IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35467

SCOTT McMAHON and KAREN JOHN, individually and on behalf of and others similarly situated,

Plaintiffs/Respondents,

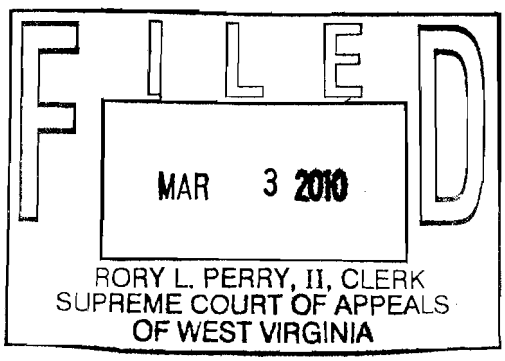
v.

ADVANCE STORES COMPANY, INCORPORATED, dba Advance Auto Parts, and DONN FREE,

Defendants/Petitioners.

Hon. Arthur M. Recht, Judge
Circuit Court of Ohio County
Civil Action No. 06-C-306

BRIEF OF THE *AMICI CURIAE*



WEST VIRGINIA RETAILERS ASSOCIATION AND WEST VIRGINIA MANUFACTURERS ASSOCIATION as ***Amici Curiae***

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I. INTRODUCTION

This is the brief of the *amici curiae*, the West Virginia Retailers Association ("WVRA") and the West Virginia Manufacturers Association ("WVMA").

The issue at stake in this case, the validity and vitality of restrictions on express warranties, is extremely important to WVRA and WVMA because hundreds if not thousands of consumer and industrial products are manufactured and sold in West Virginia with various warranty limitations, including those as to time, use, and parties.

In this case, the product was an automobile battery with warranty restrictions specifying the time within which the retailer was obligated to provide a replacement for a defective battery; the use or misuse of the battery which would relieve the retailer of its replacement obligation; and the parties to whom the retailer owed its replacement obligation. Again, these types of limitations on express warranties are common to many products sold not only in West Virginia, but around the world.

Express warranties are contracts between manufacturers and/or retailers and purchasers. The parties to those contracts are the manufacturers and/or retailers and the purchasers. A subsequent purchaser has no contractual relationship with the manufacturer and/or retailer and, although the subsequent purchaser might have other rights, such as the right to bring an action if injured by a defective product, the subsequent purchaser has no right to bring a suit for breach of a contract to which the subsequent purchaser was not a party.

Accordingly, WVRA and WVMA agree with the petitioners that this Court should uphold the validity of "original purchaser" express limited warranties.

II. STATEMENT OF FACTS

A product, in this case a car battery, was sold to respondent, Scott McMahon. The express warranty provided to Mr. McMahon clearly provided, "Your warranty begins the day you purchase the battery, and expires at the end of the warranty period printed on your original receipt, or when you sell your vehicle, whichever occurs first." (Emphasis added). Moreover, with respect to replacement of the battery, which is the issue in this case, the warranty clearly provided, "Your free replacement period begins the day you purchase the battery, and expires at the end of the 'Free Replacement Period' printed on your original receipt, or when you sell your vehicle, whichever occurs first." (Emphasis added).

Once Mr. McMahon sold his vehicle to respondent, Karen John, the express warranty expired by its own terms. Thereafter, when Ms. John's husband presented the battery for a refund, the warranty had already expired. Of course, Mr. McMahon, of his own volition, paid $70 to Ms. John to reimburse her for the purchase of a replacement battery. Thus, it is difficult for WVRA and WVMA to understand how this case has been in litigation for four years with respondents threatening to turn a dispute in which Ms. John suffered no economic loss and Mr. McMahon's contractual rights terminated when he sold his vehicle to Ms. John into a class action suit ostensibly seeking hundreds of thousands if not millions of dollars. Certainly, if selling products in West Virginia with express warranties limiting their availability to original purchasers will subject manufacturers and retailers to class action liability, hundreds if not thousands of manufacturers may forgo selling their products in West Virginia or increase their prices to West Virginia consumers.

III. DISCUSSION OF LAW

A. WEST VIRGINIA LAW DOES NOT PROHIBIT MANUFACTURERS AND RETAILERS FROM LIMITING EXPRESS WARRANTIES TO THE ORIGINAL PURCHASERS OF PRODUCTS.

Article 2 of the Uniform Commercial Code governs sales. W. Va. Code § 46-2-101, et seq. It applies to all "transactions in goods" except those exempted. W. Va. Code § 46-2-102. The term "present sale" is defined in the UCC as "a sale which is accomplished by the making of the contract." W. Va. Code § 46-2-106(1). And, a "contract for sale" is defined as "a present sale of goods." *Id.* Moreover, the UCC provides, "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." W. Va. Code § 46-2-204(1). Thus, at its core, the sale of goods is a contractual undertaking.

With respect to assignment of a sales transaction, the UCC provides, "Unless otherwise agreed, all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance." W. Va. Code § 46-2-210(2) (emphasis added). Moreover, the UCC provides, "Where this article allocates a risk or a burden as between the parties 'unless otherwise agreed,' the agreement may not only shift the allocation but may also divide the risk or burden." W. Va. Code § 46-2-303. Thus, as in this case, the seller can limit the buyer's right to assign the sales contract to a third-party.

With respect to express warranties in sales transactions, the UCC provides, in relevant part, that "Express warranties by the seller are created as follows: Any

affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." W. Va. Code § 46-2-313(1)(a). Thus, as in this case, Advance Auto Parts' agreement to replace any defective battery within 24 months or prior to the buyer's sale of the vehicle, whichever came first, constituted an express warranty.[1]

With respect to limitations placed on express warranties in sales transactions, the UCC provides, "Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other . . . ." W. Va. Code § 46-2-316(1). Thus, as in this case, Advance Auto Parts was permitted, as the seller, to limit its express replacement warranty to a period of 24 months or to the buyer's sale of the vehicle, whichever came first.

With respect to third-party beneficiaries of express warranties, the UCC provides, "A seller's warranty whether express or implied extends to any natural person who is in <u>the family or household of his buyer or who is a guest in his home</u> if it is reasonable to expect that such person may use, consume or be affected by the goods <u>and who is injured in person by breach of the warranty</u>. A seller may not exclude or limit the operation of this section." W. Va. Code § 46-2-318 (emphasis added).

This is a codification of the abolition of vertical privity for purposes of product liability cases and was relied upon by this Court in *Dawson v. Canteen Corp.*, 158 W. Va.

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[1] Obviously, the UCC also addresses implied warranties, such as the implied warranties of merchantability and fitness for a particular use. W. Va. Code §§ 46-2-314 and -315. This case, however, deals only with express warranties.

516, 518, 212 S.E.2d 82, 83 (1975)("The requirement of privity of contract in warranty actions in West Virginia began to erode with the passage of the Uniform Commercial Code. W. Va. Code, 46-2-318 (1963) eliminated the privity of contract requirement for warranty actions in what is known as the 'horizontal' chain of users."); see also *Louk v. Isuzu Motors, Inc.*, 198 W. Va. 250, 259 n.8, 479 S.E.2d 911, 920 n.8 (1996).

This statute, however, is limited to product liability actions and does not extend to suits for economic damages for breach of an express warranty. In *Bay State-Spray & Provincetown S.S., Inc. v. Caterpillar Tractor Co.*, 404 Mass. 103, 110-11, 533 N.E.2d 1350, 1355-56 (1989), for example, the court held:

> The appropriate statute of limitations to apply to a breach of warranty claim under art. 2 of the Uniform Commercial Code is found by determining the nature of that particular breach of warranty claim. If, as is the case here, the claim asserts a contract-based theory of liability, § 2-725 (not § 2-318) furnishes the applicable statute of limitation. *See Wilson v. Hammer Holdings, Inc.*, 850 F.2d 3, 7-8 (1st Cir.1988) (stating correctly, as to Massachusetts law, "that section <u>2-318 is designed to cover breach of warranty actions that are in essence products liability actions, and is not designed as an alternative for contractually based warranty claims</u>"). . . .
>
> To apply § 2-725's statute of limitation provision to contract-based breach of warranty claims gives that provision its original meaning. To apply § 2-318's statute of limitation to tort-based breach of warranty actions carries out the intention underlying the amendments to § 2-318. Steamship's is a contract-based breach of warranty claim. It is barred by § 2-725.

(emphasis added); see also 18 WILLISTON ON CONTRACTS § 52:39 (4th ed. 2009) (Section 2-318 "dispense[s] with the privity requirement <u>only when the breach of warranty claim is for injury to the person</u>" and is "usually interpreted not to cover claims for property damage or purely economic loss.")(emphasis supplied).

The Consumer Credit and Protection Act does not abrogate these provisions of the Uniform Commercial Code or basic contract principles. W. Va. Code § 46A-6-108(a) does not even refer to "express" warranties, but states only, "Notwithstanding any other provision of law to the contrary, no action by a consumer for breach of warranty or for negligence with respect to goods subject to a consumer transaction shall fail because of a lack of privity between the consumer and the party against whom the claim is made. An action against any person for breach of warranty or for negligence with respect to goods subject to a consumer transaction shall not of itself constitute a bar to the bringing of an action against another person." As noted by this Court in *Dawson, supra* at 520, 212 S.E.2d at 84, this was a codification of the law of product liability:

> It appears to this Court that it is not only the clear trend of the common law as articulated in other jurisdictions, but also the trend of modern legislation in West Virginia to recognize the problems inherent in complex, modern commerce concerning mass production, mass distribution, and mass demand generated through nationwide advertising, and therefore, to provide functional rather than arbitrary rules for recovery in warranty. Volumes of commentary have been written elsewhere in this regard since *MacPherson v. Buick Motor Company*, 217 N.Y. 382, 111 N.E. 1050 (1916) and its landmark successor *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), and there is little point in retracing those well-worn tracks here. It is sufficient merely to hold that lack of privity alone is no longer a defense to a warranty action in West Virginia.

Plainly, the Court was referring to a personal injury action by someone other than the buyer for product liability arising from breach of implied warranty, not an economic damages action by someone other than the buyer for breach of express warranty. Inclusion of the term "negligence" in conjunction with the term "warranty" in W. Va. Code § 46A-6-108(a) is indicative of the intended scope of the statute. Moreover, in this

case, Ms. John's express warranty claim did not fail because of lack of privity, it failed because it was extinguished, by its own terms, when Mr. McMahon sold his vehicle.

IV. CONCLUSION

Any manufacturer or retailer, including Advance Auto Parts, can provide express warranties with its products and can reasonably limit those warranties in any manner the manufacturer or retailer deems appropriate. The retailer, in this case Advance Auto Parts, exercised its right to limit its contractual obligations to a certain period of time (the warranty period) or upon the sale of Mr. McMahon's vehicle.

Car battery warranties, for example, could be limited to 12, 24, 36, 48, 60, or 72-months. Although the standard in the industry is to limit express warranties for car batteries to the original purchaser, manufacturers or retailers are free to permit warranties to be transferred to subsequent purchasers. Of course, car batteries with longer warranties or those permitting transfer to subsequent purchasers would generally be expected to cost more than those with shorter warranties or those limiting their availability to original purchasers.

These same principles apply to all products sold, i.e., the more liberal the express warranty provisions, the more expensive the products. Here, Mr. McMahon was able to purchase a car battery with a 24-month free replacement warranty for less than $50. Included in the retailer's profitability calculation for that battery was undoubtedly the possibility that the battery would fail within that 24-month period requiring a free replacement. Also, included in the retailer's profitability calculation is the possibility that some original purchasers sell their vehicles (particularly as consumers are unlikely to be

purchasing a car battery for a new or relatively new vehicle) within the 24-month warranty period.

If manufacturers and retailers who offer express warranties cannot rely on the validity of these warranty terms, products will either not be available to West Virginia consumers or they will be available at a higher cost.

WHEREFORE, the West Virginia Retailers Association and the West Virginia Manufacturers Association join the petitioners in requesting that this Court reverse the order of the Circuit Court of Ohio County and remand with directions to enter judgment against the respondents on their claim for breach of express warranty.

WEST VIRGINIA RETAILERS ASSOCIATION AND WEST VIRGINIA MANUFACTURERS ASSOCIATION as ***Amici Curiae***

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CERTIFICATE OF SERVICE

I, Pamela Dawn Tarr, do hereby certify that on March 3, 2010, I served the foregoing "BRIEF OF THE *AMICI CURIAE*" upon the following by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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