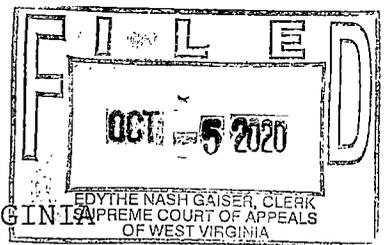


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NO. 20-0489



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

CARESSA DELANEY,

Plaintiff,

v.

Civil Action No. 18-C-75

DAN'S CAR WORLD, LLC, a West Virginia
Limited Liability Company dba DAN CAVA'S
TOYOTA WORLD,

Defendant.

FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
HONORABLE SUSAN B. TUCKER, JUDGE

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST
VIRGINIA

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d/b/a Dan Cava's Toyota World

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TABLE OF CONTENTS

STATEMENT OF THE KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW 1

ASSIGNMENTS OF ERROR AND
SUMMARY OF ARGUMENT. 10

STATEMENT OF FACTS. 11

STATEMENT REGARDING ORAL ARGUMENT 22

POINTS AND AUTHORITIES. 23

DISCUSSION. 26

 A. Standard of Review. 26

 B. The Trial Court Erred as a Matter of Law in Denying the Motion for Summary Judgment of the Appellant. 26

 C. The Trial Court Abused its Discretion in Striking the Answer and Defenses of the Appellant 32

 D. The Appellee Was Not Entitled to Recover Her Attorney Fees and Litigation Costs and the Trial Court Abused its Discretion in Awarding Attorney Fees and Costs 34

 E. The Appellee Was Not Entitled to Claim Misrepresentation as an Element of Damage and Was Not Entitled to Recover Punitive Damages. 41

 F. The Appellee Was Not Entitled to Any Prejudgment Interest on General Damages 41

CONCLUSION. 42

TABLE OF CITATIONS

Federal Cases

Key Tronic Corp. v. United States,
511 U.S. 809 (1994) 23, 36

Virden v. Altria Group, Inc.,
304 F.Supp.2d 832 (N.D. W.Va. 2004) 23, 26, 34, 37

State Cases

Aetna Casualty & Surety Company v. Pitrolo,
178 W.Va. 190, 342 S.E.2d 156 (1986). 23, 38

Alpine Property Owners Association
v. Mountaintop Development Company,
179 W.Va. 12, 365 S.E.2d 57 (1987). 23, 32

Bryant v. Prenger, 717 S.W.2d 242
(Mo. App. 1986) 23, 28

Casto Trailer Sales, Inc. v. Monarch
Industries, Inc., 150 W.Va. 669,
149 S.E.2d 238 (1966) 23, 27

Cattrell Companies, Inc. v. Carlton, Inc.,
217 W.Va. 1, 614 S.E.2d 1 (2005). 23, 32

Cavender v. Fouty, 195 W.Va. 94, 464
S.E.2d 736 (1995) 23, 31

Chevy Chase Bank v. McCamant, 204 W.Va.
295, 512 S.E.2d 217 (1998). 23, 36, 37, 38

Conrad v. ARA Szabo, 198 W.Va. 362,
480 S.E.2d 801 (1996) 23, 26

Constellium Rolled Products Ravenswood,
LLC v. Griffith, 235 W.Va. 538, 775
S.E.2d 90 (2015). 23, 26

C.W. Development, Inc. v. Structures,
Inc. of West Virginia, 185 W.Va. 462,
408 S.E.2d 41 (1991). 23, 41

Dixie Appliance Company v. Bourne,
138 W.Va. 810, 77 S.E.2d 879 (1953) 23, 29

<u>Gasque v. Mooers Motor Car Company, Inc.,</u> 227 Va. 154, 313 S.E.2d 384 (1984)	23, 28
<u>Given v. Field,</u> 199 W.Va. 394, 484 S.E.2d 647 (1997)	23, 33
<u>Golden Eagle Resources, II, LLC</u> <u>v. Willow Run Energy, LLC,</u> 242 W.Va. 372, 836 S.E.2d 23 (2019)	23, 34
<u>Goldstein v. Peacemaker Properties, LLC,</u> 241 W.Va. 720, 828 S.E.2d 276 (2019)	24, 26
<u>Gomez v. Kanawha County Commission,</u> 237 W.Va. 451, 787 S.E.2d 904 (2016)	24, 33
<u>Hawkins v. Ford Motor Company,</u> 211 W.Va. 487, 566 S.E.2d 624 (2002)	24, 38
<u>Horn v. Bowen,</u> 136 W.Va. 465, 67 S.E.2d 737 (1951)	24, 41
<u>Jividen v. Law,</u> 194 W.Va. 705, 461 S.E.2d 451 (1995)	24, 32
<u>Johnson v. F&M Bank,</u> 180 W.Va. 702, 379 S.E.2d 752 (1989)	24, 31
<u>Kocher v. Oxford Life Insurance Company,</u> 216 W.Va. 56, 602 S.E.2d 499 (2004)	24, 34
<u>Mays v. Marshall University Board of Governors,</u> 2015 WL 6181508 (W.Va. Sup.Ct. 2015)	24, 41
<u>Miller v. Lentine,</u> 495 A.2d 1229 (Me. 1985)	24, 30
<u>Muzelak v. King Chevrolet, Inc.,</u> 179 W.Va. 340, 368 S.E.2d 710 (1998)	24, 34, 38, 40
<u>Mydlach v. Daimlerchrysler Corporation,</u> 226 Ill. 2d 307, 875 N.E.2d 1047 (2007)	24, 31
<u>Painter v. Peavy,</u> 192 W.Va. 189, 451 S.E.2d 755 (1994)	24, 31
<u>Sally-Mike Properties v. Yokum,</u> 179 W.Va. 28, 365 S.E.2d 246 (1986)	24, 36

<u>Sellman Auto, Inc. v. McCowan,</u> 89 Nev. 353, 513 Pa.2d 1228 (1973)	24, 28
<u>Shafer v. Kings Tire Service, Inc.,</u> 215 W.Va. 169, 597 S.E.2d 302 (2004)	24, 39
<u>State ex rel. Fox v. Board of Trustees,</u> 148 W.Va. 369, 135 S.E.2d 262 (1964)	24, 37
<u>Stephens Industries, Inc. v. American Express Company,</u> 471 S.W.2d 501 (Mo. Ct.App. 1971)	24, 28
<u>Teller v. McCoy,</u> 162 W.Va. 367, 253 S.E.2d 114 (1979)	24, 41
<u>Tri-State Petroleum Corp. v. Coyne,</u> 240 W.Va. 542, 814 S.E.2d 205 (2018)	24, 26, 35, 41
<u>Trulargo, LLC v. Public Service Commission,</u> 242 W.Va. 482, 836 S.E.2d 449 (2019)	25, 34
<u>Vanderbilt Mortgage and Finance, Inc. v. Cole,</u> 230 W.Va. 505, 740 S.E.2d 562 (2013)	25, 38
<u>Web Press Services Corporation v. New London Motors, Inc.,</u> 203 Conn. 342, 525 A.2d 57 (1987)	25, 29
<u>Wolfe v. Welton,</u> 210 W.Va. 563, 558 S.E.2d 363 (2001)	25, 35

Statutes and Regulations

West Virginia Code §46-2-313(2)	25, 29
West Virginia Code §46-2-608.	25, 27, 28
West Virginia Code §46A-1-101 <u>et seq.</u>	11, 25, 36
West Virginia Code §46A-5-104	11, 25, 35, 36
West Virginia Code §46A-6-101 <u>et seq.</u>	25, 27, 36, 37
West Virginia Code §46A-6-102	25, 36, 37
West Virginia Code §46A-6-106	<i>passim</i>
West Virginia Code §46A-6-106(b)	25, 27

West Virginia Code §55-7-29 11, 25, 33
West Virginia Code §55-7-29(a). 25, 33
West Virginia Code §56-6-31(b). 25, 41

Rules of Appellate Procedure

West Virginia Rules of Appellate Procedure Rule 20(a) . . 22, 25

Rules of Civil Procedure

West Virginia Rules of Civil Procedure Rule 6 3, 25
West Virginia Rules of Civil Procedure Rule 56. 25, 31

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Defendant.

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TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST
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TOYOTA WORLD,

Defendant.

FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
HONORABLE SUSAN B. TUCKER, JUDGE

**BRIEF OF THE APPELLANT,
DAN'S CAR WORLD, LLD D/B/A DAN CAVA'S TOYOTA WORLD**

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST
VIRGINIA

**I. Statement of the Kind of Proceeding
and Nature of the Ruling Below**

This appeal follows the December 5, 2019 trial of the underlying civil action in which the appellee, Caressa Delaney, claimed that a used 2012 Chevrolet Equinox she purchased on February 24, 2017 was defective. Appendix at 00019. At trial, the circuit court, abusing its discretion precluded the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World, from presenting

any defenses, however, the appellee still failed to obtain a better result than pretrial settlement proposals.¹ Appendix at 01050.

The civil action was filed on February 20, 2018 claiming that the used 2012 Chevrolet Equinox with 76,014 miles purchased by the appellee, Caressa Delaney, from the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World, was defective. Appendix at 00001. The appellant filed an answer on March 20, 2018. Appendix at 00010.

On August 20, 2018 the appellant responded to the first set of interrogatories served by the appellee. On September 21, 2018 an order was entered requiring the appellant to supplement the previously filed responses. Appendix at 00019.

The appellant supplemented the responses to the to discovery requests served by the appellee on January 22, 2019. Appendix at 00061. A scheduling order was entered on June 25, 2019 setting the trial for December 3, 2019. Appendix at 00079.

On February 12, 2019 the trial court entered an order granting a second motion to compel discovery and award as sanctions an attorney fee of \$1,200.00 against the appellant. Appendix at 00082. There was no factual basis established for the award of the

¹ The appellee refused a settlement offer of \$2,500.00 from Huntington National Bank, dismissing the bank with prejudice with no consideration. The verdict of \$12,662.09 must be reduced by the \$9,500.00 value of the vehicle which the appellee is required to return to the appellant. Accordingly, the net verdict of \$9,162.09 is less than the pretrial offer of the appellant and Huntington National Bank.

\$1,200.00 attorney fee sanction against the appellant. Appendix at 00188.

Without intervention of the trial court the depositions of the appellee, Caressa Delaney; as well as, John Tiano, salesperson of the appellant; Tiffany Moines, employee of the appellant; and, Daniel A. Cava, managing member of the appellant, were completed. Appendix at 00088, 00091, 00094. The appellant also responded to requests for admissions and interrogatories served on August 16, 2019. Appendix at 00123.

Upon receipt of a demand that the responses to the request for admissions be supplemented, the appellant supplemented its responses on October 25, 2019, which was the discovery completion date. Appendix at 00132. The appellee, Caressa Delaney, filed a motion for further and additional sanctions and to compel complete responses to discovery with respect to the appellant on October 25, 2019 which was the discovery completion date and two (2) months after the discovery supplementation. The hearing notice was not sent to counsel for the appellant until October 30, 2019. Appendix at 00172. The motion of the appellee, Caressa Delaney, which claimed difficulty regarding the scheduling of depositions that had already taken place was set for hearing on November 7, 2019, affording the appellant only six (6) days notice which was not reasonable notice pursuant to Rule 6 of the West Virginia Rules of Civil Procedure. Appendix at 00172.

At the November 7, 2019 hearing, the trial court took the discovery motion under advisement but required the parties to return to mediation on or before Friday, November 15, 2019 and report to the court the results of the mediation by 9:00 a.m. on November 18, 2019. There was no argument or discussion with respect to the discovery motion at the November 7, 2019 hearing. Appendix at 00970.

On November 21, 2019, the appellee, Caressa Delaney, in person and by her counsel, John N. Ellem and Jane E. Peak, as well as the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World, by its managing member, Daniel Cava, and by counsel, Gregory H. Schillace, appeared for the final pretrial conference. Appendix at 00662. A stipulation of dismissal was entered with respect to Huntington Bankshares, on November 19, 2019, therefore, the appellee and the appellant were the only parties remaining in the action. Appendix at 00620.

The dismissal of Huntington Bank was submitted by the appellee, Caressa Delaney, foregoing an offered payment of \$2,500.00 from Huntington Bank in exchange for a release of claims. Counsel for Huntington Bank had a conflict with the December 3, 2019 trial date and the appellee did not want the trial continued, therefore, Huntington Bank was dismissed with prejudice without making any settlement payment. Appendix at 00931.

During the final pretrial conference the trial court inquired as to the status of the mediation and was informed that the appellee increased her first mediation demand of \$55,000.00 to \$75,000.00 to which the appellant had offered to repurchase the subject vehicle for \$12,000.00 which when coupled with the \$2,500.00 offered by Huntington Bank was only \$963.84 less than the appellee, Caressa Delaney, paid for the vehicle and the extended service contract. The trial court commented that the increase in the demand was "understandable". Appendix at 00663.

Throughout the November 21, 2019 hearing the trial court commented negatively with respect to the appellant. These comments included:

- (a) The appellee increase in settlement demand from \$55,000.00 to \$75,000.00 was understandable. Appendix at 00663;
- (b) "Don't apologize to me, apologize to the people who it matters to." Appendix at 00664;
- (c) "You can believe whatever you want." Appendix at 00664;
- (d) "Oh, I'm not surprised." Appendix at 00665; and,
- (e) "Jane, I am guessing that is woefully insufficient and unacceptable." Appendix at 00667.

During the November 21, 2019 final pretrial conference the trial court was advised by counsel for the appellee, Caressa Delaney, that the demand had been reduced to \$65,000.00. Appendix at 00663. The trial court then solicited a response from counsel for the appellant who responded by the offer to pay the \$2,500.00

offered by Huntington Bank prior to its dismissal in addition to the prior offer of the appellant. Appendix at 00664.

At the direction of the trial court, the appellee, Caressa Delany, then reduced the demand to \$55,000.00. Appendix at 00666. The appellant stated that to resolve the litigation the appellant would repurchase the subject vehicle for all amounts paid including the now expired service contract which totaled \$15,363.84. Appendix at 00666.

The offer was rejected and the trial court proceeded without argument to deny the motion for summary judgment of the appellant stating that there were questions of fact; grant the motion for additional sanctions of the appellee; striking the all of the defenses of the appellant; and, ordering that the trial proceed on damages only. Appendix at 00667.

The case proceeded to trial on December 5, 2019. After the one(1) day trial, the jury, being instructed that they were required to award damages as the trial court had ruled as a matter of law regarding liability rendered the following verdict:

Verdict Form

Please answer each item, as appropriate:

Part I - Revocation of Acceptance

1. For the Plaintiff, Caressa Delaney's revocation of acceptance of her 2012 Chevrolet Equinox in addition to the purchase price of \$12,662.09, what amount, if any, do you award Plaintiff Caressa

Delaney for incidental and consequential damages?

Purchase Price \$ 12,662.09
Finance Charges \$ _____
Annoyance, Nuisance and Inconvenience \$ _____

Part II - Breach of Warranty/Magnuson-Moss Warranty Act

2. As a result of Dan's Car World, LLC breach of express warranty and breach of implied warranty of merchantability and Magnuson-Moss Act with respect to Caressa Delaney's 2012 Chevrolet Equinox do you find that the violations by the Defendant were serious enough to require the Defendant to buy back the vehicle?

Yes No

If you answered "Yes" to Question No. 2, then the Plaintiff is entitled to a refund of the purchase price of \$12,662.09, what additional amount, do you award Plaintiff Caressa Delaney for the following compensatory damages?

Refund of the Purchase Price \$ 12,662.09
Annoyance, Nuisance and Inconvenience \$ _____

If you answered "No" to Question No. 2, then you have determined that the violations were NOT serious enough to require the Dan's Car World, LLC to buy back the vehicle. But you may still award Caressa Delaney damages for this violation of law. What amount do you award Plaintiff Caressa Delaney for the following compensatory damages:

Diminished Value of the Chevrolet Equinox \$ _____

Annoyance, Nuisance and Inconvenience \$ _____

Part III - West Virginia Consumer Protection Act

3. Dan's Car World, LLC has committed the following unfair or deceptive acts or practices:

A. Dan's Car World, LLC represented to Caressa Delaney that the Chevrolet Equinox was of a particular quality when it was not.

B. Dan's Car World, LLC, engaged in conduct which created a likelihood of confusion or misunderstanding with respect to any of the warranties provided with the Chevrolet Equinox.

C. Dan's Car World, LLC engaged in conduct which created a likelihood of confusion or misunderstanding with respect to any of the warranties provided with the Chevrolet Equinox.

D. Dan's Car World, LLC, engaged in an unfair or deceptive act or practice by concealment, suppression, or omission of any material fact with respect to the Chevrolet Equinox at any time before, during or after the sale to the Plaintiff?

For these violations, please indicate whether plaintiff is entitled to \$200 in damages or more than \$200 in damages by placing the amount of damages you find for Dan's Car World's unfair and deceptive practices. Remember that your verdict on this Count must be at least \$200.

\$ 2000.-

Part IV - Misrepresentation

4. Defendant Dan's Car World, LLC, misrepresented the condition of the Chevrolet Equinox it sold to Caressa Delaney.

5. Dan's Car World, LLC misrepresented that it had properly inspected the Chevrolet Equinox prior to its sale to Caressa Delaney.

What amount, if any, do you award Plaintiff Caressa Delaney, for her compensatory damages for Dan's Car World, LLC fraud and/or misrepresentations?

\$ 2000.-

Part V - Punitive Damages

6. Do you find that Plaintiff Caressa Delaney has established by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by Dan's car World, LLC with actual malice toward Caressa Delaney or a conscious, reckless and outrageous indifference to the health, safety and welfare of others?

X Yes No

If you answer to Question No. 6 was "Yes," then what additional damages, if any, do you award for punitive damages? If you answer to Question 6 was "No," then please continue to the Certification.

\$ 2000.-

Certification

The above answers are the jury's unanimous verdict.

 X Yes No

Thereafter, the appellant timely filed its motion for judgment as a matter of law or in the alternative motion for new trial. Appendix at 01198. The appellee filed a petition for the award of attorney fees and costs. Appendix at 01067.

II. Assignments of Error and Summary of Argument

A. The Appellant Was Entitled to Summary Judgment.

(1) There is no cause of action pursuant to West Virginia Code §46A-6-106 absent out-of-pocket loss of which appellee has none.

(2) The appellee kept the vehicle, therefore, there was no revocation of acceptance.

(3) The 2012 Chevrolet Equinox was fully repaired at no cost to the appellee including, being provided with a substitute vehicle.

B. The Trial Court Abused its Discretion in Striking the Answer and Defenses of the Appellant.

(1) There is an insufficient record of any discovery abuse to justify the penalty imposed.

(2) The trial court did not analyze the factors established by this Court to be considered when awarding sanctions.

(3) The trial court erred in directing a verdict regarding punitive damages as such relief exceeds the statutory authority of West Virginia Code §55-7-29.

C. The Appellee Was Not Entitled to an Award of Attorney Fees and Costs.

(1) The appellee did not prevail in this action.

(2) The conduct of the appellant did not involve debt collection and was not illegal, fraudulent or unconscionable, therefore, West Virginia Code §46A-5-104 does not apply.

(3) The attorney fees and costs awarded are not reasonable in light of the issues presented in a one (1) day trial where the appellee recovered less than the pretrial settlement offers.

D. Misrepresentation Is Not an Element of Damage and the Appellee Proved No Damages Proximately Caused by Any Misrepresentation.

E. Punitive Damages Are Not Recoverable for Breach of Contract or Pursuant to West Virginia Code §46A-1-101 et seq.

F. Prejudgment Interest Is Not Reasonable on General or Punitive Damages.

III. Statement of Facts

1. On February 24, 2017, the appellee, Caressa Delaney, purchased a used 2012 Chevrolet Equinox from the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World. Appendix at 00385.

2. At the time of the purchase the 2012 Chevrolet Equinox had one prior owner and had been driven 76,014 miles. Appendix at 00386.

3. The 2012 Chevrolet Equinox had previously been owned by William D. Pringle and Cheryl J. Pringle, who were residents of Harrison County at the time of the February 24, 2017 purchase. Appendix at 00386.

4. Mr. and Mrs. Pringle purchased another vehicle from the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World, trading in their 2012 Chevrolet Equinox which they purchased new from Harry Green Chevrolet in Clarksburg, West Virginia on or about November 21, 2011. Appendix at 00386.

5. Prior to offering the 2012 Chevrolet Equinox for sale, the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World, performed the following inspection and/or service on the vehicle:

- (a) Used vehicle inspection;
- (b) Replaced Wiper Blades;
- (c) Mounted and balanced four (4) new tires;
- (d) Front wheel alignment;
- (e) Oil and oil filter change;
- (f) Turned rear brake rotors and pads;
- (g) Replaced rear brake pads;
- (h) Replaced engine air filter;
- (i) Replaced the cabin air filter;
- (j) Performed throttle body cleaning service;
- (k) Replaced battery.

A part of the complaint of the appellee regarding discovery responses by the appellant involved the production of documents regarding this service. Appendix at 00386-00387.

6. The purchase price of the used 2012 Chevrolet Equinox purchased by the appellee was \$11,990.00 plus the \$4,000.00 attributed to the vehicle traded by the appellee. Appendix at 00387.

7. As provided by the Motor Vehicle Purchase Agreement, the appellee, Caressa Delaney, was given a credit against the purchase price in the amount of \$4,000.00 for the sale (trade in) of her 2007 Toyota Corolla to the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World. Appendix at 00406.

8. The 2007 Toyota Corolla sold by the appellee, Caressa Delaney, to the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World, for \$4,000.00 had been driven 112,690 miles. Appendix at 00406.

9. As the 2012 Chevrolet Equinox was used the appellee, Caressa Delaney, purchased a Toyota Extra Care Vehicle Service Agreement from the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World. Appendix at 00388.

10. The cost of the Toyota Extra Care Vehicle Service Agreement was \$2,525.00. Appendix at 00388.

11. The Toyota Extra Care Vehicle Service Agreement provided coverage from February 24, 2017 for 3 years or 36,000 miles. Appendix at 00431.

12. There were no additional express warranties with the vehicle as the appellee, Caressa Delaney, purchased the service agreement. Appendix at 00406.

13. At the time of the purchase of the used 2012 Chevrolet Equinox the appellee, Caressa Delaney, executed an Odometer Disclosure Statement indicating that she was aware that the used 2012 Chevrolet Equinox had been driven 76,014 miles. Appendix at 00389.

14. The appellee, Caressa Delaney, was provided with a CarFax Vehicle History Report by a sales representative employed by the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World. Appendix at 00389.

15. Following the February 24, 2017 purchase of the subject vehicle the appellee, Caressa Delaney, alleged that she noticed that the vehicle was "shifting really hard". Appendix at 00389.

16. The appellee, Caressa Delaney, further alleges that the day after she noticed the vehicle was "shifting really hard", the check engine light illuminated. Appendix at 00390.

17. The appellee, Caressa Delaney, took the 2012 Chevrolet Equinox to Premier Chevrolet located in Morgantown, West Virginia on March 6, 2017 regarding the issues alleged in the two (2)

proceeding paragraphs. Appendix at 00390.

18. On March 6, 2017 Premier Chevrolet performed the following services:

- (a) Replaced the catalytic converter;
- (b) Replaced the HVAC actuator;
- (c) Repaired a transmission fluid leak by replacing the transmission manual shaft seal;
- (d) Repaired the complaint of noise in rear of the vehicle when turning by replacing the rear sway bar bushings.

Appendix at 00390.

19. At the time the appellee, Caressa Delaney, took the used 2012 Chevrolet Equinox to Premier Chevrolet for the March 6, 2017 service, she had driven the vehicle approximately ten (10) days and had added an additional 306 miles to the total vehicle mileage. Appendix at 00390.

20. The appellee, Caressa Delaney, was not charged by Premier Chevrolet for any of the service and/or repairs performed on March 6, 2017 as she was advised that all of the issues were covered by warranty. Appendix at 00390.

21. On March 20, 2017 the appellee, Caressa Delaney, brought the used 2012 Chevrolet Equinox to the service department operated by the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World, complaining of the following:

- (a) Transmission shifting hard;
- (b) Driver side window would not roll up; and,
- (c) Vehicle misses when first started.

Appendix at 00391.

22. When delivered to the service department of the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World, by the appellee, Caressa Delaney, the 2012 Chevrolet Equinox on March 20, 2017 had 76,603 miles. Appendix at 00391.

23. The appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World, sent the vehicle to Harry Green Chevrolet located in Clarksburg, West Virginia as the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World, is not a Chevrolet dealer. Appendix at 00391.

24. While at Harry Green Chevrolet, the following services were performed on the 2012 Chevrolet Equinox:

- (a) Replaced spark plugs;
- (b) Installed General Motors Fuel Treatment System Cleaner; and,
- (c) Evaluated the complaint regarding the vehicle not shifting correctly and indicated that the technician test drove the vehicle and found it be operating as designed with no computer failure codes present or in the computer history of the vehicle.

Appendix at 00457.

25. The 2012 Chevrolet Equinox was then returned to the service department of the appellant, Dan's Car World, LLC d/b/a Dan

Cava's Toyota World, on or about April 6, 2017 where the driver's side window was lubricated correcting the complaint. Appendix at 00460.

26. In the 25 days that the appellee, Caressa Delaney, owned the 2012 Chevrolet Equinox from February 24, 2017 to March 20, 2017 the vehicle had been driven 589 miles. Appendix at 00391.

27. During the time period the 2012 Chevrolet Equinox was at Harry Green Chevrolet and at the service department of the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World, for evaluation and service, the appellee, Caressa Delaney, was provided with a vehicle by the appellant at no cost. Appendix at 00453.

28. On June 16, 2017 the appellee, Caressa Delaney, took the vehicle to Premier Chevrolet complaining that the vehicle was "shifting abnormally"; "shuts off"; "gurgles when accelerating"; and, that the check engine light was illuminated. Appendix at 00393.

29. At the time of the evaluation by service technicians at Premier Chevrolet the check engine light was not on and the vehicle was two (2) quarts low on oil. Appendix at 0393.

30. During the June 16, 2017 inspection the General Motors trained service technician(s) at Premier Chevrolet found two (2) General Motors service codes, Code p0014 and Code p0013. Appendix at 00462.

31. On June 16, 2017 Premier Chevrolet noted that the 2012 Chevrolet Equinox now had 79,284 miles, therefore the vehicle had been driven 3,270 miles since the February 24, 2017 purchase. Appendix at 00462.

32. The appellee, Caressa Delaney, returned the vehicle to Premier Chevrolet on June 21, 2017 stating that the check engine light was still on and that she still heard a noise when accelerating. Appendix at 00464.

33. The service technician at Premier Chevrolet ran a diagnostic test and replaced both exhaust and intake cam position solenoids. The repaired vehicle was then test driven and returned to the appellee, Caressa Delaney. Appendix at 00464.

34. On June 28, 2017 the appellee, Caressa Delaney, by her counsel and employer², sent a letter to the appellant claiming that the appellee, Caressa Delaney, was treated unfairly by the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World. Appendix at 00466.

35. Contemporaneously with the June 28, 2017 correspondence Daniel A. Cava, the managing member of the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World, advised the appellee, Caressa Delaney, as well as counsel for the appellee, that the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World, would repurchase the 2012 Chevrolet Equinox for the total amount

² The appellee is employed as a legal assistant at the law firm of Alan Karlin where Ms. Peak is an attorney.

paid by the appellee, Caressa Delaney. Appendix at 00470. This offer was refused by the appellee.

36. On August 22, 2017 the appellee, Caressa Delaney, again returned the vehicle to Premier Chevrolet complaining that the 2012 Chevrolet Equinox was using oil excessively. Appendix at 00472.

37. The service technicians at Premier Chevrolet performed an oil consumption test and found that "special coverage 16118" applied to the 2012 Chevrolet Equinox owned by the appellee. Appendix at 00472.

38. Pursuant to the special coverage code 16118, Premier Chevrolet replaced the pistons and rings of the 2012 Chevrolet Equinox with the vehicle being returned to the appellee, Caressa Delaney, on August 30, 2017. Appendix at 00472.

39. At all times the subject vehicle was being repaired the appellee, Caressa Delaney, was provided with a vehicle free of charge either by Premier Chevrolet or the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World. Appendix at 00395.

40. At the time the vehicle was brought to Premier Chevrolet on August 22, 2017 it had 81,271 miles, therefore, the appellee, Caressa Delaney, had driven the vehicle 5,257 miles since the February 24, 2017 purchase. Appendix at 00395.

41. As the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World, was not a General Motors dealer the appellant was not advised, informed or aware of a special coverage code or any other

issue with the 2012 Chevrolet Equinox. Appendix at 00396.

42. The appellee, Caressa Delaney, was not required to pay any amount for the services and repairs performed by Premier Chevrolet from August 22, 2017 through August 30, 2017. Appendix at 00396.

43. On November 6, 2017 the subject vehicle had a West Virginia State Inspection performed at Premier Chevrolet. At the time of the inspection, the vehicle had 83,247 miles and the vehicle passed the West Virginia State Inspection. Appendix at 00396.

44. On March 22, 2018 the appellee, Caressa Delaney, returned the vehicle to Premier Chevrolet with the complaint that the lower bumper cover was coming off and that the exhaust was "louder than normal". Appendix at 00396.

45. In addition to putting the bumper back into place the service technician at Premier Chevrolet performed a lube, oil and filter service and a multipoint vehicle inspection. Appendix at 00483.

46. With respect to the exhaust being louder than normal, the service technician at Premier Chevrolet discovered that the muffler was cracked and needed repaired. Appendix at 00483.

47. The appellee, Caressa Delaney, chose not to repair the muffler at Premier Chevrolet. Appendix at 00397.

48. At the time of the March 22, 2018 service, the 2012 Chevrolet Equinox had 86,605 miles, therefore, the vehicle had 10,591 more miles than at the time of the February 24, 2017 purchase. Appendix at 00397.

49. On April 13, 2018 the appellee, Caressa Delaney, returned the vehicle to Premier Chevrolet complaining that the vehicle was shaking when the breaks were applied with the shaking being worse at higher speeds. Appendix at 00488.

50. The technician with Premier Chevrolet determined that the front and rear brake rotors were excessively warped and required replacement. Appendix at 00488.

51. During the April 13, 2018 service visit, the Premier Chevrolet service technician(s) additionally performed a multipoint vehicle inspection at no charge. Appendix at 00488.

52. The appellee, Caressa Delaney, had the brake rotors replaced by her sister in law who is not a General Motors certified service technician. Appendix at 00489.

53. On March 27, 2019 the appellee, Caressa Delaney, took the 2012 Chevrolet Equinox to Premier Chevrolet where an oil change service was performed. Appendix at 00493.

54. The Premier Chevrolet service technician advised the appellee, Caressa Delaney, that the struts for the rear hatch which would not stay up and the tire pressure sensors needed replaced. The service technician with Premier Chevrolet also performed a

multipoint vehicle inspection. Appendix at 00493.

55. At the time of the March 27, 2019 service the mileage of the vehicle was 98,658 miles. Appendix at 00493.

56. The appellee, Caressa Delaney, chose not to repair the rear hatch struts or the tire pressure sensors. Appendix at 00497.

57. Charles Six, the General Manager of Premier Chevrolet testified that the 2012 Chevrolet Equinox purchased by the appellee had repairs that are common with the Chevrolet Equinox model and that the vehicle purchased by the appellee is not out of the ordinary. Appendix at 00398.

58. The appellee, Caressa Delaney, continues to drive the subject vehicle which now has in excess of 103,000 miles. Appendix at 00523.

IV. Statement Regarding Oral Argument

Pursuant to Rule 20(a) of the West Virginia Rules of Appellate Procedure, the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World, asserts that oral argument should be held in this case as it involves an issue of fundamental public importance. It is fundamentally important to citizens and businesses of West Virginia that used cars that have been drive in excess of 75,000 miles and are five (5) model years old not be held to the same standard as a new vehicle.

V. Points and Authorities

Federal Cases

Key Tronic Corp. v. United States, 511 U.S. 809 (1994)

Viriden v. Altria Group, Inc., 304 F.Supp.2d 832 (N.D. W.Va. 2004)

State Cases

Aetna Casualty & Surety Company v. Pitrolo, 178 W.Va. 190, 342 S.E.2d 156 (1986)

Alpine Property Owners Association v. Mountaintop Development Company, 179 W.Va. 12, 365 S.E.2d 57 (1987)

Bryant v. Prenger, 717 S.W.2d 242 (Mo. App. 1986)

Casto Trailer Sales, Inc. v. Monarch Industries, Inc., 150 W.Va. 669, 149 S.E.2d 238 (1966)

Cattrell Companies, Inc. v. Carlton, Inc., 217 W.Va. 1, 614 S.E.2d 1 (2005)

Cavender v. Fouty, 195 W.Va. 94, 464 S.E.2d 736 (1995)

Chevy Chase Bank v. McCamant, 204 W.Va. 295, 512 S.E.2d 217 (1998)

Conrad v. ARA Szabo, 198 W.Va. 362, 480 S.E.2d 801 (1996)

Constellium Rolled Products Ravenswood, LLC v. Griffith, 235 W.Va. 538, 775 S.E.2d 90 (2015)

C.W. Development, Inc. v. Structures, Inc. of West Virginia, 185 W.Va. 462, 408 S.E.2d 41 (1991)

Dixie Appliance Company v. Bourne, 138 W.Va. 810, 77 S.E.2d 879 (1953)

Gasque v. Mooers Motor Car Company, Inc., 227 Va. 154, 313 S.E.2d 384 (1984)

Given v. Field, 199 W.Va. 394, 484 S.E.2d 647 (1997)

Golden Eagle Resources, II, LLC v. Willow Run Energy, LLC, 242 W.Va. 372, 836 S.E.2d 23 (2019)

Goldstein v. Peacemaker Properties, LLC, 241 W.Va. 720, 828 S.E.2d 276 (2019)

Gomez v. Kanawha County Commission, 237 W.Va. 451, 787 S.E.2d 904 (2016)

Hawkins v. Ford Motor Company, 211 W.Va. 487, 566 S.E.2d 624 (2002)

Horn v. Bowen, 136 W.Va. 465, 67 S.E.2d 737 (1951)

Jividen v. Law, 194 W.Va. 705, 461 S.E.2d 451 (1995)

Johnson v. F&M Bank, 180 W.Va. 702, 379 S.E.2d 752 (1989)

Kocher v. Oxford Life Insurance Company, 216 W.Va. 56, 602 S.E.2d 499 (2004)

Mays v. Marshall University Board of Governors, 2015 WL 6181508 (W.Va. Sup.Ct. 2015)

Miller v. Lentine, 495 A.2d 1229 (Me. 1985)

Muzelak v. King Chevrolet, Inc., 179 W.Va. 340, 368 S.E.2d 710 (1998)

Mydlach v. Daimlerchrysler Corporation, 226 Ill. 2d 307, 875 N.E.2d 1047 (2007)

Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994)

Sally-Mike Properties v. Yokum, 179 W.Va. 28, 365 S.E.2d 246 (1986)

Sellman Auto, Inc. v. McCowan, 89 Nev. 353, 513 Pa.2d 1228 (1973)

Shafer v. Kings Tire Service, Inc., 215 W.Va. 169, 597 S.E.2d 302 (2004)

State ex rel. Fox v. Board of Trustees, 148 W.Va. 369, 135 S.E.2d 262 (1964)

Stephens Industries, Inc. v. American Express Company, 471 S.W.2d 501 (Mo. Ct.App. 1971)

Teller v. McCoy, 162 W.Va. 367, 253 S.E.2d 114 (1979)

Tri-State Petroleum Corp. v. Coyne, 240 W.Va. 542, 814 S.E.2d 205 (2018)

Trulargo, LLC v. Public Service Commission, 242 W.Va. 482, 836 S.E.2d 449 (2019)

Vanderbilt Mortgage and Finance, Inc. v. Cole, 230 W.Va. 505, 740 S.E.2d 562 (2013)

Web Press Services Corporation v. New London Motors, Inc., 203 Conn. 342, 525 A.2d 57 (1987)

Wolfe v. Welton, 210 W.Va. 563, 558 S.E.2d 363 (2001)

Statutes and Regulations

West Virginia Code §46-2-313(2)

West Virginia Code §46-2-608

West Virginia Code §46A-1-101 et seq.

West Virginia Code §46A-5-104

West Virginia Code §46A-6-101 et seq.

West Virginia Code §46A-6-102

West Virginia Code §46A-6-106

West Virginia Code §46A-6-106(b)

West Virginia Code §55-7-29

West Virginia Code §55-7-29(a)

West Virginia Code §56-6-31(b)

Rules of Appellate Procedure

West Virginia Rules of Appellate Procedure Rule 20(a)

Rules of Civil Procedure

West Virginia Rules of Civil Procedure Rule 6

West Virginia Rules of Civil Procedure Rule 56

VI. Discussion

A. Standard of Review

(1) The denial of the notice of the appellant for summary judgment is subject to a *de novov* standard of review. Conrad v. ARA Szabo, 198 W.Va. 362, 480 S.E.2d 801 (1996).

(2) With respect to the award of prejudgment interest on general damages, as this involves the interpretation of the statute authorizing the recovery of prejudgment interest, the standard of review to be applied is *de novo*. Tri-State Petroleum Corp. v. Coyne, 240 W.Va. 542, 814 S.E.2d 205 (2018).

(3) The error of the trial court in permitting the jury to award punitive damages of \$2,000.00 which are not available under the West Virginia Consumer Credit and Protection Act is reviewed *de novo* as the availability of such damages is a question of law. Viriden v. Altria Group, Inc., 304 F.Supp.2d 832 (N.D. W.Va. 2004); Constellium Rolled Products Ravenswood, LLC v. Griffith, 235 W.Va. 538, 775 S.E.2d 90 (2015).

(4) The grant of sanctions to include the striking of the answer and all defenses of the appellant is reviewed on an abuse of discretion standard. Goldstein v. Peacemaker Properties, LLC, 241 W.Va. 720, 828 S.E.2d 276 (2019).

B. The Trial Court Erred as a Matter of Law in Denying the Motion for Summary Judgment of the Appellant.

There were no genuine issue of material fact regarding the claims asserted by the appellee with respect to the used 2012

Chevrolet Equinox. The appellee purchased a used vehicle with 76,016 miles which was repaired either by Premier Chevrolet and General Motors under a special service code or under the extended service agreement purchased by the appellee.

The appellee provided no evidence of any service and/or repair related to issues claimed to have existed approximately eight (8) days after her February 24, 2017 purchase which was not fully repaired. Appendix at 00577. The appellee never returned control of the vehicle to the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World; therefore, there was no revocation of the purchase by the appellee pursuant to West Virginia Code §46-2-608. Appendix at 00588.

West Virginia Code §46A-6-106(b) provides that:

No award of damages in an action pursuant to subsection (a) may be made without proof that the person seeking damages suffered an actual out-of-pocket loss that was proximately caused by a violation of this article.

The appellee presented no evidence of any out-of-pocket loss, therefore, the appellee had no private cause of action under West Virginia Code §46A-6-101 et seq.

Further, the trial court should have granted summary judgment in favor of the appellant as the appellee failed to properly revoke her acceptance of the used 2012 Chevrolet Equinox pursuant to West Virginia Code §46-2-608 as the appellee kept the vehicle, continuing to drive it up to the present time. Casto Trailer Sales, Inc. v. Monarch Industries, Inc., 150 W.Va. 669, 149 S.E.2d

238 (1966). Any revocation pursuant to West Virginia Code §46-2-608 is forfeited where there is a use of the good after giving notice of revocation. Gasque v. Mooers Motor Car Company, Inc., 227 Va. 154, 313 S.E.2d 384 (1984).

After giving notice of revocation the appellee held the 2012 Chevrolet Equinox as a bailee for the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World. The appellee was thereafter precluded from continuing to use the vehicle as her own and still have the benefit of any revocation. Stephens Industries, Inc. v. American Express Company, 471 S.W.2d 501 (Mo. Ct.App. 1971); Sellman Auto, Inc. v. McCowan, 89 Nev. 353, 513 Pa.2d 1228 (1973). The continued use of an automobile causes depreciation in every mile the vehicle is driven, therefore, the appellant was and continues to be prejudiced by the continued use precluding the appellee from claiming a right of revocation. Gasque v. Mooers Motor Car Company, Inc., 227 Va. 154, 313 S.E.2d 384 (1984).

Upon claiming entitlement to revocation of acceptance of the used 2012 Chevrolet Equinox on or about June 28, 2017 the appellee refused to return the vehicle to the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World. The appellee continues to use the 2012 Chevrolet Equinox as her own vehicle rather than holding the vehicle as a bailee for the appellant, therefore, the appellee is precluded from revocation as a remedy. Bryant v. Prenger, 717 S.W.2d 242 (Mo. App. 1986).

Although not addressing motor vehicles, this Court in Dixie Appliance Company v. Bourne, 138 W.Va. 810, 77 S.E.2d 879 (1953), held that:

buyer of personalty must reject or return all the property sold and thus place seller in status quo as nearly as may be.

It is uncontroverted that the appellee continued to drive the 2012 Chevrolet Equinox driving the vehicle in excess of an additional 30,000 miles from the date of purchase to the time of trial and continuing to drive the vehicle after.

The appellant should have been granted summary judgment regarding the claim by the appellee that a sales person employed by the appellant informed her that the used 2012 Chevrolet Equinox was a good car; had only one (1) owner; had been checked for mechanical and other issues; and, should purchase a service contract. Appendix at 00574. The used 2012 Chevrolet Equinox had one (1) prior owner, Mr. and Mrs. Pringle and had been inspected by service technicians with the appellant prior to the February 24, 2017 sale to the appellee. Appendix at 00574.

With respect to the statements made by the sales representative that the vehicle was a good car, such statements are opinion or commendation of the vehicle and do not create a warranty pursuant to West Virginia Code §46-2-313(2). The Uniform Commercial Code recognizes that some statements of sellers are merely "puffing" and do not create express warranties. Web Press

Services Corporation v. New London Motors, Inc., 203 Conn. 342, 525 A.2d 57 (1987).

Although the drawing of a line between "puffing" and creation of a warranty is difficult a statement such as "this is a top notch car" or that the vehicle is in "good condition" have been held to not create express warranties. Miller v. Lentine, 495 A.2d 1229 (Me. 1985). Further, the appellee as well as her father were allowed to examine and test drive the vehicle prior to purchase.

Accordingly, any statement made by a sales person that the used 2012 Chevrolet Equinox was a "good car" is not actionable and the appellant was entitled to a judgment as a matter of law. The trial court erred in not granting a judgment as a matter of law in favor of the appellant regarding this claim.

The trial court should have granted summary judgment based upon the vehicle being fully repaired at no cost to the appellee as there is no cause of action pursuant to West Virginia Code §46A-6-106 without the appellee suffering any out-of-pocket loss. Appendix at 00642. It is uncontroverted that the appellee asserted no issue with the vehicle until seven (7) or eight (8) days after the purchase and then all complaints made by the plaintiff were addressed. Appendix at 00577.

An express warranty obligates the seller to deliver goods that confirm to the affirmation, promise, description, sample or model.

Mydlach v. Daimlerchrysler Corporation, 226 Ill. 2d 307, 875 N.E.2d 1047 (2007). In contrast, a repair or replacement warranty has nothing to do with the inherent quality of the goods or their future performance. Id. N.E. 2d at 1056.

The service agreement purchased by the appellee agreed to repair the vehicle and the vehicle has been repaired, therefore, the appellee has no cause of action. As the issues occurred seven (7) or eight (8) days after the February 24, 2017 sale the appellee presented no evidence of any defect in the vehicle at the time of the sale. Appendix at 00577.

The purpose of a motion for summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure is to affect a prompt disposition of a controversy on its merits without resorts to a lengthy trial if there is no real dispute as to the salient facts or if the case only involves a question of law. Cavender v. Fouty, 195 W.Va. 94, 464 S.E.2d 736 (1995). The function of the trial court at the summary judgment state is not to weigh the evidence and determine the truth of the matter but to determine if there is a genuine issue for trial. Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Even if the application of the law to the facts of a particular case is complicated or difficult, summary judgment may still be appropriate. Johnson v. F&M Bank, 180 W.Va. 702, 379 S.E.2d 752 (1989). In determining whether there is a genuine issue

of material fact between the parties, the trial court must construe the facts in a light most favorable to the non-moving party. Alpine Property Owners Association v. Mountaintop Development Company, 179 W.Va. 12, 365 S.E.2d 57 (1987).

For the purposes of summary judgment a material fact is one that has the capacity to sway the outcome of the litigation under the applicable law. Jividen v. Law, 194 W.Va. 705, 461 S.E.2d 451 (1995). There were no material facts precluding summary judgment in favor of the appellant as the vehicle had been fully repaired with no cost or expense to the appellee, therefore, the trial court erred in not granting a judgment as a matter of law in favor of the appellant.

C. The Trial Court Abused its Discretion in Striking the Answer and Defenses of the Appellant.

The trial court made no finding that the alleged discovery transgression of the appellant was due to any willfulness or bad faith. Cattrell Companies, Inc. v. Carlton, Inc., 217 W.Va. 1, 614 S.E.2d 1 (2005). Further, even if the trial court had made a finding that the discovery failure of the appellant was willful or in bad faith, the trial court did not then weigh the following factors to determine if default judgment or dismissal was an appropriate sanction:

- (1) The degree of actual prejudice to the other party;
- (2) The effectiveness of less drastic sanctions; and,

- (3) Any other factor that is relevant under the circumstances presented.

Gomez v. Kanawha County Commission, 237 W.Va. 451, 787 S.E.2d 904 (2016).

The trial court did not analyze the foregoing factors, therefore, the verdict, based upon all of the defenses of the appellant being stricken, must be reversed. Further, the striking of the defenses asserted by the appellant with respect to the punitive damage claim violated West Virginia Code §55-7-29(a) as punitive damages "may only occur in a civil action...if a plaintiff establishes by clear and convincing evidence" that:

The damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, reckless and indifference to the health, safety and welfare of others.

West Virginia Code §55-7-29 which provides the statutory authority for the award of punitive damages, does not authorize the granting of a judgment as a matter of law regarding a punitive damage claim relieving the appellee of her burden of proof and forcing the jury to award punitive damages. W.Va. Code §55-7-29.

The striking of the defenses, including, but not limited to, defenses related to the punitive damage claim violated the right of the appellant guaranteed by the Seventh Amendment of the United States Constitution and the Constitution of West Virginia. Given

v. Field, 199 W.Va. 394, 484 S.E.2d 647 (1997); Kocher v. Oxford Life Insurance Company, 216 W.Va. 56, 602 S.E.2d 499 (2004). This is especially true when the West Virginia Credit and Consumer Protection Act does not authorize the award of punitive damages. Muzelak v. King Chevrolet, Inc., 179 W.Va. 340, 368 S.E.2d 710 (1998); Viriden v. Altria Group, Inc., 304 F.Supp.2d 832 (N.D. W.Va. 2004). The express language of West Virginia Code §46A-6-106 unambiguously does not authorize the recovery of punitive damages based upon the violation of the Consumer Credit and Protection Act.³

D. The Appellee Was Not Entitled to Recover Her Attorney Fees and Litigation Costs and the Trial Court Abused its Discretion in Awarding Attorney Fees and Costs.

The trial court erred as a matter of law in awarding attorney fees and litigation costs to the appellee. Considering the totality of circumstances, the appellee was not the prevailing party in this litigation where the appellee demanded \$55,000.00 immediately prior to trial and was awarded less than \$10,000.00 by the jury.⁴ Further, the 338.55 hours claimed by counsel for the

³ When the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied by the court without resort to interpretations. Trulargo, LLC v. Public Service Commission, 242 W.Va. 482, 836 S.E.2d 449 (2019). As West Virginia Code §46A-6-106 makes no mention of the recovery of punitive damages, therefore, it is presumed that the legislation did not intend any such recovery. Golden Eagle Resources, II, LLC v. Willow Run Energy, LLC, 242 W.Va. 372, 836 S.E.2d 23 (2019).

⁴ The amount directed by the Court to be awarded of \$12,662.09 must be reduced by the market value of the vehicle at

appellee is excessive when compared to approximately 124.55 hours expended by counsel for the appellant.

The amount of hours is not broken down by claim and is unreasonable on its face. Tri-State Petroleum Corp. v. Coyne, 240 W.Va. 542, 814 S.E.2d 205 (2018). Accordingly, the trial court abused its discretion in granting the appellee her attorney fees and costs.

West Virginia Code §46A-5-104 upon which the appellee asserts as a basis for recovery of attorney fees and costs does not apply in this case. In Wolfe v. Welton, 210 W.Va. 563, 558 S.E.2d 363 (2001), this Court held that all or a portion of litigation costs, including reasonable attorney fees may be awarded to a consumer who proves illegal, fraudulent or unconscionable conduct.

In Wolfe v. Welton, 210 W.Va. 563, 558 S.E.2d 363 (2001), the seller of the used vehicle refused to honor the implied warranties, which justified awarding attorney fees. In this case, not only did the appellant undertake repairs, but Harry Green Chevrolet and Premier Chevrolet fully repaired the vehicle at no cost to the appellee.

There was no claim that went to the jury in this case that the appellant violated any prohibited debt collection practice or acted illegally, fraudulently or unconscionably. The trial court

the time of the verdict which is believed to have been approximately \$9,500.00, as the Court directed the vehicle to be returned to the appellant.

directed a verdict that the appellant violated the general consumer protection statute, West Virginia Code §46A-6-101 et seq. involving unfair or deceptive acts or practices.

The verdict form, with respect to the West Virginia Consumer Protection Act claim, informed the jury that the defendant had committed "unfair or deceptive acts or practices". Unfair or deceptive acts or practices are defined by West Virginia Code §46A-6-102, the remedies for which are provided by West Virginia Code §46A-6-106, therefore, West Virginia Code §46A-5-104 is inapplicable to this case.

With respect to the recovery of attorney fees and litigation costs West Virginia adheres to the "American Rule" which provides that parties generally bear their own fees and costs. Key Tronic Corp. v. United States, 511 U.S. 809 (1994); Sally-Mike Properties v. Yokum, 179 W.Va. 28, 365 S.E.2d 246 (1986). . Despite the general rule, Congress and the West Virginia Legislature have carved out exceptions through statutes containing fee shifting provisions one of which is the Consumer Credit and Protection Act, West Virginia Code §46A-1-101 et seq.

This Court has held that the purpose of the Consumer Credit and Protection Act is to protect consumers from unfair, unconscionable, fraudulent and abusive practices of debt collectors. Chevy Chase Bank v. McCamant, 204 W.Va. 295, 512 S.E.2d 217 (1998). This is opposed to unfair or deceptive

practices which are addressed in West Virginia Code §46A-6-101 et seq.

With respect to the West Virginia Consumer Credit and Protection Act, the claims of the plaintiff relate to West Virginia Code §46A-6-101 addressing general consumer protection. The remedies with respect to the unfair or deceptive acts or practices, defined in West Virginia Code §46A-6-102, may be remedied by a consumer as provided in West Virginia Code §46A-6-106.

West Virginia Code §46A-6-106 does not specifically provide for the shifting of attorney fees and costs. Viriden v. Altria Group, Inc., 304 F.Supp.2d 832 (N.D. W.Va. 2004). As West Virginia Code §46A-6-106 does not address the recovery of attorney fees there is no authority for such an award. State ex rel. Fox v. Board of Trustees, 148 W.Va. 369, 135 S.E.2d 262 (1964).

Absent an express statutory provision which permit the discretionary award of attorney fees and costs related to those specific claims the plaintiff has no other entitlement to any recovery of attorney fees and costs. Chevy Chase Bank v. McCamant, 204 W.Va. 295, 512 S.E.2d 217 (1998). Those claims which could permit the recovery of attorney fees and costs include the revocation of acceptance, breach of warranty/Magnuson-Moss warranty act and the West Virginia Consumer Credit and Protection Act.

The appellee is not entitled to the recovery of attorney fees and costs with respect to her claim of misrepresentation and her claim of punitive damages. Hawkins v. Ford Motor Company, 211 W.Va. 487, 566 S.E.2d 624 (2002); Chevy Chase Bank v. McCamant, 204 W.Va. 295, 512 S.E.2d 217 (1998); Muzelak v. King Chevrolet, Inc., 179 W.Va. 340, 368 S.E.2d 710 (1988). Accordingly, the trial court was required to break down the attorney fees sought by the claim to which they applied.

Any attorney fee claim must be reasonably incurred in connection with the prosecution of the specific claim which affords fee shifting discretion. Muzelak v. King Chevrolet, Inc., 179 W.Va. 340, 368 S.E.2d 710 (1988). Those claims related to punitive damages, misrepresentations/fraud as well as all claims asserted against the former defendant, Huntington Bancshares Incorporated dba The Huntington National Bank, must be disallowed.

Further, an award of attorney fees is subject to the reasonableness requirements of due process. Vanderbilt Mortgage and Finance, Inc. v. Cole, 230 W.Va. 505, 740 S.E.2d 562 (2013). In evaluating the reasonableness of attorney fees sought the test of whether such fees are reasonable must be evaluated in the light of those factors articulated by this Court in Aetna Casualty & Surety Company v. Pitrolo, 178 W.Va. 190, 342 S.E.2d 156 (1986).

The Pitrolo Factors are the following:

- (1) the time and labor required;
- (2) the novelty and difficulty of the question;
- (3) the skill requisite to perform the legal service properly;
- (4) the preclusion of other employment by the attorney due to acceptance of the case;
- (5) the customary fee;
- (6) whether the fee is fixed or contingent;
- (7) time limitations imposed by the client or the circumstances;
- (8) the amount involved and the results obtained;
- (9) the experience, reputation and ability of the attorneys;
- (10) the undesirability of the case;
- (11) the nature and length of the professional relationship with the client; and,
- (12) awards in similar cases.

Each of these factors mitigate against the award of the attorney fees claimed by the appellee in this case. Shafer v. Kings Tire Service, Inc., 215 W.Va. 169, 597 S.E.2d 302 (2004).

In considering these factors, consideration should be given to the fact that prior to the institution of this litigation, the appellant agreed to return the appellee all of the money she had paid in exchange for a return of the vehicle. Appendix at 00664. Accordingly, the recovery achieved on behalf of the appellee as a

result of this trial is not substantially different than what the appellee would have achieved prior to the filing of this action had she accepted the offer of the appellant.

Regarding the time and labor involved, a reduction of the claimed attorney fees and costs is necessary as the appellee is only entitled to an award of reasonable attorney fees for prosecuting those claims which permit fee shifting. Muzelak v. King Chevrolet, Inc., 179 W.Va. 340, 368 S.E.2d 710 (1988). Further, there is no novelty or difficulty of the questions presented in this action, nor should the skill requisite with respect to this proceeding be a factor regarding the reasonableness of the attorney fees claimed.

It should also be considered that the appellee is an employee of one of the two (2) law firms which represented her. Appendix at 01219. The nature and length of the professional relationship between the attorney and client is an appropriate factor to determine the reasonableness of an attorney fees claim.

The attorney fees sought by the appellee are not reasonable for a one (1) day trial for which the appellee chose to have two (2) lawyers participate. There were only two (2) witnesses called at the trial.

E. The Appellee Was Not Entitled to Claim Misrepresentation as an Element of Damage and Was Not Entitled to Recover Punitive Damages.

In order to recover damages for a misrepresentation, the appellee was required to establish damages flowing from any misrepresentation. Mays v. Marshall University Board of Governors, 2015 WL 6181508 (W.Va. Sup.Ct. 2015). As there was no evidence of any damage, the verdict of \$2,000.00 for misrepresentation must be set aside.

Any punitive damage award based upon breach of contract must be set aside. C.W. Development, Inc. v. Structures, Inc. of West Virginia, 185 W.Va. 462, 408 S.E.2d 41 (1991). It has long been the law in West Virginia that a cause of action for breach of contract will not support a claim for breach of contract. Horn v. Bowen, 136 W.Va. 465, 67 S.E.2d 737 (1951); Teller v. McCoy, 162 W.Va. 367, 253 S.E.2d 114 (1979).

F. The Appellee Was Not Entitled to Any Prejudgment Interest on General Damages.

The Order of Judgment permitting the recovery of prejudgment interest on general damages is in violation of West Virginia Code §56-6-31(b). To qualify for an award of prejudgment interest on special damages, such damages must be an ascertainable pecuniary loss which means that such damages must be certain or capable of being rendered certain by a reasonable calculation. Tri-State Petroleum Corp. v. Coyne, 240 W.Va. 542, 814 S.E.2d 205 (2018).

VII. Conclusion

Based upon the foregoing, the appellant, Dan's Car World, LLC d/b/a Dan Cava's Toyota World, respectfully requests that the final judgment based upon the verdict of the jury be reversed.

Dated this 2nd day of October, 2020.



Gregory H. Schillace
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NO. 20-0489

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

CARESSA DELANEY,

Plaintiff,

v.

Civil Action No. 18-C-75

DAN'S CAR WORLD, LLC, a West Virginia
Limited Liability Company dba DAN CAVA'S
TOYOTA WORLD,

Defendant.

FROM THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
HONORABLE SUSAN B. TUCKER, JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2020, I served the foregoing **APPENDIX PURSUANT TO RULE 7(e) OF THE WEST VIRGINIA RULES OF APPELLATE PROCEDURE** and the **BRIEF OF THE APPELLANT, DAN'S CAR WORLD, LLD D/B/A DAN CAVA'S TOYOTA WORLD** upon all opposing counsel of record by depositing a true copy thereof in the United States mail, first-class postage prepaid, in an envelope addressed as follows:

John N. Ellem, Esquire
Ellem Law Office, PLLC
914 Market Street, Suite 207
Parkersburg, West Virginia 26101
(Via Federal Express)

Jane E. Peak, Esquire
Allan N. Karlin & Associates
174 Chancery Row
Morgantown, West Virginia 26505
(Via U.S. Mail)