

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GREEN TREE SERVICING, LLC,

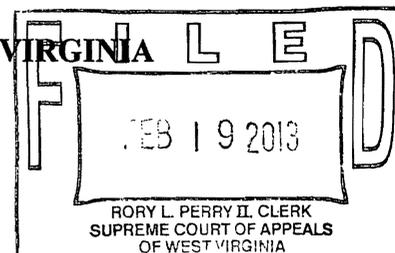
Defendant Below, Petitioner

v.

DOCKET NO. 12-1143

AIMEE NEELEY FIGGATT,

Plaintiff Below, Respondent



PETITIONER GREEN TREE SERVICING LLC's REPLY BRIEF

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I. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in declaring the entire arbitration provision void based upon the fact that certain types of claims, not even asserted in this matter, could not be heard by the specified forum.

2. The Circuit Court committed clear error in finding that claims brought under the West Virginia Consumer Credit and Protection Act, W. Va. Code §§ 46A-1-101 *et seq.* (“WVCCPA”), as well as claims for intentional infliction of emotional distress, negligence, and common law invasion of privacy, were not within the scope of the arbitration provision in the parties’ contract.

3. The Circuit Court erred by reading into the WVCCPA a prohibition against “skip tracing” except where a creditor can affirmatively prove that it had sufficient reason to believe that a debtor or its collateral were no longer within the jurisdiction.

4. The Circuit Court erred in interpreting section 46A-2-128(e) of the WVCCPA to prohibit “‘any’ communication with a debtor known to be represented by counsel[,]” regardless of that communication’s purpose.

5. The Circuit Court erred in interpreting the WVCCPA to require that a creditor must prove a telephone call was “accidentally dialed” in order to avail itself of the defense against liability for “unintentional” violations that is provided by section 46A-5-101(8) of the WVCCPA.

6. The Circuit Court erred in interpreting the word “maintain” to require that a creditor prove that it followed-up or tweaked its established (and compliant) West Virginia policies and procedures.

II. STATEMENT OF THE CASE

This appeal is about errors of law. Throughout her nine and a half page “Statement of the Case,” Figgatt questionably construes many facts in this case. Green Tree by no means agrees with all of her constructions. However, regardless of accuracy, most of Figgatt’s facts are red herrings that distract from the legal arguments at issue in this case. Figgatt contends that, based on the facts of this case, Green Tree would have to overturn each of the Circuit Court’s rulings in order to change the judgment entered below. (Resp.’s Br., 11.) Green Tree does not dispute the findings of fact made by the Circuit Court. (A.R. 3-5.) Instead, Green Tree argues that the Circuit Court misinterpreted the law. Whatever the facts of a case may be, every litigant is entitled to have the correct law applied to those facts. Green Tree was entitled to have the correct law applied to the facts of this case. Green Tree contends that the Circuit Court committed six errors of law. A favorable ruling by this Court on each of Green Tree’s six assignments of error would certainly alter the judgment below. It is from those errors that Green Tree appeals.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Figgatt contends that oral argument is unnecessary. In support of her position, Figgatt cites to two pending appeals in this Court raising similar, though not identical, errors of law regarding arbitration. She then dismisses the remaining grounds for appeal as attempts to appeal “amply-supported findings of fact.” (Resp.’s Br., 12.)

Green Tree believes that oral argument pursuant to West Virginia Rules of Appellate Procedure 20(a)(1), (a)(2), and (a)(3) remains necessary. The fact that two other arbitration appeals are currently set for hearing before this Court on April 10, 2013 underscores, rather than undermines, the fundamental issues of public importance pertaining to arbitration that are raised

by this appeal. The Tenth Judicial Circuit continues to struggle with applying this Court's unconscionability analysis, as articulated in *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011), *vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201, 182 L.Ed.2d 42 (2012). With the prevalence of arbitration agreements in consumer contracts, it is imperative that courts of this State know whether WVCCPA claims are outside the scope of a broad arbitration agreement. Likewise, following changes to the American Arbitration Associations' rules, it is increasingly at issue whether one party's inability to initiate arbitration of a hypothetical, unfiled claim in the arbitration forum referenced by the arbitration agreement renders that agreement unenforceable notwithstanding 9 U.S.C. § 5.

Not only are the arbitration issues in this appeal important, but this appeal raises four other legal issues of first impression in this state: (1) whether a creditor may skip trace an unresponsive debtor without confirmation that the debtor has disappeared or absconded with collateral; (2) whether section 2-128(e)'s prohibition against communications with a represented consumer is limited to those made to collect or attempt to collect any claim; (3) whether the WVCCPA's unintentional defense is limited to only those instances in which the physical act resulting in a violation of the WVCCPA is accidental; and (4) whether the WVCCPA's bona fide error defense imposes a maintenance requirement on creditors seeking to avail themselves of the defense. Green Tree is not asking this Court to set aside findings of fact, but rather to correct the interpretation of law on which the Circuit Court based its judgment. None of the criteria articulated in Revised Rule 18(a) that would obviate the need for oral argument is present, and oral argument, with a precedential decision, is appropriate under Revised Rule 20.

V. ARGUMENT

A. **Standard of Review.**

On appeal to this Court, “review of whether [an] [arbitration] [a]greement represents a valid and enforceable contract is *de novo*.” *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250, 267 n.12 (2011), *vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201, 182 L.Ed.2d 42 (2012) (quoting *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 772, 613 S.E.2d 914, 920 (2005)). Likewise, questions of statutory interpretation present “purely legal question[s] subject to *de novo* review.” Syl. pt. 1, *Fountain Place Cinema 8, LLC v. Morris*, 227 W. Va. 249, 707 S.E.2d 859 (2011). While Figgatt’s brief correctly states the standard by which this Court reviews a circuit court’s findings of fact, that standard is inapplicable to this appeal, which presents only questions pertaining to the enforceability of an arbitration agreement and questions of statutory interpretation.

B. **The Arbitration Agreement is valid and enforceable for Figgatt’s debt collection claims.**

Figgatt’s Response argues that the Circuit Court correctly refused to enforce the Arbitration Agreement because it was one-sided and Figgatt’s claims were outside its scope. This Court has repeatedly applied a two-part threshold inquiry for circuit courts to apply when ruling on a motion to compel arbitration: “(i) whether a valid arbitration agreement exists between the parties; and (ii) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement.” Syl. pt. 2 (in part), *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 251, 692 S.E.2d 293, 294 (2010). The Arbitration Agreement in this case is not one-sided, and Figgatt’s debt collection claims fall within the scope of the Arbitration Agreement.

1. The Arbitration Agreement is not one-sided.

In this case, the AAA remained willing to accept Figgatt's claims against Green Tree. The moratorium does not apply to all consumer claims. In fact, the only type of claim to which the moratorium applies are claims brought by creditors against consumers. In *Montgomery v. Applied Bank*, 848 F. Supp. 2d 609, 614 (S.D.W. Va. 2012), the United States District Court for the Southern District of West Virginia found that, because debt collection claims had not been alleged against a consumer, the AAA moratorium and the plaintiff's arguments regarding its one-sidedness were inapplicable to the facts of that case. *Id.* at 614. Figgatt dismisses this case as one where the "judge missed the mark" (Resp.'s Br., 13), but this is the only published case in West Virginia that has addressed the AAA moratorium's effect on a plaintiff's failure to arbitrate pursuant to an arbitration agreement involving the AAA. *Montgomery* is the mark: if the AAA is available to arbitrate the case at hand, then the unavailability of the AAA to arbitrate some other hypothetical claim is irrelevant.

In this case, the Arbitration Agreement requires arbitration pursuant to the "Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association" ("Arbitration Rules") in effect at the time arbitration is requested." (A.R. 47.) Green Tree, by motion, requested arbitration on November 22, 2010. One month earlier, on October 19, 2010, the AAA issued its "Notice on Consumer Debt Collection Arbitrations." See American Arbitration Association, Notice on Consumer Collection Arbitrations, available at <http://www.adr.org> (clicking "Areas of Expertise," then "Consumer" and opening "Notice on Consumer Collection Arbitrations" under "Documents") (last accessed on February 6, 2013). In that notice, the AAA clarified that its moratorium applied to "individual case filings in which the company is the filing party and the consumer has not agreed to arbitrate at the time of the

dispute, and the case involves . . . a consumer finance matter.” *Id.* The notice further clarifies that “[t]he AAA will continue to administer all demands for arbitration filed by consumers against businesses as well as all other types of consumer arbitrations.” *Id.*

The AAA is bilateral because in all but one instance the parties can arbitrate their claims in the AAA. There are four ways in which the Arbitration Agreement might come into play in this case. First, Figgatt might initiate a claim in arbitration against Green Tree, and this is allowed despite the moratorium. *See id.* Second, Figgatt might disregard the Arbitration Agreement, initiate a claim in the courts (such as here), and Green Tree would be entitled to compel that claim to arbitration. Figgatt would still be the filing party, so the AAA would accept her claim. *See id.* Third, Green Tree might likewise initiate a claim in court and Figgatt can compel that claim to arbitration. In that instance, the AAA will still accept that claim and administer it because Figgatt’s motion to compel would evidence her consent to arbitrate at the time of the dispute. *See id.* Fourth, Green Tree might initiate a claim in arbitration. It is only in the last instance that the AAA will not administer the claim. *Id.*

The fourth type of claim is not at issue in this case. Here, Figgatt initiated claims against Green Tree in the Circuit Court, despite the fact that she had agreed to arbitrate those claims. (A.R. 45.) Green Tree has not asserted any claims against Figgatt. Even if it had, it would not have the right to force Figgatt to litigate those claims in court. Figgatt would have every right to compel Green Tree to arbitration and the AAA would accept her claim. Green Tree could only litigate claims subject to the Arbitration Agreement in court if Figgatt elected to keep those claims there. In this way, the arbitration agreement is not one-sided. Rather, it retains mutuality and, in fact, is more favorable to Figgatt. She alone has a choice to stay in the Circuit Court in one instance, where Green Tree has that choice in none.

2. The Circuit Court could have appointed an arbitrator under section 5 of the FAA upon concluding that the AAA was unavailable (although because the AAA remains available, it was unnecessary to do so).

Figgatt next contends that the Circuit Court correctly declined to “rewrite the contract” after finding that it was one-sided because it did not allow Green Tree to initiate arbitration of consumer finance claims. (Resp.’s Br., 15.) In this case, though, the Arbitration Agreement does not require arbitration in the AAA forum. It only requires that, wherever the arbitration takes place, the arbitration judge apply the AAA’s rules. Figgatt does not dispute that. Instead, she contends that the AAA’s moratorium on arbitrating consumer finance cases initiated by the creditor without the consumer’s present-day consent is evidence of the flaws in the AAA. (Resp.’s Br., 15.) She further contends that the AAA was “integral” to the contract such that a substitute arbitrator could not be appointed if the AAA were unavailable. (*Id.*, 16-17.)

First, Green Tree only argued that section 5 of the FAA would allow the appointment of a substitute arbitrator to the extent that the AAA was deemed “unavailable.” There is no question that the AAA is available to hear Figgatt’s claims. Nonetheless, section 5 of the FAA would apply, if necessary, because the AAA was not integral to the Arbitration Agreement. Figgatt cites *Riley v. Extencicare Health Facilities, Inc.*, No. 2012AP311, 2012 WL 6743527 (Wis. App. filed Dec. 27, 2012) to support her argument, identifying only 3 factors this Court should consider in testing whether a forum (or its rules) are “integral” to the Arbitration Agreement.

Recently, the United States District Court for the Northern District of Illinois considered the same issues identified in *Riley* with respect to the availability of the National Arbitration Forum (“NAF”).¹ In *Green v. U.S. Cash Advance Illinois, LLC*, Civil Case No. 12 C 8079, 2013

¹ The NAF is a different arbitration forum than the AAA. The NAF no longer accepts any consumer claims due to a consent decree it entered into in 2009. *Green*, 2013 WL 317046, at *2. Green Tree never moved to compel Figgatt’s claims to the NAF. The NAF is not at issue in this appeal or the underlying civil action.

WL 317046, *4 (N.D. Ill. Jan. 25, 2013), the court determined that leading cases actually consider 5 factors to determine whether “the designation of a specific arbitrator is integral to an arbitration agreement”:

- 1) whether the language designating the arbitrator is mandatory or permissive; 2) whether the arbitration clause designates a particular arbitrator or merely a particular set of rules to be applied; 3) whether the arbitration agreement contains a “severance” provision or a provision for substitute of the arbitrator; 4) the relative weight in the arbitration agreement given to the designation of the arbitrator versus the requirement that disputes be sent to binding arbitration; and 5) whether the arbitrator was likely to have been chosen because of its unique characteristics.

Id. (citing, e.g., *Ranzy v. Tijerina*, 393 F. App’x 175 (5th Cir. 2010); *Carideo v. Dell, Inc.*, No. C06-1772JLR, 2009 WL 3485933 (W.D. Wash. Oct. 26, 2009); *Rivera v. Am Gen. Fin. Servs., Inc.*, 150 N.M. 398, 259 P.3d 803 (N.M. 2011); *Khan v. Dell, Inc.*, 669 F.3d 350, 357 (3d Cir. 2012). Figgatt did not identify the second factor, but suggested that a substitute arbitrator could not apply the AAA’s rules because they are copyrighted and have procedures for who may arbitrate using them. Such logic ignores the difference between “rules” and “forum,” and yet, the distinction is deemed a critical factor for determining whether a term is integral. *See id.*

Indeed, multiple courts have focused on the choice of rules, rather than a forum, in determining whether the designation of a specific arbitrator (or its rules) is integral to an arbitration agreement. In *Reddam v. KPMG LLP*, 457 F.3d 1054, 1059-60 (9th Cir. 2006), *abrogated on other grounds by Atl. Nat’l Trust LLC v. Hawley Ins. Co.*, 621 F.3d 931 (9th Cir. 2010), the choice of arbitration rules rather than the forum was not integral. Likewise, in *Meskill v. GGNSC Stillwater Greeley LLC*, 862 F. Supp. 2d 966, 972 (D. Minn. 2012), the court considered whether the parties’ selection of the NAF rules made the NAF forum integral to the arbitration agreement such that the NAF’s unavailability rendered the agreement unenforceable. The *Meskill* court considered authority, including *Reddam*, that distinguished the selection of

arbitration rules from the forum. It also considered that some jurisdictions have held that selection of a forum's rules is tantamount to selecting the forum when the rules provide that the forum in question must apply them. *Id.* The *Meskill* court dismissed this argument, however, reasoning that if an exclusive *forum* had been contemplated, then the parties could have said as much, and that language referring to the rules was purposeful. *Id.*

When the *Riley* court considered *Meskill*, it found it unhelpful because the arbitration agreements at issue were very different. Specifically, *Riley* considered that *Meskill* "concerned an agreement that mentioned NAF only once and contained no express designation of NAF as the arbitrator." *Riley*, 2012 WL 6743527, at ¶ 30.

In this case, the rules – and not the forum – are specified in the Arbitration Agreement. Just as in *Meskill*, the AAA is only mentioned once, and the Arbitration Agreement contains no express designation of the AAA as arbitrator. (A.R. 46.) Just as *Riley* was dissimilar from *Meskill*, *Riley* is inapposite to the facts of this case. *Meskill*'s logic is persuasive: in this case, the Arbitration Agreement's reference to the AAA's rules is purposeful and does not prescribe arbitration by the AAA integral to the agreement. Green Tree has already briefed, exhaustively, why the arbitration agreement's weight focuses on the agreement being sent to arbitration, rather than the identity of the arbitrator. (Pet.'s Amend. Br., 16.) Likewise, Green Tree explained that the AAA is not specialized and there is no evidence that it was selected for any unique characteristics. (*Id.* at 17.) Figgatt's Response fails to even address the merits of these specific points. A majority of the factors suggest that use of the AAA rules is not integral to the Arbitration Agreement. Thus, even if the AAA were unavailable (it is not), Section 5 of the FAA would operate to appoint a substitute arbitrator.

3. Figgatt's debt collection claims are within the scope of the Arbitration Agreement.

Figgatt contends that her claims are based on illegal conduct² and thus do not fall within the scope of the Arbitration Agreement. The Circuit Court did not find that Green Tree's conduct was willful (thus making it criminal under the WVCCPA). In fact, the Circuit Court made no findings or conclusions with respect to whether Green Tree's conduct was willful or criminal, nor is this a criminal case. The prosecuting attorney has not charged Green Tree with a crime. Figgatt effectively asks this Court to extend its review beyond issues of law and instead supplant its findings of fact for those of the Circuit Court.

First, Figgatt ignores that multiple West Virginia courts that have regarded alleged WVCCPA violations as within the scope of arbitration agreements. *See Baker v. Green Tree Servicing LLC*, No. 5:09-cv-00332, 2010 WL 1404088, *3 (S.D.W. Va. Mar. 31, 2010) (“[w]ithout the contract, there would have been no collection calls”); *Credit Acceptance Corp. v. Long*, No. 2:10-cv-00003, 2010 WL 3909837, *6 (S.D.W. Va. Sept. 22, 2010) (“the Court is in agreement with the Longs that four violations of the WVCCPA are potentially at issue in any future arbitration.”); *Jones v. Green Tree Servicing, LLC*, No. 1:10CC119, Doc. 14 (N.D.W. Va. Oct. 4, 2010); *Caton v. Green Tree Servicing, L.L.C.*, Civ. Action No. 06-C-419, Order (Cir. Ct. Berkeley Cnty. Nov. 28, 2007) (“the dispute should be settled via arbitration”

² In her Response, Figgatt suggests that Green Tree conceded that activities like “kneecapping the debtor” are criminal and would fall outside the scope of the Arbitration Agreement. (Resp.’s Br., 19.) What Green Tree actually conceded is that certain activities, like kneecapping, might arise entirely outside the scope of the offending debt collector’s employment duties. (A.R. 265.) Debt collectors make telephone calls and send letters. Violations arising from these collection activities are within the scope of the Arbitration Agreement. Neither kneecapping nor conduct giving rise to kneecapping would be part of a debt collector’s employment duties. It might therefore make sense for a court to find that kneecapping fell outside the scope of the Arbitration Agreement.

(A.R. 122)) (A.R. 117-23).³ Second, to support her argument that her claims were outside the scope of the Arbitration Agreement, Figgatt relies on *Long v. Juniper Bank*, Civ. Action No. 11-C-787, Order Denying Motion to Compel Arbitration (Apr. 27, 2012) and *Chassereau v. Global-Sun Pools, Inc.*, 644 S.E.2d 718 (S.C. 2007). Her reliance is misplaced. In *Chassereau*, the Supreme Court of South Carolina concluded that the alleged conduct was outrageous and akin to conduct historically associated with the common law tort of outrage. *Id.* at 720. In *Long*, the circuit court presupposed the illegality of the conduct. *Long*, at 5-6.

Chassereau is unpersuasive because the rationale for denying arbitration in that case is preempted by the FAA for the same reasons as in *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. ___, 132 S. Ct. 1201, 182 L.Ed.2d 42 (2012). *Chassereau* instituted a categorical denial of arbitration for claims based on outrageous debt collection calls. 644 S.E.2d at 720. In *Marmet*, the Supreme Court of the United States made clear that a categorical prohibition against arbitration of certain types of claims was preempted by the FAA. *Id.* at 1203. Under the holding of *Marmet*, the *Chassereau* court's categorical denial of arbitration of claims based on outrageous collection calls would also be preempted by the FAA. Any attempt to single those claims out from the application of arbitration agreements that are otherwise broad enough to permit them is contrary to the express purpose of the FAA and the Supreme Court's interpretation of the FAA.

Indeed, the United States District Court for the Southern District of West Virginia ("Southern District") granted a motion to compel arbitration in a case alleging similar violations of the WVCCPA. *Montgomery v. Applied Bank*, 848 F. Supp. 2d 609, 611 (S.D.W. Va. 2012).

³ At least one other circuit court in West Virginia has also compelled WVCCPA claims to arbitration. However, as it is an unpublished decision and not part of the record below, Green Tree cautiously refrain from citing it in this Reply. Green Tree is filing a motion for leave to supplement the record and, if it is granted, Green Tree will supply a copy of the case on which it relies to support this footnote.

In doing so, it held that that “[q]uestions concerning the scope of an arbitration clause are to be left to the arbitrator, ‘unless it can be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute.’” *Id.* at 618 (quoting *Winston Salem Mailers Union 133, CWA v. Media Gen. Operations, Inc.*, 55 F. App’x 128, 133 (4th Cir. 2003) (citations omitted)). The “positive assurance” on which Figgatt seeks to rely is the alleged criminality of Green Tree’s conduct. Unlike in *Long*, where the circuit court speculated as to possible illegalities, the trial of this matter has come and gone. The Circuit Court did not rule that Green Tree’s conduct was willful or criminal pursuant to section 5-103(4) of the WVCCPA. *Long* and its prohibition on illegalities simply do not apply.

C. Green Tree does not dispute the Circuit Court’s findings of fact, but instead asserts that the Circuit Court erred by unjustifiably expanding the WVCCPA.

When the Circuit Court held that Green Tree was liable for statutory violations of the WVCCPA, it failed to base its holdings on the actual language of the applicable statutes. Green Tree is entitled to have its conduct assessed under the correct and balanced interpretation of the WVCCPA. It is on this basis that Green Tree asserts the Circuit Court erred.

1. Section 2-128(e) cannot be read in a vacuum, regardless of the alleged consequences.

Figgatt contends that section 2-128 of the WVCCPA prohibits all unfair and unconscionable means to collect a debt, and that “means” includes steps to verify representation by counsel in an effort to determine whether debt collection efforts can resume. (Resp.’s Br., 22.) Figgatt accuses Green Tree of “slic[ing] the statute too thin.” (*Id.*) Communications made for purposes other than debt collection are not prohibited by the plain language of 2-128(e) when it is read in conjunction with 2-128. The plain language of section 2-128 of the WVCCPA only prohibits communications to collect a debt. *See* W. Va. Code §§ 46A-2-128, -128(e). The plain

meaning of a statute must be obeyed. *Kelley & Moyers v. Bowman*, 68 W. Va. 49, 69 S.E. 456, 457 (1910).

Figgatt claims that adhering to this plain reading of the statute is “bad policy” because it allows collectors to interfere with attorney client relationships. (Resp.’s Br., 23.) Figgatt’s argument is not compelling. First, her allegation of “bad policy” does not override the rule that the plain meaning of a statute must be applied when the Legislature’s intent is clear. *See Bowman*, 68 W. Va. 49, 69 S.E. at 457. Second, if Figgatt’s “bad policy” argument has merit, then enforcing West Virginia Rule of Professional Responsibility 4.2 is also “bad policy.” Rule 4.2 prohibits lawyers from communicating with represented persons about the “subject of the representation.” It does not prohibit “any” communication. Under Figgatt’s theory, any communication between a lawyer and a represented person would also undermine the attorney client relationship. Yet, the plain meaning of Rule 4.2 only prohibits a limited topic of communication.

The fact is that, absent an express statutory prohibition on all communication, there is no general law or policy in West Virginia prohibiting parties from all communications with each other.⁴ In this case, the Circuit Court expressly determined that it did not need to determine the purpose for each of Green Tree’s calls after attorney notification. Any communications that Green Tree made to Figgatt for purposes other than to collect a debt were improperly penalized.

2. Unlike the FDCPA, the WVCCPA affords collectors two distinct defenses, each of which has meaning under West Virginia law.

West Virginia Code section 46A-5-101(8) provides creditors with two distinct defenses to alleged violations of the WVCCPA. “If the creditor establishes by a preponderance of the

⁴ Even if the Court were to find some general policy that prohibited a collector from communicating with a consumer known to be represented by an attorney about some subject other than debt collection, any violations of that policy would not violate the WVCCPA. Therefore, any violations of that policy could not be assessed penalties under section 5-101 of the WVCCPA.

evidence that a violation is 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, no liability is imposed” W. Va. Code § 46A-5-101(8) (emphasis added). Unlike its conjunctive parallel provision under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, *et seq.* (“FDCPA”), the WVCCPA makes clear through its disjunctive “or” that two defenses are available. (*See also* A.R. 570.)

a. Violations resulting from errors of fact, like Green Tree’s, are subject to the unintentional defense under the WVCCPA.

Figgatt contends that the “unintentional” defense contained in section 5-101(8) of the WVCCPA only prohibits unintentional actions and not unintentional violations of the WVCCPA. (Resp.’s Br., 24.) The Circuit Court likewise held that the act of dialing Figgatt’s number, rather than the resulting violation, needed to be unintentional for the defense to apply. (A.R. 7.) In support of her position, Figgatt relies on *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. ___, 130 S. Ct. 1605, 176 L.Ed.2d 519 (2010). In *Jerman*, a collector incorrectly interpreted the requirements of the FDCPA, and a violation resulted from that misinterpretation. *Id.* at 1610-11. In *Jerman*, the error was a legal error. The Supreme Court of the United States explained that a mistake of law is not a defense. *Id.* at 1611. The Supreme Court of the United States declined to extend the FDCPA’s bona fide error defense to apply to errors of law.⁵ *Id.* at 1625. The *Jerman* court was silent regarding an intent requirement for mistakes of fact. *Jerman* is inapposite to the facts of this case.

⁵ Figgatt further argues that, because the FDCPA’s bona fide error defense does not apply to errors of law, the WVCCPA’s unintentional defense should not apply to errors of law either. Such a conclusion fails to address the nuance of the disjunctive requirement of the defenses available in the WVCCPA. Unlike the FDCPA, which pairs “unintentional” and “bona fide error of fact” through the conjunctive “and,” the WVCCPA’s use of the word “or” creates no such relationship.

Here, Green Tree knew what the law was in West Virginia, and it adopted policies and procedures specific to West Virginia collection laws. (A.R. 5.) Green Tree has never alleged that the calls to Figgatt for which it asserted the unintentional defense resulted from a misunderstanding of the applicable law. Rather, Green Tree argued that, in order to rely on the “unintentional” defense, it needed only to prove by a preponderance of the evidence “that a violation is unintentional” W. Va. Code § 46A-5-101(8). The remainder of the statute pertains to the second defense – the bona fide error defense – available to creditors. Green Tree was required to prove no more than unintentional violations to avail itself of this defense.

Further, it is difficult to determine what more Green Tree would have to prove beyond the fact that the violation was unintentional. The Circuit Court and Figgatt suggest that Green Tree must show that the underlying act giving rise to the violation was unintentional. (Resp.’s Br., 24; A.R. 7.) The language of section 5-101(8) of the WVCCPA does not support this interpretation. Further, short of a pocket-dialed mobile phone, it is hard to conceive of an “accidental” action, but the resulting violation certainly could be unintentional. Under the statute, “unintentional” describes violation. W. Va. Code § 46A-5-101(8).

The unintentional defense retains meaning if it applies to mistakes of fact that result in a violation. In this case, Green Tree attempted to confirm attorney representation for Robert Adkins and was mistaken as to the attorney’s representation of Figgatt. (A.R. 5.) Therefore, communications made to Figgatt following Green Tree’s final attempts to confirm Mr. Adkins’ representation were unintentional violations resulting from its mistake of fact as to the attorney’s representation in this matter. The Circuit Court’s holding that the physical placement of the call itself must be unintentional for the “unintentional” defense to apply is reversible error.

- b. **The WVCCPA’s bona fide error defense only requires that policies and procedures be *reasonably* adapted to avoid violations, and it is unreasonable to expect the complete elimination of human error.**

Green Tree argues that the Circuit Court erred by injecting into the bona fide error defense contained in section 5-101(8) of the WVCCPA a requirement that creditors “tweak” their procedures, even if those procedures have been implemented and tailored to West Virginia law. (Pet.’s Amend. Br., 25-26.) Figgatt contends that the bona fide error defense requires a creditor to implement policies and procedures reasonably adapted to avoid specific WVCCPA violations and show that those policies and procedures are “effective.” (Resp.’s Br., 25-26.) Figgatt’s argument echoes the Circuit Court’s determination that “[i]f they have one that doesn’t work, they don’t have one.” (*Id.* at 26; A.R. 578.)

Figgatt relies on *Owen v. LC System, Inc.*, 629 F.3d 1263, 1274 (11th Cir. 2011) to support the Circuit Court’s reasoning that the bona fide error defense requires procedures that “work.” (*Id.*) Figgatt misconstrues *Owen*. In *Owen*, the Eleventh Circuit explained that “the procedures component of the bona fide error defense involves a two-step inquiry.” *Id.* (*quoting Johnson v. Riddle*, 443 F.3d 723, 729 (10th Cir. 2006). The first step is “whether the debt collector ‘maintained’ – *i.e.*, actually employed or implemented – procedures to avoid errors.” *Id.* (*quoting Johnson*, 443 F.3d at 729). Second the court must ask “whether the procedures were “reasonably adapted” to avoid the specific error at issue.” *Id.* Although the Eleventh Circuit expressly noted that the specific criteria fulfilling the first and second inquiries is fact-intensive and best suited to a case by case inquiry, *id.* at 1277, *Owen* is readily distinguishable from the facts of this case.

Owen involved an error where interest was being compounded instead of computed as simple interest, resulting in alleged violations under the FDCPA. The collector asserted a bona

fide error defense and, to satisfy the “procedures” prong of the defense, it cited 3 actions it took to address the mistake. First, it took actions already required by the statute. Second, it had a contractual agreement with a creditor to only receive accurate information on a debt. Third, it requested contact from the aggrieved party if she continued to contest the debt. The Eleventh Circuit held that complying with statutorily mandated requirements is not a “procedure,” that delegating an entire burden to a creditor is not reasonable, and that sending a letter after a problem has occurred does not prevent the problem. *Id.* at 1275.

Unlike in *Owen*, the Circuit Court found that Green Tree actually had implemented policies and procedures, and that they were tailored to West Virginia law. (A.R. 5.) Green Tree produced evidence and testimony that its procedures involved training and computer protocols to flag an account upon receipt of attorney notification so as to avoid placing additional calls to that individual. (A.R. 368-70.) However, the Circuit Court then imposed a “success” requirement beyond the “reasonable” requirement in the defense: “If they have one that doesn’t work, they don’t have one.” (A.R. 578.)

The requirement that procedures be “reasonably adapted” does not mean that those policies and procedures have to be flawless. Rather, the *Owen* court’s rationale demonstrates that the policies and procedures have to contemplate the type of error to be avoided and provide a reasonable solution for avoiding it. *See Owen*, 629 F.3d at 1274-75. In this case, Green Tree’s system failed to eliminate all human error and calls were placed to Figgatt after her initial attorney notification. Figgatt cited two other cases in which errors occurred. Again, the errors were all human-caused. The pithy phrase “to err is human” is rooted in truth. It is impossible to avoid all instances of human error. Yet, the handful of cases in which Green Tree experienced

human error is overshadowed by the thousands more in which the system worked. (A.R. 570-71.)

A reading that the WVCCPA's bona fide error defense a requirement that Green Tree "tweak" its procedures like one changes oil in a car (A.R. 578) extends beyond the statute's mandate. Evaluating the "reasonableness" of procedures based on their flawlessness is in itself unreasonable. The Circuit Court's interpretation of section 5-101(8) of the WVCCPA impermissibly narrows the defenses available to creditors in West Virginia.

3. The WVCCPA is an Act of prohibitions and specific compliance requirements, none of which address skip-tracing.

Green Tree argues that the Circuit Court impermissibly expanded the WVCCPA to prohibit skip tracing unless a creditor knows that the debtor has absconded with the collateral. (See Pet.'s Amend. Br., 20-22.) Figgatt contends that, unless a debt collection practice like "skip tracing" is specifically provided limited protection by statute, it is prohibited. (Resp.'s Br., 29.) Figgatt's argument is inverted. The WVCCPA does not attempt, and never has attempted, to set forth every conceivable action that debt collectors may take. Nowhere does the WVCCPA state that, if an action is not expressly allowed, then it is prohibited. Rather, debt collection statutes, including the WVCCPA, either prescribe conduct that debt collectors must do, or they prohibit conduct that debt collectors may not do. *Compare, e.g.,* W. Va. Code §§ 46A-2-101 through 114 (directing liability and requiring compliance with certain debt collection procedures) *with* W. Va. Code §§ 46A-115 through 139 (prohibiting debt collection practices and other methods of communication). The fact that the WVCCPA does not address skip-tracing does not mean that it is subject to greater regulation than under the FDCPA, but rather that West Virginia has chosen not to regulate it more stringently.

Further, whether or not Green Tree's conduct precisely complied with the requirements under the FDCPA is irrelevant. Figgatt did not assert FDCPA claims against Green Tree. Whether Green Tree complied with the FDCPA has no bearing on whether the WVCCPA limits or prohibits skip-tracing. The sole issue is whether the WVCCPA specifically imposes a burden on skip-tracing that Green Tree actually know that Figgatt had absconded with the collateral. Such limitations do not exist in the WVCCPA and the Circuit Court impermissibly extended West Virginia law.

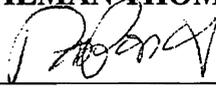
VI. CONCLUSION

Figgatt's response suggests that Green Tree contests the Circuit Court's findings of fact. To be clear, Green Tree appeals six specific errors of law. Green Tree should never have been forced to try this case in state court. The parties had a valid Arbitration Agreement to which this matter should have been compelled. When the Circuit Court erred in denying Green Tree's motion to compel arbitration, Green Tree was at least entitled to litigate and be judged according to the correct laws of the State of West Virginia. By applying incorrect law to the facts of this case, the Circuit Court committed reversible error. Further, in all respects, the Circuit Court's holdings will have significant, lasting, and profound effects on the state of arbitration and consumer protection laws in West Virginia. Based on the foregoing, Green Tree respectfully requests that this Honorable Court:

1. reverse the decision of the Circuit Court; and
2. grant such other and further relief as this Court deems just and proper.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

GREEN TREE SERVICING, LLC,

Defendant Below, Petitioner

v.

DOCKET NO. 12-1143

AIMEE NEELEY FIGGATT,

Plaintiff Below, Respondent

CERTIFICATE OF SERVICE

I, Don C.A. Parker, hereby certify that service of the foregoing **Petitioner Green Tree Servicing LLC's Reply Brief** has been made via U.S. Mail, on this 19th day of February, 2013, addressed as follows:

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