

13-0216

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

VALENA R. KIDD,

Plaintiff,

v.

**Civil Action No. 10-C-541-H
Honorable John A. Hutchison**

I.C. SYSTEM, INC.,

Defendant.

ORDER FOLLOWING BENCH TRIAL

On the 4th day of September, 2012, this action came on for a 2-day trial before the Court without a jury, by consent of the parties. The Plaintiff appeared in person and by counsel, Ralph C. Young and Steven R. Broadwater, Jr.; and the Defendant appeared by counsel, Kenneth E. Webb, Jr.

The issues tried to this Court are (1) whether the Defendant, I.C. System, violated the West Virginia Consumer Credit and Protection Act (Count I of Plaintiff's Complaint) and (2) whether the Defendant, I.C. System, Inc., engaged in conduct that constituted an invasion of privacy (Count IV of Plaintiff's Complaint). Prior to the bench trial, Plaintiff withdrew her claims against I.C. System, Inc., alleging common law negligence (Count II of Plaintiff's Complaint) and intentional infliction of emotional distress (Count III of Plaintiff's Complaint).

Evidence was presented by witness testimony and exhibits, and the Court heard the arguments of counsel. The Court has carefully considered the evidence, the arguments of counsel, all papers of record, and pertinent legal authorities. As a result of these deliberations, the Court makes certain Findings of Fact and Conclusions of Law set forth below. Based thereon, the Court has concluded that the Plaintiff is entitled to judgment.

FINDINGS OF FACT

From a preponderance of the evidence presented herein, the Court makes the following findings of fact:

1. The Plaintiff, Valena R. Kidd (hereinafter "Mrs. Kidd"), was a resident of West Virginia at all times relevant to this action.
2. Mrs. Kidd is a "consumer" within the definition set forth in West Virginia Code § 46A-2-122(a).
3. The Plaintiff is, and was at all times relevant to this action, married to Kenneth R. Kidd, Jr.
4. Prior to any of the conduct of I.C. System, Inc. ("I.C. System"), complained of in Plaintiff's Complaint, Mrs. Kidd owed a debt to AT&T Wireless ("AT&T"), which debt was incurred primarily for personal, family or household purposes.
5. At trial, Mrs. Kidd and her husband both admitted that she owed AT&T a legitimate debt – e.g., she used the services of AT&T, understood she would be charged for those services by AT&T and failed to pay AT&T for those services.
6. I.C. System is a corporation having its principal offices in a state other than West Virginia, and which does business in West Virginia.
7. I.C. System is a debt collector engaging directly or indirectly in debt collection within the State of West Virginia, including Raleigh County and Nicholas County, West Virginia, as defined by West Virginia Code § 46A-2-122(d) and (c).
8. AT&T hired I.C. System to collect debts from AT&T's customers, including Mrs. Kidd.

9. I.C. System, in its general business practice, maintains electronic records of each call placed to a debtor, by date, time called, duration of call, and identity of the caller.
10. I.C. System's employees place notes and codes on the computer record of each account called to detail the content of each collection call.
11. All of I.C. System's records are stored electronically.
12. Prior to letting any employee engage in collection calls, I.C. System provides training to its employees on the requirements of the federal and state laws that regulate debt collection. The initial training includes classroom work and observing other callers. Additionally, each employee is tested to assure that they have mastered their training.
13. The job training of I.C. System includes instruction on the Fair Debt Collection and Practice Act ("FDCPA").
14. The job training of I.C. System includes instruction on West Virginia state laws that differ from the FDCPA.
15. I.C. System's employees are re-tested at least once a year on the FDCPA and the states' laws.
16. As part of their initial and ongoing training, all I.C. System employees are trained to flag an account in the computer system and take down relevant information when the person called indicates they are represented by an attorney.
17. During each collection call, I.C. System employees are also trained to first verify that they are speaking with the debtor or the debtor's spouse and, if so, to provide the debtor or the debtor's spouse with a "mini-Miranda" at the inception of each collection call and before discussing the debt with the debtor or the debtor's spouse.

18. If the caller will not verify that they are the debtor or debtor's spouse, the collection call is terminated.

19. Where the caller verifies that they are the debtor or debtor's spouse, the following "mini-Miranda" is provided by the I.C. System employee: "This is an attempt to collect a debt by a debt collector. Any information obtained will be used for that purpose and the call may be monitored or recorded for quality purposes."

20. The computer records maintained by I.C. System for the Kidd account indicate that a total of 46 calls were attempted by I.C. System callers to reach Mrs. Kidd in an effort to collect on the AT&T debt – 44 calls were placed to a home phone number – (304) 872-0190 – and 2 calls were placed to a work number – (304) 343-9250. The work number was deemed a bad or wrong number and Mrs. Kidd was not reached in either call at that number.

21. Mr. Kidd and Mrs. Kidd both participated in the maintenance of their own handwritten call log, where they logged collection calls from several creditors.

22. Mrs. Kidd was in nursing school at the time in question, and neither she nor Mr. Kidd was home for every call.

23. During the time period in question, the Kidds had an answering machine attached to their home phone that picked up after four rings.

24. During the time period in question, the Kidds had a caller ID on their home phone that recorded calls placed to the home number in reverse chronological order.

25. The Kidds took calls off their caller ID and wrote them on their call log.

26. On the Kidds' call log, if there is nothing written in the column "Caller's Name," then Mr. or Mrs. Kidd did not speak to the caller.

27. Mr. Kidd noted a conversation with a male caller from I.C. System to whom he testified that he provided his wife's attorney's name and telephone number. The time of such call was noted by Mr. Kidd in the handwritten call log as 5:42 p.m., (EST). The date of the call in the handwritten log is not legible, but the call appears to be the call that I.C. System's records show to have taken place on May 6, 2010, at 4:43 p.m., (CST) where collector, Mr. Un, noted that he spoke to the husband of Mrs. Kidd. Mr. Un did not note in the I.C. System record any name or telephone number of an attorney. Mr. Un testified that he had no recollection of the call, but that if an attorney's name and number was provided, he would have noted the same.

28. This is the first of several instances where the recollection and records of the Plaintiff differs from the testimony of the Defendant's witnesses and Defendant's records. For example, the Court must decide what took place during the conversation between Mr. Kidd and Mr. Un on May 6, 2010, at 4:43 p.m., (CST). To believe Mr. Un and disbelieve Mr. Kidd on this important point, the Court must conclude that the business records upon which Mr. Un relied were complete and accurate. However, the accuracy of Defendant's call records are called into question by two separate and distinct anomalies.

29. First, Defendant's witness testified that some of the computer generated telephone calls placed to the Kidd household, which were answered by Mr. or Mrs. Kidd, were "fielded" by employees of I.C. System who were not trained collectors, who did not have access to, or the ability to input information into, Defendant's computer records system, and the names of these non-collector employees of I.C. System are not in Defendant's system.

30. The second and more troubling set of facts giving rise to the clear existence of an anomaly developed by the evidence appears in instances where Mr. or Mrs. Kidd actually noted the correct identity of a caller when, to the contrary, Defendant's records show that no

conversation ever took place. Such conversations were noted in the I.C. System records as having “No Answer”, “Dead Air”, and “No Contact.” The Court cannot reasonably believe that Mr. or Mrs. Kidd were clairvoyant, or otherwise had the ability to discern the identity the callers during telephone conversations which I.C. System maintains never took place.

31. Mr. Kidd was correctly able to identify Mr. Un as a “man” caller in his handwritten call log entry reflecting the May 6, 2010, conversation with Mr. Un at 4:44 p.m., CST. (Mr. Kidd noted the call at 5:42 p.m., EST.) Defendant’s call records note the same call and show the identity of Mr. Un as the caller. However, there is no entry of attorney information made by Mr. Un as testified to by Mr. Kidd. Further, Plaintiff’s handwritten call log and the testimony of Mrs. Kidd establish that on May 15, 2010, at 7:48 a.m., CST (Mrs. Kidd noted 8:47 a.m., EST), Mrs. Kidd spoke to someone whom identified himself to Mrs. Kidd as “Frank” and Mrs. Kidd noted his name in her call log as “Frank.” This call also appears on Defendant’s call log and shows the caller as one “Francis Racaniello” whom Plaintiff maintains must be in fact the “Frank” to whom Mrs. Kidd spoke and provided her attorney information. The glaring inconsistency in Defendant’s records is that although the I.C. System records verify that Francis Racaniello made a call on that day at that precise time, Mr. Racaniello noted in the records that this was a call where “No Contact” was made.

32. Similarly, Defendant’s handwritten call logs and the testimony of Mr. Kidd establish that Mr. Kidd, on May 18, 2010, at 1:52 p.m., EST, spoke to a caller who identified herself as “Carla” and Mr. Kidd noted the same on his handwritten call log. Defendant’s records show this same call on May 18, 2010, at 12:53 p.m., CST, with the notation being, “No Answer.” Defendant’s records further show that its employee that placed that call was one “Karla Gundmison,” who noted in Defendant’s record that there was “No Answer” to this call. Again,

the Court will not attribute the trait of clairvoyance to Mr. Kidd who obviously had to have a conversation with Karla Gundmuson to enable him to accurately record the caller's name as "Carla" on his handwritten call log.

33. The same pattern repeats when Mrs. Kidd noted on May 19, 2010, at 1:52 p.m., EST, that she spoke with "Marcie" from I. C. System. Defendant's records show the call on May 19, 2010, at 12:52 p.m., CST, but note the event as "Dead Air" and do not note the identity of the caller. Obviously, Mrs. Kidd spoke to a female caller from I. C. System who identified herself as "Marcie", and was most likely a transfer agent.¹ The evidence establishes a similar conundrum on May 20, 2010, where Mr. Kidd noted that he received a call from "T. J." from I. C. System at 4:28 p.m., EST. The Defendant's records show that a call was placed to Mr. and Mrs. Kidd on May 20, 2010, at 3:29 p.m., CST, but the Defendant noted the call as "No Contact." Yet, the Defendant's records show the actual caller was one "Timothy Lee" whose name is similar enough to the Plaintiff's notation of "T. J." for the Court to conclude that a conversation actually took place between Timothy Lee and Mrs. Kidd at that day and time.

34. Plaintiff's records further show on the same day that Mrs. Kidd spoke to "Jane" from I. C. System at 5:52 p.m., EST. Defendant's records show the same call on May 20, 2010, at 4:52 p.m., CST, but note the event as "Answer Machine," with the caller again shown the Defendant's records as being "Timothy Lee." This leads to the conclusion that "Jane," like the "Marcie" discussed above, was a transfer agent handling the call before the call was transferred to Timothy Lee.

¹From the testimony of I.C. System employees, "transfer agents" were employees of I.C. System who were not trained as collectors, did not have access to the computer record keeping system and merely handled the call until a regular collector with the ability to enter information into Defendant's system could come on line.

35. The Court can only conclude under such circumstances that Defendant's records have been proven to be inaccurate with respect to when conversations occurred between Mr. and Mrs. Kidd and I.C. System collectors or transfer agents. The I.C. System witnesses denied that conversations took place in reliance, not on their memory, but upon the I.C. System records which show that rather than a conversation, as testified by Plaintiff and her husband, these calls resulted in "No Answer," "No Contact," "Dead Air" or "Answer Machine." Defendant's witness, Mr. Volk, specifically testified that it was not possible for a conversation to actually take place that would not be reflected in the I.C. System records. But, without a conversation taking place, the Plaintiff and her husband would not have been able to correctly identify the I.C. System employee responsible for the call. Therefore, the Court must then view with caution the testimony of Defendant's four witnesses who had no actual knowledge or recollection of the important events, but instead, relied upon the I.C. System records which have been demonstrated to be inaccurate.

36. The Court concludes as a matter of fact that on May 6, 2010, Mr. Kidd provided his wife's attorney's name and telephone number to Mr. Un, who placed a call to the Kidd household at 4:43 p.m., CST. The Court must further conclude that Mrs. Kidd provided her attorney's name and telephone number to a caller who identified himself as "Frank" from I.C. System on May 15, 2010, at 7:48 a.m., CST.

37. Notwithstanding the Findings of Fact above, it is conclusively established by Defendant's records that it appeared that Mr. and Mrs. Kidd were represented by an attorney and that no contact should be made with Mrs. Kidd as the same was noted in Defendant's records on May 3, 2010, at 8:20 p.m., when I.C. System noted in its records, "Debtor has attorney. Flag changed from yes to no."; "Debtor cease type change from not cease to cease all. Debtor has

attorney. Flag changed from no to yes.” Such entries are entirely inconsistent with the testimony of the four I.C. System witnesses, none of whom were asked by counsel to comment upon such entries in any way. At no time in taking the evidentiary deposition of I.C. System’s four witnesses did counsel for I.C. System address these admissions entered into the I.C. System records.

38. The Court concludes as a matter of fact that Defendant knew that Plaintiff was represented by an attorney on May 3, 2010, when it noted the same in its records at 8:20 p.m., CST, and further knew that contact with the Plaintiff after such time was prohibited as it noted in its records that “No contact” with the Plaintiff should be made.

39. The Court finds from Defendant’s call records that after May 3, 2010, at 8:20 p.m., beginning with the call of May 4, 2010, at 9:12 a.m., Defendant placed 44 telephone calls to Plaintiff’s residence telephone number which were either answered by Mr. or Mrs. Kidd or, noted on Mr. and Mrs. Kidd’s Caller ID and as such, were “communication” within the meaning of *West Virginia Code* § 46A-2-128(e) which was prohibited.

CONCLUSIONS OF LAW

1. “The burden of proof, meaning the duty to establish the truth of the claim by a preponderance of the evidence, rests upon [the plaintiff] from the beginning, and does not shift, as does the duty of presenting all the evidence bearing on the issue as the case progresses.” *Burk v. Huntington Dev. & Gas Co.*, 58 S.E.2d 574, 581 (W.Va. 1950), holding modified by *Foster v. City of Keyser*, 501 S.E.2d 165 (W.Va. 1997).

2. “[T]he trier of fact is the ultimate judge of credibility and is free to accept or reject any testimony it does not find credible.” *Brown v. Gobble*, 474 S.E.2d 489, 499 (W.Va. 1996).

3. The Plaintiff has proven by a preponderance of the evidence that the call records maintained by the Defendant contain discrepancies, and that the Plaintiff in fact provided her attorney information to I.C. System on May 3, 2010.

Count 1: Violations of the *West Virginia Consumer Credit and Protection Act*

4. “The WVCCPA is a comprehensive consumer protection law that incorporates elements of the Uniform Consumer Credit Code, the National Consumer Act, and older West Virginia statutes.” *Duncan v. JP Morgan Chase Bank, N.A.*, 2011 WL 5359698, at 3 (S.D.W.Va. Nov. 4, 2011) (internal citations omitted).

5. The WVCCPA at West Virginia Code § 46A-2-128 provides as follows regarding the use of unfair or unconscionable means in debt collection:

No debt collector shall use unfair or unconscionable means to collect or attempt to collect any claim. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section:

...

(e) Any communication with a consumer whenever it appears that the consumer is represented by an attorney and the attorney's name and address are known, or could be easily ascertained, unless the attorney fails to answer correspondence, return phone calls or discuss the obligation in question or unless the attorney consents to direct communication.

6. Plaintiff has proven by a preponderance of the evidence presented at trial that I.C. System employees continued to communicate with her after she informed I.C. System that she was represented by an attorney.

7. Plaintiff has proven by a preponderance of the evidence presented at trial that she told I.C. System she was represented by an attorney on May 3, 2010.

8. Plaintiff has proven by a preponderance of the evidence that I.C. System placed forty-four (44) calls to her after I.C. System learned she was represented by an attorney.

9. The Plaintiff is entitled to recover a statutory penalty of not less \$100.00 nor more than \$1,000.00 as provided by West Virginia Code § 46A-5-101(1) as adjusted for inflation by West Virginia Code § 46A-5-106 for each violation of West Virginia Code § 46A-2-128(e). Hence, the range of statutory penalties as adjusted for inflation from the *Consumer Price Index* existing on September 1, 1974, to the present, is a statutory penalty of not less than \$462.81 nor more than \$4,628.14 per violation.²

10. The Court finds that based upon the evidence presented, the Plaintiff has proven by a preponderance of the evidence that on at least ten (10) calls, there was an actual conversation or participation between the Plaintiff or her husband and the Defendant's agent. Therefore, the Court awards a statutory penalty of \$4,628.14 for each of these 10 violations, for a total award of \$46,281.40.

11. The record does not show to the satisfaction of the Court as trier of fact that the remaining 34 calls occurred when the Plaintiff or her husband were home and heard the

²West Virginia Code §46A-5-106 provides that the statutory penalties provided under Section 101 may be adjusted to account for inflation indexed upon the *Consumer Price Index* from the effective date of the WVCCPA, September 1, 1974. The CPI in effect on September 1, 1974, was 50. The most recent available CPI is 231.407 for September 2012, creating an inflation multiplier of 4.62814.

telephone ringing, or were indeed home and attempted to communicate with the caller, but failed to do so. For that reason, the Court believes the minimum statutory penalty in this case is appropriate for any call which was made by the Defendant, but the telephone was not heard to ring by the Plaintiff or her husband, or there was no message left on the Plaintiff's answering machine by the Defendant, i.e. the Plaintiff and her husband were made aware of the call by their caller ID device or some other method. Therefore, the Plaintiff is entitled to an award of \$462.81 for each of the remaining 34 calls, for a total award of \$15,735.54.

12. The Court therefore finds that the Plaintiff is entitled to a total award in the amount of sixty-two thousand sixteen dollars and ninety-four cents (\$62,016.94) as a result of the Defendant's violations of West Virginia Code § 46A-2-128(e).

13. The WVCCPA at West Virginia Code § 46A-2-125(d) provides as follows regarding causing oppression or abuse in debt collection:

No debt collector shall unreasonably oppress or abuse any person in connection with the collection of or attempt to collect any claim alleged to be due and owing by that person or another. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section:

...

(d) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously, or at unusual times or at times known to be inconvenient, with intent to annoy, abuse, oppress or threaten any person at the called number.

14. “[A] pattern and volume of the calls, alone, [may] evidences harassment [However,] ‘[w]hether there is actionable harassment or annoyance turns not only on the volume of calls made, but also on the pattern of calls.’” *Clements v. HSBC Auto Fin., Inc.*, 2011 WL 2976558, at 5 (S.D.W.Va. July 21, 2011) (quoting *Akalwadi v. Risk Management Alternatives, Inc.*, 336 F.Supp.2d 492, 505 (D.Md. 2004)).

15. However, this factor alone is not determinative. A court would be warranted in finding that a plaintiff's allegations that a debt collector's calls were unwanted and intended to harass, oppress, or abuse are unsupported by facts and evidence even when a high volume of calls exists. *Clements*, 2011 WL 2976558, at 5 (citing *Kerr v. Dubowsky*, 71 Fed.Appx. 656, 657 (9th Cir. 2003)).

16. "The nature of the violations at issue in these types of claims is fact-intensive and a court must be cautious to view each alleged violation on a case-by-case basis" *Duncan*, 2011 WL 5359698, at 4.

17. The Court has found that the Defendant placed a total of 44 calls to the Plaintiff and her husband in the 30-day period following May 3, 2010, the date the Plaintiff provided her attorney information to the Defendant.

18. The Court finds that the pattern and volume of the calls in this case are evidence of the Defendant's intent to annoy and harass the Plaintiff, and that the Plaintiff has proven by a preponderance of the evidence that the Defendant's calls were intended to and did in fact annoy and harass the Plaintiff and her husband.

19. The Court finds that the Plaintiff is entitled to an award of actual damages as provided by West Virginia Code § 46A-5-101(1) for annoyance, aggravation and inconvenience in the amount of twenty-five thousand dollars (\$25,000.00).

Count 2: Common Law Invasion of Privacy; and Attorney's Fees

20. The Court recognizes that it has awarded to the Plaintiff for statutory penalties the amount of \$62,016.94, and has awarded for compensation for the Plaintiff's annoyance and inconvenience the amount of \$25,000.00. The total amount awarded to the Plaintiff thus far is

\$87,016.94, which clearly exceeds the Plaintiff's self-imposed recovery limit of seventy-four thousand nine hundred ninety-nine dollars (\$74,999.00).

21. Therefore, the Court finds that any consideration of an award of damages for common law invasion of privacy is deemed moot. The Court further finds that any consideration of attorney's fees in this matter is likewise deemed moot.

Summary

22. The Court finds that the Plaintiff is entitled to a judgment in the amount of eighty-seven thousand sixteen dollars and ninety-four cents (\$87,016.94). By stipulation, the maximum amount recoverable by the Plaintiff is seventy-four thousand nine hundred ninety-nine dollars (\$74,999.00). Therefore, the Court finds that the Plaintiff shall be awarded a final judgment in the amount of seventy-four thousand nine hundred ninety-nine dollars (\$74,999.00), plus post-judgment interest.

23. To the extent that the proposed factual findings and legal conclusions of the parties were not specifically included in this Order, they were incorporated by reference or deemed not proven.

24. The exceptions and objections of both parties to the Court's ruling are noted and preserved for the record.

Based on the foregoing Findings of Fact and Conclusions of Law, it is therefore **ADJUDGED** and **ORDERED** as follows:

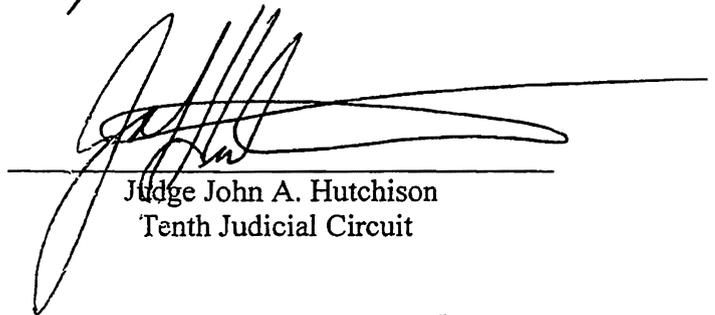
1. That the Plaintiff is awarded a judgment of seventy-four thousand nine hundred ninety-nine dollars (\$74,999.00), plus post-judgment interest at the statutory rate of seven percent (7.0%) from and after the date of entry of this Order.

2. That the Circuit Clerk provide certified copies of this Order to:

Ralph C. Young, Esq.
Steven R. Broadwater, Jr., Esq.
Hamilton, Burgess, Young & Pollard, PLLC
P.O. Box 959
Fayetteville, WV 25840

Kenneth E. Webb, Jr., Esq.
Bowles Rice McDavid Graff & Love LLP
P.O. Box 1386
600 Quarrier Street
Charleston, WV 25325-1386

Entered this 29th day of January, 2013.



Judge John A. Hutchison
Tenth Judicial Circuit

The foregoing is a true copy of an order entered in this office on the 30 day of Jan., 2013.

PAUL H. FLANAGAN, Circuit Clerk of Raleigh County, West Virginia

By:
Deputy

**Remove From Docket
By Order Of JAH**

COPIES TO ALL LAWYERS

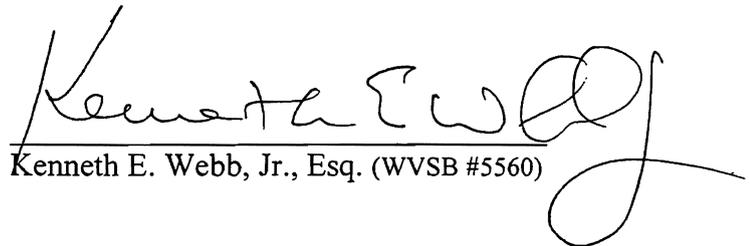
CERTIFICATE OF SERVICE

I, Kenneth E. Webb, Jr., counsel for I.C. System, Inc., do hereby certify that service of the foregoing *Notice of Appeal* has been made this **28th day of February, 2013**, on counsel of record, a true and exact copy thereof, via U.S. Mail, addressed as follows:

The Honorable John A. Hutchison, Judge
Circuit Court of Raleigh County
215 Main Street
Beckley, West Virginia 25801

Janice Davis, Clerk
Circuit Court of Raleigh County
215 Main Street
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Kenneth E. Webb, Jr., Esq. (WVSB #5560)