

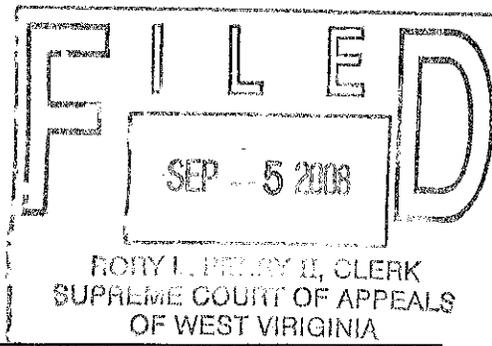
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

DAN'S CARWORLD, LLC
D/B/A DAN CAVA'S TOYOTA WORLD
Plaintiff,

v.

Supreme Court Case No. 34146
Marion County Circuit Court Case No. 06-C-209

DAVID SERIAN
Defendant.



**BRIEF OF APPELLANT DAVID SERIAN
IN REPLY TO BRIEF OF THE APPELLEE, DAN'S CARWORLD, LLC,
D/B/A DAN CAVA'S TOYOTA WORLD**

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September 4, 2008

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ISSUE

The issue in this case is whether the Appellee, Dan's Carworld, LLC, made a claim arising out of a consumer sale of goods against a consumer when it filed suit against a purchaser of one of its vehicles for additional amounts alleged to be owed by the consumer in connection with that sale.

PROCEDURAL HISTORY

Following discovery in this case, Appellee filed its motion for summary judgment. The Circuit 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) The Court agreed with Appellee’s reasoning that Appellee’s claims against the Appellant were not claims arising out of or related to a consumer sale. Appellant thereafter filed this appeal.

STATEMENT OF FACTS

Certain facts in this case are undisputed and set forth in the briefs of both the Appellant and the Appellee. Those undisputed facts are that:

1. David Serian purchased a 2006 Toyota Tacoma from Dan’s Carworld, LLC D/B/A Dan Cava’s Toyota World (hereinafter Dan Cava Toyota) on or about March 23, 2006.
2. At the time of purchase, Appellant advised the seller that the balance owed on his 2002 trade-in was approximately \$ 2,000.
3. The Motor Vehicle Purchase Agreement was prepared by Dan Cava Toyota after contacting the lender bank to obtain the actual pay-off amount for the trade-in.
4. The trade-in pay-off amount recited in the Motor Vehicle Sales Agreement was incorrect.

5. Dan Cava Toyota contacted the Appellant to demand payment of the difference between the pay-off amount set forth in the Motor Vehicle Sales Agreement and the alleged actual pay-off only after Appellant's trade-in had been sold.

6. The reverse side of the Motor Vehicle Purchase Agreement between the parties provides that if the balance owed on the trade-in vehicle is different than the amount of the balance owed as recited in the Motor Vehicle Sales Agreement, the Purchaser agrees to pay the difference to the dealer.

7. When the Appellant purchaser refused to pay the amount alleged by Appellee to be the difference between the balance owed and that recited in the Motor Vehicle Purchase Agreement, Appellee filed suit against the Appellant alleging unjust enrichment.

8. Appellant filed his counter-claims for violation of the West Virginia Consumer Credit and Protection Act and fraud.

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).

ARGUMENT

The issue in this case is whether the Appellee, Dan Cava Toyota, made a claim arising out of a consumer sale against a consumer, the Appellant, when the Appellee filed suit in Marion County Circuit Court seeking to collect amounts alleged to be due to the Appellee and arising out of the sale of a vehicle to the consumer Appellant. In granting summary judgment in favor of the Plaintiff automobile dealership, the Circuit Court reasoned that the dealership, which was attempting to collect money from the purchaser, was not making a claim against the Appellant when it filed suit for unjust enrichment to collect those amounts. 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 dispute that this vehicle was purchased for Appellant’s personal, family or household use. However, it appears that the Circuit Court reasoned that because the disputed sum alleged to be due to the seller related to the trade-in vehicle, then that amount was somehow separate and distinct from the purchase of the new motor vehicle by the

Appellant and actually represented a purchase of the trade-in vehicle by the dealership. The Court therefore concluded that because there was no "claim" made against a consumer by the Appellee dealership, then the Appellant's causes of action for violation of the West Virginia Consumer Credit and Protection Act were subject to judgment as a matter of law in favor of the Appellee because the Appellee was not attempting to collect a debt arising out of a consumer transaction.

In its Brief, Appellee argues that the West Virginia Consumer Credit and Protection Act counter-claims made by the Appellant may not be raised in response to Appellee's lawsuit against the Appellant because Appellee brought its action to collect those amounts as a claim for unjust enrichment. Nowhere does the West Virginia Consumer Credit and Protection Act provide that a consumer's counter-claims may only be brought when the lender or seller attempting to collect money arising out of a consumer transaction brings its claims using certain specific language. West Virginia Code § 46A-2-122(b) is clear. A claim is defined as "any" obligation of a consumer. This Court considered the term "any" in Thomas v. Firestone, 164 W. Va. 763, 769; 266 S. E. 2d 905,909 (1980), and determined that in the absence of specific indication to the contrary, such terms shall be given their common, ordinary meaning. Upon considering whether "any" party collecting a debt was subject to the provisions of the West Virginia Consumer Credit and Protection Act, this Court found:

" that the plain meaning of W.Va. Code §§ 46A-2-122 requires that the provisions of

bargaining power of the parties to this transaction. Appellee was not merely the seller of a new vehicle to the Appellant and the receiver of the Appellant's trade-in vehicle in this transaction. Appellee was the lender for the purchase of the new motor vehicle purchased by Appellant. As such, the Appellee dealership is obligated to comply with the provisions of the Truth-in-Lending Act. 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."

In light of the Appellee's position as a creditor in this transaction, there can be no doubt that the Appellee was a creditor who made a claim against a consumer when it filed its lawsuit claiming that its alleged mistake in reciting the trade-in pay-off unjustly enriched

the Appellant. Furthermore, Appellee's claim arose out of a transaction involving the purchase of goods or services for personal or household use.

Many times this Court has used the phrase "arising out of" in describing the relationship of certain events. This Court has defined the phrase "arising out of" as events with a common causal connection. Baber v. State Farm, 186 W. Va. 413; 412 S. E. 2d 814 (1991); Johnson v. State Farm, 190 W. Va. 526; 438 S. E. 2d 869 (1993). This Court has also used the phrase "arising out of" to describe events occurring as a result of the same transaction or occurrence. Hanlon v. Joy Mfr. Co., 187 W. Va. 280; 418 S. E. 2d 594 (1992). To undertake to define the phrase "arising out of" would be as difficult as the task of the Court in defining the word "any" in the Thomas v. Firestone case. However, if, as we are instructed in Thomas v. Firestone, we give that phrase its plain, common and ordinary meaning, there can be no doubt that Appellee's claims against Appellant in this case originate "arising out of" the purchase of consumer goods for personal or household use. Thomas v. Firestone, 164 W. Va. 763, 769; 266 S. E. 2d 905,909 (1980).

Not only did the Appellee make claims against the consumer Appellant arising out of the sale of consumer goods, those claims were illegally made. As is more fully set forth in Appellant's Brief, the Appellee dealership was the original lender in this motor vehicle purchase by the Appellant. The financing agreement signed by both parties clearly identifies the lender as Dan Cava's Toyota World. The terms "we" and "us" as used in the finance agreement indicate no other party as the lender. In its Brief, Appellee argues

that it complied with the Truth-n-Lending Act and lists the items disclosed. However, in order to comply with the provisions of the Truth-in-Lending Act, a lender in a consumer transaction finance agreement must set forth the total sale price of the consumer purchase.

Regulation Z at 12 C.F.R. § 226.18 sets forth the required disclosures in any consumer credit sale. Regulation Z at 12 C.F.R. § 226.18j provides that the total sale price is a required disclosure in any consumer credit sale. Regulation Z at 12 C.F.R. § 226.18 defines the total sale price as:

(J) *Total sale price.* In a credit sale, the “total sale price” using that term, and a descriptive explanation (including the amount of any downpayment) such as “ the total price of your purchase on credit including your downpayment of \$ ____ ” The total sale price is the sum of the cash price, the items described in paragraph (b)(2), and the finance charge disclosed under paragraph (d) of this section.”

The definitions and rules of construction for Regulation Z are set forth at 12 C.F.R. §226.2. Therein, at 12 C.F.R. § 226.2 (a) (18) the downpayment is defined as:

(18) “Downpayment” means an amount, including the value of any property used as a trade-in, paid to the seller to reduce the cash price of goods or services purchased in a credit sale transaction.

A lender who fails to accurately recite the trade-in value is not in compliance with the Truth-in-Lending Act. Furthermore, a sales agreement, such as was used in this instance, which provides that the consumer must pay the difference if the seller/lender fails to accurately identify the trade-in pay-off amount invites the seller to recite a lower trade-in pay-off amount in order to close the sale and obligate the consumer. 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). A consumer such as the Appellant who only after the trade-in vehicle has been sold finds out that the trade-in pay-off was falsely stated has no choice but to pay the additional amount alleged to be owed or refuse to pay those amounts and risk his good credit rating. The Circuit Court's ruling in this case would give a consumer no recourse if the seller/lender labeled its claim in any terms other than a debt collection action. Such an outcome would be grossly inequitable and only serve to undermine those protections which today's headlines tell us only barely protect consumers against unconscionable lending and debt collection practices.

CONCLUSION

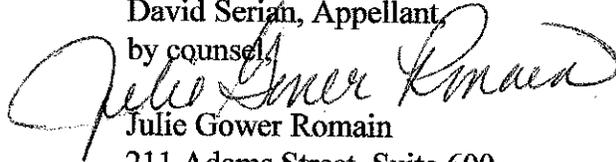
The Appellant is a consumer who purchased a vehicle from the Appellee. Not only did the Appellee sell the goods, it was the original lender in this consumer purchase. But for the purchase of the vehicle from the Appellee, the Appellant would not have been involved in a transaction with the Appellee. Appellee argues that its acceptance of a trade-in vehicle from the Appellant as a part of this consumer purchase was so totally unconnected from the purchase of the new vehicle by the Appellant that it did not arise out of a consumer transaction and is therefore not subject to the Appellant's consumer protection claims. Appellee argues that it is not a creditor seeking to collect money from the Appellant and has therefore not made a claim against the consumer Appellant. The Appellee chooses to ignore that it was the original lender in this consumer transaction. As the original lender, the Appellee failed to comply with the disclosure of the total sale price as required by the Truth-in-Lending Act. As a lender in this transaction, the Appellee is a creditor seeking to collect money from a consumer when any consumer obligation to pay that money arose out of a consumer purchase of goods. Appellant's counter-claims for violation of the West Virginia Consumer Credit and Protection Act are therefore made against a lender attempting to collect a debt alleged to be owed by a consumer and arising out of a consumer sale of goods or services. Appellant's counter-claims are not therefore subject to judgment as a matter of law on the basis that the Appellee has not made a claim against the Appellant consumer.

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 Appellant's counter-claims made pursuant to the provisions of the West Virginia Consumer Credit and Protection Act.

Respectfully submitted this 4th day of September, 2008.

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by counsel,



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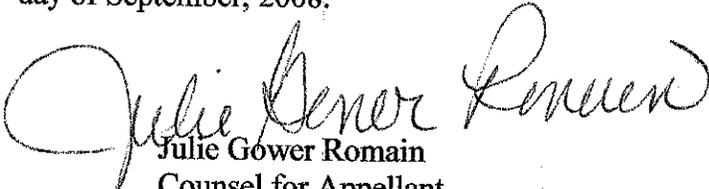
DAVID SERIAN
Defendant.

CERTIFICATE OF SERVICE

I certify I have this 4th day of September, 2008, served upon all counsel of record a true and accurate copy of BRIEF OF APPELLANT DAVID SERIAN IN REPLY TO BRIEF OF THE APPELLEE, DAN'S CARWORLD, LLC, D/B/A DAN CAVA'S TOYOTA WORLD by depositing the same in the United States mail with sufficient postage attached thereto and addressed to:

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