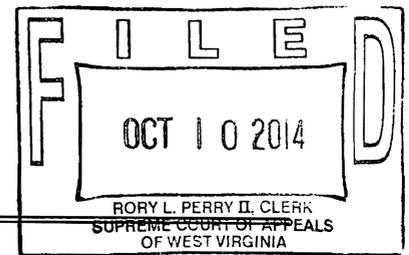


No. 14-0637



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

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JAMES R. FLEET, JAMILLA FLEET,  
AND JAMES LAMPLEY, Defendants Below,

Petitioners,

v.

WEBBER SPRINGS OWNERS  
ASSOCIATION, INC., Plaintiff Below

Respondent.

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**RESPONDENT'S RESPONSE TO PETITIONERS' PETITION FOR APPEAL**

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## I. STATEMENT OF THE CASE

### A. Underlying Facts and Background of Instant Matter

#### 1. Webber Springs Owner's Association, Inc.

Webber Springs Subdivision is a residential community located on Rt. 51 in Inwood, Berkeley County, West Virginia. The subdivision is comprised of 132 acres and divided into three (3) sections with 360 lots. On November 19, 2003, the developer of Webber Springs Subdivision, Webber Springs LLC ("Developer") recorded a Declaration of Conditions, Covenants, Restrictions and Easements of Webber Springs Subdivision ("Declaration") with the County Clerk of Berkeley County, West Virginia ("County Clerk") in Book 00748, page 00140. Joint Appendix ("App."), pp. 115-124. Pursuant to the Declaration, a non-profit homeowners association was established and named Webber Springs Owners' Association, Inc. ("Webber Springs"). App., pp. 1 ¶1, 18 ¶1 and 115-224. Pursuant to the Declaration, Webber Springs is a *limited expense* liability planned community as it is exempt from the West Virginia Uniform Common Interest Ownership Act. ("UCIOA"). W.Va. Code § 36B-1-203 and App. 121 ¶ 3 and 5. (Emphasis added.)

The Declaration recorded in the office of the County Clerk provides that all lots within the subdivision are subject to a covenant for maintenance assessments. In this regard, Article X ¶ 1 of the Declaration states:

1. Creation of the Lien and Personal Obligation of Assessments: The Declarant for each Lot owned by it within The Properties hereby covenants and **each Owner of any Lot by acceptance of a deed therefore, whether or not it shall be so expressed in any such deed or other conveyance, be deemed to covenant and agree to pay the Association:** (1) annual assessments or charges; (2) special assessments for capital improvements, such assessments to be fixed, established and collected from time to time as hereinafter provided; and (3) default assessments which may be levied and collected from time to time. **The annual, special and default assessments, together with such interest thereon, and costs of collection thereof as hereinafter provided, shall be a charge on**

**the land and shall be a continuing lien upon the property against which each such interest thereon and cost of collection thereof as hereinafter provided, shall also be the personal obligation of the person who was the Owner of such property** at the time when the assessment fell due.

App., p. 121 ¶1. (Emphasis added.) The foregoing assessments are “exclusively for the purpose of road and street maintenance, promoting the recreation, health, safety, and welfare of the residents in The Properties and in particular for the improvement and maintenance of properties, services, and facilities devoted to this purpose and related to the use and enjoyment of the Common Properties”. App., p. 121 ¶2. The Declaration further provides that the general assessment for each lot “shall not exceed \$300.00” as adjusted pursuant to W.Va. Code 36B-1-114. App., p. 121 ¶3.

With respect to a property owner’s failure to pay the prescribed assessment, the Declaration provides as follows:

9. Effect of Non-Payment of Assessment: The Personal Obligation of Owner; the Lien; Remedies of the Association: **If the assessments are not paid on the date when due (being the dates specified in Section 7 thereto), then such assessment shall become delinquent and shall, together with such interest thereon and the cost of collection thereof, as hereinafter provided, thereupon become a continuing lien on the property** which shall bind such property in the hands of the then Owner, his heirs, devisees, personal representatives, successors and assigns.

**If the assessment is not paid within thirty (30) days after the delinquency date, the assessment shall bear interest from the date of delinquency at the maximum rate permitted by law and the Association may apply a late fee and may bring an action at Law against the Owner personally obligated to pay the same or to foreclose the lien against the property, and there shall be added to the amount of such assessment the late fees and costs of preparing, filing and prosecuting the complaint in such action (including reasonable attorney's fees), and in the event a judgment is obtained, such judgment shall include interest on the assessments as above provided together with costs of the action (including reasonable attorney's fees).**

10. Successor's Liability for Assessment: **In addition to the personal obligation of each Owner to pay all assessments thereon and the Association's perpetual lien for such assessments, all successors to the fee**

**simple title of a Lot, except as provided in Paragraph 11, shall be jointly and severally liable with the prior Owner or Owners thereof for any and all unpaid assessments, interest, late fees, costs, expenses, and attorney's fees against such Lot** without prejudice to any such successor's right to recover from any prior Owner amounts paid by such successor. Such successor shall be entitled to rely on Certificate of Assessment as defined in Section 8 hereof.

App., pp. 122-123 ¶¶ 9 and 10. (Emphasis added.)

## **2. Petitioners James R. Fleet and Jamila J. Fleet**

On May 6, 2005, John S. Lumbard and Angelia Lumbard conveyed Lot No. 53, Section I, Phase 2, of Webber Springs Subdivision to the Petitioners James R. Fleet and Jamila Fleet (“Petitioners Fleet”) by deed, of record in the County Clerk’s office in Deed Book 797, page 281. Pursuant to well accepted principles of property law as well as the language in the deed, the conveyance was subject to all “restrictive covenants of record.” App., pp. 128-129. Thus, the conveyance of Lot No. 53 to the Petitioners Fleet was expressly subject to the Declaration filed by the Developer which included an obligation to pay annual assessments for the property and the procedure by which the same would be collected. Petitioners Fleet were also put on notice with respect to the homeowner assessment during the closing as reflected by their agreement to pay their pro-rata share of the assessments for 2005 as set forth in the Settlement Statement.<sup>1</sup> App., p. 242. In addition, the Metropolitan Regional Information System (MRIS) listing plainly identified that the property was subject to homeowner assessments and dues. App., pp. 245 and 247.

In order to purchase Lot No. 53, the Petitioners Fleet obtained a loan using the property as collateral. On March 6, 2005, Petitioners Fleet executed a Deed of Trust in favor of Texcorp Mortgage Bankers, Inc., of record in the County Clerk’s office in Trust Book 1652, page 543.

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<sup>1</sup> The closing was conducted by the office of Nichols & Skinner, the predecessor firm now known as the Skinner Law Firm, counsel of record in this case.

Attached to the Deed of Trust, and also executed by the Petitioners Fleet was a Planned Unit Rider. App., pp. 215-216. In this Planned Unit Rider, the Petitioners Fleet (a) acknowledged that they had an obligation to pay homeowners dues and assessments as prescribed in the Declaration; and (b) promised their lender that they would satisfy these obligations. More specifically, the Planned Unit Rider states in pertinent part:

A. PUD Obligations. Borrower shall perform all of Borrower's obligations under the PUD's Constituent Documents. The "Constituent Documents" are the: (i) Declaration; (ii) articles of incorporation, trust instrument or any equivalent document which creates the Owners Association; and (iii) any by-laws or other, rules or regulations of the Owners Association. Borrower shall promptly pay, when due, all dues and assessments imposed pursuant to the Constituent Documents.

...  
F. Remedies. If Borrower does not pay PUD dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph F shall become additional debt of Borrower secured by the, Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest upon notice from Lender to Borrower requesting payment.

App., pp. 215-216.

Despite having knowledge of their obligation to pay homeowner assessments, the Petitioners Fleet did not pay the annual assessments which accrued yearly on the property from 2006 through 2011. In fact Petitioners Fleet admit that they chose not to pay the assessments as a set off for services they maintain that Webber Springs did not perform, even though the Declaration does not provide any type of set-off or credit. App., pp. 9, 79 and 115-124.

On February 26, 2008, the Treasurer for Webber Springs executed a Notice of Lien for Assessments which specified that the Petitioners Fleet owed \$900.00 for unpaid homeowner assessments, plus filing fees and interest for the years 2006-2008. Webber Springs submitted the Notice of Lien to the County Clerk for recording in Trust Book 2236, page 127. App., pp. 4-5. Two years later, with assessments still unpaid, Webber Springs' President executed a Notice of

Lien for NonCompliance which specified that the Petitioners Fleet owed an additional \$600.00 for unpaid homeowner assessments, filing fees, attorney fees and interest and had the same recorded with the County Clerk in Trust Book 2442, page 75. App., pp. 7-8. Although the Petitioners Fleet were provided notice of the foregoing filings they made no effort to reconcile the delinquency. Webber Springs filed suit in the Circuit Court of Berkeley County, West Virginia, against the Petitioners Fleet seeking to recover unpaid assessments, costs and fees totaling \$2,475.64, in accordance with the Declaration running with the land. App., pp. 1-8 and 122-123 ¶9.<sup>2</sup>

### **3. Petitioner James Lampley**

On February 25, 2005, Mosam Khan conveyed Lot No. 61, Section I, Phase 2, of Webber Springs Subdivision to the Petitioner James Lampley (“Petitioner Lampley”) by deed, of record in the County Clerk’s office in Deed Book 790, page 570. Pursuant to well accepted principles of property law as well as the language in the deed, the conveyance was subject to “all those reservations, restrictions, easements and other matters of record in the aforesaid Clerk’s Office in Deed Book 748, at page 140, and as supplemented and recorded in Deed Book 283, at page 176, *et seq.*, and in Plat Cabinet 9, at Page 179, . . .” App., pp. 218-219. Thus, the conveyance of Lot No. 61 to the Petitioner Lampley was expressly subject to the Declaration recorded by the Developer which included an obligation to pay annual assessments for the property and the procedure by which the same would be collected. In addition, the MRIS listing plainly identified that the property was subject to homeowner assessments and dues. App., pp. 248 and 250.

In order to purchase Lot No. 61, the Petitioner Lampley obtained a loan using the property as collateral. On May 6, 2005, Petitioner Fleet executed a Deed of Trust in favor of National City Bank of Indiana, of record in the County Clerk’s office in Trust Book 1652, page

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<sup>2</sup> Webber Springs’ suit is to collect the unpaid amount, not to foreclose.

543. Attached to the Deed of Trust, and also executed by the Petitioner Fleet was a Planned Unit Rider. App., pp. 221-223. In this Planned Unit Rider, the Petitioner Lampley (a) acknowledged that he had an obligation to pay homeowners dues and assessments as prescribed in the Declaration; and (b) promised his lender that he would satisfy these obligations. More specifically, the Planned Unit Rider states in pertinent part:

A. PUD Obligations. Borrower shall perform all of Borrower's obligations under the PUD's Constituent Documents. The "Constituent Documents" are the: (i) Declaration; (ii) articles of incorporation, trust instrument or any equivalent document which creates the Owners Association; and (iii) any by-laws or other, rules or regulations of the Owners Association. Borrower shall promptly pay, when due, all dues and assessments imposed pursuant to the Constituent Documents.

...

F. Remedies. If Borrower does not pay PUD dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph F shall become additional debt of Borrower secured by the, Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest upon notice from Lender to Borrower requesting payment.

App., pp. 221-222.

Despite having knowledge of his obligation to pay homeowner assessments, the Petitioner Lampley did not pay the annual assessments which accrued yearly on the property from 2007 through 2011. In fact Petitioner Lampley admits that he chose not to pay the assessments as a set off for services he maintains that Webber Springs did not perform, even though the Declaration does not provide for the same. App., pp. 25, 79 and 115-124.

On February 26, 2008, the Treasurer for Webber Springs executed a Notice of Lien for Assessments which specified that the Petitioner Lampley owed \$600.00 for unpaid homeowner assessments, plus filing fees and interest for the years 2006-2008. Webber Springs submitted the Notice of Lien to the County Clerk for recording in Trust Book 2241, page 391. App., pp. 21-22. Two years later, with assessments still not being paid, Webber Springs' President executed a

Notice of Lien for NonCompliance which specified that the Petitioner Lampley owed an additional \$600.00 for unpaid homeowner assessments, filing fees, attorney fees and interest and had the same recorded with the County Clerk in Trust Book 2442, page 75. App., pp. 23-24. Although the Petitioner Lampley was provided notice of the foregoing filings he made no effort to reconcile the delinquency. Rather foreclose, Webber Springs filed suit in the Circuit Court of Berkeley County, West Virginia, against the Petitioner Lampley seeking to recover unpaid assessments, costs and fees totaling \$2,031.64, in accordance with the Declaration running with the land. App., pp. 18-24 and 122-123 ¶9.

**B. Summary of the Instant Matter**

On January 3, 2012, Webber Springs instituted civil actions for non-payment of homeowner fees and assessments against the Petitioners Fleet and Petitioner Lampley as authorized under the Declaration. App., pp. 1-8, 18-24 and 122-123 ¶¶ 9 and 10. After initially filing Motions to Dismiss that were without legal basis, on March 20, 2012, the Petitioners each filed an Answer and Counterclaim alleging that Webber Springs had committed multiple violations of the West Virginia Consumer Credit and Protection Act (“WVCCPA”) by attempting to enforce a lien.<sup>3</sup> App., pp. 9-15 and 25-31. Webber Springs filed its Answers to the Counterclaims of the Petitioners on April 9, 2012. App., pp. 16-17 and 32-36.

On May 30, 2013, the Petitioners jointly requested that the Circuit Court (1) consolidate the two civil actions filed by Webber Springs against them individually; and (2) permit them to file an amended answer and counterclaim to assert class action claims. App., pp. 37-48. In its Responses, Webber Springs posited that (1) the Petitioners were seeking to amend their

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<sup>3</sup> The Motion was premised upon West Virginia Code § 36B-3-116(d) which provides that a lien for unpaid assessments is extinguished unless proceedings to enforce the lien are commenced within three (3) years after the full amount of the assessment becomes due. However, since Webber Springs is a Limited Liability Expense Community, West Virginia Code § 36B-3-116(d) is not applicable.

complaints beyond the deadline set forth by the Circuit Court in its Scheduling Order without justification; and (2) that consolidation should be limited to liability only, with damages being tried separately. App., pp. 49-55 and 65-72. After consideration of the issues, the Circuit Court (1) granted leave to the Petitioners to file an amended answer and counterclaim by Order dated July 22, 2013; and (2) ordered that the two cases be consolidated on September 13, 2013. App., pp. 63-64 and 76-77. Subsequently, the Petitioners filed a joint First Amended Answer and Class Action Counterclaims asserting virtually the same allegations as contained in their originally filed answers. Webber Springs filed an Answer to the same. App., pp. 78-87.

On October 29, 2013, Webber Springs filed a Motion for Summary Judgment concerning the Petitioners' Counterclaims and certain affirmative defenses asserted by the Petitioners. App., pp. 88-149. More specifically, Webber Springs argued that (a) it had both contractual and statutory authority to assess liens against the Petitioners; (b) the WVCCPA did not apply; and (c) even if the WVCCPA were deemed to apply, each of the four (4) causes of action asserted against Webber Springs would be precluded by the one-year statute of limitations provided under W.Va. Code § 46A-5-101. App., pp. 88-149. The Petitioners filed a brief entitled "Combined Response to Plaintiff's/Class Defendant's Motion for Summary Judgment and Motion for Judicial Review of Documentation Purporting to Create a Lien". In this filing the Petitioners not only opposed the motion for summary judgment but also requested that the Court make a legal finding that the liens filed against the Petitioners were unlawful common law liens and that the debts asserted by Webber Springs are illegal and nonexistent. App., pp. 150-177. Subsequently, the parties filed further responses and replies in support of their respective positions. App., pp. 178-261 and 262-272.

A hearing was held before the Circuit Court on January 27, 2014, concerning Webber Springs' Motion for Summary Judgment and the Petitioners' Motion for Judicial Review. Following the hearing, the Petitioners submitted an unsolicited "Memorandum of Law Pursuant to January 27 Hearing" and introduced new arguments and matters for the Circuit Court's consideration. App., pp. 310-318. After initially objecting to this fugitive document, Webber Springs filed a Supplemental Response on March 18, 2014. App., pp. 337-338.

After consideration of the various legal memoranda submitted by the parties and oral argument, the Circuit Court entered partial summary judgment in favor of Webber Springs on April 24, 2014. The Court (a) dismissed with prejudice the Petitioners' Counterclaims for failure to state a cause of action; and (b) determined that the notices of liens and liens against the Petitioners in this matter were *bona fide* and consensual liens. App., pp. 339-349. The Circuit Court, by separate order, also denied the Petitioners' request to certify the class. App., pp. 350-351.

## **II. SUMMARY OF ARGUMENT**

In this matter, Webber Springs is seeking to recover from the Petitioners several years of unpaid homeowner dues and assessments, including all interest and costs associated with same. Pursuant to the Declaration for the Webber Springs Subdivision, each residential lot is subject to a covenant for maintenance assessments and Webber Springs is authorized to collect such fees. Notably, the Petitioners are not disputing the validity of the covenant or Webber Springs ability to collect dues and fees from owners of property within the subdivision. In fact, the Petitioners admit that their respective homeowner assessments are delinquent. Instead, the Petitioners are seeking to evade payment of the assessments and recover monetary sanctions from Webber

Springs despite acknowledging their own delinquency by virtue of a *pro forma* attack on the manner by which Webber Springs attempts to collect unpaid assessments.

The Declaration at issue provides that the covenants related to homeowner assessments create obligations that arise *in rem* and *in personam*. Once assessments become delinquent the Declaration provides for two options, namely, (1) bring a civil action against the homeowner personally; or (2) institute foreclosure proceedings against the property. Since the Declaration specifically provides that the assessments are perpetual liens against the property and that all successor owners for the property at issue are jointly and severally liable for any unpaid assessments, consensual liens were created in the instant matter as soon as the assessments became delinquent. Thus, when Webber Springs issued a Notice of Lien to the Petitioners and recorded same with the County Clerk, it was not creating a judgment lien, only providing notice to prospective purchasers that the unpaid assessments existed and that a right to seek satisfaction of same *via* a foreclosure upon the described real estate was possible. However, rather than institute foreclosure proceedings pursuant to these consensual liens, Webber Springs chose to institute *in personam* civil actions directly against the Petitioners with respect to the delinquent assessments in order to obtain a judgment lien against the homeowner personally. The recording of the declaration, itself, creates a lien. Thus, Webber Springs is not seeking to enforce any liens which currently encumber the property as permitted by the Declaration running with the land.

The Petitioners sole defense, and the basis of their counterclaims, is that Webber Springs is not allowed to file a notice of lien against their properties regardless of whether it acts upon them. However, the Petitioners have not proffered any defensible position with respect to their personal obligation for the assessments that accrue annually on their properties or the right of

Webber Springs to sue them personally to recover same. This is a classic smokescreen argument which attempts to divert attention away from the fact that the instant matter is an *in personam* proceeding. From a purely academic perspective, Webber Springs is not precluded by West Virginia law from filing notices of lien with the County Clerk and choosing to foreclose on properties when the owners fail to redeem same. Upon purchase of the property the Petitioners accepted the legal covenant that failure to pay their annual assessments would create a perpetual lien on the property which could result in foreclosure if not redeemed. Thus, Webber Springs has prescribed contractual authority to file liens by virtue of the Declaration running with the land. Therefore, such liens would be deemed to be consensual in nature, and not precluded by West Virginia law. Moreover, as correctly held by the Circuit Court, this method for collecting assessments is not governed by, nor is it a violation of, the WVCCPA.

### **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Although required by Rule 10(c) of the West Virginia Rules of Appellate Procedure (“W.Va.R.App.P.”), the Petitioners’ Brief did not contain a statement regarding oral argument and decision.<sup>4</sup> The extent that this Court determines that the Circuit Court’s April 24, 2014, was final for purposes of appeal, Webber Springs maintains that oral argument is necessary pursuant to the criteria outlined under W.Va.R.App.P. 18(a) as: (a) the parties have not agreed to waive oral argument; (b) the petition is not frivolous; (c) the dispositive issues have not previously been authoritatively decided by this Court and the decisional process would be significantly aided by oral argument. Webber Springs further states that this case is suitable for oral argument pursuant to W.Va.R.App.P. 19 as it involves: (1) assignments of error in the application of settled law;

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<sup>4</sup> The failure to include a statement concerning oral argument and decision is also counter to this Court’s December 10, 2012 Administrative Order concerning “Filings that do not comply with the Rules

and (2) the unsustainable exercise of discretion where the law governing that discretion is settled. This case is further suitable for argument pursuant to W.Va.R.App.P. 20 as it potentially involves issues of first impression and issues of fundamental public importance.

To the extent that this Court finds that the petitioner's appeal seeks appellate review of an interlocutory order, Webber Springs would argue that the matter should simply be dismissed without prejudice by virtue of a memorandum decision pursuant to W.Va.R.App.P. 21.

#### IV. ARGUMENT

##### A. Not a Final Appealable Order

As noted by this Court in *Gooch v. West Virginia Dep't of Pub. Safety*, 195 W. Va. 357, 362, 465 S.E.2d 628, 633 (1995) “[g]enerally, this court in its appellate capacity only has jurisdiction over final decisions of the circuit court.” Quoting from *James M.B. v. Carolyn M.*, 193 W. Va. 289, 292-293, 456 S.E.2d 16, 19-20 (1995), the *Gooch* Court further stated:

Under W.Va. Code, 58-5-1 (1925), appeals only may be taken from final decisions of a circuit court. A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined. The purpose of the "rule of finality," as it is known, is to prohibit piecemeal appellate review of trial court decisions which do not terminate the litigation.

*Gooch*, 195 W. Va. at 362, 465 S.E.2d at 633. See also *Smith v. Andreini*, 223 W. Va. 605, 614, 678 S.E.2d 858, 867, (2009).

While there are exceptions to the rule of finality, they are rare. As further explained by this Court in *James M.B.*,

With rare exception, the "finality rule" is mandatory and jurisdictional. Thus, to be appealable, an order must be final as discussed above, must fall within a specific class of interlocutory orders which are made appealable by statute or by

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of Appellate Procedure.”

the West Virginia Rules of Civil Procedure, or must fall within a jurisprudential exception.

*James M.B.*, 193 W. Va. at 292-293, 456 S.E.2d at 19-20.

The Circuit Court's April 24, 2014 Order is not a final adjudication of the matter and none of the exceptions to the final judgment rule are applicable. The Circuit Court's Order was not an adjudication of the merits of the action and multiple claims remain. In fact, the Circuit Court did not address the actual merits of the action, that being whether the Petitioners owe assessments and the amount of same including fees and costs, and these matters are now stayed pending this appeal. While W.Va.R.Civ.P. 54(b) does indicate that the trial court "may direct the entry of a final judgment as to one or more but fewer than all of the claims" it may do so only "upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." The Circuit Court did not incorporate such rulings into its April 24, 2014 Order.

The Circuit Court's April 24, 2014 Order did two things: (1) made a legal determination that the notices and liens against the Petitioners in this matter are *bona fide* consensual liens; and (2) dismissed with prejudice the Petitioners' counterclaims against Webber Springs on the basis that the liens at issue were *bona fide* consensual liens. While the counterclaims of the Petitioners were dismissed with prejudice, it is apparent that these claims were not independent causes of action. Instead, these counterclaims were raised as defenses to the claims asserted by Webber Springs. Since the Circuit Court's April 24, 2014 Order is not final and did not terminate the litigation between the parties on the merits, the action remains pending. The Petitioners have appealed interlocutory legal rulings associated with the claims asserted by Webber Springs. Should this Court deny their Petition, the Petitioners will simply return to the Circuit Court and defend the claim on the basis of the affirmative defenses set forth in their answer or upon an

entirely new theory, and should they lose, appeal again. Such piecemeal appellate review is why the “finality rule” was implemented. *James M.B., supra* and *Gooch, supra*.

As demonstrated above, the Circuit Court’s April 24, 2014 Order is an unappealable interlocutory order and this Court lacks jurisdiction to consider the same. The required finality is a statutory mandate, not a rule of discretion." *Province v. Province*, 196 W.Va. 473, 478, 473 S.E.2d 894, 899 (1996). Therefore, the Petitioners’ Appeal should be denied without prejudice so that the matters may be appealed, if necessary, after a proper final judgment is in place.

**B. The Standard of Review.**

Pursuant to W.Va.R.Civ.P. 56, summary judgment is required when the record indicates that there is no "genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W.Va. 385, 390, 508 S.E.2d 102, 107 (1998). "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). In considering the propriety of summary judgment, this Court is to apply the same standard that is applied at the circuit court level. *Watson v. INCO Alloys Int’l, Inc.*, 209 W.Va. 234, 238, 545 S.E.2d 294, 298 (2001). In reviewing a motion for summary judgment *de novo* all contested questions of fact must be considered in the light most favorable to the party resisting summary judgment. This Court must resolve all ambiguities and draw all factual inferences in favor of the Petitioners. *Hanlon v. Chambers*, 195 W.Va. 99, 105, 464 S.E.2d 741, 747 (1995) and *Estate of Helmick v. Martin*, 192 W.Va. 501, 504, 453 S.E.2d 335, 338 (1994).

**C. The Circuit Court did not Err by Finding that Webber Springs had Valid Common Law Liens Against the Petitioners' Real Property.**

**1. The Circuit Court correctly concluded that the liens at issue are *bona fide* common law consensual liens.**

The Petitioners maintain that the Circuit Court erred by failing to find that all common law liens against real property, even those that are consensual, are invalid and unenforceable in West Virginia pursuant to W.Va. Code § 38-16-202(a). However, the Circuit Court's decision was correct and appropriately adhered to the basic tenets of statutory construction. In order to reach the conclusion proffered by the Petitioners, the Circuit Court would have committed reversible error, as such a finding would have necessitated the interpretation and construction of an unambiguous statute.

As noted by this Court in *Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 312, 465 S.E. 2d 399, 415 (1995), quoting the United States Supreme Court opinion of *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992), “[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *See also, Cunningham v. Hill*, 226 W. Va. 180, 185, 698 S.E.2d 944, 949 (2010). As further noted by this Court in *Taylor v. Nationwide Mut. Ins. Co.*, 214 W. Va. 324, 328, 589 S.E.2d 55, 59, (2003), when interpreting a statutory provision, courts are “bound to apply, and not construe, the enactment's plain language.” Thus, a trial court must favor the plain and obvious meaning of the statute rather than a narrow or strained construction. *See also, Liberty Mut. Ins. Co. v. Morrissey*, 760 S.E.2d 863, 872, 2014 W. Va. LEXIS 698, 2014 WL 2695524 (2014).

W.Va. Code § 38-16-202(a) provides that “[a] common law lien against real property is invalid and is not recognized or enforceable in this state.” Notably Section 202(a) does not state that “all” common law liens against real property or “consensual” common law liens against real

property are invalid. These words were purposefully omitted by the West Virginia Legislature (“W.Va. Legislature”). As noted by this Court in *Banker v. Banker*, 196 W.Va. 535, 474 S.E.2d 465 (1996), “[i]t is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.” More specifically, this Court has also previously cautioned that “[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten.” Syllabus Point 1, *Consumer Advocate Division v. Public Service Commission*, 182 W.Va. 152, 386 S.E.2d 650 (1989). *See also, Subcarrier Communications, Inc. v. Nield*, 218 W. Va. 292, 299 n.10, 624 S.E.2d 729, 736 n.10 (2005). Since the terms “all” or “consensual” were not used by the W.Va. Legislature in W.Va. Code § 38-16-202(a), it is apparent that this section was not intended to declare consensual liens against real property invalid. In fact, to conclude that a lien against real property that is created **with the consent of the parties** is invalid and unlawful would result in an absurdity with respect to the rights of individuals to contract freely under the laws of this State. *Peters v. Rivers Edge Min., Inc.*, 224 W.Va. 160, 680 S.E.2d 791 (2009).

It is well settled law in West Virginia that statutes relating to the same subject matter must be read and applied together. As noted by this Court in *Univ. Commons Riverside Home Owners Ass'n v. Univ. Commons Morgantown, LLC*, 2013 W. Va. LEXIS 264, 13-14 (W. Va. Mar. 28, 2013), “[s]tatutes *in pari materia* must be construed together and the legislative intention, as gathered from the whole of the enactments, must be given effect.” Thus, W.Va. Code § 38-16-201 must also be given due consideration. Section 201 provides that nothing in Chapter 38, Article 16, was intended to affect “[c]onsensual liens now or hereafter recognized under the common law of this state.” The W.Va. Legislature chose not to limit the type of

consensual liens at issue, personal or real, in Section 201. Instead, the Legislature simply references “consensual liens” in an all-inclusive manner. Since Sections 201 and 202 must be read in *pari materia*, it is clear that W.Va. Code § 38-16-202(a) *was not* intended to apply to consensual common law liens.

The foregoing methodology was most recently endorsed in a Memorandum Decision issued by this Court in *In re A Purported Lien Or Claim Against DeBlasio*, 2014 W. Va. LEXIS 891 (Aug. 29, 2014). In *DeBlasio*, the trial court, following a review of a subdivision’s Declaration of Covenants in conjunction with W.Va. Code § 38-16-201(3) and W.Va. Code § 38-16-106(2), determined that liens filed with respect to unpaid assessments were valid consensual liens because the homeowner had consented to be bound by the subdivision’s covenants upon purchase of the property. App., pp. 252-261.<sup>5</sup>

Upon review, this Court summarily stated that the trial court “correctly determined that the liens were valid consensual liens.” *DeBlasio, supra*. The Circuit Court in the instant case utilized the same logic and reached the same conclusion. The Circuit Court reviewed W.Va. Code § 38-16-202(a) in conjunction with W.Va. Code § 38-16-201 and applied the terms as written to the record before it. *Univ. Commons*, 2013 W. Va. LEXIS 264, 13-14. More specifically, the Circuit Court carefully analyzed the Declaration running with the land for Webber Springs Subdivision. The Circuit Court found: (a) the Declaration specifically provides that unpaid assessments, plus interest and costs, constitute liens against a lot and that Webber Springs has authority to record and enforce such liens; and (b) the Petitioners consented to same

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<sup>5</sup> The subdivision at issue in the *Deblasio* matter was a small community similar to Webber Springs, which was exempt from the UCIOA. The annual fees at issue were \$100 a year. In *Deblasio*, the trial court determined that the UCIOA was not applicable as the UCIOA was not addressed in the Court’s Order. This is noteworthy for the reason that if the UCIOA were applicable, the liens at issue would have been statutory and the trial court’s discussion of consensual versus nonconsensual liens, and this Court’s review of same, would have been inapplicable. W.Va. Code § 38B-3-116.

upon purchase of their respective properties. The Circuit Court appropriately determined that the liens created by the Declaration constituted *bona fide* consensual liens.

**2. A homeowners association which is exempt from the Uniform Common Interest Ownership Act may still possess a valid common law lien against a homeowner's real property for unpaid assessments, attorney fees, and costs.**

Pursuant to W.Va. Code § 36B-1-203, Webber Springs is exempt from the UCIOA, W.Va. Code § 36B-1-101, *et seq.*, because it is a small/limited expense liability community (“small community”) which has capped its annual assessments. The Petitioners maintain that since Webber Springs capped its assessments and therefore was exempt from the application of the UCIOA, it does not possess the right to assert a lien for recovery of delinquent assessments. In other words, the Petitioners maintain that while Webber Springs has the right to assess and collect fees, Webber Springs is not empowered to take any action to recover delinquent fees from homeowners that refuse to pay. However, a close examination of the UCIOA does not support the Petitioners’ position.

According to the UCIOA, small communities are subject to the following provisions of the Act, “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.” W.Va. Code § 36B-1-203. Since small communities are not governed by W.Va. Code § 36B-3-116, the Petitioners argue that Webber Springs has no statutory authority to assert and/or file liens against property owners. However, the UCIOA *does not* suggest that small communities cannot assert liens with respect to delinquent assessments. Such a position cannot be found within the wording of the Act. As noted above, courts “must presume that a legislature says in a statute what it means and means in a statute what it says there” and cannot “add to statutes something

the Legislature purposely omitted." *Randolph Co., supra; Banker, supra; and Liberty Mut. Ins. Co., supra.* If the Legislature had intended to preclude small communities from asserting and enforcing liens for delinquent assessments, it would have incorporated such a prohibition into the UCIOA. Since it did not create such a prohibition, this Court is bound to give effect to the statute as written. As recently observed by this Court in *Liberty Mut. Ins. Co.* 760 S.E.2d at 872, "a statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." (Internal citations omitted.) *See also, Univ. Commons*, 2013 W. Va. LEXIS 264, 13-14 ("[w]here the language of a statutory provision is plain, its terms should be applied as written and construed.")

The Petitioners have not raised as an assignment of error in these proceedings that the Circuit Court erred by failing to determine that the UCIOA is ambiguous.<sup>6</sup> Acceptance of Petitioners' argument would require this Court to conclude that the UCIOA is ambiguous and then broaden its application with respect to limitations placed on small communities, beyond that expressly intended by the W.Va. Legislature. As recently noted by this Court, "[i]t is not this Court's prerogative to here legislate additional coverage in a statute that is expressly self-limiting." *Liberty Mut. Ins. Co.*, 760 S.E.2d at 873. In the absence of ambiguity, the only logical conclusion to be made is that the W.Va. Legislature did not intend to preclude small communities from asserting and enforcing liens.

Notwithstanding the foregoing, application of the Petitioners interpretation of the UCIOA would also lead to an absurd result. The Petitioners adamantly argue that they are not disputing

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<sup>6</sup> "Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived." Syl. Pt. 6, *Addair v. Bryant*, 168 W.Va. 306, 284 S.E.2d 374 (1981). Since the Petitioners have not argued that the UCIOA is ambiguous, their appeal relates only to the application of the UCIOA, as written, and *not* its construction.

Webber Springs' right to assess fees, only their right to enforce liens. However, acceptance of Petitioners argument would deem the assessments as voluntary, leaving Webber Springs to simply hope that property owners will honor the Declaration and pay the assessments in "good faith". The failure to pay assessments by property owners is having, and will continue to have, a crippling effect on Webber Springs which will only be exacerbated if its ability to assert valid consensual liens is taken away. App., pp. 172-176. Obviously, the W.Va. Legislature did not intend to rescind or invalidate existing subdivision covenants and restrictions and preclude small communities from asserting liens in order to enforce and collect valid assessments. As this Court observed in *Peters*, 224 W.Va. at 176, 680 S.E.2d at 807, a trial court has the "duty to avoid whenever possible [an application] of a statute which leads to absurd, inconsistent, unjust or unreasonable results." On this basis, the Circuit Court correctly found that Webber Springs may maintain a valid common law lien despite being exempt from the UCIOA.

**3. The liens at issue were consensual since Petitioners purchased real property that was subject to covenants and restrictions which run with the land.**

Despite the plain language of the Declaration, the Petitioners refuse to recognize that the non-payment of assessments constitutes a lien against their property. The primary basis for the Petitioners argument is their contention that West Virginia does not recognize consensual common law liens against real property. As addressed above and correctly noted by the Circuit Court, West Virginia law does not support this position. As an ancillary argument, the Petitioners argue that the liens at issue are not consensual because they do not derive their existence from their specific and individual consent in reliance upon W.Va. Code § 38-16-106. In support of their position, the Petitioners maintain that they never executed a security agreement giving Webber Springs an interest in their property. Although the Petitioners admit

that they purchased property subject to covenants and restrictions, they argue that a deed of conveyance, unsigned by them, does not constitute a valid security agreement. In support of their position, the Petitioners refer this Court to Article 9 of the West Virginia Consumer Commercial Code, (“UCC”), specifically W.Va. Code § 46-9-102, and three bankruptcy cases which examine consensual liens in the context of 11 U.S.C. § 101, *et seq.* The Petitioners reliance upon the UCC and federal bankruptcy law is misplaced.

First, the liens at issue in this case involve real property, and not personal property. The Declaration plainly provides that if assessments are not paid when due “then such assessment shall become delinquent and shall, together with such interest thereon and the cost of collection thereof, as hereinafter provided, thereupon become a **continuing lien on the property.**” App., pp. 122 ¶9. As set forth in W.Va. Code § 46-9-109(d)(11), Article 9 of the UCC “does not apply” to the “creation or transfer of an interest in or lien on real property.” Since the liens at issue are against real property, application of the UCC to this matter would be inappropriate. *Charleston Urban Renewal Auth. v. Stanley*, 176 W. Va. 591, 594, 346 S.E.2d 740, 743 (1985).

It is important to recognize that the covenant concerning maintenance assessments was placed on the property by the Developer and runs with the land. As observed by this Court in *Wallace v. St. Clair*, 147 W. Va. 377, 390, 127 S.E.2d 742, 751 (1962), “in legal contemplation the servitude imposed on each lot runs to and attaches itself to each of the rest of the lots in the restricted area, thus forming a network of cross-easements or cross-servitudes, the aggregate effect of which is to impose and confer on each lot reciprocal and mutual burdens and benefits appurtenant to the lot, so as to run with the land and follow each lot upon its devolution and transfer.” (Internal citations omitted.) Similarly, this Court in *Daugherty v. Baltimore & O. R.R.*, 135 W. Va. 688, 704-705, 64 S.E.2d 231, 241 (1951), stated that covenants “which are

connected with, or require something to be done on or about the land, and become united with, and form a part of, the consideration for which the land, or some interest in it, is parted with, run with the land, and bind it in the hands of any one who claims title through or under the covenant, with notice of the covenant.” (Internal citations omitted.)

When the Declaration at issue was filed, covenants and restrictions were placed on the land in perpetuity, and acceptance of the same by each subsequent purchaser is not necessary. Since the liens for maintenance assessments were created by virtue of the covenants and restrictions that run with the land owned by the Petitioners, written consent from each of them is NOT necessary. To reiterate, the Petitioners purchased and accepted lots in Webber Springs Subdivision subject to covenants and restrictions that run with the property. App., pp. 115-124, 128-129 and 218-219. The Petitioners were further on notice that the covenants and restrictions in place included annual assessments which, if unpaid, constituted a lien by virtue of the Declaration itself. A Planned Unit Rider which they each executed also acknowledged same. App., pp. 122-123 ¶9, 215-216 and 221-222. By purchasing the properties, subject to all restrictive covenants of record, the Petitioners agreed to be bound by same. By virtue of this acceptance, the Petitioners were on notice, and consented to, the placement of liens on their properties for delinquent assessments. App., pp. 122-123 ¶9.

4. **Pursuant to the covenants and restrictions, Webber Springs had a valid common law lien for all costs associated with the collection of delinquent assessments, including reasonable attorney fees.**

As recognized by this Court in *Wallace*, 147 W. Va. at 390, 127 S.E.2d at 751, “[t]he fundamental rule in construing covenants and restrictive agreements is that the intention of the parties governs. That intention is gathered from the entire instrument by which the restriction is created, the surrounding circumstances and the objects which the covenant is designed to

accomplish.” Citing with approval its decision in *Wallace*, this Court further stated in *Allemong v. Frenzel*, 178 W. Va. 601, 605, 363 S.E.2d 487, 491 (1987), that “[w]ith respect to the construction of restrictive covenants, words should be given their ordinary and popular meaning, unless they have acquired some peculiar significance.”

In the instant matter, the Declaration is the controlling document with respect to Webber Springs’ enforcement of liens for delinquent assessments. With respect to costs and attorney fees, the Declaration specifically provides that if the assessment is not paid within thirty (30) days after the delinquency rate, Webber Springs may add “to the amount of such assessment the late fees and costs of preparing, filing and prosecuting the complaint in such action (**including reasonable attorney's fees**)”. App., pp. 122 ¶9. (Emphasis added.) Pursuant to the plain and unambiguous terms of the Declaration, attorney fees may be added to the delinquency. The liens created by the Declaration are *not consumer debts* against the Petitioners for personalty, but are liens against the real property, therefore W.Va. Code 46A-2-128(c) is not applicable. The Petitioners each purchased the property in Webber Springs Subdivision, subject to all restrictive covenants of record. By purchasing said property, the Petitioners were on notice of, and consented to, the addition of costs, including attorney fees, on delinquent assessments. App., pp. 122 ¶9.

**D. In Granting Webber Springs' Motion for Summary Judgment on Petitioners' Counterclaims the Circuit Court Correctly Concluded that the Petitioners did not have Valid Claims Under the West Virginia Consumer Credit and Protection Act**

- 1. The West Virginia Consumer Credit and Protection Act does not apply to homeowners associations attempting to collect assessments because the alleged liens were not for personal, family, household purposes.**

The Petitioners attempt to apply the WVCCPA to the collection of delinquent homeowners assessments is the legal equivalent of trying to pound a square peg into a round hole. As addressed above, the liens against real property of the Petitioners are consensual common law liens created contractually upon the recordation of the Declaration. Nonetheless, in an attempt to avoid paying their annual fees and punish a non-profit homeowners association for attempting to recover delinquent assessments for the benefit of the community, the Petitioners argue that the liens for the delinquent assessments constitute claims under the WVCCPA and that violations have occurred. In so doing, the Petitioners have interpreted and have essentially attempted to redraft certain provisions of the WVCCPA arguing that such is necessary because it is a remedial statute that should be liberally construed. W.Va. Code § 46A-6-101.

The Petitioners presumption that the construction and interpretation of the WVCCPA is always necessary and proper because it is a remedial statute, is misplaced. As this Court acknowledged in *Raynes v. Nitro Pencil Co.*, 132 W. Va. 417, 419, 52 S.E.2d 248, 249 (1949), “the rule permitting the liberal construction of remedial statutes, it is, like other rules of construction, not applied where the language under consideration carries a plain meaning.” Although the WVCCPA is a remedial statute, construction of its terms, **only occurs if there is a finding of ambiguity**, otherwise, as with any other statute, its plain terms are to be applied as

written and enacted. *Liberty Mut. Ins. Co.* 760 S.E.2d at 872 and *Univ. Commons*, 2013 W. Va. LEXIS 264, 13-14.

Despite the foregoing principles of statutory construction, the Petitioners argue that the liens for delinquent assessments are “claims” as that term is defined by the WVCCPA. However, W.Va. Code § 46A-2-122(b) defines “claims” as follows:

(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.

(Emphasis added).

Focusing on the phrase “any obligation or alleged obligation”, the Petitioners maintain that all obligations are covered regardless of the type. The Petitioners’ broad application of the term “claim” is not supported by the plain language of the statute which limits its application to claims that are “primarily for personal, family, or household purposes.” *Id.* In that regard, before concluding that liens for homeowners assessments are deemed to be claims under the WVCCPA, it is first necessary to consider the full context of W.Va. Code § 46A-2-122(b) in conjunction with the Declaration which contractually established the liens at issue. The Declaration provides in pertinent part:

#### COVENANT FOR MAINTENANCE ASSESSMENTS

...

2. Purpose of Assessments: The assessments levied by the Association shall be used **exclusively** for the purpose of road and street maintenance, promoting the recreation, health, safety, and welfare of the residents in the Properties and in particular for the improvement and maintenance of properties, services, and facilities devoted to this purpose and related to the use and enjoyment of the Common Properties and homes situated on the Properties, including, but not limited to, the payment of taxes and insurance thereon and repair, replacement and additions thereto, and for the cost of labor equipment, materials, management, and supervision thereof.

App., pp. 102-03, 121, 192-193, 207. (Emphasis added).

In accordance with the rules of statutory construction, the Circuit Court appropriately analyzed and applied the plain meaning of W.Va. Code § 46A-2-122(b), to the factual circumstances presented in this case. In particular, the Circuit Court found the language of the Declaration to be instructive. On this basis, the Circuit Court held as follows:

This Court is well aware that the WVCCPA is to be construed liberally, Syl. Pt. 2, *Thomas v. Firestone Tire & Rubber Co.* 164 W. Va 763, 263 S.E.2d 905 (1980). West Virginia Code § 46A-2-122 definition of the word “claim” is broad and expansive and states that a claim means any obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or service that is the subject of the transaction is primarily for personal family or household purposes. However, this Court finds that the Declaration at issue in this case provides that any assessment levied by Webber Springs shall be used exclusively for the purpose of road and street maintenance, promoting the recreation, health, safety, and welfare of its residents. The Court concludes that even applying a liberal construction of the word “claim”, the purpose of the Webber Springs’ dues is for recreation, health and safety for the community, and by definition, it would not be a claim as contemplated by the WVCCPA.

*See App.*, p. 343.

As correctly determined by the Circuit Court, the term “exclusively” as used in the Declaration merits considerable attention. The assessments at issue are exclusively for road and street maintenance for the collective purpose and benefit of the community. The assessments are not primarily for the Petitioners, but exclusively for the benefit of the common community. Moreover, maintenance of the roads and streets is not primarily for a personal, family, or household purpose, but is an incidental benefit derived from the collective fund. The assessments are not being used to pay for the Petitioners’ own insurance, taxes, and personal property. Rather, as clearly stated in the Declaration, it applies to common properties, which are owned by the entire community. On this basis, Webber Springs is akin to a small governmental entity, and the assessments are akin to taxes that are levied.

Although not raised in their arguments before the Circuit Court, the Petitioners now assert that the legal reasoning of this Court in *Dan's Carworld, LLC v. Serian*, 223 W.Va 478, 485, 677 S.E.2d 914, 921 (2009) supports their position. In *Dan's Carworld, LLC*, this Court ruled that the trial court committed error when it found that that an automobile dealer purchasing a trade-in-vehicle in connection with the purchase of a new vehicle by a consumer, David Serian (“Serian”), did not constitute “personal use” under W.Va. Code § 46A-2-122(b). More specifically, this Court opined that the trial court mischaracterized the transaction as a purchase by Dan's Carworld of a vehicle sold to it by Serian for non-personal use. *Dan's Carworld, LLC*, 223 W. Va at 485-86, 677 S.E.2d at 921-922.

Upon consideration of the matter, the *Dan's Carworld, LLC* Court determined that that the heart of the transaction at issue was Serian's purchase of the 2006 truck from Dan's Carworld. Therefore, this Court held that the “subject of the transaction” for purposes of W. Va. Code § 46A-2-122(b) was the 2006 truck being purchased. *Dan's Carworld, LLC*, 223 W.Va at 485-86, 677 S.E.2d at 921-922.

Unlike *Dan's Carworld*, the heart of the transaction in the case *sub judice* is the assessment of dues for the exclusive purposes of (a) road and street maintenance; and (b) promoting the health, safety, and welfare of the occupants with respect to the common properties, collectively for the entire community. Further, the Circuit Court in this case, unlike the trial court in *Dan's Carworld*, had a written Declaration which specifically set forth its purpose and goals. While the payment of assessments, like the payment of taxes, benefits all, it cannot be said that the heart of the transaction in the assessments levied by Webber Springs were *primarily* for a personal, household, and family purpose. After analyzing the language found in the Declaration and the WVCCPA, the Circuit Court reached the proper legal conclusion. The

Petitioners failed to produce any evidence at the hearing to suggest otherwise. See App., p. 345 § 9.

The assessments at issue derive from a covenant which plainly indicates that it is used exclusively for the community. Further, there are no statutory provisions in the WVCCPA which expressly provide that the WVCCPA applies to assessments of dues under the facts in this specific case. In addition, there is no case law in West Virginia that opines that the WVCCPA would apply to the facts presented in this matter. It is clear that the WVCCPA was not promulgated to regulate assessments that are created by covenants and restrictions that run with the land.

In the *Amicus* Brief filed in support of the Petitioners, the West Virginia Association of Justice (“WV Association”) refers this Court to several non-binding federal court decisions regarding the Federal Fair Debt Collection Practices Act (“FDCPA”) which have broadly construed the term “debt” to include the assessments of condominium associations and some homeowners assessments. At first glance, it would appear persuasive that select federal courts have concluded that the assessments of dues are primarily for personal, family, and household use. However, a careful examination of the cases cited by the WV Association does not reflect that covenants and restrictions were a part of the record before the respective federal courts, or that such covenants were considered prior to issuance of the opinions.<sup>7</sup> In this case, the Circuit Court had the opportunity to review and analyze both the Declaration and W. Va. Code § 46A-2-122(b). Thus, WV Association reliance on these distinguishable opinions is inappropriate.

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<sup>7</sup> In a string citation, the WV Association identified the following cases: *Ladick v. Van Gemert*, 146 F.3d 1205 (10<sup>th</sup> Cir. 1998); *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7<sup>th</sup> Cir. 1997); *Williams v. Edelman*, 408 F. Supp.2d 1261 (S.D. Fla. 2006); *Dikun v. Streich*, 369 F. Supp. 2d 1361 (M.D. Fla. 2002); *Taylor v. Mount Oak Manor Homeowners Ass’n, Inc.*, 11 F.Supp.2d 753 (D. Md. 1998); *Thies v. Law Offices of William A. Wyman*, 969 F.Supp. 604 (S.D. Cal. 1997).

The Petitioners ignore the existence of the Declaration when they posit that, “the alleged debt arises out of the purchase and ongoing maintenance of the Petitioners’ homes”. See Petitioners Brief, p. 20. Petitioners go to great lengths to argue that a loan is not necessary to implicate the WVCCPA. However, their argument fails to adequately address the “primary purpose” component that is inherently required to effectively argue that the assessments were primarily for personal, family, or household purposes. Pursuant to W. Va. Code § 46A-2-122(b), the Petitioners do not have a “claim” as defined by the WVCCPA. The assessments do not fall within the purview of the statute. The word “primarily” indicates that a court must at least balance factors to determine if the assessments meet such a standard.

The assessments in this case derive from a covenant that clearly indicates that it is used *exclusively* for the community. The Declaration is clear and unambiguous and it evinces that the exclusive purpose for the assessments is for the community as a whole, and not primarily for an individual’s personal, family, or household purposes. As further observed by the Circuit Court, a plain reading of W.Va. Code § 46A-2-122(b) in conjunction with the Declaration reflects that the WVCCPA does not apply to the Petitioners. The Petitioners ignore the plain language of the covenant and are requesting that this Court rewrite the WVCCPA.

The primary argument of Petitioners in support of their position is that the WVCCPA is a remedial statute and should be construed liberally in favor of the consumer. While this remedial nature of the statute may be true, this Court cannot adopt the Petitioners’ arguments in their totality. See *Dunlap v. Friedman's, Inc.*, 213 W. Va. 394, 395, 582 S.E.2d 841, 842 (2003); *Vanderbilt Mortgage & Finance, Inc. v. Cole*, 230 W. Va. 505, 740 S.E.2d 562 (2013); *Barr, supra*; and *Arnold v. United Companies Lending Corp.*, 204 W. Va. 229, 511 S.E. 2d 854 (1998).

As noted by this Court in *Subcarrier Communications, Inc.* 218 W. Va. at 299 n.10, 624 S.E.2d at 736 n.10, “[i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten.” In that regard, the Circuit Court was charged with the responsibility of interpreting the statute as written in accord with West Virginia law governing statutory construction. In the oft-cited case of *Ohio County Comm'n v. Manchin*, 171 W. Va. 552, 554, 301 S.E.2d 183,185 (1983), this Court held that “interpretation of a statute is warranted only if the statute is ambiguous and the initial step in such interpretative inquiry is to ascertain the legislative intent.” Referencing its decision in *Ohio County Comm'n*, this Court also stated in *Barr v. NCB Mgmt. Servs.*, 227 W. Va. 507, 711 S.E.2d 577 (2011):

[W]e are mindful that ‘[a] statute that is ambiguous must be construed before it can be applied.’ Syl. pt. 1, *Farley v. Buckalew*, 186 W. Va. 693, 414 S.E.2d 454 (1992). Importantly, ‘[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.’ Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). See also Syl. pt. 1, *Ohio Cnty. Comm'n v. Manchin*, 171 W. Va. 552, 301 S.E.2d 183 (1983).

*Barr*, 227 W. Va. at 512, 711 S.E.2d at 582. Therefore, a “finding of ambiguity must be made prior to any attempt to interpret a statute.” *Dunlap*, 213 W. Va. 394, 398, 582 S.E.2d 841, 845 (2003).

Recognizing its own limitations with respect to the interpretation of statutes, this Court in *Huffman v. Goals Coal Co.*, 223 W. Va. 724, 679 S.E.2d 323 (2009) observed that:

This Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation. It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation. It is the duty of this court to enforce legislation unless it runs afoul of the State or Federal Constitutions. *Boyd v. Merritt*, 177 W.Va. 472, 474, 354 S.E.2d 106, 108 (1986). See also, *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 692, 408 S.E.2d 634, 642 (1991) (“the judiciary may not sit as a superlegislature to judge the wisdom [\*\*\*12] or desirability of legislative policy determinations made in areas that neither affect

fundamental rights nor proceed along suspect lines."); Syllabus Point 1, in part, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965) ("Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary.")

*Huffman*, 223 W.Va. at 728, 679 S.E.2d at 327.

Recently, this Court stated that "[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect. In other words, '[w]here the language of a statutory provision is plain, its terms should be applied as written and not construed.'" *Univ. Commons*, 2013 W. Va. LEXIS 264, 13-14.

Furthermore, in *Banker*, 196 W.Va. at 546-47, 474 S.E.2d 476-77 this Court stated, "[i]t is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted." More specifically, this Court has noted that "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syl. Pt. 1, *Consumer Advocate Divisio, supra*. See also, *Subcarrier Communications, supra*. The Petitioners have never argued that the WVCPPA, and specifically W.Va. Code § 46A-2-122(b), is ambiguous, nor have they addressed the clear and binding mandate of the Declaration.

Assuming *arguendo* that W.Va. Code § 46A-2-122(b) was deemed to be ambiguous, this Court would have to ascertain the intent of the legislature before adopting the Petitioners' position. *Ohio County Comm'n*, 171 W.Va. at 554, 301 S.E.2d at 185; *Barr*, 227 W.Va. at 512, 711 S.E.2d at 582; *Dunlap*, 213 W.Va. at 398, 582 S.E.2d at 845. Although not addressed by the Petitioners, it is clear that the W.Va. Legislature did not intend for the WVCCPA to regulate a

non-profit small community run homeowners association such as Webber Springs. In that regard, W.Va. Code § 46A-6B-1(1) which provides that the WVCCPA should be liberally construed must be read *in pari materia* with W.Va. Code § 46A-6B-1(2). W.Va. Code § 46A-6B-1(2) specifically states that it is the intent of the W.Va. Legislature that the WVCCPA “not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or **which are not injurious to the public interest.**” (Emphasis added.)

There is nothing inherently “injurious to the public interest” concerning Webber Springs procedures for recovering delinquent homeowner assessments pursuant to a valid Declaration of record in the Office of the County Clerk. In addition, Webber Springs’ pursuit of valid assessments is not unreasonable nor deceptive. Before purchasing a lot in Webber Springs Subdivision, prospective purchases are placed on notice that assessments run with the land, and non-payment constitutes a lien against the property. Petitioners have *not* demonstrated how they are harmed or prejudiced by Webber Springs’ adherence to the Declaration. Simply stated, the Petitioners have asserted claims under the WVCCPA to (1) avoid paying assessments which they agree are owed; and (2) intimidate Webber Springs with threats of fines and violations. It is clear that this not-for-profit community association’s continued existence hinges on the payment of assessments and dues by property owners. The WVCCPA was not promulgated by the W.Va. Legislature for this purpose and the Circuit Court correctly concluded that it did not apply.

**2. The Statute of Limitations applies and bars the counterclaims asserted by the Petitioners against the Respondent.**

Notwithstanding the fact that the Circuit Court concluded that the WVCCPA did not apply and therefore the Petitioners had failed to state a cause of action upon which relief could be granted, the Circuit Court further found that their claims were time barred. In reaching this

conclusion, the Circuit Court correctly recognized that a two year statute of limitation applied to the counterclaims that were lodged by the Petitioners, in reliance upon, W.Va. Code § 55-2-12.

The Petitioners argue that their claims are not subject to the statute of limitations pursuant to W.Va. Code § 46A-5-102, since they arise from counterclaims asserted in response to an action filed by Webber Springs. *See* Petitioners Brief, p. 23. That legal premise does not apply in the case *sub judice*.

The scope of W.Va. Code § 46A-5-102 was clarified in *Tribeca Lending Corp v. McCormick*, 231 W. Va. 455, 745 S.E.2d 493 (2013). In *Tribeca*, James McCormick (“McCormick”) argued that he was permitted to assert counterclaims because those counterclaims were not subject to the statute of limitations. In *Tribeca*, this Court disagreed with McCormick and ruled that W.Va. Code § 46A-5-102 had no application to the case, determining that *Tribeca* was not pursuing any claims on a consumer loan. In reaching this conclusion, the *Tribeca* Court looked to W.Va. Code § 46A-5-102(12) which provides the definition of consumer loans. *Tribeca*, 231 W. Va. at 461-462, 745 S.E.2d at 500-501. Pursuant to W.Va. Code § 46A-5-102(12), a consumer loan is defined in part as a “loan made by a person regularly engaged in the business of making loans.” *Tribeca*, 231 W.Va. at 463, 745 S.E.2d at 501. It cannot be plausibly argued that Webber Springs was in the business of making loans. There is no evidence upon which such a claim could be made.

Specifically citing *Tribeca*, the Circuit Court in this matter ruled that “[h]ere as in the *Tribeca* case, Webber Springs is not engaged in the business of making loans. At oral argument, the Defendant [Petitioners] presented no evidence or witnesses to establish that Webber Springs is engaged in the business of making loans.” *See* App., p. 345. As recognized by the Circuit Court, Webber Springs was not pursuing any claims on a consumer loan, but was commencing

an *in personam* action for non-payment of assessments. Thus, the reasoning in *Tribeca, supra*, clearly applies to the instant case. Since there was no claim at issue pursuant to the WVCCPA, there can be no consumer transaction. Therefore, there is no cause of action pursuant to W.Va. Code § 46A-5-102(12). To the extent that any claims were available, they were subject to a two year statute of limitation which had clearly expired. Syl. Pt. 5, *Tribeca, supra*; Syl. Pt. 6 *Chrysler Credit Corp. v. Copley*, 189 W. Va. 90, 428 S.E. 2d 313 (1993).

**3. Assuming *arguendo* that the WVCCPA applied, only the one year provision found in W.Va. Code § 46A-5-101 would apply as the assessment dues are not by definition revolving charge accounts or revolving loan accounts.**

Assuming *arguendo* that the WVCCPA applied in this matter, the one year statute of limitations would be applicable. W.Va. Code § 46A-5-101 sets forth the limitations of actions under the WVCCPA. West Virginia Code § 46A-5-101 reads, in pertinent part:

With respect to violations arising from consumer credit sales or consumer loans made pursuant to **revolving charge accounts** or **revolving loan accounts**, or from sales as defined in Article 6 [§§ 46A-6-101 *et seq.*] of this chapter, no action pursuant to this section may be brought more than four years after the violations occurred. With respect to violations arising from other consumer credit sales or consumer loans, no other action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement. (Emphasis added.)

In this matter, there is no charge account or revolving loan account between the Petitioners and Webber Springs. The four year statute of limitations does not apply. Any assessments owed by the Petitioners are not revolving loan accounts. A “revolving charge account” and a “revolving loan account” are defined in W.Va. Code § 46-A-1-102(39)-(40) as:

- (39) “Revolving charge account” means an agreement between a seller and a buyer which: (a) They buyer may purchase goods or services on credit or a seller card; (b) the balances of amounts financed and the sales finance and other appropriate charges are debited to an account; (c) a sales finance charge if made is not precomputed but is computed periodically on the

balances of the account from time to time; and (d) there is the privilege of paying the balances in installments.

- (40) “Revolving loan account” means an arrangement between a lender and a consumer including, but not limited to, a lender credit card or similar arrangement, pursuant to which: (a) The lender may permit the consumer to obtain loans from time to time; (b) the unpaid balances of principal and the loan finance and other appropriate charges are debited to an account; (c) a loan finance charge if made is not precomputed but is computed periodically on the outstanding unpaid balances of the principal of the consumer’s account from time to time; and (d) there is the privilege of paying the balances in installments.

Under the plain definition found in W.Va. Code § 46A-1-102(39), no revolving charge account existed. No goods or services were purchased on a credit card; there were no balances financed or any sale; and there was no sale finance charge. Similarly, under the plain language of the definition set forth in W.Va. Code § 46A-1-102(40), there was never an agreement between a “lender” which permitted any party to obtain loans from time to time. The language utilized by the Legislature in these code sections is not ambiguous and construction is not required. This Court held in *Univ. Commons*, 2013 W. Va. LEXIS 264, 13-14, “[w]here the language of a statutory provision is plain, its terms should be applied as written and not construed.” (Internal citations omitted).

The resulting default provision in the WVCCPA allows for a one year limitations period. Here, the Petitioners’ Counterclaims are premised upon alleged “claims” collectively filed on January 8, 2010, February 27, 2008, and March 10, 2008. App., pp. 81-85. The Petitioners did not assert their Counterclaims until March 19, 2014 and March 20, 2014, well past the statute of limitations. App., pp. 15 and 31. Thus, even if the WVCCPA applied, the claims would be dismissed under the one year default provisions found in W.Va. Code § 46A-5-101.

## V. CONCLUSION

The April 24, 2014 Order from the Circuit Court which is the subject of this appeal is not a final appealable order as required by W.Va. Code § 58-5-1. The Petitioners are seeking appellate review of an interlocutory order. Therefore, the Petitioners' Appeal should be denied without prejudice as premature.

Notwithstanding the foregoing, the Circuit Court's rulings as set forth in its April 24, 2014 Order correctly apply West Virginia law to the facts at issue in this matter. Webber Springs has prescribed contractual authority to file liens by virtue of the Declaration running with the land of the Petitioners. On this basis, any liens created by virtue of the Petitioners default pursuant to the Declaration would be deemed *bona fide* consensual liens and not precluded by West Virginia law. Moreover, the collection of homeowners' assessments pursuant to a valid and publicly recorded Declaration are not governed by the WVCCPA, nor is it a violation of the same.

**WHEREFORE**, Webber Springs respectfully moves this Court to affirm the Circuit Court's April 24, 2014 Order.

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**CERTIFICATE OF SERVICE**

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I, Susan R. Snowden, Counsel for Respondent hereby certify that I served a true copy of the foregoing upon the following individuals, via U.S. Mail, postage prepaid, on this the 9<sup>th</sup> day of **October, 2014:**

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