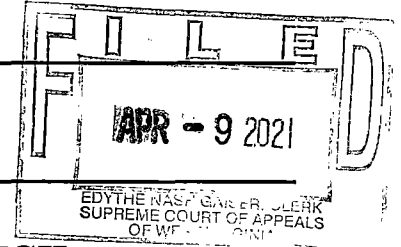


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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No: 20-0932



LESLIE TWEEDIE AND CHRISTINA WAUGH,
on behalf of themselves and other similarly situated,

Plaintiffs-Petitioners,

v.

US ASSET MANAGEMENT, INC.,
Defendant-Respondent.

On Appeal from the Circuit Court
of Fayette County Civil Action No. 18-C-199

BRIEF OF RESPONDENT
US ASSET MANAGEMENT, INC.

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I. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On November 26, 2018, Petitioners Leslie Tweedie (“Tweedie”) and Christina Waugh (“Waugh”) filed a class action complaint alleging violations of the West Virginia Consumer Credit and Protection Act (“WVCCPA”). *Appx. at 475-484, 505*. Petitioners allege that Respondent US Asset Management, Inc. (“USAM” or “Respondent”) violated the WVCCPA when USAM’s debt collection servicer sent letters to Tweedie on November 26, 2014 and Waugh on January 30, 2015 (“the Letters”) in an attempt to collect their respective AT&T debts. In support of their allegations Petitioners incorrectly assert the Letters were sent outside the 4-year statute of limitation pursuant to the Uniform Commercial Code (“UCC”). *Id.* More specifically, Petitioners allege that the Letters violated the WVCCPA because it failed to include the time-barred debt disclosure required by W. Va. Code § 46A-2-128(f). *Id.* In an attempt to support their claims, Petitioner contend that 4-year statute of limitations is applicable because their AT&T debts were for a sale of goods governed by the UCC, despite the overwhelming evidence that Petitioners’ AT&T debts USAM was attempting to collect were solely for cellular, internet and hotspot services.

On March 11, 2019, Respondent filed its answer and affirmative defense to Plaintiff’s complaints asserting that Petitioners claims fail because (1) the AT&T debts were not outside the applicable 10-year statute of limitations for written contracts, (2) the time-barred debt disclosure was not required and alternatively, (3) to the extent the court determined the Letters violated the WVCCPA, such violation was the result of bona fide error. *Appx. 487-503*. After written discovery and depositions, Respondent filed its motion for summary judgment. *Appx. 16-377*. After full briefing, oral argument and the parties’ submission of proposed findings of fact and conclusions of law, the trial court issued an order correctly granting Respondent’s motion for summary

judgment and dismissing the Petitioners' complaints. Appx. 1-16, 378-457. Petitioners then filed this meritless appeal while incorrectly asserting the trial court erred when holding that the predominate purpose of the relevant AT&T contract was for telephone, internet and hotspot services and not the purchase of a cellular phone, which the record evidence actually shows was not part of the service contract for which USAM was attempting to collect.

B. STATEMENT OF FACTS

Christina Waugh

On or about October 25, 2008, Waugh entered into a signed written contract with AT&T for cellular phone service and hotspot service. *See Appx. 32-39, 92-93, 186-200.* Waugh's account remained open until AT&T charged off Waugh's past due debt on or about June 28, 2010. When Waugh opened her AT&T account, she signed a written contract. *Appx 92-108.* In fact, she actually recalls entering her signature on an IPAD type device accepting the terms of the AT&T contract for cellular and hotspot services. Appx. 108-109, 113. Waugh further acknowledges that when you purchase AT&T services or something related thereto you are required to sign either a paper copy or an electronic box. *Id.; See also Appx. 187-204 (Waugh's electronically signed agreement and Declaration of Ben Ribero).* In addition, Waugh admits that she received monthly statements and the statements she received were for charges relating to her cellular service and hotspots — not charges for a cell phone. *Appx. 40-183 (generally) and 205-249.* Importantly, Waugh also testified that she did not pay for the phone and the contract in default was solely for services and, in fact testified in relevant part, that "I feel like they're giving you the phone, Of course you're getting a plan, but you are paying for the plan, not – not the – the equipment, not the devices." *Appx. 181.* Further, there is no record evidence that remotely shows Waugh's past due debt was related to the purchase of a good — the cellular phone.

On January 30, 2015, Waugh received the letter in an attempt to collect her outstanding AT&T debt, which was purchased by USAM. *Appx. 353*. It is undisputed that the letter did contain the word “settlement” and that it did not contain the time-barred debt disclosure required by W. Va. Code § 46A-2-128(f). *Id.* However, the debt was not time-barred, the disclosures were not required, and the use of term settlement could not be deemed false, deceptive or misleading.

Leslie Tweedie

On or about June 15, 2007, Tweedie applied for, opened and entered a written contract for an AT&T cellular phone account, which encompassed lines for two cellular phones. *Appx. 250-260*. On or about June 15, 2007, Tweedie would have been required to enter a signed written contract when entering the monthly cellular phone plan with AT&T. *Id.* On or about March 13, 2009, the account was charged-off by AT&T after Plaintiff’s failure to pay her monthly bills for cellular phone service as required by contract. (*Id.*) On or about August 13, 2012, USAM purchased Tweedie’s debt from AT&T.

Tweedie does not recall when she opened her AT&T account, where she opened her AT&T account, does not recall if she entered into a contract for one phone line or more, does not remember whether she received a service plan, does not remember if she picked a service plan and does not recall whether or not she signed any contract. *Appx. 275-283*. Tweedie does recall that she received a monthly bill that was supposed to be a sum certain and that she received monthly statements from AT&T, which showed *only* charges for her cellular phone service. *Id.*; *See also Appx. 358-376*. None of the Tweedie bills show a charge for a cellular phone and the account purchased by USAM does not have any charge related to the purchase of a cellular phone. *Id.*

Although Tweedie has no recollection of whether she signed a written contract or not when entering her AT&T cellular phone contract, both USAM and Waugh acknowledge that to enter

into a cellular phone contract with AT&T, you must physically sign either a paper copy or an electronic box before receiving cellular service. *Appx. 109-110, 114, 201-204*. In fact, Ben Ribero asserted that based upon his experience and knowledge that an AT&T cellular phone account can only be opened upon the entry of a signed written contract. *Appx. 201-204*. The execution of the cellular phone contract occurs at the time of sale whether the purchase is made in-store, on-line or otherwise. *Appx. 109-110, 114, 201-204*. Importantly, there is no record evidence that shows Tweedie's past due debt was related to the purchase of goods — a cellular phone.

On November 26, 2014, Tweedie received the letter in an attempt to collect her outstanding AT&T debt, which was purchased by USAM. *Appx. 350*. It is undisputed that the letter did contain the word "settlement" and that it did not contain the time-barred debt disclosure required by W. Va. Code § 46A-2-128(f). *Id.* However, the debt was not time-barred, the disclosures were not required, and the use of term settlement could not be deemed false, deceptive or misleading.

II. STANDARD OF REVIEW

The sole issue in this appeal is whether summary judgment was appropriate. A circuit court's entry of summary judgment is reviewed *de novo*. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994); *Drewitt v. Pratt*, 999 F.2d 774, 778 (4th Cir.1993). Therefore, the appeal court should apply the same summary judgment standard as the trial court. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995) citing *Helm v. Western Maryland Ry. Co.*, 838 F.2d 729, 734 (4th Cir.1988).

III. SUMMARY OF THE ARGUMENT

In their opening brief, Petitioners contend that the court supposedly erred when granting Defendant's motion for summary judgment, went outside the record evidence and improperly supplemented the record and the predominate purpose of the Petitioners' AT&T written contract

was for cellular, internet and hotspot services. However, these arguments lack merit and should be rejected for many reasons.

First, Petitioners rely on paragraphs 5 and 8 of the order granting summary judgment and argue that these findings show that there was a genuine issue of material fact. However, Petitioners ignore the fact that without the court's findings — that there was an issue of fact of whether the Petitioners' AT&T contracts were a hybrid contract or just a contract for cellular service, internet and hotspot services — this matter would not have proceeded to the predominate purpose test for hybrid contracts. In other words, if the court determined the contract was solely for cellular services and not a hybrid contract, summary judgment would have been granted as a matter of law because the 4-year statute of limitation pursuant to the UCC only applies to sales of goods — not services.

Second, Petitioners attempt to avoid dismissal by mischaracterizing the court's predominate purpose legal analysis as an improper supplementation of the factual record fails. The paragraphs cited by Petitioners to support his meritless argument — that the court improperly supplemented the factual record — are not facts at all but rather, hypotheticals that were part of the court's detailed legal analysis of the predominant purpose test. There is nothing in Rule 56 that limits the court's ability to use its life experiences and other examples of hybrid contracts where the predominate purpose of the contract — like here — was for services and not the sale of goods. In sum, Petitioners' mischaracterization of the court's proper legal analysis as an improper supplementation of the record holds no water.

Lastly, Petitioners argue that the court's predominate purpose legal analysis was flawed and incorrect. However, this argument also fails because the undisputed record evidence unequivocally supports the court's finding that the predominate purpose of the Petitioners' AT&T

written contract was for cellular, internet and hotspot services — not the purchase of a cellular phone.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent does not believe oral argument is necessary as 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.

V. ARGUMENT

A. THERE ARE NO ISSUES OF MATERIAL FACT THAT PETITIONERS' AT&T CONTRACTS PURPOSE WAS PREDOMINATELY FOR CELLULAR AND HOTPOT SERVICES.

Preliminarily, summary judgment is appropriate where there “is no genuine issue of material fact” and the moving party is “entitled to judgment as a matter of law.” W. Va. R. Civ. P. 56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). Where the moving party shows by “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, . . . that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law,” the Court’s entry of summary judgment in favor of the moving party is appropriate. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995) (internal quotes omitted); *Wilkinson v. Duff*, 212 W. Va. 725, 730, 575 S.E.2d 335, 340 (2002). The trial court is not charged with “weigh[ing] the evidence [or] determin[ing] the truth of the matter but . . . determin[ing] whether there is a genuine issue for trial.” *Williams*, 194 W. Va. at 59, 575 S.E.2d at 336 (quoting *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2511).

When a motion for summary judgment is mature for consideration and properly documented, the nonmoving party must take the initiative and by affirmative evidence demonstrate

that a genuine issue of fact exists. Otherwise, Rule 56(e) empowers a circuit court to grant summary judgment. The circuit court's function at the summary judgment stage is not “to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson* 477 U.S. at 249.

In other words, as suggested in *Crain v. Lightner*, 178 W.Va. 765, 769 n. 2, 364 S.E.2d 778, 782 n. 2 (1987), the initial burden of production and persuasion is upon the party moving for summary judgment. If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the **burden of production shifts** to the nonmoving party “who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f).” 178 W.Va. at 769 n. 2, 364 S.E.2d at 782 n. 2. To be specific, the party opposing summary judgment must satisfy the burden of proof by offering more than a mere “scintilla of evidence” and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor. *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214. The evidence illustrating the factual controversy cannot be conjectural or problematic.

Here, 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 just a contract for cellular service hotspot services. *Appx. 4-5*. However, Plaintiff ignores the fact the court ruled in his favor and rejected Respondent's argument that the contract was for only services and not a hybrid contract — as the Petitioners assert. It was only because of this favorable ruling for Petitioners that they were able to temporarily survive summary judgment and avoid dismissal based upon Respondent's position — that the Petitioners' contracts, which USAM

purchased, were solely for services and not the sale of goods. In other words, if the court determined the contract was solely for cellular services and not a hybrid contract, summary judgment would have been granted at that precise moment and the court would not have been required to conduct its thorough legal analysis of the predominant purpose test.

Further, although Petitioners may disagree with the court's legal analysis under the predominate purpose test, there no dispute that Plaintiff's factual contention now and throughout the case was the Petitioners cellular phone contract was a hybrid contract for both cellular phone service and the purchase of a phone. This is not in dispute and is exactly the factual finding of the court, which triggered the court's predominate purpose legal analysis. As there is no dispute that, at worst, the relevant contracts were hybrid contracts there exists no genuine issue of material fact but rather, a legal dispute relating to court's thorough and correct predominate purpose analysis. Hence, Petitioners contention that there is a genuine issue of material fact is meritless and should be rejected.

B. THE COURT DID NOT IMPROPERLY SUPPLEMENT THE RECORD

Next, Petitioners attempt to avoid dismissal by mischaracterizing the court's predominate purpose legal analysis as a supposed improper supplementation of the factual record. However, the Petitioners' argument lacks merit as the court did not supplement or rely on facts outside the record.¹ In fact, the paragraphs cited by Petitioners to support their meritless argument are not facts at all but rather, legal conclusions and hypotheticals that were part of the court's detailed legal analysis of the predominant purpose test. In its order, the court conducted a legal comparison of other situations from his everyday life experiences relating to hybrid contracts and determining the

¹ Petitioners cite to paragraphs 45-50 of the court's order in an attempt to support their proposition that the court improperly supplemented the record. *Appx. 10.*

predominate purpose applied those situations to the undisputed material facts in this case. The court did not supplement the record.

For example, the court conducted a comparison of a situation where a car dealership offers the service of an extended warranty with the purchase of a new car and found the predominate purpose of this transaction was the purchase of car and not the service warranty to the undisputed factual circumstances here *Appx. 10*. In conducting its legal analysis and comparing the hypothetical to the undisputed facts in this case, the court ultimately found that offering a phone for free or at a discount — like in both Waugh and Tweedie’s circumstances — was similar to hypothetical. As such, based upon its correct legal analysis and comparisons, the court ultimately and correctly held that the predominate purpose of the Petitioners transactions was for cellular service and not the purchase of goods — the phone. In fact, the court correctly held that free cell phone given to Waugh and the phone purchased by Tweedie (the carrots) to induce the Petitioners to enter a cellular telephone and hotspot services. *Appx. 10, 181*. Further, there is nothing in Rule 56 that limits the court’s ability to use its life experiences and other examples of hybrid contracts when conducting a legal analysis. In sum, Petitioners’ mischaracterization of the court’s proper legal analysis as an improper supplementation of the record holds no water. As such, Petitioners attempt to boot strap the court’s legal analysis as a supplement to the record is misplaced and does nothing to alter the fact the trial court correctly entered summary judgment in favor of the Respondents.

C. THE PREDOMINANT PURPOSE OF THE CONTRACT WAS CELLULAR AND HOTSPOT SERVICES.

Preliminarily, the U.C.C. governs the sale of goods; the U.C.C. also applies to certain mixed contracts for goods and services. *Princess Cruises v. GE*, 143 F.3d 828 (4th Cir. 1998); see also *Elkins Manor Associates v. Eleanor Concrete Works*, 183 W. Va. 501, 396 S.E.2d 463 (1990).

Whether a particular transaction is governed by the U.C.C., rather than the common law or other statutory law, hinges on the predominant purpose of the transaction. That is, whether the contract primarily concerns the furnishing of goods or the rendering of services. See *Princess Cruises v. GE*, 143 F.3d 828 (4th Cir. 1998); citing *Coakley & Williams*, 706 F.2d at 458 (“Whether the U.C.C. applies turns on a question as to whether the contract . . . involved principally a sale of goods, on the one hand, or a provision of services, on the other.”); *Long Island Lighting Co. v. Imo Indus. Inc.*, 6 F.3d 876, 888 (2d Cir. 1993); *Ryan v. Wersi Elecs. GmbH & Co.*, 3 F.3d 174, 181 n.3 (7th Cir. 1993). Thus, before applying the UCC, courts generally examine the transaction to determine whether the sale of goods predominates. *Id.* citing *Coakley & Williams*, 706 F.2d at 458.

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 UCC. In determining whether goods or services predominate in a particular transaction, we are guided by the seminal case of *Bonebrake v. Cox*, 499 F.2d 951 (8th Cir. 1974). In holding the UCC applicable, the Bonebrake court stated:

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). *Bonebrake*, 499 F.2d at 960.

In determining whether a contract is predominately for service or for goods, the court must look to the following factors to determine 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*; citing *Coakley & Williams*, 706 F.2d at 460.

Petitioners argue the court erred in its legal conclusion that the predominate purpose of the contract was for cellular service and not the purchase of goods — the cell phones. In support,

Petitioners contend that the trial court lacked “common sense” in its analysis, the record lacked evidence to support the courts’ predominance determination, that, incorrectly, the relevant terms of the cellular phone contract were not provided and that the predominate purpose was the purchase of the cellular phone. See *Appx. 186-200 (Cellular Phone Terms and Conditions and Plan Details)*.

However, Petitioners’ argument does not change the fact there that the court conducted the correct legal analysis and that the courts’ determination that the predominate purpose of the cellular phone contract was for cellular and hotspot services is correct and supported by the evidence. See, <https://www.fosterswift.com/communications-Uniform-Commercial-Code-Article-2.html>

First, the predominant factors weigh in favor of a service contract. The contractual terms of the defaulted cellular service contract for which Collecto is attempting to collect does not mention the purchase of a telephone and the contract is related solely to the Plaintiffs’ cellular service. *Appx. 186-200*. In addition, the AT&T billing statements for each Petitioner make it abundantly clear that the past due debts USAM purchased and that USAM’s servicer was attempting to collect derived solely from the cellular and hotspot service provided to the Petitioners. *Appx. 205-249, 305-325*. In fact, these same bills show that there was not a single charge for the purchase of a cellular phone. *Id.* Further, Waugh continues to assert that the contract entered into with AT&T was for the sales of good, despite her testimony that she did not pay for the phone and the contract in default was solely for services. *Appx. 181*. In fact, Waugh testified in relevant part, that “I feel like they’re giving you the phone, Of course you’re getting a plan, but you are paying for the plan, not – not the – the equipment, not the devices.” *Appx. 181*. Respondent is confused how Petitioner Waugh can still argue the contract she entered with the AT&T was for the sale of goods after admitting she never purchased a phone and express contract she entered and was paying for was cellular service.

Next, the undisputed testimony, including Petitioners' admissions that the relevant contracts are, at worst, a hybrid contract, makes it abundantly clear that cellular phone service is the predominant purpose of the contracts between Petitioners and AT&T. In fact, a legal analysis of the predominate purpose factors shows that the trial court's determination that the predominate purposes of the relevant contracts was for cellular services. First, as discussed in more detail above, the contract and billing statements, which have not been challenged by the Petitioners, unequivocally establishes that the contract and monies billed were solely for cellular and hotspot services, as there is not a single line item or charge for the purchase of a cellular phone. Next, the nature of AT&T's business is providing telephone service and cellular telephone service, text, hotspot and internet data service to its customers. It is not in the business of manufacturing and selling those phones. This is further supported by the record evidence which shows that phone at issue for Waugh was from Motorola and Tweedie' was from Blackberry. Finally, looking at the intrinsic value of the good — a cellular phone — in comparison of the costs of the infrastructure and towers required to support cellular telephone and hotspot services it becomes abundantly clear that the value to provide cellular services far outweighs the value of a cellular phone.

Finally, a new cellular phone without service is basically useless. At best, the purchase of a new cellular phone would be incidental to the contract's predominant purpose, which was the providing cellular phone, text, hotspot and internet service to consumers. In other words, consumers would not purchase cell phones if it would not provide them the ability to send and receive telephone calls and text messages, access the internet or use the cellular phone service as a hotspot. As such, the thrust and principle purpose of the Petitioners' contract with AT&T was for cellular service and not the purchase of goods. Accordingly, the 4-year UCC statute of limitations is not applicable.

The above is the same type of analysis the court conducted when determining whether the cellular phone service was predominately for cellular service or the purchase of goods. As discussed in more detail above, the court conducted a thorough legal analysis of all parties' legal arguments and applied the undisputed material facts to predominate purpose factors. While the court was conducting this legal analysis, as evidenced by his holdings in the summary judgment order, it became abundantly clear that the predominate purpose of the Petitioners transactions was for cellular service and not the purchase of goods — the phone. In fact, the court correctly held that free cell phone given to Waugh and the phone purchased by Tweedie (the carrots) to induce the Petitioners to enter a cellular telephone and hotspot services. Appx. 10, 181.

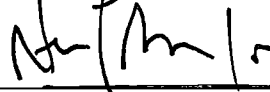
Accordingly, after application of the predominate purpose test to the undisputed facts in this case, the trial court correctly held the predominate purpose of the Petitioners' AT&T contract was predominately for cellular services. Hence, the court was correct in holding the 4-year UCC statute of limitations is inapplicable and as such, correctly dismissed the Petitioners' WVCCPA claims.

VI. CONCLUSION

Based upon the forgoing, Petitioners' appellate arguments do nothing to change to the fact the trial correctly entered summary judgment in favor of Respondent. First, there was no genuine issue of material fact. Second, the court did not improperly supplement the factual record when using hypotheticals during its legal analysis. Third, the trial court, after applying the predominate purpose test, correctly held that the predominate purpose of the contract between Petitioners and AT&T was for cellular service and not the purchase of a cellular phone. Accordingly, Respondent asserts that the trial court did not commit an error of law and therefore, Petitioners' appeal should be dismissed and the trial court's order granting Respondent summary judgment should be affirmed.

US ASSET MANAGEMENT, INC.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

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v.

No. 20-0932

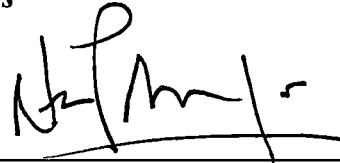
US ASSET MANAGEMENT, INC.,

Respondent.

CERTIFICATE OF SERVICE

I, Nicholas P. Mooney II, counsel for US Asset Management, Inc., do hereby certify that on April 9, 2021, I served the foregoing **Brief of Respondent US Asset Management, Inc.** by United States first-class mail, postage prepaid, upon the following:

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