No. 22-ICA-330

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

CIT BANK, N.A.,

Plaintiff/Counterclaim Defendant,

v.

CAROLINE COFFMAN, as Administratrix of Estate of Shirley Bowen,

Defendant/Counterclaim Plaintiff.

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

SUPPLEMENTAL BRIEF OF PETITIONER CIT BANK, N.A.

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SUPPLEMENTAL STATEMENT OF THE CASE

The facts underlying this matter have been set forth at length in CIT's initial appellate brief. Additional facts will be set forth here only to the extent necessary for their application to the assignments of error.[1] This action was initiated as a Petition to Rescind Foreclosure on December 6, 2016. (JA 0002–04). Nearly two years later on September 28, 2018, Respondent filed counterclaims for breach of contract and purported violations of the West Virginia Consumer Credit Protection Act ("WVCCPA"), as well as several additional counterclaims seeking relief in tort (slander of title, tort of outrage, abuse of process, and so-called "wrongful foreclosure"). (JA 0052–71).

Within a week after Ms. Bowen filed her First Amended Answer and Counterclaims, CIT filed a Motion to Dismiss the counterclaims and a supporting memorandum of law on October 4, 2018. (JA 0073–80). Although the parties thereafter mutually agreed upon a summary judgment filing deadline of June 21, 2019, the Circuit Court did not rule of CIT's Motion to Dismiss for nearly eleven months. Importantly, the Circuit Court stayed the matter generally pending the Court's resolution of CIT's Motion to Dismiss (JA 0105), which is why CIT did not file a Motion for Summary Judgment on June 21, 2019. On June 27, 2019, the Circuit Court entered an interlocutory order denying CIT's Motion to Dismiss in its entirety. (*See* JA 0106–25). Noting that the "preference is to decide cases on their merits" and that "[m]otions to dismiss should be rarely granted," the Circuit Court rejected all arguments of law in preliminary opposition to the Respondent's countersuit. (*See* JA 0107).

[1] Further, pursuant to West Virginia Rule of Appellate Procedure 10(h), this supplemental brief need not set forth a full statement of the facts, but must "only comply with such parts of [brief formatting requirements] applicable that are appropriate under the circumstances."

By subsequent order on September 11, 2019, the Circuit Court determined that CIT was "precluded from filing a Motion for Summary Judgment as to the Counterclaims asserted" based upon the parties' stipulated June 21, 2019 deadline. (JA 0243). As noted, this deadline would have resulted in dispositive motions being filed six days *prior* to a final decision on the preliminary Motion to Dismiss, which was not rendered until June 27, 2019, even though the Circuit Court had stayed the matter generally by order entered April 4, 2019. (JA 0104–05). In any event, CIT could not have anticipated or attacked the legal sufficiency of Respondent's fraudulent court record claim, which, by the Circuit Court's own admission, first was asserted "as early as January, 2020." (JA 4110). Such a result contravenes the fundamental principles of civil procedure and effectively stripped CIT of any meaningful opportunity to challenge the underlying legal merits of the claims set forth by Respondent before being presented to the fact finder.

Accordingly, all of Ms. Bowen's claims—irrespective of their legal merits—were presented to a jury, which found complete liability against CIT and returned a verdict in the total amount of $2,260,000. (JA 2254–57). CIT thereafter filed a Motion for Judgment as a Matter of Law or in the Alternative for New Trial. (JA 3724–45). Although the Circuit Court awarded judgment as a matter of law on Ms. Bowen's claims under the WVCCPA because the statutorily required notice of right to cure was not provided (JA 4100–01), it denied CIT's motion in all other respects and denied CIT's Motion for a New Trial. (JA 4096–122). This appeal followed.

SUPPLEMENTAL SUMMARY OF ARGUMENT

This matter arises from a bona fide error, which resulted solely from Ms. Bowen's own actions and inactions. Once CIT discovered the error, it promptly moved to set aside the foreclosure and restore the status quo. Nevertheless, Ms. Bowen brought a plethora of counterclaims, a number of which suffered from fundamental pleading deficiencies, a lack of legal merit or supporting evidence, and other fatal defects which should have precluded these claims

from reaching trial. Notwithstanding the fact that the parties' relationship was governed by contract, Respondent's claims primarily involved causes of action in tort, necessarily requiring the existence of a special relationship which does not exist merely by the existence of a borrower-servicer relationship. Further, CIT's ability to address and attack the legal merit of these claims *before* they were presented to a sympathetic jury was greatly hindered by the Circuit Court's September 11, 2019 Order, which precluded CIT from filing dispositive motions in relation to the counterclaims. Absent this error, the great majority of this action may have been properly disposed as a matter of law long before its presentation to a jury.

Even further, the Circuit Court enabled the continued meritless pursuit of these claims by creating a new cause of action for "wrongful foreclosure," which finds no basis under West Virginia jurisprudence. To the extent such a claim may exist in this state, allowing recovery of damages for both it and an alleged breach of contract constituted an impermissible double recovery. Additionally, the Circuit Court errantly permitted a claim for fraudulent court record—first asserted in Respondent's pre-trial memorandum—to proceed to trial in direct contravention of fundamental principles of pleading standards as set forth by the Rules of Civil Procedure.

Beyond these errors, the Circuit Court impermissibly admitted several pieces of irrelevant and prejudicial evidence without limiting instructions, which unquestionably contributed to the unsupported jury verdict in Respondent's favor. Following that erroneous verdict, the Circuit Court yet again erred in failing to grant judgment for CIT as a matter of law in regard to Ms. Bowen's claims for slander of title, abuse of process, tort of outrage, and breach of contract. For these reasons and for those more fully set forth below, the jury verdict rendered against CIT is unjustified as a matter of law and unconscionably punishes CIT for its lawful attempt to set aside a bona fide error.

STATEMENT REGARDING ORAL ARGUMENT

By Order dated November 28, 2023, this Court scheduled this matter for oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure during the Spring 2024 Term of Court on March 13, 2024.

SUPPLEMENTAL ARGUMENT

1. Standards of Review.

The applicable appellate standard of review "for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the West Virginia Rules of Civil Procedure is *de novo*." *Fredeking v. Tyler*, 224 W. Va. 1, 5, 680 S.E.2d 16, 20 (2009). The court's task on review is "to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below." *Justice Highwall Mining, Inc. v. Varney*, 249 W. Va. 1, 890 S.E.2d 685, 690 (Ct. App. 2023) (quoting Syl. Pt. 2, *Fredeking*, 224 W. Va. 1, 680 S.E.2d 16)).

Review of a circuit court's decision regarding a motion for a new trial is reviewed for abuse of discretion on appeal. *See* Syl. Pt. 3, *In re State Pub. Bldg. Asbestos Litig.*, 193 W. Va. 119, 454 S.E.2d 413 (1994). However, while the appellate court must "review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard" and review the "underlying factual findings under a clearly erroneous standard," "[q]uestions of law are subject to a *de novo* review." *Id*.; *see also McClure Mgmt., LLC v. Taylor*, 243 W. Va. 604, 614–15, 849 S.E.2d 604, 614–15 (2020) (citing *Tennant v. Marion Health Care Found.*, 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995)).

As to the review of a trial court's evidentiary rulings, the Court on appeal generally applies an abuse of discretion standard. *State v. Combs*, 247 W. Va. 1, 7, 875 S.E.2d 139, 145 (2022).

However, as to determinations of admissibility of Rule 404(b) evidence, the Court on review employs a three-step analysis:

> First, [the Court] review[s] for clear error the trial court's factual determination to show the other acts occurred. Second, [the Court] review[s] *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, [the Court] review[s] for an abuse of discretion the trial court's conclusion that the 'other acts' evidence is more probative than prejudicial under Rule 403.

Id. (citing *State v. Timothy C.*, 237 W. Va. 435, 443, 787 S.E.2d 888, 896 (2016)).

2. The Circuit Court erred in determining that a special relationship existed amongst the parties notwithstanding the contractual agreement.

The Circuit Court erred when it determined that a special relationship existed amongst the parties or, in the alternative, that no special relationship was required in order for Respondent to pursue relief in tort. (*See* JA 4108). Without this error, the majority of this action would have been disposed of prior to trial, and the subsequent errors discussed below would not have occurred. The Circuit Court's holding glaringly disregards the "gist of the action" doctrine. Accordingly, that holding cannot stand, and Ms. Bowen's counterclaims should have been limited to those arising out of the contractual relationship between a borrower and servicer.

As CIT argued below, "[a] plaintiff cannot maintain an action in tort for an alleged breach of a contractual duty." *Lockhart v. Airco Heating & Cooling, Inc.*, 211 W. Va. 609, 614, 567 S.E.2d 619, 624 (2002); *see also Strahin v. Clevenger*, 216 W. Va. 175, 183, 203 S.E.2d 197, 205 (2004). Rather, "[i]n the matters of negligence, liability attaches to a wrongdoer, not because of a breach of a contractual relationship, but because of a **breach of duty** which results in an injury to others." Syl. Pt. 2, *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988) (emphasis added). "The source of the duty is controlling." Syl. Pt. 9, *Lockhart*, 211 W. Va. 609, 567 S.E.2d 619. Put another way, "[a]n action in tort will not arise for breach of contract unless the action in tort would arise independent of the existence of the contract." *Id*.

Also known as the "gist of the action" doctrine, "[i]f the action is not maintainable without pleading and proving the contract, where the gist of the action is the breach of the contract, either by malfeasance or misfeasance, it is, in substance, an action on the contract, whatever may be the form of the pleading." *Cochran v. Appalachian Power Co.*, 162 W. Va. 86, 246 S.E.2d 624, 628 (1978). This doctrine promotes judicial economy and seeks "to prevent the recasting of a contract claim as a tort claim." *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W. Va. 577, 586, 746 S.E.2d 568, 577 (2013). Predicated upon these principles, the Supreme Court of Appeals has found that "recovery in tort will be barred" where any of the following four factors is present:

> (1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim.

Id. (quoting *Star v. Rosenthal*, 884 F. Supp. 2d 319, 328–29 (E.D. Pa. 2012)). The simplified analysis to be conducted is an examination of "whether the parties' obligations are defined by the terms of the contract." *Gaddy Eng'g Co.*, 231 W. Va. at 586, 746 S.E.2d at 577 (*citing Goldstein v. Elk Lighting, Inc.*, No. 3:12-CV-168, 2013 WL 790765, at *3 (M.D. Pa. 2013)).

The bulk of Ms. Bowen's counterclaims fall expressly within the class contemplated for preclusion pursuant to the "gist of the action" doctrine. Irrespective of the clear precedence established by this doctrine, the Circuit Court allowed a number of tort claims to proceed despite their basis being wholly contained within the contract between the parties. To clarify, the Circuit Court determined by its May 6, 2022 Order that, "to the extent that a special relationship is required here (which this Court doubts), the evidence submitted and the factual findings of the jury were sufficient to find that such existed." (JA 4108). Immediately thereafter, the Circuit Court concluded that CIT's alleged conduct "breached duties arising independent of the contractual

relationship between the parties." (JA 4108). By this statement, the Circuit Court again failed to clarify what those duties were and whether that unspecified breach was pursuant to some special relationship existing outside the mere borrower-servicer relationship or whether—as asserted by the Circuit Court previously—no such special relationship was required. The latter position is inherently contradicted by clear precedence and is grounds on its own for overturning the Circuit Court's conclusions.

Further, to the extent the Circuit Court can be deemed to have addressed the underlying special relationship requirement rather than merely determining it inessential to the analysis, the Circuit Court failed to acknowledge and address clear caselaw holding that a special relationship does not merely arise from a servicer-borrower relationship. *See Ranson v. Bank of Am., N.A.*, No. CIV.A. 3:12-5616, 2013 WL 1077093, at *5 (S.D.W. Va. Mar. 14, 2013). Specifically, West Virginia federal courts applying West Virginia law have on numerous occasions reaffirmed that a mere borrower-servicer relationship does not spawn a "special relationship" by its mere existence, but that the necessary relationship arises *only* where the servicer "performs services not normally provided by a [servicer] to a borrower." *Id.*; *see also U.S. Bank NA v. Tara Retail Grp. LLC et al. (In re Tara Retail Grp. LLC*), 634 B.R. 509, 521 (Bankr. N.D.W. Va. 2021); *Carter v. Nat'l City Mortg., Inc.*, No. 1:14CV70, 2015 WL 966260, at *8 (N.D.W. Va. Mar. 4, 2015); *Warden v. PHH Mortg. Corp.*, No. 3:10-CV-75, 2010 WL 3720128, at *9 (N.D.W. Va. Sep. 16, 2010). The Fourth Circuit Court of Appeals has confirmed the same. *See Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 783 F.3d 976, 981 (4th Cir. 2015); *Covol Fuels No. 4, LLC v. Pinnacle Min. Co.*, 785 F.3d 104, 116 (4th Cir. 2015) (denying tort claims which "simply recast" a claim for breach of contract).

Contrary to the analysis conducted by the Circuit Court below, whether such a special relationship exists "must be determined on a case-by-case basis." *Glascock v. City Nat'l Bank of W. Va.*, 213 W. Va. 61, 576 S.E.2d 540, 546 (2002). Namely, the focal point of the fact-intensive analysis is "the extent to which the particular plaintiff is affected differently from society in general." *Aikens v. Debow*, 208 W. Va. 486, 499, 541 S.E.2d 576, 589 (2000). Where a party fails to point to any specific facts that show how he or she was affected "different from society in general, or how the Bank had a specific reason to know of any tort damages or consequences likely to be suffered by the plaintiff above, beyond or different from her losses caused by the alleged breach of contract," a special relationship cannot be found. *See White v. AAMG Const. Lending Ctr.*, 226 W. Va. 339, 348, 700 S.E.2d 791, 800 (2010); *E. Steel Constructors, Inc. v. City of Salem*, 209 W. Va. 392, 397–98, 549 S.E.2d 266, 271–72 (2001). The Supreme Court of Appeals has otherwise acknowledged that without close adherence to these principles of jurisprudence, West Virginia courts may "subject[] defendant[s] to virtually limitless liability that, in addition to **being disproportionate to a defendant's negligent act or omission**, may increase litigation to a level that courts would be unable to manage." *E. Steel Constructors, Inc.*, 209 W. Va. at 397, 549 S.E.2d 266, 271 (emphasis added) (citing *Aikens*, 208 W. Va. at 491, 541 S.E.2d at 581).

Ultimately, the Circuit Court, on review of CIT's Motion for Judgment as a Matter of Law, determined that the "evidence submitted and the factual findings of the jury were sufficient to find that such [a special relationship] existed." (JA 4108). This determination essentially predicates the ultimate determination on the issue on the jury's findings of fact, despite guidance enumerating that the "existence of a duty, however, continues to be an issue resolved by the trial court." *See Aikens*, 208 W. Va. at 490–91, 541 S.E.2d at 580–81. The Supreme Court of Appeals concisely stated that this determination is not one for the jury, "rather the determination of whether a plaintiff

is owed a duty of care by defendant must be rendered by the court as a matter of law." *Id*; *see also Miller v. Whitworth*, 193 W. Va. 262, 265, 455 S.E.2d 821, 824 (1995). This determination should have been made *prior* to trial,[2] but instead was confirmed by the Circuit Court's May 6, 2023 Order at least in part upon the jury's prior factual determinations. (*See* JA 4108).

Respondent at no point presented any evidence that CIT's conduct created a special relationship or that any relationship among the parties in any way extended beyond that arising simply out of the contractually established relationship of borrower-servicer. Rather, the record before the Circuit Court below and this Court on appeal evidences that the extent of any relationship among these parties arose strictly from the applicable note and deed. Based upon this evidence and Respondent's complete failure to point to any evidence supporting a contrary conclusion, all claims in tort were precluded as a matter of law and should not have been permitted to proceed to the jury. Beyond this, CIT was similarly entitled to judgment as a matter of law and the Circuit Court's decision not to award the same was in clear error and must be reversed on appeal.

The "source of the duty is controlling." Syl. Pt. 9, *Lockhart*, 211 W. Va. 609, 567 S.E.2d 619. Where, as here, the source of CIT's duty to Ms. Bowen arose from the parties' mutual agreement, relief in tort is simply not available. Further, no special relationship exists and because the Circuit Court concluded that no special relationship was required—or at least acknowledged its "doubt" of the same—the analysis below in allowing these tort claims to go forward was inherently flawed. The result of such fatal error was a multi-million dollar verdict, which served a purely punitive purpose for alleged malfeasance that was strictly contractual in nature. Accordingly, the Circuit Court erred in its deviation from the contours of the gist of the action

[2] And very well could have been preliminarily disposed of as a matter of law had CIT been permitted to file dispositive briefing in this matter.

doctrine, and thus CIT has been burdened with substantial injustice as a result of that manifest error. That error permitted a multitude of claims in tort to proceed without legal merit and constituted the exact "misapprehension of the law or evidence," (*see* Syl. Pt. 4, *Sanders v. Georgia-Pacific Corp.*, 159 W. Va. 621, 225 S.E.2d 218 (1976)) warranting reversal on appeal.

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

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

Despite a complete lack of caselaw providing for the existence of a claim for "wrongful foreclosure," the Circuit Court *sua sponte* created such a claim on Respondent's behalf and allowed it to proceed to trial over CIT's repeated objections. This decision lacks basis in law and constitutes clear error. In support of the creation of such a claim without any prior basis in West Virginia jurisprudence, the Circuit Court generally referenced a breach of "common law and constitutional duties to Ms. Bowen resulting in the wrongful foreclosure . . . ." (*see* JA 4106). The Circuit Court further predicated its findings upon some underlying moral obligation to the Respondent, stating in support of its rejection of CIT's Motion to Dismiss the claim:

> CIT Bank's position seeks to summarily avoid its alleged immoral actions and leave Mrs. Bowen without legal remedy. Further, not providing a remedy for Mrs. Bowen relating to CIT Bank's assertedly abhorrent conduct will leave Mrs. Bowen without compensation for the resulting damages and, more importantly, will have no deterring effect on CIT Bank or any other bank seeking unlawfully to foreclose on a person's home.

(JA 0119).

The Circuit Court thereafter represented that twenty-eight states "have expressly recognized the tort of foreclosure." (JA 0116). Pulling from these states which do "expressly recogniz[e] the tort of wrongful foreclosure," the Circuit Court outlined the necessary elements as follows:

> (1) The defendant owed a duty to the plaintiff, i.e., the defendant mortgage company (mortgagee) owed a duty to the plaintiff (mortgagor), including but not limited to complying with the terms of the note and mortgage, and with any other statutory and/or common-law requirements; (2) The defendant breached the duty to the plaintiff, i.e., the defendant mortgage company (mortgagee) breached the duty to the plaintiff (mortgagor) by failing to comply with the terms of the note and mortgage and/or by failing to comply with other statutory and/or common-law requirements; (3) The plaintiff (mortgagor) was not in default of any terms of the note and mortgage, including but not limited to the payments requirements; (4) The plaintiff (mortgagor) was in compliance with any and all statutory requirements; (5) The plaintiff sustained damages; (6) The plaintiff's damages were a result of the defendant's actions regarding the mortgage foreclosure.

(JA 0116–17) (citing 123 Am. Jur. Proof of Facts 3d 417 (Originally published in 2011)). Notably, despite referencing twenty-eight states which acknowledge a claim for "wrongful foreclosure," the Circuit Court did not reference or otherwise allude to any precedential basis for such a claim under West Virginia law. Thus, the Circuit Court, on its own accord, created a new cause of action out of thin air in relation to a legal process which occurs daily in the Mountain State and for which no such parallel claim ever has been acknowledged.

Predicated upon the same underlying moral undertones as discussed above, the Circuit Court found basis in the law of other states and general West Virginia jurisprudence that "for each wrong there is a remedy" to establish a new cause of action in West Virginia. (JA 0117–18) (citing *Hannah v. Heeter*, 213 W. Va. 704, 584 S.E.2d 560 (2003)). Fundamentally, the Respondent sought a punitive method outside of that enumerated by clear statutory law—and the Circuit Court obliged. However, there is an explicit remedy available for an alleged wrongful foreclosure, and Respondent's failure to bring claims sufficiently tailored to the requirements of that statutory relief does not entitle her to the creation of a new claim never before acknowledged in the 160-year history of this state.

The Circuit Court's contention that there must be a remedy for every wrong was inapposite on this occasion for a number of reasons. Beyond the dereliction of precedence necessary to enable

this claim, the Circuit Court completely ignored the numerous other remedies simultaneously available to Respondent. Most importantly, Respondent had available to her relief in the form of rescission of the foreclosure, as contemplated by West Virginia law. *See* W. Va. Code § 38-1-4a. As expressly held by the Northern District of West Virginia applying West Virginia law, "where the trust grantor wishes to challenge a foreclosure, the proper remedy is **for the grantor to seek an injunction or to file an action to have the foreclosure sale set aside**." *Patrick v. PHH Mortg. Corp.*, 998 F. Supp. 2d 478, 494 (N.D.W. Va. 2014) (emphasis added). If the foreclosure was "wrongful" as concluded by the Circuit Court, it would have been wrongful pursuant to the terms of the parties' agreement and—to the extent applicable—pursuant to clear statutory law. Nowhere within statutory authority or West Virginia caselaw is a claim for "wrongful foreclosure" contemplated or even referenced.

Neither Respondent nor the Circuit Court succeeded in attempting to propound otherwise. Rather, if a party seeks to set aside a foreclosure sale, they must show a "failure to follow any notice, service, process, or other procedural requirement relating to a sale of property under a trust deed . . . ." W. Va. Code § 38-1-4a. Respondent brought no such claim.[3] Beyond this statutory relief, Respondent had the prospect—and ultimately, due to the plethora of additional errors discussed herein, the reality—of various forms of recovery both in contract and, impermissibly, in tort. Accordingly, Respondent had no shortfall of avenues for recovery for CIT's alleged conduct and, as a result, the Circuit Court's moral justification for the creation of a new cause of action is entirely misplaced.

Further, the same case upon which the Circuit Court relied in order to establish this new cause of action explained that the "additional foundations" contemplated therein exist in

[3] In fact, she opposed CIT's petition to rescind the foreclosure sale. (*See* JA 0054–70).

coordination with the primary purpose of tort law to "provide **reasonable compensation** for losses . . . ." *Hannah*, 213 W. Va. at 710, 583 S.E.2d at 566 (emphasis added) (citing *Roberts v. Stevens Clinic Hosp., Inc.*, 176 W. Va. 492, 504, 345 S.E.2d 791, 803 (1986)). Contrary to this objective, the Circuit Court's *sua sponte* creation of a new cause of action resulted in exorbitant damages which far exceeded those necessary to compensate Respondent for what was, at most, a bona fide error on CIT's part.

As a result, the Circuit Court's creation of a new cause of action for "wrongful foreclosure" was clearly errant, as was the failure to award CIT judgment as a matter of law upon subsequent review. Such a significant error warrants reversal.

b. A claim for wrongful foreclosure is duplicative of Respondent's claim for breach of contract.

Even if West Virginia law supported a cause of action for "wrongful foreclosure," allowing this claim to proceed while simultaneously permitting a claim for breach of contract to proceed for the same injury allows Respondent to recover twice for the same conduct. Such a situation violates fundamental principles of West Virginia law preventing double recovery for identical conduct and constitutes clear error. Further, such a situation only further bolsters and affirms the necessary application of the gist of the action doctrine.

As is well established by West Virginia law, "there can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted . . . . A plaintiff may not recover damages twice for the same injury simply because he has two legal theories." Syl. Pt. 7, *Harless*, 169 W. Va. 673, 289 S.E.2d 692; *see also McDavid v. U.S.*, 213 W. Va. 592, 601, 584 S.E.2d 226, 235 (2003) ("[I]t is axiomatic that the jury is only allowed to award . . . one recovery for each loss.").

The Circuit Court in rejecting CIT's arguments in this regard stated simply that "breach of contract and wrongful foreclosure are not duplicative of one another in this case because they have different elements, the jury made separate findings on each claim, and the jury awarded significantly different damages for each claim." (JA 4106). The Circuit Court in this regard once again predicated the determination of a question of law upon a factual finding made by the jury. The mere fact that the jury found liability as to every claim put forth does not preclude the application of well-settled law. Specifically, the Circuit Court's conclusion disregards the blanket prohibition against double recovery of damages for a single injury. *See* Syl. Pt. 7, *Harless*, 169 W. Va. 673, 289 S.E.2d 692; *State Farm Mut. Auto. Ins. Co. v. Schatken*, 230 W. Va. 201, 209, 737 S.E.2d 229, 237 (2012) (noting that West Virginia law "expressly sanctions a double recovery, which this Court has long found violative of public policy . . . .").

That the jury "made separate findings" and awarded "different damages" (*see* JA 4106) does not save this errant award from running afoul of West Virginia law. Respondent's recovery for breach of contract was predicated upon the allegation that CIT breached the contract by wrongfully foreclosing on her home. Respondent's recovery for the newly enabled action of "wrongful foreclosure" was predicated upon CIT wrongfully foreclosing on her home. The two recoveries, though different in amount, were for identical conduct and were awarded as retribution for the same injury purportedly suffered as a result of that identical conduct.

Accordingly, the Circuit Court's conclusion that the two claims were not duplicative and did not otherwise bar the general prohibition on double recovery was in error. As a result, to the extent that this Court determines "wrongful foreclosure" to be a valid cause of action under West Virginia law, CIT nevertheless should have prevailed as a matter of law and this Court should overturn that award on appeal.

4. The Circuit Court erred in allowing a settlement agreement and evidence of CIT's financial position into evidence for the purposes of determining liability.

a. The Circuit Court erred in admitting into evidence a settlement between Financial Freedom and the Department of Housing and Urban Development.

Evidence is relevant only if "it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action." W. Va. R. Evid. 401. Where evidence does not meet this criteria, it is not admissible at trial. *See* W. Va. R. Evid. 402; *see, e.g.*, Syl. Pt. 2, *Graham v. Wallace*, 214 W. Va. 178, 588 S.E.2d 167 (2003) (citations omitted). Further, even if evidence is deemed relevant, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." W. Va. R. Evid. 404(b)(1). Such information may, however, be admissible for the limited purposes of "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." W. Va. R. Evid. 404(b)(2). A party seeking to offer such evidence:

> is required to identify the specific purpose for which the evidence is being offered and the jury **must be instructed to limit its consideration of the evidence to only that purpose** . . . . The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction.

Syl. Pt. 1, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994) (emphasis added).

At the trial below, the Circuit Court impermissibly allowed the jury to be presented with evidence of a settlement between Financial Freedom, a subsidiary acquired by CIT, and the U.S. Department of Housing and Urban Development ("HUD") regarding an alleged failure by Financial Freedom to curtail insurance claims when it did not meet mandated claim filing deadlines following a loan default. (*See* JA 3779). This settlement and the trial testimony by Respondent's expert relating to the same lacked any relevance whatsoever to the facts in controversy. Rather, it is plainly apparent that Respondent proffered evidence and testimony relating to the settlement

purely as a way to incite the jury's emotions when considering the claims before it. Such a deliberate method of misleading the jury and otherwise unfairly prejudicing CIT by introduction of this evidence contravenes the principles protected by West Virginia Rules of Evidence 401 and 402, and, even if such evidence were deemed relevant, contravenes Rule 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice [or] misleading the jury . . . ."). Accordingly, such irrelevant and otherwise overly prejudicial evidence should have been restricted from presentation to the jury at the trial of this matter. These positions and arguments of law were briefed in detail in CIT's post-trial motions for relief.

The Circuit Court upon consideration of CIT's Renewed Motion for Judgment as a Matter of Law justified the admission of this evidence in accordance with the "liberal thrust of rules pertaining to experts." (JA 4117) (citing *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995)). However, the next line of the Circuit Court's order justifying the admission acknowledges that "[t]his standard is very generous and follows the general framework of the federal rules which favors the admissibility of all **relevant** evidence." (JA 4117) (emphasis added) (citing Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 7-2(A), at 24). Accordingly, as conceded therein, this "liberal thrust" is applicable only where the evidence in question is relevant. Because the evidence in question here was not relevant and served only a prejudicial purpose, its admission was in clear error and an abuse of the Circuit Court's discretion.

The Circuit Court's May 6, 2022 Order further justified the admission of this evidence based upon the doctrine of "invited error" and CIT's purported introduction of the evidence at trial. (JA 4118) (citing *State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996)). The "invited error" doctrine holds that an appellant "will not be permitted to complain of error in the

admission of evidence which he offered or elicited . . . ." Syl. Pt. 1, *State v. Compton*, 167 W. Va. 16, 277 S.E.2d 724 (1981) (quoting Syl. Pt. 2, *State v. Bowman*, 155 W. Va. 562, 184 S.E.2d 314 (1971)). "The idea of invited error is not to make the evidence admissible but to protect principles underlying notions of judicial economy and integrity by allocating appropriate responsibility for the inducement of error." *Crabtree*, 198 W. Va. at 627, 482 S.E.2d at 612.

Essentially, this doctrine is intended to prevent a party from introducing evidence then subsequently challenging the negative effects of that introduction. Because CIT offered the evidence in question only in rebuttal, the doctrine is inapplicable here. Rather, CIT introduced this information only to the extent necessary to counter the prejudice it faced as a result of the Circuit Court permitting Respondent's expert Michael L. Scales to testify about the settlement, putting further irrelevant testimony and improper legal opinions before the jury. The Circuit Court acknowledged that the Respondent "filed its notice of intent to use the 404(b) evidence specifying the exhibits the [Respondent] intended to use." (JA 4119). This notice included the settlement and articles relating to it and, as a result, CIT timely moved, *in limine*, for its exclusion. (*See* JA 0930–37). The Court denied this motion, allowed the evidence to be presented at trial, and CIT accordingly had no choice but to counter it at trial.

Specifically, Mr. Scales admitted that he conducted no independent research and instead formulated the basis of his testimony relating to the reverse mortgaging industry as a whole from the prejudicial and irrelevant evidence permitted by the Court. (JA 3217–18).[4] That testimony was

[4] Attorney Saunders: Well, my question specifically was the information that you refer to today and your knowledge of the reverse mortgaging industry came from articles that you reviewed that Mr. Brill printed off for you; is that correct?

Mr. Scales: Well, that's part of it, but I also watched Secretary Mnuchin at his confirmation hearing when he was cross-examined by Democratic senators, and I watched all of that.

based almost entirely upon articles regarding this settlement and, accordingly, introduction by CIT was necessitated to enable the jury to hear both sides of a story which should not have been permitted in the first place based upon its clear irrelevance. If not for CIT's subsequent introduction, the jury would have been presented only with the unopposed "expert" opinion derived from that same information, despite its irrelevance and prejudicial effect. These circumstances do not meet those contemplated by the "invited error" doctrine.

Further, even had CIT invited error as so suggested by the Circuit Court in refusing to grant CIT judgment as a matter of law, the doctrine of "invited error" nevertheless permits deviation when "application of the rule would result in manifest injustice." *See Crabtree*, 198 W. Va. at 628, 482 S.E.2d at 613. Accordingly, an exception applies so long as "the party inviting the error [can] demonstrate that reversal 'is necessary to preserve the integrity of the judicial process or prevent a miscarriage of justice.'" *Wilson v. Lindler*, 995 F.2d 1256, 1262 (4th Cir. 1993); *see also Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877 (1976). Reversal contemplated by this precedence is clearly warranted to counteract the prejudicial effect this error had on the jury at the trial of this matter.

The settlement agreement which Respondent was permitted to present at trial pertained to overpayments allegedly received by Financial Freedom—a subsidiary acquired by CIT—from HUD. It had absolutely nothing to do with a direct action of CIT, nor any practice concerning the foreclosure of Ms. Bowen's reverse mortgage loan. Accordingly, this settlement agreement was entirely irrelevant to the claims brought by Respondent and, even if relevant, served only to

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Attorney Saunders:	Okay. So let me ask you this, what independent research did you do, other than watching senatorial issues?
Mr. Scales:	None.

prejudice and/or confuse the jury. *See* W. Va. R. Evid. 403. Nevertheless, the Court permitted Respondent to present this settlement for the purpose of proving that CIT wrongfully foreclosed on Ms. Bowen's home. Admission of such blatantly irrelevant information was clear error and, if not entitling CIT to judgment as a matter of law, warrants a new trial which excludes this irrelevant and prejudicial evidence.

b. The Circuit Court erred in failing to instruct the jury to disregard evidence of CIT's financial position for purposes of determining liability.

The Circuit Court likewise permitted evidence of CIT's net worth and financial position without a necessary instruction limiting the jury's consideration of the evidence only to the determination of punitive damages if liability was found. As such, the jury was able (and unquestionably did) impermissibly consider CIT's financial situation in rendering its ultimate verdict as to liability.

As set forth within CIT's Motion for Judgment as a Matter of Law, if the trial court is satisfied that such evidence is admissible, it is required to "instruct the jury on the limited purpose for which such evidence has been admitted." (JA 3774) (citing *McGinnis*, 193 W. Va. at 159, 455 S.E.2d at 528).

Over CIT's objection, Respondent was permitted to call David Epperly as an expert who testified almost exclusively as to CIT's financial position, resources, and wealth. Such testimony was provided to the jury without limiting instruction and served to irreparably bias the jury against CIT. This financial information was entirely irrelevant to the general liability determination in this matter and expressly qualifies as evidence which is "unfairly prejudicial." *See State v. Guthrie*, 194 W. Va. 657, 683 n. 37, 461 S.E.2d 163, 189 n.37 (1995) ("[E]vidence is unfairly prejudicial if it 'appeals to the jury's sympathies, arouses its sense of horror, **provokes its instinct to punish**, or otherwise may cause a jury to base its decision on something other than the established

propositions in the case.'") (emphasis added). As a result of this prejudice, if the testimony was to be permitted at all it should have been restricted to consideration in determining the amount of punitive damages, if appropriate. Because no limiting instruction was issued, this bias—whether intentional or not—permeated the jury's minds during deliberation as to overall determination of liability and resulted in a conclusion which is not supported by the evidence.

In rejecting CIT's later challenge to this evidence and the failure to issue a limiting instruction, the Circuit Court propounded that "[a]t no time did CIT request and/or offer any instruction on 'Net Worth.'" (JA 4112). Based upon this conclusion and the general rule that a party may not "assign as error the giving or refusal to give an instruction unless he objects thereto before the arguments to the jury are begun," *see Skaggs v. Elk Run Coal Co., Inc.*, 198 W. Va. 51, 70, 479 S.E.2d 561, 580 (1996), the Circuit Court rejected CIT's post-trial motions in this regard. (JA 4111–12). However, this conclusion is not supported by the record and entirely neglects supplemental Jury Instruction No. 28 proffered by CIT, which included language directing jurors that "in reaching your verdict, you cannot consider the following information: [a]ny evidence, commentary, or arguments related to CIT's corporate history; or [a]ny evidence, commentary, arguments, or testimony regarding the net worth and/or financial condition of CIT." (JA 2076). Although this instruction initially was proffered in contemplation as to the consideration of punitive damages, it referenced case law applying these principles regardless and specifically indicated that, beyond consideration of punitive damages, the allowance of this prejudicial evidence had to be strictly mitigated by a necessary limiting instruction.

The Circuit Court's conclusion that its failure to provide a limiting instruction as to net worth and corporate history evidence was somehow imputable to CIT despite its proposed supplemental jury instruction is without support in the record and otherwise contrary to West

Virginia law. As the Circuit Court observed, "[a] verdict should not be disturbed based on the formulation of the language of the jury instructions **so long as the instructions given as a whole are accurate and fair to both parties**." (JA 4112) (emphasis added) (quoting *Tennant*, 194 W. Va. at 116, 459 S.E.2d at 393). Without the limiting language previously offered by CIT and otherwise necessitated by West Virginia jurisprudence to neutralize the prejudicial effect of the evidence, the instructions as a whole were neither accurate nor fair to both parties. Based upon this error, the Circuit Court clearly erred and should be overturned on appeal.

5. The Circuit Court erred in failing to grant CIT judgment as a matter of law or, in the alternative, a new trial, on claims for slander of title, abuse of process, tort of outrage, and breach of contract.

As set forth by Rule of Civil Procedure 50, it is within the trial court's discretion to direct entry of judgment as a matter of law where "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue . . . ." A motion made pursuant to this rule should be granted where "there can be but one reasonable conclusion as to the proper judgment." *Sias v. W-P Coal Co.*, 185 W. Va. 569, 577, 408 S.E.2d 321, 329 (1991). Specifically, if the evidence established at trial "fails to establish a prima facie right to recover, the court should grant the motion." *James v. Knotts*, 227 W. Va. 65, 70, 705 S.E.2d 572, 577 (2010).

"If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence . . . [t]he movant may renew the request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59." W. Va. R. Civ. P. 50(b). Further, the trial judge in review of a post-trial motion for new trial has "broad discretion to determine whether or not a new trial should be granted." *In re State Public Bldg. Asbestos Litig.*, 193 W. Va.

at 124, 454 S.E.2d at 418. In doing so, "the trial judge has the authority to weigh the evidence as if he or she were a member of the jury" and may set aside a verdict which, despite the jury's determination, is not supported by the weight of the evidence. *Id.* at 125, 454 S.E.2d at 419 (citing 3 Charles Alan Wright, *Federal Practice and Procedure* § 553 at 247 (2d ed. 1982)).

Following the trial of this matter, CIT timely filed a Motion for Judgment as a Matter of Law or in the Alternative for New Trial. (JA 3758–81). Through that Motion, CIT sought reconsideration of a number of claims, in addition to evidentiary rulings and other trial errors which the Court permitted to proceed to the jury as discussed above. With limited exception relating to Respondent's WVCCPA claims, the Circuit Court denied CIT's post-trial motions, confirming awards of damages on claims which lacked support in law and/or fact to CIT's detriment.

a. The Circuit Court erred in failing to grant CIT judgment as a matter of law on Respondent's slander of title claim.

The necessary elements of a claim for slander of title are: (1) publication of (2) a false statement (3) derogatory to plaintiff's titles (4) with malice (5) causing special damages (6) as a result of diminished value in the eyes of third parties." Syl. Pt. 3, *TXO Prod. Corp. v. All. Res. Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992). Importantly, where the plaintiff fails to "me[e]t its burden of showing that [a defendant] acted with the requisite malice necessary to support such a claim," a claim for slander of title cannot proceed. *GMO Forestry Fund 3, L.P. v. Ellis*, 337 Fed. App'x 279, 280 (4th Cir. 2009).

The Fourth Circuit in *Ellis* affirmed summary judgment and corresponding dismissal on a slander of title claim where, although the defendant's actions "may have been questionable, no reasonable jury could find that he acted with malice as defined by *TXO*" based upon the evidence presented. 337 Fed. App'x at 280 (citing *TXO Prod. Corp.*, 187 W. Va. at 466, 419 S.E.2d at 879) (finding malicious conduct when recording a quitclaim deed which defendant "knew to be

frivolous"). Even assuming all other elements necessary for Respondent's claim of slander of title were met, the record is entirely deficient of so much as a suggestion of underlying maliciousness to legally support the relief requested. Nor could any reasonable person determine that Respondent's case as presented sufficiently proved the existence of special damages as a result of this conduct, or a "diminished value in the eyes of third parties." Put plainly, the factual predicates of this matter and evidence presented by Respondent at the trial of this matter did not warrant relief for slander of title as established under West Virginia law. Absent an attempt to even allude to the necessary supporting evidence, CIT was entitled to judgment as a matter of law. Even viewed in the light most favorable to the non-movant, "only one reasonable conclusion as to the verdict can be reached." *See* Syl. Pt. 3, *Brannon v. Riffle*, 197 W. Va. 97, 475 S.E.2d 97 (1996).

Because the jury's verdict operated in direct opposition to all evidence (or lack thereof) presented at the trial of the matter, the Circuit Court erred in failing to grant CIT judgment as a matter of law as to Respondent's claim for slander of title.

b. The Circuit Court erred in failing to grant CIT judgment as a matter of law on Respondent's abuse of process claim.

A claim for abuse of process generally "consists of the willful or malicious misuse or misapplication of lawfully issued process to accomplish some purpose not intended or warranted by that process." *Preiser v. MacQueen*, 177 W. Va. 273, 279, 352 S.E.2d 22, 28 (1985); *see also Wayne Cnty. Bank v. Hodges*, 175 W. Va. 723, 726, 338 S.E.2d 202, 205 (1985). As stated by the District Court for the Northern District of West Virginia,

> the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process in itself for an end other than that which it was designed to accomplish . . . . [T]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion . . . .

Rahmi v. Sovereign Bank N.A., No. 3:12-CV-87, 2013 WL 412623, at *2–3 (N.D.W. Va. Feb. 1, 2013) (internal quotations omitted).

In *Hodges*, Wayne County Bank sued when a promissory note secured by borrower's vehicle went unpaid. 175 W. Va. at 724, 338 S.E.2d at 203. Similar to Respondent here, the borrower and co-signers counterclaimed for abuse of process in relation to an attachment executed by the bank in an attempt to satisfy the debt. *Id*. at 724–25, 338 S.E.2d at 203. The property sought to be attached was later determined not to be subject to attachment, and it was subsequently quashed. *Id.* at 726, 338 S.E.2d at 205. Accordingly, the Circuit Court entered summary judgment in favor of the bank on the counterclaim because the counterclaimants "had failed to raise any factual issue with regard to the allegation[] of abuse of process…" *Id*. at 725, 338 S.E.2d at 204. Specifically, because nowhere did the "record suggest that the Wayne County Bank, in obtaining the attachment, may have intentionally or recklessly harmed the appellants," the necessary elements for abuse of process were not present. *Id.* at 727, 338 S.E.2d at 206.

As set forth within CIT's *Motion in Limine* below, Respondent's allegations as they relate to this claim are based upon the filing of the Petition to Rescind Foreclosure Sale and purportedly false information contained therein. (*See* JA 0962). These allegations, in sum, represent merely a summarization of the necessary legal steps CIT took to rescind the foreclosure and restore ownership of the Property to Ms. Bowen. (*See* JA 0069–70). The only allegations which actually relate to CIT's conduct after the petition was filed are that it served Respondent with the petition by certified mail and sought default judgment when she failed to respond. In fact, service of the Motion for Default Judgment was rendered *pursuant* to the directive of the Circuit Court, which, by Order on June 19, 2017, expressly required that "Petitioner shall complete personal legal service of Motion for Default Judgment upon Respondent." (*See* JA 0048). It is hard to fathom a

scenario—like the one created by Respondent's claim here—where a party is faced with a decision between disregarding a court order (and West Virginia Rule of Civil Procedure 4(d)(1)) or committing abuse of process.

Despite clear precedence that such actions fall well outside the type of malicious conduct contemplated by a claim for abuse of process, the Circuit Court errantly permitted this claim to go forward and rejected CIT's proposed jury instruction on the claim, instead instructing the jury only to determine whether, by preponderance of the evidence, "the CIT Bank willfully and intentionally committed abuse of the legal process?" (JA 2255). This language excluded important clarification offered by CIT that "abuse of the legal process" is defined by West Virginia caselaw as "misuse or misapplication of lawfully issued process to accomplish some purpose not intended or warranted by that process." *See Hodges*, 175 W. Va. at 724, 338 S.E.2d at 202. The Circuit Court's exclusion of the critical and clarifying language constituted clear error to the detriment of CIT.

For these reasons, the Circuit Court erred in its failure to grant CIT judgment as a matter of law as to Respondent's claim for abuse of process.

c. The Circuit Court erred in failing to grant CIT judgment as a matter of law on Respondent's tort of outrage claim.

As a result of Respondent's claim for the tort of outrage, the jury awarded $500,000.00 in damages. However, this claim and the evidence presented in support failed to meet minimum factual standards to warrant a determination of liability and a corresponding award to this degree. As a result, the Circuit Court erred in its failure to grant CIT judgment as a matter of law on Respondent's tort of outrage claim.

Pursuant to West Virginia law, "[o]ne who by extreme or outrageous conduct **intentionally or recklessly** causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for bodily harm." Syl. Pt. 6, *Harless*, 169

W. Va. 673, 289 S.E.2d 692 (emphasis added). Put another way, these damages exist where a plaintiff can demonstrate an instance "where gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others appear . . . ." Syl. Pt. 11, *Vandevender v. Sheetz*, 200 W. Va. 591, 490 S.E.2d 678 (1997). "Especially where no physical injury accompanies the wrong, the tort of outrage is a slippery beast, which can easily get out of hand without firm judicial oversight." *Keyes v. Keyes*, 182 W. Va. 802, 802, 392 S.E.2d 693, 696 (1990). Where a claim is "based solely on emotional distress, such emotional distress must not only be severe, but must manifest distinct psychological or mental patterns that are commonly recognized by experts." *Courtney v. Courtney*, 190 W. Va. 126, 130, 437 S.E.2d 436, 440 (1993).

Based on these principles, courts repeatedly have acknowledged that speculation and conclusory statements by a plaintiff are insufficient on their own to support a claim for actual damages with respect to emotional damages and the tort of outrage. *See Price v. City of Charlotte*, 93 F.3d 1241, 1250 (4th Cir. 1996). Damages are not recoverable if the related injurious effect is too remote or speculative. Syl. Pt. 7, *Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618 (1974). Rather, a plaintiff is required to "reasonably and sufficiently explain the circumstances of [the] injury and not resort to mere conclusory statements. *Price*, 93 F.3d at 1251. Courts have distinguished between "plaintiff testimony that amounts only to 'conclusory statements' and plaintiff testimony that 'sufficiently articulate[s]' true 'demonstrable emotional distress.'" *Id.* at 1254.

Respondent presented no evidence that CIT's conduct in this regard was either extreme or outrageous, nor was it intentional or reckless. There was no underlying malice or willful harm. CIT, at worst, made a bona fide error which it promptly sought to correct through the origin of this

action. The allegations made against CIT plainly do not support liability pursuant to the tort of outrage as it is contemplated under West Virginia law. *See* Syl Pt. 3, *Travis v. Alcon Lab'ys, Inc.*, 202 W. Va. 369, 504 S.E.2d 419 (1998) ("It must be shown that . . . the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct . . . .").

The evidence presented by Respondent to corroborate the damages suffered were limited to the exact type of "conclusory statements" expressly indicated by courts to preclude an award of damages. Specifically, Respondent merely testified generally that Ms. Bowen suffered emotional distress as a result of the foreclosure. Respondent provided no evidence of corroborating medical treatment, other diagnoses, or further indicia of the distress beyond mere conclusory allegations. Although CIT is well aware and concedes that caselaw supports the proposition that expert testimony is not necessarily required to prove these form of emotional damages, something beyond mere statements as to the concerned party's "anxiety, worry, fear and confusion" (JA 4120) must be present to conclude that "the emotional distress suffered by the plaintiff was **so severe that no reasonable person could be expected to endure it**." *See Travis*, 202 W. Va. at 371, 504 S.E.2d at 421 (emphasis added). Any qualifying evidence was entirely absent from Respondent's claims and the evidence presented at trial.

In sum, West Virginia law does not contemplate liability for actions which result in mere anxiety, fear, or inconvenience and, as a result, the Circuit Court erred in its failure to award CIT judgment as a matter of law. Accordingly, the determination of liability as to Respondent's claim for outrage and the corresponding damages awarded pursuant to the same should be overturned.

d. The Circuit Court erred in failing to grant CIT judgment as a matter of law on Respondent's breach of contract claim.

In order to prevail for a claim of breach of contract under West Virginia law, a party must prove "(1) that there is a valid, enforceable contract; (2) that the plaintiff has performed under the contract; (3) that the defendant has breached or violated its duties or obligations under the contract; and (4) that the plaintiff has been injured as a result." *Corder v. Antero Res. Corp.*, 322 F. Supp. 3d 710, 717 (N.D.W. Va. 2018), *aff'd*, 57 F.4th 384 (4th Cir. 2023) (citations omitted); *see also Charleston Nat'l Bank v. Sims*, 137 W. Va. 222, 70 S.E.2d 809, 813 (1952) (quoting *Jones v. Kessler*, 98 W. Va. 1, 126 S.E. 344, 350 (1925)) Of particular pertinence to this appeal, a plaintiff must specifically demonstrate that the "defendant failed to comply with a term in the contract . . . ." *Nance v. Huntington W. Va. Hous. Auth.*, No. 16-0855, 2017 WL 2210152, at *5 (W. Va. May 19, 2017) (citing *Wittenberg v. Wells Fargo Bank, N.A.*, 852 F. Supp.2d 731, 749 (N.D.W. Va. 2012)).

The failure to specify the contractual provision breached expressly precludes recovery for an alleged breach of contract. *Corder v. Countrywide Home Loans, Inc.*, 322 F. Supp.3d at 717 (plaintiff's breach of contract claim relating to foreclosure action failed where (1) plaintiff failed to specify contractual provision allegedly violated by defendant and (2) Deed of Trust at issue gave defendant unqualified right to foreclose in event of default). "'[S]ketchy generalizations' that fail to identify any contractual provision alleged breached" such as those that "go no further than to generally state a breach of contract occurred . . . warrant dismissal of the breach of contract claim . . . ." *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 534, 854 S.E.2d 870, 896 (2020) (Jenkins, J., concurring, in part, and dissenting, in part).

CIT by its Motion for Judgment as a Matter of Law sufficiently outlined a multitude of facets by which Respondent's claim for breach of contract fails as a matter of law. Namely,

Respondent's countersuit and all evidence presented at trial in support of this claim are noticeably entirely deficient of any citation to a specific term of the contractual agreement which Respondent alleges was breached. Rather, Respondent supports this claim with purely the same type of "sketchy generalizations" referenced by Justice Jenkins in his concurrence in *Mountaineer Fire & Rescue Equipment, LLC*. This generalized allegation of breach of contract, coupled with a failure to point to a specific term breached precludes the relief sought by Respondent and, had the Circuit Court permitted dispositive motions as contemplated by West Virginia Rule of Civil Procedure 56, would have disposed of the claim prior to its presentation to the jury.[5]

As a result of Respondent's blatant failure to proffer any specific term of the contract which CIT breached, relief for breach of contract under these circumstances was precluded as a matter of law. Accordingly and for the reasons set forth herein, CIT was entitled to judgment as a matter of law on this claim and the Circuit Court's decision not to award the same constitutes clear error.

6. The Circuit Court erred when it allowed Respondent's unpled claim of fraudulent court record to be presented to the jury.

Despite a complete failure to plead a claim for fraudulent court record and no mention whatsoever of the same until it was referenced in passing by Respondent's pretrial memorandum filed eleven months after the initial counterclaims, the Circuit Court errantly permitted the unpled claim to go forward. (JA 0141). This cause of action is noticeably absent from Respondent's First

[5] Further, Respondent's allegations of breach by CIT relate directly to actions taken as a result of a bona fide error as to Respondent's breach of duties under the same contract. To the extent that Respondent may have been in breach of her duties, West Virginia courts have long held:

> Where the plaintiff claims damages for the breach of a contract, it is necessary to a recovery that he show that **he has complied with the contract himself**, or that he has been prevented or relieved from compliance by act of the defendant; and, **if the evidence shows that he has not complied with the terms of the contract, and has not been prevented or relieved therefrom as a aforesaid, he will be denied recover from the breach of the same.**

Charleston Nat'l Bank, 127 W. Va. at 228, 70 S.E.2d at 813 (emphasis added) (quoting *Jones*, 98 W. Va. 1, 126 S.E. at 350).

Amended Answer to Petition and Counterclaims ("Answer and Counterclaims"). (JA 0052–71). Nevertheless, over CIT's objection, the Circuit Court allowed this claim to proceed to trial upon which a jury found liability and awarded $10,000.00 in resulting damages. (JA 2257). Allowing an unpled claim to proceed to trial constituted clear error and must now be overturned on appeal.

At the most fundamental level, a claimant is required to set forth "(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks." W. Va. R. Civ. P. 8(a). Underlying this requirement is the fundamental principal that "the plaintiff's attorney must know every essential element of his cause of action and **must state it in the complaint**." *Sticklen v. Kittle*, 168 W. Va. 147, 287 S.E.2d 148, 158 (1981) (emphasis added). Beyond this, the Rules of Civil Procedure—similar to their federal counterpart—explicitly require that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake **shall be stated with particularity**." W. Va. R. Civ. P. 9(b) (emphasis added). "In order to establish fraud, it must be clearly alleged and proved." *Hager v. Exxon Corp.*, 161 W. Va. 278, 283, 241 S.E.2d 920, 923 (1978). "[T]he failure to do so precludes the offer of proof thereof during the trial." Syl. Pt. 3, *Highmark W. Va. v. Jamie*, 221 W. Va. 487, 655 S.E.2d 509 (2007).

Despite these clear pleading requirements, the Respondent failed to set forth any cause of action for fraudulent court record within the Answer and Counterclaims. To be sure, the Respondent's pre-trial memorandum filed on August 5, 2019 constitutes the first reference to any such claim and the first time in which Respondent made citation to the statutory authority providing for such a claim. (JA 0141). This allowance, coupled with the Circuit Court's refusal to permit the filing of dispositive motions, allowed these claims to be presented to the jury despite clear legal deficiency.

Upon consideration of CIT's arguments of law pertaining to this claim within the Motion for Judgment as a Matter of Law, the Circuit justified the allowance of this claim as within the general liberality "as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure." (JA 4109) (citing *State ex rel. McGraw v. Scott Runyon Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995)). The Circuit Court thereafter provided a number of justifications for allowing notice pleading liberality in construal of a fraud claim despite the explicit heightened pleading standard set forth within West Virginia Rule of Civil Procedure 9(b). However, the "fair notice of this claim" amounts to an assortment of selectively chosen allegations contained in paragraphs throughout the countersuit. (*See* JA 4110). What the Circuit Court failed to acknowledge however, is the complete failure to so much as mention "fraudulent court record" or West Virginia Code § 38-16-501, which provides the statutory basis for such a claim. Both were entirely absent from this suit until, at the earliest, the Respondent's pre-trial memorandum filed on August 5, 2019. (*See* JA 0141). Beyond the Circuit Court's errant conclusion that "[t]he claim was adequately pleaded and CIT suffered no prejudice as a result . . . ." the Circuit Court predicated the allowance of this claim upon CIT's knowledge "that the Estate was asserting the claim as early as January, 2020, nearly 18 months prior to the start of the trial." (JA 4110). This justification is entirely undermined by the fact that the Circuit Court precluded the issuance of any dispositive motions beyond June 21, 2019, effectively depriving CIT of any meaningful opportunity to challenge the legal basis of the claim prior to its presentation to a jury. That deprivation unfairly prejudiced CIT and permitted a previously unpled claim lacking legal merit to be presented the jury. Put simply, these circumstances created a "trial by ambush" which the Rules of Civil Procedure are expressly in place to prevent. *See, e.g.*, *McDougal v. McCammon*, 193 W. Va. 229,

237, 455 S.E.2d 788, 796 (1995). This result and the Circuit Court's subsequent confirmation of the same constituted clear error.

Accordingly, the Circuit Court's failure to grant CIT judgment as a matter of law as to Respondent's unpled claim for fraudulent court record and any such award relating to the same should be overturned.

CONCLUSION

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

CIT BANK, N.A.

/s/ Marc E. Williams

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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

CERTIFICATE OF SERVICE

The undersigned attorney certifies that the foregoing ***"Supplemental Brief of Petitioner CIT Bank, N.A."*** was electronically filed using the File & ServeXpress system on the 21st day of December, 2023, which shall send automatic notification to the following:

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