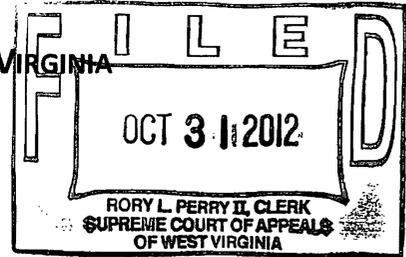


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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)

PETITIONER'S REPLY BRIEF

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NOW COMES Petitioner, 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 Reply 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.

REPLY ARGUMENT

Respondent is unquestionably seeking, and essentially has received, a double recovery in this matter for the exact same claims arising under the West Virginia Consumer Credit and Protection Act (“WVCCPA”) and the exact same phone calls her husband previously made claims for against Ally and settled. For the legal and common sense reasons set forth herein and in Ally’s appellate brief, Ally seeks a reversal of the findings of the Circuit Court with respect to the partial summary judgment order, as well as the finding that Respondent’s claims were not duplicative of her husband’s previously settled claims, and therefore, her claims must be dismissed as a matter of law. Petitioner now replies to the arguments and assertions made by Respondent in her Brief and Summary Response by stating as follows:

I. Respondent’s Too Little Too Late Argument is Wholly Without Merit.

In an attempt to deflect this Court’s attention away from the fact that partial summary judgment should not have been granted in this case, Respondent claims that Ally acted too little too late in defending against Respondent’s motion for partial summary judgment because it did not conduct discovery and depose Respondent in a timely manner. (Respondent’s Brief 3, 5, 6-7). Respondent’s criticism of the timing of Ally’s taking of her deposition is completely

misplaced and belied by the fact that such deposition occurred over four (4) months before the discovery deadline in the Scheduling Order. (A.R. 125). Notably absent from Respondent's brief is that she moved for partial summary judgment as to the WVCCPA claims just thirty-six (36) days after filing her Complaint. (A.R. 2). Yes, that is correct, only thirty-six (36) days had passed and Respondent determined it was proper and appropriate to move for partial summary judgment against Ally for sixty (60) violations of the WVCCPA. (A.R. 51-64).

Ally had just timely filed a motion to dismiss on October 4, 2010, the day before Respondent filed her motion for partial summary judgment, and so it was immediately faced with responding to and defending against summary judgment without the benefit of any discovery in this case. (A.R. 2). Despite Respondent's opinion to the contrary, "[a] party opposing a motion for summary judgment must have a reasonable 'opportunity to discover information that is essential to [its] opposition' to the motion." *Powderidge Unit Owners Ass'n. v. Highland Properties, Ltd.*, 196 W. Va. 692, 701, 474 S.E.2d 872, 881 (1996) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5, 106 S. Ct. 2505, 2511 n.5 (1986)). Moreover, no scheduling order had been entered at that point so there were not even deadlines to complete discovery or to file dispositive motions. (A.R. 125-126).

Furthermore, Respondent's argument that Ally lost in defending against her motion for partial summary judgment and then did nothing more than rehash the same issues and facts in its motion for reconsideration is wholly without merit. (Respondent's Brief 1-5). During a hearing on March 18, 2011, despite Ally's objections, the Circuit Court orally denied Ally's motion to dismiss and granted Respondent's motion for partial summary judgment for sixty (60) violations of the WVCCPA and then, on July 12, 2011, entered its written Order granting

the same. (A.R. 123-124). However, there were never any evidentiary findings as to the communications which were supposedly comprised of the sixty (60) violations. (A.R. 123-124). Respondent merely asserted that Ally committed sixty (60) violations of the WVCCPA and the Circuit Court improperly accepted this as true even though Respondent had not demonstrated by facts, evidence, testimony or otherwise what Ally's call log sheets indicated, what each log entry meant, whether there were sixty (60) phone calls even listed on Ally's call logs, and/or whether there were sixty (60) actual violations of the WVCCPA, *West Virginia Code* § 46A-2-128(e). (A.R. 51-64, 123-124).

Additionally, Ally had not yet taken the depositions of Respondent or her spouse regarding their claims or the alleged unlawful communications. (A.R. 238, 266). The Circuit Court simply decided as a matter of law that Respondent's unsupported claims and allegations of sixty (60) phone calls made in violation of *West Virginia Code* § 46A-2-128(e) were true and entered partial summary judgment. (A.R. 123-124). This finding, as well as the finding that Ally was not entitled to relief from partial summary judgment as to the WVCCPA claims, were clearly erroneous and an abuse of discretion by the Circuit Court. (A.R. 123-124, 294-297).

Importantly, once Ally deposed Respondent and her spouse in October 2011, well before the March 2, 2012 discovery deadline, it then proceeded to file a motion for reconsideration, along with a supplement to such motion upon receipt of the deposition transcripts. (A.R. 125, 127-217, 218-272). Ally's motion for reconsideration set forth newly discovered facts developed during the depositions which established that genuine issues of material fact existed as to Respondent's claims that Ally violated the WVCCPA, *West Virginia Code* § 46A-2-128(e), sixty (60) times. (A.R. 130-138, 218-224). The motion also made

additional supporting arguments with respect to Respondent's claims being barred by the doctrines of *res judicata* and collateral estoppel, including the fact that said claims were duplicative based on the deposition testimony and admissions of Respondent and her spouse. (A.R. 138-145, 224-229).

Ally was entitled to engage in discovery with respect to Respondent's claims and it properly and timely did so in accordance with the Circuit Court's scheduling order and the *West Virginia Rules of Civil Procedure*. (A.R. 125-126). Just because Respondent wanted to be able to file suit and obtain summary judgment in the blink of an eye, without affording Ally the opportunity to develop material facts and defend against the claims asserted against it, does not mean that Ally should just roll over and admit defeat. No instead, Ally proceeded with discovering information in opposition to the premature partial summary judgment and appropriately moved the Circuit Court to reconsider the newly discovered facts and additional arguments. (A.R. 127-217, 218-272). Notably, the testimony of Respondent and her spouse presented evidence that genuine issues of material fact existed. (A.R. 238-265, 266-271).

Respondent, who has the burden of proof in demonstrating the number of phone calls or communications and the number of violations, has not deduced evidence from Ally with respect to its call logs, the number of calls listed on its call logs, or the subject matter of each call that was made. Despite having no proof or evidence with respect to the number of calls made, Respondent made unsupported allegations and argument in support of summary judgment as to the WVCCPA claims and now has the luxury of relying upon the Circuit Court's erroneous rulings. (A.R. 51-64, 123-124, 294-297). What facts and evidence did the Circuit Court rely upon to determine that Ally violated the WVCCPA, *West Virginia Code* § 46A-2-

128(e), sixty (60) times? The answer is none as the Circuit Court only relied upon Respondent's conclusory allegations set forth in her motion for partial summary judgment. (A.R. 51-64, 123-124, 294-297).

Accordingly, Ally did not act too little too late and its motion for reconsideration raised valid arguments and material facts which, if properly considered by the Circuit Court, would have resulted in the partial summary judgment as to the WVCCPA claims being vacated.

II. Standard of Review.

Respondent asserts that the proper standard of review is an abuse of discretion since Ally is appealing from the Circuit Court's Order denying Ally's motion for reconsideration on issues that had already been litigated. (Respondent's Brief 1-2, 4-5). However, this assertion is misplaced. Ally is not only challenging the entry of the Order, but also the findings of fact and conclusions of law set forth therein, because the Circuit Court failed to consider the evidence and newly discovered facts in its motion and incorrectly applied the summary judgment standard and the doctrines of *res judicata* and collateral estoppel. (A.R. 294-297). 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*, 228 W. Va. 762, 766, 724 S.E.2d 733, 737 (2012).

III. Ally's Motion for Reconsideration Established that Genuine Issues of Material Fact Existed and that Partial Summary Judgment as to Respondent's Claims Under the WVCCPA Should Have Been Vacated.

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.

W. Va. Code § 46A-2-128(e).

Thus, in granting Respondent's motion for partial summary judgment on the issue of liability for sixty (60) violation of *West Virginia Code* § 46A-2-128(e) and in denying Ally's motion for reconsideration, the Circuit Court determined that no genuine issues of material fact existed as a matter of law. (A.R. 123-124, 294-297). See *Hanlon v. Chambers*, 195 W. Va. 99, 105, 464 S.E.2d 741, 747 (1995). Importantly, "[t]he 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.* "A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law." Syl. Pt. 5, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995).

Respondent was granted partial summary judgment based on the material fact that she and Timothy Smallwood, her husband and primary obligor on the vehicle purchase contract, first advised Ally on November 30, 2009 that they were being represented by Attorney Lynn Pollard with respect to the debt owed under such contract. (A.R. 29-30, 51, 123-124). However, Ally's activity note relied upon in support of this material fact does not actually communicate that an attorney had been retained as required by *West Virginia Code* § 46A-2-

128(e). (A.R. 51, 55). The activity note merely states that, on November 30, 2009, during a phone call with Timothy Smallwood, that **“buyer said that we should call 3045742727 collard”**. (A.R. 51, 55). Furthermore, any information provided by Respondent’s spouse about himself would only apply to him as he was the main buyer and obligor on the contract. (A.R. 29-30). Accordingly, it was improper for the Circuit Court to conclude that this activity note provided sufficient notice to Ally that Respondent had retained an attorney, and thus, summary judgment was not warranted and should have been vacated as requested by Ally in its motion for reconsideration. (A.R. 130-132).

Furthermore, Respondent was granted partial summary judgment for sixty (60) alleged violations of *West Virginia Code* § 46A-2-128(e) after Ally was supposedly put on notice that she was represented by an attorney on November 30, 2009 and then it continued to call her sixty (60) times to collect on the debt. (A.R. 51-52, 123-124). However, Ally’s motion for reconsideration clearly established that a certain number of these phone calls were not communications under the statute and a certain number of these phone calls were not even made to Respondent. (A.R. 132-135, 218-224).

The language set forth in *West Virginia Code* § 46A-2-128(e) is clear and unambiguous in that it must be a “communication with a consumer”. Here, that was not the case since Respondent testified during her deposition that, as to thirty-two (32) of the sixty (60) alleged phone calls, she did not take, answer, or otherwise observe the phone call. (A.R. 132-135, 152-157, 218-224, 238-265). Respondent and her husband also testified that some of these alleged sixty (60) phone calls were made to her husband’s personal cell phone, which she never used or saw the caller id or phone numbers on. (A.R. 245, 254-255, 258-259, 261-262, 265, 269, 271).

So these alleged phone calls to her husband's personal cell phone, regardless of whether he answered the calls or if messages were left, account for approximately ten (10) to fifteen (15) of the sixty (60) alleged phone calls and should not have been found to be communications with Respondent. (A.R. 219-221, 238-265).

Based on Respondent's own testimony, she did not know that sixty (60) phone calls were made by Ally regarding the debt, so certainly there were not sixty (60) communications with the consumer after Ally was allegedly put on notice that she had retained an attorney. (A.R. 132-135, 218-224, 238-265). How can there be a communication if one side was clearly not aware of it and never became aware of it? The Circuit Court's ruling, as quoted in both Ally and Respondent, states "All you have to do is know the call was made . . .". (A.R. 309).

Furthermore, the language in the statute is "communication", not "attempted communication". *W. Va. Code* § 46A-2-128(e). Thus, as stated herein, unknown phone calls cannot be considered communications as nothing was expressed or relayed to the communicatee/Respondent. Judge Irene Berger, in the *Fingerhut* decision cited and relied upon by Respondent, defines "communications" in several ways, including utilizing Black's Law Dictionary by stating "the expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another's perception" and "conduct that expresses information to the intended recipient." *Stover v. Fingerhut Direct Mktg., Inc.*, Memorandum Opinion and Order at 4, Civil Action No. 5:09-cv-00152 (S.D. W. Va. March 17, 2010) (attached to Respondent's Brief). If Respondent was never aware that phone calls were made, did not hear the calls, did not see them on a caller id, and/or was not told that phone calls were made, then there can be no "communication" under the statute and pursuant to the

definitions utilized in West Virginia case law. (A.R. 132-135, 152-157, 218-224, 238-265). There is a difference between unanswered phone calls and calls which were never even known about.

In this matter, it is undisputed that Respondent was not aware of sixty (60) communications made to her, her home, or her husband's personal cell phone, as the calls that she knew were made are listed in her own call log sheets that she kept. (A.R. 152-157, 238-265). This number is certainly less than sixty (60) and the Circuit Court erred and essentially contradicted its own ruling during the hearing which was that the consumer had to know about the phone call for it to be a communication under the WVCCPA. (A.R. 309).

Thus, the Circuit Court was improper in not finding that genuine issues of material fact existed with respect to the number of phone calls and erred in not vacating the partial summary judgment as to the WVCCPA claims.

IV. Ally's Motion for Reconsideration Established that Respondent's Claims Against Ally are Barred by the Doctrines of *Res Judicata* and/or Collateral Estoppel.

The Circuit Court erred by not concluding that Respondent's claims alleging violations of the WVCCPA, *West Virginia Code* § 46A-2-128(e), were estopped as a matter of law since they encompass the exact same phone calls which were the subject of a lawsuit brought by her husband, Timothy Smallwood. (A.R. 138-145, 200-207, 208-214, 215-216, 224-229, 260-264, 266-268). Mr. Smallwood's claims alleging violations of the WVCCPA, *West Virginia Code* § 46A-2-128(e), against Ally for the same sixty (60) phone calls have been previously resolved, settled, and dismissed. (A.R. 200-207, 215-216, 260-264, 266-268). Accordingly, Ally's motion for reconsideration on the issues of collateral estoppel and *res judicata* should have been granted by the Circuit Court as such doctrines preclude Respondent's claims for the same phone calls

made by Ally that allegedly violated the WVCCPA, *West Virginia Code* § 46A-2-128(e). (A.R. 138-145, 224-229, 260-264, 266-268).

As established by the deposition testimony of Respondent and her husband, the doctrine of *res judicata* is applicable in this action. (A.R. 260-264,, 266-268). Respondent's claims are the exact same as her husband's claims which were previously resolved, settled, and dismissed in a previous lawsuit brought by her husband. (A.R. 200-207, 215-216, 260-264, 266-268). 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, 272, 672 S.E.2d 598, 601 (2008) (quoting *State v. Miller*, 194 W. Va. 3, 9, 459 S.E.2d 114, 120 (1995)). "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, 459 S.E.2d at 120. See *Conley v. Spillers*, 171 W. Va. 584, 588, 301 S.E.2d 216, 219 (1983). *Res judicata's* purpose is to prevent a defendant from being vexed twice for the same thing, and not to allow double recovery. *Conley*, 171 W. Va. at 588, 301 S.E.2d at 219. Respondent, in the case at bar, has attempted to obtain monies for alleged unlawful phone calls which her husband has already made the exact same claims and recovered for. (A.R. 138-145, 200-207, 208-214, 215-216, 224-229, 260-264, 266-268).

First and foremost, there is clear privity involved between Respondent and her husband. *Jordache Enterprises, Inc. v. National Union Fire Insurance Company of Pittsburgh, PA.*, 204 W. Va. 465, 478, 513 S.E.2d 692, 705 (1998) discusses privity as follows:

In determining whether privity exists, courts generally employ a functional analysis, which entails a careful examination of the circumstances of the case and the rights and interests of the parties to be held in privity. Thus, the question of who is a privity is a factual one requiring a case-by-case examination.

* * *

In general, it may be said that . . . privity involves a person so identified in interest with another that he represents the same legal right. *47 Am Jur.2d Judgments § 663*, p. 84-86 (1995) (footnotes omitted). One court has stated that, [a] privity, in the context of collateral estoppel, is one so related by identity of interest with the party to the judgment that such party represented the same legal right. Parties are in privity for collateral estoppel purposes if the interests of the non-party are so closely related to the interests of the party, that the non-party can be fairly considered to have had his day in court. *Missouri Mexican Products, Inc. v. Dunafon*, 873 S.W.2d 282, 286 (Mo.App. 1994) (citations omitted).

Also, “[a] common requirement for the application of *res judicata* and collateral estoppel was that there had to be mutuality of parties between the first suit which had proceeded to judgment and the second suit where the defense of *res judicata* or collateral estoppel was being asserted. The concept of mutuality extended not only to the named parties but to those who were privy to them.” Syl. Pt. 1, *Wolverton v. Holcomb*, 174 W. Va. 812, 329 S.E.2d 885, (1985). “Privity, in a legal sense, ordinarily denotes mutual or successive relationship to the same rights of property.” Syl. Pt. 4, *State ex rel. Division of Human Servs. v. Benjamin P.B.*, 183 W. Va. 220, 395 S.E.2d 220 (1990). In *Beahm v. 7-Eleven, Inc.*, 223 W. Va. 269, 273, 672 S.E.2d 598, 602 (2008), this Court held that “the concept of privity with regard to the issue of claim preclusion is difficult to define precisely but the key consideration for its existence is the sharing of the same legal right by parties allegedly in privity, so as to ensure that the interests of the party again whom preclusion is asserted have been adequately represented.” Other jurisdictions have similar findings with respect to privity holding that joint debtors and joint tenants are in privity with each other as well as the finding of contractual privity. See *Clinesmith v. Bolton*, 710 P.2d 30, 1985 Kan. App. Lexis 1015 (1985) (finding that husband and wife joint tenants were found to be privity with each other; *Aguilera v. Corkill*, 201

Kan. 33, 38-39, 439 P.2d 93 (1968) (holding that "privity" may be one with a mutual relationship to the same right of property); *Birgin v. Tzaferis*, 81 Va. Cir. 475; 2005 Va. Cir. LEXIS 125 (2005) (husband and wife joint tenants were found to be in privity). *Cotton v. Underwood*, 223 Tenn 122, 442 S.W.2d 632 (Tenn. 1968) (privies are not only those who are so related by blood and law, but are those who are so related by reason of the facts showing an identity of interest . . . Privies are persons who are partakers or have an interest in any action or thing, or any relation to another, including privies in contract). Furthermore 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."

There can be no question that Respondent and her husband are privies to one another with respect to the purchase of the vehicle and the debt owed to Ally, and all responsibilities flowing from the purchase contract in question. (A.R. 29-30). Respondent and her husband are both obligors and signers on the vehicle purchase contract with Ally. (A.R. 29-30). They are married, living together, and sharing the same home phone. (A.R. 266-267). They are clearly persons in privity with each other and are both responsible for the debt owed to Ally under such contract. (A.R. 29-30). Importantly, they have both admitted that the husband's claims were for the exact same sixty (60) phone calls under the exact same legal theories, and sought the exact same damages as Respondent's claims. (A.R. 260-264, 266-268). Therefore, *res judicata* applies to bar Respondent's action as her claims were completely and fully resolved, settled, and dismissed in her husband's lawsuit. (A.R. 200-207, 215-216, 260-264, 266-268).

In addition, Respondent's claims and issues 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, 558 S.E.2d 598, 604 (2001). See *Christian v. Sizemore*, 185 W. Va. 409, 412, 407 S.E.2d 715, 718 (1991). As stated above, Respondent’s spouse previously filed a lawsuit against Ally alleging that it violated the WVCCPA, *West Virginia Code* § 46A-2-128(e), and relied on the exact same sixty (60) phone calls that Respondent has relied on in this case. (A.R. 138-145, 200-207, 208-214, 215-216, 224-229, 260-264, 266-268). Respondent’s spouse previously resolved his claims relating to these sixty (60) phone calls. (A.R. 215-216, 260-264, 266-268).

Accordingly, the identical issues raised in this case were also raised in the case filed by Respondent’s spouse against Ally relating to its debt collection efforts under the vehicle purchase contract and violations of the WVCCPA. (A.R. 138-145, 200-207, 208-214, 215-216, 224-229, 260-264, 266-268). Also, the phone calls that Respondent’s spouse asserted violated the WVCCPA, *West Virginia Code* § 46A-2-128(e), are the same phone calls that Respondent has relied upon in support of her WVCCPA claims. (A.R. 260-264, 266-268). The Circuit Court erred when ruling that collateral estoppel does not preclude Respondent from bringing the same claims in this case, and therefore, Petitioner seeks a reversal of the partial summary judgment order. (A.R. 294-297).

V. Judge Berger Agrees that Respondent Cannot Bring a Cause of Action for the Same Phone Calls as Her Spouse Pursuant to the WVCCPA as Such Claims are Duplicative.

Judge Irene Berger, in her Memorandum Opinion and Remand Order in *Massey v. Greentree Servicing, LLC*, Civil Action No. 5:10-cv-00533 at 10 (S.D. W. Va. July 21, 2011), clearly enunciates her position that in instances of joint debtors/consumers making claims under the WVCCPA, said joint debtors/consumers can maintain separate claims as long as their claims are

not duplicative. Judge Berger stated as follows:

While the substance of Plaintiffs' claims appears to be identical, upon the record before the court, there is no evidence that Plaintiffs intend to allege the same statutory violation for each of the allegedly unlawful telephone calls. In other words, the allegations in the Complaint do not foreclose that Ms. Massey may be seeking enforcement of a statutory right under the WVCCPA for violations which occurred as a result of phone calls made to Plaintiffs' residence which were fielded by her (say, on Monday, Tuesday or Wednesday), while her husband could be asserting a statutory violation for calls that he received at times in which he was in the home. There is no evidence before the Court that each Plaintiff's claims are duplicative.

Massey v. Greentree Servicing, LLC, Memorandum Opinion and Remand Order at 10, Civil Action No. 5:10-cv-00533 at 10 (S.D. W. Va. July 21, 2011). (A.R. 276-289).

Both Respondent and her spouse have each testified under oath admitting that their claims are the same, involve the same sixty (60) phone calls, and seek the same damages. (A.R. 260-264, 266-268). The nexus of this lawsuit is a single vehicle purchase contract entered into with Ally, whereby both Respondent and her spouse are obligors and signers. (A.R. 29-30). There is no dispute on the issue that Respondent's claims against Ally are "duplicative" of her husband's previously resolved, settled, and dismissed claims. (A.R. 200-207, 208-214, 215-216, 260-264, 266-268).

The indisputable evidence establishes that Respondent has sought enforcement of statutory rights under the WVCCPA for violations which occurred as a result of the same phone calls that her husband previously sought enforcement for. (A.R. 200-207, 208-214, 215-216, 260-264, 266-268). Therefore, pursuant to the *Greentree* opinion of Judge Berger, the Circuit Court erred in granting Respondent partial summary judgment and in denying Ally's motion for reconsideration. (A.R. 123-124, 294-297). Petitioner seeks a reversal of said rulings and requests that this Court follow Judge Berger's lead and direct the Circuit Court to find that

Respondent's claims are duplicative to those claims of her husband, which have been resolved, settled, and dismissed.

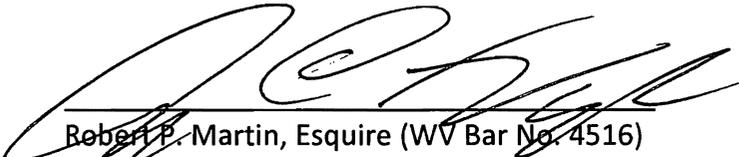
CONCLUSION

The Circuit Court's Order denying Defendant Ally Financial Inc.'s motion for reconsideration of the 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 erred with respect to entering the same.

Respectfully Submitted,

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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.**

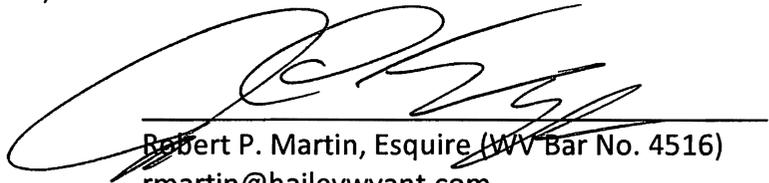
**Appeal from a final order
of the Circuit Court of Raleigh
County (10-C-771)**

CERTIFICATE OF SERVICE

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

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Done this 31st day of October, 2012.



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