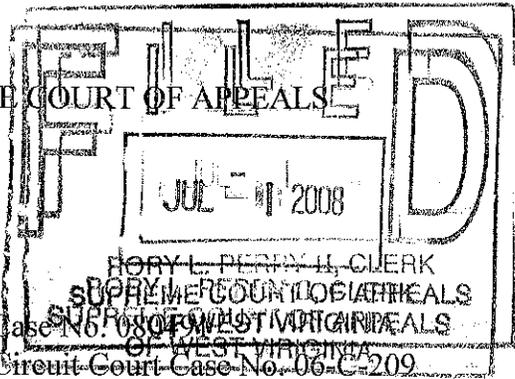


BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS



DAN'S CARWORLD, LLC
d/b/a DAN CAVA'S TOYOTA WORLD
Plaintiff,

v.

DAVID SERIAN
Defendant.

Supreme Court Case No. 08-0019
Marion County Circuit Court Case No. 06-C-209

34146

BRIEF OF APPELLANT DAVID SERIAN

ISSUE: Whether a car dealership, which is the original lender in a new motor vehicle purchase consumer transaction, is a creditor making a claim regarding a debt arising out of a consumer sale of goods or services, when it attempts to collect additional amounts alleged to be owed by the consumer purchaser, following execution of the purchase agreement reciting an inaccurate trade-in value, and the finance agreement containing incomplete and inaccurate Truth In Lending disclosures.

I. PROCEDURAL HISTORY

David Serian, the Appellant submits this Brief in support of his appeal of an Order of the Circuit Court of Marion County, West Virginia, granting Appellee's Motion for Summary Judgment and finding in favor of the Appellee regarding all issues. Appellee, an

automobile dealership, filed its Complaint in this case setting forth its claim against the consumer Appellant, David Serian for unjust enrichment of the Appellant in connection with the sale of a new motor vehicle to the Appellant. Appellant filed his Answer and Counter-claim, denying the allegations of unjust enrichment and making his Counter-Claims for violation of the West Virginia Consumer Credit and Protection Act and fraud. Following discovery, both Appellant and Appellee filed their motions for summary judgment. The Court heard oral argument of the Appellee's motion for summary judgment on September 26, 2007, and by its ORDER GRANTING JUDGMENT AS A MATTER OF LAW IN FAVOR OF THE PLAINTIFF ON ALL ISSUES AND FINAL JUDGMENT ORDER, (hereinafter Order) entered October 19, 2007, ruled in favor of the Appellee on all issues. The Court specifically found that " as the amounts owed by the defendant to the plaintiff do not constitute a "claim" as defined by West Virginia Code § 46A-2-122(b), therefore, the plaintiff is entitled to judgment as a matter of law in its favor with respect to the defendant's counterclaims". (Order, Conclusions of Law ¶ 14) Appellant submitted his Petition for Appeal to this Court on February 19, 2008. Appellant now submits his Brief in support of his appeal of the judgment of the Circuit Court of Marion County.

II. STATEMENT OF THE CASE

In March, 2006, Appellant David Serian and his wife owned a 1997 Toyota truck. David Serian and his wife also owned a 2002 Toyota truck in March, 2006. Neither of these vehicles was fully paid off and a balance was owed to the lien holder for each. On several occasions, and following visits to Appellee dealership for routine service of his 2002 Toyota

truck, Appellant was solicited by telephone by Appellee's salesman to purchase a new 2006 Toyota truck to replace the 2002 vehicle. During these solicitations, Appellee's salesman inquired about how much the Appellant owed on the vehicle and was advised that the Appellant owed a "couple thousand" dollars. (See Petition Exhibit A, Deposition of David Serian at page 9:12) (See Petition Exhibit B, Deposition of Joseph Iaquina at page 18:7) Appellant finally relented and agreed to purchase a new truck from the Appellee, but advised the Appellee's salesman that he did not want to make a larger monthly payment. (See Petition Exhibit A, Deposition of David Serian at page 9:9). This purchase was made for Appellant's personal or household use. (See Petition Exhibit C, Deposition of Dan Cava at page 14:9) On March 23, 2006, during the evening hours, David Serian met with Jean Haught at Dan's Carworld LLC, d/b/a Dan Cava's Toyota World (hereinafter Dan Cava Toyota) to sign the new motor vehicle purchase agreement and the loan agreement prepared by Erin Garrison, Appellee's employee who was not present. (See Petition Exhibit D, Deposition of Jean Haught at page 9:21) The New Motor Vehicle Purchase Agreement, which consists of a pre-printed form upon which the dealership fills in numbers and vehicle identification information, and all other documents connected with the sale, were prepared by Appellee. (See Petition Exhibit C, Deposition of Dan Cava at page 21:10) The New Motor Vehicle Purchase Agreement signed by the Appellant recites the balance owed toward the trade-in vehicle as \$ 2,320.09. (See Exhibit A, Purchase Agreement) The New Motor Vehicle Purchase Agreement (hereinafter the Purchase Agreement) also provides, in small type, that the information on the reverse side of the agreement is a part of the New Motor Vehicle Purchase Agreement. The reverse side of

Purchase Agreement includes paragraph 7, which states:

7. BALANCE OWED ON TRADE-IN: If the Purchaser is delivering a trade-in vehicle or is turning in a leased vehicles as part of the transaction and the actual amount of the balance owed on the trade-in vehicle/lease turn-in is different than the amount of the balance owed as listed in this Agreement, the Purchaser agrees to pay the difference to the Dealer if the actual amount of the balance owed is greater than the amount listed and, if the actual amount of the balance owed is less than the amount listed, the Dealer agrees to pay the difference to the Purchaser. (See Exhibit A, Purchase Agreement)

Also included in the documents prepared by the dealership was the finance agreement. (See Exhibit B, Finance Agreement) The finance agreement provides that the terms "we" and "us" shall mean Dan Cava's Toyota World. The finance agreement further provides:

SECURITY: To secure your payment and performance under the terms of this Contract, you give "us" a security interest in the vehicle, all attachments, accessories, and equipment placed in or on the Vehicle, together called Property, and proceeds of the Property. (*emphasis added*)

and further provides:

PROMISE TO PAY AND PAYMENT TERMS:

You promise to pay "us" the principal amount of \$ 14,033.09, plus sales finance charges accruing on the unpaid balance at the rate of 8.000 % per year from today's date until paid in full. ... (*emphasis added*)

The finance agreement further provides, at its last paragraph, that it shall be assigned by the seller of the vehicle, who pursuant to the terms of the finance agreement, as above, is the first original lender.

At the time the New Motor Vehicle Purchase Agreement was prepared by the Appellee, Appellee's employee contacted Wachovia Bank, the lien holder for the trade-in vehicle. (See Petition Exhibit D, Deposition of Jean Haught at page 35:21) Appellee's employee was advised by the lien holder that the Appellant, a good Toyota customer, had two Toyota vehicles financed with them. Rather than use the vehicle's VIN number to verify the pay-off for the 2002 truck to be traded by the Appellant, it is alleged that Appellee's employees assumed that the larger pay off, of \$ 4,357.87 was due on the 1997 vehicle and that the higher pay off was due on the newer, 2002 vehicle to be traded in. Appellee's employees then completed the New Motor Vehicle Purchase Agreement and represented to the Appellant that the amount of \$ 2,320.09 was the pay-off for the 2002 vehicle he was trading in. The Appellant executed all the purchase and finance documents as requested and drove off in his new truck.

The Appellee gave Appellant a trade-in allowance of \$ 17,200.00 for his trade-in and sold Appellant's trade-in for \$ 28,190.00 within five days. Thereafter, Appellee alleges it learned that the pay-off amount for the trade-in vehicle was incorrect and was actually greater than that stated by Appellee in the Purchase Agreement. Appellee's owner, Dan Cava and it's salesman, Joe Iaquina, contacted Appellant by telephone on several

occasions, demanding that Appellant pay the difference in the pay-off as recited in the purchase agreement prepared by Appellee and that as verbally stated by the Appellee. Appellant refused and demanded return of his trade-in vehicle. Appellee refused, as the trade-in had already been sold, demanded payment of the difference between the amounts, and the calls thereafter became "heated", with the Appellee's owner cursing at the Appellant and threatening to ruin Appellant's credit rating. (See Petition Exhibit C, Deposition of Dan Cava at page 23-24: 7-17) (See Petition Exhibit A, Deposition of David Serian at page 16:17)

After sending correspondence demanding payment to the Appellee by its counsel, Appellee brought this instant action for unjust enrichment of the Appellant for the difference in the amount of the pay-off of the trade-in as recited by the Appellee in the sales agreement and the alleged actual pay-off amount. Appellant filed his counter-claims against the Appellee for violations of the West Virginia Consumer Credit and Protection Act, and fraud, and on the basis that Appellee was attempting to collect a debt arising out of a consumer transaction. Appellant's counter-claims against the Appellee were brought on the basis of:

I. violation of the West Virginia Consumer Credit and Protection Act, West Virginia Code § 46A-2-125(a), which provides that no debt collector shall unreasonably oppress or abuse any person in connection with the collection or attempt to collect a debt through the use of profane or obscene language;

II. violation of the West Virginia Consumer Credit and Protection Act, West Virginia Code § 46A-2-127(d), which provides that no debt collector shall use any false representation or implication of the character, extent or amount of a claim against a consumer in an effort to collect a debt;

III. violation of the West Virginia Consumer Credit and Protection Act, West Virginia Code § 46A-2-128(d), which provides that it is an unconscionable debt collection practice for a debt collector to collect or attempt to collect any interest or other charge, fee or expense incidental to the principal obligation unless such fee, interest or charge is expressly authorized by the agreement creating the obligation and;

IV. fraud, which is particularly pled in Defendant's counter-claim, and which claim was made on the basis that the Plaintiff, with years of experience in the valuation and pay-off of trade-in vehicles, merely recited a lower pay-off amount in the Purchase Agreement in order to cause the Appellant to enter into a new motor vehicle purchase at a time when Appellant had advised the Plaintiff that he would only purchase a new vehicle if his monthly payments would not increase.

Following discovery, the parties each filed their motions for summary judgment in this case. Appellee's motion for summary judgment with respect to the counter-claims of the Appellant asserted that the amounts the Appellee sought to recover from the Appellant were owed to the Appellee regarding the trade-in vehicle and not the vehicle purchased and

therefore Appellant's counter-claims did not arise out of a consumer transaction and further did not meet the definition of a "claim" of a creditor as the same is defined by West Virginia Code § 46A-2-122(b). In support of its motion, Appellee asserted that it was the purchaser of a vehicle from the Appellant by accepting his trade-in vehicle and on that basis the West Virginia Consumer Credit and Protection Act did not apply to the claims of the Appellee. On September 26, 2007, the Court held hearing of Appellee's motion for summary judgment. In opposition to Appellee's motion for summary judgment the Appellant asserted that:

I. Appellee's claims are subject to the provisions of the West Virginia Consumer Credit and Protection Act, as the debt alleged to be owed by Appellant to the Appellee arose as a part of an " obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or service which is the subject of the transaction is primarily for personal, family or household purposes.." pursuant to West Virginia Code § 46A-2-122(b).

II. Appellee is a debt collector as the same is defined by Thomas v. Firestone, 164 W.Va. 763; 266 S. E. 2d 905 (1980).

III. All of Appellant's claims are not subject to summary judgment, as "(o)nly where there are no factual disputes in existence can an unconscionability claim under West Virginia Code § 46A-2-121 be determined as a question of law based on the undisputed factual

circumstances ad resolved by summary judgment”. Herrod v. First Republic Mortgage Corporation, Inc., 218 W. Va. 611,625; 625 S. E. 2d 373,379 (2005).

IV. Appellee failed to accurately disclose, in both the Purchase Agreement and the finance agreement, the accurate purchase price of the new motor vehicle to the Appellant, both in violation of the Truth-in-Lending Act, 15 U.S.C. 1638 (a) (7) and Regulation Z, § 228.18(j).

V. Where the bargaining power of the parties is unequal, summary judgment is not appropriate when the consumer has made claims of unconscionability. Herrod v. First Republic Mortgage Corporation, Inc., 218 W. Va. 611; 625 S. E. 2d 373, (2005). And, the bargaining power of the parties is unequal where the agreement upon which the consumer transaction is based is a pre-printed contract of adhesion prepared, printed and provided by the seller. State ex. rel. Dunlap v. Berger, 211 W.Va. 549; 567 S.E. 2d 265 (2002).

By ORDER dated October 19, 2007, the Court found in favor of the Appellee on all issues and entered its ORDER GRANTING JUDGMENT AS A MATTER OF LAW IN FAVOR OF THE PLAINTIFF ON ALL ISSUES AND FINAL JUDGMENT ORDER. In its ORDER, the Court found that the West Virginia Consumer Credit and Protection Act did not apply to this transaction because the Appellee “sought to recover amounts it paid to get a clear title to the vehicle traded by the defendant to the plaintiff”, and upholding the position of the Appellee that the claim of the Plaintiff did not arise out of a transaction which was a sale of goods to a consumer. (Order, Findings of Fact, paragraph 21,

Conclusions of Law, paragraphs 11, 12, 13, 14) The Court found that “ (a)s this transaction involves the purchase of the 2002 Toyota Tacoma by the plaintiff it does not involve a claim as contemplated by West Virginia Code § 46A-2-122(b). The amount owed is to satisfy the lien on personal property purchased by the plaintiff from the defendant.” (Order, Conclusions of Law, paragraph 13). It is from this decision that the Appellant appeals.

III. STANDARD OF REVIEW

The Court’s standard of review for a grant of summary judgment is de novo. “A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. Syllabus Point 3, Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963).” Painter v. Peavy, 192 W.Va. 189, 192; 451 S. E. 2d 755, 758 (1994).

IV. ARGUMENT

The pivotal issue in this case is whether the claims made by the Appellee are the claims of a creditor attempting to collect a debt from a consumer purchaser, and if so whether the Appellee’s claims are subject to the fair debt collection provisions of the West Virginia Consumer Credit and Protection Act.

The growing body of case law in both federal and state courts regarding the financing of automobile sales to consumers tells us that more and more automobile dealers are willing to engage in schemes such as “yo-yo” delivery and “spot financing” in order to cause consumers to purchase vehicles they don’t want, or to finance those vehicles at terms the consumer never agreed to. For the most part, these tactics are merely new twists on the old “bait and switch”. This case is no exception.

Following multiple telephone solicitations from the Appellee, David Serian agreed to purchase a new truck from Dan Cava Toyota. Mr. Serian was already the owner of a 1997 Toyota truck and a 2002 Toyota truck, both purchased from this same dealership when operated by a prior owner. As a part of the sale, Mr. Serian agreed to trade in his 2002 Toyota truck toward the purchase of the new 2006 Toyota truck. In effect, the Appellant’s equity in the 2002 vehicle served as part of the payment for the new 2006 truck. The 2002 vehicle was not quite paid off. Appellant owed a balance of \$ 4,357.87 on the 2002 truck. When the Appellee inquired about the pay-off for the 2002 vehicle, Appellant responded that he owed a “couple thousand dollars” and relied upon the Appellee to obtain the exact pay-off amount. Appellant agreed to purchase the new 2006 vehicle only if his monthly payments would not increase. In order to make the sale and keep the Appellant’s monthly payments at or near the same as those he was currently making, Appellee misstated the amount of the pay-off of the 2002 vehicle by about \$ 2,000.00. This resulted in the Appellant financing less than he would have if the stated pay-off in the purchase and financing documents had been accurately disclosed. Because the Appellant financed less

for the purchase of the new vehicle as a result of the misrepresented pay-off of the trade-in, Appellee was able to meet the Appellant's requirement that his monthly payments not increase significantly over those he was currently making for the 2002 vehicle.

Only after Dan Cava Toyota sold Appellant's 2002 trade-in for a profit of about \$ 10,990, did the dealership contact the Appellant to inform him of the alleged error in the trade-in pay-off amount. In fact, Appellant was called at his home by the owner of the dealership, Dan Cava. That contact consisted of Dan Cava cursing and swearing at Appellant and threatening to ruin Appellant's credit rating. When the Appellant did not agree to pay the additional amounts in order to preserve his good credit rating, and demanded return of his 2002 trade-in, Appellee refused and its counsel wrote to the Appellant demanding payment and thereafter instituted this action.

In granting summary judgment for the Appellee dealership, the Circuit Court found that Appellant was not a consumer entitled to the protection of the West Virginia Consumer Credit and Protection Act in this motor vehicle purchase transaction because the Appellee dealership had not brought a "claim" against the Appellant and was therefore not a creditor. The essence of the Court's reasoning was that the action brought by the Appellee dealership was not a "claim" arising out of Appellant's purchase of a motor vehicle from the Appellee. Rather, the Court's findings reflect an opinion that the trade-in of the 2002 vehicle was a wholly separate transaction from the Appellant's purchase of the 2006 vehicle. West Virginia Code § 46A-2-122(b) defines a "claim" as:

Any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or service which is the subject of the transaction is primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment.

This purchase was made for Appellant's personal or household use. (See Petition Exhibit C, Deposition of Dan Cava at page 14:9) The Appellant is a consumer. A consumer is "any natural person obligated or alleged to be obligated to pay any debt". *West Virginia Consumer Credit and Protection Act, West Virginia Code* § 46A-2-122(a). Appellee is a debt collector engaged in the collection of a debt from a consumer. A "debt collector means any person or organization engaging directly or indirectly in debt collection". *West Virginia Consumer Credit and Protection Act, West Virginia Code* § 46A-2-122(d). "Debt collection" means 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. *West Virginia Consumer Credit and Protection Act, West Virginia Code* § 46A-2-122(c). A debt collector may include a seller of goods and services seeking to collect its own debt. In finding that a seller, to whom a consumer was alleged to owe a debt was acting as a debt collector when attempting to collect amounts owed to the seller, this Court in Thomas v. Firestone, 164 W.Va. 763; 266 S.E. 2d 905 (1980) held:

"The 1974 enactment of Chapter 46A of the West Virginia Code represents recognition by the legislature of abuses in consumer credit transaction practices. In the face of the use of the word "any" it would be improper for this Court to limit the application of the statute to the activities of professional debt collection agencies.

That would be usurpation of the legislative function. The statute was designed to protect consumers against unscrupulous collection practices, by whomever perpetrated. In light of the broad remedial purposes of this legislative act, all who engage in debt collection are alike subject to its prohibitions. It would be incongruous to suggest that a creditor could evade the requirements of the statute by collecting his own debt in unconscionable fashion, which another would be held to account if it enlisted the service of a professional collector to pursue the same course of action. Such a strained interpretation would conflict with common sense.” *Id.* at 770.

In this action, Dan Cava’s Toyota World is a creditor of the Appellant, seeking to collect a debt which arose primarily out of the purchase of consumer goods purchased mainly for personal or household use. The financing agreement provides that the lender is “we” or “us” and defines “we” or “us” as Dan Cava’s Toyota World. The Truth in Lending Act is set out at 15 U.S.C. §§ 1601-1666j. The Truth in Lending Act requires that certain disclosures be made in every consumer sale. The Federal Reserve System is charged with the implementation and interpretation of the Truth in Lending Act. 12 C.F.R. § 226.1 “ The specific content and timing of the disclosures are set forth in Regulation Z, which is adopted by the Federal Reserve Board in support of TILA. 15 U.S.C. § 1638(a); 12 C.F.R. §§ 226.2(a)(13) and 226.18; See also Ford Motor Credit Co. v. Milhollin, 444 U.S. 555,568 (1980) (courts must defer to the regulations of the Federal Reserve Board when interpreting TILA). Regulation Z requires that the creditor disclose the identity of the creditor, the amount being financed, the annual percentage rate, the total sale price, and the total amount of payment. 15 U.S.C. § 1638(a); 12 C.F.R. § 226.18.

These disclosures must be made “before credit is extended,” a point known as consummation. Consummation means the time that a consumer becomes contractually obligated on a credit transaction. 12 C.F.R. § 226(a)(13).” Bragg v. Bill Heard Chevrolet, Inc., 374 F. 3d 1060, 1065 (11th Cir. 2004), citing Cody v. Community Loan Corp. of Augusta, 606 F. 2d 499 (5th Cir.1979). If the required disclosures are not made prior to consummation of the transaction, “creditors could intentionally provide faulty disclosures to consumers, obtain their commitment, and then afterwards provide accurate disclosures prior to closing the transaction, which if provided earlier might have dissuaded the consumer from accepting the credit, all without incurring TILA liability” Gibson v. LTD Inc., 434 F. 3d 275,281 (4th Cir. 2006), citing Nigh v. Koons Buick Pontiac GMC Inc., 319 F. 3d 119, 123 (4th Cir. 2003), rev’d in part (regarding amount of damages and attorney’s fees) 543 U.S. 50, 125 S. Ct. 460, 160 L. Ed. 389 (2004). The Federal Reserve Board has set forth its rules and interpretations of the Truth in Lending Act in Regulation Z, 12 C.F.R. § 226. To further assist in the interpretation of the Truth in Lending Act, the Federal Reserve Board has set forth its staff commentaries in Appendix C to Regulation Z. At 12 C.F.R. § 226 Appendix C, 2(a)(17)(2) the term “ creditor” is specifically explained in the context of an auto dealer who assigns a vehicle purchase obligation as follows.

“ If an obligation is initially payable to one person, that person is the creditor even if the obligation by its terms is simultaneously assigned to another person. For example:

- An auto dealer and a bank have a business relationship in which the bank

supplies the dealer with credit sale contracts that are initially made payable to the dealer and provide for the immediate assignment of the obligation to the bank. The dealer and the purchaser execute the contract only after the bank approves the creditworthiness of the purchaser. Because the obligation is initially payable on its face to the dealer, the dealer is the only creditor in the transaction.”

Therefore, Appellee was not merely the purchaser of the Appellant’s trade-in vehicle in this transaction. Appellee was the lender. And in making its claim against the Appellant, Dan Cava’s Toyota World was a creditor seeking to collect a claim against a consumer when that claim resulted from the dealership creditor’s own violation of the Truth in Lending Act.

In opposition to Appellee’s motion for summary judgment, Appellant asserted four legal theories regarding why dispositive relief should not be granted to the Appellee. Based upon the facts of the case and provisions of the West Virginia Consumer Credit and Protection Act, as above, Appellant has asserted his counter-claims against the Appellee for violation of the West Virginia Consumer Credit and Protection Act. Appellant submits that Appellee’s claims against the Appellant are not subject to summary judgment because the claims of the Appellee are unconscionable or based upon the unconscionable actions of the Appellee. One of the counter-claims asserted by the Appellant is that the Appellant was induced to enter into the purchase of this vehicle based upon unconscionable actions of the Appellee, in violation of West Virginia Code § 46A-2-121. That portion of the West Virginia Consumer Credit and Protection Act provides that if the Court, as a matter of law,

finds that the agreement or transaction is unconscionable, then the Court may refuse to enforce the agreement or enforce only those provisions which are not unconscionable. Particularly, West Virginia Code § 46A-2-121, provides that “ (i)f it is claimed or appears to the Court that the agreement or transaction or any term or part thereof may be unconscionable, the parties shall be afforded a reasonable opportunity to present evidence as to its setting, purpose and effect to aid the court in making the determination”. No testimony or evidence of the unconscionability of the agreement or transaction was sought by the Court. Appellant did, however, submit to the Court, both at argument and in his response to Appellee’s motion for summary judgment that the transaction was unconscionable as it was illegally made in violation of the Truth-in-Lending Act and Regulation Z.

The Appellee was the original lender in this transaction. The financing agreement provides that the terms “we’ and “us” as used in the finance agreement shall mean Dan Cava’s Toyota World. (See Petition Exhibit F, Finance Agreement) The finance agreement further provides that the purchaser is David Serian, referred to as “you” in the agreement, which states: “ SALE: You agree to purchase from us, on a time basis, subject to the terms and conditions of this contract and security agreement (contract) the Motor Vehicle (Vehicle) and services described below”. The agreement additionally provides under the heading of “SECURITY” that “ To secure your payment and performance under the terms of this Contract, you give us a security interest in the Vehicle, all attachments, accessories, and equipment placed in or on the Vehicle, together called Property, and

proceeds of the Property". The agreement also states, under the heading of "PROMISE TO PAY AND PAYMENT TERMS" that "You promise to pay us the principal amount..." Clearly the Appellee was the initial lender regarding Appellant's purchase of this vehicle. The finance agreement also states the purchase price of the vehicle as \$ 13,933.09, the same amount set forth in the Purchase Agreement. Regulation Z, 12 C.F.R 226, at § 226.18 provides that the lender must disclose the total of all payments, the payment schedule, and the total sale price of the item financed in a consumer credit sale. The Appellee bases its claims against the Appellant upon language found on the reverse side of the vehicle Purchase Agreement. Such terms, at paragraph 7, provide:

7. BALANCE OWED IN TRADE-IN: If the Purchaser is delivering a trade-in vehicle or is turning in a leased vehicle as a part of the transaction and the actual amount of the balance owed on the trade-in vehicle/lease turn-in is different than the amount of the balance owed as listed in this Agreement, the Purchaser agrees to pay the difference to the Dealer if the actual amount of the balance owed is greater than the amount listed and, if the actual amount of the balance owed is less than the amount listed, the Dealer agrees to pay the difference to the Purchaser.

A creditor, such as the Appellee, seeking to enforce the terms of the Purchase Agreement at paragraph 7, above, could not comply with the provisions of the Truth In Lending Act and Regulation Z, section 226.18, because the total of all payments, the payment schedule and total sale price could not have been accurately disclosed to the purchaser when that amount was subject to change pursuant to paragraph 7 of the Purchase Agreement. The disclosures required by the Truth-in-Lending Act and Regulation Z, must be made prior to the consummation of the sale. Truth In Lending Act, 15 U.S.C § 1638 (a)

because the downpayment, which includes the value of any trade-in, was not accurately set forth in the purchase agreement and loan documents. Furthermore, no seller using the adhesion contract employed by Appellee could comply with the Truth In Lending Act or Regulation Z because the total sale price, which includes the downpayment allowance would always be subject to change.

Appellee's violations of the Truth-in-Lending Act and Regulation Z, only serve to support Appellant's position that Appellee's actions regarding the sale of the vehicle to Appellant and its subsequent debt collection efforts are unconscionable. Summary judgment is not an appropriate disposition of this case. "Only when there are no factual disputes in existence can an unconscionability claim under West Virginia Code § 46A-2-121 be determined as a question of law based on the undisputed factual circumstances and resolved by summary judgment." Herrod v. First Republic Mortgage Corporation, 218 W.Va. 611,625; 625 S.E. 2d 373,379 (2005). Furthermore, where the Appellee has acted illegally in the sale and financing of the consumer purchase, no valid argument can be made that the sale and financing subject to such illegality were not unconscionable.

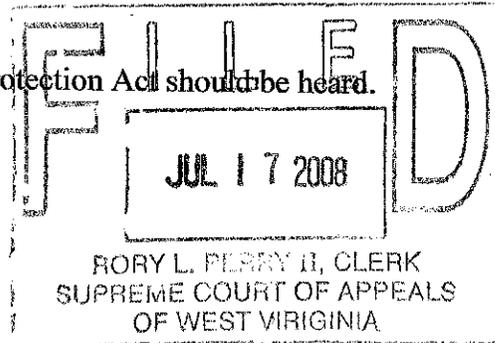
Summary judgment is not an appropriate remedy where the bargaining power of the parties is unequal. Herrod v. First Republic Mortgage Corporation, 218 W.Va. 611; 625 S.E. 2d 373 (2005). The bargaining power of the parties is unequal where the sale of consumer goods is subject to an adhesion contract consisting of a pre-printed form prepared or presented by the seller and submitted to the consumer on a "take it or leave it" basis.

State ex. Rel. Dunlap v. Berger 211 W.Va. 549, 556; 567 S. E. 2d 265, 272 (2002). The terms of the Purchase Agreement, including paragraph 7 on the reverse side of the Purchase Agreement, are pre-printed contract provisions not subject to negotiation by consumers. Summary judgment is only appropriate if “ from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” *Syl. Pt. 2, Williams v. Precision Coil, Inc.*, 194 W.Va. 52; 459 S. E. 2d 329 (1995). “ A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law” *Syl. Pt. 3, Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W.Va. 160; 133 S.E. 2d 770 (1963).

Summary judgment on the basis that the Appellant was not a consumer who could assert his claims and defenses pursuant to the West Virginia Consumer Credit and Protection Act was not an appropriate remedy in this case where the Appellant was so clearly a consumer who incurred a debt for a vehicle purchased for his own personal use. A legal dispute exists regarding whether the Appellee is a debt collector attempting to collect a debt in this action. Inquiry into the facts of the Appellee’s role as a lender in its motor vehicle sales is “ desirable to clarify the application of the law” in this case. In light of Appellee’s failure to comply with the Truth In Lending Act and Regulation Z, factual and legal issues remain regarding whether the loan documents themselves were unconscionable and unenforceable. Therefore, Appellant’s claims against the Appellee for

violation of the West Virginia Consumer Credit and Protection Act should be heard.

V. CONCLUSION



The transaction which forms the basis for this litigation arose from the sale of consumer goods to the Appellant for his own personal or household use. The Appellee was not only the seller, but also the original lender in this transaction. The Appellant financed a consumer debt with the Appellee. As a lender, the Appellee was obligated to make certain required Truth In Lending disclosures to the Appellant in the financing of this consumer sale prior to its consummation. The adhesion contracts employed by the Appellee in its course of business make it impossible to accurately disclose the purchase price of the consumer goods as is required by the Truth In Lending Act. The Appellee is a creditor of the Appellant as the same is defined by Regulation Z. The West Virginia Consumer Credit and Protection Act provisions regarding fair debt collection apply to sellers or creditors collecting their own debts. A creditor making a claim for payment of money arising out of the sale of consumer goods and services makes a "claim" against the consumer as the same is defined by the West Virginia Consumer Credit and Protection Act, West Virginia Code § 46A-2-122(b). As a creditor collecting a consumer debt, Appellee must comply with the provisions of the West Virginia Consumer Credit and Protection Act. The West Virginia Consumer Credit and Protection Act prohibits unconscionable actions in the collection of debts. Summary judgment on the basis that the Appellee was not a creditor making a claim against a consumer was not an appropriate disposition of this case

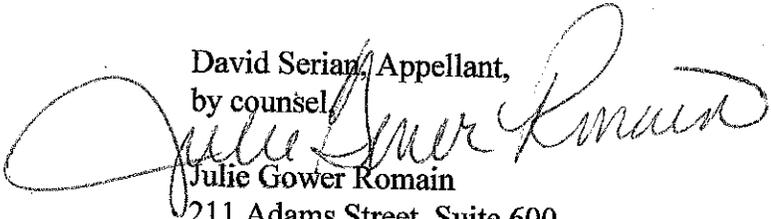
where the Appellant was clearly a consumer, the Appellee was clearly a creditor collecting a debt, and the actions of the Appellee were so clearly in violation of the Truth In Lending Act as to be in violation of, and unconscionable under the provisions of, the West Virginia Consumer Credit and Protection Act.

VI. PRAYER FOR RELIEF

Appellant prays that this honorable Court find that the Appellee in this action is a creditor attempting to collect a claim arising out of a sale of consumer goods to the Appellant and that such claim is subject to the provisions of the West Virginia Consumer Credit and Protection Act.

Respectfully submitted this 30th day of June, 2008.

David Serian, Appellant,
by counsel



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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

DAN'S CARWORLD, LLC
d/b/a DAN CAVA'S TOYOTA WORLD
Plaintiff,

Supreme Court Case No. 080491
Marion County Circuit Court Case No. 06-C-209

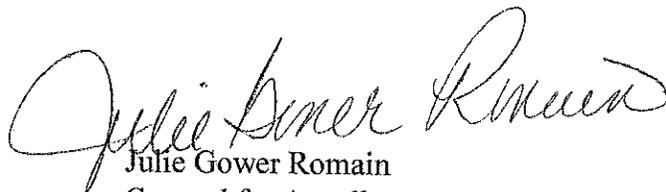
v.

DAVID SERIAN
Defendant.

CERTIFICATE OF SERVICE

I certify that I have this 30th day of June, 2008, served a true and accurate copy of Brief of David Serian and the attachments thereto upon counsel for the Plaintiff by depositing the same in the United States Mail with sufficient postage attached thereto and addressed to:

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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE