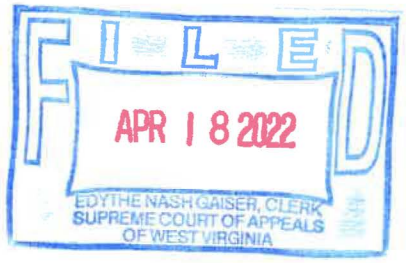

NO. 22-0035

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GARY DETEMPLE,

Petitioner,

v.

AMERICAN ADVISORS GROUP,
A California Corporation,

Respondent.

(ON APPEAL FROM THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA CIVIL ACTION NO. 17-C-249)

PETITIONER'S BRIEF

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II. STATEMENT OF THE CASE

A. Procedural Posture

The Petitioner Gary DeTemple brought an action in circuit court seeking statutory remedies and compensatory damages pertaining to certain violations of the West Virginia Consumer Credit Protection Act, W.Va. Code § 46A-1-1 *et seq.* (the "CCPA") and the West Virginia Residential Mortgage Lender, Broker and Servicer Act, W.Va. Code § 31-17-1 *et seq.* (the "RMLBSA") that are evident in the reverse mortgage transaction that he entered into with American Advisor Group ("AAG").

Petitioner commenced this action on September 1, 2017 in the Ohio County Circuit Court. An Amended Complaint was filed on December 20, 2017. This matter was reassigned to Judge Michael Olejasz on July 15, 2020, after a motion to recuse Judge David Sims was filed by Respondent AAG. Petitioner's Amended Complaint included six separate counts, some of which include allegations that multiple statutory provisions were violated. Counts 1-3 pertain to an alleged unauthorized practice of law, Count 4 alleges unauthorized charges and prohibited loan practices under RMLBSA, Count 5 alleges unauthorized charges under the CCPA, and Count 6 pertains to unconscionable terms or unconscionable inducement under the CCPA.

Factually, the Petitioner sought to establish below that (1) Respondent AAG engaged in a loan closing without allowing Mr. DeTemple counsel or at least his counsel of choice; (ii) AAG charged Mr. DeTemple excessive fees in conjunction with the loan closing; and (iii) AAG failed to provide Mr. DeTemple with signed copies of the loan documents at closing. Following cross motions for summary judgment, the circuit court granted judgment on all counts in favor of AAG. The circuit court based its judgment order on three findings. First, the circuit court dismissed Counts 1-3 by finding no unauthorized practice of law because the notary performing the closing brought a letter from an attorney unknown to Mr. DeTemple indicating said attorney was available by telephone to answer any questions of Mr. DeTemple, and the notary had a pre-existing contractual relationship with this attorney. While Petitioner disagrees with the circuit court's logic and conclusion, this issue is not being presented on appeal.

Second, relying on language from the Reverse Mortgage Enabling Act specifically W.Va. Code §47-24-8(c), the circuit court held that reverse mortgage lenders which issue loans under a federal program (representing virtually all reverse mortgages available in the current market) are exempt from the *entire* West Virginia Code. Following a timely Motion to Amend or Alter Judgment, the circuit court vacated its prior holding and adopted the

Petitioner's interpretation of the applicable statutes. Order on Rule 59 Motion at 2-3. JA-8-9. Accordingly, it is not necessary to present this issue on appeal.

Finally, the circuit court dismissed Counts 4-6 by finding that the subject loan was for a commercial purpose opposed to a consumer purpose and, therefore, consumer protection laws did not apply. Order Granting Summary Judgment at 3. JA-4. The circuit court denied Petitioner's Rule 59 Motion on this issue and added a comment that Petitioner was not "aggrieved" because of his commercial pursuits. Order on Rule 59 Motion at 2-3. These statements appear to be mere dicta and do not correspond to the prior summary judgment order or underlying motions. The circuit court's statements in this regard are themselves vague and ambiguous. Out of an abundance of caution, to the extent these statements may not be dicta, Petitioner seeks review of any such finding on appeal.

B. **Factual Background**

The Petitioner Gary DeTemple owns a personal home in Ohio County, West Virginia. In late December of 2014, the Petitioner, who was over the minimum age of 62 required for a Home Equity Conversion Mortgage ("HECM"), commonly known as a reverse mortgage loan, inquired of AAG about obtaining a reverse mortgage for his principal residence. See, Deposition of AAG's corporate representative Victor Sanchez at 28. JA-266. What Petitioner did not know then was the loan process he was starting would take nearly 9 months. According to an emailed apology sent by AAG loan agent, David Schmidt, to Gary DeTemple on August 6, 2015, "[n]ormally the turn time from start to finish is only 60 days and your file was highly delayed." JA-282.

Nearly, a month later the loan eventually closed on September 2, 2015. Petitioner was charged $7,325 in total settlement charges. JA-285. At closing, AAG charged and collected multiple fees related to legal services that Petitioner alleged to be excessive, illusory, and

duplicitous in nature, including:

1. $395 for a "Settlement or Closing Fee"
2. $375 for an "Attorney Closing Fee"
3. $595 for a "Title Examination Fee"
4. $295 for an "Abstract or title search"

Despite all these fees, Petitioner did not have the benefit of an attorney at the closing. Nor did the Petitioner receive a signed copy of the closing documents at the closing. Deposition of DeTemple at 65. JA-311. To understand how all this occurred, we must begin with the loan application.

A Residential Loan Application for Reverse Mortgages was first signed by Mr. DeTemple on March 13, 2015 and immediately returned to AAG. Deposition of Sanchez at 25-28. JA-265-266. [1] The stated purpose for the loan according to the application was for home improvements. *See*, JA-293-299. Thereafter, the loan was delayed by AAG because of "an issue with the property address" and related title issue. See, Deposition of Sanchez at 28-29. JA-266.

Mr. DeTemple grew weary of the delay and perceived ineptitude of AAG's chosen title provider and requested to use his own counsel, Lantz Law Offices. See letter from DeTemple to AAG dated May 28, 2015. JA-283. Shortly, thereafter, Lantz Law Offices was engaged and conducted a title search. On June 17, 2015, it provided a Commitment for Title Insurance. JA-289. Lantz Law was never paid by AAG for this title work or any services it performed. Deposition of Sanchez at 59. JA-270.

FNC Title Services, LLC ("FNC") also provided a title report around the same time as Lantz Law Office. *See*, JA-289 at entry dated 6/11/2015 ("So we got title today from FNC ...").

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[1] Unlike most conventional mortgages, reverse mortgages require the borrower to first obtain counseling pertinent to this complex loan product prior to signing an application. The lender typically arranges for the counseling, which is often conducted by way of a video presentation, and the borrower pays for it outside of closing. See, Sanchez Deposition at 59-60 noting the counseling occurred, here, on February 26, 2015. JA-270.

In fact unbeknownst to Mr. DeTemple and contrary to what he was led to believe, AAG ordered a title report from FNC on June 1, 2015. *See*, JA-315. Thus, as of 6/17/2015 competing title reports existed. FNC is an affiliate of AAG. The President and 15.34% owner of AAG is one of 4 corporate officers and owns 49% of FNC. See, JA-300.

The Affiliated Business Arrangement Disclosure Statement required by federal law provides that the borrower is not required to use the affiliated provider and that he is "free to shop around" and it further discloses that AAG's President may receive financial and other benefits from the referral to FNC. "[Borrowers] can elect to choose one that is identified by AAG or they can choose to shop around and select their own service provider." Deposition of Sanchez at 93. JA-273.

Due to this supposed confusion over the property address and title delays, the initial loan was terminated and a new loan file created on June 25, 2015. *See*, JA-289. The purpose of the loan listed on the new loan application was "Leisure," as some of Mr. DeTemple's home improvement plans had been completed by this time given the lengthy delay. See, Deposition of DeTemple at 25 (JA-466); JA 123-136 (loan application). Mr. DeTemple would go on to use the loan funds for multiple vacations and the purchase of two boats among other items relating to "leisure", as well as further home improvements. JA-455-459.

After the creation of the new loan file, Mr. DeTemple continued to insist orally and in writing that Lantz Law Office provide both the title and closing services for the loan. *See*, JA-301-304. Mr. DeTemple had a strong preference for Lantz Law Office and wanted his lawyer to review the fees that were being charged. "And, of course, I wanted Lantz Law Office to do it, because I know those people and trust them people. And the people in California weren't doing well ..." Deposition of DeTemple at 45; see also *id.* at 47 (discussing his belief that Lantz Law's fees would be less than the providers AAG assigned to him) & 51 (indicating he wanted

Lantz Law to review the high closing costs on his behalf). JA-309-310.

However, contrary to its own disclosures indicating the borrower had the right to shop for service providers and prior representations that it would indeed accept Lantz Law, AAG never made a genuine attempt to use Lantz Law as either the title or settlement provider. Eventually in late August, AAG broke the news to Mr. DeTemple that he was not permitted to use his attorney after all. Deposition of DeTemple at 32. JA-307. He was told AAG would use its attorney to perform the closing. Deposition of DeTemple at 45. JA-309.

In the deposition of its corporate representative, AAG characterizes its denial of Mr. DeTemple's counsel of choice as an "oversight" and offers no explanation for its conduct. Deposition of Sanchez at 36-37 & 106. JA-267, JA-275. Former defendant and notary public Frank Pearson performed the closing without an attorney present. Mr. DeTemple had no notice prior to the closing that an attorney would not be present to advise him at closing. See, JA-904-905. Pearson has no training as a lawyer or paralegal. Deposition of Pearson at 22 & 43. JA-327, 329. Mr. Pearson disclaimed providing any legal services. Deposition of Pearson at 23. JA-327. Nonetheless, the parties below disputed whether Pearson engaged in the unauthorized practice of law or was acting under the direct supervision of a lawyer. See *Dijkstra vs. Carenbauer, et al.*, 2014 WL 791140, USDCNDWV Case No. 5:11-cv-152.[2]

A third loan application signed for closing again indicated that the purpose of the loan was for "Leisure." JA-116-122.

[2] The instant matter involves two peculiar facts that are distinct from those at issue in *Dijkstra*: (1) the borrower attempted to select and use an attorney to conduct the closing but this was ultimately not allowed by the lender in contravention of its stated policy, loan disclosures, and federal law; and (2) the notary brought with him to closing a letter from an attorney unknown to the borrower indicating he would be available to answer legal questions by telephone. See, Exhibit 7 to Sanchez Deposition. JA-332.

C. Standard of Review and Applicable Law

"A circuit court's entry of summary judgment is reviewed de novo." *Estate of Helmick ex rel. Fox v. Martin*, 192 W.Va. 501, 453 S.E.2d 335 (1994). In order to prevail on a motion for summary judgment, the moving party must prove "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W.Va. RCP 56(c). "A party is not entitled to summary judgment unless the facts established show a right to judgment with such clarity **as to leave no room for controversy** and show affirmatively that the adverse party cannot prevail under any circumstances." *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W.Va. 160, 171, 133 S.E.2d 770, 777 (1963) (emphasis added). "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Casualty & Sur. Co.*

"In determining on review whether there is a genuine issue of material fact between the parties, the Supreme Court will construe the facts in a light most favorable to the losing party." *Alpine Property Owners Ass'n v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17, 365 S.E.2d 57, 62, (1987). A genuine issue or dispute is simply one "about which reasonable minds could differ." *Dent v. Fruth,* 192 W. Va. 506, 510, 453 S.E.2d 340, 344 (1994). A material fact "is one that has the capacity to sway the outcome of the litigation under the applicable law." Syl. pt. 5, in part, *Jividen v. Law,* 194 W.Va. 705, 461 S.E.2d 451 (1995). The burden is entirely on the Respondent, as the moving party below, to show that the facts are so well-developed that there are no more genuine issues as to any material fact. "A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and **any doubt** as to the existence of such issue **is resolved against the movant** for such judgment." Syl. Pt. 2, *Justus v.*

Dotson, 161 W.Va. 443, 242 S.E.2d 575 (1978) (Citing *Aetna Casualty & Sur. Co., Supra*) (emphasis added).

In ruling on summary judgment, the courts are limited to the record before them, and are not free to supplement that record. "The court must grant the nonmoving party the benefit of inferences, **as credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.**" *Cavender v. Fouty*, 195 W.Va. 94, 464 S.E.2d 736 (1995) (emphasis added). Circuit court judges are not permitted to base their findings of fact on "personal knowledge as distinguished from proof of such facts." *Boggs v. Settle*, 150 W.Va. 330, 338, 145 S.E.2d 446, 451 (1965).

In this case, the circuit court ignored the Petitioner's evidence to the contrary and relied entirely on uncertain deposition testimony of the Petitioner that was expressly subject to confirmation. The circuit court failed to even acknowledge the contemporaneous evidence in the form of three separate loan applications in its judgment order let alone the significance of those applications under analogous federal law. Instead, the court exceeded its authority at summary judgment by resolving genuine factual disputes before trial and thereby committed reversible error.

III. SUMMARY OF ARGUMENT

Multiple violations of the CCPA and the RMLBSA are evident in the reverse mortgage transaction that Petitioner entered into with AAG, the nation's largest reverse mortgage lender. AAG concealed its overcharging and other misconduct from the borrower, Gary DeTemple, by virtue of denying him legal counsel for purposes of performing a title search and, more importantly, a residential real estate loan closing. Instead of allowing Mr. DeTemple to use his own counsel after repeated requests, AAG obtained a separate title commitment from an affiliated business and sent only a notary to close the loan. To make matters worse, AAG

charged Mr. DeTemple twice for the lawyer, who did not bother to show up to the closing. The charges are not only duplicitous but, moreover, are of a nature and in amounts not permissible under West Virginia law. Through this action, the circuit court was asked to remedy the mistreatment of a West Virginia senior.

The Petitioner has more than made the prima facie showing necessary to warrant a trial on the merits as to his claims that AAG violated (i) statutory provisions pertaining to the inducement of the loan by unconscionable conduct; (ii) statutory provisions that prohibit the charging of title search fees by *related* third parties; (iii) statutory provisions that prohibit the collection of any attorney fee at closing in excess of the fee that has been or will be remitted to the attorney and the collection of a fee for a product or service (such as an "attorney closing") where the product or service is not actually provided; and (iv) statutory provisions that require the lender to provide the borrower with a signed copy of the closing file at closing. AAG has made several admissions supporting the same.

However, the circuit court never reached these issues of liability. The circuit court determined that neither the CCPA nor the RMLBSA applied because it concluded the subject loan was a "commercial" loan rather than a "consumer" loan protected by statute. The circuit court's decision was based entirely on select excerpts from the Petitioner's deposition. In this regard, the circuit court erred because it failed to recognize that the deposition testimony was not conclusive and indeed contradicted by other testimony from the Petitioner and from AAG. Moreover, the circuit court failed to acknowledge the best possible evidence of the purpose of the loan that being the statements made in not one but in three contemporaneous loan applications. Finally, the circuit court erred by disregarding bank statements that demonstrated the vast majority of loan proceeds were not used for the supposed commercial purpose. Plainly

then, drawing all inferences in favor of the non-moving party material questions of fact remain that should prohibit a circuit court from granting summary judgment.

Finally, the circuit court exceeded its authority in finding that Petitioner's claims could be dismissed because he was not "aggrieved" in its post judgment order without ever providing notice or an opportunity for the Petitioner to be heard on the issue. Regardless, the petitioner was aggrieved in a classic pocket book form when he paid for closing services he did not receive and was otherwise overcharged at closing.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to R. A. P. 10(c)(6), oral argument is necessary as the dispositive issues would be significantly aided by oral argument. Petitioner requests that the Court set this matter for Rule 19 argument because the case involves a result against the weight of the evidence. Petitioner believes that a memorandum decision may be appropriate.

V. ARGUMENT

In granting summary judgment, the circuit court failed to hold the Respondent to its high burden of showing that no genuine issue of material fact remained. The parties disagreed on the primary purpose of the underlying transaction, and provided evidence in support of both positions that left the issue unresolved. This clear factual disagreement is material. The entire case rests upon its determination. As the non-moving party, the Petitioner was entitled to all inferences in his favor, and to have the evidence viewed in a light most favorable to him. Instead, the circuit court denied the Petitioner those reasonable inferences in granting summary judgment, and then compounded that error by making unsupported findings at the Rule 59 stage without input from the parties.

A. THE DETERMINATION OF WHETHER A LOAN IS *PRIMARILY* FOR A PERSONAL, FAMILY OR HOUSEHOLD PURPOSE IS DETERMINED BY THE ENTIRE CIRCUMSTANCES AND IS HIGHLY FACT INTENSIVE.

Rule 56(c) requires a party seeking summary judgment to show that no genuine issue of material fact remains such that judgment as a matter of law is warranted on those undisputed facts. Despite contrary information in the loan file itself and, importantly, on all of the loan applications, the circuit court found Respondent had met its burden of showing that Mr. DeTemple's reverse mortgage loan was for a commercial purpose and not covered by the CCPA or RMLBSA.

In moving for summary judgment, the Respondent relied on *Morris v. Marshall*, 172 W.Va. 405, 305 S.E.2d 581 (1983). However, the loan at issue here looks nothing like the loan at issue in *Morris*. In fact, the loan in *Morris* was characterized by the parties as a "Dealer Agreement."

> The corporate note and a 'Closed End Credit Disclosure Statement' were guaranteed by the appellants, Mr. and Mrs. Morris, and they gave three deeds of trust to secure the debt. Part of the proceeds from this loan paid off debts incurred on October 30, 1976, on November 10, 1977, and on March 17, 1976. An October 1976 Floor Plan Agreement ('Dealer Agreement') was consolidated into a new Dealer Agreement, in which Morris Garage's line of credit was increased. Later, after problems arose, Ralph C. Morris pledged all of his stock in the corporation as collateral for this debt.

Id. at 172 W.Va. at 406, 305 S.E.2d at 582. *See also*, *Wayne Cty. Bank v. Hodges*, 175 W.Va. 723, 727, 338 S.E.2d 202, 206 (1985) ("As the record unquestionably demonstrates, the loan from the Wayne County Bank to Gary Hodges ... was for a business purpose, i.e., to advance the business of Gary Hodges of selling used automobiles. Furthermore, as the circuit court determined, each of the appellants 'knew that the loan was made for a business purpose.'").

Quite the opposite, the loan here has all the hallmarks of a consumer loan: the loan was made under a federally insured loan program designed to "ease the financial burden on elderly

homeowners facing increased health, housing, and subsistence costs at a time of reduced income"[3], the lender attempted to provide the disclosures required for consumer loans under both federal and state law, the loan application denotes a consumer purpose, the loan is secured by Mr. DeTemple's personal residence, the loan proceeds were disbursed directly to Mr. DeTemple (opposed to his business or a business creditor) and placed in his personal checking account without strings attached to do with what he pleased.

Other than a couple of civil cases, like *Morris*, where the conclusion is obvious, there is virtually no case law in West Virginia to guide us. We may however look to federal law applying the same or a substantially similar definition. *See*, *Fleet v. Webber Springs Owners Ass'n, Inc.*, 235 W.Va. 184, 194, 772 S.E.2d 369, 379 (2015). The definitions utilized for a consumer loan under Wes Virginia's statutes have their origin in the Federal Truth in Lending Act ("TILA"). In fact, the definition of "Primary mortgage loan" under the RMLBSA cites to TILA, and "it means any loan primarily for personal, family or household use that is secured by a mortgage [or] deed of trust ... on a dwelling as defined in Section 103(w) of the Truth in Lending Act." W.Va. Code § 31-17-1(m). Under TILA, "the adjective 'consumer', used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. § 1602 (i); *compare* to W.Va. Code § 46A-2-102(15) defining "consumer loan" as a debt "incurred primarily for a personal, family, household or agricultural purpose."

We can take the following three lessons from a review of the decisions interpreting the definition of "consumer" under TILA involving similar circumstances. **First, the nature of the**

[3] 82 FR 7094, Jan. 19, 2017, available at: https://www.federalregister.gov/documents/2017/01/19/2017-01044/federal-housing-administration-strengthening-the-home-equity-conversion-mortgage-program#sectno-reference-206.8

transaction is determined by the entire circumstances and is highly fact intensive. *See, e.g., Tower v. Moss*, 625 F.2d 1161 (5th Cir. 1980) ("the nature of the credit transaction is ultimately determined by the entire surrounding factual circumstances"). *See also*, *Associates Fin. Servs. Co. v. Richardson*, 56 P.3d 748 (Haw. Ct. App. 2002) (when affidavits from creditor and borrower contradicted each other regarding the purpose of the loan, there was a genuine issue of material fact precluding summary judgment for the creditor).

Second, the purpose of the individual loan and not the use of the proceeds controls. A statement in the loan file that the loan is or is not for a covered purpose is generally dispositive.[4] If the consumer originally intended to use the proceeds primarily for business purposes and so informed the lender, and subsequently changed his or her mind and spent it for personal purposes, the stated purpose will control. *See*, *Bank of New Haven v. Liner*, 1995 WL 416204 (Conn. Super. Ct. July 11, 1996) ("Whether a loan is a consumer loan or a commercial loan is to be determined by what has taken place at and prior to the closing of the transaction."); *Washington Mut. Bank v. Freitag,* 259 P.3d 1 (Or. Ct. App. 2011). By the same token, if the consumer's original purpose in obtaining the credit was for personal, family, or household use, changing this purpose-for example, by moving out of a home and renting it to others-does not

[4] The courts have almost uniformly given effect to the stated "purpose" of the extension of credit. See, *Stillman v. First Nat. Bank, 117 Idaho 642, 645*, 791 P.2d 23 (Idaho Ct. App. 1990); *In Winkle v. Grand National Bank*, 267 Ark. 123, 137, 601 S.W.2d 559, 565, cert. denied, 449 U.S. 880 (1980) (loan application stating its purpose to be commercial controlled); *Toy Nat'l Bank of Sioux City v. McGarr*, 286 N.W.2d 376, 378 (Iowa 1979)(The only workable approach, in light of the scheme established by Congress, is to characterize a loan according to the purpose stated by the borrower at the outset of the transaction, and to maintain this characterization throughout the life of the loan.); *Sherrill v. Verde Capital Corp.*, 719 F.2d 364, 367 (11th Cir. 1983); *Waldron v. Ak Plus Cash* (*In re Denney*), 2007 WL 4302770 (Bankr. W.D. Wash. Dec.6, 2007) (finding a consumer purpose where application and underwriting materials contained proof that loan was intended to pay off personal bills and expenses). *See also, R.R. Fredeking v. Jpmorgan Chase Bank, N.A.*, 2018 U.S. Dist. LEXIS 80526, S.D.W.Va. (May 14, 2018) (WVCCPA is concerned with the purpose of the individual transaction at issue, not the spending on the account).

make TILA inapplicable. *See*, *Taggart v. Wells Fargo Home Mortgage, Inc.*, 2010 WL 3769091 (E.D. Pa. Sept. 27. 2010).

Third, a single loan may have both consumer and commercial purposes. In deciding how such a loan should be characterized for statutory application, some courts have adopted a quantitative approach. **"Primary" is not synonymous with "exclusive."** *See*, *Semar v. Platte Valley Fed. Sav. & Loan Ass'n*, 791 F.2d 699 (9th Cir. 1986) (loan "primarily" for personal purpose if primary purpose is to pay off a second trust deed loan on consumer's home and only 10% of proceeds used for business purposes); *Tower*, 625 F.2d 1161 (home improvement transaction for consumer purpose although home had been leased). Where more than half the money loaned is for an exempt purpose, such as to fund a business, consumer protection requirements are deemed not to apply.[5] The actual use of the proceeds can be considered but only to the extent helpful in determining the original purpose of the loan. *See e.g.*, *All Erection & Crane Rental Corp. v. Bucheit*, 2006 WL 459268 (Ohio Ct. App. Feb. 24, 2006).

B. UNRESOLVED FACTUAL DISPUTES REMAIN REGARDING THE PRIMARY PURPOSE OF THE REVERSE MORTGAGE LOAN.

With these principles in mind, we can turn to the relevant facts. In late December of 2014, the Petitioner inquired of AAG about obtaining a reverse mortgage loan for his principal residence. To his surprise, the loan process he was starting would take nearly 9 months. A loan application was first signed by Mr. DeTemple on March 13, 2015. The stated purpose for the

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[5] *See*, *Stillman v. First Nat'l Bank of N. Idaho*, 117 Idaho 642, 644, 791 P.2d 23, 25 (Idaho Ct. App. 1990). *See also*, *Cashmere Valley Bank v. Brender*, 146 P.3d 928 (Wash. 2006) (if loan has two discrete purposes, test is whether more than half of proceeds are intended for business purposes); *CIT Fin. Servs. v. Bowler*, 537 So. 2d 4 (Ala. 1988) (business purpose where, of 30,000 loan, $2,000 paid off credit card debts, remainder used to finance opening of medical practice); *Palmer v. Statewide Group*, 134 F.3d 378, 1998 U.S. App. LEXIS 1497 (9th Cir. 1998) (consumers' use of their home for child care business did not make loan a business loan); *Schulken v. Washington Mut. Bank*, 2012 WL 28099 (N.D. Cal. Jan. 5, 2012) (HELOC was primarily for personal, family, or household purposes even though it was used to pay some expenses related to daycare business run out of the residence, where business expenses were "minimal" compared to personal expenses.); *Waldron* (*In re Denney*), 2007 WL 4302770.

loan was for "home improvements." See, JA-293-299. Due to confusion or ineptitude on the part of AAG and/or its affiliated title company, the initial loan took too long and had to be terminated under AAG's policies. A new loan file was created on June 25, 2015. The purpose of the loan listed on the new loan application was "Leisure." See, JA-123.

Mr. DeTemple originally intended to use the initial loan proceeds on home improvements and wanted much of that work done by the beginning of summer (2015) as his daughters were graduating from school and spending the summer at home. Because the loan was so terribly delayed, Mr. DeTemple completed some of the home improvements by essentially borrowing funds from his construction project of townhomes that he was building near his home. Since circumstances had changed with some of the home improvements complete at the time of the second application, this time Mr. DeTemple placed a mark next to "leisure" on the loan application identifying it as the purpose of the loan. Mr. DeTemple would go on to use the funds for vacations among many other personal needs relating to leisure, such as purchasing two boats. Mr. DeTemple explained in lengthy detail how he used the loan proceeds in a verified interrogatory answer issued after he conducted extensive research. See, DeTemple's Answer to Interrogatory No. 3 (JA-455-458).

To support its dispositive motion, AAG made much out of a few statements made by Mr. DeTemple at deposition where he acknowledged he was waiting on part of the money to complete a single stage of construction of the townhouse project. This evidence was the entire basis of the circuit court's ruling where it gave no consideration to the Petitioner's evidence. Most importantly, the circuit court ignored the stated purpose for the loan in 3 separate loan applications, which indicated the loan was indeed for a consumer purpose. Again, this evidence is itself generally dispositive in analogous federal cases. See, footnote 4 *supra*. Nonetheless, the circuit court made no mention of this contemporaneous evidence in its rulings.

The circuit court also omitted other answers given by Mr. DeTemple at deposition from its analysis. When first asked "[w]hat was the purpose of you getting this reverse mortgage", Mr. DeTemple agreed the purpose was "leisure" and added: "[j]ust to have money to do things that I wanted to do. Because I'm retired." Deposition of Gary DeTemple at 25 (JA-466). The deposition testimony also references a vacation and completing the "rec room" at his personal residence. *Id.* at 42, 63 (JA-467, 468). When later asked the crucial question, "Was the Hubbard Townhouse project the primary motivating factor to get the reverse mortgage?" Mr. DeTemple responded, "I can't really answer that without thinking and probably looking at a calendar, being that far back." *Id.* at 64 (JA-469). The necessary research was later completed and resulted in the interrogatory answers referenced above.

But Petitioner's evidence doesn't stop with the loan applications or the detailed, verified interrogatory answers. In fact in response to a specious construction of Petitioner's bank statements by AAG, Petitioner demonstrated in his Memorandum in Opposition to Defendant's Motion for Summary Judgment at 15-17 (JA-437-439) that at most 4 transactions for the townhouse project are traceable to the loan proceeds which total only $12,600. *See also*, Affidavit of Attorney Causey and exhibits (JA-548-600). Even those funds were simply to repay money that was diverted to the home improvement project from Mr. DeTemple's townhouse project as a result of AAG's delay in closing the loan. *See also*, DeTemple's Answers to Interrogatory Nos. 4 and 6 discussing the two projects in detail (JA-458-461). Even if the circuit court had analyzed these as direct transfers of loan proceeds to a commercial project under the quantitative approach described *supra*, it would have gotten nowhere near crediting 50% of the total loan proceeds out of a $79,660 line of credit to a commercial purpose. Unfortunately, there is no indication in the Rule 56 or Rule 59 orders that the circuit court gave Mr. DeTemple the favorable inference he was entitled to from the bank statements as required under Rule 56.

Finally, AAG itself conceded at least indirectly that the loan was for a consumer purpose. At deposition, corporate representative Sanchez was asked if AAG had committed any errors in originating the loan. Sanchez testified that he found "that there was a slight overcharge in the origination fee" in reference to the cumulative fee cap set in RMLBSA, W.Va. Code § 31-17-8(m)(4). *See*, Deposition of Sanchez at 107-111 (JA-787-788). He found the violation because AAG excluded FNC fees from the calculation in error as FNC is not an "unrelated third party" and, therefore, such fees must be included in the cap. *See*, JA-255, 730-731. However, for our purposes, the important point is that Sanchez is acknowledging the loan is a consumer loan covered by West Virginia's consumer protection laws, including RMLBSA. If this were a commercial loan, no type of fee cap would apply and Sanchez would not have acknowledged such error. Here, again, Petitioner was entitled to a favorable inference stemming from Sanchez' testimony.

This brings us back to the principles we learned from the analogous Truth In Lending cases. First, after a factually intensive inquiry, the facts and circumstances indicate that the subject loan is indeed a consumer loan. All versions of the loan application state the subject loan was for a consumer purpose and these contemporaneous statements are alone sufficient to defeat summary judgment. However, when you combine the applications with the detailed and verified interrogatory answers, a fair and logical analysis of the bank statements in the record, and the testimony of AAG itself, to conclude that no genuine issue of material fact exists prior to trial is untenable.

Petitioner submits that only a clear and unequivocal admission of a *primary* commercial purpose would justify judgment without trial in the face of all the evidence Petitioner has put forth. However, no such unequivocal admission exists here. Therefore, a clear error of law is implicated. AAG relies exclusively on a select portion of Mr. DeTemple's deposition testimony.

Unfortunately, it has ignored other important parts of his testimony where he expressly stated further research and reflection was needed to refresh Petitioner's memory on a transaction which at that point was several years earlier. *See*, Deposition of DeTemple at 64. (JA-469). Thus, the deposition testimony is not conclusive.

AAG itself recognized the deposition was not conclusive and served interrogatories and requests for production of documents on Mr. DeTemple shortly ***after*** the deposition. The necessary research was completed by Mr. DeTemple and resulted in very detailed answers to the interrogatories. If Mr. DeTemple's deposition testimony were unequivocal or anywhere near conclusive in its favor, AAG would not have served these interrogatories in the first place. Mr. DeTemple answered the interrogatories truthfully, fairly and thoroughly after having the opportunity to obtain records from his banking institutions and review the bank statements, his calendar and other records in order to refresh his memory. Mr. DeTemple's interrogatory answers are entitled to be considered and taken at face value, especially since they are consistent with other evidence such as loan applications and bank records.

Mr. DeTemple agrees that he intended to reimburse his townhouse project for having to divert certain funds from it to a personal remodeling project while the loan process drug on unexpectedly. He submits even this remains a covered purpose under the two consumer protection laws at issue. Indeed, personal home-improvement was the original intent of the loan. Accordingly, a quantitative test which may be implicated in a dual purpose situation is unnecessary. However, even if that approach were explored, the results would not support a finding at the summary judgment stage that the loan was *primarily* intended for a commercial purpose. The very most that could conceivably be found at this stage in the litigation is that the townhouse project was a *secondary* purpose for the loan and, even concluding as much, is questionable.

Plainly questions of fact were presented on this record. Accordingly, this Court should reverse. The circuit court should hear from Petitioner's witnesses, including his daughters and those involved in the construction of the townhouses, and review the evidence at trial regarding (1) the intent of the loan, (2) the spending of the loan proceeds and (3) the true and full funding of the construction project which took place over several years.

C. PETITIONER WAS INDEED "AGGRIEVED" AND THE ISSUE WAS NOT RIPE FOR DECISION

With no motion ever pending on the issue and no opportunity for the parties to be heard, the circuit court found for the first time in deciding the Rule 59 motion that the Petitioner was not "aggrieved" and, therefore, did not have a "viable cause of action." Rule 59 Order at 3 (JA-09). To repeat, no such argument was advanced by AAG in its motion for summary judgment. As such, the issue was never briefed at any stage. Perhaps, the circuit court used this language to emphasize its ruling that the loan was a commercial loan because some loan proceeds in its opinion were used for a "commercial advantage", and this language is merely dicta. *Id.* If that is this Court's opinion, then the issue is moot. However, on the chance that the Court is of another opinion, Petitioner wishes to address it.

At a minimum, the Court should reverse so that a record can be developed and due process can be had at the circuit court level before this Court weighs in on the merits of such a finding. Civ. R. 56(f) contemplates a fair opportunity to oppose an issue asserted against a party. *See, Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 61, 459 S.E.2d 329, 338 (1995). Here, the circuit court potentially raises an issue on its own without notice or an opportunity for the adversely impacted party to be heard. These circumstances are analogous to when a circuit court converts a Rule 12 motion to a Rule 56 motion without notice. "Under these circumstances, a circuit court is required to give the parties notice of the changed status of the motion and a

reasonable opportunity to present all material made pertinent to such a motion by Rule 56. In this way, no litigant will be taken by surprise by the conversion." *Kopelman & Assocs., L.C. v. Collins*, 196 W. Va. 489, 491, 473 S.E.2d 910, 912 (1996)

While summary reversal and remand may be appropriate for lack of due process and fundamental fairness, Petitioner will briefly address the merits. Petitioner was clearly damaged in being charged illegal, excessive and duplicitous fees. While the fees may only be in the hundreds of dollars, Petitioner was nonetheless "aggrieved." The record is clear that AAG charged for attorneys' fees that were not remitted to an attorney in violation of statute and, therefore, the excessive part of the fee constitutes actual damages. *See*, JA-254, 728-730. Moreover, the RMLBSA was violated because a $375 fee was charged for a service not actually provided – *i.e.*, an attorney closing. *Id.* Nor were the two unreasonable closing fees authorized under the CCPA. *See*, JA-440.

Furthermore, West Virginia Code § 31-17-8(g) prohibits the charging of title fees by related third parties. Accordingly, the FNC charge of $595 for a title examination (which it did not perform) is improper and constitutes actual damages to the Petitioner. *See*, JA-255, 730-731. In addition, an award for annoyance and inconvenience if demonstrated may be included as actual damages. *See*, S*loane v. Equifax Information Serv.*, LLC, 510 F.3d 495 (4th Cir. 2007); *King v. JP Morgan Chase Bank*, N.A., Civil Action No. 3:09-0744, 2010 WL 2815729 (S.D.W. Va. July 16, 2010). These laws exist to protect seniors, like Mr. DeTemple, and consumers in general from being exploited. In fact, statutory damages may also be implicated in matters such as this. *See*, W.Va. Code § 46A-5-101 and § 31-17-17.

Tellingly, the circuit court's statement that "[w]hether the RML[BS]A and/or the WVCCPA applies is irrelevant as a party must be aggrieved to make out a viable cause of action and in this case, there is no aggrieved party" demonstrates a misunderstanding of the consumer

protection laws at issue. Rule 59 Order at 3 (JA-09). If these Acts apply, then the unreasonable fees charged by AAG are actionable and Mr. DeTemple has a remedy to address this injury. If these Acts do not apply, Mr. DeTemple will still have been "aggrieved" having suffered a classic pocketbook form of injury by paying for services not received; however, then, he may not have a realistic and viable remedy.

At least for consumer loans, a lender cannot get away with charging for services not rendered or padding its owner's pocket by steering business to related parties that overcharge the consumer. Because the circuit court stopped at the gateway issue of whether this was a consumer loan and never reached the merits, this Court must accept Petitioner's liability and damages theories as true in reviewing the circuit court's finding.

Finally, the circuit court's colorful statement that Petitioner cannot "have his cake and eat it too" only illustrates the overall error made by the circuit court. *Id.* The circuit court was apparently of the opinion that the loan had to have an exclusive purpose either consumer or commercial. But as we have seen *supra* at 14 and fn. 5, the loan can have dual purposes and there are no restrictions on how HECM loan proceeds can be used by borrowers. So then, the question becomes whether the "primary" purpose is consumer or commercial. If the primary purpose is consumer in nature (which we have here) and a secondary purpose is a "commercial advantage", then *yes*, a consumer may benefit from *both* the minority portion of the loan proceeds being put to use to earn income and yet be protected by consumer statutes that prohibit abusive practices and unreasonable fees. The circuit court erred in failing to consider such a scenario.

VI. CONCLUSION

Petitioner humbly requests this Court reverse the lower court's finding that the primary purpose of the Petitioner's loan transaction with AAG was commercial in nature and further reverse what *may* be considered an alternative finding (on what appears to be the circuit court's own un-briefed and un-argued theory) that Petitioner was not "aggrieved." The matter should be remanded for further litigation and ultimately a trial on the merits. Petitioner, finally, requests that this Court allow the circuit court on remand to consider awarding attorneys' fees and costs incurred in bringing this appeal under West Virginia Code § 46A-5-104 and § 31-17-17 should the Petitioner ultimately prevail at trial.

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CERTIFICATE OF SERVICE

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