

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

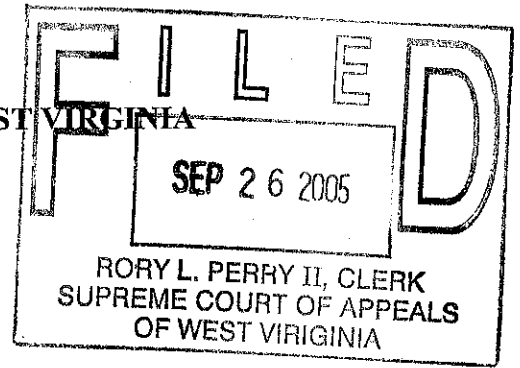
Plaintiff/Appellant,

v.

No. 32725

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

Defendant/Appellant.



APPELLEE'S BRIEF

Albert C. Dunn, Jr., Esquire (#5670)
MacCorkle, Lavender, Casey & Sweeney, PLLC
300 Summers Street, Suite 800
Charleston, WV 25301
(304) 344-5600
Counsel for Appellee Paul White Chevrolet, Inc.

TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES	iii
II.	STATEMENT OF THE CASE	1
III.	RESPONSE TO ASSIGNMENTS OF ERROR	2
IV.	POINTS AND AUTHORITIES RELIED UPON	3
V.	ARGUMENT	4
	A. The Circuit Court was correct to conclude that the conduct at issue did not constitute debt collection pursuant to the CCPA, but was authorized by the terms of the Appellant's Contract and the provisions of West Virginia Code § 46-2-707 and § 46-2-710.	3,4
	B. The Circuit Court was correct to conclude that, if the CCPA were deemed to apply to the conduct at issue, the actions of the Appellee were in compliance with W. Va. Code § 46A-2-128.	3,8
	C. Summary judgment was proper as to all counts of the Appellant's Complaint as each count relied upon the alleged violation of the CCPA, Chapter 46A of the Code, and the conclusion that the CCPA did not apply to the actions at issue necessitated the dismissal of all counts.	3,10
VI.	RELIEF PRAYED FOR	12

I. TABLE OF AUTHORITIES

FEDERAL CASES:

<i>Chevy Chase Bank v. McCamant</i> , 204 W.Va. 295, 302, 512 S.E.2d 217 (1998).	3,5
<i>Freyermuth v. Credit Bureau Services, Inc.</i> , 248 F.3d 767 (8th Cir. 2001).	3,9
<i>Southern Erectors, Inc. v. Olga Coal Co.</i> , 159 W.Va. 385, 223 S.E.2d 46 (1976).	3,11

STATUTES:

West Virginia Code § 46-2-707	3,4,6
West Virginia Code § 46-2-710	3,4,5,6
West Virginia Code § 46A-2-106	7
West Virginia Code § 46A-2-115	3,7,9
West Virginia Code § 46A-2-126	2,3,11
West Virginia Code § 46A-2-127	3,7,8,11
West Virginia Code § 46A-2-128	3,7,8,9,11
West Virginia Code § 46A-2-134	2,3,11
15 U.S.C. 1692f	3,9,10

II. STATEMENT OF THE CASE

Donald Weekley acts as a repossession or "repo" man, and is an independent contractor who attempts to repossess vehicles after the customer has failed to make timely payments as required by a contract for sale, and is thus in default. Mr. Weekley is referred to as "Paul White's agent" and as the "collector" in the Appellant's Brief, and is thus alleged to have collected a collection fee from Ms. Banks in addition to an overdue payment, pursuant to the terms of her Retail Installment Contract and Security Agreement (hereinafter the "Contract") with Paul White Chevrolet. To the extent that the Appellant repeatedly refers to Weekley as a debt collector or collection agent, to his actions as debt collection, and to his fee as a collection fee, the Appellant begs the question at issue, and implies that there is no dispute regarding the nature of Weekley's acts. Whether Weekley's actions constituted debt collection under the circumstances is the core of the parties' dispute.

Mr. Weekley was paid a fee by Paul White Chevrolet (hereinafter sometimes referred to as "Paul White") each time that he made an attempt to repossess a vehicle, and was paid a fee whether he successfully repossessed the vehicle or not. When a vehicle was repossessed, the defaulting customer could retrieve the repossessed vehicle, and continue payments on the vehicle, by paying to Paul White both the full amount of the overdue payment and the repossession fee incurred by Paul White in attempting to realize on its security interest. In some cases, in lieu of repossessing a vehicle, Mr. Weekley allowed the purchaser to keep the vehicle, collecting the overdue payment and a repossession fee that would have been required had the vehicle been repossessed but subsequently redeemed by the purchaser. Although the Appellant's reference to "how Paul White and its agent split the two \$300 fees" might suggest otherwise, there is no evidence that Paul White profited from

such fees, and the discovery completed prior to entry of the order now at issue indicated that the fees did not cover the expenses incurred.

The Appellant now states that Count IV of her Complaint alleges a breach of the duty of good faith and fair dealing imposed by W. Va. Code § 46-1-203. Reference to the Complaint itself shows that no reference was made to the Uniform Commercial Code, and that the Appellant's claims were based upon alleged violations of the Consumer Credit and Protection Act, Chapter 46A of the West Virginia Code (hereinafter the "CCPA"). A fair reading of Count IV of the Complaint indicates that it refers back to Counts II and III of the Complaint, which counts assert violations of W. Va. Code § 46A-2-126(a) and W. Va. Code § 46A-2-134, respectively.

III. RESPONSE TO ASSIGNMENTS OF ERROR

The Circuit Court was correct in granting Paul White's Motion for Summary Judgment, based upon its determination that, as a matter of law, the provisions of the CCPA relied upon by the Appellant do not apply to the attempts of a seller to repossess goods in which it retains a security interest, and that the expenses incurred through its efforts to regain possession do not constitute "debt collection fees" as that term is used in the CCPA. The Circuit Court was also correct in its determination that all the Appellant's claims were based upon the alleged violation of provisions of the CCPA relating to debt collection and were thus subject to dismissal.

The Appellant mischaracterizes the nature of the Circuit's Court's rulings. Contrary to the Appellant's second and third assignments of error, the Circuit Court did not conclude that a collection fee could be charged by Paul White, nor did the Circuit Court conclude that any practice permitted by the U.C.C. is authorized by the provisions of the CCPA. The Circuit Court's rulings were properly restricted to the circumstances and Code sections at issue. The Circuit Court

determined only that the fee at issue was not a collection fee but an expense incurred in realizing on a security interest, that certain provisions of the U.C.C applied, and that the CCPA did not forbid their application.

IV. POINTS AND AUTHORITIES RELIED UPON

- A. The Circuit Court was correct to conclude that the conduct at issue did not constitute debt collection pursuant to the CCPA, but was authorized by the terms of the applicable Contract and the provisions of West Virginia Code § 46-2-707 and § 46-2-710.**

Chevy Chase Bank v. McCamant, 204 W.Va. 295, 512 S.E.2d 217 (1998)
W. Va. Code § 46-2-707

W. Va. Code § 46-2-710

- B. The Circuit Court was correct to conclude that, if the CCPA were deemed to apply to the conduct at issue, the actions of the Appellee were in compliance with W. Va. Code § 46A-2-128.**

Freyermuth v. Credit Bureau Services, Inc., 248 F.3d 767 (8th Cir. 2001)

W. Va. Code § 46A-2-115

W. Va. Code § 46A-2-127

W. Va. Code § 46A-2-128

15 U.S.C. § 1692f

- C. Summary judgment was proper as to all counts of the Appellant's Complaint as each count relied upon the alleged violation of the CCPA, Chapter 46A of the Code, and the conclusion that the CCPA did not apply to the actions at issue necessitated the dismissal of all counts.**

Southern Erectors, Inc. v. Olga Coal Co., 159 W.Va. 385, 223 S.E.2d 46 (1976)

W. Va. Code § 46A-2-126

W. Va. Code § 46A-2-127

W. Va. Code § 46A-2-128

W. Va. Code § 46A-2-134

V. ARGUMENT

- A. The Circuit Court was correct to conclude that the conduct at issue did not constitute debt collection pursuant to the CCPA, but was authorized by the terms of the Appellant's Contract and the provisions of West Virginia Code § 46-2-707 and § 46-2-710.**

The Appellant contends that the conduct of Donald Weekley "unquestionably" constitutes debt collection under the provisions of the CCPA. Appellant's argument on this point is conclusory. The Appellant fails to mention or dispute the fact that Paul White Chevrolet had the right to repossess the Appellant's vehicle, and that the alternative to Ms. Banks dealing with Mr. Weekley was to lose possession of the car. Had Mr. Weekley repossessed the car and returned it to Paul White Chevrolet, Ms. Banks would have either lost the car or would have eventually gone to the dealership in order to retrieve it by paying the appropriate sum.

Although the scenario described by the Appellant would suggest Weekley was simply collecting a debt, that description fails to consider the dealership's security interest in the vehicle, and the fact that the conduct at issue is actually an attempt to repossess goods, pursuant to the terms of a contract, by a seller with a security interest. Mr. Weekley was never directed to simply collect a debt, but was only called upon where repossession was believed to be the specific remedy available to the Paul White Chevrolet. The issue is straightforward. The Appellant claims that Weekley's conduct constitutes debt collection and falls under the CCPA and the Appellee disagrees, arguing

that an attempt to repossess goods in order to realize on a security interest is not “debt collection” and is not covered by the provisions of the CCPA relating to debt collection.¹

The Contract entered into by the Appellant includes a section referring to default, which section reads in pertinent part as follows:

DEFAULT: You agree that the following are additional terms and conditions of this Contract and that if one or more of the following occur you will be in default.

A. You fail to make a payment in full when it is due.

...

If you default, you agree to pay the reasonable expenses including costs and fees authorized by statute, that we incur to realize on any security interest.

(Second emphasis added).

“[T]he purpose of the [CCPA] 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). The collection of a reasonable incidental expense such as a repossession fee, whether it is properly subject to the provisions of the CCPA or not, understandably results from a seller’s attempt to enforce its contractual rights, and to realize on its security interest. It cannot be deemed to constitute a *per se* unfair, unconscionable, fraudulent, or abusive practice. Further, as the Circuit Court noted, the recovery of such expenses is specifically authorized by W. Va. Code § 46-2-710:

Seller’s Incidental Damages

Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the

¹The language of the Contract that indicates that the CCPA applies to the Contract, referred to in the Appellant’s Brief at 6, n. 1, has no bearing on the determination of whether the conduct at issue constitutes or does not constitute “debt collection” under the CCPA.

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.**

(Emphasis added).

The Appellant's loan was a "full recourse" loan held by a bank, but for which Paul White Chevrolet was ultimately responsible in case of a default. Paul White maintained a security interest in the goods, and may be considered either the seller pursuant to the U.C.C., or a person in "the position of a seller." West Virginia Code § 46-2-707 states in pertinent part:

(1) A "person in the position of a seller" includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.

(2) A person in the position of a seller may as provided in this article withhold or stop delivery (section 2-705) and resell (section 2-706) and recover incidental damages (section 2-710).

(Emphasis added). The Circuit Court reasonably concluded that these provisions of the U.C.C. applied to the Appellant's transaction with Paul White. Under § 46-2-710, the fee paid by Paul White to Mr. Weekley for his attempt at repossession is a charge, expense, or commission "otherwise resulting from the breach." Had the breach not occurred, there would be no reason to attempt repossession of the vehicle.

Although the Appellant argues that the application of various provisions of the U.C.C. are "expressly" forbidden by the CCPA, the Appellant cites no section of the CCPA that expressly prohibits application of the U.C.C. provisions at issue here. The fact that the Appellant can cite to various other express prohibitions found in the CCPA serves only to emphasize the absence of a provision that expressly forbids application of §§ 46-2-707 and 46-2-710. The Appellant also quotes

but refuses to consider the effect of the language of W. Va. Code § 46A-2-115 that expressly permits “reasonable expenses authorized by statute incurred in realizing on a security interest[.]”

In order to argue that the charges at issue are collection fees rather than expenses incidental to repossession, the Appellant contends that any attempt to actually repossess the vehicle would have violated W. Va. Code § 46A-2-106, and that, thus, Mr. Weekley’s actions could not have been an attempt at repossession. The logic of this argument is questionable on its face.² Paul White Chevrolet or Mr. Weekley may have unwittingly violated § 46A-2-106 by failing to wait the required 10-day period before attempting to repossess the Appellant’s car, but the Appellant has never asserted a claim based upon an alleged violation of § 46A-2-106. All of the Appellant’s claims hinge on the premise that Paul White Chevrolet was engaged in debt collection, and that the fee charged was a collection fee and not an authorized expense incurred when Paul White attempted to repossess the car and realize on its security interest. The statutes relied upon in the Appellant’s Complaint consistently refer to debt collection and debt collectors.

The Appellant did not plead a violation of § 46A-2-106 as an alternative cause of action, nor did she move to amend her pleading in order to add such a claim. If it is assumed for the sake of argument that the Appellant could have asserted a claim for violation of § 46A-2-106 against Paul White, which, in essence, is what the Appellant now contends, her failure to assert the correct cause of action does not transform the claims she did assert into valid claims. The fact that Paul White’s repossession efforts may have violated § 46A-2-106 does not transform them into “debt collection.” Since the Circuit Court correctly concluded that the actions at issue did not constitute debt collection, those provisions of the CCPA relied upon by the Appellant as the basis for the causes of action

²Essentially, the Appellant appears to be arguing that Paul White Chevrolet must have been violating §§ 46A-2-127(g) and 46A-2-128(c) because, otherwise, Paul White would have been violating § 46A-2-106.

asserted in the Complaint did not apply, and summary judgment in favor of the Appellee was warranted.

B. The Circuit Court was correct to conclude that, if the CCPA were deemed to apply to the conduct at issue, the actions of the Appellee were in compliance with W. Va. Code § 46A-2-128.

In its Order, the Circuit Court also noted that, even if the CCPA were presumed to apply to the transaction at issue, and the repossession process were presumed to constitute a means of debt collection pursuant to statute, the conduct complained of in Count I of the Complaint was authorized by law. Under such circumstances, the Circuit Court reasoned that it is W. Va. Code § 46A-2-128(d) that is applicable, rather than § 46A-2-127(g) and § 46A-2-128(c) as relied upon by the Appellant, due to the existence of the Contract and its express terms. The \$300.00 fee at issue is not properly denoted a collection fee, but a fee incidental to the principal obligation.

The pertinent subsections of § 46A-2-128 read as follows:

No debt collector shall use unfair or unconscionable means to collect or attempt to collect any claim. Without limiting the general application of the foregoing, the following conduct is deemed to violate this section:

...

(c) The collection or the attempt to collect from the consumer all or any part of the debt collector's fee or charge for services rendered: Provided, That attorney's fees, court costs and other reasonable collection costs and charges necessary for the collection of any amount due upon delinquent educational loans made by any institution of higher education within this state may be recovered when the terms of the obligation so provide. Recovery of attorney's fees and collection costs may not exceed thirty-three and one-third percent of the amount due and owing to any such institution: Provided, however, That nothing contained in this subsection shall be construed to limit or prohibit any institution of higher education from paying additional attorney fees and collection costs as long as such additional attorney fees and collection costs do not exceed an amount equal to five percent of the amount of the debt actually recovered and such additional attorney fees and collection costs are deducted or paid from the amount of the debt recovered for the institution or paid from other funds available to the institution;

(d) The collection of or the attempt to collect any interest or other charge, fee or expense incidental to the principal obligation unless such interest or incidental fee, charge or expense is expressly authorized by the agreement creating the obligation and by statute[.]

(Emphasis added). Thus, under the appropriate circumstances, pursuant to § 46A-2-128(d), a fee may be expressly authorized, if the fee is incidental to the principal obligation and it can be shown that the fee is also “expressly authorized by the agreement creating the obligation[.]” As the Appellant emphatically indicates in the course of argument, § 46A-2-115 also states, in pertinent part,

(a) Except for reasonable expenses including costs and fees 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.

W.Va. Code § 46A-2-115 (emphasis added).³

The provisions of the CCPA quoted above do not restrict the authorizing statute to the terms of the CCPA itself. The language of § 46A-2-115 shows that, were that restriction intended, the CCPA would not refer to a “statute,” but to “this chapter.” The Appellant cites no express provision of the CCPA that prohibits application of the U.C.C. provisions at issue. Also, since the Appellant notes the similarity of a federal statute, 15 U.S.C. § 1692f (Appellant’s Brief at 7, n.2), it should be noted that at least one federal appellate court has adopted reasoning similar to that of the Circuit Court here. In *Freyermuth v. Credit Bureau Services, Inc.*, 248 F.3d 767 (8th Cir. 2001), the plaintiff sued an admitted debt collector who attempted to collect on several checks that had been returned for insufficient funds, on the grounds that the collection service had attempted to collect a service charge prohibited by 15 U.S.C § 1692f(1). The Eighth Circuit found that the Nebraska version of

³Although the Appellant refers to a number of federal cases in apparent support of her argument regarding the CCPA, the cited cases stand only for the proposition that there is a federal statute with provisions analogous to those of the CCPA. The Appellant offers no analysis of these cases that would shed light on the particular issues at hand.

the U.C.C., § 2-2710, permits the collection of a service charge in that it “**authorizes reimbursement to the seller for incidental damages** incurred as a result of the buyer’s breach.” 248 F.3d at 770 (emphasis added).

The provisions of the U.C.C., as cited above, authorize the recovery of costs and fees as incidental damages resulting from the buyer’s breach. The fee at issue was authorized by statute, by the agreement creating the obligation, and was incurred in the course of the Appellee’s attempt to realize on a security interest. As the Circuit Court observed, were the CCPA applicable, at least partial summary judgment would still be warranted.

C. Summary judgment was proper as to all counts of the Appellant’s Complaint as each count relied upon the alleged violation of the CCPA, Chapter 46A of the Code, and the conclusion that the CCPA did not apply to the actions at issue necessitated the dismissal of all counts.

The Appellant’s argument that the Circuit Court improperly dismissed all claims where only Count I of the Complaint was at issue fails to note the pertinent language of the Order.

Paul White argues that it does not engage in “debt collection” when it has a security interest in a vehicle subject to repossession, as permitted by a contract, and the consumer pays a repossession fee in order to regain or retain possession. The fee charged is not a fee for the collection of a debt, but a fee for the costs incurred incident to Paul White’s repossession or attempted repossession of the vehicle in order to realize on its security interest. After default and breach of contract by the purchaser, when the seller repossesses or attempts to repossess a vehicle pursuant to the terms of the contract, it is no longer a matter of debt collection, but a matter of damages for breach of contract. Thus, the Defendant argues that the statutes cited by the Plaintiff do not apply, no violation of statute has occurred, and judgment as a matter of law in favor of Paul White is therefore warranted. **Since all claims set forth in the Plaintiff’s Complaint are predicated upon application of statutes pertaining to debt collection, a finding in favor of Paul White on these grounds would serve as a sufficient legal basis to grant summary judgment as to all the Plaintiff’s claims.**

Order at 2 (emphasis added).

There is no question that there was a motion for summary judgment before the trial court. If the Circuit Court found that the CCPA did not apply, on the grounds that the activities complained of did not constitute debt collection, all claims based upon the alleged violation of the CCPA were also subject to dismissal, and additional fact development was unnecessary. Under the appropriate circumstances, where there has been an opportunity for adequate fact development, a trial court may even grant summary judgment *sua sponte* in the absence of a motion. *Southern Erectors, Inc. v. Olga Coal Co.*, 159 W.Va. 385, 223 S.E.2d 46 (1976), Syl. pt. 4. Here, the Circuit Court determined that all of the Appellant's causes of action were dependant upon the cause of action asserted in Count I of the Complaint.

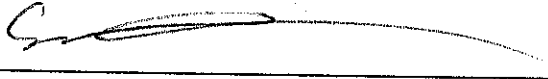
Count I was based upon the alleged violation of W. Va. Code § 46A-2-128(c) and § 46A-2-127(g), the collection of illegal debt collection fees. Count II was based upon the alleged violation of W. Va. Code § 46A-2-126(a), unreasonable publication, by a debt collector, of the Appellant's indebtedness by communication with her employer. Count III was based upon the alleged violation of W. Va. Code § 46A-2-134, misrepresentation of the amount due, where the alleged misrepresentation was made in relation to a purported improper debt collection fee. Finally, Count IV was based upon the breach of a duty of good faith and fair dealing, which breach was alleged to have resulted from the violations of W. Va. Code § 46A-2-126(a) and W. Va. Code § 46A-2-134 set forth in Counts II and III, respectively. Pursuant to the language of the Complaint, all the Appellant's claims were based upon express violations of the CCPA or were made actionable by application of the CCPA. Given the terms of the Complaint, were the CCPA found by the Circuit Court to be inapplicable, all of the Appellant's claims, whether specifically argued or not, were thus subject to dismissal as a matter of law.

VI. RELIEF PRAYED FOR

Based upon the foregoing, the Appellee, Paul White Chevrolet, Inc., respectfully requests that the decision of the Circuit Court of Kanawha County be affirmed.

PAUL WHITE CHEVROLET, INC.

By Counsel,



Albert C. Dunn, Jr., Esquire (#5670)
MacCorkle, Lavender, Casey & Sweeney, PLLC
300 Summers Street, Suite 800
Charleston, WV 25301
(304) 344-5600
(304) 344-8141 (fax)
Counsel for Appellee

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Plaintiff/Appellant,

v.

No. 32725

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

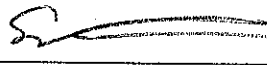
Defendant/Appellee.

CERTIFICATE OF SERVICE

I, Albert C. Dunn, Jr., counsel for Defendant, Paul White Chevrolet, Inc., do hereby certify that I have on this the 26nd day of September, 2005, hand delivered this original and nine copies of the "**BRIEF OF APPELLEE**" to the Clerk of the Supreme Court of Appeals of West Virginia. I further hereby certify that I have served a true and exact copy of the foregoing upon all counsel of record herein, by depositing the same in the regular United States Mail, postage prepaid, and addressed as follows:

Daniel F. Hedges, Esquire
Pepper, Nason & Hayes
8 Hale Street
Charleston, WV 25301
Counsel for Appellant

John W. Barrett, Esquire
Bailey & Glasser LLP
227 Capitol Street
Charleston, WV 25301
Counsel for Appellant


Albert C. Dunn, Jr. (#5670)