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

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**NO. 20-0932**



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**LESLIE TWEEDIE AND CHRISTINA WAUGH,**

**on behalf of themselves and others similarly situated, Plaintiffs Below,**

**PETITIONERS**

**vs.**

**US ASSET MANAGEMENT, INC.,**

**Defendant Below,**

**RESPONDENT**

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**On Appeal from the Honorable Paul M. Blake, Jr.**
**Circuit Court of Fayette County**
**Civil Action No. 18-C-199**

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# PETITIONERS' BRIEF

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## 1. ASSIGNMENT OF ERROR

The lower court erred in relaxing the standard of proof to which a moving party is held at the summary judgment stage by failing to draw all reasonable inferences in favor of the nonmoving party and by relying on its own life experiences to supplement the factual record before it.

## 2. STATEMENT OF THE CASE

### a) PROCEDURAL HISTORY

Petitioners Leslie Tweedie and Christina Waugh filed the underlying class action on November 26, 2018, in the Fayette County Circuit Court. Petitioners' causes of action each stemmed from Respondent US Asset Management, Inc.'s attempt to collect debt that Petitioners specifically allege was time-barred by the statute of limitations in the Uniform Commercial Code[1] ("UCC") which is four years. *Appx.* at 475-484. Respondent is a debt buyer who purchased debt originally owed to AT&T before hiring a debt collector, EOS CCA, to collect that debt on Respondent's behalf. Under West Virginia law, a collector who attempts to collect time-barred debt must include specific disclosures informing the consumer of the legal status of the debt, and the fact the consumer cannot be sued for the debt, in any written correspondence with the consumer. *See* W.Va. Code §46A-2-128(f). Respondent's written collection correspondence did not contain any disclosure required by W.Va. Code §46A-2-128(f).

The circuit court held an in-person status conference on July 16, 2019, to determine how the case should proceed. At that hearing, the court ordered limited discovery to take place on Petitioners' individual claims so as to allow Respondent to seek summary judgment and dismissal of those claims before proceeding with class-wide discovery. The parties engaged in written discovery and depositions were taken. Respondent filed its motion for summary judgment on July

[1] W.Va. Code §46-1-101 *et seq.* Specifically, the statute of limitations is W.Va. Code §46-2-725.

9, 2020, which ignored Petitioners' specific allegations that the UCC applied, and argued instead that a ten-year statute of limitations applied because the original debt was created pursuant to a written contract signed by the Petitioners. *Appx.* at 20-31. Petitioners filed their response in opposition to Respondent's motion for summary judgment on July 23, 2020, re-alleging that the UCC applied, showing that the underlying agreement with AT&T was a hybrid transaction for both goods and services, and showing that the *predominant purpose* of the transaction was for the mobile devices rather than the mobile service. *Appx.* at 379-388. Respondent filed its reply in further support of its Motion on August 4, 2020, claiming that the underlying signed contract (which Respondent failed to produce) may not have been for any good or device, but that even if it were, that the predominant purpose of the transaction with AT&T was for services rather than goods. *Appx.* at 395-401.

It is undisputed that the collection correspondence was sent to Petitioners more than four years after default and that it did not include the time-barred debt disclosures. The fundamental issue on appeal is the question of the predominant purpose of the underlying transactions with AT&T, because that purpose controls the applicable statute of limitations. Although Respondent first claims the underlying transaction does not include the sale of goods, such an argument is contrary to direct evidence produced by Petitioners, and the argument is without merit because Respondent fails to produce the written agreement that it alleges was signed by the Petitioners (an element necessary to avail themselves to the ten-year statute). The admissible evidence shows, and the lower court decided, that the Petitioners' underlying transaction with AT&T was a "hybrid" contract because the underlying transaction was for both goods (governed by the UCC) and services (governed by other statute). Petitioners maintain that the predominant purpose of the transaction with AT&T was for the purchase of mobile telephone devices, and that the UCC's

four-year statute of limitations for sale of goods therefore applies. *Appx.* at 383-386. Respondent maintains a longer statute of limitations applies pursuant to W.Va. Code 55-2-6 (which provides a ten-year statute of limitations for a written contract with specific terms, and a five-year statute of limitations of other contracts or implied contracts). *Appx.* at 20-31.

On August 14, 2020, the circuit court held oral argument on the motion, and directed the parties to submit proposed orders and objections to those proposed orders, which the parties submitted. *Appx.* at 445-455 & 458-473. On October 14, 2020, the circuit court granted Respondent's motion, finding that the predominant purpose of the underlying transaction was for the mobile telephone service rather than the devices themselves. *Appx.* at 2-15.

In granting the motion for summary judgment, the court supplemented the factual record before it with its own "common knowledge" about how the mobile telephone industry conducts business, and invented colorful analogies based on the Court's own life experiences, which analogies were never before presented, let alone discussed, by the parties. *Appx.* at 10. Neither party offered this "common knowledge" evidence or analogies upon which the entire Order was based.

Petitioners maintain that the circuit court impermissibly went beyond the record before it to make assumptions about the structure and design of the AT&T business model ten years prior, without any direct evidence from the original creditor, AT&T, or anyone else other than the Petitioners, and based its ruling on those assumptions instead of denying the motion and allowing the case to proceed to a jury determination.

**b) STATEMENT OF FACTS**

Petitioners Christina Waugh and Leslie Tweedie both purchased mobile devices and service from AT&T years prior to the filing of this action. In its motion, Respondent insisted that there was no evidence that any goods were purchased as part of the underlying transactions at all,

ignoring both Petitioners' direct testimony and interrogatory responses. Specifically, Christina Waugh went into an AT&T store and purchased multiple mobile telephones and the accompanying service in 2008. *Appx.*at 92, 180-181, 381. Ms. Waugh later defaulted on the account, and AT&T eventually charged off the account on July 28, 2010. *Appx.* at 89. On January 30, 2015, Respondent's debt collector, EOS CCA, mailed Ms. Waugh a collection letter seeking to collect the old debt originally owed to AT&T. *Appx.* at 390. The collection letter represented that Respondent owned the AT&T debt, and that EOS CCA had been hired to collect on behalf of Respondent. *Id.*

On June 15, 2007 Leslie Tweedie purchased a mobile telephone and the accompanying service through AT&T. *Appx.* at 43, 275 (deposition pages 54-55), 381. A dispute arose between Petitioner Tweedie and AT&T regarding fees. Tweedie stopped making regular payments and AT&T charged off the account in March 2009. *Appx.* at 23, 285 (deposition pages 94-95). On November 26, 2014, EOS CCA, Respondent's debt collector, mailed Ms. Tweedie a collection letter seeking to collect on the stale AT&T debt on Respondent's behalf. *Appx.* at 392.

W.Va. Code §46A-2A-128(f) requires a debt collector to include specific disclosures if it attempts to collect debts statute after the expiration of the applicable of limitations. It is undisputed that the collection letters mailed on Respondent's behalf were mailed to the Petitioners more than four years, but less than ten years, after Petitioners defaulted on their AT&T debts. It is likewise undisputed that the collection letters did not contain the disclosure language required by W.Va. Code §46A-2-128(f) for time-barred debt. *Appx.* at 390, 392. A debt collector's failure to provide these disclosures constitutes a straightforward violation of the West Virginia Consumer Credit and Protection Act. *See Adkins v. Midland,* No. 5:17-cv-04107, 2019 WL 1562124 (S.D. W. Va. Apr. 10, 2019) (granting plaintiffs' motion for summary judgment on this claim).

The evidence in this matter makes clear that the debts at issue arose from Plaintiffs' purchases of mobile devices *and* service contracts from original creditor AT&T. The fact that these goods were purchased along with the service contracts makes the underlying transaction a "hybrid contract," and the "predominant purpose" test is applied to determine the applicable statute of limitations. *See Bluefield Gas Co. v. Abbs Valley Pipeline, LLC,* No. 1:09-cv-01497, 2012 WL 40460 (S.D. W. Va. Jan. 9, 2012). When a contract involves both the sale of goods as well as services, i.e. a "hybrid contract," courts apply a "predominant purpose" test, which states:

> [t]he test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (*e.g.,* contract with artist for painting) or is a transaction of sale, with labor incidentally involved (*e.g.,* installation of a water heater in a bathroom).

*Bluefield Gas, supra,* 2012 WL 40460 at *5, citing *Bonebrake v. Cox,* 499 F.2d 951, 960 (8th Cir.1974). The *Bluefield* court noted that the "'predominant purpose' test has been followed by numerous jurisdictions, including courts in Virginia and West Virginia." *Id.,* citing *Princess Cruises v. GE,* , 143 F.3d 828 (4th Cir. 1998); *Prestige Magazine Co. v. Panaprint, Inc.* No. 3:09-0314, 2010 WL 4259398 (S.D. W.Va. Oct. 6, 2010).

Respondent claims that the debt at issue does not seek to collect debt related to the devices, but it fails to produce the written contract signed by either petitioner, nor does it produce a receipt of the transaction or any other evidence rebutting the Petitioners' direct testimony that the underlying transaction with AT&T was for both devices and service. In its Reply, Defendant acknowledged that the court may conclude the underlying transaction was a hybrid contract, but maintained that even so, the predominant purpose was for the service rather than the goods. The circuit court did properly find that the underlying agreements were "hybrid" contracts that necessarily involved both the sale of goods (mobile devices) and services (mobile service that allowed the devices to connect to service when wireless internet (Wi-Fi) was unavailable). *Appx.*

at 5 (¶17), 7 (¶36). The circuit court then correctly applied the predominant factor test set forth in *Bluefield Gas Co., Supra.* The court acknowledged the "considerable disagreement between the parties" on this factual issue. *Appx.* at 4 (¶5), 5 (¶20).

However, rather than find this to be a genuine issue of material fact and deny the Motion, the circuit court instead supplemented the record with its own facts about AT&T's business model and the underlying transaction that were not offered by any party into the record, and were referred to by the court simply as "common knowledge." *Appx.* at 10 (¶¶ 45-49). The court relied upon inaccurate analogies not suggested by either party, as follows:

> This is akin to an auto dealership offering a big screen television with the purchase of every new vehicle. While the consumer may need a vehicle and be drawn to purchase the vehicle from the specific dealer because of the free television, it cannot be said that the primary purpose and thrust of the contract was the television rather than the vehicle.
>
> A clearer and even more comparable example would be an auto dealership offering an extended service warranty free, or at a drastically reduced rate, with the purchase of every new vehicle. Clearly it cannot be said that the primary purpose of such a contract is the service warranty rather than the vehicle.
>
> In the cases at bar, the cell phone service ***is the vehicle***, with the individual marketing devices (cell phone and blackberry cellular devices) being the carrots to induce the customer to enter a contract with the particular service provider.

*Id* (emphasis in original).

In the end, citing its own "common knowledge," the circuit court granted summary judgment to Respondent on the only material issue: the predominant purpose of the transaction. *Appx.* at 11 (¶51, ¶55).

Petitioners bring this appeal because the circuit court exceeded its authority by supplementing the factual record and basing its ultimate determination on assumptions offered by the court itself rather than the evidence and the record before it.

## c) STANDARD OF REVIEW AND APPLICABLE LAW

"A circuit court's entry of summary judgment is reviewed de novo." *Estate of Helmick ex rel. Fox v. Martin*, 192 W. Va. 501, 453 S.E.2d 335 (1994). In order to prevail on a motion for summary judgment, the moving party must prove "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W.Va. RCP 56(c). "A party is not entitled to summary judgment unless the facts established show a right to judgment with such clarity **as to leave no room for controversy** and show affirmatively that the adverse party cannot prevail under any circumstances." *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W. Va. 160, 171, 133 S.E.2d 770, 777 (1963) (emphasis added). "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Casusalty & Sur. Co.*

"In determining on review whether there is a genuine issue of material fact between the parties, the supreme court will construe the facts in a light most favorable to the losing party." *Alpine Property Owners Ass'n v. Mountaintop Dev. Co.*, 179 W. Va. 12, 17, 365 S.E.2d 57, 62, (1987). A genuine issue or dispute is simply one "about which reasonable minds could differ." *Dent v. Fruth,* 192 W. Va. 506, 510, 453 S.E.2d 340, 344 (1994). A material fact "is one that has the capacity to sway the outcome of the litigation under the applicable law." Syl. pt. 5, in part, *Jividen v. Law,* 194 W. Va. 705, 461 S.E.2d 451 (1995). The burden is entirely on the Respondent, as the moving party below, to show that the facts are so well-developed that there are no more genuine issues as to any material fact. "A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and **any doubt** as to the existence of such issue **is resolved against the movant** for such judgment." Syl. Pt. 2, *Justus v. Dotson*, 161 W. Va. 443, 242 S.E.2d 575 (1978) (Citing *Aetna Casualty & Sur. Co., Supra*) (emphasis added).

In ruling on summary judgment, the courts are limited to the record before them, and are not free to supplement that record. "The court must grant the nonmoving party the benefit of inferences, as credibility determinations, the weighing of the evidence, **and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.**" *Cavender v. Fouty*, 195 W. Va. 94, 464 S.E.2d 736 (1995) (emphasis added). Circuit court judges **are not permitted to base their findings of fact on "personal knowledge** as distinguished from proof of such facts." *Boggs v. Settle*, 150 W. Va. 330, 338, 145 S.E.2d 446, 451 (1965) (emphasis added).

In this case, the circuit court recognized the Respondent's failure to show there was no genuine issue of fact by acknowledging that there is significant disagreement between the parties regarding the purpose of the underlying transactions with the original creditor, AT&T. *Appx.* at 4 (¶5), 5 (¶20). Upon coming to this conclusion, the court should have denied the motion because it was clear genuine issues of material fact remained. Instead, the court exceeded its authority at summary judgment by supplementing the record with what the court referred to as "common knowledge" regarding how third-party AT&T conducted the transaction with Petitioners. The court committed reversible error by supplementing the record and relying upon that supplementation to grant Respondent's Motion for Summary Judgment.

## 3. SUMMARY OF ARGUMENT

Rule 56 requires a circuit court to first determine whether there is any genuine issue of material fact in the record before it. That record is limited by the Rule to the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any." The circuit court in this case erred by acknowledging a genuine dispute remained regarding a fundamental factual issue and then resolved that dispute by supplementing the factual record with its own perceived "common knowledge" about how AT&T conducted business over a decade ago.

The court should have denied the motion upon acknowledgment of that genuine factual dispute and allowed the case to proceed to a jury.

The circuit court went beyond the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," to adopt its own findings of fact that directly addressed the fundamental factual dispute at issue. In so doing, the court exceeded its authority and improperly took the ultimate factual decision-making duty away from the jury. Specifically, the court found:

> 5. There is considerable disagreement between the parties regarding whether the cellular devices that were obtained by Waugh were part and parcel to the contract in contention or a consideration given for entering into the contract for services...
>
> 20. There is considerable disagreement between the parties regarding whether the blackberry device obtained by Tweedie was part and parcel to the agreement in contention, a consideration given for entering the contract for services, or a wholly separate purchase...
>
> 45. The Court does not operate in a vacuum, and, as such, it must acknowledge that it is everyday common knowledge that cell phone service providers often offer the newest and flashiest cell phone devices free, or at drastically reduced cost, simply to entice and induce customers to sign service contracts with a particular provider.
>
> 46. While from a subjective standpoint the consumer may agree to an extended service contract with a particular service provider so as to obtain the device for free, or at a reduced cost, from an objective standpoint the primary, underlying purpose of the contract, as a whole, is the rendition of cell phone service, not a transaction for the individual stand-alone device.
>
> 47. This is akin to an auto dealership offering a big screen television with the purchase of every new vehicle. While the consumer may need a vehicle and be drawn to purchase the vehicle from the specific dealer because of the free television, it cannot be said that the primary purpose and thrust of the contract was the television rather than the vehicle.
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> 48. A clearer and even more comparable example would be an auto dealership offering an extended service warranty free, or at a drastically reduced rate, with the purchase of every new vehicle. Clearly it cannot be said that the primary purpose of such a contract is the service warranty rather than the vehicle.

> 49. In the cases at bar, the cell phone service is the vehicle, with the individual marketing devices (cell phones and blackberry cellular devices) being the carrots to induce the customer to enter a contract with the particular service provider.
>
> 50. The Court's purpose here is not to critique a particular businesses' market strategies, but rather to determine what the ***primary purpose and thrust*** of the underlying contract IS.

*Appx.* at 4, 5, 10. (emphasis in original).

The lower court was not free to supplement the record with its own "common knowledge." The court should have acknowledged that the "considerable disagreement between the parties" on this issue constitutes a genuine issue of material fact, and denied the motion. The circuit court was not free to supplement the record before it with assumptions of how the mobile telephone industry worked in 2007 and 2008.

## 4. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners maintain that oral argument is appropriate here pursuant to Rule 19(a) of the Rules of Appellate Procedure. This matter raises an assignment of error in the application of settled law and it involves a narrow issue of law: whether a circuit court can supplement the record before it with disputed facts at the summary judgment stage (it may not). Petitioners maintain that the circuit court's error is plain, violates established tenants of Rule 56, and a memorandum decision may very well be appropriate.

## 5. ARGUMENT

In granting summary judgment, the circuit court failed to hold the Respondent to its high burden of showing that no genuine issue of material fact remained. The parties disagreed on the predominant purpose of the underlying transaction, and provided evidence in support of both positions that left the issue unresolved. This clear factual disagreement is material. The entire case rests upon its determination. As the non-moving party, the Petitioners were entitled to all inferences in their favor, and to have the evidence viewed in a light most favorable to them. Instead,

the court denied the Petitioners those reasonable inferences, and supplemented the insufficient record – which was Respondent's burden to present – with its own assumptions about the underlying transactions in 2007 and 2008. The circuit court based its granting of Respondent's Motion for Summary Judgment not on the record before it, but on the court's own assumptions. The Motion should have been denied, and the case should have been allowed to proceed to class discovery, and ultimately submitted to a jury.

**a) A GENUINE QUESTION OF MATERIAL FACT REMAINED UNRESOLVED**

Rule 56(c) requires a party seeking summary judgment to show that no genuine issue of material fact remains such that judgment as a matter of law is warranted on those undisputed facts. The Rule is clear that this showing must be made on the record before the court which is limited to "the pleadings, depositions, answers to interrogatories, and admissions on file, together with [any] affidavits." Respondent failed to make this showing and the parties disagreed on the most material fact in this case: the predominant purpose of the Petitioners' underlying transaction with AT&T. The court made similar findings as to each Petitioner that neither disputes:

> 5. There is considerable disagreement between the parties regarding whether the cellular devices that were obtained by Waugh were part and parcel to the contract in contention or a consideration given for entering into the contract for services...
>
> 20. There is considerable disagreement between the parties regarding whether the blackberry device obtained by Tweedie was part and parcel to the agreement in contention, a consideration given for entering the contract for services, or a wholly separate purchase.

*Appx.* at 4, 5. As to Petitioner Waugh, the court then goes on to make contradictory findings that the contract was limited to mobile telephone service, but also acknowledges that she received a device as part of the agreement:

> 10. There is no record evidence that shows that Waugh's past due debt was related to the purchase of goods or a cell phone....

> 17. Since phones were received by Waugh at the time the contract was entered, the Court considers the contract between Waugh and AT&T a mixed or hybrid contract involving both services and goods.

*Appx.* at 4, 5. That contradiction highlights the Respondent's failure to make a clear and undisputed records before the circuit court. The court made similar contradictory findings as to Petitioner Tweedie:

> 28. There is no record evidence that shows that Tweedie's past due debt was related to the purchase of a blackberry cellular device...
>
> 36. Since a blackberry cellular device was received by Tweedie at the time the contract was entered, the Court considers the contract between Tweedie and AT&T a mixed or hybrid contract involving both services and goods.

*Appx.* at 7. Had the respondent produced the written contract or the receipt from the day Petitioners purchased their telephones from AT&T, then perhaps the record would be clear. But the Respondent failed to create such a sufficient record.

The court was correct that considerable disagreement remains. This disagreement goes right to the heart of Petitioners' claims in this case, making it a genuine issue of material fact that should be resolved by a jury after full discovery. It is not a disagreement that the circuit court is free to resolve with independent and unique presumptions of fact at the summary judgment stage.

**b) THE COURT EXCEEDED ITS AUTHORITY BY SUPPLEMENTING THE RECORD**

Petitioners are the only individuals to offer any direct testimony regarding the underlying transactions with AT&T. Both Petitioners testified similarly, stating that they purchased mobile telephone devices at an AT&T store. Petitioner Christina Waugh confirmed that she purchased multiple phones from AT&T as part of her contract. *Appx.* at 92, 180-181 (Waugh Deposition Transcript at 53:9-20; 141:19 - 142:20). Petitioner Leslie Tweedie confirmed she received a BlackBerry when she opened the account. *Appx.* at 330 (Response to Int. #8), 275 (Tweedie Deposition transcript at 54-55). In response to Respondent's interrogatory seeking the basis for

her contention that the debt at issue arose from the sale of goods as defined by the UCC, Ms. Waugh stated in her response that she "received three phones for her and her daughters as well as two mobile hot spots" when she opened her account with AT&T, and that the "costs of those devices were to be paid over time as part of the Plaintiffs' monthly bill." *Appx.* at 381.

Similarly, Ms. Tweedie stated in her interrogatory responses that she "does recall that as part of the transaction she received a mobile device and that the cost thereof was added to her monthly bill." *Id.* She further stated that the basis for her contention that the UCC applies is that she "received a mobile device (telephone) as part of her agreement with AT&T and that she "purchased a telephone and that the purchase amount was added to her monthly bill." *Appx.* at 381-2, 330-1).

In Response, Respondent offered only the testimony of its employee, Mr. Ribeiro, who possesses no direct knowledge of the transactions, is not employed by AT&T, and who has no authority to speak on AT&T's behalf. Devoid of any authority to testify on behalf of AT&T or knowledge of the underlying transactions, Mr. Ribeiro's testimony was limited to claiming that the Petitioners would have had to sign something in order to receive their mobile telephones. *Appx.* at 203 (¶11). Respondent offered no evidence whatsoever on the purposes of the Plaintiffs' transactions.

In sum, Petitioners offered direct testimony confirming that they went to the AT&T store to purchase mobile telephones. Respondent offered an affidavit acknowledging that the Petitioners would have had to sign to contract for a "cellular phone." By all accounts, the record confirms that the underlying transaction was for a good, a mobile telephone device. The parties appear in full agreement that the underlying transactions involved both the devices and an accompanying service for those devices. There remained, as the Court acknowledged, "considerable disagreement

between the parties" regarding the predominant purpose of that transaction. *App.* at 4 (¶5), 5(¶20). In the face of such a dispute that remained unresolved by the evidence in the record, summary judgment should have been summarily denied.

But instead of acknowledging the genuine issue of material fact that remained, the court chose instead to supplement the record with conjecture and imagined analogy:

> 45. The Court does not operate in a vacuum, and, as such, it must acknowledge that **it is everyday common knowledge that cell phone service providers often offer the newest and flashiest cell phone devices free, or at drastically reduced cost,** simply to entice and induce customers to sign service contracts with a particular provider.
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> 46. While from a subjective standpoint the consumer may agree to an extended service contract with a particular service provider so as to obtain the device for free, or at a reduced cost, from an objective standpoint the primary, underlying purpose of the contract, as a whole, is the rendition of cell phone service, not a transaction for the individual stand-alone device.
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> 49. In the cases at bar, the cell phone service is the vehicle, with the individual marketing devices (cell phones and blackberry cellular devices) being the carrots to induce the customer to enter a contract with the particular service provider.
>
> 50. The Court's purpose here is not to critique a particular businesses' market strategies, but rather to determine what the primary purpose and thrust of the underlying contract IS.

*App.* at 10 (emphasis added).

No party presented evidence supporting the court's perception of how AT&T conducted business so long ago such that the court could rely on it to rule on this summary judgment motion.

The court did not give the parties an opportunity to respond to its presumptions regarding AT&T's alleged business practices. Fundamentally, courts cannot supplement the record with their own knowledge that has not been obtained judicially in the case at bar:

> While courts are permitted to take judicial notice of certain facts, it is well settled that a trial judge is not permitted to base a finding upon facts which are merely matters of his personal knowledge as distinguished from proof of such facts. "It is a well-entrenched part of the judicial system that the judge sees only with judicial eyes and knows nothing respecting any particular case of which he is not informed judicially." 20 Am. Jur., Evidence, Section 16, page 46. "Judicial knowledge is limited to what a judge may properly know in his judicial capacity and he is not authorized to make his individual knowledge of a fact not generally or professionally known the basis of his action." 31 C. J. S., Evidence, Section 11, page 832. See also 23 C. J., Evidence, Section 5, pages 61-62. The individual and extrajudicial knowledge on the part of a judge will not dispense with proof of facts not judicially cognizable, and cannot be resorted to for the purpose of supplementing the record. *Newton et al.* v. *Newton*, 202 Va. 96, 116 S. E. 2d 94; *Young* v. *Commonwealth*, 194 Va. 780, 75 S. E. 2d 479; *Darnell* v. *Barker*, 179 Va. 86, 18 S. E. 2d 271... "The personal knowledge of the chancellor is not judicial knowledge of the court, for there is no way of testing the accuracy of knowledge which rests entirely within the breast of the court." *Weatherton* v. *Taylor*, 124 Ark. 579, 584, 187 S. W. 450, 452.

*Boggs v. Settle*, 150 W. Va. 330, 338-339, 145 S.E.2d 446, 451 (1965). *See also In re State Pub. Bldg. Asbestos Litig.*, 193 W. Va. 119, 128, 454 S.E.2d 413, 422 (1994) ("A judge may not take judicial notice of adjudicative facts that are open to reasonable dispute, even if the judge is personally convinced of the correctness of a particular conclusion." C*iting* 1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, § 2-1(G) (3d ed. 1994)).

The circuit court was asked to determine whether, on the limited record before it, the Respondent had established that there remained no genuine issue of material fact. The court found that there remained "considerable disagreement" between the parties, and that it was clear the transactions were "hybrid" in that they involved the purchase of both goods and services. Petitioners take no issue with these findings. However, in the face of insufficient evidence to find that the transactions' predominant purpose was for the sale of services, Petitioners maintain that

the Court should decline to rule further. Instead, the court exceeded its authority by considering extrajudicial perceived knowledge in making its ultimate determination: that the predominant purpose for the hybrid contracts was for services rather than goods because the mobile devices are akin to an imagined free TV in an auto sale. In relying on that extrajudicial knowledge, the circuit court committed reversible error.

### c) THE PREDOMINANT PURPOSE OF THE TRANSACTION WITH AT&T WAS FOR THE PURCHASE OF A MOBILE DEVICE, NOT THE INCIDENTAL SERVICE

Petitioners plainly laid out their argument that the predominant purpose of the transactions with AT&T were predominantly for the purpose of obtaining telephones. "The evidence and common sense instead demonstrate that the predominant purpose of Petitioners' agreements with AT&T was to procure functioning mobile devices, with the services 'incidentally involved.' There would be no reason for the cellular services if the devices were not purchased along with them." *Appx.* at 385. The predominant purpose test is singularly focused on that question of primacy: was the purpose of the transaction a "good" with the labor or service incidentally involved (*i.e.* the installation of an appliance such as a water heater), or was it the services or labor that was primary (such as an artist's painting)? *See Bonebrake, Supra.*

Having failed to produce the underlying written contract upon which Respondent rests its argument, Respondent acknowledges that courts apply the predominant purpose of the transaction to determine the applicable statute of limitations. *Appx.* at 398. Respondent's argument on this point is to simply disagree with Petitioners' direct testimony. "...[I]t is abundantly clear that the principle purpose of the contract was for cellular service, as the purchase of cell phone without service is nothing but a paperweight." *Appx.* at 397. "At best, the purchase [of] a new cellular phone is incidental to the contract's predominant purpose, which was the providing [of] cellular phone, text, hotspot and internet service to Plaintiffs." *Appx.* at 400.

The parties both acknowledge that the predominant purpose of the underlying agreement is a key factual issue and the Respondent does not controvert the Petitioners' testimony that they obtained mobile telephones from AT&T as part of their underlying transaction with that creditor. Respondent claims that the service utilized by the mobile telephones was the predominant purpose of the underlying transaction between the Petitioners and AT&T, and that the telephones are merely paperweights without the service. *Appx.* at 400. Petitioners, on the other hand, point out all the ways in which the device can be used without the service. For instance, one can switch mobile service carriers, going from one service to another. One may also use a whole host of features on the telephone that do not require cellular service with apps that allow the consumer to use the telephone as a camera, a datebook, a notebook, a voice recorder, a gaming console, or a calculator to name a few. And, if Wi-Fi is available, one can use the telephone in all manners nearly identical to a device with cellular service – downloading and viewing media, getting directions for a road trip, surfing the internet, and making video or voice calls. All of these uses can be made without service. This begs the question in reverse: what use is the *service*, in turn, without the *device*? The answer is "none;" the service is completely useless without the device.

Recognizing this disagreement and a dearth of evidence in the record sufficient to grant summary judgment in Respondent's favor, the circuit court simply took notice of its own view of the facts and offered the analogy of a car dealership who offers a free television with the purchase of a car. Petitioners take issue with the court's analogy because it is entirely inapplicable. The car does not require the free television for its use and vice versa. It is not as if the free television is the key that allows a consumer to access the vehicle's driving capabilities.

On the contrary, mobile telephone service is entirely useless without the mobile device. The device is not some extra goodie thrown in to entice a customer to buy a car. A more accurate

analogy would be someone paying a toll without having a car to drive down the turnpike. Consider a dealer offering to pay for a consumer's tolls for two years in exchange for the purchase of a car. The car has numerous other uses, it can be driven on other roads for instance, or used to haul other goods. But the predominant purpose is the car -- the good -- not the incidental service he may receive that would have his tolls pre-paid should he chose drive his car on the turnpike.

Although it is clear to Petitioners that the predominant purpose of their transaction with AT&T was to obtain a mobile telephone, the issue presents, at the very least, a question of fact for the jury and Respondent has failed to present a record adequate to take that ultimate question of fact away from the jury.

## 6. CONCLUSION

Petitioners humbly request this Court reverse the lower court's finding that the predominant purpose of the Petitioners' transactions with AT&T was to obtain a service, and remand the matter for further litigation and ultimately a jury trial on the merits.

Respectfully submitted this 16th day of February, 2021.

**LESLIE TWEEDIE and**
**CHRISTINA WAUGH,**
**on behalf of themselves and**
**all others similarly situated**

BY COUNSEL

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

**LESLIE TWEEDIE AND CHRISTINA WAUGH,**
on behalf of themselves and
others similarly situated, Plaintiffs Below,
**PETITIONERS**

**vs.** No. 20-0932

**US ASSET MANAGEMENT, INC.,**
Defendant Below,
**RESPONDENT**

## CERTIFICATE OF SERVICE

I, **STEVEN R. BROADWATER, JR.**, counsel for the plaintiff, do hereby certify that a copy of the **PETITIONER'S BRIEF AND APPENDIX RECORD** were served upon counsel of record in the above cause by enclosing the same in an envelope addressed to said attorney at the business address as disclosed in the pleadings of record herein as follows:

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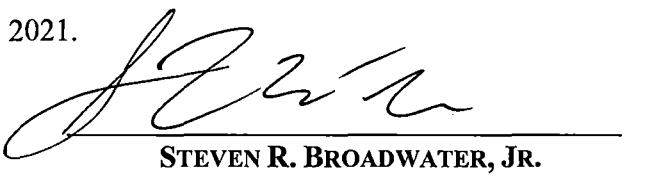
the same being the last known address with postage fully paid and depositing said envelope in the United States Mail on the 16th day of February, 2021.



**STEVEN R. BROADWATER, JR.**