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 Estate of Shirley Bowen,

Defendant/Counterclaim Plaintiff.

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

SUPPLEMENTAL REPLY OF PETITIONER CIT BANK, N.A.

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INTRODUCTION

Much of Respondent's response can be reduced to the following refrain: CIT received a fair trial in this matter. It did not raise certain arguments below. It is not entitled to relief now. Although Respondent's characterization is temptingly straightforward, it could not be further removed from the reality of this runaway matter. For example, Respondent asserts that CIT bears responsibility for not filing dispositive motions because "CIT understood that the case had not been generally stayed." Resp't's Resp. at 1. Yet Respondent ignores the language in the Circuit Court's Order entered *after* the hearing on March 14, 2019, which states that "this matter is continued generally pending the Court's ruling on the Plaintiff's Motion to Dismiss Counterclaims." (JA 105). Similarly, Respondent claims that CIT waived arguments regarding the gist of the action doctrine and duplicative nature of certain claims below. Yet Respondent ignores that CIT asserted that "Ms. Bowen is asserting contract-based claims for breach" as early as its motion to dismiss Respondent's Counterclaims. (JA 0076).

Indeed, this matter *should have been* straightforward. At its core, it was a run-of-the-mill breach of contract claim. But that was not the case that was litigated below. Instead, the Circuit Court repeatedly bent applicable laws to Respondent's benefit and to CIT's detriment. The Circuit Court allowed tort claims based upon the alleged breach of contractual duties and a previously unpled fraud claim to proceed to trial. The Circuit Court allowed irrelevant and prejudicial evidence of an unrelated settlement agreement to be discussed before the jury and then punished CIT for attempting to explain the entire story. Where the law would not bend, the Circuit Court *sua sponte* created new claims, fashioning a previously unrecognized tort claim for wrongful foreclosure from thin air. All of this leads to the inescapable conclusions that CIT did not receive a fair trial in this matter, that it did raise these overarching arguments below, and that it is entitled to the relief it seeks in this appeal. For these reasons, the Circuit Court must be reversed.

ARGUMENT

1. The Circuit Court erred in determining that CIT owed Respondent duties beyond those dictated in the confines of the applicable loan documents.

Contrary to Respondent's assertion, *see* Resp't's Resp. at 3, 16, CIT has maintained throughout this case that the entire crux of Respondent's claims sound in contract. As early as its Motion to Dismiss Respondent's counterclaims, CIT argued: "Ms. Bowen alleges that CIT failed 'to comply with the terms, conditions, covenants, and agreements under the terms of the Note and the Trust Deed.' Counterclaim, paragraph 45. By these very allegations, Ms. Bowen is asserting contract-based claims for breach." (JA 0076). Likewise, CIT repeatedly argued below that "[Respondent] cannot, as she attempts to do here, maintain an action in tort for an alleged breach of contractual duty." (JA 1086, 1734 (citing *In re Tillette*, 557 B.R. 902, 909 (Bankr. S.D. W. Va. 2016); *Lockhart v. Airco Heating & Cooling, Inc.*, 211 W. Va. 609, 614, 567 S.E.2d 619, 624 (2002))). The notion that a plaintiff cannot maintain an action sounding in tort based upon the alleged breach of a contractual duty is the hornbook definition of the gist of the action doctrine. Accordingly, CIT did not raise this issue for the first time on appeal as Respondent suggests.

Respondent ignores that the parties' responsibilities and obligations in this matter were governed by the terms of a Home Equity Conversion Loan Agreement ("Loan Agreement"), an Adjustable Rate Note ("Note"), and an Adjustable Rate Home Equity Conversion Deed of Trust ("Deed of Trust"). (*See, e.g.*, JA 2305–10; JA 2299–301; JA 2274–82).[1] Simply put, the Loan Agreement, Note, and Deed of Trust are contracts. In pertinent part, the Loan Agreement signed by Shirley Bowen provides a definition for the borrower's "Principal Residence" and further states that, "Lender shall have no obligation to make Loan Advances if Lender has notified Borrower

[1] Notably, Respondent's property was subject to a second Adjustable Rate Note (*see* JA 2274–82) and second Deed of Trust (see JA 2302–04), each with the Secretary of the Department of Housing and Urban Development ("HUD"), as is required to secure HUD's interest in the reverse mortgage.

that immediate payment in full to Lender is required under one or more of the Loan Documents unless and until the notice is by rescinded Lender." (JA 2305–10). Likewise, the Note details the borrower's promise to pay as well as grounds under which the lender could require immediate payment of the debt in full if "[t]he Property ceases to be the principal residence of a Borrower for reasons other than death and the Property is not the principal residence of at least one other Borrower[.]" (JA 2299–301). Similarly, the Deed of Trust provides detailed occupancy requirements, grounds for acceleration of the debt, notice provisions, and the procedure for foreclosure. (JA 2274–82).[2]

Respondent points to the nature of the relief requested, which extends beyond a claim for "purely economic damages," *see* Resp't's Resp. at 13, as support for the notion that a special relationship was not required to impose tort liability. However, as the Supreme Court of Appeals has recognized, it is "[t]he source of the duty," not damages sought, that "is controlling." *See* Syl. Pt. 9, *Lockhart v. Airco Heating & Cooling, Inc.*, 211 W. Va. 609, 567 S.E.2d 619 (2002). Instead, "[i]n the matters of negligence, liability attaches to a wrongdoer, not because of a breach of a contractual relationship, but because of a breach of duty which results in an injury to others." Syl. Pt. 2, *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988).

This Court recently recognized the continuing validity of the gist of the action doctrine, notwithstanding the plaintiffs' emphasis that its application would seriously curtail the remedies

[2] Foreclosures under deeds of trust long have been recognized as valid under West Virginia law. As the Supreme Court of Appeals of West Virginia noted *in Young v. Sodaro*, 193 W. Va. 304, 456 S.E.2d 31 (1995):

> While the deed of trust, and not the mortgage, is the instrument used in West Virginia to secure the payment of a debt, this Court has stated that "a deed of trust is in effect a mortgage, the primary difference being the manner in which it is foreclosed." . . . In the event there is a default in payment of a debt secured by a deed of trust, the holder thereof need not apply to a court to foreclose it, as the holder of a mortgage would. Instead, the property merely becomes liable to sale under the power of sale conferred upon the trustee. . . .

Id. at 307 n.7, 456 S.E.2d at 34 n.7 (citations omitted).

to which they were entitled, in *Maher v. Camp 4 Condominium Association, Inc.*, 895 S.E.2d 836 (W. Va. Ct. App. 2023). In *Maher,* the plaintiffs brought claims for breach of contract, breach of statutory and common law duties, negligence, fraud, and civil conspiracy against the defendants. *Id.* The circuit court had granted summary judgment against the plaintiffs, finding that their negligence and fraud claims were barred under the gist of the action doctrine. *Id.* This Court affirmed the circuit court's decision on appeal: "The gist of the action doctrine bars tort actions which are premised on a breach of contract." *Id.* at 844.

In reaching its holding, this Court agreed with the circuit court's determination that the plaintiffs' negligence and fraud claims were "inextricably intertwined" with their breach of contract claims and, therefore, barred under the gist of the action doctrine. *Id.* This Court reasoned that the plaintiffs "tacitly admit[ted] the need of a contractual relationship by referencing the [contract] in the negligence and fraud counts against the [defendants]." *Id.* at 845. Because the applicable contract was the foundation of the plaintiffs' cause of action, this Court determined that the plaintiffs had no independent cause of action. *Id.*

Manifestly, the Loan Agreement, Note, and Deed of Trust collectively set forth the parameters and procedures for the acceleration of the debt, notice, and foreclosure. Indeed, each of the tort claims below turns, in some fashion, on whether CIT breached its duties to Ms. Bowen under the Note and Trust Deed. (*See* JA 0063 (wrongful foreclosure claim premised on allegation that "CIT Bank negligently, willfully, and recklessly breached the duty owed to Mrs. Bowen when it *failed to comply with the terms of the Note and Trust Deed . . . .*" (emphasis added)); JA 0064 (slander of title claim premised upon contested statements that Mrs. Bowen had defaulted under the Note); JA 0066–67 (outrage claim premised upon contested statements that Mrs. Bowen had defaulted under the Note and purported unlawful foreclosure); JA 0069 (abuse of process claim

premised upon contested statement that Mrs. Bowen had defaulted under the Note and purported unlawful foreclosure). As was the case in *Maher*, Respondent's claims in this case undoubtedly are "inextricably intertwined" with the claim for breach of contract.

The gist of the action doctrine should have barred Respondent's ability to maintain claims sounding in tort based on the alleged breach of contractual duties under the loan documents. Where, as here, the contracts serve as the foundation of Respondent's other claims, it becomes clear that the Circuit Court below should have recognized that Respondent has no independent cause of action in their absence. The Circuit Court's holding glaringly disregards the gist of the action doctrine. Without this error, the majority of this action would have been disposed of prior to trial, and the subsequent errors discussed below would not have occurred. Accordingly, that holding cannot stand, and Ms. Bowen's counterclaims should have been limited to those arising out of the contractual relationship between a borrower and servicer.

Moreover, no special relationship existed between the parties that would permit deviation from this doctrine. As the Supreme Court of Appeals recognized in *Lockhart*, "[t]ort liability of the parties to a contract arises from the breach of some positive legal duty imposed by law because of the relationship of the parties, rather than from a mere omission to perform a contract obligation." Syl. Pt. 9, in part, 211 W. Va. 609, 567 S.E.2d 619. The Supreme Court of Appeals refers to this arrangement as a "special relationship." *See e.g.*, *Aikens v. Debow*, 208 W. Va. 486, 499, 541 S.E.2d 576, 589 (2000); *E. Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 398, 549 S.E.2d 266, 272 (2001); *Glascock v. City Nat'l Bank of W. Va.*, 213 W. Va. 61, 66, 576 S.E.2d 540, 545 (2002). As *Aikens*, *Eastern*, and *Glascock* recognized, "[t]he existence of a special relationship will be determined largely by the extent to which the particular plaintiff is affected differently from society in general." *Id.* In the lender-borrower context, courts consider whether

the lender has created a "special relationship" by performing services not normally provided by a lender to a borrower. *See Glascock*, 576 S.E.2d at 545–56.

Based on these tenets, various West Virginia courts have refused to find a special relationship exists beyond the four corners of a deed of trust. *See, e.g.*, *Weber v. Wells Fargo Home Equity Asset-Backed Sec. 2004-2*, No. 3:20-CV-48, 2022 WL 740763 (N.D. W. Va. Feb. 18, 2022); *Weller v. JP Morgan Chase Bank, Nat'l Ass'n*, No. 3:16-CV-110, 2017 WL 5158681 (N.D. W. Va. Jan. 30, 2017); *Ranson v. Bank of Am., N.A.*, No. CIV.A. 3:12-5616, 2013 WL 1077093 (S.D. W. Va. Mar. 14, 2013); *Koontz v. Wells Fargo, N.A.*, No. 2:10-CV-00864, 2011 WL 1297519 (S.D. W. Va. Mar. 31, 2011); *Warden v. PHH Mortg. Corp.*, No. 3:10-CV-75, 2010 WL 3720128 (N.D. W. Va. Sept. 16, 2010).

Irrespective of the gist of the action doctrine, Respondent maintains that the Circuit Court was correct in determining that the parties shared a special relationship. *See* Resp't's Resp. at 15–16. Respondent dismisses CIT's reliance on *Ranson* and *Warden*, arguing that those cases did not involve alleged "intentional misfeasance." *See* Resp't's Resp. at 15. Both Respondent and the Circuit Court point to the notion that CIT purportedly knew that "CIT knew Ms. Bowen was in her late 70's when it foreclosed and sold her home. CIT knew she could not afford a mortgage payment. CIT knew Ms. Bowen could not afford a post office box." *Id.* (citing JA 4107–08).

Whether a special relationship existed between the parties does not turn on what CIT may or may not have apprehended about Mrs. Bowen. Rather, the existence of a special relationship depends on the services CIT provided and whether those services extend beyond that of the normal borrower-lender context. The court rejected an argument similar to Respondent's in *Branch Banking & Trust Co. v. Meridian Holding Co., LLC*, No. CV 3:18-0486, 2020 WL 1908490 (S.D. W. Va. Apr. 17, 2020). In that case, the plaintiff lender and defendant borrower were parties to a

promissory note and deed of trust. Following the borrowers' default, the lender elected to foreclose on the property secured by the deed of trust. The borrowers asserted numerous claims against the lender, including a negligence claim "predicated on the notion that a special extra-contractual relationship existed between" the parties. *Id.* at *8.

The court rejected the defendants' argument that a special relationship existed, reasoning:

> Defendants attempt to establish a special relationship by relying on several key pieces of information. First, they point to their account's transfer to a specialized unit in Florida. . . . Second, they point to the personal involvement of that unit's Team Leader. . . . Third, they claim that Plaintiff withheld information of "unique significance," including limitations on the availability of a [deed in lieu of foreclosure], the role of other departments in the approval process, and a warning "not to cease working towards all of their options." . . . None of this is sufficient to actually create a special relationship. The fact that Defendants' account was transferred to a special unit—or that a relatively high-ranking employee was involved in managing it—does not demonstrate that Plaintiff provided a *service* not normally provided by a lender to a borrower. Indeed, the "service" provided by the specialized asset management unit falls well within the parameters of a lender/borrower relationship—that is, attempting to remedy a default. Finally, the allegedly "unique" information Defendants draw on is actually just material related to their contractual relationship as lender and borrowers. Of course, this too is insufficient to create a special relationship.

Id. (footnote and citations omitted).

Meridian Holding perfectly illustrates the Circuit Court's error in finding a special relationship existed between the parties here. The Circuit Court examined only what Respondent alleged CIT *knew*. JA 4107–08. The Circuit Court never examined the central question that should have been answered below, which was: "What did CIT actually do?" In that context, Respondent failed to present any evidence that CIT's *services* extended beyond the normal course of a borrower-servicer relationship. Rather, the record before the Circuit Court below and this Court on appeal demonstrates that the extent of any relationship among these parties arose strictly from the applicable Note and Deed of Trust (*i.e.*, from the contracts). Based upon this evidence and Respondent's complete failure to point to any evidence supporting a contrary conclusion, each of

Respondent's tort claims was precluded as a matter of law and should not have been permitted to proceed to the jury. For these reasons, the Circuit Court must be overturned.

2. The Circuit Court erred when it created a claim for wrongful foreclosure under West Virginia law.

a. Wrongful foreclosure is duplicative of Respondent's claim for breach of contract.

Nowhere is the Circuit Court's manifest error in allowing tort claims to proceed based upon the breach of contractual duties more evident than in its whole cloth creation of a previously unrecognized tort under West Virginia law—wrongful foreclosure. As CIT argued below (*see, e.g.*, JA 0076; JA 3767–70), such a claim patently is duplicative of Respondent's breach of contract claim.[3] Indeed, as noted above, the entire crux of Respondent's wrongful foreclosure claim, both as pled (*see* JA 0063 (wrongful foreclosure claim premised on allegation that "CIT Bank negligently, willfully, and recklessly breached the duty owed to Mrs. Bowen when it *failed to comply with the terms of the Note and Trust Deed* . . . ." (emphasis added)), and as recognized by the Circuit Court (*see* JA 0063 (creating element of wrongful foreclosure claim to include "[t]he defendant breached the duty to the plaintiff, i.e., the defendant mortgage company (mortgagee) breached the duty to the plaintiff (mortgagor**)** *by failing to comply with the terms of the note and mortgage* and/or by failing to comply with other statutory and/or common-law requirements" (emphasis added)), turns on the alleged breach of contractual duties.

Accordingly, Respondent's assertion that the breach of contract and foreclosure claims are not duplicative because they have different elements," Resp't's Resp. at 20, is simply unavailing. Because the same set of facts were required to prove both Respondent's breach of contract claim,

[3] As discussed above, contrary to Respondent's assertion, *see* Resp't's Resp. at 20, CIT raised this argument as early as its motion to dismiss where it argued, "Ms. Bowen alleges that CIT failed 'to comply with the terms, conditions, covenants, and agreements under the terms of the Note and the Trust Deed.' Counterclaim, paragraph 45. *By these very allegations, Ms. Bowen is asserting contract-based claims for breach*." (JA 0076 (emphasis added)).

(which is based upon a breach of the loan documents) and the wrongful foreclosure claim (which is likewise based upon identical allegations of a breach of the loan documents by foreclosing under improper circumstances), the Circuit Court improperly allowed the jury to award damages for the same injury under duplicative claims. As is well established by West Virginia law, "there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted . . . . A plaintiff may not recover damages twice for the same injury simply because he has two legal theories." Syl. Pt. 7, *Harless v. First Nat'l Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982); *see also McDavid v. U.S.*, 213 W. Va. 592, 601, 584 S.E.2d 226, 235 (2003) ("[I]t is axiomatic that the jury is only allowed to award . . . one recovery for each loss."). Accordingly, the Circuit Court's conclusion that the two claims were not duplicative and did not otherwise bar the general prohibition on double recovery was in error.

b. The Circuit Court's creation of a cause of action for wrongful foreclosure is contrary to West Virginia jurisprudence.

Even if such a claim were not barred by the gist of the action doctrine under these circumstances, the Circuit Court's *sua sponte* creation of a new claim for "wrongful foreclosure" finds no basis in West Virginia law. Both Respondent and the Circuit Court heavily rely on *Hannah v. Heeter*, 213 W. Va. 704, 584 S.E.2d 560 (2003), for the notion that this previously unrecognized claim is valid based upon vague notions that the "the foundations of tort law are morality and deterrence," *see* Resp't's Resp. at 17 (citing JA 0106), and that "for each wrong there is a remedy," (*see* JA 118). What both Respondent and the Circuit Court ignore, however, is that those twin aims discussed in *Hannah* are more than sufficiently addressed under existing West Virginia law.

In addition to potential damages under a breach of contract claim, equitable remedies available under West Virginia statutory and common law also exist to "remedy" the conceivable "wrong" in this context, supplanting the need for a previously unrecognized tort in this state.

Notably, the statutory framework for foreclosure sales under deeds of trust has been available in its current form for more than a century. *See* W. Va. Code § 38-1-3 (1923). In that time, only one West Virginia court—the Circuit Court below—has recognized a claim for wrongful foreclosure.

On the contrary, numerous other cases have recognized the general principle recited in *Patrick v. PHH Mortg. Corp.*, 998 F. Supp. 2d 478 (N.D. W. Va. 2014): "[W]here the trust grantor wishes to challenge a foreclosure, the proper remedy is for the grantor to seek an injunction or to file an action to have the foreclosure sale set aside." *Id.* at 494 (citation omitted). For example, in *Dennison v. Jack*, 172 W. Va. 147, 304 S.E.2d 300 (1983), the Supreme Court of Appeals addressed a challenge to West Virginia Code Section 38-1-1 *et seq.* based on due process and public policy grounds. The Court rejected such arguments, holding:

> One reason in particular for our conclusion in these actions that the provisions of W.Va.Code, ch. 38, art. 1, do not violate public policy is that, although due process imposed notice and hearing prior to foreclosure are not contemplated by those provisions, *other remedies are available to the petitioners by which the public sale of their property may be precluded or challenged.* The existence of such other remedies diminishes the argument that the foreclosure procedures contained within W.Va.Code, ch. 38, art. 1, are inherently unfair to the grantor of the trust deed.

Id. at 156–57, 304 S.E.2d at 310 (emphasis added). As to the other available remedies, the Court recognized that "[t]he grantor of a trust deed may seek a court injunction against a proposed trust deed foreclosure sale . . ., or subsequent to a foreclosure sale, such a grantor may seek to have that sale set aside." *Id.* at 157, 304 S.E.2d at 310 (citations omitted).

In this vein, the Court also has recognized:

> [T]he lending institutions of this state have operated under the current trustee foreclosure scheme since the founding of this state. This scheme has always permitted a grantor to seek an independent action to either prevent a real property foreclosure from taking place, or to have a real property foreclosure sale set aside.

Fayette Cnty. Nat'l Bank v. Lilly, 199 W. Va. 349, 357, 484 S.E.2d 232, 240 (1997).

The Court memorialized the availability of these two equitable remedies in the Syllabus of *Lucas v. Fairbanks Capital Corp.*, 217 W. Va. 479, 618 S.E.2d 488 (2005), holding that, "[W]here the trust grantor wishes to challenge a foreclosure, the proper remedy is for the grantor to seek an injunction or to file an action to have the foreclosure sale set aside." *Id.* at Syl. Pt 3, in part.[4] *See also Chandler v. Greenlight Fin. Servs.*, No. 2:20-CV-00217, 2021 WL 1202078, at *10 (S.D. W. Va. Mar. 30, 2021) ("*Lucas* makes clear that requesting equitable relief of this nature from a court is, in effect, the only option for plaintiffs . . . who face impending foreclosure.").

In addition to broadly announcing and reaffirming the availability of these equitable remedies to trust debtors like Mrs. Bowen, even more cases have discussed the application of those contexts in a wide variety of contexts. Specifically, several cases have examined the availability of an injunction in the face of a pending foreclosure sale. *See, e.g.*, *Villers v. Wilson*, 172 W. Va. 111, 304 S.E.2d 16 (1983); *Wood v. W. Va. Mortg. & Disc. Corp.*, 99 W. Va. 117, 127 S.E. 917 (1925); *Shrader v. Gardner*, 70 W. Va. 780, 74 S.E. 990 (1912); *see also Wygal v. Litton Loan Servicing LP*, No. 5:09-CV-00322, 2009 WL 2524701, at *3 (S.D. W. Va. Aug. 18, 2009) ("It has long been held that the trust-debtor may file an action against the trustee to enjoin the foreclosure sale of the property.").

Likewise, several cases have addressed the availability of recission to set aside a completed foreclosure. *See, e.g.*, *Moore v. Hamilton*, 151 W. Va. 784, 155 S.E.2d 877 (1967); *Emery's Motor Coach Lines v. Mellon Nat'l Bank & Tr. Co. of Pittsburgh*, 136 W. Va. 735, 68 S.E.2d 370 (1951);

[4] Although *Lucas* dealt with certified questions regarding the obligations of a trustee under a deed of trust, it is worth noting that the plaintiffs in that case brought claims against the loan servicer for "breach of the duty of good faith and fair dealing, *illegal pursuit of foreclosure*, and collection of unauthorized charges." 217 W. Va. at 482, 618 S.E.2d at 491 (emphasis added). If anything, *Lucas* stands for the additional proposition that the West Virginia Supreme Court of Appeals has been reluctant to adopt rules that complicate foreclosures. *See id.* at 486, 618 S.E.2d at 495 ("[W]e believe it may be readily inferred that the legislative purpose for allowing trustee foreclosure is to provide a more time efficient and economical method of foreclosure. Having made this acknowledgment, we are reluctant to accept the Lucases' invitation to interpret W. Va. Code § 38-1-3 in a manner that complicates the trustee foreclosure process, as such a construction would be contrary to the legislative intent of the statute.").

Atkinson v. Wash. & Jefferson Coll., 54 W. Va. 32, 46 S.E. 253 (1903); *Corrothers v. Harris*, 23 W. Va. 177 (1883). Moreover, certain aspects of a claim for recission are codified at West Virginia Code Section 38-1-4a, which states that, if:

> the grantor on the deed of trust or the agent or personal representative of the grantor is provided notice as required by section four of this article, no action or proceeding to set aside a trustee's sale due to the failure to follow any notice, service, process or other procedural requirement relating to a sale of property under a trust deed shall be filed or commenced more than one year from the date of the sale.

W. Va. Code § 38-1-4a.[5]

Respondent attempts to discredit the general pronouncement repeated in *Patrick*, arguing that CIT, like the mortgagee PHH, was not the trustee under the applicable security instrument. *See* Resp't's Resp. at 19. Granted, Judge Groh determined that the defendant in *Patrick* could not point to the fact that the debtors had not yet brought a case to set aside the foreclosure when the defendant contacted plaintiffs' insurer to cancel their homeowners policy as a defense to plaintiffs' claim for tortious interference. But nothing in *Patrick* detracts from West Virginia's general recognition that additional remedies available to trust debtors like Mrs. Bowen are limited to an injunction or recission. Coupled with potential damages under a claim for breach of contract, such equitable relief adequately remedy the Circuit Court's perceived "wrong" in this matter—obviating the stated rationale behind the Circuit Court's aims. Thus, the Circuit Court's creation—and lone recognition—of a tort of wrongful foreclosure was in violation of well settled West Virginia law, warranting reversal.

[5] As the Supreme Court of Appeals recognized in *Tribeca Lending Corp. v. McCormick*, 231 W. Va. 455, 461, 745 S.E.2d 493, 499 (2013), the statute of limitations provided in Section 38-1-4a applies only to complaints surrounding procedural defects in a foreclosure sale under a deed of trust. Respondent relies on *Persinger vs. Peabody Coal Co.*, 196 W. Va. 707, 474 S.E.2d 887 (1996), *see* Resp't's Resp. at 18–19, for the notion that Section 38-1-4a supports the creation of a claim for wrongful foreclosure because the Legislature has not indicated that rescission under Section 38-1-4a is the sole remedy available to a trust debtor. Respondent's argument is unavailing to the extent it ignores more than a century of West Virginia common law to the contrary.

c. Out-of-state authority does not support the creation of a cause of action for wrongful foreclosure.

In addition, the Circuit Court's and Respondent's reliance on laws from other states in support of the creation of a new tort of wrongful foreclosure were neither exacting nor persuasive.[6] As a threshold matter, several of the cases the Circuit Court relied on in justifying its creation of a tort of wrongful disclosure do not stand for that proposition. For example, *Four Strong Winds, Inc. v. Lyngholm*, 826 P.2d 414 (Colo. App. 1992), which was relied on by the Circuit Court (*see* JA 0122), does not discuss a claim for wrongful foreclosure; rather, that case merely recognized that "a claim based upon the receiver's alleged breach of his fiduciary obligation may be asserted in the receivership proceedings." *Id.* at 417. *Cf. Schwartz v. Bank of Am., N.A.*, No. 10-CV-01225-WYD-MJW, 2011 WL 1135001, at *4 (D. Colo. Mar. 28, 2011) (noting that Colorado does not recognize a claim for damages based on wrongful foreclosure.").

Likewise, *Aid Investment and Discount, Inc. v. Younkin*, 118 N.E.2d 183 (Ohio Ct. App. 1951), also relied on by the Circuit Court (*see* JA 0125), also does not recognize a claim for wrongful disclosure. Instead, *Younkin* merely examined whether the failure to exercise due diligence in a foreclosure sale of an automobile could be conclusive evidence that the creditor was damaged in the absence of evidence that the exercise of due diligence would have secured a higher price. *Id.* at 168. The facts and discussion in *Younkin* could not be more disparate from those presented in the instant appeal.

Numerous decisions from Ohio courts recognize that the Buckeye State "does not recognize a 'wrongful foreclosure' cause of action." *Adena at Miami Bluffs Condo. Owners' Ass'n,*

[6] Of those states that actually recognize a claim for wrongful foreclosure, one of the rationales for doing so appears to be an additional layer of oversight. However, additional oversight was present in this matter. As noted above, HUD held a second Note and Deed of Trust on the subject property. CIT's predecessor was required to secure HUD's permission to foreclose in this matter. (*See* JA 2658; JA 3483; JA3521; JA 3799). CIT's predecessor also asked HUD to reinstate the Deed of Trust and undo the foreclosure. (*See* JA 2723).

Inc. v. R. Hugh Woodward, No. CA2020-08-044, 2021 WL 5055865, at *5 (Ohio Ct. App. Nov. 1, 2021). *Accord Ogle v. BAC Home Loans Servicing LP*, 924 F. Supp. 2d 902 (S.D. Ohio 2013); *Hammond v. Citibank, N.A.*, No. 2:10-CV-1071, 2011 WL 4484416 (S.D. Ohio Sept. 27, 2011); *Wells Fargo Bank, N.A. v. Favino*, No. 1:10 CV 571, 2011 WL 1256771 (N.D. Ohio Mar. 31, 2011); *Third Fed. S. & L. Ass'n of Cleveland v. Formanik*, 64 N.E.3d 1034 (Ohio Ct. App. 2016); *PHH Mortg. Corp. v. Barker*, No. 15-19-01, 2019 WL 7049680 (Ohio Ct. App. Dec. 23, 2019).

Similarly, *Mathews v. PHH Mortgage Corp.*, 724 S.E.2d 196 (Va. 2012), relied upon by the Circuit Court (*see* JA 0125), does not recognize a claim for wrongful foreclosure. *Mathews* involved an action for declaratory judgment seeking a pronouncement that a foreclosure sale would be void based on the trustee's failure to satisfy conditions precedent regarding notice set forth in a deed of trust. In dicta, the court recognized the unremarkable notion that a borrower could bring an action "for damages after the fact of the improper sale or to bar the improper sale in equity before it occurs." *Id.* at 199.[7] *Mathews* does not announce a sweeping new tort claim for wrongful foreclosure.

Subsequent Virginia courts recognized that a claim for damages based upon a purportedly improper foreclosure necessarily would be a claim for breach of contract. *See Foster v. Wells Fargo Bank, N.A.*, No. 3:14-CV-00017, 2014 WL 3965059, at *7 (W.D. Va. Aug. 13, 2014) ("[I]f the foreclosure sale violated the provisions of the deed of trust, [plaintiff] would likely need to bring a breach of contract claim against Defendant for breaching the terms of the deed of trust."); *Sheppard v. BAC Home Loans Servicing, LP*, No. 3:11-CV-00062, 2012 WL 204288, at *7–8 (W.D. Va. Jan. 24, 2012) (recognizing that "the deed of trust spells out the powers an duties of the trustee with respect to the sale of the property following the initiation of foreclosure").

[7] Following *Mathews*, the Supreme Court of Virginia was forced to clarify that a court could grant equitable relief even after a foreclosure sale in *Parrish v. Federal National Mortgage Association*, 787 S.E.2d 116, 122 (Va. 2016).

In this regard, several Virginia cases flatly have rejected the notion that the Commonwealth recognizes a claim for wrongful foreclosure. *Hayes v. Fay Servicing, LLC*, No. 6:22-CV-00040, 2023 WL 2760429, at *3 (W.D. Va. Apr. 3, 2023) ("Plaintiff fails to state a wrongful foreclosure claim because Virginia does not recognize such a cause of action."). *Accord Hardnett v. M&T Bank*, 204 F. Supp. 3d 851, 857 (E.D. Va. 2016) ("As an initial matter, no cause of action for 'wrongful foreclosure' exists in Virginia."); *Grenadier v. BWW L. Grp.*, No. 1:14-cv-827, 2015 WL 417839, at *8 (E.D. Va. Jan. 30, 2015) ("There is no independent cause of action in Virginia for "wrongful foreclosure[.]"); *Hien Pham v. Bank of New York*, 856 F. Supp. 2d 804, 811 (E.D. Va. 2012) ("Virginia does not recognize a cause of action for wrongful foreclosure.").

In addition to Ohio and Virginia, it is worth noting that none of the other states surrounding West Virginia recognize a claim for wrongful foreclosure. *See Womack v. Freedom Mortg.*, No. GJH-19-3182, 2019 WL 13401859, at *1 (D. Md. Nov. 13, 2019) ("Plaintiff is not likely to succeed on the merits of his wrongful foreclosure claim because no such cause of action exists in Maryland."); *Miller v. Caliber Home Loans, Inc.*, No. 3:16-CV-621-DJH-DW, 2018 WL 935439, at *8 (W.D. Ky. Feb. 16, 2018) (finding that Kentucky would not recognize a wrongful foreclosure claim); *Laychock v. Wells Fargo Home Mort.*, 399 Fed. App'x 716 (3d Cir. 2010) (applying the doctrine of claim preclusion under Pennsylvania law to bar mortgagor's claim for damages due to a wrongful foreclosure where the mortgagor raised such issues as a defense to the underlying foreclosure action).

The Circuit Court's creation of a new tort of wrongful foreclosure did not acknowledge existing West Virginia law and did not appreciate any of the nuances of the cases from other jurisdictions purporting to recognize such an action. Thus, the Circuit Court's representation that twenty-eight states "have expressly recognized the tort of foreclosure," (JA 0116), is specious. For

more than a century, West Virginia law has provided adequate remedies—both in law and in equity—for debtors asserting irregularities and improprieties surrounding foreclosure sales under deeds of trust. The laws of our sister states do not compel any departure from this system. As a result, the Circuit Court's creation of a new cause of action for "wrongful foreclosure" was clearly errant, as was the failure to award CIT judgment as a matter of law upon subsequent review. Such a significant error warrants reversal.

3. The Circuit Court erred in admitting a settlement between Financial Freedom and HUD over CIT's objections where CIT did not invite the error.

The Circuit Court's application of the "invited error" doctrine and Respondent's defense of that doctrine overlook notable exceptions under West Virginia law. As to the irrelevant settlement agreement,[8] Respondent asserts that "CIT attempts to sidestep the invited error claiming that CIT introduced the evidence for rebuttal purposes[.] The contention is without merit." Resp't's Resp. at 24. Respondent goes on to cite both *State v. Smith*, 178 W. Va. 104, 358 S.E.2d 188 (1987), and *State v. Knuckles*, 196 W. Va. 416, 473 S.E.2d 131 (1996), for the notion that the Supreme Court of appeals has rejected the notion that a litigant such as CIT waives a prior objection by subsequently introducing previously objectionable evidence. *See* Resp't's Resp. at 24–25.

Tellingly, Respondent omits a crucial holding from *Smith*, which was repeated in *Knuckles*. Specifically, the *Smith* Court held: "Where a party objects to incompetent evidence, but subsequently introduces the same evidence, he is deemed to have waived his objection. *However*,

[8] To the extent Respondent asserts that the settlement agreement and CIT's financial position generally were admissible to show "show motive, opportunity, preparation, plan, knowledge, absence of mistake and lack of accident" under West Virginia Rule of Evidence 404(b), *see* Resp't's Resp. at 22, such assertion is incorrect when contrasted with the fact that CIT, as a loan servicer, only profits during the life of the loan. (*See* JA 3484 ("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.")). Manifestly, an unrelated settlement agreement between CIT's predecessor and HUD regarding tax payments could not show "motive" here.

one does not waive an objection otherwise sound and seasonably made by attempting to explain or destroy the probative value of the evidence on cross-examination." *Id.* at Syl. Pt. 3 (emphasis added). *Accord* Syl. Pt. 2, *Knuckles*, 196 W. Va. 416, 473 S.E.2d 131. In recognizing this exception to waiver, the *Smith* Court reasoned:

> The waiver question is not without some qualification in the context of cross-examination. Courts have recognized that a party objecting to evidence which is claimed to be inadmissible may cross-examine to further undermine its evidentiary basis without waiving his initial objection. This was clearly explained in *State v. Wells*, 52 N.C.App. 311, 315, 278 S.E.2d 527, 530 (1981): "[I]t is also true that one does not waive an objection, otherwise sound and seasonably made, by attempting to explain or destroy the probative value of the evidence on cross-examination." (Citations omitted). Here, the cross-examination consisted of going over the initial statement of Mr. Chastain with no attempt to undermine or have explained the testimony of Mrs. Wright in those few areas where she made adverse comments against the defendant.

178 W. Va. at 111, 358 S.E.2d at 195.

Notably, Respondent's counsel conceded during trial that Respondent's expert, Michael L. Scales, "certainly did testify" about the settlement agreement during his direct examination. (JA 3219). Accordingly, CIT's rebuttal did not suffer from the same defects the Court discussed in *Smith*. Rather, CIT discussed the settlement agreement only to the extent necessary to counter the prejudice it faced as a result of the Circuit Court permitting Mr. Scales to testify about the settlement, putting further irrelevant testimony and improper legal opinions before the jury. Mr. Scales' testimony was based almost entirely upon articles regarding the disputed settlement. Accordingly, CIT had no choice but to address it to explain and destroy the probative value of the evidence. If not for CIT's subsequent introduction, the jury would have been presented only with the unopposed "expert" opinion derived from that same information, despite its irrelevance and prejudicial effect. These circumstances do not meet those contemplated by the "invited error" doctrine. Admission of such irrelevant information was clear error and, if not entitling CIT to judgment as a matter of law, warrants a new trial excluding this irrelevant and prejudicial evidence.

4. The Circuit Court erred in failing to grant CIT judgment as a matter of law on Respondent's outrage claim where it was not supported by the evidence.

Notably, Respondent does not appear to challenge CIT's contention that the evidence presented at trial failed to establish that CIT's conduct in this matter was extreme, outrageous, intentional, or reckless. *See* Syl Pt. 3, *Travis v. Alcon Lab'ys, Inc.*, 202 W. Va. 369, 504 S.E.2d 419 (1998) ("It must be shown that . . . the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct . . . ."). [9] Instead, Respondent points to evidence that Mrs. Bowen experienced "anxiety, worry, fear, and confusion . . . ." Resp't's Resp. at 35–36. These are precisely the type of conclusory statements courts have rejected when analyzing a claim for actual damages for the tort of outrage. *See Price v. City of Charlotte*, 93 F.3d 1241, 1250 (4th Cir. 1996); *see also* Syl. Pt. 7, *Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618 (1974).

Respondent's reliance on *Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 490 S.E.2d 678 (1997), and *Mace v. Charleston Area Medical Center Foundation, Inc.*, 188 W. Va. 57, 422 S.E.2d 624 (1992), is misplaced. In *Vandevender*, the Court acknowledged that the evidence offered at trial regarding the plaintiff's "suffering of emotional distress may indeed have been meager" in the context of its discussion regarding a punitive damages award. 200 W. Va. 607, 490 S.E.2d 694. Likewise in *Mace*, the Court lamented the "paucity of evidence of emotional distress" in the context of its determination that a punitive damages award was not warranted. 188 W. Va. at 67, 422 S.E.2d at 634. Neither case sanctions the cursory proof submitted here. [10]

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[9] Generally, exercising one's legal rights is not considered outrageous conduct. *See Dzinglski v. Weirton Steel Corp.*, 191 W. Va. 278, 286, 445 S.E.2d 219, 227 (1994) ("Conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such instance is certain to cause emotional distress." (cleaned up)).

[10] In the absence of evidence regarding a concrete physical injury stemming from the purportedly outrageous conduct, worrying about potential property damage is not sufficient to maintain a claim for emotional distress under West Virginia law. *See Games v. Chesapeake Appalachia, LLC*, No. 5:17CV101, 2018 WL 3433280, at *6 (N.D. W. Va.

5. The Circuit Court erred when it allowed Respondent's unpled claim of fraudulent court record to be presented to the jury where CIT lacked fair notice of the claim.

Accepting Respondent's argument regarding the purported fraudulent court record claim, taken to its logical conclusion, would eviscerate all pleading standards set forth in West Virginia Rules of Civil Procedure 8 and 9.[11] It is true that "[c]omplaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure." *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995). However, even "notice pleading" requires that a defendant is given fair notice of a potential claim against it. *See id.* ("The primary purpose of these provisions is rooted in fair notice. Under Rule 8, a complaint must be intelligibly sufficient for a circuit court or an opposing party to understand whether a valid claim is alleged and, if so, what it is.").

In addition to requiring a "short and plain statement of the claim showing that the pleader is entitled to relief," Rule 8 also requires that "[e]ach averment of a pleading shall be simple, concise, and direct." W. Va. R. Civ. P. 8(a), (e)(1). Rule 9 goes beyond these basic requirements when pleading certain special matters, including fraud: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." W. Va. R. Civ. P. 9. "The rationale for these requirements is to permit the party charged with fraud the opportunity to prepare a defense." *Hager v. Exxon Corp.*, 161 W. Va. 278, 283, 241 S.E.2d 920, 923 (1978). None of these purposes was served where the Circuit Court permitted Respondent's unpled claim for fraudulent court record under West Virginia Code Section 38-16-501 to proceed to trial.

July 16, 2018) ("In West Virginia, a plaintiff must allege that some personal injury was incurred in order to maintain an action for mental or emotional distress, and damage to property alone is not sufficient for such damages." (citing *Jarrett v. E.L. Harper & Son, Inc.*, 160 W. Va. 399, 235 S.E.2d 362 (1977)).

[11] The Circuit Court's logic for allowing this claim to proceed to trial completely crumbles when juxtaposed with its decision not to permit a previously unpled claim for elder abuse to proceed to trial. (*See* JA 2045–47).

Not only did Respondent fail to allege fraud with the requisite particularity, Respondent did not so much as mention the statutory provision under which she sought relief until her pretrial memorandum. (JA 0141). Nor could such allegations be considered "direct" under Rule 8 where the Circuit Court cobbled together a claim from four separate, nonconsecutive paragraphs in Respondent's Counterclaim, three of which were couched under an enumerated claim for slander of title (*See* JA 4110 (citing Paragraphs 15, 54, 55, and 57 of Respondent's Counterclaim as alleging a cause of action for fraudulent court record)). Accordingly, the Circuit Court's failure to grant CIT judgment as a matter of law as to Respondent's unpled claim for fraudulent court record and any such award relating to the same should be overturned.

CONCLUSION

For the foregoing reasons, Petitioner CIT Bank, N.A. respectfully requests that the Court overturn the orders of the Circuit Court of Hampshire County and grant all such other relief as the Court deems necessary and proper.

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 ***"Supplemental Reply Brief of Petitioner CIT Bank, N.A."*** was electronically filed using the File & ServeXpress system on the 6th day of February, 2024, which shall send automatic notification to the following:

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