

No. 35296

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

SHIRLEY WHITE, CATHY DENNISON,
and JENNY L. TYLER, on behalf of themselves
and a class of others similarly situated,

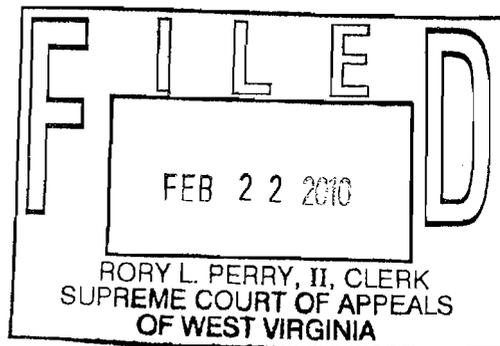
Plaintiffs - Respondents,

v.

WYETH, f/k/a AMERICAN HOMES PRODUCTS,
d/b/a WYETH-AYERST LABORATORIES,
KETCHUM, INC., and DANNEMILLER
MEMORIAL EDUCATIONAL FOUNDATION,

Defendants – Petitioners.

QUESTION CERTIFIED BY THE CIRCUIT COURT OF
PUTNAM COUNTY, WEST VIRGINIA.



BRIEF OF *AMICUS CURIAE* WEST VIRGINIA ASSOCIATION FOR JUSTICE

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INTRODUCTION

The certified question posed in this case seeks a ruling on whether the remedies available to a private plaintiff under the provisions of the West Virginia Consumer Credit and Protection Act, W. Va. Code § 46A-6-106 ("the Act") require proof of individual reliance. For the reasons noted by the plaintiff and the West Virginia Attorney General, the clear language of the statute commands this Court answer in the negative and these arguments will not be repeated here.

The West Virginia Association for Justice ("WVAJ") files this amicus brief to address two issues. First, the rejection of a reliance requirement has been a consistent part of the jurisprudence in this State for at least ten years. Answering no to the certified question requires nothing more than reaffirming this consistent jurisprudence. Second, this conclusion is a result that is consistent with the majority of states addressing the issue and this Court's announced policies that underlie the Act.

DISCUSSION, POINTS OF AUTHORITIES AND ARGUMENT

I. WEST VIRGINIA DECISIONS HAVE CONSISTENTLY HELD THAT THE PROVISIONS OF THE W.VA. CODE § 46A-6-104 DO NOT REQUIRE A PRIVATE PLAINTIFF TO PROVE RELIANCE.

The parties and the Circuit Court in this case treat the issue raised by the Certified Question as one of first impression in the courts of this state. A review of opinions in this Court and the circuit courts evidence that West Virginia judges and justices have near consistently rejected the defendants' contention here that the provisions of W.Va. Code § 46A-6-104 require a private plaintiff to make an individual showing of reliance. Instead, the Courts have

interpreted the Act to merely require that the plaintiff show an ascertainable loss of money or property.

The first West Virginia case addressing this issue was *Muzelak v. King Chevrolet, Inc.*¹ While the issue in *Muzelak* was whether punitive damages were recoverable, it is instructive to note the jury instructions (both the ones used by the trial court and offered by the defendant) omit any requirement that the private plaintiff therein establish that he relied on the misrepresentations or omissions alleged to violate the Act.² The fact that the first published decision addressing this provision of the Act resulted in neither the courts nor the parties even mentioning reliance is persuasive evidence that no individual showing of reliance is required.

The second case addressing W.Va. Code § 46A-6-104 was *Orlando v. Finance One of West Virginia, Inc.*³ *Orlando* involved the inclusion in a loan agreement of an illegal clause purporting to amount to a waiver of the borrower's homestead exemption "to the extent permitted by law."⁴ While finding the clause an "unfair practice," the Court rejected the claim for damages under section 104 holding:

[B]ecause Finance One made no attempt to enforce Clause # 14, the appellants have suffered no "ascertainable loss of money or property" as a result of the inclusion of Clause # 14 in the loan contract. West Virginia Code § 46A-6-106 requires that in order to bring an action for damages, a consumer must have suffered "ascertainable loss of money or property, real or personal, as the result of the use or employment by another person of a method, act or practice

¹179 W.Va. 340, 343-344, 368 S.E.2d 710, 713-714 (1988).

²*Id.* at n. 6 (Defendant's proposed instruction); *id.* at n. 5 (trial court's instruction); see also *id.* at n. 7 (jury interrogatories not requiring proof of reliance).

³179 W.Va. 447, 452-453, 369 S.E.2d 882, 887-888 (1988).

⁴*Id.*

prohibited or declared unlawful by the provisions of this article.” W.Va.Code § 46A-6-106.⁵

Notably, the Court (without any showing of reliance) granted the plaintiff an injunction ordering the “the contracts or any similar contracts ‘be immediately destroyed or removed from the State of West Virginia and no longer be used.’”⁶ The *Orlando* Court did not address the issue of reliance; instead, as the above discussion makes clear, the basis for the holding is that the plaintiff presented no evidence of an ascertainable loss.

This Court would not have an occasion to address the reliance issue for thirteen years in *Rezulin, infra*. However, in the meantime, the Circuit Courts found no difficulty interpreting the Act as not requiring reliance. Notably, the first pharmaceutical class action involving a defective drug involved drugs recalled by the defendant herein. In *Burch v. American Home Products*,⁷ plaintiffs sought certification of a class against Wyeth arising out of the sale of its diet drugs Fenfluramine Dexfenfluramine while hiding the serious health risks of the drugs. Wyeth opposed class certification in part by arguing proof of reliance was required to recover under the provisions of section 106 of the Act. The Circuit Court in *Burch* rejected this argument

⁵*Id.*

⁶179 W.Va. at 448, 369 S.E.2d at 883.

⁷Civil Action No. 97-C-204, Circuit Court Brooke County, W.Va. (Feb. 11, 1999). American Home Products, the defendant in *Burch*, subsequently changed its name to Wyeth, the defendant herein. A copy of the opinion is reproduced at www.wvaj.org/opinions-public.

based upon the plain language of the Act holding: “there are no individual issues with respect to reliance, as the Act does not require a plaintiff to prove reliance as an element of his claim.”⁸

In the Oxycontin litigation, the Circuit Court of Putnam County, the same court where this case is pending, rejected the argument that the Act required an individualized showing of reliance.⁹ Defendants therein sought a writ of prohibition challenging this very holding. This Court refused the petition.¹⁰

The rejection of a reliance requirement is not limited to drug cases. In a case arising out of an illegal \$0.97 environmental fee imposed by an oil change company, in *Stepp v. West Virginia Oil and Lube, LLC*, the Circuit Court of Mingo County again rejected the claim that the Act required an individualized showing of reliance: “there are no individual issues with respect to reliance as the act does not require the plaintiff to prove reliance as part of his claim.”¹¹ This Court again rejected a writ seeking to challenge this holding.¹²

Finally, the trial court below, while certifying the question also rejected the reliance argument advanced by the Defendants herein. Other than the Circuit Court in *Rezulin, supra*,

⁸Slip op. at p. 40 (emphasis added) (in part relying on the logic of *Pocahontas Mining Co. Limited Partnership v. OXY USA, Inc.*, 202 W.Va. 169, 503 S.E.2d 258, (1998) (Workman, J., concurring)).)

⁹*McCallister v. Purdue Pharma, L.P.*, No. 01-C-0238, slip op at pp. 61-64 (Cir. Ct. Putnam Co. June 3, 2005) (reproduced at www.wvaj.org/opinions-public).

¹⁰No. 051692 (Oct. 6, 2005).

¹¹No. 02-C-296, p. 16-17, ¶¶ 19-20 (Cir. Ct. Mingo Co., WV May 10, 2007) (reproduced at www.wvaj.org/opinions-public).

¹²No. 072670 (Oct. 11, 2007).

which will be addressed below, WVAJ is not aware of any contrary opinions by this Court or our Circuit Court judges.

The one exception known to WVAJ was the Circuit Court's opinion in *In Re: West Virginia Rezulin Litigation*.¹³ The Circuit Court opinion in *Rezulin* is significant because it removes all doubt that this Court's reversal of that decision amounted to a rejection of the very reliance argument advanced in this case. Like their brethren both before and after, the defendants in *Rezulin* argued that because individualized proof of reliance was necessary this defeated the plaintiffs' ability to establish Rule 23(b)(3)'s requirement that common issues predominate over individual issues. This time, however, the Circuit Court agreed:

119. Finally the Plaintiffs assert claims under the Consumer Protection Act. An action for damages under the Consumer Protection Act requires proof that the consumer "suffered 'ascertainable loss of money or property ... as the result of the use'" of an unfair trade practice.

120. This claim raises predominating individual issues regarding causation and reliance. Each class member would have to demonstrate that his or her physician would not have prescribed Rezulin had Warner-Lambert disclosed information that plaintiffs contend should have been disclosed. The evidence shows that the information available to physicians about Rezulin and other diabetes medications varied from physician to physician and changed over time.

121. This claim also raises predominating individual issues as to whether each class member suffered an ascertainable loss. The evidence in the record shows that Rezulin successfully controlled blood sugar for many people, including the proposed class representatives. Indeed, there is no evidence that Rezulin was ineffective. Thus, the only "ascertainable loss" that could be claimed is some sort of physical injury.

122. Accordingly, for each person the Court would have to determine whether the drug caused transient side-effects (if plaintiffs claim that this constitutes "ascertainable loss"), or whether it caused some other physical

¹³No. 00-C-1180, 2001 WL 1818442 (Cir. Ct. Raleigh Co., W.Va. Dec. 13, 2001).

injury. A class may not be certified when such predominating individual issues would have to be determined.¹⁴

Thus, when this Court found that the *Rezulin* “plaintiffs have therefore met the requirements of Rule 23(b)(3), and the circuit court erred in holding otherwise, it was by necessity rejecting the individual reliance requirement adopted by the *Rezulin* Circuit Court.”¹⁵

While the Circuit Court in this case found some doubt, the explicit holding of this Court in *Rezulin* is consistent with this interpretation. First, on appeal, the *Rezulin* defendants continued in their quest to establish an individual reliance and causation requirements under the Act. This Court quickly dismissed the idea that reliance was required based on the plain language of the Act:

W.Va.Code, 46A-6-102(f)(13) [1996] prohibits the “act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby.”¹⁶

The Court then proceeded to address the Defendant’s arguments that causation was required:

¹⁴*Id.* at p.*20-21 (footnotes omitted). In making the explicit holding that Rule 23(b)(3)’s predominance requirement could not be met because reliance was required, the *Rezulin* Circuit Court explicitly relied upon an unpublished federal court opinion interpreting the Act as requiring proof of reliance. *Id.* at n. 184 (“*State of West Virginia v. Secretary of Education*, 1993 WL 545730, *12-13 (S.D.W.Va. Sept. 30, 1993) (denying class certification of claims under the Consumer Protection Act because of the ‘need for an individualized, case-by-case investigation of what misrepresentation each member of the putative class relied upon’)).

¹⁵*In re West Virginia Rezulin Litigation*, 214 W.Va. 52, 76, 585 S.E.2d 52, 76 (2003).

¹⁶*In re West Virginia Rezulin Litigation*, 214 W.Va. at 74, 585 S.E.2d at 74 (emphasis by Court).

Furthermore, *the defendants contend that each individual plaintiff will be required to show, under the Consumer Protection Act, that the defendants committed an unfair trade practice or other violation of the Act that caused the plaintiff to buy Rezulin.* The defendants therefore argue that, because there are substantial individual issues inherent in the plaintiffs' claims, these individual issues predominate over issues common to the class.¹⁷

In the end, as this Court made clear, there is no requirement to prove reliance and only a slight requirement to prove causation:

As stated previously, the circuit court interpreted these two statutes as requiring that each putative class member would have to prove that a violation of the Consumer Protection Act caused him or her to purchase Rezulin, and to prove specific damages resulting from that purchase.

....

Other jurisdictions interpreting statutes similar to ours have concluded that consumers can meet the 'ascertainable loss' requirement without proving that the consumer suffered a specific monetary loss based upon the unfair or deceptive acts or practices. In the leading case of *Hinchliffe v. American Motors Corp.*, 184 Conn. 607, 440 A.2d 810 (1981), the court interpreted a Connecticut statute that allowed a cause of action by '[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b' 184 Conn. at 612, 440 A.2d at 813. The Connecticut court concluded that the words 'any ascertainable loss' do not require a plaintiff to prove a specific amount of actual damages in order to make out a *prima facie* case. 184 Conn. at 612-613, 440 A.2d 810, 813-814.

Our conclusion finds initial support in the language chosen by the legislature when it framed § 42-110g(a). Where drafters meant 'actual damages,' they employed those exact words. The use of different terms within the same sentence of a statute plainly implies that differing meanings were intended. Moreover, the inclusion of the word 'ascertainable' to modify the word 'loss' indicates that plaintiffs are not required to prove actual damages of a specific dollar amount. 'Ascertainable' means 'capable of being discovered, observed or established.'

¹⁷*Id.* at 72, 585 S.E.2d at 72 (emphasis added).

'Loss' has been held synonymous with deprivation, detriment and injury. It is a generic and relative term. 'Damage,' on the other hand, is only a species of loss. The term "loss" necessarily encompasses a broader meaning than the term 'damage.'

Whenever a consumer has received something other than what he bargained for, he has suffered a loss of money or property. That loss is ascertainable if it is measurable even though the precise amount of the loss is not known. CUTPA is not designed to afford a remedy for trifles. In one sense the buyer has lost the purchase price of the item because he parted with his money reasonably expecting to receive a particular item or service. When the product fails to measure up, the consumer has been injured; he has suffered a loss. In another sense he has lost the benefits of the product which he was led to believe he had purchased. That the loss does not consist of a diminution in value is immaterial, although obviously such diminution would satisfy the statute.

184 Conn. at 613, 440 A.2d at 814 (citations omitted). See also, *Scott v. Western Intern. Surplus Sales, Inc.*, 267 Or. 512, 515, 517 P.2d 661, 662-63 (1973) ("Under the statute there is no need to allege or prove the amount of the 'ascertainable loss'; the plaintiff is only claiming the minimum of \$200 which is recoverable if an ascertainable loss of any amount is proved 'Ascertainable' can reasonably be interpreted to mean, capable of being discovered, observed or established. As we have already stated, the amount of the loss is immaterial if only \$200 is sought."); *Miller v. American Family Publishers*, 284 N.J.Super. 67, 87-89, 663 A.2d 643, 655 (1995) ("To satisfy the 'ascertainable loss' requirement, a plaintiff need prove only that he has purchased an item partially as a result of an unfair or deceptive practice or act and that the item is different from that for which he bargained.").

We conclude that for a consumer to make out a *prima facie* case to recover damages for 'any ascertainable loss' under *W.Va.Code*, 46A-6-106, the consumer is not required to allege a specific amount of actual damages. If the consumer proves that he or she has purchased an item that is different from or inferior to that for which he bargained, the 'ascertainable loss' requirement is satisfied.¹⁸

¹⁸214 W.Va. at 74-75, 585 S.E.2d at 74-75.

Two conclusions can be drawn from this recitation of West Virginia case law on this subject. First, this Court has already decided that the answer to the certified question is a resounding no. While this Court has not held the doctrine of stare decisis sacrosanct, the doctrine does have significant weight:

The Court has said often and with great emphasis that the doctrine of stare decisis is of fundamental importance to the rule of law. Although we have cautioned that *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, it is indisputable that stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon "an arbitrary discretion." *The Federalist*, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton).

Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. Nonetheless, we have held that any departure from the doctrine of stare decisis demands special justification.¹⁹

No special justification has been advanced here. Notably, WVAJ is not aware of a single legislative attempt to overturn these precedents regarding proof of reliance in the over ten years since this Defendant first faced the issue in *Burch, supra*. Indeed, it seems that only the pharmaceutical manufacturers and others who commit consumer fraud are interested in imposing the reliance requirement.

¹⁹*Murphy v. Eastern American Energy Corp.*, 680 S.E.2d 110, 116 (2009) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989) (citations and internal quotations omitted)).

Second, the longstanding, consistent interpretation of the Act as not requiring reliance goes a long way towards refuting the horribles the Defendant and its amicus posit in their briefs. As the above recitation makes clear, a number of pharmaceutical class actions have been litigated in this State after a finding that no proof of individual reliance was required under the Act. The Defendant offers no specific horror stories or abuses as a result of the settlements approved in those cases.

This Court and the Circuit Courts have consistently held that proof of individual reliance is not required of a private plaintiff. This result is consistent with the plain language of the Act. The Court should either dismiss the certified question as improvidently granted or answer it no.

II. WEST VIRGINIA'S INTERPRETION OF THE ACT AS NOT REQUIRING PROOF OF RELEIANCE IS CONSISTENT WITH THE MAJORITY RULE.

A review of the statutes and cases from other jurisdictions establishes that requiring proof reliance is a minority position.

A few states have explicit reliance requirements.²⁰ Because the requirement is explicitly imposed by the legislature, these states are not persuasive here where the legislative direction

²⁰Ind. Code Ann. § 24-5-0.5-4(a) (requiring reliance “upon an uncured or incurable deceptive act”); Tex. Bus. & Com. Code Ann. § 17.50(a)(1)(B) (Vernon Supp. 2005) (requiring that the deceptive act or practice be “relied on by a consumer to the consumer’s detriment”); Wyo. Stat. Ann. § 40-12-108(a) (2005) (“A person relying upon an uncured unlawful deceptive trade practice may bring an action under this act for the damages he has actually suffered as a consumer as a result of such unlawful deceptive trade practice.”); see also Vt. Stat. Ann. tit. 9, § 2461(b) (1993) (providing a private right of action to “[a]ny consumer who contracts for goods or services in reliance upon false or fraudulent representations or practices prohibited by . . . [the act] . . . or who sustains damages or injury as a result of any false or fraudulent representations or practices prohibited by [the act]”).

is explicitly contrary. A few states do judicially impose reliance requirements.²¹ The vast majority, however, do not.²² Two conservative critics of many aspects of state UDAP laws and decisions concede that most states do not require proof of reliance.²³ The suggestion that this

²¹See, e.g., *Lynas v. Williams*, 454 S.E.2d 570, 574 (Ga. Ct. App. 1995) (finding that “justifiable reliance” is an essential element of a claim under Georgia’s Fair Business Practices Act); *Philip Morris, Inc., v. Angeletti*, 752 A.2d 200, 234–39 (Md. 2000) (denying class certification while noting that action under consumer protection statutes would require a showing of individual reliance); *Weinberg v. Sun Co.*, 777 A.2d 442, 445–46 (Pa. 2001) (holding that because Pennsylvania’s Unfair Trade Practices and Consumer Protection Law is rooted in fraud prevention, it is likely the legislature intended to retain the common law elements of fraud, including reliance); see also *Tim Torres Enters. v. Linscott*, 416 N.W.2d 670, 675 (Wis. Ct. App. 1987) (noting with approval the trial court’s instruction that “there must be some actual consumer reliance . . . before awarding pecuniary damages”).

²²See, e.g., *Att’y Gen. v. Wyndham Int’l, Inc.*, 869 So. 2d 592, 598 (Fla. Dist. Ct. App. 2004) (“When addressing a deceptive or unfair trade practice claim, the issue is not whether the plaintiff actually relied on the alleged practice, but whether the practice was likely to deceive a consumer acting reasonably in the same circumstances. . . . [U]nlike fraud, a party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue.” (citing *Davis v. Powertel, Inc.*, 776 So. 2d 971, 973–74 (Fla. Dist. Ct. App. 2000))); see also *Alicke v. MCI Commc’ns Corp.*, 111 F.3d 909, 912 (D.C. Cir. 1997); *Smoot v. Physicians Life Ins. Co.*, 87 P.3d 545, 550 (N.M. Ct. App. 2003); *Forbes v. Par Ten Group, Inc.*, 394 S.E.2d 643, 650 (N.C. Ct. App. 1990); *Richards v. Beechmont Volvo*, 711 N.E.2d 1088, 1090 (Ohio Ct. App. 1998); *Peabody v. P.J.’s Auto Village, Inc.*, 569 A.2d 460, 462 (Vt. 1989); *PNR, Inc. v. Beacon Prop. Mgmt*, 842 So. 2d 773, 777 (Fla. 2003) (finding that a showing of reliance is not required but that the plaintiff must show that a consumer acting reasonably under the circumstances would have been misled); *Sw. Starving Artists Group, Inc. v. State ex rel. Summer*, 364 So. 2d 1128, 1130 (Miss. 1978) (requiring a showing that the plaintiff would have acted differently had he or she known the actual facts); *Blue Cross, Inc. v. Corcoran*, 558 N.Y.S.2d 404, 405 (N.Y. App. Div. 1990) (finding that a showing of reliance is not required but that the plaintiff must show that a consumer acting reasonably under the circumstances would have been misled). Other states statutes do not require reliance, but do require some casual connection to the violation of the law. See *Haesche v. Kissner*, 640 A.2d 89, 93–94 (Conn. 1994); *Morris v. Osmose Wood Preserving*, 667 A.2d 624, 634 (Md. 1995); *Gennari v. Weichert Co. Realtors*, 691 A.2d 350, 366–67 (N.J. 1977).

²³Victor E. Schwartz & Cary Silverman, Common-Sense Construction of Consumer Protection Acts, 54 Kansas L. Rev. 1, 18 (2006)

Court would be outside the mainstream if it upholds established West Virginia law is clearly false.

Finally, interpreting the Act as requiring reliance is contrary to many policies that underlie the statute. First, it is no accident that it is defendants opposing class actions that seek to impose an individual reliance requirement – the clear aim is to defeat class certification.

Judicially imposing a reliance requirement is inconsistent with the legislative choices made in establishing the statute and this Court's precedents. First, as this Court has recognized, the Legislature explicitly left out class action bans present in the model act upon which the W.Va. Statute is based.²⁴ Moreover, this Court has explicitly held that contractual restrictions on the right to bring consumer protection class actions are unconscionable and unenforceable.²⁵ If this Court will not permit parties to contractually waive class relief on public policy grounds, it should not strain to adopt constructions of the Act that may have substantially the same effect.

CONCLUSION

For the reasons noted herein, this Court should either dismiss this case as improvidently granted or answer the certified question no.

²⁴See *Orlando, supra* n. 6 (noting that the Uniform Consumer Credit Code contains class action bans that were omitted from the Act in West Virginia).

²⁵*State ex rel. Dunlap v. Berger*, 211 W.Va. 549, 564, 567 S.E.2d 265, 280 (2002).

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I, Anthony J. Majestro, counsel for the West Virginia Association for Justice, hereby certify that I have this 22nd day of February served a copy of the foregoing brief upon the following counsel for the parties of record and *amici curiae* by First Class, U.S. Mail, postage pre-paid.

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