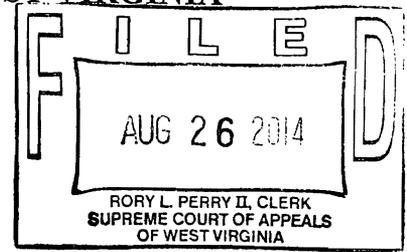


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

No. 14-0637



**JAMES R. FLEET, JAMILA J. FLEET,  
and JAMES LAMPLEY,**  
Defendants Below,

**Petitioners,**

**v.**

**Appeal from the Circuit Court of  
Berkeley County (11-C-1091)**

**WEBBER SPRINGS OWNERS  
ASSOCIATION, INC.,**  
Plaintiff Below,

**Respondent,**

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**Petitioners' Brief**

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## QUESTIONS PRESENTED

1. Does a limited expense liability planned community have a common law lien against homeowners for unpaid assessments?
2. Does a limited expense liability planned community have a common law lien against homeowners for attorney fees and costs for collecting assessments?
3. Does the West Virginia Consumer Credit and Protection Act apply to a limited expense liability planned community in collection of assessments from a homeowner?
4. What is the statute of limitations for counterclaims under the West Virginia Consumer Credit and Protection Act?

## STATEMENT OF THE CASE

This case concerns a dispute between Respondent, Webber Springs Owner's Association, Inc. ("Webber Springs"), and Petitioners, James R. Fleet, James J. Fleet, and James J. Lampley ("Petitioners" / "Homeowners") over the ability of Respondent to cloud the titles of the Petitioners' homes by recording notices of liens against Petitioners' homes for assessments, attorney fees, and costs in recording.

All Petitioners own homes in the Webber Springs residential development, in Berkeley County, West Virginia. Webber Springs is a West Virginia limited expense planned community under W. Va. Code § 36B-1-203, which means that it is exempt from many parts of the Uniform Common Interest Ownership Act ("UCIOA"). (App. - 95). Both Petitioners and Respondent agree that Webber Springs has the right to assess and collect fees and homeowners association dues. However, this case does not concern the right to assess fees, but rather, whether a homeowners association that purposefully exempts itself from W. Va. Code § 36B-3-116 (which gives most homeowners associations statutory authority to assert liens on real property for assessments) has the right to assert a common law lien on real property for assessments, attorney fees, and costs for recording the lien.

Respondent asserts – and the lower court held – that the liens filed by Webber Springs are valid "consensual common law liens." (App. - 346). The question for this Court is whether a homeowners association has a common law lien against the real property of homeowners for assessments, attorney fees, and costs. Because West Virginia

law is clear that **all** common law liens against real property are invalid, the purported common law liens against real property are invalid.

### FACTS

Webber Springs knowingly and purposefully exempted itself from the right to record valid liens pursuant to the Uniform Common Interest Ownership Act (“UCIOA”) when it chose to form as a limited expense liability planned community under W. Va. Code § 36B-1-203. W. Va. Code § 36B-1-203 exempts Webber Springs from W. Va. Code § 36B-3-116 that gives many HOAs the right to record liens for assessments. When it formed as a limited expense planned community, Webber Springs was able to market homes to potential purchasers, by emphasizing the capped HOA fees of a limited expense liability planned community as an attractive purchase incentive. (Webber Springs’ Motion for Summary Judgment at 4, App. - 95). Had Webber Springs intended to have the power to obtain and record valid statutory liens against homeowners, it should not have formed limited expense planned community.

Nonetheless, on March 10, 2008, and January 8, 2010, Webber Springs recorded in the Berkeley County Clerk’s office “Notices of Liens” purporting to create a lien on James Lampley’s real property for unpaid assessments, attorney fees, and costs. (App. 21-24). Likewise, on February 27, 2008, and January 8, 2010, Webber Springs recorded in the County Clerk’s office “Notices of Liens” purporting to create a lien on James R. Fleet and Jamila J. Fleet’s real property for unpaid assessments, attorney fees, and costs. (App. - 4-7).

Recording these notices that purport to be valid liens on homeowners' real property has become Webber Springs's *modus operandi* for collecting assessments, attorney fees, and costs. Since its inception in 2003, Webber Springs has filed at least one hundred eleven (111) Notices of Liens against homeowners in Berkeley County and, in many instances, has recorded judgments pursuant to the purported liens.

On January 3, 2012, Webber Springs filed two separate complaints against the Petitioners for "damages upon and pursuant to the lien[s]." (App. – 1-3, 18-20). In response to the Complaints, Petitioners, on March 19, 2012, filed multiple counterclaims against Webber Springs for violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA") including: 1) misrepresentation of the status of a debt, 2) unfair and unconscionable means for seeking attorney fees for collections, 3) fraudulent, deceptive and misleading representations, and 4) unfair and unconscionable means by recording a lien for attorney fees on Petitioners' real property absent a court judgment. (App. – 25-39). On October 29, 2013, Webber Springs moved for Summary Judgment on all of Petitioners' counterclaims. (App. - 88). In addition to opposing Summary Judgment, Petitioners filed a Motion for Judicial Review of Documentation Purporting to Create a Lien pursuant to W. Va. Code § 38-16-403. (App. -150).

After briefing and oral argument on Respondent's Motion for Summary Judgment, the circuit court dismissed all of Petitioners' counterclaims (see circuit court Order, App. 339 – 351) and held:

1. The WVCCPA does not apply to Webber Springs because "Webber Springs in the normal course of its business does not extend credit to any entity;"

2. The WVCCPA does not apply to Webber Springs because any alleged debts of Petitioners were not for personal, family, or household purposes; and
3. All of Petitioners WVCCPA counterclaims are time barred by a one-year statute of limitations.

Furthermore, the circuit court reviewed the documents purporting to create a lien and held:

1. Webber Springs has a valid consensual common law lien against Petitioners' real property for unpaid assessments, attorney fees, and costs; and
2. "[T]he Declaration is a covenant running with the land and gives Webber Springs the authority to file additional Notices of Liens, and that these liens are consensual and do not trigger the application of Chapter 38."

Petitioners seek to have the circuit court's order on the Motion for Summary Judgment reversed because the WVCCPA applies and was timely asserted by Petitioners. Moreover, Petitioners seek reversal of the circuit court's Order on Petitioners' motion to determine the legal status of the purported liens, because Respondents do not have a valid lien on Petitioners' real property.

#### STANDARD OF REVIEW

This Court has consistently found that "[a] circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Moreover, "[w]hen undertaking our plenary review, we apply the same standard for granting summary judgment as would be applied by a circuit court." *Subcarrier Communications, Inc. v. Nield*, 218 W. Va. 292, 296, 624 S.E.2d 729,

733 (2005). Furthermore, “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. pt. 2, *Painter*, 192 W. Va. 189, 451 S.E.2d 755. The role of the circuit court “at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.” Syl. pt. 3, *Id.*

## ARGUMENT

### **I. The Circuit Court Erred by Finding that the Respondent had Valid Common Law Liens Against the Petitioners’ Real Property.**

#### **A. Chapter 38 of the West Virginia Code, entitled “Liens,” applies to the purported liens that Respondent recorded against Petitioners’ real property.**

W. Va. Code § 38-16-202(a) is clear: “[a] common law lien against real property is invalid and is not recognized or enforceable in this state.” Rather than refer to the statute that Petitioners allege makes the purported liens invalid as a basis for its decision, the circuit court held “as a matter of law that the Declaration [of Conditions, Covenants, Restrictions and Easements of Webber Springs Subdivision] is a covenant running with the land and gives Webber Springs the authority to file additional Notices of Liens, and that these liens are consensual and do not trigger the application of Chapter 38.” (App. – 348). Although neither Petitioners nor Respondent argued that Chapter 38 is only “triggered” for certain types of liens, the circuit court simply stated that Chapter 38 did not apply to the purported liens and cited no other authority for exempting the purported liens from the purview of Chapter 38 of the Code.

**B. A homeowners association that exempts itself from the Uniform Common Interest Ownership Act does not have a valid common law lien against a homeowner’s real property for unpaid assessments, attorney fees, and costs, because no common law liens against real property are recognized in West Virginia.**

Petitioners, Respondent, and the circuit court all agree that Webber Springs never had a statutory lien for HOA assessments under the Uniform Common Interest Ownership Act (W. Va. Code § 36B-3-116 *et seq.*) because Webber Springs is a limited expense liability planned community formed under W. Va. Code § 36B-1-203(2).<sup>1</sup> (App. – 97, 346). All parties and the circuit court agree on this, because “Webber Springs at its inception opted to exempt itself from the majority of the Uniform Common Interest Ownership Act.” (App. – 346).

All common law liens against real property are invalid and not recognized or enforceable in West Virginia regardless of consent. W. Va. Code § 38-16-202(a) is crystal clear: “A common law lien against real property is invalid and is not recognized or enforceable in this state.” W. Va. Code § 38-16-202(a). Therefore, in no case can authority for a lien on real property derive from the common law; rather, it must derive

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<sup>1</sup> W. Va. Code § 36B-1-203 titled “**Applicability to new common interest communities — Exception for small and limited expense liability planned communities**” reads:

If a planned community:

- (1) Contains no more than twelve units and is not subject to any development rights; or
- (2) Provides, in its declaration, that the annual average common expense liability of all units restricted to residential purposes, exclusive of optional user fees and any insurance premiums paid by the association, may not exceed three hundred dollars as adjusted pursuant to section 1-114 [§ 36B-1-114] (adjustment of dollar amounts) it is subject only to sections 1-105 [§ 36B-1-105] (separate titles and taxation), 1-106 [§ 36B-1-106] (applicability of local ordinances, regulations and building codes) and 1-107 [§ 36B-1-107] (eminent domain), unless the declaration provides that this entire chapter is applicable.

(emphasis added)

from statute, e.g. deeds of trust (W.Va. Code §38-1-1 *et seq.*); liens for HOA dues under the Uniform Common Interest Ownership Act (W. Va. Code § 36B-3-116 *et seq.*)<sup>2</sup>; tax liens (W. Va. Code § 38-10-1 *et seq.*), mechanics liens (W. Va. Code § 38-2-1 *et seq.*); or court judgment liens (W. Va. Code § 38-3-1 *et seq.*), etc. The statute does not say that consensual common law liens against real property are valid and that nonconsensual common law liens are invalid. Rather, it says that “a common law against real property is invalid;” it does not further modify “a common law lien against real property” or create any exceptions to “a common law lien against real property.” Thus, the plain language of the statute shows that the legislature intended that **any** common law lien against real property is invalid.

W. Va. Code § 38-16-202 clearly states which consensual common law liens are recognized in this state:

**§ 38-16-202. Real property common law liens unenforceable; personal property common law liens limited.**

- (a) A common law lien against real property is invalid and is not recognized or enforceable in this state.
- (b) A common law lien claimed against personal property is invalid and is not recognized or enforceable if, at the time the lien is claimed, the claimant does not have:
  - (1) Actual possession, lawfully acquired, of specific personal property against which the lien is asserted; or
  - (2) Exclusive control, lawfully acquired, of specific personal property against which the lien is asserted.
- (c) A valid common law lien claimed against personal property is destroyed or terminated if the person entitled to the lien fails to retain possession or control of the property, unless the person against whom the lien is asserted agrees, in writing, that the lien may continue after delivery of the property from the possession of the lienholder.

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<sup>2</sup> It should be noted that even though the UCIOA does give homeowners associations a lien for unpaid assessments, it does not provide for a lien for attorney fees for collecting that assessment.

The statute's title makes it clear that there is a distinction between common law liens on real property, which are "unenforceable," and common law liens on personal property, which are "limited." Common law personal property liens are limited to those in possession or control of the personal property, or where "the person against whom the lien is asserted agrees in writing." W. Va. Code § 38-16-202(c). The language that requires consent in writing for common law liens on personal property is where the requirement for consent for common law liens on personal property derives, but in no way does that language apply to subsection (a) on real property.

W. Va. Code § 38-16-202 and W. Va. Code § 38-16-201<sup>3</sup>, read *in pari materia*, give two types of property and three types of authority for liens which gives us six types of liens: 1) statutory liens on real property, 2) statutory liens on personal property, 3) judgment lien on real property, 4) judgment liens on personal property, 5) common law liens on real property, and 6) common law liens on personal property. As demonstrated in Table 1 below, liens 1-4 are always valid. Lien 5 is never valid, and lien six is invalid unless consented to by possession, control or a signed writing.

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<sup>3</sup> The Statute reads:

**"W. Va. Code § 38-16-201. Bonafide liens are not affected by this article**

Regardless of whether such liens may also be considered to be common law liens, nothing in this article is intended to affect:

- (1) Statutory liens arising under an enactment of the Legislature;
- (2) Equitable liens, constructive liens and other liens that are imposed by a court of competent jurisdiction; or
- (3) Consensual liens now or hereafter recognized under the common law of this state."

**TABLE 1**

	<b>Real Property</b>	<b>Personal Property</b>
<b>Statutory</b> § 38-16-201(1)	Valid	Valid
<b>Court Judgment</b> § 38-16-201(2)	Valid	Valid
<b>Common Law</b> § 38-16-201(3)	<b><u>Invalid</u></b> W. Va. Code § 38-16-202(a)	Invalid Unless Consent by  - Possession - Control - Signed writing  W. Va. Code § 38-16-202(b) and (c).

The circuit court improperly found that Respondent had common law liens against real property despite the fact that those liens are invalid and not recognized in this state. Such a rule is not unique to this state, nor is it a new rule. Even prior to the adoption of W. Va. Code § 38-16-202, courts in our sister state of Virginia recognized that “[a] debt is in no sense a lien upon the property of the debtor, until reduced to judgment or secured by a deed of trust or mortgage upon the property.” *Cain v. Rea*, 159 Va. 446 (1932). Moreover, our sister state’s court explained that a claim on a debt is not a lien because a “claim is generally a liability *in personam*. A lien is a liability *in rem*.” *Fairbanks, Morse & Co. v. Cape Charles*, 144 Va. 56 (1926). Instead of seeking to obtain judgment against the

Homeowners personally prior to recording a notice of lien, Webber Springs recorded notices of liens on Homeowners' realty.

Although the statute makes clear that common law liens on real property are invalid irrespective of the issue of consent, Webber Springs cited, and the circuit court adopted as persuasive in this case, a recent circuit court order in, *In Re: A Proported (sic) Judgment Lien Against Keith William Deblasio et al.* Morgan County Circuit Court, 12-P-1 through 12-P-6 and 12-P-25 through 12-P-26,<sup>4</sup> as precedent for an opposite finding. In *Deblasio*, *pro se* petitioners sought to invalidate documentation purporting to create a lien. Respondent had filed multiple liens on Petitioners' real property for unpaid assessment liens.

Notably, the *pro se* petitioners in *Deblasio* never mentioned W. Va. Code § 38-16-202 which distinguishes real and personal property. Furthermore, the Court never cited, mentioned, or applied W. Va. Code § 38-16-202. Rather the Court looked only to W. Va. Code § 38-16-116 (Nonconsensual common law lien defined), and concluded that:

West Virginia does not have a statute that authorizes liens upon property for failure to pay homeowner dues analogous to statutory liens such as mechanics liens or self-service storage liens. Therefore, to enforce a declaration by placing a lien upon the property for failure to pay dues, there must be a judgment from a court of competent jurisdiction or consent of the owner of the affected property.

*Deblasio* at 13.

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<sup>4</sup> The liens filed in *Deblasio* on behalf of the homeowners association, like in this case were, filed with the assistance of an attorney from the very same law firm who filed the liens against Homeowners in this case.

The *Deblasio* court found that the liens in question were consensual because the deeds that transferred the property to the petitioners referenced the Declarations of the HOA. Because the liens were considered consensual the court deemed them valid without analyzing whether the liens had a basis in law other than not being a “nonconsensual common law lien.” Beyond failing to address W. Va. Code § 38-16-201 (defining three types of liens), or § 38-16-202 (defining which common law liens are valid), *Deblasio*, failed to distinguish liens for unpaid assessments from liens for attorneys fees and costs.

The circuit court in *Deblasio* was in error that there is no statutory authority for homeowners associations to file liens for the nonpayment of dues. Pursuant to the Uniform Common Interest Ownership Act codified at W. Va. Code § 36B-3-116 (Lien for Assessments) qualifying HOAs may file liens for assessment and even “limited expense liability planned communities” may file liens if they opt in to the provisions of UCIOA by forming pursuant wherein the “declaration provides that this entire chapter [Chapter 36B] is available.” W. Va. Code § 36B-1-203. However, Webber Springs and the HOA in *Deblasio* decided to be a “limited expense liability planned community,” and rather than subject itself to all of the rules of UCIOA (Chapter 36B), Webber Springs chose to not be subject to many of the provisions of the UCIOA. Because Webber Springs chose to exempt itself from W. Va. Code § 36B-3-116, it does not have authority to record liens for assessments, let alone liens for attorneys fees and costs for recording the notices of liens.

Notably, *Deblasio* missed the key statute concerning liens on real property, W. Va. Code § 38-16-202, which clearly states that all common law liens against real property

are invalid regardless of whether or not they are consensual. In essence *Deblasio* was applying the rules pertaining to consensual common law liens on personal property to liens on real property without the part that requires a signed writing.<sup>5</sup> Even if such standard applied here, Webber Springs would not have a valid lien because the lien is not supported by an authenticated writing.

**C. The liens at issue were not consensual because Petitioners never granted consent through an authenticated document.**

The circuit court found that the Webber Springs Declaration of Conditions, Covenants, Restrictions and Easements (“Declaration”) amounts to a valid common law lien by way of the consent of the homeowners. This is in error. First, the Declaration is not provided for by a statute or sanctioned by a court of competent jurisdiction as required by W. Va. Code §§ 38-16-201 and 38-16-202, and accordingly, the purported liens could not be validated by mere consent. Second, even had the lien been against personal property, wherein a consensual common law lien could be valid, courts have interpreted “consensual liens” as Article 9 security interests under the Uniform Commercial Code, which require signed security agreement for validity. *See United States v. Ron Pair Enters*, 489 U.S. 235, 240 (U.S. 1989); *In re Pfister*, 449 B.R. 422, 426 (Bankr. D.N.M. 2011); *In re Yampell*, 2013 Bankr. LEXIS 2231, 5-6 (Bankr. D.N.J. May 31, 2013); W. Va. Code § 46-9-102.

Even assuming for argument’s sake that this case did involve personal property, the Homeowners never signed or authenticated any document giving Webber Springs a

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<sup>5</sup> None of this is surprising since the *Deblasio* homeowners were not represented by counsel.

security interest in their homes as required for Article 9 security agreements. W. Va. Code § 46-9-203(b).<sup>6</sup> Rather, homeowners signed a Planned Unit Development Rider, which is nothing like a security agreement, and states nothing about any liens. (App – 215-223) W. Va. Code § 46-9-203(b) requires that the debtor (Homeowners) to authenticate a security agreement that provides a description of the collateral (the homes) and recite the obligation secured.

Petitioners never authenticated any document that granted Webber Springs authority to file the liens, nor have Petitioners ever signed any deed. Importantly, the deeds are from grantor of the property, *not* from the grantee homeowners. Nevertheless, Webber Springs argues that because there are deeds granted by the previous property owners to the Homeowners, this somehow gives Webber Springs a lien on Petitioners' real property and the right to record the liens against Homeowners' property. Neither the deeds, which were not signed by the homeowners, nor the Planned Unit Development Riders state that Webber Springs has anything resembling a security interest or lien on Homeowners property to secure the payment of HOA dues. Rather these documents merely mention that there exists a declaration that governs the HOA. Accordingly, even if these common law liens were on personal property, which they clearly are not, they would still be invalid because they are not consensual.

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<sup>6</sup> *In re Hoyt's, Inc.* interpreted W. Va. Code § 46-9-203(b):

At a minimum, a security agreement must recite the obligation secured. *Modafferi*, 45 Bankr. at 374, citing, *Needle v. Lasco, Inc.*, 10 Cal. App. 3d 1105, 1108, 89 Cal. Rptr. 593, 595 (1970). In the absence of a writing evidencing the intent of the debtor to grant a creditor a security interest in certain property to secure a specific obligation, the Court cannot infer a security agreement.

*In re Hoyt's, Inc.*, 117 B.R. 226, 230 (Bankr. N.D. W. Va. 1990).

**D. Even if Webber Springs had a valid common law lien for for unpaid assessments, Webber Springs would still not have a common law lien for attorney fees and costs.**

Not only did Webber Springs record purported liens for assessments, it too recorded and attempted to collect attorney fees and costs for the collection of the assessments despite there being no court order awarding attorney fees and costs. (App. – 4-7, 21-24). The purported liens on Petitioners’ homes for attorney fees and costs are not only unlawful for the same reasons as liens on real property for assessment, purported liens for attorney fees and costs are also unlawful because it is an attempt to collect attorney fees for a consumer debt. In fact, West Virginia Code § 46A-2-128(c) is crystal clear that it is unconscionable conduct to collect or attempt to collect any part of the debt collector’s attorney fees. Webber Springs attempts to collect attorney fees and costs through recording liens on Petitioners’ property is even more reprehensible than the purported liens for assessments. Although it was unlawful for Webber Springs to record notices of liens for the collection of assessments, it was still lawful for Webber Springs to attempt to collect the assessment by traditional. Conversely, it was not only unlawful for Webber Springs to record the Notices of liens for attorney fees and costs, it would be unlawful to use any means to collect attorney fees and costs for the collection of the debt from Homeowners.

**II. The Circuit Court Erred in Granting Respondent’s Motion for Summary Judgment on Petitioners’ Counterclaims Because Petitioners Have Valid West Virginia Consumer Credit and Protection Act Claims and No Statute of Limitations Applies to Petitioners’ Counterclaims.**

**A. The West Virginia Consumer Credit and Protection Act applies to homeowners associations attempting to collect debts from homeowners because homeowners are “consumers” and homeowners association assessments are primarily for personal, household, and/or family use.**

The circuit court erred in holding that the West Virginia Consumer Credit and Protection Act did not apply to the debt collection practices of Respondent Webber Springs because: 1) Respondent did not extend credit to Petitioners, or enter into a consumer credit sale with petitioners, and 2) because the alleged debts of Petitioners were not for personal, family, or household purposes. (Order p. 4-5).

Petitioners are consumers under W. Va. Code § 46A-2-122(a), which provides that “[c]onsumer’ means any natural person obligated or allegedly obligated to pay any debt.” (emphasis added). Clearly Petitioners meet this broad definition because 1) each is a natural person; and 2) Webber Springs alleges Petitioners are obligated to pay a debt. Moreover, W. Va. Code § 46A-2-122 defines “claim,” “debt collector,” and “debt collection”:

**(b)** “Claim” means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or service which is the subject of the transaction is primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment.

**(c)** “Debt collection” means any action, conduct or practice of soliciting claims for collection or in the collection of claims owed or due or alleged to be owed or due by a consumer.

**(d)** “Debt collector” means any person or organization engaging directly or indirectly in debt collection. The term includes any person or ‘organization’ who sells or offers to sell forms which are, or are represented to be, a collection system, device or scheme, and are intended or calculated to be used to collect claims.

(emphasis added). This Court has emphasized that “West Virginia Code § 46A-5-101 is a remedial statute to be liberally construed to protect consumers from unfair, illegal, or deceptive acts. . .” Syl. Pt. 6, *Dunlap v. Friedman's, Inc.*, 213 W. Va. 394, 395, 582 S.E.2d 841, 842 (2003).

This Court has further emphasized how liberally the above definitions should be applied, finding that “[t]he word (any) when used in a statute should be construed to mean any.” Syl. Pt. 2 *Thomas v. Firestone Tire & Rubber Co.* 164 W. Va. 763, 266 S.E.2d. 905 (W. Va. 1980). In *Thomas*, the court further found,

[t]he plain meaning of W.Va. Code § 46A-2-122 requires that the provisions of article 2 of Chapter 46A regulating improper debt collection practices in consumer credit sales must be applied alike **to all who engage in debt collection**, be they professional debt collectors or creditors collecting their own debts.

Syl. Pt. 3, *Thomas v. Firestone Tire & Rubber Co.*, 164 W. Va. 763, 266 S.E.2d. 905 (1980) (emphasis added). The circuit court mistakenly overlooked the debt collection provisions of the WVCCPA.

As the Respondent is aware, the alleged debt arises out of the purchase and the ongoing maintenance of the Petitioners’ homes. The circuit court, rather than apply the clear statutory language and this Court’s liberal interpretation of the WVCCPA, erred when it concluded that there is no “factual basis that [Homeowners] engaged in any type of credit transaction with Webber Springs.” The circuit court ruled that because “Webber Springs never lent any money to the Defendants,” then the WVCCPA does not apply. The circuit court cited no statute or case supporting its decision that the statute required a “loan” for claims alleging unfair or unconscionable means under § 46A-2-128, or claims

for fraudulent, deceptive, or misleading representations under § 46A-2-127. Indeed, Petitioners concede that Webber Springs never loaned Petitioners any money. However, a plain reading of the statute shows that a loan need not be made for the WVCCPA to apply to debt collection activity against consumers. Rather, there need only be an alleged debt, a consumer, and a debt collector. In sum, because Respondent engaged in debt collection when it was attempting to collect a debt from consumer homeowners, Respondent is a “debt collector,” Petitioners are “consumers” and the WVCCPA applies.

Moreover, the alleged liens fall within the purview of the statute, because the purchase of a home and the associated homeowners association assessments are for both personal and household purposes. Despite the plain language of W. Va. Code § 46A-2-122(b), which states that a “[c]laim’ means any obligation . . . to pay money arising out of a transaction . . . which is . . . primarily for personal, family or household purposes . . .” This Court interpreted that statutory language in *Dan’s Carworld, LLC v. Serian* and held that the circuit court’s finding that an automobile dealer purchasing a trade-in-vehicle in connection with the purchase of a new vehicle by Defendant consumer as not being for personal use was “erroneous.” 223 W. Va. 478, 485, 677 S.E.2d 914, 921 (2009). The Court found that the purchase at the heart of the transaction was Defendant consumer’s purchase of the new vehicle. The Court, without explicitly making a distinction between business purpose and personal/family/household purpose applies a very broad interpretation of personal/family/household purpose that would seem to encompass almost all non-business transactions by persons, households, and families that benefit the

person, family, or household involved. Notably, *Dan's Carworld*, did not involve any loan between the consumer and the debt collector, and yet the WVCCPA applied.

The circuit court, in this case, contravened this Court's precedent, erroneously finding that a family's obligation to personally pay for assessments associated with their household is not for any personal, family, or household purpose. (App. 343). As in *Dan's Carworld, LLC*, where the consumer purchased an automobile, the heart of Petitioners' obligation to pay dues to Webber Springs derives from the purchase of Petitioners' homes. The dues are to help maintain the neighborhood so that Petitioners' home values are maintained by keeping the entire neighborhood maintained. Because the HOA dues are for a personal, household, and family purpose, Petitioners claims fall within the purview of the WVCCPA.

**B. No statute of limitations applies to counterclaims under the West Virginia Consumer Credit and Protection Act.**

When the provisions of the WVCCPA are "asserted as a defense, setoff or counterclaim to an action against a consumer," such defense, setoff or counterclaim may be asserted "without regard to any limitation of actions." W. Va. Code § 46A-5-102. This Court reiterated the clear intention of the legislature holding that "(w)here a consumer is sued for the balance due on a consumer transaction, any asserted defense, setoff, or counterclaim available under the Consumer Credit Protection Act, W. Va. Code § 46A-2-101, *et seq*, may be asserted without regard to any limitation of actions under W. Va. Code, 46A-5-102 (1974)." Syl. Pt. 5, *Tribeca Lending Corp. v. McCormick*, 231 W. Va.

455, 745 S.E.2d 493 (2013); Syl. Pt. 6, *Chrysler Credit Corp. v. Copley*, 189 W. Va. 90, 428 S.E.2d 313 (1993).

Despite this clear exception to the statute of limitations under W. Va. Code § 46A-5-102, the circuit court “conclude[d] as a matter of law that even if the WVCCPA applied, all claims lodged in the Counterclaims would still nevertheless be time-barred.” (App. - 344) Nonetheless, the circuit held as such, even though the Petitioners explicitly cited W. Va. Code § 46A-5-102. The circuit court ignored § 46A-5-102 applying to counterclaims, and analyzed Petitioners’ counterclaims as if they were initial claims by applying § 46A-5-101.

In this case, Webber Springs brought separate actions against Petitioners, and Petitioners counterclaimed under the WVCCPA. Because Petitioners’ claims are counterclaims, W. Va. Code § 46A-5-102 applies, and the claims are not subject to any statute of limitations. Nonetheless, the circuit court ignored the fact that Petitioners claims are counterclaims and applied a one year statute of limitations. (App. - 344)

Assuming *arguendo* that a statute of limitations applied to Petitioners’ counterclaims, that statute of limitations would be four years. The circuit court found that a four-year statute of limitations under W. Va. Code § 46A-5-101 does not apply to the Petitioners’ claims because it is not a revolving charge account or a revolving loan account. In this case, however, there is a revolving charge account because annual assessments are made against the Petitioners for the services that Webber Springs is supposed to provide in return. That setup is a revolving charge account, and for that reason the four-year statute of limitations would apply.

Moreover, the Supreme Court of Appeals of West Virginia held that:

West Virginia Code § 46A-5-101(1) (1996) (Repl. Vol. 1998) is a remedial statute to be liberally construed to protect consumers from unfair, illegal, or deceptive acts. In face of the ambiguity found in that statute, a consumer who is party to a closed-ended credit transaction, resulting from a sale as defined in West Virginia Code § 46A-6-102(d), may bring any necessary action within either the four-year period commencing with the date of the transaction or within one year of the due date of the last payment, whichever is later.

Syl. Pt. 6, *Dunlap v. Friedman's, Inc.*, 213 W. Va. 394 (W. Va. 2003). So, even if this was a closed-ended credit transaction, the four-year statute of limitations would apply and the claims would be within the statute of limitations. Thus, while not statute of limitation applies to Petitioners' counterclaims, had the claims not been counterclaims a four year statute of limitations would apply.

### **CONCLUSION**

For the reasons setforth, this Court should reverse both the circuit court's Order dismissing Petitioners' counterclaims and the circuit court's Order that finding that Respondent had a valid common law lien for assessments and attorney fees on Petitioners' realty. More specifically Webber Springs does not have, nor has it ever had a common law lien on Petitioners' real property, because no common law liens against real property are recognized in West Virginia. Finally, petitioners have valid claims under the West Virginia Consumer Credit and Protection Act because Petitioners are consumers and because no statute of limitations applies to counterclaims under the WVCCPA.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
AT CHARLESTON

JAMES R. FLEET, JAMILLA FLEET,  
AND JAMES LAMPLEY

Petitioners,

Circuit Court of Berkeley County  
Civil Case No. 11-C-1091  
Docket No. 14-0637

vs.

WEBBER SPRINGS OWNERS  
ASSOCIATION, INC.,

Respondent.

CERTIFICATE OF SERVICE

I, Anthony J. Delligatti, of Skinner Law Firm, counsel for the Petitioners do hereby certify that I have served the foregoing **PETITIONERS' BRIEF** on this 25th day of August 2014, by United States Mail, postage prepaid to the following:

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