



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.

APPEAL BRIEF OF PETITIONERS

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I. ASSIGNMENTS OF ERROR

- A. **The Circuit Court erred when it 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 support a finding that the Respondent's Motion for Summary Judgment and Motion to Dismiss should be held in abeyance pending further discovery.**
- B. **The Circuit Court erred by basing its decision, in whole, or in part, upon its unpublished August 20, 1998 decision in the case styled as *West Virginia Automotive Dismantlers and Recyclers Association, the West Virginia Insurance Federation, Inc. and State Farm Mutual Automobile Insurance Company v. McGraw, et al.*, C.A. 97-C-2797.**
- C. **The Circuit Court erred by construing the West Virginia Automotive Crash Parts Act, W.Va. Code § 46A-6B-1, *et seq.*, without first finding that the same was ambiguous.**
- D. **The Circuit Court erred by modifying and rewriting the West Virginia Automotive Crash Parts Act, W.Va. Code § 46A-6B-1, *et seq.*, which is beyond its jurisdiction.**
- E. **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.***
- F. **The Circuit Court erred by interpreting the West Virginia Automotive Crash Parts Act, W.Va. Code § 46A-6B-1, *et seq.*, in such a fashion that it is impossible for the Petitioners to comply with the same without violating provisions of the West Virginia Consumer Credit Protection Act concerning the use of false or misleading statements in consumer transactions.**
- G. **The Circuit Court erred by finding that the West Virginia Automotive Crash Parts Act, W.Va. Code § 46A-6B-1, *et seq.* requires that a new car warranty must be maintained for the specific part replaced following a repair, thereby rewriting the Act and adding additional criteria that was not contemplated by the West Virginia Legislature.**

II. STATEMENT OF THE CASE

A. Background Of Instant Action

The Petitioner Liberty Mutual Insurance Company ("Liberty") is an insurance company licensed to do business in the State of West Virginia. The issuance of automobile insurance, and the handling of claims which arise thereunder, are two aspects of the business conducted by Liberty in West Virginia. See Joint Appendix ("App."), pp. 0211-0212, ¶¶ 7 and 8. As part of its services to automobile insurance policyholders, Liberty maintains a list of preferred body shops that may be selected by their insureds to repair vehicles that are involved in accidents or are otherwise damaged. These preferred body shops are referred to by Liberty as Total Liberty Care ("TLC") Shops. See App., pp. 0040, ¶¶ 16, 17; and 212, ¶¶

16, 17. The Petitioner, Greg Chandler's Frame & Body, LLC ("Chandler") operates a body shop in West Virginia and is one of Liberty's TLC Shops. See App., pp. 0040, ¶¶ 16, 17; and 250, ¶¶ 16, 17.

In the automobile repair industry there are three basic classifications of parts that are typically available for the repair of vehicles, namely genuine Original Equipment Manufacturer ("OEM") parts, aftermarket parts, and reconditioned or recycled OEM parts. These three classifications can generally be defined as follows:

Genuine OEM parts are parts that have been manufactured by the original manufacturer of the vehicle and are authorized to carry the name or trademark of the original manufacturer. See W.Va. Code § 46A-6B-2(d).

An aftermarket part is a part made by a company other than the vehicle manufacturer or the original equipment manufacturer. See W.Va. Code § 46A-6B-2(a); App., pp. 0137, 0455, or 1173; 0211; and 0268-0269.

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.

With respect to aftermarket crash parts, the West Virginia Legislature ("W.Va. Legislature") passed the West Virginia Automotive Crash Parts Act, W.Va. Code § 46A-6B-1, *et seq.* ("Crash Parts Act") to address the use of aftermarket crash parts in the repair of motor vehicles involved in accidents.¹ Specifically, the W.Va. Legislature enacted the following declaration as part of the Crash Parts Act:

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. (Emphasis added.) Notably, the W.Va. Legislature did not mention recycled OEM crash parts in its declaration, and specifically stated that its purpose for the enactment of the Crash Parts Act was to address the use of aftermarket crash parts. This is substantiated by the fact that the

¹ Crash parts as defined in West Virginia are exterior or interior sheet metal or fiberglass panels and parts which 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.

phrase “recycled OEM crash parts” is not only undefined under the Crash Parts Act, but also such parts are not referenced whatsoever. W.Va. Code § 46A-6B-1, *et seq.*

In an effort to further reduce the cost of premiums for its insureds, Liberty instituted a nationwide policy for its TLC Shops concerning the use of recycled OEM crash parts. Liberty directed its TLC Shops to repair vehicles utilizing recycled OEM crash parts where available and appropriate, which satisfied the following criteria: (a) manufactured by the original manufacturer; (b) from a vehicle of the same model year or newer; and (c) with the same number of miles or fewer than the vehicle to be repaired. However, Liberty’s policy that aftermarket crash parts should not be utilized did not change. See App., p. 0213, ¶ 18.

With respect to the implementation of this policy in West Virginia, Liberty’s decision was based upon its understanding that the use of recycled OEM crash parts was sufficient to maintain the manufacturers’ warranties for fit, finish, structural integrity, corrosion resistance, dent resistance and crash performance of the motor vehicle, pursuant to the provisions set forth in the Crash Parts Act, the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.* (“MMWA”), and factory warranties issued by new car manufacturers. See App., pp. 0212-0213, ¶¶ 18-19; 0238, ¶ 47; and 0137, 0455 or 1173. As a further service, Liberty provided a lifetime warranty to the owner of the motor vehicle for all repairs performed by its TLC Shops. See App. pp. 0107; 0208; and 0460. In addition, Chandler issued its own lifetime warranty for vehicles repaired by it. See App., pp. 0209 and 0459.

Following the implementation of this policy, one of Liberty’s West Virginia TLC Shops, Joe Holland Chevrolet, a body shop and authorized seller of new OEM parts, voiced an objection concerning the use of recycled OEM crash parts. Unable to resolve their respective differences over this issue, Joe Holland Chevrolet was removed from Liberty’s TLC program. See App., pp. 0172-0174; 0735-0737; 0169-0171; 0738-0740; and 1117. Following its removal from the TLC program, Joe Holland Chevrolet

Code § 46A-6B-2(c). In that regard, the Crash Parts Act does not pertain to all parts on a vehicle that may need to be repaired, only those that would be classified as crash parts.

authorized its counsel, Frank A. Baer, III, to contact the WVAG and request that the matter be investigated, despite the fact that no customer complaints had been received. See App., p. 1117.²

Following the implementation of Liberty's policy concerning recycled OEM crash parts, and during the same month that Mr. Baer, III submitted his letter to the WVAG, the Federal Trade Commission ("FTC") issued a consumer alert clarifying the application of the MMWA to new car warranties. In its July 2011 Consumer Alert the FTC unequivocally stated the following with respect to recycled parts:

An 'aftermarket' part is a part made by a company other than the vehicle manufacturer or the original equipment manufacturer. A 'recycled' 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. **Simply using an aftermarket or recycled part does not void your warranty. The Magnuson-Moss Warranty Act makes it illegal for companies to void your warranty or deny coverage under the warranty simply because you used an aftermarket or recycled part.** Still, if it turns out that the aftermarket or recycled part was itself defective or wasn't installed correctly, and it causes damage to another part that is covered under the warranty, the manufacturer or dealer has the right to deny coverage for that part and charge you for any repairs. **The FTC says the manufacturer or dealer must show that the aftermarket or recycled part caused the need for repairs before denying warranty coverage.**

See App., pp. 0137; 0455; or 1173. (Emphasis added).

However, the WVAG in July 2011, and at all times pertinent to its investigation of the Petitioners, has taken a position that is completely opposite to that of the FTC. During its investigation of the Petitioners, the WVAG's website, in the section entitled "Frequently Asked Questions - Crash Parts / Used Sold as New", strongly cautioned the public that "if aftermarket crash parts or salvage crash parts³ are used on a consumer's vehicle, as opposed to genuine crash parts, the factory warranty **will be**

² The Petitioners were not aware that the investigation was initiated upon the request of Joe Holland Chevrolet until the WVAG filed its supplemental discovery responses on August 3, 2012. See App., p. 1117.

³ Rather than use the term recycled OEM crash parts, the WVAG, in these proceedings and during interviews with the Charleston, West Virginia media, has instead utilized the terms "salvage parts", "junk parts" or "junk yard parts" which have negative connotations to the uninformed consumer. Although the Petitioners were denied the opportunity to present evidence concerning this issue, the recycled OEM crash parts utilized by the industry in general, and by the Petitioners, must satisfy certain criteria and testing before they are acceptable for use.

declared totally void on that crash part and any part it touches” for vehicles in the year of their manufacture or in the two succeeding years thereafter. (Emphasis added.) See App., p. 453.⁴

Upon receipt of the letter from counsel for Joe Holland Chevrolet, the WVAG initiated an investigation of Liberty’s practices without having received one consumer complaint concerning the issue. See App., pp. 56-57. As part of its investigation, a former deputy attorney general for the WVAG contacted general counsel for Liberty and inquired whether Liberty used “aftermarket parts”. In response, Liberty’s general counsel stated that Liberty did not utilize aftermarket parts in the repair of vehicles that are three years old or newer. Unbeknownst to Liberty at that time, the WVAG’s use of the phrase “aftermarket parts” encompassed all parts that are not brand new OEM parts. Nonetheless, the WVAG erroneously assumed that Liberty was being less than forthright and decided to proceed forward with a full investigation. See App., pp. 0060 and 0188-189.

In September of 2011, the WVAG issued fourteen (14) investigative subpoenas to select motor vehicle body shops in West Virginia, including but not limited to Chandler, seeking information with respect to Liberty’s negotiation of repairs for motor vehicles in the year of their manufacture or in the two succeeding years thereafter with motor vehicle body shops in West Virginia, for the past three years.

From October 2011 to December 13, 2011, the Petitioners attempted to amicably discuss with the WVAG their respective differences of interpretation with respect to the requirements associated with repairs of motor vehicles under the Crash Parts Act. Specifically, the Petitioners, by and through their counsel, sent an email to the Deputy Attorney General, stating that the Petitioners strongly believed that the MMWA, 15 U.S.C. § 2301, *et seq.*, governed the disposition and resolution of this dispute.

Nonetheless, counsel for Petitioners indicated that Liberty was willing to suspend its policy and that its TLC Shops, including Chandler, would repair vehicles using only new genuine OEM parts, pending the

⁴ During the pendency of this matter, the WVAG modified its website to reflect that the use of recycled OEM crash parts would not serve to “totally void” the warranty. The WVAG amended its website to reflect that “if aftermarket crash parts or salvage crash parts are used on a consumer’s vehicle, as opposed to genuine crash parts, the car manufacturer is not required to warrant those parts. In the event the aftermarket crash parts or salvage crash parts are determined to be the cause of any malfunction, the manufacturer may refuse to honor the warranty on any part the aftermarket crash part or salvage crash part touches.” See App. p. 1309, lines 21-24, p. 1310, lines 1-4.

parties requesting, and obtaining, an informational opinion from the FTC concerning the effect that the MMWA has on the Crash Parts Act and the warranties on the parts set forth therein. See App., pp. 135-36. The WVAG did not respond to this email.

On December 15, 2011, the WVAG filed its Complaint against the Petitioners. Despite its admissions that the majority of the body shops investigated had implemented Liberty's policy with respect to the use of recycled crash parts, the WVAG only filed suit against Chandler. Coincidentally, Chandler was the only body shop which decided to retain counsel in response to the investigative subpoena that it received. See App., p. 0060.

B. Summary of Claims

The WVAG's Complaint consists of three counts. Count I alleges that Liberty required the use of recycled OEM crash parts when negotiating repairs without obtaining the consent of the consumer, which constitutes violations of W.Va. Code §§ 46A-6B-3 and 46A-6-104. Count II alleges that Chandler failed to obtain the written consent of the consumer when negotiating repairs using recycled OEM crash parts, which constitutes violations of W.Va. Code §§ 46A-6B-4 and 46A-6-104. Count III alleges that the actions of the Petitioners with respect to the use of recycled OEM crash parts when negotiating repairs constitutes the concealment, suppression, or omission of a material fact, and is an unfair or deceptive act or practice in violation of the West Virginia Consumer Credit Protection Act, W.Va. Code § 46A-1-101, *et seq.* ("WVCCPA"), specifically, W.Va. Code § 46A-6-104. By way of relief, the WVAG is seeking (1) a permanent injunction with respect to the Petitioners use of recycled OEM crash parts; (2) restitution for all affected consumers, (3) reimbursement of investigative costs, court costs and attorney fees; and (4) civil penalties, as proscribed at W.Va. Code § 46A-7-111(2). See App., pp. 0037-0054. Interestingly, the five (5) consumer complaints subsequently identified by the WVAG in discovery concerning this matter were all received after the Complaint was filed and the WVAG engaged in a series of media interviews and press releases decrying the actions of the Petitioners. See App., pp. 0667-0717.

As reflected by their respective Answers to the WVAG's Complaint, the Petitioners maintain that the use of recycled OEM crash parts is not a violation of the Crash Parts Act or the WVCCPA. The

Petitioners maintain that the Crash Parts Act is completely silent with respect to the use of recycled OEM crash parts and is not applicable. Further, the Petitioners aver that compliance with the WVAG's interpretation of the Crash Parts Act is impossible because the statutory mandated language in the notice provision of the Act only addresses aftermarket crash parts. W.Va. Code § 46A-6B-4. In addition, the Petitioners maintain that the WVAG's unsubstantiated opinion that the use of recycled OEM crash parts totally voids new car warranties under the Crash Parts Act, as originally declared on its website, and its enforcement of the Act on this premise, is in direct contradiction with long-standing federal law, namely the MMWA. Not only does the WVAG's enforcement of the Crash Parts Act serve to facilitate a tying arrangement, the WVAG has actually created a tying arrangement for the exclusive use of genuine OEM crash parts in West Virginia or vehicles that are three years old or newer, which is in direct contravention of the MMWA. In that regard, the Petitioners have each asserted a counterclaim for declaratory judgment seeking a series of declarations concerning the Crash Parts Act, the MMWA and the effect that use of recycled OEM crash parts has on a new car warranties. See, App., pp. 0210-0246; and 0247-0283.

C. Proceedings and Rulings Below

After service of the Complaint, the Petitioners immediately sought to remove the matter to the United States District Court for the Southern District of West Virginia ("WV Southern District Court") on the basis that there was a question of federal law at issue, specifically the interplay between the MMWA and the Crash Parts Act. In that regard, the Petitioners removed the instant matter on January 10, 2012, to the WV Southern District Court.

Following removal, the Petitioners filed a Motion to Dismiss under Rule 12(b)(6) for Failure to State a Claim on January 17, 2012. App., pp. 0108-0138. Subsequently, the WVAG filed a Motion to Remand and its Memorandum of Law in Opposition to Petitioners' Motion to Dismiss. See App., pp. 0139-0186. In response, the Petitioners filed a Reply to the WVAG's Memorandum of Law in Opposition to Petitioners' Motion to Dismiss. See App., pp. 0187-0209. Upon consideration of the WVAG's Motion to Remand, the WV Southern District Court entered a Memorandum Opinion and Order on March 27, 2012. Finding that the Crash Parts Act did not raise a federal issue and that the matter as

filed could not have been brought in Federal Court, the WV Southern District Court remanded the matter back to the Circuit Court, leaving the substantive issues, including the Petitioners' Motion to Dismiss, for its determination. See App., pp. 0029-0036.

Following remand, the Circuit Court scheduled a hearing on April 9, 2012, concerning the WVAG's request for a preliminary injunction. On April 9, 2012, the parties appeared before the Circuit Court and reported that they had reached an agreement with respect to a preliminary injunction and the WVAG's request for information concerning the parts utilized by Liberty's TLC body shops in West Virginia for the past three (3) years. See App., pp. 1269-1271 and 0023.

The Petitioners also agreed during the April 9, 2012, hearing that their previously filed Motion to Dismiss the WVAG's Complaint should be converted to a Motion for Summary Judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure ("W.Va.R.Civ.P."), and that they would have the right to supplement the same following additional discovery. In that regard, the Petitioners further agreed to file answers to the WVAG's Complaint on or before April 24, 2012. See App., pp. 1279-1281. The Circuit Court further inquired as to the intent of the parties to take any discovery. Counsel for the Petitioners indicated that they intended to engage in discovery and the WVAG objected, stating that such was not necessary. After consideration, the Circuit Court refused to prohibit the Petitioners from conducting discovery and simply decided to turn the parties "loose" See App., pp. 1281-1283. However, the Circuit Court did not enter a scheduling order pursuant to W.Va.R.Civ.P. 16(b).

On April 25, 2012, the Petitioners each filed an answer to the WVAG's Complaint, including a counterclaim seeking a declaratory judgment concerning the issues at hand. See, App., pp. 0210-0246; and 0247-0283. In addition, Liberty submitted its Response to the WVAG's Request for Information on June 8, 2012. This response provided documentation concerning the type of crash parts and non-crash parts utilized by Liberty's TLC body shops in West Virginia for the past three (3) years. See App., pp. 0767-0777. Upon receipt of the Answers and Counterclaims of the Petitioners, the WVAG filed a Motion to Dismiss the Counterclaims on May 10, 2012. See App., pp. 0284-0294.

Consistent with the representations of its counsel at the hearing on April 9, 2012, concerning the necessity for discovery, Liberty submitted its first set of interrogatories and requests for production of documents to the WVAG on April 25, 2012. These discovery requests sought information that the Petitioners jointly deemed relevant to the instant proceedings. See App., pp. 0582-0592; and pp. 0593-0627. On May 24, 2012, the WVAG submitted its Response to Petitioners' First Discovery Requests which were generally replete with objections and otherwise non-responsive. See App., pp. 0628-0766. While the WVAG did produce some documentation, a careful examination of these discovery responses demonstrates a complete unwillingness on the part of the WVAG to participate meaningfully in discovery since it believed that discovery was completely unnecessary, as first reflected in the comments of its counsel during oral argument on April 9, 2012. See App., pp. 1281-1283; and 0628-0766. This is also substantiated by the litany of objections asserted by the WVAG in response to requests that were clearly proper under the West Virginia Rules of Civil Procedure.

By way of example, the very first request for production of documents proffered by Liberty sought all of the documents that the WVAG obtained by virtue of the fourteen (14) investigative subpoenas it issued to Liberty's TLC Shops in West Virginia. Despite the fact that W.Va. Code § 46A-7-104(4) provides that preclusion on disclosure of these investigatory materials does not apply when enforcement proceedings, like the instant matter, are filed, the WVAG refused to provide the information on the basis that the request was overbroad, burdensome, and vague, and further asserted that its disclosure was protected by the its investigative privilege and the attorney-work product doctrine. See App., p. 0639 (Req. 1). In addition, the WVAG refused to provide information related to (1) individuals having knowledge of the allegations in its Complaint; (2) the basis for the WVAG's determination that recycled OEM crash parts totally voids new car warranties; (3) its witnesses; and (4) communications with automobile manufacturers, the FTC and other third-parties concerning new car warranties and the allegations against the Petitioners. See App., pp. 0629 (Int. 1); 0631 (Int. 3); 0636-0637 (Int. 16, 17, 18); and 0655-0659 (Requests 39-81).

As reflected by its “responses”, the WVAG generally objected to each and every discovery request proffered by Liberty with respect to new car warranties, its investigation and consumer complaints. In fact, the WVAG even objected to routine discovery requests. For instance, in response to Liberty’s request for information concerning experts, as contemplated by W.Va.R.Civ.P. 26(b)(4), the WVAG objected to providing such information on the basis that it was irrelevant, overbroad, burdensome, vague, and also somehow protected by its investigative privilege and the work product doctrine. See App., pp. 0637-0638 (Int. 19).

From the onset of this action, the WVAG demonstrated a complete unwillingness to participate meaningfully in discovery. Rather, the WVAG, operating under its own interpretations of the Crash Parts Act, continued to push for early disposition of the matter. On June 6, 2012, the WVAG filed its Motion for Summary Judgment, attaching in support of its claims fugitive manufacturers’ documents that were apparently obtained by virtue of internet research, including consumer-slanted vehicle sites such as www.edmunds.com. See App., pp. 0302-0414. This was followed by a supplement to its Motion that was filed on June 18, 2012. See App., pp. 0415-0417.

Despite the efforts of the WVAG to push for a decision and ignore discovery, the Petitioners continued their efforts to obtain full and complete responses without the Circuit Court’s intervention. On June 26, 2012, counsel for the Petitioners sent a letter to the WVAG briefly outlining their objections to the responses. See App., p. 0778-0779. On July 5, 2012, the parties conferred telephonically concerning the discovery responses, but were unable to resolve their differences. During this conversation the WVAG expressed displeasure at the discovery requests propounded. Rather than review the requests in further detail, the WVAG only offered to produce approximately 300 complaints for review and inspection at its offices in Charleston, West Virginia, stating that such was more than generous and exceeds what it would normally do under the circumstances. When counsel for the Petitioners indicated that they still intended to seek more complete responses, the WVAG replied by suggesting that if the Petitioners did so, then it would withdraw its offer to provide documents. See App., p. 0467, ¶ 20.

Nonetheless, counsel for the Petitioners submitted another letter to the WVAG on July 10, 2012, outlining with specificity their objections to the discovery responses. See App., pp. 0780-0798.

Rather than address discovery issues, the WVAG instead insisted on scheduling a hearing on its dispositive motions, arbitrarily scheduling a hearing with the Circuit Court without contacting counsel for the Petitioners on July 26, 2012, a date that was not available for the Petitioners or their counsel.⁵

Refusing to voluntarily agree to move the hearing, the Petitioners filed a Motion to Continue, and the Circuit Court continued the hearing until September 24, 2012, at 9:30 a.m. by virtue of its July 5, 2012 Order.

Since the WVAG objected to voluntarily providing any warranty information in its possession concerning new car manufacturers stating that such information “is obtainable from some other source that is more convenient, less expensive, and less burdensome”, Liberty filed a Notice of Intent to Serve Subpoenas *Duces Tecum* concerning twenty corporations in order to acquire this information. See App., pp. 0651-0652 (Req. 31 and 32); 0655-0656 (Req. 39-56) and 0799-0802. The WVAG did not submit any objections to this Notice of Intent. In that regard, Liberty submitted twenty (20) original subpoenas *duces tecum* for service of process through the West Virginia Secretary of State. See App., pp. 0803-0825; and p. 0468, ¶¶ 23-24.

On or about August 7, 2012, counsel for the Petitioners began conferring with various representatives and/or counsel from the companies that were served with a subpoena *duces tecum*, concerning the request for documentation. While some of the manufacturers agreed to provide limited responses, primarily consisting of new car warranties, objections were raised and it became apparent that all of the information would not be available before the Circuit Court’s September 24, 2012, hearing. See App., pp. 0469-0470, ¶ 30. With respect to the protective orders requested by some of the manufacturers, counsel for the Petitioners never received a definitive response from the WVAG prior to the hearing. See App., pp. 0471-0472, ¶¶ 36, 39; and 1129-1153; and 1156-1157.

⁵ For the purposes of this brief, dispositive motions of the WVAG refers to its Motion for Summary Judgment and Motion to Dismiss the Petitioners’ Counterclaims.

On August 3, 2012, over three months after the discovery requests were first filed, the WVAG filed supplemental responses to Liberty's first set of interrogatories and first request for production of documents. See App., pp. 0826-1078; and 1079-1119. These responses provided additional responses to some of the discovery requests, but remained by and large evasive and incomplete. In addition, and despite the imminence of the September 24 hearing, the WVAG would only agree to produce for inspection (a) the documents it obtained by virtue of its investigative subpoena; and (b) select consumer reports. This inspection occurred on September 12 through 14, 2012. In the meantime, Petitioners' counsel sent a letter on September 11, 2012, to the WVAG outlining their remaining objections to the discovery requests. See App., pp. 1124-1128.

Following the September 12-14, 2012, inspection, the WVAG reluctantly agreed to produce all of the documents obtained by the WVAG from the fourteen body shops that it served with subpoenas during its investigation of the Petitioners upon the entry of a protective order. See Affidavit ¶¶ 29, 31-32, 34-35, and 37-38. These documents were ultimately received, albeit one business day before the hearing on September 24, 2012.

Despite numerous requests to obtain additional information, as of the September 24, 2012, hearing, the Petitioners still lacked appropriate responses from the WVAG to the discovery requests they filed on April 25. More specifically, requests related to (1) the effect the use of recycled OEM crash parts, if any, has upon a new car factory warranty, information that was at the very root of the WVAG's allegations against the Petitioners; and (2) the identify of all prospective fact witnesses, remained unanswered. As a result of the WVAG's refusal to provide complete and full discovery, the Petitioners were not in a position to schedule any fact witness depositions. The lack of cooperation in discovery further inhibited the Petitioners' ability to obtain expert opinions in support of their position. See App., p. 0473, ¶ 40-41. At this point the Petitioners recognized that they would not be able to obtain and review all of the information they believed was pertinent and material to contest the WVAG's dispositive motions, or to seek summary judgment on their own behalf. In that regard, the Petitioners filed their responses to the WVAG's dispositive motions, along with an affidavit from their counsel pursuant to

W.Va.R.Civ.P. 56(f). See App., pp. 0418-0460; pp. 0461 to 1157; and pp. 1158-1189. In response, the WVAG filed a Reply to the Petitioners' Response to the Motion for Summary Judgment on September 20, 2012. See App., pp. 1190-1196.

On September 24, 2012, the Circuit Court conducted a hearing concerning the WVAG's dispositive motions. Rather than delay the hearing on the basis that discovery was incomplete, the Circuit Court decided to consider the WVAG's dispositive motions and noted that if it felt it was appropriate to simply render a decision with no further discovery, it would do so. See App., p. 1296. In that regard, the Circuit Court proceeded to hear oral argument from the parties concerning the WVAG's dispositive motions. Upon the conclusion of oral arguments, the Circuit Court directed the parties to submit proposed orders containing findings of fact and conclusions of law within two weeks.

On October 8, 2012, the Petitioners submitted two proposed orders, (1) finding that additional discovery was necessary and a decision on the merits should be held in abeyance; and (2) finding that genuine issues of material facts exist and the WVAG's dispositive motions should be denied. See App., pp. 1197-1120 and 1121-1245. On October 9, 2012, the WVAG submitted its proposed order. See App., pp. 1246-1265.

On December 18, 2012, the Circuit Court entered an order granting the WVAG's (1) Motion for Summary Judgment; and (2) Motion to dismiss the Petitioners' Counterclaim for Declaratory Judgment, hereinafter referred to as the "Final Order". See App., p. 0004-0020. In reaching this decision, the Circuit Court rejected counsel for the Petitioners' W.Va.R.Civ.P. 56(f) affidavit and concluded that the Crash Parts Act precluded the use of both aftermarket and recycled OEM crash parts on motor vehicles three years old or newer unless written consent was obtained in advance from the consumer. On this basis, the Circuit Court held that Liberty violated W.Va. Code §§ 46A-6B-3 and 46A-6-104 and Chandler violated W.Va. Code § 46A-6B-4 by using recycled OEM crash parts. See App., pp. 0004-0020. On January 18, 2013, the Circuit Court entered an Order amending its December 18, 2012 Order and declaring it final for purposes of Appeal pursuant to W.Va.R.Civ.P. 54(b). See App., pp. 0001-0003.

III. SUMMARY OF ARGUMENT

The Circuit Court entered judgment in favor of the WVAG prior to the completion of discovery and before the Petitioners had ample time to discover information material to their defense of the WVAG's allegations, as well as the prosecution of their respective counterclaims. The Petitioners further aver that the Circuit Court's finding that the Affidavit submitted by the Petitioners' counsel failed to (1) provide a plausible basis to believe that discoverable material facts are likely to exist; and (2) demonstrate good cause for its failure to conduct discovery earlier, is not supported by the record.

Notwithstanding the fact that discovery was incomplete and the Circuit Court's decision was premature, the Circuit Court's rulings are further erroneous on their merits. First, it is plainly evident that genuine issues of material fact exist. Second, the Circuit Court ignored a basic tenet of statutory construction and interpreted an unambiguous statute, the Crash Parts Act which was never intended to apply to the use of recycled OEM crash parts. By interpreting and constructing this unambiguous statute, the Circuit Court actually modified and rewrote the Act which beyond its jurisdiction. In addition, the Circuit Court's construction of the Crash Parts Act has resulted in an absurd result, making compliance impossible unless other state and federal laws are violated. In reaching its decision, the Circuit Court further (1) improperly applied and relied upon an unpublished 1998 Circuit Court opinion as precedent; (2) failed to read each section of the Crash Parts Act *in pari materia* with the other sections of the Act, and (3) ignored the MMWA.

For the foregoing reasons, the Petitioners request that this Court reverse the Circuit Court of Kanawha County's December 18, 2012 Order granting the WVAG's (1) Motion for Summary Judgment; and (2) Motion to Dismiss Liberty and Chandler's Counterclaim for Declaratory Judgment on the basis that discovery is incomplete, genuine issues of material fact exist and the Circuit Court's interpretation of the Crash Parts Act is erroneous and exceeds its jurisdiction.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioners maintain that oral argument is necessary pursuant to the criteria outlined under Rule 18(a) of the West Virginia Rules of Appellate Procedure because (a) the parties have not agreed to

waive oral argument; (b) the petition is not frivolous; (c) the dispositive issues have not previously been authoritatively decided by this Court and the decisional process would be significantly aided by oral argument. The Petitioners further state that this case is suitable for oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure because it involves: (1) assignments of error in the application of settled law; and (2) the unsustainable exercise of discretion where the law governing that discretion is settled. This case is further suitable for argument under Rule 20 under the West Virginia Rules of Appellate Procedure because it potentially involves issues of first impression and issues of fundamental public importance.

V. ARGUMENT

A. The standard of review for a motion for summary judgment and a motion to dismiss is *de novo*.

Pursuant to W.Va.R.Civ.P. 56, summary judgment is required when the record shows that there is no "genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W.Va. 385, 390, 508 S.E.2d 102, 107 (1998). "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). In considering the propriety of summary judgment, this Court is to apply the same standard that is applied at the circuit court level. *Watson v. INCO Alloys Int'l, Inc.*, 209 W.Va. 234, 238, 545 S.E.2d 294, 298 (2001). In reviewing a motion for summary judgment *de novo* all contested questions of fact must be considered in the light most favorable to the party resisting summary judgment facts. Thus, this Court must resolve all ambiguities and draw all factual inferences in favor of the Petitioners. *Hanlon v. Chambers*, 195 W.Va. 99, 105, 464 S.E.2d 741, 747 (1995) and *Estate of Helmick v. Martin*, 192 W.Va. 501, 504, 453 S.E.2d 335, 338 (1994).

Likewise, the standard of appellate review from an order dismissing a claim under W.Va.R.Civ.P. 12(b)(6) for failure to state a claim is *de novo*. *Sturm v. Board of Educ. of Kanawha County*, 223 W.Va. 277, 280, 672 S.E.2d 606, 609 (2008) (citing *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995)). The controlling principle of law on appeal, as at the trial court

level, is that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. See *Conrad v. ARA Szabo*, 198 W.Va. 362, 480 S.E.2d 801 (1996); *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530, 236 S.E.2d 207 (1977).

B. The Circuit Court erred when it 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 support a finding that the Respondent's Motion for Summary Judgment and Motion to Dismiss should be held in abeyance pending further discovery.

As recently restated by this Court in *Hinerman v. Rodriguez*, ___ W.Va. ___, 736 S.E.2d 351, 360 (2012) concerning the issuance of a summary judgment, "as a general rule, summary judgment is appropriate only after adequate time for discovery" and the refusal to allow such discovery is "reversible error." More specifically, this Court held in *Board of Education in the County of Ohio v Van Buren and Firestone, Arch., Inc.*, 165 W.Va. 140, 144, 267 S.E. 2d 440, 443 (1980) that granting a motion for summary judgment before the completion of discovery is "precipitous." See also, *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).

W.Va.R.Civ.P. 56(c) provides that judgment shall be rendered if "the pleadings, depositions, answers to interrogatories, and admission on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As of September 24, 2012, only the pleadings of the parties, incomplete answers to interrogatories and affidavits from select individuals submitted by the WVAG (who the Petitioners were prevented from deposing), were a part of the record before the Circuit Court.

As more particularly set forth above, the Petitioners determined that they were unable to effectively resist the WVAG's motion for summary judgment and the motion to dismiss the counterclaims because of an inadequate opportunity to conduct discovery. In that regard, the Petitioners' counsel submitted an affidavit pursuant to W.Va.R.Civ.P. 56(f). Syl.Pt 3, *Crain v. Lightner*, 178 W. Va. 765, 364 S.E.2d 778 (1987).

However, the Circuit Court departed from the general rule that summary judgment is inappropriate until discovery is completed and was also not swayed by the extensive affidavit submitted by Petitioners' counsel pursuant to W.Va.R.Civ.P. 56(f). The Circuit Court, in reliance upon this Court's decision in *Powderidge Unit Owners Ass'n., supra.*, found that the Petitioners (1) failed to "present the Court with a plausible basis to believe that discoverable material facts are likely to exist which have not yet been accessible to it that would dispute the allegations contained in the State's complaint"; and (2) "demonstrate good cause for its failure to conduct its discovery earlier." In addition, the Circuit Court found that the WVAG's dispositive motions "demonstrated the absence of genuine issues of material fact." See App., pp. 0012-0015.

At the outset, a review of the record simply does not support the Circuit Court's finding that the Petitioners did not demonstrate good cause for failure to complete discovery. As discussed in detail above, the WVAG adamantly maintained that discovery throughout these proceedings was not needed, and for the most part refused to participate meaningfully in discovery. This was clearly apparent from (1) the objections that were submitted in response to Liberty's initial request; and (2) from conversations with the WVAG concerning discovery. See App., pp. 0628-0665. It is important to keep in mind that Liberty proffered its first set of interrogatories and requests for production to the WVAG on April 25, 2012. On May 24, 2012, the WVAG submitted "responses" which were replete with objections that for the most part lacked any merit, as substantiated by its initial refusal to provide documents obtained by virtue of their investigative subpoena and W.Va.R.Civ.P. 26(b)(4) information. See App., pp. 0639 (Req. 1); 0637-0638 (Int. 19); and 0780-0798. The Petitioners did not receive a formal supplemental response until August 3, 2012, over three (3) months later, and that response still remained incomplete and by and large unresponsive. See App., pp. 0826-1078; and 1079-1119. While the WVAG reluctantly agreed to permit a document inspection on September 12-14, 2012, the WVAG's willingness to finally provide documents came essentially on the very eve of the Circuit Court's September 24 hearing, which not only failed to provide the Petitioners with ample time to review the documents for relevance, but essentially prevented them from following up with further written discovery requests or depositions of prospective fact

witnesses, as outlined by the Petitioners counsel in his W.Va.R.Civ.P. 56(f) affidavit. See App., pp. 0473-0474. In fact, the Petitioners did not have access to the documents the WVAG obtained from Liberty's TLC Body Shops until September 21, 2012, the very documents that served as the basis for the WVAG's lawsuit, until one business day before the scheduled hearing.

The Final Order further states that Liberty/Chandler essentially waited until the eve of the September 24 hearing to initiate any further discovery and further failed to take any depositions during the course of nine (9) months. See App., p. 0011, ¶ 15. This is erroneous for two specific reasons. First, the Petitioners attempted to obtain materials from manufacturers relating to warranties in its written discovery and the WVAG refused to respond and suggested that the Petitioners should obtain that information from other sources. Although the Petitioners attempted to resolve this issue with the WVAG, it became readily apparent that the WVAG was unwilling to cooperate. See App., pp. 0461-0475. On July 13, 2012, the Petitioners filed a Notice of Intent to Serve Subpoenas, as required under the W.Va.R.Civ.P., and submitted the subpoenas for service to the manufacturers on August 1, 2012. Second, the Petitioners took no depositions from April to September because they were waiting for full and complete responses to discovery requests initially submitted to the WVAG on April 25, 2012, which had a bearing on the scope of the depositions of certain fact witnesses. See App., pp. 0473-0474. Again, the Petitioners did not even receive the documents obtained by the WVAG from Liberty's own TLC Body Shops until September 20, 2012, one business day before the hearing. In addition, full and complete responses from the WVAG would most likely have revealed additional witnesses that the Petitioners would need to depose.

The Circuit Court also ruled in error when it determined that there was not a plausible basis to believe that discoverable material facts are likely to exist which had yet to become available to the Petitioners. At the outset, the WVAG's allegations are based upon its interpretation of the Crash Parts Act and its reliance upon a non-precedential 1998 Circuit Court opinion, and not the plain language of the Act itself. Although the WVAG claims that the use of recycled OEM crash parts serves to totally void a new car warranty, it did not produce, and the Circuit Court did not have before it, any evidence to support

this conclusion. In fact, there is not even a single manufacturer warranty in the record, much less any evidence to demonstrate that the use of recycled OEM crash parts fails to maintain manufacturers' warranties for "fit, finish, structural integrity, corrosion resistance, dent resistance and crash performance." W.Va. Code § 46A-6B-3.

Conversely, as the record shows, the Petitioners produced evidence, in the form of an FTC Consumer Alert, which stands in opposition to the WVAG's interpretation of the Crash Parts Act. See App., pp. 0137; 0455; or 1173. Based upon the FTC Consumer Alert alone, it is clear that there was at least one disputed "material fact." One lone disputed material fact is in and of itself a sufficient showing that there is a genuine issue of material fact, which would therefore preclude summary judgment. *Pritt v. Republican Nat. Committee*, 210 W.Va. 446, 452-453, 557 S.E.2d 853, 859-860 (2001); *Daniel v. United Nat. Bank*, 202 W.Va. 648, 651, 505 S.E.2d 711, 714 (1998); and *Painter, supra*.

The Petitioners also pointed out to the Circuit Court in their written and oral arguments, as supported by their counsel's affidavit, a litany of issues that were material to the allegations asserted by the WVAG, and the Petitioners' counterclaims. To summarize, the Circuit Court essentially determined that the following information was not relevant and/or would not reveal a genuine issue of material fact:

1. **WVAG's Investigative Subpoenas.** Documents that the WVAG obtained by virtue of fourteen (14) investigative subpoenas it issued upon body shops that worked with Liberty. Despite the fact that W.Va. Code § 46A-7-104(4) provides that any preclusion on the disclosure of these investigatory materials does not apply when enforcement proceedings are filed, the WVAG refused to disclose them until the very eve of the September 24 Hearing. Thus, the Petitioners did not have an opportunity to review and analyze these documents and the Circuit Court was only provided snippets of certain documents that were arbitrarily selected by the WVAG. These documents included, but are not limited to, estimates, payment vouchers, part descriptions, communications with the consumers, and authorizations to commence work as signed by the consumers. In this regard, the record before the Circuit Court was woefully incomplete at the time it entered its Final Order.
2. **Discovery Documents from 1998 Proceedings.** Although requested in discovery, the Petitioners have not been able to obtain a copy of the discovery exchanged by the parties in the 1998 proceeding (*West Virginia Automotive Dismantlers and Recyclers Association, et al v. The Attorney General of the State of West Virginia, et. al.*). These materials, if available, would provide insight concerning the warranties that were reviewed and relied upon in 1998, and how they differentiate from the warranties in place at the present time.
3. **FTC Documents.** Communications and other documents obtained by the WVAG from the FTC were sought in discovery. The WVAG refused to provide this information citing a litany

of objections and purported privileges. By refusing to hold the WVAG's dispositive motions in abeyance, the Circuit Court concluded that discovery concerning the FTC's July 2011 Consumer Alert was not material, even though the FTC expressly opined in the Consumer Alert that the use of recycled parts does not void a new car warranty. In fact, as reflected by the Final Order, the Circuit Court specifically IGNORED this material fact. See App., pp. 0004-0020; and 0137; 0455; or 1173.

4. **Manufacturer Documents.** As noted above, the Petitioners sought warranty and other information related to manufacturers in discovery from the WVAG. In response, the WVAG objected and suggested that the Petitioners should get this information themselves. This process began in July 2012 and upon receipt of the subpoenas many of the manufacturers either objected or only provided limited responses. See App. pp. 465-466, ¶ 14; 0468, ¶ 23-24; and 0469-0470, ¶ 30. Nonetheless, no current warranties were apart of the record and the Circuit Court's decision was not based upon any warranties from car manufacturers.

5. **Deposition testimony from any party.** Despite the fact that no depositions were taken and the Petitioners requested time to take depositions, the Circuit Court apparently concluded that such were not necessary and instead relied upon affidavits, fugitive documents and unsubstantiated statements from the WVAG, thereby precluding the Petitioners from having an opportunity to invalidate them. In fact, the Circuit Court specifically found that Petitioners repaired a consumer's vehicle (Regina Anderson) with recycled OEM crash parts without her knowledge or consent on the sole basis of her affidavit without allowing the Petitioners an opportunity to depose her. See App., p. 0014, ¶ 7.

6. **Further discovery concerning the Statements of Third-Parties.** The Circuit Court also based its findings of facts and conclusions of law, in part, upon (a) manufacturers' position statements from Mazda, Honda, Volvo and Ford; (b) published opinions from automobile industry guide Edmunds.com; and (c) correspondence from the New York State Auto Collision Technicians Association and the FTC that were produced by the WVAG in support of its motion for summary judgment. See App., pp. 0396-0414. No foundation was established for this evidence and arguably the statements contained therein would be considered hearsay and inadmissible for the Circuit Court's consideration. In that regard, the Petitioners explained to the Circuit Court that discovery was necessary to appropriately counter this evidence. This request was not only denied, the Circuit Court inappropriately relied upon this information.

7. **Expert Discovery.** No expert discovery was undertaken or otherwise permitted.

Contrary to the Circuit Court's findings, a review of the affidavit submitted by the Petitioners' counsel pursuant to W.Va.R.Civ.P. 56(f) plainly shows that the requirements first established by this Court in *Powderidge Unit Owners Ass'n, supra*, have been met. As substantiated by the record, the Circuit Court entered its Final Order less than one year after this action was initiated by the WVAG, hardly enough time to conduct and complete discovery in a case of this magnitude, even discounting the WVAG's refusal to participate. Furthermore, it is abundantly clear that a review of the manufacturers' current new car warranties was necessary before the Circuit Court could conclude that recycled OEM

crash parts are not sufficient to maintain those warranties. The fact that no warranties were before the Circuit Court demonstrates that there was a realistic prospect that material facts were available that would engender an issue that was both genuine and material as of September 24, 2012. When combined with the Petitioners' request to further investigate the FTC's position that recycled OEM parts do not void warranties and the subpoenas issued to the new car manufacturers, it is clear that the Petitioners met and exceeded the necessary requirements to justify their request for additional time to conduct discovery.

In addition, as noted by this Court in *Elliott v. Schoolcraft*, 213 W. Va. 69, 73, 576 S.E.2d 796, 800 (2002), rather than simply turn the parties "loose", the Circuit Court should have entered a scheduling order before considering the dispositive motions of the WVAG. As reflected by the record, no scheduling order had been entered, nor was one discussed or proposed. In that regard, the WVAG continued to push for hearing dates, while the Petitioners attempted to conduct discovery.

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). 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. The circuit court therefore abused its discretion by ruling on the WVAG's dispositive motions. *Powderidge Unit Owners Ass'n, supra*, and *Elliott, supra*.

Despite (1) not having any of the evidence outlined above; (2) the presence of facts that were clearly in dispute; and (3) not having one single manufacturer warranty a part of the record, the Circuit Court concluded with very little explanation that the use of recycled OEM crash parts was not sufficient to maintain the manufacturers' warranty under the Crash Parts Act, even though the FTC has expressly opined otherwise. See App., p. 0013, ¶ 6. Without any support, the Circuit Court also found that any parts removed from salvaged vehicles "have no manufacturer's warranty" and therefore the MMWA is inapplicable even though neither of the parties addressed this point, either orally or in their written briefs, and no evidence was introduced for the record concerning the same. See App., p. 15, ¶ 28. On this basis, and with an incomplete record before it, the Circuit Court concluded that since the Petitioners admitted to the use of recycled OEM crash parts, they were in violation of the Crash Parts Act, and therefore

summary judgment was appropriate. However, even with the limited record before the Circuit Court, it is clear that there were numerous issues of material fact in dispute and the Circuit Court's granting summary judgment in favor of the WVAG was improper and erroneous.

First and foremost, the Circuit Court's findings completely ignore the Petitioners' contention that the Crash Parts Act is not applicable to recycled OEM Crash Parts, as specifically raised in their affirmative defenses to this action and in their counterclaims seeking declaratory judgment concerning the Act. See App., pp. 0504-0542; and 0543-0481. Second, it was not the Circuit Court's function at this stage to weigh the evidence and determine the truth of the matter; its sole function was to determine whether or not there was a genuine issue of fact for trial. *Poling v. Pre-Paid Legal Services, Inc.*, 212 W.Va. 589, 594, 575 S.E.2d 199, 204 (2002). Thus, the primary factors at issue in this proceeding, whether the Crash Parts Act applies to recycled OEM crash parts, and if so, whether such parts are sufficient to maintain the manufacturer's warranty, were completely glossed over by the Circuit Court. Instead, it made broad and unsubstantiated assumptions concerning recycled OEM crash parts in wholesale reliance upon its 1998 unpublished and non-precedential opinion, rather than weigh the arguments presented by each side to determine if material facts were in dispute. Again, the Petitioners would point out that it specifically introduced evidence which demonstrated that recycled OEM crash parts do not serve to void a warranty and are therefore sufficient to maintain the warranty as contemplated under the Crash Parts Act.

In assessing the record to determine whether there is a genuine issue as to any material facts, the trial court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought, i.e. the Petitioners. *Hanlon*, 195 W.Va. at 105, 464 S.E.2d at 747. It is abundantly clear that there were genuine issues of material fact in dispute, and that discovery with respect to these material facts remained incomplete, at the time the Circuit Court entered its Final Order in favor of the WVAG. Further, despite the existence of these material issues of fact, the Circuit Court drew all of its factual inferences in favor of the WVAG, which was improper. Therefore, the Circuit Court's Final Order must be viewed as "precipitous" and the Circuit Court's failure to permit the

Petitioners to conduct and complete discovery constitutes reversible error. See, *Board of Education in the County of Ohio, supra* and *Hinerman, supra*.

- C. **The Circuit Court erred by basing its decision, in whole, or in part, upon its unpublished August 20, 1998 decision in the case styled as *West Virginia Automotive Dismantlers and Recyclers Association, the West Virginia Insurance Federation, Inc. and State Farm Mutual Automobile Insurance Company v. McGraw, et al.*, C.A. 97-C-2797.**

As noted by the Circuit Court in its Final Order, the WVAG's allegations against the Petitioners are primarily based upon its 1998 decision in the case styled as *West Virginia Automotive Dismantlers and Recyclers Association, the West Virginia Insurance Federation, Inc. and State Farm Mutual Automobile Insurance Company v. McGraw, et al.*, C.A. 97- C-2797. See App., pp. 0011-00128, ¶ 20. In that regard, the Circuit Court stated:

This Court notes that it previously ruled on the issue that is the basis for the state's complaint. Specifically, this Court ruled that "when automobile insurance companies negotiate the repair of automobiles, and when motor vehicle body shops repair automobiles using new 'genuine crash parts' sufficient to maintain the automobile manufacturer's new car warranty for that part, they first must obtain the written consent of the owner of the automobile to be repaired to use 'aftermarket crash parts,' as defined by the Act, or 'salvage crash parts,' as the term has been used in this opinion." The West Virginia Automotive Dismantles and Recycles Association, the West Virginia Insurance Federation, Inc. and State Farm Mutual Automobile Insurance Company v. McGraw, et al., C.A. 97-C-2797 (Aug. 1998).

See App., p. 0008.

Careful examination of the Circuit Court's Final Order reflects that the Circuit Court determined that the decision it reached in August of 1998 is still valid and applicable in these current proceedings. More specifically the Final Order states that "[h]aving reviewed its 1998 Order, this Court concludes that it was correct in its prior interpretation of the Automotive Crash Parts Act . . ." See App., p. 0016, ¶ 21.

While the Circuit Court did previously address the Crash Parts Act in 1998, it is important to recognize that its prior decision is not binding upon the Petitioners. It is well-settled in West Virginia that circuit court opinions have no precedential value. *State ex rel. Miller v. Stone*, 216 W. Va. 379, 382 n. 3, 607 S.E.2d 485 (2004). In fact, if *per curiam* decisions of this Court are not given any precedential weight or value, it is axiomatic that an unpublished opinion of a trial court would also have no

precedential value. *Pugh v. Workers' Compensation Comm'r*, 188 W. Va. 414, 417, 424 S.E.2d 759, 762 (1992). As observed by the Fourth Circuit Court of Appeals (“Fourth Circuit”) in *Simpson v. Duke Energy Corp.*, 1999 U.S. App. LEXIS 21553 (4th Cir. S.C. Sept. 8, 1999), a decision reached by a trial court is “not an authoritative statement of state law” and, “as an unpublished decision, lacks any precedential value.” In that regard, the Fourth Circuit determined that “[w]here neither a state's supreme court nor its intermediate appellate courts have ruled on an issue, a federal court is not bound by an unpublished trial court decision.” *Id.* While this opinion is also unpublished, and not precedential, the Fourth Circuit’s observations are certainly persuasive with respect to the 1998 Circuit Court opinion at issue.

Furthermore, nonparties to an action are not bound by judgments to which they were not active participants, or did not exercise control over the conduct of the litigation. *Montana v. United States*, 440 U.S. 147 (1979). The Petitioners were not active participants in the 1998 action before the Circuit Court. In that regard, the Petitioners exercised no control whatsoever over the conduct of the 1998 litigation, and are accordingly not bound by the Circuit Court’s determinations at that time. Thus, the doctrine of *res judicata* is not applicable. *Blake v. Charleston Area Med. Ctr.*, 201 W. Va. 469, 498 S.E.2d 41 (1997). Therefore, the Circuit Court’s consideration of the WVAG’s allegations against the Petitioners and the Petitioners’ counterclaims should have been considered as *de novo*.

Despite the foregoing principles, the Circuit Court did not fully analyze the Crash Parts Act. In fact, it did not, incorporate, or otherwise include a full recitation of its 1998 analysis and interpretation into its Final Order. The Circuit Court simply stated that its prior conclusions were correct. In that regard, without (a) conducting any discovery with respect to present day warranties; (b) making a specific finding in this present action that the Crash Parts Act remains ambiguous; and (c) making any findings or conclusions of law concerning its interpretation and construction of the Crash Parts Act, the Circuit Court simply adopted its 1998 opinion and applied its prior interpretations to the present action. Specifically the Circuit Court made the following conclusions of law:

3. "Salvage crash parts" means "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." 1998 Order (August 1998); State ex rel. McGraw v. Liberty Mutual Insurance Company, et al., 2012 WL 1036848 (S.D.W. Va.).

5. "Recycled genuine original equipment manufacturer parts," as used by the Petitioners, has the same meaning as "salvage crash parts." 1998 Order (Aug. 1998).

6. Although salvage crash parts meet the statutory definition of "genuine crash parts," they do not comply with the underlying requirement that such parts be "sufficient to maintain the manufacturer's warranty" on that part.

21. Having reviewed its 1998 Order, this Court concludes that it was correct in its prior interpretation of the Automotive Crash Parts Act - that "when automobile insurance companies negotiate the repair of automobiles, and when motor vehicle body shops repair automobiles, they must negotiate and effect the repair of automobiles using new "genuine crash parts" sufficient to maintain the automobile manufacturer's new car warranty for that part, unless they first obtain the written consent of the owner of the automobile to be repaired to use 'aftermarket crash parts,' as defined by the Act, or 'salvage crash parts,' as the term has been used in [the 1998 opinion]."

22. The language required to be used in the notice to the consumer "if the replacement parts are aftermarket crash parts" set forth in W.Va. Code § 46A-6B-4(b) does not preclude Petitioners from complying with W.Va. Code § 46A-6B-4(a) which requires:

- a. providing 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);
- b. specifying whether the replacement parts are genuine crash parts, W.Va. Code § 46A-6B-4(a)(2); and
- c. identifying the manufacturer of the parts if the replacement parts are aftermarket crash parts, W.Va. Code § 46A-6B-4(a)(3).

These disclosures are required to be given to consumers before the motor vehicle body shop begins work on the consumer's vehicle and is clearly intended to include all replacement crash parts intended to be used in the repair whether new, salvaged, or aftermarket.

See App., pp. 0006 and 0016-0017.

Although the 1998 action and this present action both involve the use of recycled genuine OEM crash parts under the Crash Parts Act, the parties are not the same and the facts at issue are different. As noted above, the Circuit Court's August 1998 decision is not the "law" of the State of West Virginia, as the judicial system does not promulgate laws, it simply is charged with the application and enforcement of laws as passed by the W.Va. Legislature. As specifically noted by the W.Va. Supreme Court in *Subcarrier Communications, Inc. v. Nield*, 218 W. Va. 292, 299 n.10, 624 S.E.2d 729, 736 n.10 (2005)

“[i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten.” In that regard, the Circuit Court was charged with the responsibility of treating this present action as a *de novo* proceeding and fully analyze all of the issues at hand in accord with West Virginia law governing statutory construction. However, the Circuit Court chose not to treat this matter in that fashion, and it simply adopted its rulings from proceedings which occurred over fourteen (14) years ago. By doing so, the Circuit Court committed reversible error.

D. The Circuit Court erred by construing the West Virginia Automotive Crash Parts Act, W.Va. Code § 46A-6B-1, *et seq.*, without first finding that the same was ambiguous.

As noted by this Court in the oft-cited case of *Ohio County Comm'n v. Manchin*, 171 W. Va. 552, 554, 301 S.E.2d 183,185 (1983), “interpretation of a statute is warranted only if the statute is ambiguous and the initial step in such interpretative inquiry is to ascertain the legislative intent.” Referencing its decision in *Ohio County Comm'n*, this Court more recently stated in *Barr v. NCB Mgmt. Servs.*, 227 W. Va. 507, 711 S.E.2d 577 (2011):

[W]e are mindful that ‘[a] statute that is ambiguous must be construed before it can be applied.’ Syl. pt. 1, *Farley v. Buckalew*, 186 W. Va. 693, 414 S.E.2d 454 (1992). Importantly, ‘[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.’ Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). See also Syl. pt. 1, *Ohio Cnty. Comm'n v. Manchin*, 171 W. Va. 552, 301 S.E.2d 183 (1983).

Barr, 227 W. Va. at 512, 711 S.E.2d at 582. Thus, a “finding of ambiguity must be made prior to any attempt to interpret a statute.” *Dunlap v. Friedman's, Inc.*, 213 W. Va. 394, 398, 582 S.E.2d at 845 (2003).

A close examination of the Final Order, in conjunction with the Crash Parts Act, reflects that the Circuit Court not only interpreted the Act, it modified, revised and amended the Act in order to apply it to the use of recycled OEM crash parts. However, the Final Order does not include the requisite finding that the Crash Parts Act is ambiguous and therefore in need of interpretation. Even if the Circuit Court were permitted to rely upon its 1998 unpublished non-precedential decision, this does not absolve the Circuit

Court from adhering to the requisite factors of statutory construction in this proceeding. Since the Circuit Court failed to specifically find that the Crash Parts Act was ambiguous, it committed reversible error by interpreting the Act.

E. The Circuit Court erred by modifying and rewriting the West Virginia Automotive Crash Parts Act, W.Va. Code § 46A-6B-1, et seq., which is beyond its jurisdiction.

Recognizing its own limitations with respect to the interpretation of statutes, this Court in *Huffman v. Goals Coal Co.*, 223 W. Va. 724, 679 S.E.2d 323 (2009) strongly observed that:

This Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation. It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation. It is the duty of this court to enforce legislation unless it runs afoul of the State or Federal Constitutions. *Boyd v. Merritt*, 177 W.Va. 472, 474, 354 S.E.2d 106, 108 (1986). See also, *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 692, 408 S.E.2d 634, 642 (1991) ("the judiciary may not sit as a superlegislature to judge the wisdom [***12] or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."); Syllabus Point 1, in part, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965) ("Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary.")

Huffman, 223 W.Va. at 728, 679 S.E.2d at 327.

Concerning statutory interpretation, this Court recently stated that "[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect. In other words, '[w]here the language of a statutory provision is plain, its terms should be applied as written and not construed.'" *Univ. Commons Riverside Home Owners Ass'n v. Univ. Commons Morgantown, LLC*, 2013 W. Va. LEXIS 264, 13-14 (W. Va. Mar. 28, 2013) (Internal citations omitted.)

Furthermore, in *Banker v. Banker*, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996) this Court stated, "[i]t is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted." More specifically, the W.Va. Supreme Court has further cautioned that "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syllabus Point 1, *Consumer Advocate*

Division v. Public Service Commission, 182 W.Va. 152, 386 S.E.2d 650 (1989). See also, *Subcarrier Communications, supra*.

As noted above, once a statute is determined to be ambiguous, the next step and primary objective in statutory construction is to ascertain the intent of the legislature. *Ohio County Comm'n*, 171 W.Va. at 554, 301 S.E.2d at 185; *Barr*, 227 W.Va. at 512, 711 S.E.2d at 582; *Dunlap*, 213 W.Va. at 398, 582 S.E.2d at 845. With respect to the Crash Parts Act, the intent of the W.Va. Legislature is plainly set forth in the Declaration for the Act. In that regard, the Crash Part Act specifically states that its purpose is 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. (Emphasis added.)⁶ The only conclusion that can be reached under this circumstance is that the W.Va. Va. Legislature purposely omitted reference to recycled OEM crash parts in the Crash Parts Act. *Banker, supra*.

As reflected by the Final Order, the Circuit Court did not address the legislative intent for the Crash Parts Act. The Circuit Court simply interpreted the Act, relying in part upon its 1998 opinion. Without any substantive analysis, the Circuit Court determined that recycled OEM genuine crash parts are the same as aftermarket crash parts and therefore the same notice provisions under the Crash Parts Act for aftermarket crash parts are applicable. The Circuit Court reached this decision despite the fact that the Crash Parts Act does not even reference recycled OEM genuine crash parts, much less include a definition. Further, the Circuit Court concluded that under the Crash Parts Act the statutory definition of aftermarket parts includes recycled genuine OEM crash parts even though the parts themselves are diametrically different. The Crash Parts Act defines aftermarket parts as:

⁶ The intention of the W.Va. Legislature with respect to the Crash Parts Act is also reflected by its subsequent legislative history since the passage of the Act in 1995. However, the Petitioners are cognizant that this Court has previously commented that it does not believe that “post-enactment legislative history is entitled to substantial consideration in construing a statute.” *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438(1995). Nonetheless, the Petitioners would point out that from 1997 through 2003, ten (10) bills were introduced during the Regular Session of the W.Va. Legislature seeking to amend the Crash Parts Act and address the use of used or recycled crash parts. None of these bills were passed which is quite telling with respect to the W.Va. Legislature’s stated purpose for the Act, to simply address the use of aftermarket crash parts.

- (a) "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) (Emphasis added.)

Contrary to the definition of aftermarket parts in the Crash Parts Act, recycled OEM genuine recycled parts are actually manufactured by the original equipment manufacturer, and are authorized to use that manufacturer's name and/or trademark. In that regard, the Circuit Court's findings, despite failing to include any findings as to its statutory interpretations or construction, actually serves to rewrite the Crash Parts Act, which exceeds its judicial authority. As noted by the W.Va. Supreme Court in *Soulsby v. Soulsby*, 222 W.Va. 236, 247, 664 S.E.2d 121, 132 (2008)

If the Legislature has promulgated statutes to govern a specific situation yet is silent as to other related but unanticipated corresponding situations, it is for the Legislature to ultimately determine how its enactments should apply to the latter scenarios. . . . When specific statutory language produces a result argued to be unforeseen by the Legislature, the remedy lies with the Legislature, whose action produced it, and not with the courts. The question of dealing with the situation in a more satisfactory or desirable manner is a matter of policy which calls for legislative, not judicial, action. *Worley v. Beckley Mech., Inc.*, 220 W. Va. 633, 643, 648 S.E.2d 620, 630 (2007).

Soulsby, 222 W.Va. at 247, 664 S.E.2d at 132.

It is undisputed that the Crash Parts Act does not mention or specifically address recycled genuine OEM crash parts. Furthermore, the Declaration for the Crash Parts Act plainly states that the legislative intent for the Act was to prevent the use of aftermarket crash parts without notice. In that regard, the Circuit Court has modified the Crash Parts Act and has broadened its application beyond that intended by the W.Va. Legislature, even though the Act and its purpose is quite plain. Therefore, the Circuit Court's interpretation of the Crash Parts Act was not necessary, as the Act speaks plainly for itself. In that regard, by modifying and rewriting the Act the Circuit Court exceeded its jurisdiction, which is reversible error.

F. 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.*

Despite the Circuit Court's rulings to the contrary, there is nothing in the Crash Parts Act that defines what is "sufficient to maintain the manufacturer's warranty". Further, nothing under West Virginia law speaks to the standard that is applicable to determine 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. Rather, the law on this subject is federal in nature, as set forth by the United States Congress in the MMWA, 15 U.S.C. § 2301, *et seq.*

15 U.S.C. § 2302(c) of the MMWA provides that auto manufacturers are prohibited from invalidating or voiding warranties on automobiles for the use of aftermarket or non-OEM parts.

Specifically, the MMWA provides that:

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).

It is clear that the provisions set forth in 15 U.S.C. § 2302(c) of the MMWA and corresponding FTC regulations prohibit warrantors from voiding warranties on consumer products because aftermarket parts or recycled OEM parts were used to make repairs. This is substantiated by the regulations promulgated by the FTC. Interpreting the MMWA, the FTC has stated:

[n]o warrantor may condition the continued validity of a warranty on the use of only authorized repair service and/or authorized replacement parts for non-warranty service and maintenance. For example, provisions such as, "This warranty is void if service is performed by anyone other than an authorized 'ABC' dealer and all replacement parts must be genuine 'ABC' parts," and the like, are prohibited where the service or parts are not covered by the warranty. These provisions violate the Act in two ways. First, they violate the section 102 (c) ban against tying arrangements. Second, such provisions are deceptive under section 110 of the Act, because a warrantor cannot, as a matter of law, avoid liability under a written warranty where a defect is unrelated to the use by a consumer of 'unauthorized' articles or service.

16 C.F.R. § 700.10(c).

Thus, the FTC's interpretation of the MMWA is consistent with the Petitioners' position that, as a matter of law, auto manufacturers may not void or otherwise invalidate new car warranties where aftermarket or recycled genuine OEM parts have been used to make repairs to the warranted automobile. To do so is a direct violation 15 U.S.C. § 2302(c). This was specifically clarified by the FTC in July of 2011, where it stated 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.

The WVAG, whether intentionally or unintentionally, has used its position as chief legal officer for the State of West Virginia to influence vehicle owners to insist upon the use of only genuine new OEM crash parts in the repair of vehicles three years old or newer. Since genuine OEM crash parts may only be purchased at higher costs directly from the new car manufacturers themselves or its representatives, i.e. Joe Holland Chevrolet, the application and enforcement of the Crash Parts Act by the WVAG not only serves to facilitate a tying arrangement, but in actuality creates a tying arrangement for such parts, which is in direct contravention of the anti-tying provisions of the MMWA.

The Circuit Court concluded that the MMWA was not applicable because its interpretation of the Crash Parts Act is not a prohibition on the use of recycled genuine OEM crash parts, but only subjects such usage to the same notice and consent provisions in place for aftermarket crash parts. However, that is not the cumulative effect the Circuit Court's 1998 decision has had, or enforcement of this present decision will have. At the time it filed its Petition, the WVAG's website strongly cautioned the public that the use of recycled genuine OEM crash parts will automatically serve to "totally void" the factory warranty for "that crash part and any part it touches", despite the FTC's statements to the contrary. See App., pp. 0453-0454. Further, the WVAG, in various interviews and press releases, has referred to recycled genuine OEM crash parts as "junkyard parts" or "junk parts" that are unsafe, unfit, dangerous and incapable of maintaining the factory warranty. Such comments have improperly characterized the condition of recycled genuine OEM crash parts and the effect the use of the same have on a new car factory warranty. This has undoubtedly influenced vehicle owners to insist upon the use of only genuine

OEM crash parts in the repair of vehicles three years old or newer, and the Circuit Court's decision will only further exacerbate the issue.

Furthermore, while the Circuit Court has ruled that use of recycled genuine OEM parts will void manufacturers' warranties, there is nothing in the Crash Parts Act that defines what is "sufficient to maintain the manufacturer's warranty". There is no West Virginia law or administrative rule that addresses in any fashion the standard for determining what parts do and do not violate new car warranties, thereby triggering the notice and consent provisions of W.Va. Code § 46A-6B-3. Rather, the law on this subject is federal in nature, and set forth by the United States Congress in the MMWA.

Notwithstanding the foregoing, the Circuit Court also concluded that the MMWA was inapplicable because "Congress did not intend to supplant state warranty law; rather MMWA intended to complement state laws." See App., p. 0017, ¶ 27. In a vacuum, the Circuit Court's finding that the MMWA was not intended to supplant state warranty law is correct. However, when considered in conjunction with the facts of this matter, the Circuit Court's application is incorrect. Again, it is important to keep in mind that West Virginia law does not define in any manner what types of parts are "sufficient to maintain the manufacturer's warranty." In that regard, one must turn to the MMWA which has specifically addressed this issue. To reiterate, West Virginia law is completely silent on this issue.

As noted above, the FTC, the federal agency charged with promulgating regulations interpreting the MMWA, has concluded that new car warranties may not be invalidated due to the use of aftermarket or recycled OEM parts. See 16 C.F.R. § 700.10(c) and App., pp 0137, 0455, or 1173. Despite the fact that the MMWA serves to prohibit manufacturers from invalidating warranties based on the use of aftermarket or recycled genuine OEM crash parts, the Circuit Court's Final Order supplants a basic tenet of the MMWA by concluding that only brand new OEM parts are sufficient to maintain a new car warranty in West Virginia. Regardless of the actors, this finding undermines the MMWA.

With respect to this issue, 15 U.S.C. § 2311(c) of the MMWA provides that:

(1) Except as provided in subsection (b) of this section and in paragraph (2) of this subsection, a State requirement-

(A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;
(B) which is within the scope of an applicable requirement of sections 2302, 2303, and 2304 of this title (and rules implementing such sections), and
(C) which is not identical to a requirement of section 2302, 2303, or 2304 of this title (or a rule thereunder),
shall not be applicable to written warranties complying with such sections (or rules thereunder).

15 U.S.C. 2311(c). Thus, under the plain meaning of this express preemption provision, state laws that impose requirements not identical to those in 15 U.S.C. § 2302 are preempted, and rendered without effect. This provision also creates a Congressional mandate that, where the state law is silent regarding whether the use of recycled OEM crash parts will void manufacturers' warranties, the provisions of the MMWA will control, because state laws are prohibited from differing from the provisions set forth in 15 U.S.C. § 2302.

If a State desires to enact a law that is not identical to the provisions of 15 U.S.C. § 2302, such will be allowed only when:

(2) If, upon application of an appropriate State agency, the Commission determines (pursuant to rules issued in accordance with section 2309 of this title) that any requirement of such State covering any transaction to which this chapter applies
(A) affords protection to consumers greater than the requirements of this chapter and
(B) does not unduly burden interstate commerce, then such State requirement shall be applicable (notwithstanding the provisions of paragraph (1) of this subsection) to the extent specified in such determination for so long as the State administers and enforces effectively any such greater requirement.

15 U.S.C. § 2311(c)(2). No West Virginia state agency (*e.g.* the WVAG) has made such an application to the FTC, let alone has such an application been granted. As such, provisions of the MMWA are controlling in West Virginia, and mandate that no warrantor in this State may invalidate a new car warranty on the grounds that aftermarket or recycled genuine OEM parts were used to make repairs to the vehicle. Simply stated, if a new car manufacturer cannot void a warranty because a recycled OEM crash part is used in making repairs, then such parts are "sufficient to maintain the manufacturer's warranty" under W.Va. Code § 46A-6B-3, and the use of the same is permitted under the Crash Parts Act, with or without consent.

A plain reading of the MMWA and the FTC's recent consumer alert, at a minimum, creates a genuine issue of material fact. For these reasons and contrary to the Circuit Court's ruling that the Crash Parts Act and MMWA regulate "different actors and different conduct", the MMWA does apply in this action. In that regard, the Circuit Court's failure to give the MMWA due consideration is reversible error.

G. The Circuit Court erred by interpreting the West Virginia Automotive Crash Parts Act, W.Va. Code § 46A-6B-1, *et seq.*, in such a fashion that it is impossible for the Petitioners to comply with the same without violating provisions of the West Virginia Consumer Credit Protection Act concerning the use of false or misleading statements in consumer transactions.

Notwithstanding the Circuit Court's failure to properly adhere to West Virginia law concerning statutory construction, compliance with the Circuit Court's interpretation of the Crash Parts Act is not feasible. This is substantiated by the very consent language required by the Crash Parts Act to obtain from consumers before aftermarket parts are to be utilized. More specifically, the Crash Parts Act mandates that the following notice provision, without any changes, must be used:

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.

W.Va. Code § 46A-6B-4 (emphasis added.)

It is plainly apparent that W.Va. Code § 46A-6B-4 is a specific statute with a specific purpose, to ensure that when "aftermarket parts" are used appropriate notice is given to the vehicle owner. This is an important factor because the general rules of statutory construction require "that a specific statute be given precedence over a general statute relating to the same subject matter[.]" *Hicks v. Mani*, 2012 W. Va. LEXIS 716, 22-23 (W.Va. Oct. 19, 2012); *Trumka v. Kingdon*, 174 W.Va. 330, 325 S.E.2d 120 (1984). More specifically, this Court has declared that when "both a specific and a general statute apply to a given case, the specific statute governs." *In re Chevie V.*, 226 W.Va. 363, 371, 700 S.E.2d 815, 823 (2010).

By failing to give due deference to the actual notice provision set forth in W.Va. Code § 46A-6B-4, the “specific statute” promulgated by the W.Va. Legislature, the Circuit Court failed to follow the “cardinal rule of statutory construction”, that “significance and effect must, if possible, be given to every section, clause, word or part of the statute.” Syllabus Point 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999). This Court in *Martin v. Randolph County Bd. of Educ.*, 195 W.Va. 297, 312, 465 S.E. 2d 399, 415 (1995), quoting the United States Supreme Court opinion of *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149, 117 L. Ed. 2d 391, 397 (1992), stated that “[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.” See also, *Cunningham v. Hill*, 226 W. Va. 180, 185, 698 S.E.2d 944, 949 (2010). As further noted by this Court in *Taylor v. Nationwide Mut. Ins. Co.*, 214 W. Va. 324, 328, 589 S.E.2d 55, 59, (2003), when interpreting a statutory provision, courts are “bound to apply, and not construe, the enactment's plain language.” Thus, a trial court must favor the plain and obvious meaning of the statute rather than a narrow or strained construction.

As this Court also observed in *Peters v. Rivers Edge Min., Inc.*, 224 W.Va. 160, 176, 680 S.E.2d 791, 807 (2009), a trial court has the “duty to avoid whenever possible [an application] of a statute which leads to absurd, inconsistent, unjust or unreasonable results.” Likewise, this Court in *State v. Kerns*, 183 W.Va. 130, 394 S.E.2d 532 (1990), as relied upon in *Peters, supra*, stated that “[w]here a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made.” Furthermore, as this Court noted in *Banker*, 196 W.Va. at 546-547, 474 S.E. at 476-477, the trial court cannot “add to statutes something the Legislature purposely omitted.”

With respect to the case at hand, the Circuit Court’s interpretation of the Crash Parts Act produces an “absurd result”. Specifically, the Circuit Court’s Final Order would require a body shop to provide a written estimate to a vehicle’s owner each time that recycled genuine OEM crash parts are being used to inform them that aftermarket crash parts will be used, even though they are not being used, and require the consumer to sign a consent before repairs would commence. In that regard, *argumento* if

the Circuit Court had properly found that the Crash Parts Act was ambiguous, its interpretation would violate established canons of statutory construction. The W.Va. Legislature specifically chose not to address the use of recycled OEM crash parts in the Crash Parts Act, otherwise it would have enacted a specific notice provision for the use of those parts. As noted above, the Circuit Court must presume that the W.Va. Legislature said in the Crash Parts Act what it meant, that consent is only required with respect to aftermarket crash parts. *Martin, supra*.

Since recycled OEM crash parts are manufactured by the original manufacturer, unlike aftermarket crash parts, the proscribed notice is not only inapplicable with respect to recycled OEM crash parts, but erroneous, highly misleading and deceptive because it completely misstates and mischaracterizes the type of part at issue. On this basis, it is impossible for the Petitioners to comply with the Circuit Court's interpretation of the statute. In fact, compliance by the Petitioners would in actuality violate other provisions of the WVCCPA which 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). In addition, the application of the notice provision to recycled OEM crash parts would further serve to indirectly facilitate a tying provision that is contrary to federal law. MMWA, 15 U.S.C. § 2302(c).

This exact issue was encountered by the parties in this matter following the entry of the Circuit Court's preliminary injunction Order and the parties had to jointly draft a hybrid notice with a disclaimer to denote that recycled genuine OEM crash parts, unlike aftermarket parts, are indeed manufactured by the original manufacturer. Nonetheless, this hybrid notice modifies the language mandated by W. Va. Code § 46A-6B-4. See App., pp. 0457-0458.

In light of the foregoing factors, it is clear that the notice provision of the Crash Parts Act (W. Va. Code § 46A-6B-4) must be read in conjunction with the entire statute. In fact, it is boilerplate law in West Virginia that statutes relating to the same subject matter must be read and applied together. *Univ. Commons Riverside Home Owners Ass'n, supra*. ("Statutes *in pari materia* must be construed together and the legislative intention, as gathered from the whole of the enactments, must be given effect.") Thus,

each section of the Crash Parts Act must be read *in pari materia*, which very clearly establishes that it was the legislature's intent that (1) aftermarket parts are only those not manufactured by the original manufacturers; and (2) the notice must only be given for those parts NOT manufactured by the original manufacturer. Nonetheless, the Circuit Court did not adhere to these principles, and compliance with its Final Order specifically requires that the Petitioners violate the Crash Parts Act, the WVCCPA and potentially the MMWA. This demonstrates that the Circuit Court's interpretation of the Act leads to an 'absurd result.' Since it is impossible for the Petitioners to comply with the Circuit Court's Order without violating other laws, it is abundantly clear that the Circuit Court's interpretation is incorrect, and must be overturned.

H. The Circuit Court erred by finding that the West Virginia Automotive Crash Parts Act, W.Va. Code § 46A-6B-1, *et seq.* requires that a new car warranty must be maintained for the specific part replaced following a repair, thereby rewriting the Act and adding additional criteria that was not contemplated by the West Virginia Legislature.

As discussed above, upon commencement of its investigation against Liberty, the WVAG was proclaiming on its website that when aftermarket or recycled OEM crash parts are used in the repair of a vehicle that the "new car warranty will be declared totally void on that crash part and any part it touches." Presumably after the WVAG reviewed the FTC's July 2011 Consumer Alert in further detail, the WVAG revised its erroneous public position concerning recycled OEM crash parts. This is confirmed by the subsequent amendments made by the WVAG to its website to reflect that the use of aftermarket or recycled OEM crash parts may cause a manufacturer to refuse to honor a warranty on any part the aftermarket or recycled OEM crash part touches if it is determined that such part is the cause of a subsequent malfunction. The WVAG's current website has completely removed the "frequently asked questions" portion of its website.

The WVAG's position in this matter also changed. Instead of arguing that the use of recycled OEM crash parts serves to totally void a warranty upon their usage, the WVAG began to maintain that there is no warranty on the newly replaced crashed part itself, and therefore, such usage violates the Crash Part Act, as previously interpreted by the Circuit Court in 1998. While the Petitioners requested

information on this issue, the WVAG objected, and refused to provide any evidence to support its assertion that a new car warranty would transfer to a new OEM crash part in the repair of a vehicle involved in an accident. Based upon the Petitioners' initial review of recent new car warranties, once a car is involved in an accident, a manufacturer may choose not to honor the warranty on any specific part that is replaced because of that accident, even if it is a brand new OEM crash part purchased directly from the manufacturer. However, the Petitioners were prevented from addressing this point further in discovery.

Even though discovery was incomplete, and it did not have one single new car warranty on the record before it, the Circuit Court determined that no further discovery was necessary and adopted the WVAG's argument. In that regard, the Circuit Court concluded that under the Crash Parts Act, an insurer and motor vehicle body shop must obtain consent from the consumer unless the crash parts used in the repair of the vehicle are "sufficient to maintain the manufacturer's warranty on that specific part." See App., p. 0018, ¶ 30. (Emphasis in original). However, this finding is not based on the unambiguous language of the Crash Parts Act, but is instead, based completely on the Circuit Court's 1998 interpretation of the Act, which essentially broadens the scope of the Act farther than what was intended by the W.Va. Legislature, as discussed in further detail above.

With respect to crash parts that do not require notice or consent, the Crash Parts Act simply states 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.

W.Va. Code § 46A-6B-3. (Emphasis added.) Notably, the Crash Parts Act does not specify that the warranty must be maintained on the specific part itself. Rather the Crash Parts Act provides that the crash part utilized must not serve as a basis in and of itself to violate/void the warranty. As noted multiple times hereinabove, the FTC has stated that under federal law a new car manufacturer cannot void a

warranty simply because a recycled OEM crash part is used. The car manufacturer can only deny coverage under a warranty if it can demonstrate that the recycled OEM crash part was the root cause for subsequent repairs. See App., pp. 0137; 0455; or 1173.

In light of the foregoing, the Circuit Court's Final Order is not interpreting W. Va. Code § 46A-6B-3, it is rewriting it, by adding additional criteria that was not contemplated by the W.Va. Legislature. In such circumstances, this Court has specifically stated that "[a] statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." *Consumer Advocate Division, supra*, and *Subcarrier Communications, supra*. Again, the Circuit Court failed to properly adhere to West Virginia law as the same governs statutory construction. By expanding the Crash Parts Act beyond what was enacted by the W.Va. Legislature, and essentially rewriting portions of the Act, the Circuit Court committed reversible error.

VI. 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). In particular the affidavit demonstrated that (1) there was a plausible basis to believe that discoverable facts are likely exist which were not accessible as of September 24, 2012; (2) that the information could be readily obtained if additional time were permitted; (3) such information would engender an issue both genuine and material; and (4), that there was good cause for the Petitioners failure to conduct and complete its discovery before that time, especially in light of the WVAG's reluctant refusal to participate. *Powderidge Unit Owners Ass'n., supra*. On this basis, the Circuit Court's summary judgment in favor of the WVAG was indeed "precipitous", and therefore constitutes appealable error which should be reversed. *Board of Education in the County of Ohio, supra*.

Notwithstanding the fact that discovery was incomplete, it is also clear that there are various elements of material facts that are in dispute, especially when you consider that the Circuit Court is directed to resolve all ambiguities and draw all factual inferences in favor of the Petitioners in this matter.

Hanlon, supra. As discussed hereinabove, the only parts under the Crash Parts Act that are specifically declared to be unable to “maintain the manufacturer’s warranty”, are aftermarket crash parts. On this basis, recycled genuine OEM crash parts cannot simply be designated as “aftermarket crash parts” as defined by the Crash Parts Act since they (1) meet the definition of genuine crash parts under the Crash Parts Act as they are manufactured by, or for, the original manufacturer of the vehicle and are further authorized to carry the name or trademark of the original manufacturer; and (2) are sufficient to maintain the factory warranty. With respect to recycled genuine OEM crash parts, the FTC has opined, based upon the MMWA, that the use of such parts in the repair of vehicles does not automatically serve as a basis to totally invalidate a factory warranty. Since the notice and consent provisions of the Crash Parts Act are not applicable to recycled genuine OEM crash parts, it is therefore axiomatic that the Petitioners have not concealed, suppressed, and omitted material terms in a transaction constituting unfair or deceptive acts or practices as defined by W.Va. Code 46A-6-102(7)(L)-(M). At a minimum, these factors create genuine issues of material fact that must be addressed and the Circuit Court’s judgment in favor of the WVAG was therefore premature and improper and should be reversed.

Dated May 20, 2013.

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