

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 16-0127

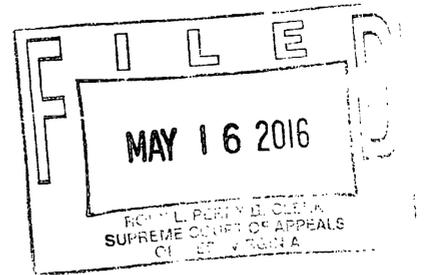
VALENTINE & KEBARTAS, INC.

DEFENDANT BELOW/PETITIONER

V.

GARY J. LENAHAN

PLAINTIFF BELOW/RESPONDENT



VALENTINE & KABAARTAS, INC.'S PETITION FOR APPEAL

Albert C. Dunn, Jr., Esq. (WV Bar No. 5670)

Bailey & Wyant, PLLC

500 Virginia Street, East, Suite 600

P.O. Box 3710

Charleston, WV 25337-3710

Telephone: (304) 345-4222

Facsimile: (304) 343-3133

E-mail: adunn@baileywyant.com

TABLE OF CONTENTS

Table of Authorities 3
Assignment of Error 4
Statement of the Case4
Summary of Argument 6
Argument 7
Conclusion21

TABLE OF AUTHORITIES

Case law:

Ferrell v. Santander Consumer USA, Inc., 816, 817, 859 F Supp. 2d 812 (S.D.W.Va. 2012) 8

Bourne v. Mapother, 998 F. Supp. 2d 495 (S.D. W.Va. 2014) 9

Duncan v. JP Morgan Chase Bank, 2011 U.S. Dist. Lexus 127884, 2011 WL 5359698 (S.D.W.Va. 2011) 10

FTC Statements of General Policy or interpretation Staff 10

Figgatt v. Green Tree Servicing, LLC, Civil Action Number 10-C-930(b) 11

Commentary in the FDCPA, 53 Fed. Reg. 50097, 50105 (Dec. 13, 1988)

3A Norman Singer, Sutherland Statutory Construction § 71:5 (7th ed.) 16

2 Norman Singer, Sutherland Statutory Construction § 41:11 (7th ed.) 16

Sizemore v. State Workmen's Compensation Commissioner, 159 W.Va. 100, 219 S.E.2d 912 (1975), Syllabus ¶. 3. 16

Petition for Attorney's Fees and Costs, 234 W.Va. 485, 766 S.E.2d 432 (2014) 16

Statutes

West Virginia Code, 46A-2-125. 5, 16

West Virginia Code, 46A-2-125 (d). 4, 5, 6, 7, 8, 9, 11, 12, 15

West Virginia Code, 46A-2-128 5

West Virginia Code, 46A-2-101 et. seq 4

West Virginia Code, 46A-2-128(e) 5, 6

III. ASSIGNMENTS OF ERROR

1. **The Lower Court committed error in holding that, as a matter of law, the number of phone call attempts made by a debt collector to a debtor, within a given period of time, without other evidence of inappropriate communication, can support a finding that the debt collector caused “. . . a telephone to ring or engaging a person in telephone conversation repeatedly or continuously . . . with the intent to annoy, abuse, oppress” as prohibited by *West Virginia Code, 46A-2-125(d)*.**
2. **The lower Court committed error in making a factual finding that Defendant knew it was calling Plaintiff based upon the fact that the calls were made to Plaintiff’s cell phone which had a voice mail greeting and that the original creditor gave Defendant the number it had associated with Plaintiff’s account.**
3. **The lower Court committed error in not applying the 2015 Amendment to West Virginia Code, 46A-2-125(d) to the facts of this case; the application of this Amendment to the facts of this case would have clearly supported a defense verdict as a matter of law.**
4. **The lower Court committed error in factually finding that Defendant’s auto dialer calls made to Plaintiff’s phone, unanswered and not returned by Plaintiff; alone, constituted evidence of Defendant’s intent to annoy, abuse or oppress Plaintiff sufficient to support a violation of *West Virginia Code, 46A-2-125(d)*.**

IV. STATEMENT OF THE CASE

This Petition for Appeal stems from a lawsuit Plaintiff Gary J. Lenahan filed against Valentine & Kebartas, Inc. (hereinafter V&K) associated with V&K’s attempt to collect an ADT debt from Plaintiff. Plaintiff filed his lawsuit on or about March 7, 2013, asserting 5 causes of action; primarily associated with V&K’s conduct as a debt collector and pursuant to *West Virginia Code, 46A-2-101 et. seq.* Plaintiff also stipulated that he would not accept any verdict amount greater than \$75,000.00 so that the case could not be removed to federal court. The case was discovered and ultimately a pretrial conference was held before the trial court on January 28, 2015 followed by the Court’s adoption of a Pretrial Order entered January 30, 2015, setting forth the issues of fact and law to be tried at an agreed-to bench trial before the Honorable Judge Robert A. Burnside, Jr., on February 2, 2015. In the Pretrial Order, the Court indicated that the trial would address two primary issues of fact and law: 1) Whether Defendant’s conduct in calling Plaintiff to attempt to collect a debt violated *West Virginia Code, 46A-2-125(d)* and/or

128; and, whether Defendant called Plaintiff to attempt to collect a debt after he had notified Defendant that he was represented by counsel, in violation of 128(e). The factual and legal issues at trial surrounded the issue of the volume of calls made by Defendant to Plaintiff and whether Defendant called Plaintiff after he had provided Defendant the name of his retained counsel.

During the one day trial, two witnesses were presented to testify; Lynn Diaz, a representative of Defendant; and Plaintiff. The only exhibit to the trial was Plaintiff's exhibit 1 which was the computerized account history and notes of Defendant's collection efforts on the account. At the conclusion of the trial, the Court requested that the parties submit proposed findings of fact and conclusions of law representing their respective positions. In Mid-February, 2015, counsel submitted timely, competing proposed findings of fact and conclusions of law; counsel for V&K also submitted to the Court a Supplemental Post-Trial Memorandum of Law addressing the March, 2015 legislative amendment to *West Virginia Code*, 46A-2-125; an amendment to the statute at issue that went into effect June 15, 2015. On January 15, 2016, Judge Burnside issued his Verdict Order that is challenged by Petitioner in this Appeal.

In the Verdict Order, the Court erroneously concluded that Defendant's attempt to collect a debt from Plaintiff by having sent Plaintiff one collection letter and then having a computer dial the phone number for Plaintiff given to V&K by the creditor ADT, 252 times over the period of March 10, 2012 through November 17, 2012; none of which resulted in any communication with Plaintiff, was a violation of *West Virginia Code*, 46A-2-125(d). 230 calls over an 8 month period of time constituted harassment of Plaintiff by Defendant based solely upon the volume of calls alone. In doing so, the Court concluded that the first 22 calls made by Defendant's auto dialer where appropriate attempts to collect a debt; however, any subsequent call after that was deemed to be harassment by causing Plaintiff's phone to ring "repeatedly or continuously". Because the Court found that Defendant committed over 230 violations of 125(d); a finding that would support a penalty of an amount greater than the

\$75,000.00 stipulated damage amount, the Court did not make any factual or legal findings associated with the allegation that Defendant violated *West Virginia Code, 46A-2-128(e)* or that Defendant's conduct rose to a level of misconduct supporting any of the other alleged violations of law contained within Plaintiff's Complaint. Therefore, the only issue for consideration in this appeal is whether Judge Burnside's determination that Defendant violated *Section 125(d)* was erroneous as a matter of law and/or the result of an abuse of discretion based upon one or more erroneous findings of fact. Petitioner contends that Judge Burnside's Findings of Fact are not supported by the testimony and evidence adduced at trial; and, that the Conclusions of Law are erroneous given the facts of the case; as a result, the Verdict Order must be overturned and Defendant is entitled to Judgment as a matter of law.

V. SUMMARY OF ARGUMENT

The trial court's Verdict Order is based upon an abuse of discretion in its determination of fact from the testimony at trial; an improper inference drawn from that basic fact; and, an erroneous finding of law. In supporting the Verdict Order, Judge Burnside made the following findings of fact relevant to this Petition: Defendant placed 252 calls to Plaintiff's phone with the first 250 calls being unanswered; Plaintiff's phone (a cell phone) had voice mail and caller ID; Defendant knew that it was calling Plaintiff personally; and, that Defendant's calls resulted in activating Plaintiff's answering machine which identified Plaintiff as the owner of the phone number called. Based upon these findings of fact, the lower Court made one key erroneous conclusion of fact: that Defendant knew it was calling Gary Lenahan; and based upon this erroneous finding of fact, the Court then concluded that Defendant's act of calling him 230 times without a response constituted harassment by causing his phone to ring "repeatedly or continuously" solely by virtue of the number of call attempts. The error made by the trial Court is simple; the undisputed facts are that the 250 calls made by Defendant were placed by an auto dialer, a computer based calling system; no person called Plaintiff; no representative of Defendant

ever heard Plaintiff's voicemail greeting. Therefore, even if one assumes the evidence presented by Plaintiff at trial is correct in that his cell phone voice mail system identified himself to callers; this fact cannot support the conclusion drawn by the Court that Defendant knew it was calling Plaintiff: simply stated, a computer cannot listen to a voice mail recording and know whose voicemail it has activated. The fact that Defendant's computer called Plaintiff's computer voicemail cannot support a finding of fact that any actual representative of Defendant was aware that the auto dialer was calling the correct number and was actually contacting Gary Lenahan or his voicemail. Finally, the undisputed testimony of Defendant's corporate representative at trial was that the auto dialer was programmed to hang up once it detected a voicemail recording; therefore, it was also an erroneous conclusion of fact for the Court to conclude that simply because Defendant's auto dialer may have activated Plaintiff's voicemail; that Defendant ever knew that it was reaching Gary Lenahan or his voicemail. The trial Court's conclusion that Defendant violated Section 125(d) because it intentionally called Plaintiff's cell phone 230 times, knowing that it was calling Plaintiff specifically; and, that the sheer number of times Plaintiff's phone was called can support a violation of Section 125(d) was erroneous as a matter of fact and law. Finally, the Trial Court's conclusion of law that a defendant can be held liable for a violation of Section 125(d) based upon the sheer volume of calls alone made to a debtor; never answered; and when no communication occurs between the two parties take place; is further erroneous as a matter of law.

VI. ARGUMENT

1. The Lower Court committed error in holding that, as a matter of law, the number of phone call attempts made by a debt collector to a debtor, within a given period of time, without other evidence of inappropriate communication, can support a finding that the debt collector caused ". . . a telephone to ring or engaging a person in telephone conversation repeatedly or continuously . . . with the intent to annoy, abuse, oppress" as prohibited by West Virginia Code, 46A-2-125(d).

The trial Court's decision was primarily premised upon the findings of fact and conclusions of law contained within pages 3 and 5 of the Verdict Order; the only legal authority relied upon the Court

was the Southern District Court case of *Ferrell v. Santander Consumer USA, Inc.*, 859 F. Supp. 2d 812 (S.D.W.Va. 2012); the trial Court clearly concluded, although not specifically stating such, that call volume alone by a debt collector can support a finding of fact that the collector intended to harass the debtor by causing the debtor's phone to ring "repeatedly or continuously". In paragraph 3 of the Court's Conclusions of Law, it stated that it was to "look at Defendant's testimony to determine Defendant's intent in making the telephone calls and to determine what legitimate purpose, if any, was advanced by the telephone calls" (emphasis added). The Court erroneously attempted to draw a conclusion as to Defendant's **INTENT** to harass Plaintiff based solely upon the volume of unanswered calls made to a phone number that Defendant had no way of knowing was Plaintiff's phone. The Court relied upon the general statement of Judge Copenhaver in the *Ferrell* case at page 816 of that decision; wherein that Court stated that a debt collector can violate Section 125(d) in three ways: 1) making calls repeatedly or continuously; 2) making calls at unusual times; or 3) making calls when the times are known to be inconvenient. Under the facts of this case, we know that 2 and 3 above are not at issue herein. Therefore, Judge Burnside erroneously relied upon Judge Copenhaver's recognition that Section 125(d) prevents a collector from making repeated or continuous calls to a debtor as supporting the proposition that the volume of calls alone made to a consumer can be deemed to be oppressive or abusive. And further, in this case, Judge Burnside further erroneously concluded that V&K knew it was calling Gary Lenahan because its computer had activated his voicemail; therefore, V&K's computer calls to Plaintiff over the 8 month period of time at issue amounted to an intent to harass Plaintiff.

It is not disputed that the parties and the lower Court were in agreement that this Supreme Court has not had an occasion to issue a decision addressing an interpretation of 46A-2-125(d) governing the exact issues on point in this case which is why Judge Burnside relied upon the *Ferrell* case. In that case, the plaintiff took out a car loan then became late on the payments resulting in telephone attempts to collect the debt by the defendant. The allegations in the Complaint in that case were that

the collector called plaintiff after he indicated he was represented by counsel and, too many times: 75 times over a 2 month period. There were also questions of fact as to whether the collector called plaintiff's co-worker on his cell phone; plaintiff's sister; and, on at least one occasion mentioned plaintiff's indebtedness to plaintiff's brother's wife. *Id.*, p. 816. In the *Ferrell* case, the Defendant filed a Motion for Summary Judgment and argued that the facts of the case could not support a violation of the WVCCPA as alleged. In opposition to the MSJ, plaintiff argued that the sheer volume of calls made was sufficient to demonstrate a material issue of fact; the defendant disagreed. Judge Copenhaver ruled that defendant was not entitled to summary judgment as the facts taken as a whole; the call volume and the other alleged calls made to third parties, created a genuine issue of material fact as to whether defendant violated 125(d). *Id.*, p. 816-817. There was no pronouncement in this decision that call volume alone can support a finding of a violation of 125(d) as a matter of law; Judge Burnside's reliance upon Judge Copenhaver's ruling in the *Ferrell* case supporting the denial of a motion for summary judgment as establishing this legal standard was erroneous as a matter of law.

In Petitioner's post trial Memorandum of Law submitted in this case, Judge Burnside was directed to the District Court case of *Bourne v. Mapother*, 998 F. Supp. 2d 495 (S.D. W.Va. 2014); a case decided two years after *Ferrell*, wherein Judge Faber did specifically address the issue of whether call volume alone could support a finding of a violation of Section 125(d); Judge Faber held that call volume alone cannot support such a violation. Judge Burnside simply stated that he was not going to follow the pronouncements in the *Bourne* case in his decision herein. It also seems persuasive that Judge Faber in the *Bourne* decision cited to the *Ferrell* decision and the plaintiff's arguments in that case that the requisite intent to annoy, abuse, oppress or threaten can be established by the volume of telephone calls or the nature of the telephone conversations; however, clearly, Judge Faber was not persuaded by this argument that call volume can establish such a violation because he went on to state in *Bourne* that the West Virginia Supreme Court of Appeals has not had occasion to address the specific statutory

provisions with any detail. But, fortunately, the federal diversity cases interpreting the WVCCPA, and the numerous cases interpreting the near identical provision of the FDCPA are very helpful. The Court in *Bourne* held that the volume and nature of the calls did not evidence an intent to annoy, abuse, oppress or threaten. Judge Fabor went on to state that a review of cases interpreting the analogous FDCPA provision bolsters these conclusions.¹ The *Bourne* Court stated that in the federal court cases where summary judgment was denied as to WVCCPA defendants, those cases involved many more calls and other evidence which suggested abuse. The *Bourne* Court cited to *Duncan v. JP Morgan Chase Bank*, 2011 U.S. Dist. Lexus 127884, 2011 WL 5359698 (S.D.W.Va. 2011) wherein Judge Berger held that 68 calls over 11 months coupled with abusive language in at least one of the phone calls, a fact that more directly displays the requisite intent than the volume of calls, did not support an award of summary judgment. Id. What is important here in this analysis is the recognition that the more important fact in determining a violation of this act, the necessity of finding intent, is associated with conduct in addition to that of just the volume of calls. In other words, there must be evidence to support the position that the defendant intended to harass the consumer by conduct more than just making phone calls in a case where the parties never speak; the content of actual discussions is what has been viewed as crucial to determine intent to harass. The *Bourne* Court went on to rely upon the holdings in a number of other cases interpreting the federal act to support its conclusions of law. The Court stated “T[h]ese cases generally go as far as asserting that even daily phone calls, without other abusive conduct are insufficient to raise a triable issue of fact.” Id., (emphasis added).

Because Judge Fabor in the *Bourne* case analyzed the alleged violation of Section 125(d) by referring to a number of other federal court cases throughout the country that interpreted the FDCPA; it

¹ As with our state act, the FDCA does not define the terms “continuously” or “repeatedly”; also neither act sets forth the specific number of calls that constitute harassment. The Federal Trade Commission Staff has ruled that a consumer is called continuously if he receives a series of collection calls, one right after the other; the Staff has defined “repeatedly” as calling with excess frequency under the circumstances. *FTC Statements of General Policy or Interpretation Staff Commentary in the FDCPA*, 53 Fed. Reg. 50097, 50105 (Dec. 13, 1988).

is clear from a review of these cases that sheer call volume is not sufficient in and of itself to support a violation of the FDCPA; nor should call volume solely support a violation of the WVCCPA respectively. However, given this analysis of judge Fabor, the lower Court herein did not even consider this argument when finding that as a matter of law, V&K violated 125(d) by making 230 unanswered calls to Plaintiff's voicemail without leaving a message and, without any actual conversation between the two parties; it is clear that Judge Burnside erroneously determined that call volume alone, without any communication between the parties, could support a violation of the WVCCPA because there are no facts in this case to support any other conclusion. And specifically, in this case, from a technical, factual standpoint, the conduct Judge Burnside found to be abusive was not conduct of a person; the calls were all interactions between computers; Defendant's calls were made by a computer dialer; all received by Plaintiff's computer voicemail system associated with his cell phone; and there was no testimony at trial as to evidence of messages being left on plaintiff's voicemail. In fact, Plaintiff testified that he didn't even recall ever listening to a single voicemail message left by Defendant. Tran., p. 154.

Further, the trial Court's conclusion that Defendant's unanswered calls to Plaintiff over an 8 month period, alone, could constitute harassment and illegal, continuous calls in violation of *Section*, 125 when this same Court had previously stated in a Judgment Order in August, 2012, in a case styled *Figgatt v. Green Tree Servicing, LLC*, Civil Action Number 10-C-930(b); stemming from a bench trial; that 615 calls over a 44 month period, while annoying to a debtor, **does not violate *Section* 125(d)** based upon the sheer volume of calls alone. This decision was cited by Defendant's counsel in its proposed findings of fact and conclusions of law to the Court and never addressed by the Court.

2. The lower Court committed error in making a factual finding that Defendant knew it was calling Plaintiff based upon the fact that the calls were made to Plaintiff's cell phone which had a voice mail greeting and that the original creditor gave Defendant the number it had associated with Plaintiff's account.

Beyond this issue of an misapplication of law by the trial Court, the lower Court further compounded its error by attempting to determine as a matter of fact that Defendant could have formed the requisite intent to have harassed Plaintiff by making an inappropriate volume of calls to Plaintiff under a flawed finding of fact that Defendant actually knew it was calling Plaintiff because it had to have known it was calling the correct number for Plaintiff because Plaintiff testified that his phone had voicemail identifying himself. As state above, this erroneous finding of fact was the result of an inappropriate assessment of the evidence of record. The undisputed evidence of record was that all 250 calls were made by a computer dialer and not a person; that the dialer is set up to terminate the call when an answering machine is detected Tran., p. 27; and, it is flawed logic to conclude that if a computer dialer does actually activate a computer voicemail associated with a cell phone and the voicemail message is played, that a representative of Defendant could ever know that the computer dialer actually called the right person's phone number. Because this is a factual impossibility, the conclusion that Judge Burnside reached; i.e., that Defendant knew it was calling Plaintiff specifically; therefore, It could have formed the requisite intent to harass him by making a large number of calls to his cell phone, is simply unsupported by the evidence of record. It is a factual impossibility for person A to intent to harass person B by communication if person A does not know he is communicating with person B. Therefore, the conclusion of law that Defendant violated Section 125(d) by intending to call Plaintiff repeatedly or continuously is not supported by any appropriate finding of fact from the evidence adduced at trial.

Respondent will likely argue that the harassment was simply based upon the fact that Defendant's manager requested its computer call Plaintiff 230 times, after March 26, 2012; and the act of causing the dialer to call was the act that constituted a violation of *Section 125*. However, this argument is simply not persuasive and not what the trial Court based its Verdict Order on; the trial Court based its logic and conclusion of law on the determination that Defendant "knew it was

calling Gary Lenahan” because his phone number was provided by the creditor; and, that “an answering machine was detected and Mr. Lenahan has already established through testimony that his outgoing message identified himself as the owner of the telephone number.” Verdict Order Conclusion of Law number 5. Then, the trial Court went further to conclude in the Order that “The Court cannot fathom any possible legitimate purpose that could be served by increasing the volume and frequency of collection calls to a consumer **who is known to exercise dominion over the telephone number being called and who has already been informed that Defendant was collecting a debt by mail.** Verdict Order Conclusion of Law number 9. It is clear from reading the Verdict Order that the lower Court thought it important to determine that Defendant had knowledge it was calling Plaintiff specifically, in order to support a finding of intent to harass. However, the factual basis upon which the Court relied to make this finding of fact and related conclusion of law was flawed as there was no factual evidence adduced at the trial that could support a conclusion that Defendant ever had knowledge that the address it sent the letter to or the phone number it was dialing was Plaintiff’s. It is not logical to conclude that simply because Defendant was given a phone number for Plaintiff by ADT; that the number was actually Plaintiff’s number without any effort on Plaintiff’s behalf to confirm same. Individuals move; individuals change phone numbers (especially cell phone numbers); there are a myriad of reasons why it is not logical to assume that simply because a business has a phone number purported to be that of a client, customer, etc., that it can have actual knowledge that the phone number is currently the correct number; especially when the number is called numerous times without being answered or a return call made, over an extended period of time. Because this finding of the fact made by the lower Court was obviously an integral component of its logic and then the conclusion that Defendant’s actions amounted to a violation of law; an argument that the simple attempt to make the number of calls made by

Defendant, without this imputed knowledge of Defendant, is not what the trial Court relied upon in drawing its conclusions.

It is clear that the lower Court analyzed the facts of this case and deemed the improper finding that Defendant knew Plaintiff specifically knew it was calling him and, that he specifically did not want to talk to it; as opposed to any other possibility such that Plaintiff himself did not know Defendant was trying to contact him or for what purpose. Simply stated, the logic and rationale used by the Court was based solely upon the simple concept outlined in its May 22, 2015 Memorandum wherein the Court explained that the analysis of this entire case was based upon one premise; if an individual calls another individual a number of times without successfully communicating with the individual called or receiving a return call; the only logical conclusion that can then be reached is that person B, that person A is trying to talk to, does not want to talk; therefore, continued attempts to contact person B must be deemed to be harassment because person A is then imputed with the knowledge that it has reached person B and that person B has made a conscious decision not to communicate.

First, Petitioner would assert that this over simplified logic associated with casual telephone communication is not appropriate to the world of debt collection. A debt collector, as Judge Burnside has noted, has a legal right to attempt to contact a debtor by phone; this is obvious. There is also case law that stands for the proposition that all debt collector calls can be deemed unwanted; these calls were business calls and were not calls made by individuals for casual conversation. The trial Court concluded that Plaintiff's silence meant that he knowingly determined he did not want to talk to Defendant and, more importantly, that Defendant should have drawn this same conclusion based upon the fact that no contact was made or return call occurred. The Court, in a footnote in its Memorandum, analyzed the facts of this case and a debt collector's efforts to call a debtor who does not respond, in contrast with a hypothetical dating scenario where a man sits next to a woman

and tries to strike up a conversation but it becomes clear that the woman is not interested in the man because she refuses to acknowledge his comments; this analogy is not consistent with this fact pattern for the basic reason that in the Court's hypothetical, there is no doubt in the man's mind based upon the fact that he is sitting next to the woman, that she is not interested because she will not acknowledge his advances; that her silence should tell him that she does not want to talk to him. This analogy is not relevant to the facts of debt collection efforts by a business attempting to contact a debtor by phone; the collector is not physically present with the debtor; the collector does not know that the debtor knows it is calling; and, the collector cannot then be assured that the debtor will not later pick up the phone or make a return call. The persistence that a debt collector must have is not the same as a guy wanting to talk to a girl. In fact, in this case, we know that Defendant's persistence paid off, on the 251st call, Plaintiff answered the phone; although he at that time also refused to identify himself as Gary Lenahan. This analysis of this type of case should not be governed by common interpersonal communication standards of the public. Defendant had no way of knowing Plaintiff's personal situation: whether he had the same phone number; had moved; was screening calls because he was getting calls from other collectors; disputed the debt; had money to pay the debt; etc.; its intent should not have been inferred from the simple fact that its computer called a number thought to be Plaintiff's and he never answered the phone; the fact that he did not answer the phone is the only conclusion that was proper to be drawn from these facts and nothing more. The conduct of the parties is not akin to the personal communication in the scenario posed by the Court in its Memorandum and the same logical analysis of the causal communication by a guy and a girl on a bench is not persuasive.

- 3. The lower Court committed error in not applying the 2015 Amendment to West Virginia Code, 46A-2-125(d) to the facts of this case; the application of this Amendment to the facts of this case would have clearly supported a defense verdict as a matter of law.**

Plaintiff's counsel has contended in this case that the 230 attempted calls made to Plaintiff's cell phone violated *Code*, 125(d) which makes it illegal to: "Causing a telephone to ring or engaging a person in telephone conversation repeatedly or continuously, or at unusual times or at times known to be inconvenient, with the intent to annoy, abuse, oppress or threaten any person at the called number." Under the facts of this case, Defendant called Plaintiff 44 times in March; 54 times in April; 53 times in May; 34 times in June; 25 times in July; 17 times in August; 27 times in September; and 7 times in November, 2012. (Remember in the *Figgatt* case, the defendant called on average 14 calls a month).

In March, 2015, the legislature passed an amendment to the WVCCPA that became effective in June, 2015 and, this amendment, in relevant part, stated that the Bill was to **amend and reenact** 46A-2-125 . . . , all relating to **clarifying** permitted and prohibited actions with regard to the prohibition on oppression and abuse in the course of debt collection. . . . *West Virginia Code*, 46A-2-125 is the section of the Act that deals with Oppression and Abuse by debt collectors. [Emphasis added] It was Defendant's position after the trial of this case and it is Petitioner's position now, that "Where a statute provides that it clarifies existing law, such a provision indicates an intent that the amendment apply to all existing causes of action from the date of its enactment." See, 3A Norman Singer, Sutherland Statutory Construction § 71:5 (7th ed.). See also 2 Norman Singer, Sutherland Statutory Construction § 41:11 (7th ed.)("an amendment may be applied retroactively if it is curative and it is intended to clarify rather than change the law,... and as long as there is no interference with vested rights or contractual obligations.")(footnote omitted). "A law is not retroactive merely because part of the factual situation to which it is applied occurred prior to its enactment; only when it operates upon transactions which have been completed or upon rights which have been acquired or upon obligations which have existed prior to its passage can it be considered to be retroactive in application." *Sizemore v. State Workmen's Compensation Commissioner*, 159 W.Va. 100, 219 S.E.2d 912 (1975), Syllabus ¶. 3. See also *In re Petition for Attorney's Fees and Costs*, 234 W.Va. 485, 766 S.E.2d 432 (2014)(statutory enactment during

litigation, held to apply to pre-amendment work, without being retroactive). Because is it clear from the preamble of this amended statute that the prohibited conduct of debt collectors set forth in 125(d) was meant to be clarified by the passage of this new law, the lower Court should have considered the new provisions of 125(d) instructive on the legal and factual issues in this case and consider the amendment to 125(d) in assessing the facts of this case under the confines of the new amendment, finding that Defendant did not violate 125(d) when it called Plaintiff 251 times over nine months; never calling Plaintiff more than 54 times in any one month. If the Court for some reason did not believe that this new amendment to the section in question was controlling, the Court should have, at a minimum, considered the clarification of the section instructive and should have still found the provisions instructive and persuasive. However, the trial Court never considered this argument at all as evidenced by the Verdict Order.

Under the new amendment to 125(d), this section has been specifically clarified to quantitatively set forth the number of times that a debt collector can call a debtor in any given week and the number of times that a collector can talk to a debtor in a week; the number of actual communications per week is not an issue here. Under the amendment, a collector is permitted to call a debtor up to 30 times in one week before the calling can be considered abusive or oppressive. Therefore, a collector may call a debtor up to 120 times per month, (for the months made up of 4 weeks), before a Court can find that the collector violates 125(d) by repeatedly calling a debtor; this equates to 1560 calls a year or 130 calls a month on average. Clearly, under the facts of this case, Defendant never called Plaintiff half of that number of times per month as would be permitted under this amendment as it called Plaintiff 251 times in 9 months and no more than 54 times in the month of the highest number of calls; April, 2012. Because Defendant never called Plaintiff close to 120 to 130 times per month, and there are no other facts that can support a finding that Defendant's conduct

violated Section 125; the Verdict Order should be reversed by this Court and Petitioner should be granted judgment as a matter of law.

- 4. The lower Court committed error in factually finding that Defendant's auto dialer calls made to Plaintiff's phone, unanswered and not returned by Plaintiff; alone, constituted evidence of Defendant's intent to annoy, abuse or oppress Plaintiff sufficient to support a violation of West Virginia Code, 46A-2-125(d).**

The lower Court abused its discretion in determining that all calls by Defendant after the second week of calls, evidenced an intent to harass Plaintiff by Defendant thereafter making *repeated* calls. The rationale that the Court used to support this conclusion was that after Plaintiff did not answer any of the first 22 calls or call Defendant back, the Defendant "ramped up" its calling which demonstrated evidence that it intended to harass Plaintiff. Again, while there is no evidence of this requisite intent under the facts in evidence, this inference from the facts is further not supported by the evidence. While it is true that during the 37 weeks that Defendant auto dialed Plaintiff's phone, the week with the most calls was the week of March 26th when 22 calls were made. However, after that week, there is no evidence that Defendant "ramped" up the calling; and again, at no time did Defendant ever call Plaintiff 30 times in a week or more; the Court's reliance upon this erroneous "ramping up" of calls could never support a finding of a violation of the amended Section 125(b) (or the pre-amended section) as the "ramping up" was still less than 30 calls per week. Nevertheless, there was no "ramping up"; even if "ramping up" is a relevant factor for consideration which Petitioner contends it is not. For the months after March in which Defendant called Plaintiff 44 times with the first call not occurring until the 10th of the month; it called 54 times in April; 53 times in May; 34 times in June; 25 times in July; 17 times in August; 27 times in September; no calls in October; and only 7 calls in November. Clearly, the evidence does not support a factual finding that Defendant called more aggressively after March 10, 2012 and after Plaintiff refused to communicate with it; just the opposite is factually accurate; as time went on, Defendant called less on average per month than in the beginning. It is Petitioner's position

that there is no factual basis to support the lower Court's conclusion of law in this case and the Court simply, arbitrarily picked a point in time with which to conclude that any calls thereafter was evidence of unreasonable conduct on behalf of Defendant; so, it arbitrarily chose call number 23 because that was the beginning of the week during which the most calls over 8 months were made. However, this was an arbitrary and capricious determination by the Court because with all of the calls over 8 months going unanswered and/or not returned; what could possibly separate call 23 from call 15, from call 50, from call 175, and so on, to support a determination that Defendant intended to harass Plaintiff. Finally, what is also obvious is that the Court simply adopted Plaintiff's counsel's argument as to the "cut-off" for the number reasonable and then harassing calls; Plaintiff's counsel's proposed Conclusion of Law number 11 made this distinction of calls starting at number 22 and even used the words "ramped up" in describing defendant's conduct. It is clear that the Court simply adopted Plaintiff's counsel's version of the facts without performing its own independent analysis and using its own judgment which is it required to do in order to not be arbitrary and capricious.

The Court's flawed logic is exactly the reason why unanswered call volume alone cannot and should not be used to support a violation of Section 125(d) without more; there is simply no way to objectively determine which call is harassing and which call is appropriate when one only looks solely at the volume of calls. This is why the majority of both state and federal courts require some other form of inappropriate, actual communication, in order to support a finding of the intent to harass under this state law and the related federal act. Absent this being the standard to be used in determining whether a collector has repeatedly called with an intent to harass; every debt collector in this country would be at the absolute mercy of every state and federal court judge in his/her respective jurisdiction, making inevitable inconsistent rulings as to how many calls are allowed and how many are permitted, over case by case specific bases. Under the logic and methodology used by the trial Court herein, 100 different judges looking solely at volume of auto dialer calls over a 8 month period of time, would surely all

conceivably reach different conclusions as to what the cut-off of appropriate number of calls vs. inappropriate calls would be; imagine a debt collector trying to predict how many calls it can safely make to attempt to collect a debt when it could be subject to penalties and an adverse verdict in some jurisdictions and not others; or subject to an adverse verdict based upon the last 50 calls made as determined by one judge; the last 75 made by another judge; the last 50 by still another judge; and so on. Clearly, this kind of arbitrary and capricious state of affairs is not desired (and likely the reasons why 125 was amended by the Legislature).

The simple fact is that in a case like this instant one, when there was never any communication between the parties that could be deemed harassing, to try to arbitrarily supported a factual finding that the first "X" number of calls are appropriate and then every call thereafter inappropriate, without some other factual support to differentiate the calls, is the very definition of an arbitrary and capricious finding of fact. And, there would be no way that a debt collector such as V& K could ever have a business practice of attempting to communicate with a debtor to collect a debt by phone without being concerned that a specific judge would find the conduct to be in violation of the WVCCPA; without the ability to reasonably foresee the result; under the facts of this case, a judge in Cabell County; a Judge in Ohio County; etc., could all have reached different conclusions without any meaningful, distinguishing factual basis. This is not how the law should work and would appear to the reason why the other state and federal court judges interpreting the facts of cases under the FDCPA, look to more than just call volume as the determining factor; and likely why our legislature last year decided to clarify the provisions of 125(d) and make it clear that a certain number of calls are permitted per week and a certain number of conversations are permitted a week; this approach provides predictability under the law and does not give rise to multiple, inconsistent rulings by different judges. Petitioner would be amiss in not stating that it does not argue a debt collector could call a debtor 100 times a day and be isolated from liability so long as there is no conduct; if this fact pattern did occur; the remedy would be

to find that the number of calls made per day would be deemed to be “continuous” calls as prohibited by 125(d) as opposed to “repeated” calls, as defined by Federal Trade Commission, which is what the issue in the case revolves around.

VII. CONCLUSION

Petitioner asserts that the Verdict Order in this case should be reversed by this Court as one of the key Findings of Fact made by the trial Court is not supported by the evidence and, as a result, was an abuse of discretion by the Court: namely, the Court incorrectly determined as a matter of fact that Defendant intended to harass Plaintiff by making a number of automated, computer dialed calls to a phone purported to be Plaintiff's; knowing that it was calling the correct phone number for Plaintiff based solely upon the fact that Plaintiff testified at trial that the phone number called was a cell phone and that this cell phone had voice mail greeting that identified himself as the owner of the number. However, the clear and undisputed evidence of record is that every call made to Plaintiff before the 251st call was a call made by a computer that could not comprehend a voice mail greeting. In addition, the undisputed evidence from the testimony of Defendant's representative was that once the auto dialer determined that an answering machine had been activated, the call was discontinued. Therefore, even the Defendant's computer did not “listen” to Plaintiff's voice mail greeting. As a result, it was not factually possible for Defendant to have actual knowledge that the number being dialed was Plaintiff's phone number. The lower Court improperly imputed Defendant's computer's activation of an individual's voice mail greeting to personal knowledge of the Defendant which it then used as a basis for the factual finding that Defendant called Plaintiff 230 times over an eight month period with the intent to harass him in violation of law.

Further, the trial Court compounded its abuse of discretion in determining the facts of this case by then erroneously finding as a matter of law that Defendant's attempts to contact Plaintiff through

the use of an auto dialer system, over approximately an 8 month period of time, calling on average 31 times per month, resulting in not one actual communication between the parties, amounted to calling “continuously or repeatedly” in violation of *West Virginia Code*, 46A-2-125; without any evidence of any inappropriate conduct of Defendant other than the attempt to reach Plaintiff via phone. The Court’s Conclusion of Law in this case improperly stands for the proposition that call volume alone can equate to a violation of Section 125; which is not supported by the language of the statute in question; any prior ruling by the Court; or any other federal or state court decision that could be deemed instructive or persuasive on the issue. Further, the Court abused its discretion in not considering in its analysis, the 2015 legislative amendment to Section 125; an amendment to the statutory provision at issue which the legislature specifically stated was intended to “clarify” the existing statutory provision.

Petitioner requests that this Court reverse the Verdict Order of the lower Court and find as a matter of law that Defendant’s conduct in attempting to contact Plaintiff through its use of an automated phone call system was not a violation of *West Virginia Code*, 46A-2-125; that Defendant did not intend to harass Plaintiff by its efforts at attempting to communicate with him in order to collect a debt; and, therefore, there is no need to remand the case to the trial Court for additional determination. Petitioner requests that this Court hold, as a matter of law, that Defendant did not violate West Virginia and that this case should be dismissed with prejudice; and, any and all other relief deemed appropriate.

Valentine & Kebartas, Inc.,

By Counsel,



Albert C. Dunn, Jr. (WV Bar #5670)
BAILEY & WYANT, PLLC
500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

NO. 16-0127

VALENTINE & KEBARTAS, INC.

DEFENDANT BELOW/PETITIONER

v.

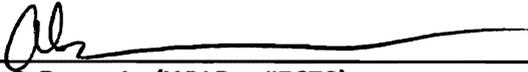
GARY J. LENAHAN

PLAINTIFF BELOW/RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing “Valentine & Kebartas, Inc.’s Petition for Appeal” was served upon the following parties by U.S. Mail on this day, Monday, April 25, 2016:

Ralph C. Young
Christopher B. Frost
Steven R. Broadwater, Jr.
Jed R. Nolan
Hamilton Burgess Young & Pollard PLLC
P.O. Box 959
Fayetteville, WV 25840-0959
Counsel for Gary Lenahan



Albert C. Dunn, Jr. (WV Bar #5670)
BAILEY & WYANT, PLLC
500 Virginia Street, East, Suite 600
Post Office Box 3710
Charleston, West Virginia 25337-3710
(304) 345-4222