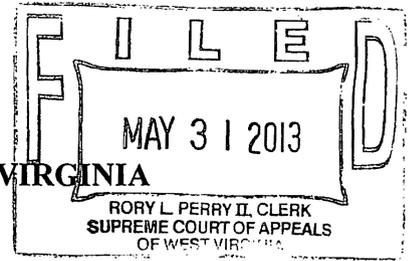


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0216

(Raleigh County Circuit Court, Civil Action No. 10-C-541-H)



VALENA R. KIDD,

Petitioner,

v.

I.C. SYSTEM, INC.,

Respondent.

**I.C. SYSTEM, INC.'S
PETITION FOR APPEAL**

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I. TABLE OF CONTENTS

I. TABLE OF CONTENTS i

II. TABLE OF AUTHORITIES iii

III. ASSIGNMENTS OF ERROR 1

IV. STATEMENT OF THE CASE 1

V. SUMMARY OF ARGUMENT 12

VI. STATEMENT REGARDING ORAL ARGUMENT 15

VII. ARGUMENT 16

 A. The Circuit Court Clearly Erred and Abused Its Discretion in Rendering Its Findings of Fact and Conclusions of Law because It (i) Wholly Discredited Petitioner’s Evidence and conversely, Credited Respondent’s Impeached Evidence, (ii) Deduced Findings of Fact Unsupported by the Evidence and Contrary to Other Findings Made by the Circuit Court, and (iii) Found Petitioner Acted with the Specific Intent to Annoy and/or Harass Respondent in Violation of West Virginia Code § 46A-2-125(d) without any Evidence.....16

 i. The Circuit Court Abused Its Discretion and Clearly Erred When It Wholly Discredited Petitioner’s Evidence and conversely, Credited Respondent’s Impeached Evidence.17

 ii. The Circuit Court Abused Its Discretion and Clearly Erred When It Deduced Findings of Fact Unsupported by the Evidence and Contrary to Other Findings Made by the Circuit Court.21

 iii. The Circuit Court Clearly Erred and Abused Its Discretion When It Found Petitioner Acted with the Specific Intent to Annoy and/or Harass Respondent in Violation of West Virginia Code § 46A-2-125(d) without any Evidence.....23

 B. Even if this Court Upholds the Circuit Court’s Findings of Fact and Conclusions of Law Related to Petitioner’s Liability Under West Virginia Code §§ 46A-2-125(d) and 46A-2-128(e), this Court Still Must Remand to Calculate a Proper Damages Award.....26

 i. The Circuit Court Unfairly Penalized Petitioner for Ten Calls Made Prior to Mr. Kidd Ever Speaking to Any of Petitioner’s Employees.26

ii.	The Circuit Court’s Award of Twenty-Five Thousand Dollars based on Petitioner’s Alleged Specific Intent to Harass and/or Annoy Fails to Mitigate Against the Educational and Procedures Programs Petitioner Implements.....	28
C.	The Circuit Court Abused Its Discretion by Denying Petitioner’s Motion to Compel in Violation of this Court’s Prior Precedent of <i>Keplinger</i>	29
D.	The Circuit Court Abused Its Discretion when It Allowed Respondent to Untimely Submit Her Proposed Findings of Fact and Conclusions of Law to the Unfair Prejudice and Detriment of Petitioner.	36
E.	The Circuit Court Abused Its Discretion by Allowing Respondent to Simultaneously Impeach and Adopt Evidence at Issue to Her Advantage.	38
VIII.	CONCLUSION.....	39

II. TABLE OF AUTHORITIES

Cases

<i>Graham v. Wallace</i> , 214 W. Va. 178, 588 S.E.2d 167 (2003).....	37
<i>Hall v. Casto</i> , 212 W. Va. 389, 572, S.E.2d 912 (2002).....	36
<i>Hollen v. Hathaway Elec., Inc.</i> , 213 W. Va. 667, 584 S.E.2d 523 (2003).....	38
<i>In Interest of Tiffany Marie S.</i> , 196 W. Va. 223, 470 S.E.2d 177 (1996).....	16, 20
<i>Keplinger v. Virginia Elec. and Power Co.</i> , 208 W. Va. 11, 537 S.E.2d 632 (2000).....	passim
<i>McDougal v. McCammon</i> , 193 W. Va. 229, 455 S.E.2d 788 (1995).....	38
<i>Messer v. Huntington Anesthesia Group, Inc.</i> , 222 W. Va. 410, 664 S.E.2d 751 (2008).....	22
<i>Public Citizen, Inc. v. First Nat Bank in Fairmont</i> , 198 W. Va. 329, 480 S.E.2d 538 (1996).....	16
<i>State ex rel. Cooper v. Caperton</i> , 196 W. Va. 208, 470 S.E.2d 162 (1996).....	16
<i>State ex rel. Erie Ins. Property & Cas. Co. v. Mazzone</i> , 220 W. Va. 525, 648 S.E.2d 31 (2007).....	29
<i>State ex rel. Leung v. Sanders</i> , 213 W. Va. 569, 584 S.E.2d 203 (2003).....	38
<i>State ex. rel. Med. Assurance West Virginia, Inc. v. Recht</i> , 213 W. Va. 457, 583 S.E.2d 80 (2003).....	33
<i>State Farm Auto. Ins. Co. v. Stephens</i> , 188 W. Va. 622, 425 S.E.2d 577 (1992).....	30
<i>State v. McGinnis</i> , 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994).....	16
<i>Vanderbilt Mortg. and Finance, Inc. v. Cole</i> , -- W. Va. --, 740 S.E.2d 562 (2013)	26

Wells v. Key Commc'ns, L.L.C.,
226 W. Va. 547, 551, 703 S.E.2d 518, 522 (2000)..... 16, 20

West Virginia Dept. of Transp., Div. of Highways v. Parkersburg Inn, Inc.,
222 W. Va. 688, 698, 671 S.E.2d 693, 703 (2008)..... 37

Statutory Authorities

W. Va. Code § 46A-2-125(d) passim

W. Va. Code § 46A-2-128(d) 22

W. Va. Code § 46A-5-101(1) 26

W. Va. Code § A6A-2-128(e)..... passim

III. ASSIGNMENTS OF ERROR

- A. The Circuit Court Clearly Erred and Abused Its Discretion in Rendering Its Findings of Fact and Conclusions of Law because It (i) Wholly Discredited Petitioner's Evidence and conversely, Credited Respondent's Impeached Evidence, (ii) Deduced Findings of Fact Unsupported by the Evidence and Contrary to Other Findings Made by the Circuit Court, and (iii) Found Petitioner Acted with the Specific Intent to Annoy and/or Harass Respondent in Violation of West Virginia Code § 46A-2-125(d) without any Evidence.**
- B. Even if this Court Upholds the Circuit Court's Findings of Fact and Conclusions of Law Related to Petitioner's Liability under West Virginia Code §§ 46A-2-125(d) and 46A-2-128(e), this Court Still Must Remand to Calculate a Proper Damages Award.**
- C. The Circuit Court Abused Its Discretion by Denying Petitioner's Motion to Compel in Violation of this Court's Prior Precedent of *Keplinger*.**
- D. The Circuit Court Abused Its Discretion when It Allowed Respondent to Gain an Unfair Tactical Advantage through Her Untimely Filing of Her Findings of Fact and Conclusions of Law.**
- E. The Circuit Court Abused Its Discretion by Allowing Respondent to Both Simultaneously Impeach and Adopt the Same Evidence to Her Advantage.**

IV. STATEMENT OF THE CASE

Respondent, Valena R. Kidd, was a resident of West Virginia at all times relevant to this action. Respondent is, and was at all times relevant to this action, married to Kenneth R. Kidd, Jr. It is undisputed that Respondent owed a debt to AT&T Wireless ("AT&T"). Respondent and her husband both admitted that she owed AT&T a legitimate debt – e.g., she used the services of AT&T, understood she would be charged for those services by AT&T and failed to pay AT&T for those services. [Hr'g¹ at 24 (Mr. Kidd), 64-65 (Respondent).] Petitioner is a debt collector that AT&T hired to collect debts from its customers, including Respondent.

¹ Hr'g refers to Appendix Volume I.

Between early May and early June of 2010, Petitioner placed calls to Respondent at her home in an effort to collect the debt owed AT&T. [R. at 235-41 (Petitioner's Records).] Most of the calls were never answered. [R.² at 152-53 (CVS' Records), 235-41 (Petitioner's Records).] Of the few calls that were answered, Respondent or her husband, would not commit to payment of the AT&T debt and yelled at or hung up on the caller. [Hr'g at 118, 122 (Smagacz), 156-57 (Heide)]; [R. at 133 (Notes).] Finally, in the last answered call on June 2, 2010, Respondent's husband told the caller that he and his wife were represented by an attorney with respect to the AT&T debt. [Hr'g at 185 (Un)]; [R. at 153 (CVS' Records), 237 (Petitioner's Records).] Petitioner made note of the attorney representation and calls to Respondent stopped. [Hr'g at 185 (Un)]; [R. at 153 (CVS' Records), 237 (Petitioner's Records).]

On June 30, 2010, Respondent filed suit against Petitioner alleging that Petitioner's calls (1) violated the West Virginia Consumer Credit and Protection Act (Count I of Plaintiff's Complaint) by calling Respondent when Petitioner allegedly knew that Respondent was represented by an attorney with respect to the debt; (2) amounted to common law negligence (Count II of Plaintiff's Complaint); (3) constituted intentional infliction of emotional distress (Count III of Plaintiff's Complaint) and was an invasion of privacy (Count IV of Plaintiff's Complaint). [R. at 184-95 (Complaint).] Prior to the bench trial, Respondent withdrew her claims against Petitioner alleging common law negligence and intentional infliction of emotional distress.

Petitioner propounded written discovery and noticed depositions to challenge the veracity of Respondent's allegations that Petitioner called to collect the AT&T debt after

² R. refers to Appendix Volume II.

learning that Respondent was represented by counsel with respect to the debt. In the written discovery, Petitioner sought information contained in other debt collection cases filed by the Respondent or her husband against other creditors at the same time as the case below and alleging the same causes of action. [R. at 308-10 (Petitioner's First Set of Discovery to Respondent).] Petitioner hoped to learn from the information in the other collection cases when Respondent told her other creditors she had counsel. [R. at 303 (Motion to Compel).] Respondent also sought financial and employment records that would show where the Respondent or her husband were when collection calls allegedly were placed. [R. at 304 (Motion to Compel), 308-09 (Petitioner's First Set of Discovery to Respondent).] Petitioner hoped this information would show that Respondent and her husband were not home on days or at times when the Respondent alleged Petitioner was told that Respondent was represented by counsel with respect to the AT&T debt. [R. at 162-66 (Aug. 16, 2011, Hr'g).] Respondent objected to providing the information about her other collection cases and also objected to providing the employment and financial information requested by Petitioner. [R. at 345 (June 30, 2011, Email from Broadwater to Webb).] Petitioner moved to compel responses, but the lower court denied the motion. [R. at 350-52 (Order Denying Motion to Compel).] The Respondent and her husband were deposed as were the Petitioner's collectors who attempted collection calls and actually spoke with Respondent or her husband about the AT&T account.

The case was tried to the Court on September 4 and 5, 2012. At the trial, Petitioner presented overwhelming evidence that completely refuted Respondent's allegation that Petitioner called Respondent to collect the AT&T debt after Petitioner knew that Respondent was represented by counsel with respect to the debt; impeached Respondent's credibility, and the

testimony of Petitioner's witnesses was nowhere called into question and the credibility of Petitioner's witnesses was not impeached. Specifically, at the bench trial, Petitioner showed:

- Petitioner, in its general business practice, maintains electronic records of each call placed to a debtor, by date, time called, duration of call, and identity of the caller. [Hr'g at 195 (Volk).]

- Petitioner's employees place notes and codes on the computer record of each account called to detail the content of each collection call. [Hr'g at 195 (Volk).]

- All of Petitioner's records are stored electronically. [Hr'g at 195 (Volk).]

- All calls placed by Petitioner to Respondent, in any manner, are electronically logged and notated in Petitioner's computer record of Respondent's account. [Hr'g at 195 (Volk)]; [R. at 235-41 (Petitioner's Records).]

- There are no known errors in the computer system that Petitioner uses to maintain its records. [Hr'g at 229 (Volk).]

- Prior to letting any employee engage in collection calls, Petitioner provides training to its employees on the requirements of the federal and state laws that regulate debt collection. The initial training includes classroom work and observing other callers. Additionally, each employee is tested to assure that they have mastered their training. [Hr'g at 104-12 (Smagacz), 132-42 (Heide), 171-78 (Un), 191-94 (Volk).]

- The job training of Petitioner includes instruction on the Fair Debt Collection and Practice Act ("FDCPA"). [Hr'g at 134, 136, 140 (Heide), 172, 174-75 (Un), 214-15 (Volk)]; [R. at 1-24 (Training Manual).]

- The job training of Petitioner includes instruction on West Virginia state laws that differ from the FDCPA. [Hr'g at 158-60 (Heide), 175-77 (Un)]; [R. at 36, 38 (Training Manual).]

- Petitioner's employees are re-tested at least once a year on the FDCPA and the states laws. [Hr'g at 139 (Heide), 177-78 (Un).]

- As part of their initial and ongoing training, all Petitioner employees are trained to flag an account in the computer system and take down relevant information when the person called indicates they are represented by an attorney. The computer system then ceases call activity to that account. [Hr'g at 124-25 (Smagacz), 186-86 (Un).]

- During each collection call, Petitioner's employees are also trained to first verify that they are speaking with the debtor or the debtor's spouse and, if so, to provide the debtor or the debtor's spouse with a "mini-Miranda" at the inception of each collection call and

before discussing the debt with the debtor or the debtor's spouse. [Hr'g at 116 (Smagacz), 145-46 (Heide), 209 (Volk).]

- If the caller will not verify that they are the debtor or debtor's spouse, the collection call is terminated. [Hr'g at 117 (Smagacz), 145-46 (Heide), 209 (Volk).]

- Where the caller verifies that they are the debtor or debtor's spouse, the following "mini-Miranda" is provided by the Petitioner's employee: "This is an attempt to collect a debt by a debt collector. Any information obtained will be used for that purpose and the call may be monitored or recorded for quality purposes." [Hr'g at 146-47 (Heide).]

- As is evident from the time recording on the Justin Heide video of his Evidentiary Deposition, it took Mr. Heide twenty (20) second to speak the mini-Miranda – from counter 16:20 to counter 16:40 on the video tape. Twenty seconds translates into between 3 and 4 tenths of a minute. [Hr'g at 146-47 (Heide).]

- The computer records maintained by Petitioner for the Kidd account indicated that a total of 46 calls were attempted by Petitioner callers to reach Respondent in an effort to collect on the AT&T debt – 44 calls were placed to a home phone number – (304) 872-0190 – and 2 calls were placed to a work number – (304) 343-9250. [R. at 152-53 (CVS' Records), 235-41 (Petitioner's Records).]

- The work number was deemed a bad or wrong number and Respondent was not reached in either call at that number. [R. at 239 (Petitioner's Records).]

- Of the 44 call attempts to the Kidd home number, the majority – 41 calls -- resulted in no answer (5 calls), no contact (7 calls), dead air (3 calls), or the calls were terminated because an answering machine answered the calls (26 calls). [Hr'g at 203-14 (Volk)]; [R. at 235-41 (Petitioner's Records).]

- Account notes indicating a "no answer", "no contact" or "dead air" means there was not a completed call between the debtor and Petitioner's collector and that the debtor did not speak to Petitioner's employee. [Hr'g at 201-02 (Volk).]

- The computer program that controls the dialer that initiates Petitioner collection calls determines if a live person or an answering machine answers the call. If an answering machine answers the call, the call is terminated and is not transferred to a collector. [Hr'g at 202 (Volk).]

- Of the 44 call attempts to the Kidd home number, only 3 calls were answered by the Kidds. [R. at 235-41 (Petitioner's Records).]

- The first outbound collection call attempt made to Respondent by Petitioner was on May 3, 2010 at 8:49 Central Time. No call attempts were made on May 2, 2010. [Hr'g at 202 (Volk)]; [R. at 152 (CVS' Records), 240 (Petitioner's Records).]

- The first call made by Petitioner's collector that was answered by Mr. or Mrs. Kidd occurred on May 6, 2010 at 4:44 p.m. Central Time. Petitioner's collector who participated in the call was Enne Un. Mr. Un called and spoke to Mr. Kidd, verified that he was the husband of Respondent and gave the mini-Miranda. In the call, Mr. Kidd made no commitment to make a payment on the AT&T debt and hung up. Mr. Kidd did not tell Mr. Un that he or his wife were represented by an attorney. [Hr'g at 181-83 (Un)]; [R. at 152 (CVS' Records), 239 (Petitioner's Records).]

- One of the calls listed as a "no contact" call in Petitioner's records-- the call that occurred on May 20, 2010 at 6:16 p.m. Central Time -- was answered by someone at the Kidd home number and was transferred to Cassie Smagacz. Ms. Smagacz did not have an opportunity to verify the identity of the person who answered the phone. The person was yelling as the call was being transferred and hung up the phone. The person yelling on transfer of this call did not tell Ms. Smagacz that he or she was represented by an attorney. [Hr'g at 118-22 (Smagacz)]; [R. at 134 (Notes), 237 (Petitioner's Records).]

- The second call made by Petitioner's collector that was answered by Mr. or Mrs. Kidd occurred on May 24, 2010 at 3:17 p.m. Central Time. Petitioner's collector who participated in the call was Justin Heide. Mr. Heide called and spoke to Respondent. In the call, Respondent verified who she was but hung up on Mr. Heide before providing any information about her intentions regarding the AT&T debt. Respondent did not tell Mr. Heide she had an attorney during the call. [Hr'g at 148-51 (Heide)]; [R. at 134 (Notes), 237 (Petitioner's Records).]

- Another one of the calls listed as a "no contact" call in Petitioner's records -- the call that occurred on June 2, 2010 at 9:49 a.m. Central Time -- was answered by someone at the Kidd home number and was transferred to Petitioner's collector Enne Un. Mr. Un did not have an opportunity to verify the identity of the person who answered the phone. A female answered the phone and hung up before verifying who she was. The caller did not tell Mr. Un that she was represented by an attorney. [Hr'g at 184-85 (Un)]; [R. at 236 (Petitioner's Records).]

- The third and last call made by Petitioner's collector that was answered by Mr. or Mrs. Kidd occurred on June 2, 2010 at 5:22 p.m. Central Time. Petitioner's collector who participated in the call was Enne Un. Mr. Un verified that he was speaking to Mr. Kidd who stated that he and his wife had an attorney and provided partial information about the attorney. Mr. Un put the attorney information in Petitioner's computer system and calls to the collection calls from Petitioner the Kidds ceased. [Hr'g at 185-86 (Un), 212-15 (Volk)]; [R. at 153 (CVS' Records), 236 (Petitioner's Records).]

- Petitioner's records are consistent with the Call Detail Report obtained from Ioan Pomian, the Custodian of Records for Computer Voice Systems, Inc. who prepares call reports based upon data provided by third-party phone service providers like Verizon. The Call Detail Report lists all of the calls placed by Petitioner to the Kidd home number at all times relevant hereto and show the duration of each call in tenths of minutes (six second intervals) from when the call is initiated until it is terminated -- including ring time. [Hr'g at 230-31]; [R. at 157-58 (Pomian Affidavit).]

- Mr. Kidd and Respondent both participated in the maintenance of their call log where they logged collection calls from a host of creditors including AT&T, GMAC, Chase Visa, Lowe's Visa, BRC, GE Money Bank, World Financial, JC Penney and CVCS. [Hr'g at 26-27 (Mr. Kidd), 66-67 (Respondent)]; [R. at 143-51 (Respondent's Creditor Log).]
- Mr. Kidd, though unemployed at the time period in question, was not home for every call and Respondent was in nursing school at the time. [Hr'g at 29 (Mr. Kidd), 66-67 (Respondent).]
- During the time period in question, the Kidds had an answering machine attached to their home phone that picked up after four rings. [Hr'g at 29 (Mr. Kidd).]
- During the time period in question, the Kidds had a caller ID on their home phone that recorded calls placed to the home number in reverse chronological order. [Hr'g at 29-30 (Mr. Kidd).]
- The Kidds took calls off their caller ID and wrote them on their call log. The calls taken off the caller ID and transferred to the call log were written on the call log in reverse chronological order. [Hr'g at 30 (Mr. Kidd).]
- On the Kidds' call log, if there is nothing written in the column "Caller's Name", then Mr. or Mrs. Kidd did not speak to the caller. [Hr'g at 33 (Mr. Kidd), 66-67 (Respondent).]
- In discovery and at trial, Mr. and Mrs. Kidd gave multiple and inconsistent testimony about the collection calls they allegedly received from Petitioner's debt collectors. In his deposition testimony, Mr. Kidd testified that he spoke with Petitioner's debt collectors "more than ten times." [Hr'g at 30-31 (Mr. Kidd).]
- Mr. Kidd identified these calls during his deposition by putting a yellow highlighter mark to the left of the calls on a copy of the Kidds' call log. [R. at 143-51 (Respondent's Creditor Log).]
- Mr. Kidd admitted in his trial testimony that if there is no name in the "Caller's Name" column of Defendant's trial exhibit number 1, then he did not speak to anyone from Petitioner but rather copied the call information from the caller ID. This eliminates 6 of the 10 alleged calls -- specifically, calls numbered 2 (May 6, 2010 at 10:21 a.m.), 14 (May 18, 2010 at 11:23 a.m.), 15 (May 18, 2010 at 10:16 a.m.), 28 (May 22, 2010 at 12:52 p.m.), 29 (May 24, 2010 at 9:44 a.m.) and 33 (June 2, 2010 at 2:05 p.m.) from the 10 highlighted calls from Defendant's trial exhibit number 1. Leaving 4 calls still at issue -- specifically, calls numbered 1 (May 2 or May 6, 2010 at 5:42 p.m.), 8 (May 15, 2010 at 8:47 a.m.), 17 (May 18, 2010 at 1:52 p.m.) and 34 (June 2, 2010 at 6:20 p.m.). [Hr'g at 40-43 (Mr. Kidd).]
- At trial on direct examination, Mr. Kidd testified about 4 instances where he allegedly spoke to Petitioner's debt collector but had a different list of 4 -- (1) on May 2 or May 6, 2010 at 5:42 p.m.; (2) on May 15, 2010 at 8:47 a.m.; (3) on May 18, 2010 at 1:52 p.m.;

and (4) on June 2, 2010 at 10:48 a.m. – Mr. Kidd direct testimony about the time of the June 2, 2010 call was at odds with his testimony on cross-examination. [Hr’g at 31-32 (Mr. Kidd).]

- Mr. Kidd testified on cross-examination that he believed the May 2 or May 6, 2010 call took place on May 2. [Hr’g at 43-46 (Mr. Kidd).]

- Petitioner’s records and the Call Detail Report provided by Ioan Pomian, the Custodian of Records for Computer Voice Systems, Inc. show no call activity between Petitioner and the Kidds on May 2, 2010. [*Compare* R. at 152 (CVS’ Records) *and* 239 (Petitioner’s Records) *with* 144 (Respondent’s Records)]; [R. at 157-58 (Pomian Affidavit).]

- Petitioner’s records and the Call Detail Report provided by Ioan Pomian, the Custodian of Records for Computer Voice Systems, Inc. show a call from Petitioner to the Kidds on May 15, 2010 at 8:47 a.m. Petitioner’s records show no contact and the Call Detail Report shows a call duration of only seven tenths of a minute – between 36 and 42 seconds – from time of initiation to time of termination. The call duration was of too short a duration to allow for the phone to ring out, Petitioner’s collector to verify the identity of the caller, provide the mini-Miranda, inquire about the AT&T debt and exchange information about retained counsel. [*Compare* R. at 152 (CVS’ Records) *and* 238 (Petitioner’s Records) *with* 145 (Respondent’s Records)]; [R. at 157-58 (Pomian Affidavit).]

- Petitioner’s records and the Call Detail Report provided by Ioan Pomian, the Custodian of Records for Computer Voice Systems, Inc. show a call from Petitioner to the Kidds on May 18, 2010 at 1:52 p.m. Petitioner’s records show no answer and the Call Detail Report shows a call duration of only four tenths of a minute – between 18 and 24 seconds – from time of initiation to time of termination. Again, the call duration was of too short a duration to allow for the phone to ring out, Petitioner’s collector to verify the identity of the caller, provide the mini-Miranda, inquire about the AT&T debt and exchange information about retained counsel. [*Compare* R. at 152 (CVS’ Records) *and* 237 (Petitioner’s Records) *with* 146 (Respondent’s Records)]; [R. at 157-58 (Pomian Affidavit).]

- Mr. Kidd’s testimony about the time of the June 2, 2010 call is contradictory. However, Petitioner’s records and the Call Detail Report provided by Ioan Pomian, the Custodian of Records for Computer Voice Systems, Inc. show a call from Petitioner to the Kidds on June 2, 2010 at 5:22 p.m. Petitioner’s records show that Mr. Kidd did provide partial information about being represented by an attorney to Enne Un. [Hr’g at 185-86 (Un)]; [R. at 153 (CVS’ Records) 237 (Petitioner’s Records)]; [R. at 157-58 (Pomian Affidavit).]

- Mr. Kidd testified in direct and cross-examination that he told every collector who called that he and his wife had an attorney. [Hr’g at 10 (Mr. Kidd).] In a recorded call from a transfer agent for Petitioner, Mr. Kidd is heard talking to the agent about his wife but did not provide the caller with any information about an attorney. [Hr’g at 49 (Mr. Kidd).]

- Respondent testified in direct examination that she spoke to the Petitioner’s collectors on 5 occasions -- May 19, 2010 at 1:52 p.m. (“Marcie”); May 20, 2010 at 4:28 p.m. (“T.J.”); May 20, 2010 at 5:52 p.m. (“Jane”); May 24, 2010 at 4:16 p.m. (“Justin”) and June 2, 2010 at 10:48 a.m. (“Nathan Robert”). [Hr’g at 70-74 (Respondent).]

- Respondent’s testimony at trial about the calls where she spoke with a collector from Petitioner is inconsistent with an Affidavit she offered in support of her Motion for Summary Judgment in the case where she offered a different list of calls – many of which were calls that Mr. Kidd testified he took in his direct examination testimony. [*Compare* Hr’g at 70-74 (Respondent) *with* R. at 154-56 (Respondent Affidavit).]

- Specifically, Respondent’s Affidavit affirms that Respondent and not Mr. Kidd took a call from Petitioner on May 2, 2010 at 5:42 p.m. This is inconsistent with Mr. Kidd’s testimony at trial and with Respondent’s trial testimony. [*Compare* Hr’g at 42-45 (Mr. Kidd) *with* R. at 154-56 (Respondent Affidavit).]

- Specifically, Respondent’s Affidavit affirms that Respondent and not Mr. Kidd took a call from Petitioner on May 6, 2010 at 5:42 p.m. This is inconsistent with Mr. Kidd’s testimony at trial and with Respondent’s trial testimony. Mr. Kidd testified that the May 2 and May 6 calls are one and the same and that he believes the call took place on May 2. [*Compare* Hr’g at 42-45 (Mr. Kidd) *with* R. at 154-56 (Respondent Affidavit).]

- Specifically, Respondent’s Affidavit affirms that Respondent and not Mr. Kidd took a call from Petitioner on May 15, 2010 at 8:47 a.m. This is inconsistent with Mr. Kidd’s testimony at trial and with Respondent’s trial testimony. [*Compare* Hr’g at 48-50 (Mr. Kidd) *with* R. at 154-56 (Respondent Affidavit).]

- Specifically, Respondent’s Affidavit affirms that Respondent and not Mr. Kidd took a call from Petitioner on May 18, 2010 at 1:52 p.m. This is inconsistent with Mr. Kidd’s testimony at trial and with Respondent’s trial testimony. [*Compare* Hr’g at 48-50 (Mr. Kidd) *with* R. at 154-56 (Respondent Affidavit).]

- Petitioner’s records and the Call Detail Report provided by Ioan Pomian, the Custodian of Records for Computer Voice Systems, Inc. show a call from Petitioner to the Kidds on May 19, 2010 at 1:52 p.m. (“Marcie”). Petitioner’s records show dead air and the Call Detail Report shows a call duration of only four tenths of a minute – between 18 and 24 seconds – from time of initiation to time of termination. The call duration was of too short a duration to allow for the phone to ring out, Petitioner’s collector to verify the identity of the caller, provide the mini-Miranda, inquire about the AT&T debt and exchange information about retained counsel. [*Compare* R. at 152 (CVS’ Records) *and* 237 (Petitioner’s Records) *with* 146 (Respondent’s Records)]; [R. at 157-58 (Pomian Affidavit).]

- Additionally, no collector named “Marcie” from Petitioner worked on the Kidd account. [R. at 235-41 (Petitioner’s Records).]

- Petitioner’s records and the Call Detail Report provided by Ioan Pomian, the Custodian of Records for Computer Voice Systems, Inc. show a call from I.C. System to the Kidds on May 20, 2010 at 4:28 p.m. (“T.J.”). Petitioner’s records show no contact and the account notes indicate that a female answered the phone, refused to verify the information that Petitioner had in their file and the collector ended the call. [Hr’g at 210-11 (Volk)]; [R. at 237 (Petitioner’s Records).]

- Additionally, no collector named “T.J.” from Petitioner worked on the Kidd account. [R. at 235-41 (Petitioner’s Records).]

- Petitioner’s records and the Call Detail Report provided by Ioan Pomian, the Custodian of Records for Computer Voice Systems, Inc. show a call from Petitioner to the Kidds on May 20, 2010 at 5:52 p.m. (“Jane”). Petitioner’s records show that an answering machine took the call and the Call Detail Report shows a call duration of only two tenths of a minute – between 6 and 12 seconds – from time of initiation to time of termination. The call duration was of too short a duration to allow for the phone to ring out, the I.C. System collector to verify the identity of the caller, provide the mini-Miranda, inquire about the AT&T debt and exchange information about retained counsel. [*Compare* R. at 152 (CVS’ Records) *and* 237 (Petitioner’s Records) *with* 146 (Respondent’s Records)]; [R. at 157-58 (Pomian Affidavit).]

- Additionally, no collector named “Jane” from I.C. System worked on the Kidd account. [R. at 235-41 (Petitioner’s Records).]

- Petitioner’s records and the Call Detail Report provided by Ioan Pomian, the Custodian of Records for Computer Voice Systems, Inc. show a call from Petitioner to the Kidds on May 24, 2010 at 4:16 p.m. (“Justin”). Petitioner’s collector who participated in the call was Justin Heide. Mr. Heide called and spoke to Respondent. In the call, Respondent verified who she was but hung up on Mr. Heide before providing any information about her intentions regarding the AT&T debt. Respondent did not tell Mr. Heide she had an attorney during the call. [Hr’g at 148-50 (Heide)]; [R. at 133 (Notes), 237 (Petitioner’s Records).]

- Petitioner’s records and the Call Detail Report provided by Ioan Pomian, the Custodian of Records for Computer Voice Systems, Inc. show a call from Petitioner to the Kidds on June 2, 2010 at 10:48 a.m. (“Nathan Robert”). Petitioner’s records show no contact. The call was answered by someone at the Kidd home number and was transferred to Petitioner’s collector Enne Un. Mr. Un did not have an opportunity to verify the identity of the person who answered the phone. A female answered the phone and hung up before verifying who she was. The caller did not tell Mr. Un that she was represented by an attorney. [Hr’g at 183-84 (Un)]; [R. at 236 (Petitioner’s Records).]

- Additionally, no collector named “Nathan Robert” from Petitioner worked on the Kidd account. [R. at 235-41 (Petitioner’s Records).]

- Mr. Kidd testified that the call log may be inaccurate. [Hr’g at 26-27 (Mr. Kidd).]

Following the close of the evidence on September 5, 2010, the Circuit Court directed the parties to submit their respective proposed Findings of Fact and Conclusions of Law on or before October 5, 2012. [Hr’g at 235-36.] Petitioner properly complied. [R. at 473 (Docket Sheet).] Respondent did not. In fact, Respondent waited an additional seventeen (17)

days after receipt of Petitioner's proposed Findings of Fact and Conclusions of Law before she submitted hers. [R. at 463-69 (Motion to Strike).] This allowed Respondent the opportunity to make specific arguments, not previously presented, to Petitioner's proposed Findings of Fact and Conclusions of Law.

On January 29, 2013, the Circuit Court reached its decision. The Circuit Court found that Mr. Kidd informed Petitioner on May 6, 2010, that Lynn Pollard ("attorney Pollard") represented them and provided Petitioner with attorney Pollard's telephone number. [R. at 360 (Final Order, Finding at ¶ 36).] The Circuit Court further concluded that Petitioner knew that Respondent and Mr. Kidd retained attorney Pollard on May 3, 2010. [R. at 360-61 (Final Order, Findings at ¶¶ 37-38).] Next, the Circuit Court determined that Petitioner made a total of forty-six (46) phone calls, forty-four (44) to Respondent's home phone number and two (2) to a work phone number which never rang (bad/incorrect telephone number). [R. at 356 (Final Order, Finding at ¶ 20).] Finally, the Circuit Court determined that Mr. Kidd and Respondent presented credible evidence and testimony, and the Circuit Court discredited Petitioner's testimony and evidence except for the number of calls made. [R. at 357-59 (Final Order, Findings at ¶¶ 27-35).] Consequently, based on these findings, the Circuit Court found Petitioner violated the West Virginia Consumer Credit and Protection Act ("WVCCPA") specifically West Virginia Code §§ 46A-2-125(d) and 46A-2-128(e):

- A preponderance of the evidence showed that Mr. Kidd or Respondent had ten (10) conversations with Petitioner's employees in violation of the WVCCPA and, therefore, fined Petitioner a statutory penalty of \$4,628.14 for each call for a total award of \$46,281.40 [R. at 363 (Final Order, Conclusion at ¶ 10)];
- A preponderance of the evidence showed that Petitioner caused Mr. Kidd and Respondent's phone to ring thirty-four (34) times and, therefore, fined Petitioner a statutory penalty of \$462.81 for a total award of \$15,735.54 [R. at 363-64 (Final Order, Conclusion at ¶ 11)];

- A preponderance of the evidence showed that Petitioner engaged in a pattern and practice of calling Respondent with the intent to annoy and harass and, therefore, the Circuit Court awarded Respondent damages of Twenty-Five Thousand Dollars (\$25,000.00) [R. at 365 (Final Order, Conclusion at ¶ 19)];
- The total award of \$87,016.94 related to Petitioner's alleged WVCCPA violations exceeded Petitioner's stipulated damages limit and, therefore, the Circuit Court deemed moot any award for privacy violations or attorneys' fees [R. at 366 (Final Order, Conclusions at ¶¶ 20-22)].

Petitioner now appeals this judgment and award because it was entered against the overwhelming weight of the evidence presented at trial and because the lower court improperly limited Petitioner's right to discover information material to the case.

V. SUMMARY OF ARGUMENT

Four independent reasons exist for this Court to reverse and remand this litigation, or alternatively reduce the damages. The first reason arises out of the Circuit Court's erroneous Findings of Fact and Conclusions of the Law. The Circuit Court clearly erred and abused its discretion because the overwhelming evidence not only favored Petitioner, but also Respondent's own evidence and testimony contradicted itself. Moreover, the Circuit Court's clear error and abuse of discretion is self-evident based upon several Findings of Fact directly contradicting other Findings made. For example, the Circuit Court concluded that the evidence conclusively showed that Mr. Kidd informed Petitioner that he and Respondent retained attorney Pollard's services for the first time Petitioner on May 6, 2010. However in later Findings, the Circuit Court held that Petitioner knew on May 3, 2010 that attorney Pollard represented Respondent related to the debt. It is simply impossible for Petitioner to have known Respondent retained counsel three days before Mr. Kidd allegedly communicated this information for the first time. This error alone undermines and calls into question the validity of the Circuit Court's Final Order. Moreover, Petitioner placed ten (10) calls from May 3, 2010 to May 6, 2010, none of

which could have violated the WVCCPA as neither Respondent or Mr. Kidd had yet to even speak with any of Petitioner's employees. Yet, the Circuit Court still fined Petitioner almost Nine Thousand Dollars for these ten (10) phone calls. Moreover, the Circuit Court also inexplicably found Petitioner acted with the specific intent to annoy and/or harass based solely upon the forty-four (44) alleged violations. The Circuit Court also failed to credit Petitioner for its comprehensive education and training programs. Debt collecting is not *per se* illegal, or at least it should not be. This multitude of errors show a need for reversal.

Secondly, the Circuit Court abused its discretion in denying Petitioner's Motion to Compel. Through investigation, Petitioner learned that Respondent filed five (5) concurrent lawsuits against other creditors alleging similar violations under the WVCCPA during the time period in question. Therefore, Petitioner properly asked for information in discovery related to the other suits. The relevancy of such evidence is undeniable. If the requested discovery showed that Respondent waited until late May or June to inform her other creditors of attorney Pollard's involvement, this fact tends to help prove an issue in dispute: when Respondent and/or Mr. Kidd informed Petitioner of their retention of counsel. Petitioner also sought employment and financial records that would show where the Respondent or her husband were when the collection calls were allegedly placed. Respondent improperly resisted these discovery requests under the guise of relevancy and a confidentiality agreement and, therefore, refused to produce the information requested. Petitioner moved to compel. At the hearing, the Circuit Court denied the motion as to the employment and financial records based on relevancy and took the remaining issues under advisement, so that the lower court could contact counsel for the other creditors at issue. It never did so. Instead, mere weeks before the trial, the lower court suddenly denied Petitioner's Motion and stated Petitioner always possessed the ability to subpoena the

creditors yet failed to do so. This ruling clearly and undeniably violates this Court's holding in *Keplinger v. Virginia Elec. and Power Co.*, 208 W. Va. 11, 537 S.E.2d 632 (2000). The jurisprudence of this State prohibits a party from using Rule 45 of the West Virginia Rules of Civil Procedure to circumvent a disputed discovery issue. Consequently, this error and misapplication of the law requires reversal.

Third, the Circuit Court permitted, over Petitioner's objection, Respondent to untimely file her proposed Findings of Fact and Conclusions of Law and two other documents not requested by the Court (an Addendum of Calls and Closing Argument/Summary of the Evidence). This untimely filing gave Respondent the opportunity to review Petitioner's proposed Findings of Fact and Conclusions of Law and tailor make responsive arguments to them. This is unfair and procedurally improper. Therefore, this Court should reverse and remand this case as a consequence.

Finally, the Circuit Court abused its discretion in allowing Respondent to simultaneously adopt Petitioner's calls log as accurate evidence of the number of calls made, while at the same time allowing Respondent to impeach Petitioner's Records as inaccurate as to whether a call was completed, the length of calls and the communications made during the calls, if any. Respondent should not be able to "have her cake and eat it to." If she chooses to adopt Petitioner's Records, she must also adopt the information about the calls reflected in the records. If she impeaches Petitioner's Records, than she must rely on the number of calls she and her husband documented. As the Circuit Court's evidentiary ruling resulted in an untenable position, this Court should reverse and remand this litigation, or alternatively adjust the damages award.

VI. STATEMENT REGARDING ORAL ARGUMENT

Both Rule 19 and 20 of the Revised Rules of Appellate Procedure support oral argument on this appeal. Rule 19 applies to Petitioner's arguments related to the Circuit Court's erroneous Findings of Fact and Conclusions of Law, abuse of discretion in denying Petitioner's Motion to Compel, and abuse of discretion on its evidentiary ruling. The law on these issues is well settled. Because the law is settled, it magnifies the Circuit Court's error. Nevertheless, oral argument will aid this Court in adjudication this appeal because it will provide a clear record of the events that transpired. Moreover, it will allow this Court the opportunity to reaffirm syllabus point six (6) in *Keplinger* which has not been revisited by this Court since the 2000 decision.

Rule 20 also makes oral argument appropriate in this matter because it involves "an inconsistenc[y] or conflict[] among the decisions of the lower tribunals:" namely, when to permit or strike belated Findings of Fact and Conclusions of Law. In this instance, the Circuit Court allowed Respondent to submit her proposed Findings of Fact and Conclusions of Law, more than two weeks after the Circuit Court's self-imposed deadline and after Petitioner previously filed its Findings of Fact and Conclusion of Law. The belated filing of proposed Orders frequently arises in the lower tribunals with little or no current guidance existing on the subject matter at hand. In an effort to prevent future errors, Petitioner recommends the following syllabus point of law:

- A Circuit Court abuses its discretion when it permits a party to file late Findings of Fact and Conclusions of Law absent good cause shown where the late filing prejudices the opposing party. Indicia of prejudice include: (i) the raising of new arguments; and (ii) the addressing/responding to specific arguments raised in the opposing party's timely submission.

VII. ARGUMENT

- A. The Circuit Court Clearly Erred and Abused Its Discretion in Rendering Its Findings of Fact and Conclusions of Law because It (i) Wholly Discredited Petitioner's Evidence and conversely, Credited Respondent's Impeached Evidence, (ii) Deduced Findings of Fact Unsupported by the Evidence and Contrary to Other Findings Made by the Circuit Court, and (iii) Found Petitioner Acted with the Specific Intent to Annoy and/or Harass Respondent in Violation of West Virginia Code § 46A-2-125(d) without any Evidence.**

“In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review.” Syl. pt. 1, *Public Citizen, Inc. v. First Nat Bank in Fairmont*, 198 W. Va. 329, 480 S.E.2d 538 (1996). “[O]stensible findings of fact, which entail the application of law or constitute legal judgments transcend ordinary factual determinations [and, therefore,] must be reviewed *de novo* Syl. pt. 1, in part, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996). “A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” Syl. pt. 1, in part, *In Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). The Circuit Court abuses its discretion when it acts in an arbitrary an irrational manner. *See Wells v. Key Commc'ns, L.L.C.*, 226 W. Va. 547, 551, 703 S.E.2d 518, 522 (2000) quoting *State v. McGinnis*, 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994).

Following a two day bench trial on September 4 and 5, 2012, the Circuit Court found that (i) Petitioner knew that attorney Pollard represented Respondent on May 3, 2010 [R. at 360-61 (Final Order, Findings at ¶¶ 37-38).]; (ii) found that on May 6, 2010, Mr. Kidd

communicated to Petitioner, in the first instance, attorney Pollard's name and telephone number [R. at 360 (Final Order, Finding at ¶ 36)]; (iii) that Petitioner made forty-four (44) calls to Respondent's home phone number; and (iv) that Mr. Kidd and Respondent presented wholly credible evidence, while Petitioner's evidence displayed serve inaccuracies. [R. at 357-59 (Final Order, Findings at ¶¶ 27-35).] Because the overwhelming evidence supports Petitioner, the Circuit Court's Findings of Fact contradict each other, and no evidence of specific intent exists, the Circuit Court clearly erred and abused its discretion. Therefore, this Court should reverse and remand.

i. The Circuit Court Abused Its Discretion and Clearly Erred When It Wholly Discredited Petitioner's Evidence and conversely, Credited Respondent's Impeached Evidence.

The testimony at the hearing and the evidence in the record support that a definite and firm conviction that the Circuit Court made a mistake. In its Findings of Fact and Conclusions of Law, the Circuit Court called into question the accuracy of Petitioner's records. [R. at 357 (Final Order, Finding at ¶ 28).] As such, the Circuit Court found Petitioner liable for forty-four (44) violations of West Virginia Code § 46A-2-128(e). [R. at 360-61 (Final Order, Conclusions at ¶¶ 10, 11.)] Because the undisputed evidence in the record undermines the Circuit Court's conclusion, this Court should reverse.

On a preliminary note, Respondent never took issue with the evidence submitted by Ioan Pomian. [Hr'g at 230.] Mr. Pomian, the records custodian for Computer Voice Systems ("CVS"), provided an activity sheet of calls made from Petitioner's phone number of (651) 204-1347 to Respondent's home phone number of (304) 872-0190, which his company created through data received by Verizon, Petitioner's third-party phone provider. [R. at 152-53 (CVS' Records) at 157-58 (Pomian Affidavit).] These records, again accumulated through independent

data provided by Verizon, matched Petitioner's records [Compare R. at 152-53 (CVS' Records) *with* 235-241 (Petitioner's Records)], while Respondent's records and caller id only showed thirty-five (35) of the forty-four (44) total calls. [R. at 143-51 (Respondent's Call Log).] Notwithstanding that the Circuit Court adopted the information regarding the number of calls from Petitioner's records, the Circuit Court's Findings of Fact and Conclusions of Law never once mention the Pomian Affidavit or these independent records. This failure directly undermines the Circuit Court's determination of credibility.

The duration amount stated for the calls in CVS' records supports the testimony of Petitioner's witnesses En Un, Cassie Smagacz and Justin Heide. All three testified that the calls that they participated in were short in duration and Respondent and/or Mr. Kidd hung up soon after these employees attempted to verify their identity or offered the mini-Miranda. [Hr'g at 118-22 (Smagacz), 148-51 (Heide), 181-85 (Un).] Moreover, the one recorded call illustrated the short duration of the telephone exchange between Petitioner and the Kidds and lasted no more than thirty (30) seconds. [Hr'g at 49.] Yet, the Circuit Court ignores this. [R. at 357-63 (Final Order).]

Instead, the Circuit Court found wholly credible Respondent's evidence. [R. at 357-61 (Final Order, Finding at ¶¶ 27-39).] Even a cursory review shows that Respondent's evidence suffer from a variety of inconsistencies and variances none of which even a favorable standard of review can explain away. For instance, Respondent swore, under the penalty of perjury, that she not only spoke with Petitioner on May 2, 2010, but also provided Petitioner with attorney Pollard's name and telephone number. [R. at 154 (Respondent Affidavit at ¶ 1).] This testimony got discredited by everybody. Petitioner's records discredited it. [R. at 240 (Petitioner's Records).] CVS' records discredited it. [R. at 152 (CVS' Records).] Respondent's

own husband discredited it. [Hr'g at 42-45 (Mr. Kidd).] And, worst of all, Respondent discredited it. [Compare R. at 154 (Respondent Affidavit at ¶ 1) with Hr'g 52-60 (Respondent).] Again, the Circuit Court's finding of credibility ignores this evidence. [R. at 357-61 (Final Order, Finding at ¶¶ 27-39).] More egregious examples exist.

Both Respondent and Mr. Kidd swore and testified that on every call either one answered from Petitioner that they informed the debt collector that attorney Pollard represented them and provided her telephone number. [Hr'g at 10-11, 48-49 (Mr. Kidd) 60 (Respondent)]; [R. at 154 (Respondent Affidavit).] However, the evidence proved otherwise. In the phone call Petitioner recorded, Mr. Kidd never stated that attorney Pollard represented him or Respondent:

Collector: Hello, is Valena available?

Mr. Kidd: May I ask who's calling?

Collector: Yes, I'm calling for -- trying to reach Valena Kidd.

Mr. Kidd: What is it in regard to?

Collector: It's a personal business matter, sir. Are you her husband?

Mr. Kidd: Yes, I'm her husband.

Collector: Okay. She's not available?

Mr. Kidd: No, I'm her husband. You can talk to me.

[Hr'g at 49.] Prior to hearing this recording, Mr. Kidd testified that he was positive that he always told Petitioner's employees that attorney Pollard represented Respondent and him. [Hr'g at 2.] Just another evidentiary discrepancy the Circuit Court failed to note. [R. at 357-61 (Final Order, Finding at ¶¶ 27-39).]

The inconsistencies and discrepancies in Respondent's evidence continue. Mr. Kidd testified that he believed he spoke with a man who worked for Petitioner on May 2, 2012. [Hr'g at 39-42 (Mr. Kidd).] Again, the independent phone records of CVS and the data of Verizon prove otherwise. [R. at 152 (CVS' Records).] Moreover of the four (4) other phone calls Mr. Kidd testified to, the same calls Mr. Kidd swore he identified attorney Pollard and provided her telephone number, independent and un-contradicted records show these calls last at most forty-two (42) seconds and some lasted between eighteen (18) and twenty-four (24) seconds. [*Compare* Hr'g at 48-50 (Mr. Kidd) *with* R. at 152 (CVS' Records).] In this diminutive time period, Petitioner allegedly verified Mr. Kidd's identity; Mr. Kidd verified Petitioner's employee; Mr. Kidd heard the mini Miranda; and Mr. Kidd stated that attorney Pollard represented Respondent and him in dispute of the debt and provided attorney Pollard's phone number. [Hr'g at 10-11, 48-49.] That is a mouthful even in forty-two (42) seconds, let alone eighteen (18) seconds, all with the duration time starting when the phone first rings.

Liability in this case certainly turns on the weight and credibility of the evidence. In this case, Petitioner presented more, better evidence. So much so that the Circuit Court's Final Order appears mistaken. This Court must reverse and remand if a clear and definite conviction exists that a mistake has been made. Syl. pt. 1, in part, *In Interest of Tiffany Marie S.*, 96 W. Va. 223, 470 S.E.2d 177. Moreover, the review of the evidence shows the Circuit Court acted arbitrarily or irrationally. *See Wells*, 226 W. Va. at 551, 703 S.E.2d at 522. How many evidentiary errors, inconsistencies, variances, and discrepancies must exist before the evidence the Circuit Court relied upon is rendered un-credible. Is it one? Two? Three? Ten? Respondent bears the burden of satisfying the preponderance standard under West Virginia Code § 46A-2-128(e). She failed. As such, this Court needs to reverse the Judgment.

ii. **The Circuit Court Abused Its Discretion and Clearly Erred When It Deduced Findings of Fact Unsupported by the Evidence and Contrary to Other Findings Made by the Circuit Court.**

Notwithstanding that the fact that overwhelming evidence undermines the Circuit Court's credibility determination, the Circuit Court's own Findings of Fact show clear error by directly contradicting themselves. In Finding of Fact Thirty-Six (36), the Circuit Court conclusively found that "on May 6, 2010, Mr. Kidd provided his wife's attorney's name and telephone number to Mr. Un, who placed a called to the Kidd household at 4:43 p.m., CST. . . ." [R. at 360 (Final Order, Finding at ¶ 36)]; [see also R. at 357 (Final Order, Finding at ¶ 27).] Based on the Final Order, this communication represents the first instance in which either Mr. Kidd or Respondent spoke with Petitioner's employees. In Finding of Fact Thirty-Seven (37), the Circuit Court found that:

[n]otwithstanding the Findings of Fact above, **it is conclusively established by Defendant's records that it appeared that Mr. and Mrs. Kidd [Respondent] were represented by an attorney and that no contract should be made with Mrs. Kidd as the same was noted in Defendant's records on May 3, 2010, at 8:20 p.m.**, when I.C. System [Petitioner] noted in Defendant's records, "Debtor has attorney. Flag changed from yes to no."; "Debtor cease type change from not cease to cease all. Debtor has attorney. Flag changed from no to yes." Such entries are entirely inconsistent with the testimony of the four I.C. System witnesses, none of whom were asked by counsel to comment upon such entries in any way. At no time in taking the evidentiary deposition of I.C. System's four witnesses did counsel for I.C. System address these admissions entered into the I.C. System records.³

[R. at 360-61 (Final Order, Finding at ¶ 37) (emphasis added).] Finding of Fact Thirty-Eight (38) similarly concludes that Petitioner knew that Respondent and Mr. Kidd had an attorney on May 3, 2010: "The [Circuit] Court concludes as a matter of fact **that Defendant knew that**

³ Respondent never made this argument during the bench trial. Instead, Respondent raised this argument in her belated Findings of Fact and Conclusions of Law. Also, the only evidence submitted on this matter came from Petitioner and related to programing. [R. at 254 (Defs. Resp. to Plff's 2nd Set of Interrogatories).]

Plaintiff was represented by an attorney on May 3, 2010” [R. at 361 (Final Order, Finding at ¶ 38) (emphasis added).] The Circuit Court’s factual error leaps off the page. How can Petitioner possibly know that Respondent and Mr. Kidd obtained counsel **three days prior** to Petitioner making any telephone contact with Mr. Kidd or Respondent? The simple answer is that they could not have. It is impossible. This inherent contradiction renders the Findings of Fact defective.

These aforementioned flawed Findings of Fact similarly infect the Conclusions of Law rendered. In the Final Order, the Circuit Court concluded Petitioner committed forty-four (44) separate violations of West Virginia Code § 46A-2-128(e). [R. at 363-64 (Conclusions at ¶¶ 10-11).] Importantly, Petitioner’s records, and confirmed by CVS, show ten (10) calls occurred **before** Petitioner made any contact with Mr. Kidd or Respondent on May 6, 2010.⁴ [R. at 152 (CVS’ Records), 238-39 (Petitioner’s Records).] West Virginia Code § 46A-2-128(e) requires a debtor communicate the existence of counsel in order to violate this prohibition of the WVCCPA. *See* W. Va. Code § 46A-2-128(d). Therefore, absolutely no violation occurred in these ten (10) calls. The Circuit Court’s misapplication of the law, in this instance, requires a *de novo* review. *See* syl. pt. 2, in part, *Messer v. Huntington Anesthesia Group, Inc.*, 222 W. Va. 410, 664 S.E.2d 751 (2008). This misapplication of the law also enables this Court to reverse and remand this action.

⁴ In contrast, Respondent’s records show only eight calls during this period. [*Compare* R. at 144 (Respondent’s Call Log) *with* R. at 235-41 (Petitioner’s Records), 152 (CVS’ Records).] Because the Circuit Court adopted the number of calls from Petitioner’s records, Petitioner refers to exclusively its records.

iii. The Circuit Court Clearly Erred and Abused Its Discretion When It Found Petitioner Acted with the Specific Intent to Annoy and/or Harass Respondent in Violation of West Virginia Code § 46A-2-125(d) without any Evidence.

Finally, the Circuit Court erroneously concluded “that the pattern and volume of the calls in this case are evidence of the [Petitioner’s] intent to annoy and harass the [Respondent], and that the [Respondent] has proven by a preponderance of the evidence that the [Petitioner’s] calls were intended to and in fact annoy and harass the [Respondent] and her husband.” [R. at 365 (Final Order, Conclusion at ¶ 18).] The Circuit Court made this finding based upon the fact that Petitioner placed forty-four (44) calls from May 3, 2010 until June 2, 2010. [R. at 365 (Final Order, Conclusion at ¶ 18).] However, the evidence established that Petitioner made ten (10) calls before either Mr. Kidd and/or Respondent ever allegedly communicated that counsel represented them in dispute of the debt. Therefore, the Circuit Court’s conclusion of law that Petitioner acted with the specific intent to annoy or harass must be called into question.

Moreover, no evidence of specific intent to annoy and/or harass exists; in fact, the evidence supports that Petitioner engaged in, or at the least attempted to engage in responsible debt collection. To achieve this goal, Petitioner thoroughly educated its employees on the FDCPA and other applicable state laws. [R. at 1-21, 34-40 (Training Manual).] The Circuit Court’s Findings of Fact and Conclusions of Law, while defective in many respects, properly acknowledge that Petitioner provided this comprehensive education and proper training prior to

allowing any employees to participate in debt collection calls.⁵ [R. at 355 (Final Order, Findings at ¶¶ 12-15).]

In addition to providing this comprehensive education on the law, Petitioner also provide adequate procedures for debt collection calls:

- Before the call is place, the communicating debt collector’s screen displays the name of the debtor, their address, the creditor, the amount owed, a summary of the phone calls/account activity, and a checklist box with collection information. [R. at 217-41 (Petitioner’s Records).] The checklist boxes allow the collector to flag the account in the event of bankruptcy, a dispute of a debt, and/or the retention of an attorney. [Hr’g at 113-16 (Smagacz)].
- If the debtor answers the phone, the debt collector must first verify the identity of the individual caller as the debtor or debtor’s spouse. [Hr’g at 116 (Smagacz), 145-46 (Heide), 209 (Volk)]. If the individual refuses to identify themselves, the debt collector must terminate the call. [Hr’g at 117 (Smagacz), 145-46 (Heide), 209 (Volk).]
- If the call continues, thereafter, the debt collector provides the following “mini-Miranda” to the debtor or the debtor’s spouse: “This is an attempt to collect a debt by a debt collector. Any information obtained will be used for that purpose and the call may monitored or recorded for quality purposes.” [Hr’g at 146-47 (Heide).]
- Ensuing this mini-Miranda instruction, the debt collector attempts to work with the debtor to reach a satisfactory solution to the outstanding debt. [147 (Heide).]

These are Petitioner’s standard operating procedures, but apparently none of this matters. The Circuit Court’s Findings of Fact and Conclusions of Law presume intent simply for acting as a debt collect. This erroneous assumption requires reversal.

The Circuit Court’s conclusion that Petitioner acted with the specific intent to annoy and harass Respondent also differs from its initial perception of the charge during the bench trial. Following Respondent’s case-in-chief, Petitioner moved for directed verdict on

⁵ This training included specific education on West Virginia law and the importance to discontinue any debt collection activity even when the debtor fails to specify which attorney represents them. [R. at 36 (Training Manual).]

Respondent's allegations of specific intent to annoy and/or harass under West Virginia Code § 46A-2-125(d). Specifically, Petitioner argued that Respondent failed to deduce any witness testimony that Petitioner acted with the specific intent to annoy, harass, inconvenience or intimate Respondent. [Hr'g at 87.] Respondent countered that the more than thirty (30) phone calls themselves warranted a finding of pattern and practice. [Hr'g at 88.] Ultimately, the Circuit Court denied Petitioner's motion for direct verdict on pattern and practice; however, the Circuit Court noted the lack of evidentiary support for Respondent's pattern and practice claim:

The Court: It's a weak position, Mr. Young, on pattern and practice. I'm not -- I'm going to deny it on that, I'm going to deny the motion to dismiss on that one, but as the great and late Honorable Judge John Calvin Ashworth told me one time whenever I was trying to defend a plaintiff's case, he said your evidence is like a nuclear submarine; it's running deep, and it's running silent, but I believe there might be something there. So I'm going to let you try to prove it. That's what I'm saying with the pattern and practice.

[Hr'g at 93.] Nothing in Petitioner's case-in-chief substantiated, in any way, this lack of evidence. During cross-examination of Petitioner's four (4) witnesses, Respondent's counsel only established that the debt collectors receive a potential commission, in addition to their hourly compensation, for any and all money obtained in collections. [Hr'g at 125-26 (Smagacz), 187 (Un).] A possible commission, absent more, fails to evidence the specific intent needed under the statute. Moreover, the four (4) witnesses testified that they receive training on the WVCCPA and understood the serious ramifications for failing to comply. [Hr'g at 104-12 (Smagacz), 132-42 (Heide), 171-78 (Un), 191-94 (Volk).] Therefore, the Circuit Court erred in finding Petitioner acted with the specific intent to annoy and harass Petitioner pursuant to West Virginia Code § 46A-2-125(d) because it lacked sufficient evidence to reach this conclusion.

B. Even if this Court Upholds the Circuit Court's Findings of Fact and Conclusions of Law Related to Petitioner's Liability Under West Virginia Code §§ 46A-2-125(d) and 46A-2-128(e), this Court Still Must Remand to Calculate a Proper Damages Award.

Alternatively, if this Court chooses to uphold the Circuit Court's Findings of Fact and Conclusions of Law related to Petitioner's liability under the WVCCPA, this Court must reassess and recalculate the damages awarded. "Because the amount of an award of civil penalties pursuant to West Virginia Code § 46A-5-101(1) is within the discretion of the circuit court, [this Court] review[s] an award of civil penalties under this section for abuse of discretion." Syl. pt. 1, *Vanderbilt Mortg. and Finance, Inc. v. Cole*, -- W. Va. --, 740 S.E.2d 562 (2013). The Circuit Court committed critical damages gaffes when it fined Petitioner for ten (10) calls made before either Mr. Kidd or Respondent ever communicated with Petitioner's employees, and assessed a Twenty-Five Thousand Dollars (\$25,000.00) award without factoring in Petitioner's training and educational programs. These errors, at the least, require this Court to reassess the damages awarded.⁶

i. The Circuit Court Unfairly Penalized Petitioner for Ten Calls Made Prior to Mr. Kidd Ever Speaking to Any of Petitioner's Employees.

By way of recap, the Circuit Court found that Petitioner knew that Respondent and Mr. Kidd retained counsel on May 3, 2010 [R. at 360-61 (Final Order, Findings at ¶¶ 37-38).]; yet, neither Mr. Kidd nor Respondent informed Petitioner that they obtained counsel until May 6, 2010. [R. at 360 (Final Order, Finding at ¶ 36).] During this three day interim period (May 3, 2010 until May 6, 2010), Petitioner made ten (10) calls to Respondent's home phone number. [R. at 152 (CVS' Records), 236-37 (Petitioner's Records).]

⁶ As demonstrated in the previous argument section, Petitioner firmly believes that the Circuit Court's numerous errors requires reversal and remand on its finding of liability under West Virginia Code §§ 46A-2-125(d) and 46A-2-128(e).

No debt collector shall use unfair or unconscionable means to collect or attempt to collect any claim. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section:

....

(e) 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 communications.

W. Va. Code § 46A-2-128(e) (emphasis added). Implicit in this statutory law is the notion that the debt collector must know that the debtor retained counsel and, therefore, the debtor must communicate and articulate this fact. In this instance, the parties agree, and the evidence supports, that Petitioner first spoke with Mr. Kidd on May 6, 2010 and never spoke with Respondent before this date. [Hr'g at 13, 40-41 (Mr. Kidd), 180 (Mr. Un)]; [R. at 221, 238 (Petitioner's Records).] Ten (10) of the alleged forty-four (44) violations happened between Petitioner's first call on May 3, 2010 through and including the May 6, 2010 call with Mr. Kidd. West Virginia Code § 46A-2-128(e) requires a debtor communicate counsel's representation to the creditor of the disputed debt before any violation occurs and, therefore, no violation of the WVCCPA occurred during these ten (10) calls. *See* W. Va. Code § 46A-2-128(e).

Nevertheless, the Circuit Court imposed a Four Hundred Sixty-Two Dollars and eighty-one cents (\$462.81) statutory penalty for nine (9) of these ten (10) calls for a total of Four Thousand One Hundred Sixty-Five Dollars and twenty-nine cents (\$4,165.29). [R. at 363-64 (Final Order, Conclusion at ¶ 11).] Also, the Circuit Court fined Petitioner Four Thousand Six Hundred Twenty-Eight Dollars and forty cents (\$4,628.40) for the phone call in which Mr. Kidd allegedly informed Petitioner for the first time that attorney Pollard represented Respondent. [R.

at 363 (Final Order, Conclusion at ¶ 10).] No violation occurs **until after** the debt collector knows that the debtor retained counsel and unless the creditors continue to make phone calls. At best, this occurred on May 6, 2010.⁷ See W. Va. Code § 46A-2-128(e).

In essence, the Circuit Court erroneously awarded Petitioner Eight Thousand Seven Hundred Ninety-Three Dollars and sixty-nine cents (\$8,793.69) for calls that never violated West Virginia Code § 46A-2-128(e). Consequently, this Court, in the event it fails to overturn the finding of liability, must reduce the award by at least Eight Thousand Seven Hundred Ninety-Three Dollars and sixty-nine cents (\$8,793.69).

ii. The Circuit Court's Award of Twenty-Five Thousand Dollars based on Petitioner's Alleged Specific Intent to Harass and/or Annoy Fails to Mitigate Against the Educational and Procedures Programs Petitioner Implements.

Alternatively, if this Court finds sufficient evidence exists to uphold the Circuit Court's determination that Petitioner violated West Virginia Code § 46A-2-125(d), this Court must revisit and reduce the Twenty-Five Thousand Dollars (\$25,000) award in annoyance, aggravation and inconvenience damages. [R. at 365 (Conclusion of Law at ¶ 19).]

In its Findings of Fact and Conclusions of Law, the Circuit Court acknowledged that the evidence showed that (i) Petitioner instructed its employees on the FDCPA [R. at 355 (Final Order, Finding at ¶ 13)]; (ii) that Petitioner instructed its employee on the aspects of the WVCCPA that differ from the FDCPA [R. at 355 (Final Order, Finding at ¶ 14)]; (iii) that Petitioner re-tested its debt collection callers at least once a year on these laws [R. at 355 (Final Order, Finding at ¶ 15)]; (iv) that Petitioner trained its employees to flag debt collection accounts

⁷ For the reasons previously stated *supra*, Petitioner contends that Mr. Kidd never communicated that Respondent possessed counsel during the May 6, 2010 phone call and, instead, only informed Petitioner of counsel on June 2, 2010.

and to “take down relevant information when the person called indicates that they are represented by an attorney” [R. at 355 (Final Order, Finding at ¶ 16)]; (v) that Petitioner trained its employees to verify the person to whom they speak and to provide them with a “mini-Miranda” - “This is an attempt to collect a debt by a debt collector. Any information obtained will be used for that purpose and the call may be monitored or recorded for quality purposes” [R. at 355-56 (Final Order, Finding at ¶¶ 17, 19)]; and finally (vi) Petitioner trained its employees to terminate any collection calls in which they cannot verify the identity of the debtor or their spouse. [R. at 356 (Final Order, Finding at ¶¶ 18).] These procedures and training needed to factor into the Circuit Court’s award. They did not. Instead, the Circuit Court blankly awarded Twenty-Five Thousand Dollars (\$25,000.00). [R. at 365 (Final Order, Conclusion at ¶ 19).] This award must be reconsidered and reduced in light of the education and training Petitioner provided.

C. The Circuit Court Abused Its Discretion by Denying Petitioner’s Motion to Compel in Violation of this Court’s Prior Precedent of *Keplinger*.

“A circuit court’s ruling on discovery requests is reviewed for an abuse of discretion standard; but, where a circuit court’s ruling turns on a misinterpretation of the West Virginia Rules of Civil Procedure, our review is plenary. The discretion that is normally given to a trial court’s procedural decisions does not apply where the trial court makes no findings or applies the wrong legal standard.” Syl. pt. 2, *State ex rel. Erie Ins. Property & Cas. Co. v. Mazzone*, 220 W. Va. 525, 648 S.E.2d 31 (2007). “The question of the relevancy of the information sought through discovery essentially involves a determination of how substantively the information requests bears on the issues to be tried. However, under Rule 26(b)(1) of the West Virginia Rules of Civil Procedure, discovery is not limited only to admissible evidence, but

applies to information reasonably calculated to lead to the discovery of admissible evidence.” Syl. pt. 4, *State Farm Auto. Ins. Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992).

Early on through its independent investigation, Petitioner learned that Respondent and Mr. Kidd filed additional legal actions against other creditors, which asserted similar WVCCPA violations during the same time period as this litigation. [R. at 345 (June 30, 2011, Email from Broadwater to Webb).] In fact, Respondent’s Creditor Call Log confirmed that numerous other creditors called Respondent and/or Mr. Kidd repeatedly in May and June of 2010. [R. at 143-51 (Respondent’s Call Log).] Therefore, Petitioner sought to discover from Respondent information related to these corresponding litigation. [R. at 308-10 (Def. First Set of Discovery).] Specifically, Petitioner requested the following discovery:

Interrogatory 3:

3. List and identify each and every lawsuit or legal action which you or your husband have filed or in which you or your husband have been involved, either as plaintiff or defendant, exclusive of the present action, including:
 - a. The style of each case;
 - b. A brief description of the nature of the legal action;
 - c. The status or outcome of the legal action; and
 - d. The attorney and/or law firm representing you or your husband.

Request for Production 1:

For each lawsuit or legal action identified in response to Interrogatory Number 3, produce a copy of all of the suit papers, including but not limited to, pleadings, discovery requests and responses, correspondence with the opposing party or counsel for the opposing party, documents supporting the underlying action, subpoenas and responses to subpoenas and every other document related in any way to each lawsuit or legal action identified.

[*Id.*] Petitioner also requested Respondent's work schedule and financial record (redacted). [*Id.*] Petitioner wanted this information to confirm Respondent's whereabouts at the time the calls were made.

Respondent refused to produce this information. As to the litigation requests, Respondent contended that she entered into confidentiality orders in the other litigation that prohibited her production, and Petitioner bear the responsibility of obtaining relief from the Confidentiality Orders. Respondent refused to produce her work information and financial records finding them unnecessary to the claims at issues. [R. at 345 (June 30, 2011 Email from Broadwater to Webb).] This discovery dispute led Petitioner to file a Motion to Compel, which the Circuit Court heard during an August 16, 2011, hearing.

At the motion to compel hearing, Respondent continued to assert that she lacked the ability to produce any information related to her and her husband's other legal actions because of the confidentiality orders entered. [R. at 170 (Aug. 16, 2011 Hr'g).] At the same time, Petitioner implored the Circuit Court as to the necessity and relevancy of the discovery at issue. [R. at 163-64 (Aug. 16, 2011 Hr'g), 303 (Mot. to Compel).] The Circuit Court recognized these competing interests:

The Court: Well, I can't give you the other defendants' call logs without -- clearly I can't do that without a hearing of some kind to tell them what I'm thinking about giving up -- giving out your info.

[R. at 177 (Aug. 16, 2011 Hr'g).] As such, the Circuit Court tried to remedy the dispute without involving the other creditor/defendants:

The Court: Well, but a huge part of the -- the arguments that I heard early on in this thing is about the protective order, was that -- the documents themselves contain proprietary information, the way they collected the information, who was involved in collecting information. I have -- I guess I have a little bit of a problem with saying GE Money Bank's records indicate she told the collector she had counsel on this date. That doesn't mean they're certifying that, but if I hear Mr. Webb's representation, what he's trying to figure out is, is there a pattern of differences between when she claims and their records show that she told them, is there a pattern of a discrepancy between the dates; or, in the alternative, does it appear as though she told every one of them of her representation on or about the same day becomes relevant.

Mr. Young: I understand. But if this Court would direct me to answer that, I think, out of an abundance -- I'd put every defendant on notice. . . .

I don't want to get in a position with these defendants where they're not going to give me records because they're claiming that I violated a, you know, sacred oath. And some of these agreements are 20 pages long. I mean, I don't' --

[R. at 179-80 (Aug. 16, 2011 Hr'g).] Ultimately, the Circuit Court took the dispute under advisement. [R. at 180 (Aug. 16, 2011 Hr'g).] The Circuit Court denied Petitioner's request for Respondent's work and financial records finding Respondent's presence during the call immaterial and, therefore, not relevant. [R. at 173-74 (Aug. 16, 2011 Hr'g).]

Unexpectedly, on August 20, 2012, a year after the Motion to Compel hearing and mere weeks before the trial, the Circuit Court changed course and outright denied Petitioner's Motion to Compel. [R. at 350-52 (Order Den. Def. Mot. to Compel).] The Circuit Court concluded, in error, that Petitioner possessed the ability to subpoena the information under Rule 45 of the West Virginia Rules of Civil Procedure and chose not to exercise this power. [R. at

351 (Order Den. Def. Mot. to Compel).] This reasoning misapplies West Virginia law, and this Court should undertake plenary review. Syl. pt. 5, *State ex. rel. Med. Assurance West Virginia, Inc. v. Recht*, 213 W. Va. 457, 583 S.E.2d 80 (2003).

Without question, this Court’s jurisprudence prohibits a party, enthralled in a discovery dispute, from using Rule 45 of the West Virginia Rules of Civil Procedure: “A party may not use Rule 45 of the West Virginia Rules of Civil Procedure, or any other discovery device, to pursue discovery of items that are subject of an ongoing discovery dispute that has not yet been resolved by the parties or decided by the trial court.” Syl. pt. 6, *Keplinger v. Virginia Elec. and Power Co.*, 208 W. Va. 11, 537 S.E.2d 632 (2000).

In *Keplinger*, the plaintiff alleged that the defendant improperly terminated her without affording her reasonable accommodations for her work related handicap. The defendant sought full discovery of plaintiff’s medical records; plaintiff refused this production; and, thereafter, defendant filed a motion to compel. *Id.* at 13, 537 S.E.2d at 634. However prior to the hearing, defendant issued several Rule 45 subpoenas to plaintiff’s previous healthcare providers. *Id.* at 13-14, 537 S.E.2d at 634-35. The parties, thereafter, called upon this Court to decide whether a party may use Rule 45 of the West Virginia Rules of Civil Procedure to subpoena documents subject to an ongoing discovery dispute. *Id.* at 24, 537 S.E.2d at 645. In any case, defendants previously requested the medical records **from the plaintiff** and she **refused** to produce them. This Court made sure in the future no party would attempt to circumvent a discovery dispute with a Rule 45 subpoena:

[a]s indicated above, the discovery rules set forth a scheme for addressing discovery disputes. Part of this scheme, when Rule 45 is involved, is that the parties be afforded the opportunity to object to a discovery request *before* information is disclosed by the

nonparty who is designated to receive a subpoena duces tecum. Thus, when a party timely objects to the discovery of particular information, all efforts at obtaining discovery of that information should cease until the discovery dispute is resolved. If, after a discovery dispute arises with regard to particular information, a party may nevertheless pursue such information by using an alternate method of discovery, the discovery rules and the protections afforded by them are rendered meaningless. Furthermore, such a practice is fundamentally unfair and violates all sense of civility. For these reasons, we hold that a party may not use Rule 45 of the West Virginia Rules of Civil Procedure, or any other discovery device, to pursue discovery of items that are the subject of an ongoing discovery dispute that has not yet been resolved by the parties or decided by the trial court.

Id. at 25, 537 S.E.2d at 646 (emphasis in original).

Based upon this Court's holding in *Keplinger*, the Circuit Court misapplied the law. Petitioner requested certain documents from Respondent and she refused. This refusal negated Petitioner's Rule 45 powers, if any at all existed, at this moment. Therefore, the Circuit Court's conclusion that Petitioner "had the ability to obtain that information on its own without requiring in this case to undertake to seek relief from the protective orders filed in the various other cases" misapplies the law [R. at 351 (Order Den. Def. Mot. to Compel).]

In addition to this gross error, the Circuit Court's ruling came as a complete surprise based on the Circuit Court's instructions at the hearing. The Circuit Court indicated that it would contact the other creditors and take the issue under advisement. [R. at 180 (Aug. 16, 2011.)] It did neither. Instead, it outright denied Petitioner's Motion to Compel. This error transcends harmlessness. It unfairly prejudiced Petitioner's ability to adequately defend the case. Without question, the discovery at issue made the existence of a fact of consequence more or less probable. If the call logs in the corresponding litigation revealed that the other creditors similarly noted that Respondent informed them of attorney Pollard's representation at or near

June 2, 2010, this fact calls into question the veracity of Respondent and Mr. Kidd's testimony and supports Petitioner's evidence and testimony. On the other hand, these other creditors' call logs may reveal that Respondent and/or Mr. Kidd informed these other creditors of attorney Pollard's representation at a different date and time.

Finally and in light of the Circuit Court's Final Order, Respondent's work schedule and financial information matter. The Circuit Court fined Petitioner Four Thousand Dollars (\$4,000.00) more for calls Mr. Kidd and Respondent answered. [*Compare* R. at 363 (Final Order, Conclusion at ¶ 10) *with* 363-64 (Final Order, Conclusion at ¶ 11).] If this requested discovery showed that Respondent was not in her residence on the days in question, it not only cuts against her testimony (a ton of evidence already does that) but it potentially reduces the fines levied against Petitioner by thousands of dollars. Therefore, the requested items met the discovery standard of Rule 26 of the West Virginia Rules of Civil Procedure, and the standard set forth by this Court in *State Farm Auto Insurance Co. v. Stephens*. Syl. pt. 4, 188 W. Va. 622, 425 S.E.2d 577. For this reason, the Circuit Court erred.

In sum, the Circuit Court erred in denying Petitioner's Motion to Compel. This error is underscored by the Circuit Court's blatant misunderstanding of *Keplinger* and its sudden change in conduct from the directives given at the hearing. Therefore, the Circuit Court abused its discretion in preventing Petitioner from obtaining relevant discovery and this Court should reverse and remand to fix this mistake.

D. The Circuit Court Abused Its Discretion when It Allowed Respondent to Untimely Submit Her Proposed Findings of Fact and Conclusions of Law to the Unfair Prejudice and Detriment of Petitioner.

This Court reviews the lower court's procedural decisions under an abuse of discretion standard. *See* syl. pt. 1, in part, *Hall v. Casto*, 212 W. Va. 389, 572, S.E.2d 912 (2002). The Circuit Court abused its discretion by allowing Respondent to untimely submit her proposed Findings of Fact and Conclusions of Law more than two weeks after the Circuit Court's imposed deadline and after Petitioner timely submitted its proposed Findings of Fact and Conclusions of Law.

Without question, the Circuit Court provided an unambiguous deadline for both parties to submit their Findings of Fact and Conclusions of Law to provide proposed Findings of Fact and Conclusions of Law within thirty (30) days after September 5, 2012. [Hr'g at 235-36.] Despite clear instruction, Respondent failed to comply. [R. at 473 (Docket Sheet).] Instead, she waited over seventeen days to file not only her proposed Findings of Fact and Conclusions of Law, but also to file an Addendum of Calls Made and Closing Statement/Summary of the Argument. [*Id.*] Respondent provided no reason, good cause or otherwise, for this delay.

Moreover, this delay acted to unfairly disadvantage Petitioner. For more than two weeks, Respondent possessed and reviewed Petitioner's Findings of Fact and Conclusions of Law. This allowed Respondent to address specific proposed findings and conclusions raised in Petitioner's proposed Findings of Fact and Conclusions of Law without providing Petitioner a sufficient opportunity to recast or reinforce its submission. Specifically, Respondent argued that Petitioner's records showed that Petitioner knew that Mr. Kidd and Respondent retained counsel on May 3, 2010. [R. at 464 (Mot. to Strike Respondent's Findings of Fact and Conclusions of Law at ¶8).] Notwithstanding the absolute absurdity of this argument, Petitioner presented the

only evidence as to why its records indicate a perceived abnormality: “Programing behind the scenes.”⁸ [R. at 254 (Def.’s Resp. to Plff’s 2nd Set of Interrogatories).]

Respondent never once made this argument to the Circuit Court below until she untimely submitted her proposed Findings of Fact and Conclusions of Law. [R. at 464-65 (Mot. to Strike Respondent’s Findings of Fact and Conclusions of Law).] Petitioner should not be punished for obeying the Circuit Court’s filing deadline directive. This is unfair.

Petitioner believes that the untimely submission of proposed Findings of Fact and Conclusions of Law mirrors the untimely disclosure of a witness for trial or the untimely disclosure of documents. In these situations, this Court routinely strikes or disavows motions and pleadings based upon the litigant’s untimeliness and the prejudiced caused. *See, e.g., West Virginia Dept. of Transp., Div. of Highways v. Parkersburg Inn, Inc.*, 222 W. Va. 688, 698, 671 S.E.2d 693, 703 (2008) (upholding the striking of an expert witness based upon failure to timely disclose); *Graham v. Wallace*, 214 W. Va. 178, 173-74, 588 S.E.2d 167, 184-85 (2003) (striking a witness testimony based on failure to timely disclose). This Court proceeds in this manner because of the unambiguous deadlines provided coupled with the unfair prejudice the opposing party suffers as a result of the delay. Both justifications exist in this instance and support this Court’s reversal and remand.

The untimely filing of proposed Findings of Fact and Conclusions of Law arises frequently in lower tribunals. Despite the often occurrence of this problem, the lower tribunals act inconsistently on this issue. To avoid further confusion of this issue amongst the lower tribunals, Petitioner recommends the following syllabus point of law:

⁸ This answer was submitted in the form of exhibit to the Circuit Court at the bench trial. [Hr’g at 232-33.]

- A Circuit Court abuses its discretion when it permits a party to file late Findings of Fact and Conclusions of Law absent good cause shown that prejudices the opposing party. Indicia of prejudice include: (i) the raising of new arguments; and (ii) the addressing/responding to specific arguments raised in the opposing party's timely submission.

E. The Circuit Court Abused Its Discretion by Allowing Respondent to Simultaneously Impeach and Adopt Evidence at Issue to Her Advantage.

This Court reviews a Circuit Court's evidentiary ruling under an abuse of discretion standard. Syl. pt. 1, *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995). "In general an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighting them." *State ex rel. Leung v. Sanders*, 213 W. Va. 569, 576, 584 S.E.2d 203, 209 (2003). While this Court affords latitude to the Circuit Courts to make evidentiary rulings, this authority does not go unchecked and this Court should "not hesitate to right the wrong that has been committed." *See Hollen v. Hathaway Elec., Inc.*, 213 W. Va. 667, 670, 584 S.E.2d 523, 526 (2003).

Petitioner's records and Respondent's creditor log differed in several material aspects. Petitioner's Records evidenced forty-four (44) calls to Respondent's home phone number from May 3, 2010 to June 2, 2010, while Respondent's creditor log only showed thirty-five (35) phone calls. [*Compare* R. at 143-51 (Respondent's Creditor Log) *with* R. at 235-41 (Petitioner's Phone Log), 152-53 (CVS' Records).] Clearly, this evidence conflicted. In spite of this conflict, the Circuit Court permitted Respondent to impeach the entirety of Petitioner's Records, except for the number of calls made. This led to the incongruous result that Petitioner failed to keep adequate phone records to the detriment of its case and increased its own statutory violations. This is absurd. This "result" was an abuse of discretion and requires this Court to reverse and remand this litigation.

VIII. CONCLUSION

As demonstrated throughout this Petition, several reasons exist for this Court to reverse this case. First, the Circuit Court abused its discretion and clearly erred in issuing its Findings of Fact and Conclusions of Law against the overwhelming weight of Petitioner's unimpeached evidence. Moreover, several Findings made contradict other Findings to the detriment of the Petitioner. Namely, the Circuit Court somehow concluded that Petitioner knew that Respondent retained counsel ten (10) calls before Mr. Kidd allegedly made this first communication. Moreover, the Circuit Court found Petitioner acted with the specific intent to annoy and/or harass Respondent despite the fact that Petitioner implemented sufficient education and training procedures. Alternatively, the Circuit Court erred in applying a statutory penalty for phone calls made prior to Mr. Kidd and/or Respondent notifying Petitioner of their counsel, and not in violation of the WVCCPA.

In addition to the above, the Circuit Court abused its discretion in its discovery and evidentiary rulings. The Circuit Court denied Petitioner's Motion to Compel because it determined that Petitioner possessed the ability to subpoena the other creditors documents under Rule 45 of the West Virginia Rules of Civil Procedure. However, Respondent disputed Petitioner's entitlement to this discovery. The moment this dispute arose, Petitioner's subpoena power vanished until the Court decided the merits of the dispute under *Keplinger*, which happened mere weeks before the trial. Further, the Circuit Court improperly denied Petitioner's request for work and financial documents as irrelevant, yet the Circuit Court assessed a Four Thousand Dollars (\$4,000) greater penalty for calls in which Respondent or Mr. Kidd answered. Moreover, the Circuit Court allowed Respondent to untimely submit her proposed Findings of Fact and Conclusions of Law. This untimeliness disadvantaged Petitioner because Respondent

submitted certain proposed Findings to counter Petitioner's Findings and also asserted new arguments never previously argued below. Finally, the Circuit Court allowed Petitioner to discredit the length of the calls and notes made by the debt collectors in Petitioner's records, while at the same time allowed Respondent to accept and adopt the number of calls reflected in Petitioner's "discredited" records.

Any of the aforementioned items allows this Court to reverse the case. Alternatively, if this Court upholds the Circuit Court's finding of liability under West Virginia Code §§ 46A-2-125(d), 46A-2-128(e), this Court should reduce the penalty assessed.

I.C. SYSTEM, INC.,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0216

(Raleigh County Circuit Court, Civil Action No. 10-C-541-H)

I.C. System, Inc.,

Petitioner,

v.

Valena R. Kidd,

Respondent.

CERTIFICATE OF SERVICE

I, Kenneth E. Webb, Jr., do hereby certify that I have caused copies of the hereto attached *I.C. System, Inc.'s Petition for Appeal* to be served upon the following:

Ralph C. Young
Steven R. Broadwater, Jr.
HAMILTON, BURGESS, YOUNG & POLLARD, pllc
Post Office Box 959
Fayetteville, West Virginia 25840
Counsel for Respondent

by first class mail, postage pre-paid on this 31st day of May 2013.

Kenneth E. Webb Jr. ^{w/ permission}
Kenneth E. Webb, Jr. (WVSB # 5560) PCI
CWVSB #1171