

No. 34146

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA

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

Appellee,

v.

Civil Action No. 06-C-209

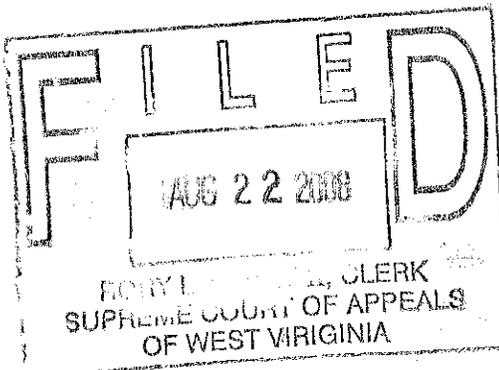
DAVID SERIAN,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
THE HONORABLE DAVID R. JANES, JUDGE

BRIEF OF THE APPELLEE,
DAN'S CARWORLD, LLC, D/B/A DAN CAVA'S TOYOTA WORLD

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA



GREGORY H. SCHILLACE WWSB #5597

Counsel for Appellee, Dan's Carworld,
LLC, d/b/a Dan Cava's Toyota World

SCHILLACE LAW OFFICE
Huntington Bank Building
Post Office Box 1526
Clarksburg, West Virginia 26302-1526
Telephone: 304-624-1000
Facsimile: 304-624-9100

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**I. Statement of the Kind of Proceeding
and Nature of the Ruling Below**

This action was instituted by the Appellee, Dan's Carworld, LLC, d/b/a Dan Cava's Toyota World, as a consequence of the Appellant's refusal, to reimburse the Appellee for monies expended to payoff a lien on a vehicle sold by the Appellant to the Appellee. After the filing of the civil action against the

Appellant, the Appellant filed a counterclaim alleging violations by the Appellee of the West Virginia Consumer Credit and Protection Act.¹

On October 19, 2007, the Circuit Court of Marion County, West Virginia, properly granted the motion for summary judgment filed on behalf of the Appellee. It is from the grant of the motion for summary judgment that the Appellant appeals.

II. Statement of Facts

1. On or about March 23, 2006, the Appellant, David Serian, contracted with the Appellee, Dan's Carworld, LLC, d/b/a Dan Cava's Toyota World, to purchase a 2006 Toyota Tacoma.

2. As part of the Motor Vehicle Purchase Agreement the Appellant traded his 2002 Toyota Tacoma to the Appellee. In exchange for the trade of 2002 Tacoma, the Appellant received a credit of \$17,200.00 toward the purchase of the 2006 Tacoma.

3. The Appellant in negotiating the purchase of the 2006 Toyota Tacoma dealt directly with Joseph Iaquina, a salesperson employed by the Appellee.

4. Prior to entering into the Motor Vehicle Purchase Agreement, Mr. Iaquina had a discussion with the Appellant during which Mr. Serian advised Mr. Iaquina that the payoff on the 2002 truck was approximately \$2,000.00.

¹ Despite substantial attention in the Appellant's Brief to the Truth in Lending Act, 15 U.S.C. § 1601 et seq., there is no allegation in the Appellant's counterclaim regarding any violation of any federal law including, but not limited to, the Truth in Lending Act.

5. Other employees of the Appellee, utilizing the information provided by the Appellant, including, but not limited to, his social security number, requested payoff information from Mr. Serian's lienholder, Wachovia Bank.

6. Information from Mr. Serian's lienholder, Wachovia Bank, was obtained by a representative of the Appellee utilizing a fully automated telephone system. The payoff was obtained using Mr. Serian's social security number as reference.²

7. Utilizing the Wachovia automated telephone system and Mr. Serian's social security number representatives of the Appellee discovered that Mr. Serian had two (2) loans with Wachovia, one with a balance of \$2,320.09 and one with a balance of \$4,357.87.

8. Relying upon the representations of the Appellant, the Appellee considered the payoff of Mr. Serian's 2002 Toyota Tacoma being equal to \$2,320.09.

9. On March 23, 2006 a representative of the Appellee, Jean Haught, met with the Appellant and reviewed the documents related to Mr. Serian's purchase of the 2006 Toyota Tacoma.

10. The Appellant executed the Motor Vehicle Purchase Agreement agreeing and certifying, among other things, that the balance he owed with respect to the 2002 Toyota Tacoma being traded to the Appellee was \$2,320.09.

² It is not possible with this system to use a vehicle verification number to obtain the amount of the loan payoff.

11. In addition to the Motor Vehicle Purchase Agreement, the Appellant executed an Authorization for Certificate of Title Release. This document authorized Wachovia Bank to release the 2002 Toyota Tacoma title to the Appellee. By executing this document, the Appellant again represented to the Appellee that the amount owed to Wachovia with respect to the 2002 Toyota Tacoma was \$2,320.09.

12. On March 23, 2006 the Appellee forwarded to Wachovia Bank a check in the amount of \$2,320.09 representing the payoff for the 2002 Toyota Tacoma as represented by the Appellant to the Appellee.

13. On March 28, 2006 the Appellee received correspondence from Wachovia Bank indicating that the actual payoff with respect to the 2002 Toyota Tacoma was \$4,357.87.

14. As the 2002 Toyota Tacoma had been previously sold to a third party³, the Appellee was left with no option but to pay Wachovia Bank the sum of \$2,037.78 fully satisfying the lien on the 2002 Toyota Tacoma previously owned by the Appellant for which Mr. Serian remained indebted to Wachovia Bank.⁴

³ The 2002 Tacoma was sold to the third party prior to March 28, 2006.

⁴ The Appellant asserts in his Brief at page 5 that the 2002 Tacoma sold by the Appellant to the Appellee was sold to a third party for \$28,190.00, however, that is not correct. The 2002 truck sold by the Appellant to Appellee was sold for less than the allowance given to the Appellant by the Appellee. The gross sale price for the 2006 Tacoma was \$28,190.00.

15. Although the security for the Appellant's loan had been sold, the Appellant was still responsible for this loan to Wachovia Bank until the loan was fully satisfied by the Appellee.

16. After March 28, 2006 representatives of the Appellee advised the Appellant regarding the incorrect amount of the payoff as represented by Mr. Serian in various documents including, but not limited to, the Motor Vehicle Purchase Agreement and the Authorization for Certificate of Title Release, however, the Appellant refused to reimburse the Appellee for the \$2,037.78 paid on his behalf to Wachovia Bank.

17. The Motor Vehicle Purchase Agreement executed by the Appellant provides at paragraph 7 as follows:

7. BALANCE OWED IN TRADE-IN: If the Purchaser is delivering a trade-in vehicle or is turning in a leased vehicle 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.

18. The Circuit Court found this paragraph of the purchase agreement to expressly and unambiguously provide that the Appellant was obligated to pay the difference of \$2,037.78 to the Appellee as the actual amount of the balance owed by the Appellant to Wachovia Bank was greater than the amount identified in the Motor Vehicle Purchase Agreement.

III. Assignment of Error

The Circuit Court properly granted a judgment as a matter of law in favor of the Appellee as, among other reasons, the paragraph of the Motor Vehicle Purchase Agreement requiring the Appellant to reimburse the Appellee for the difference in the amount owed on the 2002 truck sold to the Appellee is, clear; unambiguous; and fairly balanced among the parties and therefore, not unconscionable.

IV. Points and Authorities

Federal Cases

Gary v. Goldman and Company, 180 F.Supp.2d 668 (E.D. Pa. 2002)

State Cases

Aetna Ca. & Surety Co. v. Federated Ins. Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963)

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Prudential Insurance Company of America v. Couch, 180 W. Va. 210, 376 S.E.2d 104 (1988)

Realmark Developments v. Ranson, 208 W. Va. 717, 542 S.E.2d 880 (2000)

Taylor v. Godfrey, 62 W. Va. 677, 59 S.E. 631 (1907)

Federal Statutes and Regulations

15 U.S.C. § 1601 et seq.

15 U.S.C. § 6092a(5)

15 U.S.C. § 1638(a)

12 C.F.R. § 226.18

State Statutes and Regulations

West Virginia Code § 46A-2-122(b)

V. Discussion

A. Standard of Review

Where a Circuit Court grants summary judgment the review by this Court is de novo. A de novo consideration requires that summary judgment be set aside only if it is clear that no genuine issue of fact exists to be tried and an inquiry concerning the facts is not desirable to clarify the application of law. Aetna Ca. & Surety Co. v. Federated Ins. Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963); and Burless v. West Virginia University Hospitals, Inc., 215 W. Va. 189, 451 S.E.2d 755 (1994).

The determination of whether a contractual provision is unconscionable is equitable in nature and should be made by the court. Drake v. West Virginia Self-Storage, Inc., 203 W. Va. 497, 509 S.E.2d 21 (1998). Underlying the Circuit Court's grant of summary judgment to the Appellee is the determination by the Circuit Court that the contractual provision requiring the Appellant to satisfy any outstanding balance of the existing lien on the 2002 truck sold by the Appellant to the Appellee was clear and unambiguous.

The provision of the purchase agreement is not grossly imbalanced, one-sided or lopsided. Id. S.E.2d at 24. The agreement clearly provides that if the Appellee collected more money than necessary to satisfy the balance owed on the traded vehicle, the excess money would be refunded to the Appellant. If, however, as happened here, insufficient funds were collected to satisfy the lien on the traded vehicle, the Appellant is required to pay the difference. Accordingly, the purchase agreement is fair and balanced.

B. The Appellee was Entitled to Recover all Sums Expended to Satisfy the Lien on the Vehicle Sold by the Appellant to the Appellee.

As correctly determined by the Circuit Court, the Appellee was not attempting to collect a claim or debt as defined and contemplated by the West Virginia Consumer Credit and Protection Act. The Appellee was seeking reimbursement of amounts paid on

behalf of the Appellant to satisfy the lien on the 2002 truck sold by the Appellant to the Appellee.

The payment made on behalf of the Appellant by the Appellee and the refusal by the Appellant to reimburse the Appellee resulted in the unjust enrichment of the Appellant. This Court has previously held that if benefits have been received and retained under such circumstance that it would be inequitable and unconscionable to permit the party receiving the benefits to avoid paying for such benefits, the law requires the party receiving the benefits to pay the reasonable value of those benefits. Copley v. Mingo County Board of Education, 195 W. Va. 480, 466 S.E.2d 139 (1995); Realmark Developments v. Ranson, 208 W. Va. 717, 542 S.E.2d 880 (2000).

In this action it is inequitable and unconscionable to permit the Appellant, from unjustly benefitting from the payment by the plaintiff of the full amount of the lien on the 2002 Toyota Tacoma. In equity, it is not what caused the mistake which is operative, but rather the existence of the mistake. Further, even if a mistake arises from negligence, the negligence does not in and of itself preclude the consideration of the mistake in the equitable context. Absure, Inc. v. Huffman, 213, W.Va. 651, 584 S.E.2d 507 (2003).

As this Court explained in Prudential Insurance Company of America v. Couch, 180 W.Va. 210, 376 S.E.2d 104 (1988), the

equitable theory of restitution allows one who has mistakenly paid money to a payee to recover that money later on the ground that it would be inequitable and unjust for a person to be enriched by retaining money to which they had no valid claim when the money had been mistakenly tendered to them. This is precisely the circumstance present in this action.

The Appellee paid money on behalf of the Appellant for which Mr. Serian received the benefit. Even if the Appellee mistakenly misplaced its confidence in the truthfulness of the Appellant regarding the amount of the lien against his 2002 Toyota Tacoma the Appellee is entitled to relief to prevent the defendant from being unjustly enriched. Taylor v. Godfrey, 62 W.Va. 677, 59 S.E. 631 (1907); Absure, Inc. v. Huffman, 213, W.Va. 651, 584 S.E.2d 507 (2003). Accordingly, the Appellee is entitled to a judgment as a matter of law with respect to amounts owed by the Appellant which were paid by the Appellee.

C. **The Appellee Did Not Violate Any Provision of the West Virginia Consumer Credit and Protection Act as this Act is Inapplicable to the Facts and Circumstances Presented Herein.**

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.

There is no decision of this Court instructive as to the meaning of a claim for the purposes of this statutory section, however, the Federal Fair Debt Collection Act, although not applicable in this action, is somewhat instructive as the definition of "debt" under the federal law is virtually identical to the definition of claim under West Virginia law. See, 15 U.S.C. § 6092a(5).

Under the federal act the threshold requirement to assert a claim is the determination that the debt arose out of a transaction, in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family or household purposes. Gary v. Goldman and Company, 180 F.Supp.2d 668 (E.D. Pa. 2002). The entitlement of the Appellee to be reimbursed by the Appellant for the satisfaction of the lien on the 2002 Tacoma is not related to any personal, family or household purposes of the Appellee or the Appellant.

The Appellant sold a 2002 Toyota Tacoma to the Appellee for consideration, including, but not limited to, the satisfaction of the Appellant's loan with Wachovia Bank in the amount of \$2,320.09. After the transaction was concluded it was discovered that the Appellant owed Wachovia Bank \$4,349.27 which was paid by the Appellee in order for the plaintiff to obtain a clear title to the 2002 Toyota Tacoma.

As this transaction involves the purchase of the 2002 Toyota Tacoma by the Appellee 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 Appellee from the Appellant.

In sum, the Appellant sold personal property to the Appellee which did not have clear title. The Appellee expended the money to clear the title and is entitled to recover that money. This is not a claim as defined by the West Virginia Consumer Protection and Credit Act.

A clear and unambiguous written contract's meaning and legal effect must be determined solely from its contents and it will be given full force and effect according to its plain terms and provisions. Capitol Chrysler-Plymouth, Inc. v. Megginson, 207 W. Va. 325, 532 S.E.2d 43 (2000); Kanawha Banking and Trust Co. v. Gilbert, 131 W. Va. 88, 46 S.E.2d 225 (1947). When the language of valid written contract is plain and unambiguous, it is not subject to judicial interpretation. Magnus v. Halltown Paper Board Company, 143 W. Va. 122, 100 S.E.2d 201 (1957); Green v. Farm Bureau Mutual Automobile Insurance Co., 139 W. Va. 475, 80 S.E.2d 424 (1954); Davis v. Combined Insurance Company of America, 137 W. Va. 196, 70 S.E.2d 814 (1952); Kanawha Banking and Trust Co. v. Gilbert, 131 W. Va. 88, 46 S.E.2d 225 (1947). Where valid written contract is clear and free from ambiguity, the only function of

court is to give such contract force and effect. Magnus v. Halltown Paper Board Company, 143 W. Va. 122, 100 S.E.2d 201 (1957); Continental Coal Company v. Connellsville By-Product Coal Company, 104 W. Va. 44, 138 S.E. 737 (1927).

The purchase agreement entered into between the parties clearly and unambiguously states "the Purchaser agrees to pay the difference to the Dealer if the actual amount of the balance owed is greater than the amount listed." Despite the incorrectness of the payoff amount represented by the defendant, the defendant has the contractual obligation to pay the full balance of the loan on the 2002 Toyota Tacoma.

The actual amount of the balance owed on the 2002 Toyota Tacoma traded to the plaintiff was \$4,357.87. The Motor Vehicle Purchase Agreement executed by the defendant acknowledged that the trade in loan balance identified on the Motor Vehicle Purchase Agreement may be more than the amount on the face of the agreement but the defendant expressly agreed to pay the correct lien amount.

D. The Truth in Lending Act Is Not Applicable to this Appeal and If it Was this Act Was Not Violated by the Appellee

Although not pled in the counterclaim filed by the Appellant, the Appellant has attempted to apply the federal Truth in Lending Act to this action. 15 U.S.C. § 1601 et seq. However, as evidenced by the documents and the record in this action, the Appellee fully complied with the Truth in Lending requirements. Pursuant to the regulations promulgated by the Truth in Lending

Act, the Appellee had the obligation to disclose the following information:

- (a) The identity of the creditor making the disclosures;
- (b) The amount financed;
- (c) The annual percentage rate;
- (d) The total sale price; and,
- (e) The total amount of the payment.

15 U.S.C. § 1638(a); 12 C.F.R. § 226.18.

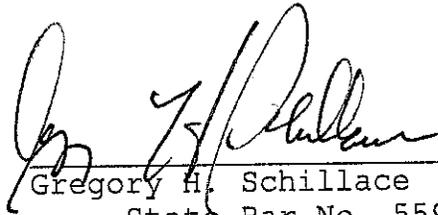
As is evidenced by the record in this case these required disclosures were made and executed by the Appellant on March 23, 2006. The Appellant was informed that United Bank was providing financing for his vehicle; that the total amount financed was \$13,933.09; that the total amount of the payments to be made was \$17,265.05; that annual percentage rate was 8.28%; and, that there would be sixty-three (63) payments in the amount of \$274.05 beginning on May 1, 2006.

No other lending documents were ever submitted to the Appellant by the Appellee and to the knowledge of the Appellee the Appellant is paying his loan pursuant to those terms and conditions. Accordingly, there has not been any violation of any federal law including, but not limited to, the Truth in Lending Act by the Appellee.

CONCLUSION

For all of the foregoing reasons, the appellee, Dan's Carworld, LLC, d/b/a Dan Cava's Toyota World, respectfully requests that the October 19, 2007 Order of the Circuit Court of Marion County be affirmed in all respects.

Dated this 21st day of August, 2008.



Gregory H. Schillace
State Bar No. 5597

Counsel for Appellee, Dan's Carworld,
LLC, d/b/a Dan Cava's Toyota World

Schillace Law Office
Post Office Box 1526
Clarksburg, West Virginia 26302
Telephone: 304-624-1000
Facsimile: 304-624-9100

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August, 2008, I served the foregoing **BRIEF OF THE APPELLEE, DAN'S CARWORLD, LLC, D/B/A DAN CAVA'S TOYOTA WORLD** upon all opposing parties by depositing a true copy thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

Julie Gower Romain, Esquire
Attorney at Law
211 Adams Street
Suite 600
Fairmont, West Virginia 26554

