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 REPLY BRIEF

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INTRODUCTION

The essence of the trial court's inquiry on a motion for summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Wilson v. Daily Gazette Co.*, 588 S.E.2d 197, 214 W.Va. 208 (2003). The record, here, is not one-sided in favor of AAG by any means. Indeed, the facts and circumstances indicate that the subject loan is a consumer loan for which 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") apply.

The remaining issues and arguments put forth by AAG are not properly before this Court and can be summarily rejected. Despite the character assassination against one of its customers, Mr. DeTemple, by AAG, a 27-year-old felony conviction should not result in Mr. DeTemple's forfeiture of consumer protection rights afforded under West Virginia law. The Circuit Court made no such finding. Mr. DeTemple's criminal record is not relevant to this appeal.

Having failed to address the issue in Respondent's brief, it appears AAG may agree that the Circuit Court's language in the Rule 59 Order (JA-006-009) that the Petitioner was not "aggrieved" and, therefore, did not have a "viable cause of action" was mere dicta. In any event, injury and standing are easily established as Petitioner submits, he is entitled to a refund of illegal, excessive and/or duplicitous loan fees assessed by AAG along with statutory damages afforded by the Legislature.

Finally, this Court should reject AAG's request that it rule on Petitioner's claims on independent grounds which were not substantively ruled on by the Circuit Court. As noted in Petitioner's brief, the Circuit Court declined to substantively address Mr. DeTemple's statutory claims deeming them moot following its determination that the CCPA and the RMLBSA did not apply to this loan transaction. Order Granting Summary Judgment at 3. JA-004. Deciding non-jurisdictional fact-dependent questions for the first time on appeal is not appropriate. Moreover, as AAG did not cross-assign as error the Circuit Court's decision not to rule on AAG's other grounds for summary judgment in accordance with Appellate Rule 10(f), these issues are not properly before this Court.

ARGUMENT

I. The Record Reflects a Genuine and Substantial Factual Dispute That Should Prohibit Summary Judgment

Upon a motion for summary judgment all exhibits, affidavits and other matters submitted by both parties should be considered by the court and such motion can only be granted when it is clear that no genuine material issue of fact is involved. *Haga v. King Coal Chevrolet Co.*, 150 S.E.2d 599, 151 W.Va. 125 (1966). Trial judges should ordinarily hear evidence and, upon trial, direct a verdict if the judge is of an opinion to do so, rather than try the case in advance on a motion for summary judgment. *Dawson v. Woodson*, 376 S.E.2d 321, 180 W.Va. 307 (1988). Summary judgment is only appropriate where the record, taken as a whole, cannot lead a rational trier of fact to find for the nonmoving party. *Alex Lyon & Son, Sales Managers & Auctioneers Inc. v. Leach*, 844 S.E.2d 120 (W.Va. 2020).

With these standards fresh in mind, it may be helpful to visualize the factual dispute that exists here regarding the purpose of the loan in the chart below:

Petitioner DeTemple's Evidence	**Respondent AAG's Evidence**
Initial loan application signed by Mr. DeTemple on March 13, 2015. The stated purpose for the loan was for home improvements. *See*, JA-293-299.	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. *See*, JA-95-96, 99 & 102.
Second loan application signed by Mr. DeTemple on July 23, 2015. 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*, JA 123-136 (loan application).	An illegitimate construction of Petitioner's bank statements that relies on impossibilities. Compare JA 62-63 to JA-437-439 & JA-548-600. The Circuit Court did not embrace this analysis in its Order and relied solely on the deposition testimony.
A third loan application signed for closing that occurred on September 2, 2015, again indicated that the purpose of the loan was for "Leisure." *See*, JA-116-122	
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 detailed interrogatory answers. Interrogatory No. 3 describes the use of the loan proceeds and spending during the relevant time. Interrogatory No. 6 explains the funding and construction of the townhome project. *See*, JA-455-461.	
Through bank statements, Petitioner demonstrated that at most 4 transactions for the townhouse project are traceable to the loan proceeds which total only $12,600. *See*, JA-437-439 & JA-548-600.	
AAG itself conceded at least indirectly that the loan was for a consumer purpose. *See*, Petitioner's Brief at 17 and JA-255, 730-731 & 787-788.	

The essence of the trial court's inquiry on a motion for summary judgment is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Wilson*, 214 W.Va. 208. Here, the existence of genuine issues of material fact are undeniable. The record is not one-sided in favor of AAG by any means. Indeed, the facts and circumstances indicate that the subject loan is 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 and to rule in favor of AAG is reversible error. This is simply not a record upon which summary judgment can be granted under well-established jurisprudence.

Several misstatements of fact in Respondent's brief make it even more clear that summary judgment was not appropriate. First, AAG invokes Hubbard Townhouse, LLC as somehow playing a role in the purpose of the loan. Respondent Brief at 1. However, this LLC did not even exist until March 24, 2017, more than two years after the initial loan application. *See*, JA-107. AAG also blurs the timeline in discussing the loan and the construction of the Hubbard townhome. *See*, Respondent's Brief at 3[1] & 12. AAG conveniently ignores the undisputed fact that the loan process took 9 months to complete.[2] The foundation of the Hubbard townhome was not ready to

[1] In addition, there is nothing in the record that supports the assertion that lenders "hesitated" to lend to Mr. DeTemple.

[2] AAG wrongly attempts to blame Mr. DeTemple for an address discrepancy that supposedly resulted in the loan being initially rejected. In reality, Mr. DeTemple went to great lengths to assist AAG and make it understand that the same property had two separate addresses. In fact, he wrote a series of three letters to AAG and enclosed proof of his address beginning on March 12, 2015. *See*, JA-720-721. Given these

build on when the loan process began or when the first application was signed in March of 2015. There was no need for loan proceeds to fund the Hubbard townhome project at that time. The foundation was only ready to be put under roof as the September 2015 closing neared. Because the loan process drug on way past a normal turn around, Mr. DeTemple borrowed funds from the Hubbard townhome project to fund, in part, a summer remodeling of his primary residence that he promised his daughters and that was intended to be funded by the subject loan. *See*, JA 458. While Mr. DeTemple needed part of the eventual loan proceeds to repay the money borrowed from the Hubbard project, this need was not pressing until after the loan process had been greatly delayed into August of 2015. The Hubbard townhome was never the primary intent of the loan and only came into play at all because of the extreme delay by AAG in processing the loan.

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. *See e.g*, *Stillman v. First Nat. Bank, 117 Idaho* 642, *645*, 791 P.2d 23 (Idaho Ct. App. 1990)("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."); *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."); *Taggart v. Wells Fargo Home Mortgage, Inc.*, 2010 WL 3769091 (E.D. Pa. Sept. 27. 2010) (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 make TILA inapplicable). The actual use of the proceeds can be considered but only to the extent

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efforts and the early understanding by other third parties such as the local appraisal, AAG and/or its affiliated title vendor demonstrated simple incompetence in processing the loan application. *See, Id.*

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).

Mr. DeTemple's answer to Interrogatory No. 3 attempts to describes the use of the loan proceeds and his spending during the relevant time. He begins by stating:

> Plaintiff states that the Reverse Mortgage Proceeds were deposited in Mr. DeTemple's personal bank account for his personal use. The funds were mixed with existing funds and future sources of income. Because money is fungible, it is impossible to say exactly what these funds were used for - they were not earmarked for a specific purpose but instead used generally for Mr. DeTemple's personal needs and desires. Funds were received into Mr. DeTemple's personal bank account which is used primarily for personal, family and household purposes. Those deposits include: $40,471 in September of 2015; $10,000 on November 21, 2016; $10,000 on February 22, 2017; $11,000 on March 15, 2017; and $2,900 on May 11, 2017.

Mr. DeTemple goes on to detail his spending which was for personal, family and household purposes over several pages. *See* JA-455-458. He concludes his answer by stating:

> Mr. De Temple believes that only a small fraction of the total loan proceeds would have been "used" for the Construction Project. Any such expenditure was necessary because Mr. DeTemple started remodeling his personal home months before the actual closing in reliance on receiving the loan proceeds, which were delayed due to no fault of his own. As a result of the delay, it was necessary to divert money Plaintiff had saved to use on the Construction Project and put it into his own home project. It is impossible to provide exact dollar figures as detailed records were not maintained to track loan related spending beyond what has been produced. Further as explained above, United States currency is fungible and deposits unrelated to the loan were made into Mr. DeTemple's personal checking account during the relevant time in addition to loan funds and preexisting funds. On occasion, supplies for the Construction Project may have been funded from this account. However, the primary funding for the Construction Project came from other income including that earned by Mr. DeTemple as a contractor and several years of acquiring materials that predate any notion of the subject loan.

The funding of the Hubbard townhome project was further detailed in response to Interrogatory No. 6. Mr. DeTemple's construction business Shadyside Construction has serviced hundreds of residents of the Northern Panhandle and the Ohio Valley over decades. The materials for the

Hubbard townhome project were largely accumulated by Mr. DeTemple over years of collecting excess items from other contracting jobs, salvaging materials from tear downs, and shopping clearance opportunities. Much of the labor he performed himself. *See*, JA-460-461.

In its response brief, AAG attempts to tell a different story. The calculation of $56,000 it offers at page 6 (though it informed the Circuit Court of $59,000) is easily debunked and was not accepted by the Circuit Court in granting summary judgment. The bank statements can be found at JA-548-600 and are surprisingly simple to understand.

The initial deposit of loan proceeds into Mr. DeTemple's personal account was $40,471.00 on September 10, 2015. The first two transactions listed by the Defendant, which total $8,000, are traceable to the loan proceeds, meaning sufficient loan proceeds were still in the account when these funds were transferred to Shadyside Construction. All of the initial loan proceeds were out of the Wesbanco account by late December of 2015. The checking account balance was only $753.37 on December 21, 2015.

The next deposit of loan proceeds from the reverse mortgage for $10,000 was not until November 21, 2016. Accordingly, the next 3 transfers to Shadyside Construction identified by the Respondent at page 6 of its brief, which were made on February 23, 2016 and two transfers on March 17, 2016, are not possibly traceable to the loan proceeds. The loan proceeds had been spent months earlier primarily on personal, household and family items.

The second deposit of loan proceeds ($10,000) on November 21, 2016 was out of the account by late December of 2016. The balance on December 22, 2016 was $300.63. None of the transfers to Shadyside Construction identified by AAG involve the second disbursement of loan proceeds.

The third deposit of loan proceeds was for $10,000 on February 22, 2017. The $2,600 transfer to Shadyside Construction on February 27, 2017 is traceable to the loan proceeds. However, the transfer on March 13, 2017 of $2,100 to Shadyside Construction is not traceable to the loan proceeds. The reverse mortgage loan proceeds were out of the account at the time of this transfer. This transfer to Shadyside Construction was funded by a deposit of $7,005.30 made from another source of funds on the same day, March 13, 2017.

The fourth deposit from the reverse mortgage of $11,000 was made on March 15, 2017. The transfer of $2,000 to Shadyside Construction on March 23, 2017 is traceable to this deposit. However, none of the remaining transfers can be traced to this deposit as the balance of these loan proceeds were spent elsewhere.

The fifth and last deposit of loan proceeds of $2,900 was made on May 12, 2017. It did not fund any transfer to Shadyside Construction identified by Defendant.

In fact, none of the final four transactions identified by AAG are traceable to the reverse mortgage loan proceeds. The transfers to Shadyside Construction were made long after all the loan proceeds were expended. In fact, these are not even transfers from the personal checking account where the loan proceeds were deposited. Three are transfers from the newly established checking account for Hubbard Townhouse, LLC and these stem from the proceeds received from the sale of one of the townhomes opposed to the subject loan. The fourth transfer is not to but from Shadyside Construction to Gary DeTemple.

In sum, only 4 of the identified transactions are traceable to the reverse mortgage loan proceeds, which total $12,600.[3] Therefore, to the extent AAG is correct that Mr. DeTemple spent

[3] In its response brief, AAG constructs a false assertion that it assigns to the Petitioner and proceeds to tear it down. "It, again, defies all logic—and DeTemple's sworn testimony—to argue that DeTemple completed the construction of the townhouse (except for the foundation) for merely $12,600.00. [J.A. at 183-213.] This argument is simply not persuasive." However, no where has Mr. DeTemple asserted that

$56,000 finishing the Hubbard townhomes (which is not conceded), only $12,600 of it came from the loan with AAG. Certainly, questions of fact surround these bank statements (and others), and they simply do not support summary judgment in favor of AAG.

What can be gleaned from these bank statements is that the overwhelming majority of the loan proceeds were *not* transferred to Shadyside Construction to complete the Hubbard townhome project. Thus, they are consistent in this regard with both the loan applications and the verified interrogatory answers submitted by Mr. DeTemple. Consistent with the forgoing legal authorities, the actual use of the proceeds can be considered but only to the extent helpful in determining the original purpose of the loan. Here, the bank statements at a minimum support the assertion that the primary purpose of the loan was *not* to construct the Hubbard townhomes.

Moreover, because the actual use of the loan proceeds plays at most a secondary role in the analysis, the fact that Mr. DeTemple cannot show his use of the loan proceeds *to the exact penny* is hardly relevant and certainly not dispositive. While the bank statements demonstrate that the loan proceeds were largely *not* used for Mr. DeTemple's construction business, Mr. DeTemple's other evidence including the loan applications all denoting a consumer purpose, the interrogatory answers explaining the consumer purpose, the balance of his deposition testimony discussing leisure and home improvement purposes, and the admission of AAG itself that consumer laws apply are more than sufficient to carry the Petitioner's burden as to the intent of this loan at the summary judgment stage.

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the townhome project that began in 2010, was partially completed in 2017, and continues today costs only $12,600. Petitioner said nothing like this in his deposition and certainly not when he provided detail in responding to Interrogatory Nos. 3 and 6. *See* JA-455-461.

II. AAG's Recitations of Petitioner's Prior Criminal Conviction Are Not Relevant to The Questions Presented on Summary Judgment

Throughout these civil proceedings in nearly *every* pleading, AAG reminded the Circuit Court that Mr. DeTemple has been convicted of felony charges. Once again it goes to the well and digs up a 1995 criminal proceeding to show this Court. It even asks this Court to consider Mr. DeTemple's credibility in light of his criminal record. *See*, Respondent's Brief at 14.

Fortunately for the Petitioner, this Court applies the rules of evidence and civil procedure. With respect to summary judgment, a trial 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). AAG has inappropriately asked the Circuit Court and now this Court to weigh the credibility of Mr. DeTemple before trial.

Moreover, evidence regarding any such prior criminal proceeding is not admissible under Evidence Rule 401 as it has no bearing on what occurred 27 years after conviction and more than 30 years after the subject matter of the conviction. Furthermore, Rule 403 requires its exclusion as any probative value is substantially outweighed by the risk of unfair prejudice. Pursuant to Rule 404(a), evidence of a person's character is generally not admissible in a civil case. Any exception under rule 404(b) must meet the strict requirements of *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994), and reasonable notice of the general nature of and the specific and precise purpose for which the evidence is being offered is required. No such notice was ever provided below, and no pretrial *McGinnis* hearing was held or even requested.

In additon to the extent Rule 609(a)(2) could apply, Rule 609(b) would still prohibit the admission of a conviction more than 10 years after the conviction or release from confinement, whichever is later. The referenced matter occurred far more than 10 years ago, and Mr. DeTemple

was released from confinement around 2001. Finally, Rule 609 only permits under limited circumstances evidence of the conviction itself for impeachment and not the underlying criminal file, case briefs, docket sheets or details of the underlying factual allegations. Rule 609 makes clear that any use of "such evidence" is limited to trial proceedings and, therefore, inappropriate for summary judgment.

AAG plainly seeks to win this appeal through character assassination opposed to the deployment of material facts. Here, the Court should not ignore Mr. DeTemple's testimony set forth in his interrogatory answers that he offered only after researching records some of which he obtained from third party financial institutions[4] simply because Mr. DeTemple was convicted of a felony for acts that allegedly occurred in the early 1990s. This is especially true when Mr. DeTemple reserved the right to conduct such research in answering deposition questions and in light of the corroborating facts plainly established in AAG's own loan records and in independent bank statements.

III. AAG's Brief Does Not Address the Language in the Circuit Court's Rule 59 Order That Found Petitioner Was "Not Aggrieved" Indicating Such Language Does Not Independently Support Dismissal of This Action

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). Perhaps this is just dicta or, perhaps, the Circuit Court ruled on standing without being requested

[4] To throw shade on these interrogatory answers, AAG submits that they were provided months after the due date and close of discovery. Respondent's Brief at FN 9. While late, the answer deadline was subject to multiple agreed upon extensions as records had to be gathered from third parties and analyzed, and no motion to compel was ever filed. Moreover, the Answers were provided by email on April 27, 2021 prior to the close of discovery on May 3, 2021. In fact, the scheduling order was later amended by agreement but still AAG never sought to develop these answers through an additional deposition (which Plaintiff would have certainly granted) or otherwise.

to do so. In Respondent's Brief, it makes no mention of this language.

To the extent it is not mere dicta, 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 such a finding. "'[C]ourts are essentially passive instruments of government.' They 'do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties.' The party presentation principle is supple, not ironclad. There are no doubt circumstances in which a modest initiating role for a court is appropriate. But this case scarcely fits that bill." *United States v. Sinening-Smith*, 140 S.Ct. 1575, 206 L.Ed.2d 866 (2020).

Moreover, Petitioner was clearly damaged in being charged illegal, excessive and/or duplicitous fees. 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. As this Court recently held, statutory damages alone are sufficient to confer standing under the CCPA. *See*, *State ex rel. Dodrill Heating & Cooling, LLC v. Akers*, No. 21-0561, 2022 WL 1197831, at *7 (W. Va. Apr. 22, 2022). At least for consumer loans, a lender should not be allowed to get away with charging for services not rendered or padding its owner's pocket by steering business to related parties that overcharge the consumer. To be sure, the issue of standing is not in doubt despite the Circuit Court's gratuitous language.

IV. This Court Should Not Affirm Summary Judgment of Petitioner's Claims on Independent Grounds Which Were Not Substantively Ruled on by the Circuit Court

Without explanation, the Respondent goes into an argument of the various claims on the merits. As noted in Petitioner's brief, the Circuit Court declined to substantively address Mr.

DeTemple's claims deeming them moot following its determination that the CCPA and the RMLBSA did not apply to this loan transaction. Order Granting Summary Judgment at 3. JA-4.

While the parties each filed motions for summary judgment addressing the merits, the Circuit Court never reached the issues. This Court has a long-established history of declining to decide "nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken." *State ex rel. Ten South Mgmt. Co. LLC v. Wilson*, 231 W.Va. 372, 745 S.E.2d 263, n. 4 (W.Va. 2013) (citing syl. pt. 1, *Mowery v. Hitt*, 155 W.Va. 103, 181 S.E.2d 334 (1971); syl pt. 1, *Shackleford v. Catlett*, 161 W.Va. 568, 244 S.E.2d 327 (1978); syl. pt. 3, *Voelker v. Frederick Business Properties Co.*, 195 W.Va. 246, 465 S.E.2d 246 (1995)). As the *Mowery* Court noted:

> [u]pon an appeal to this Court from a judgment of a circuit court entered in a civil action, if it appears that certain questions were properly presented for decision but not considered or decided by the trial court, this Court may reverse the judgment of the trial court and remand the case to that court for decision of the questions thus properly presented for decision but not decided.

Id. at syl. pt. 2. The reason behind this hesitation is due to the "need to have the issue refined, developed, and adjudicated by the trial court so that we may have the benefit of its wisdom." *Whitlow v. Bd. of Educ. Of Kanawha Cty.*, 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993).

This case exemplifies why this long-accepted principle of appellate review exists. The Circuit Court specifically declined to address certain arguments made by the parties on the basis that it had determined the Plaintiff's claims against AAG fell outside the consumer protection laws of the state. Thus, the only ruling and finding by the Circuit Court to be appealed was the finding that the claims were not covered by the CCPA and the RMLBSA.

AAG should have filed a cross-assignment of error pursuant to Appellate Rule of Procedure 10(f) if it desired to have this Court address and decide issues not ruled on by the Circuit Court. *See Fairmont Tool v. Opyoke*, 2022 W.Va. LEXIS 455 at n.17 (W.Va. 2022) (finding respondent

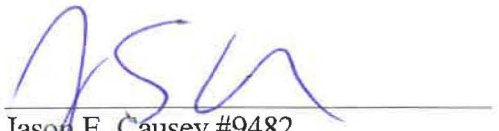
failed to assert a cross-assignment of error on issue); *Yost v. Fuscaldo*, 185 W.Va. 493, 408 S.E.2d 72, n.1 (W.Va. 1991) (declining to address argument raised by appellee after finding that he did not appeal decision, thus his argument was not properly before the Court); *Brooks v. City of Huntington*, 234 W.Va. 607, 768 S.E.2d 97, n. 7 (W.Va. 2014) (finding that an issue was not properly before the Court when respondent did not cross-assign a finding as error).

If this Court were to find that a question of fact indeed exists as to the purpose of the loan that would influence the application of the CCPA and the RMLBSA, then it should remand the matter to the Circuit Court for further proceedings. The Circuit Court would then be free to address the cross motions for summary judgment as to the merits. Petitioner's arguments on the merits can be found at JA-253-261, JA-440, and JA-726-735, which are incorporated herein by reference. On remand, the Circuit Court could theoretically grant AAG's motion for summary judgment on the merits potentially ending the case. Alternatively, the court could grant Plaintiff's motion for summary judgment and require trial proceedings only as to the gateway issue of whether these consumer protection laws apply in light of the aforementioned competing evidence as to the purpose of the loan. Finally, the court would have the option of denying both motions on the merits and leave all issues for trial.

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 as questions of fact exist that plainly prevent such a finding under the well-established summary judgment standards of this Court. For all the reasons stated herein, the judgment of the Circuit Court should be reversed, and this matter should be remanded for further proceedings.

GARY DeTemple, Petitioner

By: 

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