

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FEB 25 2020

STATE OF WEST VIRGINIA, ex rel,  
CREDIT CONTROL, LLC

Petitioner,

v.

Docket No. 20-0045

HONORABLE RONALD E. WILSON.,  
Judge of the Circuit Court of Ohio County,  
West Virginia, and Melissa Thompson,

Respondents.

*From the Circuit Court of Ohio County, West Virginia  
Civil Action No. 14-C-213*

**RESPONDENT'S OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF  
PROHIBITION**

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## **I. QUESTIONS PRESENTED**

1. Whether the court committed a substantial abuse of discretion in denying Defendant's Motion for Protective Order and permitting Plaintiff to take a second deposition of Defendant's corporate representative where Defendant failed to timely supplement its discovery responses with respect to the paramount issue in the litigation before the first deposition and where Defendant failed to avail itself of an opportunity to avoid the second deposition by providing full written discovery responses to Plaintiff's deposition topics as directed by the trial court?
2. Whether the court committed a substantial abuse of discretion in denying Defendant's Motion for Protective Order and ordering that Defendant's corporate representative must present for a deposition in Wheeling, WV, as opposed to Las Vegas, NV where the equitable, economic and logistical factors favor a deposition in the forum and where Defendant's misconduct in the discovery process caused the need for the deposition?

## **II. STATEMENT OF THE CASE**

This case arises out of Petitioner Credit Control, LLC's improper and unlawful attempts to collect a consumer debt from Plaintiff Melissa Thompson, in violation of common law and the West Virginia Consumer Credit and Protection Act ("WVCCPA"). In or about 2013 Melissa Thompson and her husband, Donald Thompson, fell upon difficult financial times when Mr Thompson, who was self-employed as a contractor, was injured in an automobile accident and was unable to work. [SA 8-9]. Shortly thereafter, the Thompson's became delinquent on personal credit card debt payments and began receiving collection telephone calls from debt collector Credit Control (Petitioner). [SA 8; 188 – 191; and 202-204]. As a result, Melissa Thompson hired attorney Thomas E. McIntire who sent a letter of representation to Credit Control via certified mail on December 10, 2013 which was received on December 13, 2013. [SA 28 – 30, 32]. The letter of representation directed Credit Control to "immediately cease and desist all telephone calls and correspondence to [Melissa Thompson] with regard to [Acct #9023895] **as well as any other accounts or debts which your agency is attempting to collect**

from our client." (Emphasis Supplied). [SA 28-30]. The letter of representation also requested validation of the debt; basic details and documentation related to the account; and whether Credit Control had made negative reports concerning the debt to any credit bureaus. [SA 28 – 30] Thereafter, Credit Control ignored both Attorney McIntire's inquiries and request to cease and desist collection communications with his client. Credit Control provided attorney McIntire none of the information requested and continued to make collection telephone calls and send correspondence to Melissa Thompson in violation of W.Va. Code §46A-2-128(e) (1990) which prohibits a debt collector from "communication with a consumer whenever it appears that the consumer is represented by an attorney and the attorney's name and address are known, or could be easily ascertained." [SA 76-77; 83-86, 466-467].

As a result, on July 24, 2014 Melissa Thompson filed a complaint in the Circuit Court of Ohio County containing counts for: (1) violations of §§46A-2-125, 46A-2-125(d), 46A-2-128(e) and 46A-2-127(c) of the West Virginia Consumer Credit and Protection Act ("WVCCPA"); (2) violations of the West Virginia Computer Crime and Abuse Act ("WVCCAA"); (3) Intentional Infliction of Emotional Distress; and (4) Invasion of Privacy; as well as a claim for Punitive damages. [SA 19-26; 35-42]. Service of process was completed upon Credit Control via certified mail no later than August 4, 2014; however, it took Credit Control over 6 months to file an answer, after an intervening motion for default had been filed on January 1, 2015. [SA 155-166].

Melissa Thompson served her first set of written discovery on Credit Control on August 6, 2015; however, Credit Control did not serve responses until February 9, 2016 – over 6 months after the date of service. [SA 167-214]. In fact, Plaintiff was required to file an intervening motion to compel to obtain responses to her first set of discovery requests. [SA 215-232].

Importantly, in its discovery Responses, Credit Control denied that it was asserting any of those affirmative defenses to WVCCPA claims specifically set forth in W.Va. Code §46A-5-101(8).

Credit Control's Answer to Plaintiff's Interrogatory No. 7 states:

7. If Defendant asserts the defense set forth in West Virginia Code §46A-5-101(8), that any violation of the West Virginia Consumer Credit and Protection Act was unintentional or the result of a bona fide error of fact, notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error, please provide the following:
  - a. State the substance of every such procedure;
  - b. The date or dates such procedure was implemented;
  - c. State how Defendant ensures that its employees placing phone calls to consumers in West Virginia understand and follow all such procedures;
  - d. Identify by date, agent or employee, and action, each possible unintentional violation of the West Virginia Consumer Credit and Protection Act in Defendant's dealings with Plaintiff;
  - e. Explain how such unintentional violation occurred, notwithstanding the maintenance of procedures reasonably adapted to avoid such unintentional violation;
  - f. Identify by date, agent or employee, and fact, each violation of the West Virginia Consumer Credit and Protection Act in Defendant's dealings with Plaintiff which was the result of a bona fide error of fact; and
  - g. Explain how such bona fide error of fact occurred, notwithstanding the maintenance of procedures reasonably adapted to avoid such error.

**RESPONSE: AT THIS TIME, DEFENDANT DOES NOT ASSERT SAID DEFENSE BUT RESERVES THE RIGHT TO DO SO AS INVESTIGATION AND DISCOVERY CONTINUES. DEFENDANT WILL SUPPLEMENT IF NECESSARY.** (Emphasis supplied) [SA 193].

Thereafter Credit Control filed its first set of discovery requests on March 28, 2017 which was timely answered by Plaintiff on May 1, 2017. Shortly thereafter on June 1, 2017, counsel for Credit Control unilaterally noticed the deposition of Melissa Thompson for June 30, 2017 without any attempts to coordinate said deposition with Plaintiff's counsel. [SA 246]. In response, on June 12, 2017, Plaintiff served a 30(b)(7) notice of corporate representative deposition upon Credit Control which was to take place at the office of Attorney McIntire in

Wheeling, WV on June 30, 2017 immediately following the deposition of Plaintiff. [SA 241-244]. On June 20, 2017 Credit Control filed its **first of three motions for protective order in this litigation** requesting that the deposition take place on a different date in Las Vegas, NV and objecting to multiple subject areas set forth in the deposition notice. [SA 233-244]. The parties ultimately agreed to conduct the deposition in Wheeling and the court issued its order granting in part Credit Control's request to limit the scope of the deposition subject matter on July 11, 2017. [SA 253-254].

Pursuant to a renewed 30(b)(7) deposition notice, the deposition of Credit Control's Chief Compliance Officer Anthony Pirotta was taken on December 6, 2017. [SA 255-259]. Immediately following Plaintiff Counsel's examination of Mr. Pirotta, Credit Control's counsel elicited from the deponent that Credit Control was in fact asserting an affirmative defense - that the WVCCPA violations committed by Petitioner were "unintentional ... notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error." [SA 132-134]. This testimony concerning the central issue in the case was contradictory to Credit Control's Answers to Plaintiff's Interrogatories, **which had not been supplemented prior to the deposition.** [SA 193].

Following the deposition, on April 9, 2018 Plaintiff and Defendant filed cross motions for Summary Judgment. [SA 260-288]. As a primary basis for its Summary Judgment Motion, Credit Control asserted that its violations of the WVCCPA were "unintentional" pursuant to W.Va. Code §46A-5-101(8). [SA 274-288]. In Response Melissa Thompson, argued that Credit control 1) could not carry its burden of proof to establish that the conduct was intentional and 2) that Credit Control had waived the defense by failing to properly answer and/or timely supplement responses to Plaintiff's Interrogatory specifically related to that item. [SA 289-296].



The court entered an order on April 23, 2018 denying Defendant's summary judgment motion and denying, and granting in part, Plaintiff's summary judgment motion. [SA 296-299]. The court found that Plaintiff had established that Credit Control violated WVCCPA §46A-2-128(e); however, the court also found that Credit Control had not waived and that a genuine issue of material fact existed with respect to Credit Control's affirmative defense. [SA 296-299]. Importantly, with respect to Plaintiff's waiver argument the court found:

Bearing on this issue is that the Defendant, in its answer to plaintiff's question of whether it was asserting a *W.Va. Code §46A-5-101(8)* defense in Interrogatory 7 of Plaintiffs First Set of Discovery Requests, stated that it was not asserting and did "not assert said defense but reserves the right to do so as investigation and discovery continues. Defendant will supplement if necessary."

The defendant never supplemented its answer to this Interrogatory as required by the Rules of Civil Procedure. However, the court cannot ignore the fact that defendant clearly asserted this defense in the deposition of Anthony Pirotta, Credit Control, LLC's 30(b)(7) corporate representative, and in its motion for summary judgment. Thus, the court cannot say that the plaintiff was prejudiced by the defendant's failure to comply [with] the Rules of Civil Procedure. **Nevertheless, because of defendant's failure to supplement its answer to this important interrogatory, the court will, at the request of counsel for the plaintiff, continue the trial to give the plaintiff a further opportunity to conduct additional discovery.** (Emphasis in Original). [SA 298].

Based on the trial court's summary judgment order, Plaintiff filed a motion to continue the scheduled May 9, 2018 trial date in order to conduct additional discovery with respect to Credit Control's affirmative defense. [SA 300-302]. Thereafter, on April 25, 2018, over two years after filing its original answer, Defendant Credit Control filed a supplemental answer to Plaintiff's Interrogatory No. 7 setting forth in writing its alleged basis for the WVCCPA §46A-5-101(8) affirmative defense. [SA 303-306]. Shortly thereafter, on April 27, 2018 the trial court entered an order granting Plaintiff's motion to continue the trial. [SA 307-308].

Now that Plaintiff had been properly apprised of the defenses asserted by Defendant and an opportunity to prepare therefore, on June 8, 2018, Plaintiff filed a notice to take a second 30(b)(7) deposition of Credit Control's corporate representative Anthony Pirota at a date and time to be agreed upon by the parties. [SA 309-314]. In response, on June 28, 2018 Credit Control filed its second motion for protective order to prevent the deposition. [SA 315-325]. Credit Control objected to the Deposition alleging that the topics contained in the deposition notice were covered at the previous deposition; were meant only to cause Defendant additional expenses; and were not likely to lead to the discovery of admissible evidence. [SA 315-325]. Credit Control also argued that any topics which had not been covered at the previous deposition would be better suited for written discovery. [SA 315-325]. In response, Plaintiff primarily argued that the noticed deposition topics were relevant and that Plaintiff should be permitted to explore these new topics and/or revisit topics that had been at least partially covered at the first 30(b)(7) deposition in light of Credit Control's failure to supplement its discovery responses prior to the deposition and sandbagging notice of the paramount issue in the case. [SA 326-358].

The trial court held a hearing on Credit Control's second motion for protective order on November 19, 2018. [SA 359-360]. At the hearing the court informed the parties that it would hold Credit Control's motion in abeyance pending the following procedure: 1) Credit Control was to treat the topics covered in Plaintiff's 30(b)(7) deposition notice as interrogatories and provide written objections and/or responses within 30 days from November 20, 2018; 2) Plaintiff was to file any objections to the responses within 10 days of receipt; and 3) the trial court would then issue a ruling on Credit Control's motion for protective order. [SA 359-360]. On December 19, 2018, Credit Control filed written responses to the 30(b)(7) deposition notice topics and lodging a number of objections generically based on relevancy and the breadth of the

topics. [SA 361-370]. Plaintiff filed a response thereto on January 3, 2019 and as part of that response and in an effort to resolve the objections withdrew three of the topic areas.<sup>1</sup> [SA 371-377]. As a result, on February 21, 2019<sup>2</sup> the trial court issued an order denying Credit Control's motion for protective order. [SA 378-383]. The court overruled Credit Control's objections; ordered that a second deposition of Mr. Pirotta take place at a time and place agreed upon by the parties; ordered Credit Control to provide supplemental information to Plaintiff prior to the deposition; and based its decision on the following:

### **Conclusion**

Defendant had the opportunity to avoid the requested deposition by fully answering the information sought by the plaintiff. It failed to do so. Therefore, it is **ORDERED** that the Defendant's motion for protective order preventing the Video Deposition (Duces Tecum) of Defendant's 30(b)(7) Representative(s) is denied. [SA 378-383].

Based on the Court's ruling, Plaintiff filed an amended notice to take a video deposition of Defendant's 30(b)(7) representative(s) on October 3, 2019 to take place in Wheeling, WV on October 24, 2019. [SA 397-400]. On October 11, 2019, Credit Control filed a notice to take a second deposition of Plaintiff Melissa Thompson and also filed its third motion for protective order in this matter arguing that the deposition take place in Las Vegas, Nevada. [SA 401-417]. On October 23, 2019 Plaintiff responded to Credit Control's motion arguing primarily that since Credit Control's conduct necessitated taking a second deposition, it should occur in Wheeling. [SA 418-459]. Plaintiff also argued that a number of other economical, logistical and equitable factors favored a deposition in Wheeling. [SA 418-459]. On November 6, 2019 the trial court

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<sup>1</sup> Plaintiff withdrew topics 5, 7 and 8 from consideration.

<sup>2</sup> Although the order was dated February 21, 2019, Plaintiff's counsel did not receive a copy of the order until July 1, 2019. See Plaintiff's Motion to Amend Scheduling Order dated July 9, 2019. [SA 384-394]. As a result, the trial court entered an amended scheduling order on September 9, 2019. [SA 395-396].

entered an order denying Defendant's motion for protective order finding that the economics and relative financial position of the parties favored a deposition in Wheeling, WV. [SA 460-461].

Thereafter, on December 2, 2019 Plaintiff filed her second amended notice to take video deposition of Defendant's 30(b)(7) representative(s) to take place in Wheeling, WV on January 28, 2020. [SA 462-465]. Credit Control then filed the instant petition for writ of prohibition on January 21, 2020 and mailed a copy to Plaintiff's counsel via regular US mail which was received by Plaintiff's counsel on January 24, 2020 – four days before the scheduled deposition.

### **III. SUMMARY OF ARGUMENT**

The Trial Court did not abuse its discretion by denying Petitioner's motions for protective order and allowing Plaintiff to take a second deposition of Credit Control's 30(b)(7) corporate representative in Wheeling, WV. The trial court granted Plaintiff's request to take the second deposition as a sanction and/or remedial measure to correct Petitioner Credit Control's discovery misconduct. The Trial Court found that Credit Control did not comply with the West Virginia Rules of Civil Procedure when it failed to timely supplement its discovery response on the critical issue in the case prior to the deposition of its 30(b)(7) representative. Specifically, Credit Control raised a statutory affirmative defense to Plaintiff's WVCCPA claims at the corporate representative deposition when it had made a prior representation in an Interrogatory that it was not raising such a defense. Further, the Trial Court gave Credit Control an opportunity to avoid the second deposition by providing written responses to the subject areas identified in the notice of the second 30(b)(7) deposition; however, the trial court found that Credit Control did not avail itself of this opportunity by failing to fully answer the inquiries. Based upon this discovery misconduct, it was well within the Trial Court's discretion, pursuant to the Rules of Civil Procedure and/or the inherent sanctioning power of the Court, to remedy the

situation by permitting Plaintiff to take a second deposition of Credit Control's 30(b)(7) representative on issues that relate to the untimely disclosed affirmative defense. Further, because Credit Control's discovery misconduct was the root cause requiring a second corporate representative deposition, and because the economic, logistical and equitable factors favored requiring Credit Control's representative to appear in Wheeling, WV for the deposition, it was not an abuse of discretion for the court to find an exception to the general rule that depositions of corporate representative be taken at or near their place of business.

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

Oral argument is unnecessary pursuant to W.Va. Rule of App. Proc. 18(a), because the petition is without substantial merit; the dispositive issues have been authoritatively decided; the facts and legal arguments are adequately presented in the briefs and record on appeal; and the decisional process would not be significantly aided by oral argument. Indeed, the matter is appropriate for memorandum decision pursuant to W.Va. Rule of App. Proc. 21, because there is no substantial question of law and the trial court's decision was correct; there is no prejudicial error; and other just cause exists for summary affirmance.

#### **V. ARGUMENT**

##### **A. Standard of Review**

"[W]rits of prohibition provide a drastic remedy [that] should be invoked only in extraordinary situations." *Health Mgmt., Inc. v. Lindell*, 207 W.Va. 68, 72, 528 S.E.2d 762, 766 (1999). Typically, "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers." *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*,

228 W. Va. 252, 258–59, 719 S.E.2d 722, 728–29 (2011) (quoting W. Va. Code §53–1–1). "Therefore, a litigant seeking relief through this extraordinary remedy bears a heavy burden and must demonstrate his/her entitlement to the issuance of such a writ." *State ex rel. State Farm Mut. Auto. Ins. Co. v. Marks*, 230 W. Va. 517, 522, 741 S.E.2d 75, 80 (2012). Where, as here, the alleged error relates to a court's discovery order, a writ of prohibition is only available to correct a clear legal error resulting from a trial court's ***substantial abuse of its discretion*** ..." Syl. pt. 1, *State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W.Va. 622, 425 S.E.2d 577 (1992) (emphasis added).

**B. Credit Control's discovery misconduct necessitated the taking of a second 30(b)(7) corporate representative deposition.**

The West Virginia Rules of Civil Procedure have traditionally been given a liberal construction favoring broad discovery, because broad discovery policies are essential to the fair disposition of both civil and criminal lawsuits. *State ex rel. W. Virginia State Police v. Taylor*, 201 W. Va. 554, 565, 499 S.E.2d 283, 294 (1997) at FN 16, citing *State ex rel. U.S. Fidelity and Guar. Co. v. Canady*, 194 W.Va. 431, 444, 460 S.E.2d 677, 690 (1995). Additionally, "discovery questions are generally within the discretion of the trial court." *State ex rel. Melanie Kaye P. v. MacQueen*, 199 W. Va. 382, 385, 484 S.E.2d 635, 638 (1997) quoting *State v. Delaney*, 187 W. Va. 212, 215, 417 S.E.2d 903, 906 (1992). See also *Bartles v. Hinkle*, 196 W. Va. 381, 389, 472 S.E.2d 827, 835 (1996) ("Discovery orders lie within the sound discretion of a trial court").

Further, pursuant to W. Va. R. Civ. P. 26(e)(2) "a party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which: (A) The party knows that the response was incorrect when made, or, (B) The party knows that the response

though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.” “If supplementation is not made as required by this Rule, the court, upon motion or upon its own initiative, may impose upon the person who failed to make the supplementation an appropriate sanction as provided for under Rule 37.” W. Va. R. Civ. P. 26(e)(3). Additionally, “if a party fails to supplement as provided for under Rule 26(e) ... the court in which the action is pending may make such orders in regard to the failure as are just.” W. Va. R. Civ. P. 37(b)(2).

The trial court found on two separate occasions that Credit Control engaged in conduct which required the court to afford Plaintiff further opportunities to conduct discovery. First, in its April 23, 2018 Summary Judgment Order, the trial court found that “defendant never supplemented its answer to [Plaintiff’s Interrogatory No. 7] as required by the Rules of Civil Procedure” prior to Anthony Pirotta’s deposition and that because of the **“failure to supplement its answer to this important interrogatory, the court will, at the request of counsel for the plaintiff, continue the trial to give the plaintiff a further opportunity to conduct additional discovery.”** (Emphasis in original). [SA 298]. Second, the trial court’s February 21, 2019 order denying Defendant’s second motion for protective order found that Credit Control had failed to avail itself of an opportunity to avoid the second deposition altogether by providing full written responses to the topics set forth in Plaintiff’s 30(b)(7) deposition notice. [SA 382]. Based on these two specific findings the trial court was well within its discretion to permit Plaintiff to take a second deposition of Credit Control’s corporate representative.

Additionally, from a policy perspective, if the court were to issue a writ of prohibition under these circumstances, such a ruling would have far-reaching negative effects on the judicial process in this state. At the core of this debate, it is clear that Credit Control’s discovery

misconduct is the root cause requiring a second deposition of its corporate representative. Based on the underlying facts, one of two scenarios exists: 1) Credit Control intentionally failed to supplement its discovery response and attempted to ambush Plaintiff's counsel at the deposition of its corporate representative; or 2) Credit Control was negligent in failing to supplement its discovery responses prior to the deposition. Regardless of which scenario is true, this court should not reward such behavior. If the court were to issue a writ of prohibition in this case it would basically be sanctioning a return to the days of trial by ambush. See *McDougal v. McCammon*, 193 W. Va. 229, 236–37, 455 S.E.2d 788, 795–96 (1995) (“one of the purposes of the discovery process under our Rules of Civil Procedure is to eliminate surprise. Trial by ambush is not contemplated by the Rules of Civil Procedure.”).

**C. Plaintiff should be permitted to conduct a second deposition of Mr. Pirotta concerning Credit Control's late disclosure of W.Va. Code §46A-5-101(8) affirmative defense and should be permitted to further explore other items even if they were discussed at the first deposition.**

“The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard.” Syl. Pt. 1, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995). The Rule governing failure to make disclosure or cooperate in discovery is designed to provide sanctions so as to ensure that those parties who are subject to discovery requests promptly and adequately respond. W. Va. R. Civ. P. 37; *State ex rel. McDowell Cty. Sheriff's Dep't v. Stephens*, 192 W. Va. 341, 452 S.E.2d 432 (1994); See also *Doulamis v. Alpine Lake*



*Prop. Owners Ass'n, Inc.*, 184 W. Va. 107, 399 S.E.2d 689 (1990) (Sanctions may be imposed against a party who refuses to comply with discovery rules.)

The court's orders of April 27, 2018 (Granting Plaintiff's motion to continue trial and conduct additional discovery) and February 21, 2019 (Denying Credit Control's second motion for protective order and permitting Plaintiff to take a second deposition of Anthony Pirotta) were in essence discovery sanctions and/or corrective measures which the court fashioned in order to remedy Credit Control's failure to timely supplement and fully respond to discovery. Plaintiff has never suggested that a party or deponent should be subjected to multiple depositions in the ordinary course of litigation; however, where as in this case a party has engaged in discovery misconduct with regard to the critical issue in the case, the trial court is well within its discretion to permit a second deposition of a deponent. See *Jenkins v. CSX Transp., Inc.*, 220 W. Va. 721, 729, 649 S.E.2d 294, 302 (2007) (Ruling that Trial Court did not abuse its discretion by excluding trial testimony of Plaintiff's expert for failure to timely supplement expert disclosures and citing with approval Trial Court's prior consideration of alternative sanctions such as permitting Defense counsel to redepose expert.).

Based upon the failure to disclose its affirmative defense until the time of the corporate representative deposition, Plaintiff should certainly be permitted to re-examine Mr. Pirotta on the affirmative defense and any facts which are the basis of the affirmative defense. Attorney McIntire prepared for Mr. Pirotta's deposition in reliance upon Credit Control's initial discovery response that it was not asserting an affirmative defense under W.Va. Code §46A-5-101(8). It is inequitable to expect an attorney to prepare for the paramount issue in the case "on the fly" at a deposition. Had Attorney McIntire had proper notice of the defense, he certainly may have developed a different strategy for the deposition, asked different questions and/or would have

conducted additional supporting discovery beforehand. Further, had Attorney McIntire had advance notice of Credit Control's affirmative defense, he may have approached the deposition differently and/or asked different questions about other topic areas not related to the affirmative defense. Therefore, it is reasonable for the court to allow Plaintiff to re-visit Credit Control's untimely disclosed affirmative defense and facts related thereto at a second deposition, as well as other limited topics that may have been covered and/or partially covered at the first deposition.

Additionally, Petitioner Credit Control has also argued that Plaintiff has sought a second deposition of its corporate representative for the sole purpose of causing Defendant to incur additional expenses in this action. This is not true as the discovery sought involves the central and paramount issue remaining in the case. Further, it is important to note that Defendant has filed three motions for protective orders and a petition for writ of prohibition on this issue. From a practical standpoint, if even a fraction of the time and resources expended by Defendant in resisting the court ordered discovery had been utilized to complete the second deposition, this matter and probably the entire case would have been concluded long ago.

**D. The topics identified in Plaintiff's December 3, 2019 Second Amended Notice To Take Deposition of Defendant's 30(b)(7) representative relate to Credit Control's untimely disclosed affirmative defense.**

The trial court granted Plaintiff's motion for partial summary judgment with respect to allegations that defendant violated W.Va. Code §46A-2-128(e) (1990) by communicating with Melissa Thompson when it appeared that she was represented by an attorney and the attorney's name and address were known, or could be easily ascertained. [SA 296-299; 466-467]. However, Credit Control raised the affirmative defense of "unintentional" conduct as set forth in W.Va. Code §46A-5-101(8) at the deposition its corporate representative on December 6, 2017. [SA 132-134]. To prevail on an "unintentional" conduct affirmative defense, a debt collector

must prove: (1) that it maintains procedures reasonably adapted to avoid violating the WVCCPA; and (2) that the alleged violation was “unintentional.” W.Va. Code §46A-5-101(8); *LTD Fin. Servs., L.P. v. Collins*, No. 18-0008, 2019 WL 1223251, at \*3 (W. Va. Mar. 15, 2019). Based on Credit Control’s untimely disclosure of its affirmative defense the court did not abuse its discretion in allowing Plaintiff to take a second deposition of Credit Control’s corporate representative with respect to the affirmative defense, any facts supporting the defense; and necessary background information.

Each of the topics identified in the December 3, 2019 Second Amended Notice To Take Video Deposition of Defendant’s 30(b)(7) [SA 462-465] relate to Credit Control’s W.Va. Code §46A-5-101(8)(e) affirmative defense, supporting facts thereto, or necessary background information:

- (a) The details of each account of Melissa A. Thompson placed for collection with and/or purchased by Credit Control, LLC, including, the account number, the date said account was placed for collection with and/or purchased by Credit Control, and the status of each account.

This topic both relates to Credit Control’s affirmative defense and provides necessary background information for the deposition. Credit Control has asserted as part of its defense that Plaintiff had multiple accounts that had been placed for collection and that collection activities had inadvertently been halted on only one of the accounts after receiving Attorney McIntire’s cease and desist letter. Certainly, Plaintiff should be permitted to explore the details surrounding each account to test Credit Control’s assertion. Further, this topic is necessary background information for the deposition. It would be difficult to meaningfully question credit control’s representative concerning collection activities against Plaintiff without being able to identify exactly what accounts existed and the status of each.

- (b) How and why calls were initiated and made to Melissa A. Thompson after December 13, 2013, including the decision to initiate said phone calls to Melissa A. Thompson, the person(s) making the decision(s) and their identities, titles and present employment status, together with the decision-making process.

This topic goes to the heart of Credit Control's affirmative defense as the "how and why" calls were placed to Plaintiff after receiving a cease and desist letter from her attorney relates directly to whether the calls were made intentionally with knowledge that Plaintiff was represented by an attorney. The identity, position and employment status of the individuals making the decision to continue the calls after December 13, 2013, is relevant because this is one of the few categories of people who could testify, without speculating, that the WVCCPA violations committed by Credit Control were unintentional. The identity of these individuals is also relevant to determine whether they had been trained on and/or were aware of company procedures reasonably adapted to avoiding the alleged mistake.

- (c) The person(s) who initiated and/or caused phone calls to be made to Melissa A. Thompson after December 13, 2013, from or on behalf of Credit Control, LLC, including the times when initiated, how initiated, and the purpose and circumstances of each call.

The Trial Court's order of February 21, 2019 did not direct that this topic be answered at the 30(b)(7) deposition. The Trial Court's order merely directed Credit Control to supplement its prior written response and to include the identity of any Credit Control employees who had made manual phone calls to Plaintiff (as opposed to Robo-Dialer), if any. It should be noted that Credit Control has not provided any supplementation pursuant to the Trial Court's directive.

- (d) The policies, procedures and protocols established for employees and/or agents of Credit Control, LLC, which were applicable to all collection activities and/or methods utilized to collect upon the accounts of Melissa A. Thompson, which are the subject of this litigation. The subject areas include but is not limited to the exercise and details of any policies, procedures, or protocols governing the collection calls.

In order to prevail on an affirmative defense under W.Va. Code §46A-2-128(e) (1990) a debt collector must first prove that it maintains procedures reasonably adapted to avoid violating the WVCCPA. W.Va. Code §46A-5-101(8); *LTD Fin. Servs., L.P. v. Collins*, No. 18-0008, 2019 WL 1223251, at \*3 (W. Va. Mar. 15, 2019). This topic matter seeks information directly relevant to the first element of the W.Va. Code §46A-2-128(e) defense.

- (e) The process, procedure and protocol as to what to do when a letter is received from a lawyer representing a debtor/account holder, informing Credit Control, LLC to cease and desist all communication with the debtor/account holder.

In order to prevail on an affirmative defense under W.Va. Code §46A-2-128(e) (1990) a debt collector must first prove that it maintains procedures reasonably adapted to avoid violating the WVCCPA. W.Va. Code §46A-5-101(8); *LTD Fin. Servs., L.P. v. Collins*, No. 18-0008, 2019 WL 1223251, at \*3 (W. Va. Mar. 15, 2019). This topic matter seeks information directly relevant to the first element of the W.Va. Code §46A-2-128(e) defense.

- (f) The existence and details of any systems, policies and/or procedures designed to ensure compliance with the West Virginia Consumer Credit and Protection Act or similar acts including the training of any individuals tasked with supervision and/or enforcement of said systems, policies and/or procedures.

In order to prevail on an affirmative defense under W.Va. Code §46A-2-128(e) (1990) a debt collector must first prove that it maintains procedures reasonably adapted to avoid violating the WVCCPA. W.Va. Code §46A-5-101(8); *LTD Fin. Servs., L.P. v. Collins*, No. 18-0008, 2019 WL 1223251, at \*3 (W. Va. Mar. 15, 2019). This topic matter seeks information directly relevant to the first element of the W.Va. Code §46A-2-128(e) defense. Further the trial Court's February 21, 2019, directed Credit Control to provide a copy of "Credit Control Compliance Policy 4.2 Consumer Complianc[e] and Dispute Policy in effect before February 14, 2017." This document is relevant because it is the version of the policy that would have been in effect at the

time Attorney McIntire's cease and desist letter was received. Credit Control has not supplemented as directed by the Trial Court's order.

- (g) All other matters provided in the order denying Defendant's Motion for Protective Order and Granting Plaintiff's Request to Take Video Deposition of Defendant's 30(b)(7) Representative.

In addition to addressing topic matters to be covered at the second deposition of Credit Control's 30(b)(7) representative, the Trial Court's February 21, 2019 order directed Defendant to provide supplemental written discovery to topics (c) and (f). This deposition topic was intended to reference those supplemental items as it would seem reasonable for Plaintiff to inquire about the newly produced material.

In summation, all of the topics identified in the December 3, 2019 Second Amended Notice To Take Video Deposition of Defendant's 30(b)(7) relate to Credit Control's W.Va. Code §46A-2-128(e) affirmative defense, supporting facts thereto, or necessary background information and the Trial Court did not abuse its discretion in allowing Plaintiff further discovery of those items by way of a 30(b)(7) corporate representative deposition.

- E. The Trial Court did not abuse its discretion in ordering that the 30(b)(7) deposition of Credit Control's corporate representative take place in Wheeling WV because it was Credit Control's discovery misconduct which necessitated the taking of the second deposition.**

A party may unilaterally choose the place for deposing an opposing party, subject to the granting of a protective order by the Court pursuant to W.Va. R. Civ. P. 26(c)(2) designating a different place. W.Va. R. Civ. P. 26(c)(2). See also Fed. R. Civ. P. 26(c)(2) and *Turner v. Prudential Ins. Co. of Am.*, 119 F.R.D. 381, 383 (M.D.N.C. 1988) citing 8 *C. Wright & A. Miller, Federal Practice and Procedure*, § 2112 at 403 (1970). The Court is permitted to exercise broad discretion in determining the appropriate place for examination and may attach conditions such

as payment of expenses. *Turner*, 119 F.R.D. at 383 citing 8 *C. Wright & A. Miller, Federal Practice and Procedure*, § 2112 at 404-405 (1970). Further, a deposition of a corporation through its agents or officers should normally be taken at the principal place of business of the corporation. *Turner*, 119 F.R.D. at 383 citing 8 *C. Wright & A. Miller, Federal Practice and Procedure*, § 2112 at 409-410 (1970) and *Farquhar v. Shelden*, 116 F.R.D. 70 (E.D.Mich.1987).

However, although there is an initial presumption that a defendant should be examined at his residence or the principal place of business, a number of factors serve to dissipate the presumption and may persuade the Court to require the deposition to be conducted in the forum district or some other place. *Turner*, 119 F.R.D. at 383 citing *Farquhar*, 116 F.R.D. 70. See also *Turner v. Prudential Ins. Co.* 199 F.R.D. 381 (M.D.N.C. 1988) (Nature of claim and relationship of parties supported decision to conduct deposition of defendant insurance corporation's officer in forum district, rather than in state where officer resided and worked; claim involved insured's attempt to have coverage determined for medical insurance policy, insured was small employer and insurer a large corporation, and insurer sold policies in various states and could be expected to have claims and actions brought by policyholders in those states.)

These factors are as follows: (1) location of counsel for the parties in the forum district, (2) the number of corporate representatives a party is seeking to depose, (3) the likelihood of significant discovery disputes arising which would necessitate resolution by the forum court, (4) whether the persons sought to be deposed often engage in travel for business purposes, and (5) the equities with regard to the nature of the claim and the parties' relationship. *E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc.*, 268 F.R.D. 45, 54 (E.D. Va. 2010) citing *In re Outsidewall Tire Litig.*, 267 F.R.D. 466, 470 at n.4, 2010 WL 1849035, \*2-3 n. 4.

In its Order dated November 6, 2019 the Trial Court ruled that the second deposition of Credit Control's corporate representative take place in Wheeling, WV. In its order the court found that the relative economic situation of the parties was the most persuasive factor:

What is persuasive is the fact that the expense of the Plaintiff's attorneys flying to Las Vegas, Nevada will ultimately be paid by the Plaintiff. In a case like this, the attorneys' fee is usually a contingent fee, where the attorney gets nothing and are fortunate if they can recover their costs if the Plaintiff does not prevail in this lawsuit. Defendant Credit Control is in a much better position to finance their employees cost to come to Wheeling, West Virginia than Plaintiff Melissa Thompson is to finance her attorney's flight to Las Vegas, Nevada. [SA 460-461].

While the court was correct in finding that the relative economics of the parties favored a deposition in the forum, there were many other factors which supported its decision that the deposition should be taken in Wheeling:

1. Counsel for the Parties are Located in West Virginia.

Counsel for all parties are located in West Virginia. Specifically, Defense counsel is located in Charleston, West Virginia, within reasonable driving distance of the proposed deposition site.<sup>3</sup> It would be far more economical for one witness to travel to West Virginia than for at least two attorneys, and perhaps others to travel to Las Vegas, Nevada.

2. The 30(b)(7) Deposition Will Only Involve One Corporate Representative.

As indicated in Credit Control's motion for protective order [SA 403-17], only one corporate representative will be required to travel which favors a deposition in Ohio County.

3. There is a High Likelihood of Significant Discovery Disputes Arising Which Would Necessitate Resolution by the Forum Court.

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<sup>3</sup> See *Turner*, 119 F.R.D. at 383 citing *Farquhar*, 116 F.R.D. 70, *Sugarhill Records Ltd. v. Motown Record Corp.* 105 F.R.D. 166 (S.D.N.Y. 1985) and *Leist v. Union Oil Co. of California*, 82 F.R.D. 203 (E.D.Wis.1979).



This case has been full of discovery disputes since its inception. The Trial court found that Credit Control failed to supplement its discovery requests as required by the rules of civil procedure by order dated April 23, 2018 and found the second deposition of its corporate representative was necessary because Credit Control failed to provide full responses to court ordered discovery by order dated February 21, 2019. Further, Credit Control has filed three motions for protective order and the instant petition for writ of prohibition. Given the high likelihood of further discovery disputes which may require court intervention, the subject deposition should be conducted in Ohio County.

4. The nature of Defendant's business necessarily requires frequent travel of employees.

Credit Control holds itself out as a nationally licensed organization providing collection services in all 50 states, as well as Puerto Rico and Guam.<sup>4</sup> Further, the company has offices in St. Louis MO, Las Vegas NV, Memphis TN and Tampa FL.<sup>5</sup> Tony Pirotta, Defendant's corporate representative, is the Chief Compliance Officer of this national organization and as such it is reasonable to assume that Mr. Pirotta is required by his job to travel.<sup>6</sup>

5. The equities with regard to the nature of the claim and the parties' relationship strongly favor a deposition in Ohio County.

First, this 30(b)(7) deposition has been necessitated by Defendant's conduct by (1) failing to timely supplement its discovery responses<sup>7</sup> and (2) failing to comply with this Court's February 21, 2019 Order directing Defendant to supply Plaintiff with certain enumerated

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<sup>4</sup> [SA 424-426].

<sup>5</sup> [SA 424-426].

<sup>6</sup> [SA 427].

<sup>7</sup> [SA 298].

categories of information.<sup>8</sup> **In fact, if Defendant had complied with the February 21, 2019 Order, there would be no deposition.**

Additionally, the nature and relationship of the parties also favors an Ohio County deposition. Plaintiff is an individual consumer who does not regularly engage in litigation. Defendant is a national collection business who would not experience financial hardship by traveling to the forum and should be clearly expected to have claims brought against it in the states in which it is doing business.<sup>9</sup>

In summation, Plaintiff acknowledges that in the ordinary course of litigation the deposition of a corporate 30(b)(7) representative should normally occur at or near the deponent's place of business; however, where there are extraordinary circumstances, such as discovery misconduct which necessitate the taking of the deposition as in this case, the court is well within its discretion to order that the deposition take place in the forum.

## **VI. CONCLUSION**

For all the foregoing reasons, and based upon the record, Respondent respectfully requests that this Court deny the *Petition for Writ of Prohibition* in its entirety.

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<sup>8</sup> [SA 382].

<sup>9</sup> [SA 430-436].

Respectfully Submitted,

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