

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 35497

TRADERS BANK,

Appellant,

v.

**Circuit Court of Roane County
Civ. Action No. 06-C-1 N
(Honorable David W. Nibert, Judge)**

**SHERMAN DILS III,
PAMELA DILS, and
DILS RENTAL, INC.,**

Appellee.

**BRIEF OF APPELLANT UPON CERTIFIED QUESTION
FROM THE CIRCUIT COURT OF ROANE COUNTY**

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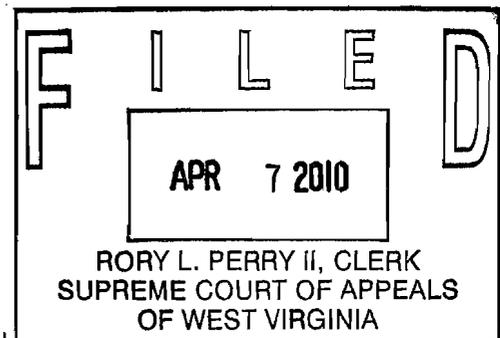


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I. KIND OF PROCEDURE AND NATURE OF RULING BELOW

The certified question presented under West Virginia Code § 58-5-2 arises upon a challenge to the sufficiency of a Counterclaim and the jurisdiction of the circuit court over the Counterclaim's subject matter.¹

QUESTION PRESENTED:

Where a plaintiff lender seeks to recover a debt on a promissory note, does the maker of the promissory note have standing to assert, as a defense and counterclaim, a tort claim of fraud in the inducement, on the basis that the maker relied upon the oral promise of the lender (that the lender knew or should have known would not be fulfilled), where the lender claims that it is relevant that the promise was made for the benefit of a third party, but where the counterclaimant asserts that it is the deceit by false promise, not the nature of the promise, which gives rise to standing in a tort claim of fraudulent inducement?

ANSWER OF THE LOWER COURT:

Yes.

(Order of Certification, p. 2.) Traders Bank argues that the certified question should be answered "no."

¹ Questions of law may be certified in a number of situations. *See* W. Va. Code §58-5-2. Implicated here are both a challenge to the sufficiency of a pleading, informed by limited discovery, and a challenge to the jurisdiction of the court over the subject matter. To the extent the circuit court, at the time of its ruling, relied on evidence outside the pleadings, this certified question may be said to arise upon a denied motion for summary judgment, a motion into which the circuit court could have converted Traders Bank's 12(b) motion to dismiss.

II. INTRODUCTION

In this case a commercial borrower is seeking to prevent a foreclosure on commercial real estate securing a promissory note (“Note”) by alleging that the lender fraudulently induced him to enter into the Note by making an oral promise for the benefit of a third party then failing to fulfill it. Sherman Dils, III (“Mr. Dils”) et al. (“the Dils”) seek to avoid their obligations to Traders Bank (“Traders”) on a \$1,110,000.00 Note, the purpose of which was to secure a suddenly-discovered, serious out-of-trust deficiency (missing cars and/or proceeds from the sale of cars) in a floor plan financing arrangement (“Floor Plan”) between Traders and St. Marys Ford-Mercury, Inc., an automobile dealership (“Dealership”) owned by Mr. Dils’ son, Brett.² Though Mr. Dils executed the Note to relieve the out-of-trust situation, all loan documents are between Traders and the Dils; none of the documents refer to Brett, the Dealership, or the Floor Plan. Traders asserts that the certified question should be answered in the negative and the Dils’ Counterclaim dismissed because:

- Mr. Dils may not circumvent contract law and the integration clause in the promissory note he signed by asserting new oral terms under a fraudulent inducement theory;
- the fraud alleged by the Dils is not actionable or plead with the requisite particularity; and
- Mr. Dils does not have standing to assert breach of an alleged oral promise benefitting solely his son’s Dealership.

² Mr. Dils signed the promissory note, and he and the other Appellees executed deeds of trust on real estate that secured the note.

III. STATEMENT OF FACTS

Traders Bank (“Traders”), incorporated in 1903, has its principal offices in Spencer, West Virginia. Appellees Sherman Dils, III (“Mr. Dils”) and Pamela Dils reside in Wood County, West Virginia, which is the principal office location of Appellee Dils Rental, Inc., a West Virginia corporation (“the Dils”).

In November 1999, the Dils’ son Sherman Dils, IV (“Brett”), as owner of the now-defunct St. Marys Ford-Mercury, Inc. (“Dealership”), entered into a \$2 million floor plan financing agreement (“Floor Plan”) with Traders for the financing of new motor vehicles. The new motor vehicles purchased from the manufacturer provided the collateral under the agreement. In March of 2002, the Floor Plan was modified, whereby \$500,000.00 was reserved for the financing of a Dodge line of cars in a second location.

Traders discovered in January of 2004 that the Dealership was in severe default. It had sold vehicles financed under the Floor Plan but had not paid Traders, which was a blatant violation of the Floor Plan’s terms (requiring payment within two days). The result was the disappearance of inventory and proceeds valued at \$1,110,000.00 – known in floor plan financing as being “out of trust.”

By the time Mr. Dils got involved, Traders was aware that Brett had tried to cover up the out-of-trust situation by providing fraudulently altered sales contracts to Traders during its investigation. (*See* Patrick G. Fink Affidavit, Ex. C to Mem. Supp. Traders’ Mot. to Dismiss & Mot. for Summ. J.) The dates of those contracts (Motor Vehicle Purchase Agreements) reflected that payment was not yet due on the missing vehicles, when in fact the purchasers (state agencies and local governments) had paid for the

vehicles months before. (*See id.*) When Traders found out that the sales contract dates had been altered, it took immediate action to protect its unsecured interests, placing the Dealership on finance hold and demanding that it make the bank whole.³

Mr. Dils stepped into this situation to cover the Dealership and protect his son, ultimately executing a short term (six month) Commercial Variable Rate Promissory Note (“Note”) payable to Traders in the amount of \$1,110,000.00. (*See Promissory Note, Ex. E to Mem. Supp. Traders’ Mot. to Dismiss & Mot. for Summ. J.*) The Note, dated February 19, 2004, was secured by Deeds of Trust on real estate. (*See Deeds of Trust, id. at Exs. F, G, & H.*) The Dils have verified that the Note was executed for the benefit of the Dealership without any expectation of repayment to Mr. Dils by Brett.⁴ (*See Answer to Interrog. 25, id. at Ex. A.*) They further deny any ownership interest or involvement in the day-to-day operations of the Dealership. (*See Resps. to Reqs. for Admis. 2, 3, 5, 8, 9, & 12, Ex. D to Mem. Supp. Traders’ Mot. to Dismiss & for Summ. J., and Answers to Interrog. 3, 7 8, 9, & 22 and Resps. to Reqs. for Produc. of Docs. 7 & 8, id. at Ex. A.*)

³ When asked to produce documentation for missing vehicles at the Dealership, Brett submitted altered sales contracts indicating that sales of certain vehicles had occurred in January of 2004, when in fact those vehicles had been sold in the middle of 2003 and the Dealership had kept the funds from the sales without proper payment to Traders Bank. (*See Patrick G. Fink Affidavit, Ex. C to Mem. Supp. Traders’ Mot. to Dismiss & Mot. for Summ. J.*)

⁴ Asked to describe any agreement in which Brett Dils, St. Marys Ford-Mercury, Inc., or any other person or entity promised to provide anything to him in exchange for his entering into the Promissory Note, Mr. Dils answered, “None. Defendant believed that, [sic] once the floor plan was reinstated, the out of trust situation would be corrected and St. Mary’s [sic] Ford would have sufficient capital to continue to operate, paying its debts on a timely basis, and Defendant would eventually be released from the Promissory note.” (Sherman Dils, III’s Answer to Interrog. 25, Ex. A to Mem. Supp. Traders’ Mot. to Dismiss & Mot. for Summ. J.)

After the Note was written, Traders partially reactivated the Floor Plan, sending letters to Ford and Dodge in early March of 2004 informing them of the amounts of credit it was then making available, \$350,000.00 and \$300,000.00 respectively. (See March 2004 Letters, Exs. 8 & 9 to Defs.' Resp. to Traders' Mot. for Relief from Order, Alternative Mot. to Certify Question, & Mot. to Stay Disc.) Though Traders had every right to discontinue the Floor Plan immediately upon discovery of the Dealership's fraud, it did not, and its generosity allowed the Dealership to continue to operate while seeking floor plan financing elsewhere. To be sure, however, in light of the unexplained disappearance of more than \$1 million worth of cars, the bank monitored the Dealership's accounts with a microscope from that point forward. (See Fink Affidavit, Ex. C to Mem. Supp. Traders' Mot. to Dismiss & Mot. for Summ. J.)

Traders pressed the Dealership to obtain floor plan financing from another bank, and Brett repeatedly assured Traders that he was working on it. Meanwhile, Mr. Dils' Note came due, with interest-only payments having been made from March through August of 2004. On September 9, 2004, the Dils sold a parcel of real property under one of the Deeds of Trust and voluntarily paid the net proceeds (\$245,000.00) to Traders, in partial payment of the principal owed under the Note. They subsequently (on November 12, 2004) sold a second parcel, again paying the proceeds (\$200,000.00) to Traders. In the end, Traders extended the maturity date on Mr. Dils Note no fewer than seven times, not calling the Note finally due and payable until April 21, 2005. (See Loan Modifications/Renewal Agreements, *id.* at Ex. J.) The last payment made, which was interest only, was made on April 25, 2005. (See Aff. of Jokima Spears, *id.* at Ex. M.)

Neither at the time of payments nor at the time of renewals did Mr. Dils assert that Traders had failed to keep any oral promise to anyone.

As Brett's Dealership continued to spiral downward, Brett resorted to using bad checks to purchase vehicles from other dealerships. (*See* Countercl., ¶ 25-27.) The Dealership's business activities ended in May of 2005, when the West Virginia Department of Motor Vehicles took away its temporary tags following customer complaints that they were not receiving their titles. Brett was by then again out of trust with Traders, which ultimately lost another \$428,000.00 plus on the Floor Plan. (*See* Fink Aff., Ex. C to Mem. Supp. Traders' Mot. to Dismiss & for Summ. J.)

In December of 2005, Traders took steps to advertise a sale of the remaining real estate securing Mr. Dils' Note. The Dils reacted by seeking a restraining order, which they obtained *ex parte* in Wood County, causing Traders to institute the underlying civil action in Roane County. (*See* Mot. for Award of TRO, *id.* at Ex. K.) Not only was there never any mention of a "fraudulently inducing promise" until the Dils sought their injunction, Mr. Dils admits that over two years he never made a written complaint to Traders about the now-alleged misrepresentation (Ans. to Interrog. 20, *id.* at Ex. A), and during that time he clearly affirmed the Note by paying interest and making large payments against principal on two occasions (*see* Countercl., ¶ 18). The Note was the Note – until the Dealership failed, Traders Bank finally called for payment in full of the

Note, and Mr. Dils learned that Brett would be criminally charged for his illegal activities in the Dealership's business.⁵

To prevent foreclosure, Mr. Dils now claims that representatives of Traders orally promised him that it would reinstate the Dealership's Floor Plan in the amount of \$1.5 million if Mr. Dils would sign the Note securing the out-of-trust amount. (Countercl., ¶ 8.) He alleges that he signed the Note and Deeds of Trust in reliance on this unwritten side promise made by Traders. (*Id.* at ¶¶ 9 & 12.) Mr. Dils further alleges that Traders "failed and refused" to reinstate the Floor Plan of the Dealership to \$1.5 million and informed Brett that the amount of credit available to him was substantially less than that. (*Id.* at ¶¶ 10 & 12.) Finally, Mr. Dils claims that Traders "knew or should have known at the time it made the alleged promise that it would be unwilling or unable to reinstate the Floor Plan with the Dealership to the amount of \$1.5 million." (*Id.* at ¶ 11.)

Traders denies that any bank representative ever promised Mr. Dils, Brett, or anyone at the Dealership that the Floor Plan would be reinstated to the \$1.5 million level if Mr. Dils would "cover" the \$1,110,000.00 his son had embezzled. The present civil action, born of Mr. Dils' attempt to prevent foreclosure, has artificially extended his already much lengthened repayment schedule another four years. The fraudulent inducement claim is an additional mechanism by which Mr. Dils seeks to excuse, diminish, or at the very least, delay payment.

⁵ Brett was charged with one count of mail fraud in February of 2006, in violation of 18 U.S.C. §1341, and pled guilty in September of 2006.

The Dealership went defunct fourteen months after Mr. Dils signed the Note. After having sold two parcels of property in order to pay it down, Mr. Dils refused to make additional payments. But only after Brett was indicted by federal authorities did Mr. Dils assert that Traders had breached an alleged oral promise to reinstate “in full” (rather than only partially) the Dealership’s Floor Plan, asserting the alleged breach in an Answer and Counterclaim designed to avoid the Note. He further seeks reimbursement of payments made following sales of loan collateral, consequential damages (reimbursement for covering bad checks written by Brett in order to keep Brett out of jail), and “exemplary damages . . . sufficient to punish Traders Bank for its willful misconduct.” (*See Counterclaim, p. 11.*)

In September of 2008, Traders moved pursuant to Rule 56 of the West Virginia Rules of Civil Procedure for summary judgment on its claim that Mr. Dils had defaulted on a Promissory Note and was in breach of contract and, under Rule 12(b)(6), sought dismissal of the Counterclaim based on the Dils’ lack of standing to assert it. The Circuit Court of Roane County denied both motions, finding with respect to the latter that the Dils could pursue a fraudulent inducement claim against Traders, even where the alleged inducement was for the benefit of a third party. Asked to reconsider, the circuit court granted Traders *Motion to Certify Question*, answering a question framed by the Dils and allowing the fraud claim they are attempting to pursue.

IV. CERTIFIED QUESTION AND RELIEF REQUESTED

Question Presented: Where a plaintiff lender seeks to recover a debt on a promissory note, does the maker of the promissory note have standing to assert, as a defense and counterclaim, a tort claim of fraud in the inducement, on the basis that the maker relied upon the oral promise of the lender (that the lender knew or should have known would not be fulfilled), where the lender claims that it is relevant that the promise was made for the benefit of a third party, but where the counterclaimant asserts that it is the deceit by false promise, not the nature of the promise, which gives rise to standing in a tort claim of fraudulent inducement?

Answer of the Lower Court: Yes.

(Order of Certification at p. 2.)

Traders asserts that the Circuit Court of Roane County erred by answering the certified question in the affirmative where the pleadings and evidence at the time of decision indicated that the alleged oral promise was made for the benefit of a third party, donee beneficiary. Traders also asserts that the law should not permit the counterclaimant, the debtor on a promissory note, to assert a tort claim of fraudulent inducement in an attempt to avoid or delay his obligations under the Note. The larger question presented is this:

May a sophisticated borrower avoid contractual obligations undertaken by him by alleging a new oral term to the contract, which term benefitted solely an unrelated third party, and calling the non-fulfillment of that term a fraudulent inducement?

As the United States Court of Appeals for the Fourth Circuit recognized in *White v. National Steel Corporation*, 938 F.2d 474 (1991), construing West Virginia law: “We must be careful to distinguish between actual fraud and artfully pleaded breach of contract claims[.]” Indeed, based on this Court’s precedent, the United States District Court for the Southern District of West Virginia recently found that a fraud claim raised in *Bluestone Coal Corporation v. CNX Land Resources, Inc.*, 2007 W.L. 6641647 (S.D. W. Va. 2007) (Mem. Op. & Order) (construing West Virginia law) was nothing more than “a thinly veiled recasting of [a] breach of contract claim as a tort” and consequently dismissed it. That is precisely what the Dils offer below. Traders asks this Court, as a matter of law and of public policy, to put a stop to their machinations so this simple breach of contract matter may be resolved. Traders respectfully requests that this Honorable Court answer the certified question “no.”

V. STANDARD OF REVIEW

The standard of review for questions of law answered and certified by a circuit court is *de novo*. Syl. Pt. 1, *Williamson v. Greene*, 200 W. Va. 421, 490 S.E.2d 23 (1997). This Honorable Court may reformulate a certified question in order to fully address the law involved in the question. See Syl. Pt. 3, *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993).

VI. DISCUSSION OF LAW

A. PREFACE

When the circuit court considered Traders' motion to dismiss, Mr. Dils had admitted that there were no agreements, oral or written, between him and the Dealership relating to the Note. Asked to describe any agreement in which Brett Dils, St. Marys Ford-Mercury, Inc., or any other person or entity promised to provide anything to him in exchange for his entering into the Promissory Note, Mr. Dils answered, "None. Defendant believed that, [sic] once the floor plan was reinstated, the out of trust situation would be corrected and St. Mary's [sic] Ford would have sufficient capital to continue to operate, paying its debts on a timely basis, and Defendant would eventually be released from the Promissory Note." (Sherman Dils, III's Answer to Interrog. 25, Ex. A to Mem. Supp. Traders' Mot. to Dismiss & Mot. for Summ. J.; *see also* Resp. to Req. for Produc. 1 & 2, *id.*)

In pleadings filed in this Court, Mr. Dils' lawyers have attempted to modify that answer, given under oath per Rule 33, by simply stating that Mr. Dils was relying on Dealership business to generate sufficient profits to repay him – despite the fact that the Dealership undertook no obligation to do so. (*See* Resp. of Resp'ts Sherman Dils, III, Pamela Dils and Dils Rental, Inc. to Traders Bank's Pet. for Review of Certified Question, pp. 7 & 8, 23 (emphasis added).) Mr. Dils' lawyers cannot change the sworn facts by statements in a brief. Mr. Dils denies that the Dealership was obligated to repay him and that he held any interest in the Dealership's business, yet he still asserts that he

was damaged because of the alleged breach of oral promise by Traders. (*See* Answers to Interrogs. 3, 7-9, & 22, Ex. A to Mem. Supp. Traders' Mot. to Dismiss & Mot. for Summ. J.) This Court should not countenance these inconsistent positions.

The certified question is based on Traders' assertion that a lender's failure to perform an alleged oral promise to a third party, donee beneficiary cannot excuse repayment under the unambiguous terms of a note. Since Traders submitted its Petition, Mr. Dils' lawyers for the first time have indicated his "expectation" of repayment by the third party beneficiary Dealership. They thus seek to convert the Dealership into a "creditor beneficiary," which they cannot do simply by saying something in a brief. Nevertheless, the larger question presented is the extent to which a borrower in default may put a lender through the paces of discovery simply by stating that it was induced to enter into a written contract by an oral promise unfulfilled.

Appellees (Counterclaim Plaintiffs below) want this to be a tort case. In reality, this case presents the intersection of two business contracts, the Note and a Floor Plan. Regarding the Note, Mr. Dils wants to show that Traders agreed, as part of the Note, to fully reinstate his son's Dealership's Floor Plan upon application of loan proceeds to amounts overdue under the Floor Plan. Because contract law (and the integration clause in the Note signed by Mr. Dils) limits Mr. Dils' ability to prove that an additional, unwritten obligation was part of the contract, he has creatively converted the alleged unwritten contractual obligation into an alleged oral fraudulent inducement, improperly expanding the universe of both admissible evidence and recoverable damages, including punitive damages. At base, Traders denies that it made any such promise. But because

this Court must assume that the Dils' allegations are true, all argument Traders presents herein assumes an alleged oral promise was made.

Allowing the Dils to circumvent the law of contract (e.g., the parol evidence rule) by pleading in tort would create precedent that seriously dilutes the ability of contracting parties in West Virginia to define in writing the extent of their obligations. Every potential contract would immediately become a riskier proposition. If anyone can avoid a contract after formation simply by importing into it, with a fraudulent inducement claim, an unfulfilled oral term, then any contractual certainty existing in West Virginia will become uncertain. The Dils' theory provides an easy "out" for, or at least a costly delay in the enforcement of, any contract.

B. IF FULL REINSTATEMENT OF THE DEALERSHIP'S FLOOR PLAN WAS CONTEMPLATED AS A MATERIAL TERM OF THE NOTE, THAT TERM WOULD HAVE BEEN PUT IN WRITING.

Mr. Dils represents that he is a sophisticated businessman and experienced car dealership owner. (Resp. of Resp'ts Sherman Dils, III, Pamela Dils, and Dils Rentals, Inc. to Traders Bank's Pet. for Review of Certified Question, p. 7, fn. 9.) Sophisticated and experienced business people define obligations relating to a million dollars in writing. If the alleged promise to fully reinstate the Dealership's Floor Plan was contemplated as a material term at the time the Note was negotiated, an experienced businessman would have included it in the Note or a written addendum. Mr. Dils made no such demand.

Further, the Note signed by Mr. Dils contains an “integration” or “merger” clause, which provides:

11. MISCELLANEOUS. . . . This Note represents the complete and integrated understanding between Borrower and Lender regarding the items hereof.

(See Promissory Note, Ex. E to Mem. Supp. Traders’ Mot. to Dismiss & Mot. for Summ. J., ¶ 11.) This merger clause indicates that the Note represents the parties’ complete and final agreement and that it supersedes all informal understandings and oral agreements relating to the agreement’s subject matter and forecloses exactly what the Dils are trying to do. See *Frederick Business Properties Co. v. Peoples Drug Stores, Inc.*, 191 W. Va. 235, 240, 445 S.E.2d 176, 181 (1994) (citing *Peoples Service Drug Stores v. Mayfair*, 50 N.C.App. 442, 274 S.E.2d 365 (1981)) (finding that when a contract contains an integration clause, it is interpreted to be “evidence of the intention of the parties . . . that [the terms appearing in the contract] constitute their entire agreement, and that conflicting oral agreements should not be allowed to vary its terms.”). Mr. Dils, who has been in business in the Parkersburg area for many years, understood the import of a merger clause.

The law prefers written contracts because the writing process forces the parties to think about what they are undertaking and encourages them to create more complete and thorough agreements. Moreover, a writing is harder to dispute. Sophisticated parties like Mr. Dils do not allow material terms of agreements to go unwritten, especially where a million dollars is involved. Given this strong presumption, Mr. Dils cannot be permitted to raise in tort an alleged oral promise unfulfilled as an excuse for avoiding a contract.

“[W]here a writing appears to be a complete contract, embracing all the particulars necessary to make a perfect agreement and designed to express the whole arrangement between the parties, it is conclusively presumed to embrace the entire contract and all the terms and provisions of the agreement.” *Wood County Airport Authority v. Crown Airways, Inc.*, 919 F. Supp. 960, 965 (S.D. W. Va. 1996) (citing *Kelley, Gidley Blair & Wolfe, Inc. v. City of Parkersburg*, 190 W. Va. 406, 438 S.E.2d 586, 589 (1993)).

C. PERMITTING THE DILS TO AVOID CONTRACTUAL OBLIGATIONS BY ALLEGING THAT AN ORAL PROMISE UNFULFILLED AMOUNTS TO A FRAUDULENT MISREPRESENTATION WOULD BE CONTRARY TO THE STRONG PUBLIC POLICY OF THIS STATE.

According to Black’s Law Dictionary, a contract is “[an] agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.” Black’s Law Dictionary, 318 (7th ed. 1999). A promissory note is “[a]n unconditional written promise, signed by the maker, to pay absolutely and in any event a certain sum of money either to, or to the order of, the bearer or a designated person.” Black’s, 1086. People enter into contracts both general and specific to define obligations and limit risk. They expect their contracts to be governed by contract law rather than tort law. A promissory note is one of the most straightforward and longstanding forms of contract.

Contract law arises “out of the attempt by private individuals to order relationships among themselves.” *Strum v. Exxon Company, USA*, 15 F.3d 327, 330 (4th Cir. 1993). By contrast, tort law emerges from duties people owe “generally to other members of society.” *Id.* When contractual relationships go awry, parties expect to be compensated

– or to have to pay – only actual loss, *see id.*, à la *Hadley v. Baxendale*, 9 Exch. 341 (1854). By contrast, under tort law principles, aggrieved parties may not only be compensated, they may seek to have the tortfeasor punished. *See id.* For this reason, courts should not allow parties to convert what are, at base, breach of contract claims into tort claims, thus using the murkiness of the latter to avoid the clarity of the former.⁶

Allowing tort law principles of punishment to be imported easily into contracts would undermine parties' abilities to minimize future risks. *See id.* at 330. It would allow borrowers in default to put lenders through the paces of disruptive and expensive discovery simply by saying that they were induced to take out a loan by an oral representation the lender made but then failed to carry out. Allowing parties, especially sophisticated businesspeople, to circumvent rules of contract (e.g., the parol evidence rule) simply by pleading an alleged oral promise unfulfilled and calling it a tort would seriously disrupt the ability of all parties to enforce contracts in West Virginia, suddenly making every contract-to-be a much riskier proposition. The Dils' theory provides an easy "out" for, or at least a costly delay in the enforcement of, any contract. Such a result is against the public policy of this and every state.

Accordingly, Traders urges this Honorable Court to see through the Dils' attempt to disguise a contract claim as though it were a claim in tort.

⁶ North Carolina, for example, "in order to keep open-ended tort damages from distorting contractual relations," recognizes "independent torts" arising out of breach of contract only in "carefully circumscribed" circumstances. *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998) (citing *Strum*, 15 F.3d at 330-31).

D. THE DILS DO NOT EVEN PLEAD ACTIONABLE FRAUD.

1. ASSUMING ARGUENDO THAT AN ORAL PROMISE WAS MADE, THE DILS DO NOT CLAIM THAT WHEN IT MADE THE PROMISE, TRADERS HAD NO INTENTION OF PERFORMING.

This Honorable Court's decision in *Love v. Teter*, 24 W. Va. 741 (1884) sets out the widely-held, general rule that while "[i]n morals the failure to perform a promise may be without excuse or justification[,] in law false representations to authorize the rescission of a contract must be made in regard to existing facts." *Jannsen v. Carolina Lumber Co.*, 137 W. Va. 561, 571, 73 S.E.2d 12, 17 (1952) (citing *Teter* and its counterparts in Virginia, Arkansas, Connecticut, Kentucky, Massachusetts, and New York). While the Court has had occasion since *Jannsen* to discuss a party's ability to rescind a contract based on false representations,⁷ it has not yet ruled on a case in which the question arises before "extensive discovery," see *Croston*, infra. fn. 7, has taken place.

The to-be-narrowly construed exception⁸ to the general rule of *Teter* has been stated various ways: "Where it is shown that no intention to keep the promise existed at the time the promise was made, the bar against promissory statements constituting fraud

⁷ See *Croston v. Emax Oil Co.*, 195 W. Va. 86, 90, 464 S.E.2d 728, 732 (1995) (finding ground upon which fraud claim predicated a statement of opinion relating to a future event and that the evidence did not support that defendant did not intend to carry out representation at time contract negotiated).

⁸ See e.g., *State v. Harris*, 207 W. Va. 275, 531 S.E.2d 340 (2000) (narrowly construing exception to evidentiary rules); *Calabrese v. City of Charleston*, 204 W. Va. 650, 515 S.E.2d 814 (1999) (narrowly construing exception to statute); *Persinger v. Peabody Coal Co.*, 474 S.E.2d 887 (1996) (narrowly construing a common law exception to cause of action created by statute).

is lifted.” *Bluestone Coal Corporation v. CNX Land Resources, Inc.*, 2007 W.L. 6641647 at *5 (S.D. W. Va. 2007) (citing *Dyke v. Alleman*, 130 W. Va. 519, 44 S.E.2d 587 (1947)). One may proceed with a fraud claim where a transaction occurred “in reliance on a promise the promisor did not intend to keep at the time of swearing,” *id.* (citing *Dyke*), where “the fraudulent promise . . . was the device used to accomplish the fraud,” *id.* (citing *Davis v. Alford*, 113 W. Va. 30, 166 S.E. 701 (1932)). Appellees the Dils, Counterclaim Plaintiffs below, allege only that “[a]t the time [the alleged misrepresentation was made], Traders Bank knew or should have known that it would be unwilling or unable to reinstate the Floor Plan Agreement with the Dealership in the amount of \$1,500,000.00.” Countercl. ¶ 11 (emphasis added). Again, even assuming *arguendo* that there was a promise, this is not an allegation of facts indicating a present intent to deceive. This is not an allegation of fraud.

“Fraud cannot be predicated on statements which are promissory in their nature, or constitute expressions of intention, and an actionable representation cannot consist of mere broken promises, unfulfilled predictions of expectations, or erroneous conjectures as to future events” *Jannsen*, 137 W. Va. 561, 571, 73 S.E.2d 12, 17 (quoting C.J.S. Fraud § 11). “[T]he existence of fraud is not deducible from facts and circumstances which would be equally consistent with honest intentions.” *Steele v. Steele*, 295 F. Supp. 1266, 1269 (S.D. W. Va. 1969) (citation omitted).

The Dils have not pled facts sufficient to state a fraud claim. Any misunderstandings that may have occurred during negotiation of the Note do not rise to the level of fraud. The issue of the Dealership’s Floor Plan availability may have been

“under-discussed,” and people may have left conversations and meetings with differing impressions of what was going to occur; but that does not rise to the level of fraud. Traders’ loan officer could have implied, suggested, or even stated outright that Mr. Dils’ covering of the Dealership’s out-of-trust situation would return the Dealership to full credit-line availability,⁹ but even that does not rise to the level of fraud.

The Dils do not claim and have no basis to claim that Traders promised to reinstate the Dealership’s full Floor Plan and, at the same time, had no present intention of performing that promise (e.g., that it was simultaneously doing something inconsistent with the promise), intending with a misrepresentation to deceive the Dils for its own purposes. *See Leake v. Sunbelt Ltd. of Raleigh*, 93 N.C. App. 199, 204-05, 377 S.E.2d 285, 289, *disc. review den.*, 324 N.C. 578, 381 S.E.2d 774 (1989) (finding that fraud claim based on alleged misrepresentation that recreational facilities would be built for townhouse purchasers was not pleaded with sufficient particularity and stating that when “a promissory misrepresentation is made with an intent to deceive the purchaser and at the time of making the misrepresentation the defendant has no intention of performing his promise, fraud may be found.”).¹⁰ What Mr. Dils is really complaining about is Traders’

⁹ At the same time it discovered the Dealership was out of trust, Traders Bank discovered that the loan officer in charge of the Dealership’s floor plan was not conducting floor plan checks in person but was calling the Dealership and asking it whether Traders Bank’s collateral was on the lot. The loan officer was fired for that failure (though his employment continued through negotiation of the Note).

¹⁰ *See also White v. National Steel Corporation*, 938 F.2d 474 (4th Cir. 1991) (ruling that summary judgment should have been granted on plaintiffs’ state law claims for fraud relating to alleged oral employment contracts); *Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 256 Va. 553, 559-60, 507 S.E.2d 344 (1998) (affirming summary judgment dismissing fraud claim based on contractor’s alleged misrepresentations in construction documents and alleged physical

decision that it would not return full Floor Plan availability to the Dealership. If that decision was in breach of the Floor Plan, let the Dealership bring that claim. The Dils have nothing to do with the Dealership and no standing to argue this now.¹¹

By rendering a decision that the Dils cannot pursue a fraudulent inducement claim, this Court will safeguard the parol evidence rule and contractual integration clauses from the addition of new terms through a fraudulent inducement allegation. As quoted in *Richmond Metro*, fn. 8, *infra*:

If the cause of complaint be for an act of omission or non-feasance which, without proof of a contract to do what was left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists) then the action is founded upon contract, and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from that relationship, irrespective of the contract, to take due care, and the defendants are negligent, then the action is one of tort.

Oleyar v. Kerr, Trustee, 217 Va. 88, 90, 225 S.E.2d 398, 399-400 (1976) (quoting Burks, *Pleading and Practice* § 234 at 406 (4th ed. 1952)) (distinguishing between actions for tort and contract); *see also Silk v. Flat Top Const., Inc.*, 192 W. Va. 522, 526, 453 S.E.2d 356, 360 (1994) (determining in an insurance coverage case whether the underlying action was merely one of breach of contract or was a tort claim). This case is about a straightforward Note that the debtor now wants to avoid.

concealment of noncompliance with design criteria and observing that nothing in the record suggested that contractor did not intend to fulfill its contractual duties at the time it entered into the contract).

¹¹ Further, if that decision (expressed clearly in March of 2004) was in breach of a relied upon oral promise to Mr. Dils to do otherwise, the cry of “you lied to me” would have come right away, not when Traders sought to foreclose almost two years later.

2. THE DILS DO NOT STATE A CLAIM FOR FRAUD WITH SUFFICIENT PARTICULARITY.

Even if this Court were to find that Appellee's fraud claim can constitute a cause of action under West Virginia law, the Dils' failure to plead that claim with particularity is fatal. A pleading that includes a claim of fraud "requires more than the short, plain statement of the claim contemplated under Rule 8(a)(1)." *Highmark West Virginia, Inc. v. Jamie*, 221 W. Va. 487, 494, 655 S.E.2d 509, 515 (2007). "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Rule 9(b), W. Va. R. Civ. P.; *see also Kessel v. Leavitt*, 204 W. Va. 95, 132, 511 S.E.2d 720, 757 (1998), cert. denied, 525 U.S. 1142, 119 S.Ct. 1035, 143 L.Ed.2d 43 (1999) (fraud must be stated with particularity); Syl. Pt. 1, in part, *Hager v. Exxon Corporation*, 161 W. Va. 278, 241 S.E.2d 920 (1978) ("fraud or mistake must be alleged in the appropriate pleading with particularity and the failure to do so precludes the offer of proof thereof during the trial").

"[A] complaint which fails to specifically allege the time, place and nature of the fraud is subject to dismissal on a Rule 12(b)(6) motion." *Lipscomb Am., Inc. v. Reynolds*, 911 F.2d 970, 980 (4th Cir. 1990); *see also* 5 Wright & Miller, Federal Practice & Procedure, § 1297 at 590 (2d ed. 1990). The Dils do not plead the time, place, or contents of the allegedly false representation by Traders, nor do they identify the person who made the misrepresentation or what Traders stood to gain thereby.¹² Pleadings that

¹² Though the Court may not consider in reviewing the certified question anything the circuit court did not consider in answering the certified question, the discovery done to date, not surprisingly, has revealed no detail as to any of these seminal questions.

fail to meet the heightened pleading requirements for fraud are subject to dismissal under Rule 12(b)(6). See *Bluestone*, 2007 W.L. 6641647, *7-8 (dismissing claim against party who allegedly induced others to lie about company's intention to honor a contract, knowing the company did not intend to honor it, finding that heightened pleading requirements for fraud were not met); *Rouse v. Philip Morris, Inc.*, 2003 WL 22850072 (S.D. W. Va. 2003) (dismissing fraud claims against cigarette manufacturers for plaintiff's failure to identify in pleadings the substance of any misstatement made, the utterer of such misstatement, the time of utterance, and how it was communicated); *Baker v. Purdue Pharma, L.P.*, 2002 WL 34213424 (S.D. W. Va. 2002) (dismissing fraudulent misrepresentation claim against pharmacy for failure to allege in complaint time, place, and nature of alleged misrepresentation regarding safety of OxyContin).

E. THE FACTS OF *DAVIS* AND *DYKE*, THE FRAUDULENT INDUCEMENT CASES UPON WHICH THE DILS RELY, ARE DISTINGUISHABLE FROM THE CASE AT BAR.

The Dils rely on *Davis v. Alford*, 113 W. Va. 30, 166 S.E. 701 (1932) and *Dyke v. Alleman*, 130 W. Va. 519, 44 S.E.2d 587 (1947) to argue that their tort claim of fraud in the inducement overrides the contract terms raised by Traders and implicated in the question certified, stating that the substance of Traders' alleged promise to the Mr. Dils is not relevant "because the promise was not in the contract . . . , but used as a means to

Without suggesting that discoverable facts will cure these omissions, Traders Bank points out that a legitimate purpose of Rule 9(b), besides protecting defendants from frivolous suits, is to "eliminate fraud actions in which all the facts are learned after discovery." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) (quoting *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia, Inc.*, 755 F. Supp. 1055, 1056-57 (S.D. Ga. 1990)).

induce . . . a contract” (Def.’s Resp. to Traders Bank’s Mo. to Dismiss & Mo. for Summ. J., pp. 25-26 (emphasis in original).) It is Traders’ position that substance is all that matters.

Davis involved a plaintiff who entered into an oral agreement with the defendant whereby the defendant was to purchase property on behalf of the plaintiff. *Davis*, 113 W. Va. at 31, 166 S.E. at 702. Plaintiff already owned an interest in the property with a business partner, but their relationship had become strained. *Id.* The property was being sold at a trustee’s sale because of a default of payment. *Id.* After making the purchase, the defendant was to convey the purchased property to the plaintiff, who would execute a new deed of trust. *Id.* Though the defendant made the purchase of the property at issue, he failed to convey it over to the plaintiff, who had put a great deal of money into the property just before the default. *Id.* A lawsuit followed.

This Court affirmed a jury verdict for the plaintiff, who had pursued a fraud claim, holding that an action would lie where a defendant had made a false promise without the intention of performing it in order to obtain an advantage at the plaintiff’s expense and the plaintiff had acted on the promise to his detriment. “Under the plaintiff’s evidence the jury was justified in the belief that the defendant caused financial loss to the plaintiff by making to him a promise upon which the plaintiff relied, and which the defendant did not intend to perform.” *Id.*

Davis differs from the instant case in three material respects. First, there existed no written contract between the plaintiff and the defendant into which the plaintiff attempted to import an ancillary, oral promise. Second, the subject matter of the alleged

broken oral promise did not also relate to an existing written contract that defined the relationship and obligations existing between the promisor and a third party for whose benefit the promise was made. Third, plaintiff did not have to overcome an integration clause¹³ that provided that the contract (which did not reflect the oral promise) contained the “complete and integrated understanding . . .” between the parties. In *Davis*, where all understandings were oral and there existed no written contract upon which the breach alleged could be measured, a fraudulent inducement claim permitted the plaintiff to recover for a harm he had suffered.

This Court’s other recognition of a fraudulent inducement claim is *Dyke*, 130 W. Va. 519, 44 S.E.2d 587. In *Dyke*, the plaintiff owed a sum of money to the defendant and, as payment for the debt, verbally agreed to sell his property to the defendant at a sale price reduced by the amount of the debt owed. *Id.* at 520-21, 44 S.E.2d at 590-91. However, the deed executed by the plaintiff and defendant failed to include an exception of the oil and gas rights and contained an erroneous description of the plaintiff’s interest in the land. *Id.* at 522, 44 S.E.2d at 590. The plaintiff brought suit alleging mutual mistake, or in the alternative, fraud on the part of the defendant. *Id.* The defendant successfully obtained dismissal of the complaint, and the plaintiff appealed. *Id.* at 520, 44 S.E.2d at 588-89. Reversing, this Court found that “if it should be established by proof that defendant agreed to pay six thousand dollars for the farm and had no intention of performing the promise, and plaintiff relied thereon, whereby defendant fraudulently

¹³ See *infra*, § VI.B.

procured the delivery of the deed, the rule in *Davis v. Alford* . . . would be applicable.”
Id. at 524, 44 S.E.2d at 590.

Dyke is like *Davis* in that there existed no written contract (with an integration clause) between the plaintiff and defendant into which the plaintiff attempted to import an ancillary, oral promise; and the subject matter of the alleged broken promise did not also involve the subject matter of another existing contract. The promise in *Dyke* was made by the promisor (defendant) to the promisee (plaintiff) for the sole benefit of the promisee, with no contracts existing in the background to define the duties and obligations of the parties. Further, in neither *Davis* nor *Dyke* was the fraudulent inducement claim raised as a defense to an alleged breach of contract or brought as a counterclaim. In *Dyke* and *Davis* the core dispute was about oral transactions; here the core dispute is about a written contract, the clear terms of which were never questioned until Traders finally went to court to enforce them.

F. THE CIRCUIT COURT INCORRECTLY HELD THAT A MAKER OF A PROMISSORY NOTE HAS STANDING TO SEEK TO AVOID THE NOTE BASED ON THE LENDER’S ALLEGED BREACH OF AN ORAL PROMISE MADE FOR THE BENEFIT OF A THIRD PARTY DONEE BENEFICIARY.

Although Mr. Dils now claims (in his Response to Traders’ Petition for Review) that he expected full repayment from the Dealership for signing the Note, the record upon which the circuit court answered the certified question establishes that no such expectation existed: Mr. Dils, as he had done numerous times before, simply wanted to bail out his son and his son’s failing business.

Assuming Traders did make an oral promise to restore the Dealership's Floor Plan to full availability in exchange for Mr. Dils securing the out-of-trust situation with the Note, such a promise would have been for the sole benefit of the Dealership, which undertook no obligation to pay Mr. Dils back and was therefore a donee beneficiary in the transaction. While under no obligation to do so, Mr. Dils signed the Note to secure the Dealership's \$1,100,000.00 out-of-trust obligation to Traders. As the promisee in the transaction (with Traders as the promisor and the Dealership as a donee beneficiary), Mr. Dils' only recourse for Traders' breach of a promise made to the Dealership under third-party beneficiary law would have been to seek specific performance of the alleged promise, which although presumably breached from March of 2004 forward, was never done. The Dils lack standing to recover damages for the alleged breach because they cannot rest a claim for relief on the legal rights or interests of the Dealership. Therefore, the circuit court lacks jurisdiction over the Counterclaim and it, as well as the Dils' corresponding "defense" to repayment of the Note, should properly be dismissed.

1. THE DILS DO NOT HAVE STANDING TO RECOVER DAMAGES ARISING OUT OF AN ALLEGED BROKEN ORAL PROMISE OF TRADERS TO THE DEALERSHIP.

Standing focuses on the appropriateness of a party bringing the questioned controversy to the court. It is defined as a party's right to make a legal claim or seek judicial enforcement of a duty or right. *Findley v. State Farm Mutual Auto. Ins. Co.*, 213 W. Va. 80, 94, 576 S.E.2d 807, 821 (2002) (quoting Black's Law Dictionary 1413 (7th ed. 1999)). This Honorable Court has defined standing this way:

Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an “injury-in-fact”—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

Id. at Syl. Pt. 5.

There are potentially two types of standing: a) first party standing, where a litigant asserts an alleged right unique to him or her; and b) third party standing, where a litigant seeks to assert the rights of a third party. *See Abraham Linc Corp. v. Bedell*, 216 W. Va. 99, 112, 602 S.E.2d 542, 555 (2004) (Davis, J., concurring).

West Virginia has a clear and long-standing precedent against third-party standing, barring litigants from asserting rights or legal interests of others in order to obtain relief from their own alleged injury. *Id.* (discussing *Kessel v. Leavitt*, 204 W. Va. 95, 118, 511 S.E.2d 720, 743 (1998), in which the Court held that one co-defendant lacked standing to raise another co-defendant’s personal jurisdiction objection). “One specific aspect of standing is that a person generally lacks standing to assert the rights of another.” *State ex rel. Leung v. Sanders*, 213 W. Va. 569, 578, 584 S.E.2d 203, 212 (2003). It is a well established rule that “a litigant may assert only his own legal rights and interests and cannot rest a claim to relief on the legal rights or interests of third parties.” *Abraham Linc Corp., infra*, 602 S.E.2d at 555 (citing *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153, 1163 (9th Cir. 2002)).

Courts are reluctant to “allow persons to claim standing to vindicate the rights of a third party on the grounds that third parties are generally the most effective advocates of their own rights and that such litigation will result in an unnecessary adjudication of rights which the holder either does not wish to assert or will be able to enjoy regardless of the outcome of the case.” *Id.* (citing *Snyder v. Callaghan*, 168 W. Va. 265, 279, 284 S.E.2d 241, 250 (1981)). The third party standing requirements that “must be established by a litigant seeking to assert the rights of a third party are: 1) the litigant must have suffered an injury in fact; 2) the litigant must have a close relation to the third party; and 3) there must exist some hindrance to the third party’s ability to protect his/her own rights.” *Id.* at 557 (citing *Powers v. Ohio*, 499 U.S. 400, 411 (1991); *Galbraith v. City of Medina Fire Dep’t.*, 2006 WL 2466199 *1 (Ohio Ct. App. 2006)).

To show that a litigant meets the first prong of the *Powers* test, “a party must be able to demonstrate that it has suffered or will suffer a specific injury traceable to the challenged action that is likely to be redressed if the court invalidates the action or inaction.” *Galbraith*, 2006 WL 2466199 at *2 (citing *In re Estate of York*, 133 Ohio App.3d 237, 241 (1999)). To establish the second prong, “a litigant must show that ‘the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, . . . [or] the relationship between the litigant and the third party [is] such that the former is fully, or very nearly, as effective a proponent of the right as the latter.’” *Abraham Linc Corp.*, 602 S.E.2d at 557 (citing *Singleton v. Wulff*, 428 U.S. 106, 114-15 (1976)). The third prong of the *Powers* test can be proven by showing that “there is some genuine obstacle to [the third party’s] assertion [of his rights].” *Id.*

The proposition that the Dils cannot obtain relief for injury allegedly suffered by the Dealership is directly in line with West Virginia's general standing principles. Using the definition of "first party standing" in *Abraham Linc Corp.*, the Dils must assert a right that is unique to them. Claiming that Traders fraudulently promised to restore the Dealership's Floor Plan to full availability is not a legal right unique to the Dils; it is not even their legal right at all. It is the right of the Dealership.

As stated in *Findley*, the Dils must have suffered an injury-in-fact by the complained of action, but the Dils suffered no actual injury at all. The complaint is that Traders did not increase the amount of credit available to the Dealership under the Floor Plan to the amount that existed before the out-of-trust, criminal breach occurred . . . that Traders did not allow its relationship with the Dealership to return to the *status quo ante* after Brett embezzled more than a million dollars. But the Note signed by Mr. Dils to help the Dealership was a gift, and the Dils have verified that they had no expectancy of repayment to them from Brett or the Dealership. The "injury," if there was one, was suffered by the Dealership, because it was the Dealership's Floor Plan that breach of the alleged "inducing" oral promise affected. Whether Traders restored or failed to restore the Floor Plan to full availability did not affect, much less cause injury to, Mr. Dils, Mrs. Dils, or Dils Rental, Inc., and for Mr. Dils to be permitted to recover amounts already paid or still payable on the Note as "injuries" would be a miscarriage of justice. The injured party here is Traders, from which Brett stole \$1.11 million, then another \$428,000.00, and now his dad wants to double up.

Further, the Dils do not have third party standing because they cannot meet all three prongs of the *Powers* test as required in West Virginia. As *Galbraith* explained the first standard, the Dils cannot demonstrate that they have suffered or will suffer any injury traceable to Traders' alleged "promise" or "failure" to restore the Floor Plan to its full amount of availability. The Dils have no legally recognized connection to the Floor Plan or to the Dealership. Even if the Dils have made and still owe payments on the Note, those are not the type of injuries contemplated in the first prong; the Dils must have suffered or stand to suffer an injury related to the alleged oral promise to reinstate the Floor Plan to full availability. The Dils promised to repay the Note – not the Dealership. The oral promise alleged is "personal" to the Dealership.

Second, the Dils cannot establish a "close relationship" with the Dealership, which was the party to the Floor Plan. They had no ownership rights, nor were they a creditor of the Dealership, and there was no contemplation that the Dealership or Brett would repay the Note amount to the Dils. In fact, the Dils have made every attempt to distance themselves from the Dealership rather than assert that they have some sort of privity with it. (*See* Resps. to Reqs. for Admis. 2, 3, 5, 8, 9, & 12, Ex. D to Mem. Supp. Traders' Mot. to Dismiss & for Summ. J., and Answers to Interrogs. 3, 7 8, 9, & 22 and Resps. to Reqs. for Produc. of Docs. 7 & 8, *id.* at Ex. A.)

Third, as *Abraham Linc Corp.* explains, the Dils are unable to establish any genuine obstacle preventing Brett and the Dealership from asserting a claim against Traders, if in fact there is one. Brett has had ample opportunity since February of 2004 (when it became apparent to him that the full line of credit had not been reinstated) to

seek performance of the alleged oral promise.¹⁴ Thus, the Dils fail to meet the third prong of the *Powers* test.

Mr. Dils adamantly denies having any connection to the Dealership, so restoration of the Floor Plan to full availability would have had no effect on him. Had Traders made and breached such a promise, the Dealership's inability to purchase new cars due to a lack of financing might have "damaged" it, but not the Dils. Accordingly, the Dils do not have first party standing or third party standing to assert a counterclaim for damages.

2. **EVEN IF THE DILS COULD SHOW THAT THEY HAVE STANDING TO BRING A CLAIM FOR THE BREACH, THEY NO LONGER HAVE ANY RECOURSE; SINCE THE DILS HAD NO ECONOMIC INTEREST IN THE PERFORMANCE OF THE ALLEGED PROMISE (RESTORATION OF THE FLOOR PLAN TO FULL AVAILABILITY), THEIR ONLY RECOURSE *WOULD HAVE BEEN* TO SEEK SPECIFIC PERFORMANCE OF THE ALLEGED PROMISE, WHICH WAS NOT DONE AND WHICH THE DEALERSHIP'S FAILURE MAKES IMPOSSIBLE.**

Third party beneficiaries of a contract are classified as either donee beneficiaries, creditor beneficiaries, or incidental beneficiaries. *Pettus v. Olga Coal Co.*, 137 W. Va. 492, 497, 72 S.E.2d 881, 884 (1952).¹⁵ A third party is a donee beneficiary if the promisee (Mr. Dils) obtained the promise of performance from the promisor (Traders) in order to make a gift to the beneficiary (the Dealership) or to confer upon the beneficiary a

¹⁴ A suit by the Dealership against Traders Bank on the alleged promise unfulfilled might properly have sought specific relief and/or damages.

¹⁵ A third party is a creditor beneficiary if no intention to make a gift appears from the promise and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary. *Pettus*, 72 S.E.2d at 884. A third party is an incidental beneficiary if the benefits to him are merely incidental to the performance of the promise and if he is neither a donee beneficiary nor a creditor beneficiary. *Id.*

right against the promisor to some performance neither due, nor supposed, nor asserted to be due from the promisee to the beneficiary. *Id.*

According to the Restatement, a promise in a contract creates a duty in the promisor to both the intended beneficiary and the promisee to perform the promise. Restatement (Second) Contracts § 305(1) (1981). As such, the promisee of a promise for the benefit of a beneficiary has the same right to performance as any other promisee. *Id.* at cmt. a; *see also Delaney v. Davis*, 81 S.W.3d 445, 449 (Tex. App. 2002) (emphasis added). However, the promisee cannot recover damages suffered by the beneficiary (though the promisee may sue for specific performance of the promisor's obligation). Restatement (Second) Contracts § 307 cmt. b (1981); *see Desco Corp. v. Harry W. Trushel Constr. Corp.*, 186 W. Va. 430, 434, 413 S.E.2d 85, 89 (1991) (plaintiff must prove damages by defendant's alleged breach to recover under contract); *see also In re Marriage of Smith & Maescher*, 26 Cal.Rptr.2d 133, 137 (Cal. App. 1993) (no recovery under breach of contract for promisee-mother who voluntarily paid donee-son for his college education without demonstrating legal obligation to pay if promisor-father did not).

The Restatement (Second) of Contracts § 307,¹⁶ comment d¹⁷ discusses the situation involving a gift promise. In particular, the “promisee may suffer no damages as

¹⁶ § 307. Remedy of Specific Enforcement. Where specific performance is otherwise an appropriate remedy, either the promisee or the beneficiary may maintain a suit for specific enforcement of a duty owed to an intended beneficiary. Restatement (Second) of Contracts § 307 (1981).

the result of breach by the promisor” where the promisee has no economic interest in the performance of the promise.¹⁸ “In such cases the promisee’s remedy in damages is not an adequate remedy . . . and specific performance may be appropriate.” *Id.*

Mr. Dils used the Note to try to get his son out of “hot water.” As promisee, he had no economic interest in the Floor Plan or the Dealership. (Mr. Dils was not a party to the Floor Plan, nor was he an owner of the Dealership.) The Dealership, as donee beneficiary, was under no legal obligation to reimburse Mr. Dils or to repay his Note. As a promisee in a contract for the benefit of a donee beneficiary, Mr. Dils could not have suffered any damages resulting from any alleged breach by Traders under the Note because he had no economic interest in reinstatement of the Floor Plan or the Dealership, for that matter. As a promisee, Mr. Dils’ sole remedy, if in fact a breach occurred, would have been for specific performance (i.e., reinstatement of the Floor Plan to the limits

¹⁷ d. Gift promise. Where the promisee intends to make a gift of the promised performance to the beneficiary, the beneficiary ordinarily has an economic interest in the performance but the promisee does not. Thus the promisee may suffer no damages as the result of breach by the promisor. In such cases the promisee’s remedy in damages is not an adequate remedy within the rules stated in §§ 359 and 360, and specific performance may be appropriate. *See* Illustration 1 to § 305. The court may of course so fashion its decree as to protect the interests of the promisee and beneficiary without unnecessary injury to the promisor or innocent third persons. *See* § 358.

¹⁸ Illustration 2 under comment d. is applicable to the instant case. It reads as follows:
2. As part of a separation agreement B promises his wife A not to change the provision in B’s will for C, their son. A dies and B changes his will to C’s detriment, adding also a provision that C will forfeit any bequest if he questions the change before any tribunal. A’s personal representative may sue for specific performance of B’s promise.

Substituting the parties in this illustration to the instant case demonstrates the applicability of the Restatement. As part of the Note, Traders (B) promises Mr. Dils (A) that it will reinstate the Floor Plan (“FP”) with Brett’s Dealership (C). Assuming Mr. Dils’ allegations as true, Traders (B) changes the FP with Brett’s Dealership (C) to the Dealership’s detriment by reducing the allowable amount under the FP. Mr. Dils (A) may sue for specific performance of Traders’ (B) promise to reinstate the FP to its original amount.

allegedly promised). Failing to sue for specific performance at the time of Traders' alleged breach and for the fourteen months that followed (even to assert a breach during that period), Mr. Dils waived his only remedy for the alleged breach. Of course, his failure to pursue this remedy, or in fact to ever even mention the alleged oral promise unfulfilled upon which it would have been based, simply underscores that it never existed to begin with.

VII. RELIEF REQUESTED

Traders Bank respectfully asks this Honorable Court to answer the certified question presented "no" and to rule that a party may not avoid a contractual obligation (1) by raising as a defense and/or counterclaim the tort of fraudulent inducement, with the substance of the allegation being a mere oral promise (i.e., a contract) unfulfilled, or (2) by asserting the breach of an oral promise made for the benefit of a third party, donee beneficiary. The Dils' Counterclaim and Defense based on the alleged oral promise are unsustainable as a matter of law and for reasons of efficiency should be dismissed/stricken based on this Court's review of and answer to the question certified.

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BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 35497

TRADERS BANK,

Appellant,

v.

**Circuit Court of Roane County
Civ. Action No. 06-C-1 N
(Honorable David W. Nibert, Judge)**

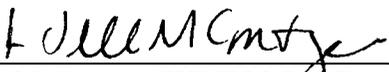
**SHERMAN DILS III,
PAMELA DILS, and
DILS RENTAL, INC.,**

Appellee.

CERTIFICATE OF SERVICE

I, L. Jill McIntyre, counsel for the Appellant, do hereby certify that a true and exact copy of the attached **Brief of Appellant upon Certified Question from the Circuit Court of Roane County** was served upon counsel for Appellee by United States mail, postage prepaid, this **7th day of April, 2010**, addressed as follows:

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