IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 20-0932

LESLIE TWEEDIE AND CHRISTINA WAUGH,

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

PETITIONERS

vs.

US ASSET MANAGEMENT, INC.,

Defendant Below,

RESPONDENT

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

PETITIONERS' REPLY BRIEF

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I. PRELIMINARY STATEMENT

In its Response,[1] Respondent fails to address Petitioners' fundamental argument that the trial court committed plain error by supplementing the record with "common knowledge" not presented by any party. Respondent also misrepresents the evidence and fails to acknowledge its own failure to present direct evidence in support of its motion for summary judgment. For the sake of absolute clarity, Petitioners submit that there were two questions of fact that the trial court ruled upon at summary judgment: 1) whether the original contract was a "hybrid" agreement for the purchase of both goods and services; and 2) if the agreement was a hybrid, whether the predominant purpose of that agreement was for the goods (the mobile devices) or for the services (cellular data plans)? The trial court first found that yes, the original agreement at issue was a hybrid contract. That finding is *not* at issue in this appeal because neither party assigns error to that finding. It is the second finding of fact, that the predominant purpose of the original agreement was for services rather than goods, to which Petitioners assign error.

Petitioners argue simply that the Respondent failed to carry its burden of establishing that no issue of material fact remained as to the factual question of whether the purpose of the original agreement between Petitioners and AT&T that resulted in the Petitioners obtaining electronic cellular devices was predominantly for goods (the devices themselves) or services (the cellular service the devices were capable of utilizing). Because Respondent failed to establish that no material question of fact remained, the motion should have been denied.

However, the court instead supplemented the record with its own assumptions of specific terms of the contract at issue, and then *relied on those assumptions* to determine a disputed

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[1] By Order dated December 9, 2020, Respondent's brief was due April 2, 2021, with any Reply due "within twenty days of the respondent's brief." On March 30, 2021, Respondent served its Uncontested Motion to Enlarge the Remaining Briefing Deadlines One Week. To Petitioner's knowledge, that relief has not been granted. Respondent's brief was served on April 9, 2020, and Plaintiff hereby files this Reply brief within twenty days of that filing.

question of fact about the underlying transaction between Petitioners and AT&T. The trial court's factual conclusion was based entirely upon the court's "common knowledge" rather than any admissible evidence provided by the parties. Going beyond the record evidence to grant summary judgment is plain error.

II. ARGUMENT

Respondent cites the "written contract" between the Petitioners and AT&T (the original creditor from whom Respondents purchased the right to collect an alleged debt) no less than five times. But the written contract was never produced by Respondent. It is not part of the record and the lower court never had an opportunity to review it because Respondent failed to produce it. When Respondent specifically claims to cite the underlying agreement, nothing could be further from the truth. For instance, at page 2, Respondent specifically cites to the appendix record and the signed contract: "See also Appx. 187-204 (Waugh 's electronically signed agreement and Declaration of Ben Ribero)." However, when one looks to the pages cited, there is no signed agreement. Instead, there are what appear to be pages of monthly statements provided by someone that cannot attest to their authenticity.

Besides fundamentally misrepresenting the record before this Court, Respondent's inability to cite to the original agreement was a materially glaring flaw in its motion for summary judgment. Petitioners maintain that the purpose of their visit to AT&T was to purchase cellular devices, telephones, goods. It is undisputed that Petitioners were not simply given the electronic devices, they were required to agree to pay for services as well in order to receive what they really wanted, the devices. However, the details of that transaction, the underlying agreements that Petitioners entered into with AT&T, remain disputed because the Respondent has produced absolutely no evidence of those transactions. Of course, neither have the Petitioners who cannot

reasonably be expected to keep records of cell phone transactions that occurred now more than a decade ago.

Although Petitioners maintain that Respondent has no admissible evidence to contradict their position that the underlying transactions that resulted in their obtaining electronic devices was for the purpose of obtaining those devices, Petitioners simply maintain here that the trial court should have recognized the factual dispute and denied Respondent's motion for summary judgment instead of supplementing the record itself and then relying on that supplementation to find in the movant's favor.

A. A GENUINE ISSUE OF FACT STILL REMAINS

In the first section of their argument in their Petition for Appeal, Petitioners argue that a question of fact remained which precluded summary judgment. Petition at 11-12. Petitioners contend that Respondent, as the moving party, failed to show that no genuine issue of fact remained on the ultimate factual question of the predominant purpose of the underlying agreement. *See* Petition at 11: "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."

Despite the requirement in Rule 10(d) that Respondent specifically address each assignment of error or waive the argument,[2] Respondent fails to address Petitioners' argument head-on. Instead, Respondent either fails to grasp the argument or materially misrepresents it, claiming "Plaintiff argues that there are genuine issues of material fact because the court held there is a material dispute as to whether the Petitioners' AT&T contracts were a hybrid contract or

[2] "Unless otherwise provided by the Court, the argument section of the respondent's brief must specifically respond to each assignment of error, to the fullest extent possible. If the respondent's brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner's view of the issue." WVRAP Rule 10(d).

just a contract for cellular service hotspot services." Response at 7. But Petitioners have decidedly *not* assigned error to the trial court's finding that the underlying contract is a hybrid one for both goods and services. Respondent's misrepresentation fails to cite any page of the Petition and is without merit.

Respondent thus fails to address Petitioners' argument and fails throughout to acknowledge that the "written agreement" to which Respondent repeatedly cites was never made part of the record. In order for Respondent to establish that no issue of material fact exists as to the terms of the original agreement between Petitioners and AT&T, then Respondent should at least produce the contract upon which it allegedly relies in a manner that is admissible. Instead, Respondent simply misrepresents monthly statements as the original transaction between Petitioners and AT&T.

Further, Respondent argues nonsensically that the predominant purpose of the underlying transaction is not a question of fact, and is instead a "legal dispute." Respondent states: "...there exists no genuine issue of material fact but rather, a legal dispute relating to court's thorough and correct predominate purpose analysis." Response at 8. Respondent presents no basis or authority for its mischaracterization of this basic, and disputed, question of fact. Respondent also does not offer any explanation as to how a simple question of fact regarding the predominant purpose of the Petitioners' purchase of electronic devices from AT&T can morph into this undefined "legal dispute" or how such a "legal dispute" absolves Respondent of its burden at summary judgment. The purpose of the transaction is an objective, factual dispute, not a question of law.

The Fourth Circuit made this clear in *Princess Cruises v. GE*, 143 F.3d 828 (4th Cir. 1998). Therein, the court analyzes the predominant purpose of the contract after agreeing that the record had been sufficiently developed below. *Id* at 833 ("Because the facts in this case are sufficiently

developed and undisputed, it is proper for the Court to determine on appeal whether the GE-Princess transaction was a contract for the sale of goods within the scope of the U.C.C."). In proceeding in this manner, The Fourth Circuit cites and adopts the approach taken by the First Circuit in *Cambridge Plating Co. v. NAPCO, Inc.*, 991 F.2d 21 (1st Cir. 1993), finding that "determining the type of contract at issue typically may be a jury function," but allowing a court to make the determination as a matter of law when the facts are "sufficiently clear and undisputed," and viewed in "the light most amicable to the party contesting summary judgment." *Id* at 24. In both *Princess Cruises* and *Cambridge Plating Co.*, the courts applied a summary judgment standard to facts which were not in dispute because each court had the actual contractual language in the record. Here, the facts are clearly in dispute and the moving party has failed to produce the underlying contract.

Defendant's mischaracterization of Petitioners' argument and that simple question of fact is nonsensical and unpersuasive. As Petitioners originally stated, "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." Petition at 12. But Respondent failed to produce the underlying agreement, and instead asked the trial court to draw factual conclusions on an incomplete record. Unfortunately, the court obliged, supplemented the record with its own "common knowledge," and then relied on that knowledge to grant summary judgment in the movant's favor, committing plain error.

B. THE COURT IS STILL LIMITED TO THE RECORD BEFORE IT

After establishing that the predominant purpose of the agreement between AT&T and Petitioners that allowed Petitioners to obtain electronic devices remains an unresolved question of fact, Petitioners next argue that the trial court resolved that question of fact by improperly supplementing the record before it with assumptions of fact not previously disclosed or offered by

any party. Petition at 12-16. In response, Respondent simply denies reality and claims that "the court did not supplement or rely on facts outside the record." To be clear, Petitioners maintain that the following paragraphs of the court's order demonstrate that the court went beyond the record evidence to reach its conclusion:

> 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.
>
> 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.

App. at 10, Petition at 14 (emphasis added).

Nowhere in the record before the trial court does any party submit 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." Even if this were the case, and to be clear Respondent failed to offer any evidence that this is the case, it is not dispositive on the question of predominant purpose of the transactions between *Petitioners and AT&T*, a non-party.

For the trial court to take this ultimate question away from the jury (*See Cambridge Plating Co., Supra*), and simply conclude based on its "everyday common knowledge" what the contract may have said or how the transaction may have occurred is improper at the summary judgment stage especially here, where the Respondent has not established any of those facts. Given that Respondent is the movant and carries the burden on its motion for summary judgment, that failure to establish the record on this issue should have been fatal to its motion.

Simply put, the trial court was restricted to only those facts not in dispute and unequivocally established by admissible evidence on the record when ruling on Respondent's Motion.

> 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..."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, 145 S.E.2d 446, 451 (1965). The trial court was therefore wrong to conclude that it "does not operate in a vacuum, and, as such, it must acknowledge ... everyday common knowledge." App. at 10. This precept is beyond well-established in West Virginia and Respondent cites no contrary authority.

> 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...

1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, § 2-1(G) (3rd ed. 1994). Tellingly, Respondent makes no effort to distinguish this concept or line of on-point West Virginia authority.

The court overstepped its bounds in relying on alleged "everyday common knowledge" to resolve the disputed predominant purpose of the underlying transaction in respondent's favor. In doing so, the trial court improperly relieved Respondent of its burden at summary judgment – to establish that no material issue of fact remains as to the predominant purpose of the Petitioners underlying transaction with AT&T for electronic devices. At the very least, the predominant purpose of the agreement remains in dispute and the trial court committed plain error in granting summary judgment to the movant despite the record being so insufficient that the court felt compelled to supplement it with "everyday common knowledge."

C. THE PREDOMINANT PURPOSE OF THE UNDERLYING TRANSACTION WAS FOR GOODS

In an effort to demonstrate that the trial court improperly granted summary judgment on a disputed material fact, Petitioners' final argument is that if the *Petitioners* had moved for summary judgment, sufficient evidence is contained in the record to find in their favor. The predominant purpose of Petitioners agreeing to pay AT&T was to obtain goods, the phones and devices they unquestionably received from AT&T. On this point, it is worth revisiting the seminal case cited by both parties, *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974), which states:

> The 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).

Id. at 960. In adopting this analysis for mixed contracts, the fourth Circuit went a step further and "deemed the following factors significant in determining the nature of the contract: (1) the

language of the contract, (2) the nature of the business of the supplier, and (3) the intrinsic worth of the materials." *Princess Cruises* at 833.

Petitioners offered direct testimony on the predominant purpose of their agreements with AT&T. Both Petitioners have testified that they purchased devices. Appx. At 92 (Petitioner Waugh Testifying that what she remembers about opening the account was that she "got a phone for me [and] both of my children and two [hotspot] connectors."), and at 275 (Petitioner Tweedie testifying that she purchased a "little red" Blackberry telephone). Petitioners did not move for summary judgment and therefore had no burden to carry. Nonetheless, Petitioners argue that the predominant purpose for the agreement with AT&T was for the devices they unquestionably received.

For its part, Respondent does not provide the agreement with AT&T or any other direct evidence about the transaction. It simply relies on account statements after the fact and its own documents created after the fact by itself. This does not put to rest the question at hand because it does not establish the terms of the agreement entered into between Petitioners and AT&T the day that each purchased devices from the telephone store.

Respondent also argues three points which are not supported by the record, the law, or any sense of reality. First, Respondent argues that "courts generally examine the transaction to determine whether the sale of goods predominates." On this, all parties agree. However, Respondent then goes on to claim that "the facts in this case are sufficiently developed and undisputed" without offering any evidence whatsoever of the actual transaction. Again, Respondent has failed to provide any evidence of the transaction between AT&T and the Petitioners other than the Petitioners' own testimony that they purchased telephones and hotspot devices. On the one hand Respondent argues that the court must look to the transaction, the

contract; then, on the other, Respondent fails to produce any evidence regarding the contract or transaction, and asks the trial court to take its counsel's word for it. That is simply a failure to establish that no material question of fact remains.

Second, Respondent claims "Petitioners contend that the trial court lacked 'common sense' in its analysis." Despite using quotations, Respondent fails to provide a citation. That is because none exists and Petitioners never argued such. The phrase "common sense" appears nowhere in Petitioners' brief.

Third, Respondent claims to cite to "Cellular Phone Terms and Conditions and Plan Details" as if it is citing to the underlying agreement between AT&T and Petitioners. Response at 11. But no document is actually cited or otherwise provided by Respondent, the moving party with the burden of proof. Instead, all that is cited are a precious few monthly statements allegedly sent to Petitioner Waugh by AT&T. The documents clearly are not the underlying agreement spelling out the terms and conditions which were contingent upon the Petitioners purchase of the goods from AT&T. Throughout the monthly statement, the customer is directed to AT&T's website for additional terms and information. Also, throughout are references to devices and the terms associated therewith not contained a monthly statement.

For example, the "Rate Plan" is identified solely as "/FT9NTNT00RUMMUNW" and no additional information about that rate plan is identified or given. App. At 187. Waugh's phone is identified as a Motorola (App. At 187), but she is warned that her "next bill may be higher than expected," and that it may include an upgrade fee. App. At 188. The monthly statement also states that "the sample bill is not part of your contract (top left), that she had a "Previous Rate Plan" and was upgrading to a "Current Rate Plan," (upper left), and that "your rate plan brochure/contract controls" (bottom). *Id.* That rate plan/brochure is not provided. The statement specifically states

that AT&T's current terms of service apply by incorporation along with a list of brochures, none of which are provided. App. At 189 (Center left). Further, in regard to the devices themselves, the statements are silent except to direct the consumer to the website for details. A return policy with a restocking fee and instructions on how to return a device is prominently displayed. App. At 188.

Monthly statements are just that. They are not the underlying contract. These statements acknowledge throughout that the consumer also purchased a device but are silent as to the terms of that purchase. Thus, the trial court was left with the Petitioners' direct testimony that they purchased goods on the one hand, and no direct evidence from the Respondent in the other. The Respondent's Motion should have been denied for failure to meet the requisite burden of proof.

III. CONCLUSION

Respondent provided no direct evidence on the underlying contract and transactions and thus has provided no evidence of the predominant purpose of the transactions. Respondent is a debt buyer. It purchased this debt for pennies on the dollar and clearly it failed to pay a sufficient price to obtain the documents that would provide direct evidence beyond that which the Petitioners have already provided and will continue to provide. Without that supplementation, and the assumptions about how the underlying transaction was *actually* conducted, the trial court was required to deny the motion due entirely to Respondent's failure to carry its burden.

That lack of direct evidence should have been fatal to the Respondent's motion for summary judgment. However, instead of denying the motion, the trial court committed plain error and supplemented the record with "common knowledge" not previously submitted by any party. Petitioners humbly request this Court reverse the trial court's granting of summary judgment to Respondent and remand for further proceedings.

Respectfully submitted this 29th day of April, 2021.

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

BY COUNSEL

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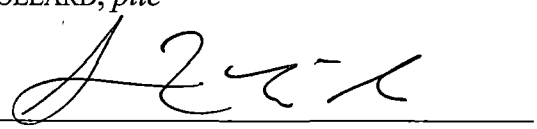
BY: 

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CERTIFICATE OF SERVICE

I, **STEVEN R. BROADWATER, JR.**, counsel for the plaintiff, do hereby certify that a copy of the **PETITIONER'S REPLY BRIEF** 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 29th day of April, 2021.

STEVEN R. BROADWATER, JR.