

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,

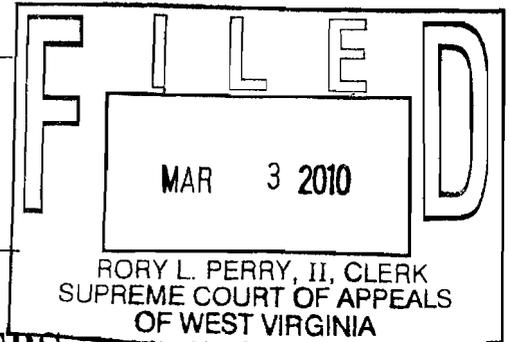
Plaintiffs/Respondents,

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 PETITIONERS

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I. INTRODUCTION

This is the brief of the petitioners in a certified question proceeding arising from a suit over a \$49.94 car battery. This case presents issue of whether a “purchaser only” express limited warranty is valid in West Virginia.

The Court’s ruling on this issue is important because “purchaser only” express limited warranties are common throughout the United States for a wide variety of industrial and consumer products, including automotive and truck batteries. If this common warranty provision is invalid in West Virginia, it will have a profound impact on manufacturers and retailers of products in the State.

Indeed, if manufacturers and retailers are unable to limit their express warranties to the original purchasers, many may choose not to sell their products in West Virginia, not to provide express limited warranties for products sold in West Virginia, or to increase their prices to West Virginia consumers.

In 1975, this Court held, “The requirement of privity of contract in an action for breach of an express or implied warranty in West Virginia is hereby abolished,”¹ but the case before the Court was a product liability action, where abolition of vertical privity is widely-accepted. This Court has not extended this abolition of vertical privity in product liability actions to suits for breach of express limited warranties where one has to be a party to a contract to sue for its breach.²

¹ Syl., *Dawson v. Canteen Corp.*, 158 W. Va. 516, 212 S.E.2d 82 (1975).

² The only exception to this rule is when the contract is for the sole benefit of a third-party. See, e.g., W. Va. Code § 55-8-12 (“If a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others,

Indeed, because a suit for breach of express warranty is contractual in nature, it is widely-accepted that manufacturers or sellers may limit their express warranties to the original purchasers of their products.³

Although it is clear from the Court's cases after 1975 that it did not intend its ruling to extend to non-product liability suits for breach of express limited warranties,⁴ the Circuit Court, feeling constrained by the language of the syllabus point in *Dawson*, reluctantly ruled that "purchaser only" express limited warranties

such person may maintain, in his own name, any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise.").

³ Indeed, in 2001, this Court held that a contractor had no standing to sue under an express warranty in a contract to which the contractor was not a party:

Eastern has failed to direct this Court to any language in the contract between Kananui and Salem that either expressly or impliedly declares an intent that the contract was for Eastern's sole benefit. While it is clear that the contracting parties knew the contract would result in professional work product by Kananui that would ultimately be relied upon by a construction contractor building the project, it is equally clear that the contract itself was for the benefit of the contracting parties. Consequently, we find no error in the circuit court's grant of summary judgment on this ground.

Eastern Steel Constructors, Inc. v. City of Salem, 209 W. Va. 392, 404, 549 S.E.2d 266, 278 (2001).

⁴ All of the cases subsequent to *Dawson* have involved product liability actions, not contract actions for breach of express implied warranties, see *Louk v. Isuzu Motors, Inc.*, 198 W. Va. 250, 479 S.E.2d 911 (1996) (product liability action citing *Dawson*); *Taylor v. Ford Motor Co.*, 185 W. Va. 518, 408 S.E.2d 270 (1991) (product liability action citing *Dawson*); *Blankenship v. General Motors Corp.*, 185 W. Va. 350, 406 S.E.2d 781 (1991) (product liability action citing *Dawson*); *Anderson v. Chrysler Corp.*, 184 W. Va. 641, 403 S.E.2d 189 (1991) (product liability case citing *Dawson*); *Hill v. Joseph T. Ryerson & Son, Inc.*, 165 W. Va. 22, 268 S.E.2d 296 (1980) (product liability case citing *Dawson*); *Morningstar v. Black and Decker Manufacturing Co.*, 162 W. Va. 857, 253 S.E.2d 666 (1979) (product liability case citing *Dawson*), or, alternatively, suits for breach of implied warranties in which privity is not required, see *Eastern Steel, supra*; *Sewell v. Gregory*, 179 W. Va. 585, 371 S.E.2d 82 (1988) (implied warranties of habitability and fitness for use).

are invalid in West Virginia,⁵ but entered a certified question order so that Advance Auto Parts could seek interlocutory review.

II. STATEMENT OF FACTS

On March 2, 2004, Scott McMahon purchased a battery for \$49.94 from an Advance Auto Parts store in Weirton and placed the battery in his Jeep.⁶ His receipt states, “24 MO. FREE REPL . . . Visit us at www.advanceautoparts.com. RECEIPT REQUIRED FOR RETURNS. WARRANTY INFORMATION AVAILABLE.”⁷ The Advance Auto Parts Limited Warranty Policy states:

OUR GUARANTEE

We will replace any battery we sell, should it fail due to defects in materials or workmanship, under normal installation, use, and service, while under warranty. . . .

LENGTH OF WARRANTY

Your warranty begins the day you purchase the battery, and expires at the end of the warranty period printed on

⁵ As the Circuit Court stated at a hearing on March 20, 2008:

THE COURT: That’s just the traditionalist that I am; to me a syllabus point has great meaning.

MR. RAMEY: Right.

THE COURT: But if they’re going to change –

MR. RAMEY: -- they should be the one to change it. . . .

Tr. at 9-10.

⁶ *Exhibit A*.

⁷ *Id.*

your original receipt, or when you sell your vehicle, whichever occurs first.

FREE REPLACEMENT PERIODS

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.⁸

In September 2004, Mr. McMahon sold the Jeep to the plaintiff, Karen John, wife of Wheeling attorney, Joseph J. John.⁹ This, according to its plain and unambiguous terms, terminated the express limited warranty.

In January 2005, the battery failed and, on January 20, 2005, Mr. John purchased a new battery from Advance Auto Parts.¹⁰ Mr. John apparently then decided to attempt to pursue a limited warranty claim even though he did not purchase the battery and contacted Mr. McMahon about obtaining a copy of the original receipt.¹¹

On February 9, 2005, after securing the original receipt, Mr. John took the defective battery to Advance Auto Parts, but rather than requesting a replacement,¹² requested a refund.¹³ Once the defendant, Donn Free, an Advance

⁸ *Exhibit B* (emphasis supplied).

⁹ Second Amended Complaint at ¶ 13.

¹⁰ *Id.* at ¶ 15.

¹¹ *Id.* at ¶ 16.

¹² W. Va. Code § 46-2-719(1) (a) expressly provides, “the agreement may provide for remedies in addition to or in substitution for those provided in this article and may limit or alter the measure of damages recoverable under this article, as by limiting the buyer’s remedies to return of the goods and repayment of the price or to repair and replacement of

Auto Parts employee,¹⁴ learned that Mr. John was not the original purchaser, he informed Mr. John that he was not entitled to a refund under the terms of the express limited warranty.¹⁵

After Advance Auto Parts refused to give him a refund for \$49.94 for a battery he did not purchase, Mr. John demanded that Mr. McMahon reimburse him for the \$70.00 replacement cost of a new battery, and Mr. McMahon reimbursed Mr. John for the full \$70.00.¹⁶

Although, at that point, the Johns had been fully compensated, Mr. John nevertheless filed suit on behalf of Mr. McMahon, seeking compensatory damages, punitive damages, and attorney fees because Advance Auto Parts refused to give Mr. John a \$49.94 refund.¹⁷

After Advance Auto filed a motion to dismiss challenging Mr. McMahon's standing to sue, Mr. John twice amended the complaint ultimately naming Mr.

nonconforming goods or parts") (emphasis supplied). Pursuant to this UCC provision, battery manufacturers and dealers limit their warrants to "repair or replacement." See *In re Eagle-Picher Industries, Inc.*, 181 B.R. 51, 53 (Bankr. S.D. Ohio 1995) ("Our obligation under this warranty shall be limited to the repair or replacement, FOB factory, of any CAREFREE battery which is returned as a complete unit to the factory within the 1 year warranty period, transportation charges prepaid, and which proves to our satisfaction, upon examination, to be defective.") (emphasis supplied).

¹³ *Id.* at ¶¶ 17, 20.

¹⁴ Mr. Free is also named as a defendant in this matter, apparently in order to defeat diversity for purposes of removal to federal court.

¹⁵ *Id.* at ¶ 21. Of course, even if Mr. John had been the original purchaser, he would not have been entitled to a refund, but only a replacement battery.

¹⁶ Response to Motion to Dismiss at 2.

¹⁷ Complaint.

McMahon and Ms. John, individually and on behalf of others similarly situated, seeking to certify a class of all Advance Auto Parts customers who have been denied battery refunds or replacements because they were not the original purchasers.¹⁸ Eventually, Mr. McMahon and Ms. John filed a motion for class certification.¹⁹

Ultimately, the Circuit Court granted partial summary judgment against Advance Auto Parts on the issue of the validity of its express limited warranty because it felt constrained by the language in the single syllabus of *Dawson*, but because of the novelty of the issue presented and uncertainty about the intended scope of this Court's ruling in *Dawson*, entered an order²⁰ certifying the following question to this Court:

Does W. Va. Code § 46A-6-108(a) apply to suits for breach of limited warranty by subsequent purchasers where the limited warranty involved limits its availability to original purchasers?

The Circuit Court answered this question in the affirmative.

Because it is clear from this Court's decisions that *Dawson* is limited to product liability cases and does not allow breach of contract suits by persons who are not parties to the express warranty; because "purchaser only" express limited warranties are common throughout the United States for a wide variety of industrial and consumer products and have been upheld by other courts; and

¹⁸ Second Amended Complaint.

¹⁹ Motion for Class Certification.

²⁰ *Exhibit C*.

because the plaintiffs have sought to broaden this dispute over a \$49.94 car battery into a state-wide class action, Advance Auto Parts respectfully requests that this Court reverse the order of the Circuit Court of Ohio County.

III. DISCUSSION OF LAW

A. STANDARD OF REVIEW

“The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.”²¹

In this case, under the Uniform Commercial Code and under general contract principles, a seller is permitted to limit an express warranty to the original purchaser. Because a suit for express warranty is contractual in nature, a seller, as one of the parties to the contract, may limit its transferability by the other party to the contract, the original purchaser. Accordingly, this Court has frequently held, that a third-party may not sue on a contract unless the contract was for the third-party’s sole benefit or unless has been assigned to the third-party. Here, the original warranty was obviously not for the subsequent purchaser’s sole benefit and the contract itself precluded its assignment and/or transfer.

This Court never intended, by its decision in *Dawson*, to abolish privity with respect to anything other than product liability actions, which are grounded in tort, not in contract. Accordingly, under a *de novo* standard of review, the order of the Circuit Court of Ohio County should be reversed.

²¹ Syl. pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996).

B. WEST VIRGINIA LAW DOES NOT PROHIBIT MANUFACTURERS AND SELLERS FROM LIMITING EXPRESS WARRANTIES TO THE ORIGINAL PURCHASERS OF INDUSTRIAL AND CONSUMER PRODUCTS.

1. Because a Suit for Breach of an Express Limited Warranted is Grounded in Contract, it is Common for Manufacturers and Sellers to Limit Warranties to the Original Purchasers of Their Products.

An express limited warranty is a contract between the seller and the purchaser.²² Accordingly, as a matter of basic contract law, a subsequent purchaser cannot bring an action for economic damages for breach of an express limited warranty, in the absence of a provision permitting its transfer, because there is no contractual relationship between a manufacturer or seller and a subsequent purchaser.²³

Just as any contracting party can include a provision prohibiting assignment of the contract,²⁴ a seller can include a provision in an express limited warranty restricting its availability to the original purchaser.²⁵

²² 15 CAUSES OF ACTION § 2 (2007) (“In general, an express warranty, as the name implies, is a warranty which is created by the making of express representations concerning the subject of the warranty, the terms of which are determined by the substance or content of those representations.”).

²³ Indeed, in *Eastern Steel Constructors, Inc. v. City of Salem*, supra at 404, 549 S.E.2d at 278, this Court expressly held that a contractor had no standing to sue based upon a theory of express warranties under a contract to which the contractor was not a party.

²⁴See, e.g., Syl. pt. 3, *Collia v. McJunkin*, 178 W. Va. 158, 358 S.E.2d 242 (1987) (“Unless there is some statutory prohibition or an express provision in the lease to the contrary, a lease on real property, other than a tenancy at will, is assignable.” Syllabus Point 2, *Randolph v. Kowry Corp.*, 173 W. Va. 96, 312 S.E.2d 759 (1984).”).

For this reason, the sellers and manufacturers of a wide variety of industrial and consumer products limit their express warranties to the original purchaser, including sprinkler systems,²⁶ fencing,²⁷ cotton burr extractors,²⁸ transit buses,²⁹ greenhouses;³⁰ bedding;³¹ televisions;³² vacuum cleaners,³³ hydrolyzers,³⁴ pressure-

²⁵ Advance Auto Parts does not contest that if limiting language had not been included in its express limited warranty, it may have been assigned to a subsequent purchaser. 15 *Causes of Action* § 2 (2007) (“Where a purchaser of goods has received an express warranty from the party from whom the goods were purchased, and where the purchaser has made a valid assignment of its rights under the warranty to the plaintiff, it will not be necessary for the plaintiff to establish privity of contract with the warrantor in order to establish a breach of warranty claim, since the plaintiff will ‘stand in the shoes’ of its assignor respecting privity with the warrantor.”). Where such language is present, however, express warranties are non-transferable.

²⁶ *St. Paul Mercury Ins. Co. v. The Viking Corporation*, 539 F.3d 623, 626 (7th Cir. 2008) (insured and subcontractor lacked privity for breach of warranty claim where “Viking’s warranty was limited to the original purchaser.”) (emphasis supplied).

²⁷ *Nebraska Plastics, Inc. v. Holland Colors Americas, Inc.*, 408 F.3d 410, 417-18 (8th Cir. 2005) (“the warranty also limited coverage to the original purchaser The non-transferability of the warranty would presumably limit the effective period for warranty coverage in many cases”) (emphasis supplied).

²⁸ *Western Tractor Corp. v. Continental-Eagle Corp.*, 24 F.3d 240 at *3 (5th Cir. 1994) (“The factory warranty provides: ‘Each new machine or component manufactured by Bush Hog/Continental Gin is warranted by Bush Hog/Continental Gin to the original purchaser to be free from defects in material and workmanship under normal use and service.’”) (emphasis supplied).

²⁹ *Dade County v. Rohr Industries, Inc.*, 826 F.2d 983, 985 n.2 (11th Cir. 1987) (“The Flexible Company’s obligation under this warranty being limited to repairing or at its option furnishing a replacement part at its factory or warehouse designated by it for any part or parts thereof which shall, within twelve (12) months after delivery of such motor coach to the original purchaser or before such motor coach has been driven thirty-five thousand (35,000) miles”) (emphasis supplied).

³⁰ *S-C Industries v. American Hydroponics System, Inc.*, 468 F.2d 852, 853 n.2 (5th Cir. 1972) (“Pan American Hydroponics, Inc., warrants to the original purchaser this merchandise to be free from defects in materials and workmanship under normal use and service in compliance with all bulletins, manuals, and instructions furnished by Pan American, for a period of one (1) year from date of purchase”) (emphasis supplied).

treated wood,³⁵ HVAC equipment;³⁶ video game consoles,³⁷ lollipop manufacturing systems,³⁸ power tools,³⁹ logging equipment,⁴⁰ vehicle seats,⁴¹ roofing materials,⁴²

³¹ *Stearns v. Select Comfort Retail Corp.*, 2008 WL 4542967 at *4 (N.D. Cal.) (“Select Comfort provides an express Limited Warranty with the Sleep Number® bed, which warrants to the original purchaser that the Select Comfort sleep system will be free from defects in material and workmanship for a period of twenty years.”) (emphasis supplied); *Dan-Foam A/S v. Brand Named Beds, LLC*, 500 F. Supp. 2d 296, 299-300 (S.D.N.Y. 2007) (“Tempur-Pedic provides a twenty-year warranty that is ‘valid only to the original purchaser of the product.’”)(emphasis supplied).

³² *Cooper v. Samsung Electronics America, Inc.*, 2008 WL 4513924 at *3 (D. N.J.) (“THIS LIMITED WARRANTY SHALL NOT EXTEND TO ANYONE OTHER THAN THE ORIGINAL PURCHASER OF THIS PRODUCT.”)(emphasis supplied).

³³ *Jordan v. Scott Fetzer Co.*, 2007 WL 4287719 at *1 (M.D. Ga.) (“The salesperson completes each sale of a new Kirby vacuum by presenting the buyer with an ‘Owner Care Program’ brochure and a gold ‘Original Purchaser’s Registration’ card (‘Gold Card’). The brochure explains the buyer’s warranty rights and ‘specifies in several instances that the warranty rights belong only to the ‘original purchaser.’”)(emphasis supplied).

³⁴ *Tyson Foods, Inc. v. Dupps Co.*, 2007 WL 4166210 at *10 (W.D. Ark.) (“SELLER warrants the equipment of its manufacture to be free from defective workmanship for a period of ninety (90) days from the date of shipment from SELLER’S plant, except rendering equipment, which shall be guaranteed for one (1) year from date of shipment from SELLER’S plant when given normal and proper usage and while owned by the original PURCHASER from SELLER . . .”)(emphasis supplied).

³⁵ *JM McCormick Co., Inc. v. International Truck & Engine Corp.*, 2007 WL 2904825 at *6 (S.D. Ind.) (“To qualify for the pressure preservatively treated plywood Ten Year Plywood Subflooring Limited Warranty, the claim must be made by the original purchaser of a bus which contains NatureWood preserved plywood supplied by J.M. McCormick Company.”)(emphasis supplied).

³⁶ *Neuser v. Carrier Corp.*, 2007 WL 1470855 at *2 (W.D. Wis.) (“The Company warrants to the original purchaser, during his or her lifetime, that the heat exchanger will be free from defects materials and workmanship . . .”)(emphasis supplied).

³⁷ *White v. Microsoft Corp.*, 454 F. Supp. 2d 1118, 1122 (S.D. Ala. 2006) (“Subject to the terms and conditions of this Limited Warranty, Microsoft warrants to you only (the original purchaser), that under normal use and service the Xbox Product will substantially conform with the accompanying printed user instruction materials for a period of 90 days starting as of the date of your sales receipt . . .”)(emphasis supplied).

residential construction,⁴³ wheelchair lifts,⁴⁴ recreational vehicles,⁴⁵ farm equipment,⁴⁶ and building materials.⁴⁷

³⁸ *Day Spring Enterprises, Inc. v. LMC Intern., Inc.*, 2004 WL 2191568 at *4 (W.D. N.Y.) (“All machines and parts manufactured by Latini Machine Company, Inc. are guaranteed to be free from defects in material and workmanship for six (6) months from date of shipment when given normal and proper usage and when owned and used only by the original purchaser.”) (emphasis supplied).

³⁹ *Kingsford Fastener, Inc. v. Koki*, 2002 WL 992610 at *1 (N.D. Ill.) (“Hitachi Koki, U.S.A., Ltd. (‘Hitachi’) gives the limited warranty to only the original end-user purchaser of a Hitachi brand power tool or pneumatic tool (‘Hitachi Product’).”) (emphasis supplied).

⁴⁰ *Ison Logging, L.L.C. v. John Deere Const. Equipment Co., Inc.*, 2000 WL 1843833 at *13 (S.D. Ala.) (“The parties agree that plaintiff’s complaints about the hydraulic system fall under the full machine warranty which covers all parts of the John Deere product for a period of six (6) months from the date of delivery of the product to its original purchaser.”) (emphasis supplied).

⁴¹ *Strange v. Keiper Recaro Seating, Inc.*, 117 F. Supp. 2d 408, 411 (D. Del. 2000) (“The warranty provides ‘Gillig Corporation warrants its transit coaches to be FREE FROM DEFECTS IN MATERIAL AND WORKMANSHIP UNDER NORMAL USE AND SERVICE for 50,000 miles or the expiration of twelve (12) months after the date of delivery of the coach to the original purchaser, whichever comes first’”) (emphasis supplied).

⁴² *Weyerhaeuser Corp. v. Tamko Roofing Products, Inc.*, 298 F. Supp. 2d 836, 838 (N.D. Iowa 2003) (“This limited warranty shall accrue and inure only to the benefit of the first consumer purchaser or owner of the TAMKO product and shall not be assigned, sold, or transferred in any manner whatsoever.”)(emphasis supplied).

⁴³ *Reid v. Thompson Homes at Centreville, Inc.*, 2007 WL 4248478 at *3 (Del. Super.) (“Said Builder’s Warranty is non-transferable and terminates when the dwelling is resold or is no longer occupied by the Buyer, whichever comes first.”)(emphasis supplied); *Peterson v. Cornerstone Property Development*, 2007 WL 4233009 at *1 n.2 (Wis. App.) (“THIS LIMITED WARRANTY is extended to Buyer only and not to a future owner of the unit or to a tenant thereof. This Limited Warranty is non-transferable and all of Warrantor’s obligations under it terminate if the unit is resold or ceases to be occupied by Buyer.”)(emphasis supplied).

⁴⁴ *Smith v. Mobility Group, Inc.*, 2008 WL 2168436 at *5 (Mich. App.) (“The Braun Corporation . . . warrants its wheelchair lift against defects in material and workmanship for three years, provid[ed] the lift is operated and maintained properly and in conformity with this manual. The warranty is limited to the original purchaser”)(emphasis supplied).

Indeed, a “purchaser only” limited warranty like the one used by Advance Auto Parts is standard in the auto and truck parts industry, with AAA (“warrants only to the original purchaser”);⁴⁸ AC-Delco (“warrants to the original retail purchaser”);⁴⁹ Auto Zone (“warranty expires when you sell or transfer your vehicle”);⁵⁰ Interstate (“warrants only to the original purchaser”);⁵¹ CSK Auto (“warranty applies only to the original purchaser”);⁵² Optima (“IBSA warrants only to the original purchaser”);⁵³ Apex (“The battery manufacturer warrants only to the

⁴⁵ *Perry v. Gulf Stream Coach, Inc.*, 871 N.E.2d 1038, 1041 (Ind. App. 2007) (“Your new recreational vehicle has a limited warranty by [Gulf Stream] to the original purchaser as follows:”) (emphasis supplied).

⁴⁶ *Limestone Farms, Inc. v. Deere & Co.*, 29 Kan. App. 2d 609, 612, 29 P.3d 457, 460 (2001) (“The trial court dismissed Beim’s express warranty claims because he was not the owner of the planter and he had suffered no economic loss; the trial court found Interior Farms’ claims were barred because it was not the original purchaser of the planter.”) (emphasis supplied).

⁴⁷ *Lamb v. Georgia-Pacific Corp.*, 194 Ga. App. 848, 392 S.E.2d 307, 309 (1990) (“If a defendant is not the seller to the plaintiff-purchaser, the plaintiff as the ultimate purchaser cannot recover on the implied or express warranty, if any, arising out of the prior sale by the defendant to the original purchaser.”) (emphasis supplied).

⁴⁸ <http://discover.aaa.com/default.aspx?node=CarsDriving/MobileBatteryWarranty&>.

⁴⁹ <http://www.acdelco.com/parts/battery/battery-warranty.jsp>.

⁵⁰ <http://www.autozone.com/autozone/termsandconditions/termsAndConditionsHome.jsp;jsessionid=A6B0B5A3093C5BDC1069393D6726E910.diyprod2-b2c3?leftNavPage=warranties&pageCategory=duralastGoldAndBatteryWarranty>.

⁵¹ <http://corporate.interstatebatteries.com/warranty>.

⁵² <http://www.cskauto.com/Warranty.aspx>.

⁵³ http://www.batteriesareus.com/index.php?main_page=page&id=5.

original purchaser”);⁵⁴ Tireman (“The original purchaser is eligible for the benefits of this warranty if the battery has been used in the proper application”);⁵⁵ and NAPA (“The End User’s pro-rated fee is based on the Price Sheet . . . originally used to sell the battery”);⁵⁶ all limiting their express warranties for automobile and truck batteries to the original purchaser.

Yet, according to plaintiffs, all of these manufacturers and retailers, as well as the manufacturers and retailers of a host of other industrial and consumer products are not only violating West Virginia law, but are subject to a class action suit and statutory damages, because they sell products to West Virginia consumers with “original purchaser” limited warranties.

2. The Uniform Commercial Code and Contract Principles, not the Consumer Credit and Protection Act, Govern the Nature and Scope of Express Limited Warranties, and the UCC and Contract Principles Permit Manufacturers and Sellers to Limit Express Warranties to Original Purchasers.

The Uniform Commercial Code and contract principles, not the Consumer Credit and Protection Act, govern the nature and scope of express limited warranties. Under the Uniform Commercial Code, “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 . . .

⁵⁴ <http://www.apexbattery.com/warranty.html>.

⁵⁵ www.thetireman.com/warranty/Battery%20Warranty%20Brochure.pdf.

⁵⁶ http://www.napaonline.com/Search/Detail.aspx?R=NBR403575_0240819829.

”⁵⁷ Thus, under the Uniform Commercial Code, manufacturers and retailers are free to limit their express warranties to the original purchasers of their products.

In *Reece v. Yeager Ford Sales, Inc.*,⁵⁸ for example, in a case involving language nearly identical to that in the Advance Auto Parts warranty, this Court expressly upheld the right of a manufacturer to limit its express warranty, stating as follows:

The warranty issued by Ford and used by Yeager in connection with the sale contains, among others, these pertinent provisions:

‘Ford Motor Company in the case of a vehicle purchased by the owner in the United States * * * warrants to the original retail purchaser * * * each part of a new and unused 1968 model Ford-built passenger car * * * to be free under normal use and service from defects in factory material and workmanship for a period of 24 months from the date of original retail delivery or first use, or until it has been driven for 24,000 miles (1), or until sold by the Original Purchaser, whichever comes first * * *

This Court holds that the purchaser from a dealer of an automobile subject to an express warranty limiting the liability of the manufacturer of the automobile and the dealer to the replacement or repair of any defective parts by the dealer and providing that such warranty is expressly in lieu of any other warranty, express or implied, or condition or guarantee, including any implied warranty of merchantability or fitness, and of any other obligation on the part of the manufacturer or the dealer, can not maintain an action for the rescission of the sale of

⁵⁷ W. Va. Code § 46-2-316(1).

⁵⁸ 155 W. Va. 461, 466-68, 184 S.E.2d 727, 729-731 (1971) (emphasis supplied).

the automobile by the dealer against the manufacturer who is not a party to the contract of sale.

Although, under the Uniform Commercial Code, manufacturers and sellers may limit their express warranties to the original purchasers for purposes of suits for economic damages, they may not limit their warranties, whether express or implied, for purposes of suits for bodily injury for defective products by purchasers' family members and guests.

Specifically, the Uniform Commercial Code provides, "A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section."⁵⁹

This section of the UCC, however, extends the benefit of express and implied warranties only to (1) the buyer's family members and guests (2) who suffer "injury," not to those other than the purchaser who suffer only economic damages.⁶⁰ Where anyone other than the purchaser suffers economic damages as the result of

⁵⁹ W. Va. Code § 46-2-318 (emphasis supplied).

⁶⁰ To be clear, it is undisputed Ms. John suffered no economic loss because she was reimbursed by Mr. McMahon for the January 20, 2005 purchase of the replacement battery.

an alleged breach of an express warranty, there is no cause of action because there is no privity of contract.⁶¹

A cause of action for breach of an express warranty seeking damages for economic loss is a contract action and there is nothing in West Virginia law extending contract rights to non-parties.

Conversely, a cause of action for breach of express warranty seeking damages for personal injury is a tort action. Indeed, as this Court held in Syllabus Point 3 of *Morningstar*,⁶² the product liability cause of action is “covered by the term ‘strict liability in tort’” For that reason, the two-year statute of limitations applicable to tort actions, not the four-year statute of limitations applicable to breach of express warranty actions, applies to product liability suits.⁶³

⁶¹ See *Downriver Internists v. Harris Corp.*, 929 F.2d 1147 (6th Cir. 1991) (partnership that allegedly financed hospital’s purchase of computer hardware and software was not in privity of contract with sellers, was not third-party beneficiary of contracts, and, therefore, could not recover economic damages for alleged breach of warranty); *AT&T Corp. v. Medical Review of North Carolina, Inc.*, 876 F. Supp. 91 (E.D. N.C. 1995) (privity is still required to assert claim for breach of implied warranty when only economic loss is involved); *Ridge Co., Inc. v. NCR Corp.*, 597 F. Supp. 1239 (N.D. Ind. 1984) (when a cause of action arises out of economic loss related to loss of the bargain or profits and consequential damages related thereto, bargained for expectations of buyer and seller are relevant and privity between them is still required); *R & L Grain Co. v. Chicago Eastern Corp.*, 531 F. Supp. 201 (N.D. Ill. 1981) (privity of contract is a necessary element for an action on a warranty for economic losses); *Miller Industries, Inc. v. Caterpillar Tractor Co.*, 473 F. Supp. 1147 (S.D. Ala. 1979) (breach of warranty theory was not a basis on which to recover against manufacturer and seller of defective engine placed in plaintiffs’ vessel inasmuch as a purely economic loss was involved and there was no privity of contract between parties).

⁶² *Supra* note 4.

⁶³ See, e.g., *Goodwin v. Bayer Corp.*, 218 W. Va. 215, 624 S.E.2d 562 (2005) (affirming summary judgment in product liability action where suit was filed more than two years after plaintiff consulted with physician for breathing problems associated with exposure to

Indeed, in *Basham v. General Shale*,⁶⁴ decided by this Court well after *Dawson*, this Court expressly and extensively differentiated between product liability and economic damages suits arising from express warranties, stating as follows:

This Court has consistently recognized the fundamental differences between tort and contract or warranty causes of action. In *Star Furniture Co. v. Pulaski Furniture Co.*, 171 W. Va. 79, 297 S.E.2d 854 (1982), we stated:

Tort law traditionally has been concerned with compensating for physical injury to person or property. Contract law has been concerned with the promises parties place upon themselves by mutual obligation. Physical harm to the defective product belongs with tort principles; reduction in value merely because of the product flaw falls into contract law.

Id. 171 W. Va. at 84, 297 S.E.2d at 859 (citations omitted).

The purpose behind the doctrine of strict tort liability “is to insure that the costs of injuries resulting from defective products are borne by the manufacturer that put such products on the market rather than by the injured persons who are powerless to protect themselves.” *Id.* 171 W. Va. at 82, 297 S.E.2d at 856 (quoting *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 63, 27 Cal. Rptr. 697, 701, 377 P.2d 897, 901 (1963)). Following our adoption of strict liability in products liability cases in

allegedly defective product); *Bennett v. Asco Services, Inc.*, 218 W. Va. 41, 621 S.E.2d 710 (2005) (affirming summary judgment in product liability action where suit filed more than two years after manufacturer of allegedly defective heat sensor was identified); *Cecil v. Airco, Inc.*, 187 W. Va. 190, 416 S.E.2d 728 (1992) (affirming summary judgment in product liability action where suit filed more than two years after manufacturer of allegedly defective oxygen regulator component of torch was identified).

⁶⁴ 180 W. Va. 526, 377 S.E.2d 830 (1988).

Morningstar v. Black and Decker Manufacturing Co., 162 W. Va. 857, 253 S.E.2d 666 (1979), we held *Star Furniture* that strict liability may be used to recover property damages even when the defective product causes property damage without also causing personal injury. However, we refused to extend strict liability in tort to cases involving economic loss such as a decline in the intrinsic value of a product or lost profits, although we recognized that some jurisdictions had done so. The Court stated that:

... [w]e reject the line of cases begun by *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1964), which have permitted use of strict liability to recover the difference between the value of the product received and its purchase price in the absence of a sudden calamitous event. [citations omitted.] In West Virginia, property damage to defective products which results from a sudden calamitous event is recoverable under a strict liability cause of action. Damages which result merely because of a 'bad bargain' are outside the scope of strict liability.

171 W. Va. at 84, 297 S.E.2d at 859. Thus, we concluded that a consumer can be “fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.” *Id.* 171 W.Va. at 82, 297 S.E.2d at 859 (*quoting Seely v. White Motor Co.*, 63 Cal.2d 9, 18, 45 Cal.Rptr. 17, 23, 403 P.2d 145, 151 (1965)).

A case presenting allegations somewhat similar to those now before us is *Roxalana Hills, Ltd. v. Masonite Corp.*, 627 F. Supp. 1194 (S.D. W. Va. 1986), in which a contractor sued the suppliers and manufacturers of allegedly defective siding used in the construction of an apartment complex. The plaintiffs attempted to recover damages under a tort negligence theory, complaining of rotting, decay, degeneration of appearance and “inconvenience to the tenants.” *Id.* at 1198. In an

opinion by Chief Judge Haden, the United States District Court for the Southern District of West Virginia stated:

The character of losses charged are decay and rotting--the type *Star Furniture* explicitly held to be economic and, therefore, the subjects of a bad bargain Because Roxalana complains of a bad bargain, of economic loss, it cannot make a strict liability in tort claim out of this commercial case.

Id.

It is clear from these cases that while a strict liability tort claim may arise when a defective product causes injury, a party who suffers mere economic loss as a result of a defective product must turn to the Uniform Commercial Code to seek relief.⁶⁵

Indeed, one of the very reasons this Court abolished vertical privity in *Morningstar* is because a product liability suit is grounded in tort, not contract, and therefore limitations on express warranties cannot extend to third-party consumers who are not parties to the contract:

The rather narrow holding in *Williams* is simply not sustainable under the law of strict liability in tort for two reasons. First, the ultimate user of the product generally does not have privity of contract with the manufacturer, and therefore there will be no applicable contractual

⁶⁵ *Id.* at 529-30, 377 S.E.2d at 833-34 (emphasis supplied and footnotes omitted). Later, in the single Syllabus of *Taylor, supra*, this Court expressly held that when a suit is for personal injury, as opposed to economic injury, the two-year tort statute of limitations applies, whether the cause of action is grounded in tort, in breach of express or implied warranty, or both: “Where a person suffers personal injuries as a result of a defective product and seeks to recover damages for these personal injuries based on a breach of express or implied warranties, the applicable statute of limitations is the two-year provision contained in W. Va. Code, 55-2-12 (1959), rather than the four-year provision contained in our Uniform Commercial Code, W. Va. Code, 46-2-725.”

disclaimer. Second, and of greater importance, under tort product liability law there can be no disclaimer limitation since such disclaimers are contractual defenses which are not applicable to a cause of action founded on strict liability in tort. E.g., *Sterner Aero AB v. Page Airmotive, Inc.*, 499 F.2d 709, 713 (10th Cir. 1974); *West v. Caterpillar Tractor Co.*, 336 So.2d 80, 88 (Fla. 1976); *Whitaker v. Farmhand, Inc.*, 567 P.2d 916, 922 (Mont. 1977); *Elliott v. Lachance*, 109 N.H. 481, 484, 256 A.2d 153, 156 (1969); *Pearson v. Franklin Laboratories, Inc.*, 254 N.W.2d 133, 138-39 (S.D. 1977); *Dippel v. Sciano*, 37 Wis. 2d 443, 459-60, 155 N.W.2d 55, 63 (1967).⁶⁶

Certainly, Ms. John would have a strict liability cause of action against Advance Auto Parts for product liability had she suffered a personal injury caused by a design or manufacturing defect in the battery even though its express limited warranty had limited its terms to Mr. McMahon, the original purchaser. On the other hand, Ms. John has no cause of action for breach of contract where she is a stranger to the express limited warranty, was expressly excluded from its scope, and has no cause of action under the Uniform Commercial Code.

3. The Scope of W. Va. Code § 46A-6-108(a) is Limited to Product Liability Actions and was not Intended and Has Not Been Applied to Suits for Breach of Express Warranty for Economic Damages.

The Consumer Credit and Protection Act was enacted in 1974.⁶⁷ The term “consumer” is defined in the Act as “a natural person to whom a sale or lease is made in a consumer transaction.”⁶⁸ The term “consumer transaction” is defined as

⁶⁶ *Supra* at 882, 253 S.E.2d at 679-80.

⁶⁷ 1974 W. VA. ACTS, ch. 12.

⁶⁸ W. Va. Code § 46A-6-102(2).

“a sale or lease to a natural person or persons for a personal, family, household or agricultural purpose.”⁶⁹

With respect to sales of products to consumers, the Act provides, “Notwithstanding any other provision of law to the contrary with respect to goods which are the subject of or are intended to become the subject of a consumer transaction, no merchant shall . . . (e)xclude, modify or otherwise attempt to limit any warranty, express or implied, including the warranties of merchantability and fitness for a particular purpose.”⁷⁰

What this means is that a seller may not provide an express warranty, e.g., that a product will remain free from defects for a period of twenty-four months, and then attempt in some way to limit that warranty, e.g., that the consumer waives that express warranty with respect to a specific sale.

Obviously, it does not mean that a seller may not initially define the express warranty, e.g., limiting its application to twelve months, twenty-four months, thirty-six months, or to the original purchaser, however the seller sees fit. Otherwise, a seller of consumer goods in West Virginia could not place any “limit” on express warranties, including traditional limits as to time, use, and remedy.

Plainly, Advance Auto Parts, for example, could limit its express warranty to Mr. McMahon, the purchaser, as it did, to twenty-four months and for replacement, rather than refund, as the remedy, and Ms. John could not extend that warranty

⁶⁹ W. Va. Code § 46A-6-102(2).

⁷⁰ W. Va. Code § 46A-6-107(1).

beyond that period or remedy. Otherwise, Ms. John would have a better warranty than Mr. McMahon, the party to the contract with Advance Auto Parts and, as one court has observed, “To provide a remote purchaser who lacks privity with a better remedy than the original purchaser who had privity defies common sense and logic. It would undermine the law of sales to allow a manufacturer to limit liability via warranty to an original purchaser but then allow a remote purchaser to seek remedies not available to the original purchaser.”⁷¹

Likewise, when W. Va. Code § 46A-6-108(a) provides, “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,” it was never intended to give a non-party to the sales transaction, in this case Ms. John, a remedy not available under the plain and unambiguous terms of the express limited

⁷¹ *Midwest Helicopters Airways, Inc. v. Sikorsky Aircraft*, 42 F.3d 1391 at *1 (7th Cir. 1994) (emphasis supplied); *see also Kagan v. Harley Davidson, Inc.*, 2008 WL 1815308 at * (E.D. Pa.) (“Kagan contends that Harley Davidson is not entitled to summary judgment on this claim because, as he testified in his deposition (see Kagan Dep. 179:21-23), he never received a copy of the owner’s manual that expressly limited the warranties. The one-year express warranty Harley Davidson provided to the first purchaser of the motorcycle expired approximately ten years before Kagan filed this lawsuit. Therefore, the original purchaser of the model year 1995 motorcycle would not now be able to sustain a claim for breach of express warranty. It would be incongruous to allow Kagan to sustain a claim that the original purchaser of the motorcycle could not sustain merely because Kagan was not aware that the express warranty only lasted one year.”) (emphasis supplied).

warranty, i.e., a right to a refund or a right to a replacement when she was not the original purchaser.

In *Lankarani v. Jeld-Wen, Inc.*,⁷² as in this case, the plaintiffs argued that a state consumer protection statute that abolished vertical privity precluded limiting an express warranty to the original purchaser of a consumer product. Specifically, the plaintiffs purchased a home in which windows had been installed with a warranty that provided, “This warranty applies to the ‘original purchaser.’”⁷³ Rejecting the plaintiffs’ argument that a Kansas consumer protection statute which provided, “Notwithstanding any provision of law, no action for breach of warranty with respect to property subject to a consumer transaction shall fail because of a lack of privity between the claimant and the party against whom the claim is made,”⁷⁴ the court held the “purchaser only” limited warranty was nevertheless valid under the Uniform Commercial Code:

We emphasize that an express warranty is a creature of contract, while an implied warranty is imposed by law. Accordingly, a seller such as Jeld-Wen is free to limit, as a matter of contract, an express warranty to the first/original purchaser if it chooses to do so. See 1 Clark & Smith, THE LAW OF PRODUCT WARRANTIES, § 10.12, p. 10-32 (2d ed.2002).

An express warranty is a promise made in addition to any implied warranties arising out of law. Here, the express warranty promised to repair or replace defective windows

⁷² 192 P.3d 1130 (Kan. Ct. App. 2008).

⁷³ *Id.* at *1.

⁷⁴ *Id.* at *2.

for 10 years. But Jeld-Wen chose to extend this warranty only to the supplier/contractor and the first buyer of the home. Such a promise does not violate the law.

In conclusion, we hold that K.S.A. 50-639(b) does not apply to express warranties and, therefore, Jeld-Wen was entitled to summary judgment on that claim.⁷⁵

Of course, that same analysis applies with equal force in this case as the West Virginia Consumer Credit and Protection Act does not apply to express warranties. Rather, express warranties are governed by the Uniform Commercial Code and principles of contract, which both allow manufacturers and retailers to limit express warranties to the original purchaser.

Again, if the battery had exploded because of a defect causing physical injury to Ms. John, she would be entitled to sue for product liability and breach of warranty no matter what language in the express warranty attempted to limit Advance Auto Part's liability to original purchasers. Under West Virginia law, she may also be entitled to pursue implied warranty claims, although none appear from the circumstances of this case. When she sued for breach of a contract to which she was not a party, however, she could not assert rights greater than those of Mr. McMahan, whose contractual rights were limited to the original purchaser.

IV. CONCLUSION

As demonstrated in this petition for certified question review, express limited warranties, including those in the auto and truck battery industry, commonly provide that they are available only to the original purchaser. Neither the

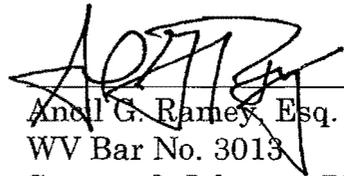
⁷⁵ *Id.* at *3 (emphasis supplied).

Legislature, when it enacted W. Va. Code § 46A-6-108(a), nor this Court, when it decided *Dawson*, intended to prohibit manufacturers and sellers from limiting express warranties to the original purchaser for causes of actions seeking solely economic damages. Non-purchasers are simply strangers to the contract, i.e., the express limited warranty, and unless the contract permits its assignment to a non-party, it may limit itself to the contracting party, i.e., the original purchaser. The Uniform Commercial Code affirms this basic tenet of contract law and the Consumer Credit and Protection Act does not negate it.

Accordingly, the petitioners, Advance Stores Company, Inc., and Donn Free, respectfully request that this Court modify its single Syllabus as follows: “The requirement of privity of contract in an action for product liability arising from an alleged breach of an express or implied warranty in West Virginia is hereby abolished,” which will reconcile *Dawson* with this Court’s subsequent decisions and will place manufacturers and retailers who do business in West Virginia on the same footing as manufacturers and retailers in other states who routinely limit express warranties to the original purchasers of consumer and industrial products.

**ADVANCE STORES COMPANY,
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Auto Parts, and DONN FREE**

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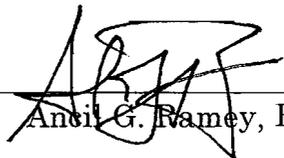
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CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that on March 3, 2010, I served the foregoing "BRIEF OF THE PETITIONERS" by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE