

12-1143

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

AIMEE NEELEY FIGGATT,

PLAINTIFF

V.

CIVIL ACTION NO. 10-C-930 (B)

GREEN TREE SERVICING, LLC,

DEFENDANT

**JUDGMENT ORDER**

On the 24<sup>th</sup> day of July, 2012 came the plaintiff, Aimee Figgatt ("Plaintiff") in person and by her counsel, Ralph C. Young, Esq. and Christopher B. Frost, Esq., and the defendant, Green Tree Servicing LLC ("Green Tree") by its corporate representative, Stewart Derrick, and its counsel, Nicholas P. Mooney, Esq. and Kimberly K. Parmier, Esq., to try the issues joined in a trial to the Court. Whereupon, after opening statements, witnesses were sworn, testimony was taken and the Court received certain exhibits into evidence. At the conclusion of the evidence, on July 25, 2012 counsel for the Plaintiff and Defendant each made their closing arguments and the Court retired to consider the verdict. On July 25, 2012, the Court returned its verdict and made the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. The parties stipulate that on December 9, 2000 the Plaintiff, under her former name of Aimee Adkins, signed a Note, Disclosure and Security Agreement and Agreement to Arbitrate for the purchase of a 1995 Belmont Home, model HT, serial number MSB951472SN20215. The parties further stipulate that Plaintiff's ex-husband, Robert Adkins, also signed the Loan, resulting in the account associated with the loan being in the name of Robert Adkins and Aimee Adkins.

2. The parties stipulate that the Plaintiff did not dispute the validity of the Loan.

3. The Court finds that the Plaintiff, while almost continuously delinquent, made payments on the loan on a fairly regular basis.

4. The Court finds that, while the Plaintiff refused to take most of the telephone calls placed to her by the Defendant, there was no evidence that she was hiding from the Defendant or had taken the home and absconded. The Court further finds that the evidence shows only that the Plaintiff did not want to talk to the Defendant.

5. It is not disputed that the Defendant attempted to place a total of 615 telephone calls to the Plaintiff over the course of approximately 44 months, from March 2007 through October 2010.

6. It is not disputed that the Defendant attempted to place a total of 20 telephone calls to third parties over that same 44 month period.

7. The Court finds that these 20 attempted contacts with third parties not obligated on the account were made at a time when the Defendant appeared to have a valid telephone number for the Plaintiff (though she was not answering its calls) and was receiving fairly regular (albeit, untimely) payments on the account.

8. While the Defendant presented testimony that these calls to third parties were for the purpose of obtaining additional contact information for the Plaintiff, the Court finds from the evidence that there was no legitimate intent behind the placement of these calls, but instead infers that the intent was to place additional pressure on the Plaintiff to pay the account.

9. It is not disputed that on December 16, 2009 the Plaintiff advised the Defendant during a telephone collection call that she was represented by attorney Ralph Young and provided the Defendant's collector with Mr. Young's correct telephone number. The Court further finds that, notwithstanding the fact that it appeared that the Plaintiff was represented by

an attorney and the attorney's name and address were known or could have been easily ascertained, a collector employed by the Defendant placed a telephone call to the Plaintiff on December 18, 2009 and the Plaintiff again provided the collector with her attorney's name and telephone number.

10. It is not disputed that the Defendant attempted to place a total of 28 telephone calls to the Plaintiff after December 16, 2009. The Defendant asserts that not all of these telephone calls were placed in an attempt to collect a debt. The Court, based upon its rulings, finds that it need not make a finding as to the purpose of each of the 28 telephone calls.

11. The Court finds that in May 2010, Defendant retained outside counsel and made 18 separate attempts to contact Mr. Young regarding his representation of the person or persons obligated on the account at issue. The Court further finds that every attempt to communicate attempted by the Defendant referenced the primary account holder, Robert Adkins, rather than the Plaintiff, Aimee Figgatt. Due to this confusion, Mr. Young could not confirm representation on the account and, in fact, denied representation of Robert Adkins.

12. The Court finds that the Defendant has in place West Virginia specific policies and procedures pertaining to the collection of accounts in this State. The Court further finds that the policies and procedures in evidence in this matter comport with West Virginia law relating to debt collection.

13. The Court finds that the evidence supports a conclusion that the Defendant has violated West Virginia law, and its own policies, regarding contact with debtors known to be represented by counsel, in cases involving other debtors.

## CONCLUSIONS OF LAW

1. It is not disputed that the Plaintiff, Amy Figgatt, is a person who falls under the protection of the *West Virginia Consumer Credit and Protection Act*.

2. It is not disputed that the Defendant, Green Tree Servicing LLC, is a debt collector as defined by *West Virginia Code* §46A-2-122(d) with respect to the account at issue in this litigation.

3. The Defendant argues that *West Virginia Code* §46A-2-128(e) is qualified by the general language of *West Virginia Code* §46A-2-128, and therefore prohibits only communications made in an attempt to collect a debt. The Court finds that *West Virginia Code* §46A-2-128(e) prohibits "any" communication with a debtor known to be represented by counsel, regardless of the nature of that communication.

4. The Court finds that the 28 telephone calls the Defendant attempted to place to the Plaintiff after it appeared the Plaintiff was represented by counsel are each separate violations of *West Virginia Code* §46A-2-128(e).

5. The Court finds that a creditor has a right to engage in the procedure generically referred to in the collection industry as "skip tracing" if an alleged debtor has in fact "skipped," disappeared, moved, relocated, or attempted to abscond with or conceal secured property. However, in this case, the Court has made a finding of fact that the attempted calls to third parties were not made with the legitimate intent to locate the Plaintiff, but were rather made with the intent to increase the pressure on the Plaintiff to pay on her loan. In this instance, the Court finds that the 20 attempted calls to third parties were oppressive and abusive attempts to collect a debt in violation of *West Virginia Code* §46A-2-125, and unfair or unconscionable means to collect a debt in violation of *West Virginia Code* §46A-2-128.

6. The Plaintiff asserted that the sheer volume of attempted calls placed to her (615 calls over a period of 44 months) constituted a violation of *West Virginia Code* §46A-2-125(d). The Court finds that the volume of calls established in this case (averaging about 14 calls per month), while annoying to a debtor, is not oppressive and thus, does not violate *West Virginia Code* §46A-2-125(d).

7. The Defendant invoked the defenses available under *West Virginia Code* §46A-5-101(8), with respect to the calls placed to Plaintiff after it appeared she was represented by counsel. That is, that the violations were “unintentional,” or “the result of a bona fide error of fact notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error....”

8. The Court finds that the calls to Plaintiff after December 16, 2009 were placed intentionally, in that they were not accidentally dialed, and thus the Defendant cannot avail itself of the defense that any violations of *West Virginia Code* §46A-2-128(e) were unintentional.

9. The Court finds that *West Virginia Code* §46A-5-101(8) requires that a creditor prove not only that such policies and procedures have been put into place, but also that there be shown regular maintenance and follow up on those procedures. The Court finds that, in this case, while the Defendant established that it did have policies and procedures in place to prevent calls after it appeared a debtor was represented by counsel, the Defendant did not establish that those procedures had been “maintained” as required by the statute.

10. The Court finds that the 28 telephone calls placed to the Plaintiff after it appeared that Plaintiff was represented by an attorney deserve the maximum statutory penalty provided by *West Virginia Code* §46A-5-101(1), as adjusted by inflation pursuant to *West Virginia Code* §46A-5-106, because the Defendant was clearly aware of the prohibition against such

communications and the evidence established that the Defendant had a pattern and practice of violating *West Virginia Code* §46A-2-128(e).

11. With respect to the 20 telephone calls placed to third parties, the Court also imposes the maximum statutory penalty available under *West Virginia Code* § 46A-5-101(1), as adjusted by inflation pursuant to the Consumer Price Index pursuant to *West Virginia Code* §46A-5-106, for each violation. The Court concludes that the degree of oppression brought about by the use of skip tracing in this instance when the Plaintiff has shown no inclination to hide or avoid the debt is totally without justification and this penalty is assessed to also deter further like conduct.

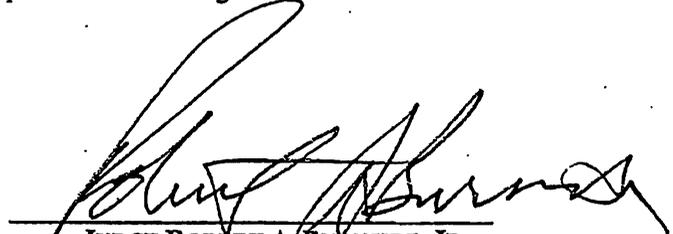
12. The maximum statutory penalty provided by *West Virginia Code* §46A-5-101(1) is \$1,000. *West Virginia Code* §46A-5-106 allows for the adjustment of such penalty for inflation pursuant to the Consumer Price Index (CPI) in effect on September 1, 1974 to the present. The CPI in effect on September 1, 1974 was 49.4. The most recent available CPI is for July 2012 and is 229.478. This creates an inflation multiplier of 4.64530. Thus, the total statutory penalty assessed in this case is 48 times \$4, 645.30 which equals \$222,974.40. However, since Plaintiff filed a stipulation at the time this action was filed limiting her damages to no more than \$75,000, the Court Orders a remittitur and Plaintiff is awarded judgment against the Defendant in the amount of \$75,000 with interest thereon at the statutory rate of 7% from July 25, 2012.

13. Although the Plaintiff has asserted claims for actual damages pursuant to *West Virginia Code* §46A-5-101(1) and her attorney fees and costs pursuant to *West Virginia Code* §46A-5-104 the Court concludes that such issues are rendered moot by the Plaintiff's self-imposed cap upon her damages.

The Defendant's objections and exceptions to the findings and conclusions are noted.

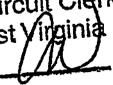
**ORDER:**

**ENTER:**

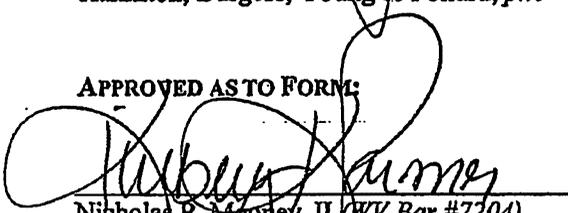
  
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JUDGE ROBERT A. BURNSIDE, JR.

**PREPARED BY:**

  
\_\_\_\_\_  
Ralph C. Young (WV Bar #4176)  
Hamilton, Burgess, Young & Pollard, pllc

The foregoing is a true copy of an order  
entered in this office on the 23 day  
of Aug, 2012.  
PAUL H. FLANAGAN, Circuit Clerk of  
Raleigh County, West Virginia  
By:   
Deputy

**APPROVED AS TO FORM:**

  
\_\_\_\_\_  
Nicholas P. Mooney, II (WV Bar #7204)  
Kimberly K. Farmer (WV Bar #9093)  
Spilman, Thomas & Battle, PLLC