

In the Supreme Court of Appeals of West Virginia

No. 13-0216

Valena Kidd,

Respondent,

v.

I.C. Systems, Inc.,

Petitioner.

**Respondent Valena Kidd's Summary Response to  
I.C. Systems's Brief**

Ralph C. Young (W.Va. Bar # 4176)  
[ryoung@hamiltonburgess.com](mailto:ryoung@hamiltonburgess.com)

Christopher B. Frost (W.Va. Bar # 9411)  
[cfrost@hamiltonburgess.com](mailto:cfrost@hamiltonburgess.com)

Steven R. Broadwater, Jr. (W.Va. Bar # 11355)  
[sbroadwater@hamiltonburgess.com](mailto:sbroadwater@hamiltonburgess.com)

Jed R. Nolan (W.Va. Bar # 10833)  
[jnolan@hamiltonburgess.com](mailto:jnolan@hamiltonburgess.com)

HAMILTON BURGESS YOUNG &  
POLLARD  
P.O. Box 959  
Fayetteville, WV 25840-0959  
304/574-2727

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## Introduction

In 2010, Valena Kidd was a full-time nursing student when her husband lost his job. They have three children and could not keep up with their bills.<sup>1</sup> This case involves I.C. Systems's attempts to collect a bill.

I.C.'s own records and testimony show that it knew that Kidd had an attorney by May 3, 2010 yet continued calling her for 30 days despite knowing that this is illegal.<sup>2</sup> The trial court found that these calls violated W.Va. Code §§ 46A-2-128(e) and 46-A2-125(d); applied Kidd's self-imposed cap to reduce a \$87,016.94 award to \$74,999; and ruled that her cap mooted her privacy claim and request for attorneys fees. App. 362-367.

Review is limited to whether the trial-court findings are clearly erroneous and whether the final order is an abuse of discretion. Sly.pt. 1, *Beverly v. Thompson*, 229 W.Va. 684, 735 S.E.2d 559 (2012). And a finding is not clearly erroneous simply because this Court would have decided the case differently. It must affirm if the trial court's account of the evidence is plausible in light of the entire record. Sly.pt. 2, *West Virginia Dept. Of Health and Human Resources v. E.P.*, \_\_\_ W.Va. \_\_\_, 741 S.E.2d 100 (2013).

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<sup>1</sup>Trial Tr. 7 ll.13-19, 8 l.14, 54 l.18-55 l.1.

<sup>2</sup>Trial Tr. 110 ll.2-23, 135 ll.2-21, 141 l.13-142 l.3, 173 ll.1-7, 193 ll.13-18; App. 11-12, 39, 130-131, 152-153, 239-240, 246-247, 361 (Finding 38).

**A. I.C.'s records prove the § 46A-2-128(e) violations.**

I.C. wrongly claims that the trial court credited all of Kidd's evidence and discredited all of its evidence. The trial court did not rely on the Kidd's evidence to find the § 46A-2-128(e) violations. I.C.'s evidence shows when it learned that Kidd was represented by counsel, and its Verizon records show how many times it continued to call.

**1. I.C.'s evidence establishes the May 3, 2010 trigger date.**

I.C.'s Operations Manager admitted that I.C. called the Kidds on May 3, 2010. Trial Tr. 224 ll.17-19. Its Verizon log reflects a 0.7 minute or 42 second call on May 3, 2010. App. 152. And I.C.'s log for that day states "debtor has attorney," "flag changed from yes to no" and "type changed from not cease to cease all." Trial Tr. 130-131; App. 239-240. The trial court cited these May 3, 2010 entries – and noted that I.C.'s witnesses failed to address them – in finding the May 3, 2010 trigger date. App. 360-361 (Findings 37-38).

I.C. describes the finding as "absurd" because the entries were created by "programming behind the scenes." This explanation, however, is not evidence. It is an unsworn discovery response signed only by the lawyer. App. 254, 467. Rule 33(a) requires answers "under oath," and "[i]t is black letter law that '[s]tatements made by lawyers do not constitute evidence in a case.'" *Barbina v. Curry*, 221 W.Va. 41, 48, 650 S.E.2d 140, 147 (2007).

Besides, programming requires a programmer. Unless clairvoyant, I.C.'s programmers would not know to say that Kidd had counsel on May 3, 2010 if I.C. did not learn it until later.

The trial court did not clearly err by giving the May 3, 2010 entries their plain meaning.

## **2. The Verizon records establish the number of calls.**

The trial court also did not clearly err by finding that I.C. called the Kidds 44 times from May 3, 2010 to June 2, 2010. App. 361 (Finding 39). This number comes directly from I.C.'s Verizon log. App. 152-153, 246-247.

Kidd has no quarrel with the Verizon log. She quarrels with I.C.'s attempt to misconstrue it.

I.C. first argues that 10 calls do not count because the Kidds did not speak to I.C. until May 6, 2010. This skews Finding 36. The court concluded there that a May 6, 2010 conversation occurred without suggesting that it was the first one. Again, I.C.'s Operations Manager admitted that I.C. first called on May 3, 2010; the Verizon log shows a 42 second call on May 3, 2010; and the court found from I.C.'s own log that it knew about Kidd's lawyer on May 3, 2010. Trial Tr. 224 ll.17-19; App.152-153, 246, 360-361 (Findings 36-38).

Findings 36 and 37 are thus not inconsistent. The court simply found that I.C. and the Kidds talked on May 3 and then again on May 6.

Kidd's self-imposed cap at \$74,999 moots I.C.'s next contention. It attacks \$4,628.14 of the award by arguing that the first call in which it learned about Kidd's attorney does not count. But the court would have awarded Kidd at least \$87,016.94. App. 365-366 (Conclusion 20). Subtracting out \$4,628.14 for the one call, an award for \$82,388.80 does not change the capped judgment. I.C. is arguing about much less money than Kidd has already given up. This Court may affirm even if the trial court miscounted one call. Sly.pt. 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965).

**3. The trial court properly enhanced the penalties.**

Sections 46A-5-101(1) and 46A-5-106 of the Code grant trial courts a range of permissible penalties. Exercising this discretion, the trial court punished the 10 calls that Kidd or her husband answered more heavily than those that went unanswered. App. 363-364 (Conclusions 9-12). In finding the number of calls that were answered, the court relied on the Kidds' testimony that they logged the "caller's name" or gender 10 times.<sup>3</sup>

This finding is entitled to great deference. Unlike I.C., who rested on deposition testimony, Kidd and her husband drove up from Florida to testify live. Trial Tr. 7 ll.3-6, 55 ll.8-22, 95 l.22-96 l.7. On appeal, "due regard shall be given

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<sup>3</sup>Trial Tr. 36 l.15-38 l.18, 46 ll.6-12, 47 ll.15-19, 48 ll.5-19, 57 l.5-60 l.20; App. 135-140.

to the opportunity of the trial court to judge the credibility of the[se] witnesses.” Rule 55(a), W.Va.R.Civ.Pro. The burden to show clear error “is especially strong” when the findings are based on live testimony. *Brown v. Gobble*, 196 W.Va. 559, 565, 474 S.E.2d 489, 495 (1996).

I.C. still tries to impeach this live testimony three ways. It first argues that Kidd’s husband only talked to I.C. four times. But Kidd identified a fifth call where her husband identified a “man” as the I.C. caller, and testified that she spoke to I.C. callers the other five times.<sup>4</sup> I.C. next stresses that Kidd earlier claimed credit for calls that her husband answered. The trial court eyeballed Kidd as she explained this and told I.C. that it made its point. Trial Tr. 76 l.15-80 l.15. I.C. lastly argues that the trial court did not consider its calls’ duration. But the Verizon record confirms that many of its 44 calls lasted 18 seconds or more. App.152-153, 246-247. I.C. does not explain why unanswered calls would last so long.

Besides stabbing at impeachment, I.C. introduced testimony from witnesses who lacked actual knowledge or recollection of the calls.<sup>5</sup> The court discounted their testimony because the Kidds named callers who supposedly never got through. App. 357 -360 (Findings 30-35). “The Court cannot reasonably believe

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<sup>4</sup>Trial Tr. 46 ll.6-12, 47 ll.15-17, 48 ll.5-19, 57 ll.18-21, 58 l.2-60 l.20.

<sup>5</sup>Trial Tr. 111 ll.5-10, 142 ll.9-13, 181 ll.13-21, 225 ll.6-19.

that Mr. or Mrs. Kidd were clairvoyant, or otherwise had the ability to discern the callers during telephone conversations which I.C. Systems maintain never took place.” App. 358 (Finding 30).

Even now, I.C. does not try to explain how the Kidds identified Carla and Frank as I.C. collectors if their calls never got through.

The trial court also noted that the logs that I.C.’s witnesses relied on do not account for I.C.’s transfer agents. These I.C. agents do not input data into the log yet called the Kidds too.<sup>6</sup> The trial court properly factored them into the mix when the court credited the Kidds’ testimony about the 10 calls. App. 357, 359 (Findings 29, 33-34).

In sum, the trial court fully explained the penalties imposed. App. 363-364 (Conclusions 9-12). There is no clear error or abuse of discretion.

#### **B. The Verizon records prove the § 46A-2-125(d) violations.**

Again, the Verizon records show that I.C. called Kidd 44 times in 30 days, calling her day after day after day for three, four, and even five times a day. App. 152-153, 246-247. The trial court properly found that § 46A-2-125(d) outlaws this misconduct. App. 364-365 (Conclusions 13-19).

Courts construing § 46A-2-125(d) hold that fact finders may find the intent

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<sup>6</sup>Trial Tr.156 ll.17-23, 199 ll.12-21, 200 ll.13-20, 219 ll.10-22.

to annoy or harass from much less concentrated calls. *See, e.g., Ferrell v. Santander Consumer USA, Inc.*, 859 F.Supp.2d 812, 816-817 (S.D.W.Va. 2012)(72 calls in two months); *Blackburn v. Consumer Portfolio Serv., Inc.*, 2012 W.L. 2089514 (S.D.W.Va. 2012)(94 calls in eight months)[Addendum]; *Duncan v. JP Morgan Chase Bank, N.A.*, 2011 W.L. 5359698 (S.D.W.Va. 2011)(68 calls in 11 months)[Addendum].

Worse yet, I.C. made these calls knowing that Kidd was represented by counsel and that calling represented debtors is prohibited.<sup>7</sup> So the intent to harass is not only gleaned from 44 calls in 30 days, as if that were not enough, but also from I.C.'s decision to continue calling Kidd after she gave it her attorney information. She testified that this contributed to her strain and frustration, prompting her to ask I.C., "Are you guys recording our information that we're giving you or what are you doing with it, they would still call." Trial Tr. 62 l.13-63 l.13.

I.C.'s knowing violations also refute its plea for mitigation. Educating bill collectors about the law does not help if its collectors promptly violate it. It just means that the collectors are brazen. And brazenness merits greater sanctions, not less. Besides, Kidd specifically asked I.C. in discovery whether it was raising

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<sup>7</sup>Trial Tr. 110 ll.2-23, 135 ll.2-21, 141 l.13-142 l.3, 173 ll.1-7, 193 ll.13-18; App. 361 (Finding 38).

any procedures as a defense. I.C. responded “N/A,” meaning that the defense is not applicable. App. 213-214. It is a little late for I.C. to start relying on its procedures now.

So, I.C. barraged Kidd with 44 calls in 30 days despite knowing the calls were illegal. The \$ 25,000 compensatory award relatively modest. It is not an abuse of discretion.

### **C. I.C. misstates the discovery dispute.**

I.C. next horribly skews a discovery dispute to try to undo the bench trial. The discovery dispute involves three issues. None merit a new trial.

The trial court first ruled that I.C.’s request for the Kidds’ work schedules was moot. The court reasoned that I.C. questioned the Kidds about their employment during their depositions, and could use the deposition testimony to subpoena the employment records. App. 181 ll.2-6. I.C. never followed up.

The court next denied I.C.’s request for the Kidds’ credit card, bank, and other financial information. While I.C. claimed that it needed this information to track the Kidds’ whereabouts, the court properly ruled that the requests “go way beyond where we need to be.” App. 165 l.14-166 l.11, 177 ll.9-17. The ruling makes sense. I.C. could have deposed the Kidds on their whereabouts without rummaging through their check statements and other financial information.

Testimony from I.C.’s Operations Manager also puts this in context. He

testified that I.C.'s system was sophisticated enough to detect an answering machine and cut the call off before it gets to a collector. Trial Tr. 198 ll.2-22. The Kidds' ability to identify a caller by name or gender thus confirms when they were home to take the call. App. 134-142.

Finally, the discovery dispute centered over I.C.'s desire to get other creditors' call logs that were protected by confidentiality orders entered in other cases. App. 170 ll.11-18. To get this information, I.C. agreed with the court that the court may have to bring the other creditors into this case for a hearing on whether to pierce their protective orders. App. 175 l.18-176 l.1, 177 ll.5-8. Kidd explained that she did not need to be at such a hearing, because she did not have a dog in the fight, and argued that I.C. should be the one to seek relief from the protective orders. App. 170 l.15-171 l.4, 178 ll.21-22, 179 l.21-180 l.13.

The Court ordered Kidd to provide information about the other cases. App. 181 l.10-182 l.3. Kidd provided the information to I.C. on August 16, 2011 – and I.C. did nothing with it for over a year. App. 351.

When the court later denied I.C.'s motion, it did not conclude that I.C. could have subpoenaed the information in the midst of the discovery dispute. App. 350-352. The context shows that the court faulted I.C. for never setting up the hearing that I.C. agreed was necessary to pierce the other creditors' protective orders. App. 175 l.18-176 l.1, 177 ll.5-8. It was not Kidd's job to set up a hearing

she did not need to attend. It was not the court's job to set up another hearing so that I.C. could try to breach the protective orders. It was I.C.'s job to schedule another hearing if it still wanted the information. It dropped that ball too.

Besides, I.C. wanted to breach these protective orders primarily to test the Kidds' account on when they told I.C. that she was represented by counsel. I.C.'s May 3, 2010 entries nail this down. App. 130-131, 239-240.

**D. I.C. feigns surprise over the May 3, 2010 entries.**

I.C.'s May 3, 2010 entries likewise refute its suggestion that Kidd's proposed order unfairly prejudiced it. It argues that the May 3, 2010 trigger date took it by surprise because Kidd "never once made this argument to the Circuit Court" before submitting her proposed order. This is untrue.

For background, I.C. produced the log containing the May 3, 2010 entries on September 20, 2010. App. 239-240, 248. Kidd later used the log to get I.C.'s Operations Manager to admit that I.C. called on May 3, 2010. Trial Tr. 224 ll.17-19. And then during trial, Kidd stressed to the court that the log "absolutely establishes our case" in that it "shows that this – this account was flagged as attorney represented – it's right in the records – attorney represented, as of May 3rd, 2010." Trial Tr. 89 ll.10-14.

If I.C. was ever surprised, it was because it stuck its head in the sand. It had two years to elicit evidence explaining the entries, yet presented nothing other

than an unsworn, cryptic statement about programming from a lawyer rather than sworn evidence from a client. App. 254, 467.

I.C. told the trial court that it had the discretion to consider Kidd's proposed order. App. 464 ¶ 7. It now tells this Court that the trial court lacked discretion to consider a crucial admission from a record that I.C. produced almost two years before. It was right the first time. The trial court enjoyed discretion to give I.C.'s May 3, 2010 entries their plain meaning.

Lastly, this Court has already established procedures for handling objections to proposed orders: the objecting party sends the court a list of its objections and a proposed order that incorporates the objections. Trial Rule 24.01(d). I.C. essentially followed this route by objecting to Kidd's proposal and asking the Court to consider its lawyer's unsworn discovery response. App. 463-469. The court simply declined to give the cryptic statement weight.

I.C.'s problem is thus not procedural. Its problem is that its May 3, 2010 entries refute its claims about when it first learned that Kidd was represented by counsel.

#### **E. A trial court may shift the wheat from the chaff.**

Lastly, I.C. wrongly suggests that a court must believe everything that a witness or document says or nothing. This resurrects the discredited "falsus in uno, falsus in omnibus" maxim where credibility is judged on an all or nothing

basis. As fact-finders, however, trial courts may be more discerning.

The trial court fully explained why it found I.C.'s logs partly credible and partly clairvoyant. The court found the May 3, 2010 entries credible because I.C.'s witnesses never addressed the damaging admission over the May 3, 2010 trigger date. App. 360-361 (Findings 37-38). Other entries in the log were less credible because the Kidds knew the names of callers who supposedly never got through. App. 357 -360 (Findings 30-35). And the court had the discretion to credit the Verizon records – that I.C. produced – on its 44 calls. App. 361 (Finding 39).

### Conclusion

Findings made in a bench trial must be affirmed unless they smell bad enough to hit the Court with the “force of a five-week-old, unrefrigerated dead fish.” *Brown*, 196 W.Va. at 563, 474 S.E.2d at 489. There is nothing fishy here. I.C.'s log and Verizon record show when it learned that Kidd was represented by counsel and how often it continued to call. Findings based on these records are not clearly erroneous. The conclusions are not an abuse of discretion. The judgment must be affirmed.

Respectfully,



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Ralph C. Young (W.Va. Bar # 4176)  
[ryoung@hiltonburgess.com](mailto:ryoung@hiltonburgess.com)

Christopher B. Frost (W.Va. Bar # 9411)  
[cfrost@hiltonburgess.com](mailto:cfrost@hiltonburgess.com)

Steven R. Broadwater, Jr. (W.Va. Bar # 11355)  
[sbroadwater@hiltonburgess.com](mailto:sbroadwater@hiltonburgess.com)

Jed R. Nolan (W.Va. Bar # 10833)  
[jnolan@hiltonburgess.com](mailto:jnolan@hiltonburgess.com)

HAMILTON BURGESS YOUNG & POLLARD  
P.O. Box 959  
Fayetteville, WV 25840-0959  
304/574-2727

2012 WL 2089514

Only the Westlaw citation is currently available.  
United States District Court, S.D. West Virginia.

Elizabeth A. BLACKBURN, Plaintiff,

v.

CONSUMER PORTFOLIO  
SERVICES, INC., Defendant.

Civil Action No. 2:11-cv-00401. | June 8, 2012.

### Attorneys and Law Firms

Wesley Harrison White, Attorney at Law, Gilbert, WV, for Plaintiff.

Brienne T. Marco, Bruce M. Jacobs, Spilman Thomas & Battle, Charleston, WV, for Defendant.

### Opinion

#### MEMORANDUM OPINION & ORDER

JOSEPH R. GOODWIN, Chief Judge.

\*1 Pending before the court is the defendant Consumer Portfolio Services, Inc.'s Motion for Partial Summary Judgment [Docket 49]. For the reasons discussed below, this Motion is **GRANTED in part** and **DENIED in part**.

### I. Background

#### A. Facts

The plaintiff, Ms. Blackburn, alleges that Consumer Portfolio Services, Inc. ("CPS") called her over 300 times from May 10, 2010, to January 2011 as part of an attempt to collect a debt. (Am. Compl. [Docket 18], ¶ 4(a).) Her Complaint claims that CPS's numerous calls were made "with the intent to annoy, harass, and oppress the Plaintiff," and she asserts that CPS called her three to four times a day while she was at work and at other inconvenient times. (*Id.*) The Complaint also alleges that CPS continued the calls after she informed it that she had retained an attorney and had requested that CPS contact her attorney. (*Id.* ¶ 4(b).) Specifically, she alleges that CPS called her more than 180 times after she informed it that she had retained an attorney and that it called five additional times after she wrote CPS requesting that it contact her attorney. (*Id.*)

In addition to the above claims, Ms. Blackburn asserts that CPS disclosed her debt to her friends and family. (*Id.* ¶ 4(c).) Finally, Ms. Blackburn claims that CPS added illegal fees and charges to her account when it refused to accept certain payment forms and when it allegedly demanded double payments. (*Id.* ¶ 4(d).)

#### B. Procedural History

Ms. Blackburn initiated the instant case by filing her Complaint on May 16, 2011, in the Circuit Court of Kanawha County. (Compl. [Docket 1-1].) The Complaint contains causes of action for (1) violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA"), (2) negligence, (3) intentional infliction of emotional distress, (4) invasion of privacy, and (5) nuisance. (*Id.*) The case was removed to this court on June 6, 2011, based on diversity jurisdiction. (Notice of Removal [Docket 1].)

On October 26, 2011, Ms. Blackburn filed an amended complaint. The defendant filed a Partial Motion to Dismiss Amended Complaint on November 9, 2011. The Motion to Dismiss sought dismissal of the plaintiff's claims for (1) violations of the WVCCPA,<sup>1</sup> (2) negligence, (3) intentional infliction of emotional distress, and (4) nuisance. The court granted the Motion as to the negligence and nuisance claims and denied the Motion as to the intentional infliction of emotional distress claim.

<sup>1</sup> In its Reply to the Plaintiff's Response to its Partial Motion to Dismiss Amended Complaint, CPS withdrew its motion to dismiss for Ms. Blackburn's Claims under the WVCCPA. (Def.'s Reply to Pl.'s Resp. to Partial Mot. to Dismiss Am. Compl. [Docket 27], at 1 n. 1.)

On April 3, 2012, CPS filed a Motion for Partial Summary Judgment [Docket 49]. This Motion is ripe for review and a hearing was held concerning the Motion on May 17, 2012.

### II. Summary Judgment Standard

To obtain summary judgment, the moving party must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(a). In considering a motion for summary judgment, the court will not "weigh the evidence and determine the truth of the matter." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Instead, the court will draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party. *Matsushita*

*Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986).

\*2 Although the court will view all underlying facts and inferences in the light most favorable to the nonmoving party, the nonmoving party nonetheless must offer some “concrete evidence from which a reasonable juror could return a verdict in his [or her] favor.” *Anderson*, 477 U.S. at 256. Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, a showing sufficient to establish that element. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The nonmoving party must satisfy this burden of proof by offering more than a mere “scintilla of evidence” in support of his or her position. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or unsupported speculation, without more, are insufficient to preclude the granting of a summary judgment motion. *See Felty v. Graves–Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir.1987); *Ross v. Comm’ns Satellite Corp.*, 759 F.2d 355, 365 (4th Cir.1985), *abrogated on other grounds*, 490 U.S. 228 (1989).

### III. Analysis

#### A. Claim Pursuant to West Virginia Code § 46A–2–125(d)

The plaintiff has brought a claim pursuant to West Virginia Code § 46A–2–125(d), which prohibits a debt collector from “[c]ausing 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.” *See* W. VA.CODE § 46A–2–125(d). The defendant has moved for summary judgment on this claim because it alleges that the plaintiff has not presented evidence to establish that the defendant acted “with intent to annoy, abuse, oppress, or threaten” Ms. Blackburn. (Mem. Supp. Def.’s Mot. for Partial Summ. J. [Docket 51], at 6.) Thus, the defendant claims that Ms. Blackburn failed to establish an essential element of her claim—that the defendant acted with intent—and it is entitled to summary judgment. (*Id.* at 6–7.) The plaintiff responds by arguing that the large number of phone calls that Ms. Blackburn received is sufficient to establish that the defendant acted “with the intent to annoy, abuse, oppress or threaten Ms. Blackburn.” (Pl.’s Resp. Opp’n Def.’s Mot. for Partial Summ. J. [Docket 57], at 7.)

West Virginia Code § 46A–2–125 forbids debt collectors from “unreasonably oppress[ing] or abus[ing] 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.” W. VA.CODE § 46A–2–125. The Code then outlines conduct that violates this prohibition. It states that “[c]ausing 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.” *Id.* § 46A–2–125(d). Courts have emphasized that determining whether calls violate this section of the Act is a fact-specific determination that should be made on a case by case basis. *See, e.g., Duncan v. JP Morgan Chase Bank, N.A.*, No. 5:10–cv–01049, 2011 WL 5359698, at \*4 (S.D.W.Va. Nov. 4, 2011). Additionally, a large number of calls may be sufficient evidence of intent to create a genuine issue of material fact. *See id.* (“[P]laintiff has made the requisite showing to demonstrate a genuine issue of material fact with respect to the issue of the Defendant’s intent, given the number of calls which were repeatedly placed to his telephones.”).

\*3 In this case, the parties dispute the number of phone calls that Ms. Blackburn received in connection with her debt. The plaintiff claims that CPS made 351 phone calls to Ms. Blackburn, her workplace, and third parties regarding the debt. (Pl.’s Resp. Opp’n Def.’s Mot. for Partial Summ. J. [Docket 57], at 4.) The defendant argues that it only placed 94 phone calls. (Reply Supp. Def.’s Mot. for Partial Summ. J. [Docket 60], at 1.) Both parties point to the call logs to support their calculation of the volume of calls. However, neither party explains who the various phone numbers listed on the call logs belong to and neither party has offered a detailed explanation of the call logs such that the court could analyze them. These omissions have made it impossible for the court to discern whether the parties’ assertions in their briefs are supported by evidence in the record.

A court must consider evidence in the light most favorable to the non-moving party when determining whether a genuine issue of material fact exists. However, a court may not consider assertions in briefs that are not supported by evidence in the record. *See Sammons v. Barker*, No. 2:07–cv–0132, 2008 WL 1968843, at \*11 (S.D.W.Va. May 2, 2008). In this case, the court is unable to determine if the plaintiff’s assertion that CPS made 351 phone calls regarding her debt is supported by the call logs because the plaintiff did not explain how she calculated this number or provide a key for deciphering the call logs.

However, when the call logs are viewed in the light most favorable to the plaintiff, it is clear that Ms. Blackburn received a high volume of calls from CPS, and that large number is sufficient to create a genuine issue of material fact as to the defendant's intent "to annoy, abuse, oppress, or threaten" Ms. Blackburn. The defendant acknowledges a high volume of calls in its briefs and in Defendant's Answers to Plaintiff's First Set of Interrogatories to Defendant [Docket 60-1], where it admitted there were ninety-four phone calls to the plaintiff based on its calculations. When evaluating summary judgment motions, other courts in this district have found that there was a genuine issue of material fact as to the intent to annoy, abuse, oppress, or threaten in cases involving fewer than ninety-four phone calls. *See, e.g., Duncan v. JP Morgan Chase Bank, N.A.*, No. 5:10-cv-01049, 2011 WL 5359698, at \*4 (S.D.W.Va. Nov. 4, 2011) (finding a genuine issue of material fact existed regarding the defendant's intent in a case involving 68 attempted calls); *Ferrell v. Santander Cons.USA, Inc.*, No. 2:11-cv-0260, at \*3 (stating that a genuine issue of material fact existed on the issue of the defendant's intent because there were an estimated 72 phone calls to the debtor). Viewing the volume of calls in the call logs in the light most favorable to the defendant, the court **FINDS** that this evidence creates a genuine issue of material fact regarding the defendant's intent. Accordingly, the defendant's Motion for Partial Summary Judgment as to the alleged violations of § 46A-2-125(d) is **DENIED**.

**B. Claims Pursuant to West Virginia Code § 46A-2-127(g)**

\*4 West Virginia Code § 46A-2-127(g) prohibits debt collectors from making "[a]ny false representation that an existing obligation of the consumer may be increased by the addition of attorney's fees, investigation fees, service fees or any other fees or charges when in fact such fees or charges may not legally be added to the existing obligation." W. VA.CODE § 46A-2-127(g). The plaintiff claims that the defendant violated this section by refusing to accept personal checks and requiring her to make payments by Western Union or by phone. (Resp. Opp'n Def.'s Mot. Summ. J. [Docket 57], at 12.) Additionally, the plaintiff claims that the defendant induced her to make double payments by insisting she pay by phone and then also accepting online payments for the same amount due. (*Id.* at 14.) She alleges that the supposed double payments forced her to cancel the post-dated checks, which resulted in late fees and check fees. (*Id.*) Finally, the plaintiff asserts that the defendant violated this section by

misrepresenting the amount of the debt by adding additional fees. (*Id.*)

The defendant asserts that the plaintiff did not introduce evidence that the defendant represented to Ms. Blackburn that she would incur additional illegal fees if she failed to make a payment. (Mem. Supp. Pl.'s Mot. Partial Summ. J. [Docket 51], at 7.) Specifically, the defendant claims that the plaintiff never asserted "that CPS misrepresented that Plaintiff's debt may be increased by the addition of attorney's fees, investigation fees, service fees, or any other fees or charges that may not legally be added to her debt if she did not make a payment." (*Id.* at 8.)

Section 46A-2-127(g) bars debt collectors from representing to consumers that their debts "may be increased by the addition of attorney's fees, investigation fees, service fees or any other fees or charges" when the debt collector may not legally add such fees. W. VA.CODE § 46A-2-127(g). Any violation of the section requires a "representation" by the debt collector about the illegal fee. *See id.* Black's Law Dictionary defines representation as a "presentation of fact—either by words or by conduct—made to induce someone to act." BLACK'S LAW DICTIONARY 1303 (7th ed.1999). Courts considering § 46A-2-127(g) have emphasized that the statute requires that the fee must be one that the debt collector cannot legally charge. *See, e.g., Tucker v. Navy Fed. Credit Union*, No. 3:10-cv-59, 2011 WL 6219852, at \*7-8 (N.D.W.Va. Dec. 14, 2011); *In re Machnic*, 271 B.R. 789, 793 (Bkrcty.S.D.W.Va.2002).

In this case, the plaintiff's contract specifically addresses "late charges," stating "[i]f all or any portion of a payment is not paid within 10 days of its due date, you will be charged a late charge of 5% of the unpaid amount of the payment due, not to exceed \$15." (Retail Installment Contract & Security Agreement [Docket 49-2], at 1.) The contract does not prohibit other fees. Thus, under the contract, CPS could not make representations to Ms. Blackburn that it would charge her more than \$15 in late charges. *See* W. VA.CODE § 46A-2-127(g).

\*5 This court must determine whether the Western Union fees, charges for phone payments, check fees, and alleged double payments are "late charges" by CPS, and thus prohibited by Ms. Blackburn's contract if they exceed \$15. The Western Union fees are not charged by CPS. Instead, they are charges associated with the payment form. Thus, they are not late charges. Likewise, charges incurred because Ms.

Blackburn paid her bill by phone are not late fees, but charges incurred by using a particular payment form. The check fees are also not late charges, but were assessed because she cancelled a check. Finally, CPS allegedly accepting “double payments” by taking a phone payment and online check payment is not a late charge prohibited by the contract. Specifically, the plaintiff has failed to present evidence that these “double payments” were late charges and not two payments on the principal. Thus, the “double payments,” Western Union fees, check fees and phone payment charges are not late charges prohibited by Ms. Blackburn's contract, and thus are not illegal fees. *See* W. VA.CODE § 46A-2-128(d) (prohibiting the “collection of or attempt to collect any interest or other charge, fee or expense incidental to the principal obligation unless such interest or incidental fee, charge or expense is expressly authorized by the agreement creating the obligation and by statute”). Accordingly, the court **FINDS** that any representation made by CPS in association with such charges was not a representation of an illegal fee and did not violate § 46A-2-127(g).

The plaintiff also claims that a \$50.00 collection fee assessed on January 1, 2011, was an illegal fee. When viewed in the light most favorable to the plaintiff, the collection fee could be considered a late fee because it arose out of her late payments. The record contains evidence that the plaintiff paid the collection fee. The fact that the plaintiff paid the collection fee is circumstantial evidence that CPS made representations to her regarding the collection fee. Thus, the court **FINDS** that the plaintiff has created a genuine issue of material fact as to whether the defendant represented that it would charge Ms. Blackburn illegal fees.

In sum, the plaintiff has failed to provide evidence that the defendant represented to Ms. Blackburn that it would charge her illegal fees as to the Western Union fee, charges for phone payments, check fees, and alleged double payments. Accordingly, the plaintiff has failed to create a genuine issue of material fact as to those claims and the defendant is entitled to judgment as a matter of law. The plaintiff has created a genuine issue of material fact as to the collection fee. Accordingly, the court **GRANTS in part** and **DENIES in part** the defendant's Partial Motion for Summary Judgment as to the § 46A-2-127(g) violations.

**C. Claims that the Defendant Violated West Virginia Code § 46A-2-128(e)**

West Virginia Code § 46A-2-128(e) prohibits a debt collector from communicating with a consumer if it appears that the consumer is represented by an attorney and the name and address of the attorney are known. W. VA. CODE § 46A-2-128(e). The plaintiff claims that the defendant violated this provision by calling her repeatedly after she informed it that she was represented by an attorney. (Am. Compl. [Docket 18], at 3.) Specifically, she claims that she informed CPS that she was represented by Wesley White on December 15, 2010, but the defendant made numerous phone calls to her concerning the debt after that time. (*Id.*)

\*6 The defendant has moved for summary judgment on the § 46A-2-128(e) claim, alleging that the exception to § 46A-2-128(e)'s general prohibition applies in this case because the plaintiff's attorney refused to “discuss the obligation.” (Mem. Supp. Def.'s Mot. for Partial Summ. J. [Docket 51], at 10-11.) It claims that it tried contacting the plaintiff's attorney three times, but he did not return its phone calls on two occasions. (*Id.* at 11.) The one time that the defendant reached the plaintiff's attorney, the defendant claims that the attorney “did not discuss the obligation beyond his agreement to follow up with his client about her intentions with respect to the obligation.” (*Id.*) CPS has submitted affidavits that it claims provide evidence of its version of the interactions with the plaintiff's attorney.<sup>2</sup> (*Id.*) The plaintiff addresses these claims in her brief, asserting that the defendant actually made five phone calls to the plaintiff's attorney after December 15, 2010. (Pl.'s Resp. Opp'n Def.'s Mot. for Partial Summ. J. [Docket 57], at 16.) The plaintiff also alleges in her brief that the plaintiff's attorney discussed the obligation with CPS and requested that CPS follow up with him.

2 The plaintiff also objected to affidavits presented by the defendants on grounds that they violate the Federal Rules of Evidence. The court will not address these objections at this time because the determination is unnecessary to decide the issue of summary judgment.

West Virginia Code § 46A-2-128(e) was enacted to prevent debt collectors from using “unfair or unconscionable means to collect” a debt. W. VA.CODE § 46A-2-128. One means prohibited by the WVCCPA is communicating with a consumer “whenever it appears” that an attorney represents the consumer and “the attorney's name and address are known.” *Id.* The section allows a debt collector to communicate with a consumer who is represented by an attorney if the “attorney fails to answer correspondence, return phone calls or discuss the obligation in question or unless the attorney consents to direct communication.” *Id.*

In this count, the issue is whether the plaintiff's attorney "failed to answer correspondence, return phone calls or discuss the obligation in question." Failure to respond or discuss would allow CPS's communications with the debtor after December 15, 2010, to fall within § 46A-2-128(e)'s exception. The call logs show that the defendant called the plaintiff's attorney on five different occasions. The call logs also reveal that during one of the phone calls, a CPS representative spoke to the plaintiff regarding the debt. When these facts are viewed in the light most favorable to the plaintiff, the court **FINDS** that there is a genuine issue of material fact as to whether the plaintiff's attorney answered correspondence, returned phone calls, or discussed the obligation in question with CPS. Accordingly, the court **DENIES** the defendant's Motion for Partial Summary Judgment as to the § 46A-2-128(e) claims.

**D. Claim for Intentional Infliction of Emotional Distress**

Finally, the plaintiff has brought a claim for intentional infliction of emotional distress (IIED) against the defendant. Specifically, the plaintiff claims that the defendant committed the tort of IIED by repeatedly and rudely contacting the plaintiff regarding her debt and by calling the plaintiff at home and at work multiple times per day. (Am. Compl. [Docket 18], at 7-8.) The plaintiff also claims that the defendant committed IIED by continually calling after she informed it that she had retained an attorney and because it contacted third parties regarding her debt. (*Id.*)

\*7 The defendant has moved for summary judgment claiming that the plaintiff has not presented evidence on several elements of IIED. First, the defendant claims that the plaintiff has not presented evidence of conduct that is "extreme or outrageous" as required by West Virginia law. (Mem. Supp. Def.'s Mot. for Partial Summ. [Docket 51], at 12.) Second, the defendant asserts that the plaintiff has failed to produce evidence establishing that the plaintiff "suffered sufficient emotional harm as a result of CPS's actions." (*Id.*)

The West Virginia Supreme Court of Appeals ("WVSCA") discussed the tort of IIED in *Travis v. Alcon Laboratories, Inc.*, stating:

The four elements of the tort can be summarized as: (1) conduct by the defendant which is atrocious, utterly intolerable in a civilized community, and so extreme and outrageous as

to exceed all possible bounds of decency; (2) the defendant acted with intent to inflict emotional distress or acted recklessly when it was certain or substantially certain such distress would result from his conduct; (3) the actions of the defendant caused the plaintiff to suffer emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

202 W. Va. 369, 375 (1998). The WVSCA has emphasized that the conduct at issue must be so extreme and outrageous "as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (quoting *Tanner v. Rite Aid of W. Va.*, 194 W. Va. 643, 651 (1995)). Furthermore, the court has explained that "liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.* (quoting *Tanner v. Rite Aid of W. Va.*, 194 W. Va. 643, 651 (1995)). In consumer protection cases, one factor in determining whether the defendant's conduct is atrocious and outrageous is whether the defendant called at inappropriate hours or used abusive and threatening language. See *Ferrell v. Santander Cons.USA, Inc.*, — F.Supp.2d —, 2012 WL 929820, at \*5 (S.D.W.Va.2012). The volume of calls is insufficient to make the conduct extreme and outrageous. *Id.* ("The mere fact that defendant attempted to collect plaintiffs' debt by the telephone calls outlined above over a couple of months is, without more, quite insufficient to support an intentional infliction of emotion distress claim.").

In this case, the court must first determine if the defendant's actions rise to the level of extreme and outrageous conduct required to establish an IIED claim. The plaintiff testified in her deposition that the defendant's representatives "weren't very nice." (Blackburn Dep. [Docket 49-3], at 30:14-18.) The primary evidence of extreme and outrageous conduct that the plaintiff points to is the large volume of calls that Ms. Blackburn and others received regarding her debt. While the defendant's repeated phone calls to Ms. Blackburn were undoubtedly annoying, its conduct is not "extreme misconduct" required to establish IIED. See *Tanner*, 194 W. Va. at 650 ("[W]e have demanded such strict proof of unprecedented and extreme misconduct."). Thus, the court **FINDS** that the plaintiff has failed to present evidence that creates a genuine issue of material fact as to the extreme and outrageous conduct element of IIED. Accordingly, the

court **GRANTS** the defendant's Motion for Partial Summary Judgment as to the IIED claim.

**IV. Conclusion**

**\*8** For the reasons discussed above, the court **GRANTS in part** the defendant's Motion for Summary Judgment as to the plaintiff's § 46A-2-127(g) claim and IIED claim. The court

also **DENIES in part** the defendant's Motion for Summary Judgment as to the plaintiff's claims pursuant to § 46A-2-125(d), § 46A-2-127(g), and § 46A-2-128(e).

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

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2011 WL 5359698

Only the Westlaw citation is currently available.  
United States District Court, S.D. West Virginia.

Elisabeth DUNCAN, Plaintiff,

v.

JP MORGAN CHASE BANK, N.A., Defendant.

Civil Action Nos. 5:10-cv-01049,  
5:10-cv-01113. | Nov. 4, 2011.

#### Attorneys and Law Firms

Christopher B. Frost, Ralph C. Young, Hamilton Burgess Young & Pollard, Fayetteville, WV, for Plaintiff.

Angela L. Beblo, Bruce M. Jacobs, Spilman Thomas & Battle, Charleston, WV, for Defendant.

#### Opinion

### MEMORANDUM OPINION AND ORDER

IRENE C. BERGER, District Judge.

\*1 Plaintiffs, Richard and Elisabeth Duncan, bring this action pursuant to the West Virginia Consumer Credit and Protection Act (“WVCCPA”), W. Va. Code §§ 46A-1-101, *et seq.*, against Defendant J.P. Morgan Chase Bank USA, N.A. (“Chase”) for Defendant’s allegedly unlawful and tortious actions in attempting to collect a debt from Plaintiffs through the use of multiple telephone calls and mail forwarded by the United States Postal Service to their residence.

The Court has reviewed *Defendant Chase Bank USA, N.A.’s Motion for Summary Judgment* (“Def.’s Mot.”) (Document 33). Upon consideration of the motion, memoranda in support thereof and in opposition thereto (Documents 34, 39, 40), attached exhibits, and the entire record, the Court, for the reasons stated herein, finds that Defendant’s motion should be denied.

#### I.

On November 6, 2006, Richard J. Duncan purchased a new 2006 Chrysler Town and Country Van from Joe Holland Chevrolet in South Charleston, West Virginia. (*See* Def.’s Ex. A., Retail Installment Contract and Security Agreement). The

contract for the purchase of the vehicle was later assigned to Chase. (*Id.*) During the summer of 2007, Mr. Duncan fell in arrearage with respect to payments for the vehicle. At some point thereafter, Defendant began engaging in collection efforts through the use of telephone calls and the United States Mail. (Compl. (Document 1-1), ¶ 5.) In September 2009, Plaintiffs began advising Chase to discontinue using the auto-dialer to call their home and to contact them only through the mail. On December 16, 2009, Plaintiffs sent a letter to the Defendant to request that they not be contacted by telephone regarding their account. However, Defendant continued to call them. (Def.’s Ex. D., Plaintiffs’ Responses to Defendant JPMorgan Chase Bank, N.A.’s First Set of Interrogatories and Requests for Production (“Pl.’s Resp.”) (Document 33-1), ¶ 1; Def.’s Ex. C., Account Log (Document 35-5), at 3.) Thereafter, Plaintiffs retained an attorney “to represent [their] interest in connection with consumer indebtedness on which [they] had become in arrears.” (Richard Duncan Complaint (Civil Action No. 5:10-cv-01113) (Document 1-1), ¶ 6; Elisabeth Duncan Complaint (Civil Action No. 5:10-cv-01049) (Document 1-1), ¶ 6.) On May 14, 2010, Elisabeth Duncan called Defendant to make a payment and provided Defendant with their attorney’s name and telephone number. (Account Log at 3.) One day later, Defendant called Plaintiffs’ attorney. However, the attorney could not tell Defendant whether he had a paid retainer from Plaintiffs or if they were planning to file bankruptcy. Eight days later, Defendant called Plaintiffs at home and on a cell phone about an insufficient funds event in their account. One of the Plaintiffs said further research would be done and hung up. Thereafter, Plaintiffs complained to Defendant’s Executive Office that their “cease and desist” request with respect to telephone calls was not adhered to. Defendant continued to contact Plaintiffs and their attorney. However, Plaintiffs’ account was never restored to good standing and on July 21, 2010, Chase facilitated the repossession of the vehicle. Account Log at 1.

\*2 On July 22, 2010, Elisabeth Duncan initiated a civil action in the Circuit Court of Raleigh County, West Virginia. On August 9, 2010, Richard Duncan filed an identical lawsuit in the Circuit Court of Raleigh County. (Elisabeth Duncan Complaint (Civil Action No. 5:10-cv-01049) (Document 1-1), ¶ 6; Richard Duncan Complaint (Civil Action No. 5:10-cv-01113) (Document 1-1)). In their Complaints, Plaintiffs allege that Defendant engaged in repeated violations of the WVCCPA by: (a) engaging in unreasonable, oppressive or abusive conduct by placing telephone calls to their residence in violation of Section 46A-2-125; (b) “causing [their] phone to ring or engaging persons, including the Plaintiffs,

in telephone conversations repeatedly or continuously or at unusual times or at time known to be inconvenient, with the intent to annoy, abuse or oppress the Plaintiffs, in violation of Section 46A-2-125(d); (c) using unfair or unconscionable means to collect a debt in violation of Section 46A-2-128(e) by communicating with them after it appeared that they were represented by an attorney and the attorney's name and address were known or could be easily ascertained; and (d) failing to clearly disclose the name of the business entity making a demand for money upon their indebtedness in violation of Section 46A-2-127 (a) and (c). (Compl.¶ 12.) In Counts Two through Four, Plaintiffs assert claims for common law negligence, intentional infliction of emotional distress ("I.I.E.D.") and common law invasion of privacy, respectively. (*Id.*, ¶¶ 14-26.)<sup>1</sup> Defendant removed the cases to this Court on August 26, 2010, and September 15, 2010, alleging that this Court had jurisdiction pursuant to 28 U.S.C. § 1332.<sup>2</sup> Plaintiffs did not challenge the removal. Pursuant to this Court's scheduling order and upon the completion of discovery, Defendant timely filed the instant dispositive motion.

<sup>1</sup> Plaintiffs seek actual damages for the past and future violations of the WVCCPA, statutory damages in the maximum amount authorized by WV Code § 46A-5-106, costs of litigation, general damages for past and future negligence, as well as, general and punitive damages for past and future conduct as alleged in their claims for intentional infliction of emotional distress and invasion of privacy.

<sup>2</sup> On October 6, 2010, the Court entered the parties' Agreed Order (Document No. 8), which dismissed with prejudice Counts I, II, and III of the Complaint filed in *Elisabeth Duncan v. JPMorgan Chase Bank, N.A.*, Civil Action No. 5:10-cv-1049, and consolidated that civil action with that of *Richard Duncan v. JP Morgan Chase Bank, N.A.*, Civil Action No. 5:10-cv-1113, pursuant to Fed.R.Civ.P 42(a). Civil Action 5:10-cv-1049 was designated as the lead case.

## II.

The well-established standard in consideration of a motion for summary judgment is that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *see also Hunt v. Cromartie*, 526 U.S. 541, 549, 119 S.Ct. 1545, 143 L.Ed.2d

731 (1999); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Rule 56 of the Federal Rules of Civil Procedure requires that,

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations ... admissions, interrogatory answers or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

\*3 Fed.R.Civ.P. (c)(1). A "material fact" is a fact that might affect the outcome of a party's case. *See Anderson*, 477 U.S. at 248; *JKC Holding Co. LLC v. Wash. Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir.2001). A "genuine" dispute concerning a "material" fact arises when the evidence is sufficient to allow a reasonable jury to return a verdict in the nonmoving party's favor. *Id.*

The moving party bears the burden of showing that there is no genuine issue of material fact, and that it is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 322-23. In considering a motion for summary judgment, the Court will not "weigh the evidence and determine the truth of the matter." *Anderson*, 477 U.S. at 249. Instead, the Court will draw any permissible inference from the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). However, the nonmoving party nonetheless must offer some "concrete evidence from which a reasonable juror could return a verdict in his favor." *Anderson*, 477 U.S. at 256. Summary judgment is appropriate when the nonmoving party has the burden of proof on an essential element of his or her case and does not make, after adequate time for discovery, an evidentiary showing sufficient to establish that element. *Celotex*, 477 U.S. at 322-23. If the nonmoving party fails to make a showing sufficient to establish the existence of an essential element, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 322-23. If factual issues

exist that can only be resolved by a trier of fact because they may reasonably be resolved in favor of either party, summary judgment is inappropriate. *Anderson*, 477 U.S. at 250.

### III.

Defendant moves for summary judgment as to each of Plaintiffs' claims. In opposition, Richard Duncan withdrew his common law claim of negligence and I.I.E.D, as well as, all claims asserted pursuant to WV Code 46A-2-127 and 128(e). Consequently, Plaintiff Richard Duncan maintains only one WVCCPA statutory claim, that is, he alleges that Defendant violated Section 2-125(d). Additionally, both Plaintiffs Richard and Elisabeth maintain their invasion of privacy claims. The Court will consider each claim in turn.

#### **(A) The Oppression and Abuse Provision (Section 46A-2-125(d))**

"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." *Countryman v. NCO Financial System, Inc.*, Civil Action No. 5:09-cv-0288, 2009 WL 1506720, at \*2 (S.D.W.Va.2009) (Johnston, J.) (quoting *Cadillac v. Tuscarora Land Co.*, 186 W.Va. 391, 412 S.E.2d 792, 794 (W.Va.1991)).<sup>3</sup> It places "restrictions on the manner in which debt collectors may attempt to collect debts." (*Id.*) Plaintiff Richard Duncan alleges that Defendant's attempts to collect on the debt of his vehicle violated Section 46A-2-125(d), which proscribes "unreasonably" oppressive and abusive behavior. Section 46A-2-125, the Oppression and Abuse Provision, provides, in relevant part, that:

<sup>3</sup> The parties do not dispute that Plaintiff Richard Duncan is a "consumer" as that term is defined by 46A-2-122(a) as "any natural person obligated or allegedly obligated to pay any debt[.]" and that Defendant is a "debt collector" as defined by 46A-2-122(d), which provides that a debt collector is "any person or organization engaging directly or indirectly in debt collection." Section 46A-2-122(c) defines "debt collection" as "any action conduct or practice of soliciting claims for collection or in the collection of claims owed or due or alleged to be owed or due by a consumer."

\*4 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.

W. Va.Code, § 46A-2-125(d). The Supreme Court of Appeals of West Virginia has indicated that the WVCCPA is to be construed broadly:

The purpose of the [WVCCPA] is to protect consumers from unfair, illegal, and deceptive acts or practices by providing an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action. As suggested by the court in *State v. Custom Pools*, 150 Vt. 533, 536, 556 A.2d 72, 74 (1988), "[i]t must be our primary objective to give meaning and effect to this legislative purpose." Where an act is clearly remedial in nature, we must construe the statute liberally so as to furnish and accomplish all the purposes intended.

*State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516, 523 (W.Va.1995) (internal citations omitted).

Defendant seeks summary judgment by arguing that Plaintiff's claim is flawed because he has no evidence that Chase acted with the requisite *intent* to annoy, abuse, oppress, or threaten him or any person at the called number. Plaintiff confronts this assertion by arguing that Defendant's own records "reflect that Defendant placed more than 100 collection calls to Plaintiffs prior to filing their civil actions in state court on July 22, 2010 (Elisabeth Duncan) and August 9, 2010 (Richard Duncan.)" (Plaintiffs' Response to Defendant's Motion for Summary Judgment ("Pls.' Oppn.") (Document 39) at 2.) According to Plaintiff, the requisite "intent" can "be inferred from the sheer [sic] number of collector calls placed to Plaintiffs" and by the fact that Plaintiffs asked Defendant to "cease and desist making collection calls to them." (*Id.* at 2-3, 461 S.E.2d 516.) In reply, Defendant asserts that it did not place more than 100 collection calls to Mr. Duncan, but that it placed a total of sixty-eight (68) attempted calls on his account over an eleven (11) month period (between August 28, 2009 and June 29, 2010). Defendant maintains that the presentment of the essential element of "intent" must

be demonstrated with something more than just placing calls and that this Court found as much in its decision in *Clements v. HSBC Auto Finance, Inc.*, Civil Action No. 5:09-cv-0086, 2011 WL 2976558 (S.D.W.Va. July 21, 2011).

The Court declines Defendant's invitation to find that "something more" or a "volume plus" type of analysis is required to demonstrate a violation of Section 2-125(d) in every case. The plain language of the statute aptly sets forth that a statutory violation can be borne from the mere volume of calls placed to a debtor. This is so, based on the statute's reference to calls which are repeated[ ] or "continuous[.]" Placed in the proper context, the volume of calls made to a debtor can be demonstrative of an intent to annoy, abuse or oppress, where, as in this case, those calls were repeated after Plaintiffs advised Defendant that they wished only to be contacted in writing, desired to have the autodialer to stop placing calls to their phones or that future communications were to be with their attorney. Although, a Court can glean "intent" from the continuous nature of the calls by highlighting a distinctive pattern, such as the number of calls placed in one day, or the time in which those calls were placed, these factors are not required in every case. 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.<sup>4</sup> Therefore, Plaintiff has made the requisite showing to demonstrate a genuine dispute of material fact with respect to the issue of the Defendant's intent, given the number of calls which were repeatedly placed to his telephones. Further, the evidence before the Court also indicates that abusive language was used in at least one of the calls placed to Plaintiffs. In her deposition testimony, Plaintiff Elisabeth Duncan recalled a conversation with one of Defendant's employees, Renee, regarding Richard Duncan's debt. Elisabeth Duncan testified that Renee called her "stupid" and told her that "she was not talking right." (Def.'s Ex. F, Deposition of Elisabeth Duncan (Document 33-3) at 15.) She also testified that she "could hear people in the background laughing and carrying on[.]" (*Id.*) Again, based on the foregoing, and giving all reasonable inferences to the non-moving party, the Court finds that there is a genuine dispute of material fact as to the existence of the requisite "intent" to satisfy a Section 2-125(d) claim. As a result, the Court finds that Defendant is not entitled to summary judgment.

<sup>4</sup> Consequently, Defendant's reliance on *Clements* is not entirely effective. In *Clements*, debtors financed the purchase of a SUV and within months of the purchase

began to experience difficulty in making the required payments. The debtors sought to work out a payment plan with the creditor in an effort to catch up on late payments; however, their efforts were unsuccessful. But the evidence demonstrated that within a seven month time span, the creditor placed over 821 calls to the debtor's home and cell phones. This Court found "in light of the totality of the evidence in [that] case" that the volume and frequency of the calls placed to the debtors was sufficient to demonstrate the requisite "intent" element of this statute, particularly in light of the "aggressiveness" of that creditor, the creditor's failure to seek other remedial measures, and to contact the debtors' attorney. A defendant's lack of such aggression does not automatically preclude a court from finding that the volume of calls made to a debtor alone can, in some cases, serve the purposes of demonstrating the intent of the caller.

#### **(B) Invasion of Privacy**

\*5 Plaintiffs, in Count Four of their separate Complaints, allege that Defendant intruded upon their seclusion by continuously placing telephone calls to them, causing them to suffer emotional distress, and to become "annoyed, inconvenienced, harassed, bothered, upset, angered, harangued and otherwise caused indignation and distress." (Compls., ¶¶ 23-26.)

The Supreme Court of Appeals of West Virginia has adopted four types of invasion of privacy claims as enumerated in the Restatement (Second) of Torts, §§ 652A-652E (1977). Invasion of privacy claims can arise by: (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life or by (4) publicity that unreasonably places another in a false light before the public. *O'Dell v. Stegall* 226 W.Va. 590, 703 S.E.2d 561, 594 (W.Va.2010) (citing *Crump v. Beckley Newspapers, Inc.*, 173 W.Va. 699, 320 S.E.2d 70 (1984)). There appears to be no dispute that Plaintiffs' allegations fall within the ambit of the first type of invasion of privacy claim. An "[u]nreasonable intrusion upon another's seclusion occurs when '[o]ne ... intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or [his or her] private affairs or concerns, ... if the intrusion would be highly offensive to a reasonable person.'" *Harbolt v. Steel of West Virginia, Inc.* 640 F.Supp.2d 803, 817 (S.D.W.Va.2009) (quoting Restatement (Second) of Torts § 652B) (emphasis supplied).

With the applicable law in mind, the Court finds that Defendant is not entitled to summary judgment as to these claims. Defendant argues that Plaintiffs' invasion of privacy claims are defeated because: 1) Plaintiffs provided their telephone number to Chase, and Chase is entitled to communicate with Plaintiff Richard Duncan regarding that debt;<sup>5</sup> 2) there is no liability for intrusion upon seclusion where the intrusion was not into a private place, and in this case, both Plaintiffs testified at their deposition that they received some of the calls on their cell phones while they were away from their home; and 3) Plaintiffs continuously contacted Chase to request information on their account, even though they were represented by counsel, and that Plaintiffs can not maintain this cause of action where Chase attempted to respond to their requests. Finally, Defendant argues that the "right to privacy" does not extend to those communications which have been consented to by the Plaintiffs.

5 Neither party makes any argument respecting whether Defendant was entitled to communicate with Plaintiff Elisabeth Duncan, who was not listed on the retail contract which is the subject of the debt or whether she consented to the calls. Therefore, the Court will not address this issue and will assume for the purposes of this decision that Plaintiff Elisabeth Duncan was in the same position as Plaintiff Richard Duncan as to this claim.

The Court finds that Defendant's assertions are without merit. There is no dispute that Plaintiffs provided Defendant with their telephone numbers. While the number of calls Defendant placed to Plaintiffs is in dispute—both after they advised defendant that they no longer desired debt collection communication via telephone and after they advised that they were represented by an attorney—there is no dispute that Defendant did, in fact, repeatedly call Plaintiffs. By Defendant's own admission, at least sixty-eight (68) calls were made in eleven (11) months with respect to the debt. These calls were placed both to the Plaintiffs' home and cell phones. Defendant's contention that it is entitled to communicate with Richard Duncan regarding the debt, and that such communications were consented to, is not entirely misplaced. Consent is a defense to an invasion of privacy claim. *Crump*, 320 S.E.2d at 83. However, that defense is not absolute. "[A]s with any other qualified privilege, conduct in excess of that consented to is not protected." (*Id.* at 84.) Consequently, the defense can be lost through, abuse, excess or actual malice. (*Id.* at 83) (discussing when the "public figure" privilege defense to an invasion of privacy claim can be lost.) It is on this point that Plaintiffs argue that providing a creditor with their phone number does not give that creditor

"license ... to place [sic] telephone calls to Plaintiffs in less than four months" in the instance where "Plaintiffs made it clear that they were bother [sic] unable to pay and that they wanted Defendant to communicate with them through their lawyer." (Pls.' Oppn. at 3.) The Court agrees with the Plaintiffs. Permitting unfettered communications solely because a debtor provided contact information with a creditor would conflict with the goals of securing to a person the right to be free from unreasonable intrusions and with the purposes of the WVCCPA. Therefore, an assertion that an individual waives a right to privacy by the mere placement of contact information on a credit application or provides a creditor with a telephone contact number is without merit.

\*6 Defendant also argues that Plaintiffs' invasion of privacy claims are flawed because they received calls outside the confines of their homes. Plaintiffs argue that they "have an expectation of privacy to be free of annoying collection calls, wherever they may happen to be when Defendant places such an illegal call." (Pls.' Oppn. at 4.) The Court finds Defendant's assertion incredible. There is no dispute that Defendant had both Plaintiffs' home telephone number and cell phone number. Indeed, Defendant used them all. To now argue that the calls to Plaintiffs' cell phone numbers cannot support an invasion of privacy claim because those calls were received outside the home is disingenuous. Technology and advances in science now allow individuals to make and receive calls on-the-go and in places in which the conventional land-line telephone would not permit. Defendant has cited no authority for the proposition that the Plaintiffs' receipt of its telephone calls while they were in their car, and outside their homes, should chip away at this longestablished "right to be let alone" in their private affairs.

Likewise, notwithstanding the fact that Plaintiffs initiated contact with Defendant after disclosing that they were represented by counsel, Defendant is not relieved of its statutory responsibility under the WVCCPA to cease communicating with a debtor after it appears that the debtor is represented by counsel. Defendant, in its reply, identifies four instances in June 2010 in which Plaintiffs initiated contact with Chase. In three of those instances, Plaintiffs made a specific written inquiry about the debt. In the other one, the contact was verbal. Defendant indicates that a response to Plaintiffs' inquiries in these instances would have been proper because Plaintiff consented to a response. The Court does not completely disagree. Inasmuch as a response was required to Plaintiffs' written inquiry, Defendant could have relayed its response to Plaintiffs' attorney either verbally or in writing

since it was free to communicate with their attorney via letter or telephone. Common sense must dictate that if Plaintiffs inquired orally of the Defendant with respect to the debt during this time period, Defendant was within its right to respond contemporaneously with that inquiry. Responding to a customer question is not the crux of this claim. Instead, it is the repeated or continuous placing of telephone calls to Plaintiffs, after they have declined to accept those calls, which is at issue. In that vein, the protection extended to a plaintiff for the right of privacy does not extend to the supersensitive, but only to persons of ordinary or reasonable sensibilities. (*Crump*, 320 S.E.2d at 84.) (citations omitted). Defendant maintains that its actions were reasonable in its attempts to collect on the debt. The Court finds that the determination of whether a Defendant's actions would be *highly offensive to a reasonable person* is subject to a jury determination, where, as here, the evidence indicates that the calls were made after Plaintiffs asked to only be contacted in writing, requested that the auto-dialer not be used to dial their home

and eventually advised Defendant that they were represented by counsel with respect to the debt. Therefore, the Court finds that a genuine dispute of material fact exists which precludes summary judgment against Plaintiffs on these claims.<sup>6</sup>

<sup>6</sup> Based on the foregoing, the Court finds that a ruling on Plaintiffs' assertion that Defendant's conduct violated state criminal statutes is not necessary.

#### IV.

\*7 Based on the foregoing, the Court does hereby **ORDER** that *Defendant Chase Bank USA, N.A.'s Motion for Summary Judgment* ("Def.'s Mot.") (Document 33) be **DENIED**.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and to any unrepresented party.

In the Supreme Court of Appeals of West Virginia  
(Raleigh County Circuit Court, Civil Action No. 10-C-541-H)

I.C. Systems, Inc.,

Defendant Below,  
Petitioner

No. 13-0216

v.

Valena R. Kidd,

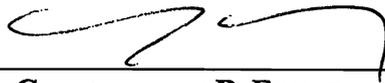
Plaintiff Below,  
Respondent

**CERTIFICATE OF SERVICE**

I, **CHRISTOPHER B. FROST**, counsel for the Respondent, Valena R. Kidd, do hereby certify that a copy of the **RESPONDENT VALENA KIDD'S SUMMARY RESPONSE TO I.C. SYSTEMS'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:

Kenneth E. Webb, Jr., Esq.  
Patrick C. Timony, Esq.  
BOWLES RICE LLP  
P. O. Box 1386  
Charleston, WV 25325

the same being the last known address with postage fully paid and depositing said envelope in the United States Mail on the 15th day of July, 2013.

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**CHRISTOPHER B. FROST**