

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

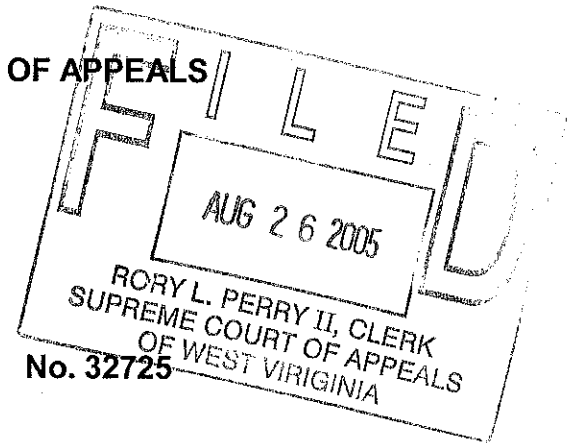
GLORIA BANKS, individually, and on
behalf of all others similarly situated,

Plaintiff Below/Appellant,

vs.

PAUL WHITE CHEVROLET, INC., a West
Virginia corporation,

Defendant Below/Appellee.



APPELLANT'S BRIEF

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- Chevy Chase Bank v. McCamant*, 204 W. Va. 295, 302, 512 S.E.2d 217, 224 (1998)
- Hively v. Merrifield*, 212 W. Va. 804, 575 S.E.2d 414 (2002)
- Horkey v. J.U.D.B. & Assoc. Inc.*, 333 F.3rd 769 (7th Cir. 2003)
- Newman v. Checkrite California, Inc.*, 912 F. Supp. 1354 (E.D. Cal. 1995)
- Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994)
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- Piscatelli v. Universal Adjustment Servs., Inc.*, Consumer Cred. Guide (CCH) ¶96.337 (D. Conn. 1985)
- Sluys v. Hand*, 831 F. Supp. 321 (S. D. N.J. 1993)
- Thomas v. Firestone Tire & Rubber Co.*, 164 W. Va. 763, 769, 266 S.E.2d 905, 909 (1980)
- Tillis v. Wright*, -- S.E.2d -- (W. Va., July 7, 2005)
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- West Va. Health Care Cost Rev. Auth. v. Boone Mem. Hosp.*, 196 W.Va. 326, 336, 472 S.E.2d 411, 421 (1996)

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- 15 U.S.C. § 1692c(a)(3)
- 15 U.S.C. § 1692e(5)
- 15 U.S.C. § 1692f
- 15 U.S.C. § 1692f(1)

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I.

Kind of Proceeding, Nature of Case and Ruling Below

Gloria Banks, Plaintiff-below/appellant, brought this action individually and on behalf of a class of West Virginia consumers. Ms. Banks purchased a vehicle from Defendant-below/Appellee Paul White Chevrolet, Inc., ("Paul White" or "dealer") that was financed by Defendant-below City National Bank of West Virginia ("City National"). Ms. Banks has dismissed her claims against City National, and proceeds only against Paul White. Consequently, this brief only addresses Ms. Banks' claims against Paul White.

In her complaint, Ms. Banks alleged that certain of Paul White's debt collection practices violated West Virginia law. Count I alleged Paul White attempted to charge Ms. Banks "collection fees" in violation of *West Virginia Code* §§ 46A-2-128(c) and -127(g). Count II alleged Paul White communicated with third parties about the alleged debt in violation of *West Virginia Code* § 46A-2-126(a). Count III alleged Paul White misrepresented an amount due on the alleged debt in violation of *West Virginia Code* § 46A-2-124. Count IV alleged that, in its dealings with Ms. Banks, Paul White breached the duty of good faith and fair dealing imposed by the Uniform Commercial Code, *West Virginia Code* § 46-1-203.

In the Circuit Court, Paul White moved for summary judgment on Count I, the collection fee claim. Despite the fact that there was no consideration of, motion about, or argument concerning Counts II, III or IV, the Court granted summary judgment on all claims and dismissed the entire action.

In its order granting summary judgment, the Circuit Court concluded that *West Virginia Code* §§ 46-2-707 and 46-2-710:

authorize the recovery of incidental damages including charges and expenses incurred by the seller in connection with the return of goods or otherwise resulting from a buyer's breach. In accordance with the provisions of *West Virginia Code* 46A-2-128(d), Paul White was expressly authorized by the terms of the agreement creating the principal obligation, and by the provisions of 46-2-101 and 46-2-710, to collect from the Plaintiff any charge, expense, or fee incurred by Paul White in its efforts to realize on its security interest after Plaintiff's breach and default.

Order at 6. Therefore, according to the Circuit Court, the collection fees were "authorized by the provisions of the UCC as incorporated in the W. Va. Code, and by the terms of the agreement at issue." *Id.* at 7. The Circuit Court found that the collection of the fees "constituted an attempt to perfect a security interest and to obtain incidental damages permitted by law. The conduct of Paul White did not constitute a debt collection practice, and, therefore, the provisions of Chapter 46A have no application to this matter." *Id.* at 7-8.

Ms. Banks takes this appeal from the above-quoted final order, which the Circuit Court entered on November 5, 2004.

II.

Statement of Facts

On March 27, 2000, Ms. Banks signed a Retail Installment Contract and Sales Agreement with Paul White for the purchase of a used Ford Escort. Paul White assigned Ms. Banks' contract to City National Bank, which accepted the contract "with recourse," meaning the dealer would be responsible for payment to City National if Ms. Banks defaulted on her loan. In November 2002, Ms. Banks did not make a timely

payment. On December 11, 2002, City National Bank sent Ms. Banks a letter advising her of her right under Article 2 of the West Virginia Consumer Credit and Protection Act ("CCPA") to cure her default on the loan within ten days. See *W. Va. Code* § 46A-2-106. Before the ten-day cure period expired, Paul White sent its agent to Ms. Banks' place of employment, a Go Mart in Montgomery, West Virginia. At the Go Mart, in front of her manager and customers, Paul White's agent demanded payment from Ms. Banks, and insisted she leave her workplace to borrow the money for the overdue monthly payment and a \$300 "collection fee." Ms. Banks complied with the agent's demand, gave the agent the late payment, and paid him the \$300 collection fee. Ms. Banks' loan account record reveals that the agent did not provide the money to City National until January 27, 2003, some 5-1/2 weeks later. This agent's failure to make the payment caused Ms. Banks additional late fees.

In May 2003 the scenario repeated itself. City National contended that Ms. Banks had not made a payment, and on May 12, 2003, sent her a second notice of her statutory right to cure her alleged default. Two days later, Paul White's agent appeared at the Go Mart, and, in front of her manager, co-workers and customers, insisted that Ms. Banks leave in order to make the late payment and yet another \$300 collection fee. Ms. Banks did so, and gave Paul White's agent the payment and the collection fee.

After discovery, only the following facts remained in dispute: the precise date of the December 2002 collection effort by the dealer's collector; the details of the collector's activities at Ms. Banks' place of employment in December 2002 and on May 14, 2003; why the dealer's agent delayed delivering Ms. Banks' payment to City National for over five weeks; and how Paul White and its agent split the two \$300 fees. There is no dispute

that the dealer's agent charged the additional \$300 fee on either occasion for collecting the payment, nor is there a dispute that these collection activities took place at Ms. Banks' place of employment and in front of others at the store.

III.

Assignments of Error

1. The Circuit Court erred in concluding that Chapter 46A had no application and no debt collection was involved.
2. The Circuit Court erred in concluding that West Virginia law allowed Paul White's agent to charge the collection fee.
3. The Circuit Court erred in concluding that any practice permitted by Chapter 46 (the UCC) is authorized by Chapter 46A (the CCPA).
4. The Circuit Court erred in dismissing Counts II, III and IV when Paul White only presented arguments for summary judgment on Count I.

IV.

Standard of Review

The Court recently summarized the standard of review for a decision to grant summary judgment in *Bennett v. Asco Services*, -- S.E.2d -- (W. Va. July 8, 2005):

We review a circuit court's summary judgment ruling under the standard announced in Syllabus Point 1 of *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994), which is as follows: "A circuit court's entry of summary judgment is reviewed *de novo*."

In reviewing summary judgment, this Court will apply the same test that the circuit court should have used initially, and must determine whether 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. Roughly stated, a "genuine issue" for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence

favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.

As with the circuit court, we must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion, that is, the appellants.

Id. (internal citations and quotations omitted).

V.

Argument

A. The Circuit Court erred in concluding that Chapter 46A had no application and no debt collection was involved.

The Circuit Court held that "the conduct of [the dealer] did not constitute a debt collection practice and, therefore, the provisions of Chapter 46A [the CCPA] have no application to this matter." Order at 7-8. This holding is clearly wrong and without evidentiary support.

As noted above, Paul White's agent came to Ms. Banks' workplace, demanded past due payments, accepted past due payments (plus the \$600 in "collection fees"), and eventually forwarded the late payment to the lending bank. This conduct amounts to debt collection. The CCPA defines "debt collection" as "any action, conduct or practice of soliciting claims for collection or in the collection of claims owed or due or alleged to be owed or due to a creditor by a consumer." *W. Va. Code* § 46A-2-122(b). A "debt collector" is "any person or organization engaging directly or indirectly in debt collection." *W. Va. Code* § 46A-2-122(c). To point out the obvious, "any," when used in a statute, should be construed to mean, in a word, any." *Thomas v. Firestone Tire & Rubber Co.*, 164 W. Va. 763, 769, 266 S.E.2d 905, 909 (1980) (holding the above definition of "debt

collector" extends not only to professional debt collectors, but to any persons or organizations who engage directly or indirectly in statutorily-defined "debt collection"). Paul White's agent's conduct unquestionably fits the statutory definition of debt collection.¹

B. The Circuit Court erred in concluding that West Virginia law allowed Paul White's agent to charge the collection fee.

The CCPA prohibits debt collection charges that are not authorized both by agreement *and* statute. It proscribes:

- "[t]he collection or attempt to collect from the consumer all or any part of the debt collector's fee or charge for services rendered." *W.Va. Code* § 46A-2-128(c);
- "[t]he collection or attempt to collect any . . . other charge, fee or expense incidental to the principle obligation unless such . . . incidental fee, charge or expense is expressly authorized by the agreement creating the obligation and by statute." *W.Va. Code* § 46A-2-128(d); and
- "[a]ny representation that an existing obligation of the consumers may be increased by the addition of . . . , service fees or any other fees or charges when in fact such fees or charges may not legally be added to the existing obligation." *W.Va. Code* § 46A-2-127(g).

¹ There is no dispute that the Retail Installment Contract and Security Agreement states, "You agree that this Contract is subject to the provisions of the West Virginia Consumer Credit and Protection Act." See Retail Installment Contract and Sales Agreement, attached as Exhibit A. Nor is there any question (or contention to the contrary by Paul White, for that matter) that Ms. Banks' purchase of the vehicle from Paul White was a "consumer credit sale" under *W. Va. Code* § 46A-1-102(12). See also *Thomas*, 164 W. Va. at 765, 266 S.E.2d at 907 (discussing statutory definition of consumer credit sale).

And if that is not clear enough, *West Virginia Code* § 46A-2-115(a) states:

Limitation on default charges: Except for reasonable expenses authorized by statute incurred in realizing on a security interest, the agreement with respect to a consumer credit sale or a consumer loan may not provide for charges as a result of default by the consumer other than those authorized by this chapter.²

Id.

Notwithstanding this clear law, the Circuit Court held Paul White's collection of the \$600 in fees from Ms. Banks did not violate the CCPA. The Circuit Court accepted the dealer's argument that the fee charged by its agent was not a collection fee, but rather was a "fee, charge, or expense that is incidental to the principal obligation incurred by the Plaintiff, that was incurred by Paul White in its efforts to realize on its security interest, and that resulted from the Plaintiff's breach of the agreement." Order at 7. As such, the Circuit Court held, the collection fee was "authorized by the provisions of the UCC as incorporated in the W. Va. Code, and by the terms of the agreement at issue." *Id.* The UCC, the Circuit Court noted, authorizes an aggrieved seller to recover "incidental damages," including "any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from

² Title 15 U.S.C. §1692f establishes similar limitations on debt collection fees. See also, e.g., *Patzka v. Viterbo College*, 971 F. Supp. 654 (W. D. Wis. 1996) (violation of 15 U.S.C. §1692f to charge collection fee and interest not allowed by contract and prohibited by state law); *Piscatelli v. Universal Adjustment Servs., Inc.*, Consumer Cred. Guide (CCH) ¶96.337 (D. Conn. 1985) (25% collection fee added by collection agency violated 15 U.S.C. §1692f(1) where state collection agency statute limited fee to 15%, and 1692f(1) where state collection agency statute limited fee to 15%); *West v. Costen*, 558 F. Supp. 564 (W.D. Va. 1983) (imposition of \$15.00 service charge on bad check violated 15 U.S.C. §1692f since not expressly authorized by law); *Newman v. Checkrite California, Inc.*, 912 F. Supp. 1354 (E.D. Cal. 1995) (lawyers collecting debts for a check collection agency violated 15 U.S.C. §§ 1692e(5) and 1692(f) by seeking attorney fees to collect when no attorney fees were authorized).

the breach." *W. Va. Code* § 46-2-710. In other words, the Circuit Court viewed Paul White's conduct not as debt collection, but as "an attempt to perfect a security interest and to obtain incidental damages permitted by law." Order at 7-8.

Paul White's so-called "attempt to perfect a security interest" was nothing more than debt collection, plain and simple. Its agent showed up at Ms. Banks' workplace, took her money, and gave it to the bank. It never repossessed Ms. Banks' vehicle, nor could it have done so given the fact that the statutory cure period had not yet expired. See *W. Va. Code* § 46A-2-106 ("[A]fter a default on any installment obligation or any other secured obligation . . . a creditor may not accelerate maturity of the unpaid balance of any such installment obligation or any other such secured obligation, commence any action or demand or take possession of collateral on account of default until ten days after notice has been given to the consumer of his or her right to cure such default"). See also Notice of Right to Cure, attached hereto as Exhibit B.

Because Paul White did not repossess the vehicle and therefore never truly "realize[d] on its security interest," it had no right to incidental damages pursuant to *West Virginia Code* § 46-2-710. Again, that provision of the UCC authorizes an aggrieved seller to recover incidental damages "incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach." Paul White did not stop delivery, did not transport, care for or take custody of the goods, and did not incur expenses in connection with the return or resale of the goods. The UCC provision simply has no application, because Paul White did not repossess the vehicle, and indeed could not have lawfully repossessed it.

Even ignoring the fact that there was no repossession, the dealer's argument cannot stand in light of the clearly contrary provisions of the CCPA. The CCPA prohibits debt collectors from collecting from a consumer all or part of the debt collector's fee, *W. Va. Code* § 46A-2-128(c); prohibits the collecting of fees not authorized by statute and the principle contract, *W. Va. Code* § 46A-2-128(d); and prohibits any representation that a debt collector may charge such fees, *W. Va. Code* § 46A-2-127(g). If the Circuit Court's ruling is correct, any secured creditor would be free to charge a consumer-borrower for a collection agent's fee, so long as the collection agent also intends (or says he intends) to repossesses the secured goods unless the borrower pays the collection agent's fee. Such a ruling would eliminate the important protections afforded by the CCPA. The CCPA's purpose "is to protect consumers from unfair, unconscionable, fraudulent, and abusive practices of debt collectors." *Chevy Chase Bank v. McCamant*, 204 W. Va. 295, 302, 512 S.E.2d 217, 224 (1998). Paul White's agent's threat that he would illegally repossess Ms. Banks' car unless she paid him \$600 and two car payments is exactly the sort of abuse the CCPA was intended to address.

C. The Circuit Court erred in concluding that West Virginia law allowed Paul White's agent to charge the collection fee.

The Circuit Court held that the UCC authorized the collection fee charged to Ms. Banks, and therefore the CCPA's prohibition on such fees did not apply. As established in the preceding section, the UCC does not authorize Paul White's charging of the collection fees because Paul White did not repossess the vehicle, and further, the CCPA squarely prohibits the sort of collection fees charged by Paul White's agent. Additionally, the Circuit Court's holding ignores the fact that many activities that are lawful in the wide range of

commercial, non-consumer transactions governed by the UCC are in fact unlawful in the context of consumer transactions governed by the CCPA.

The UCC regulates certain aspects of commercial and consumer transactions. Many of the practices that the UCC expressly authorizes in commercial transactions are expressly forbidden by the CCPA in the context of consumer transactions. To list but a few examples, the UCC authorizes generally the waiver of implied warranties, see *W. Va. Code* § 46-2-316, but the CCPA prohibits the waiver of implied warranties in consumer transactions, see *W. Va. Code* § 46A-6-107(1). In addition, while the UCC authorizes limitations on consequential damages, *W. Va. Code* §§ 46-2-718, -719, the CCPA forbids such limitations in consumer transactions, *W. Va. Code* § 46A-6-107(2)

In sum, even if the UCC authorized the collection fees charged by Paul White's agent – and it does not – the more specific provisions of the CCPA expressly bar them in the context of consumer transactions.³

³ Because there is no ambiguity regarding the CCPA's prohibition of debt collectors charging consumers all or part of their fees, there is no need to interpret the statute. Syl. Pt. 3, *Tillis v. Wright*, -- S.E.2d -- (W. Va., July 7, 2005). Even if there was a need for interpretation, and even if there was a conflict between what the UCC allows and what the CCPA forbids, under canons of statutory interpretation, the CCPA proscription against collection fees would trump the UCC's purported allowance of such fees. "[I]t is a settled principle of statutory construction that courts presume the Legislature drafts and passes statutes with full knowledge of existing law. Accordingly, when two statutes conflict, the general rule is that the statute last in time prevails as the most recent expression of the legislative will." *West Va. Health Care Cost Rev. Auth. v. Boone Mem. Hosp.*, 196 W.Va. 326, 336, 472 S.E.2d 411, 421 (1996) (cited authority omitted). The relevant UCC provision, *West Virginia Code* § 46-2-710, was enacted in 1963; the relevant CCPA provision, *West Virginia Code* § 46A-2-128, was enacted in 1974, and amended in 1983 and 1990. Therefore, if there was a conflict – and there is none – the CCPA would control.

D. The Circuit Court erred in dismissing Counts II, III and IV when Paul White only presented arguments for summary judgment on Count I.

In its motion for summary judgment, the dealer referenced only the claims in Paragraphs 12 and 13 of the Complaint. Defs.' Mot. Sum. J. at 2. The dealer made no reference whatsoever in its briefing to Counts II, III, IV, Complaint paragraphs 16-22, or to the factual context of these claims.

Count II alleges that in violation of *West Virginia Code* § 46A-2-126(a), Paul White's agent came to Ms. Banks' place of employment and demanded payment in front of her employer and third parties. As Ms. Banks testified, "The embarrassment at my job was the last straw." Banks Dep. at 12. At her deposition, she described the agent's abusive conduct:

[By Ms. Banks] A. So the manager said, "I think you are awful rude."

[By Paul White's attorney] Q. Where is this conversation taking place?

A. Go Mart.

Q. Where at in Go Mart?

A. Out front where everybody is listening.

Q. Outside of the Go Mart?

A. No, in the store.

Q. In front of the counter?

A. In the store, yeah.

Q. Who else was there?

A. Customers

* * * * *

Q. So your manager was there involved in the conversation?

A. Yes. He told her to shut up

Id. at 51-52, 56.

Q. Did she come down on you for that? How did she come down on you?

- A. That kind of thing taking place, starting with him getting smart with her, too, I could have lost my job.
- Q. Did she say something to you about it?
- A. Yes, she said something about it.
- Q. Did it cause you to worry about losing your job?
- A. Yeah.

Id. at 88-89.

These kinds of employer and third-party contacts in the context of collection efforts are illegal. *W.Va. Code* § 46A-2-126(a) & (b). See also *Austin v. Great Lakes Collection Bureau, Inc.*, 834 F. Supp. 557 (D. Conn. 1993); *Sluys v. Hand*, 831 F. Supp. 321 (S. D. N.J. 1993); *Horkey v. J.U.D.B. & Assoc. Inc.*, 333 F.3rd 769 (7th Cir. 2003); 15 U.S.C. §1692c(a)(3).

Count III alleged Paul White breached its duty of good faith and fair dealing. Paul White breached these duties by coming to Ms. Banks' workplace, by demanding that she leave her employment on two occasions, by falsely stating she had bounced a check, and by the dealer's agent failure to forward the payment he collected to City National. As Ms. Banks described it:

- [By Ms. Banks] A. He said I had to have November's payment and his fees of \$300.
- [By Paul White's attorney] Q. Why did he tell you that?
- A. Why did he tell me he had to have his fees?
- Q. Did you give a check or cash to Mr. Weekley?
- A. I gave him cash, because he said he couldn't take a check. And he went to the bank with me.
- Q. So you gave him cash and then the two of you went to a bank?
- A. Yes.
- Q. What bank did you go to?
- A. City National.
- Q. What did the two of you do at the bank?
- A. I cashed a check. I gave him the money and cried.
- Q. You gave him the money and cried?
- A. Yes. Wondering how I'm going to pay that back.

- Q. After you paid Mr. Weekley the cash at the Bank, did you call City National Bank and complain? Did you call Paul White --
- A. I called -- all right. That's what I remember, getting one of those. I can't tell you which one it was. But that's how I know the money wasn't turned in, because I got one of those.
- A. Yes.
- Q. So you got that notice and what did you do?
- A. I called the Bank, and I asked them how come he had come up to collect the money, why come they didn't get it. They said I had to call Paul White. I called down Paul White's. I was three days getting in touch with Mr. Weekley [Paul White's collection agent]. Finally I got him on the phone, and he said he will call me back. Finally, I got him and I asked him about the money.
- Q. Did you call him or did he call you?
- A. I called him.
- Q. So you got ahold of Mr. Weekley. And what did you talk about with Mr. Weekley?
- A. Where that money was I done borrowed.
- Q. What was his response?
- A. He left it in his truck.
- Q. What is the next thing that happened?
- A. When he come down to my job.
- Q. Who?
- A. Mr. Weekley.
- Q. So he went to the Go Mart?
- A. Yes.
- Q. When was this?
- A. May the 14th.
- Q. What time of the day was it?
- A. It was afternoon. I can't really say what time, but it was in the afternoon.
- Q. Did you have a certain shift that you worked?
- A. I work all shifts.
- Q. You describe for me where he is at in the store?
- A. He is in the store and at the end of the counter. About middle ways.
- Q. Was he talking to anyone or what was he doing? Just standing there?
- Q. Did you show him any receipts?
- A. I had to leave work. I missed three hours of work going home to find him these receipts that didn't do

any good, because every time I give him a receipt he come up with something else.

Q. So he asked to see receipts and you didn't have them there, so you had to go home to find them?

A. Yes.

Q. So the two of you left the Go Mart store and went to your house?

A. Yes.

Q. During that period of time that you were present in the store, did Mr. Weekley have any conversation with Sylvia or anyone else that was there?

A. Yeah. She my manager. Well, wait a minute.

Q. At that point in time?

A. Not then, no. When he come back.

Q. So tell me what happens when the two of you go to your house to look for the receipts.

A. I go there. He told me I missed a payment. He told me my check bounced. He asked me did I pay it with checks.

Q. So he said you were behind because a check had bounced?

A. Yes.

Q. Do you recall having made a check that had bounced?

A. I paid my car payment out of my work check. I told him Go Mart better not be giving me no rubber checks as hard as I work. So I called the manager.

Q. Hold on a second. So your testimony is that you actually wrote a Go Mart check?

A. No. My paycheck.

Q. So you sent your paycheck from Go Mart

A. I take my paycheck to the bank, and they takes my car payment out of it and give me the change. So I called the manager. She called the supervisor.

Q. You called Sylvia?

A. Yes.

Q. You called Sylvia from your house?

A. From his phone.

Q. From his phone?

A. His cell phone.

Q. What did you ask her?

A. I told her that he said my check bounced.

Q. What did she say?

A. She said that is impossible, but let me call Virginia, which is our supervisor. She called Virginia and she said, Call me back in a few minutes. I called her back

and she said, Virginia said ain't no way my check bounced. He wanted \$264. He wanted the car payment. He wanted 300, and he charged me taxes. So this was pretty close to \$600, if not six.

Q. So what happens next? When do you again meet Mr. Weekley, at the store, at Go Mart?

A. So the manager said, "I think you are awful rude."

Q. Where is this conversation taking place?

A. Go Mart.

Q. Where at in Go Mart?

A. Out front where everybody is listening.

Q. Outside of the Go Mart?

A. No, in the store.

Q. In front of the counter?

A. In the store, yeah.

Q. Who else was there?

A. Customers. I don't know everybody. I don't know their name and I don't want to.

Q. So your manager was there involved in the conversation?

A. Yes. He told her shut up, it wasn't none of her business.

Banks Dep. at 27-52.

Paul White referenced none of these claims in its motion. The Circuit Court addressed none of these claims in its order, but dismissed the entire action nonetheless. The Circuit Court failed to provide sufficiently detailed findings of fact, and provided no relevant conclusions of law, to support its entry of summary judgment on all claims. This fact alone constitutes reversible error. *Syl., Hively v. Merrifield*, 212 W. Va. 804, 575 S.E.2d 414 (2002).

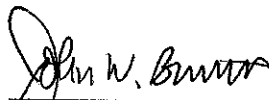
VI.

Relief Sought

WHEREFORE, Appellant Gloria Banks prays that this Court reverse the decision of the Circuit Court granting summary judgment in favor of Appellee Paul White

Chevrolet, Inc., and that this Court direct the Circuit Court to enter summary judgment on Count I in Ms. Banks' favor.

Respectfully Submitted.



John W. Barrett (State Bar # 7289)
Bailey & Glasser, LLP
227 Capitol Street
Charleston, West Virginia 25301
Telephone: (304) 345-6555
Facsimile: (304) 342-1110

RETAIL INSTALLMENT CONTRACT AND SECURITY AGREEMENT No. <u>31301435</u> Date <u>Mar 27, 2000</u>	for Paul White Chevrolet, Inc. P. O. Box 129 Cabin Creek, WV 25035 "We" and "us" mean the Seller above, its successors and assigns.	Buyer GLORIA J BANKS P O BOX 475 MONTGOMERY, WV 25136 "You" and "your" mean each Buyer above, and guarantor, jointly and individually.
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SALE: You agree to purchase from us, on a time basis, subject to the terms and conditions of this contract and security agreement (Contract), the Motor Vehicle (Vehicle) and services described below. The Vehicle is sold in its present condition, together with the usual accessories and attachments.

Description of Motor Vehicle Purchased	Year <u>1999</u>	Make <u>FORD</u>	Model <u>ESCORT</u>	VIN <u>1FAFP10P2XW152058</u>	Lic. No./Year	Other:
				<input type="checkbox"/> New <input checked="" type="checkbox"/> Used		
				<input type="checkbox"/> Rebuilt <input type="checkbox"/> Demonstrator		

Description of Trade-In

SECURITY: To secure your payment and performance under the terms of this Contract, you give us a security interest in the Vehicle, all attachments, accessories, and equipment placed in or on the Vehicle, together called Property, and proceeds of the Property.

PROMISE TO PAY AND PAYMENT TERMS: You promise to pay us the principal amount of \$ 8414.75, plus sales finance charges accruing on the unpaid balance at the rate of 16.00 % per year from today's date until paid in full. Sales finance charges accrue on an actual 365 day basis. You agree to pay this Contract according to the payment schedule and late charge provisions shown in the TRUTH IN LENDING DISCLOSURES. You also agree to pay any additional amounts according to the terms and conditions of this Contract.

THIS CONTRACT IS NOT PAYABLE IN INSTALLMENTS OF EQUAL AMOUNTS:
 AN INSTALLMENT OF \$ N.A. WILL BE DUE ON N.A.
 LARGER INSTALLMENTS WILL BE DUE AS FOLLOWS: N.A.

MINIMUM SALES FINANCE CHARGE: You agree to pay a minimum sales finance charge of \$ 7.50 if you pay this Contract in full before we have earned that much in sales finance charges.

DOWN PAYMENT: You also agree to pay, or apply to the Cash Price, on or before today's date, any cash, rebate and net trade-in value described in the ITEMIZATION OF AMOUNT FINANCED. You agree to make deferred payments as part of the cash down payment as reflected in your Payment Schedule.

TRUTH IN LENDING DISCLOSURES

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS	TOTAL SALE PRICE
The cost of your credit as a yearly rate <u>16.26</u> %	The dollar amount the credit will cost you. \$ <u>2712.87</u>	The amount of credit provided to you or on your behalf. \$ <u>8379.75</u>	The amount you will have paid when you have made all scheduled payments. \$ <u>11092.62</u>	The total cost of your purchase on credit, including your down payment of <u>1000.00</u> \$ <u>12092.62</u>

Payment Schedule: Your payment schedule will be

Number of Payments	Amount of Payments	When Payments Are Due
<u>42</u>	<u>264.11</u>	Monthly, beginning May 6, 2000, until paid in full.

Security: You are giving a security interest in the Motor Vehicle purchased. 5% of the unpaid portion of any regularly scheduled payment, but not less than \$1.00 nor more than \$5.00, will be charged late if a payment is more than 5 days late. You will be charged 5% of the unpaid portion of any regularly scheduled payment, but not less than \$1.00 nor more than \$5.00.

Prepayment: If you pay off this Contract early, you may will not have to pay a Minimum Sales Finance Charge.
Contract Provisions: You can see the terms of this Contract for any additional information about nonpayment, default, any required repayment before the scheduled date, and prepayment refunds and penalties.

CREDIT INSURANCE: Credit life, credit disability (accident and health), and any other insurance coverage quoted below, are not required to obtain credit and we will not provide them unless you sign and agree to pay the additional premium. If you want such insurance, we will obtain it for you (if you qualify for coverage). We are quoting below ONLY the coverages you have chosen to purchase.

Credit Life: Insured N.A. Term N.A.
 Single Joint Prem. N.A.
 Credit Disability: Insured N.A. Term N.A.
 Single Joint Prem. N.A.

ITEMIZATION OF AMOUNT FINANCED

Vehicle Price (incl. sales tax of \$ <u>62.25</u>)	\$ <u>8262.25</u>
Service Contract, Paid to:	\$ <u>1000.00</u>
Cash Price	\$ <u>9262.25</u>
Manufacturer's Rebate	\$ <u>N.A.</u>
Cash Down Payment	\$ <u>1000.00</u>
Deferred Down Payment	\$ <u>N.A.</u>
a. Total Cash/Rebate Down	\$ <u>1000.00</u>
b. Trade-In Allowance	\$ <u>N.A.</u>
c. Less: Amount owing	\$ <u>N.A.</u>
Paid to (by) you (f):	
which will be paid by	
d. Net Trade-In (b. minus c.)	\$ <u>N.A.</u>
e. Net Cash/Trade-In (a. plus d.)	\$ <u>1000.00</u>
f. Amount to Finance line e. (if a. is negative)	\$ <u>8262.25</u>
Down Payment (e.; disclose as \$0 if negative)	\$ <u>1000.00</u>
Unpaid Balance of Cash Price	\$ <u>N.A.</u>
Paid to Public Officials - Filing Fees	\$ <u>N.A.</u>
Insurance Premiums*	\$ <u>35.00</u>
Doc Processing Fee	\$ <u>80.00</u>
To: <u>V.S.I. Insurance</u>	\$ <u>37.50</u>
To: <u>Doc Fee</u>	\$ <u>152.50</u>
To:	\$ <u></u>
Total Other Charges/Amounts Pd. to Others	\$ <u>35.00</u>
Less: Prepaid Finance Charges	\$ <u>8379.75</u>
Amount Financed	\$ <u></u>

Your signature below means you want (only) the insurance coverage(s) quoted above. If none are quoted, you have declined any coverages we offered.

PROPERTY INSURANCE: You must insure the Property securing this Contract. You may purchase or provide the insurance through any insurance company reasonably acceptable to us. The collision coverage deductible may not exceed \$ 500.00 if you get insurance from or through us you will pay \$ N.A. for N.A. of coverage.

This premium is calculated as follows:
 \$ N.A. Deductible, Collision Coverage
 \$ N.A. Deductible, Comprehensive Cov.
 Fire-Theft and Combined Additional Coverage \$ N.A.

Liability insurance coverage for bodily injury and motor vehicle damage caused to others is not included in this Contract unless checked and indicated.

SINGLE-INTEREST INSURANCE: You must purchase single-interest insurance as part of this sale transaction. You may purchase the coverage from a company of your choice, reasonably acceptable to us. If you buy the coverage from or through us, you will pay \$ 80.00 for 12 months of coverage.

SERVICE CONTRACT: With your purchase of the Vehicle, you agree to purchase a Service Contract separate service contract agreement. This Service Contract will be in effect for

ASSIGNMENT: This Contract and Security Agreement is assigned to the Assignee, phone 304-442-2475. This assignment is made under the terms of a separate agreement under the terms of the ASSIGNMENT BY SELLER on page 2 of this assignment is made with recourse. Seller By [Signature] Date 03-27-00

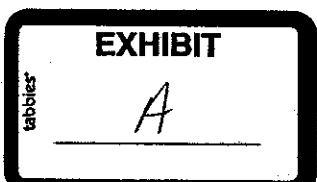
*We may retain or receive a portion of this amount.

NOTICE TO BUYER

(1) Do not sign this agreement before you read it or if it contains any blank spaces. (2) You are entitled to a completely filled-in copy of this agreement. (3) Under the law, you have the right to pay off in advance the full amount due and under certain conditions to obtain a partial refund of the finance charge.

BY SIGNING BELOW BUYER AGREES TO THE TERMS ON PAGES 1 AND 2 OF THIS CONTRACT AND ACKNOWLEDGES RECEIPT OF A COPY OF THIS CONTRACT.

Buyer: [Signature] Date
 Signature _____ Date _____
 Signature _____ Date _____
 Seller By: [Signature] Date



City
NATIONAL BANK
of West Virginia

Collections Department

NOTICE OF RIGHT TO CURE DEFAULT

GLORIA J BANKS
PO BOX 475
MONTGOMERY WV

25136

Description of Transaction

Lender: *City National Bank*

Loan Account: # 31301435

Date of Note or Contract: 03-27-00

Amount of Note of Contract: 8,414.75

YOU HAVE THE RIGHT TO CURE THE FOLLOWING

AMOUNT OF PAYMENT IN DEFAULT: \$567.07

Other requirements to cure default:

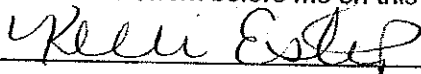
Unless you cure the default in the manner aforesaid by **May 22nd, 2003** the above creditor all have the right to exercise all of its rights and remedies with the respect to accelerated maturity of the unpaid balance thereof and the right to take possession of all collateral securing such transaction.

The Collection Department of the City National Bank, certify that the notice of the consumers right to cure default on which this certification appears on this 12th day of May 2003 mailed to the person(s) whose name(s) appear herein at the address set forth. This is an attempt to collect a debt, and any information obtained will be used for that purpose.

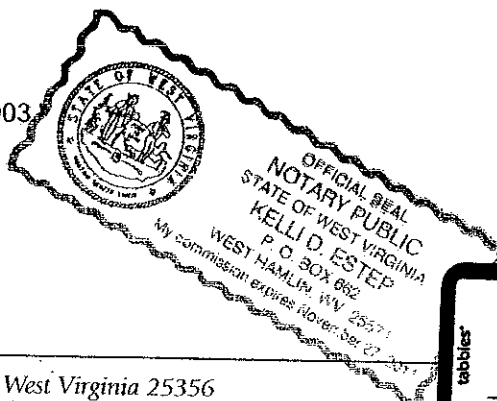


Collection Department
1-800-598-2489

"Subscribed and sworn before me on this 12th day of May 2003.



Notary Public of West Virginia



EXHIBIT

B

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

GLORIA BANKS, individually, and on
behalf of all others similarly situated

Plaintiff,

vs.

Civil Action No. 03-C-1411

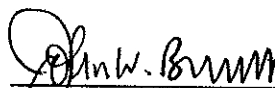
CITY NATIONAL BANK OF WEST VIRGINIA,
and PAUL WHITE CHEVROLET, INC., a West
Virginia corporation,

Defendants.

CERTIFICATE OF SERVICE

I, John W. Barrett, Counsel for Appellant, do hereby certify that the attached Petition for Appeal has been made upon the parties by mailing a true and exact copy thereof by depositing the same in the United States Mail, postage prepaid, this the 25th day of August, 2005, to:

Albert C. Dunn, Jr., Esquire
MacCorkle, Lavender, Casey & Sweeney, PLLC
Post Office Box 3283
Charleston, West Virginia 25332
Counsel for Appellee Paul White Chevrolet, Inc.



John W. Barrett (State Bar # 7289)