

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**William L. Pearson,
Defendant Below, Petitioner**

vs.) No. 11-1455 (Raleigh County 10-C-711-K)

**Americredit Financial Services, Inc.,
Plaintiff Below, Respondent**

FILED

September 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner William L. Pearson, pro se, appeals the July 22, 2011, order of the Circuit Court of Raleigh County granting summary judgment to Americredit Financial Services, Inc. Respondent Americredit Financial Services, Inc. (“Americredit”), by Jacob C. Zweig, its attorney, filed a response to which petitioner filed a reply.

The Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On February 28, 2006, petitioner entered into a retail installment contract and security agreement (“contract”) with Americredit for the purchase of a 2005 Dodge Durango. The contract provided that petitioner was to make sixty payments of \$555.25 to Americredit in order to repay a loan with a principal balance of \$20,576.57 at an interest rate of 20.85% per annum. Petitioner made the first payment on March 30, 2006.

Americredit sent petitioner at least three notices of default and right to cure letters: on July 18, 2008, on October 20, 2008, and on April 17, 2009. After the October 20, 2008, notice of default and right to cure letter, Americredit attempted to repossess the Dodge Durango. Petitioner alleges that in attempting to repossess the vehicle, Americredit failed to wait the statutory ten day grace period and that the towing company breached the peace by making threats against him and his family. Americredit alleges that because the insurance had expired on the vehicle, it had the right to repossess the vehicle without giving petitioner a notice of default and an opportunity to cure and that

no unlawful activity occurred in the repossession attempt.¹ (Petitioner still has possession of the Dodge Durango.)

The April 17, 2009, notice of default and right to cure letter reflected a past due amount of \$897.75, representing \$302.50 of the payment for March 5, 2009, and the full payment for April 5, 2009, plus \$40 in late charges.² At the hearing on Americredit's motion for summary judgment, petitioner admitted that March of 2009 was "the last time I made any type of payment. . . ."

Over a year later, on August 13, 2010, Americredit filed suit against petitioner for possession of the Dodge Durango and a judgment for \$12,435.88 plus interest and late charges. Petitioner filed an answer. Americredit subsequently moved for summary judgment.

When the circuit court granted Americredit's motion, the court noted that it had considered petitioner's response to the motion. The circuit court's amended order concluded as follows:

* * *

4. West Virginia Code § 46A-2-106 provides that a creditor must give the consumer Notice of a consumer's right to cure default. Because AmeriCredit did properly send [petitioner] a Notice of consumer's right to cure default, AmeriCredit has the right to take possession of the vehicle as a result of that default.
5. Because the pertinent authorities quoted above give AmeriCredit the right to take possession of the car, there is no material fact in question. Therefore, summary judgment is granted and AmeriCredit is entitled to take immediate possession of the vehicle.
6. Upon review of the parties' arguments, the pertinent legal authorities, and the standard of review for summary judgment motions, the court must grant AmeriCredit's motion for summary judgment.

¹ Americredit is correct that notice is not required when there has been a default "with respect to a covenant to provide insurance for or otherwise to protect and preserve the property covered by a security interest." *See* W.Va. Code § 46A-2-106.

² After this third notice and right to cure letter, Mr. Pearson lost any right to cure. *See* W.Va. Code § 46A-2-106 ("A consumer who has been in default three or more times on the same obligation and who has been given notice of such fact three or more times shall not have the right to cure a default under this section . . .").

Petitioner appealed the circuit court's amended order on September 2, 2011, and filed his appendix on December 13, 2011. Americredit filed a response brief and a motion to file a supplemental appendix. This Court granted the motion. Petitioner's reply brief was due March 29, 2012, but the Court granted a motion for an extension of time. Petitioner then filed his reply brief on April 13, 2012. Subsequently, petitioner filed a motion to file a supplemental appendix, which remains pending.

PETITIONER'S MOTION TO FILE A SUPPLEMENTAL APPENDIX

This Court has reviewed the materials petitioner proffers with his motion to file a supplemental appendix along with the existing record on appeal. The record on appeal already contains Americredit's complaint, petitioner's answer, Americredit's motion for summary judgment and supporting memorandum (including exhibits), a transcript of the summary judgment hearing before the circuit court, a sworn affidavit by an Americredit employee, and various financial records. A copy of petitioner's response to the motion for summary judgment is also included in the record on appeal.³ Because of the adequacy of the existing record on appeal, this Court concludes that petitioner's motion to file a supplemental appendix should be and is hereby denied.

WHETHER THE CIRCUIT COURT ERRED IN GRANTING AMERICREDIT SUMMARY JUDGMENT

Petitioner alleges that the towing truck driver, when attempting to repossess the vehicle, breached the peace by threatening him and his family. However, a breach of the peace during the repossession attempt does not give the consumer a defense to the default. Therefore, petitioner's allegations constitute an issue unrelated to whether the circuit court properly awarded Americredit possession of the Dodge Durango and a judgment for \$12,435.88 plus interest and late charges.⁴

This Court reviews the circuit court's entry of summary judgment under a de novo standard of review. *See* Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party . . ." Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). Petitioner contends that he was never in default and that he paid the principal under the contract. Petitioner does not say, however, that he paid all the interest that was due under the contract. Petitioner admitted at the summary judgment hearing that March

³ This Court contacted the Raleigh County Circuit Clerk and caused another copy of petitioner's response to be faxed to the Court, which included the attached exhibits.

⁴ Rather than a defense, a breach of the peace during a creditor's repossession of the vehicle potentially could give rise to an independent claim by the consumer against the creditor. *See General Electric Credit Corp. v. Timbrook*, 170 W.Va. 143, 291 S.E.2d 383 (1982). Petitioner included such a counterclaim in his answer to Americredit's complaint, but petitioner has not assigned error in this regard.

of 2009 was “the last time I made any type of payment” In addition to petitioner’s admission, Americredit’s claim for \$12,435.88 was supported by the sworn affidavit from one of its employees. Once Americredit’s prima facie case was made, the burden of production shifted to petitioner to rehabilitate the evidence, introduce new evidence, or explain why further discovery would yield relevant evidence. *See* Syl. Pt. 3, *Williams*. Petitioner failed to meet this burden. Accordingly, this Court concludes that the circuit court’s decision to grant Americredit summary judgment is affirmed.

For the foregoing reasons, we find no error in the decision of the circuit court and its July 22, 2011, order granting summary judgment is affirmed.

Affirmed.

ISSUED: September 7, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh