



No. 13-0195

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

LIBERTY MUTUAL INSURANCE COMPANY,
a Massachusetts corporation; and GREG CHANDLER'S
FRAME & BODY, LLC, a West Virginia limited
liability corporation, Defendants Below,
Petitioners,

v.

PATRICK MORRISEY, ATTORNEY GENERAL, Plaintiff Below
Respondent.

REPLY BRIEF OF PETITIONERS

Clarence E. Martin, III, Esq.
W.Va. State Bar No. 2334
Martin & Seibert, LC
1453 Winchester Ave.
Post Office Box 1286
Martinsburg, West Virginia 25402-1286
Telephone: (304) 262-3213
Facsimile: (304) 260-3376
E-Mail: cemartin@martinandseibert.com
Counsel for Petitioners

R. Michael Shaw
W.Va. State Bar No. 3354
P.O. Box 3
610 Main Street
Point Pleasant, WV 25550
Telephone: (304) 675-5191
Facsimile: (304) 675-2654
Email: shawlaw@suddenlinkmail.com
*Counsel for Petitioner, Greg Chandler's
Frame & Body, LLC.*

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I. INTRODUCTION

The Petitioners Liberty Mutual Insurance Company (“Liberty”) and Greg Chandler’s Frame & Body, LLC (“Chandler”) respectfully submit this Brief as their Reply to the arguments raised by the Respondent, hereinafter referred to as the “WVAG”, in the Response Brief of the State of West Virginia Ex Rel. Patrick Morrissey, Attorney General (“Response Brief”). As fully addressed below, the Response Brief of the WVAG fails to provide a justifiable basis for this Court to refuse to reverse the Circuit Court’s December 18, 2012 Order (“Final Order”) as requested by the Petitioners. Instead, the WVAG’s Response Brief simply reiterates the same argument that the WVAG has proffered since the inception of this matter, that its interpretation of the West Virginia Automotive Crash Parts Act, W.Va. Code § 46A-6B-1, *et seq.* (“Crash Parts Act”) is correct, as affirmed by a fifteen (15) year old non-precedential and unpublished circuit court opinion involving different parties and warranties, and therefore, judgment should be affirmed as a matter of law. However, acceptance of the WVAG’s argument would require this Court to not only ignore the plain language of the Crash Parts Act and years of boilerplate case law concerning statutory construction, but to also prevent the Petitioners the opportunity to conduct discovery.

II. STATEMENT OF THE CASE

In the “Statement of the Case” section off their Appeal Brief, the Petitioners provided a very detailed and precise summary of the instant action, the claims at issue and the proceedings and rulings below. However, it is incumbent upon the Petitioners to address two specific issues concerning facts that the WVAG maintains are uncontested.

A. **It is not an uncontested fact that the Petitioners failed to provide notice to consumers that recycled OEM crash parts were used in estimation of repairs to motor vehicles.**

Without any support in the record, the WVAG alleges in its Response Brief that the Petitioners have admitted to concealing from consumers (1) the type of parts used in estimating repairs to damaged vehicles three years old or less (“late-model vehicles”); and (2) that repairs to their late-model vehicle were made with recycled OEM parts. Such accusations are completely untrue and not supported by the limited record before the Court.

On multiple occasions, the Petitioners informed the WVAG that they were providing notification to the consumers of the parts that were used to (a) provide an estimate for their repairs, and (b) to repair the motor vehicle. Liberty's TLC body shops are required to provide the consumer with a copy of the estimate and obtain consent to proceed before any repair work commences. In fact, the Circuit Court asked Petitioners' counsel this very question during oral argument on September 24, 2013:

THE COURT: Why wouldn't they [Liberty and Chandler] just go ahead and tell the consumer when you bring a car in for repairs that they're going to put a certain kind of parts on them?

MR. MARTIN: Well, in fact, Mr. Chandler, Your Honor, when he gives – when he does it, the consumer gets an estimate of what the repair is; and if you look at it, it will say what kind of part it is, whether it's a new part, a recycled part, or an OEM part. And then the consumer has to sign a consent.

See, App., p. 1315, lines 2-9.

The foregoing statement by counsel for the Petitioners is supported by the documents obtained by the WVAG from fourteen (14) of Liberty's TLC Shops in West Virginia. Liberty's TLC shops consistently provided a detailed estimate to the consumer which included a list of parts that would be used in advance of the performance of repairs. However, as noted by the Petitioners in their Appeal Brief, the WVAG refused to produce these documents, despite the fact that W.Va. Code § 46A-7-104(4) specifically provides that there is no privilege associated with such documents once enforcement proceedings are initiated. See App., p. 0639 (Req. 1) pp. 0461-0475 (Affidavit), ¶¶ 29, 31-32, 34-35, and 37-38. Thus, these records were not before the Circuit Court when it reached its decision, and therefore not part of the record because of the WVAG's refusal to participate meaningfully in discovery. Nonetheless, even the limited record before the Circuit Court, and the hand-picked documents presented in piece-meal fashion as exhibits to the WVAG's various pleadings, corroborate that notification concerning the type of parts used in the estimates were provided by the Petitioners to consumers. In this regard, the Petitioners would direct the Court to the following:

1. The Affidavit of Charles Parsons dated 09/20/2011. See App., pp. 0081-0083, 0169-0171 and 0738-0740. While Mr. Parsons' affidavit indicates that Liberty implemented a policy change in March 2011 concerning the use of recycled OEM parts, it is noteworthy that he did not attest that Liberty (a) intended to conceal the type of parts that would be used in preparing estimates, or in the completion of repairs from the consumer; or (b) directed Joe Holland to conceal from consumers the type of parts that

would be used in preparing estimates, or in the completion of repairs.

2. The Affidavit of Alice Dorsey dated 11/16/2011. See App., pp. 0084-0086, 0172-0174 and 0735-07737. Ms. Dorsey's affidavit indicates that Liberty implemented a policy change in the beginning of 2011 concerning the use of "used OEM genuine crash parts". It is noteworthy that she also did not attest that Liberty (a) intended to conceal the type of parts that would be used in preparing estimates, or in the completion of repairs from the consumer; or (b) directed Joe Holland to conceal from consumers the type of parts that would be used in preparing estimates, or in the completion of repairs.

3. The affidavit of Paul Stroebel, an intern employed by the WVAG, dated 06/01/2012, attached in support of the WVAG's Motion for Summary Judgment. Mr. Stroebel states that he reviewed documents obtained by the WVAG from fourteen (14) of Liberty's TLC Shops in West Virginia. He noted that he was asked to look only for consent statements where the consumer provided permission to the TLC body shop to use "aftermarket parts and/or salvaged parts" to repair motor vehicles. Notably, Mr. Stroebel was not asked to see if the estimates or other documents provided to the consumers listed the various types of parts at issue, which they do. Nonetheless, he did note that the repair orders [estimates and invoices] did reflect the use of recycled OEM parts. In fact, all of the estimates the affidavit plainly show if recycled OEM crash parts were relied upon in completion of the estimate. See generally, App., pp. 0324-0395. Also, attached to the affidavit is an Authorization to Repair & Direction of Payment which shows that the consumer gave authority to commence repairs following review of the estimate. See App., p. 0370.

4. The Consumer Complaint of Brian Holmes, dated 1/10/2012. See App., pp. 0680-0692. Mr. Holmes specifically states in his Complaint that he "signed estimate of work needed." The estimate attached reflects that recycled OEM parts were used in formulating the estimate.

5. The Consumer Complaint of Bobbie McMillian, dated 1/14/2012. See App., pp. 0696-0699. Mr. McMillian attached a copy of a letter from Liberty which indicates that he was provided a copy of an estimate for repairs to his vehicle. The attached estimate specifically indicates that recycled OEM parts were used in formulating the estimate.

As demonstrated by the foregoing, it was not, as alleged by the WVDOH, an uncontested fact that the Petitioners willfully concealed from consumers the type of parts utilized in estimating the costs of repairs to motor vehicles, or the actual parts used in performing repairs pursuant to such estimates. At the time the Circuit Court rendered its decision, there was actual evidence that the Petitioners were providing such notice to consumers. Furthermore, the Petitioners were precluded from deposing other purported fact witnesses of the WVAG who alleged or insinuated that they were not provided any notice, such as Regina Anderson, because they were attempting to secure full and complete written discovery responses from the WVAG for nearly five (5) months. At the very least, there was a genuine issue of material fact with respect to this issue at the time the Circuit Court rendered its decision.

B. It is not an uncontested fact that recycled OEM crash parts are not sufficient to maintain the original manufacturer's warranty for fit, finish, structural integrity, corrosion resistance, dent resistance and crash performance.

The WVAG maintains that it is essentially an uncontested fact in its Response Brief that recycled OEM crash parts are not sufficient to maintain the original manufacturer's warranty for fit, finish, structural integrity, corrosion resistance, dent resistance and crash performance. In support of this contention, the WVAG refers the Court to position statements from certain manufacturers, a letter from a trade association and a Federal Trade Commission ("FTC") letter. App., p. 0396-0414. At the outset it is important to recognize that the WVAG's contention is contrary to the FTC's position on this issue. The FTC has stated that "[s]imply using an aftermarket or recycled part does not void your warranty. The Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* makes it illegal for companies to void your warranty or deny coverage under the warranty simply because you used an aftermarket or recycled part." While the FTC notes that the manufacturer has the right to deny coverage if it determines that the part "was itself defective or wasn't installed correctly, and it causes damage to another part that is covered under the warranty", it is noteworthy that such denial is not automatic and requires proof from the manufacturer. See App., pp. 0137; 0455; or 1173. It is worth noting that every new car warranty issued by manufacturers also provides them with the same leeway to void a warranty, in whole or in part, if the vehicle is involved in an accident regardless of how the repairs are made, or who makes them.

Moreover, the "evidence" the WVAG has directed this Court to review does not support its position. First and foremost, any manufacturer that voids a warranty simply because recycled OEM crash parts are utilized is violating the Magnuson-Moss Act Warranty ("MMWA"). See App., pp. 0137; 0455; or 1173. Second, "evidence" that the WVAG downloaded from the internet fails to demonstrate that the use of recycled OEM crash parts is not "sufficient" to maintain a new car's warranty. In that regard, the Petitioners would point out the following for the Court's benefit:

1. Mazda, news release dated 08/12/2011. See App., p. 0396. This news release does not address the use of recycled OEM parts, but instead outlines Mazda's position with respect to the use of aftermarket parts which are not at issue in these proceedings.
2. Volvo Service Manager Bulletin dated 07/18/2011. See App., p. 0397. This Bulletin does not address the use of recycled OEM parts, but instead outlines Volvo's

position with respect to the use of aftermarket parts which are not at issue in these proceedings. The Bulletin states that Volvo “does not *support* the use of aftermarket, alternative or anything other than original Volvo parts for collision repair.” As noted in the Petitioners’ Appeal Brief, recycled OEM parts are not aftermarket, reverse-engineered or alternative parts. A recycled OEM part is a part that was made for and installed in a new vehicle by the manufacturer or the original equipment manufacturer, and later removed from the vehicle and made available for resale or reuse. See App., pp. 0137, 0455 or 1173; 0211; and 0268-0269. Under this standard, a recycled OEM Volvo part would, by definition be an original Volvo part.

3. Honda Position Statement concerning the replacement of structural parts on Honda and Acura Vehicles, dated 03/22/2010. See App., p. 0398. According to the statement, Honda “does not support the use or re-use of structural components that have been removed and salvaged or recycled from an existing vehicle that has been previously damaged.” Nonetheless, the statement DOES NOT state that Honda will void a new car warranty if recycled OEM parts are used.

4. Honda Position Statements concerning Acura Genuine Parts and Honda Genuine Parts, dated 08/20/2010. See App., pp. 0399-400. Neither of these Statements address the use of recycled OEM parts. Instead the statements outline Honda’s position with respect to the use of “aftermarket, counterfeit or gray market” parts in the repair of Honda and Acura vehicles. These types of parts are not at issue in these proceedings.

5. Ford brochure entitled “Facts you Need to Know How to Avoid Pitfalls in Collision Repair.” See App., pp. 0401-0405. While this brochure may appear to be a public service announcement, in actuality it is nothing more than a sales brochure designed to persuade consumers to purchase only brand new OEM parts directly from Ford or its authorized dealers. In any event, this brochure does not indicate that the use of recycled OEM parts in the repair of late-model vehicles will serve to void the Ford’s new car warranty as suggested by the WVAG. Instead, the brochure simply states that **future** “[d]amage to your vehicle or its parts caused by the failure of new aftermarket, salvage or reconditioned parts *may not* be covered by your Ford Motor Company new-vehicle warranty.”

6. Edmunds.com article entitled “What Voids Your Vehicle’s Warranty”, dated 07/28/2009. See App., pp. 0406-0408. This article does not discuss or even make reference to recycled OEM parts. Instead it discusses aftermarket parts which are again not at issue in these proceedings.

7. Letter from New York State Auto Collision Technicians Association to the WVAG dated 01/24/2012. At the outset, it is important to recognize that this letter is authored by a trade association charged with promoting the initiatives and purposes of its members. In that regard, the letter does not constitute unbiased opinions on the issues at hand. In addition, this letter indicates that the Association is “concerned that ‘aftermarket’ NON-OEM parts from ‘salvage yard’ vehicles are being sold as original manufacturer parts unbeknownst to shops and/or consumers. This situation is inapplicable to the instant case.

8. Letter from the FTC to Mr. Danny Wyatt of the Collision Service Investigators of North Carolina dated May 30, 2007. See App., pp. 0412-0414. The WVAG’s citation to this reference in support of its position is highly misleading. The Environmental Guides referred to in this letter do not apply to the instant case and therefore do not regulate the Petitioners’ conduct.

As the foregoing demonstrates, whether or not recycled OEM crash parts are sufficient to maintain the original manufacturer’s warranty under the Crash Parts Act is indeed a contested issue of fact.

III. ARGUMENT

The Response Brief submitted by the WVAG does not address the assignments of error as presented by the Petitioners in their Appeal Brief. Instead the WVAG divided its argument into four sections choosing to provide what purports to be singular combined responses to several assignments of error. However, the WVAG failed to respond whatsoever to certain assignments of error.

A. Assignments of error that were not addressed by the Respondent.

Rule 10(d) of the West Virginia Rules of Appellate Procedure (“W.Va.R.App.Proc. 10(d)”) provides that a response brief “must specifically respond to each assignment of error, to the fullest extent possible.” Rule 10 (d) further provides that “if the respondent’s brief fails to respond to an assignment of error, the Court will assume that the respondent agrees with the petitioner’s view of the issue.” Upon review of the Response brief, the Petitioners believe that the WVAG has failed to respond to Assignments of Error C, F and G as outlined in Section I of the Petitioners Appeal Brief. In that regard, the Court may, during its consideration of this matter, conclude that the WVAG agrees, or otherwise has no credible response to the Assignments of Error C, F and G.

B. The Circuit Court incorrectly concluded that there were no material facts in dispute and that the Petitioners did not satisfy the requisite standards under W.Va. R. Civ. P. 56(f) to delay entry of Summary Judgment in favor of the Respondent.

The WVAG’s Response Brief completely misrepresents the position of the Petitioners and the issues that were before the Circuit Court. At no point have the Petitioners argued that the Crash Parts Act permits them to “intentionally conceal” from consumers that their late-model vehicles were being repaired with recycled OEM crash parts. The Petitioners have consistently argued that the consent provisions of the Crash Parts Act were intended for application to aftermarket crash parts, and not recycled OEM crash parts because (1) the stated purpose for the Act is to prohibit the use of aftermarket parts without consent, W.Va. Code §§ 46A-6B-1, 46A-6B-3 and 46A-6B-4; (2) recycled OEM crash parts are genuine crash parts pursuant to the definition of that term by the Act, W.Va. Code § 46A-6B-2; and (3) they are sufficient to maintain the manufacturer’s warranty for fit, finish, structural integrity, corrosion resistance, dent resistance and crash performance, W.Va. Code § 46A-6B-3. Based on this understanding

of the Crash Parts Act in 2011, estimates were drafted, and repairs were made following receipt of authorization from the consumer, to late-model vehicles using recycled OEM Parts.

The Petitioners have the inherent right to presume that in the enactment of the Crash Parts Act the W.Va. Legislature said what it means and means what it said. *Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 312, 465 S.E. 2d 399, 415 (1995) and *Cunningham v. Hill*, 226 W. Va. 180, 185, 698 S.E.2d 944, 949 (2010). The W.Va. Legislature specifically declared that the purpose of the Crash Parts Act was to address the use of aftermarket parts, and it drafted a part specific consent provision concerning the same. W.Va. Code § 46A-6B-4(b). Thus, the actions of the Petitioners were not in violation of the Crash Parts Act or the West Virginia Consumer Credit Protection Act, W.Va. Code § 46A-1-101, *et seq.* (“WVCCPA”), and furthermore the Petitioners certainly did not concede to any such violations, as further reflected by the record before this Court. At a minimum, it is clear that these material issues of fact were in dispute before the Circuit Court.

While the WVAG insinuates that the Petitioners essentially rested on their laurels for nine (9) months and did not actively pursue discovery throughout their Response Brief, this is not supported by the record. As painstakingly detailed by the Petitioners in their Appeal Brief, the record demonstrates that the WVAG did not feel discovery was necessary from the onset of this matter and intentionally refused to cooperate. This is plainly manifest upon review of the WVAG’s baseless objections to Liberty’s discovery requests and refusal to provide essential documents and supplemental discovery responses until the very eve of the Circuit Court’s Hearing on the dispositive motions.

Suffice to say, the WVAG’s litigation tactics and refusal to cooperate thwarted the Petitioners ability to complete discovery. Even if the WVAG had cooperated in discovery, nine (9) months is hardly enough time to interview and depose 192 consumers; review 6,455 pages of documents obtained by the WVAG from TLC body shops and interview representatives of those body shops; depose the WVAG’s fact witnesses; obtain and review documents from twenty (20) manufacturers and/or dealers; and conduct expert discovery. Even if the WVAG had fully cooperated in discovery, which it did not, the Circuit Court did not provide the Petitioners with adequate time to complete discovery. In fact, the Circuit Court

did not even enter a scheduling order in this matter. This is important because whether or not recycled OEM parts are sufficient to maintain a late-model vehicle's warranty is a question of fact, and not one plainly established by the Crash Parts Act.

While the WVAG may believe that the Petitioners will never find evidence in support of their position "even if they were given another fourteen years to do discovery", the Petitioners are entitled to conduct discovery, and the Circuit Court should have permitted it. Furthermore, despite the WVAG's repeated accusations that the Petitioners have not found any evidence to demonstrate that recycled OEM crash parts are sufficient to maintain a late-model vehicle's warranty. The WVAG has not produced one iota of evidence to demonstrate that such parts are insufficient to maintain the warranty. In fact, the WVAG did not introduce one single manufacturer warranty into the record.

Further, as discussed in detail above, the evidence the WVAG has adduced either pertains solely to aftermarket parts, or reflects that a manufacturer may sometime in the future deny a warranty if it can **prove** that the recycled OEM part used was itself defective or wasn't installed correctly, **and** it causes damage to another part that is covered under the warranty. This is hardly conclusive evidence in support of the WVAG's position. In fact, if the Circuit Court provided the Petitioners with ample time to complete discovery, they intended to introduce evidence that would have shown that (1) the warranty for a vehicle that is involved in a collision/accident may be voided, at the manufacturer's discretion, regardless of the type of part utilized in the repairs; and (2) certain manufacturers actually mandate that recycled, used and/or reconditioned parts are to be used in making repairs to vehicles under warranty.¹ Furthermore, the Petitioners believe that if the Circuit Court had allowed time for expert testimony, the Petitioners would have had even more support for its position. For reasons just like these, this Court has repeatedly stated that granting a motion for summary judgment before the completion of discovery is "precipitous." See, *Board of Education in the County of Ohio v Van Buren and Firestone, Arch., Inc.*,

¹ The WVAG suggests that since the Petitioners did not reference any documents produced by the WVAG from the TLC body shops, or any manufacturer warranties, that they still have no evidence in support of their position. However, the Petitioners believe they do have such evidence. However, because of the WVAG's refusal to cooperate in discovery, such materials were not before the Circuit Court and are therefore not part of the record.

165 W.Va. 140, 144, 267 S.E. 2d 440, 443 (1980); *Williams v Precision Coil, Inc.*, 194 W.Va. 52, 61, 459 S.E. 2d 329, 338 (1995) and *Powderidge Unit Owners Ass'n v Highland Properties, Ltd.*, 196 W.Va. 692, 474 S.E. 2d 872 (1996).

In light of the foregoing, the Petitioners maintain that they met their burden for a continuance pursuant to W.Va.R.Civ.P. 56(f) and the standard established by this Court in *Powderidge Unit Owners Ass'n, supra*. The record as a whole plainly establishes that the Petitioners simply were not given an opportunity to conduct sufficient formal discovery, and therefore they could not adequately respond to the WVAG's dispositive motions on all issues that were before the Circuit Court. These included violations of the Crash Parts Act and/or the WVCCPA, specifically W.Va. Code §§ 46A-6-104 and 102(7)(M), which the WVAG erroneously suggests that the Petitioners have conceded.

C. The Circuit Court did not correctly construe the Crash Parts Act.

1. The record does not reflect that the Petitioners intentionally failed to notify consumers of the types of parts that were relied upon in preparation of the estimate, or used in the repair of their vehicles.

In its Response Brief, p. 15, the WVAG admits that the "Crash Parts Act was enacted to both give notice to consumers of the type of crash parts being used to repair vehicles and to prevent the use of aftermarket crash parts without consent of the vehicle owner." The Petitioners agree that the Crash Parts Act was passed to prevent the unsanctioned use of aftermarket crash parts. As discussed in depth in Petitioners' Appeal Brief, aftermarket crash parts and recycled OEM crash parts are by definition completely different. In this respect, the Crash Parts Act is not at all ambiguous and not in need of interpretation.

The Petitioners further agree that the Crash Parts Act, specifically W.Va. Code § 46A-6B-4(a) requires that the consumer be provided a list of parts which the body shop intends to use in making repairs. As indicated in detail hereinabove, the Petitioners provide such notice to consumers by giving a detailed estimate which identifies the type of parts that have been relied upon in preparing the estimate and will be used by TLC body shops, such as Chandler, in making the repairs. If, as discussed above, the Petitioners would have been able to compile a complete record through discovery this would have been

fully demonstrated for the Circuit Court's benefit.

However, the WVAG is not satisfied with the plain language of the Crash Parts Act which requires that a simple list of parts be provided to the consumer, and has therefore broadened its intended application when enforcing the same. The WVAG maintains that the list provided to the consumer must adhere to the statutory "written statement" mandated for aftermarket parts (W.Va. Code § 46A-6B-4(b)) and that written consent must be obtained to use such parts (W.Va. Code § 46A-6B-3) or otherwise the WVCCPA has been violated. This is substantiated by the Affidavit of Mr. Stroebel, who as an intern for the WVAG was charged with the task of reviewing the documents it obtained from Liberty's TLC body shops in West Virginia to find instances where the consumer provided written consent to the TLC body shop to use "aftermarket parts and/or salvaged parts." Again, it is apparent that Mr. Stroebel was not asked to see if the estimates provided to the consumers listed these parts, or otherwise he would have noted that the parts were listed on the estimates. See App., pp. 0324-0325.² Further, the documents attached to Mr. Stroebel's Affidavit include several estimates which delineate the types of parts that were relied upon. See App., pp. 0339-0345, 0349-356, 0360-0365, 0366-0369, 0373-0375, 0377-0382, 0386-0388, 0389-0391, 0392-0395. In addition, the affidavits of Charles Parsons and Alice Dorsey, relied upon extensively by the WVAG, do not allege that the Petitioners attempted to prevent its TLC body shops from providing detailed estimates or notice to consumers as to the types of parts being utilized.³

As plainly set forth in W.Va. Code § 46A-6B-4, when aftermarket crash parts are NOT being used, only a list of parts is required to be provided to the consumer. This requirement is satisfied upon provision of the estimate to the consumer, which is exactly what the Petitioners did. However, the WVAG maintains that more is necessary, arguing that the exact written provision mandated by W.Va.

² The Petitioners deny that aftermarket crash parts were used in making any repairs without consent. First, under the Crash Parts Act, aftermarket parts can be used for repairs involving **non-crash parts**. Second, the WVAG's allegations in this respect were made by its counsel and is not supported by any evidence in the record. Finally, the WVAG refused to produce the documents from the TLC body shops until the very eve of the September 24, 2012, hearing and, therefore, the Petitioners were not afforded an opportunity compile a record on this issue.

³ The WVAG acknowledges that the affidavit of Regina Anderson alleges that she was not provided with an estimate prior to commencement of repairs to her motor vehicle. The Petitioners dispute her claims. If adequate time had been allowed for discovery, competing evidence and testimony would have been presented.

Code § 46A-6B-4(b) concerning aftermarket crash parts must be used for recycled OEM crash parts. Based upon the WVAG's arguments, and nothing more, the Circuit Court agreed and concluded that the Petitioners were each prohibited from utilizing recycled OEM crash parts in estimates and in the performance of repairs in late-model vehicles unless "written consent" was obtained. See App., pp. 0019-0020. Nonetheless, whether or not the Petitioners provided "notice" under the statute was, and still is a disputed material fact which demonstrates that the Circuit Court committed reversible error by entering summary judgment on behalf of the WVAG before the completion of discovery, as appropriately raised by the Petitioners in their Appeal.

2. The Crash Parts Act is not ambiguous and is not in need of interpretation.

Contrary to the WVAG's representations, the Circuit Court did not find that the Crash Parts Act was ambiguous. The Circuit Court's Final Order, which was in actuality drafted by the WVAG, does not contain this finding. Moreover, the Circuit Court's Final Order does not address how the Crash Parts Act is ambiguous. See App., 0004-0020. While the Circuit Court did address these issues in its 1998 opinion, which again involved separate parties and warranties that have been rewritten several times over, the Final Order fails to address these issues, and did not restate such opinions. In any event, the stated purpose of the Crash Parts Act, as agreed to by the WVAG in its Response Brief, is to provide notice to consumers concerning the type of crash parts being used to repair vehicles and to prevent the use of aftermarket crash parts without consent of the vehicle owner. W.Va. Code § 46A-6B-1. Despite this clear declaration, the Circuit Court interpreted and rewrote the Crash Parts Act to require written consent for parts other than just aftermarket parts, even for parts which are sufficient to maintain the late-model vehicle's warranty. The WVAG maintains that the Circuit Court's interpretation was proper because (1) the WVCCPA is, by statute, to be liberally construed; and (2) the Crash Parts Act is a remedial statute.

First, WVAG's contention that that the Circuit Court's interpretation of the unambiguous Crash Parts Act was required because it is a remedial statute which always requires construction is not correct. As this Court acknowledged in *Raynes v. Nitro Pencil Co.*, 132 W. Va. 417, 419, 52 S.E.2d 248 (1949), "the rule permitting the liberal construction of remedial statutes, it is, like other rules of construction, not

applied where the language under consideration carries a plain meaning.” As noted above, the W.Va. Legislature’s intention was made clear in its enacted declaration. W.Va. Code § 46A-6B-1.

The WVAG further argues that the Circuit Court found an ambiguity in its 1998 opinion in W.Va. Code § 46A-6B-3 of the Crash Parts Act which required construction. Notwithstanding the fact that the 1998 opinion is not binding on the Petitioners, and that it is further not precedential, a close examination of the 1998 opinion reflects that the Circuit Court’s opinion was based upon evidence that was not before it in the current matter. More specifically, the Circuit Court determined in 1998 that there was a conflict between the first and second sentences of W.Va. Code § 46A-6B-3 because it believed that the use of recycled OEM parts would serve to “void automobile manufacturers’ new car warranties”, warranties that the Circuit Court has presumably reviewed and analyzed. Thus, the 1998 Circuit Court’s finding of ambiguity was based upon an evidentiary finding, and not an analysis of the specific language and terms utilized in the Crash Parts Act. To reiterate, the Circuit Court reached a conclusion based upon the factual record that recycled OEM crash parts were not sufficient to maintain a late-model vehicle’s warranty in 1998. See App., 0052-0054.

However, it is unclear what warranties that the Circuit Court reviewed and relied upon in reaching its 1998 decision because the WVAG refused to provide such information in discovery. What is apparent is that in the current matter, the Circuit Court did not review one single late-model vehicle warranty nor were any produced by the WVAG in support of its arguments. The Circuit Court’s Final Order hinges entirely on whether or not recycled OEM parts are sufficient to maintain a new car warranty. This is not solely a legal issue and evidence is necessary to support this conclusion. The WVAG has not produced any evidence which plainly states that recycled OEM crash parts are not sufficient to maintain a late-model vehicle’s warranty, only warnings and recommendations from manufacturers who serve to benefit from a law which would mandate that only brand new OEM parts purchased from the manufacturers are sufficient to be in compliance with the Crash Parts Act. Conversely, the Petitioners have, at a minimum, raised an issue of material fact by showing that the FTC, a federal entity charged with monitoring warranties under the MMWA, has stated that the use of recycled OEM parts does not, in

and of itself, void a new car warranty.

Further, the mere fact that the WVCCPA is to be liberally construed once there is a finding of ambiguity does not provide the Circuit Court with autonomy to simply construe and rewrite the Crash Parts Act as it deems fit. By way of example, W.Va. Code § 46A-6B-1(1) must be read in conjunction with W.Va. Code § 46A-6B-1(2) which specifically states that it is the intent of the W.Va. Legislature that the WVCCPA “not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest.” Thus, as this Court first observed in *McFoy v. Amerigas, Inc.*, 170 W. Va. 526, 529, 295 S.E.2d 16 (1982), whenever a trade practice is challenged “the lawfulness of the challenged practice must be measured by whether that activity was reasonable in relation to the development and preservation of business”

Even based on the limited record before the Circuit Court, it is clear that notice of the type of parts utilized in formulating estimates and repairing vehicles was being provided to consumers by the Petitioners. The WVAG did not produce any evidence to suggest that the Petitioners actions were “inherently unreasonable or deceptive” in this practice. Furthermore, the Circuit Court did not find that the Petitioners’ actions in this regard were “inherently unreasonable or deceptive” and warranted a finding of liability as a matter of law. These issues were completely ignored and the statute was simply rewritten by the Circuit Court, at the behest of the WVAG, to include a mandate that recycled OEM crash parts cannot be used on late-model vehicles unless written consent is obtained from the consumer. The Petitioners did not provide notice and obtain written consent concerning the use of recycled OEM crash parts because the Crash Parts Act’s consent provisions only pertain to aftermarket parts and it is an uncontested fact that a manufacturer cannot void a warranty simply because recycled OEM crash parts were used. In fact, compliance by the Petitioners as envisioned by the WVAG would in actuality violate other provisions of the WVCCPA that bar the use of false or misleading statements in consumer transactions, since recycled OEM crash parts are by definition not the same as aftermarket crash parts. W.Va. Code 46A-6-102(7)(L)-(M).

Out of 192 consumers identified by the Petitioners in this matter, the WVAG only produced five

(5) consumer complaints. Of those complaints only one (1) consumer maintains that she was not given any notice, which the Petitioners dispute. Even more noteworthy is the fact that these complaints are each based upon the consumer's impression that the use of recycled OEM crash parts is illegal in West Virginia, presumably in reliance upon the WVAG's public representations that the factory warranty "**will be declared totally void** on that crash part and any part it touches" if recycled OEM crash parts are used, in conjunction with numerous interviews given by the WVAG to the media concerning the same. See App., p. 453, emphasis added. Furthermore, the WVAG did not produce any evidence showing that a manufacturer had denied coverage under a new car warranty simply because recycled OEM crash parts. Even the unsubstantiated position papers of the manufacturers that the WVDOH downloaded from the internet do not support this position.

While the WVAG maintains that it is unreasonable to suppose that the W.Va. Legislature did not intend for "genuine crash parts" to mean brand new OEM parts, the plain fact of the matter is that the Crash Parts Act does not include this as a requirement, and all efforts to amend the statute in this regard have been rejected. The definition of "genuine crash parts" does not include the added condition that such parts must be brand new or unused. W.Va. Code § 46A-6B-2(d). Further, the very language of W.Va. Code § 46A-6B-3 with respect to the use of "genuine crash parts" does not mandate that such parts be brand new or unused. The W.Va. Legislature plainly stated that the parts used must be "sufficient to maintain the manufacturer's warranty". If the W.Va. Legislature intended that only brand new parts could be used, the W.Va. Legislature in its wisdom would most certainly have added this requirement. Obviously, the W.Va. Legislature, as substantiated by its stated declaration, was only concerned with the use of aftermarket parts and recognized that other parts, such as recycled OEM crash parts that are sufficient to maintain the manufacturer's warranty, could also be used. Again, one must presume that the W.Va. Legislature said what it means and means what it said. *Martin v. Randolph County Bd. of Educ.*, *supra*, *Cunningham v. Hill*, *supra*. While the W.Va. Legislature has stated that the WVCPPA should be literally construed, in such circumstances where its stated purpose is clear, such as the Crash Parts Act, there is no need for construction.

As also recognized by this Court in *White v. Wyeth*, 227 W. Va. 131, 139, 705 S.E.2d 828 (2010), there is a dual legislative purpose for the WVCPPA, namely protecting consumers and promoting sound and fair business practices. The stated purpose for the Crash Parts Act was quite clear, i.e. to preclude the use of aftermarket crash parts in the repair of late-model vehicles without written consent from the consumer. No other parts were referenced, addressed or even defined under the statute. As the Petitioners have repeatedly stated there is a distinctive difference between aftermarket parts and recycled OEM crash parts since aftermarket parts are NOT manufactured by the original manufacturer of the motor vehicle. In interpreting the statute the Circuit Court never considered these important issues and/or relied upon an incomplete record, which again demonstrates that it committed reversible error by modifying and rewriting the Crash Parts Act and failing to adhere to the West Virginia law concerning statutory construction. At the very least, questions of fact still exist on these and other issues.

D. The Circuit Court erred by failing to consider the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et seq., in its construction and interpretation of the West Virginia Automotive Crash Parts Act, W.Va. Code § 46A-6B-1, et seq.

It is important to recognize that in its declaration for the WVCCPA, the W.Va. Legislature stated that any time construction is necessary that courts are to “be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters.” W.Va. Code § 46A-6-101(1). Adhering to this requirement, this Court noted in *Rice v. Mike Ferrell Ford, Inc.*, 184 W. Va. 757, 759, 403 S.E.2d 774, 776 (1991) that that it was “clear then that the W.Va. Legislature has specifically declared that interpretations given by the federal courts to the federal statutes dealing with unfair, deceptive and fraudulent acts or practices, such as the Magnuson-Moss Act and the Odometer Act, **should be used as guidelines by the courts in construing the West Virginia Consumer Credit and Protection Act.**” (Emphasis added.)

It is undisputed that the Crash Parts Act does not define what is “sufficient to maintain the manufacturer’s warranty”. Further, nothing under West Virginia law addresses what parts do and do not violate warranties and thus trigger the notice and consent provisions of W.Va. Code § 46A-6B-3 and 4. However, federal law, specifically the MMWA, 15 U.S.C. § 2301, et seq., does address this issue.

As noted in its Appeal Brief, the MMWA provides that auto manufacturers are prohibited from invalidating or voiding warranties on automobiles for the use of aftermarket or non-OEM parts. 15 U.S.C. § 2302 (c). In addition, FTC regulations prohibit manufacturers of motor vehicles from voiding warranties on consumer products because aftermarket parts or recycled OEM parts were used to make repairs. 16 C.F.R. § 700.10(c). Specifically addressing the application of the federal law and regulations concerning this issue, the FTC stated in July of 2011, that “simply using an aftermarket or recycled part does not void your warranty. The MMWA makes it illegal for companies to void your warranty or deny coverage under the warranty simply because you used an aftermarket or recycled part . . .” See App., pp. 0137, 0455, or 1173.

In light of the foregoing, if the Circuit Court believed that the Crash Parts Act was ambiguous, it should have first looked at the MMWA to determine what parts are sufficient to maintain a late-model vehicle’s warranty, and then if necessary considered factual evidence from the parties. The Circuit Court ignored the MMWA, agreeing with dicta in a remand order entered by the United States District Court for the Southern District of West Virginia (“WV Southern District Court”) that the MMWA and the WVCCPA “govern different actors and conduct.” See App., pp. 14 and 0035. The WVAG further notes that the WV Southern District Court believed that the application of the MMWA to the WVCCPA/Crash Parts Act was “nonsensical” because violations under the Crash Parts Act would not constitute a claim under the MMWA. See App., p. 0035.

Unfortunately, since the WV Southern District Court did not permit oral argument on the WVAG’s Motion to Remand, and therefore made its decision in a vacuum, it missed the point of the Petitioners’ argument, as did the Circuit Court in its Final Order. The Petitioners are not arguing that violations of the WVCCPA constitute claims under the MMWA. Instead, the Petitioners maintain that since the Crash Parts Act, and for that matter the entire WVCCPA, fail to establish what types of parts are sufficient to maintain a manufacturer’s warranty, then it is necessary examine federal law on this issue, as contemplated by W.Va. Code § 46A-6-101(1). While the Crash Parts Act and the MMWA may govern different actors with respect to violations thereunder, they are similar in that enforcement of their

respective provisions hinges on what types of parts are sufficient to maintain a new car warranty. Only the MMWA and FTC regulations specifically address this issue. In that regard, the Circuit Court can, and in accord with W.Va. Code § 46A-6-101(1), should have examined the MMWA and used it as a guideline in construing provisions of the WVCCPA, as also recognized by this Court in *Rice v. Mike Ferrell Ford, Inc., supra*.

The WVAG did not provide any response to the arguments raised by the Petitioners in their Appeal Brief concerning the cumulative effect that the Circuit Court's 1998 decision has had, or enforcement of its present decision will have if left undisturbed. The Circuit Court's decision essentially mandates that only brand new/unused OEM parts are permissible for use in West Virginia without consent. This decision, in conjunction with the WVAG's (1) public service announcements that recycled OEM parts are "junkyard parts" which "totally void" new car warranties; and (2) enforcement of the Act on this basis, has effectively created a tying arrangement for such parts, since these parts may only be purchased at higher costs directly from the new car manufacturers themselves or their representatives, i.e. Joe Holland Chevrolet, Inc. ("Joe Holland") In fact, there is already evidence of such tying arrangements in West Virginia.

In that regard the Petitioners would request that the Court take judicial notice of a civil action filed in the Kanawha County Circuit Court of West Virginia in May of 2013, bearing Civil Action No. 13-C-978, and styled as *Joe Holland Chevrolet, Inc. v. Liberty Mutual Insurance Company and Greg Chandler Frame & Body, LLC*. In this action, Joe Holland, the very dealership which requested that the WVAG initiate an investigation against Liberty, seeks to recover damages related to the use of recycled OEM crash parts and the TLC program. Of particular note is Joe Holland's allegations related to the use of brand new OEM parts in the repair of late-model vehicles in West Virginia, and its expectations related to the sale of the same. More specifically Joe Holland has averred as follows:

Joe Holland has a has a clear expectation, based on its business dealings and relationships, past experiences, market share, and status **as an authorized new original equipment manufacturer ("OEM") parts dealer for General Motors and other car manufacturers**, that other repair shops **will purchase new OEM parts from Joe Holland's wholesale parts business in order to conduct and complete repairs in**

compliance with the law and the public's expectation that new OEM parts will be used for repairs of newer cars.

Joe Holland Chevrolet, Inc. v. Liberty Mutual Insurance Company and Greg Chandler Frame & Body, LLC., Kanawha County Circuit Court, Civil Action No. 13-C-978, p. 9, ¶ 40. (Emphasis added.) In addition, Joe Holland's website erroneously informs visitors of its public website that the Crash Parts Act **"requires the use of new, original equipment parts on vehicle that are of the current year model and the two (2) previous model years."**⁴

As the foregoing demonstrates, manufacturers and dealerships are improperly utilizing erroneous interpretations of the Crash Parts Act to wrongfully lessen competition and increase their market share with respect to parts necessary for the repair of motor vehicles involved in accidents and/or collisions. This is exactly the type of tying arrangement that the MMWA was enacted to prevent, as substantiated by the FTC's clear and uncontroverted statement that recycled OEM crash parts do not constitute a violation of a late-model vehicle's warranty. The Petitioners further maintain that further information on these areas would have been presented had the Circuit Court provided adequate time for discovery.

E. The Circuit Court's wholesale reliance upon its 1998 opinion was reversible error.

It is important to reiterate that the Petitioners were not parties to the *West Virginia Automotive Dismantlers and Recyclers Association, et al v. The Attorney General of the State of West Virginia, et. al.*, much less active participants. *Montana v. United States*, 440 U.S. 147 (1979). While the WVAG maintains that Liberty was a member of the West Virginia Insurance Federation in 1998 and therefore indirectly a party, the WVAG did not produce any evidence in support of this assertion. Furthermore, Liberty denies that it was a member of the Federation in 1998. Finally, it is clear that Chandler was not a direct or indirect participant in the 1998 action.

The WVAG also cites three citations, one from this Court, and two from other jurisdictions, in support of its argument that the Circuit Court's 1998 decision is binding to the current matter, *Marguerite Coal. Co. v. Meadow River Lumber Co.*, 98 W.Va. 698, 127 S.E. 644 (1925), *Stranahan v. Fred Meyer*,

⁴ See, <http://www.joehollandchevrolet.com/?http://joeholland.com/bodyshop.shtml>.

Inc., 331 Or. 38, 11 P.3d 228 (2000); and *Scott v. Maryland*, 150 Md. App. 468, 822 A.2d. 472 (2003).

As reflected by a review of these citations, the WVAG is suggesting that the doctrine of *stare decisis* should be applied with respect to the Circuit Court's 1998 Order.

As noted by this Court in *Martin v. Workers' Comp. Div.*, 210 W.Va. 270, 557 S.E.2d 324 (2001) the "doctrine of *stare decisis* rests on the principle, that law by which men are governed should be fixed, definite, and known, and that, when the law is declared by a court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority." See also, *Verba v. Ghaphery*, 210 W.Va. 30, 552 S.E.2d 406 (2001); *Booth v. Sims*, 193 W.Va. 323, 456 S.E.2d 167 (1995); and *In re Proposal to Incorporate Town of Chesapeake*, 130 W.Va. 527, 45 S.E.2d 113 (1947).

Thus the doctrine of *stare decisis* is concerned with the "law by which men are governed" as construed by a court of competent jurisdiction or the legislature. *Martin v. Workers' Comp. Div.*, *supra*.

With respect to the effect of *stare decisis* on a court's review of a matter, this Court recently stated:

Stare decisis is not a rule of law but is a matter of judicial policy. It is policy which promotes certainty, stability and uniformity in the law. It should be deviated from only when urgent reason requires deviation. However, *stare decisis* is not an inflexible policy. [43] In the rare case when it clearly is apparent that an error has been made or that the application of an outmoded rule, due to changing conditions, results in injustice, deviation from that policy is warranted. Much has been written and many clichés have been formulated to demonstrate why, in a certain case, *stare decisis* should not apply. We think it is sufficient to say that a rule of principle of law should not be adhered to if the only reason therefor is that it has been sanctified by age." "It has been well said that 'it is better to be right than to be consistent with the errors of a hundred years.'" Put another way, "No legal principle is ever settled until it is settled right."

Faith United Methodist Church v. Morgan, 2013 W. Va. LEXIS 691, 42-43, 2013 WL 2920012 (2013)

(Internal citations and footnotes omitted. See also, *Adkins v. St. Francis Hospital of Charleston*, 149

W.Va. 705, 718-719, 143 S.E.2d 154, 162-163 (1965). This Court's recent statements are consistent with

its interpretation from nearly 116 years ago, "the doctrine of *stare decisis*, like almost every other legal

rule, is not without exceptions. It does not apply to a case where it can be shown that the law has been

misunderstood or misapplied, or where the former determination is evidently contrary to reason."

Simpkins v. White, 43 W. Va. 125, 129, 27 S.E. 361, 362, (1897).

As set forth above, the doctrine of *stare decisis* does not preclude a different result when applying a body of law to a specific set of facts, nor does it deprive a party of the opportunity to be heard on the merits of this issue. Moreover, even to the extent that this doctrine applies to the Circuit Court's 1998 opinion, the Petitioners presented the Circuit Court with overwhelming arguments to demonstrate that its prior decision was incorrect, contrary to reason and no longer applicable when analyzed along with warranties for late-model vehicles that are in place at this time in conjunction with federal law. In that regard, it was reversible error for the Circuit Court not to have given due consideration to the same.

IV. CONCLUSION

The Circuit Court committed reversible error when it concluded that this matter should not be held in abeyance to allow the Petitioners to conduct discovery, and entered summary judgment in favor of the WVAG. The affidavit submitted by counsel for the Petitioners met and exceeded the requisite standards of W.Va.R.Civ.P. 56(f). Moreover, it is also clear that there are various material facts that remained in dispute when the Circuit Court entered its Final Order. Notwithstanding the inadequate amount of time permitted for discovery, the Circuit Court also erred on multiple levels by interpreting the Crash Parts Act as fully set forth in the Assignments of Error and outlined by the Petitioners in their Appeal Brief and this Reply.

Dated July 24, 2013.

**LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts corporation and GREG CHANDLER'S FRAME & BODY, LLC, a West Virginia limited liability corporation,
BY COUNSEL**

Clarence E. Martin III (Bar #4657)
Clarence E. Martin, III, Esq., W.Va. Bar No. 2334
Martin & Seibert, LC
1453 Winchester Ave., Post Office Box 1286
Martinsburg, West Virginia 25402-1286
Telephone: (304) 262-3213
Counsel for Petitioners

R. Michael Shaw (Bar #4657)
R. Michael Shaw, Esq. W.Va. Bar No. 3354
P.O. Box 3, 610 Main Street
Point Pleasant, WV 25550
Telephone: (304) 675-5191
*Counsel for Petitioner, Greg Chandler's
Frame & Body, LLC.*

CERTIFICATE OF SERVICE

I, Clarence E. Martin, III, Counsel for Petitioners hereby certify that I served a true copy of the foregoing upon the following individuals, via e-mail and U.S. Mail, postage prepaid, on this the **24th** day of **July, 2013**:

Douglas L. Davis, Esq.
W.Va. State Bar No. 5502
Office of the Attorney General
of the State of West Virginia
812 Quarrier Street
P.O. Box 1789
Charleston, WV 25326-1789
Telephone: (304) 558-8986
Facsimile: (304) 558-0184
E-mail: doug.davis@wvago.gov


Clarence E. Martin, III, Esquire