the litigation, CIT continued to blame Ms. Bowen for its actions, and made various misrepresentations throughout the trial in its persistence to place blame elsewhere. To aid in its efforts, CIT misrepresented to the jury that a HUD guideline was a regulation binding on Ms. Bowen, necessitating a curative instruction to inform the jury of the truth. The amount of the lower court's assessment of attorney fees is reasonable for the reasons set forth in the lower court's detailed analysis of the *Pitrolo* factors.

The Estate respectfully requests that the Court find and conclude that: CIT failed to perfect an appeal on any issues raised in the lower court's May 6, 2022, Order Denying New Trial Motion; even if CIT had perfected such an appeal, such an appeal would have been untimely; and the Intermediate Court of Appeals lacks jurisdiction over the lower court's May 6, 2022, Order Denying New Trial Motion.

Because CIT acted with actual malice and a conscious, reckless and outrageous indifference to Ms. Bowen's health, safety, and welfare, the Estate respectfully requests that the Court affirm the lower court's conclusion that CIT's conduct warranted punitive damages, and for the reasons stated, reinstate the full amount of the jury's punitive damage verdict. Because CIT acted in bad faith and vexatiously, wantonly, and for oppressive reasons in both its conduct leading to the litigation and during the litigation, the Estate respectfully requests that the Court affirm the lower court's *Order Granting Estate of Shirley Bowen's Motion for Attorney Fees*.

Respectfully submitted,
CAROLINE COFFMAN,
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***Respondent*,**

By: _____

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 22-ICA-330

CIT BANK, N.A,

Plaintiff / Counterclaim Defendant Below,
Petitioner,

v.

Appeal from order of the
Circuit Court of Hampshire County
Civil Action No. 16-C-97

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

Defendant / Counterclaim Plaintiff Below,
Respondent.

CERTIFICATE OF SERVICE

I, Jonathan G. Brill, a practicing attorney before the bar of this Honorable Court, certify that I filed the foregoing *Respondent's Brief and Cross-Assignment of Error* using the File & ServeXpress system on May 4, 2023, which will send an electronic copy to the following:

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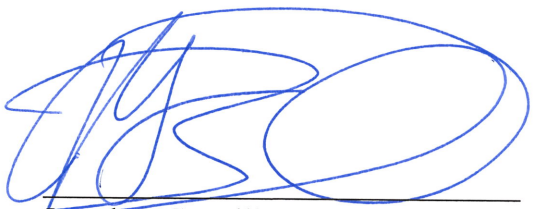

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