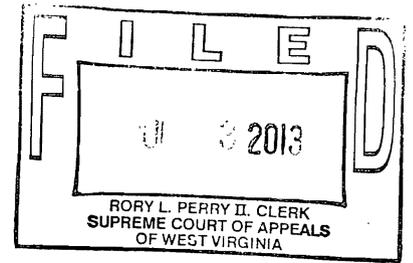


IN THE SUPREME COURT OF APPEALS
OF THE STATE OF WEST VIRGINIA

No. 13-0195



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.

RESPONSE BRIEF OF THE STATE OF WEST VIRGINIA
EX REL. PATRICK MORRISEY, ATTORNEY GENERAL

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I.
STATEMENT OF THE CASE

The State of West Virginia, through its Attorney General (hereinafter “the State”), filed this civil action against Liberty Mutual Insurance Company, a Massachusetts corporation (“Liberty”); and, Greg Chandler’s Frame & Body, LLC (“Chandler”), a West Virginia limited liability company (collectively “Petitioners”), alleging that the Petitioners violated the West Virginia Automotive Crash Parts Act, W. Va. Code § 46A-6B-1 *et seq.* (“Crash Parts Law”), and the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-1-101 *et seq.* (“WVCCPA”). The State claims Petitioners intentionally concealed from consumers the material fact that their new vehicles were being repaired with junkyard crash parts¹ retrieved from salvaged vehicles (“salvage crash parts”).² Petitioners do not deny this. They believe the law permits them to conceal from vehicle owners that salvage crash parts are being used to repair late-model vehicles (the year of manufacture or two succeeding years).

More specifically, the State asserts that the Petitioners used salvage crash parts in the repairs of consumers’ new vehicles³ without first obtaining their written consent, failed to properly disclose

¹(c) “Crash parts’ means exterior or interior sheet metal or fiberglass panels and parts that form the superstructure or body of a motor vehicle, including, but not limited to, fenders, bumpers, quarter panels, door panels, hoods, grills, fire walls, permanent roofs, wheel wells and front and rear lamp display panels.” W. Va. Code § 46A-6B-2(c).

²The circuit court defines “salvage crash parts” as “a part manufactured by or for the original manufacturer that is authorized to carry the name or trademark of the original manufacturer, but has been removed from a salvaged vehicle.” App., p. 0013.

³Specifically, W. Va. Code § 46A-6B-3 prohibits the use of aftermarket crash parts when negotiating repairs of “the motor vehicle . . . for a period of three years . . . the year the vehicle was manufactured and the two succeeding years thereafter . . .” The circuit court ruled this statute applies to salvage crash parts as well.

to consumers the use of salvage crash parts in the repair of their new vehicles prior to beginning repair work, and concealed, suppressed, or omitted material facts when preparing estimates and making repairs on new motor vehicles.

Liberty writes automotive casualty insurance in West Virginia. Chandler is in the business of repairing vehicles that have been in collisions or otherwise damaged. Chandler is a preferred body shop of Liberty's known as a "Total Liberty Care" Shop or TLC Shop. When repairing vehicles, Chandler cannot use any type of body part he wants. There are essentially three types of parts available to repair vehicles; new parts made by the car maker or original equipment manufacturer ("OEM"); new parts made by a third party ("aftermarket"); and used parts from vehicles that have ended up in a junk yard ("salvage"). West Virginia's Legislature passed a law in 1988 that regulates the type of body parts that can be used to repair wrecked vehicles, the Crash Parts Law, W. Va. Code § 46A-6B-1 *et seq.* The Crash Parts Law restricts the type of crash parts that can be used by body shops such as Chandler and whether an insurance company such as Liberty, can force a consumer to accept anything other than new OEM crash parts in the repairs of vehicles that are three years old or newer.⁴

⁴ For all motor vehicles requiring repair by motor vehicle body shops in the year of their manufacture or in the two succeeding years thereafter, motor vehicle body shops must use genuine crash parts sufficient to maintain the manufacturer's warranty for fit, finish, structural integrity, corrosion resistance, dent resistance and crash performance unless the motor vehicle owner consents in writing at the time of the repair to the use of aftermarket crash parts. No insurance company may require the use of aftermarket crash parts when negotiating repairs of the motor vehicle with any repairer for a period of three years, the year the motor vehicle was manufactured and the two succeeding years thereafter, unless the motor vehicle owner consents in writing at the time of the repair to the use of aftermarket crash parts.

W. Va. Code § 46A-6B-3.

Petitioners want to use salvage parts on newer vehicles, three years old or newer, without telling the owners or getting their consent. This is fundamentally unfair,⁵ and violates the West Virginia Consumer Credit and Protection Act. W. Va. Code § 46A-1-101 *et seq.*

A. Procedural Background of Case

Respondent, the State of West Virginia *ex rel.* Patrick Morrissey (the “State”), commenced the civil action against Liberty and Chandler alleging three violations of the WVCCPA after a short investigation. The State alleged Liberty and Chandler each violated the Crash Parts Law, a sub-chapter of the WVCCPA, W. Va. Code § 46A-6B-1 *et seq.*, and they violated the general consumer protection laws under the WVCCPA for failing to disclose the negotiation of and use of salvage automotive parts in repairs of consumers’ vehicles that were three years old or newer.⁶

The State sued Liberty and Chandler on December 15, 2011. Petitioners’ removed the civil action to the U.S. District Court for the Southern District of West Virginia on January 10, 2012. While the action was in federal court, Petitioners’ filed a motion to dismiss and the State filed its motion to remand.

On March 27, 2012, U.S. District Court Judge Joseph R. Goodwin remanded the action to the Circuit Court of Kanawha County. *See* Joint Appendix (“App.”), pp. 0029-0036. Judge Goodwin found Petitioners’ argument that the federal Magnuson-Moss Warranty Act, 15 U.S.C. § 2301

⁵This exact issue was raised in *WV Auto Dismantlers et al. v. McGraw et al.*, C.A. No. 97-C-2797 (Cir: Ct. Kanawha Cty.) and decided by the same circuit court judge on August 20, 1998 (Honorable Charles E. King, Jr.) (“1998 Order”).

⁶Petitioners refer to used, junkyard or salvage crash parts as recycled OEM (Original Equipment Manufacturer) crash parts. The circuit court referred to them as salvage crash parts. *See* note 2. The State will do the same.

et seq., preempted the Crash Parts Law to be “nonsensical.” Because the State raised or pled no federal issues, the matter was remanded. App., pp. 0029-0036.

During a hearing on the State’s Petition for Preliminary Injunction on April 9, 2012, the parties presented an agreed preliminary injunction order to the Court for entry, which the Court then entered April 10, 2012. App., pp. 0021-0025. During the hearing, Liberty and Chandler agreed that their previously filed motion to dismiss the State’s Complaint should be converted to a motion for summary judgment under Rule 56 of the West Virginia Rules of Civil Procedure (“W. Va. R. Civ. P.”). App., pp. 0026-0028. Petitioners also agreed during the hearing to file answers to the Complaint on or before April 24, 2012. App., pp. 1279-1281. During the hearing, the Court specifically permitted the parties to engage in discovery and it commenced. App., pp. 1281-1283.

Petitioners’ answers, filed on April 25, 2012, contained affirmative defenses and a counterclaim seeking a declaratory judgment. The State filed a motion to dismiss the counterclaims on May 12, 2012. App., pp. 0284-0301.

In accordance with the agreement reached on April 9, 2012, and the Order entered April 10, 2012, the State filed its Motion for Summary Judgment on June 6, 2012, attaching affidavits and pertinent documents in support of its motion. App., pp. 0302-0314. The motion was supplemented with a filing on June 18, 2012. App., pp. 0415-0417. Rather than abide by the trial court’s order entered April 10, 2012, and their agreement, App., p. 1280, Petitioners did not supplement their motion to dismiss. Instead, on September 12, 2012, Petitioners filed the Affidavit of Clarence E. Martin, III, counsel for Petitioners, pursuant to W. Va. R. Civ. P. 56(f) in support of their joint response to the State’s Motion for Summary Judgment. App., pp. 0461-1157.

On September 24, 2012, the Circuit Court heard arguments on the State's Motion for Summary Judgment and Motion to Dismiss Counterclaims, the Petitioners' Motion to Dismiss converted to a Motion for Summary Judgment and the Petitioners' Affidavit pursuant to W. Va. R. Civ. P. 56(f). App., pp. 1286-1319.

The Circuit Court entered its Order on December 18, 2012, granting the State's Motion for Summary Judgment and Motion to Dismiss Counterclaims while denying Petitioners' Motion to Dismiss. App., pp. 0004-0020. In its December 18, 2012 Order, the Court found that further discovery was unnecessary because there was no genuine issue of material fact which the Petitioners could raise if discovery were permitted to continue. App., pp. 0015-0016. The parties agreed to request an interlocutory appeal of the Court's Order which the Court granted January 18, 2013. App., pp. 0001-0003.

B. Statement of the Facts Relevant to the Assignments of Error

Two facts are essential to the resolution of this case as noted by the Circuit Court in its December 18, 2012 Order. App., p. 0009, ¶¶ 4 & 7, p. 0012, ¶ 22. Those facts are as follows:

1. Liberty requires the use of salvage crash parts when negotiating the repairs of motor vehicles by automotive body shops including the year the motor vehicle was manufactured and the two succeeding years thereafter without the motor vehicle's owner's consent in writing at the time of the repair to use salvage crash parts. Liberty admitted this in its answer App., pp. 0213-0214 and in its response to the State's request for information. App., pp. 0767-0768.⁷

⁷ As reflected in paragraph no. 3 of the Agreed Preliminary Injunction Order, Liberty Mutual agreed to provide the WVAG with a list of all consumers who reside in West Virginia ("West Virginia consumers"), . . . for whom it has required the use of salvaged crash parts when negotiating for repairs for motor vehicles in the year of their manufacture or in the two succeeding

2. Chandler failed to provide notice to or obtain written consent from vehicle owners of the use of salvage crash parts in the repairs of their vehicles in the year of their manufacture and the two succeeding years. App., pp. 0324-0325, 0335-0338, 0360-0369, 0386-0395. Chandler knew how to comply with the law, but simply chose not to. Chandler created a form notice after being sued by the State. App., pp. 0440 and 0457-0458.

These two uncontested facts establish the Petitioners' violation of the WVCCPA. W. Va. Code § § 46A-6-104 and 102(7)(M). Petitioners concede they violate the WVCCPA through their failure to contest the circuit court's ruling in their brief. *See generally*, Petitioners' Brief.

Petitioners attempt to *create* an issue fact regarding warranties on salvage crash parts. Salvage crash parts are not sufficient to maintain the original manufacturer's warranty for fit, finish, structural integrity, corrosion resistance, dent resistance and crash performance. App., pp. 0396-0414. Petitioners have failed to adduce any evidence to the contrary. Even Chandler disclaims defects in the crash parts used for repairs. App., p. 0209. "Defects in parts and materials will be subject to the terms as extended by the manufacturer. Dents, chips, and scratches are not covered by this warranty." App., p. 0209. No manufacturer warrants salvage crash parts. Liberty offers a lifetime warranty on crash parts used to repair vehicles by its TLC Shops. App., p. 0208. However, it is non-transferable, unlike an OEM warranty. App., p. 0208.

Any other fact is irrelevant. Petitioners admit the first essential fact. Chandler has failed to produce any documents which purport to give notice of or obtain consent in writing from consumers

years without the written consent of the owner of the motor vehicle for the past three (3) years. . . .

Liberty's Response To WVAG's Request For Information, App., pp. 0767-0768.

whose vehicles were repaired with salvage crash parts during the three year period, thereby admitting the second essential fact. Petitioners attempt to create an issue of fact with regard to whether salvage crash parts are sufficient to maintain a manufacturer's warranty. Petitioners fail to do so and could not do so even if they were given another fourteen years to do discovery. Petitioners had nine months from the date of the filing of the State's Complaint to find at least one original equipment manufacturer such as Ford or Toyota that agreed to continue the new car warranty on salvage crash parts used to repair vehicles during the manufacturer's warranty period. Petitioners failed to do so.

The State did not represent that a vehicle's entire warranty would be voided by the use of salvage crash parts. Manufacturers simply will not continue a new vehicle warranty on the salvage crash parts and any parts they cause to become defective. *See, e.g.*, Ford's policy on warranty coverage for salvage crash parts. App., pp. 0403-0404.

The circuit court recognized any warranty on OEM crash parts ends when the vehicle is salvaged. App., p. 0018, ¶ 28. This fact has not changed in 14 years. The same circuit court, the same circuit court judge, ruled the same way, 14 years ago (1998) in *West Virginia Automotive Dismantlers and Recyclers Association et al. v. McGraw, et al.*, Civil Action No. 97-C-2797, App., pp. 0162-0168 ("1998 Order"). Petitioners were aware of this order and apparently complied with the order until Liberty affirmatively changed its policy in June 2010. App., p. 0334. Thus, Liberty has had more than fourteen years to find an original equipment manufacturer that will maintain the original manufacturer's warranty on a salvage crash part used to repair a vehicle still under the original manufacturer's warranty. Even the Federal Trade Commission recognizes that a manufacturer has a "right" to deny warranty coverage on salvage parts that are defective or cause damage to other parts on the vehicle. App., pp. 0455-0456.

Petitioners continue to claim they could not conduct meaningful discovery yet conveniently fail to disclose that much of the information they sought was available to Liberty through its Total Liberty Care Body Shops. TLC Body Shops receive preferential treatment from Liberty and also provide written estimates to Liberty on vehicles needing repairs. App., pp. 0040, ¶¶ 16 and 17. Petitioners could have subpoenaed original equipment manufacturers at any time after the Complaint was filed December 15, 2011, but waited until August 1, 2012 to serve any *subpoena duces tecum* on original equipment manufacturers. Even with two months to enforce the subpoenas before the September 24, 2012 summary judgment hearing, Petitioners failed to find one OEM that would continue its original manufacturer's warranty on salvage crash parts. In addition, many of the original equipment manufacturers have published their positions with regard to warranting salvaged crash parts. App., pp. 0104-0106 and pp. 0396-0405. They do not. Thus, Petitioners have no plausible basis for believing materials facts exist which have not yet become available to Petitioners through discovery. The circuit court was absolutely correct. 2012 Order, App., p. 0012, ¶ 23.

Petitioners also complained they did not know who potential witnesses would be for the State. Quite frankly, every one of the 192 consumers who had his late model vehicle repaired with salvage crash parts by Chandler or any of Liberty's TLC Body Shops was a potential witness. Liberty has records of every such consumer. In addition, the State disclosed the names of certain witnesses on January 5, 2012 when it filed its Memorandum of Law in Support of Complaint and Petition for Temporary and Permanent Injunction, attaching the affidavits of three potential witnesses. App., pp. 0081-0103. Liberty failed to notice or take the deposition of any of the witnesses identified by the State in January 2012. Liberty also received copies of consumer complaints filed with the Attorney General between December 2011 and May 2012. All of these

consumers could have been deposed by Petitioners yet they failed to do so. App., pp. 0667-0717. None of the likely witnesses would have had any discoverable information that would have been helpful to Petitioners' defense. Petitioners had the affidavits of Joe Holland Chevrolet employees, Regina Anderson's affidavit (consumer complainant) and the written complaints of several other consumers. App., pp.0081-0103 and 0667-0733. All consumers were upset that Petitioners' failed to disclose the use of salvage crash parts. App., pp. 0667-0733.

Petitioners' Rule 56(f) affidavit failed to demonstrate good cause for failure to have conducted discovery earlier. Rather, Petitioners' attempt to blame their failure to conduct discovery earlier on the State. The circuit court rightly rejected this attempt to shift the blame. 2012 Order, App., p. 0012, ¶ 24. This Court should affirm that rejection.

II. **SUMMARY OF THE CASE**

The circuit court's ruling was correct in December 2012. It was correct in August 1998. Defendants have either admitted the material issues of fact or failed to produce any evidence to create a material issue of fact. Petitioners, in 14 years have failed to find one vehicle manufacturer that agrees salvage crash parts are sufficient to maintain an OEM warranty. Petitioners sat on their discovery rights for eight months before subpoenaing car makers, nearly two months before the summary judgment hearing. In the nearly two months after the discovery subpoenas were issued, Petitioners still could not create a material issue of fact. Thus, only issues of law were left for the circuit court to decide.

Petitioners violated the Crash Parts law, as interpreted by the circuit court 14 years ago. Petitioners knew about the decision and complied with the decision for nearly 12 years. In June,

2010, they changed how they did business and started using salvage crash parts to repair late-model vehicles. Two acts have been violated under the WVCCPA: The Crash Parts Law, W. Va. Code § 46A-6B-1 *et seq.*; and the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-6-101 *et seq.* Petitioners argue at length the circuit court has misinterpreted the Crash Parts Law. Petitioners fail to address the general Consumer Protection Act, thus conceding the circuit court correctly decided the issue. Thus even if the Court finds the circuit court misinterpreted the Crash Parts Law, Petitioners are still liable for their unfair or deceptive acts or practices when they fail to disclose material facts to owners of newer vehicles needing repairs.

The federal district court and the circuit court correctly found the Crash Parts Law is not in conflict with federal warranty law. The two laws govern different actors and different conduct.

Another 9 months of discovery will not change the material facts. The circuit court was correct when it found Petitioners Rule 56(f) affidavit failed to meet the standards required to defeat the State's Summary Judgment motion.

III. **STATEMENT AS TO ORAL ARGUMENT**

The State believes oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

IV. ARGUMENT

- A. The Circuit Court correctly concluded 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 State.**

When reviewing a circuit court's grant of summary judgment, the judgment is reviewed *de novo* by the Supreme Court of Appeals. *Painter v Peavey*, 192 W. Va. 189, 451 S.E.2d 755, Syl. pt. 1 (1994). When considering the propriety of summary judgment, the Court applies the same standard that is applied at the circuit court level. "[A] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963)." *Watson v. Inco Alloys Int'l, Inc.*, 209 W. Va. 234, 238, 545 S.E.2d 294, 298 (2001). If the record taken as a whole cannot lead a rational trier of fact to find for the nonmoving party, summary judgment must be granted. *Parker v. Estate of Bealer*, 221 W. Va. 684, 687, 656 S.E.2d 129, 132 (W. Va. 2007) (*quoting Williams v. Precision Coil, Inc.*, 459 S.E.2d 329, 338 (W. Va. 1995)(*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-8 (1986))).

Although the Court must view the facts and all permissible inferences from them in the light most favorable to the nonmoving party, that party "must nonetheless offer some concrete evidence from which a reasonable. . . [finder of fact] could return a verdict in . . . [its] favor." *Painter v. Peavy*, 192 W. Va. at 193, 451 S.E.2d at 759 (W. Va. 1994), (*quoting Anderson v. Liberty Lobby, Inc.*, *supra*). If it does not, the court should grant the motion for summary judgment.

The State submitted a properly supported motion for summary judgment pursuant to W. Va. R. Civ. P. 56(c). The burden of proof shifts to the Petitioners to rehabilitate evidence, produce additional evidence showing a genuine issue for trial, or explain why further discovery is necessary pursuant to Rule 56(f). W. Va. R. Civ. P. 56(f). Petitioners could not rehabilitate evidence (essential facts were admitted), did not produce additional evidence to support their position (though they had opportunity), and thus relied on a Rule 56(f) affidavit to defeat the State's motion for summary judgment.

The Petitioners' submitted an affidavit by their counsel pursuant to Rule 56(f) that was deficient in all respects. Rule 56(f) provides:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

W. Va. R. Civ. P. 56(f). This Court has set forth criteria a party must meet in a Rule 56(f) affidavit to defeat a motion for summary judgment. *Powderidge Unit Owner Assoc. v. Highland Properties, Ltd.*, 196 W. Va. 692, 474 S.E.2d 872, Syl. pt.1 (1996). The Rule 56(f) affidavit must:

(1) articulate some plausible basis for the party's belief that specified "discoverable" material facts likely exist which have not yet become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier.

Id. Petitioners failed on all four points as noted by the trial court in its order. App., pp. 0011-0012, 0014-0015.

Petitioners have no plausible basis to believe there are discoverable facts that are material. Petitioners admit no written consent is obtained from consumers for the use of salvage crash parts prior to the repairs of their vehicles. App., pp. 0213-0214, 0767-0768, 0324-0325, 0335-0338, 0360-0369, 0386-0395. Petitioners admit Liberty negotiates for the use of salvage crash parts in the repairs of vehicles without obtaining written consent from the owners of the vehicles. App., pp. 0213-0214, 0250-0251. Admitting these facts is fatal to the Petitioners' Rule 56(f) affidavit. No further discovery is necessary on these admitted facts.

Petitioners claim they were not timely given documents obtained by the State during its investigation. The State obtained records from Liberty TLC Shops. The State eventually produced these records to Petitioners. However, Petitioners had better and easier access to any documents from their own TLC Shops and could have obtained the information from them at any time - even prior to the commencement of the action since Petitioners were well aware of the investigation. *See generally*, App., p. 0236, ¶¶ 40 and 41. Petitioners, even now, fail to point to any documents produced by the State from TLC Shops that were material to their defenses.

Petitioners also produced records to the State showing 192 customers had salvage parts placed on their late model vehicles without Petitioners obtaining written consent from the vehicle owners. App., pp. 0415-0416. Petitioners could have questioned or deposed any of these 192 vehicle owners to determine if they had received written consent for the use of salvage crash parts on their vehicles, and whether they would have consented if they had known before repairs were made.

Petitioners also admitted in the Rule 56(f) affidavit that they had not even attempted to schedule depositions of three witnesses identified by the State in January 2012. App., p. 0473.⁸ Petitioners failed to help themselves. Thus the Rule 56(f) affidavit fails under *Powderidge*, 196 W. Va. 692, 474 S.E.2d 872, Syl. pt. 1.

Petitioners also belatedly realized they could issue Rule 45 subpoenas to third-party vehicle manufacturers. W. Va. R. Civ. P. 45. They didn't issue the Rule 45 subpoenas until eight months after the action was filed, but still two months before the hearing on summary judgment motions that had been continued to September 24, 2012, at Petitioners' request. App., p. 0009. Petitioners still have not found one manufacturer willing to agree it would continue its original manufacturer's warranty on salvage crash parts. It is unlikely that additional discovery time would produce Petitioners' desired facts.⁹ Thus, Petitioners' efforts again fail under *Powderidge*. 196 W. Va. 692, 474 S.E.2d 872, Syl. pt. 1.

Nothing precluded Petitioners from hiring an expert. App., p. 0473. They sat on their discovery rights. Why they continue to think one is necessary is unknown.

Petitioners' Rule 56(f) affidavit was nothing more than a feeble, if voluminous, attempt to delay the inevitable: compensating vehicle owners whose vehicles were repaired with salvage crash parts without notice to, or written consent from the owners.

⁸Compare this with Petitioners' statement that the State prevented Petitioners from deposing the State's affiants. Petitioners' Brief at p. 16. The State never prevented the Petitioners from issuing notices of deposition for anyone. The assertion is ridiculous.

⁹Petitioners rely on a Federal Trade Commission circular to create an "issue of fact." However, at best, the FTC's position is a legal position on how it interprets the Magnuson Moss Warranty Act, 15 U.S.C. § 2301 *et seq.* The FTC's position is not even contrary. The FTC recognizes that "the manufacturer or dealer has the right to deny coverage for that part and charge you for repairs. . ." if the salvage part was defective, causes damage to another part or was not installed correctly. App., pp. 0455-0456.

B. The Circuit Court correctly construed the West Virginia Automotive Crash Parts Act, W. Va. Code § 46A-6B-1, et seq. and Petitioners appear to have complied with the 1998 Order in the past.

a. Failure to notify consumers of the use of salvage crash parts is an unfair or deceptive act or practice under the Consumer Credit and Protection Act

The purpose of the CCPA is to protect consumers from unfair, illegal, and deceptive acts or practices by providing an avenue of relief for consumers who would otherwise have difficulty proving their case under a more traditional cause of action.

State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 777, 461 S.E.2d 516, 523 (1995). “Where an act is clearly remedial in nature, we must construe the statute liberally so as to furnish and accomplish all the purposes intended.” *Id.* (citations omitted) The WVCCPA is to be construed liberally so that its “beneficial purposes may be served.” W. Va. Code § 46A-6-101(1).

Petitioners consistently fail to recognize the beneficial purposes of the WVCCPA , generally, and the Crash Parts Law, specifically. The Crash Part Law was enacted to **both** give notice to consumers of the type of crash parts being used to repair their vehicles and to prevent the use of aftermarket crash parts without the consent of the vehicle owner. W. Va. Code § 46A-6B-1.¹⁰ At a minimum, Petitioners could have given the required notices under the Crash Parts Law, but they failed to do so. The record is devoid of any notice to any consumer that is in compliance with the law. The Petitioners’ position has been quite clear - they claim they are not required to give notice

¹⁰ The Legislature hereby finds and declares as a matter of public policy that the purposes of this article are to require disclosure to motor vehicle owners of information on certain replacement crash parts for repairs to their motor vehicles and to prevent both motor vehicle body shops and insurance companies from requiring the use of aftermarket crash parts for repair unless the motor vehicle owner consents in writing at the time of the repair.

W. Va. Code § 46A-6B-1.

to, or get written consent from consumers when salvage crash parts are to be used to repair their vehicles. *See generally*, Petitioners' Brief; App., p. 0122.

Failing to give notice to consumers about the salvage crash parts under the WVCCPA as required, is unfair or deceptive and such failure and omission is a violation of the WVCCPA as well as the Crash Parts Law.¹¹ West Virginia Code provides that "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are . . . unlawful."

W. Va. Code § 46A-6-104. "Unfair or deceptive acts or practices" is defined, in part, to include:

The act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with the intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby.

W. Va. Code § 46A-6-102(7)(M). Petitioners cannot credibly dispute that the type of crash part being used to repair a consumer's vehicle is a material fact. "A material fact exists where a buyer would have acted differently knowing the information, or if it concerned the type of information upon which a buyer would be expected to rely in making a decision whether to purchase." *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482, 505, 675 N.E.2d 584, 595 (1996); *F.T.C. v. Cyberspace.Com LLC*, 453 F.3d 1196, 1201(9th Cir. 2006). The types of crash parts to be used are so material, the Legislature enacted the Crash Parts Law to specifically require body shops to give a consumer, before repairs commence, "a list to the vehicle owner of the replacement crash parts that the body shop intends to use in making repairs." W. Va. Code § 46A-6B-4(a)(1).

¹¹"A violation of any provision of this article [Crash Parts Law] is an unfair or deceptive act or practice within the meaning of section one hundred two, article six of this chapter and is subject to the enforcement and penalty provisions contained in this chapter." W. Va. Code § 46A-6B-6.

Petitioners failed to produce any such crash parts list given to any consumer before repairs were made. This failure is supported by the complaints and affidavits of consumers as well as their displeasure with the deception once they learned of the Petitioners' omissions. App., pp. 0087-0091, 0680-0717.

The circuit court found that the type of crash parts being used to repair consumers' vehicles was material. "The type and quality of parts being used to repair a consumer's motor vehicle, i.e. - salvaged crash parts, are material facts." App., p. 0017, ¶ 23. Petitioners do not challenge this finding, nor can they. Petitioners also cannot dispute the fact that they failed to give notice to consumers that salvaged crash parts were being used on their vehicles and failed to get written consent from the consumers for the use of those parts. Thus, Petitioners, at a minimum, failed to give consumers material information about the repairs performed on their vehicles in violation of the WVCCPA. W. Va. Code § § 46A-6-104, 46A-6-102(7)(M).

Both Liberty and Chandler could comply with the WVCCPA if they choose to. Petitioners have drafted notices to consumers of the types of crash parts to be used to repair their vehicles. App., pp. 0457-0458. Although the notices may not be perfect, they do convey the basic information of the types of crash parts to be used, and more importantly, they would get written consent from the consumers, if they agreed to the use of the parts. Petitioners' refusal to provide meaningful disclosure about the type of crash parts to be used to repair a consumer's vehicle has not been explained. The answer is obvious, Petitioners do not want consumers to know. Petitioners' current violation of the WVCCPA, W. Va. Code § 46A-6-104, failing to disclose material facts, must be confirmed.

Petitioners can comply with both the WVCCPA and the Crash Parts Law. Prior to June 2010, it appears that they did. App., p. 0334. They simply chose not to comply after June 2010. The Crash Parts Law requires body shops such as Chandler's to comply with the following:

(a) Effective the first day of July, one thousand nine hundred ninety-five, before beginning repair work on crash parts, a motor vehicle body shop shall:

(1) Provide a list to the vehicle owner of the replacement crash parts that the body shop intends to use in making repairs;

(2) Specify whether the replacement parts are genuine crash parts; and

(3) Identify the manufacturer of the parts if the replacements parts are aftermarket crash parts.

(b) If the replacement crash parts to be used by the body shop in the repair work are aftermarket crash parts, the body shop shall include with its estimate the following written statement: "THIS ESTIMATE HAS BEEN PREPARED BASED ON THE USE OF AFTERMARKET CRASH PARTS THAT ARE NOT MANUFACTURED BY THE ORIGINAL MANUFACTURER OF THE VEHICLE OR BY A MANUFACTURER AUTHORIZED BY THE ORIGINAL MANUFACTURER TO USE ITS NAME OR TRADEMARK. THE USE OF AN AFTERMARKET CRASH PART MAY INVALIDATE ANY REMAINING WARRANTIES OF THE ORIGINAL MANUFACTURER ON THAT CRASH PART."

(c) The notices and statements required under this section shall be made in writing in a clear and conspicuous manner on a separate piece of paper in ten-point capital type.

W. Va. Code § 46A-6B-4. The Crash Parts Law requires Chandler to provide a list of the crash parts to be used for repairs, before beginning the work. W. Va. Code § 46A-6B-4(a)(1). Chandler failed to do this. Chandler also must specify whether the crash parts to be used are genuine. W. Va. Code § 46A-6B-4(a)(2).¹² Chandler failed to do this. Chandler also was required to identify the

¹²(d) "'Genuine crash parts' means crash parts:(1) Manufactured by or for the original manufacturer of the motor vehicle to be repaired; and (2) That are authorized to carry the name or trademark of the original manufacturer of the motor vehicle." W. Va. Code § 46A-6B-2(d).

manufacturer if the crash part was an “aftermarket crash part.”¹³ If an aftermarket crash part was used, Chandler was required to give the notice provided in the statute. All of the notices and statements are required to be on a separate piece of paper in at least 10 point capital type. None of this was done. All of this could have been done regardless of the circuit court’s 1998 Order. Chandler can’t change these facts, even if he is given another 14 years to do discovery.

Chandler’s failure to comply with this part of the Crash Parts Law is an unfair or deceptive act in violation of the Crash Parts Law, W. Va. Code § 46A-6B-6 and the WVCCPA, W. Va. Code § 46A-6-104. No amount of further discovery will cure Chandler’s failure to comply with this part of the Crash Parts Law, a statute simply requiring disclosure of the type of crash parts to be used to repair vehicles. Petitioners concede this. They failed to address it at all in their brief.

The Petitioners complain about the circuit court’s 2012 Order which requires them to notify and get consent from consumers before repairing vehicles with salvage crash parts. The statute provides as follows:

For all motor vehicles requiring repair by motor vehicle body shops in the year of their manufacture or in the two succeeding years thereafter, motor vehicle body shops must use genuine crash parts sufficient to maintain the manufacturer's warranty for fit, finish, structural integrity, corrosion resistance, dent resistance and crash performance unless the motor vehicle owner consents in writing at the time of the repair to the use of aftermarket crash parts. No insurance company may require the use of aftermarket crash parts when negotiating repairs of the motor vehicle with any repairer for a period of three years, the year the motor vehicle was manufactured and the two succeeding years thereafter, unless the motor vehicle owner

¹³ “Aftermarket crash parts’ means crash parts: (1) Manufactured by a person other than the original manufacturer of the motor vehicle to be repaired; and (2) For which the original manufacturer of the motor vehicle has not authorized the use of its name or trademark by the manufacturer of the crash parts.” W. Va. Code § 46A-6B-2(a).

consents in writing at the time of the repair to the use of aftermarket crash parts.

W. Va. Code § 46A-6B-3. Petitioners can comply with this provision of the Crash Parts Law. Under the circuit court's 1998 Order and 2012 Order, Petitioners are required to obtain the written consent from vehicle owners before salvage crash parts are used. Otherwise, they must use "genuine crash parts 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. Until June, 2010, Liberty appeared to be in compliance with the circuit court's 1998 Order. App., p. 0334. As long as Liberty was not requiring the use of salvage crash parts when negotiating repairs of motor vehicles, body shops such as Chandler's were using new OEM crash parts.

Petitioners can continue to comply with the WVCCPA and the Crash Parts Law and have drafted notices to give to consumers that would fulfill the purposes of the consumer protection laws. App., pp. 0457-0458.

b. The Crash Parts Law is ambiguous and must be construed

The circuit court found the Crash Parts Law to be ambiguous. It then looked to legislative intent and construed the statute liberally as it must. Syl. pts. 3, 4, 6, *Dunlap v. Friedman's, Inc.*, 213 W. Va. 394, 582 S.E.2d 891 (2003). The Crash Parts Law must be liberally construed by this Court as it is harmonized with the WVCCPA. Syl. pt. 3, *Mckinney v. Fairchild International, Inc.*, 199 W. Va. 718, 487 S.E.2d 913 (W. Va. 1997). The first and most persuasive reason is that the legislature said so. "It is the intent of the legislature that . . . this article shall be liberally construed that its beneficial purposes may be served." W. Va. Code § 46A-6-101.

The legislative intent is so important in construing and applying statutory provision that the literal application of the statute is avoided where it would “thwart the evident intent of the legislature” because this Court has held that it is the “spirit rather than its letter [that] is the guiding star.” *Pristavec v. Westfield Ins. Co.*, 184 W. Va. 331, 337, 400 S.E.2d 575, 581 (1990); *see also*, Syl. pt. 3, *Pond Creek Pocahontas Co. v. Alexander*, 137 W. Va. 864, 74 S.E.2d 590 (1953).

" `It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity.' Syllabus Point 2, *Click v. Click*, 98 W. Va. 419, 127 S.E. 194 (1925)." Syllabus point 2, *Conseco Finance Servicing Corp. v. Myers*, 211 W. Va. 631, 567 S.E.2d 641 (2002).

Syl. pt. 6, *Barr v NCB Management Services, Inc.*, 227 W. Va. 507, 711 S.E.2d 577 (2011).

The intent of the Legislature is to protect consumers and foster fair and honest competition. W. Va. Code § 46A-6-101. Furthermore, in liberally construing the WVCCPA and the Crash Parts Law, if the court is to err, it must be in favor of the consumer who is least able to protect herself when dealing with body shops and insurance companies. “When a statute’s language is ambiguous, a court often must venture into extratextual territory in order to distill an appropriate construction . . . this Court is obligated to consider the overarching design of the statute.” *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516, 523 (1995).

When a statute is ambiguous, the court may incorporate “necessary implications” into the statute and give them the force of law. “That which is necessarily implied in a statute, or must be included in it in order to make the terms actually used have effect, according to their nature and its ordinary meaning, is as much a part of it as if it had been declared in express terms.” *Crouch v. West*

Virginia Workers' Comp. Comm'r, 184 W. Va. 730, 403 S.E.2d 747, Syl. pt. 1 (1991). “A necessary implication within the meaning of the law is one that is so strong in its probability that the contrary thereof cannot reasonably be supposed.” *First Nat'l Bank of Webster Springs v. DeBerriz*, 87 W. Va. 477, 481, 105 S.E. 900, 901 (1921). It is unreasonable to suppose the Legislature would specifically require the use of genuine crash parts that will maintain the manufacturer's warranty, but would not intend that those parts should be new and unused when any other parts would not be warranted by the manufacturer. As such, the circuit court had the authority in construing the statute to make the necessary implication that the genuine crash parts used to maintain the manufacturer's warranty must be new and unused, and that implication would have the force of law.

Even if the Legislature had failed to expressly state its will in W. Va. Code § 46A-6-101, this Court would still be required to liberally construe the provisions of the WVCCPA because remedial statutes should always be so construed. Syl. pt. 6, *Dunlap v. Friedman's, Inc.*, 213 W. Va. 394, 582 S.E.2d 891 (2003); *Davenport v. Gatson*, 192 W. Va. 117, 451 S.E.2d 57 (1994); *State Farm Mut. Auto. Ins. Co. v. Norman*, 191 W. Va. 498, 446 S.E.2d 720, Syl. pt. 1 (1994); *Martin v. Smith*, 190 W. Va. 286, 438 S.E.2d 318 (1993); *Plymale v. Adkins*, 189 W. Va. 204, 429 S.E.2d 246, Syl. pt. 2 (1993).

The circuit court did not re-write or add criteria to the Crash Parts Law with the 1998 Order or the 2012 Order. The circuit court had to construe an ambiguous statute. If the statute did not have the qualifying language with regard to “genuine crash parts,” then, any genuine crash part could be used without notice to the vehicle owner. W. Va. Code § 46A-6B-3; App., p. 0131. The use of the

qualifying language, then, makes the statute ambiguous. Salvage crash parts do not maintain the manufacturer's warranty. The court explained the ambiguity as:

There is conflict between the first and second sentences of § 46A-6B-3. A literal reading of the second sentence would permit an insurance company to negotiate with a motor vehicle body shop, a "repairer" under the statutory language, for the use of any "genuine crash parts," including "salvage crash parts." However, a literal reading of the first sentence would prohibit a motor vehicle body shop from using "salvage crash parts," because their use would void automobile manufacturers' new car warranties. Thus, a motor vehicle body shop would be placed in the position of having an insurer pay it to install "salvage crash parts," while it would be required to install new, unused "genuine crash parts." An ambiguity is created insofar as an insurance company may require the use of "salvage crash parts," while a motor vehicle body shop may not install them. (footnote omitted) The Court must resolve the ambiguity created by W. Va. Code § 46A-6B-3.

1998 Order, App., p. 0052. Nothing has changed in 14 years as the circuit court noted in its 2012 Order. "Having reviewed its 1998 Order, this Court concludes that it was correct in its prior interpretation of the Automotive Crash Parts Act..." App., p. 0016, ¶ 21. In fact, nothing has changed except Liberty's desire to pocket more cash while providing its insureds (and those who get hit by Liberty's insureds) with crash parts that do not maintain the manufacturer's warranty. Petitioners failed to produce any evidence that even one manufacturer will maintain a warranty on a salvage crash part even though Petitioners had from nine months to 14 years to find one.

Faced with the ambiguity in the Crash Parts Law, the circuit court construed it to effectuate its purpose as expressed in the code. App., p. 0018, ¶¶ 30, 31, and App., p. 0053. "[T]he purposes of this article are to require disclosure to motor vehicle owners of information on certain replacement crash parts for repairs to their motor vehicles. . ." W. Va. Code § 46A-6B-1. Thus, if the Petitioners notify vehicle owners of the use of salvage crash parts, and the owners consent, in writing, the

Petitioners can negotiate for the use of, and use salvage crash parts in the repairs of late-model vehicles. The State has not contested this. The circuit court recognized this in its 1998 Order. App. p. 0053-0054.

None of the parties contend that the legislature intended to prohibit the use of “salvage crash parts.” In spite of the fact that the first sentence of W. Va. Code § 46A-6B-3 gives some indication that their use is prohibited, the Court is of the opinion that this is not what the legislature intended. Instead, considering all of the provisions of Article 6B, the Court finds that the legislature’s overarching intent is to prevent motor vehicle body shops and insurers from requiring the installation of replacement crash parts that would void automobile manufacturers’ new car warranties, unless they complied with certain requirements. Specifically, motor vehicle body shops and insurers are required to ensure that owners of motor vehicles requiring repairs are made aware that these types of parts are to be installed, that the owners are made aware that installation of these types of parts will void their new car warranties and that the owners of the motor vehicles give their informed, express and written consent to the installation of these types of replacement parts. Since “salvage crash parts” void automobile manufacturers’ new car warranties, the consent of the owners of motor vehicles to be repaired is required before “salvage crash parts” are installed.

1998 Order, App., pp. 0053-0054.

Given the conflict in complying with the Crash Parts Law, the trial court made the only rational decision it could. It prohibited Liberty from requiring the use of salvage crash parts when negotiating the repairs of vehicles in the year of manufacture and the two succeeding years unless Liberty gets consent, in writing, from the consumer. 2012 Order, App., pp. 0019-0020. If the consumer consents to the use of salvage crash parts, the purpose of the statute will have been met. If the consumer does not consent, then Liberty will be obligated to negotiate the repairs of vehicles with the use of new genuine crash parts. W. Va. Code § 46A-6B-3. Liberty has no choice since the Crash Parts Law states that insurance companies cannot negotiate for the use of aftermarket crash

parts, and the statute also prohibits body shops from using genuine crash parts that do not maintain the manufacturer's warranty. The only parts left to use are new genuine crash parts.

Thus, the circuit court's 2012 Order and 1998 Order comprise the only practical way to solve the ambiguity created by the Crash Parts Law. If consumers are notified first about the intent to use salvage crash parts, they have the choice on whether the parts are put on their vehicles. This is the same choice given to consumers when it comes to the use of aftermarket crash parts. If Petitioners' view of the Crash Parts Law is upheld, consumers will not even know the salvage crash parts are being used. That is simply unfair and deceptive. The circuit court's 2012 Order must be confirmed.

C. The Circuit Court considered the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et seq. and correctly found it inapplicable to the matter.

Appellants' argument based on the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.* ("MMWA"), is "nonsensical"¹⁴ and designed to distract the court from the core issues at hand. The MMWA is a federal law that regulates warrantors of consumer products. It has nothing to do with the State's causes of action which are based on the Petitioners' non-compliance with the WVCCPA and more specifically, the Crash Parts Law, both state laws. Generally, the State alleged Petitioners were engaged in unfair or deceptive conduct by i) failing to disclose the type of crash parts being used in repairs of consumers' vehicles and ii) by using salvage crash parts without first giving notice to, and getting consent from consumers whose cars were being repaired pursuant to a Liberty insurance policy. The federal U.S. District Court and the state trial court correctly found that the MMWA has nothing to do with the State's causes of action.

¹⁴*State ex rel. McGraw v. Liberty Mutual Ins. Co., et al.*, 2012 WL 1036848 (S.D. W. Va. 2012), App., p. 0035.

Petitioners argue the MMWA prohibits manufacturers from voiding new car warranties because of the use of salvage crash parts in repairs pursuant to 15 U.S.C. § 2302(c). The entire new car warranty is not voided. Only the replacement crash parts and the parts they may affect are in issue. Crash parts are required to maintain the OEM's warranty for fit, finish, corrosion resistance and crash performance under the WVCCPA. W. Va. Code § 46A-6B-3. Why? The statute does not say, but, likely so that if a part rusts, the vehicle manufacturer will still repair or replace the part while the vehicle is still under warranty at no cost to the owner. The Magnuson-Moss Act provides:

No warrantor of a consumer product may condition his written or implied warranty of such product on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name. . .

15 U.S.C. § 2302(c). Liberty is not the warrantor of the late-model vehicle being repaired, rather the warrantor is a new car manufacturer such as Ford or GM. If Ford or GM were repairing the vehicle under warranty, rather than under a policy of insurance, they would use new OEM parts and OEM authorized service. 15 U.S.C. § 2302(c). Petitioners, under the WVCCPA and Crash Parts Law, are obligated to repair newer vehicles with parts that maintain a manufacturer's warranty. Liberty is not the warrantor. Chandler is not the warrantor. Neither have any obligation or duty under the MMWA. Their obligations are under state law as correctly decided by the U.S. District Court and by the state trial court.

In its remand order, the U.S. District Court held:

The provision of the MMWA cited by the defendants prohibits warrantors of consumer products from conditioning their warranties in certain circumstances. In contrast the Crash Parts Act maintains standards for motor vehicle body shops and insurance companies for the repair of new automobiles. The federal and state statutes govern

different actors and different conduct. It is *nonsensical* to allege that a claim that an insurance company and a motor vehicle body shop have repaired automobiles in a way that violates the Crash Parts Act is actually a claim under the MMWA, which applies to warrantors of consumer products. (emphasis added)

State ex rel McGraw v. Liberty Mutual Ins. Co., 2012 WL 1036848 (S.D. W. Va. 2012). App., p. 0035. The trial court below approvingly referred to the U.S. District Court's remand decision. App., p. 0017, ¶¶ 25 & 26.¹⁵ The trial court also found the MMWA was passed to improve information available to consumers, prevent deception and enhance competition. App., p. 0017, ¶26. The trial court held that even if the MMWA was applicable, it does not invalidate or restrict state laws. App., p. 0017, ¶ 27. The trial court also held that once a vehicle ends up in a junk yard, the manufacturer's warranty on the vehicle ends, and thus, the MMWA is no longer applicable. App., p. 0018, ¶ 28. The circuit court also found that the FTC recognizes that a manufacturer may refuse to warrant problems caused by an aftermarket part. App., 0018, ¶ 29. Thus, Petitioners' assignment of error that the trial court failed to consider the MMWA in reaching its decision is simply wrong. This Court should not waste any further time on this "nonsensical" argument. App., p. 0035.

The Petitioners claim that a plain reading of the MMWA and FTC public statements create an issue of fact. Appellant is wrong. The circuit court made conclusions of law which Petitioners do not like, but these are not issues of fact. The only relevant issues of fact are whether a) Liberty requires the use of salvage crash parts when negotiating the repairs of vehicles during the three-year window, and b) whether Chandler gives written notice of and obtains written consent from consumers for the use of salvage crash parts in the repairs of their vehicles during the three-year

¹⁵Petitioners have largely abandoned their argument that the Magnuson-Moss Act preempts the Crash Parts Law. The U.S. District Court's Order thoroughly discusses why the Crash Parts Law is not preempted by the Magnuson-Moss Act and need not be repeated here. App., pp. 0029-0036.

window. Liberty required the use of salvage parts and Chandler used the parts without getting prior written consent. These facts are still undisputed by Petitioners.

D. The Circuit Court did not commit procedural errors in finding the West Virginia Automotive Crash Parts Act ambiguous and construing it to effectuate its purposes.

The Petitioners attempt to divert the Court’s attention from their unfair and deceptive conduct by raising issues that are irrelevant to the primary issue - whether salvage crash parts can be used to repair late model vehicles without giving notice to and getting written consent from the vehicle owner. In sections, C, D and E of the Petitioners’ Brief, Petitioners raise three non-controversial issues.

a. Circuit Court was correct to refer to its 1998 Order

The State concedes circuit court opinions have no precedential value in this Court. *State ex rel. Miller v. Stone*, 216 W. Va. 379, 382, 607 S.E.2d 485, 488, n.3 (2004). *Miller* holds nothing more. The trial court certainly can look to its own decisions to determine matters pending in its own court, especially on the exact same issues. “When a rule of law has once been deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal and review, and never by the same court, except for very cogent reasons and upon a clear manifestation of error.” *Marguerite Coal Co. v. Meadow River Lumber Co.*, 98 W. Va. 698, 127 S.E. 644, 646 (1925). *See also, Stranahan v. Fred Meyer, Inc.*, 331 Or. 38, 53-54, 11 P.3d 228, 237 (2000) (“decision of a court or judge, . . . is an authority, or binding precedent, in the same court or in other courts of equal or lower rank, in subsequent cases, where ‘the very point’ is again in controversy”); *Scott v. Maryland*, 150 Md. App. 468, 477, 822 A.2d 472, 477 (2003) (trial judges are free to accept prior decisions of judges of the same court). Although the circuit court’s 1998 Order in *West Virginia Automotive*

Dismantlers and Recyclers Assoc. et al. v. McGraw, et al., C.A. No. 97-C-2797 (Cir.Ct. Kan.Cty.) named the Attorney General as a party, the Petitioners were not parties. The circuit court's 1998 Order, however, received significant distribution since one of the parties was the West Virginia Insurance Federation, Inc. (Liberty has been a member in the past). Petitioners also appeared to be in compliance with the 1998 Order until Liberty changed its policy in June, 2010. App., p. 0334. Liberty's change of policy came to the attention of the State when one of its TLC Shops, Joe Holland Chevrolet, Inc., refused to put salvage crash parts on its customers' vehicles in the year of their manufacture or the two succeeding years. App., pp. 0084-0086. Liberty terminated Joe Holland as a TLC Shop. Joe Holland then brought Liberty's conduct to the Attorney General's attention.

The issue in *Automotive Dismantlers* was the same as the issue before the circuit court, and now this Court: can insurance companies and automotive body shops hide the fact that salvage crash parts are being used to repair late-model vehicles. The facts are the same. They haven't changed in the 14 years since the first decision was made in 1998, despite the Petitioners' protestations to the contrary. Petitioners have failed to produce any evidence showing facts - not legal positions - have changed. Consumers still do not want their late-model vehicles repaired with salvage crash parts. App., pp. 0667 - 00734. Salvage crash parts still do not maintain the OEM warranty. App., pp. 0396-0414. Petitioners fail to disclose the intended use of and obtain written consent to use salvage crash parts. W. Va. Code §§ 46A-6-104 and 46A-6B-4. Petitioners are still required to make meaningful disclosures about repairs done to consumers' vehicles. W. Va. Code §§ 46A-6-104 and 46A-6-102(7)(M). Why wouldn't the same circuit court, in fact the same circuit court judge, look to the 1998 Order to help craft a decision in the instant matter? Petitioners do not cite the Court to any case on point because there are none. It is nonsense to suggest a court must ignore its history

when deciding cases. *Marguerite Coal Co. v. Meadow River Lumber Co.*, 98 W. Va. 698, 127 S.E. 644, 646 (1925). This Court does.

b. No Requirement for Circuit Court to Specifically Incorporate 1998 Order into its 2012 Order

Although the 2012 Order does not specifically “incorporate” the 1998 Order, the circuit court makes it clear that it is looking to that order since it was deciding the same issue. App., pp. 0008, 0015-0016, ¶¶ 18 & 21 (“The Court must construe any ambiguity in the statute to effectuate that purpose.”). The circuit court found the Crash Parts Law to be ambiguous in its 1998 Order and then liberally construed the statute so that the Crash Parts Law’s beneficial purposes could be served. App., pp. 0048-0054; W. Va. Code § 46A-6-101; *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 777, 461 S.E.2d 516, 523 (1995). Petitioners’ argument that the circuit court didn’t incorporate its 1998 Order into the 2012 Order is simply another red herring.

c. Circuit Court Appropriately Interpreted Ambiguous Crash Parts Law

Again, there is no controversy that a court must find a statute is ambiguous before it interprets the statute. *Dunlap v. Friedman's, Inc.*, 213 W. Va. 394, 398, 582 S.E.2d 841, 845 (2003). The circuit court found the Crash Parts Law to be ambiguous when it referenced its 1998 Order. App., pp. 0008, 0015-0016, ¶¶ 18 & 21 (“Having reviewed its 1998 Order, this Court concludes that it was correct in its prior interpretation of the Automotive Crash Parts Act...”). The circuit court found the Crash Parts Law ambiguous in its 1998 Order, looked to legislative intent, construed it, and applied it. App., pp. 0051-0054. There was no need to repeat the process, in writing, in the 2012 Order. The circuit court found that its 1998 Order was correct. Since Petitioners bring the same issues based on the same facts, there is no reason to deviate from the well-reasoned 1998 Order.

Marguerite Coal Co. v. Meadow River Lumber Co., 98 W. Va. 698, 127 S.E. 644, 646 (1925).
Stranahan v. Fred Meyer, Inc., 331 Or. 38, 53-54, 11 P.3d 228, 237 (2000). Petitioners' attempts to have the Court put form over substance should be ignored. *Postlewait v. City of Wheeling*, ___ S.E.2d ___, 2012 WL 171324, p. 3 (W. Va. 2012).

V.
CONCLUSION

The circuit court's 2012 Order must be affirmed. The circuit court's construction and application of an ambiguous statute was appropriate. In construing the statute liberally, the purpose of the statute, to both give notice to consumers of the types of crash parts to be used in the repairs of their vehicles, and to prevent aftermarket crash parts or salvage crash parts from being used without notice and consent, is served. It is fundamentally unfair and deceptive to conceal what types of parts are being used to repair a consumer's vehicle.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Douglas L. Davis, Assistant Attorney General, hereby certify that a copy of the foregoing **RESPONSE BRIEF OF THE STATE OF WEST VIRGINIA EX REL. PATRICK MORRISEY, ATTORNEY GENERAL** was served by United States First Class mail this 3rd day of July, 2013, upon:

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