

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,

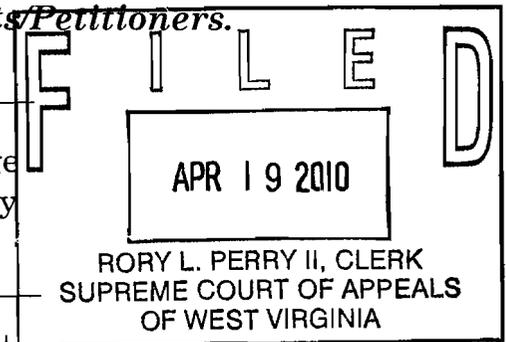
Plaintiffs/Respondents,

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



REPLY BRIEF OF THE PETITIONERS

Counsel for Petitioners

Ancil G. Ramey, Esq.
WV Bar No. 3013
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, WV 25326 1588
Telephone (304) 353-8112

Karen E. Kahle, Esq.
WV Bar No. 5582
Steptoe & Johnson, PLLC
P.O. Box 751
Wheeling, WV 26003
Telephone (304) 231-0441

Counsel for Respondents

Joseph J. John, Esq.
WV Bar No. 5208
John Law Offices
80 Twelfth Street
Wheeling, WV 26003
Telephone (304) 233-4380

Anthony I. Werner, Esq.
WV Bar No. 5203
Bachmann Hess Bachmann & Garden
1226 Chapline Street
Wheeling, WV 26003
Telephone (304) 233-3511

TABLE OF CONTENTS

I. INTRODUCTION	1
II. STATEMENT OF FACTS	2
III. DISCUSSION OF LAW	5
A. STANDARD OF REVIEW	5
B. WEST VIRGINIA LAW DOES NOT PROHIBIT MANUFACTURERS AND SELLERS FROM LIMITING EXPRESS WARRANTIES TO THE ORIGINAL PURCHASERS OF INDUSTRIAL AND CONSUMER PRODUCTS.....	6
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	6
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.	9
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.	11
a. Mr. McMahan's Suit is Covered Solely By the UCC, Which Permits Sellers to Limit Express Warranties Under These Circumstances.....	12
b. Ms. John's Claim is Barred, Not By the Absence of Privity, But Because Mr. McMahan's Express Warranty Expired, by its Own Terms, When He Sold His Vehicle.	12
c. Ms. John Never Engaged as a "Consumer" in Any "Consumer Transaction" with Advance Auto Parts.	12

d. Ms. John's Suit for Economic Damages Does Not Fall
Within the Prohibition of W. Va. Code § 46A-6-108)(a) 13

IV. CONCLUSION..... 23

TABLE OF AUTHORITIES

CASES

<i>AT&T Corp. v. Medical Review of North Carolina, Inc.</i> , 876 F. Supp. 91 (E.D. N.C. 1995)	11
<i>Austin v. Will-Burt Company</i> , 232 F. Supp. 2d 682 (N.D. Miss. 2002)	16
<i>Baugh Farms, Inc. v. Smith</i> , 495 F. Supp. 40 (D. Miss. 1980)	8
<i>Cartwright v. Viking Industries, Inc.</i> , 249 F.R.D. 351 (E.D. Cal. 2008)	7
<i>Collia v. McJunkin</i> , 178 W. Va. 158, 358 S.E.2d 242 (1987)	7
<i>Dawson v. Cantzen Corp.</i> , 158 W. Va. 516, 212 S.E.2d 82 (1975)	23-24
<i>Downriver Internists v. Harris Corp.</i> , 929 F.2d 1147 (6th Cir. 1991).....	10
<i>Ferguson v. Sturm, Ruger & Company, Inc.</i> , 524 F. Supp. 1042 (M.D. Pa. 1993)	16
<i>Gallapoo v. Wal-Mart Stores, Inc.</i> , 197 W. Va. 172, 475 S.E.2d 172 (1996)	6
<i>Giarratano v. Midas Muffler</i> , 166 Misc.2d 390, 630 N.Y.S.2d 656 (1995)	6
<i>Groppe Company, Inc. v. United States Gypsum Company</i> , 616 S.W.2d 49 (Mo. Ct. App. 1981)	17, 18, 19
<i>Hyundai Motor America, Inc. v. Goodwin</i> , 822 N.E.2d 947 (Ind. 2005)	18
<i>Kelly v. Painter</i> , 202 W. Va. 344, 504 S.E.2d 171 (1998)	8

<i>Kinlaw v. Long Mfg. N.C., Inc.</i> , 298 N.C. 494, 259 S.E.2d 552 (1979)	18, 20-22
<i>Koperski v. Husker Dodge, Inc.</i> , 208 Neb. 29, 302 N.W.2d 655 (1981)	20, 21, 22
<i>Lankarani v. Jeld-Wen, Inc.</i> , 192 P.3d 1130 (Kan. Ct. App. 2008).....	14
<i>Miller Industries, Inc. v. Caterpillar Tractor Co.</i> , 473 F. Supp. 1147 (S.D. Ala. 1979)	11
<hr/>	
<i>Peterson v. Cornerstone Property Development</i> , 745 N.W.2d 88 (Wis. Ct. App. 2007)	7
<i>Randolph v. Koury Corp.</i> , 173 W. Va. 96, 312 S.E.2d 759 (1984)	7
<i>Reece v. Yeager Ford Sales, Inc.</i> , 155 W. Va. 461, 184 S.E.2d 727 (1971).....	9-10
<i>Ridge Co., Inc. v. NCR Corp.</i> , 597 F. Supp. 1239 (N.D. Ind. 1984).....	11
<i>R & L Grain Co. v. Chicago Eastern Corp.</i> , 531 F. Supp. 201 (N.D. Ill. 1981).....	11
<i>Santor v. A&M Karagheusian, Inc.</i> , 44 N.J. 52, 207 A.2d 305 (1965).....	17, 18, 19
<i>Sewell v. Gregory</i> , 179 W. Va. 585, 371 S.E.2d 82 (1988)	16, 17-19
<i>Smith v. Wm. Wrigley Jr. Co.</i> , 663 F. Supp. 2d 1336 (S.D. Fla. 2009)	19, 20-22
<i>Spring Motors Distributors, Inc. v. Ford Motor Co.</i> , 98 N.J. 555, 489 A.2d 660 (1985)	21-22
<i>State ex rel. Dunlap v. Berger</i> , 211 W. Va. 549, 567 S.E.2d 265 (2002)	17
<i>Watkins v. AutoZone Parts, Inc.</i> , 2009 WL 3214341 at *1 (S.D. Cal.)	8

Wolfe v. Welton,
210 W. Va. 563, 558 S.E.2d 363 (2001) 16

STATUTES

W. Va. Code § 46-2-318..... 11

W. Va. Code § 46A-6-102 13

W. Va. Code § 46A-6-108 11, 13, 22
23

OTHER

10 HAWKLAND UCC SERIES UCITA § 401:1 (2009) 17

15 CAUSES OF ACTION § 2 (2007)..... 7

White & Summers, UNIFORM COMMERCIAL CODE,
§ 11-7 at 410-11 (2d ed. 1980) 21

I. INTRODUCTION

This is the reply brief of the petitioners in a certified question proceeding arising from a suit over a \$49.94 car battery. This case presents the issue of whether a “purchaser only” express limited warranty, which is common not only for car batteries, but scores of other products, is invalid in West Virginia.

Contrary to respondents’ brief, petitioners do not claim that they are “victims;” rather, they are a retailer and retail employee selling auto parts, including car batteries.

Petitioners do take exception to use of the adjectives “corrupt and pervasive” to describe what is a common practice of limiting the scope of express warranties to original purchasers. They also take exception to the accusation that this common warranty limitation “victimizes West Virginia consumers.”¹

Respondent, Karen John (“Ms. John”), did not purchase the car battery from petitioner, Advance Stores Company Incorporated (“Advance Auto Parts”). Rather, respondent, Scott McMahon (“Mr. McMahon”), was the only “consumer” involved in any transaction with Advance Auto Parts.

Advance Auto Parts, as far as Mr. McMahon is concerned, did exactly as it promised, i.e., to replace the battery if it failed within a 24-month period *except if*

¹ Although respondents’ refer to “consumers who have been wronged by Advance Auto Part’s policy,” Respondents’ Brief at 2, there is no evidence in the record that anyone other than Ms. John’s husband has been denied a request for refund or replacement because they were not the original purchaser.

he sold the vehicle in which the battery was placed prior to expiration of that period. Doing what one promises certainly does not equate to “victimization.”

When Mr. McMahon sold the vehicle in which the battery was installed, the express warranty, by its own terms, expired. At that point, Mr. McMahon had no express warranty and, thus, no express warranty claim. Moreover, because the express warranty expired when Mr. McMahon sold his vehicle, there was no 24-month replacement warranty to convey to Ms. John and, therefore, she could have no express warranty claim.

Any representations by Mr. McMahon to Ms. John regarding the vehicle or its component parts, including the battery, were Mr. McMahon’s warranties, not Advance Auto Parts’, and in the end, Mr. McMahon made good on his warranties by reimbursing Ms. John’s husband for the purchase price of a replacement battery.

II. STATEMENT OF FACTS

Respondents repeatedly refer to the battery as “defective,”² but it was obviously not defective when sold as it functioned from March 2, 2004, Respondents’ Brief at 5, to January 2005, *id.* at 6, a period of 10 months. Obviously, it is anticipated that batteries of these types may fail within the first 24 months of ownership and, hence, a 24-month replacement warranty. The failure of a battery

² There was never any “admission” that the battery was “defective.” Respondents’ Brief at 1. Rather, petitioner, Donn Free, testifying on his own behalf and not as any corporate representative, simply used the term “defective” to describe its condition when, after 10 months, it ceased the ability to hold a charge. Even respondents’ own second amended complaint describes the circumstances as follows: “Donn Free[] tested the subject battery and determined that the subject battery was defective and a ‘bad battery.’” Second Amended Complaint at ¶19.

within that period does not render it “defective,” but merely incapable of being recharged and eligible for replacement by the original purchaser.

Respondents also engage in a confusing discussion of the timing of Mr. McMahan’s payment to Ms. John, but their own response to petitioners’ motion to dismiss states, “Mr. McMahan, *prior to suit*, reimbursed Ms. John the sum of \$70.00 cash for the replacement cost of the battery because Mr. John had represented, in the sale, that the battery was new and was covered under warranty” Response to Motion to Dismiss at 2 (emphasis supplied). Of course, this begs the question of why did anyone sue?

Mr. McMahan did not own the battery at the time it failed and his Advance Auto Parts warranty expired, by its own terms, when he sold his vehicle containing the battery. Mr. John did not purchase the battery and, prior to suit, was reimbursed in full under Mr. McMahan’s warranty.

If Mr. McMahan is the one making the warranty claim, privity is not an issue because the contract was between he and Advance Auto Parts, but his warranty expired, by its own terms, when he sold the vehicle.

If Ms. John is the one making the warranty claim, privity in a sense is still not the issue because the express warranty expired, by its own terms, when Mr. McMahan sold the vehicle and she suffered no economic loss because Mr. McMahan honored his express warranty to Ms. John. In reality, Ms. John’s warranty claim

was not denied because she lacked privity; rather, it was denied because there was no warranty under which to make a claim – it had already expired.³

This is no “Catch-22” as respondents contend. Respondents’ Brief at 7. Mr. McMahon got what he bargained for, i.e., a warranty from Advance Auto Parts that provided for a free replacement if the battery failed within the first 24 months or as long as he owned it, whichever came first. Ms. John got what she bargained for, i.e., a warranty from Mr. McMahon that he would replace the battery if it failed during what would have been the balance of the Advance Auto Parts warranty had he not sold the vehicle.

Respondents’ protestations to the contrary, petitioners certainly do not cast any aspersions on Ms. John. They just question why she would sue when she suffered no loss? She indicates that it was to resolve a potential standing issue on the part of Mr. McMahon, Respondents’ Brief at 4, but she could have assigned any cause of action to Mr. McMahon rather than joining as a party plaintiff.

As to Mr. McMahon’s consumer transaction, respondents concede that he received a receipt upon which was conspicuously printed, at the bottom of the receipt, the following language: “Visit us at www.advanceautoparts.com. RECEIPT REQUIRED FOR RETURNS. WARRANTY INFORMATION

³ Respondents engage in an extended explanation of how a demand for a “refund” was actually a demand for “replacement,” Respondents’ Brief at 10-11, but the fact remains that the language relied upon by respondents, “24 MO. FREE REPL. 72 MO. PRO,” provides for “replacement,” not a “refund,” and Mr. John asked for a “refund,” not a “replacement.” It is interesting how respondents resist the slightest deviation from the actual language printed on the receipt except when it might bar their claims.

AVAILABLE. CUSTOMER COPY.” Respondents’ Brief at Exhibit A.⁴ Thus, neither Mr. McMahon nor any other consumer could have been confused about the availability of warranty information.⁵

Respondents’ brief also contains the following false premise: “Advance maintained, and still maintains, that the consumer should be forced to bear the loss associated with the defective battery” Respondents’ Brief at 8. First, Mr. McMahon suffered no “loss” because his warranty expired when he sold the vehicle in which it was installed. He only suffered a “loss” because of his warranty to Ms. John. Second, Ms. John suffered no “loss” because her seller, Mr. McMahon, honored his warranty to her.

III. DISCUSSION OF LAW

A. STANDARD OF REVIEW

Respondents agree that, “The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.”⁶ Respondents’ Brief at 13.

⁴ Curiously, respondents describe petitioners’ *quotation* of this language as “misleading” even though their own brief contains the same quotation. Respondents’ Brief at 8.

⁵ Indeed, Ms. John’s receipt, issued when her husband purchased the replacement battery on January 20, 2005, has this same language. Respondents’ Brief at Exhibit C. Respondents’ claim that the phrase “WARRANTY INFORMATION AVAILABLE” “does not imply the existence of some separate writing which serves to limit or restrict what the receipt says,” Respondents’ Brief at 9, is absurd. All the receipt otherwise says is “24 MO. FREE REPL. 72 MO. PRO” without even using the word “WARRANTY,” and if a consumer can figure out that shorthand language is a warranty, he or she can figure out that “WARRANTY INFORMATION AVAILABLE” means there is “WARRANTY INFORMATION AVAILABLE” that explains “24 MO. FREE REPL. 72 MO. PRO.” Moreover, battery warranty information is obviously available at each store location as Mr. Free was able to communicate its terms to Mr. John.

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.**

Respondents argue that Advance Auto Parts' warranty is unlawful because it

“require[s] privity of contract,” Respondents' Brief at 15, but this is inaccurate. The

Advance Auto Parts Limited Warranty Policy⁷ 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 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

⁶ Syl. pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996).

⁷ Respondents' discussion of the genuineness of this warranty is curious as their brief acknowledges it is part of the record and was considered by the trial court as the applicable warranty. Respondents' Brief at 10.

⁸ *Exhibit A* (emphasis supplied). “As long as you own” warranties are not uncommon. See, e.g., *Giarratano v. Midas Muffler*, 166 Misc.2d 390, 392, 630 N.Y.S.2d 656,

There is no requirement of “privity” in this warranty. And, even though its effect is to limit its availability to the original purchaser because it terminates upon the consumer’s sale of his or her vehicle, there is actually no express language to that effect. Rather, the reason Ms. John could not seek a replacement under Mr. McMahon’s warranty is because he sold his vehicle, the replacement period ended.

Just as any contracting party can include a provision prohibiting assignment of the contract,⁹ a seller can include a provision in an express limited warranty restricting its availability to the original purchaser.¹⁰ Indeed, respondents concede

658 (1995)(“WARRANTY PERIOD. ‘Your Midas brake shoes or disc brake pads are warranted by Midas to you, the original purchaser, for as long *as you own the vehicle* on which the brake shoes and/or disc brake pads were originally installed.”)(emphasis supplied); *Cartwright v. Viking Industries, Inc.*, 249 F.R.D. 351, 355 (E.D. Cal. 2008)(“These express warranties guarantee that the Window Products would be ‘free from defects in material workmanship that significantly impairs their operation and proper usage . . . and applies for as long *as you own them.*”)(emphasis supplied); *Peterson v. Cornerstone Property Development*, 745 N.W.2d 88 n.2 (Wis. Ct. App. 2007)(“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).

⁹See, 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. Koury Corp.*, 173 W. Va. 96, 312 S.E.2d 759 (1984).”).

¹⁰ 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.

that “a merchant is not mandated to have an express warranty. For instance, in this case, Advance Auto did not even need to make an express warranty” Respondents’ Brief at 26. Of course, once one accepts the premise that a seller can choose to extend any express warranty it chooses, it is inconsistent to argue that the seller cannot limit the scope of that express warranty to the original purchaser.

“[T]his Court is not at liberty to rewrite the contract between the parties,” it has observed, “The plain language of the contract controls.”¹¹ Here, there is no ambiguity in the language “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,¹² or when you sell your vehicle, whichever occurs first” and, consequently, Mr. McMahon’s warranty expired, by its own terms, when he sold his vehicle. At that point, Mr. McMahon could not sue upon the express warranty because it had expired and Ms. John could not sue upon the express warranty because it had ceased to exist. The problems with their claims went well beyond any absence of vertical privity.

¹¹ *Kelly v. Painter*, 202 W. Va. 344, 348, 504 S.E.2d 171, 175 (1998).

¹² Just as respondents complain about a type of warranty that is common not only in the auto parts business, but in many other businesses, they also now complain about the printing of warranty information on the sales receipt. Again, however, there is nothing unique to Advance Auto Parts about the practicing of printing warranty information on sales receipts. See *Watkins v. AutoZone Parts, Inc.*, 2009 WL 3214341 at *1 (S.D. Cal.) (“Information relating to the warranty is printed directly on the customer’s receipt for the product covered by the warranty.”); *Baugh Farms, Inc. v. Smith*, 495 F. Supp. 40, 45 (D. Miss. 1980) (“The receipt also contained the following printed matter: ‘Freshly harvested rice is a highly perishable commodity, and since Southern Seed Service can not control the conditions of the harvest and delivery to the dryer, green rice is received for drying with no warranty of specific quality of such rice when dry.’”).

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.**

In *Reece v. Yeager Ford Sales, Inc.*,¹³ 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

¹³ 155 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.

Respondents dismiss *Reece* because it was decided prior to adoption of the Consumer Credit and Protection Act, Respondents' Brief at 24, but the point is that *Reece* was decided under the UCC, which permits sellers to limit their warranties to the buyer.

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."¹⁴

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.¹⁵ Where anyone other than the purchaser suffers economic damages as the result of an alleged breach of an express warranty, there is no cause of action because there is no privity of contract.¹⁶ Consequently, under the UCC, respondents do not

¹⁴ W. Va. Code § 46-2-318 (emphasis supplied).

¹⁵ 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.

¹⁶ 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

contest the right of Advance Auto Parts to limit the express warranty to Mr. McMahan.¹⁷

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.

As they do not contest the ability of sellers to limit express warranties under the UCC under these circumstances, Respondents' case rests with their assertion that W. Va. Code § 46A-6-108(a) applies and trumps the UCC. For this reason, neither can prevail.

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).

¹⁷ In their brief, respondents' state, "Noticeably absent from the petition is any attempt to justify Advance Auto's 'original purchaser only' policy," Respondents' Brief at 18, but the subject warranty provides, "This warranty does not cover: failure due to misuse, abuse, modification, accident or collision, or improper installation. Automotive batteries are warranted only when installed in cars or light trucks. Installation of an automotive battery in any other type of vehicle or equipment voids your warranty." *Exhibit A*. If an original purchaser misused, abused, modified, or improperly installed, or if the battery had been involved in an accident or collision, a subsequent purchaser might not have knowledge of that information and, consequently, Advance Auto Parts could be required to pay a warranty claim even if the battery's failure was due to a wrongful act by the original purchaser. Whether this valid purpose of an original purchaser limited warranty has any "public good," Respondents' Brief at 18, it is obviously untrue that, "All that this policy accomplishes is the evasion of liability for defective products and the shifting of the loss to the purchasers and users of worthless products," Respondents' Brief at 18-19.

a. Mr. McMahon's Suit is Covered Solely By the UCC, Which Permits Sellers to Limit Express Warranties Under These Circumstances.

Mr. McMahon's suit for breach of express warranty is covered solely by the UCC, not the Consumer Credit and Protection Act ("CCPA"). As he has identified nothing in the UCC which precludes a seller, like Advance Auto Parts, from terminating an express warranty upon the sale of the product to a third-party, like Mr. McMahon, he simply has no claim as there is no provision of the CCPA which would resurrect his express warranty after it expired.

b. Ms. John's Claim is Barred, Not By the Absence of Privity, But Because Mr. McMahon's Express Warranty Expired, by its Own Terms, When He Sold His Vehicle.

Ms. John has no express warranty claim because it expired, by its own terms, when Mr. McMahon sold his vehicle. This is simple term of the contract, not avoidance of a warranty due to assertion of an absence of privity. Again, there is no provision of the CCPA which would resurrect the express warranty after it expired when Mr. McMahon sold his vehicle.

c. Ms. John Never Engaged as a "Consumer" in Any "Consumer Transaction" with Advance Auto Parts.

Ms. John's purchase of the vehicle which included the battery was not a "consumer transaction" with Advance Auto Parts under the CCPA. The term "consumer" is defined in the Act as "a natural person to whom a sale or lease is

made in a consumer transaction.”¹⁸ The term “consumer transaction” is defined as “a sale or lease to a natural person or persons for a personal, family, household or agricultural purpose.”¹⁹ Here, the only “consumer transaction” by Ms. John as a “consumer” was her purchase of the vehicle from Mr. McMahon. Thus, she is not a “consumer” for purposes of suit against Advance Auto Parts.

Ms. John argues that “nowhere . . . is the definition of ‘consumer’ limited to the original purchaser only,” Respondents’ Brief at 22, but “to whom a sale or lease is made in a consumer transaction,” by definition, limits its application to a sales transaction between a seller and consumer.

**d. Ms. John’s Suit for Economic Damages
Does Not Fall Within the Prohibition of
W. Va. Code § 46A-6-108)(a).**

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 consumer sales transaction, in this case Ms. John, a remedy not available under the plain and unambiguous

¹⁸ W. Va. Code § 46A-6-102(2).

¹⁹ W. Va. Code § 46A-6-102(2).

terms of the express limited 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.*,²⁰ 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.’”²¹ 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,”²² 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

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

²¹ *Id.* at *1.

²² *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.²³

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.

None of the cases relied upon by respondents support a contrary result. One group involves suits for breach of implied warranties, which may be maintained by the original or subsequent purchasers depending upon the circumstances. The other group involves suits for breach of express warranties where the plaintiff was the original purchaser of the product.²⁴ Respondents cite no cases in which a subsequent purchaser of a product has been permitted to maintain a suit for breach of express warranty seeking purely economic damages where the express warranty was limited to the original purchaser.

²³ *Id.* at *3 (emphasis supplied).

²⁴ Under the example in respondents' brief of a consumer who has a vehicle serviced by repair shop and, in conjunction with that service, purchases a battery with an express limited warranty that is communicated to the consumer at the time the repair work is performed, Respondents' Brief at 19, would have a cause of action against the manufacturer of the battery providing the express warranty as the original purchaser of the product. Thus, no one would be "holding the bag," *id.*, under that scenario.

First, respondents cite *Sewell v. Gregory*,²⁵ but that case involved a suit for breach of “[i]mplied warranties of habitability and fitness for use,”²⁶ which are not contractual, not for breach of express warranty, which is contractual.

Second, respondents cite *Wolfe v. Welton*,²⁷ but that case involved a suit between the original purchaser²⁸ and the seller for breach of “implied warranties,”²⁹ not an express warranty.

²⁵ 179 W. Va. 585, 371 S.E.2d 82 (1988).

²⁶ *Id.* at Syllabus Point 6.

²⁷ 210 W. Va. 563, 558 S.E.2d 363 (2001).

²⁸ The respondents’ brief blurs the distinction between vertical and horizontal privity. This is not a case of “vertical privity,” i.e., where the plaintiff has purchased a product in the normal chain of distribution. Rather, it is a case of “horizontal privity,” i.e., where the plaintiff has purchased a product from the original purchaser outside the normal chain of distribution. Under those circumstances, any cause of action lies between the plaintiff and the original purchaser, not between the plaintiff and the original purchaser’s seller. See *Austin v. Will-Burt Company*, 232 F. Supp. 2d 682, 687 (N.D. Miss. 2002) (“If any express warranty was rendered, the more likely party to such a warranty would be Quality Coach, to whom Will-Burt sold the mast, not to Austin or WABG-TV. Will-Burt was not even aware that WABG-TV had acquired the mast nearly ten years after Will-Burt made its original sale to Quality Coach.”); *Ferguson v. Sturm, Ruger & Company, Inc.*, 524 F. Supp. 1042 (M.D. Pa. 1993) (claim for breach of express warranty by revolver manufacturer was barred by lack of privity where plaintiff was not original purchaser). Likewise, the respondents’ brief blurs the distinction between express and implied warranties. Express warranties are contractual and implied warranties. See 10 HAWKLAND UCC SERIES UCITA § 401:1 (2009) (“Warranties can be characterized in terms of two fundamental distinctions. One distinguishes between express warranties and warranties that arise by operation of law unless disclaimed (often referred to as ‘implied warranties’). The difference is that express warranties exist only if they involve obligations that become part of the actual bargain of the parties, while implied warranties arise by operation of law unless the parties by agreement disclaim (e.g., exclude them). The second distinction is between warranties associated with qualitative characteristics of a party’s performance, and warranties associated with ownership, infringement and similar issues.”). Accordingly, the cases relied upon by respondents involving the original purchasers and implied warranties are simply inapposite in a case involving a subsequent purchaser and express warranty.

²⁹ *Id.* at 575, 558 S.E.2d at 375.

Third, respondents cite *Santor v. A&M Karagheusian, Inc.*,³⁰ but that case involved a product liability suit against a carpet manufacturer “for breach of its implied warranty of reasonable fitness”³¹ by a subsequent purchaser, which is no different from this Court’s holding in *Sewell*.

Fourth, respondents cite *Groppel Company, Inc. v. United States Gypsum Company*,³² but again the holding in that case was “implied warranties [extend] to remote purchasers,”³³ the same as this Court’s holding in *Sewell*.

Fifth, respondents cite *State ex rel. Dunlap v. Berger*,³⁴ but that case involved consuming financing issues, not any warranty claims, and whether an arbitration provision was enforceable or unconscionable.³⁵ The certified question before this Court involves validity, not unconscionability, which was never asserted by respondents. Moreover, a warranty which plainly states it expires when the product it covers is sold by the original purchaser, which is common to many consumer products, cannot be said to be unconscionable.

³⁰ 44 N.J. 52, 207 A.2d 305 (1965).

³¹ *Id.* at 63, 207 A.2d at 310.

³² 616 S.W.2d 49 (Mo. Ct. App. 1981).

³³ *Id.* at 58.

³⁴ 211 W. Va. 549, 567 S.E.2d 265 (2002).

³⁵ *Id.* at 568, 567 S.E.2d at 284 (“we conclude that the circuit court erred in refusing to exercise its ordinary jurisdiction over the claims made by Mr. Dunlap, and in instead requiring Mr. Dunlap to bring any disputes he has with Friedman’s et al. to arbitration.”).

Sixth, respondents cite *Hyundai Motor America, Inc. v. Goodwin*,³⁶ but that case, like *Sewell*, *Santor*, and *Groppel*, involved a suit for breach of implied warranty, not for breach of an express warranty: “[W]e conclude that Indiana law does not require vertical privity between a consumer and a manufacturer as a condition to a claim by the consumer against the manufacturer for breach of the manufacturer’s implied warranty of merchantability.”³⁷

Seventh, respondents cite *Kinlaw v. Long Mfg. N.C., Inc.*,³⁸ but that case involved the original purchaser and seller: “Plaintiff alleges that in November, 1975, he purchased a new farm tractor and attachments from Sessions Farm Machinery, Inc., an authorized dealer of defendant-manufacturer. An owner’s manual issued by defendant and delivered to plaintiff with the new tractor expressly warranted to the new owner that each tractor sold by defendant’s authorized dealers would be free from defects in material and workmanship.”³⁹ The manufacturer attempted to disclaim the express warranty by asserting that even though Mr. Kinlaw had purchased the tractor from an authorized dealer, it could not sue him for breach of contract because he did not purchase the tractor directly from the manufacturer. The court’s rationale was not based upon any statutory prohibition against the assertion of privity in suits for breach of express warranty,

³⁶ 822 N.E.2d 947 (Ind. 2005).

³⁷ *Id.* at 959.

³⁸ 298 N.C. 494, 259 S.E.2d 552 (1979).

³⁹ *Id.* at 494-95, 259 S.E.2d at 553.

but upon fundamental principles of detrimental reliance: “Authority from most other jurisdictions holds that a purchaser who relies upon a manufacturer’s representations can recover for breach of an express warranty despite lack of privity.”⁴⁰ As the court correctly described Mr. Kinlaw’s circumstances: “He bought a new tractor, the performance of which was expressly guaranteed within the limits and upon the terms specified in the warranty contained in the owner’s manual. Plaintiff could reasonably expect the author of the warranty to stand by its promise. He may base a claim upon its alleged breach. We find no ‘sensible or sound reason’ requiring us to hold otherwise.”⁴¹ Certainly, if Advance Auto Parts had given Mr. McMahan a written warranty that stated, “We will replace this battery if it fails within 24 months to you or any subsequent purchaser of your vehicle” or that stated, “We will replace this batter if it fails within 24 months and this warranty is transferrable,” it could not complain that Ms. John’s suit for breach of express warranty is barred by the absence of privity. Where the warranty provides, however, that it automatically expires upon sale of Mr. McMahan’s vehicle, there could be no detrimental reliance by him.

Eighth, respondents’ reliance on *Smith v. Wm. Wrigley Jr. Co.*,⁴² is curious because, unlike *Sewell*, *Santor*, *Groppel*, and *Goodwin*, the court held, “a plaintiff

⁴⁰ *Id.* at 500, 259 S.E.2d at 556.

⁴¹ *Id.* at 501, 259 S.E.2d at 557.

⁴² 663 F. Supp. 2d 1336 (S.D. Fla. 2009).

cannot recover economic losses for breach of implied warranty in the absence of privity.”⁴³

Ninth, respondents cite *Koperski v. Husker Dodge, Inc.*,⁴⁴ but as in *Kinlaw* and *Smith*, the plaintiff was the direct purchaser/consumer of the defendant’s product who relied upon defendant’s express warranties in making such purchase: “plaintiff sets out five causes of action against the defendants Husker Dodge, and Chrysler, setting forth her claims against those defendants arising out of the sale to her of a 1978 Dodge Diplomat automobile, and based on allegations of breach of warranty, rescission of contract and revocation of acceptance of the automobile, and a violation of the Consumer Product Warranties Act”⁴⁵ Obviously, under the UCC, the direct purchaser/consumer of a product may institute a suit against a manufacturer of that product based upon express warranties even if the product is purchased through a retailer or dealer.⁴⁶

⁴³ *Id.* at 1342 (citation omitted). With respect to plaintiff’s express warranty claim, the *Smith* court correctly concluded, as in *Kinlaw*, that as the direct purchaser/consumer of the defendant’s product, she had standing to institute a suit for breach of express warranty which, in this case, was that its chewing gum kills germs that cause bad breath. *Id.* at 1342 (“Here, it defies common sense to argue that purchasers of Eclipse gum presumed that the cashier at the local convenience store is familiar with the scientific properties of MBE. Second, it is significant that the express warranty the manufacturer allegedly breached is contained on the packaging of Eclipse gum. Compl. ¶ 14. Moreover, the Complaint alleges that Plaintiff relied on the warranty when purchasing the gum. *Id.* ¶ 8. Accordingly, the Court finds that Plaintiff states a valid claim for breach of express warranty.”).

⁴⁴ 208 Neb. 29, 302 N.W.2d 655 (1981).

⁴⁵ *Id.* at 31, 302 N.W.2d at 658.

⁴⁶ As the *Koperski* court correctly noted:

Finally, respondents cite *Spring Motors Distributors, Inc. v. Ford Motor Co.*,⁴⁷ but as in *Kinlaw*, *Smith*, and *Koperski*, the plaintiff was the direct purchaser of the product. Specifically, “Spring Motors Distributors, Inc. (Spring Motors), which is in the business of selling and leasing trucks, operates a fleet of 300 vehicles. Spring Motors agreed to purchase from defendant Turnpike Ford Truck Sales, Inc. (Turnpike) 14 model LN8000 trucks made by defendant Ford Motor Company (Ford) at a purchase price of \$265,029.80. . . . In the agreement, Spring Motors specified that the trucks should be equipped with model 390V transmissions made by Clark Equipment Company (Clark), a supplier to Ford. Spring Motors specified

Chrysler Corporation contends, however, in its brief and argument that it is not liable under its limited warranty to the plaintiff herein because of failure of privity of contract between it and the buyer of the vehicle, pointing out that it was not the “seller” of the vehicle, but, on the contrary, that the sale of the vehicle was a transaction between Husker Dodge and the plaintiff. We point out, however, that Chrysler Corporation’s warranty, although limited in scope, *was a direct representation and warranty made by Chrysler to the purchaser*. Chrysler’s contention is effectively answered by White & Summers, UNIFORM COMMERCIAL CODE, § 11-7 at 410-11 (2d ed. 1980), where those authorities state: “*When the non-privity plaintiff’s suit is not based upon 402A or implied warranty, but rather upon defendant’s express representation made to the particular plaintiff in advertising or otherwise, courts generally hold that the plaintiff need not be in privity with the defendant*. Usually courts characterize such cases as express warranty cases, though in some jurisdictions they are classed as misrepresentation cases. The misrepresentation may come through the defendant’s advertising, through labels attached to the product, or through brochures and literature about the product. The only limitation is that *the plaintiff must be a party whom the defendant could expect to act upon the representation*. Of course, any such plaintiff must also state the other elements of his cause of action.”

Id. at 45-46, 302 N.W.2d at 664 (emphasis supplied). Here, of course, no representations were made to Ms. John as she was not the original purchaser of the battery.

⁴⁷ 98 N.J. 555, 489 A.2d 660 (1985).

Clark transmissions because of 'excellent service and parts availability on past models' and because of Clark's advertisements and brochures."⁴⁸ Rejecting the plaintiff's claims for strict liability and negligence, the court held that those claims were governed by the UCC and the UCC's period of limitations barred those claims:

Eliminating the requirement of vertical privity is particularly appropriate in the present action where Spring Motors *read advertisements published by Clark, specifically requested Clark transmissions, expected the transmissions to be incorporated into trucks to be manufactured by Ford*, contracted with Ford only, and now seeks to recover its economic loss. Given the nature of the transaction and the expectations of the parties, the absence of a direct contractual relationship should not preclude Spring Motors from asserting a cause of action for breach of express warranty against Clark. Because the Code, not principles of tort law, governs the relationship between Spring Motors and Clark, the appropriate period of limitations is that provided by the Code. As previously indicated, the expiration of this period bars Spring Motors' claim against Clark.⁴⁹

Again, this analysis, which is similar to that of the courts in *Kinlaw*, *Smith*, and *Koperski*, as Ms. John was not the direct purchaser of the product who, in making that purchase, relied upon advertising and an express warranting in making the purchase from someone in the normal chain of distribution.

Again, 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

⁴⁸ *Id.* at 562, 489 A.2d at 663.

⁴⁹ *Id.* at 587-88, 489 A.2d at 676-77.

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.”

Mr. McMahon has privity with Advance Auto Parts. His “action” is not “fail[ing] because of a lack of privity,” but because his warranty expired, by its own terms, when he sold his vehicle.

Ms. John lacks privity with Advance Auto Parts, but (1) her “action” is not “fail[ing] because of a lack of privity,” but because Mr. McMahon’s warranty expired, by its own terms, when he sold the vehicle; (2) her “action” is not as the result of any purchase made by her as a “consumer . . . with respect to goods subject to a consumer transaction” between her and Advance Auto Parts;⁵⁰ (3) she was never provided any express warranty by Advance Auto Parts to support any cause of action for its breach; and (4) she suffered no economic loss because she was made whole on Mr. McMahon’s warranty to her.

IV. CONCLUSION

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 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

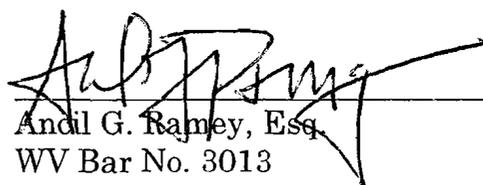
⁵⁰ No amount of “liberal construction” or resort to dictionary definitions of statutorily-defined terms, Respondents’ Brief at 22-23, can make Ms. John a “consumer” with respect to “goods subject to a consumer transaction” between her and Advance Auto Parts.

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 reconcile *Dawson* with this Court's subsequent decisions and place manufacturers and retailers who do business in West Virginia on the same footing as manufacturers and retailers in other states who limit express warranties to the original purchasers of consumer and industrial products.

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

By Counsel



Andil G. Ramey, Esq.
WV Bar No. 3013
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, WV 25326-1588
Telephone (304) 353-8112

Karen E. Kahle, Esq.
WV Bar No. 5582
Steptoe & Johnson, PLLC
P.O. Box 751
Wheeling, WV 26003
Telephone (304) 231-0441



NEED HELP?

Not sure who to e-mail? Help is just a click away... Click above to see the categories.

StoreNet

Site Map

Online MPT

Daily Commercial Sales

Additional Vehicle Info

Second Source

Report a Claim or Safety Concern

AAP Career Page

Advance Auto Parts Limited Warranty Policy

BATTERIES

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. This warranty does not cover the exceptions listed below under, "WHAT IS NOT COVERED".

LENGTH OF WARRANTY

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.

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.

PRORATION

The prorated purchase price of any battery listed above, which becomes defective after the lapse of the "Free Replacement Period", and prior to the end of the warranty period, will be either credited toward the purchase of another battery, or refunded. The amount of the proration shall be determined by dividing the purchase price by the number of months of the warranty period, and then multiplying the result by the months elapsed from the date of the purchase. (Any partial months will be rounded to the nearest whole month).

DISCHARGED BATTERY

A battery that is within the warranty period and found to be only in a state of discharge, will be recharged at no cost to you.

WHAT IS NOT COVERED

This warranty does not cover; failure due to misuse, abuse, modification, accident or collision, or improper installation. THIS WARRANTY DOES NOT COVER INCIDENTAL OR CONSEQUENTIAL DAMAGES SUCH AS PHYSICAL INJURIES, PROPERTY DAMAGE, LOSS OF TIME, LOSS OF USE OF THE VEHICLE, INCONVENIENCE, RENTAL VEHICLE, TOWING CHARGES, OR ACCOMODATIONS RESULTING FROM THE FAILURE OF THE BATTERY.

WHAT YOU MUST DO

You must take the defective battery and the purchase receipt therefore, to an Advance Auto Parts store during normal business hours. If "proration" applies and Advance Auto Parts does not refund the prorated purchase price, you must pay the difference between the cost of a new battery and the amount of the proration when you receive your new battery, plus any taxes.

LEGAL

This limited warranty represents the total liability of Advance Auto Parts for any part it warrants. Advance Auto Parts makes no other warranties expressed or implied, including the warranties of



merchantability and fitness for a particular purpose. Some states do not allow limitations on how long an implied warranty lasts, so the above information may not apply to you. This warranty gives you specific rights and you may have other rights, which vary from state to state. Advance Auto Parts does not authorize any person to vary the terms, conditions, or exclusions of this warranty. Advance Stores Company Incorporated, P.O. Box 2710, Roanoke, VA. 24001

[Home](#)

©Advance Auto Parts

NOTICE -

CONFIDENTIAL AND PRIVILEGED - This e-mail may contain privileged and confidential information and is intended only for the addressee named above. If you received this message in error, please immediately notify the sender by return e-mail and delete the original message; any distribution, copying or use of this e-mail by you is strictly prohibited and may be unlawful.

CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that on April 19, 2010, I served the foregoing "REPLY BRIEF OF THE PETITIONERS" by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

Joseph J. John, Esq.
John Law Offices
200 Board of Trade Building
80 Twelfth Street
Wheeling, WV 26003
Counsel for Plaintiff

Anthony I. Werner, Esq.
Bachmann Hess Bachmann & Garden
1226 Chapline Street
Wheeling, WV 26003
Counsel for Plaintiff

Jeffrey A. Holmstrand, Esq.
McDermott & Bonenberger, PLLC
53 Washington Avenue
Wheeling, WV 26003
Counsel for DTCWV

Eric L. Silkwood, Esq.
Flaherty Sensabaugh Bonasso PLLC
200 Capitol Street
Charleston, WV 25301
Counsel for DTCWV

Amanda J. Davis, Esq.
Frost Brown Todd LLC
Chase Tower, Suite 1200
Charleston, WV 25301-2705
Counsel for DTCWV

Alvin L. Emch, Esq.
Pamela Dawn Tarr, Esq.
Jackson Kelly PLLC
P.O. Box 553
Charleston, WV 25322-0553
*Counsel for WV Retailers/WV
Manufacturers*


Ancil G. Ramey, Esq.
WV Bar No. 3013