IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
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CIT BANK, N.A,

Plaintiff / Counterclaim Defendant Below,
Petitioner,

v.

Appeal from order of the
Circuit Court of Hampshire County
Civil Action No. 16-C-97

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

Defendant / Counterclaim Plaintiff Below,
Respondent.

RESPONDENT'S BRIEF IN RESPONSE TO *SUPPLEMENTAL BRIEF OF PETITIONER CIT BANK, NA*

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I. SUPPLEMENTAL STATEMENT OF THE CASE

This is an appeal from a jury verdict rendered by six West Virginia citizens in Hampshire County. The Estate submits this supplemental statement of the case in response to each specific assignment raised in CIT's supplement brief. Several of CIT's assertions require correction.

This supplemental brief provides a more detailed procedural history concerning the specific matters at issue. Review of the history of this case, relevant to each of CIT's assignments, demonstrates the lower court's fairness to CIT throughout the proceedings below. Ms. Bowen filed her counterclaims on September 28, 2018. (J.A. 52). CIT filed a motion to dismiss under W. Va. R. Civ. P. 12(b)(6). (J.A. 73). With CIT's motion pending, CIT agreed to the entry of a scheduling order setting forth various deadlines, including a deadline for summary judgment, and scheduling a final pre-trial hearing to occur on June 27, 2019. (J.A. 102).

Between entry of the scheduling order in December, 2018, and the final pre-trial hearing, the Estate served discovery and filed motions to compel responses to the discovery. (J.A. 104, 209). While its motion to dismiss was pending, CIT noticed the case for hearing to occur on March 14, 2019. CIT understood that the case had not been generally stayed. (J.A. 104).

On June 11, 2019, before the scheduled pre-trial hearing, the Estate's Counsel sent an email to CIT's counsel discussing, among other issues, the upcoming hearing on June 27, 2019:

> Paul: Jonathan and I were on the phone this week talking about several matters. We wanted to follow up again about the discovery concerns mentioned in Jonathan's email and letter to you of May 31, 2019. We assume that CIT Bank will respond fully by the 15th.
>
> Although the parties failed to mediate by the 7th of June as provided in the agreed order, we would like to get mediation scheduled and conducted before the June 27 pre trial hearing. In that regard, please provide dates when you and a representative can be available to do the mediation. We propose using Joe Selep in Pittsburg or Jim Varner in Clarksburg, both very experienced lawyers with extensive litigation and mediation backgrounds.

> The agreed order erroneously calls for some of the pre-trial filings to be made the day after the pre trial conference. We suggest a stipulation agreeing that they be filed by June 24, 2019. If you wish, we can submit an agreed order modifying the date as per the stipulation. Thank you. Sam

(J.A. 227). At no time did CIT's Counsel respond to the emails, filings, or the motions suggesting a belief that the case had been continued generally. Neither CIT nor its Counsel appeared at the hearing on June 27, 2019. (J.A. 126). Though the lower court had no explanation for CIT's absence, the lower court continued the pre-trial hearing and afforded CIT additional time to make disclosures and make pre-trial filings, setting a new deadline of August 5, 2019. (J.A. 126). CIT failed to make any disclosures or pre-trial filings before the new deadline. (J.A. 4396).

CIT's current counsel appeared in the case on August 13, 2019, filed an "emergency" motion to continue and appeared at a pre-trial hearing on August 22, 2019. (J.A. 242). The court again continued the trial of the case, afforded CIT additional time to make expert disclosures, afforded CIT the ability to designate a corporate representative, though none had been previously designated, and permitted CIT to depose the Estate's experts, all out of time from the agreed-upon scheduling order and over the Estate's objection. (J.A. 242).

The court later continued the jury trial to occur in 2020. As the pre-trial litigation continued, the Estate necessarily filed three separate motions for contempt and sanctions because CIT failed to respond to discovery, hid document evidence in the face of a motion to compel, failed to make disclosures, and failed to comply with the lower court's orders. (J.A. 209, 247, 316).

Despite the circuit court's fairness and patience, CIT now suggests that the court acted unfairly in a manner warranting reversal of a jury verdict. For instance, CIT incorrectly suggests the lower court precluded CIT from filing for summary judgment. The agreed-upon scheduling order afforded the parties more than six months to file motions for summary judgment. (J.A. 102). As the case progressed, it became apparent that material, factual disputes existed making summary

judgment inappropriate. Despite CIT's pre-trial litigation misconduct, the lower court afforded CIT every opportunity to engage in discovery, call experts and a corporate representative, make filings, and develop its case. (J.A. 126, 242).

Following the height of the COVID pandemic, the circuit court set the trial of the case to commence on June 14, 2021. (J.A. 2207). Prior to trial, the lower court conducted several pre-trial hearings, including hearings regarding CIT's ongoing litigation misconduct, and considered a litany of motions from both sides, some of which are at issue in CIT's additional assignments. (J.A. 242, 509, 593, 673, 691, 940, 946, 952, 1074, 1198, 1320, 1441, 1564, 1568, 1574, 1579, 1582, 1585, 1589, 1637, 1797, 1827, 2020, 2014, 2027, 2082, 2207). Despite these opportunities, a number of matters raised in CIT's supplemental brief before this Court were not properly raised below and preserved for appeal.

Regarding CIT's first assignment of error, CIT claims that a "special relationship" is necessary to sustain the Estate's tort claims. CIT raised the issue before and after trial. (J.A. 1074, 3758, 3762). In its first assignment, however, and for the first time in this case, CIT mentions, in passing, the gist-of-the-action doctrine. Prior to the commencement of trial, during trial, and following trial, CIT made no mention of this new defense. CIT references the doctrine in passing, for the very first time in the case, in its supplemental brief.

Regarding CIT's second assignment of error, the lower court carefully researched and thoroughly considered the Estate's wrongful foreclosure claim. The court first considered the claim following CIT's motion to dismiss and issued a 20-page ruling permitting the claim to go forward. The court again considered the claim throughout the pre-trial proceedings. As the lower court provided, "The Court notes that this issue has been litigated and argued extensively. The Court has carefully considered and ruled upon the issue…." (J.A. 4102).

CIT also claims that the wrongful foreclosure claim duplicates the breach of contract claim. CIT, at no time prior to trial, claimed that the Estate's wrongful foreclosure claim was duplicative of the Estate's breach of contract claim. (J.A. 4096). In addition, CIT submitted a proposed verdict form to the lower court permitting the jury to consider both the wrongful foreclosure claim and the breach of contract claim. (J.A. 1990).

Regarding CIT's third assignment of error, the Estate filed its notice of intent to introduce 404(b) evidence in February, 2020, a year and a half before the jury trial. (J.A. 1797). The lower court considered the offered the 404(b) evidence to be introduced and ruled that the evidence's probative value outweighed any prejudice, and therefore, would be admissible. At trial, CIT also introduced the 404(b) evidence about which it now complains (a news article describing an $89-million-dollar settlement with the US Department of Justice). (J.A. 2918, 3221-3222).

CIT also argues that the lower court failed to instruct the jury regarding CIT's financial position. CIT failed to offer an instruction about which it now complains. (J.A. 2073). During the pre-trial proceedings, the lower court considered instructions regarding evidence of CIT's financial position. (J.A. 2027). The court had previously indicated that it would likely permit the Estate to introduce evidence relevant to punitive damages, including CIT's financial position, in its case-in-chief because the evidence was relevant to the Estate's claims relating to CIT's financial motives for ridding itself of reverse mortgages. (J.A. 2027).

At a hearing on February 3, 2021, five months before trial, the court addressed instructions to be considered if: 1) the court did not permit the punitive damage claim to go to the jury; and 2) if the court permitted the punitive damage claim to go to the jury. (J.A. 2027). The lower court requested that the parties, specifically CIT, to submit any instructions it deemed appropriate for the court's consideration. (J.A. 2027). On March 4, 2021, after the court's directive, CIT filed two

supplemental instructions titled "Punitive Damages" and "Punitive Damages Unavailable." (J.A. 2073). At the conclusion of the Estate's case, CIT neither moved the court to exclude the punitive damage claim or to modify any instructions. (J.A. 2224). The lower court included CIT's punitive damages instruction, titled "Punitive Damages," in the court's final charge to the jury. (J.A. 2250-2252). The lower court properly rejected CIT's instruction titled "Punitive Damages Unavailable" because the instruction was inapplicable.

Regarding CIT's fourth assignment of error, CIT claims that the evidence is insufficient to support the abuse of process, slander of title, and breach of contract claims. CIT did not file a post-trial motion for judgment as a matter of law on claims of insufficiency of the evidence on these claims. (J.A. 3758, 3762). Though CIT had orally moved the lower court, at the close of the Estate's case-in-chief, for judgment as a matter of law on those claims based upon purported insufficiency of the evidence, CIT failed to renew those motions for judgment as a matter of law following the verdict and entry of judgment. (J.A. 2224, 3758, 3762).

CIT also claims that the evidence does not support the tort of outrage claim. Unlike the abuse of process, slander of title, and breach of contract claims, CIT filed its motion for judgment as a matter of law on this claim following the verdict claiming insufficient of evidence on the tort of outrage claim. The evidence was sufficient - Caroline Coffman, Ms. Bowen's daughter, testified at trial that CIT's conduct caused her mother to worry every day that she would lose her home. Ms. Coffman testified that, upon learning of CIT's foreclosure, something in Ms. Bowen "broke" and that her mom was never the same. (J.A. 3385). Ms. Coffman also testified to the anxiety, worry, fear, and confusion Ms. Bowen suffered over an extended period. Following trial, the lower court found that the "record is replete with sufficient evidence for which a jury could sustain a verdict in favor of Bowen for the claim of tort of outrage." (J.A. 4119-4120)

Regarding CIT's fifth assignment of error, CIT claims that the Estate failed to plead a claim for fraudulent court record. The Estate filed its counterclaim on September 18, 2018, which sets forth the elements for a claim of fraudulent court record under W. Va. Code § 38-16-501. The Estate submitted its first pre-trial memorandum in this case on August 5, 2019, likewise identifying the Estate's claim for fraudulent court record. (J.A. 141). The Estate filed proposed instructions with the lower court including an instruction on a claim of fraudulent court record on January 24, 2020, a year-and-a-half before the trial. (J.A. 1651). On January 24, 2020, CIT filed a motion in limine seeking the lower's court preclusion of the claim. (J.A. 946).

Having set forth the history regarding the specific assignments, the Estate must correct CIT's misstatement regarding the lower court's dismissal of the West Virginia Consumer Credit Protection Act claims. CIT erroneously states that the lower 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." The assertion is incorrect.

The court's ruling sets forth the actual basis for the dismissal of the WVCCPA claim:

> At the close of the Estate's case-in-chief, … and for the first time in this case, CIT orally moved the Court to dismiss Shirley Bowen's WVCCPA claims based upon the argument that the WVCCPA claims do not survive Shirley Bowen's death in January, 2019. During argument of the oral motion, the Estate's Counsel objected to CIT's motion with regard to survivability and further informed the Court that Counsel would research the issue.
>
> In keeping with that representation and counsels' duty of candor to the tribunal under Rule 3.3(a)(2) of the Rules of Professional Conduct, [the Estate's] counsel disclosed to this Court that in *Horton vs. Professional Bureau of Collections of Maryland, Inc.*, 238 W.Va. 310, 794 S.E.2d 395 (2016), the West Virginia Supreme Court held, "[A] claim brought under W.Va. Code § 46A-2-127(c) (1997) of the West Virginia Consumer Credit and Protection Act is not sufficiently analogous to a claim for deceit and fraud so as to survive the death of the consumer pursuant to West Virginia Code § 55-7-8a(a)."
>
> Although the issue of survivability was never plead or raised until the close of Plaintiff's case-in-chief, this Court cannot ignore the Supreme Court's holding in

> *Horton*. Therefore, in accordance with *Horton*, this Court GRANTS the Defendant's Motion for Judgment as a Matter of Law as it relates to the Plaintiff's claims under the WVCCPA, as the same do not survive Ms. Bowen's death. (J.A. 4096).

The court concluded that the issue regarding the "notice of right to cure to be MOOT." (J.A. 4096). The lower court did not dismiss the claim for failure to provide a statutorily required notice as claimed in CIT's supplemental statement of the case. (J.A. 4096).

II. SUPPLEMENTAL SUMMARY OF ARGUMENT

Review of the record in this case establishes that the Circuit Court of Hampshire County, West Virginia, gave CIT considerable latitude and conducted a fair proceeding below. The court rescheduled the first pre-trial conference after CIT's counsel failed to appear, allowed CIT to depose the Estate's expert witnesses out of time, and permitted CIT to call a corporate representative after it failed to disclose witnesses in compliance with the court's order.

Moreover, the court dismissed the Estate's WVCCPA claim because of Ms. Bowen's death pursuant to *Horton v. Professional Bureau of Collections of Maryland, Inc.*, 238 W.Va. 316, 794 S.E.2d 395 (2016), even though CIT failed to raise the issue prior to the close of evidence. The court also reduced the jury's punitive damages verdict out of concern for possible duplication of damages even though CIT failed to raise the duplication issue before the verdict.

The additional assignments of error raised in CIT's supplemental brief are without merit. First, the circuit court correctly determined that a special relationship is not required under the circumstances of this case because the Estate's claim did not seek purely economic damages or losses from interruption of business. Because the Estate's claim involved claims of property loss and personal injury, the lower Court rightly found that no special relationship was required to be proven. But the relationship was proved based upon CIT's knowledge and foreseeability of the potential consequences of its wrongdoing, the persons likely to be injured and the damages likely

to be suffered (CIT knew Ms. Bowen's age and financial limitations). The court correctly determined that CIT knew the probable consequences of its intentional conduct, and therefore, the evidence demonstrated a special relationship.

Second, the Estate set forth a valid claim for wrongful foreclosure. The lower court did not err in denying CIT's motion to dismiss the wrongful foreclosure claim and allowing the claim to go to the jury considering the evidence of CIT's intentional, malicious conduct. The court carefully reviewed CIT's argument that W.Va. Code § 38-1-4a was the Estate's sole remedy, reviewed and applied *Persinger vs. Peabody Coal Company*, 196 W.Va. 707, 474 S.E.2d 887 (1996), and correctly concluded that the lack of a private cause of action being specified in the statute was supportive of the conclusion that a cause of action for wrongful foreclosure can exist. In addition to compensation, the court found that permitting the cause of action was consistent with the purposes of tort law – morality and deterrence. The court followed guidance from *Hannah v. Heeter*, 213 W. Va. 704, 584 S.E.2d 560 (2003), concerning viability of torts not previously recognized.

The lower court properly determined that the wrongful foreclosure and breach of contract claims are not duplicative because: 1) CIT did not raise the issue prior to trial or following the close of the evidence in the case and Petitioner submitted a proposed verdict form with both claims on it; and 2) the two claims contain different elements, the court properly instructed the jury, the jury made separate findings, and the jury awarded separate damages for each claim.

Third, the lower court properly allowed the Estate to introduce 404(b) evidence to show CIT's plan, motive, intent, scheme, and lack of accident. The Estate introduced the evidence to show CIT's broader, nationwide plan, scheme, and intent to shed the money-losing, reverse mortgage segment of its business. Moreover, CIT introduced the same evidence about which it

complains. CIT introduced Defendant's Exhibit 99 relating to CIT's $89-million-dollar settlement with the United States Department of Justice. CIT cannot now complain about its "invited error."

Additionally, the lower court correctly offered CIT the opportunity to offer a cautionary instruction regarding its financial position in the event the court permitted the punitive damage claim to go to the jury. The court also permitted CIT to submit a proposed instruction to include in the jury charge if the court determined, as a matter of law, that the punitive damage claim did not go to the jury. CIT submitted two instructions: one titled "Punitive Damages" and another titled "Punitive Damages Unavailable." At the close of evidence, the court determined that the punitive damage claim would go to the jury and included CIT's "Punitive Damages" instruction in the jury charge. CIT never offered any changes to its "Punitive Damages" instruction. CIT incorrectly argues that the circuit court should have dissected and used a portion of CIT's "Punitive Damages Unavailable" instruction in the jury charge. CIT now wrongly contends that the lower court's failure to dissect CIT's inapplicable instruction constitutes error. CIT's argument is without merit.

Fourth, CIT failed to move the lower court for judgment as a matter of law following the jury's verdict and entry of judgment on insufficiency of the evidence claims regarding the abuse of process, slander of title, and breach of contract claims. Because CIT did not make this motion below for judgment as a matter of law on the claims, it cannot now raise the issue on appeal.

The evidence supports the jury's verdict on the tort of outrage claim. During the trial of this case, Ms. Bowen's daughter testified that CIT's conduct caused her mother to worry every day that she would lose her home. She testified that something in her mom "broke" and that her mother was never the same. Ms. Coffman also testified to the anxiety, worry, fear, and confusion Ms. Bowen suffered over an extended period. As the trial court noted, the record is replete with sufficient evidence from which a jury could render a verdict for the tort of outrage claim.

Fifth, the circuit court properly considered the facts alleged in the counterclaim to determine that the pleadings sufficiently allege a claim of fraudulent court record. The lower court determined that CIT had been aware of the claim more than a year-and-a-half before trial. The court properly found CIT had fair notice of the claim and that the pleadings adequately set forth the facts regarding the claim.

Despite CIT's failing to show up for hearings, failing to meet deadlines, and hiding incriminatory documents in discovery, the circuit court conducted a fair proceeding below and allowed CIT considerable leeway, continuing pre-trial conferences, allowing depositions of experts after the deadlines, and allowing CIT to call a corporate representative at trial. Following trial, the court reduced the jury's verdict by $510,000.00, even though CIT failed to properly and timely raise the WVCCPA survivability and claimed duplication issues under the tort of outrage claim. The lower court did not err and CIT's assignments are without merit.

III. STATEMENT REGARDING ORAL ARGUMENT

On November 28, 2023, this Court set the matter for oral argument under W. Va. R. App. P. 19 to occur on March 13, 2024.

IV. STANDARD OF REVIEW

"When this Court reviews a trial court's order granting or denying a renewed motion for judgment as a matter of law after trial under Rule 50(b) of the West Virginia Rules of Civil Procedure, it is not the task of this Court to review the facts to determine how it would have ruled on the evidence presented. Instead, its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the

light most favorable to the nonmoving party." *Fredeking v. Tyler*, 224 W. Va. 1, 680 S.E.2d 16, 17 (2009).

"In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." *Orr v. Crowder*, 173 W. Va. 335, 339, 315 S.E.2d 593, 597 (1983). "We 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 we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review." *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995).

V. SUPPLEMENTAL ARGUMENT

This case went through extensive pre-trial litigation before going to trial. The lower court properly ruled upon all the issues timely presented to the court before trial. The court conducted a fair trial, properly instructed the jury, properly reviewed the jury's verdict, and correctly ruled upon post-trial matters. "An essential element of our judicial system is the right of a party, in most cases, to request a jury of his or her peers to render a verdict based upon the evidence and testimony presented. Because of the jury's unique ability to see the evidence and judge the demeanor of the witnesses on an impartial basis, a jury verdict is accorded great deference. It is the province of the jury to weigh the testimony and to resolve questions of fact when the testimony conflicts." *McNeely v. Frich*, 187 W. Va. 26, 29, 415 S.E.2d 267, 270 (1992). "A jury's verdict is accorded great deference when it involves the jury weighing conflicting evidence." *Id*.

"When a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the weight of the evidence or without sufficient evidence to support it." *Laslo v. Griffith*, 143 W. Va. 469, 469, 102 S.E.2d 894 (1958). The additional assignments of error set forth in CIT's supplemental brief are without merit, and each one is addressed in turn.

a. The lower court correctly determined that a special relationship is not necessary under the circumstances of this case, and although not required, the evidence proved a special relationship.

Based upon the pleadings and the evidence developed and introduced at the trial of this case, the lower court correctly concluded that no special relationship was necessary for the Estate to recover damages in tort because the special-relationship doctrine applies only in cases seeking purely economic or business interruption damages. The evidence also demonstrated that a special relationship existed. CIT's reliance upon the special relationship doctrine is misplaced.

The special relationship doctrine applies only in cases seeking purely economic loss damages and not in cases involving personal injury. "After thoroughly considering the intricacies of a potential rule permitting the **recovery of economic damages absent physical or personal injury**, we conclude that an individual who sustains purely economic loss from an interruption in commerce caused by another's negligence may not recover damages in the absence of physical harm to that individual's person or property, a contractual relationship with the alleged tortfeasor, or some other **special relationship** between the alleged tortfeasor and the individual who sustains **purely economic damages** sufficient to compel the conclusion that the tortfeasor had a duty to the particular plaintiff and that the injury complained of was clearly foreseeable to the tortfeasor." *Aikens v. Debow*, 208 W. Va. 486, 499, 541 S.E.2d 576, 589 (2000) (emphasis added).

The same applies in lender-borrower cases. “In West Virginia, the general rule holds that when a lender breaches its contract with a borrower **causing economic loss (but no property damage or personal injuries)**, the borrower's primary remedy is to pursue a breach of contract action against the lender. However, where the lender and borrower have a **‘special relationship’** that extends beyond the contract, the borrower may recover tort-type damages.” *White v. AAMG Const. Lending Ctr.*, 226 W. Va. 339, 346, 700 S.E.2d 791, 798 (2010) (emphasis added). “In other words, our law allows a negligence claim for **purely economic losses** when then there is evidence of a **‘special relationship’** between the plaintiff and the defendant.” *Id*. (emphasis added).

In this case, Ms. Bowen did not assert a claim for “purely economic damages.” Rather, as the lower court reasoned, “[T]here was evidence of harm to Ms. Bowen. Ms. Coffman testified in detail about the worry, stress, and anxiety CIT’s conduct caused her mother over a long period of time.” (J.A. 4107-4108). The lower court concluded that this case and the jury’s findings did not pertain only to economic losses; rather the tort claims are for personal injuries. (J.A. 4107-4108). The Supreme Court has held, “[A]n action for severe emotional distress caused by a defendant's tortious conduct is a personal injury.” *Courtney v. Courtney*, 190 W. Va. 126, 132, 437 S.E.2d 436, 442 (1993). Applying the law to the facts of this case, the lower court correctly concluded that the special relationship doctrine has no application to the facts of this case because the Estate presented evidence of intentional conduct causing personal injury. (J.A. 4107-4108).

Though Ms. Bowen did not seek economic loss damages or claim interruption in commerce, the lower court correctly found that the special relationship analysis, if applied to this case, demonstrates such a relationship existed. CIT knew Ms. Bowen was poor, elderly, could not afford a post office box, and she continued to live in her home. (J.A. 4107-4108).

In the *Aikens* decision, the Court stated, "The existence of a special relationship will be determined largely by the extent to which the particular plaintiff is affected differently from society in general. It may be evident from the defendant's knowledge or **specific reason to know of the potential consequences of the wrongdoing, the persons likely to be injured, and the damages likely to be suffered**. Such special relationship may be proven through evidence of foreseeability of the nature of the harm to be suffered by the particular plaintiff or an identifiable class and can arise from contractual privity or other close nexus." *Aikens*, 208 W. Va. at 499 (emphasis added).

The Supreme Court of Appeals of West Virginia examined the special relationship doctrine in the context of a borrower-lender relationship in *Glascock v. City Nat. Bank of W. Virginia*, 213 W. Va. 61, 65, 576 S.E.2d 540, 544 (2002). The Court looked to tort principles to determine that a special relationship existed. Relying upon *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988), the Court in *Glascock*, "In 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." *Id.* at 65 citing Syl. Pt. 2 *Sewell v. Gregory*, 179 W. Va. 585, 586, 371 S.E.2d 82, 83 (1988). The *Glascock* Court continued, "The ultimate test of the existence of a duty to use care is found in the foreseeability that harm may result if it is not exercised. The test is, would the ordinary man in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result?" *Id*. Concluding that the lender and borrower had a special relationship, the *Glascock* Court analyzed, "In this case, the bank possessed information of no interest to 'society in general,' but of great interest to the Glascocks. The bank had reason to know of the 'potential consequences of the wrongdoing,' that is, withholding the information … In short, it was eminently foreseeable to the bank that withholding the information from the Glascocks could cause the Glascocks harm." *Id*. at 66.

In this case, and though the lower court correctly doubted the necessity of a special relationship, the court nonetheless found that a special relationship existed using the same reasoning as the *Glascock* Court:

> "[T]his case was about a reverse mortgage case involving an elderly person. To qualify for the loan, Ms. Bowen had to be more than 62 years old. CIT knew Ms. Bowen was in her late 70's when it foreclosed and sold her home. CIT knew she could not afford a mortgage payment. CIT knew Ms. Bowen could not afford a post office box. … Thus, to the extent that a special relationship is required (which this Court doubts), the evidence submitted and the factual findings of the jury were sufficient to find that they existed. CIT's conduct breached duties arising independent of the contractual relationship between the parties. It is therefore clear to the Court that the economic loss doctrine has little or no application in this case based on these particular facts and evidence and even if it did, CIT's conduct violated duties independent from those arising in contract. CIT's conduct was part of a much larger scheme and plan to get rid of this segment of its business and it used 'inaccurate occupancy assessments' as part of its method to foreclose on the elderly and vulnerable like Ms. Bowen." (J.A. 4107-4108).

Like in *Glascock*, the lower court reasoned that a particular plaintiff, namely Shirley Bowen, was affected differently from society in general. It was evident from CIT's knowledge, i.e. that Ms. Bowen was elderly, had limited financial means, had specific reason to know of the potential consequences of the wrongdoing, the persons likely to be injured, and the damages likely to be suffered. "Such special relationship may be proven through evidence of foreseeability of the nature of the harm to be suffered by the particular plaintiff or an identifiable class and can arise from contractual privity or other close nexus." *Id*. at 66 quoting *Aikens*, 208 W.Va. at 499.

Instead of analyzing the facts of this case under *Glascock* or *Aikens*, CIT relies upon two federal cases that have no application, namely *Ranson v. Bank of Am.*, N.A., No. CIV.A. 3:12-5616, 2013 WL 1077093, at *1 (S.D.W. Va. Mar. 14, 2013) and *Warden v. PHH Mortg. Corp.*, No. 3:10-CV-75, 2010 WL 3720128, at *1 (N.D.W. Va. Sept. 16, 2010). Neither of the two cases involved intentional malfeasance. Unlike the two federal cases cited, where the alleged tort claim arose out of a "normal service in a lender-borrower relationship," here the Bank engaged in a

scheme to foreclose on reverse mortgages without basis. Because CIT's intentional and malicious actions went well beyond the normal services provided by a lender-borrower relationship, the cases CIT relies upon have no application to this case.

Before concluding with the special relationship issue, CIT, for the first time in this case, attempts to raise the gist-of-the-action doctrine. CIT did not plead gist-of-the-action doctrine as a defense to the counterclaims, did not raise the doctrine in any pre-trial filings, did not mention the doctrine during trial, and did not raise the doctrine in any post-trial motions. The defense cannot be raised now: "As a general rule … an appellate court will not consider an issue raised for the first time on appeal." *PITA, LLC v. Segal*, 894 S.E.2d 379, 393 (W. Va. Ct. App. 2023).

The special relationship doctrine does not apply in this case because the Estate did not seek purely economic damages or assert claims for an interruption in commerce. Regardless, under the facts of this case, a special relationship existed. Moreover, CIT cannot for the first time on appeal assert the newly raised defense – gist of the action. The lower court did not err.

b. The lower court correctly permitted the wrongful foreclosure claim based upon the particular facts alleged and established below and the court's thorough research and consideration of the claim.

The lower court had a factual and legal basis to permit the wrongful foreclosure claim. It is imperative to examine the standard upon which to view the lower court's decision permitting the Estate to present a claim of wrongful foreclosure. CIT first raised the issue in its motion to dismiss filed in October, 2018. (J.A. 73). After extensive briefing and consideration, the circuit court issued a twenty-page opinion, carefully addressing the court's basis for permitting the claim. (J.A. 106). The court correctly concluded that it must view the facts alleged in the counterclaim as true. "When assessing a motion to dismiss pursuant to W.Va. Rule of Civil Procedure, the facts

must be taken in a light most favorable to the non-moving party and taking all allegations as true. *Sedlock v. Moyle*, 222 W.Va. 547, 550, 668 S.E.2d 176, 179 (2008).” (J.A. 106).

As the court first noted, numerous jurisdictions in the United States permit claims for wrongful foreclosure. The court then examined forty-six paragraphs from Ms. Bowen’s counterclaim, which paragraphs set forth the factual basis for Ms. Bowen’s claim. The court relied, in part, upon *Hannah v. Heeter*, 213 W. Va. 704, 584 S.E.2d 560 (2003) for guidance concerning previously unrecognized torts. Taking the facts asserted to be true, reasoned that “the object of tort law is to provide reasonable compensation for losses and recognized that the foundations of tort law are morality and deterrence.” The lower court continued,

> CIT Bank's position seeks to summarily avoid its allegedly 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. Because "[t]he framers of the West Virginia Constitution provided citizens who have been wronged with rights to pursue a remedy for that wrong in the court system" and because it is alleged in the counterclaim that CIT Bank has unlawfully and oppressively wronged Mrs. Bowen, a remedy must be available for her to right the wrong. Accordingly, the Court concludes CIT Bank's motion to dismiss counterclaim for wrongful foreclosure shall be denied.

(J.A. 106). The court’s careful decision was studied, thoughtful and just.

The Estate pleaded that CIT intentionally, and without a default, foreclosed and sold Ms. Bowen’s home without notice to her. CIT’s actions caused Ms. Bowen significant injury. Taking the facts to be true, the lower court correctly determined that a cause of action necessarily existed for Ms. Bowen to have a remedy, rather than only equitable recission as CIT contended. The lower court properly determined that the Estate could present its wrongful foreclosure claim to the jury.

The circuit court next examined a challenge to the claim following the jury’s verdict. The court’s post-trial review of the wrongful foreclosure was likewise to be viewed in a light most

favorable to the Estate as the prevailing party. Examining the viability of the wrongful foreclosure claim, post-trial and viewing the facts as the jury determined, the lower court correctly permitted the wrongful foreclosure claim to stand.

As it has done throughout this case, CIT seeks to have this Court disregard the evidence and jury findings. CIT points to no West Virginia case disallowing wrongful foreclosure claims. Neither the lower court nor the jury believed CIT's claim that the foreclosure had been Ms. Bowen's fault or that, at best, it was a bona fide error on CIT's part. And nothing about the facts of this case parallels "a legal process which occurs daily in the Mountain State," as CIT claims. The lower court correctly and carefully analyzed the viability of the wrongful foreclosure claim based upon thorough research and the evidence pleaded and proven at trial. Taking the evidence in light most favorable to the Estate and for the reasons set forth in the court's well-articulated order, the lower court did not err in permitting the claim.

CIT additionally argues that the only relief afforded to Ms. Bowen under these circumstances is recission under W. Va. Code § 38-1-4a. The statute has no application to this case. As the lower Court reasoned, W. Va. Code § 38-1-4a (titled "Statute of limitations for sale by Trustee") sets forth the statute of limitations to file an "action or proceeding to set aside a trustee's sale due to the failure to follow any notice, service, process or other procedural requirement relating to a sale of property under a trust deed…. W. Va. Code Ann. § 38-1-4a (West)." The obvious purpose of the statute is to limit the time period for recission actions so as to allow title to real estate be cleared in a reasonable period of time.

The circuit court, relying in part upon *Persinger vs. Peabody Coal Company*, 196 W. Va. 707, 474 S.E.2d 887 (1996), further reasoned that there is no language in the statute to indicate a legislative intent to supplant any other remedies. There, the defendant argued that because W. Va.

Code § 23-1-16 provided a criminal sanction for testifying falsely before a commissioner, the remedies in the statute were the sole remedy and no private cause of action could exist. The Supreme Court quickly disposed of this argument writing: “We disagree with the defendant's contentions. Contrary to the defendant's assertion, we find the lack of a statutory provision regarding a private cause of action for submitting false evidence supportive of the fact that such a cause of action can exist. If the legislature had intended for the statute to supplant such a cause of action, it would have expressly stated that within the statute.” *Id*. at 719. Applying the same reasoning, the circuit court correctly concluded that W. Va. Code § 38-1-4a is not the sole means of relief afforded to Ms. Bowen under the facts of this case.

The lower court correctly decided, “Therefore, the Court FINDS that W. Va. Code § 38-1-4a has no application to the facts of this case. Furthermore, there is no language in the statute to indicate a legislative intent to supplant any other remedies.”

CIT’s reliance upon Judge Groh’s opinion in *Patrick v. PHH Mortg. Corp.*, 998 F. Supp. 2d 478 (N.D. W.Va. 2014) is misplaced. CIT fails to point out that Judge Groh, in her opinion, specifically notes that W. Va. Code § 38-1-4a relates to trustees, and further notes that the lender in the case, PHH, is not a trustee. Judge Groh noted that PHH was arguing that the borrower’s only remedies were injunction or recission (just as CIT argued below). Judge Groh, finding that PHH was not the trustee, denied PHH’s motion for summary judgment, in part, because PHH was not the trustee. Judge Groh’s opinion does not hold or even suggest that the borrower's sole remedies against the lender (as opposed to the Trustee) are limited to injunction or recission.

Based upon the allegations set forth in the Estate’s counterclaim, the evidence presented at trial, and the careful legal research cited in its order, the lower court correctly permitted the Estate to pursue and maintain its claim for wrongful foreclosure. The jury did not believe CIT’s claim

that, at most, it made a bona fide error. The jury found that CIT engaged in an egregious pattern of conduct, foreclosing on Ms. Bowen's home for its own financial gain. Those facts warrant recognition of the wrongful foreclosure claim. The lower court did not err in permitting the Estate to pursue and maintain its claim for wrongful foreclosure.

c. The claimed duplication error was not properly raised, and the Estate's wrongful foreclosure claim is not duplicative of its breach of contract claim because each had its own elements and involved different conduct.

CIT failed to timely raise any objection regarding the claimed duplication before trial. Further, the damages awarded under the breach of contract claim are not duplicative of the wrongful foreclosure claim because the two claims have different elements, the court properly instructed the jury that the Estate had to prove each of the distinct elements for each claim, and CIT included both claims on its proposed verdict form.

The lower court carefully analyzed CIT's post-trial arguments regarding duplication and determined that CIT failed to raise the issue. In its 26-page order, the lower court reasoned:

> The Court FINDS that CIT did not raise the issue of duplication with regard to breach of contract and wrongful foreclosure prior to trial or following the close of evidence in this case. In addition, CIT's proposed verdict form contains both claims. As the issue has never before been raised, the Court concludes that CIT cannot now rely upon the argument to seek relief from this Court to modify the jury's verdict. See *Otto v. Catrow Law, LLC*, 243 W.Va. 709, 716 (2020) ("A motion under Rule 59(a) is not appropriate for presenting new legal arguments, factual contentions, or claims that could have been previously argued."). (J.A. 4105-4107).

Moreover, even if the issue had been timely and properly raised, and not invited, the breach of contract and wrongful foreclosure claims are not duplicative because they have different elements, the jury made separate findings on each claim, and the jury awarded significantly different damages for each claim. As the lower court determined,

> During the trial of this case, document evidence and testimonial evidence supported the Estate's allegations that CIT breached the contract. The evidence in this case

also supported the jury's separate finding that CIT wrongfully foreclosed absent any default by Ms. Bowen. (J.A. 4105-4107).

For example, at trial, CIT contended that the basis for its foreclosure arose because CIT could verify neither that Ms. Bowen continued to reside in her home nor her change of address. To the contrary, CIT knew, based upon its own loan notes, that Ms. Bowen had called in and explained that she could not afford to keep her post office box and had changed her mailing address to the physical property location at 1207 Delray Road, Augusta, West Virginia. (J.A. 3377-3378). As Mr. Scales explained in his testimony and report, the loan documents required Ms. Bowen only to provide CIT with an address to receive notices. (J.A. 3162-3163). CIT failed and refused to honor this provision of the contract even though Ms. Bowen sent the information in writing, as well as provided the information to CIT over the phone.

The elements of each claim were set forth in the jury charge. And the Court instructed the jury, on numerous occasions, you can find for the Estate "if you find by a preponderance of the evidence that Plaintiff has proven each essential element of her claim. . .." The jury charge by the Court required the jury to find the separate essential elements of each cause of action. And there was different evidence from which the jury could, and did, find CIT breached the contract with Ms. Bowen. (J.A. 2235-2252). The jury found separately and independently that CIT wrongfully foreclosed on Ms. Bowen's home. (J.A. 2253-2258).

"Where a case has been submitted to a jury, an appellate court cannot presume that the jury did not understand or follow the clear impact of the instructions given." *Dustin v. Miller*, 180 W.Va. 186, 189, 375 S.E.2d 818, 821 (1988). "[A] jury is presumed to follow the court's instructions." *Showater v. Binion*, No. 18-0128, 2019 WL 6998319, at 4* (W.Va. Dec. 20, 2019) (Memorandum Decision). CIT breached the contract with Ms. Bowen and breached its common law and constitutional duties to Ms. Bowen in conducting the wrongful foreclosure. The lower court

properly allowed both claims with separate instructions, and the jury found for the Estate on both claims. Moreover, CIT failed to raise the issue prior to trial or following the close of evidence and CIT's proposed verdict form contained both claims. Therefore, CIT's assignment is without merit.

d. The lower court correctly, and within its discretion, permitted the Estate to introduce 404(b) evidence to show plan, motive, intent, scheme, and lack of accident, and CIT introduced the very evidence about which it now complains.

The lower court properly permitted the Estate to introduce CIT's financial information and other information regarding CIT's nationwide increase in foreclosure rates and conduct regarding reverse mortgages because the evidence related to CIT's motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." W. Va. R. Evid. 404. CIT, too, introduced the very evidence for which it now complains.

On February 9, 2020, nearly a year-and-a-half before trial, the Estate filed its *Notice of Intent to Introduce 404(b) Evidence* outlining the evidence sought to be introduced. (J.A. 1797). The Estate brought its claims based, in part, upon the public knowledge of CIT ridding itself of underwater mortgages to minimize financial losses. Evidence of CIT's conduct had been published in several forums. The notice set forth that the purpose of the evidence had been to "show motive, opportunity, preparation, plan, knowledge, absence of mistake and lack of accident." (J.A. 1797). Additionally, and during the discovery phase of this case, the Estate disclosed the reports of Michael Scales (foreclosure expert) and forensic accountant, David Epperly, both of which referenced the evidence. (J.A. 2536, 2547). The notice detailed specific exhibits and referenced Mr. Scales' report and deposition. The evidence identified in the Estate's notice related directly to CIT's conduct and motives relating to Ms. Bowen's reverse mortgage and the foreclosure.

A portion of the evidence related to an $89-milion-dollar settlement between CIT and the United States Department of Justice relating to reverse mortgages. Throughout the entirety of this

case, the Estate alleged and proved that CIT wrongfully foreclosed on Ms. Bowen's home and real estate as part of a larger scheme to rid itself of underwater mortgages and minimize financial losses. The $89-million-dollar settlement came because of CIT's agreement to repay insurance funds it had unlawfully received from the United States government for foreclosing on reverse mortgages.

CIT's conduct leading to the settlement fit squarely within the Estate's case relating to CIT's motive, opportunity, preparation, plan, knowledge, absence of mistake and lack of accident, i.e. CIT sought to exit the reverse mortgage market and minimize its losses. The court conducted several hearings regarding the evidence the Estate sought to be introduced. The lower court, after careful consideration, concluded that the Estate could introduce the evidence. (J.A. 2044).

Though not specifically argued in its assignment claiming the lower court erred in permitting evidence of the $89-million-dollar settlement, CIT cites *McGinnis* regarding a 404(b) instruction. Therefore, the Estate briefly addresses the issue.

It is noteworthy that the West Virginia Supreme Court has recognized that the risk of prejudice under Rule of Evidence 403 is not likely to be as great in a civil case versus a criminal case. *Stafford v. Rocky Hollow Coal Co.*, 198 W. Va. 593, 598, 482 S.E.2d 210, 215 (1996). During the pre-trial litigation, the Estate offered an extrinsic evidence instruction. (J.A. 1667). At a pre-trial hearing on June 11, 2021, the lower court discussed the 404(b) issue and the instruction at length. (J.A. 2082, 2207). CIT offered no objection to the instruction tendered by the Estate, and further, offered no instruction of its own.

The Rules of Evidence provide, "If the court admits evidence that is admissible against a party or for a purpose--but not against another party or for another purpose--the court, **on timely request**, must restrict the evidence to its proper scope and instruct the jury accordingly." W. Va. R. Evid. 105 (emphasis added). Because CIT failed to offer an applicable instruction of its own

and because CIT did not object to the Estate's proffered instruction, the lower court included the instruction offered by the Estate in the final charge to the jury. Therefore, and to the extent CIT now argues that the lower court failed to properly instruct the jury regarding the 404(b) evidence, CIT's argument is untimely, waived, and without merit.

Further, CIT introduced the same evidence about which it now complains. During the trial, CIT moved for the admission of a news article setting forth details regarding the settlement between CIT and the United States Department of Justice relating to reverse mortgages. (J.A. 2918). CIT cannot now complain of the evidence on appeal.

CIT attempts to sidestep the invited error claiming that CIT introduced the evidence for rebuttal purposes The contention is without merit. While cross-examination of the challenged evidence may not, in all circumstances, invite error, a party cannot itself introduce the challenged evidence and then claim error. In *State of West Virginia vs. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987), the Supreme Court closed the door on this type of challenge:

> Although the defendant initially objected to these statements at an *in camera* hearing, we believe he waived his objection when on cross-examination of Kenny Chastain, one of the paramedics, he introduced and read to the jury Mr. Chastain's lengthy written statement which contained the same information. It is generally held that where a party objects to incompetent evidence, but subsequently introduces the same evidence, he is deemed to have waived his objection. E.g., *People v. Haywood*, 60 Ill.App.3d 236, 17 Ill. Dec. 329, 376 N.E.2d 328 (1987, cert. denied, 440 U.S. 948, 99 S. Ct. 1427, 59 L.Ed.2d 637 (1979); *State v. LaVe*, 174 Mont. 401 571 P.2d 97 (1977); *State v. Smith*, 290 N.C. 148, 226 S.E.2d 10, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L.Ed.2d 301 (1976); *Curry v. State*, 468 S.W.2d 455 (Tex.Cr.App.1971), vacated in part on other grounds, 408 U.S. 939, 92 S. Ct. 2872, 33 L.Ed.2d 761 (1972); *Saunders v. Commonwealth*, 211 Va. 399, 177 S.E.2d 637 (1970); 75 Am.Jur.2d Trials § 174 (1974). *State of West Virginia v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987); see also (Syl. Pt. 2) *State of West Virginia v. Knuckles*, 196 W.Va. 416, 473 S.E.2d 131 (1996).

In *Knuckles*, the Court held, "[T]he law in West Virginia is well established that a defendant cannot subsequently introduce the same evidence he previously objected to without it constituting

a waiver." *Id*. at 421. "A litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal." *Maples v. W. Virginia Dep't of Com., Div. of Parks & Rec.*, 197 W. Va. 318, 319, 475 S.E.2d 410, 411 (1996).

The lower court's reasoning about the 404(b) evidence and CIT's introduction of the settlement agreement is carefully set out in the court's ruling:

> CIT next argues that this Court improperly allowed the introduction of a settlement between the United States Department of Justice and CIT relating to reverse mortgages. The Court notes that CIT itself introduced evidence of the settlement. See Def.'s Trial Ex. 99. See *Hopkins v. DC Chapman Ventures, Inc.*, 228 W.Va. 213, 219, 719 S.E.2d 381, 388 (2011) ("It is well-established law in this state that 'a party cannot invite the court to commit an error, and then complain of it.").
>
> During the pendency of this case, and on numerous occasions, the Court heard argument and received memoranda of law on this issue. Over a year in advance of the trial, the Estate also filed its notice of intent to use the 404(b) evidence specifying the exhibits the Estate intended to use. The Court carefully considered the introduction of the evidence. The Court found and finds that there is no question or issue that the act or conduct occurred and that CIT committed the act. See *State v. Sites*, 2019WL507829. The Court considered the matters in an *in camera* hearing at a pre-trial conference and found the evidence to be relevant and that the probative value outweighed any prejudice. This is particularly true because CIT itself introduced Defendant's Exhibit 99.
>
> Based upon the Court's prior findings, and based upon the evidence adduced at trial, as well as the important fact that CIT itself introduced Defendant's Exhibit 99, the Court again finds, concludes, and affirms that the evidence was admissible. Because the evidence was proper in light of the issues in the case under *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994) and because CIT introduced evidence of the settlement, the evidence was properly admitted.

(J.A. 4118-4119). CIT's argument concerning the issue is wrong. The lower court committed no error under these circumstances.

e. The lower court properly instructed the jury using CIT's offered instruction regarding evidence concerning punitive damages and CIT's "Punitive Damages Unavailable" instruction was inapplicable.

The lower court offered CIT the opportunity to offer a cautionary instruction regarding evidence of CIT's financial position. After determining punitive damages would be submitted to

the jury, adopted and used CIT's instruction in the charge to the jury. The court did not accept CIT's inapplicable instruction regarding punitive damages not being permitted.

In addition to the 404(b) evidence, the lower court also considered the possible bifurcation regarding the evidence relating to punitive damages, specifically CIT's financial position. During the pre-trial litigation, the Estate argued that the same evidence would be presented in both its case-in-chief and for purposes of punitive damages. More specifically, the Estate argued that the motivation for CIT's nationwide foreclosure campaign came because of CIT's financial position, i.e. its losses generated from the reverse mortgage segment of its business.

After careful consideration, the lower court concluded, because the evidence would be relevant to both liability and damages, not to bifurcate the punitive damage claim and to permit the Estate to introduce evidence of CIT's financial position during the Estate's case-in-chief. During a hearing on the issue, the Court gave consideration to permitting a cautionary instruction with regard to the evidence either way: a cautionary instruction if the lower court, at the conclusion of the evidence, permitted the punitive damage claim to go to the jury; and a cautionary instruction if the lower court concluded that the punitive damage claim failed, as a matter of law, and would not be permitted to go the jury. (J.A. 2047-2049, 2051, 2052). The lower court made clear it would consider an instruction both ways.

Importantly, the lower court stated, in applicable part, that it wanted counsel, particularly CIT's counsel, to submit proposed instructions:

> [B]ut I am leaning toward a cautionary instruction, in fairness to CIT Bank, that the jury would be instructed that they could not use certain evidence in arriving at their verdict. That might be too fine of a line for us to determine, but I would like you all to take a crack at that.
>
> I am okay - - I will give you the instruction or we will argue another day about the cautionary instruction in the event that the punitive claim goes to the jury. What I would like for you all to submit - - and if you could agree on it, that's great; if you

> don't, that's fine, submit your own - - I would like to know what your instruction would look like in the event that the prima facie case of punitives is not met, and that's the way I am leaning. Now, I might be, between now and the time you submit this, I might be amenable to some other compromise perhaps or some other way, if I am persuaded. (J.A. 2057) (emphasis added)
>
> All right. Why don't we do this so we are thinking either side here. Why don't you all submit - - if you all are happy with the punitive damages, and if you have the pattern instructions which look like this in the green book - - it's the very last one, as you would guess, Section 1500 - -it seems to me to be a pretty comprehensive instruction. I am not going to suggest that it's perfect, but I would like to start with that one as the instruction, on the instruction to the jury, assuming they get that issue, assuming they get the punitives at all. **So if you want to expound on that one, that's fine**.
>
> What I also want is an attempt at an instruction given that I don't allow the punitive damages claim, **and, Mr. Saunders [CIT's Counsel], this is more, I suppose, in your camp**, so you might want to work on that, start working on that. (J.A. 2060) (emphasis added)

The lower court expressed its amenability to a cautionary instruction, both ways, and requested CIT's counsel to submit proposed instructions.

On March 4, 2021, CIT submitted two instructions: CIT's No. 27 titled "Punitive Damages" and CIT's No. 28 titled "Punitive Damages Unavailable." (J.A. 2073). At the final pre-trial hearing held on June 11, 2021, the lower court adopted CIT's proposed Instruction No. 27 with regard to punitive damages. During the hearing, and regarding the sufficiency of CIT's instructions relating to punitive damages going to the jury, CIT's Counsel stated, "I believe if we just use No. 27 that we submitted, that should be sufficient." (J.A. 2128).

Following the Estate's case-in-chief, CIT made no mention of punitive damages and did not move the Court to preclude the punitive damage claim from submission to the jury. As a result, the lower court instructed the jury, regarding the punitive damage claim, using CIT's Instruction No. 27. (J.A. 2250-2252). To the extent that CIT had any further issue with the instruction, CIT should have raised the issue at that time.

As the lower court properly ruled:

> CIT next argues that this Court failed to properly instruct the jury with regard to CIT's net worth and the jury's consideration of CIT's net worth. As with other arguments set forth in CIT's motion, CIT's post-trial motion argument is the first time CIT presented the argument to this Court. Notably, CIT did not offer the instruction that it now contends was necessary.
>
> "As a general rule, objections to a trial judge's charge must be clear and explicit enough to tell the trial judge what the parties want done to correct the alleged error." *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 70, 479 S.E.2d 561, 580 (1996). "This requirement of a "clear and explicit" objection is echoed by Rule 51 of the West Virginia Rules of Civil Procedure, which provides, in pertinent part: "[n]o party may assign as error the giving or refusal to give an instruction unless he objects thereto before the arguments to the jury are begun, stating distinctly, as to any given instruction, the matter to which he objects and the grounds of his objection [.]" *Kessel v. Leavitt*, 204 W. Va. 95, 143-144, 511 S.E.2d 720, 768-69 (1998). …
>
> At the pre-trial hearing held on February 3, 2021, this Court permitted CIT to tender a punitive damages instruction to be used if the Court found, as a matter of law at the close of evidence, that punitive damages were appropriate. The Court further permitted CIT to tender an instruction to be used if the Court found that the Estate of Shirley Bowen failed to meet her burden for punitive damages. CIT did not move the Court, at the close of evidence, to direct the verdict on the punitive damages issue.
>
> At the final pre-trial hearing in this case, the Court considered both CIT's offered instruction and the Estate's offered instruction. Ultimately, the Court adopted CIT's offered instruction. At no time did CIT request and/or offer any instruction on "Net Worth."
>
> CIT further contends that the Estate called David Epperly who "only opined on CIT's financial position." CIT's assertion oversimplifies Mr. Epperly's testimony. Mr. Epperly opined on CIT's financial losses as a result of the segment of CIT's business including the reverse mortgage portfolio, which supported the Estate's contention that CIT was motivated to foreclose on elderly folks to avoid losses. Mr. Epperly's testimony related mostly to CIT's recognition of losses and its divestment of the reverse mortgage portfolio to "avoid risk." (J.A. 4111-4113).

To sidestep its failure to raise the issue, CIT seems to argue that the lower court should have offered a portion of CIT's Instruction Number 28, titled "Punitive Damages Unavailable." CIT argues that the lower court "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." CIT's instruction was proffered for use only if punitive damages were unavailable, as its title indicates. Wrongly, CIT now contends that the lower court should have used its instruction titled "Punitive Damages Unavailable" even though the lower court used CIT's instruction titled "Punitive Damages." CIT appears to contend that the lower court should have dissected out part of its instruction for a purpose not intended by CIT itself. "A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy." *State v. Foster*, 221 W. Va. 629, 640, 656 S.E.2d 74, 85 (2007).

Once the lower court concluded that the jury could consider punitive damages, the lower court used CIT's instruction regarding punitive damages. CIT had every opportunity to offer any instruction it deemed appropriate, including a punitive damages instruction to be used if the lower court, at the close of evidence, determined that the jury could consider the punitive damage claim. CIT did, in fact, offer such an instruction, which the lower court adopted in its entirety. CIT's argument that the lower court should have examined and offered part of its instruction titled "Punitive Damages Unavailable" is without merit and improper. "It is fundamental that a defendant must live by his trial decisions." *Knuckles*, 196 W. Va. at 421.

f. CIT failed to move the lower court for judgment as a matter of law based upon insufficiency of the evidence on the slander of title, abuse of process, and breach of contract claims, and therefore, any claimed error is waived; the jury's verdict on those claims, and the tort of outrage claim, is supported by the evidence.

In its fifth assignment, CIT claims that insufficient evidence existed to support verdict regarding the Slander of Title claim, Abuse of Process claim, and Breach of Contract claim, and therefore, CIT was entitled to judgment as a matter of law. CIT did not properly raise the

assignments before the lower court, and therefore, the alleged assignments of error are not subject to appeal. (J.A. 3758, 3762). Moreover, the evidence supports the jury's verdict on those claims as well as the tort of outrage claim.

CIT did not raise the claims of insufficiency of evidence regarding slander of title, abuse of process, and breach of contract following the trial, and therefore, the assignments cannot be raised in this appeal. Nowhere in CIT's *Motion for Judgment as a Matter of Law or in the Alternative for New Trial*, does CIT assert insufficient evidence claims regarding the Abuse of Process, Slander of Title, and Breach of Contract claims. "A party's failure to file a post-verdict motion for judgment as a matter of law under Rule 50(b) of the West Virginia Rules of Civil Procedure precludes this Court from reviewing an insufficiency of the evidence claim." Syl. Pt. 5 *W. Virginia Dep't of Transp., Div. of Highways v. Newton*, 235 W. Va. 267, 773 S.E.2d 371, 374 (2015). "A party's failure to file a post-verdict motion under Rule 50(b) precludes an appellate court from entering a judgment contrary to that which was entered by the trial court.... A post-verdict motion is necessary because determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the trial judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Id*. at 281, citing Cleckley, Davis, and Palmer, Litigation Handbook, § 50(b), at 1116.

Following the close of the Estate's case-in-chief, CIT orally moved for judgment as a matter of law under W. Va. R. Civ. P. § 50(a) on all claims, except punitive damages, claiming insufficiency of the evidence. The lower court denied the oral motion. (J.A. 2224).

CIT failed to make an insufficiency of the evidence claim following the verdict. CIT filed a post-trial motion for judgment as a matter of law under Rule 50(b); as part of its motion, however, CIT did not move the lower court for judgment as a matter of law, based upon insufficiency of the

evidence, on the Slander of Title claim, the Abuse of Process claim, and the Breach of Contract claim as it now raises in this appeal. CIT's failure to file a post-verdict motion for judgment as a matter of law under Rule 50(b) of the West Virginia Rules of Civil Procedure on the claims it now asserts precludes this Court from reviewing the insufficiency of the evidence claims.

In *Newton*, 235 W. Va. 267, 773 S.E.2d 371, 374 (2015), the Supreme Court acknowledged that the petitioner had made an insufficiency of the evidence claim both at the close of the plaintiff's case-in-chief and the close of the evidence. The Supreme Court recognized, however, that the petitioner failed to raise the motion following the verdict. The Court reasoned,

> DOH's brief indicates that it moved the court for judgment as a matter of law at the close of Ms. Newton's case-in-chief and at the end of its case-in-chief. The circuit court denied both motions. DOH now asks this Court to reverse the judgment and grant it judgment as a matter of law. Ms. Newton contends that this issue was not preserved for appellate review. We agree.
>
> 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, the court is considered to have submitted *281 **385 the action to the jury subject to the court's later deciding the legal questions raised by the motion. The 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.
>
> Even though Rule 50(b) provides that a party "may" renew the motion, this does not impact what consequence flows from a failure to renew the motion. The following observations have been made regarding the failure of a party to renew a motion for judgment as a matter of law under Rule 50(b):
>
> **A party's failure to file a post-verdict motion under Rule 50(b) precludes an appellate court from entering a judgment contrary to that which was entered by the trial court**.... A post-verdict motion is necessary because determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the trial judge who saw and heard the witnesses, and has the feel of the case which no appellate printed transcript can impart. Cleckley, Davis, and Palmer, Litigation Handbook, § 50(b), at 1116–17.

Id. at 280-281 (emphasis added). The Court concluded, "Consequently, we now hold that a party's failure to file a post-verdict motion for judgment as a matter of law under Rule 50(b) of the West

Virginia Rules of Civil Procedure precludes this Court from reviewing an insufficiency of the evidence claim." *Id*. at 282. Because CIT failed to make a post-verdict insufficiency of the evidence claim regarding the Abuse of Process, Slander of Title, and Breach of Contract claims, CIT is precluded from now asserting these arguments on appeal.

Moreover, the evidence supported the jury's verdict on all the claims. The Supreme Court has often held, "In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, may be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true." Syl Pt. 3, *Walker vs. Monongahela Power Company*, 147 W.Va. 825, 131 S.E.2d 735 (1963).

The jury's verdict regarding the slander of title claim is properly supported by the evidence. "The elements of slander of title are: 1) publication of 2) a false statement 3) derogatory to plaintiff's title 4) with malice 5) causing special damages 6) as a result of diminished value in the eyes of third parties." Syl. Pt. 2, *TXO Prod. Corp. v. All. Res. Corp.*, 187 W. Va. 457, 460, 419 S.E.2d 870, 873 (1992), aff'd, 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366 (1993). "As a general rule, courts have found that wrongfully recording an unfounded claim to the property of another is actionable as slander of title." *Id*. at 467.

At trial, the Estate proved the elements of slander of title. (J.A. 2315). In February, 2016, CIT published, in the Hampshire Review, a local circulating paper in Hampshire County, that Ms. Bowen had defaulted under the terms of the reverse mortgage, despite CIT's knowledge, as set forth in its loan notes, that the publication was false and derogatory to Ms. Bowen's title to her home. In addition, and in March, 2016, CIT published and recorded a foreclosure deed stating that Ms. Bowen had defaulted in making payments under the reverse mortgage. (J.A. 2294). As Mr.

Scales testified, "That the deed from Seneca Trustees, Inc., and CIT Bank to Federal National Mortgage Association, dated March 8, 2016, is slander of title to Ms. Bowen and her heirs, being the deed…." (J.A. 3209). CIT knew that Ms. Bowen was not required to make payments under the reverse mortgage. The foreclosure deed purported to convey Ms. Bowen's home and real estate to a third party and slandered the title to her home.

The jury concluded that, at the time of the newspaper publication and recordation of the deed, CIT knew that Ms. Bowen continued to reside in her home and knew that she had not defaulted on the reverse mortgage. The Estate also proved that, at the time, CIT had engaged in a nationwide foreclosure campaign to foreclose on elderly people across the country on the basis of "inaccurate occupancy assessments." The jury's conclusion that CIT slandered the title to Ms. Bowen's home is well supported by the evidence.

Like the defendant in *TXO*, CIT contends that its actions were devoid of malice. But as the *TXO* Court reasoned, "At trial, and again on appeal, TXO argued that there was no malice in its actions, and that the filing of the false quitclaim deed was the result of a good faith mistake. However, after the testimony of TXO's efforts to reduce royalty payments and much testimony about previous similar bad acts by TXO, the jury found the requisite malice." *Id*. Here, the jury found the requisite malice.

CIT relies upon *GMO Forestry Fund 3, L.P. v. Ellis*, 337 F. App'x 279, 280 (4th Cir. 2009). In *Ellis*, the plaintiff brought a slander of title claim, arguing "that Ellis acted with malice by not conducting a title search and by ignoring a notation on the plat of the survey performed at Ellis' request that stated that the surveyor did not warrant ownership of the property surveyed." *Id*. The Fourth Circuit also noted, "At oral argument, GMO conceded that there was no evidence in the

record that Ellis had knowledge of any other claim to the subject property when he filed his deed." *Id*. at footnote 1.

The contrast between *Ellis* and this case could not be more striking. Here, the Estate pleaded and proved, and the jury concluded, that CIT purposefully, intentionally, and with malice published a false statement in the local newspaper and recorded a false and fraudulent deed. As Mr. Scales testified, "That the deed from Seneca Trustees, Inc., and CIT Bank to Federal National Mortgage Association, dated March 8, 2016, is a slander of title to Ms. Bowen and her heirs…" (J.A. 3209). *Ellis* has no application to this case.

CIT's claims of lack of insufficient evidence of special damages is also misguided. CIT recorded the deed selling Ms. Bowen's home to a third-party. Certified Appraiser Craig See testified to the value of Ms. Bowen's home, establishing special damages. (J.A. 3303-3308).

The jury's verdict for abuse of process claim is, likewise, well supported by the evidence. "Generally, abuse of process consists of the willful or malicious misuse or misapplication of lawfully issued process to accomplish some purpose not intended or warranted by that process. … The distinctive nature of an action for abuse of process, as compared with the actions for malicious prosecution and false imprisonment, is that it lies for the improper use of a regularly issued process, not for maliciously causing process to issue, or for an unlawful detention of the person. ... The authorities are practically unanimous in holding that to maintain the action [for abuse of process] there must be proof of a willful and intentional abuse or misuse of the process for the accomplishment of some wrongful object—an intentional and willful perversion of it to the unlawful injury of another." *Preiser v. MacQueen*, 177 W. Va. 273, 279, 352 S.E.2d 22, 28 (1985).

CIT omits the most damaging evidence supporting the abuse of process claim. The Estate proved and the jury determined that CIT had filed the underlying action in an attempt to cover-up

its wrongdoing. Understanding CIT's scheme and plan, as well as its need to cover up its wrongdoing, Ms. Bowen asserted her claim on the basis that CIT "misused lawfully issued process for some purpose not intended or warranted by that process." See, *Wayne Cty Bank vs. Hodges*, 175 W.Va. 723, 724, 338 S.E.2d 202 (1985).

The evidence established CIT foreclosed and sold Ms. Bowen's home knowing that she still resided in her home and had not defaulted under the reverse mortgage. Despite its knowledge, and to coverup its wrongdoing, CIT falsely alleged in Paragraph 5 of its Petition before the lower court that Ms. Bowen had defaulted under the terms of the reverse mortgage. (J.A. 1). Following issuance of service, CIT attempted to seek default judgment against Ms. Bowen, with a finding that she defaulted on the reverse mortgage, without notifying or personally serving Ms. Bowen with the pleadings. (J.A. 20, 45). The jury concluded that CIT filed its petition in the lower court, asserting the false allegation that Ms. Bowen had defaulted, to cover up its wrongdoing. The jury's verdict on the claim is based upon sufficient evidence.

The evidence at trial, likewise, supported the claim for tort of outrage. "In order for a plaintiff to prevail on a claim for intentional or reckless infliction of emotional distress, four elements must be established. It must be shown: (1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) 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; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and, (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it." *Travis v. Alcon Lab'ys, Inc.*, 202 W. Va. 369, 371, 504 S.E.2d 419, 421 (1998).

In *Vandevender v. Sheetz, Inc.*, 200 W.Va. 591, 607, 490 S.E.2d 678, 694 (1997), the West Virginia Court affirmed a compensatory damages award under the tort of outrage based upon testimony that a letter "from Sheetz made her feel 'real bad.' Her son testified that his mother was very upset by Sheetz's treatment of her." *Id*. In that case, the plaintiff did not introduce any evidence of psychiatric or psychological treatment or any medical testimony of related trauma, and the Court upheld the compensatory damages award.

Similarly, in *Mace v. Charleston Area Med. Ctr. Found., Inc.*, 188 W.Va. 57, 422 S.E.2d 624, (1992), the Supreme Court upheld an award of compensatory damages when the plaintiff admitted that there was no direct evidence of emotional distress, but suggested that there was ample evidence from which the jury could, and apparently did, infer such suffering.

In addressing whether the evidence was sufficient to support a claim of intentional infliction of emotional distress, the Supreme Court has held:

> We do not adopt a bright-line rule that expert testimony is never required to prove the tort of outrage. Although expert testimony may be a helpful and effective method of proving emotional distress and its relationship to the act complained of, it is not always necessary. A determination by the trial court as to whether a plaintiff has presented sufficient evidence, absent expert testimony, such that the jury from its own experience can evaluate the claim, its causal connection to the defendant's conduct and the damages flowing therefrom will not be disturbed unless it is an abuse of discretion. Syl. Pt. 4 of *Tanner v. Rite Aid of West Virginia*, 194 W.Va. 643, 461 S.E.2d 149 (1995).

The evidence in this case established and proved that CIT intentionally inflicted emotional distress upon Ms. Bowen with its conduct. Caroline Coffman, Ms. Bowen's daughter, testified that CIT's conduct caused her mother to worry every day that she would lose her home. Movingly, Ms. Coffman testified that, upon learning of CIT's foreclosure, something in Ms. Bowen "broke" and that her mom was never the same. (J.A. 3385). Ms. Coffman also testified to the anxiety, worry, fear, and confusion Ms. Bowen suffered over an extended period.

As the lower court found, the "record is replete with sufficient evidence for which a jury could sustain a verdict in favor of Bowen for the claim of tort of outrage." (J.A. 4119-4120). CIT's contention that the evidence is insufficient under the tort of outrage claim is without merit.

The jury's verdict on the breach of contract claim is well supported by the evidence. The elements for a breach of contract are 1) the existence of a valid and enforceable contract, 2) complaining party has performed under the contract, 3) defendant has breached the contract, and 4) the complaining party has been injured. CIT then wrongly asserts that the Estate is required to identify the specific provisions breached.

In *Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Virginia*, 244 W. Va. 508, 521, 854 S.E.2d 870, 883 (2020), the Supreme Court reversed the trial court's ruling dismissing a case under W. Va. R. Civ. P. 12(b)(6) for lack of specificity in pleadings, and the majority made clear that fair notice pleading remains the standard in West Virginia. "Taken as a whole, the West Virginia Rules of Civil Procedure establish the principle that a plaintiff pleading a claim for relief need only give general notice as to the nature of his or her claim." *Id*.

The Estate set forth and proved that CIT breached the contract. For example, Ms. Bowen's expert testified, "There was absolutely no contractual requirement that Ms. Bowen provide a reason to Financial Freedom (CIT's predecessor) for her change of address. I explained to you all earlier, there is nothing in any documents that Ms. Bowen signed at her closing back on December 15, 2006, that she had to give Financial Freedom a reason for her change of address." (J.A. 3204). Mr. Scales noted that, despite no requirement for her to provide a reason for a change of address, Ms. Bowen had actually given CIT the reason for her change of address. (J.A. 3204). Further, and though CIT failed to comply with the discovery deadlines, the lower court nonetheless permitted CIT to depose Mr. Scales out of time and well before trial. CIT had every opportunity to, and

actually did, discover the specific provisions the Estate alleged CIT had breached well in advance of trial. The jury's verdict for breach of contract is supported by the evidence.

g. The lower court properly permitted the Estate to present its fraudulent court record claim because the facts were pleaded in the Counterclaim and CIT had fair notice of the claim.

The Estate adequately pleaded the factual basis for a claim for fraudulent court record under W. Va. Code § 38-16-501. The lower court carefully determined that the Estate adequately pleaded the facts of the fraudulent court record claim under the notice pleading standard in West Virginia.

The Estate pleaded that the foreclosure Deed, signed by CIT and recorded, falsely claimed that Ms. Bowen defaulted "in the payment of principal and interest…" under the Trust Deed. Further, the Counterclaim provided that CIT, through its agent and representative, recorded the Deed of Foreclosure publicly stating that Ms. Bowen was in "default in the payment of principal and interest", knowing full well that the reverse mortgage did not require the payment of principal and interest during Ms. Bowen's lifetime. The public statement recorded in the Hampshire County Land Records that Ms. Bowen was in "default in the payment of principal and interest" is false…. CIT's actions in directing the recordation of a deed attempting to deprive Ms. Bowen of her home were knowing, willful, reckless, and malicious. (J.A. 52).

CIT had adequate notice of these factual assertions in the Counterclaim. Moreover, CIT suffered no prejudice as a result of the court allowing the claim to go forward. The lower court, in its discretion, reviewed the pleadings and wrote: "CIT had fair notice of this claim. The claim was adequately pleaded, and CIT suffered no prejudice as a result of the claim not having its own heading. In addition, CIT knew that the Estate was asserting the claim as early as January, 2020, nearly 18 months prior to the start of the trial." (J.A. 4108-4110).

In *State ex rel. McGraw v. Scott Runyon Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995), writing for the majority, Justice Cleckley stated, "Complaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure." (citing *Mandolidis v. Elkins Indus., Inc.*, 161 W.Va. 695, 246 S.E.2d 907 (1978); *John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 245 S.E.2d 157 (1978); *Conley v. Gibson*, 355 U.S. 41, 47-48, 788 S.Ct. 99, 102-03, 2 L.Ed.2d 80, 85-86 (1957)). In *Tribeca Lending Corp. v. McCormick*, 231 W.Va. 455, 745 S.E.2d 743 (2013), the High Court reaffirmed its adherence to notice pleading under the Rules of Civil Procedure. Justice Davis, writing separately, stated unequivocally that, "[t]his jurisdiction subscribes to the concept of notice pleading." *Id*. at 467.

Going further, the West Virginia Supreme Court has held that, even under Rule 9 where fraud must be pleaded with particularity, the requirement that fraud be stated with particularity does not automatically render a complaint fatally flawed if the magic word "fraud" has not been invoked; the complaint will generally be deemed sufficient so long as the cause of action for fraud may be discerned from the allegations contained therein. *Kessel v. Leavitt*, 204 W. Va. 95, 511 S. E. 2d 720 (1998). See also *Mountaineer Fire & Rescue*, 244 W. Va. at 525 ("A plaintiff does not need to prove a claim of fraud at the pleading stage; rather he needs to articulate the claim with enough particularity so that the defending party can properly respond.")

The Counterclaim alleges sufficient facts for a fraudulent court record claim, and CIT had notice of the claim as early as January, 2020. CIT wholly fails to demonstrate any prejudice. The Court's decision to permit the claim to be presented at trial was well within its discretion.

VI. CONCLUSION

Review of the record and briefs in this case reveals that the lower court was more than fair in its handling of the case. Despite CIT's failure to attend pre-trial hearings scheduled by agreed

order, failure to respond to discovery, false claims that it had produced all documents in its possession when, in fact, it had withheld hundreds of pages of documents, despite its failure to mediate timely, failure to disclose witnesses in compliance with court orders, the lower court continued pre-trial conferences for CIT, allowed CIT to name experts, take depositions of the Estate's experts, and continued the trial at CIT's request. The court also set aside the WVCCPA claim although CIT never raised the survivability issue until close of the Estate's case. The Court also reduced the punitive damages award by $ 500,000.00 upon concern of possible duplication of damages with the intentional infliction of emotional distress claim, even though CIT had failed to raise the issue before the verdict, an issue the Estate raised in its cross assignment of error.

The lower court's orders in this case were well reasoned and researched, detailed and thoughtful. It offered both sides a fair opportunity to develop and try their cases. The Court did not commit reversible error. The Estate respectfully requests that the Intermediate Court of Appeals affirm the lower court's May 6, 2022, Order Denying New Trial Motion, deny CIT the relief requested in its supplemental brief, grant the Estate the relief sought in its cross-assignment of error filed May 4, 2023, and grant the Estate such further relief as to the Court seems just.

Respectfully submitted,

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 22-ICA-330

CIT BANK, N.A,

Plaintiff / Counterclaim Defendant Below,
Petitioner,

v.

Appeal from order of the
Circuit Court of Hampshire County
Civil Action No. 16-C-97

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

Defendant / Counterclaim Plaintiff Below,
Respondent.

CERTIFICATE OF SERVICE

I, Jonathan G. Brill, a practicing attorney before the bar of this Honorable Court, certify that I filed the foregoing *Respondent's Brief in Response to Supplemental Brief of Petitioner CIT Bank, NA* using the File & ServeXpress system on January 22, 2024, which will send an electronic copy to the following:

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