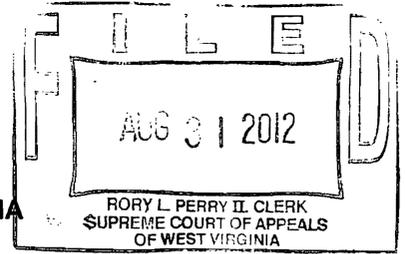


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



DOCKET No. 12-0636

**ALLY FINANCIAL INC.,  
Petitioner,**

v.

**CATHERINE A. SMALLWOOD,  
Respondent.**

**Appeal from a final order  
of the Circuit Court of Raleigh  
County (10-C-771)**

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**PETITIONER'S BRIEF**

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**NOW COMES** Defendant Ally Financial Inc., f/k/a GMAC Inc. (“Ally”), by counsel, Bailey & Wyant, P.L.L.C., Robert P. Martin, Justin C. Taylor, and Kristen V. Hammond, and hereby submits this brief in support of its appeal from the Order denying its Motion for Relief From and to Vacate the Court’s Entry of Partial Summary Judgment Pursuant to Rule 60(b) of the *West Virginia Rules of Civil Procedure* and/or Pursuant to the Court’s Inherent Plenary Power entered by the Circuit Court of Raleigh County, West Virginia, on April 30, 2012.

### **PETITIONER’S ASSIGNMENTS OF ERROR**

1. The Circuit Court erred in finding that no genuine issues of material fact existed with respect to when it first appeared to Ally that Plaintiff was represented by an attorney and when her attorney’s name and address were known by Ally, or could have been easily ascertained by Ally.
2. The Circuit Court erred in finding that Plaintiff was entitled to judgment as to Ally’s liability for sixty (60) violations of the WVCCPA, *West Virginia Code* § 46A-2-128(e).
3. The Circuit Court erred in finding that no genuine issues of material fact existed with respect to whether sixty (60) communications were made to and/or with Plaintiff pursuant to the WVCCPA, *West Virginia Code* § 46A-2-128(e).
4. The Circuit Court erred in finding that telephone calls made to the personal cell phone of Plaintiff’s spouse, telephone calls answered by others than Plaintiff, and messages left on the home answering machine were considered communications under the WVCCPA, *West Virginia Code* § 46A-2-128(e).
5. The Circuit Court erred in finding that no genuine issues of material fact existed with respect to whether Ally’s communications with Plaintiff were the result of bona fide errors of fact notwithstanding Ally’s maintenance of procedures reasonably adapted to avoid such errors and/or violations of the WVCCPA.
6. The Circuit Court erred in finding that Plaintiff’s claims against Ally were not barred by the doctrines of *res judicata* or collateral estoppel and such claims were not duplicative and were not the same claims and issues previously litigated, resolved, dismissed, and settled in a civil action brought by Plaintiff’s spouse against Ally.

### **STATEMENT OF THE CASE**

Ally appeals from an Order of the Circuit Court of Raleigh County, West Virginia, which

denied Defendant Ally Financial Inc.'s Motion for Relief From and to Vacate the Court's Entry of Partial Summary Judgment Pursuant to Rule 60(b) of the *West Virginia Rules of Civil Procedure* and/or Pursuant to the Court's Inherent Plenary Power on April 30, 2012. In denying such relief, the Circuit Court found that Ally violated the West Virginia Consumer Credit and Protection Act ("WVCCPA"), *West Virginia Code* § 46A-2-128(e), sixty (60) times and that Plaintiff was entitled to summary judgment as to Ally's liability for such violations since there were no genuine issues of material fact as to: (1) when it first appeared to Ally that Plaintiff was represented by an attorney and when her attorney's name and address were known by Ally, or could have been easily ascertained by Ally; (2) whether sixty (60) communications were made to and/or with Plaintiff pursuant to the WVCCPA, *West Virginia Code* § 46A-2-128(e); (3) the issue of Ally's liability for sixty (60) violations of the WVCCPA, *West Virginia Code* § 46A-2-128(e); and (4) whether Ally's communications with Plaintiff were the result of bona fide errors of fact notwithstanding Ally's maintenance of procedures reasonably adapted to avoid such errors and/or violations of the WVCCPA. (A.R. 294-297). Ally seeks to have the Order denying its Motion for Relief and the partial summary judgment entered against it reversed.

In the underlying civil action, on or about August 30, 2012, Plaintiff filed a Complaint in the Circuit Court of Raleigh County, West Virginia, against Ally asserting claims under the WVCCPA, *West Virginia Code* § 46A-2-101, *et seq.*, and West Virginia law for negligence, intentional infliction of emotional distress, and invasion of privacy. (A.R. 4-11). Plaintiff's allegations arise out of the purchase of a 2007 Chevrolet Impala which she and her husband, Timothy Smallwood, jointly financed through the dealership of Saturn of Charleston-Huntington pursuant to a Retail Installment Sale Contract ("Chevrolet Contract") dated May 5, 2009, in the

amount of \$14,928.94. (A.R. 29-30). Immediately thereafter, the Chevrolet Contract was assigned to Ally and it was granted a security interest in the vehicle. (A.R. 29-30).

Plaintiff asserted that Ally violated the WVCCPA, *West Virginia Code* § 46A-2-101, *et seq.*, by engaging in unreasonable, oppressive and abusive conduct, as well as by using unfair and unconscionable means in connection with its attempts to collect on the Chevrolet Contract. (A.R. 6-7). Plaintiff further demanded recovery of actual damages, statutory damages, general damages, punitive damages, attorney's fees, costs, and expenses. (A.R. 10-11). A Stipulation was also filed by Plaintiff and his counsel stating that neither would seek nor accept an amount greater than \$74,999.00 in this action, including attorney's fees, but excluding interest and costs. (A.R. 12).

Ally was served with the Summons and Complaint, as well as with Plaintiff's First Set of Interrogatories and Requests for Production of Documents, on September 1, 2010. (A.R. 14). Ally filed a Motion to Dismiss Plaintiff's Complaint on October 4, 2010. (A.R. 15-50). The next day, on October 5, 2010, Plaintiff filed a Motion for Partial Summary Judgment for Sixty (60) Violations of *West Virginia Code* § 46A-2-128(e). Plaintiff's Motion claimed that Ally repeatedly violated the WVCCPA by continuing to call her in order to collect on the Chevrolet Contract after Timothy Smallwood, her husband and also the main obligor on such Contract, allegedly advised it on November 30, 2009 that his wife was being represented by an attorney and further provided her attorney's phone number. (A.R. 51-64).

Notably, only a day after Ally's Motion to Dismiss was filed and before Ally's discovery responses were timely served on October 14, 2010, Plaintiff had already moved for summary judgment against Ally. (A.R. 50, 64, 65). In Ally's response to Plaintiff's Motion for Partial

Summary Judgment as to the WVCCPA claims filed on December 15, 2010, it argued that genuine issues of material fact existed as to whether it was liable for sixty (60) violations of the WVCCPA, *West Virginia Code* § 46A-2-128(e). (A.R. 68-119). However, during a hearing held on March 18, 2011, the Circuit Court orally denied Ally's Motion to Dismiss and granted Plaintiff's Motion for Partial Summary Judgment for Sixty (60) Violations of *West Virginia Code* § 46A-2-128(e). (A.R. 120-121, 123-124). Given the Circuit Court's verbal denial of Ally's Motion to Dismiss, it then proceeded to propound written discovery requests upon Plaintiff and the responses to the same were later served on March 1, 2012 (A.R. 122).

On July 12, 2011, the Circuit Court entered a written Order Granting Plaintiff's Motion for Partial Summary Judgment on the issue of liability for sixty (60) violations of the WVCCPA, *West Virginia Code* § 46A-2-128(e). (A.R. 123-124). Pursuant to *West Virginia Code* § 46A-2-128(e), the following conduct is deemed to violate the WVCCPA:

Any communication with a consumer whenever it appears that the consumer is represented by an attorney and the attorney's name and address are known, or could be easily ascertained, unless the attorney fails to answer correspondence, return phone calls or discuss the obligation in question or unless the attorney consents to direct communication.

The Circuit Court ruled that (1) the name and address of Plaintiff's counsel were known or were easily ascertainable by Ally on November 30, 2009; (2) Ally's records, call logs, policies, and procedures were insufficient to raise a genuine issue of material fact; and, (3) Ally's records establish that it made sixty (60) telephone calls to Plaintiff after it first appeared that she was represented by counsel and the name and address of Plaintiff's counsel were known or were easily ascertainable by Ally on November 30, 2009. (A.R. 123-124).

At the time the Circuit Court granted summary judgment in favor of Plaintiff as to the

WVCCPA claims, it had not yet held a Scheduling Conference or entered a Scheduling Order setting forth the applicable deadlines in this action. However, the Circuit Court did both on August 3, 2011. (A.R. 2, 125-126). Per the Scheduling Order entered on August 3, 2011, the deadline to complete discovery was March 2, 2012 and the trial was set for June 5, 2012. (A.R. 125-126).

Ally then filed a Motion for Relief From and to Vacate the Court's Entry of Partial Summary Judgment Pursuant to Rule 60(b) of the *West Virginia Rules of Civil Procedure* and/or Pursuant to the Court's Inherent Plenary Power on September 21, 2012, as well as a Supplemental Motion on January 13, 2012, which sought relief from the Circuit Court's Order Granting Plaintiff's Motion for Partial Summary Judgment. (A.R. 127-217, 218-272). Ally's Motion and Supplemental Motion asserted that genuine issues of material fact existed with respect to Plaintiff's claims that Ally violated the WVCCPA, *West Virginia Code* § 46A-2-128(e), sixty (60) times and sought to have the Circuit Court reconsider the evidence presented with respect to the summary judgment entered against it. (A.R. 127-217, 218-272). Ally further requested that the Court consider additional evidence derived from the testimony of Plaintiff and Plaintiff's spouse provided during their respective discovery depositions that were taken on October 11, 2011, well before the discovery deadline of March 2, 2012. (A.R. 125-126, 238-265, 266-272).

Plaintiff filed a response in opposition to Ally's Motion and Supplemental Motion and the Circuit Court orally denied the same after hearing argument of counsel during a hearing on March 5, 2012. (A.R. 273-293, 300-315). Thereafter, on April 30, 2012, the Circuit Court entered an Order Denying Defendant Ally Financial Inc.'s Motion for Relief From and to Vacate

the Court's Entry of Partial Summary Judgment. (A.R. 294-297). The Circuit Court's Order found that Ally violated the WVCCPA, *West Virginia Code* § 46A-2-128(e), sixty (60) times and that Plaintiff was entitled to judgment as to Ally's liability for such violations since there were no genuine issues of material fact as to: (1) when it first appeared to Ally that Plaintiff was represented by an attorney and when her attorney's name and address were known by Ally, or could have been easily ascertained by Ally; (2) whether sixty (60) communications were made to and/or with Plaintiff pursuant to the WVCCPA, *West Virginia Code* § 46A-2-128(e); (3) the issue of Ally's liability for sixty (60) violations of the WVCCPA, *West Virginia Code* § 46A-2-128(e); and (4) whether Ally's communications with Plaintiff were the result of bona fide errors of fact notwithstanding Ally's maintenance of procedures reasonably adapted to avoid such errors and/or violations of the WVCCPA. (A.R. 294-297).

In addition, the Circuit Court's Order specifically found that any telephone calls made to the personal cell phone of Plaintiff's spouse, telephone calls answered by others than Plaintiff, and messages left on the home answering machine were considered communications under the WVCCPA, *West Virginia Code* § 46A-2-128(e). (A.R. 294-297). The Order further found that Plaintiff's claims against Ally were not duplicative and were not the same claims and issues previously litigated, resolved, dismissed, and settled in a civil action previously brought by Plaintiff's spouse against Ally, as well as that Plaintiff's claims against Ally were not barred by the doctrines of res judicata or collateral estoppel. (A.R. 294-297).

Ally now appeals from the Order denying its Motion for Relief From and to Vacate the Court's Entry of Partial Summary Judgment Pursuant to Rule 60(b) of the *West Virginia Rules of Civil Procedure* and/or Pursuant to the Court's Inherent Plenary Power entered by the Circuit

Court on April 30, 2012. For the reasons stated herein, the Circuit Court's Order and decision to grant partial summary judgment in favor of Plaintiff should be reversed.

### **SUMMARY OF ARGUMENT**

Ally asserts that the Circuit Court erred in entering the Order Denying Defendant Ally Financial Inc.'s Motion for Relief From and to Vacate the Court's Entry of Partial Summary Judgment Pursuant to Rule 60(b) of the *West Virginia Rules of Civil Procedure* and/or Pursuant to the Court's Inherent Plenary Power as to sixty (60) violations of the WVCCPA, *West Virginia Code* § 46A-2-128(e), on April 30, 2012. In Ally's Motion, it sought relief from the Order Granting Plaintiff's Motion for Partial Summary Judgment pursuant to Rule 60(b) of the *West Virginia Rules of Civil Procedure* and the Court's inherent plenary power. Given that this Order only granted partial summary judgment then it was not a final judgment order disposing of the entire case, and therefore, the Circuit Court possessed the inherent power to reconsider and modify its previously-entered Order. However, the Circuit Court, in applying its inherent power, improperly found that Plaintiff was entitled to partial summary judgment as to the WVCCPA claims because it ignored genuine issues of material fact which, if considered, would have precluded partial summary judgment.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioner believes that the record and briefs in this case will provide the Court with all necessary information needed to decide the issues, and therefore oral argument under Rule 18(a) of the *West Virginia Rules of Appellate Procedure* is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court

determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

### ARGUMENT

Ally asserts that the Circuit Court erred in entering the Order Denying Defendant Ally Financial Inc.'s Motion for Relief From and to Vacate the Court's Entry of Partial Summary Judgment Pursuant to Rule 60(b) of the *West Virginia Rules of Civil Procedure* and/or Pursuant to the Court's Inherent Plenary Power as to sixty (60) violations of the WVCCPA, *West Virginia Code* § 46A-2-128(e), on April 30, 2012. In Ally's Motion, it sought relief from the Order Granting Plaintiff's Motion for Partial Summary Judgment pursuant to Rule 60(b) of the *West Virginia Rules of Civil Procedure* and the Court's inherent plenary power. Given that this Order only granted partial summary judgment then it was not a final judgment order disposing of the entire case.

"[T]he key to determining if an order is final is not whether the language from Rule 54(b) of the West Virginia Rules of Civil Procedure is included in the order, but is whether the order approximates a final order in its nature and effect." Syl. Pt. 1, *State ex rel. McGraw v. Scott-Runyon Pontiac Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995). "A judgment properly may be certified under Rule 54(b) only if it possesses the requisite degree of finality. That is, the judgment must completely dispose of at least one substantive claim." *Province v. Province*, 196 W. Va. 473, 479 n.12, 473 S.E.2d 894, 900 n.12 (1996). Furthermore, "[a] partial summary judgment which adjudicates liability but not damages is, by definition, interlocutory." *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 549 n.13, 584 S.E.2d 176, 183 n.13 (2003). Thus, in

this case, the Circuit Court's Order Granting Plaintiff's Motion for Partial Summary Judgment was an interlocutory order and not a final judgment order.

"[W]hen a party seeks to have a circuit court reconsider its ruling on such an order prior to entry of a final judgment disposing of the entire case, the interlocutory order should not be reviewed under Rule 60(b) of the *West Virginia Rules of Civil Procedure*" Syl. Pt. 3, *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 584 S.E.2d 176 (2003). In fact, "[i]nterlocutory orders and judgments are not within the provisions of 60(b), but are left to the plenary power of the court that rendered them to afford such relief from them as justice requires." *Caldwell v. Caldwell*, 177 W. Va. 61, 63, 350 S.E.2d 688, 690 (1986). Moreover, "[a]s long as a circuit court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, rescind, or modify an interlocutory order for cause seen by it to be sufficient." *Id.* at Syl. Pt. 4.

In this case, Ally is challenging the Circuit Court's findings of fact and conclusions of law set forth in its Order Denying Defendant Ally Financial Inc.'s Motion for Relief From and to Vacate the Court's Entry of Partial Summary Judgment Pursuant to Rule 60(b) of the *West Virginia Rules of Civil Procedure* and/or Pursuant to the Court's Inherent Plenary Power. Thus, "[i]n reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review." *Shenandoah Sales & Serv. v. Assessor of Jefferson County*, 724 S.E.2d 733, 737, 2012 W. Va. LEXIS 11, \*6-7 (2012).

In this case, the Circuit Court, in applying its inherent power, improperly found that Plaintiff was entitled to partial summary judgment as to the WVCCPA claims on the basis that no genuine issues of material fact existed as to (1) when it first appeared to Ally that Plaintiff was represented by an attorney and when her attorney's name and address were known by Ally, or could have been easily ascertained by Ally; (2) the issue of liability for sixty (60) alleged violations of *West Virginia Code* § 46A-2-128(e); (3) whether telephone calls to Plaintiff were the result of bona fide errors of fact notwithstanding Ally's maintenance of procedures reasonably adapted to avoid such errors or violations of the West Virginia Consumer Credit and Protection Act; and (4) *res judicata* and collateral estoppel since Ally has previously resolved a lawsuit filed by Plaintiff's husband for the exact same alleged violations occurring with respect to the exact same phone calls being claimed by Plaintiff. The Circuit Court clearly ignored genuine issues of material fact which, if considered, would have precluded partial summary judgment. Thus, based on the arguments set forth herein, the Circuit Court's Order denying Ally's Motion Relief From and to Vacate the Court's Entry of Partial Summary Judgment should be reversed.

**I. The Circuit Court Erred in Finding that No Genuine Issues of Material Fact Existed With Respect to When it First Appeared to Ally that Plaintiff was Represented by an Attorney and When Her Attorney's Name and Address Were Known by Ally, or Could Have Been Easily Ascertained by Ally.**

Plaintiff was granted partial summary judgment on the issue of liability for sixty (60) violations of the WVCCPA, *West Virginia Code* § 46A-2-128(e). Pursuant to *West Virginia Code* § 46A-2-128(e), the following conduct is deemed to violate the WVCCPA:

Any communication with a consumer whenever it appears that the consumer is represented by an attorney and the attorney's name and address are known, or could be easily ascertained, unless the attorney fails to answer correspondence,

return phone calls or discuss the obligation in question or unless the attorney consents to direct communication.

In West Virginia, “[a] motion for summary judgment may not be granted unless the circuit court determines there is no genuine issue of material fact to be tried and the facts as to which there is no such issue warrant judgment for the moving party as a matter of law.” *Hanlon v. Chambers*, 195 W.Va. 99, 105, 464 S.E.2d 741, 747 (1995). “The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment; in assessing the record to determine whether there is a genuine issue as to any material facts, the circuit court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought.” *Id.* “The inferences to be drawn from the underlying affidavits, exhibits, answers to interrogatories, and depositions must be viewed in the light most favorable to the party opposing the motion.” *Id.* See also *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 58, 459 S.E. 2d 329, 335 (1995). Thus, the party opposing summary judgment is entitled to have its version of the facts accepted as true. Moreover, “if there is any evidence in the record from any source from which a reasonable inference can be drawn in favor of the nonmoving party, summary judgment is improper.” *Id.*

“[A] ‘genuine issue’ for purposes of *West Virginia Rule of Civil Procedure* 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party.” *Jividen v. Law*, Syl. Pt. 5, 194 W. Va. 705, 461 S.E.2d 451 (1995). Furthermore, “[t]he opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed ‘material’ facts.” *Id.* “A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.” *Id.*

In Plaintiff's Motion for Partial Summary Judgment, she asserted that Timothy Smallwood, her husband and primary obligor on the Chevrolet Contract, first advised Ally on November 30, 2009 that he and his wife were being represented by Attorney Lynn Pollard with respect to the debt owed under such Contract. (A.R. 51). In support of this assertion, Plaintiff relied on an activity note in Ally's records relating to a telephone call from its employee, Irene Sarah Sanchez, to Timothy Smallwood on November 30, 2009 which stated that **"buyer said that we should call 3045742727 collard"**. (A.R. 51, 55). However, there is nothing in this activity note that referenced an attorney, lawyer, or counsel had been retained to represent Plaintiff. As a result of the aforementioned activity note, Plaintiff concluded that Ally had been provided with her attorney's name and phone number on November 30, 2009. Thus, Plaintiff claimed that she was entitled to summary judgment as a matter of law for sixty (60) telephone calls allegedly made by Ally in an attempt to collect on the debt after November 30, 2009.

Plaintiff made inferences in her favor from Ally's activity note on November 30, 2009, which were that it first appeared to Ally that she was represented by an attorney on that date and that her attorney's name and address could have been easily ascertained. However, she failed to acknowledge that the activity note did not mention anything about an attorney being retained. Under West Virginia law, any such inferences were to have been viewed in the light most favorable to Ally since it is the party opposing Plaintiff's Motion for Partial Summary Judgment.

Plaintiff's contention that she was entitled to summary judgment as to sixty (60) phone calls made by Ally after November 30, 2009 in violation of the WVCCPA, *West Virginia Code* § 46A-2-128(e), was belied by the material fact that Ally's activity note did not show that it had

been provided with her attorney's name and address, or with sufficient information that would allow it to easily ascertain the same. Ally's records reflect that on November 30, 2009, Plaintiff's husband merely provided Ally with the telephone number 3045742727 and the name "collard." The activity note does not provide reference to an attorney, lawyer, or counsel so it would not have appeared to Ally that Plaintiff was being represented by an attorney on November 30, 2009.

Plaintiff also attached her own call logs that she and her husband kept with respect to Ally's phone calls in support of her Motion for Partial Summary Judgment. (A.R. 58-63). While it appears that Plaintiff relied solely on Ally's activity note on November 30, 2009 in claiming that Ally been put on sufficient notice that she was being represented by an attorney, her husband's note on a call from Ally on November 30, 2009 which stated "[g]ave Attony info" was also insufficient to prove that Ally was given notice that an attorney had been retained. (A.R. 58). Her husband's note does not show that what information was provided about an attorney being retained, if any. Furthermore, it was Plaintiff's spouse, not Plaintiff who supposedly provided this information to Ally so any such information given would only have provided notice as to him.

Plaintiff further contended in her Motion for Partial Summary Judgment that Ally was also provided with notice that she had retained an attorney based on its activity note on December 8, 2009 which stated that "buyer sd call his atty william pollard 304-574-2727 byr did not tell if they file for bankruptcy." (A.R. 51, 55). However, the attorney information was provided by Plaintiff's spouse during a phone call with an Ally employee as he was the main buyer/obligor on the Chevrolet Contract. (A.R. 55). The activity note specifically referenced

“his” attorney and said nothing about Plaintiff retaining an attorney, and thus, it would not have appeared to Ally that Plaintiff was being represented by an attorney on December 8, 2009.

Plaintiff further argued that Ally’s records showed that her attorney’s identity was also provided to Ally on several other dates. She claimed that her attorney’s identify was provided to Ally during phone calls on December 11, 2009, December 17, 2009, December 18, 2009, December 24, 2009, December 28, 2009, December 29, 2009, January 4, 2010, January 7, 2010, January 19, 2010, and January 24, 2010. (A.R. 52). Such contentions were disputed by Ally as it was not put on notice that Plaintiff, as co-buyer on the Chevrolet Contract, was represented by an attorney on these dates.

As set forth above, there were clearly genuine issues of material fact as to when it first appeared to Ally that Plaintiff was represented by an attorney and when her attorney’s name and address were known by Ally, or could have been easily ascertained. Specifically, there was a material dispute as to whether it appeared to Ally that Plaintiff was represented by an attorney and her attorney’s name and address were known, or could have been reasonably ascertained on November 30, 2009. Despite the existence of genuine issues of material fact regarding notice, the Circuit Court entered an Order Granting Plaintiff’s Motion for Partial Summary Judgment on the issue of liability for sixty (60) violations of the WVCCPA, *West Virginia Code § 46A-2-128(e)*, on July 12, 2011. (A.R. 123-124). The Circuit Court found that, on November 30, 2009, it first appeared to Ally that Plaintiff was represented by an attorney and such attorney’s name and address were known or easily ascertainable, and thereafter, Ally made sixty (60) phone calls to Plaintiff in violation of the WVCCPA. (A.R. 123-124). Thus, the

Circuit Court erred in entering such Order since a genuine issue of material fact existed as to when it first appeared to Ally that Plaintiff had retained an attorney.

Following the Circuit Court's entry of the Order Granting Plaintiff's Motion for Partial Summary Judgment, on September 21, 2011, Ally filed a Motion for Relief From and to Vacate the Court's Entry of Partial Summary Judgment Pursuant to Rule 60(b) of the *West Virginia Rules of Civil Procedure* and/or Pursuant to the Court's Inherent Plenary Power. (A.R. 127-217). Ally argued that the Circuit Court, upon reconsidering the evidence presented with respect to the partial summary judgment, should relieve Ally of such judgment. In support of Ally's Motion, it asserted that issues as genuine issues of material fact existed as to whether Plaintiff had demonstrated that Ally was placed on notice that she was personally represented by an attorney as co-buyer with respect to the Chevrolet Contract or whether Ally was obligated to assume or somehow know that the Plaintiff should have the same attorney (if any) as her husband. Ally's Motion, and Supplemental Motion, for relief from the Circuit Court's entry of partial summary judgment also incorporate the testimony of Plaintiff and Plaintiff's husband, Timothy Smallwood, as their depositions were taken on October 11, 2011, well before the discovery deadline of March 2, 2012. (A.R. 238-265, 266-271).

However, after hearing argument of counsel, on May 1, 2012, the Circuit Court entered an Order Denying Defendant Ally Financial Inc.'s Motion for Relief From and to Vacate the Court's Entry of Partial Summary Judgment as to sixty (60) violations of the WVCCPA, *West Virginia Code* § 46A-2-128(e). (A.R. 294-297). The Circuit Court's Order improperly found that genuine issues of material fact existed as to (1) when it first appeared to Ally that Plaintiff was represented by an attorney and when her attorney's name and address were known by Ally, or

could have been easily ascertained by Ally; (2) the issue of liability for sixty (60) alleged violations of *West Virginia Code § 46A-2-128(e)*; (3) whether telephone calls to Plaintiff were the result of bona fide errors of fact notwithstanding Ally's maintenance of procedures reasonably adapted to avoid such errors or violations of the West Virginia Consumer Credit and Protection Act; and (4) *res judicata* and collateral estoppel since Ally has previously resolved a lawsuit filed by Plaintiff's husband for the exact same alleged violations occurring with respect to the exact same phone calls being claimed by Plaintiff. The Circuit Court disregarded material facts and failed to reverse the partial summary judgment.

**II. The Circuit Court Erred in Finding that Plaintiff was Entitled to Judgment as to Ally's Liability for Sixty (60) Violations of the WVCCPA, *West Virginia Code § 46A-2-128(e)*.**

Plaintiff was granted partial summary judgment for sixty (60) alleged violations of *West Virginia Code § 46A-2-128(e)* based on the argument that Ally unlawfully continued to contact plaintiff to collect the debt owed under the Contract after it first appeared that she was represented by an attorney on November 30, 2009. However, it is clear that: (1) a certain number of these phone calls were not communications under the statute; and, (2) a certain number of these phone calls were not made to Plaintiff, and therefore, were not communications to Plaintiff/consumer.

**A. The Circuit Court Erred in Finding that No Genuine Issues of Material Fact Existed With Respect to Whether Sixty (60) Communications Were Made to and/or With Plaintiff Pursuant to the WVCCPA, *West Virginia Code § 46A-2-128(e)*.**

Plaintiff failed to demonstrate any evidence establishing that she received sixty (60) "communications" which violated *West Virginia Code § 46A-2-128(e)*.

*West Virginia Code § 46A-2-128(e)* prohibits:

Any communication with a consumer whenever it appears that the consumer is represented by an attorney and the attorney's name and address are known, or could be easily ascertained, unless the attorney fails to answer correspondence, return phone calls or discuss the obligation in question or unless the attorney consents to direct communication.

Based upon the clear and unambiguous language of the statute, Plaintiff did not demonstrate that there were sixty (60) "communications" made to her by Ally after the date in question, November 30, 2009. Plaintiff's own call logs were discussed and testified to at length and in great detail during her deposition. (A.R. 152-157). Plaintiff testified that she filled out these call logs after being provided the form by counsel. (A.R. 238-241). On these call logs there are several columns including "Creditor", "Date", "Time", "Witness", and "Comments". (A.R. 152-157). Plaintiff testified that under the "Witness" column is listed the person who actually answered the phone or saw the alleged Ally number on a Caller ID. (A.R. 242-258).

For numerous phone calls that were allegedly made to either the home phone or to her husband's personal cell phone, whether the calls were answered or not, Plaintiff is not listed as the witness and therefore, did not take, answer, or observe the phone call. (A.R. 152-157, 243-247, 249-250, 253-258). These , alleged calls, where either Plaintiff's husband, son, or daughter took the call or observed the call on a Caller ID, accounts for at least thirty-two (32) of the alleged calls that Plaintiff is claiming violated the law pursuant to her lawsuit and pursuant to the summary judgment order. Plaintiff's own testimony establishes that she did not receive at least thirty-two (32) of the alleged 'communications' that she is claiming.

Furthermore, Plaintiff testified as to what she labeled in the call logs as "missed calls". These alleged phone calls, four (4) of them, were never answered or witnessed by Plaintiff, and no messages were left. These four (4) calls were allegedly observed on the Smallwoods' Caller

ID after returning home or observed on her husband's personal cell phone Caller ID. (A.R. 242-247). Importantly, Plaintiff's testimony indicates that three (3) of these "missed calls" were possibly to her husband's personal cell phone, which she never used or saw the phone numbers on. (A.R. 152-157, 244-245). The fourth call labeled as a "missed call" on the call logs indicates that Plaintiff's daughter was the person who saw it on the caller ID. (A.R. 152-157, 249).

Additionally, the evidence establishes that Plaintiff never answered, witnessed, or was present for alleged phone calls made to her husband's personal cell phone that she is claiming damages for. (A.R. 245, 254-255, 258-259, 261-262, 265, 269, 271). These alleged Ally phone calls to the husband's cell phone, regardless of whether he answered the calls or if messages were left, account for approximately ten (10) to fifteen (15) of the alleged phone calls being claimed by plaintiff on her call logs. (A.R. 152-157). With respect to these ten (10) to fifteen (15) phone calls made to her husband's personal cell phone, she was only made aware of the calls when her husband told her about them after the fact. (A.R. 245, 254-255, 25-, 269, 271).

Plaintiff was never made aware of phone calls, if any, on her husband's phone where Ally requested to talk with her, and she never talked with anybody from Ally on her husband's cell phone. (A.R. 262). Importantly, the testimony indicates that she never used her husband's cell phone. (A.R. 262, 265, 270). Therefore, the indisputable evidence establishes that between ten (10) to fifteen (15) of the alleged phone calls asserted by Plaintiff as "communications" to her in violation of the statute could not have been "communications" to her because they were solely phone calls made to her husband's cell phone which she never witnessed, observed, or was effected by.

Plaintiff further claims damages for phone calls that were allegedly made when she was not home, and that her son Tom, was the witness to the calls. Per the call logs and her own testimony, Plaintiff reports six (6) phone calls on the call log sheets of this nature. (A.R. 152-157, 256-257). For each of these alleged calls reported by her son, Plaintiff was not home, did not hear the phone call, and did not observe the phone call on her Caller ID. Moreover, these specific phone calls apparently requested to speak to her husband Timothy, the primary and main obligor with respect to the debt owed to Ally, and not her. (A.R. 152-157, 257).

This indisputable factual evidence and testimony of Plaintiff and her husband, which is to be viewed in the light most favorable to the non-moving party Ally, clearly demonstrates that there were not sixty (60) communications made with Plaintiff. The Partial Summary Judgment Order and Plaintiff's claims were incorrect in that telephone calls made to Plaintiff's husband's cell phone and calls made where she did not observe and was not a witness thereto, are treated as communications to the Plaintiff under the WVCCPA. Furthermore, genuine issues of material fact existed with respect to the exact number of phone calls that were made to Plaintiff's home and her husband's cell phone, and therefore, Ally sought relief from the Partial Summary Judgment Order. This evidence, which was to be viewed in the light most favorable to the non-moving party Ally, clearly demonstrated that there were not sixty (60) communications made with Plaintiff, and thus, the Circuit Court erred in finding that no genuine issues of material fact existed as to these communications.

- B. The Circuit Court Erred in Finding that Telephone Calls Made to the Personal Cell Phone of Plaintiff's Spouse, Telephone Calls Answered by Others Than Plaintiff, and Messages Left on the Home Answering Machine Were Considered Communications Under the WVCCPA, *West Virginia Code* § 46A-2-128(e).**

Plaintiff is also claiming that all sixty (60) phone calls were calls made to or attributed to her in violation of *West Virginia Code* § 46A-2-128(e), and the Order granting Partial Summary Judgment has allowed her to prevail on this claim. However, based upon a clear and unambiguous reading of the statute, plaintiff cannot assert or claim that the vast majority of the phone calls, or communications for that matter, were even made to her or directed to her.

The attached Ally Call Logs indicate that fifty-six to fifty-eight (56-58) calls were made to either the Smallwood home, an attorney's office, or Plaintiff's husband's cell phone (and as already demonstrated above, twenty-six (26) of these calls cannot be considered "communications" pursuant to the statute, as no communication with any consumer took place). (A.R. 148-157). Importantly, a close inspection of these call logs do not indicate any evidence that calls were made to Plaintiff's personal cell phone. Importantly, twenty-three (23) of the calls were made to her husband "Tim's" cell phone. Therefore, of the fifty-six to fifty-eight (56-58) total calls listed on the Ally call logs, at least forty-nine (49) of the calls are not "communications" to Plaintiff, pursuant to the plain language of the statute; which leaves only seven (7) to nine (9) calls that could possibly be argued by Plaintiff as being "communications" to her as a consumer in violation of the statute.

Furthermore, Plaintiff's own call log sheets indicate that "Cathy" had communications with Ally on only four (4) occasions. (A.R. 148-157). This is a huge discrepancy between her claims of sixty (60) violations for sixty (60) phone calls, when the facts and evidence establish only four (4) communications. It would be completely unfair and unconscionable to allow Plaintiff to attribute and include phone calls and/or communications which she was not a part of, which were not directed towards her, or which she was not privy to, as her recovery.

Plaintiff's own call logs and testimony establish that of the forty-two (42) alleged phone calls listed on Plaintiff's authored call logs, between ten (10) and fifteen (15) were clearly made to her husband's personal cell phone, which she never used. (A.R. 245, 254-255, 258-259, 261-262, 265, 269, 271). Plaintiff's reasoning as to why she believes she has been injured for calls made to her husband's personal cell phone was that her and her husband are on the same Ally account. (A.R. 264). This is clearly not an adequate or sufficient basis for Plaintiff to be allowed to claim phone calls made to her husband's cell phone. Being on the same account is not a 'communication' pursuant to the statute and therefore, the approximate twenty-three (23) (as indicated from Ally call logs and Plaintiff's call logs) phone calls made to Plaintiff's husband's cell phone should not have been considered communications to her in the Order granting Partial Summary Judgment.

Additionally, Plaintiff's testimony and call logs which she authored establish that she was the actual "witness" for only potentially ten (10) of the alleged phone calls being made by Ally. (A.R. 152-157, 238-265). Therefore, of the sixty (60) calls that the Circuit Court has ruled applicable to Plaintiff's claim and granted summary judgment for, Plaintiff's personally authored call logs and her testimony demonstrate that she can only argue that ten (10) of the alleged phone calls were communications to her. Plaintiff's call logs list her as the actual "witness" to the alleged phone calls on ten (10) occasions, with the remainder of the calls being witnessed by others not her. (A.R. 152-157, 243-247, 249-250, 253-258). For the calls she did not witness, Plaintiff testified that she only wrote the information down in her call logs after being told second-hand from either her husband, son, or daughter. (A.R. 239-240, 242-243).

It would be completely unfair and unconscionable to allow Plaintiff to attribute and include phone calls and/or communications which she was not a part of or witness to, which were not directed towards her, or which she was not privy to. Plaintiff's own call logs and testimony establish that sixty (60) communications were not made to her. At the very least, Ally has demonstrated that genuine issues of material fact existed with respect to the alleged sixty (60) calls total and whether or not said calls can even be considered communications to Plaintiff from which Plaintiff based her claims. Viewing the evidence and facts in the light most favorable to the non-moving party, Ally, it is indisputable that Ally produced evidence which completely counters Plaintiff's allegations. Therefore, Circuit Court failed properly vacate the partial summary judgment against Ally.

**III. The Circuit Court Erred in Finding that No Genuine Issues of Material Fact Existed With Respect to Whether Ally's Communications Were the Result of Bona Fide Errors of Fact Notwithstanding Ally's Maintenance of Procedures Reasonably Adapted To Avoid Such Errors and/or Violations of the WVCCPA.**

Pursuant to *West Virginia Code* § 46A-5-101(8):

If the creditor establishes by a preponderance of evidence that a violation is unintentional or the result of a bona fide error of fact notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error, no liability is imposed under subsections (1), (2) and (4) of this section, and the validity of the transaction is not affected.

Ally maintains a policy designated as "Ally Servicing Collection Policies and Individual Agreement" ("Policy") which has been reasonably adapted to avoid violations of the West Virginia Consumer Credit and Protection Act, including *West Virginia Code* § 46A-2-128(e). (A.R. 158-175). In order to avoid violations of *West Virginia Code* § 46A-2-128(e), the Policy requires

employees to comply with the specific procedures to ensure that customers represented by counsel do not receive telephone calls. The Policy states, in pertinent part, as follows:

You must not do any of the following in collecting consumer accounts: Communicate with a consumer if it appears that the consumer is represented by an attorney and the attorney's name and address are known, or could be easily ascertained, unless the attorney fails to answer correspondence, return phone calls or discuss the obligation in question or unless the attorney consents to direct communication.

(A.R. 158- 175). Upon reading the Policy and procedures set forth therein, all employees are required to execute a verification stating that he/she understands and agrees to comply with the same. (A.R. 158- 175).

On March 5, 2010, Ally issued Bulletin LGM-52 which requires the following procedure "to ensure all contact with customers who notify GMAC/Ally they have retained an attorney for any reason cease in accordance with Semperian's policy"<sup>1</sup>:

Effective immediately, all employees must adhere to the following procedure:

Upon notification from a customer who advises GMAC an attorney has been retained, place the account in 15-18-800 to suppress phone calls and notices to the customer. Please note that in the District of Columbia and West Virginia, employees are not permitted to communicate with a consumer if it appears that the consumer is represented by an attorney and the attorney's name and address are known. Employees should obtain the attorney's name, address, phone number, intent of the customer, and if applicable, the bankruptcy case filing number and update CARS, ICARE, or Shaw accordingly. If the customer refuses to provide such information, note the account as such and place into 15-18-800 as described above.

**Note:** CRTS tracking requests will be revised for this purpose and a new Shaw activity code will be created to remove accounts from collection queues. Detailed instructions will be communicated separately.

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<sup>1</sup> Semperian, n/k/a Ally Servicing, a subsidiary of Ally, provides payment processing, collections, call center operations, support services, and remarketing activities for Ally's auto portfolio.

Accounts placed in 15-18-800 for this purpose will route to the Roseville Bankruptcy Center for handling. The Roseville Special Accounts Team will verify that an attorney has been retained and for what purpose. Depending on the circumstances, Roseville will determine if the account should be returned to the HRC for handling, routed for repossession, charge-off, bankruptcy, etc.

It is absolutely critical that employees adhere to this procedure to ensure contact is not made once a customer notifies GMAC they have retained an attorney.

(A.R. 158- 175). In addition, Ally employees are required to attend initial and ongoing training in order to ensure their understanding of and compliance with all of Ally's policies and procedures. (A.R. 176-185).

In this case, a genuine issue of material fact exists as to whether Ally's phone calls to Plaintiff after she alleges that her husband advised Ally on November 30, 2009 that she was represented by an attorney and when her attorney's name and address purportedly became known, were the result of bona fide errors of fact. Ally was only provided the name "Collard" by Plaintiff's husband, along with a purported phone number. Plaintiff's husband did not inform Ally that "Collard" was, in fact, an attorney. (A.R. 148-151). Without knowing whether "Collard" was an attorney, that communication, for purposes of *West Virginia Code* § 46A-2-128(e), cannot give rise to liability. The partial summary judgment, therefore, should have been vacated by the Circuit Court.

Moreover, not only is the application of the bona fide error defense a question of fact for the jury, but so is the question of whether the foregoing policies and procedures maintained by Ally were reasonable. Pursuant to *West Virginia Code* § 46A-5-101(8) and the facts presented by Ally, Plaintiff should not have been entitled to summary judgment with respect to

statutory liability and penalties imposed under *West Virginia Code* § 46A-5-101(1). Therefore, Ally moves for relief from the Order granting Partial Summary Judgment on these issues.

**IV. The Circuit Court Erred in Finding that Plaintiff's Claims Against Ally Were Not Barred by the Doctrines of *Res Judicata* or Collateral Estoppel and Such Claims Were Not Duplicative and Were Not the Same Claims and Issues Previously Litigated, Resolved, Dismissed, and Settled in a Civil Action Brought by Plaintiff's Spouse Against Ally.**

Plaintiff's claims and assertions should have been estopped and dismissed as a matter of law as the same telephone calls that she is alleging violated the WVCCPA, *West Virginia Code* § 46A-2-128(e), are the same phone calls which were the subject of a lawsuit brought by her husband, Timothy Smallwood, and which claims have been previously resolved, dismissed, and settled. Ally asserts that the Circuit Court should not have granted partial summary judgment in favor of Plaintiff with respect to alleged violations of the WVCCPA, *West Virginia Code* § 46A-2-128(e), as collateral estoppel and *res judicata* operate to preclude her action for a large number of these alleged calls.

It cannot be disputed that this is not the first civil action filed with respect to the Chevrolet Contract to which Plaintiff is a co-signer/obligor. On January 29, 2010, Timothy Smallwood, Plaintiff's spouse and the primary signer/obligor on the Chevrolet Contract, filed the exact same Complaint in the Circuit Court of Raleigh County, West Virginia, bearing Civil Action No. 10-C-95(B), which alleged the identical same counts and causes of action as the Complaint filed by Plaintiff in the instant action. (A.R. 4-11, 200-207). Importantly, Mr. Smallwood's action relied upon and sought relief for the exact same phone calls that Plaintiff is relying upon and sought recovery therefore.

Thereafter, in August 2010, Timothy Smallwood entered into a Confidential Release and Settlement Agreement with Ally regarding his claims that it repeatedly made telephone calls to

him with the intent to annoy, inconvenience, bother, upset, anger, and distress him and that it unlawfully continued to contact him after being put on notice that he was represented by the law firm of Hamilton, Burgess, Young & Pollard, P.L.L.C. with respect to the debt owed under the Chevrolet Contract. (A.R. 200-207). His civil action against Ally was dismissed, with prejudice, on August 23, 2010. (A.R. 215-216). Ally's account with respect to the Chevrolet Contract was then closed and any remaining unpaid balance was charged off and the title to the automobile was sent to the Smallwood's.

"[T]he doctrines of *res judicata*, or claim preclusion, and collateral estoppel, or issue preclusion, are closely related. *Res judicata* generally applies when there is a final judgment on the merits which precludes the parties or their privies from relitigating the issues that were decided or the issues that could have been decided in the earlier action." *State v. Miller*, 194 W.Va. 3, 10 (1995). See *Allen v. McCurry*, 449 U.S. 90, 94 (1980). "A claim is barred by *res judicata* when the prior action involves identical claims and the same parties or their privies. Collateral estoppel, however, does not always require that the parties be the same. Instead, collateral estoppel requires identical issues raised in successive proceedings and requires a determination of the issues by a valid judgment to which such determination was essential to the judgment." *Miller*, 194 W.Va. at 10-11. See *Conley v. Spillers*, 171 W.Va. 584, 587-90 (1983). Under these legal theories Ally sought relief from the Circuit Court's Order granting Plaintiff partial summary judgment against it.

**A. Plaintiff's Claims Against Ally are Barred Pursuant to the Doctrine of *Res Judicata*.**

Plaintiff's own testimony demonstrates the applicability of the doctrine of *res judicata* to this action. In West Virginia, the doctrine of *res judicata* "precludes the parties or their

privies from relitigating the issues that were decided or the issues that could have been decided in the earlier action.” *Beahm v. 7-Eleven, Inc.*, 223 W.Va. 269, 273 (2008) (quoting *Miller*, 194 W.Va. at 9). *Res judicata* generally applies when there is a final judgment on the merits which precludes the parties or their privies from relitigating the issues that were decided or the issues that could have been decided in the earlier action.” *State v. Miller*, 194 W.Va. 3, 10 (1995). See *Allen v. McCurry*, 449 U.S. 90, 94 (1980). “A claim is barred by *res judicata* when the prior action involves identical claims and the same parties or their privies.” *Miller*, 194 W.Va. at 10-11. See *Conley v. Spillers*, 171 W.Va. 584, 587-90 (1983).

“[T]he underlying purpose of the doctrine of *res judicata* was initially to prevent a person from being twice vexed for one and the same cause.” *Conley v. Spillers*, 171 W. Va. 584, 588 (1983). Furthermore, public policy supports the doctrine of *res judicata* since its purpose is “[t]o preclude parties from contesting matters that have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Id.* (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)).

It cannot be disputed that the claims and issues (including the exact same phone calls) that Plaintiff is litigating have previously been litigated, decided, resolved, and settled in a previous lawsuit brought by her husband. Ally has already litigated and settled the exact claims on the exact same issues (including the exact same phone calls) in a previous action involving Plaintiff’s husband. *Res judicata*’s purpose is to prevent a defendant from being vexed twice for the same thing, and not to allow double recovery. *Conley v. Spillers*, 171 W. Va. 584, 588 (1983). Plaintiff, in the case at bar, has attempted to obtain monies for alleged unlawful phone

calls which her husband has already made claims and recovered for.

“Before the prosecution of a lawsuit may be barred on the basis of *res judicata*, three elements must be satisfied. First, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. Second, the two actions must involve either the same parties or persons in privity with those same parties. Third, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action.” *Beahm*, 223 W.Va. at Syl. Pt. 3 (quoting *Blake v. Charleston Area Med. Ctr., Inc.*, Syl. Pt. 4, 201 W.Va. 469 (1997)).

Under the first element, there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings. “A valid agreement of compromise and settlement of a case properly pending in a court of competent jurisdiction, in the absence of any exception or reservation, constitutes a merger and a bar of all claims properly litigable in such case[,]” and thus, a settlement is a final adjudication on the merits. *State ex rel. Queen v. Sawyers*, Syl. Pt. 3, 148 W.Va. 130 (1963). See *Fortuna v. Queen*, Syl. Pt. 3, 178 W.Va. 586 (1987). This element is satisfied as the prior action involving Timothy Smallwood, Plaintiff’s husband has been resolved, settled, and dismissed with prejudice, and he was fully compensated for his claims. (A.R. 215-216). Accordingly, there was a final adjudication on the merits in the prior Civil Action No. 10-C-95(B) filed by Timothy Smallwood, Plaintiff’s spouse and primary signer/obligor on the Chevrolet Contract, as he entered into a Confidential Release and Settlement Agreement with Ally as to the exact same claims and alleged communications asserted by Plaintiff, as co-signer on the Chevrolet Contract, in this

action.

With respect to the second element of *res judicata*, the two actions must involve either the same parties or persons in privity with those same parties. “It has been recognized that ‘[p]rivity . . . is merely a word used to say that the relationship between one who is a party on the record and another is close enough to include that other within the *res judicata*.’” *Beahm v. 7-Eleven, Inc.*, 223 W.Va. 269, 273 (2008) (quoting *Rowe v. Grapevine Corp.*, 206 W.Va. 703, 715 (1999)). “Privity, in a legal sense, ordinarily denotes ‘mutual or successive relationship to the same rights of property.’” *State ex rel. Division of Human Servs. v. Benjamin P.B.*, Syl. Pt. 4, 183 W.Va. 220 (1990) (quoting *Cater v. Taylor*, Syl. Pt., 120 W. Va. 93 (1938)). Black’s Law Dictionary defines “privity” as a “derivative interest founded on or growing out of contract, connection or bond of union between the parties, mutuality of interest.” The second element is also satisfied as plaintiff and her husband are certainly in privity with each other as husband and wife living together and each being on the same Ally/GMAC account and/or Chevrolet Contract at issue. (A.R. 50).

With respect to the third and final element of demonstrating *res judicata*, the cause of action identified for resolution in the subsequent proceeding either must be identical to the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action. All of the causes of action asserted and settled by Timothy Smallwood in his prior lawsuit are identical to the causes of action asserted against Ally by Plaintiff in this lawsuit. The Complaint filed in both cases is the exact same except for Plaintiff’s name and substituting GMAC Inc. for Ally Financial Inc. (GMAC Inc. is now known as Ally Financial Inc.) in this action. (A.R. 215-216). Moreover, this final element is met as Plaintiff

testified that her lawsuit involves the same allegations regarding the same phone calls as her husband's previous lawsuit, including phone calls made to the home phone and her husband's cell phone. (A.R. 260-261) Plaintiff's husband further testified that his lawsuit also sought damages for and made claims for the same phone calls that his wife is relying upon in her action. (A.R. 267-268). Furthermore, both Plaintiff and her husband relied upon the same Ally account/Contract and call logs in order to demonstrate their claims.

Of relevance to this issue and Plaintiff's attempt at double recovery is Judge Berger's Memorandum Opinion in *Massey v. Greentree Servicing, LLC*, Case No. 5:10-cv-00533 at 10, S.D.W.V. 2011. In *Massey*, separate husband and wife plaintiffs were attempting to claim damages pursuant to *West Virginia Code* § 46A-2-128(e), just like the case at bar. Judge Berger specifically stated that either plaintiff could maintain a separate claim without the participation of the other, if there was no evidence that their claims were duplicative. In the matter at bar, the Plaintiff admits that her claims for damages involve the same phone calls, and facts, which her husband previously asserted in his separate lawsuit and which he settled. Therefore, there can be no dispute that Plaintiff's claims are duplicative of her husband's previously litigated, settled, and dismissed claims.

Thus, the doctrine of *res judicata* applies with respect to Plaintiff's causes of action against Ally and her attempt to bring the exact same causes of action previously adjudicated by her spouse and primary obligor on the Contract, is an improper attempt to obtain double recovery from Ally. Plaintiff's claims could and should have been resolved in the prior civil action filed by her spouse, Timothy Smallwood, since they arise out of the same Chevrolet Contract and arrears of indebtedness owed to Ally, and arise out of the same phone calls and

communications that allegedly violated the WVCCPA. This is a clear example of double-dipping for the exact same alleged claims and phone calls. At the very least, issues of material fact existed as to if, why, or how Plaintiff could attribute and rely upon phone calls, utilized and relied upon by her husband in another lawsuit, for her own separate claims. Therefore, the Order granting Partial Summary Judgment on these issues should be have been vacated by the Circuit Court.

**B. Plaintiff's Claims Against Ally are Barred Pursuant to the Doctrine of Collateral Estoppel.**

"The doctrine of collateral estoppel applies to preclude the litigation of an issue that has been previously resolved." *Stillwell v. City of Wheeling*, 210 W.Va. 599, 605 (2001). See *Christian v. Sizemore*, 185 W.Va. 409, 412 (1991) (Finding that "[c]ollateral estoppel is essentially a doctrine which precludes the relitigation of an issue, while *res judicata* precludes relitigation of the same cause of action."). Thus, "[c]ollateral estoppel is designed to foreclose relitigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit." *Stillwell v. City of Wheeling*, 210 W.Va. at 605.

"Collateral estoppel will bar a claim if four conditions are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." *State v. Miller*, Syl. Pt. 1, 194 W.Va. 3 (1995). "The doctrine of collateral estoppel also requires as does *res judicata* that the first judgment be rendered on the merits and be a final judgment

by a court having competent jurisdiction over the subject matter and the parties.” *Conley v. Spillers*, Syl. Pt. 3, 171 W.Va. 584 (1983). Collateral estoppel is also broader than *res judicata* as it does not require that the same parties be involved. *State Federal Kemper Insurance Co. v. Zakaib*, 203 W.Va. 95, 99 (1998).

As required by the first factor, the issues previously decided and settled in the prior civil action filed by Timothy Smallwood are the identical issues raised by Plaintiff Catherine Smallwood in this civil action. (A.R. 4-11, 200-207). In fact, not only are the issues and the subject matters the same in both cases, the causes of action asserted in both cases are the exact same. (A.R. 4-11, 200-207). The issues in this case arise out of the same Chevrolet Contract and debt owed to Ally at issue in the previously resolved and settled case filed by her spouse, Timothy Smallwood. Also, the phone calls Timothy Smallwood claimed violated *West Virginia Code § 46A-2-128(e)* are the same phone calls that Plaintiff relied upon and utilized to make her claims. As demonstrated herein, the vast majority of these phone calls never involved Plaintiff.

Moreover, Plaintiff’s and her husband’s own testimony provide ample factual evidence that Plaintiff’s claims surrounding the alleged phone calls are the exact same claims and phone calls that her husband made in a prior lawsuit against Ally and previously settled for. Importantly, she admits that she was aware of her husband’s prior lawsuit and how much it settled for, and that her lawsuit and his lawsuit are essentially the same allegations regarding the same phone calls, including phone calls made to the home phone and her husband’s cell phone. (A.R. 260-261). She openly admits that she is making claims and seeking damages for phone calls made to her husband’s cell phone, despite the fact, as stated hereinabove, that she

never used his cell phone, never listened to a message from his cell phone, and never saw any phone numbers on his cell phone. (A.R. 261-262). Additionally, she agrees that her husband was “fully compensated for his claims for phone calls made to his cell phone and to the home”. (A.R. 263-264). Plaintiff’s husband also testified that his lawsuit sought damages and made claims with respect to the same phone calls that Plaintiff is seeking recovery. (A.R. 267-268). Plaintiff’s husband further admitted that he was fully compensated for the claims he made in his lawsuit. (A.R. 268).

Under the second factor, a settlement is a final adjudication on the merits. *See State ex rel. Queen v. Sawyers*, Syl. Pt. 3, 148 W.Va. 130 (1963). *See Fortuna v. Queen*, Syl. Pt. 3, 178 W.Va. 586 (1987). In this regard, there was a final adjudication on the merits in the prior Civil Action No. 10-C-95(B) filed by Timothy Smallwood, Plaintiff’s spouse and primary signer/obligor on the Chevrolet Contract as he entered into a Confidential Release and Settlement Agreement with Ally as to the exact same claims asserted by Plaintiff, as co-signer on the Contract, in this action. A Final Dismissal Order was then entered on August 23, 2010 by the Honorable Robert A. Burnside, Jr., dismissing Timothy R. Smallwood’s civil action, with prejudice. (A.R. 215-216).

With respect to the third factor, Plaintiff Catherine Smallwood, as co-signer/obligor on the Chevrolet Contract, and Timothy Smallwood, as primary signer/obligor on same Contract, are certainly persons in privity with each other. They are both signers on the Chevrolet Contract and responsible for the debt owed to Ally which is ultimately the basis for the previously settled case filed by Timothy Smallwood and the current case filed by Plaintiff Catherine Smallwood. They are also husband and wife and reside in the same residence that Ally allegedly repeatedly and unlawfully called even after being out on notice that they had

retained the law firm of Hamilton, Burgess, Young & Pollard, P.L.L.C. to act as counsel with regard to their indebtedness to Ally.

As to the fourth factor, Plaintiff certainly had a full and fair opportunity to litigate the issues in the prior civil action filed by Timothy Smallwood. However, she did not do so by choice. She and her spouse and primary signer on the Chevrolet Contract, Timothy Smallwood, are parties in privity and have the same rights and mutuality of interest with respect to the issues raised in the previously-settled case. She had a full and fair opportunity as she was in privity to the party to litigating the exact same issues. At the very least, issues of material fact existed as to if, why, or how Plaintiff could attribute and rely upon phone calls her husband utilized and relied upon in another lawsuit, for her own separate claims.

Plaintiff's own testimony easily satisfies the four elements for demonstrating collateral estoppel as (a) her lawsuit involves the exact same claims, phone calls, and issues; (b) her husband's previous lawsuit has been adjudicated and resolved on its merits with her husband receiving settlement monies; (c) Plaintiff and her husband are certainly in privity with each other for numerous reasons including being co-obligors on the account in question; and (d) Plaintiff obviously had a full and fair opportunity to litigate the issue in her husband's action.

Without question, at least twenty-three (23) of the calls made to plaintiff's husband's cell phone (based upon Ally's call logs) are her husband's claims which have been previously settled, adjudicated, and resolved and are not her claims. Her own testimony establishes that these were not communications made to her and that her husband's prior lawsuit accounted for these phone calls. This is clearly a situation where collateral estoppel applies which

precludes the relitigation of an issue. Thus, Plaintiff should have been collaterally estopped from bringing the current civil action against Ally.

### CONCLUSION

The Circuit Court's Order Denying Defendant Ally Financial Inc.'s Motion for Relief From and to Vacate the Court's Entry of Partial Summary Judgment as to sixty (60) violations of the WVCCPA, *West Virginia Code* § 46A-2-128(e), should be set aside because it abused its discretion with respect to entering the same.

**Respectfully Submitted,**

**ALLY FINANCIAL INC.**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 12-0636

ALLY FINANCIAL INC.,  
Petitioner,

v.

CATHERINE A. SMALLWOOD,  
Respondent.

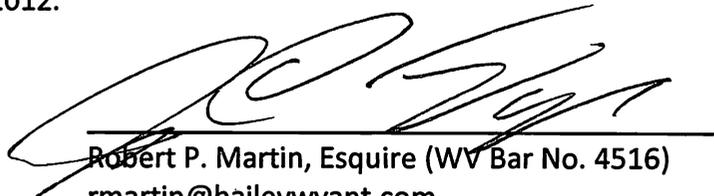
Appeal from a final order  
of the Circuit Court of Raleigh  
County (10-C-771)

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true copy of the foregoing "Petitioner's Brief" has been served this day via U.S. Mail upon the following:

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