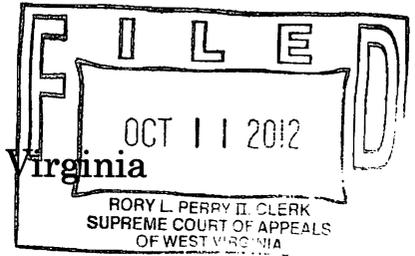


In the Supreme Court of Appeals of West Virginia



Docket No. 12-0636

**Ally Financial Inc.,
Petitioner,**

v.

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

**Catherine A. Smallwood,
Respondent**

**Respondent's Brief and Summary Response
to Ally Financial Inc.**

**Ralph C. Young (W.Va. Bar # 4176)
ryoung@hamiltonburgess.com**

**Christopher B. Frost (W.Va. Bar # 9411)
cfrost@hamiltonburgess.com**

**Steven R. Broadwater, Jr.
(W.Va. Bar # 11355)
sbroadwater@hamiltonburgess.com**

**HAMILTON, BURGESS, YOUNG
& POLLARD, pllc**

**P.O. Box 959
Fayetteville, WV 25840-0959
304/574-2727
Fax: 304/574-3709**

**Counsel for the Respondent
Catherine A. Smallwood**

Table of Contents

Table of Authorities..... ii

Introduction..... 1

Argument

1. The circuit court did not abuse its discretion..... 1

 a. Ally rehashed arguments..... 2

 b. Rule 60(b) does not apply..... 4

 c. Discretion includes the ability to enforce the rules and
 reject rehashed arguments..... 4

2. Ally admitted the November 30, 2009 trigger date..... 6

3. Ally’s attack on the number of calls is too little, too late..... 6

4. The bona fide error defense has gaps..... 10

5. The husband’s settlement does not bar Smallwood’s claims... 12

Conclusion..... 14

Addendum containing:

Clements v. HSBC Auto Finance, Civil Act. No. 5:09-cv-00086 (S.D.W.Va. July 21, 2011)

Stover v. Fingerhut Direct Mktg., Inc., Civil Action No. 5:09-cv-00152 (S.D.W.Va. March 17, 2010)

Table of Authorities

Cases

| | |
|---|---------------|
| <i>Barr v. NCB Mgmt. Serv., Inc.</i> , 227 W.Va. 507, 711 S.E.2d 577 (2011)..... | 9 |
| <i>Cozmyk v. Prompt Recovery Serv., Inc.</i> , 851 F.Supp.2d 991 (S.D.W.Va. 2012)..... | 8 |
| <i>Crum v. Equity Inns, Inc.</i> , 224 W.Va. 246, 685 S.E.2d 219 (2009)..... | 11 |
| <i>Galanos v. National Steel Corp.</i> , 178 W.Va. 193, 358 S.E.2d 452 (1987)..... | 13 |
| <i>Kerner v. Affordable Living, Inc.</i> , 212 W.Va. 312, 570 S.E.2d 571 (2002)..... | 1, 4 |
| <i>Hubbard v. State Farm Indemn. Co.</i> , 213 W.Va. 542, 584 S.E.2d 176 (2003)..... | 4 |
| <i>Jackson v. Putnam County Bd. of Educ.</i> , 221 W.Va. 170, 653 S.E.2d 632 (2007)..... | 7 |
| <i>Massey v. Green Tree Serv., LLC</i> , Civil Action No. 5:10-cv-00533 (S.D.W.Va. March 30, 2011)..... | 12 |
| <i>Meadows v. Wal-mart Stores</i> , 207 W.Va. 203, 530 S.E.2d 676 (2000)..... | 12 |
| <i>Payne’s Hardware & Bldg. Supply, Inc. v. Apple Valley Trading Co. of West Virginia</i> , 200 W.Va. 685, 490 S.E.2d 772 (1997)..... | 2, 5, 7 |
| <i>Powderidge Unit Owners Assoc. v. Highland Properties, Ltd.</i> , 196 W.Va. 692, 474 S.E.2d 872 (1996)..... | 2, 4, 5, 6 |
| <i>Stover v. Fingerhut Direct Mktg., Inc.</i> , Civil Action No. 5:09-cv-00152 (S.D.W.Va. March 17, 2010)..... | 8 |

| | |
|---|----|
| <i>West Virginia Human Rights Comm'n v. The Esquire Group, Inc.</i> , 217 W.Va. 454, 618 S.E.2d 463 (2005)..... | 12 |
|---|----|

Statutes

| | |
|---------------------------------|-----------|
| W.Va. Code § 46A-5-101(1) | 1, 12, 14 |
| W.Va. Code § 46A-5-101(8)..... | 10 |
| W.Va. Code § 46A-2-128(e)..... | 2, 8, 9 |
| W.Va. Code § 46A-5-106..... | 14 |
| 15 U.S.C. § 1692c..... | 9 |

Rules

| | |
|--|---------|
| Rule 56(f), West Virginia Rules of Civil Procedure..... | 1, 3, 6 |
| Rule 60(b), West Virginia Rules of Civil Procedure | 4 |

Introduction

This is not an appeal from a summary judgment order. It is an appeal from an order denying Ally's motion for the Circuit Court to change its mind on issues that Ally earlier litigated and lost. The distinction is triply significant: the underlying order's substance is not at issue but only the order of denial; review is only for an abuse of discretion; and discretion includes the ability to avoid rehashed arguments. *Kerner v. Affordable Living, Inc.*, 212 W.Va. 312, 570 S.E.2d 571 (2002).

Besides misframing the appeal, Ally ignores: (1) its admission;¹ (2) its failure to ask for a Rule 56(f) or other continuance; (3) the lack of any showing on which Ally procedures existed and when; and (4) that W.Va. Code § 46A-5-101(1) grants causes and rights of action that each consumer holds individually and not in privity with others.

The circuit court should be affirmed and the case remanded for a determination on damages and the amount of Ally's statutory penalties.

1. The circuit court did not abuse its discretion.

This Court has repeatedly upheld the circuit courts' discretion to deny motions to reconsider that seek nothing more than to ask the court to

¹Ally verified that it knew that Smallwood was represented by counsel on November 30, 2009. App. 115, 118.

change its mind. *Payne's Hardware & Bldg. Supply, Inc. v. Apple Valley Trading Co. of West Virginia*, 200 W.Va. 685, 490 S.E.2d 772 (1997); *Powderidge Unit Owners Assoc. v. Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E.2d 872 (1996). It should again here.

a. Ally rehashed arguments.

Smallwood moved for partial summary judgment on Ally's liability for violating W.Va. Code § 46A-2-128(e), the *West Virginia Consumer Credit and Protection Act* (herein "WVCCPA") provision outlawing direct communications with consumers after it appears that the consumer is represented by an attorney and the debt collector knows or could reasonably ascertain the attorney's name and address. App. 51-53. She supported her November 30, 2009 attorney notification/trigger date and the number of violations with her own and Ally's telephone logs. App. 54-63.

Ally responded that factual issues exist on: (1) when it first appeared that Smallwood was represented by counsel and it knew or could have ascertained counsel's name and address; (2) how many telephone calls it made and whether all the logged calls count; and (3) whether its procedures create a bona fide error defense. App. 68-75. It also raised a fourth issue when it argued on its motion to dismiss that its settlement with Smallwood's husband bars her claims. App. 15-27.

Over five months lapsed from the time the motion was filed and when it was heard. App. 2 l. 18, 123. During this lapse, Ally never deposed Smallwood or her husband and never moved for a Rule 56(f) or other continuance to gather evidence before the court ruled. App. 2.

The circuit court denied Ally's motion to dismiss and entered an order granting Smallwood partial summary judgment. Ally's Brief, p. 4; App. 123-124. The summary-judgment order also granted Ally the opportunity to present further evidence on its bona fide error defense. App. 124.

Two months later, Ally moved the Court to reconsider. App. 2 l.47. Styling the motion as one under both Rule 60(b) and the court's inherent power, Ally re-raised the same four issues it previously lost. App. 127-145. It presented no new evidence on its bona fide error defense, and little or no new evidence on the other three issues.²

Three months after that, Ally submitted another memorandum on some of these same issues. App. 15-27, 218-229. This time, Ally submitted testimony that it took from Smallwood and her husband a year after she moved for summary judgment and three months after the summary-

²Ally's logs are repeated at App. 55-56, 80-81, and 148-151; Smallwood's logs are repeated at App. 58-63, 83-88, and 152-157; Ally's updated procedures are repeated at App. 90-108 and 158-175; Ally's verified responses to interrogatories are repeated at App 110-118 and 176-184; and Ally's exhibits on its motion to dismiss are repeated at App. 32-50 and 200-216.

judgment order's entry. App. 2 ll.18-19, 238-271.

The circuit court denied Ally relief. App. 294-296. Ally's appeal is from this order and not the earlier orders denying its motion to dismiss or granting Smallwood partial summary judgment. Ally's Brief, pp. 6-7.

b. Rule 60(b) does not apply.

In the circuit court, Ally partly styled its motion to reconsider as a Rule 60(b) motion. App. 127, 129. It now concedes that Rule 60(b) does not apply because the summary-judgment order did not dispose of the entire case. Ally Brief, pp. 8-9, citing Syl. Pt. 3, *Hubbard v. State Farm Indemn. Co.*, 213 W.Va. 542, 584 S.E.2d 176 (2003). Rule 60(b) also does not apply because the motion merely asked the court to change its mind or consider evidence that Ally could have offered earlier. *Kerner*, 212 W.Va. at 314-315, 570 S.E.2d at 573-574; *Powderidge*, 196 W.Va. at 705-706, 474 S.E.2d at 885-886. Rule 60(b) thus offers Ally no help.

c. Discretion includes the ability to enforce the rules and reject rehashed arguments.

Without Rule 60(b), Ally is left arguing about the circuit court's inherent authority – including its ability to reject rehashed arguments.

Powderidge dealt with this on this Court's review of a denial of a motion

to reconsider a summary-judgment order. The Court held that review is only for an abuse of discretion because the circuit court is the forum best equipped to ensure that those who comply with Rule 56 are not penalized by those who do not. *Powderidge*, 196 W.Va. at 705, 474 S.E.2d at 885. It then upheld the court's refusal to indulge yet another round of proceedings on the same issues. *Id.* at 706, 474 S.E.2d at 886.

Payne's Hardware also dealt with the circuit court's discretion to deny reconsideration of its summary-judgment order. The Court confirmed that review is only for an abuse of discretion, and concluded that no abuse occurred because the appellants failed to adhere to the procedures concisely articulated by the rules of civil procedure. *Payne's Hardware*, 200 W.Va. at 688, 691, 490 S.E.2d at 775, 778. These procedures require parties to rebut properly supported summary-judgment motions with evidence – not just argument – or ask for a continuance to gather evidence. *Id.* at 689-691, 490 S.E.2d at 776-778.

There is likewise no abuse of discretion here. Ally re-raised the same issues that it previously lost. The only difference is that it tried to bolster some of its arguments with depositions that it could have taken before the summary-judgment ruling. Like *Payne's* and *Powderidge*, the circuit court did not abuse its discretion by refusing Ally a do-over.

2. Ally admitted the November 30, 2009 trigger date.

Ally not only misapprehends the circuit court's discretion, but also ignores its admission on the trigger date. Smallwood asked Ally when it learned that the Plaintiff – Catherine Smallwood – was represented by counsel. App. 115. Ally's verified response states:

Please see attached Bates No. ALLY000002 which reflects that Ally was first informed that an attorney had been retained when "buyer said that we should call 3045742727 pollard" during a telephone call with Ally employee, Irene Sarah Sanchez, on November 30, 2009. App. 115, 118.

Ally strains to kick up dust around this without mentioning its admission, much less controverting it. App. 115. The admission and all the other evidence in the summary-judgment record confirm that Ally knew or could easily ascertain Smallwood's attorney's name and address on the November 30, 2009 date. *See* App. 58 (Smallwood's logs saying "gave attorney info" that day); App. 81 (Ally's log Bates No. ALLY000002).

3. Ally's attack on the number of calls is too little, too late.

Ally likewise ignores Rule 56(f) and *Powderidge* in its attack on the calls logged. These authorities require parties who face a summary-judgment motion to move for a continuance if they need time to gather evidence. Syl.

pt. 1, *Powderidge*, 196 W.Va. 692, 474 S.E.2d 872. Ally never moved for the continuance, yet relies almost exclusively on testimony that it did not take until a year after Smallwood moved for summary judgment and three months after the summary-judgment order's entry. App. 2 ll.33-34, 3 ll.63-66, 238, 266, 272.

The circuit court raised this point, stating "I dealt with this at the other hearing and you're raising new facts that were those – were those call logs or were her call logs available to you at the time we made the – I made my finding on partial summary judgment? I think they were." Ally responded, "The call logs were available, but interpreting those call logs from the plaintiff's deposition testimony was not available." App. 312 ll.4-12. Ally did not add that the only reason that the deposition was not available earlier was because it chose not to depose Smallwood in the five months leading up to the summary judgment ruling, nor did it ask for a continuance. App. 2 l.18, 123.

Summary judgment rulings are limited to the record that was before the court at the time of the ruling. *Jackson v. Putnam County Bd. Of Educ.*, 221 W.Va. 170, 177, 653 S.E.2d 632, 639 (2007). And it is not an abuse of discretion to deny reconsideration based on evidence that could have been presented before the ruling. *Payne's Hardware*, 200 W.Va. at 691, 490

S.E.2d at 778.

The attack also misreads the statute. The statute prohibits “[a]ny communication with a consumer whenever it appears that the consumer is represented by an attorney . . .” W.Va. Code § 46A-2-128(e). The circuit court properly concluded “that you don’t have to hear the phone ring, they don’t actually have to talk to the folks. All you have to do is know the call was made and the idea of the – the idea of the continuing pressure to pay is, in and of itself, conveyed.” App. 309 ll.10-14.

Two federal decisions elaborate. In *Stover v. Fingerhut Direct Mktg., Inc.*, Civil Action No. 5:09-cv-00152 (S.D.W.Va. March 17, 2010) [Addendum A], Judge Berger noted that this Court instructed her to construe the WVCCPA liberally and then relied on Black’s Law Dictionary to conclude that unanswered telephone calls from a debt collector communicate that it wants to speak to you to get its money.³ Judge Berger later added that “[m]issed calls communicate more than a phone number,” and held that even unanswered calls may communicate intimidation or harassment. *Clements v. HSBC Auto Finance*, Civil Act. No. 5:09-cv-00086 (S.D.W.Va. July 21, 2011) [Addendum 2] at * 5.

³Judge Goodwin recently distinguished *Stover* because it construed the WVCCPA. *Cozmyk v. Prompt Recovery Serv., Inc.*, 851 F.Supp.2d 991, 994 n. 1. (S.D.W.Va. 2012). This case involves the WVCCPA.

Ally nevertheless argues that there is still no communication unless Smallwood herself heard its recorded message or saw the caller id. Judge Burnside addressed this point, concluding that the statutory prohibition broadly includes calls placed to a shared residence, whether they were answered by the debtor, the spouse, or no one at all. App. 290-292.

This makes sense. The Legislature enacted the WVCCPA to protect consumers from unfair and deceptive debt collection practices. *Barr v. NCB Mgmt., Serv., Inc.*, 227 W.Va. 507, 513, 711 S.E.2d 577, 583 (2011). This protection broadly outlaws communications with the consumer once it appears that the collector can deal with the consumer's attorney. W.Va. Code § 46A-2-128(e). At that point, the collector has no legitimate reason to call anyone about the debt other than the attorney. This protection is lost if the collector can by-pass the attorney and continue hounding represented consumers through their spouses or other family members, knowing that the messages will get passed along. Outlawing "any" communication outlaws indirect communications too.

Congress recognized this danger when it later enacted the Fair Debt Collection Practices Act. The federal statute provides that its prohibition against collections efforts with a represented consumer include efforts directed to the consumer's spouse. 15 U.S.C. § 1692c(a)(2) and (d). There is

no reason to read W.Va. Code § 46A-2-128(e) more narrowly.

Lastly, the circuit court noted that Ally's various attacks on the calls may be better framed as a jury argument for mitigation. Ally quickly responded "right." App. 313 ll.2-10. The parties are not there yet.

4. The bona fide error defense has gaps.

Ally next claims that a jury must decide if it may use § 46A-5-101(8) to escape liability. To apply, Ally must "establish[] by the preponderance of the 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 such violation or error" *Id.* Ally, however, made no showing: (1) that the violations were unintentional or bona fide errors or (2) on which procedures existed when.

Smallwood specifically asked Ally to explain any § 46A-5-101(8) defense, including how any purported mistakes happened. App. 113-114. Ally did not respond with anything from any of the callers who actually committed the violations. It instead said that there were "possible unintentional violations" and "possible unintentional bona fide errors of fact." App. 115.

Smallwood also asked point blank when any procedures were implemented. App. 113. Rather than answer directly, Ally referred to the procedures it produced, explaining that the procedures reflect when they

were updated or revised. App. 114.

The problem is that the relevant dates post-date Ally's violations. The logs within the summary-judgment record reflect that Ally's calls to Smallwood ended in February 2010. App. 54-63, 80-88. The memorandum that Ally quotes extensively is dated March 5, 2010. App. 108. Other dates include a bulletin release in May 2010 and updates in August 2010. App. 90, 106. The only date pre-dating Ally's violations says "Legal reviewed for the Policy Manual project" in 2009. App. 106. This one line does not indicate which procedures existed in 2009 and which ones were later added during the August 2010 updates.

The circuit court gave Ally a chance to present further evidence on its bona fide error defense. App. 124. Squandering the opportunity, Ally resubmitted the same procedures without identifying which ones existed during its violations. App. 90-108, 158-175.

Genuine issues of material fact require more than pointing out possibilities or unidentified procedures. A non-movant must instead produce evidence sufficient for a reasonable jury to find in the non-moving party's favor. Mere speculation, or building inference upon inference, does not create a genuine issue of material fact. *Crum v. Equity Inns, Inc.*, 224 W.Va. 246, 254, 685 S.E.2d 219, 227 (2009).

5. The husband's settlement does not bar Smallwood's claims.

Ally lastly contends that its settlement with Smallwood's husband makes Smallwood's claims unfair and that the settlement precludes her lawsuit even though nothing in the husband's consent judgment suggests this preclusive effect and the two lack privity.

Consent judgments lack estoppel effect unless the judgment admits liability or states that it is preclusive. *Meadows v. Wal-mart Stores*, 207 W.Va. 203, 220-222, 530 S.E.2d 676, 693-695 (2000). This one does neither. App. 48-49, 215-216.

Collateral estoppel and *res judicata* also require that the two actions involve the same parties or privity. Privity, in turn, requires "sharing of the same legal right" or a mutual or successive relationship "to the same rights of property." Syl. pts. 3-4, *West Virginia Human Rights Comm'n v. The Esquire Group, Inc.*, 217 W.Va. 454, 461, 618 S.E.2d 463, 470 (2005). That is not this case. In this case, W.Va. Code 46A-5-101(1) grants "the consumer" a cause and right of action which each holds individually. These rights are not collective or shared.

Massey v. Green Tree Serv., LLC, 5:10-cv-00533 (S.D.W.Va. March 30, 2011)[App. 276-289], explored this point. As here, the husband and wife there were co-obligors on a note and filed separate actions claiming that the

debt collector continued to telephone them after it knew that they were represented by counsel. Green Tree removed the case to federal court, justifying the removal by arguing that the couple sought to enforce a single title or right.

Judge Berger disagreed, noting that the WVCCPA does not limit its protection from unlawful debt collection practices to only one co-obligor or consumer, and not to both. Each, the Court held, enjoy separate and distinct statutory and tort claims. App. 285-286.

Ally tries to twist *Massey* by saying that the decision supports it because Smallwood and her husband are trying to recover twice for the same telephone calls. But that does not create privity. It means only that Ally's wrongdoing separately injured multiple victims.

In *Galanos v. National Steel Corp.*, 178 W.Va. 193, 356 S.E.2d 452 (1987), an explosion at a coke facility injured multiple employees. Some filed separate actions, including an action that went to judgment for the facility owner. The circuit court held that this judgment barred subsequent actions brought by the same counsel on behalf of other employees. This Court reversed, holding that the mere involvement in a common accident, without more, does not create privity among the victims. *Id.* at Syl. pt. 3. This is true even though the victims share counsel who seeks redress from

the same wrongdoer for the same wrong. *Id.* at 196, 358 S.E.2d at 455.

So too here. Again, W.Va. Code § 46A-5-101(1) creates causes of action and rights which each consumer holds individually. Privity is not created simply because one wrong triggers each co-obligor's statutory causes and rights of action.

Lastly, the Legislature granted circuit courts the ability to weigh any unfairness in any one case by authorizing a range of penalties from only \$ 100 up to \$ 1000 per violation, which may or may not be adjusted for inflation. W.Va. Code §§ 46A-5-101(1), 46A-5-106. Under this statutory scheme, Ally's perceived unfairness may mitigate – not exonerate.

Conclusion

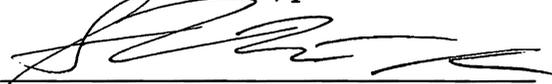
The circuit court enjoys the discretion to deny Ally's attempt to flout summary judgment procedures and rehash arguments that Ally previously raised and lost. And Ally lost for good reasons – the summary judgment record shows that it admitted a crucial fact and failed to demonstrate genuine disputes over the others.

The denial of reconsideration should be affirmed and the case remanded for a determination on damages and the statutory penalties.

Respectfully submitted,

HAMILTON, BURGESS, YOUNG
& POLLARD, pllc

By:


Ralph C. Young (W.Va. Bar # 4176)
ryoung@hamiltonburgess.com

Christopher B. Frost (W.Va. Bar # 9411)
cfrost@hamiltonburgess.com

Steven R. Broadwater, Jr.
(W.Va. Bar # 11355)
sbroadwater@hamiltonburgess.com

PO. Box 959
Fayetteville, WV 25840-0959
304/574-2727
Fax: 304/574-3709

Exhibits on File in Supreme Court Clerk's Office

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-0636

ALLY FINANCIAL INC.,

Petitioner and
Defendant Below,

v.

CATHERINE A. SMALLWOOD,

Respondent.

CERTIFICATE OF SERVICE

I, **STEVEN R. BROADWATER, JR.**, counsel for the Respondent, Catherine A. Smallwood, do hereby certify that a copy of the **RESPONDENT'S BRIEF AND SUMMARY RESPONSE TO ALLY FINANCIAL INC.** was served upon counsel of record in the above cause by enclosing the same in an envelope addressed to said attorney at the business address as disclosed in the pleadings of record herein as follows:

Robert P. Martin, Esq.
Justin C. Taylor, Esq.
Kristen V. Hammond, Esq.
BAILEY & WYANT, P.L.L.C.
P. O. Box 3710
Charleston, WV 25337

the same being the last known address with postage fully paid and depositing said envelope in the United States Mail on the 11th day of October, 2012.



STEVEN R. BROADWATER, JR.