No. 22-ICA-330

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

CIT BANK, N.A.,

Plaintiff/Counterclaim Defendant,

v.

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

Defendant/Counterclaim Plaintiff.

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

BRIEF OF PETITIONER CIT BANK, N.A.

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ASSIGNMENT OF ERROR

1. This Court has jurisdiction over the Circuit Court's orders entered prior to November 18, 2022 because none of those orders were final and immediately appealable orders.
2. This Court has jurisdiction over this entire appeal because this appeal did not ripen until November 22, 2022.
3. The Circuit Court erred in failing to strike the jury's award of punitive damages because CIT's conduct failed to rise to the level of conduct required to assess punitive damages.
4. The Circuit Court erred when it awarded Ms. Bowen's attorneys' fees in the absence of bad faith, vexatious, wanton, or oppressive conduct by CIT.
5. The Circuit Court erred when it awarded Ms. Bowen all of her attorneys' fees on the basis of her fraudulent court record claim, which at most, permitted her to recover for attorneys' fees as to that claim.
6. The Circuit Court erred by awarding Ms. Bowen's attorneys' fees on a contingency fee basis, rather than an accrual basis.

STATEMENT OF THE CASE

1. Factual History

a. The Reverse Mortgage and its Requirements

On December 15, 2006, Respondent Shirley Bowen signed two notes and two deeds of trust secured by her property located at Rt. 29, Mountain View Road, Tract 2, Augusta, West Virginia (JA 0002, 0005). The parties to the first Note and Deed of Trust included Ms. Bowen and Financial Freedom Senior Funding Corporation. (JA 0012). Following a series of commercial transactions, on August 3, 2015, the entity that held the rights to the Note became a division of CIT Bank, N.A. (JA 0057).

Relevant to this action, Ms. Bowen and Financial Freedom structured the transaction as a reverse mortgage. (JA 0057, 0131). A reverse mortgage provides regular and reliable income to a homeowner in exchange for his or her forfeiture of equity in the property securing the mortgage. However, the terms of a reverse mortgage—including this one—include strict requirements for occupancy. (JA 0007, 2658-667). The Deed of Trust requires that "Borrower shall occupy, establish, and use the Property as Borrower's principal residence" after the execution of the Deed of Trust. (JA 0007, 2583). In fact, the Deed of Trust permitted acceleration of the debt if "[t]he Property cease[d] to be the principal residence of a Borrower." (JA 0008, 2584).

To ensure compliance with the occupancy requirement, CIT required annual written occupancy certifications. (*See, e.g.*, JA 2626, 2627, 2628). Though she cooperated in the first four years of the reverse mortgage, Ms. Bowen stopped submitting her written occupancy certifications in December of 2012. (JA 2631, 2632). Seeking to maintain its own compliance, CIT sent Ms. Bowen a second certification request for 2012 occupancy in January 2013 and a third request in February 2013. (JA 2632, 2634). Repeating the process for Ms. Bowen's 2013 occupancy certification, CIT sent requests to certify occupancy on December 15, 2013, January

15, 2014, and February 15, 2014. (JA 2636, 2638, 2640). On March 22, 2014, Ms. Bowen verified her occupation of the Property via telephone. (JA 2642, 2659).

History repeated itself in 2014 and early 2015. (JA 2644, 2646, 2648). CIT sent notices on December 15, 2014, January 15, 2015, and February 15, 2015. (JA 2644, 2646, 2648). This time, however, CIT did not receive any official certification of occupancy. (JA 2650). Instead, a May 14, 2015, note in CIT's system stated that occupancy itself was visually confirmed. (JA 2665). Another note on that same day states that the occupant was unknown and needed to be verified.[1] (JA 2665).

Approximately one week later, CIT received a May 14, 2015, letter from Ms. Bowen stating, "To whom it may concern I Shirley M. Bowen still live in my home." (JA 2650). Below her signature, Ms. Bowen listed her name and 1207 Delray Rd. Augusta, WV 26704 as her address. (JA 2650). This notation set off the series of events at the center of this litigation. Specifically, after reviewing the letter, CIT deemed it an insufficient occupancy certification because the address provided did not match the Property address on the reverse mortgage. (JA 2650).

b. Ms. Bowen's Incomplete Change of Address

During the same timeframe that Ms. Bowen stopped submitting her annual occupancy certifications, Ms. Bowen requested that CIT change her mailing address. On July 2, 2012, Ms. Bowen called CIT and requested that it change her mailing address to the Delray Road Address. (JA 2878). Beyond stating that her P.O. Box had increased in price, Ms. Bowen did not provide any additional information regarding the change. (JA 2878). During the call, CIT's representative informed Ms. Bowen that she needed to sign and return a specific form to formally request the

[1] As previously noted, occupancy alone was insufficient under the terms of the reverse mortgage. *Occupancy by Ms. Bowen* was required. Thus, confirmation of occupancy by her was important.

change. (JA 2878). Six months later, on her January 7, 2013, occupancy certification, Ms. Bowen listed the Delray Road Address as that of her alternative contact, her daughter Caroline Coffman. (JA 2635). This implied that Ms. Bowen had moved in with her daughter in violation of the occupancy requirement of the Deed of Trust.

Subsequently, on March 29, 2013, Ms. Bowen completed and returned CIT's required change of address form, which listed her mailing address as P.O. Box 528 Augusta, WV 26704. (JA 2653). The form then listed the Delray Road Address as the "Forwarding address provided by United States Postal Service (USPS)." (JA 2653). Though Ms. Bowen placed an "X" in the box beside "The forwarding address provided by USPS is correct; please update my mailing address," she failed to provide a mandatory "Reason for Change," as required to ensure compliance with the Deed of Trust. (JA 2653).

CIT received the form on April 15, 2013, and marked it invalid for its failure to include a reason for the change. (JA 2653). On October 31, 2013, CIT sent Ms. Bowen a letter advising her that it could not forward her mail to an address that she had not authorized. (JA 2651). At the time of this letter, Ms. Bowen also had still not provided the mandatory "Reason for Change." (JA 2652, 2653). At the same time, CIT sent another "Change of Mailing Address" form, and again requested the "Reason for Change." (JA 2652). Ms. Bowen never resubmitted the form or an explanation for her requested change of address. (JA 2655, JA 2658, JA 2739). As a result, CIT never executed an official change of address for Ms. Bowen, and therefore sent all correspondence to both (1) the Property at Rt. 29, Mountain View SD, Tract 2 August, WV 26704 and (2) Ms. Bowen's previously designated P.O. Box, to ensure compliance with the Deed of Trust. (*See, e.g.,* JA 2638, 2640, 2643, 2644, 2646, 2648, 2655, 2739).

c. Ms. Bowen's Failure to Pay Property Taxes

Despite her requirement to do so, Ms. Bowen failed to pay the Property's 2013 and 2014 property taxes. (JA 2662, JA 2666). This provided yet another indication that Ms. Bowen did not occupy the Property as required by the Deed of Trust. Accordingly, on May 9, 2014, CIT sent Ms. Bowen a notice of the delinquent taxes, which was returned as undeliverable. (JA 2661, 2852). To avoid delinquency, CIT paid the real estate taxes. (JA 2662). Thereafter, on June 12, 2014, CIT sent Ms. Bowen a notice for nonpayment of property taxes, which included a request to be repaid. (JA 2662, 2656, 2858). Again, the letter was returned as undeliverable. (JA 2662). Ms. Bowen did not repay the taxes at any time prior to the foreclosure sale.

In 2015, CIT sent a notice of the delinquency on the 2014 taxes. (JA 2861). Once again, CIT paid the taxes on Ms. Bowen's behalf, and once again, Ms. Bowen did not repay the amount of the 2014 taxes prior to the foreclosure sale of the Property. (JA 2864-66).

d. The Foreclosure

Due to Ms. Bowen's failure to certify occupancy, CIT sent letters on July 29, 2015, calling the Loan due, and November 2, 2015, noticing intent to foreclose. (JA 2668-71, 2676-2679, JA 2684-2691). These letters provided additional opportunities for Ms. Bowen to comply with her obligations under the reverse mortgage. (JA 2668-71, 2676-2679, JA 2684-2691 Specifically, the July 29, 2015, letter stated that Ms. Bowen could cure the default by reoccupying the property as her principal residence within 35 days. (JA 2669). The November 2, 2015, notice likewise advised that Ms. Bowen could cure the default by moving back into the Property, completing a certification of occupancy, and providing documented proof (such as utility bills) of occupancy within 10 days of the notice. (JA 2684). Ms. Bowen again failed to certify occupancy. Again,

because of her failure to submit the required change of address documentation, CIT could not send either letter to the Delray Road Address. (JA 2669, 2684).

On February 18, 2016—based on Ms. Bowen's failure to certify occupancy—CIT foreclosed on the Property. (JA 0003, 2713). CIT purchased the Property at the sale for $116,000 and conveyed it to Federal National Mortgage Association by a Deed of Foreclosure dated March 8, 2016. (JA 2712-13). Two days after the sale—on March 10, 2016—Ms. Bowen's daughter called CIT on her mother's behalf. (JA 2892). Four days later, CIT received a March 15, 2016, letter from Ms. Bowen, confirming both her occupancy and her intent to maintain occupancy. (JA 2727). Along with the letter, Ms. Bowen submitted her driver's license, and an electric bill, which reflected the Delray Road Address. (JA 2728, 2729).

On March 25, 2016—a week after receiving the proper occupancy certification—CIT submitted a request to the U.S. Department of Housing and Urban Development ("HUD") to rescind the foreclosure sale, and HUD approved the request on April 7, 2016. (JA 2895, 2898). HUD's approval was required by the structure of the transaction, which involved two deeds of trust. (JA 2311; JA 3484-3485; JA 3521). The government held one deed of trust, while CIT held the other. (JA 2262-2271; JA 2273-2282). Therefore, and due to the terms of the deeds of trusts, before CIT could foreclose on its Deed of Trust, it was required to obtain the government's permission. (JA 2266; JA 3484-3485; JA 3521).

CIT's difficulties verifying Ms. Bowen's correct address continued. In response to a handwritten March 31, 2016, letter from Ms. Bowen, requesting a change of address—and again failing to specify the reason for the change—CIT sent an April 12, 2016, letter requesting for Ms. Bowen to "resubmit a signed change of address request with a reason for the change." (JA 2655, 2898). That same day, CIT called Ms. Bowen, but it did not receive an answer and could not leave

a message. (JA 2898). The call note confirms CIT called to obtain a reason for the requested change of address. (JA 2898).

On June 13, 2016, CIT sent Ms. Bowen another letter explaining, among other things, that it could not process the requested change of address without a stated reason for the change. (JA 2739, 2740). CIT also instructed Ms. Bowen to submit a request, in writing, providing a reason for the requested address change. (JA 2739). On June 24, 2016, Ms. Bowen's daughter called CIT and finally provided the reason for Ms. Bowen's change of address; it was a 911 change of address. (JA 2733). On that same date, CIT entered the address change into its internal system. (JA 2733, JA 2906). Thereafter, CIT directed its correspondence to Ms. Bowen to the Delray Road address. (JA 2906).

Subsequently, on December 6, 2016, CIT filed a Petition to Rescind Foreclosure Sale. (JA 2936). However, Ms. Bowen refused this remedy and continues to do so. Moreover, despite proper service, Ms. Bowen failed to answer or otherwise respond to the Petition. Accordingly, on April 12, 2017, CIT moved for default judgment. (JA 0020-23).

At the hearing on CIT's Motion for Default Judgment on June 15, 2017, the Court ordered that CIT complete personal legal service of its Motion for Default Judgment on Ms. Bowen. Thereafter, Ms. Bowen obtained counsel and filed her counterclaims. Throughout the course of the litigation, Ms. Bowen has made clear that she does not desire rescission of the foreclosure sale, and the Circuit Court has never entered any ruling either granting or denying the original Petition.

2. Procedural History

On September 28, 2018, almost two years after CIT filed the initial action to rescind foreclosure, Ms. Bowen added counterclaims for wrongful foreclosure, slander of title, violation of the West Virginia Consumer Credit Protection Act, breach of contract, tort of outrage, and abuse of process. (JA 0052-71). During trial, the Circuit Court also allowed the jury to consider an

unpled fraudulent court record claim, a statutory fraud claim that was not referenced in Ms. Bowen's counterclaim. (JA 0062-0070, 2245).

On June 16, 2021, the jury delivered a verdict on Ms. Bowen's counterclaims. In doing so, the jury found in favor of Ms. Bowen for (1) wrongful foreclosure, (2) slander of title, (3) breach of contract, (4) violation of the West Virginia Consumer Credit Protection Act, (5) abuse of process, (6) tort of outrage, and (7) fraudulent court record. (JA 2254-57). In its verdict, the jury awarded $200,000 for wrongful foreclosure, $10,000 for slander of title, $20,000 for breach of contract, $10,000 for the violation of the West Virginia Consumer Credit Protection Act, $10,000 for abuse of process, $500,000 for the tort of outrage, $10,000 for fraudulent court record, and punitive damages of $1,500,000, for a total judgment of $2,260,000 (JA 2234, 2254-57).

Following the verdict and the entry of the Judgment Order, CIT and Ms. Bowen filed a total of three post-trial motions on August 27, 2021. (JA 3724-45; JA 3758-3781; JA 3823-42). CIT filed both a Motion for Judgment as a Matter of Law or in the Alternative for New Trial and a Motion on Punitive Damages. (JA 3724-45; JA 3758-3781). Ms. Bowen filed a Motion for Attorneys' Fees. (JA 3823-42). On December 27, 2021, the Circuit Court entered an order holding the Motion for Attorneys' Fees in abeyance to allow the parties to engage experts on the issue. (JA 3968-75).

The Circuit Court issued its rulings on the motions throughout 2022. First, on May 6, 2022, the Circuit Court granted in part, CIT's Motion for Judgement as a Matter of Law or in the Alternative for New Trial. (JA 4096-4122). This ruling is the subject of the jurisdictional issue in this brief. Then, on November 18, 2022, the Circuit Court issued its order on the post-trial review of punitive damages. (JA 4359-78). In doing so, the Circuit Court recognized duplication between the jury's verdict on the tort of outrage and its award of punitive damages, and reduced Ms.

Bowen's award by $500,000. Finally, on November 22, 2022, the Circuit Court issued its order granting Ms. Bowen's motion for fees. (JA 4379-4395). In that order, the Circuit Court awarded Ms. Bowen's counsel one-third of the jury's total award. (JA 4393).

On December 22, 2022, CIT filed its Notice of Appeal. Thereafter, on January 20, 2023, after not receiving a scheduling order, CIT filed a motion for consideration out of time explaining why the appeal was timely. CIT also explained that regardless, there was good cause for enlarging the time to encompass all appealable issues in this matter.[2] On February 10, 2023, this Court issued its Scheduling Order granting the motion as to the Circuit Court's November 18, 2022, and November 22, 2022 orders, but requesting additional briefing on its jurisdiction over the appeal of the May 6, 2022, order.

SUMMARY OF THE ARGUMENT

This litigation arose out of a dispute between the servicer of a reverse mortgage loan—CIT—and the estate of the borrower—Ms. Bowen—on that loan. However, Ms. Bowen's side of the dispute fails to recognize a key fact: reverse mortgage loans are highly regulated financial products, subject to close regulation by the federal agencies that insure them. As it relates to this case, one key component of those regulations requires servicers to ensure that borrowers on reverse mortgages continue to occupy the property that secures the loan.

As the borrower, Ms. Bowen had a responsibility to provide annual certifications of her occupancy. The sole purpose of this requirement was to ensure that CIT could comply with the aforementioned federal regulations. Complicating matters, at the same time Ms. Bowen stopped certifying her occupancy, she also provided a new address (an address she previously listed as the

[2] Counsel for CIT was advised by the Deputy Clerk of this Court on January 20, 2023, that a Motion for Leave to Appeal Out of Time was necessary because of concern about the timeliness of the appeal.

address of her daughter), both of which tended to suggest that she was *not* occupying the Property. Raising yet another red flag, she also stopped paying property taxes in 2014. Despite multiple attempts to obtain compliance, CIT deemed the loan to be in default and foreclosed. Thereafter, CIT offered to rescind the foreclosure, but Ms. Bowen refused; instead, she opted to prosecute the counterclaims at the heart of this appeal.

This appeal focuses on the Circuit Court's rulings in three separate post-trial orders: (1) a May 6, 2022, Order Denying CIT Bank N.A.'s Motion for New Trial (the "May 6 Order"), (2) a November 18, 2022, Order Following Post-Trial Review of Punitive Damages (the "November 18 Order"), and (3) a November 22, 2022, Order Granting Estate of Shirley Bowen's Motion for Attorney Fees (the "November 22 Order"). However, at this Court's request, this particular brief also focuses on this Court's jurisdiction to consider CIT's appeal of the May 6 Order, as well as CIT's substantive arguments regarding the errors in both the November 18 Order and the November 22 Order.

First, this Court has jurisdiction over the May 6 Order, the November 18 Order, and the November 22 Order. Because the November 22 Order was the court's only final and immediately appealable order, the appeal of that order encompasses the other two prior orders. Any other finding would vitiate the Supreme Court of Appeals' mandatory rule of finality. Moreover, because the appeal did not ripen until after July 1, 2022, this Court has jurisdiction over the entire appeal.

Second, punitive damages are not supported by the facts or the law, and this Court should strike the November 18 Order in its entirety. Specifically, Ms. Bowen failed to prove that CIT acted with the actual malice required to justify punitive damages. Indeed, the evidence demonstrated that CIT acted pursuant to both its rights under the parties' binding contract and

guidelines from the federal government. To the extent that any wrongful conduct was asserted against CIT, it was negligence in the handling of the foreclosure action, which does not give rise to a claim for punitive damages.

Finally, neither the law nor equity entitles Ms. Bowen to her attorneys' fees, and this Court should strike the November 22 Order in its entirety. Put simply, the trial court's order awarding attorneys' fees violates more than two centuries of jurisprudence set out in the American Rule: parties are not entitled to recover attorneys' fees as a prevailing party in the absence of a statutory provision that provides for such recovery, or in circumstances where egregious misconduct of counsel, or a party, is present. Ms. Bowen is not entitled to an equitable award where she has failed to prove that CIT acted in bad faith, vexatiously, wantonly, or oppressively. For that reason alone, an award of attorney's fees is unjustified as a matter of law. The court also erred to the extent it awarded attorneys' fees based on Ms. Bowen's fraudulent court record claim. Any collection of fees on that basis is limited solely to work performed in pursuit of that claim.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

CIT states that oral argument is necessary pursuant to the criteria set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure. Further, CIT contends that this case is appropriate for Rule 19 argument because it concerns assignments of error in the application of settled law. CIT also states that this case is appropriate for a memorandum decision.

Finally, CIT requests that this Court affirm that the full appeal is timely and that it has jurisdiction over this appeal. Once those issues are decided, CIT requests that this Court order briefing on the errors arising from the May 6 Order.

ARGUMENT

1. Standard of Review

An appellate court has a responsibility to review its jurisdiction *sua sponte*. *Moten v. Stump*, 220 W. Va. 652, 655, 648 S.E.2d 639, 642 (2007). "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." *In re H.W.*, 247 W. Va. 109, 875 S.E.2d 247, 252 (2022) (quotation omitted).

The same *de novo* standard of review applies to this Court's review of the punitive damages award. *Quicken Loans, Inc. v. Brown*, 236 W. Va. 12, 34, 777 S.E.2d 581, 603 (2014). This Court should apply an abuse of discretion standard in its review of the lower court's award of attorneys' fees. *Sanson v. Brandywine Homes, Inc.*, 215 W. Va. 307, 310, 599 S.E.2d 730, 733 (2004).

2. The Circuit Court's May 6 Order Was Not a Final Order; Thus, it Was Not Immediately Appealable.

The West Virginia Appellate Reorganization Act vests this Court with jurisdiction over final judgments issued by West Virginia's circuit courts. W. Va. Code Ann. § 51-11-4. However, the relevant statute expressly limits jurisdiction to "*[f]inal* judgments or orders of a circuit court in civil cases, entered after June 30, 2022." *Id.* (emphasis added). The Supreme Court of Appeals has also recognized, "[t]he usual prerequisite for our appellate jurisdiction is a final judgment, final in respect that it ends the case." *Coleman v. Sopher*, 194 W. Va. 90, 94–95, 459 S.E.2d 367, 371–72 (1995). Except in rare cases, the "finality rule" is "mandatory and jurisdictional." *James M.B. v. Carolyn M.*, 193 W. Va. 289, 292, 456 S.E.2d 16, 19 (1995).

Where, such as here, an order is not a final and immediately appealable order because additional issues remain pending in the lower court, that order is interlocutory and not immediately appealable. *Ally Fin., Inc. v. Smallwood*, No. 12-0636, 2013 WL 5379637, at *2 (W. Va. Sept. 26,

2013) (quotation omitted) (where damages issues remained pending, the court dismissed an appeal and recognized case law stating, "[s]ince the circuit court's order ... is interlocutory and not subject to appeal, we find the petition for appeal was improvidently granted and accordingly dismiss the same for lack of appellate jurisdiction"). `

a. An order without a determination of damages—such as the May 6 Order—is a partial adjudication and not a final, immediately appealable order.

i. The November 22 Order was the only immediately appealable order.

The rule of finality is a bedrock principle of appellate jurisprudence. "[A] case is final only when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined." *James M.B.*, 193 W. Va. at 292 456 S.E.2d at 19. Thus, an order that solely addresses liability—and not damages—is generally not a final and immediately appealable order.

That said, a party may take a permissive appeal of such an order where the remaining damages calculation is ministerial in nature. Specifically, the Supreme Court of Appeals has held:

> An order determining liability, without a determination of damages, is a partial adjudication of a claim and is generally not immediately appealable. However, an immediate appeal from a liability judgment *will be allowed* if the determination of damages can be characterized as ministerial. That is, a judgment that does not determine damages is a final appealable order when the computation of damages is mechanical and unlikely to produce a second appeal because the only remaining task is ministerial, similar to assessing costs.

Ally Fin., Inc. v. Smallwood, No. 12-0636, 2013 WL 5379637, at *2 (W. Va. Sept. 26, 2013) (quotation omitted and emphasis added); *see also C & O Motors, Inc. v. W. Virginia Paving, Inc*., 223 W. Va. 469, 474, 677 S.E.2d 905, 910 (2009) ("Courts have recognized an exception to the prohibition against appealing an order that imposes liability only. Under this exception an immediate appeal from a liability judgment will be allowed if the determination of damages can be characterized as ministerial.") (quotation omitted).

While there are no fixed criteria for a "ministerial" damage calculation, the Supreme Court of Appeals generally considers (1) the amount of discretion left to the trial court and (2) the likelihood that a party will appeal the court's ruling. *See, e.g.*, *Ally Fin., Inc*., 2013 WL 5379637, at *2 ("Given the discretion afforded the court in affixing the amount of damages…it cannot be said that the computation of damages in this instance is mechanical and unlikely to produce a second appeal"); *see also C & O Motors, Inc.* 223 W. Va. at 475, 677 S.E.2d at 911 (2009) (finding determination to be non-ministerial "because there is a likelihood of an appeal from the resolution of the damages issue").

A mandatory *Garnes* review of punitive damages is not ministerial in nature. *Alkire v. First Nat. Bank of Parsons*, 197 W. Va. 122, 130, 475 S.E.2d 122, 130 (1996) ("under our punitive damage jurisprudence, it is imperative that the amount of the punitive damage award be reviewed in the first instance by the trial court by applying the model specified in Syllabus Points 3 and 4 of [*Garnes*]); *see also Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991). In fact, the Supreme Court of Appeals of West Virginia recognized this when it stated:

> Although there is no mechanical mathematical formula to use in all punitive damages cases, we think it appropriate here to offer some broad, general guidelines concerning whether punitive damages bear a reasonable relationship to actual damages.

TXO Prod. Corp. v. All. Res. Corp., 187 W. Va. 457, 474, 419 S.E.2d 870, 887 (1992), aff'd, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993), *and holding modified by State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994), *and holding modified by Alkire v. First Nat. Bank of Parsons*, 197 W. Va. 122, 475 S.E.2d 122 (1996).

With those considerations in mind, the November 22 Order was the only order to terminate the litigation between the parties. Put differently, for a number of reasons, the November 22 Order was the only order that met the requirements of the rule of finality.

First, at the time the Circuit Court issued its May 6 Order, there was nothing final for it to "enforce by execution," because the punitive damages and attorneys' fees motions remained pending. Second, the Circuit Court's resolution of those two pending motions was anything but "ministerial." Rather, the Circuit Court possessed considerable discretion—which it exercised—in both (1) its mandatory *Garnes* review of punitive damages and (2) its award of attorneys' fees. As to punitive damages alone, the Circuit Court's mandatory *Garnes* analysis required it to evaluate five factors related to the jury's decision, and four additional factors for the court's own independent consideration. Thus, the court had nine factors upon which to rest any number of decisions on punitive damages.

The same is true for the Circuit Court's remaining ruling on Ms. Bowen's motion for attorneys' fees. The court was left to make a number of rulings, including whether there was a basis to depart from the traditional "American Rule" that parties are responsible for their own attorney's fees, but also whether to assess fees based on an accrual basis or a contingency-fee basis. Despite calculating total fees of $390,965 for actual hours worked, the Circuit Court awarded fees equal to one-third of Ms. Bowen's total recovery. (JA 4392, 4394-95).

Finally, given the Circuit Court's significant discretion—and its exercise thereof—the rulings on punitive damages and attorneys' fees were almost certain to be appealed. Even worse, those appeals were likely from either party: CIT would appeal any award at all, and Ms. Bowen would likely appeal any reduction of the award. For those reasons, the November 22 Order was the only order to trigger the timeline for a timely appeal.

b. The May 6 Order lacked the language and intent necessary to establish finality.

Even if a court's order partially resolves a case, that order *may be* immediately appealable only if it uses language to indicate there is "no just reason for delay." This permissive appeal is described in the West Virginia Code, which states:

> A party to a civil action may appeal to the Supreme Court of Appeals from a final judgment of any circuit court or from an order of any circuit court constituting a final judgment as to one or more but fewer than all claims or parties *upon an express determination by the circuit court that there is no just reason for delay and upon an express direction for the entry of judgment as to such claims or parties*: *Provided*, That an appeal of a final order or judgment of a circuit court entered after June 30, 2022, shall be to the Intermediate Court of Appeals.

W. Va. Code Ann. § 58-5-1 (emphasis added). The same concept appears in the West Virginia Rules of Civil Procedure:

> [T]the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an *express determination* that there is no just reason for delay and upon an *express direction* for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties….

W. Va. R. Civ. P. 54(b).

Even without such language, a party may still immediately appeal a partial judgment if the appellate court can determine that the lower court intended finality in its order. *See Riffe v. Armstrong*, 197 W. Va. 626, 637, 477 S.E.2d 535, 546 (1996), *holding modified by Moats v. Preston Cnty. Comm'n*, 206 W. Va. 8, 521 S.E.2d 180 (1999) ("[T]he absence of the language required in Rule 54(b) will not be a bar to finality if this Court can determine that finality was intended."). To determine whether an order is immediately appealable, the appeals court must strongly consider the lower court's intent. *State ex rel. Consolidation Coal Co. v. Clawges*, 206 W. Va. 222, 228, 523 S.E.2d 282, 288 (1999) (recognizing that the Supreme Court of Appeals "affords great deference to the intent of the circuit court in its determination of whether an order

is final for purposes of Rule 54(b) certification"). As to this requirement, the Supreme Court of Appeals has recognized:

> Ordinarily, an appellate court cannot properly evaluate this prong without knowing how the circuit court feels about separating these issues for appellate purposes. Indeed, the entire purpose of Rule 54(b) is to place this decision in the hands of the trial court who can best make this delicate balance.

Id. (quotation omitted).

In this case, there is no question that the Circuit Court neither indicated nor intended finality in the May 6 Order. Indeed, the May 6 Order ends with the statement "[t]he Court notes the objections of the parties to any adverse ruling by the Court;" however, it does not include any language regarding finality or reason for delay. (JA 4122). There are also two distinct differences between the Circuit Court's May 6 Order and its November 22 Order, both of which suggest that the November 22 Order was the only final order.

First, the November 22 Order is the only order that the Circuit Court designated as "final." Specifically, in reviewing the cover pages of the three post-trial orders, only the November 22 Order contains reference to a "final" order. (JA 4379). Second, the November 22 Order is the only order that directs either party to pay costs. (JA 4395). It makes sense that an award of costs would come in the court's final order, upon which costs have stopped accruing. *See, e.g., Humphrey v. Mauzy*, 155 W. Va. 89, 96, 181 S.E.2d 329, 333 (1971) ("A distinction is sometimes made between 'fees' and 'costs' which may be awarded, for instance, to the prevailing party upon final judgment").

Were that not enough evidence of the Circuit Court's intent and understanding, the court's comments during the June 21, 2022, hearing on the post-trial motions make things even more clear:

> So I will look forward to getting your proposed orders. We will do the best we can. We have got some trials scheduled, but good lord willing, and as they say, if the

> creek don't rise, we will try to get it entered so that you all can move on up the chain.

(JA 4251). The court separately acknowledged, "I assume the appeal that you take, if anyone does, will go to the new ICA." (JA 4252). Thus, even in the court's mind, the parties could not "move on up the chain" on appeal until after the court entered its two remaining orders on punitive damages and fees. The Circuit Court's intent is clear: the November 22 Order was to be its final order. Accordingly, it was the Circuit Court's entry of that order that started the clock for a timely appeal, and this Court maintains jurisdiction over the May 6 Order.

Regardless, much like the permissive appeal of a partial adjudication described above, an appeal based upon language or intent of finality is similarly permissive. Indeed, the Code language itself states that a party "may appeal," and the case law simply states that the absence of such language will not be a bar to finality; it does not indicate that such an appeal is either required or encouraged. W. Va. Code Ann. § 58-5-1. In other words, an appeal upon language or intent of finality is simply the exception, not the rule, and CIT's appeal of all three orders was timely.

c. Any other conclusion would vitiate the rule of finality, lead to piecemeal litigation and result in the absurdity of multiple appeals in different courts.

The Supreme Court of Appeals has recognized, "[b]y limiting appellate jurisdiction to final judgments, the finality rule serves to avoid piecemeal review of trial court rulings which do not end litigation regarding all or some claims or parties in a case." *S. Env't, Inc. v. Bell*, 244 W. Va. 465, 475, 854 S.E.2d 285, 295 (2020). The Court has gone so far as to say that the principle of finality prohibits piecemeal review of litigation and is "ironclad." *Keith v. Lawrence*, No. 15-0223, 2015 WL 7628691, at *2 (W. Va. Nov. 20, 2015) ("This rule, commonly referred to as the 'rule of finality,' is designed to prohibit piecemeal appellate review of trial court decisions which do not terminate the litigation"); *see also Robinson v. Pack,* 223 W. Va. 828, 832, 679 S.E.2d 660,

664 (2009); *Coleman v. Sopher*, 194 W. Va. 90, 96 n.7, 459 S.E.2d 367, 373 (1995) (referring to the "ironclad" rule against piecemeal appeals).

Merriam Webster defines "piecemeal" as "done, made, or accomplished piece by piece or in a fragmentary way." Here, had CIT immediately appealed the May 6 Order, it would have needed to separately appeal each of the November 18 Order and the November 22 Order. Thus, the three issues of liability, damages, and attorneys' fees would all be appealed and considered separately. Such a requirement would represent the essence of a "piece by piece" appeal. It would also represent a perfect case study on why the rule of finality is a necessity in the first place.

What's worse is that the circumstances in this case are particularly unique: an adoption of any other approach to this appeal would have created a jurisdictional nightmare. Because the Circuit Court issued the May 6 Order prior to June 30, 2022, this Court would not have had jurisdiction over the appeal of that order and the appeal would have been to the Supreme Court of Appeals.[3] However, since the Circuit Court issued the remaining two orders after June 30, 2022, this Court does have jurisdiction over those appeals. Thus, if required to immediately appeal the May 6 Order, CIT would need to pursue three separate appeals, on three separate orders, in two different appellate courts. The finality rule is designed to prevent such chaos.

In consideration of the appellate courts' "ironclad" rule against piecemeal litigation, and the potential harm that could have resulted with multiple appeals, CIT acted appropriately in its

[3] An additional absurd consequence of piecemeal appeals would have been that if an appeal had been taken from the May order, that appeal would proceed before the Supreme Court of Appeals, while the trial court considered the remaining post-trial motions, including the mandatory *Garnes* review of the punitive damage award. This is assuming that the Circuit Court would not have been divested of jurisdiction to even consider the remaining issues until that first piecemeal appeal was resolved. The finality rule exists to prevent this kind of situation from occurring.

decision to wait and appeal after the November 22 Order. Any other decision would have vitiated the rule of finality.

3. Since There Was No Final Order Until After June 30, 2022, This Court Possesses Jurisdiction Over This Entire Appeal.

According to its enabling statute, this Court has jurisdiction over "[f]inal judgments or orders of a circuit court in civil cases, entered after June 30, 2022; *Provided*, that the Supreme Court of Appeals may, on its own accord, obtain jurisdiction over any civil case filed in the Intermediate Court of Appeals." W. Va. Code § 51-11-4. Moreover, "if an appeal is taken from what is indeed the last order disposing of the last of all claims as to the last of all parties, then the appeal brings with it all prior orders." *Riffe v. Armstrong*, 197 W. Va. 626, 637, 477 S.E.2d 535, 546 (1996), *holding modified by Moats v. Preston Cnty. Comm'n*, 206 W. Va. 8, 521 S.E.2d 180 (1999).

As discussed above, because the May 6 Order was only a partial adjudication and lacked finality, the November 22 Order was the last order that disposed of all claims. For that reason, the November 22 Order brought with it all prior orders of the Circuit Court. Put differently, the May 6 Order on liability and the November 18 Order on punitive damages are encompassed by any appeal of the Circuit Court's November 22 Order on fees.

Furthermore, the Intermediate Court of Appeals' enabling statute makes clear that this Court has jurisdiction over "final judgments or orders…entered after June 30, 2022." W. Va. Code § 51-11-4. Thus, this Court has jurisdiction over the final judgment entered on November 22, which encompasses the May 6 Order. Additionally, the Circuit Court's significant action—reducing the punitive damages award by a half a million dollars—after the May 6 Order, proves that the May 6 Order was not final, and had not triggered this Court's jurisdiction. Thus, there is no question as to this Court's current jurisdiction of this entire appeal.

4. The Circuit Court Erred in Failing to Strike the Jury's Award of Punitive Damages Because CIT's Conduct Failed to Rise to the Level of Conduct Required to Assess Punitive Damages.

The Supreme Court of Appeals of West Virginia has explained the criteria for punitive damages as follows:

> [A]n award of punitive damages may only occur in a civil action against a defendant 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 outrageous indifference to the health, safety and welfare of others.

Jordan v. Jenkins, 245 W. Va. 532, 555, 859 S.E.2d 700, 723 (2021) (upholding an award of punitive damages where an insurer intentionally engaged in conduct to force an insured to accept a low offer of settlement). Accordingly, "[p]unitive damages are allowed only where there has been malice, fraud, oppression, or gross negligence." *Warden v. Bank of Mingo*, 176 W. Va. 60, 65, 341 S.E.2d 679, 684 (1985) (overturning award of punitive damages where bank had simply made a "mistake"). For this reason, "[a] wrongful act done under a bona fide claim of right and without malice in any form constitutes no basis for punitive damages." *Id.* Thus, "punitive damages are generally unavailable in pure contract actions." *Id.*

Any party seeking punitive damages must prove the presence of malice, fraud, oppression, or gross negligence by the high standard of clear and convincing evidence. *See* W. Va. Code § 55-7-29(a). Specifically, "[c]lear and convincing evidence or clear, cogent and convincing evidence is the highest possible standard of civil proof." *O'Dell v. Stegall*, 226 W. Va. 590, 608, 703 S.E.2d 561, 579 (2010) (quotation omitted). Indeed, it is "more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases." *Id.*

To put it simply, this is not the type of case that warrants punitive damages. This case does not involve manipulative conduct by an insurer, such as in *Jordan*, where the court upheld an award of punitive damages. Rather, this case involves an "honest mistake by the bank," such as

in *Bank of Mingo*, where the Court overturned an award of punitive damages. In fact, this litigation commenced when CIT filed an action to undo the foreclosure on Ms. Bowen's property.

Here, CIT acted pursuant to an undisputed and *bona fide* claim of right. Critically, there is no dispute that both CIT and Ms. Bowen are parties to a legally binding contract in the form of a reverse mortgage. There is also no dispute that Ms. Bowen's own error set off the chain of events that led to this litigation. Her own expert, Michael Scales, admitted at trial that the listing of 1207 Delray Road as her daughter's address in the January 8, 2013, occupancy certification was an error on Ms. Bowen's part. (JA 3261). Importantly, it was that error that led to CIT's subsequent requests for verification. Additional errors—such as Ms. Bowen's failures to respond to repeated correspondence regarding the reported address change, failure to pay property taxes as required by law and contract, and failure to respond to inquiries to reimburse CIT for their payment of the taxes—further compounded the initial error. For this reason alone, CIT's conduct does not support an award of punitive damages.

Moreover, not only did CIT have a *bona fide* right to ensure Ms. Bowen's occupancy, it was legally obligated to do so. As discussed above, reverse mortgages are highly regulated financial products. The government agencies insuring the loans require for the loan servicers to ensure compliance with various occupancy requirements. *HUD Guideline* 4330.1 (13-22); (JA 3479). Therefore, by permitting such a large recovery, let alone punitive damages, the Circuit Court has now encouraged both (1) non-compliance by borrowers and (2) non-enforcement by servicers. Borrowers may no longer fear the consequences that encouraged compliance, and servicers will be afraid of the consequences of taking action on that non-compliance.

Ms. Bowen has also failed to show by a preponderance of the evidence—let alone clear and convincing evidence—that CIT acted with malice, fraud, oppression, or gross negligence. To the contrary, the evidence shows that CIT acted in good faith.

First, despite Ms. Bowen's failure to verify occupancy—and CIT's legal right to do so—CIT did not foreclose in 2012, 2013, or 2014. Instead, CIT sent countless notices and requests for certification of occupancy. (JA 2632, 2634, 2636, 2638, 2640, 2636, 2638, 2640). In other words, CIT gave Ms. Bowen more than a dozen chances to maintain compliance.

Second, despite receiving no response to numerous requests for a valid explanation for Ms. Bowen's change of address, CIT did not immediately foreclose on the residence. Instead, CIT re-sent those requests, attempted phone contact, and sought an exception to avoid Ms. Bowen's removal. (JA 2651, 2655, 2739-40, 2898).

Third, despite its clear right to do so, CIT did not foreclose after Ms. Bowen failed to pay the Property's taxes for two consecutive years. Instead, CIT paid Ms. Bowen's property taxes in both 2013 and 2014 to avoid the sale of the Property at a tax sale. (JA 2662, 2864-66).

Fifth, after verifying both Ms. Bowen's occupancy, and the legitimate basis for the change of address, CIT moved to quickly rescind the foreclosure action. Put differently, as soon as Ms. Bowen fulfilled her obligations under the reverse mortgage, CIT ended its foreclosure efforts. Ms. Bowen rejected this effort.

Finally, prior to instituting the foreclosure action, CIT obtained approval from NOVAD, the servicer for HUD. (JA 2658, 2667). Therefore, this was not a rogue and malicious lender foreclosing on homes; rather, HUD—tasked with assisting Americans in obtaining and maintaining quality and affordable housing—retained complete oversight over CIT's actions.

In light of those facts, Ms. Bowen has—at most—presented evidence that CIT acted based on a misunderstanding of Ms. Bowen's occupancy status. However, acting based on a mistake does not justify punitive damages. Ms. Bowen was required to prove—and failed to do so—that CIT acted with malice, fraud, oppression, or gross negligence. For this reason, CIT's conduct does not rise to the level required to justify an award of punitive damages, and any such award is improper. Accordingly, this Court should vacate the award.

Further, the damages that serve as the basis of the punitive damage claim were nothing more than an extension of the tort of outrage damages, which is itself duplicative of the punitive damage award. In *Tudor*, the Supreme Court of Appeals of West Virginia explained that a tort of outrage claim without certain proof is merely a disguised punitive damage award. Specifically:

> [i]n cases where the jury is presented with an intentional infliction of emotional distress claim, without physical trauma or without concomitant medical or psychiatric proof of emotional or mental trauma, *i.e.* the plaintiff fails to exhibit either a serious physical or mental condition requiring medical treatment, psychiatric treatment, counseling or the like, any damages awarded by the jury for intentional infliction of emotional distress under these circumstances necessarily encompass punitive damages …

Tudor v. Charleston Area Med. Ctr., Inc., 203 W. Va. 111, 116, 506 S.E.2d 554, 559 (1997). However, Ms. Bowen failed to present any evidence of any such trauma, let alone evidence of treatment for such trauma. In fact, Ms. Bowen never even alleged that she underwent treatment made necessary by any supposed mental or emotional trauma. Similarly, in its November 18 Order, the Circuit Court itself notes that CIT's conduct leading to the litigation was "with the intent to cause Shirly Bowen emotional distress, and actually caused Shirley Bowen severe emotional distress." (JA 4367). The Circuit Court did not find that Ms. Bowen ever sought treatment for that distress in its November 18 Order. In such an instance, the Supreme Court of Appeals of West Virginia has acknowledged that a claim for tort of outrage is duplicative of a punitive damage claim:

> this Court recognized that in a tort of outrage claim in which there is no physical trauma, all damages are essentially punitive damages given the significance of the defendant's conduct, both in supporting a tort of outrage claim and in assessing the severity of the plaintiff's emotional distress.

Stump v. Ashland, Inc., 201 W. Va. 541, 552, 499 S.E.2d 41, 52 (1997).

In evaluating the punitive damage award under *Garnes,* the Circuit Court was required to consider whether the punitive damages bear a reasonable relationship to the harm that has occurred because of the defendant's conduct. Syl. Pt. 7, *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W. Va. 482, 494, 694 S.E.2d 815, 827 (2010) (citing *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991). Because the $500,000 in tort of outrage damages are duplicative of the award of punitive damages, the punitive damages awarded in this case cannot bear a reasonable relationship to the harm that allegedly occurred. Since such a large portion of the compensatory damages upon which the punitive damage claim is based is merely another punitive damage claim in disguise, this Court should vacate the punitive damage award as the punitive damages do not bear a reasonable relationship to the harm that occurred.

5. The Circuit Court's Award of Attorneys' Fees is Not Supported by the Facts or the Law.

a. Because Ms. Bowen failed to demonstrate bad faith, vexatious, wanton, or oppressive conduct on the part of CIT, she is not entitled to attorneys' fees. Thus, this Court should overturn the Circuit Court's award in its entirety.

"[A]s a general rule each litigant bears his or her own attorney's fees absent a contrary rule of court or express statutory or contractual authority for reimbursement." *Daily Gazette Co. v. Canady,* 175 W. Va. 249, 250, 332 S.E.2d 262, 263 (1985). Known as the American Rule, the basis for the rule is that "one should not be penalized for merely prosecuting or defending a lawsuit, as litigation is at best uncertain." *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 51, 365 S.E.2d 246, 249 (1986). In general "both sides of a civil controversy must pay their own attorneys' fees—win, lose, or draw." *Hayseeds, Inc. v. State Farm Fire & Cas*., 177 W. Va. 323, 328, 352 S.E.2d

73, 78 (1986) (recognizing a limited exception to the rule in the context of insurance), *holding modified by Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997).

That said, "[t]here is authority in equity to award to the prevailing litigant his or her reasonable attorney's fees as 'costs,' without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Syl. Pt. 3, *Sally-Mike Properties v. Yokum,* 179 W. Va. 48, 49, 365 S.E.2d 246, 247 (1986).

The requirement of bad faith, vexatious, wanton, and oppressive conduct makes sense when considering the purpose of an attorneys' fees award. The Supreme Court of Appeals has previously recognized that attorneys' fees are awarded to punish and discourage intentional conduct. *Boyd v. Goffoli,* 216 W. Va. 552, 569, 608 S.E.2d 169, 186 (2004) ("[a]n obvious purpose of awarding attorney fees and costs in a case involving fraud is that intentional conduct such as fraud should be punished and discouraged"). Moreover, the Court recognized that when a party "has been sufficiently discouraged from future fraudulent conduct by the sizable punitive damages awarded by the jury…an award of attorney fees and costs is not necessary to perform this function*." Id.*

A court should only award attorneys' fees in exceptional circumstances. *Murthy v. Karpacs-Brown*, 237 W. Va. 490, 500, 788 S.E.2d 18, 28 (2016). (recognizing "the exceptional rule in equity authorizing an award to the prevailing litigant of his or her reasonable attorney's fees as 'costs' of the action"). To that end, "like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." *In re John T.*, 225 W. Va. 638, 644, 695 S.E.2d 868, 874 (2010).

This case does not warrant an equitable award of attorneys' fees. First, there is no evidence that CIT acted with bad faith, vexatiously, wantonly, or for oppressive reasons either before or

during litigation. Rather, it was CIT that sought to undo the foreclosure and end this litigation at the outset, and it is Ms. Bowen that is challenging CIT's effort to do so. (JA 0001-0004, 0054-0071). Beyond that—as Ms. Bowen's own expert acknowledged—it was Ms. Bowen's own mistake that set off the chain of events at the center of this litigation. (JA 3261). CIT's mere reliance on Ms. Bowen's error does not constitute bad faith, vexatious, or oppressive conduct. To the contrary, CIT tried—on over a dozen occasions—to seek Ms. Bowen's compliance with the requirements of the reverse mortgage. (*See, e.g.,* (JA 2632, 2634, 2636, 2638, 2640, 2636, 2638, 2640). Had it wanted to act in bad faith, vexatiously, or oppressively, it would have capitalized on Ms. Bowen's first failure to certify her occupancy, pay her taxes, or properly update her address.

CIT's pre-trial conduct was similarly reasonable. In her motion for attorneys' fees, Ms. Bowen pointed to CIT's (1) failure to comply with the Circuit Court's scheduling orders, (2) refusal to comply with the Circuit Court's order compelling discovery[4], and (3) efforts to hide, redact, or otherwise obfuscate Ms. Bowen's prosecution of her claim. However, there is no basis in fact to support these allegations. Rather, CIT's prior counsel Paul Kuhnel provided an affidavit confirming that he produced all of CIT's documents in his possession. (JA 0331). Even worse, CIT provided this same documentation repeatedly throughout this litigation. This conduct is consistent with CIT's other pre-trial conduct, which included numerous attempts to help Ms. Bowen avoid foreclosure. Besides, CIT fell victim to unfortunate circumstances when its prior counsel's law firm abruptly closed down and declared bankruptcy. As a result, CIT was left to urgently find new counsel.

[4] Issues relating to discovery misconduct are subject to the provisions of Rule 37, not a post-judgment request for attorney's fees.

The same is true for CIT's in-trial conduct. Though Ms. Bowen argues that counsel's reference to a HUD regulation constituted improper trial conduct, that is simply not true. Specifically, Ms. Bowen contends that the reference was improper because (1) counsel failed to produce a copy of the HUD regulation prior to trial and (2) counsel referred to the document as a HUD regulation, instead of a guideline. However, Ms. Bowen acknowledges that CIT's counsel informed her—before trial—that the regulation is a public document. (JA 3832). Notably, a simple internet search provided the guideline as the first search result. Besides, there is no legal requirement for CIT to disclose the applicable law to Ms. Bowen's counsel. Rather, Ms. Bowen's counsel is responsible for researching the relevant issues in this case, including HUD regulations and guidelines.

No matter what you call it—a guideline or a regulation—HUD requires a servicer to obtain an occupancy certification from each mortgagor on an annual basis. HUD also requires CIT to submit evidence of those certifications to call a reverse mortgage loan due and payable. (JA 2658-666). Therefore, this HUD "guideline" or "regulation" directly regulates CIT. Accordingly, Ms. Bowen's use of *HUD Guideline* 4330.1 (13-22) to justify an award of attorneys' fees is utterly baseless.

Regardless, the Supreme Court of Appeals discourages the award of attorneys' fees where a party has been dissuaded from similar future conduct by the imposition of a substantial punitive damages award. *See, e.g., Boyd* 216 W. Va. at 569, 608 S.E.2d at 186. Should this Court fail to modify either the attorneys' fees or punitive damages awards, it would improperly subject CIT to both attorneys' fees over $500,000 and punitive damages of $1,000,000. Thus, this Court should eliminate the award of attorneys' fees under the principle outlined in *Boyd*.

In light of the punitive damages award, CIT's non-vexatious conduct, and the sacrosanct nature of the American Rule, this Court should also overturn the November 22 Order for the threat it poses to contested civil litigation. Under Ms. Bowen's theory for attorneys' fees, and the Circuit Court's adoption of it, any litigant that vigorously defends its interest in civil litigation would jeopardize their protection by the American Rule. Cases that are tried are inherently adversarial. An affirmation of an award of attorney's fees in contested litigation would open the floodgates for post-judgment requests for attorney's fees. The American Rule would be destroyed in West Virginia.

The Circuit Court points to Ms. Bowen's need to file various motions to compel, and a motion for sanctions. (JA 4386-87). However, the motion for sanctions under Rule 37 is the proper mechanism for handling conduct that the trial courts determines to be an abuse of discovery; a wholesale award of fees is not. The Circuit Court also noted that CIT failed to appear for the final pre-trial conference; failed to comply with the mediation deadline; and failed to file a pre-trial memorandum. (JA 4387). While true, the Court's position ignores its April 4, 2019, Order, wherein the Court stayed the matter pending the ruling on CIT's Motion to Dismiss, so CIT did not miss these deadlines. (JA 0105). Further, even if this misunderstanding resulted in CIT missing certain deadlines, CIT's prior counsel's law firm was in the midst of a collapse. Accordingly, CIT was to find new counsel mere days before the final pre-trial. This was of no fault to CIT. Finally, the Court notes the incident wherein CIT's counsel reference to a "HUD regulation" that was actually a "HUD Handbook." (JA 4387-88). However, in the same finding, the Circuit Court notes that it provided a curative instruction to the jury. (JA 4388). Again, the curative instruction is the proper mechanism for handling the situation; a wholesale award of fees

is not. Accordingly, this Court should vacate the Circuit Court's award of attorneys' fees. Any other finding would truly threaten the legal system's strong deference to the American Rule.

b. Ms. Bowen's success on her claim for fraudulent court record only permits recovery of attorneys' fees for work completed on that claim.

West Virginia's statute prohibiting fraudulent court records provides for damages of "reasonable attorney's fees." W. Va. Code § 38-16-501. In doing so, it limits recovery to the greater of either 1) $10,000 or 2) actual damages, as well as court costs; reasonable attorney's fees; and exemplary damages to be determined by the Court. W. Va. Code § 38-16-501 (emphasis added). Moreover, the award of fees on such a claim is limited solely to the attorneys' fees billed for that claim. *Dolly v. United Disposal Serv., Inc.,* No. 18-1075, 2020 WL 1674254, at *4 (W. Va. Apr. 6, 2020) (limiting attorneys' fees to those related to the Wage Payment and Collection Act claim for which fees were recoverable).

Regardless, even if Ms. Bowen could recover attorneys' fees based on this claim,[5] her recovery should be limited to the work completed in pursuit of that claim. The Circuit Court failed to conduct any such analysis. Instead, the Circuit Court merely stated, "[a]dditionally, the Court would FIND that the jury found CIT liable for recording a fraudulent court record; and, that West Virginia Code § 38-16-501, permits the Court to award reasonable attorney fees." (JA 4389). However, it did not identify which fees related to that claim, or which specific fees it was awarding based on that claim. Therefore, the Circuit Court committed error to the extent it awarded fees beyond those incurred for this claim, and any such award should be overturned.

[5] The merits of Ms. Bowen's fraudulent court record claim will be the subject of briefing related to the Circuit Court's May 6 Order. CIT takes the position that any award for this claim is improper; however, this brief solely addresses the request for attorneys' fees.

c. The Circuit Court's conclusion that Plaintiff was entitled to 33% of the total recovery in attorneys' fees is a gross misstatement of *Pitrolo* and all other applicable West Virginia law.

As stated in *Pitrolo*, "[w]here attorney's fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client…" *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 191, 342 S.E.2d 156, 157 (1986); *see also W. Virginia Dep't. of Transportation, Div. of Highways v. Newton*, 238 W. Va. 615, 626, 797 S.E.2d 592, 603 (2017) (acknowledging that while a party's "contingent fee contract with her attorney is clearly enforceable, it cannot be the sole basis for determining the amount of the attorney's fee award").

Even if the court properly awarded attorneys' fees, it improperly calculated the amount of fees that it awarded. Instead of awarding the actual fees accrued in litigating this matter, the court awarded a much higher contingency fee based on the total judgment. In fact, despite calculating fees of $390,965 using customary hourly rates, the court awarded $583,333.33 in fees. (JA 4392-95). In other words, the Circuit Court punished CIT for Ms. Bowen's contingency fee arrangement with her counsel. Under the dictates of *Pitrolo* and *Newton*, the mere existence of such an arrangement between Ms. Bowen and her counsel did not justify the court's award.

Moreover, the Circuit Court's reliance on *Hayseeds*—to establish the amount of the contingency—misconstrued that court's holding. While *Hayseeds* did acknowledge that 33% is a standard contingency fee, the Court limited its holding to a specific situation: a policyholder's claims against its own insurer. *Hayseeds, Inc. v. State Farm Fire & Cas*., 177 W. Va. 323, 329–30, 352 S.E.2d 73, 80 (1986), holding modified by *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997) ("Accordingly, we hold today that *whenever a policyholder must sue his own insurance company over any property damage claim*, and the policyholder substantially prevails in the action,

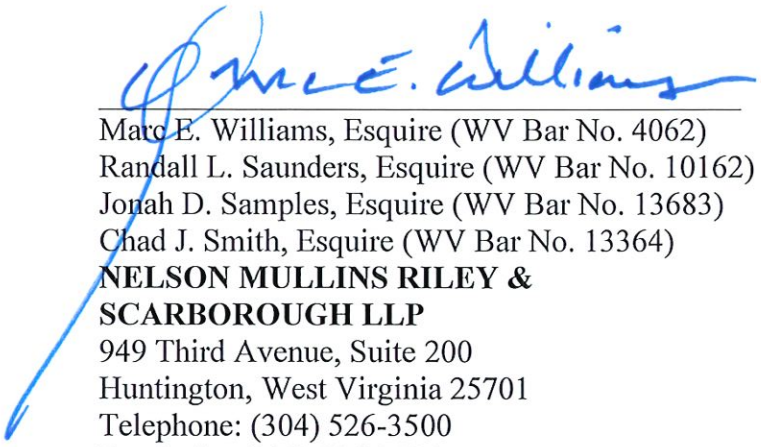
the company is liable for the payment of the policyholder's reasonable attorneys' fees.") (emphasis added).

The Supreme Court of Appeals explained its policy in a later holding by stating that "[t]he policy underlying *Hayseeds*, *Jordan* and *Marshall* is that a policyholder buys an insurance contract for peace of mind and security, not financial gain, and certainly not to be embroiled in litigation." *Miller v. Fluharty*, 201 W. Va. 685, 694, 500 S.E.2d 310, 319 (1997). Therefore, *Hayseeds* is clearly inapplicable here because this matter does not relate to a policyholder or an insurance contract. Accordingly, the Circuit Court's award of 33% of the total award, and nearly $200,000 more than the fees actually incurred, is fundamentally unfair. This is particularly true when CIT also faces a substantial award for punitive damages. For that reason, to the extent this Court upholds any award of attorneys' fees, it should lower the award to actual hours accrued by Ms. Bowen's counsel.

CONCLUSION

For the foregoing reasons, this Court has jurisdiction to address CIT's appeal of the May 6 Order. Additionally, this appeal is timely under the finality rule as the November 22 Order was the only final order issued by the Circuit Court. Moreover, in its November 18 Order and its November 22 Order, the Circuit Court erred in its award of both punitive damages and attorneys' fees. Accordingly, this Court should reverse the decision of the Circuit Court and vacate the award of punitive damages, as well as the award of attorneys' fees. With the jurisdictional and timeliness issues resolved, this Court should then order new briefing on the errors related to the May 6 Order denying CIT's Rule 59 motion.

CIT BANK, N.A.



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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

CIT BANK, N.A.,

Plaintiff/Counterclaim Defendant,

v.

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

Defendant/Counterclaim Plaintiff.

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

CERTIFICATE OF SERVICE

The undersigned attorney certifies that the foregoing "***Brief of Petitioner CIT Bank, N.A.***" and "***Joint Appendix***" were electronically filed using the File & ServeXpress system on the 20th day of March, 2023, which shall send automatic notification to the following:

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