IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

JOE HOLLAND CHEVROLET, INC.,

Plaintiff,

v.

Civil Action No. 13-C-978
Presiding: Thomas C. Evans, III

LIBERTY MUTUAL INSURANCE COMPANY and GREG CHANDLER'S FRAME AND BODY, LLC,

Defendants.

ORDER GRANTING PLAINTIFF JOE HOLLAND CHEVROLET, INC.'S MOTION FOR SUMMARY JUDGMENT AS TO THE COUNTERCLAIMS OF DEFENDANT GREG CHANDLER'S FRAME AND BODY, LLC

Pending before this Court is the motion for summary judgment by Plaintiff Joe Holland Chevrolet, Inc. ("Joe Holland" or "Holland"), seeking dismissal of all of the counterclaims filed against Joe Holland by Defendant Greg Chandler's Frame and Body, LLC ("Chandler"). Chandler asserts five separate counterclaims against Joe Holland: three for variations of tortious interference with Chandler's business relations; one for unfair and deceptive practices as defined by the West Virginia Consumer Protection Act, W. Va. Code § 46A-6-102(7); and one for "business disparagement." *See* Defendant/Respondent Greg Chandler's Frame & Body, LLC's Counterclaim Against Joe Holland Chevrolet, Inc., ¶¶ 76–124.

Joe Holland, in its motion for summary, contends that all of Chandler's claims, however styled, allege some form of injurious falsehood. Therefore, Holland argues, the protections and limitations of the First Amendment of the United States Constitution and similar provisions of the West Virginia Constitution apply. These protections require, at the least, that a statement must specifically reference the plaintiff and must be recklessly or knowingly false in order to be

actionable in tort. Holland contends that the only statements identified by Chandler that specifically or impliedly refer to Chandler are statements made in the course of the instant lawsuit brought by Holland, which Holland points out are privileged against all claims except malicious prosecution. Holland further contends that the statements Chandler has identified, described below, were not negligent as a matter of law (let alone reckless or knowingly false).

Chandler, in response, takes issue with Holland's interpretation of the First Amendment and analogous provisions in the West Virginia Constitution. Chandler's counsel also submitted an affidavit under Rule 56(f) of the West Virginia Rules of Civil Procedure, requesting additional discovery prior to this Court's ruling. Joe Holland argues that Chandler brought the counterclaim based on statements and actions that are privileged under the common law of West Virginia or protected by the First Amendment of the United States and that Chandler has had sufficient time in discovery to uncover any other statements. Therefore, Holland argues, Chandler should not be permitted to go on an extended fishing expedition in search of some non-privileged utterance upon which to rehabilitate the counterclaim.

This Court held a hearing on the matter on December 9, 2015. Both parties appeared by counsel. This Court, having fully considered the arguments of counsel and the evidence and affidavits submitted, finds that summary judgment is appropriate.

I. FINDINGS OF FACT

This instant civil action and counterclaims arise from a dispute, primarily between the West Virginia Office of the Attorney General ("WVAG") and Liberty Mutual Insurance Company ("Liberty Mutual"), over the interpretation of the West Virginia Crash Parts Act, W. Va. Code § 46A-6B-1, et seq. It is undisputed that the Crash Parts Act prohibits the use (at least without prior consent of the vehicle owner) of "aftermarket" replacement parts—parts not made

by the original equipment manufacturer ("OEM")—in the repair of cars during their model year and for the following two calendar years of their life (hereafter "newer cars"). Going as far back as 1997, the WVAG—which is specifically empowered to interpret the Act and bring civil enforcement actions for alleged violations, *see* W. Va. Code § 46A-7-102—interpreted the Crash Parts Act as also prohibiting the use of salvaged or "recycled" OEM parts (i.e., used parts removed from another vehicle, usually after a crash resulting in a total loss) in repairs of newer cars. In a 1998 case arising from a dispute between the WVAG, on one side, and State Farm Insurance Company and an association of recycled parts dealers, on the other side, Kanawha County Circuit Judge Charles King agreed with the WVAG's interpretation and issued a written order and decision to that effect. *See* "Order Denying Plaintiffs' Motion for Summary Judgment and Granting Summary Judgment to Defendants," *West Virginia Automotive Dismantlers and Recyclers Association, et al v. Darrell McGraw, The Attorney General of the State of West Virginia, et. al.,* Civil Action No. 97-C-2797 (Kanawha Cty. Cir. Ct. Aug. 20, 1998) at 3. Judge King's 1998 order was never appealed.

Around this time, in 1997 or 1998, following the WVAG's interpretation of the Crash Parts Act and continuing after Judge King's 1998 order, Plaintiff Joe Holland, which operates a body shop, placed the following language on the "FAQ" section of its body shop's website:

> 5. Sometimes an insurance estimate will include items referred to as "LKQ" or "Like, Kind, and Quality" parts, remanufactured parts and/or recycled or used parts. These are not new parts from the original manufacturer of your vehicle. A recycled/used part is one that has come off of a salvaged vehicle. While it was made by the original manufacturer, it has been used on another vehicle and carries no warranty from the vehicle manufacturer. In the case of remanufactured parts, these are parts that have come off another vehicle and have been remanufactured (rebuilt and/or repaired) by someone other than the original equipment manufacturer. These parts may or may not be warranted by the remanufacturer, but are never warranted by the original vehicle manufacturer. Aftermarket parts are new but are manufactured by

someone other than the original vehicle manufacturer. These parts may be certified by CAPA, an aftermarket collision parts association, for fit and finish; however, they are not certified for fit, finish, or corrosion resistance by the original vehicle manufacturer. In addition, they do not carry any warranty from the vehicle manufacturer. The aftermarket manufacturer may or may not offer a warranty on these parts. If you have any questions about the warranty on these types of parts, you should ask your insurance company. Please be advised that estimates written by Joe Holland Chevrolet, Inc are written using Original Equipment parts, exact duplicate of the ones that came on your vehicle.

6. A couple of years ago, the West Virginia State Legislature passed the collision repair parts law. This law requires the use of new, original equipment parts on vehicle that are of the current year model and the two (2) previous model years. For example, new parts would be repaired on 1997, 1996 and 1995 vehicles. The law does not require the use of new OEM parts on vehicle on vehicles beyond these model years. The type of parts used in this repair, OEM, aftermarket, used or remanufactured, is at the discretion of the insurance company. If you have any questions about the use of non-original equipment parts in the repair of your vehicle, you should contact your insurance company and/or the State of West Virginia Office of the Attorney General.

Those statements continued to be hosted on the website through the end of the 1990s and all of the first decade of the new millennium, evidently without controversy, debate, or complaint from Chandler or any other body shop, informing consumers of their rights under the then-prevailing interpretation of the Crash Parts Act.

At some point in or around 2011, Chandler's co-Defendant, Liberty Mutual Insurance Company ("Liberty Mutual"), conducted its own analysis and decided that the Crash Parts Act did *not* prohibit the use of salvaged OEM parts in newer cars. Accordingly, Liberty Mutual decided to require body shops on its preferred list of body shops (called "TLC" body shops in Liberty Mutual's marketing materials) to use salvaged or "recycled" crash parts—used parts made by the original car manufacturer—in repairs covered by its insurance policies, whenever available, even in situations where the repair was being performed on newer cars.

It appears that Liberty Mutual required its TLC body shops to use salvaged parts in the repair of newer cars. *See* "State's Memorandum of Law in Support of Complaint and Petition for Preliminary Injunction," filed in Civil Action No. 11-C-2231 (Kanawha Cty. Cir. Ct. Jan. 5, 2012) ("WVAG 2012 Memo") at 5 n. 3 and accompanying text (describing results of an investigation into Liberty Mutual's conduct by the WVAG Consumer Protection Division). However, Joe Holland refused to adopt this practice, and was promptly removed by Liberty Mutual from its TLC list of body shops.[1]

Joe Holland subsequently decided to report Liberty Mutual's conduct in requiring TLC shops to use salvaged parts in newer car repairs to the WVAG. To that end, Joe Holland's outside counsel, Frank Baer, sent a letter to Jill Miles, Deputy Attorney General, dated July 18, 2011. There does not appear to be any dispute as to the accuracy of the facts set forth in Mr. Baer's letter, apart from the question of the interpretation of the Crash Parts Act. The letter does not mention Chandler or suggest or imply anything about any other body shop.

After receiving the letter from Frank Baer, the WVAG opened an investigation into Liberty Mutual's conduct. It was, at that time, the long-standing opinion of the WVAG that the use of salvaged parts in the repair of newer cars without prior consent violated the Crash Parts Act. WVAG confirmed through its investigation and the use of investigatory subpoenas that Liberty Mutual was, indeed, insisting that TLC shops use salvaged parts in repairs of newer cars.

WVAG evidently decided to take enforcement action against Liberty Mutual. WVAG also decided to bring an action against one of the body shops that was complying with Liberty Mutual's demand. WVAG did not give any reason for having selected Chandler for suit from

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[1] The evidence in the record indicates that Joe Holland's body shop manager referred Liberty Mutual to the 1998 decision of Kanawha County Circuit Judge Charles King in explaining Holland's decision.

among the majority of TLC shops that its subpoenas confirmed were following Liberty's unlawful policy.[2] On December 15, 2011, WVAG sued Liberty Mutual and Chandler for violations of the Crash Parts Act. The WVAG also issued a press release at the same time, and may have issued other press releases during the course of its prosecution of the case.

On December 18, 2012, the Circuit Court of Kanawha County issued an order and decision in the case brought by the WVAG against Liberty Mutual and Chandler, and found that the Crash Parts Act prohibited the use of salvaged parts in the repair of newer cars. Liberty Mutual and Chandler appealed to the West Virginia Supreme Court.

On or about May 17, 2013, Joe Holland filed the instant civil action against Liberty Mutual and Greg Chandler. Shortly thereafter, on or about June 19, 2013, Chandler submitted the instant Counterclaim.

On or about June 11, 2014, the West Virginia Supreme Court issued its opinion and decision in the case brought by the WVAG against Liberty Mutual and Chandler. *See Liberty Mut. Ins. Co. v. Morrisey*, 760 S.E.2d 863 (W. Va. 2014). The West Virginia Supreme Court reversed the December 18, 2012 decision of the Circuit Court of Kanawha County, and held that the Crash Parts Act did not prohibit the use of salvaged OEM parts in repairs of newer cars.

II. CONCLUSIONS OF LAW

Chandler has asserted at least two and arguably three distinct theories of liability against Joe Holland: tortious interference with prospective business customers (Counts I–III) and

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[2] Depositions of relevant WVAG attorneys and other personnel were not taken, noticed or attempted by either party, and neither party submitted affidavits from any of them. A footnote to WVAG's 2012 legal memorandum hints that WVAG may have sued Chandler because Chandler was the "only one of those [subpoenaed TLC] facilities [that] chose to be represented by Clarence E. Martin, the same lawyer representing Liberty Mutual." *See* WVAG 2012 Memo at 5 n. 3. Whatever the reason may have been, absent some evidence supporting the inference—or at least an attempt at questioning the key WVAG decision-makers—Chandler is not entitled to the inference that WVAG sued Chandler because Joe Holland pressured WVAG to do so.

disparagement in both statutory (Count IV) and common-law (Count V) forms. However, the alleged actionable conduct underpinning all of Chandler's counts, however styled, is the same. All counts turn essentially on Chandler's notion that Joe Holland harmed Chandler's business interests by reporting Liberty Mutual's and Chandler's conduct to the WVAG, by filing the instant lawsuit, and by making alleged "misrepresentations" to the public, to industry trade groups, and to individuals.

The constitutional and state-law protections and privileges for the various kinds of actions that Joe Holland is accused of—reporting Liberty Mutual's conduct to the WVAG,[3] filing a civil action,[4] hosting statements on its website concerning the interpretation of the Crash Parts Act—are more important than the elements associated with the assorted labels that Chandler uses. Chandler's allegations are therefore broken down and discussed by category of statement or actionable conduct, rather than labeled theory of liability.

A. Joe Holland's act of reporting conduct to the WVAG and allegedly assisting the WVAG

It is black letter law that asking government officials to enforce the laws or attempting to influence government officials' enforcement or interpretation of the laws is protected activity under the First Amendment of the United States Constitution and article II, section 16 of the Constitution of West Virginia. *See* syl. pt. 7, *Webb v. Fury*, 167 W. Va. 434, 282 S.E.2d 28 (1981) (overruled on other grounds, *Harris v. Adkins*, 189 W. Va. 465, 432 S.E.2d 549 (1993)) ("The right to petition includes, among other things, activity designed to influence public sentiment concerning the passage and enforcement of laws as well as appeals for redress made

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[3] It should be noted that Joe Holland is not accused of *threatening* (anyone, Chandler, insurance companies, or Chandler's prospective customers) to report Liberty Mutual's or Chandler's conduct to the WVAG in order to gain advantage, just of doing it.

[4] Similarly, Joe Holland is not accused of *threatening* to institute a civil action (against anyone, Chandler or his prospective customers) in order to gain advantage, just of doing it.

directly to government."). The protection and privilege afforded by the First Amendment and the West Virginia Constitution to petitioning activity is not absolute, but proof of an intentional or reckless falsehood, referred to as "actual malice," is required to overcome it. *See* syl. pt. 1, *Harris v. Adkins*, 189 W. Va. 465, 432 S.E.2d 549 (1993) ("The right to petition government . . . does not provide an absolute privilege for intentional and reckless falsehoods, but the right is protected by the actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).").

Importantly, proof of intentional or reckless falsehood is required in order for petitioning activity to be actionable, regardless of the motive of the petitioner or any financial interest he may have in the outcome. *See* syl. pt. 6, *Webb*, 282 S.E.2d 28 ("[T]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so."); *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961) ("A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would . . . deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.").

This First Amendment requirement of "actual malice"—knowingly or recklessly false statements—is embodied in the elements of a malicious prosecution action, as well, which is an undoubtedly permissible action, but only in instances where a party not just reported potentially unlawful conduct but actually "procured" the prosecution and can satisfy the other elements. *See* syl. pt. 3, *Norfolk S. Ry. Co. v. Higginbotham*, 228 W. Va. 522, 721 S.E.2d 541, (2011) (holding that procurement is a requirement for malicious prosecution). A malicious prosecution plaintiff must show not only that the action terminated in his favor, but that it lacked probable cause at the

outset, which is basically akin to an intentional or reckless falsehood standard. *See* syl. pts. 1 and 2, *Higginbotham*, 228 W. Va. 522.[5]

With these principles in mind, it is clear that even if Chandler were correct about Joe Holland's motives for reporting Liberty Mutual's conduct to the WVAG or assisting the WVAG in its prosecution of its civil suit against Liberty Mutual,[6] that conduct is not actionable.[7] Chandler does not contend that Joe Holland falsely reported or testified about what Liberty Mutual was doing, and there is no evidence to suggest that. Chandler merely contends that Joe Holland's motives in reporting and assisting the WVAG were financially driven by Holland's interest in selling new OEM parts and harming Holland's competition, but that is an impermissible consideration under the First Amendment and equivalent state constitutional protections.[8] Constitutionally speaking, even if Holland's actions were driven by its own financial motives, they are still protected.

Moreover, while Chandler has not produced any evidence or identified a witness who will testify that Joe Holland reported Chandler's conduct to the WVAG, that action, had it occurred, would also be privileged and protected under the First Amendment. Importantly,

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[5] Defendants in malicious prosecution actions have additional defenses, such as reliance on the advice of counsel, that were flagged but not otherwise addressed by Holland's counsel, and are not addressed by the Court here, because Chandler has not pursued a claim for malicious prosecution. *See Hunter v. Beckley Newspapers Corp.*, 129 W. Va. 302, 314, 40 S.E.2d 332 (1946) (reliance on advice of counsel a defense to malicious prosecution). Nonetheless, it is apparent that in reporting Liberty Mutual's conduct to the WVAG, Joe Holland may have relied on the advice of counsel—because the letter to the WVAG reporting the conduct was from Joe Holland's counsel.

[6] Joe Holland denies any motive for reporting Liberty mutual other than those reflected in the letter from Holland's counsel.

[7] The Court notes again that Chandler does not allege that Joe Holland threatened to report the activity in order to gain advantage or that Holland reported the activity only to make good on such a threat.

[8] Proof of malicious motive is an *additional* element in a malicious prosecution claim, but proof of malicious motive does not dispense with the lack of probable cause requirement, which is akin to a knowing or reckless falsehood.

Chandler does not dispute that Chandler engaged in the conduct that Chandler accuses Joe Holland of having reported. In other words, Chandler nowhere disputes that it was, in fact, repairing newer cars with salvaged parts at Liberty Mutual's behest.

Chandler also appears to be implying that Joe Holland's alleged conduct in encouraging WVAG to adopt what Chandler deems to be an incorrect interpretation of the Crash Parts Act is somehow actionable. There are multiple problems with this implied argument. First, the evidence is undisputed that the WVAG had already, by 1997 at least, adopted the interpretation of the Crash Parts Act that Joe Holland is accused of urging or encouraging. Second, the notion that one business could be liable to another business for urging government officials to *interpret* laws in a way that favors the business's interests is clearly repugnant to the First Amendment right to petition—and presumably scary to members of the legal profession, many of whom make their living doing exactly that on a regular basis. Third, the interpretation urged by Joe Holland was clearly not negligent, unreasonable, baseless, or reckless. The interpretation Joe Holland is accused of encouraging in 2011 is the same interpretation that the WVAG had argued in favor of before a Kanawha County Circuit Judge in 1997 and that the Kanawha County Circuit Judge had adopted in a written decision in 1998. There were no contradictory opinions or interpretations offered by anyone authority in the interim. Thus, as a matter of law, Joe Holland's interpretation of the Crash Parts Act was reasonable and not negligent or otherwise actionable.

B. The actions and statements of the WVAG characterizing Chandler's conduct as illegal

In answers to interrogatories on file with the Court, Chandler alleges significant harm as a result of the actions and statements of the WVAG characterizing Liberty Mutual's and Chandler's conduct as illegal, in violation of the Crash Parts Act. Moreover, Chandler appears to

blame Joe Holland for many of those actions and statements of the WVAG. However, Joe Holland is not responsible for the WVAG's conduct. Chandler has offered no evidence (and has not even made the allegation) that Joe Holland somehow pressured the WVAG into making or publicizing certain statements or otherwise procured the WVAG's statements or the publicizing of the statements. If Chandler contends that all of this negative conduct flows naturally from Joe Holland reporting Liberty Mutual to the WVAG, then Chandler may still have time to make an explicit malicious prosecution claim.[9]

If Chandler was harmed because the Attorney General for the State of West Virginia—i.e., the state's lawyer—espoused and publicized a mistaken view of the law to Chandler's detriment, the Court cannot see why Joe Holland should be held to account for it. Chandler's argument that Joe Holland, an automobile dealership, should be held responsible for the allegedly faulty legal analysis and legal claims of the state's attorney is unsupported by legal precedent and belied by common sense. Even if Joe Holland, a car dealership, pressed weak legal arguments and interpretations on the WVAG—which Holland denies, and which would be privileged under the First Amendment right to petition if it had—the WVAG, as the state's

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[9] The Court notes, however, that the explicit requirement of "procurement" sets a high bar for laying the conduct and decisions of government enforcement agencies at the feet of private reporters in malicious prosecution cases. The West Virginia Supreme Court has endorsed the following language from an opinion of the Supreme Court of Texas, which makes it clear that where the decision to prosecute is left to someone else's discretion (here, WVAG), there is no procurement in the absence of a knowingly false report: "[T]here is no procurement when 'the decision whether to prosecute is left to the discretion of another person, a law enforcement officer or the grand jury . . . . An exception . . . occurs when a person provides information which he knows is false to another to cause a criminal prosecution.'" *See Higginbotham*, 228 W. Va. at 529 (quoting *Browning-Ferris Industries, Inc. v. Lieck*, 881 S.W.2d 288, 292 (Tex. 1994)). Moreover, WVAG's statements are actionable, Chandler contends, because they reflect an incorrect interpretation of the Crash Parts Act and a poor understanding of related elements of federal law (such as the Magnuson-Moss Warranty Act), not because they misstate facts about what Chandler and Liberty Mutual were doing. Interpreting and understanding the law is the WVAG's business, not Joe Holland's.

attorney, is still very clearly obliged to use its own discretion, analysis, and judgment in deciding whether to adopt, enforce, or publicize those arguments as its own, and is responsible for those choices. At the very least, Chandler would need some convincing evidence—something much more than what Chandler offered in interrogatory answers on file that refer to the statements of a former body shop estimator and stock video footage from inside Holland's body shop accompanying media reports on the WVAG's position—to overcome the presumption that WVAG's attorneys acted on their own judgment and discretion.

C. Joe Holland's act of filing the instant lawsuit and statements made in the course of it

One of the few absolute privileges that exist in the common-law is the absolute privilege against actions—other than for malicious prosecution—arising out of statements made in initiating litigation or during the course of litigation. "A party to private litigation or a private prosecutor or defendant in a criminal prosecution is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of or during the course and as a part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding." *Collins v. Red Roof Inns*, 211 W. Va. 458, 461, 566 S.E.2d 595, 598 (2002) (quoting *Restatement (Second) of Torts* § 587 (1977)).

One cannot evade this absolute privilege by labeling claims for injurious falsehood "disparagement" or "tortious interference" rather than defamation. That would make a mockery of the rule and the privilege. The lone exception to the absolute privilege is set forth in comment (a) to *Restatement* § 587: "One against whom civil or criminal proceedings are initiated may recover in an action for the wrongful initiation of the proceedings, under the rules stated in §§ 674 to 680, if the proceedings have terminated in his favor and were initiated without probable cause and for an improper purpose." As with Joe Holland's report to the WVAG, Chandler's

only potential remedy for being subjected to disagreeable statements in a civil suit is to satisfy all of the elements of an action for malicious prosecution.

D. Chandler's alleged harm and damages

In answers to interrogatories filed with the Court, Chandler admitted that the statements and actions that harmed the body shop were the following: (a) Joe Holland's privileged, protected request that the WVAG investigate Liberty Mutual's conduct; (b) the WVAG's own decision to bring an enforcement action against Chandler and Liberty Mutual, and to publicize that action; and (c) the "filing of the instant lawsuit." Consider the following sworn answer by Chandler:

> [P]rior to Joe Holland's request in July 2011 that the WVAG convene an investigation concerning the use of recycled OEM crash parts, Chandler enjoyed the status of a highly reputable and independent body shop which provided quality workmanship and customer care. . . . However, following the announcement of the WVAG's investigation, media reports concerning the same, and the filing of the instant lawsuit [Chandler allegedly started losing customers].

Chandler's Answer to Interrogatory No. 9; Chandler's Answer to Interrogatory No. 13; *see also* Chandler's Answer to Interrogatory No. 10 (incorporating Answer to No. 9); Chandler's Answer to Interrogatory No. 16 ("However, following the announcement of the WVAG's investigation, media reports concerning the same, and the filing of the instant lawsuit, Chandler's business immediately experienced a drastic loss of customers.").

While Joe Holland disputes that Chandler suffered any damages, and alternatively contends that any damages Chandler may have suffered were solely the result of the WVAG enforcement action, WVAG press releases, and associated WVAG-driven negative publicity—which Chandler's own evidence suggests generated a lot more publicity than the instant civil action—it doesn't matter. Joe Holland's conduct in truthfully reporting the conduct of Liberty

Mutual (and, if Holland had done so, the conduct of Chandler) is protected under the First Amendment, the conduct of the WVAG is not actionable against Joe Holland, for obvious reasons, and the initiation of the instant lawsuit is absolutely privileged. The Court finds that, based on the interrogatory answers on file, there is no genuine dispute as to whether Chandler suffered harm from any of the other, non-privileged statements and actions that Chandler attributes to Joe Holland.

E. Joe Holland's website statements and the other alleged "misrepresentations"

Apart from the allegations in Chandler's Counterclaim that are privileged except with respect to actions for malicious prosecution—reporting Liberty Mutual's conduct to the WVAG and the institution of the instant civil action—Chandler's Counterclaim is strikingly similar in many respects to the allegations advanced in the California Supreme Court case of *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 728 P.2d 1177 (Cal. 1986). In that case, an author advanced various theories and labels—including tortious interference and statutory unfair competition claims—seeking damages against a newspaper for leaving the author's book off of its best-sellers list, and for falsely identifying the criteria for inclusion on the list, creating the implication that the author's book failed to meet certain criteria that the author contended it did meet. *See id.*, 42 Cal. 3d at 1037–40.

The California Supreme Court concluded that, "although they bear different labels the five causes of action each have as their gravamen the alleged injurious falsehood of a statement." *Id.* at 1039. The Court went on to explain, in interpreting the First Amendment of the United States Constitution (not California law), that the labels given to various state-law causes of action are irrelevant to the constitutional protections. "The fundamental reason that the various limitations rooted in the First Amendment are applicable to all injurious falsehood claims and not

solely to those labeled 'defamation' is plain: although such limitations happen to have arisen in defamation actions, they do not concern matters peculiar to such actions but broadly protect free-expression and free-press values." *Id.* at 1043.

Like the plaintiff in *Blatty*, Chandler relies on the same alleged misrepresentations for all five counts in his Counterclaim, and the gravamen of those allegations in Chandler's Counterclaim is injurious falsehood. Therefore, constitutional protections under the First Amendment of the United States Constitution, analogous provisions of West Virginia constitutional law, and state-law defamation requirements apply.

In order to recover for defamation under West Virginia law, a plaintiff must show "reference to the plaintiff" and "at least negligence on the part of the publisher." Syl. pt. 1, *Crump v. Beckley Newspapers*, 173 W. Va. 699, 320 S.E.2d 70 (1983). Similarly, the *Restatement (Second) of Torts* § 626 (1977) explicitly recognizes that an action for "disparagement" is subject to the limitations on actions for "injurious falsehood" generally, including (explicitly referring to) those set forth in section 623A, which requires that the defendant "knows that the [allegedly disparaging] statement is false or acts in reckless disregard of its truth or falsity." *See Restatement (Second) of Torts* § 623A.

The California Supreme Court, interpreting the First Amendment of the United States Constitution (not California law), has held that the two requirements—specific reference to the plaintiff and knowingly or recklessly false statements—apply to any claim premised on an injurious falsehood, however labeled. *Blatty*, 42 Cal. 3d at 1042 (holding that the First Amendment requires specific reference to the plaintiff and knowing or reckless falsehood in defamation actions); *id.* (holding that the same First Amendment requirements "apply to all claims whose gravamen is the alleged injurious falsehood of a statement").

1. Chandler has not identified a single statement by Joe Holland that was knowingly, recklessly, or even negligently false

Chandler has not come forward with any evidence that any representative of Joe Holland (or even a former employee of Joe Holland) ever authored or uttered a single statement that was knowingly or recklessly false. Chandler's contention that Joe Holland either knew, or but for its recklessness or negligence should have known, that the Crash Parts Act did not apply to salvaged parts is wrong as a matter of law. There can be no genuine dispute that Holland's pre-June 11, 2014, interpretation of the Crash Parts Act was reasonable. Joe Holland was, at all times while the alleged statements were being made or hosted, relying on the uncontroverted interpretation—i.e., no judicial, administrative, regulatory, or law enforcement authority had said otherwise in any opinion on record—of both the WVAG and a Kanawha County Circuit Judge.

The WVAG is the agency designated by statute to issue written advisory opinions on legal subjects for the State of West Virginia. *See* W. Va. Code § 5-3-1. The WVAG is also the agency designated by statute to interpret and enforce the Crash Parts Act itself. *See* W. Va. Code § 46A-7-102. The Circuit Court of Kanawha County is the immediate judicial authority over Joe Holland, a dealership located in Kanawha County. The First Amendment clearly protects Joe Holland's right to inform consumers and potential customers of the requirements in the law, absent a showing of knowing or reckless falsehood.[10]

There is no conceivable way that a car dealership can be held to have *known* (or known but for its recklessness with respect to the issue) that the interpretation adopted by the agency charged with enforcing the Act and a judge charged with presiding over enforcement actions was incorrect—or that they would later be deemed incorrect by the State's highest court. There is

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[10] West Virginia law is clear that at least negligence is required, but Plaintiff submits that the First Amendment requires recklessness or knowledge of the falsehood.

therefore no genuine dispute as to whether any of Joe Holland's alleged statements—including the statement on the website and other statements referred to in Chandler's interrogatory answers and formal Counterclaim—are actionable under West Virginia law and the limitations of the First Amendment of the United States Constitution.

2. Chandler has not identified a single non-privileged statement of Joe Holland that refers to Chandler directly or indirectly

Apart from the allegations contained in the instant lawsuit, which are privileged against all of Chandler's claims, Chandler has failed to identify a single statement by Joe Holland that refers to Chandler, directly or indirectly. Statements relating to Joe Holland's interpretation of the Crash Parts Act as prohibiting the use of salvaged parts *might* satisfy the "specific reference" requirement for a business that operates and identifies itself as a seller of salvaged parts. But Chandler's business, a body shop, has never claimed any special connection to or relationship with salvaged parts versus aftermarket parts or new OEM parts. None of the statements that Chandler has identified and attributed to Joe Holland (including the statements of Holland's former employee) even remotely suggests that *any body shop* is doing *anything* wrong. Therefore no genuine dispute exists as to whether Chandler has satisfied this requirement under West Virginia law and the First Amendment.

F. The actions and statements of former Joe Holland employee Alice Dorsey

Chandler apparently attributes to Joe Holland statements in the media made by Alice Dorsey, who is identified as (and, in fact was) a former Joe Holland employee, including her statement that what Liberty Mutual (but not Chandler) was asking Joe Holland's body shop to do was a "rip off to the consumer." There are several problems with this. First, Ms. Dorsey's statements are not actionable for the same reasons stated in the previous section with respect to

Joe Holland's statements: She did not refer directly or indirectly to Chandler and her statements were not knowingly or recklessly false.

Second, Joe Holland is not responsible for the statements of a former employee, especially a non-managerial former employee. In this regard, it is telling that none of those media reports contained any statements from any active Joe Holland employees. One can reasonably suppose that the press would have liked to quote Joey Holland himself, or his body shop manager at least, on the subject, rather than a mere former employee, but that did not happen. Joe Holland had no control over whether former employee Alice Dorsey spoke to the press.

Third, Ms. Dorsey's "rip off" comment is an opinion, and it therefore is not actionable in any event. Ms. Dorsey may still believe that insurance companies that only pay for salvaged parts in repairs of newer cars are "ripping off" consumers. Courts do not have the power to declare that Ms. Dorsey's "rip off" *opinion* is wrong, or that she is not entitled to it—and the First Amendment protects her right to declare her opinion publicly. The First Amendment protects her right to shout "Liberty Mutual is still ripping people off!" on every street corner. There is no genuine dispute as to any of these issues. The Court finds that the statements by Alice Dorsey are not actionable against Joe Holland as a matter of law.

G. Video footage of workers in Joe Holland's body shop

Joe Holland is not accountable for every statement or opinion expressed in a television or print news story simply because Holland may have given permission to a camera crew to film body shop workers at work in its shop. Clearly, allowing a camera crew into a body shop does not automatically give Joe Holland editorial control over the content of those stories, and Liberty

Mutual has made no showing that Holland had or exercised any control over those news stories or the persons quoted in them. There is no genuine dispute here.

H. Chandler Rule 56(f) affidavit and motion has no evidence to support its contention that Joe Holland said anything bad about Chandler to any of Chandler's customers or prospective customers

Chandler claims that Joe Holland said negative things to individual customers, including Regina Anderson, about Chandler's conduct or the quality of repairs. *See* Chandler's Answer to Interrogatory No. 7 (on file) ("Joe Holland . . . (b) advised prior customers of Chandler (including but not limited to Regina Anderson) that their vehicles were improperly repaired by Chandler in violation of the law; (c) directly or indirectly informed customers or potential customers of Chandler that Chandler's services were not reputable because of its practice of using recycled OEM crash parts"). In its motion for summary judgment, Joe Holland pointed out that Chandler possesses no evidence that Joe Holland ever said anything bad about Chandler to anyone (other than in the course of the instant lawsuit), and certainly no evidence that Joe Holland said anything bad to Regina Anderson, the only potential witness identified. Regina Anderson herself testified, in an affidavit filed with the Court, that she was alerted to Chandler's possibly suspicious conduct when she read a story in the newspaper on the WVAG's lawsuit.

In response, Chandler's counsel submitted an affidavit under Rule 56(f) of the West Virginia Rules of Civil Procedure, requesting additional discovery prior to this Court's ruling on the motion for summary judgment. This issue was discussed at length at the hearing held on December 9, 2015, as well.

According to the West Virginia Supreme Court, a Rule 56(f) motion "must satisfy four requirements":

> It should (1) articulate some plausible basis for the party's belief that specified 'discoverable' material facts likely exist which have not yet

> become accessible to the party; (2) demonstrate some realistic prospect that the material facts can be obtained within a reasonable additional time period; (3) demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material; and (4) demonstrate good cause for failure to have conducted the discovery earlier."

Syl. pt. 5, *Hinerman v. Rodriguez*, 230 W. Va. 118, 736 S.E.2d 351 (2012) (quoting syl. pt. 1, *Powderidge Unit Owners Association v. Highland Properties*, 196 W.Va. 692, 474 S.E.2d 872 (1996)).

The Court does not believe that Rule 56(f) permits Chandler to go on an endless fishing expedition in search of statements that Joe Holland may have made that are not privileged or protected by the First Amendment after having explicitly based its counterclaim on statements that are privileged and protected. Chandler has come forward with no evidence that anyone at Joe Holland ever said anything negative about Chandler to any of its customers or anyone else (apart from the instant lawsuit), and Chandler has not provided any reason to believe that any such evidence exists or will ever be found, apart from rank speculation.

Chandler's answers to the interrogatories clearly and unambiguously identify Chandler's position that it suffered a decline in business as a result of the WVAG lawsuit, press coverage of the WVAG lawsuit, and the instant lawsuit. Thus, the Court finds that Chandler has failed to create a genuine dispute that Joe Holland said anything actionable or negative about Chandler to any of Chandler's customers, and, by Chandler's own interrogatory answers, has failed to create a genuine dispute as to whether he was harmed by any such statements. The Court therefore finds that Chandler has failed to satisfy the requirements of *Powderidge* and progeny. Summary judgment is therefore appropriate.

I. Chandler lacks standing to sue and has failed to state a claim under the WVCCPA and the Magnuson-Moss Warranty Act

As a final matter the Court notes that Chandler's claims under Count IV should be dismissed as a matter of law because Chandler, as a competitor body shop and not a consumer, has no standing to bring an action under either the WVCCPA or the Magnuson-Moss Warranty Act and has failed to state a claim under either statute. Chandler alleges that "Joe Holland's public representations, including, but not limited to, those statements contained on its website, that West Virginia law requires the use of new OEM parts on vehicles that are of the current model year and the two (2) previous years is false and misleading [and confusing]" and are therefore "unlawful pursuant to the provisions of W. Va. Code § 46A-6-102(7) and W. Va. Code § 46A-6-104." *See* Counterclaim, ¶ 110. The first problem is that—apart from the WVAG itself, *which sued Chandler, not Joe Holland*—only consumers, not competitor businesses, have standing to bring actions under the WVCCPA. See W. Va. Code § 46A-6-106. The second problem is that Joe Holland's statements and interpretation were, at all times, consistent with the WVAG's, which is charged with interpreting not only the Crash Parts Act but also the WVCCPA itself. *See* W. Va. Code § 46A-7-102. Finally, a claim for disparagement or disparagement-by-confusion, whether under the common law or statutes, is still a claim for injurious falsehood subject to the First Amendment limitations and requirements of any other claim for injurious falsehood.

In Count IV, Chandler also alleges that representations by Joe Holland concerning the interpretation of the Crash Parts Act created a "tying arrangement" for parts, allegedly in violation of the Magnuson-Moss Warranty Act. Chandler's counsel, however, clarified in response to Joe Holland's motion for summary judgment that this was not intended to be

construed as asserting an independent cause of action under that federal act. Accordingly, the Court will not address its infirmities.

ORDER

1. For the foregoing reasons, the Court hereby **FINDS** that there is no genuine dispute as to any material fact relating to Chandler's Counterclaim against Joe Holland, and **ORDERS** that Chandler's Counterclaim against Joe Holland be dismissed, with prejudice, in its entirety.

2. The Clerk of the Court is directed to send copies of this Order to all counsel of record. This is a final Order; the clerk shall dismiss this case from the active docket. TCE

Entered this 15th day of Jan., 2016.

Thomas C. Evans III
Honorable Thomas C. Evans, III, Presiding Judge

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