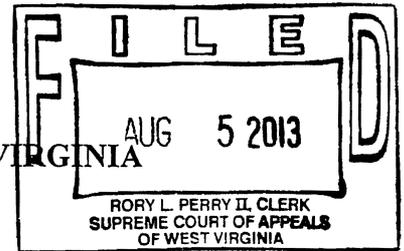


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0216



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

**I.C. SYSTEM, INC.,**

**Petitioner,**

**v.**

**VALENA R. KIDD**

**Respondent.**

**I.C. SYSTEM, INC.'S REPLY BRIEF**

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## I. STATEMENT OF THE CASE

In her response brief, Respondent, Valena Kidd, chose not to submit a Statement of the Case to this Court. Pursuant to the Revised Rules of Appellate Procedure 10(d):<sup>1</sup>

The respondent must file a brief in accordance with the subsection, or a summary response in accordance with subsection (3) of this Rule. The respondent's brief must conform to the requirements in subsection (c) of this Rule, **except that no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the petitioner's brief**

.....

W. VA. R. APP. P. 10(d). By choosing not to submit a Statement of the Case, Respondent endorses the facts Petitioner set forth in its Brief. These facts include, but are not limited to, the following:

- Where the caller verifies that they are the debtor or debtor's spouse, Petitioner, I.C. System, Inc.'s, employees give a "mini-Miranda" that states: "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) seconds 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 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).]

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<sup>1</sup> Petitioner realizes that Respondent chose to file a Summary Response and, therefore, the Revised Rules of Appellate Procedure are relaxed. See W. Va. R. App. P. 10(e). However, the fact remains that if Respondent disagreed with Petitioner's factual presentation, than Respondent should have set forth their own Statement of the Case.

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

These facts, and the facts set forth in Petitioner's Statement of the Case, demonstrate that prejudicial error occurred and reversal is warranted.

## II. ARGUMENT

### A. **Absolutely No Evidence Exists that Respondent or her Husband, Kenneth R. Kidd, Jr., Spoke with Any Employee of Petitioner on or before May 6, 2010.**

Respondent argues that the evidence established that Petitioner contacted and spoke with either Respondent and/or her husband, Kenneth R. Kidd, Jr. ("Mr. Kidd"), and, therefore, the Circuit Court acted correctly in penalizing Petitioner for all the calls made between May 3, 2010, and May 6, 2010. [Resp't Br. at 2-3.] This argument fails because Mr. Kidd's trial testimony, the Kidds' call log ("Respondent's Records"), and Petitioner's call log ("Petitioner's

Records”) all correspond and agree that Petitioner first spoke with Mr. Kidd on May 6, 2010.<sup>2</sup> For this reason, the Circuit Court erred in establishing May 3, 2010, as the appropriate start date to assign various violations to Petitioner.

Pursuant to instructions Mr. Kidd received from his and Respondent’s debt attorney, Lynn Pollard (“Ms. Pollard”), Mr. Kidd testified that he wrote down the name of the employee he spoke with on each occasion he answered the phone. [Hr’g at 10 (Mr. Kidd).] Thereafter, Mr. Kidd testified that he spoke with a male employee of Petitioner on May 2 or May 6, 2010. [Hr’g at 13-14, 31 (Mr. Kidd).] Respondent’s Records reflect this testimony as the word “man” appears in a box next to the May 6, 2010, date. [R. at 144 (Respondent’s Records).] Similarly, the notes of Enne Un (“Mr. Un”), a debt collector for Petitioner during the time period in question, indicated that he verified Mr. Kidd’s identify and issued a mini-Miranda during a May 6, 2010 call, and this call represented the first contact Mr. Un, or anyone who worked with Petitioner, had with Mr. Kidd and/or Respondent related to the debt at issue. [Hr’g at 181-183; R. at 238 (Petitioner’s Records); 295 (Interpretation of Petitioner’s Records).] While Petitioner and Respondent disagree whether Mr. Kidd informed Petitioner that an attorney represented Respondent in relation to the debt, the undisputed evidence shows that the May 6, 2010, phone conversation was the first phone conversation between Petitioner and/or Mr. Kidd. The Circuit Court’s factual findings acknowledge this fact. [R. at 357, 360 (Final Order, Findings at ¶¶ 27, 36).]

In spite of this undisputed evidence, the Circuit Court enigmatically found that Petitioner knew that Respondent retained counsel on May 3, 2010, three days prior to the

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<sup>2</sup> The parties disagree that Mr. Kidd informed Petitioner that Respondent retained counsel related to the debt during this May 6, 2010, phone conversation.

May 6, 2010, telephone conversation. Respondent argues<sup>3</sup> that the Circuit Court’s finding is not erroneous because of the following entry in Petitioner’s Records:<sup>4</sup>

Date / Time	Event	Action	Description	User	Employee Collector	Employee ID
5/3/2010 8:20 PM		Updated	Debtor debtor has attorney flag changed from No to Yes	batchuser	JC House Collector	30939075-1
5/3/2010 8:20 PM		Updated	Debtor debtor has attorney flag changed from Yes to No	batchuser	JC House Collector	30939075-1

[R. at 240 (Petitioner’s Records).] In discovery, Petitioner explained that this entry related to programming behind the scenes or, in other words, Petitioner’s IT Department confirmed that the software operated correctly to enable the account operator to properly flag an account in the event of a dispute. [R. at 254 (Petitioner’s Answer to Respondent’s Second Discovery Requests).] Respondent took no issue with this response prior to or at trial. In fact, Respondent **never** questioned any of the four (4) witnesses of Petitioner, all of whom worked for Petitioner during the time period in question, regarding the aforementioned programming entry. [Hr’g at 122-27 (Smagacz Cross-Examination); 152-66 (Heide Cross-Examination); 187 (Un Cross-Examination); 216-27 (Volk Cross-Examination).] Therefore, the Circuit Court’s finding that “[n]otwithstanding the Findings of Fact Above, it is conclusively established by Defendant’s records that it appeared that Mr. and Mrs. Kidd were represented by an attorney and that no contact should be made with Mrs. Kidd . . .” is unsupported by the evidence and presented.

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<sup>3</sup> [Resp’t Br. at 2.] For reasons unknown, Respondent improperly cites to pages 130-31 of the Trial Transcript to support her argument. These pages refer to Justin Heide’s, an employee of Petitioner, background information, including where he attended high school, college, and his major of study.

<sup>4</sup> Respondent also argues that Findings of Fact 36 and 37 are not inconsistent, because the Circuit Court found that Petitioner and Respondent and/or Mr. Kidd spoke on May 3, 2010. [Resp’t Br. at 3.] The Circuit Court’s Order makes no such finding. [R. at 357, 360 (Final Order, Findings at ¶¶ 36-37).] Instead, the Circuit Court simply found that Petitioner’s Records demonstrated that Petitioner had knowledge that Respondent retained counsel. The Circuit Court’s Order’s failure to identify whether Respondent and/or Mr. Kidd informed Petitioner of their attorney’s representation underscores the error made.

Given the evidence, it was impossible for Petitioner to know that Respondent retained counsel related to the debt three days prior to Petitioner's first communication with Mr. Kidd.<sup>5</sup> [R. at 361 (Final Order, Finding at ¶¶ 37, 38).] This incongruous result led to the Circuit Court finding Petitioner violated West Virginia Code § 46A-2-128(e) ten (10) times **before** any contact occurred between the parties. Consequently, this erroneous finding not only led the Circuit Court to inappropriately assess thousands of dollars of penalties against Petitioner for violating West Virginia Code § 46A-2-128(e), but also factored into the Circuit Court's determination that Petitioner acted with the specific intent to annoy and harass in violation of West Virginia Code § 46A-2-125(d). For these reasons, and the reasons set forth in I.C. System, Inc.'s Petition for Appeal, this Court should reverse and remand this litigation.

**B. Respondent Fails to Address the Evidentiary Inconsistencies to which Petitioner Assigned Error and, therefore, is Deemed to Agree with Petitioner's View on the Issue.**

In her brief, Respondent selectively responds to the inconsistencies Petitioner asserted exist and to which Petitioner assigned error. Specifically, Respondent never addresses: (1) the difference in calls recorded between Petitioner's Records and CVS's Records and Respondent's Records [Pet'r Br. at 17-18]; [*Compare* R. 235-41 at (Petitioner's Records), 152-53 (CVS's Records) *with* 143-51(Respondent's Records)]; (2) the inconsistencies between the amount of information Respondent and/or Mr. Kidd provided to Petitioner during their phone conversations in comparison with the short durational timeframes of the phone calls and the recorded call in which Mr. Kidd never provided Respondent's attorney's name or telephone number [Pet'r Br. at 19]; [*Compare* Hr'g at 49 *with* Hr'g at 10-11, 48-49 (Mr. Kidd)]; and (3) the

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<sup>5</sup> Petitioner's first communication with Respondent occurred on May 20, 2010. [R. at 296 (Def.'s Supp. Discovery Resps.).]

inconsistencies between Respondent's sworn affidavit and the testimony and evidence deduced at trial [Pet'r Br. at 18-19]; [*Compare* R. 154 (Respondent Affidavit at ¶ 1) *with* Hr'g at 52-60 (Respondent); R. at 240 (Petitioner's Records).] Petitioner argued that all of these inconsistencies amounted to a showing that prejudicial and reversible error occurred. [Pet'r Br. at 20.]

Revised Rule of Procedure 10(d) requires that “[u]nless provided by the Court, the argument section of Respondent’s brief must specifically respond to each assignment of error, to the fullest extent possible. If the Respondent’s brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the Petitioner’s view of the issue.”<sup>6</sup> W. Va. R. App. P. 10(d). Respondent’s brief violates this provision of the Revised Rules by failing to address arguments within the error assigned. Given Respondent’s failure to address the evidentiary inconsistencies assigned as and because Petitioner substantiated its assigned error with replete citations to the Record, this Court should conclude prejudicial and reversible error. For this reason, and the reasons set forth in I.C. System Inc.’s Petition for Appeal, the Circuit Court’s Order should be reversed, and this litigation should be remanded to the Circuit Court.

**C. The Circuit Court Erred in Finding a Violation of West Virginia Code § 46A-2-125(d) Occurred and Erred in Assessing a Twenty-Five Thousand Dollars (\$25,000.00) Penalty.**

**i. The Amount of Calls, in and of itself, is Insufficient to Establish Specific Intent.**

Respondent agrees with Petitioner that the Circuit Court erred in assessing a Four Thousand Six Hundred Twenty-Eight Dollar and fourteen cent penalty (\$4,628.14) on the first

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<sup>6</sup> In a recent Administrative Order, this Court stated that respondents frequently submit briefs “that do not ‘specifically respond to each assignment of error, to the fullest extent possible’ as required by Rule 10(d).” *See* Administrative Order, Supreme Court of Appeals Re: Filing that do not Comply with the Rules of Appellate Procedure, at 3, ¶ 8 (Dec. 10, 2012).

call in which Respondent and/or Mr. Kidd allegedly informed Petitioner that Respondent retained counsel. However, Respondent argues that this is harmless error, because the amount the Circuit Court awarded still exceeded Respondent's self-imposed cap, regardless of the erroneous penalty. [Resp't Br. at 4.] Respondent's argument misunderstands that the misconstruing of the call at issue not only impacted the May 6, 2010, call, but also the ten (10) calls placed before the May 6, 2010, telephone conversation occurred. Moreover, this error parlayed itself into the Circuit Court, concluding a violation of West Virginia Code § 46A-2-125(d) occurred, based on the high volume of calls. [R. at 364-65 (Final Order, Conclusions at ¶¶ 14-18).] However, if the volume of the calls in violation of the WVCCPA was reduced by a twenty-five percent (25%), would legally sufficient evidence still exist that Petitioner acted with an intent to annoy or harass? If it does not, then no violation of West Virginia Code § 46A-5-101(1) occurred, and no Twenty-Five Thousand Dollars (\$25,000.00) penalty can be assessed.

Nonetheless, Respondent argues that the Circuit Court properly found a violation of West Virginia Code § 46A-2-125(d), given the volume of calls. [Resp't Br. at 6-7.] In support, Respondent cites to three cases from the Southern District of West Virginia. However, the cases Respondent refers to do not support Respondent's position, as all three cases discuss evidence sufficient to survive a summary judgment motion. For example, the Southern District of West Virginia stated in *Ferrell v. Santander Consumer USA, Inc.* that "[w]hile defendants are correct that evidence in the record demonstrating such conduct may be modest, it is enough to survive summary judgment." 859 F. Supp. 2d 812, 816 (2012). Similarly, the courts in *Blackburn v. Consumer Portfolio Servs, Inc.*<sup>7</sup> and *Duncan v. JP Morgan Chase Bank, N.A.*<sup>8</sup>

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<sup>7</sup> The *Blackburn* Plaintiff alleged over 300 calls during this period, 180 of which occurred after she allegedly informed the defendant that she retained counsel. *Blackburn*, 2012 WL at \*1. The defendant acknowledged it made 94 of the alleged 300+ calls. *Id.* at \*3.

found the evidence presented was only sufficient to survive a motion for summary judgment. *Blackburn*, No. 2:11-CV-0041, 2012 WL 2089514, \*3 (S.D. W. Va. June 8, 2012) (However, **when the calls logs are viewed in the light most favorable to the plaintiff**, it is clear that Ms. Blackburn received a high volume of calls from CPS, and the large number is sufficient to create a genuine issue of material fact . . . .”); *Duncan*, 2011 WL 5359698 at \*4. Surviving summary judgment and proving violations by a preponderance evidentiary standard are not the same.

In comparison, several courts have found conduct, similar to the conduct at issue in this litigation, legally insufficient to demonstrate a specific intent to annoy or harass. For instance, in *Carman v. CBE Group, Inc.*, the debt collector called the debtor’s home and work number 92 times in September and 55 times in October, with a call frequency of 0 to 4 calls per day at home and 0 to 3 calls per day at work.<sup>9</sup> 782 F. Supp. 2d 1223, 1227 (D. Kan. 2011). In finding that legally insufficient evidence of specific intent to abuse or annoy existed, the court noted that the frequency of the calls “suggests an intent by CBE [the debt collector] to establish contact with the plaintiff, rather than an intent to harass.” *Id.* at 1234. Similarly in *Saltzman v. I.C. Systems, Inc.*, the Eastern District of Michigan found no specific intent to annoy or abuse existed when the debt collector placed between twenty (20) and fifty (50) calls in a one month period, despite evidence that the debtor answered some of the calls and allegedly informed the

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<sup>8</sup> Abusive language used during at least one of the calls factored into the court’s decision to deny summary judgment on the issue of whether the defendant acted with the intent to annoy or harass. *Duncan*, 5:10-CV-0113, 2011 WL 5359698, \*4 (S.D. W. Va. Nov. 4, 2011).

<sup>9</sup> *Carman* involved allegations of violations of 15 U.S.C. § 1692d(5) which provides that “[a] debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt . . . [c]ausing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.” *Compare* 15 U.S.C. § 1692d(5) *with* W. VA. CODE § 46A-2-125(d).

debt collector to stop. *See* No. 09-10096, 2009 WL 3190359, \*6 n.4 (E.D. Mich. Sept. 30, 2009). In reaching this decision, the *Saltzman* court stated:

The Court finds no evidence in the record from which a reasonable trier of fact could infer that Defendant acted with the requisite ‘intent to annoy, abuse, or harass’ in making the telephone calls at issue. **Although Plaintiff alleges that she requested Defendant to stop calling her, she did not send Defendant a desist letter, dispute the amount owed, or provide evidence that Defendant acted in a manner that would be actionable as harassment, oppression or abuse.** Plaintiff also acknowledges receipt of written correspondence from Defendant. At Plaintiff’s deposition, she testified that she did not answer the vast majority of defendant’s telephone calls, as she recognized Defendant’s telephone number on her caller I.D. Plaintiff further testified that she did not recall Defendant leaving any voice messages for her. **The record also indicates a significant disparity between the number of telephone calls placed by Defendants and the number of actual successful conversations with Plaintiff -- a ratio of, at best, 1:5. This suggests a ‘difficulty of reaching Plaintiff, rather than an intent to harass.’**

*Id.* at \*7 (internal citations omitted) (emphasis added).

In this case, the amount of calls and the conduct suggest “a difficulty to reach Respondent,” and not oppressive and abusive conduct. Like *Saltzman*, the ratio at issue in this litigation of successfully communicating with Respondent and/or Mr. Kidd was, at best, 1:4. Furthermore, like the *Saltzman* plaintiff, neither Mr. Kidd nor Respondent responded to the letter Petitioner sent [R. at 242-43 (May 3, 2010, Lt. from Petitioner to Respondent)]; disputed the amount owed [Hr’g at 24-25 (Mr. Kidd), 65 (Respondent)]; or screened the caller I.D. and recognized Petitioner’s number. Even daily calls, absent more, are sometimes not enough to make a legally sufficient finding that the debt collector acted with the specific intent to annoy or harass. *See Waite v. Fin. Recovery Servs., Inc.*, No. 8:09-CV-02336-T-33AEP, 2010 WL 5209350, \*3 (M.D. Fla. Dec. 16, 2010) (daily calling in and of itself insufficient to

demonstrate specific intent to annoy or harass). Given the substantial similarities in the facts between *Saltzman* and this case, this Court should find *Saltzman* persuasive. Consequently, the evidence is insufficient to establish a violation of West Virginia Code § 46A-2-125(d). Therefore, this Court should reverse and remand this litigation.

**ii. Properly Implemented Procedures Evidence a Lack of Specific Intent to Abuse or Harass.**

Respondent contends that Petitioner never raised bona fide error as a defense and, therefore, the procedures Petitioner implemented and followed are irrelevant to the Circuit Court's analysis of whether Petitioner acted with the specific intent to harass and annoy in violation of West Virginia Code § 46A-2-125(d). [Resp't Br. at 7-8.] Nothing could be further from the truth. In fact, the Middle District of Florida factored in the debt collector's procedures in determining whether sufficient evidence existed to warrant a finding of a violation under the Fair Debt Collection Practices Act. *See, e.g., Mammen v. Bronson & Migliaccio, LLP*, 715 F. Supp. 2d 1210, 1217-19 (M.D. Fla. 2009).

The Circuit Court's determination that Petitioner acted with the specific intent to annoy or harass fails to consider Petitioner's procedures. Specifically, the Circuit Court's conclusion fails to account that Petitioner trained its employees on West Virginia law [Hr'g at 158-60 (Heide), 175-77 (Un) R. at 36, 38 (Training Manual)]; tested its debt collectors annually on debt collection law [Hr'g at 139 (Heide), 177-78 (Un)]; and trained its employees to properly flag disputed accounts. [Hr'g at 124-25 (Smagacz), 185-86 (Un).] All of this procedural evidence was uncontroverted, and this procedural evidence needed to be factored into the Circuit Court's analysis of whether Petitioner violated West Virginia Code § 46A-2-125(d). It was not. For this reason, the Circuit Court erred, and this Court should reverse and remand.

**D. The Circuit Court Abused Its Discretion in Denying Petitioner Certain Discovery.**

Respondent argues that the Circuit Court properly denied Petitioner its right to discover information regarding Respondent and Mr. Kidd's other litigation alleging violations of the WVCPA, because the call log Respondent produced was enough, and Petitioner failed to set up a hearing on the matter. [Resp't Br. at 8-10.] This argument is devoid of merit for the following reasons.

**First**, Respondent's Records alone are insufficient. [Resp't Br. at 8-9.] Petitioner's discovery related to the other legal actions would shed light on the veracity and credibility of Respondent's Records. For instance, if Respondent's Records conflicted with other creditors' electronic records, this would help prove an issue in dispute. For this reason, the Circuit Court erred in denying Petitioner the requested discovery.

**Second**, the Circuit Court **never** ruled on whether Petitioner needed to subpoena the defendants in the corresponding WVCCPA litigation, whether Respondent needed to provide the requested discovery, or whether Petitioner was entitled to the discovery at all. Instead, the Circuit Court took the discovery dispute under advisement. [R. at 180 (Aug. 16, 2011 Hr'g).]

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'd have to write -- I'm going to write their counsel and say, listen, I've been directed to do this. If you don't want me to do it, you can intervene in this action. But I don't think the Court should put that burden on me, the Court should put it on the defendant. He can ask those defendants. Their counsel is sitting in Charleston, West Virginia, have those records. He can get them from them and leave me out of the fight. I don't want to fight over something like that if I don't have to.

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 --

The Court: I understand that, but the problem is -- well, I'll take that part of it under advisement, how I'm going to handle that.

[R. at 179-80 (Aug. 16, 2011 Hr'g).] Clearly, at the hearing on the Motion to Compel, the Circuit Court took the matter under advisement but never made a ruling. Instead, after the pretrial and immediately before trial, the Circuit Court issued an Order denying the Motion to Compel and criticized Petitioner (for the first time) for not subpoenaing the information. While under advisement, West Virginia law prohibited Petitioner from end-rounding the Circuit Court's order through the use of a third party subpoena.<sup>10</sup> See syl. pt. 6, *Keplinger v. Virginia Elec. and Power Co.*, 208 W. Va. 11, 537 S.E.2d 632 (2000) ("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."). It is this error that Petitioner assigned, and it is from this error that appellate relief is needed. For this reason, the Circuit Court should reverse, allow Petitioner to complete discovery, and remand this litigation.

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<sup>10</sup> Respondent argues that Petitioner failed to schedule a hearing on the matter and, therefore, the Circuit Court acted properly. [Resp't Br. at 9-10.] This argument fails because the Circuit Court decided to hold the issue in abeyance rather than make a decision. [R. at 180 (Aug. 16, 2011 Hr'g).] Moreover, the Circuit Court's Order directly stated that Petitioner "had the ability to obtain that information on its own without requiring the Plaintiff [Respondent] in this case to undertake [sic] to seek relief from the protective orders filed in the various other cases." [Hr'g at 351 (Discovery Order).]

**E. The Circuit Court Abused Its Discretion when It Permitted Respondent to Untimely Submit Her Proposed Findings of Fact and Conclusions of Law.**

Respondent argues that no abuse of discretion occurred when she untimely submitted her proposed Order, because nothing in her proposed Order should have surprised Petitioner. [Resp't Br. at 10-11.] This argument ignores the error assigned. It is undisputed that Respondent untimely submitted her proposed Order. [Hr'g at 235-36, R. at 473 (Docket Sheet).] It is further undisputed that Petitioner timely submitted its proposed Order to the Court and Respondent. [Hr'g at 235-36, R. at 463 (Def's Obj. to Pl. Late Submission), 473 (Docket Sheet).] These circumstances allowed Respondent to meticulously review Petitioner's Order and respond to the arguments made, without providing Petitioner the same opportunity. This is the injustice and unfairness that Petitioner requests this Court address.

As set forth previously, Respondent never questioned any of Petitioner's employees regarding the May 3, 2010, programming data entry. [Hr'g at 122-27 (Smagacz Cross-Examination); 152-66 (Heide Cross-Examination); 187 (Un Cross-Examination); 216-27 (Volk Cross-Examination).] The only evidence, therefore, related to this data entry was in Petitioner's discovery responses. [R. at 254 (Petitioner's Answer to Respondent's Second Discovery Requests).] Certainly, Respondent speculates that this data entry shows that Petitioner, despite not making any contact with Respondent or Mr. Kidd before May 6, 2010, knew that the Kidds retained counsel on May 3, 2010; however, speculation is not evidence and cannot sustain a verdict. For this reason, and the reasons set forth in I.C. System, Inc.'s Petition for Appeal, this assigned error provides this Court with a sufficient basis to reverse and remand.

**F. The Circuit Court Abused Its Discretion In Weighing the Credibility of the Evidence.**

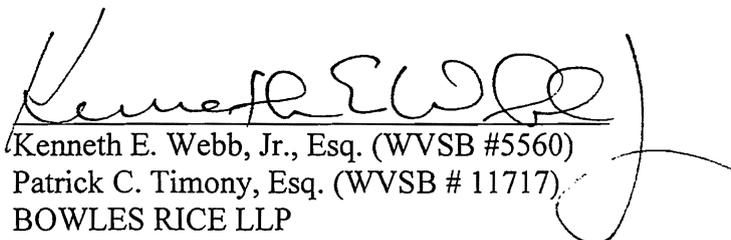
Finally, Respondent argues that the Circuit Court had the ability to “shift [sic] the wheat from the chaff” in judging the credibility of the evidence. [Resp’t Br. at 11-12.] Petitioner agrees with this statement, provided that the Circuit Court acts reasonably and properly. *See State ex rel. Leung v. Sanders*, 213 W. Va. 569, 576, 584 S.E.2d 203, 209 (2003). In this instance, the Circuit Court credited portions of Petitioner’s Records and discredited other portions of Petitioner’s Records without a sufficient basis. For instance, how can Petitioner’s records correctly set forth the time and number of phone calls while, at the same time, incorrectly noting what happened in the calls? Conversely, how can Respondent’s Records correctly make notes on calls when Respondent’s Records do not contain all the calls or match the time the calls were made? The overwhelming evidence presented to the Circuit Court bolstered Petitioner’s account of the events at issue and discredited Respondent’s account. The Circuit Court unreasonably use, improperly ignored this evidence. For this reason, the Circuit Court erred, and this Court should reverse and remand.

**III. CONCLUSION**

For the reasons set forth in this Reply and in I.C. System Inc.’s Petition for Appeal, Petitioner respectfully requests that this Court reverse and remand this case. Alternatively, if this Court upholds the Circuit Court’s finding of liability under West Virginia Code §§ 46A-2-125(d) and/or 46A-2-128(e), this Court should recalculate and reduce the penalty assessed.

I.C. SYSTEM, INC.,

By Counsel,

A handwritten signature in black ink, appearing to read "Kenneth E. Webb, Jr.", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

Kenneth E. Webb, Jr., Esq. (WVSB #5560)

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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

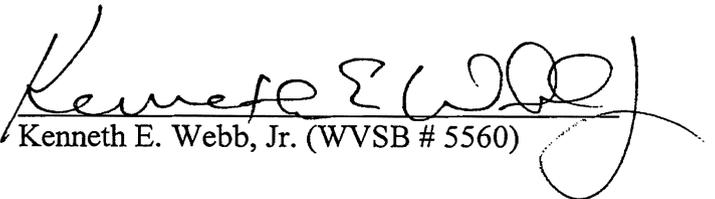
Respondent.

**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 Reply Brief* to be served upon the following:

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

by first class mail, postage pre-paid on this **5th day of August 2013**.

  
Kenneth E. Webb, Jr. (WVSB # 5560)