

In the Supreme Court of Appeals of West Virginia

Green Tree Servicing, L.L.C.,

Defendant Below, Petitioner

Docket No. 12-1143

vs.

Aimee Neeley Figgatt,

Plaintiff Below, Respondent

Respondent Aimee Neeley Figgatt's Brief

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Statement of the Case

This case involves Green Tree's debt collection practices. After a bench trial, the circuit court found that Green Tree violated West Virginia statutes by telephoning Aimee Figgatt 28 times after she told Green Tree that she was represented by counsel and by calling third parties 20 times to pressure Figgatt to pay the debt.¹ The circuit court found that each of these 48 violations justified the maximum \$4645.30 per penalty, for a total award of \$222,974.40, and then applied Figgatt's self-imposed cap to enter a \$ 75,000 judgment.² Green Tree's appeal argues that the circuit court should have compelled arbitration or accepted its explanations for its conduct.

The arbitration agreement and AAA moratorium

In 2000, Figgatt bought a single-wide trailer to have a safe place for her and her son to live after she separated from her husband Robert Adkins.³ To purchase the trailer, she and Adkins executed a standard form agreement.⁴ The agreement provides for arbitration of any and all disputes, torts, or any

¹AR 3-7.

²AR 7-8.

³AR 444 ll.5-23.

⁴AR 43-48.

other matter in question “between you and I arising out of, in connection with, or in any way relating to this Agreement . . .”⁵ It does not allow consumers to opt-out of arbitration, allow one to sever terms within the arbitration clause, or specifically cover statutory violations or crimes.

The clause further provides that arbitration “shall be” governed by rules of the American Arbitration Association “in effect at the time arbitration is requested,” defines the AAA rules as the “Arbitration Rules,” and provides that the “arbitrator shall have all powers provided by the Arbitration Rules and this Agreement.”⁶ It does not name alternative forums or provide alternate rules for selecting an arbitrator or conducting arbitration.⁷

The AAA rules are copyrighted and authorize only the AAA to administer the arbitration using AAA-appointed arbitrators from the AAA National Roster.⁸ To become an AAA arbitrator, one must meet certain criteria such as having a minimum of 10-years professional experience and a dedication to upholding the AAA’s Code of Ethics. AAA arbitrators must then comply with

⁵AR 46.

⁶AR 47.

⁷AR 46-47.

⁸AAA Rules R-2 and R-3; AAA Consumer-Related Disputes Supplementary Procedures, C-4. The AAA rules, National Roster qualifications, and Code of Ethics are available at www.adr.org.

the various AAA rules on how arbitration is conducted.⁹

The arbitration clause also provides, “This agreement may be modified only by a written agreement between you and I.”¹⁰

In July 2009, the AAA told Congress that consumers have “legitimate concerns” about arbitrating consumer claims and admitted that it needed to “substantially boost the orientation and training of consumer debt collection arbitrators” in certain areas, including the “substantive law regarding consumer protection statutes.”¹¹ To achieve these goals, the AAA issued a moratorium on it administering, processing, or participating in arbitrating consumer debt collections unless the consumer – at the time of the dispute – agrees to arbitrate. It continues to handle consumer cases where the consumer agrees to arbitrate at the time of the dispute, such as where the consumer seeks arbitration.¹²

Green Tree’s 615 calls to Figgatt

Adkins did not make the move with Figgatt and their infant toddler when

⁹AAA Consumer-Related Disputes Supplementary Procedures, C-6; AAA Rules E-5 to E-9.

¹⁰AR 47.

¹¹AR 71-72, 78.

¹²AR 71-72, 90, 267-269 (p.30 l.3 - p. 35 l.22).

they moved into the trailer, and he has never paid anything on the trailer or for child support.¹³ Although Adkins is on the note, Green Tree cannot find him to collect from him.¹⁴

Figgatt's own income from her job as a private investigator/process server for law firms is sporadic, generally coming in only once every third month.¹⁵ She was also hospitalized more than 2 dozen times for her Crohn's disease.¹⁶ These financial and health conditions caused her to fall a month behind on her payments for the trailer, but she always caught up a payment as soon as she got paid.¹⁷ She was paying every month, and was only a month late with each payment.¹⁸

Figgatt explained that part of the problem was that Green Tree often took two to three weeks to process her payments by mail.¹⁹ She once agreed to speed this process up, by paying with a check over the phone, but Green Tree

¹³AR 445 ll.9-24, 446 ll.4-12, 456 ll.9-24.

¹⁴AR 385 l.3 - 386 l.8.

¹⁵AR 446 l.16 - 447 l.11, 449 ll.4-8.

¹⁶AR 454 l.7 - 455 l.17.

¹⁷AR 458 ll.3-6, 495 ll.7-9.

¹⁸AR 411 l.23 - 412 l.5, 705 l.21 - 706 l.5.

¹⁹AR 459 l.4 - 460 l.2.

took out two payments rather than the one she authorized.²⁰

From March 2007 to October 2010, Green Tree called Figgatt 615 times.²¹ It called her at her work, at her personal number, and left messages on her answering machine.²² Figgatt always kept Green Tree up to date on her telephone numbers, and it was repeatedly able to reach her to verify her address and telephone numbers.²³ She also almost always returned Green Tree's calls the same month that a payment was due.²⁴

Figgatt testified that she spoke most often with Carmen Crumley, and that Crumley was hateful and belittling; kept after her about her inability to get child support; and at one point threatened to have a sheriff repossess the trailer and throw her things out.²⁵ Figgatt added that she repeatedly asked Crumley to stop calling, and on December 16, 2009 told Green Tree that she was represented by counsel.²⁶

²⁰AR 481 l.21 - 485 l.5.

²¹AR 4, Finding 5.

²²AR 303 ll.17-21, 656 l.9 - 657 l.22.

²³AR 301 ll.7-11, 303 ll.7-22, 336 ll.5-9, 472 ll.5-20, 499 ll.2-5.

²⁴AR 469 ll.9-23.

²⁵AR 457 ll.12-24, 464 l.21 - 465 l.24, 478 l.21 - 479 l.21, 492 l.9 -493 l.13.

²⁶AR 4, Finding 9; 460 l.14 - 461 l.15, 499 ll.18-21.

Green Tree's 28 calls after Figgatt was represented

The 615 calls that Green Tree made to Figgatt include 28 undisputed calls to her after she told Green Tree that she was represented by counsel.²⁷ Green Tree suggests on page 3 of its brief that all of these calls were made by an automatic dialer. This is not true.

When Figgatt first told Green Tree that she was represented, she spoke to a collector named Jill who is also apparently known as 9JL. Figgatt told Jill that she represented by counsel, gave her counsel's name and telephone number, and asked that Green Tree call her attorney.²⁸ Rather than cease communications, Jill transferred the call to Crumley.²⁹ After Figgatt repeated that she hired an attorney, Crumley asked her about her presumed bankruptcy. Figgatt testified that she told Crumley to call her attorney and hung up, and that Crumley called her back, again asking about the presumed bankruptcy.³⁰ Two days later, a collector known as 217 called Figgatt and again asked her about the debt and whether she intended to have her

²⁷AR 5, Finding 10, 359 ll.9-12, 383 ll.15-18.

²⁸AR 361 ll.4-17, 486 ll.9-18, 488 l.24 - 489 l.7.

²⁹AR 361 l.9 - 362 l.14, 603 ll.15-17.

³⁰AR 486 l.19 - 488 l.23, 674 l.16 - 675 l.11.

attorney file a bankruptcy.³¹ As the calls continued, Figgatt testified that she gave her attorney information to Green Tree six times and gave her counsel's telephone number twice.³²

Green Tree testified that two of these 28 calls to Figgatt were to confirm that she was represented by counsel.³³ It did not explain why it did not first telephone counsel to confirm the representation. Green Tree instead for months asked Figgatt's attorney about whether he represented Robert Adkins.³⁴ During the preceding years, Green Tree had never been able to find Adkins, dealt with Figgatt, knew that Figgatt and Adkins divorced, and knew about her new marriage to Chris Figgatt.³⁵ Yet Green Tree never asked Figgatt's counsel if he represented Figgatt, and agreed that its letters to counsel about Adkins sent counsel on a wild goose chase.³⁶

The do-not-call button “just simply didn't work”

Beginning December 16, 2009, the day Figgatt told Green Tree that she

³¹AR 362 l.16 - 363 l. 13, 604 ll.8-16, 621 l.17 - 623 l.9.

³²AR 490 l.22 - 491 l.8.

³³AR 392 l.10 - 394 l.14.

³⁴AR 5, Finding 11.

³⁵AR 319 l.8 - 320 l.9, 385 l.3 - 386 l.8, 387 l.16 - 388 l.11, 594 ll.9-13, 702 l.11 - 703 l.21.

³⁶AR 387 ll.8-15.

was represented, Green Tree repeatedly noted on her account that she was represented by counsel and “DO NOT CALL;” collectors would have seen the multiple, capitalized do-not-call notations had they looked.³⁷ Rather than rely on its notations, Green Tree said that its collectors rely on a “do-not-call” button to flag the account.³⁸ Both Crumley and collector 217 were supposed to hit this button after Figgatt told the two that she was represented. Neither did.³⁹ Green Tree did not hit the button until almost a month later and, even then, yet another employee admittedly “blew by” the do-not-call notification and later called Figgatt.⁴⁰

Green Tree summed this up, “We have a system in place. It didn’t work properly in this case. It just simply didn’t work.”⁴¹

Figgatt presented evidence that Green Tree’s system also failed in at least three other cases. In one, Green Tree continued communicating with the debtor after the debtor ask it to call her counsel.⁴² In the second, a court granted summary judgment on claims that Green Tree knew about the

³⁷AR 368 1.13 - 369 1.2, 413 11.15-16, 609 11.3-20, 788, 790-791.

³⁸AR 359 11.20-22, 363 11.15-17, 369 11.6-9, 413 11.7-14, 438 11.14-19, 588 13-17.

³⁹AR 363 1.15 - 364 1.20, 608 1.3 - 609 1.2.

⁴⁰AR 369 1.10 - 370 1.8, 371 1.10 - 373 1.6, 415 11.6-14, 438 1.20 -439 1.5.

⁴¹AR 372 11.8-9.

⁴²AR 667 1.19 - 668 1.18.

debtor's representation yet later called her 25 times.⁴³ In the third case, a debtor told Green Tree that he was represented by counsel and later received over 50 calls from five different collectors, including Crumley.⁴⁴

Crumley initially testified that she could not recall another case where Green Tree failed to flag the account. Figgatt then walked her through the calls that she made to the other debtor after the other debtor told her three different times that he was represented by an attorney. Crumley then remembered that she did not flag that account either, and testified that Green Tree told that she should have. Green Tree later promoted Crumley from senior collector to collections manager.⁴⁵

Green Tree's 20 calls to third parties

Green Tree also did not dispute that it telephoned third parties at least 20 times, including calls to Figgatt's first husband, who she divorced over a decade before she purchased the trailer; her father and her step-brother; her new husband, Chris Figgatt, at his work; and eight or nine neighbors.⁴⁶ It

⁴³AR 668 l.19 - 669 l.16, 834-837.

⁴⁴AR 658 l.20 - 660 l.16, 661 ll.8-10, 670 ll.6-22.

⁴⁵AR 580 l.23 - 581 l.14, 612 l.5 - 617 l.2, 617 l.13 - 618 l.5.

⁴⁶AR 4, Finding 6, 314 l.13 - 315 l.22, 316 ll.18-23, 320 l.10 - 324 l.13, 340 l.19 - 342 l.19, 348 ll.10-15, 442 ll.7-18, 469 ll.5-8, 472 ll.20-22, 654 ll.1-6.

even called Senator Byrd's office.⁴⁷

Green Tree also telephoned Ms. Adkins, Figgatt's former mother-in-law, nine or 10 times, which always drew a return call from Figgatt. During one of these calls to Ms Adkins, she made a payment on the debt over the phone.⁴⁸

Green Tree said that it called these third parties to get a better telephone number on Figgatt because she was not answering her answering machine.⁴⁹ It also testified, however, that Figgatt did not have to answer its calls and that it had other remedies that do not involve strangers to the contract.⁵⁰

Summary of Argument

The trial court properly concluded that Green Tree's arbitration clause is too one sided to enforce, that it could not rewrite the contract to try to cure the problem, and that the claimed illegalities fall outside the arbitration clause's scope. These rulings should be affirmed under this Court's recent decisions on the lack of mutuality and treating arbitration clauses like any other contract.

⁴⁷AR 352 l.7 - 353 l.18, 654 ll.22-24.

⁴⁸AR 357 l.21 - 359 l.8, 468 ll.14-23, 643 l.9 - 646 l.18, 648 ll.12-21, 653 l.20 - 654 l.6

⁴⁹AR 343 ll.13-16, 658 ll.16-19.

⁵⁰AR 332 ll.13-15, 657 ll.21-22, 658 ll.1-19.

The trial court also properly found that Green Tree violated the WVCCPA 48 times in two different ways. The conduct constituting the two sets of violations was undisputed. The only fighting issue during the bench trial was whether the court would accept Green Tree's excuses. The court did not. Ample evidence shows why. These findings should be affirmed because they are not clearly erroneous.

Green Tree must lastly prove that both sets of findings are clearly erroneous to reverse on the violations. The court found that each violation justified the maximum \$4645.30 penalty before it entered a remitted judgment for only \$75,000.⁵¹ Applying this penalty, the 28 violations of the representation clause alone sustain the remitted judgment (28 x \$ 4645.30 = \$ 130,068.40). The 20 violations from the third-party calls alone sustain the remitted judgment (20 x \$ 4645.30 = \$ 92,906.00). To reverse, Green Tree must thus convince this Court that both sets of findings are flawed. Neither set of findings is.

Statement on Oral Argument and Decision

The parties' law firms are litigating similar arbitration issues in consolidated appeals styled *Credit Acceptance Corp. v. Front*, Docket No. 11-

⁵¹AR 7-8.

1646, and *Credit Acceptance Corp. v. Shrewsbury*, Docket No. 12-0545. In those appeals, the debtors' counsel waived the right to request oral argument.

Figgatt likewise believes that oral argument is unnecessary. Again, Green Tree is essentially asking the Court to overrule its view on one-sided arbitration clauses, conclude that Figgatt assented to arbitrate illegalities, and reverse amply-supported findings of fact. None of this merits oral argument or anything other than a memorandum affirmance.

Argument

1. The circuit court properly declined to compel arbitration.

The parties agree that the denial of the motion to compel arbitration is reviewed de novo. *Brown v. Genesis Healthcare Corp.*, 228 W.Va. 646, ___ n. 12, 724 S.E.2d 250, 267 and n. 12 (2011)(*Brown I*), *vacated on other grounds Marmet Health Care Center, Inc. v. Brown*, 565 U.S. ___, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012).

a. The court properly found that the arbitration clause's one-sidedness renders it unconscionable.

In the circuit court, Green Tree did not dispute that its arbitration clause is a contract of adhesion.⁵² This undisputed adhesiveness is an indicia of

⁵²AR 91.

procedural unconscionability, triggering “greater scrutiny” into whether the arbitration clause is substantively unconscionable. Sly.pts.10-11, *Brown v. Genesis Healthcare*, 229 W.Va. 382, 729 S.E.2d 217 (2012)(*Brown II*).

Green Tree also admitted below that its chosen forum allows it to take its consumers to court and that it could choose to stay in court rather than seek arbitration.⁵³ While it argues that this is irrelevant, the lack of mutuality confirms that the agreement is unconscionable substantively. “Agreements to arbitrate must contain at least a modicum of bilaterality to avoid unconscionability.” *Id.*, 229 W.Va. at ___, 729 S.E.2d at 228 and n. 40. “If a provision creates disparity in the rights of the contracting parties such that it is one-sided and unreasonably favorable to one party, then a court may find the provision is substantively unconscionable.” Sly.pt. 10, *Dan River Builders, Inc. v. Nelson*, Op. No. 12-0592 (W.Va. filed Nov. 15, 2012).

This point shows how one judge missed the mark. In *Montgomery v. Applied Bank*, 848 F.Supp.2d 609 (S.D.W.Va. 2012), the Court concluded that the AAA moratorium did not render an arbitration clause too one-sided to enforce because the creditor was not bringing a debt collection claim. That is, however, precisely the point. The moratorium creates a one-way street in which creditors want to force claims against them into arbitration while they

⁵³AR 267-268 (p 30 l.3 - p. 32 l.9, p. 33 l.3 - 34 l.15).

are free to bring their claims into court. Green Tree did not cite *Montgomery*, perhaps because it frankly admitted this one-sidedness below.

Green Tree does fleetingly mention that the agreement was not one-sided when drafted. But the agreement did not incorporate the AAA rules in effect at the time the contract was drafted. The agreement explicitly binds the parties to the AAA rules “in effect at the time arbitration is requested.”⁵⁴ The AAA rules in effect when Figgatt’s dispute arose in 2010 allow Green Tree to sue its consumers in court. Besides, unconscionability is also not always determined as of the time a contract is written because “one must be sensitive to the need to evolve rules to fit changed circumstances.” *Brown I*, 228 W.Va. at ___ and n. 112, 724 S.E.2d at 284 and n. 112.

The nature of Figgatt’s claims further highlight the disparity. The Consumer Credit Protection Act is a remedial statute that the Legislature enacted to protect consumers from unfair, illegal, and deceptive acts or practices. *Barr v. NCB Mgmt. Serv.*, 227 W.Va. 507, 513, 711 S.E.2d 577, 583 (2011). To contractually limit the exercise of these rights, exceptional circumstances must exist that render the provision conscionable. *Sly*, pt. 13, *Brown II*, 229 W.Va. at ___, 729 S.E.2d at 221-222. None do here.

In sum, Green Tree wants to force Figgatt to arbitrate her statutory claims

⁵⁴AR 47.

even though it can take its claims into court. In *Brown II* and *Dan River*, this Court concluded that circuit courts may properly find that such one-sidedness is unconscionable. Green Tree often no reason to depart from these holdings.

b. The court correctly declined to rewrite the contract.

Green Tree further advocates that the court appoint an arbitrator without explaining how this solves the problem. Again, the problem is that Green Tree can admittedly haul its consumers into court and choose to stay there.⁵⁵ Forcing Figgatt to arbitrate before anyone, anywhere maintains this same unconscionable one-sidedness. Section 5 of the Federal Arbitration Act (9 U.S.C. § 5) does not make a contract between rabbits and foxes less objectionable.

Besides one-sidedness, another fundamental problem is with the AAA rules that the contract mandates. The AAA issued its moratorium because consumers admittedly have “legitimate concerns” about arbitrating consumer claims, including concerns over the arbitrator’s orientation and training on consumer protection statutes.⁵⁶ The AAA rules that the arbitration clause mandates are so flawed that the AAA itself considers them unfair.

⁵⁵AR 267-268 (p 30 l.3 - p. 32 l.9, p. 33 l.3 - p. 34 l.15).

⁵⁶AR 72, 78.

With this background, the lower court correctly declined to employ § 5 of the Act to rewrite the adhesion contract.

Courts generally take three approaches on § 5 of the Act. The Second Circuit approach is that the statute never applies when a specifically designated arbitrator subsequently becomes unavailable. *In re Saloman Inc. Shareholder Derivative Litigation*, 68 F.3d 554 (2d Cir. 1995). Under this view, Green Tree's view of the statute is always wrong.

At the other extreme, some courts scour an arbitration clause for any ambiguity which could allow a court to sever the agreement to arbitrate out from under the defunct agreement on how an arbitrator is selected and how the proceeding is conducted. The parties are then compelled to arbitrate under terms that they never assented to. This approach recently drew a split decision in the Third Circuit. *Khan v. Dell, Inc.*, 669 F.3d 350 (3rd Cir. 2012).

The Third Circuit approach cannot be squared with West Virginia law. In West Virginia, contractual ambiguities in an arbitration clause must be construed against the drafting party. *State ex. rel. Richmond American Homes of West Virginia, Inc.*, 228 W.Va. 125, ___, 717 S.E.2d 909, 924 and n. 61 (2011). This is true because arbitration clauses are treated like any other contract – no worse, but also no better. Sly.pt. 2, *Dan River*, Op. No. 12-0592.

The majority rule on § 5 of the Act applies this same contractual

interpretation and focuses on whether the specified forum is integral or ancillary to the particular arbitration contract. *See, e.g., Riley v. Extendicare Health Facilities, Inc.*, No. 2012AP311, 2012 WL 6743527 (Wis.App. filed Dec. 27, 2012)[attached as Addendum].

A key factor in this approach is whether the arbitration clause uses mandatory language to describe the forum or its rules. This one does. It states that arbitration “shall be” governed by the AAA rules and define the “Arbitration Rules” as the AAA rules.⁵⁷

Another major factor is the forum’s exclusiveness. This one is. The AAA is the only forum specified in Green Tree’s arbitration clause.⁵⁸ Nothing within the Agreement suggests any other forum or rules, and the AAA rules by their terms highlight their exclusivity. The rules provide standards to become an AAA arbitrator, implement a Code of Ethics, and forbid anyone other than an AAA arbitrator from administering the copyrighted AAA rules on how arbitration is conducted.⁵⁹ A court thus cannot simply appoint someone to step in and apply the AAA rules.

Courts also look to see whether the arbitration clause contains a provision

⁵⁷AR 47.

⁵⁸AR 46-47.

⁵⁹AAA Rules R-2 and R-3, E-5 to E-9; AAA Consumer-Related Disputes Supplementary Procedures, C-4.

allowing one to sever inoperable portions of the arbitration clause out from other portions of the clause. This one does not.⁶⁰

Green Tree tries to lessen the impact of its mandatory, exclusive, and non-severable language by arguing that the AAA references are not pervasive and the rules are not specialized. But again, nothing in the agreement suggest alternative rules. The AAA rules are it. Pervasive or not, specialized or not, they are integral by default.

Lastly, Green Tree conceded below that the parties would have to work together to fill in the gaps left by the AAA.⁶¹ But, under the contract, this requires new and written assent from Figgatt to modify the arbitration clause.⁶² She declines the invitation to modify the clause.

c. The court correctly found that Figgatt did not assent to arbitrate illegalities.

The AAA moratorium is not Green Tree's only hurdle because the circuit court also found that the arbitration clause does not cover Figgatt's claims.⁶³ To attack this conclusion, Green Tree argues that ambiguities in the scope of

⁶⁰AR 46-47.

⁶¹AR 268 (p. 34 ll.13-23).

⁶²AR 47.

⁶³AR 231.

an agreement are resolved in favor of arbitration, and that its collection activities would not have occurred “but for” the contract.

The presumption favoring arbitration is cabined by two competing rules. One is that arbitration clauses, being treated like any other contract, have ambiguities construed against the drafter. *Richmond American Homes*, 228 W.Va. at ___ and n. 61, 717 S.E.2d at 924 and n. 61. As importantly, “parties are only bound to arbitrate those issues that by clear language they have agreed to arbitrate. An agreement to arbitrate will not be extended by construction or implication.” Sly.pt. 10, *Brown I*, 228 W.Va. at ___, 724 S.E.2d at 261. And “[s]tate law governs the determination of whether a party agreed to arbitrate a particular dispute.” *Id.*, 228 W.Va. at ___, 724 S.E.2d at 277.

Applying state law, Green Tree did not prove that anyone at the time of contracting foresaw, or assented to arbitrate, its subsequent illegalities. The arbitration clause, though broadly worded, does not specifically cover statutory violations or crimes.⁶⁴ The circuit court explored this point with Green Tree, asking it whether the arbitration clause covered a debt collector who collected the debt by kneecapping the debtor; Green Tree conceded that criminal activities are outside the scope of its arbitration agreement, and that

⁶⁴AR 46-47.

unauthorized debt collection practices could also be outside the scope.⁶⁵

Figgatt replied that the conduct that she alleged were crimes.⁶⁶ She then proved that Green Tree's 20 calls to third parties were designed to improperly pressure her, and that it repeatedly violates its own policies by continuing to call represented consumers.⁶⁷ This demonstrates a willfulness sufficient to fairly call the misconduct criminal. *See* W.Va. Code § 46A-5-103(4)(providing that willful violations of the WVCCPA are crimes subject to fines and imprisonment of up to a year).

Similar misconduct was at issue in *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007). There, a consumer alleged that a debt collector began systematically harassing her, including disclosing private information to third-parties. The Court declined to interpret the debt collector's arbitration clause to apply because the consumer did not assent to arbitrate such outrageous and unforeseen misconduct.

None of Green Tree's citations suggest that similar misconduct was at issue in those cases. A closer case for Green Tree is the *Montgomery* decision. There, Judge Berger distinguished *Chassereau* where the crimes alleged are

⁶⁵AR 264-265 (p. 18 l.4 - p. 21 l.9).

⁶⁶AR 269-270 (p. 38 l.18 - p. 40 l.1).

⁶⁷AR 4-5, Findings ¶¶8-13.

making illegal telephone calls. In the court's view, debt collection calls may be crimes yet not outrageous enough to say that the arbitration clause is inapplicable. *Montgomery*, 848 F.Supp.2d at 618-619.

Judge Wilkes recently disagreed and ruled that illegal debt collection calls do fall outside a broadly worded arbitration clause. Judge Wilkes concluded that a court could say with positive assurance that the agreement did not cover the dispute because no one at the time of contracting could reasonably expect such illegalities. Otherwise, the court reasoned, the contract would be unenforceable for contracting for an illegal purpose. *Long v. Juniper Bank*, Civil Action No. 11-C-787 (Cir.Ct., Berkeley County, W.Va. April 27, 2012)[attached as Addendum].

Judge Wilkes' view is the better one. A reasonable consumer does not expect – and ought not have to contemplate – that their creditors would roust their former relatives and neighbors or engage in other illegalities. No foreseeability equals no assent equals no contract to arbitrate these claims.

2. Ample evidence supports the findings on the 28 calls after Green Tree learned that Figgatt was represented.

A reasonable consumer also ought not expect that a collector will continue calling her after she asks it to call her attorney. Green Tree does not dispute that it attempted to call Figgatt 28 times after she told it that she was

represented by counsel.⁶⁸ It argues, however, that not all of these calls count and that it proved the statutory bona fide error defense. Even if true – and it is not – Green Tree’s other 20 violations, from calling third parties, sustain the remitted judgment.

And the attack on the 28 calls is wrong because it misreads the statutes and ignores the trial court’s role as the fact finder. Such findings are only reviewed for clear error. *Sly.Pt 1, Public Citizen, Inc. v. First Nat’l Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996). They are not.

a. Any means any.

Green Tree first argues that the circuit court should not have counted two of the 28 calls to Figgatt because they were not made to collect the debt but to verify her representation by counsel.⁶⁹ The distinction slices the statute too thin. The statute is not limited to attempts to collect a debt. Its first sentence prohibits “unfair or unconscionable means.” W.Va. Code § 46A-2-128.

Regulating unfair “means” covers each step in the process, including verifying whether a collector can resume more direct collection efforts.

The further prohibition against “any communication” corroborates this

⁶⁸AR 4-5, Findings ¶¶ 9-10.

⁶⁹AR 569 ll.11-15, 696 l.21 - 697 l.6.

reading. W.Va. Code § 46A-2-128(e). “Any” means “any,” thus requiring that debt collectors communicate with the attorney once it learns that its debtor is represented by counsel – “unless the attorney fails to answer correspondence, return phone calls or discuss the obligation in question.” *Id.* Under this scheme, the collector must first try to verify the representation with the attorney before it can resume calls to the consumer. If the attorney fails to promptly respond, the collector may then – and only then – verify the representation with the consumer or resume collection efforts.

Green Tree violated this scheme. It never asked Figgatt’s counsel if he represented Figgatt. It instead admittedly put counsel on a wild goose chase by asking if he represented Adkins.⁷⁰ Once Green Tree got Figgatt’s name right, it called her directly rather than call her counsel about her. There is no legitimate reason for a collector to call a consumer after it appears that she is represented by counsel – without reaching out to counsel first.

A contrary reading is bad policy. Consumers turn to counsel for legal advice and to end the incessant calls. Allowing the calls to continue opens the door for collectors to interject themselves into the consumer’s attorney-client relationship and thwarts counsel’s role as his client’s intermediary. It would also too easily allow collectors to continue collection efforts under the ruse of

⁷⁰AR 5, Finding 11, 387 ll.8-15.

purser motives. Here, for example, Green Tree also denied that its calls to Figgatt's former mother-in-law were to collect the debt – yet wound up getting a payment out of her.⁷¹

b. The court did not negate the bona fide error defense.

Green Tree next faults the circuit court for failing to read a specific intent requirement into W.Va. Code § 46A-5-101(8). The statute, it argues, does not require it to prove that the underlying conduct was unintentional. Relying on a case on 15 U.S.C. § 1692k(c), Green Tree argues that it need only show that it did not intend to violate the law.

The case that Green Tree cites was rendered before the United States Supreme Court construed the term “violation” in 15 U.S.C. § 1692k(c). In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. ___, 130 S.Ct. 1605, 176 L.Ed.2d 519 (2010), the Court declined to read a mens rea requirement into the federal statute when it held that the defense does not protect errors of law. There is likewise no reason to read such a requirement into the state statute.

Declining to read a specific intent requirement into the state statute does not negate the defense. Section 46A-5-101(8) protects a collector if “a violation

⁷¹AR 357 1.21 - 359 1.8, 648 11.9-21, 722 11.18-21.

is unintentional or the result of a bona fide error of fact . . .” This disjunctive “or” protects collectors whose underlying conduct is intentional – as long as the resulting factual error is bona fide. Green Tree’s problem is thus not that the circuit court negated the defense. It could have tried to prove that its intentional conduct was nevertheless bona fide.

c. Ample evidence supports the finding that Green Tree failed to prove that it maintained procedures reasonably adapted to avoid the violations.

Green Tree also misreads § 46A-5-101(8) a second way. The statute’s requirement that collectors also prove “the maintenance of procedures” is not limited to bona fide errors. It also applies to “procedures reasonably adapted to avoid any such violation or error.” *Id.* The disjunctive “or,” coupled with the reference to “such violation,” shows that the collector must also prove “the maintenance of procedures reasonably adapted to avoid any such violation.” Green Tree’s brief on page 23 quotes the statute yet, without ellipses, drops “such violation.” The omission could prompt one to believe that the statute protects all unintentional violations. It does not. Collectors must also prove that they maintained procedures reasonably adapted to avoid the violation.

Green Tree next argues that it is enough to employ or implement procedures. But the statute also requires that the procedures be “reasonably

adapted to avoid any such violation or error . . .” § 46A-5-101(8). This poses two discrete burdens: 1) to prove that procedures actually existed and 2) to prove that the existing procedures were reasonably adapted to avoid the error at issue. *Owen v. LC System, Inc.*, 629 F.3d 1263, 1274 (11th Cir. 2011). In *Owen*, the Court held that the federal bona fide error defense did not apply because the procedures that were employed and implemented were not reasonably adapted to avoid the error.

The circuit court found the same flaw here. It reasoned that the issue is not just whether a procedure exists but also whether it is effective: “If they have one that doesn’t work, they don’t have one.”⁷² The court later explained, “Maintenance means like you change the oil in your car, you take the necessary steps to make it work, to see that the procedures were followed; not just announcement and deployment but maintenance, follow-up.”⁷³ Green Tree failed to show anything “reasonably formulated to avoid violations and to avoid making errors” because “there’s no evidence anything happened to maintain these procedures, to see to it that Ms. Crumley and the others in this picture would follow the procedures.”⁷⁴ This is why the court found that

⁷²AR 578 ll.7-13.

⁷³AR 719 ll.4-8.

⁷⁴AR 719 ll.9 - 720 l.4.

Green Tree failed to meet its burden.⁷⁵

The courts also uniformly hold that whether a debt collectors' procedures were reasonably adapted to avoid the violations is a "fact-intensive inquiry" that turns on the particular facts of each case. *Owen*, 629 F.3d at 1274. Under this approach, the circuit court's factual finding on whether Green Tree met its burden of proof is reviewed only for clear error. Sly.pt 1, *Public Citizen, Inc.*, 198 W.Va. 329, 480 S.E.2d 538.

The finding is not clearly erroneous. Green Tree's decision to question Figgatt about whether she retained counsel to file bankruptcy, for example, informed the court that Green Tree misapprehended the law.⁷⁶ Green Tree also frankly admitted that its calls in this case were "error upon error compounded upon error," and was forced to further admit that at least six different collectors committed over 75 other § 128(e) violations, including other multiple violations by Crumley before her promotion.⁷⁷

Green Tree could have avoided this if its collectors simply reviewed and obeyed the multiple "DO NOT CALL" notations.⁷⁸

⁷⁵AR 7, Conclusion 9.

⁷⁶AR 713 ll.3-24.

⁷⁷AR 5, Finding 13, 388 ll.9-11, 580 l.23 - 581 l.14, 612 l.5 - 618 l.5, 658 l.20 - 660 l.16, 661 ll. 8-10, 667 l.19 - 669 l.16, 670 ll.6-22, 834-837.

⁷⁸AR 359 ll.22-24, 368 l.13 - 369 l.2, 609 ll.3-20, 788, 790-791.

3. Ample evidence supports the findings on the 20 calls to third parties.

The remitted judgment may be based on the 28 violations from Green Tree calling Figgatt after it knew that she was represented. The findings on the other 20 violations, from its other calls to third parties, are icing on the cake.

Still, the attacks on these further findings are unpersuasive because 1) the West Virginia Legislature never adopted the federal skip-tracing statute; 2) Green Tree violated the federal standards; and 3) the trial court acted well within his role as fact finder. Again, the factual findings are reviewed only for clear error. *Sly*.Pt 1, *Public Citizen, Inc.*, 198 W.Va. 329, 480 S.E.2d 538.

a. The WVCCPA does not grant skip-tracing special protection.

“Skip-tracing is the collection-agency practice of tracking down debtors whose whereabouts have become unknown.” *Slough v. Federal Trade Comm’n*, 396 F.2d 870, 872 n. 2 (5th Cir. 1968). The practice has been regulated at least since the 1950s. *See Slough*, 396 F.2d at 872-873 (enforcing a cease and desist order against skip-tracing); *National Clearance Bureau v. Federal Trade Comm’n*, 255 F.2d 102 (3d Cir. 1958)(enforcing a cease and desist order against certain skip-tracing practices).

This history shows that the state Legislature could have specifically dealt with skip-tracing when it later enacted the WVCCPA in 1974. It did not. It

also could have chosen to follow Congress when Congress in 1977 specifically offered skip-tracing limited protection. 15 U.S.C. § 1692b. It again did not. In the 35 years since the federal statute was enacted, the West Virginia Legislature has never granted skip-tracing a similar dispensation.

Courts in West Virginia do not arbitrarily read into a statute that which it does not say or add to statutes something that the Legislature purposefully omitted. *Subcarrier Communications, Inc. v. Nield*, 218 W.Va. 292, 299, 624 S.E.2d 729, 736 (2005). It likewise will not, under the guise of interpretation, modify, revise, amend, or rewrite statutes. *Id.* Green Tree nevertheless wants the Court to read into the WVCCPA a federal statute that the state Legislature never adopted. Its plea is misplaced. If Green Tree wants special protection for skip-tracing, let its lobbyists pursue new legislation.

b. Green Tree violated the federal standards.

Green Tree would also need to convince the state Legislature to grant it more protection than Congress offers. Even if the federal statute applied, and it does not, Green Tree violated the statute three different ways.

The federal statute begins stating that communications with third parties must be “for the purpose of acquiring location information about the consumer.” 15 U.S.C. § 1692b. While it then also mentions “confirming” location information, “location information” is narrowly defined as the

information on “a consumer’s place of abode and his telephone number at such place, or his place of employment.” 15 U.S.C. § 1962a(7).

Green Tree was admittedly after other information. It never claimed that it needed to acquire or confirm Figgatt’s place of abode, her telephone number at her place of abode, or her telephone number at her place of employment. Figgatt’s address never changed, Green Tree was calling her at work, and Green Tree was calling and getting her personal answering machine.⁷⁹ Green Tree said that it was instead after other phone numbers on Figgatt because she was not answering her answering machine.⁸⁰ On appeal, it confirms that it wanted “better contact information” and a “better way to reach her.”⁸¹ Seeking phone numbers beyond the numbers specified in 15 U.S.C. § 1962a(7) falls outside of the limited information for which collectors may skip-trace.

Green Tree next violated the statute by calling Ms. Adkins nine or 10 times.⁸² Absent special circumstances, the federal statute forbids Green Tree from calling the same third party more than once. 15 U.S.C. § 1962b(3). Green Tree did not attempt to show the required circumstances.

⁷⁹AR 303 ll.17-21, 656 l.9 - 657 l.20.

⁸⁰AR 343 ll.13-16, 658 ll.16-19.

⁸¹Green Tree’s Opening Brief, pp. 5, 20

⁸²AR 643 l.9 - 646 l.18, 653 l.20 - 654 l.6.

Green Tree lastly violated the statute by telling Ms. Adkins about Figgatt's debt. 15 U.S.C. § 1962b(2). While it says that it did not, Ms. Adkins made a payment on the debt during one of Green Tree's calls to her."⁸³ The trial court cited this payment when explaining why the court disbelieved Green Tree's excuse for these calls.⁸⁴

c. The finding on Green Tree's motives is not clearly erroneous.

Ms. Adkins's payment was not the only evidence impeaching Green Tree's innocent explanation. When it was making these 20 calls, Green Tree had a valid telephone number for Figgatt; was almost always getting return calls from her every month; and, most importantly, was getting regular payments from her every month.⁸⁵ She just did not answer all of Green Tree's 615 calls. Even so, Green Tree was forced to admit that she did not have to answer its calls and that it had other remedies that did not drag third parties into it.⁸⁶

The trial court heard all this testimony, watched Green Tree's witness struggle through his explanation and denials, and found – as the trier of fact

⁸³AR 359 ll.1-8, 648 ll.2-21.

⁸⁴AR 722 ll.18-21.

⁸⁵AR 4, Finding 7; 301 ll.7-11, 303 ll.7-22, 336 ll.5-9, 411 l.23 - 412 l.5, 469 l.9 - 470 l.5, 472 ll.5-20, 495 ll.7-9, 499 ll.2-5, 654 ll.1-6, 705 l.21 - 706 l.5.

⁸⁶AR 332 ll.13-15, 657 ll.21-22, 658 ll.1-19.

– that Green Tree made the calls to pressure Figgatt.⁸⁷ That court, seeing the witness’s demeanor first hand, is in a much better position to judge motives. *See Miller v. Chenoweth*, 229 W.Va. 114, ___, 727 S.E.2d 658, 665 (2012)(“An appellate court may not decide the credibility of witnesses or weigh evidence as that is the exclusive function and the task of the trier of fact.”).

Conclusion

Green Tree may not force Figgatt to arbitrate her claims against it while it does not have to arbitrate its claims against her. Green Tree may not require new and written assent to modify the arbitration clause and force Figgatt to confront an arbitrator that she did not agree to who will apply rules that remain undisclosed. Green Tree may not force Figgatt’s assent to arbitrate subsequent illegalities that she could not foresee and ought not expect.

Green Tree may not talk to Figgatt about her attorney before it talks to her attorney about her. Green Tree may not escape liability by telling its collectors what the law is without taking steps to see that the law is obeyed.

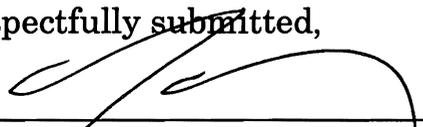
Green Tree may not skip trace a debtor who has not skipped. Green Tree may not say that it called others only to get Figgatt’s location information and get a payment on Figgatt’s debt. And Green Tree may not call Senator Byrd

⁸⁷AR 4, Finding 8; AR 6, Conclusion 5, 722 ll.2-21.

and others willy-nilly only because a sick, single mother – who is making monthly payments – decides not to answer all of its 615 calls.

The denial of arbitration is not legal error. The factual findings on the 48 violations are not clearly erroneous. This Court should affirm.

Respectfully submitted,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-1143

GREEN TREE SERVICING, L.L.C.,

Petitioner and
Defendant Below,

v.

AIMEE NEELEY FIGGATT,

Respondent.

CERTIFICATE OF SERVICE

I, **CHRISTOPHER B. FROST**, counsel for the Respondent, Aimee Neeley Figgatt, do hereby certify that a copy of the **RESPONDENT AIMEE NEELEY FIGGATT'S BRIEF** was served upon counsel of record in the above cause by enclosing the same in an envelope addressed to said attorney at the business address as disclosed in the pleadings of record herein as follows:

Don C.A. Parker, Esq.
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the same being the last known address with postage fully paid and depositing said envelope in the United States Mail on the 28th day of January, 2013.



CHRISTOPHER B. FROST

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