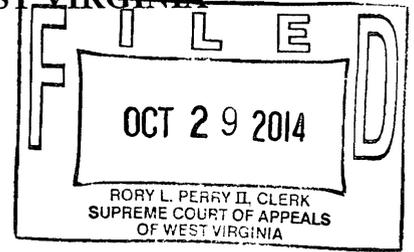


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0637



**JAMES R. FLEET, JAMILA J. FLEET,  
and JAMES LAMPLEY,**  
Defendants Below,

**Petitioners,**

v.

**Appeal from the Circuit Court of  
Berkeley County (11-C-1091)**

**WEBBER SPRINGS OWNERS  
ASSOCIATION, INC.,**  
Plaintiff Below,

**Respondent,**

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**Petitioners' Reply Brief**

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## STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners James R. Fleet, Jamila J. Fleet, and James J. Lampley (“Petitioners” / “Homeowners”), in accordance with Rule 10(c)(6) of the West Virginia Rules of Appellate Procedure, request that the Court take up oral arguments in this case under Rule 20 of the West Virginia Rules of Appellate Procedure, because this case concerns an issue of first impression. This Court has never heard argument on, nor decided a case concerning, the interpretation of W. Va. Code § 38-16-202 which makes common law liens against real property unenforceable and limits common law liens against personal property. Despite the existence of this statute, Respondent asserts common law liens against Petitioners’ real property for limited expense liability planned community assessments and attorney’s fees. Because this is a matter of first impression, Petitioners request that oral argument be granted under Rule 20.

## FACTS

Webber Springs knowingly and purposefully exempted itself from the right to record valid liens pursuant to the Uniform Common Interest Ownership Act (“UCIOA”) when it chose to form itself as a limited expense liability planned community (“LELPC”), under W. Va. Code § 36B-1-203. W. Va. Code § 36B-1-203 exempts Webber Springs from W. Va. Code § 36B-3-116, a provision that gives many HOAs the right to record liens for unpaid assessments. Its status as a (“LELPC”), rather than an actual Homeowners Association (“HOA”), allowed Webber Springs to market homes to potential purchasers by emphasizing capped fees for community assessments of an LELPC versus potentially unlimited fees allowed by an HOA. This can make a home in

an LELPC attractive to purchase. (Webber Springs' Motion for Summary Judgment at 4, App. 95). Had Webber Springs intended to have the power to obtain and record valid statutory liens against homeowners, it should not have formed as an LELPC. Instead, it sacrificed that ability in order to capitalize on the buyer's incentives provided by its LELPC status.

Nonetheless, on March 10, 2008, and January 8, 2010, Webber Springs recorded in the Berkeley County Clerk's office "Notices of Liens" purporting to create liens on Petitioner James Lampley's real property for unpaid assessments, attorney fees, and costs. (App. 21-24).<sup>1</sup> Likewise, on February 27, 2008, and January 8, 2010, Webber Springs recorded in the County Clerk's office "Notices of Liens" purporting to create liens on Petitioners James R. Fleet and Jamila J. Fleet's real property for unpaid assessments, attorney fees, and costs. (App. 4-7).

On January 3, 2012, Webber Springs filed two separate complaints against the Petitioners for "damages upon and pursuant to the lien[s]." (App. 1-3, 18-20). In response to the Complaints, Petitioners, on March 19, 2012, filed multiple counterclaims against Webber Springs for violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA") including: 1) misrepresentation of the status of a debt, 2) unfair and

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<sup>1</sup> County clerks have neither a duty to record nor a duty to reject purported common law liens, although clerks do have a duty to record statutory liens and judgment liens. W. Va. Code § 38-16-302:

A clerk of a county commission or other person has no duty to accept for filing or recording any purported claim of a common law lien, because a common law lien is neither authorized by statute nor imposed by a court of competent jurisdiction. A clerk of a county commission or other person has no duty to reject for filing or recording any claim of a common law lien, and the inadvertent or negligent recordation of a claim of a common law lien by a clerk of a county commission or other recorder does not create a cause of action against that official.

unconscionable means for seeking attorney fees for collections, 3) fraudulent, deceptive and misleading representations, and 4) unfair and unconscionable means by recording a lien for attorney fees on Petitioners' real property absent a court judgment. (App. – 25-39). On October 29, 2013, Webber Springs moved for Summary Judgment on all of Petitioners' counterclaims. (App. 88).

In addition to opposing Summary Judgment, Petitioners filed a Motion for Judicial Review of Documentation Purporting to Create a Lien pursuant to W. Va. Code § 38-16-403. (App. 150). Contrary to Respondent's claim in its Response Brief that "Petitioners . . . requested that the [circuit] Court make a legal finding that . . . the debts asserted by Webber Springs are illegal and nonexistent,"<sup>2</sup> Petitioners never moved for the circuit court to find that the debts alleged by Webber Springs are illegal and non-existent. Rather, Petitioners asked the circuit court to determine that the purported debts do not constitute a valid lien on real property.

After briefing and oral argument on Respondent's Motion for Summary Judgment, the circuit court dismissed all of Petitioners' counterclaims (see circuit court Order, App. 339 – 351) and held:

1. The WVCCPA does not apply to Webber Springs because "Webber Springs in the normal course of its business does not extend credit to any entity";
2. The WVCCPA does not apply to Webber Springs because none of Petitioners' alleged debts were not for personal, family, or household purposes; and

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<sup>2</sup> Petitioners' never alleged that the debts for unpaid assessments are "illegal and nonexistent." This is just an attempt to turn a motion on the unlawful recording of liens for attorney fees and assessments into a debate on whether LELPCs may make assessments in the first place.

3. All of Petitioners' WVCCPA counterclaims are time barred by a one-year statute of limitations.

Furthermore, the circuit court reviewed the documents purporting to create a lien and held:

1. Webber Springs has a valid consensual common law lien against Petitioners' real property for unpaid assessments, attorney fees, and costs; and
2. "[T]he Declaration is a covenant running with the land and gives Webber Springs the authority to file additional Notices of Liens, and that these liens are consensual and do not trigger the application of Chapter 38."

Petitioners seek to have the circuit court's Order on the Motion for Summary Judgment reversed, because the WVCCPA applies to Webber Springs and because Petitioners timely asserted their claims under the statute. Moreover, Petitioners seek reversal of the circuit court's Order on Petitioners' Motion for Judicial Review of Documentation Purporting to Create a Lien, because, under West Virginia's statutory scheme, Respondents do not have a valid lien on Petitioners' real property.

#### ARGUMENT

- 1. The Circuit Court's Order Dismissing All Claims Against Respondent is a Final and Appealable Order.**

Petitioners asserted five claims against respondent, and the circuit court dismissed each claim with prejudice. (App. 349). Respondent now argues that the order dismissing all of Petitioners' claims with prejudice is not an appealable order. Respondent argues

that the case is not ripe for appeal because the order did not contain Rule 54(b) language and none of the exceptions apply to the Rule 54(b) language apply.

This Court has made clear time and again the jurisprudential exception to hearing appeals of final orders lacking specific Rule 54(b) language:

Where an order granting summary judgment to a party completely disposes of any issues of liability as to that party, the absence of language prescribed by Rule 54(b) of the West Virginia Rules of Civil Procedure indicating that “no just reason for delay” exists and “directing . . . entry of judgment” will not render the order interlocutory and bar appeal provided that this Court can determine from the order that the trial court’s ruling approximates a final order in its nature and effect.

Syl. Pt. 2., *Durm v. Heck’s, Inc.*, 184 W.Va. 562, 401 S.E.2d 908 (1991); Syl. Pt. 2. *Sipp v. Yeager*, 194 W.Va. 66, 459 S.E.2d 343 (1995) (*per curiam*); *Nat’l Union Fire Ins. Co. of Pittsburgh v. Miller*, 228 W.Va. 739, 746, 724 S.E.2d 343 350 (2012); *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 549, 584 S.E.2d 176,183 (2003). In fact, “[t]he key to determining if an order is final is not whether the language from Rule 54(b) . . . is included in the order, but is whether the order approximates a final order in its nature and effect.” Syl. Pt. 1, in part, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995))(emphasis added).

In this case, the Order on summary judgment dismissed all of Petitioners’ claims with prejudice. (App. 349) Because no claims remain against Respondent, there remains no issue of liability to be tried. Accordingly, applying *Durm* and its progeny, the underlying order is final despite the absence of Rule 54(b) language.

2. **“A common law lien against real property is invalid and is not recognized or enforceable in this state” means any common law lien against real property is invalid.**

W. Va. Code § 38-16-202(a) is clear: “A common law lien against real property is invalid and is not recognized or enforceable in this state.” The Code does not further modify “a common law lien against real property” or create any exceptions to “a common law lien against real property.” The statutory language simply and plainly states that any common law lien on real property is invalid.

Respondent is correct that “courts must presume that a legislature says in a statute what it means and means in a statute what it says,” *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 312, 465 S.E.2d 399, 414 (1995) (quoting *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149 (1992)). Respondent is likewise correct that the role of the court is to apply and not construe the plain language of the statute. *Liberty Mut. Ins. Co. v. Morrisey*, 760 S.E.2d 863, 873, (W. Va. 2014). However, Respondent seeks this Court to misapply the statute based on Respondent’s mistaken understanding of the plain and ordinary meaning of the indefinite article “a.”

The article “a” preceding the words “common law lien against real property” can only mean “any” common law lien or “all” common law liens against real property. Respondent, however, contends that “a” common law lien against real property really means “some” common law liens against real property and that “all” was “purposefully omitted by the West Virginia Legislature.” Webber Springs Resp. at 15-16. Such an

obscure definition of the word “a” begs the question of which common law liens against real property are valid and enforceable in West Virginia.

Black’s Law Dictionary defines “a” as meaning “one” or “any.” *Black’s Law Dictionary* (6th ed. 1990). The question is whether the Legislature meant that “a” is a numerical limitation meaning “one” common law lien against real property is invalid or that “a” means “any” common law lien against real property is invalid. While it is sometimes difficult to determine whether “a” is a numerical limitation or a synonym for “any,” (See *Deutsch v. Mortgage Sec. Co.*, 96 W. Va. 676, 679, 123 S.E. 793, 794, (1924)<sup>3</sup>)<sup>4</sup> here it only makes sense that the article “a” mean “any.” It would not make sense that one common law lien against real property is invalid but two are valid. Thus, “a” in this statute must not denote a numerical limitation and instead must mean “any.” Accordingly, the plain language of the statute shows that the legislature meant that any common law lien against real property is invalid.

To better understand how “a” is used in rule making, it is helpful to look at something attorneys and judges are more intimately familiar with, the Rules of Professional Conduct and the Code of Judicial Conduct. *See generally*, W. Va. R. Prof. Cond.; W. Va. Code Jud. Cond. The ethical rules governing lawyers and judges use the

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<sup>3</sup> The Court had to decide whether the indefinite article “a” was a numerical limitation meaning “one” or if “a” was “generic” meaning “any.” The court found that “a” was used generically “for the purpose of euphony in the grammatical construction of the sentence, and not as a word of numerical limitation.” *Deutsch v. Mortgage Sec. Co.*, 96 W. Va. 676, 680, 123 S.E. 793, 794 (1924).

<sup>4</sup> *See also*, *Lewis v. Spies*, 43 A.D.2d 714, 715 (N.Y. App. Div. 2d Dep’t 1973); *In re Spradlin*, 231 B.R. 254, 259 (Bankr. E.D. Mich. 1999); *In re Adoption No. 12612*, 353 Md. 209, 234, 725 A.2d 1037, 1049, (Md. 1999); *Lindley v. Murphy*, 387 Ill. 506, 56 N.E.2d 832, 838 (1944); *Evans v. State*, 396 Md. 256, 341, 914 A.2d 25, 75, (2006); *State ex rel. Proctor v. Messina*, 2009 Mo. App. LEXIS 1578, 2009 WL 3735919 (Mo. Ct. App. Nov. 10, 2009).

terms “a lawyer” / “a judge” dozens of times to describe what a lawyer/judge shall do, may do, and shall not do. *See generally*, W. Va. R. Prof. Cond.; W. Va. Code Jud. Cond. As lawyers we know, because our professional licenses depend on knowing, that “a lawyer shall” means “all lawyers must” and “any lawyer shall.” Similarly, lawyers understand that “a lawyer shall not” means that “all lawyers must not” and “any lawyer shall not.” The same holds true with judges in the Code of Judicial Conduct.

Webber Springs asks this Court to modify the meaning of the statutory language from “a” meaning “any,” to “a,” meaning “some.”<sup>5</sup> Setting aside the fact that such a modification is the job of the legislature and not this Court, such an interpretation could potentially pave the way for creditors to place liens on real property for virtually any debt, rendering W. Va. Code § 38-16-202(a) meaningless.<sup>6</sup>

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<sup>5</sup> Using Petitioners’ definition of “A” the following syllogism explains the validity of the Respondent’s purported liens:

Premise 1: **All** common law liens against real property are invalid.  
Premise 2: Webber Springs has a common law lien against real property.  
Conclusion: Webber Springs’s common law lien is invalid.

Using Respondent’s definition of “A” the following syllogism explains the validity of the Respondent’s purported liens:

Premise 1: **Some** common law liens against real property are invalid.  
Premise 2: Webber Springs has a common law lien against real property.  
Conclusion: Webber Springs’s common law lien **may be** invalid.

<sup>6</sup> It may also be helpful to review this Court’s early definition of lien. “A lien is the ligament or tie which binds certain property to a particular debt for its payment or satisfaction.” Syl. Pt. 1, *United States Blowpipe Co. v. Spencer*, 40 W. Va. 698, 699, 21 S.E. 769, 770 (1895). It too, is unlikely that President Holt meant the indefinite article “a” to mean a numerical limitation on the noun lien; rather the Court concluded that any lien is the ligament which binds certain property to a particular debt.

At the time President Holt penned this definition of “a lien,” the Supreme Court had a president, rather than a chief justice. The other members of the Court were referred to as judges rather than justices.

**3. If there at some point was a common law lien on real property for Limited Expense Liability Planned Community assessments and attorney fees, such liens are clearly invalidated by statute.**

If the Legislature passes a statute that contradicts the common law, the statute supersedes the common law and becomes the law of the state. W. Va. Const. Art. VIII, § 13. This Court has further held that “[t]he general powers of the legislature are almost plenary. It can legislate on every subject not interdicted by the constitution itself.” *State Rd. Comm’n v. Kanawha County Court*, 112 W. Va. 98, 100, 163 S.E. 815, 816 (1932). Thus, unless the Constitution of West Virginia, or a law of the United States, supersedes either W. Va. Code § 38-16-202 (which forbids all common law liens on real property) or W. Va. Code § 46A-2-128(c) (which forbids collection of attorney fees against consumers for the collection of consumer debt), then this Court must give these statutes full force and effect.

In fact, this Court has dealt with a statute’s impact on common law liens before. In *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (1975), the Court found that

A lien provided for by a statute which is merely declaratory of the common law must be interpreted in conformity with its principles, but where the Legislature has enlarged and defined a common-law lien, its definition supersedes the definition of the courts, and thereafter the exercise of the powers of the courts with respect to such liens must be consistent with the legislative definition.

*Id.* at Syl. Pt. 3 (citing 51 Am. Jur. 2d *Liens* § 38 (1970)). Just as the Court in *Fruehauf Corp.* recognized that the Legislature expanded the scope of a common

law lien, this Court must also recognize when the Legislature restricts the scope of common law liens.<sup>7</sup>

Respondent, of course, has a different take. Respondent argues that “[i]f the Legislature had intended to preclude [limited expense liability planned communities] from asserting and enforcing liens for delinquent assessments, it would have incorporated such a prohibition into the UCIOA [Uniform Common Interest Ownership Act],” rather than just creating a statutory lien for other homeowners associations. Response at 19. Respondent concludes that because LELPCs have no statutory lien for assessments, that they must have common law liens because the Legislature did not specifically and affirmatively prohibit statutory liens on behalf of LELPCs. In fact, Respondent believes that any other finding would “deem the assessments voluntary, leaving Webber Springs to simply hope that property owners” will pay the assessments. Respondent ignores that it may seek redress in the courts for unpaid debts, rather than recording liens against a purported debtors property. More importantly, Respondent ignores the fact that the Legislature specifically and purposefully restricted the provisions of the UCIOA that apply to LELPCs. Liens for unpaid assessments is one of those specifically excluded provisions.

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<sup>7</sup> Both the HOAs and the LELPCs are statutory creations. The Virginia Supreme Court described this issue in dealing with condominiums which are similar to HOAs and LELPCs:

No condominium comes into existence in Virginia except on the recordation of condominium instruments pursuant to the Condominium Act (Code § 55-79.39, *et seq.*)  
The entire condominium concept and all pertaining to it is a statutory creation.

Syl. Pt. 1, *Unit Owners Asso. v. Gillman*, 223 Va. 752, 756, 292 S.E.2d 378, 379, (Va.1982). A United States bankruptcy court subsequently noted that the Condominium Act “confers a right [of liens for assessments] for the first time that did not exist at common law.” *In re Chen*, 351 B.R. 355, 361-362 (Bankr. E.D. Va.2006).

**4. Mere consent to creating liens on real property for the collection of purported debts leads to absurd results.**

Respondent contends that any agreement wherein someone agrees to grant a lien on her real property to another is not only enforceable in West Virginia, but that to find otherwise “would result in an absurdity with respect to the rights of individuals to contract freely under the laws of this state.” (Response Brief at 16). Using Respondent’s reasoning, anyone able to make contracts in this state may grant to another a lien on his or her property for any debt regardless of what laws the Legislature enacts. Under this reasoning, credit card companies could put in credit card contracts that any credit card debt is a lien on the cardholder’s real property. Not only that, the credit card company could put in the contract that any expenses or attorney fees in recording the aforementioned lien also constitutes a lien on the cardholder’s real property. In other words, the lien begets the lien, which in turn begets the lien. This sort of scheme is how Respondent and its attorneys seek to generate revenue over and above the small amount that LELPCs are permitted to collect from assessments.

Applying Respondent’s reasoning to something more familiar, attorney-client fee agreements, renders similarly absurd results. One would suspect that Respondent and its attorneys contracted for the attorneys’ services. Using Respondents’ notion of the freedom to contract for liens on real property, Respondent’s attorneys may contract with Respondent to have a lien on Webber Springs’s roads and common areas for unpaid attorney fees and another lien for any attorney fees in collecting the underlying attorney

fees. Such a system of multiplying attorney fees is absurd (even without regard to whether the debtor is a consumer within the meaning of consumer protection laws).

Although *Hawley* did not deal with a contract for a lien on real property, in *Hawley* an attorney sought an order from the probate court to find that his fee was a lien against the interests of the beneficiaries of an estate. *Hawley v. Falland*, 118 W. Va. 59, 60, 188 S.E. 759, 759 (1937). The Supreme Court found that because there was no statutory lien, the attorney first had to get a judgment from the circuit court in order to establish a judgment lien.

Thankfully, the Legislature has set forth when a valid common law lien may arise through consent of a debtor and a creditor, and it is clearly spelled out in subsections (b) and (c) of W. Va. Code § 38-16-202. W. Va. Code § 38-16-202 clearly states which consensual common law liens are valid and recognized in this state:

**§ 38-16-202. Real property common law liens unenforceable; personal property common law liens limited.**

- (a) A common law lien against real property is invalid and is not recognized or enforceable in this state.
- (b) A common law lien claimed against personal property is invalid and is not recognized or enforceable if, at the time the lien is claimed, the claimant does not have:
  - (1) Actual possession, lawfully acquired, of specific personal property against which the lien is asserted; or
  - (2) Exclusive control, lawfully acquired, of specific personal property against which the lien is asserted.
- (c) A valid common law lien claimed against personal property is destroyed or terminated if the person entitled to the lien fails to retain possession or control of the property, unless the person against whom the lien is asserted **agrees, in writing**, that the lien may continue after delivery of the property from the possession of the lienholder.

Even the statute's title makes it clear that there is a distinction between common law liens on real property, which are "unenforceable," and common law liens on personal property, which are "limited." Common law personal property liens are limited to those in possession or control of the personal property, or where "the person against whom the lien is asserted agrees in writing." W. Va. Code § 38-16-202(c). The language in subparagraph (c) that requires consent to be in writing for common law liens on personal property is where the requirement for consent for common law liens on personal property derives, but in no way does that language apply to subsection (a) on real property, which forbids common law liens on real property regardless of consent.

**5. The *Deblasio* cases did not find that LELPCs have common law liens for assessments and / or attorney fees against homeowner's homes.**

Respondent relies heavily on a case involving at least four unpublished memorandum decisions<sup>8</sup> by this Court wherein the same *pro se* petitioner(s) appealed various rulings by the Circuit Court of Morgan County regarding a dispute with their homeowners association. These memorandum decision have only limited precedential value, but, more importantly, the *pro se* petitioners never cited the statute at issue in this

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<sup>8</sup> The Court recently explained the persuasiveness of memorandum decisions:

4. Memorandum decisions are decisions by the Court that are not signed, do not contain a Syllabus by the Court, and are not published.

5. While memorandum decisions may be cited as legal authority, and are legal precedent, their value as precedent is necessarily more limited; where a conflict exists between a published opinion and a memorandum decision, the published opinion controls.

Syl. Pts. 4 & 5, *State of West Virginia v. Marcus Patrele Mckinley*, \_\_\_ W. Va. \_\_\_, \_\_\_ S.E. \_\_\_ (2014) (Dk. No. 13-0745).

case (W. Va. Code § 38-16-202(a)). Moreover, in its four memorandum decisions, this Court never considered W. Va. Code § 38-16-202.

In *Deblasio I*, *pro se* Petitioner Keith William Deblasio appealed a circuit court order dismissing his civil actions against a homeowners association for lack of standing. *Deblasio v. Stone*, 2012 W. Va. LEXIS 976, 2012 WL 6097653 (W. Va. Dec. 7, 2012) (“*Deblasio I*”). The *Pro se* petitioner also sought reversal of the sanctions awarded against him in the amount of \$5,276.25. *Id.* This Court upheld both the dismissal and the sanctions. *Id.* Neither the circuit court nor the Supreme Court performed any analysis of the validity of the subject liens. In *Deblasio I*, neither the circuit court nor the Supreme Court cited or analyzed W. Va. Code § 38-16-202.

In *Deblasio II*, the circuit court invalidated purported mechanics liens against *pro se* petitioners’ real property for failing to record the liens on time. *Pro se* petitioners, including Keith Deblasio, then sought an order finding that the already invalidated mechanics liens were fraudulent common law liens. *In re Dilts*, 2013 W. Va. LEXIS 400, 2013 WL 1707695 (W. Va. Apr. 19, 2013) (“*Deblasio II*”). The circuit court and Supreme Court found that the issue was moot because the purported liens against *pro se* petitioners property had already been invalidated by the circuit court and the classification of the liens could not be revisited. In *Deblasio II*, neither the circuit court nor the Supreme Court cited or analyzed W. Va. Code § 38-16-202.

In *Deblasio III*, the Supreme Court upheld 1) a circuit court order dismissing Keith Deblasio as an improperly joined party and 2) a circuit court order awarding summary judgment, default judgment, and sanctions against Alan and Patricia Dilts. *Deblasio III*

concerned claims by *pro se* plaintiffs for trespass and destruction of property, but a footnote to the memorandum decision noted that the circuit court's classification of the assessment dues as mechanics liens had become final. *Deblasio v. Cold Spring Forest Sec. 1 Homeowners Ass'n*, 2013 W. Va. LEXIS 825, 2013 WL 3388227 (W. Va. July 8, 2013) (“*Deblasio III*”). In *Deblasio III*, Neither the circuit court nor the Supreme Court cited or analyzed W. Va. Code § 38-16-202.

Most recently, after Petitioners in this case filed their appellate brief, this Court, on August 29, 2014, issued a fourth memorandum decision in the dispute between *pro se* party Keith Deblasio and his homeowners association. *In re A Purported Lien Or Claim Against DeBlasio*, 2014 W. Va. LEXIS 891(W. Va. Aug. 29, 2014) (“*Deblasio IV*”). *Deblasio IV* concerned a new round of purported liens recorded against *pro se* petitioner's real property for unpaid LELPC assessments. In *Deblasio IV*, this Court upheld the circuit court's order that non-lawyers may record liens on behalf of a corporation, and that the purported liens for assessments were for valid consensual common law liens, rather than mechanics liens as it had previously found in *Deblasio III*. Again, in *Deblasio IV*, neither the circuit court nor the Supreme Court cited or analyzed W. Va. Code § 38-16-202.

In sum, neither the circuit court nor the Supreme Court in any of the *Deblasio* orders and memorandum decisions ever acknowledged or cited W. Va. Code § 38-16-202, which defines which common law liens are valid and distinguishes real and personal property. Rather the Court looked only to W. Va. Code § 38-16-106 (Nonconsensual common law lien defined). The circuit court in *Deblasio IV* found that the liens in

question were consensual because the deeds that transferred the property to the petitioners referenced the declarations of the LELPC. Because the liens were considered consensual, the circuit court deemed them valid without analyzing whether the liens had a basis in law other than not being a “nonconsensual common law lien.”

Beyond failing to address W. Va. Code § 38-16-201 (defining three types of liens), or § 38-16-202 (defining which common law liens are valid), *Deblasio*, dealt only with liens for assessments and not liens for attorney fees in the recording of the liens and the collection of the underlying debt. In the instant case, the Petitioners not only argue that the purported common law liens for assessments are invalid, but that the purported common law liens for the attorney fees and costs are also invalid and unenforceable.

**6. The West Virginia Consumer Credit and Protection Act applies to homeowners associations attempting to collect debts from homeowners because homeowners association assessments are primarily for personal, household, and/or family use.**

Just as the Fair Debt Collections Practices Act (“FDCPA”) is limited to transactions “primarily for family, household or personal purposes” (15 U.S.C. § 1692a(5)), so too are claims under the West Virginia Consumer Credit and Protection Act. W. Va. Code § 46A-2-122(b). As *Amicus Curiae* point out, many courts applying the Fair Debt Collection Practices Act have found that assessments from homeowners associations constitute consumer debt and the FDCPA applies. *Ladick v. Van Gemert*, 146 F.3d 1205, 1206 (10th Cir. 1998); *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477, 481 (7th Cir. 1997); *Williams v. Edelman*, 408 F. Supp. 2d 1261, 1275 (S.D. Fla. 2005); *Fuller v. Becker & Poliakoff, P.A.*, 192 F. Supp. 2d 1361, 1367 (M.D. Fla. 2002);

*Taylor v. Mount Oak Manor Homeowners Ass'n*, 11 F. Supp. 2d 753, 754 (D. Md. 1998);  
*Thies v. Law Offices of William A. Wyman*, 969 F. Supp. 604, 606 (S.D. Cal. 1997).

Nonetheless, Respondent argues that because the assessments are to be used for road and street maintenance that the purpose is not primarily for personal, household, or family purposes, because the funds are spent for the benefit of the community at large. Using this rationale, membership to a golf club, gun club, gym, etc. as well as highway tolls, or timeshares are not for personal, household, or family purposes because the money raised is spent on the collective good. This argument is absurd. Just because more than one consumer is paying for the same shared product or service, does not exempt the collection of the debt arising out of that transaction from the WVCCPA or the FDCPA. In other words when two people split the cost of a “five dollar footlong” sub from Subway (rather than each paying four dollars a piece for a six inch sub), the WVCCPA will still apply to any claims against the consumers for that five dollars. Petitioners concede that things may be different if they merely rented the house, but these are Petitioners’ homes where their families reside. It is difficult to imagine a more household and family purpose than debts arising out of the purchase of a family home.

This Court has not interpreted W. Va. Code § 46A-2-122(b) in the context of homeowners associations, but it has interpreted § 46A-2-122(b). In *Dan’s Carworld, LLC v. Serian*, this Court held that the circuit court’s finding that an automobile dealer purchasing a trade-in-vehicle in connection with the purchase of a new vehicle by Defendant consumer as not being for personal use was “erroneous” because the underlying sale was a new automobile to a consumer. 223 W. Va. 478, 485, 677 S.E.2d

914, 921 (2009). Here, the same rationale applies; thus Petitioners' underlying purchase of a home for personal and family use, from which the assessments derive, dictates whether the debt is a consumer debt. As courts interpreting the FDCPA have concluded, debts arising from HOA assessments are consumer debts, as they derive from a transaction that is for a personal, family, and household purpose.

**7. No statute of limitations applies to counterclaims under the West Virginia Consumer Credit and Protection Act.**

When the provisions of the WVCCPA are “asserted as a defense, setoff or counterclaim to an action against a consumer,” such defense, setoff or counterclaim may be asserted “without regard to any limitation of actions.” W. Va. Code § 46A-5-102. This Court has reiterated the clear intention, of the Legislature holding that “[w]here a consumer is sued for the balance due on a consumer transaction, any asserted defense, setoff, or counterclaim available under the Consumer Credit Protection Act, W. Va. Code § 46A-2-101, *et seq*, may be asserted without regard to any limitation of actions under W. Va. Code, 46A-5-102 (1974).” Syl. Pt. 5, *Tribeca Lending Corp. v. McCormick*, 231 W. Va. 455, 745 S.E.2d 493 (2013); Syl. Pt. 6, *Chrysler Credit Corp. v. Copley*, 189 W. Va. 90, 428 S.E.2d 313 (1993).

Respondent argues that statute does not apply to this case because of the Court's holding in *Tribeca*. Response at 33. *Tribeca* found that the defendant was not sued for the balance due on a consumer transaction, rather Tribeca Lending Corp. sued Defendant for unlawful detainer and not for the balance due on any consumer transaction. *Tribeca Lending Corp. v. McCormick*, 231 W. Va. at 470, 745 S.E.2d at 508. Thus, the defendant

was not able to raise WVCCPA counterclaims to claims having nothing to do with a consumer transaction. Here, however, Webber Springs sued Petitioners for balances due on consumer transactions – fees for assessments.

In this case, Webber Springs brought separate actions against Petitioners for LELPC assessments, attorney fees, and costs, and Petitioners counterclaimed under the WVCCPA. Because Respondent’s claims seek the “balance due on a consumer transaction,” and Petitioners’ counterclaims are WVCCPA claims, the claims are not subject to any statute of limitations pursuant to W. Va. Code § 46A-5-102.

In any event, assuming *arguendo* that a statute of limitations applied to Petitioners’ counterclaims, that statute of limitations would be four years and would not be time-barred. This Court held that:

West Virginia Code § 46A-5-101(1) (1996) (Repl. Vol. 1998) is a remedial statute to be liberally construed to protect consumers from unfair, illegal, or deceptive acts. In face of the ambiguity found in that statute, a consumer who is party to a closed-ended credit transaction, resulting from a sale as defined in West Virginia Code § 46A-6-102(d), may bring any necessary action within either the four-year period commencing with the date of the transaction or within one year of the due date of the last payment, whichever is later.

Syl. Pt. 6, *Dunlap v. Friedman’s, Inc.*, 213 W. Va. 394, 582 S.E.2d 841 (2003). Thus, even if this were a closed-ended credit transaction as opposed to an open ended account, the four-year statute of limitations would apply, and the claims would be within the statute of limitations. Thus, while no statute of limitation applies to Petitioners’ counterclaims, had the claims not been counterclaims, a four year statute of limitations would apply.

## CONCLUSION

For the reasons set forth above, this Court should grant Rule 20 oral argument on this matter, reverse both the circuit court's Order dismissing Petitioners' counterclaims and the circuit court's Order finding Respondent had a valid common law lien for assessments and attorney fees on Petitioners' realty. More specifically, Webber Springs does not have, nor has it ever had a common law lien on Petitioners' real property, because no common law liens against real property are recognized in West Virginia. Finally, petitioners have valid claims under the West Virginia Consumer Credit and Protection Act because Petitioners are consumers and because no statute of limitations applies to counterclaims under the WVCCPA.

**JAMES FLEET, JAMILA FLEET,  
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By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0637

**JAMES R. FLEET, JAMILA J. FLEET,  
and JAMES LAMPLEY,**  
Defendants Below,

**Petitioners,**

v.

**Appeal from the Circuit Court of  
Berkeley County (11-C-1091)**

**WEBBER SPRINGS OWNERS  
ASSOCIATION, INC.,**  
Plaintiff Below,

**Respondent,**

**CERTIFICATE OF SERVICE**

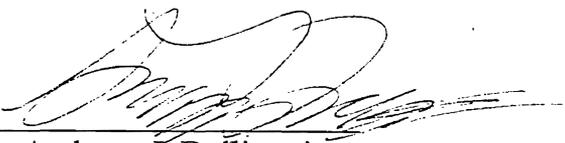
I, Anthony J. Delligatti, of Skinner Law Firm, counsel for the Petitioners, do hereby certify that I have served the foregoing **Petitioners' Reply Brief** on this 28th day of October 2014, by United States Mail, postage prepaid to the following:

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