

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**C & O MOTORS, INC.,
LOVE IMPORTS OF ST. ALBANS, INC.,
LOVE NISSAN, INC., AND
SAINT ALBANS IMPORTS, INC.**

Plaintiffs,

v.

**Civil Action No. 03-C-1853
(Hon. Jennifer Bailey Walker)**

**BELL & BANDS, PLLC.,
HARRY F. BELL, JR., AND
WILLIAM L. BANDS,**

**Defendants and
Third Party Plaintiffs,**

v.

**JAMES F. LOVE III AND
GENE WALKER,**

Third Party Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS**

Comes now Defendants/Third Party Plaintiffs Bell & Bands, PLLC., Harry F. Bell, Jr., and William L. Bands, by and through their counsel, The Tinney Law Firm, PLLC., and moves this Court for an order pursuant to the provisions of Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, dismissing all counts of the Plaintiffs' July 28, 2003, Complaint upon the ground that none of the counts contained therein states a claim upon which relief can be granted.

STANDARD OF REVIEW

When evaluating a motion to dismiss filed pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, a trial court should look at the provisions of the complaint to determine if the complaint states a claim upon which relief may be granted. Syl. Pt. 3, *Barker v. Traders Bank*, 152 W.Va. 774, 166 S.E.2d 331 (1969). In that regard, the Supreme Court of Appeals of West Virginia had explained as follows:

The purpose of a motion under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the formal sufficiency of the complaint. For purposes of the motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and its allegations are to be taken as true. Since common law demurrers have been abolished, pleadings are now liberally construed so as to do substantial justice [*citing* W.Va. R. Civ. P. 8(f)]. The policy of the rule is thus to decide cases upon their merits and if the complaint states a claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied.

John W. Lodge Distributing Co. v. Texaco, Inc., 161 W.Va. 603, 604-605, 245 S.E.2d 157, 158-159 (1978) (citation omitted). Thus, a trial court should examine “whether the allegations [in the complaint] constitute a statement of a claim under W.Va. R. Civ. P. 8(a).” *Texaco*, 161 W.Va. at 605, 245 S.E.2d at 159. Rule 8(a) of the West Virginia Rules of Civil Procedure, in the pertinent part, provides:

A pleading which sets forth a claim for relief ... shall contain (1) a short plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks.

While this does represent the general rule applicable to determining the sufficiency of a complaint, the Supreme Court of Appeals of West Virginia determined, “[W]here First Amendment rights are implicated, courts have applied a stricter standard in judging the sufficiency of a complaint.” *Dixon v. Ogden Newspapers, Inc.*, 187 W.Va. 120, 124, 416

S.E.2d 237, 241 (1992); (quoting *Long v. Egnor*, 176 W.Va. 628, 346 S.E.2d 778, 782 (1986)).

Therefore, in evaluating the instant Motion to Dismiss, the Court should determine whether the allegations in the Complaint, based upon the stricter standard noted in *Dixon, supra*, constitute a claim entitling Plaintiffs to recover from Defendants. In conducting this evaluation, the Complaint must be construed in the light most favorable to Plaintiffs.

STATEMENT OF FACTS

On or about July 3, 2002, Bell & Bands, on behalf of Kevin D. Williams and Teresa G. Williams, filed a civil action against C & O Motors, Inc., for committing fraudulent acts in the sale of a 1997 Chevrolet Monte Carlo. That same day, Bell & Bands filed a putative class action, relating to the sale of Daewoo motor vehicles, against C & O Motors Inc., Love Daewoo, Inc., and Saint Albans Imports, Inc., on behalf of Darryl K. Smith and other similar situated individuals.

During the course of discovery in *Darryl K. Smith v. C & O Motors, Inc.; Love Daewoo, Inc.; and Saint Albans Imports, Inc.*, Defendants, on August 20, 2002, served a subpoena upon the West Virginia Division of Motor Vehicles and lawfully obtained a list of individuals who purchased Daewoo motor vehicles from Plaintiffs. Utilizing this lawfully obtained list, Defendants sent targeted direct mail advertising to the individuals contained in the list. The advertisement, which can be found as exhibit #2 to Plaintiffs' July 28, 2003, Complaint, contains truthful information relating to the *Smith* case. Defendants hoped that the advertisement would identify potential witnesses that could be

offered at trial, as permitted by Rule 404(b) of the West Virginia Rules of Civil Procedure, and to notify individuals that were potentially defrauded by Plaintiffs.

After the March 7, 2003, mediation in *Williams v. C & O Motors, Inc.*, Plaintiffs and the Williams reached an agreement and decided to settle their civil action. The Williams agreed to accept \$75,000.00 for the allegations alleged in their July 3, 2002, Complaint and signed-off on an agreement. This settlement did not contain any type of protective order. Consequently, Defendants sent a second target direct mail advertisement to individuals who purchased motor vehicles from Plaintiffs. This advertisement was provided to individuals enumerated in the second list obtained by Defendants, pursuant to the February 21, 2003, subpoena, from the West Virginia Division of Motor Vehicles. The list contained all individuals that had purchased vehicles from Plaintiffs from 1999 until February of 2003. The advertisement, which can be found as exhibit #1 to Plaintiffs' July 28, 2003, Complaint, contained truthful information relating to the *Williams* case. The text of the advertisement provides:

A lawsuit was filed against **C & O Motors** which was recently settled. This lawsuit included allegations of **failure to disclose prior wreck history on vehicles**, and also, material misrepresentations concerning advising customers that in order to secure approval for financing, they needed to purchase additional products including extended service contracts, GAP insurance and credit life insurance. If you, or a family member, purchased a new or used motor vehicle from this dealership and were told that you must purchased their **extended service contract, GAP insurance or credit life insurance** in order **to obtain certain credit terms** or obtain credit at all, you may have a claim under West Virginia's consumer laws. Or, if you were **sold a used vehicle with prior wreck history which was not disclosed**, you may also have a claim.

Thereafter, Bell & Bands was contacted by a number of persons identified by the West Virginia Department of Motor Vehicles as having previously purchased an

automobile from C & O Motors or at another of Mr. Love's dealerships. Those persons requested that Bell & Bands review their situations to determine if they may have viable claims against C & O Motors or another of Mr. Love's dealerships. As a result of the evaluation of these individuals' claims, Bell & Bands has acquired additional clients that seek to obtain legal redress for fraud committed by Plaintiffs in the sale of motor vehicles.

During Bell & Bands' zealous representation of its clients in their claims against C & O Motors for fraudulent conduct, C & O Motors, on July 28, 2003, filed this action. The Complaint alleges that Defendants' use of target direct mail advertising, to obtain 404(b) evidence and inform West Virginia consumers that Plaintiffs may have defrauded them, constitutes tortious interference with a contractual or business relationship and tortious interference with a contractual or business expectancy. In addition, Plaintiffs assert that these two claims justify an assessment of punitive damages and attorney fees.

The filing of this action has and continues to play havoc with Bell & Bands' representation of its clients, and thus displays the appearance that the civil action was intended to interfere with said representation of Bell & Bands' clients. As a consequence of the Complaint, discovery requests, and motions interfering with Bell & Bands' professional and contractual obligations to fully represent its clients in their efforts to receive compensation for C & O Motors' allegedly fraudulent conduct, Defendants/Third Party Plaintiffs have filed two counterclaims and two third party claims in the above titled action.

ARGUMENT

I. Plaintiffs' Claims Must be Dismissed in Accordance with Rule 12(b)(6) of the West Virginia Rules of Civil Procedure Because the First Amendment

**Precludes Plaintiffs' Attempt to Prevent Defendants from Utilizing
"Commercial Speech"**

The First Amendment, which provides the citizens of this nation with certain freedoms, states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

These Constitutional protections provided in the First Amendment were made applicable to the states in accordance with the Fourteenth Amendment's due process clause. 44 *Liquormart, Inc., v. Rhode Island*, 517 U.S. 484, 489, n. 1 (1996); *Board of Educaiton v. Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 855, n. 1 (1982).

In addition to the protections provided to all Americans by the First Amendment, the West Virginia Constitution provides West Virginians with additional guarantees of freedom. West Virginia Constitution Article III, Section 7 provides:

No law abridging the freedom of speech, or the press, shall be passed; but the legislature may by suitable penalties, restrain the publication or sale of obscene books, papers, or pictures, and provide for the punishment of libel, and defamation of character, and for the recovery, in civil actions, by the aggrieved party, of suitable damages for such libel, or defamation.

The Supreme Court of Appeals of West Virginia, in discussing W. Va. Const. Art. III, §7, held that the West Virginia Constitution places greater restraints on the State's ability to interfere with one's freedom of speech than the First Amendment to the United States Constitution. *Pushinsky v. W. Va. Bd. Of Law Examrs.*, 164 W. Va. 736, 266 S.E.2d 444 (1980).

In *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), the United States Supreme Court was asked to determine whether the

aforementioned First Amendment protections were applicable to advertisements placed by pharmacists. Virginia’s law precluded pharmacists from providing advertisements setting forth the cost of medical drugs. The Supreme Court, while considering the law, determined that the public, particularly the poorer members of society, had an overwhelming interest in being able to compare the pricing of drugs, so they could save as much of the little money they had as possible. *Id.*, 425 U.S. at 763. Further, the Supreme Court noted that society has a strong interest in the free flow of information, even commercial information. *Id.*, 425 U.S. at 764. This rationale resulted in the Supreme Court finding that the fact someone solely has an economic interest in whatever type of speech he/she is utilizing does not prevent that individual’s speech from receiving First Amendment protections. Consequently, the Supreme Court found that “commercial speech” enjoys First Amendment protections.

A. Lawyer Advertising Constitutes “Commercial Speech” Protected by the First Amendment.

In the landmark case of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Supreme Court was asked to determine whether the First Amendment protection of “commercial speech” it found in *Virginia State Bd. Of Pharmacy, supra*, was applicable to lawyers’ advertisements. Based upon the rationale set forth in *Virginia State Bd. Of Pharmacy, supra*, the Supreme Court determined that a lawyer utilizing truthful advertisements enjoyed First Amendment protections; therefore, a disciplinary rule, which sought to prevent the free flow of such information violated the First Amendment. *Bates*, 433 U.S. at 385.

Since *Bates, supra*, the Supreme Court has consistently reaffirmed the protective status of lawyer advertising, and has enumerated some of the specific areas in which this

protection is applicable. First, in *Bates, supra*, the Supreme Court found that advertisements placed in newspapers enjoyed First Amendment protections. Expanding on this decision, the Supreme Court ruled that a lawyer's use of professional announcement cards mailed to a select list of addresses; advertisements in newspapers; and advertisements in the yellow pages were all protected "commercial speech", and consequently a blanket suppression of such speech violated the First Amendment. *In re R.M.J.*, 455 U.S. 191 (1982). Later, in *Pell v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990), the Supreme Court found that letterhead that set forth a lawyer's certifications and areas of practice constituted protected "commercial speech" that could not be completely banned unless the letterhead is actually or inherently misleading. *Id.*, 496 U.S. at 110. Finally, the Supreme Court extended the protection of a lawyer's use of "commercial speech" to targeted direct mail advertising, which is the identical type of advertising at issue in the instant case. *Shapiro v. Kentucky Bar Association*, 486 U.S. 466 (1988). This position was later reaffirmed by the United States Court of Appeals for the Fourth Circuit in *Ficker v. Curran*, 119 F.3d 1150 (4th Cir. 1997).

In *Shapiro, supra*, the Supreme Court considered whether the Kentucky Bar Association could deny approval of a direct, unsolicited mail advertisement to individuals, which a lawyer knew were in the process of having their home foreclosed upon and offering them his/her services to help resolve that issue. The letter provided:

It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by *ORDERING* your creditor [sic] to STOP and give you more time to pay them.

You may call my office anytime from 8:30 a.m. to 5:00 p.m. for *FREE* information on how you can keep your home.

Call *NOW*, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is *FREE*, there is *NO* charge for calling.

Id., 486 U.S. at 469.

The lower court objected to the direct mailing because it targeted only persons who were known to require the legal service being offered in the advertising letter, instead of, advertising to a general mass of individuals that may or may not require a lawyer's services. *Id.*, 486 U.S. at 473. The Supreme Court noted the general state of the law regarding "commercial speech" and stated:

Commercial speech that is not false or deceptive and does not concern unlawful activities ... may be restricted only in the service of substantial government interest, and only through means that directly advance the interest.

Id., 486 U.S. at 472. (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, at 638 (1985)). In applying these principles to the targeted direct mail advertising and considering the lower court's concerns, the Supreme Court found:

...[T]he First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable.

Id., 486 U.S. at 473-74.

The Supreme Court did provide that some restrictions could be placed on targeted direct mail advertising; for example, the Kentucky Bar Association could require the advertisement contain a label that identifies the document as advertising. *Id.*, 486 U.S. at 477. (quoting *In re R.M.J.*, 455 U.S. at 206, n.20). However, the Supreme Court, in its final analysis, held:

... [S]o long as the First Amendment protects the right to solicit legal business, the State may claim no substantial interest in restricting truthful and non-deceptive lawyer solicitations to those least likely to be read by the recipient. Moreover, the First Amendment limits the State's authority to dictate what information an attorney may convey in soliciting legal business.

Shapero, 486 U.S. at 479.

In the instant case, this Court is asked to consider a factual scenario similar to the set of facts considered by the Supreme Court in *Shapero, supra*. Defendants, in this case, sent targeted direct mailings to individuals who purchased vehicles from Plaintiffs based upon a list legally obtained by subpoena from West Virginia Division of Motor Vehicles.

The first targeted direct mail advertisement, the one entitled ATTENTION C & O Motors Customers, provided two disclaimers explaining that the document constituted "ADVERTISING MATERIAL." Additionally, the advertisement provided Defendants' name, Bell & Bands, PLLC Attorneys At Law; the names of the responsible attorneys, Harry F. Bell, Jr. and William L. Bands; Defendants' address; and a telephone number where they may be reached. The text of the advertisement can be found in this Motion's Statement of Facts or as exhibit #1 of Plaintiffs' Complaint.

The targeted direct mail advertisement is clear and non-deceptive. The document contains truthful, factual statements and Defendants' honest opinions based upon those truthful, factual statements. The fact that this advertisement is truthful can be evidenced by Plaintiffs' failure to allege anywhere within their ten page Complaint, which also contains four exhibits, that any statement in this targeted direct mail advertisement is false or, for that matter, misleading. Consequently, one must assume that Plaintiffs concede this point.

The second targeted direct mail advertisement, the form letter directed at individuals who purchased Daewoo vehicles from Plaintiffs, provides two disclaimers explaining that the document is “ADVERTISING MATERIAL.” In addition, the advertisement provides Defendants’ name, a list of attorneys working with the firm, Defendants’ address, and the different manners in which Defendants may be contacted. The text of the advertisement may be found as Exhibit #2 to Plaintiffs’ Complaint filed in this action.

The second targeted direct mail advertisement, much like the first, is clear and non-deceptive. It can be easily read and comprehended. Further, the advertisement exclusively contains truthful, factual statements and Defendants’ opinions based upon the truthful, factual statements. The fact the statements, contained in the second advertisement, are truthful can be evidenced by Plaintiffs’ failure to assert anywhere within the ten page Complaint and its four attached exhibits that a single phrase in the advertisement is false or deceptive. Consequently, one must assume this failure to assert that any of the phrases in the advertisement are false means that Plaintiffs concede that the document contains only truthful statements.

The two advertisements clearly mirror the targeted direct mail advertisements considered by the Supreme Court in *Shapero, supra*. Just as required in *Shapero*, the advertisements are non-deceptive and contain only truthful information. *Id.*, 486 U.S. at 473. In addition, the advertisement clearly addresses the Supreme Court’s concern that a layperson could be deceived or overly influenced by a lawyer’s advertisements by placing a disclaimer twice in each advertisement that plainly establishes that the documents constitute “advertising material.” *Zauderer*, 471 U.S. at 638. Consequently,

for the same reasons articulated by the Supreme Court in *Shapero, supra*, this Court must find that Defendants' advertisements are "commercial speech" protected by the First Amendment.

The fact that the advertisements in question constitute protected "commercial speech" limits the State's ability to restrict or prohibit said speech. As previously noted, *Zauderer* states that "commercial speech," meeting the aforementioned qualifications, may only be restricted in the service of a **substantial** government interest, and only through means directly advancing that interest. *Id.*, 471 U.S. at 638. In this case, the State has no substantial interest. In fact, it has literally NO interest in preventing Defendants from informing West Virginia consumers that they may have been defrauded by Plaintiffs' tortious conduct in the sale of motor vehicles. To the contrary, the State has a substantial interest in PROTECTING Defendants' speech in this regard. In addition to Constitutional free speech concerns, one need look no further than the West Virginia Consumer Credit and Protection Act, W.Va. 36A-6-101, et seq., for evidence of this substantial state interest. The pertinent declarations of the West Virginia Legislature state:

The legislature hereby declares that the purpose of this article is to complement the body of federal law governing unfair competition and unfair, **deceptive and fraudulent acts or practices in order to protect the public and foster fair and honest competition.**

W.Va. Code § 46A-6-101(1). (Emphasis Added). See also W.Va. Code § 46A-6-102(f) (providing a non-exhaustive list of acts or practices denoted as, inter alia, "unfair or deceptive"); W.Va. Code § 46A-6-104 (declaring unfair or deceptive acts or practices "unlawful"); W.Va. Code § 46A-6-106 (providing a private cause of action to consumers suffering ascertainable loss due to unlawful unfair or deceptive acts or practices).

Certainly, the limited restrictions permitted to be placed upon “commercial speech” was not designed or intended to allow Plaintiffs to increase their profit level at the expense of West Virginia consumers through the violation of West Virginia Law. As such, the State may not restrict Defendants’ “commercial speech” because it is protected by the First Amendment and the State can demonstrate **NO** substantial interest in restricting said speech. In fact, the inarguable weight of authority clearly establishes a substantial state interest in protecting the very “commercial speech” alleged to be tortious in this action, inasmuch as it furthers the public policy of the State to “protect the public” from unfair or deceptive acts and practices.

B. Plaintiffs Actions are Equivalent to State Actions for Purposes of the First Amendment

Defendants recognize that Plaintiffs will simply assert that they are not the State; therefore, their action in utilizing West Virginia’s common law and court system cannot constitute state action. As such, Plaintiffs’ actions do not constitute a violation of Defendants’ First Amendment rights. However, this argument does not withstand scrutiny.

The Supreme Court first addressed whether an action between private individuals utilizing the common law and court system of a state could constitute state action in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In *Sullivan*, the Supreme Court was asked to consider the First Amendment implications of a private individual suing a newspaper and individuals mentioned in the newspaper for allegedly making libelous statements in an editorial. *Id.*, 376 U.S. at 256-63. The individual who brought the action asserted that the Alabama state court judgment was insulated from constitutional

scrutiny because it was an action between private parties. *Id.*, 376 U.S. at 265. In considering this position, the Supreme Court held:

Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restriction on their constitutional freedoms of speech and press. It matters not that [the] law has been applied in a civil action and that it is common law only, though supplemented by statute.... The test is not the form in which state power has been applied but, whatever the form, whether such power has been exercised....

Id. This position was reaffirmed by the Supreme Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). In *Claiborne*, the Supreme Court noting *Sullivan*, *supra*, stated:

Although this is a civil lawsuit between private parties, the application of state rules of law by the Mississippi state courts in a manner alleged to restrict First Amendment freedoms constitutes “state action” under the Fourteenth Amendment.

Id., 458 U.S. at 917, n.51.

In accordance with *Sullivan, supra*, and *Claiborne, supra*, an individual’s utilization of a state’s common law and its court system to bring an action against another constitutes “state action” for purposes of considering whether someone’s First Amendment Rights have been violated.

C. The First Amendment Precludes Claims for Various Forms of Tortious Interference.

The statement of the law applied in *Sullivan, supra*, and *Claiborne, supra*, has been applied to cases in which individuals have been sued for various forms of tortious interference. For example, the Supreme Court of California addressed the issue in *Blatty v. New York Times Co.*, 42 Cal.3d 1033, 728 P.2d 1177, 232 Cal. Rptr. 542 (1987).

In *Blatty*, the plaintiff, an author, sued the New York Times for failing to include his book in the best seller list. The author alleged that the New York Times, in addition to other types of tortious conduct, negligently interfered with a prospective economic advantage and intentionally interfered with a prospective economic advantage. *Id.*, 42 Cal.3d at 1036, 728 P.2d at 1178, 232 Cal. Rptr. at 543. The New York Times asserted that the complaint was barred by the First Amendment to the United States Constitution and by Article I, Section 2, of the California Constitution. 42 Cal.3d at 1040, 728 P.2d at 181, 232 Cal. Rptr. at 546. The Supreme Court of California, in reaching its decision, concluded that the plaintiff was required to plead that the New York Times did in fact publish a false statement that interfered with his economic advantage. The plaintiff argued that such a requirement impermissibly required him to prove an additional element not a part of the tort of interference with a prospective economic advantage. *Id.*, 42 Cal.3d at 1047, 728 P.2d at 1186, 232 Cal. Rptr. at 550. In response the Supreme Court of California held:

Under the supremacy clause a state's definition of a tort cannot undermine the requirements of the First Amendment. That is precisely the teaching of *New York Times [v. Sullivan]*. In that case, the United States Supreme Court held that the First Amendment required the plaintiff to establish falsity ... even though state law did not require him to do so....¹

Id., 42 Cal.3d at 1047-48, 728 P.2d at 1186, 232 Cal. Rptr. at 550. Based upon this rationale, the Supreme Court of California determined that the trial court did not err in finding the author's claims of tortious interference should be dismissed. *Id.*, 42 Cal.3d at 1048-49, 728 P.2d at 1187, 232 Cal. Rptr. at 552.

¹ One year later a California Court of Appeals reaffirmed the holding in *Blatty, supra*, by finding, "*Blatty* applies here to the extent it bars appellant's cause of action for intentional interference with a prospective economic advantage on the basis of statements consisting of true facts or opinions." *Hofmann Co. v. E.I. Du Pont de Nemours and Co.*, 202 CalApp.3d 390, 403, 248 Cal. Rptr. 384, 391 (1988). (Reversed on other grounds).

The Supreme Court of Washington also considered the application of the First Amendment to claims of tortious interference. In *Caruso v. Local Union No. 690 of International Brotherhood of Teamsters*, 100 Wash.2d 343, 670 P.2d 240 (1983), the plaintiff owned a carpet business and a parking lot from which he rented spaces to others. The plaintiff found a truck blocking his parking lot and eventually had the vehicle towed. *Id.*, 100 Wash.2d at 345, 670 P.2d at 241. As a result of the towing, a member of local union became angry and wrote three articles, asserting that the plaintiff was anti-union and requesting that his union brothers not frequent the plaintiff's establishment, that were published in the local union paper. *Id.*, 100 Wash.2d at 346, 670 P.2d at 241-42. Thereafter, the plaintiff's business underwent a decline and he filed a civil action alleging that the union's publication of the three articles constituted the tort of business interference.

The union asserted that the articles were constitutionally protected and could not give rise to a claim of business interference. *Id.*, 100 Wash.2d at 347, 670 P.2d at 242. The Supreme Court of Washington determined, after considering the Supreme Court's holding in *Claiborne, supra*, that the union's publication of the three articles were constitutionally protected by the First and Fourteenth Amendments; therefore, the plaintiff was unable to maintain a claim for interference with a business relationship.² *Id.*

These cases provide the Court guidance when determining the implication of the First Amendment on tortious interference.

² The same conclusion was reached by the United States District Court for the Eastern District of Missouri, when interpreting Missouri Law, in *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 840 F. Supp. 697 (1993). See also, *Delloma v. Consolidation Coal Co.*, 996 F.2d 168 (7th Cir. 1993), wherein the United States Court of Appeals for the Seventh Circuit noted that "permitting recovery for tortious interference based on truthful statements would seem to raise significant First Amendment problems." *Id.*, at 172.

D. Plaintiffs' Filing of Their Civil Action Violates the Rights of Those Who have an Interest in Receiving the Information.

In addition to violating Defendants' First Amendment rights to "commercial speech," Plaintiffs' actions in utilizing West Virginia's common law and court system to prevent Defendants' "commercial speech" constitutes a violation of the consumers' rights to hear the protected speech. *Virginia State Board of Pharmacy*, 425 U.S. at 156. These individuals have an interest in the legal profession reaching out to them and providing them the opportunity to seek competent representation. *Bates*, 433 U.S. at 370. Additionally, these individuals have an interest procuring sufficient information to determine whether they should seek legal redress. *Id.*, 433 U.S. at 364. The dissemination of "commercial speech" has the potential to contribute substantially to a fair legal process. As noted in *Peel*, lawyer advertising, "facilitates the consumer's access to legal services and thus better serves the administration of justice." *Id.*, 496 U.S. at 110. Surely, justice is better served by informing these individuals that they may have been defrauded; instead of, permitting Plaintiffs to continue to achieve greater profits at the expense of uninformed West Virginians.

CONCLUSION

In accordance with the relevant case law, Defendants’ advertisements are “commercial speech” protected by the First Amendment. As the speech constitutes protected “commercial speech,” it may only be restricted in the service of a substantial government interest and only through means necessary to directly advance the interest. Although the State is not directly involved, Plaintiffs’ action in utilizing the common law and court system of West Virginia constitutes state action for purposes of the First Amendment. *Sullivan*, 376 U.S. at 265; *Claiborne*, 458 U.S. at 917, n. 51. As the Plaintiffs’ actions constitute state action for purpose of the First Amendment, Plaintiffs must demonstrate a substantial government interest in preventing Defendants from informing individuals that purchased vehicles from Plaintiffs that they were potentially defrauded. Clearly, Plaintiffs are unable to provide any rational argument that the State has interest in allowing Plaintiffs to defraud West Virginian consumers, by violating West Virginia Law, for the sole purpose of greater profits; consequently, Plaintiffs are precluded from restricting Defendants’ “commercial speech” through the utilization of West Virginia’s common law and court system. As such, Plaintiffs, by filing their civil action against Defendants for various forms of tortious interference and related actions, violated Defendants’ First Amendment rights; therefore, Plaintiffs have asserted a civil action that fails to state a claim upon which relief may be granted because allowing Plaintiffs to proceed with their claim violates the First Amendment. Consequently, the civil action must be dismissed pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure and the stricter standard required for review of complaints that implicate possible First Amendment issues. *See Dixon, supra*. Such a ruling comports with the

manner in which other jurisdictions have considered the impact of the First Amendment on various claims of tortious interference.

**BELL & BANDS, PLLC.,
HARRY F. BELL, JR., AND
WILLIAM L. BANDS,**

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