

No. 35467

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Plaintiffs/Respondents,

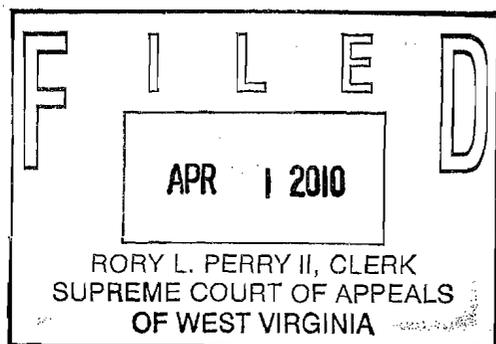
v.

**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**

RESPONDENTS' BRIEF



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 PLLC
1226 Chapline Street
Wheeling, WV 26003
Telephone (304) 233-3511

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RESPONDENTS' BRIEF TO THE CERTIFIED QUESTION REVIEW

This brief is filed pursuant to Rule 10(b) and Rule 13(g) of the Rules of Appellate Procedure, as amended, on behalf of the respondents.

INTRODUCTION

This is not simply a civil suit over a \$49.94 car battery as petitioners now contend. It is far from an unfair effort by respondents and their counsel to victimize an earnest, or at least well-intended, corporation doing business in our State. Rather, the focus of this case is a corrupt and pervasive business policy that victimizes West Virginia consumers.

Petitioners sold an admittedly defective car battery to respondent, Scott McMahon, (“original purchaser”), who immediately placed the battery in his Jeep automobile. The Jeep was then sold to respondent, Karen John (“subsequent purchaser”). Although Advance Auto readily admits that the battery was defective, when the product failed and the time came for the warranty to be honored, Advance determined to keep the money it received from the consumer with no recompense. Against clear West Virginia law, Advance Auto wants this Court to validate its statewide “no privity, no warranty” policy that allows it to retain the consumer’s money in exchange for a defective product whenever an express warranty claim is made by someone other than the original purchaser. By and through its employee, Donn Free, Advance Auto’s statewide company policy has been precisely defined as follows:

Advance Auto Parts policy is that warranty does not transfer to a new owner.
The warranty is issued to the original purchaser. (**Exhibit A**).

The corruptness of this policy cannot be denied even by Advance Auto’s own counsel, who conceded to the trial court at the February 12, 2008, summary judgment hearing:

MS. KAHLE: I'm saying there's no question this was a poor business practice. There's no question about that. And if the people at Advance could go back in time and say: Why was this handled this way, obviously they would, but they can't.
(Trans. p. 18)

Indeed, this case concerns far more than just a \$49.94 car battery. It concerns the protection of consumers who have been wronged by Advance Auto's policy, whether it was for the purchase of a battery or any other product that contained a warranty.

PROCEDURAL HISTORY

The petitioners attempt to mislead this Court and simultaneously disparage Joseph John and/or his wife, Karen John, by misrepresenting to the Court that they received their \$70.00 back from Scott McMahon (original purchaser of the battery) after advising Mr. McMahon that the battery failed and then sought their money back again from Advance Auto. This is plain wrong and the petitioners know it; yet, they continue to assert this position.

Initially, Mr. McMahon, who reimbursed Ms. John for the battery, was the sole plaintiff seeking a recovery of the money he paid out of his pocket regarding the defective battery. On August 30, 2006, respondent, Scott McMahon, filed a civil action in the Circuit Court of Ohio County, West Virginia, against the petitioners, Advance Auto and Donn Free, asserting claims for breach of warranty, express and implied, fraud, violation of the Consumer Protection Act and unjust enrichment. (R. 1 - Complaint).

Thereafter, on or about August 14, 2007, an amended complaint was filed on behalf of Scott McMahon, individually and on behalf of all others similarly situated. Again, Karen John was not a named plaintiff or party. (R. 95 - Amended Complaint).

On or about August 21, 2007, the petitioners, Advance and Free, filed a motion to dismiss amended complaint, with prejudice, claiming that, "Specifically, Scott McMahon, the sole named plaintiff in this putative class action, lacks constitutional standing". The petitioners contended that,

Scott McMahon sold the battery to the Jeep's purchaser. Therefore he cannot possibly claim injury or damages associated with Defendants alleged failure to replace or provide a refund for the battery, because he no longer had any ownership rights in the battery. (R. 132).

On or about September 4, 2007, the respondent, Scott McMahon, filed a response to the motion to dismiss contending that Scott McMahon did, in fact, have standing and was the true and proper party. (R. 145). As set forth in Scott McMahon's response to the petitioners' motion to dismiss,

The defendants want this Court to believe that the plaintiff did not name a proper party or named a party that had incurred no damages as a result of this situation. The defendants' assertions could not be further from the truth. The defendants were well aware, prior to suit, of the identity of the possible parties as plaintiff's counsel forwarded to them a proposed complaint which included Scott McMahon and Karen John as named plaintiffs. However, prior to the filing of the claim, Scott McMahon, as aforesaid, reimbursed Ms. John the \$70.00 replacement cost and therefore Karen John was removed as a named plaintiff as Scott McMahon was the person that was out the purchase price for the replacement battery as a result of Advance Auto's unlawful policy.

The plaintiff, Scott McMahon, in the complaint and amended complaint clearly alleges that he incurred the replacement cost of the battery, which he did. Mr. McMahon did incur other damages as well, including annoyance, inconvenience and other damages in trying to compel Advance Auto to abide by our laws.

Karen John did not want to be a party plaintiff in this case. The petitioners, Advance and Free, compelled her to be a party plaintiff by claiming that the "subsequent purchaser" is the proper party, not the original purchaser. Although Scott McMahon disagreed with the petitioners' contention, Ms. John was then added to make the petitioners' argument moot, by and through an amended complaint - second. (R. 187).

Thus, it is disingenuous and totally unfair for the petitioners to cast aspersions upon Karen John for being a named plaintiff. Moreover, it is a misrepresentation to claim that Ms. John is seeking the refund or reimbursement in this lawsuit for herself. The money sought is to reimburse Scott McMahon, who paid out money satisfying an obligation of Advance for Advance's unlawful practice.

After the amended complaint - second was filed, the petitioners then filed a notice of removal on September 26, 2007, invoking the Federal Court's jurisdiction under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), which requires a minimum amount in controversy in excess of \$5,000,000.00. This was met by respondents' motion to remand. By Order dated January 18, 2008, the action was remanded to the Circuit Court of Ohio County, West Virginia.¹

Back in State court, the respondents brought a motion for partial summary judgment. By Memorandum of Opinion and Order dated February 19, 2008, the lower court granted the motion. Thereafter, the petitioners filed a motion to reconsider and, correctly presuming the trial court would not substantively change its ruling, sought the insertion of W.V.R.C.P. Rule 54(b) "final appealable order" language into the order. By Memorandum of Opinion and Order dated December 5, 2008, the lower court again granted respondents' motion for partial summary judgment and included the Rule 54(b) language into the order as requested by the petitioners.

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It is interesting that petitioners suggest Mr. Free was made a defendant "apparently in order to defeat diversity for purposes of removal to federal court." (Pet. p. 4, fn. 14) Never have petitioners sought to have Mr. Free dismissed under a "failure to state a claim" contention, and they likewise did not aver to the federal court that diversity jurisdiction exists due to Mr. Free being "fraudulently joined" as a defendant. Rather, their failed removal effort was predicated upon other grounds, including the contention that more than \$5,000,000 is at stake. If anything, their "unfair suit" suggestion, and the gist of the Petition generally, evidence a multi-faceted denial and defiance of liability in the face of clearly established law.

By Memorandum of Opinion and Order dated December 5, 2008, the lower court ruled that Advance Auto could not refuse to honor its warranty because the owner of the battery at the time the product ultimately failed to function, respondent John, was not the original purchaser. The lower court ruled that Advance Auto could not refuse to honor the warranty based upon a lack of privity, rejecting the assertion of petitioners. The lower court carefully analyzed all of the implicated statutory and common law and rightly followed the sole syllabus point set out in *Dawson v. Canteen Corp.*, 158 W.Va. 516, 212 S.E.2d 82 (1975) which unambiguously provides,

The requirement of privity of contract in an action for breach of express or implied warranty in West Virginia is hereby abolished.

The petitioners filed a petition for appeal of this memorandum opinion and order, which petition was refused by this Court by Order dated June 3, 2009. Undaunted by their material, procedural and substantive problems, the petitioners sought review by this Court in the form of a certified question. By Order dated June 26, 2010, this Court found that the certified question should be accepted and reviewed.

STATEMENT OF FACTS

On March 2, 2004, respondent McMahon purchased a new Auto Craft Silver automobile battery from the petitioner, Advance Auto, at Store No. 07340 in Weirton, West Virginia, and placed the new battery in his Jeep automobile which he was intending to sell. As advertised and as part of the sale, the new battery came with an express warranty set forth on the customer sales receipt which simply and understandably enough stated "24 MO. FREE REPL 72 MO. PRO". Thus, at the point of purchase Mr. McMahon was expressly told that the warranty carried with this battery called for 24 month free replacement, and beyond 24 months called for prorated compensation up to 72 months following purchase. (**Exhibit A**).

Other than for the customer's sales receipt, at no time during the sale were any other documents given to respondent McMahon. Moreover, there were no other limitations pertaining to the express warranty conveyed to respondent McMahon by Advance Auto or any other representative of Advance Auto at the time of the sale. Furthermore, **the petitioners never made their alleged limitation part of the sale by conveying any such limitation directly to the purchaser.** Advance contends that this limitation is on the internet, to be sought out and located by its sufficiently skilled and equipped customers.

In September 2004, Mr. McMahon sold his Jeep automobile to Ms. John. Prior to the purchase, Mr. McMahon represented that the Jeep had many new parts, including the Auto Craft battery purchased at Advance Auto, which were covered by warranties.

In January 2005, the subject battery quit working and was rendered useless in the Jeep vehicle. Respondent John advised Mr. McMahon that the battery had failed and Mr. McMahon told her that the battery was purchased from Advance Auto and was under warranty. Consequently, Ms. John and her husband took the battery back to an Advance Auto store in Wheeling and reported that the battery failed. Advance requested the customer receipt before it would check the battery for defects; however, the customer receipt was not available at that time as it could not be located by Mr. McMahon.

Later that same day, January 20, 2005, because the customer receipt could not be located and because a working battery was needed for the Jeep vehicle, respondent John, through her husband, purchased a new Auto Craft battery from Advance Auto as a replacement for the one that was defective. **(Exhibit C).**

On February 8, 2005, respondent McMahon found the customer sales receipt for the defective battery and provided it to respondent John. Then, on February 9, 2005, respondent John and her husband took the defective battery and the customer sales receipt back to the same Advance Auto

Wheeling store to further address the warranty. Advance Auto, by and through and its employee, Donn Free, stated that it must test and determine the battery's defectiveness. The battery was turned over to Advance and the defectiveness was quickly confirmed to Advance's satisfaction.

Because the battery was determined to be defective within the 24 month free replacement period, respondent John requested to be reimbursed for the cost of the replacement battery purchased at Advance, not for a refund for the defective battery. Respondent John produced the customer receipt for the defective battery (**Exhibit A**) and for the replacement battery. (**Exhibit C**). After being refused reimbursement for the replacement battery, Mr. John then requested a replacement battery, which was also refused by Advance and Free.

Petitioner Free advised respondent John that a replacement battery or refund would not be forthcoming and that Advance would not honor the warranty, even though the subject battery was defective, because respondent John was not the "original purchaser" of the battery. Even worse, according to Mr. Free, not only was Ms. John ineligible for a refund or replacement, since Mr. McMahan no longer owned the battery he too was ineligible for any warranty relief. (R.132). This "Catch 22" position continues to be maintained by Advance Auto.

Attempting to resolve the matter amicably, and perhaps help Advance Auto rectify the same "poor business practice" that its own counsel has acknowledged, respondent John's husband explained to petitioner Free that such a position was contrary to West Virginia law. Then, Mr. John actually left the store and came back later with a copy of the West Virginia Consumer and Credit Protection Act which he showed to Mr. Free in an attempt to convince him that Advance Auto's policy was unlawful. Not only did petitioner Free not even consider or look at the law, he actually stated that he thought Mr. John fabricated the statutes he held in his hands. Getting nowhere, Mr.

John requested that petitioner Free write down Advance Auto's statewide company policy on the original receipt. Petitioner Free obliged and wrote the following policy on the original receipt:

Advance Auto Parts policy is that warranty does not transfer to a new owner. The warranty is issued to the original purchaser. (**Exhibit A**).

Despite the battery being defective and failing within the 24 month free replacement period, Advance maintained, and still maintains, that the consumer should be forced to bear the loss associated with the defective battery while it gets to keep the purchase price.

To force Advance Auto to rectify and compensate for its unlawful West Virginia policy and practice, this civil action was filed on behalf of the respondents and all other consumers who have been hurt by the policy. After a motion for summary judgment was filed and argued, the lower court, by Order dated December 5, 2008, granted respondents' motion for partial summary judgment by following the well established precedent set forth in *Dawson v. Canteen Corp.*, 158 W.Va. 516, 212 S.E.2d 82 (1975) whereby privity of contract in an action for breach of an express or implied warranty in West Virginia was deemed abolished.

RESPONDENTS' REBUTTAL TO PETITIONERS' STATEMENT OF FACTS

Within the petitioners' statement of facts, there are certain representations which the respondents feel compelled to address.

Initially, on Page 3 of their brief, petitioners state, "His receipt states, '24 mo. free repl...Visit us at www.advanceautoparts.com. RECEIPT REQUIRED FOR RETURNS. WARRANTY INFORMATION AVAILABLE.'" This is rather misleading, as a review of the receipt shows. The only actual express warranty terms given to the consumer at the time of the sale, as set forth in the body of the sales receipt, state as follows:

24 MO. FREE REPL 72 MO. PRO.

Understandably enough, the receipt conveys that there is a 24 month free replacement, and after that up to 72 months pro-rated compensation. Separated by other writing in this substance-laden receipt, two and a half inches lower and at the very bottom, it is stated:

Visit us at www.advanceautoparts.com
RECEIPT REQUIRED FOR RETURNS
WARRANTY INFORMATION AVAILABLE

Given that the warranty terms already seem conveyed by the receipt, and given that “warranty information available” certainly does not reasonably imply the existence of some separate writing which serves to limit or restrict what the receipt says, petitioners are taking unfair liberties in contending what warranty was ever conveyed to Mr. McMahon.

Contrary to petitioners’ suggestion, never does Advance Auto convey directly to the consumer their alleged limitations on the express warranty. The consumer would know of any such alleged limitation to the “original purchaser” only if, after the sale, he or she went to some internet site and was able to find Advance Auto’s limited warranty policy as described in petitioners’ **Exhibit B**, attached hereto as **Exhibit B** as well. In other words, Advance Auto does not convey the alleged limitation to the consumer but assumes that the consumer 1) will figure out that there is some additional warranty information beyond what is printed on the receipt, 2) has access to the internet, and 3) will circumnavigate the website after the sale to find this limitation, if it even exists on the website.

Clearly, any such alleged limitation is not even part of the sale or basis of the bargain as it is not even conveyed to the consumer at the time of the sale, or through advertisements of the product.

Further on the topic of the limitation, it is erroneous for petitioners to cite the language of the warranty serving as petitioners' **Exhibit B** and contend that it is the undisputed factual centerpiece of the defense. In truth, this document has never been established as Advance Auto's actual warranty limitation. Although respondents had sought discovery from the petitioners including with respect to warranty documentation, this document had never been formally produced. Despite their efforts, the first respondents had ever seen this document was with the service of the petitioners' motion to reconsider. For good reason, respondents dispute the petitioners' contention that the limitation set out in petitioners' **Exhibit B** is what a consumer, if lucky, may have found during the pertinent time frame at www.advanceautoparts.com after the sale. The aforementioned website led one through a myriad of prompts with no clear cut link to any "warranty" information regarding batteries.

Regardless of this impropriety, the actual language of the policy which attempts to limit privity and where it could actually be found are irrelevant as the lower court found, in accordance with West Virginia law, that privity has been abolished. Suffice to state, to the extent that the petitioners claim that the warranty language as set forth in **Exhibit B** is relevant, it is in dispute. However, it is undisputed that the warranty information as set forth in petitioners' **Exhibit B** is not given to the consumer at the time of sale.

Next in terms of misstatements by the petitioners, on Page 4 the petitioners falsely state, "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, requested a refund." The petitioners make such an allegation in a futile attempt to claim that a proper request for a replacement was never made. However, as petitioner Donn Free candidly admits in his deposition, the demand was for a refund of cash or credit. The demand for the refund or reimbursement was because Advance Auto already

received the money for the replacement battery when it was purchased at Advance Auto, and this was when the sales receipt of Scott McMahon could not be located and a replacement battery was needed. Since the replacement was purchased at Advance and Advance reaped the benefit of that purchase, reimbursing respondent John the money for the replacement battery was not a demand for a cash refund but was simply reimbursement of the replacement battery, or in other words, replacing the defective battery.

Defendant Free acknowledged that respondent John did not demand a cash refund for the defective battery but was simply seeking reimbursement for the replacement battery. In Donn Free's deposition he admits that,

Okay. All right. But it is your memory, though, Sir, that he came in and he told you that he wanted you to reimburse him in cash that he had spent on the replacement battery that he had earlier purchased; correct?

Yes.

(Free depo. p. 51).

Advance Auto is well aware of these facts; yet, frivolously maintains that a "cash refund" was demanded for the defective battery. A cash reimbursement for the replacement battery was made because Advance Auto received monies for that replacement battery. If Advance had simply refunded or reimbursed the money for the replacement battery, it would be the same exact thing as Advance handing respondent John the replacement battery off the shelf.

Lastly, on Page 5 of the petitioners' brief, petitioners assert that, "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". This misrepresentation follows petitioners' rather blatant

tactic of casting Joseph John as “the avaricious lawyer” who is either an exploiter of the unfortunate or an outright evidence fabricator. Nowhere in the record can it be found that Mr. John “demanded” that respondent McMahon reimburse him the \$70.00 for the replacement battery. In truth, unlike Advance Auto, Mr. McMahon did what was right, since he represented that the battery was new and under warranty, so suit was filed on his behalf to recover the money paid by respondent McMahon because of Advance’s improper actions.

THE CERTIFIED QUESTION

The lower court certified the following question,

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?

Your respondents contend that the certified question requested and drafted by the petitioners assumes facts not in evidence and contains factual assertions that are in dispute. The petitioners contend that the subject express warranty was limited to the original purchaser. However, respondents contend that the question contains facts not established by the petitioners. The respondents dispute whether this limitation actually exists and respondents contend that any such limitation is never conveyed or disclosed to the consumer. The petitioners have offered no proof that this limitation is ever conveyed to the consumer, and simply assert the “visit us at www.advanceauto.com” language in support of their position.

Also, although the certified question only mentions W.Va. Code §46A-6-108(a), the respondents assert that many other laws support the court ruling, including but not limited to W.Va. Code §46A-6-107, *Dawson v. Canteen Corp.*, 158 W.Va. 516, 212 S.E.2d 82 (1975), *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988), and other statutory and case laws as set forth herein.

Because other laws besides W.Va. Code §46A-6-108(a) are implicated, the certified question, if accepted by this Court, should be reformulated. As Syllabus Point 3 of *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993), sets forth:

When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under both the Uniform Certification of Questions of Law Act found in *W.Va. Code*, 51-1A-1, *et seq.* and *W.Va. Code*, 58-5-2 [1967], the statute relating to certified questions from a circuit court of this State to this Court.

The reformulated question should state:

Can a merchant of consumer products refuse to honor a warranty claim based upon a lack of privity when the person making the claim is not the original purchaser?

STANDARD OF REVIEW

“The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*. Syl. pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996).

POINTS AND AUTHORITIES

1. Rule 56 of the W.V.R.C.P. is designed to effect a prompt disposition of controversies on their merits without record to a lengthy trial if there essentially is no real dispute as to salient facts or if it only involves a question of law. *Larew v. Monongahela Power Co.*, 199 W.Va. 690, 487 S.E.2d 348 (1997).

2. If there is no genuine issue as to any material fact, summary judgment should be granted. *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

3. **W.V. §46A-6-108. Breach of warranty; privity abolished.**

- (a) 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.

4. The requirement of privity of contract in an action for breach of an express or implied warranty in West Virginia is abolished. *Dawson v. Canteen Corp.*, 158 W.Va. 516, 212 S.E.2d 82 (1975).

5. West Virginia Code §46A-6-107 (1974), part of the West Virginia Consumer Credit and Protection Act, renders void any exclusion, modification, or attempted limitation of warranties or legal remedies for breach of warranties, express or implied, arising in sales of goods and chattels to consumers. *Wolfe v. Welton*, 210 W.Va. 563, 558 S.E.2d 363 (2001).

6. The provisions of section 107, article 6, the West Virginia Consumer Credit and Protection Act, relating to sales of goods to consumers, are equally applicable to sales of new goods and to sales of used goods. *Wolfe v. Welton*, 210 W.Va. 563, 558 S.E.2d 363 (2001).

7. The requirement of privity of contract and warranty actions in West Virginia began to erode with the passage of the Uniform Commercial Code. West Virginia Code, §46-2-318 (1963) eliminated the privity of contract for warranty actions in what is known as the “horizontal” chain of users. *Dawson v. Canteen Corp.*, 158 W.Va. 516, 212 S.E.2d 82 (1975).

8. Implied warranties of habitability and fitness for use (of a family home) may be extended to second and subsequent purchasers for a reasonable length of time. *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988).

9. A third party connected with a transaction may seek restitution where there is unjust enrichment which resulted from the third party satisfying an obligation of the unjustly enriched party. *Prudential Insurance Company v. Couch*, 180 W.Va. 210, 376 S.E.2d 104 (1988).

ARGUMENT

West Virginia law, both statutory and common, has continually evolved to protect innocent individuals from defective products, whether the damages caused by the defect are purely economic or take some other form. To accept the arguments of petitioners is to overrule forty years of such protections.

The issue in this case is straight forward. Advance Auto contends that it, as a seller or supplier of a consumer product, can attempt to limit express warranty terms to the original purchaser, or in other words, require privity of contract when the product fails and a breach of warranty claim is made by someone other than the original purchaser. As the lower court found, "Advance is wrong".

The lower court, in its Memorandum of Opinion and Order held,

Within the time period expressly warranted by Advance, the battery ceased to function. Joseph John, on behalf of his wife, Karen John, sought to obtain relief from Advance regarding the defective battery. Advance refused because John was not the original purchaser. In essence, Advance took the position that because John was not in privity with Advance by being the subsequent purchaser, the warranty failed. Advance is wrong.

In the world of product sales, privity of contract is a waned concept that runs counter to public policy and thwarts the legislative intent underlying consumer protection. The privity of contract defense deprives injured parties of redress, ignores social responsibility and creates a scheme to avoid liability on behalf of sellers and manufacturers. That is precisely why West Virginia has completely abolished privity of contract as a defense to an action for breach of an express or implied warranty. See, *Dawson v. Canteen Corp.*, 158 W.Va. 516, 212 S.E.2d 82 (1975).

The sole Syllabus Point of *Dawson v. Canteen Corp.*, supra, could not be any more succinct, when it states,

The requirement of privity of contract in an action for breach of an expressed or implied warranty in West Virginia is hereby abolished.

The West Virginia Supreme Court of Appeals did not leave any room whatsoever for argument against this principle of law. The holding set forth in *Dawson* was not limited to abolishing vertical privity only or horizontal privity only. The law clearly abolished the requirement of privity, period. No doubt frustrated that this clear and concise legal pronouncement cannot be interpreted to fit its policy, Advance has resorted to the least preferred of arguments---the contention that the Supreme Court did not really mean what it said, and that this misunderstanding somehow was left uncorrected for nearly forty years despite existing in our most dynamic area of the law during that time frame.

This Court, in *Dawson*, discussed the statutory erosion of the requirement of privity. As the *Dawson* Court noted, the statutory erosion began with the passage of W.Va. Code §46-2-318 (1963) and continued to erode with the passage of the West Virginia Consumer Credit and Protection Act, W.Va. Code §46A-6-101 et seq.(1974).

W.Va. Code §46-2-318 states,

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.

Not believing that W.Va. Code§46-2-318 provided enough protection to innocent individuals injured by a defective product, in 1974 our Legislature passed W.Va. Code §46A-6-101 et seq. to further expand the protections given to consumers and individuals in the State of West Virginia.

W.Va. Code §46A-6-108 states:

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...

West Virginia Code §46A-6-108 would not have been needed or necessary if W.Va. Code §46-2-318 was all encompassing. Clearly, by this law the Legislature's goal of extending protection for the consumer against defective products was furthered.

The West Virginia Supreme Court of Appeals explained and reinforced the erosion of the requirement of privity of contract in an action for breach of an express or implied warranty in *Ryerson v. U.S. Steel*, 165 W.Va. 22, 268 S.E.2d 296 (1980), wherein the Court held,

In *Dawson v. Canteen Corp.*, 158 W.Va. 516 212 S.E.2d 82 (1975) we noted that there has been some statutory erosion of the privity of contract defense in implied warranty actions by virtue of W.Va. Code 46-2-318 and 46A-6-108, but proceeding to judicially abolish privity in *Dawson's* single syllabus point:

The requirement of privity of contract in an action from breach of express or implied warranty in West Virginia is hereby abolished.

Thus, if W.Va. Code §46-2-318 and §46A-6-108 left any room whatsoever for a seller, supplier or manufacturer to assert a defense of privity in a claim for breach of an implied or express warranty, any such defense was completely abolished by the West Virginia Supreme Court of Appeals in *Dawson*. Now, there is absolutely no ability in West Virginia jurisprudence to argue a lack of privity as a defense to a claim for breach of an implied or express warranty.

Continuing with the progression, the West Virginia Supreme Court of Appeals in *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988), held that a subsequent purchaser of a new home could pursue warranty claims against the manufacturer of the home. The West Virginia Supreme Court of Appeals in *Sewell*, held, at Syllabus points 5 and 6:

5. The requirement of privity of contract in an action for breach of an express or implied warranty in West Virginia is hereby abolished. Syllabus, *Dawson v. Canteen Corp.*, 158 W.Va. 516, 212 S.E.2d 82 (1975).

6. Implied warranties of habitability and fitness for use of a family home may be extended to a second and subsequent purchaser for a reasonable length of time after construction...

In discussing how the rigid line of product liability demarcation provided by privity makes no sense in our modern world, where products are expected to be transferred from owner to owner, and addressing not only warranties but all grounds for recovery, *Sewell* offers:

The purpose of a warranty is to protect innocent purchasers and hold builders accountable for their work. With that object in mind, any reasoning which would arbitrarily interpose a first buyer as an obstruction to someone equally as deserving of recovery is incomprehensible.... No reason has been presented to us whereby the original owner should have the benefits of an implied warranty or a recovery on a negligence theory and the next owner should not simply because there has been a transfer. Such intervening sales, standing by themselves, should not, by any standard of reasonableness, effect an end to an implied warranty or, in that matter, a right of recovery on any other ground, upon manifestation of a defect. The builder always has available the defense that the defects are not attributable to him.

371 S.E.2d, at 86. (Underline added)

Further, quashing petitioner's suggestion that the Court did not really mean what it plainly said in *Dawson*, *Sewell* emphasized that privity has been "abandoned" by West Virginia:

The existence of privity "was traditionally essential to the maintenance of an action on any contract...." *Black's Law Dictionary* 1079 (5th ed. 1979). The traditional view, however, has been abandoned in this state and lack of privity is no longer a barrier in matters of implied warranty. As we said well over a decade ago, "[t]he requirement of privity of contract in an action for breach of an express or implied warranty in West Virginia is hereby abolished." Syllabus, *Dawson v. Canteen Corp.*, 158 W.Va. 516, 212 S.E.2d 82 (1975).

Noticeably absent from the petition is any attempt to justify Advance Auto's "original purchaser only" policy. This is because, as *Sewell* goes on at length to observe, there is no public good served by the policy. All that the policy accomplishes is the evasion of liability for defective

products and the shifting of the loss to the purchasers and users of the worthless products. The product in this case, a car battery, is designed to start and run a motor vehicle. Respondent McMahon bought the battery to run his Jeep which he was selling. No material difference is presented depending on whether respondent McMahon or respondent John owns and operates the Jeep that the battery was purchased to run.

Thus, regardless of how many cases from foreign jurisdictions are cited and relied upon by Advance Auto, West Virginia has already clearly spoken, and the requirement of privity of contract in an action for a breach of an express or implied warranty is abolished.

When the effects of Advance's policy on legitimate West Virginia businesses are thoughtfully weighed, it seems rather hypocritical for petitioners to plead for appellate relief for the sake of our businesses. Consider the scenario where a person's car quits working and, not knowing why, she simply has the car taken to a local auto shop for diagnosis and repair. Determining the problem is with the battery, the garage buys a new one and fixes the car, billing the customer for parts and labor, inclusive of the battery. Who gets stuck when the new battery, which the local garage bought from Advance Auto, turns out to be defective? According to Advance the answer is either the hapless car owner or the local garage, but not it. Considering further that Advance's policy transcends batteries to other motor vehicle products, one realizes not only that the effect of this illicit policy is quite broad, but also that the local garages, who can be expected to make good to their own customers or go out of business, are left holding the bag right along with other types of consumers.

Thus, this case does not pit opportunistic consumers versus struggling businesses. Rather, it pits Advance Auto alone against its victims, including businesses. This is the wrong case for Advance Auto to predict the loss of West Virginia businesses should the Supreme Court not intervene. Actually, that argument belongs to your respondents.

Desperate, yet without any support, Advance Auto contends that the Uniform Commercial Code, not the West Virginia Consumer Credit and Protection Act, governs the nature and scope of express warranties. Again, Advance is wrong. The Uniform Commercial Code passed in 1963 provided some sections that dealt with warranties.

Again, W.Va. Code §46-2-318 states,

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 effected 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.

Advance Auto contends that a subsequent purchaser does not fall within this section and therefore is not protected from the defective product. Within the "Official Comment" to W.Va. Code §46-2-318 it states,

This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, this section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.

The law was in fact developing at this time and in 1974 the West Virginia Consumer Credit and Protection Act (W.Va. Code §46A-6-101 et seq.) was enacted, and shortly thereafter, in 1975, this Court decided *Dawson* which by its holding clearly abolished the requirement of privity as a defense to an action for breach of an express or implied warranty, and which, in essence, extended the seller's warranties to more than just those set out in W.Va. Code §46-2-318.

The West Virginia Consumer Credit and Protection Act enlarged the protections granted to consumers and users of defective products. In some instances, such as warranties, the West Virginia Consumer Credit and Protection Act expressly replaced and/or repealed the UCC.

Clearly, the Legislature had full knowledge of the UCC and its provisions when it passed the West Virginia Consumer Credit and Protection Act, as evidenced by W.Va. Code §46A-6-102(8) which states,

“Warranty” means express and implied warranties described and defined in Sections three hundred thirteen (§46-2-313), three hundred fourteen (§46-2-314) and three hundred fifteen (§46-2-315) Article 2, Chapter 46 of this Code and expressions or actions of a merchant which assure the consumer that the goods have described qualities or will perform in a described manner.

Having the UCC and all of its provisions in mind, and having full knowledge of all of its sections and terms, the Legislature then passed W.Va. Code §46A-6-107 and §46A-6-108, which respectively state as follows:

§46A-6-107 Disclaimer of warranties and remedies prohibited.

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:

- (1) Exclude, modify or otherwise attempt to limit any warranty, express or implied, including the warranties of merchantability and fitness for a particular purpose; or
 - (2) Exclude, modify or attempt to limit any remedy provided by law, including the measure of damages available, for a breach of warranty, express or implied.
- Any such exclusion, modification or attempted limitation shall be void (1974,c.12.)

§46A-6-108. Breach of warranty; privity abolished.

(a) **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.

The West Virginia Consumer Credit and Protection Act, W.Va. Code 46A-6-102 defines “consumer”, “consumer transaction” and “sale” as follows,

(2) “Consumer” means a natural person to whom a sale or lease is made in a consumer transaction and a “consumer transaction” means a sale or lease to a natural person or persons for a personal, family, household or agricultural purpose.

(5) “Sale” includes any sale, offer for sale or attempt to sell any goods for cash or credit or any services or offer for services for cash or credit.

The sale of the battery by Advance Auto to respondent McMahan and the sale of the Jeep which included the battery clearly constitute “consumer transactions” as they involve a sale of goods for cash to a natural person for a personal or family purpose. In addition, there can be no dispute whatsoever that respondent McMahan is a consumer as he purchased the battery from Advance. Respondent McMahan, a consumer, is a proper party in this case.

The petitioners, by and through a confederate Amicus Brief, argue that the subsequent purchaser should not be considered a consumer. Importantly, nowhere in W.Va. Code § 46A-6-101 et seq. is the definition of “consumer” limited to the original purchaser only. In fact, the language inserted in the CCPA is clear that a consumer is a natural person to whom a sale or lease is made in a consumer transaction. This language encompasses and includes the sale between respondent McMahan and respondent John. As set forth in W.Va. Code § 46A-6-101, the Legislature mandated that the article is to be liberally construed. Thus, if the Legislature intended the definition of “consumer” to be limited to the original purchaser, it would have easily done so within the definitions, W.Va. Code § 46A-6-102(2).

“Consumer” is defined in Black’s Law Dictionary as, “a member of that broad class of people who are affected by pricing policies, financing practices, quality of goods and services...and other trade practices for which state and federal consumer protection laws are enacted”. “Consumer” is

further defined as a buyer of any consumer product and any such person to whom such product is transferred during the duration of an implied warranty or written warranty. *Black's Law Dictionary* 286 (5th Ed. 1979).

W.Va. Code § 46A-6-101 makes it clear that the purpose of the CCPA is to protect the public. W.Va. Code § 46A-6-101 states that, "...this article shall be liberally construed so that its beneficial purposes may be served".

This Court has recognized that the CCPA was partly enacted to mitigate harsh effects of the U.C.C. *One Valley Bank v. Bolen*, 188 W.Va. 687, 425 S.E.2d 829 (1992). Furthermore, this Court has recognized that the CCPA has "unique features", *Chrysler Credit Corp. v. Copley*, 189 W.Va. 90, 428 S.E.2d 313, 316 (1993), and that the purpose of the CCPA is to protect consumers from unfair, illegal or deceptive acts by providing an avenue of relief for consumers who would otherwise have difficulty under more traditional causes of action. *State ex rel. McGraw v. Scott Runyan Pontiac*, 194 W.Va. 770, 461 S.E.2d 516, 523 (1995).

This Court further found in *Appalachian Power v. State Tax Dept.*, 195 W.Va. 573, 466 S.E.2d 424 (1995), that the Court must consider the "overarching design of the statute" and the statute must be construed liberally to protect **all consumers**. (bold added).

As set forth herein, W.Va. Code § 46A-6-108 **Breach of warranty; privity abolished** states,

(a) **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.

By the language used in the CCPA and *Dawson and Sewell*, the Legislature and this Court respectively have acknowledged that subsequent purchasers are protected in these types of cases. West Virginia clearly acknowledges that someone other than the original purchaser is protected, through statutory and case law regarding warranties. The language of W.Va. Code 46A-6-108 would be unnecessary if the statute only applied to the original purchaser as there would be no privity issue between the original purchaser and the merchant. The language obviously protects the subsequent purchaser.

Advance Auto is the merchant, seller or supplier that placed the battery in the stream of commerce in this case. The Legislature was deeply concerned with the attempts by such merchants or sellers to limit warranties; thus, it passed W.Va. Code §46A-6-107 and 108. By leading off the above two sections with the language, “Notwithstanding any other provision of law to the contrary...” the Legislature declared that the provisions of the West Virginia Consumer Credit and Protection Act are to control over the UCC or any other law that would conflict with the Act.

In support of their contention that the UCC (W.Va. Code §46-2-318), not the Consumer Credit and Protection Act (W.Va. Code §46A-6-107 and 108), controls this case and allows the seller to limit express warranties to the “original purchaser”, petitioners cite to *Reece v. Yeager Ford Sales, Inc.* 151 W.Va. 461, 184 S.E.2d 727 (1971). It is no surprise that *Reece* offers nothing respecting the Consumer Credit and Protection Act’s predominance over the UCC on these topics, given that *Reece* was decided three years prior to the passage of the Consumer Credit and Protection Act.

Any remaining doubt over the Act’s overriding applicability is resolved by the “Official Comment” to W.Va. Code §46-1-103 of the Uniform Commercial Code, titled “Construction of uniform commercial code to promote its purposes and policies; applicability of supplemental principles of law,” where it is stated,

Not only are there a growing number of state statutes addressing specific issues that come within the scope of the Uniform Commercial Code, but in some States many general principles of common law and equity have been codified....[O]ther interpretive principles addressing the interrelationships between statutes may lead the court to conclude that the other statute is controlling, even though it conflicts with the Uniform Commercial Code. This, for example, would be the result in a situation where the other statute was specifically intended to provide additional protection to a class of individuals engaging in transactions covered by the Uniform Commercial Code.

That is the exact situation here, as the Consumer Credit and Protection Act is specifically intended to provide additional protection to a class of individuals, i.e. consumers, engaging in consumer transactions. Also, by the clear mandate of the Act, the Consumer Credit and Protection Act is to apply notwithstanding any other provision of law to the contrary.

In *Wolfe v. Welton*, 210 W.Va. 563, 558 S.E.2d 363 (2001), the trial court was criticized for taking the very same position which petitioners now advance. The defendant car dealership apparently convinced the trial court that the UCC (W.Va. Code §46-2-316) allows a merchant to limit or modify express warranties. The West Virginia Supreme Court of Appeals reversed the lower court and stated,

It appears that the circuit court did not take into account the effect of West Virginia Code §46A-6-107 (1974), part of the West Virginia Consumer Credit and Protection Act, which renders void any exclusion, modification, or attempted limitation of warranties or legal remedies for breach or warranties, express or implied, arising in sales of goods and chattels to consumers,...

558 S.E.2d, at 574-75.

Syllabus Point 7 of *Wolfe* demonstrates how the Consumer Credit and Protection Act controls the field, regardless of the UCC.

West Virginia Code §46A-6-107 (1974), part of the West Virginia Consumer Credit and Protection Act, renders void any exclusion, modification, or attempted limitation of warranties or legal remedies for breach of warranties, express or implied, arising in sales of goods and chattels to consumer.

Advance Auto contends that if the lower court's ruling is not reversed, no seller could ever limit an express warranty. The petitioners contend 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. This contention is over exaggerated and without merit. Clearly, a merchant is not mandated to have an express warranty, and if it does in fact create an express warranty, the merchant is not totally prohibited as Advance Auto contends. For instance, in this case, Advance Auto did not even need to make an express warranty, but chose to do so, and once it did W.Va. Code §46A-6-107 does not allow it to then go back and limit or modify the express warranty, especially with a limitation contained only in cyberspace, if at all, that attempts to circumvent well established privity laws.

Advance Auto also contends that since there was no physical injury by Mr. McMahon or Ms. John there should be no recovery. Despite Advance Auto's contention, it is clear that the abolition of privity for breach of an express or implied warranty does not only exist in the products liability field. In fact, in a strict liability tort action, privity of contract was never required and can never be a defense. Thus, there would be no need for *Dawson* or §46A-6-101 et seq. if this principle of law only pertained to product liability. *Dawson* and §46A-6-101 et seq. were enacted to protect the innocent public from damages caused by defective products, whether physical injury or economic damages. It would be totally inconsistent for the law to protect only the consumers physically injured by the defective product and not protect those consumers who were economically injured.

The New Jersey Supreme Court, in *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 stated:

There is no doubt that the great mass of warranty cases imposing liability on the manufacturer regardless of lack of privity were concerned with personal injuries to

the ultimate consumer. But we see no just cause for recognition of the existence of an implied warranty of merchantability and a right to recover for breach thereof regardless of lack of privity of the claimant in the one case in the exclusion of recovery and the other simply because of loss of value of the article sold is the only damage resulting from the breach. The manufacturer is the father of the transaction. He makes the article and puts it in the channels of trade for sale to the public. No one questions the justice of a rule which holds him liable for defects arising out of the design or manufacture, or other causes while the product is under his control. After completion the article may pass through a series of hands, such as distributor and wholesaler, before reaching the dealer at the point of ultimate intended sale. The dealer is simply a way station, a conduit from a manufacturer to consumer. For these reasons in the recent past the Courts of many jurisdictions, in an endeavor to achieve justice for the ultimate consumer, have imposed an implied warranty of reasonable fitness on the person responsible for the existence of the article and the origin of the marketing process. From the standpoint of principle we perceive no sound reason why the implication of reasonable fitness should be attached to the transaction and be actionable against the manufacturer of the defectively made product has caused personal injury, and not actionable when an inadequate manufacturer has put a worthless article in the hands of an innocent purchaser who has paid the required price for it.

In *Groppel Company, Inc. v. United States Gypsum Company*, 616 S.W.2d 49 (MO. App.

1981), the Missouri Appellate Court stated,

...Indeed, the Courts of this State have often looked beyond the privity question to determine if the defendant owes a duty to the plaintiff particularly when strict application of the privity rule “would produce a result contrary to the requirements of essential justice and sound public policy”... Our decision simply recognizes that economic loss is potentially devastating to the buyer of an unmerchantable product and that it is unjust to preclude any recovery from the manufacturer for such loss because of a lack of privity, when the slightest physical injury can give rise to strict liability under the same circumstances.

In its effort to attack the trial court’s ruling, petitioners not only resort to the impotent argument that the Supreme Court did not mean what it plainly said forty years ago, but it also misleadingly cites to numerous cases² containing references to warranties that purport to be limited to original purchasers. Of course, petitioners’ intent is to cause the inescapable inference that these

² ...at pages 8 through 12 of its brief

cases actually address and validate such terms. However, this is a facade coupled with the hope that the Court does not go to the effort of examining all the cases. Actually, the majority of these cases do not address the issue of privity at all, some of them focus upon implied warranty, which petitioners concede is not at stake in this appeal, and many of the cases are unreported and are consequently of dubious if not disclaimed force.

Moreover, claiming commonality of a warranty disclaimer or limitation is hardly helpful. These are contracts of adhesion. It is often, if not nearly always, the case that manufacturers and sellers attempt to disclaim all warranties, express and implied, and that they purport to limit remedies to near if not total nothingness. In *Dunlap v. Berger*, and at substantial length, this Court discussed the fact that “common” exculpatory and limiting terms found within consumer contracts are often unconscionable or otherwise unlawful. 211 W.Va. 549, 567 S.E.2d 265 (2002). That is the very reason motivating enactments such as § 46A-6-107 of the “General Consumer Protection Act,”³ which invalidates exclusions and limitations of any warranty, express or implied, and which likewise invalidates purported exclusions and modifications of remedies. It is noteworthy that the warranty which petitioner claims was conveyed in this case, attached as **Exhibit B** to its *Brief*, claims to eradicate remedies in its “WHAT IS NOT COVERED” section in stark contravention to our law. Yet, this warranty is held forth as representative of what is “common”.⁴

³ Section 46A-6-107 is set forth in its entirety at page 21 herein.

⁴ Evading and limiting remedies for their defective products surely saves manufacturers/sellers money, or else obviously there would be no attempt in a warranty, however illicit, to do so. According to petitioners and their amicae confederates, this type of illegality, just like the illegality of the “original purchaser” limitation, ought to be suffered to placate manufacturers and stave off our State’s financial ruin. Built on hyperbole but no evidence, such threats cannot drive the outcome of this appeal.

Furthermore, the suggestion that West Virginia is alone in abolishing privity in an express and implied warranty scenario, or that *Dawson v. Canteen Corp.*, 158 W.Va. 516, 212 S.E.2d 82 (1975) and its outgrowth cases such as *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988), were thoughtlessly errant decisions by our Supreme Court of Appeals, is simply wrong. Echoing the same cogent rationale that *Sewell* expresses,⁵ and as a predicate to holding that purely economic losses can be recovered for breach of the implied warranty of merchantability despite the absence of vertical privity, the Supreme Court of Indiana stated in *Hyundai Motor America, Inc. v. Goodwin*:

Courts that have abolished vertical privity have cited a variety of reasons. Principal among these is the view that, in today's economy, manufactured products typically reach the consuming public through one or more intermediaries. As a result, any loss from an unmerchantable product is likely to be identified only after the product is attempted to be used or consumed.

The basis for the privity requirement in a contract claim is essentially the idea that the parties to a sale of goods are free to bargain for themselves and thus allocation of risk of failure of a product is best left to the private sector. Otherwise stated, the law should not impose a contract the parties do not wish to make. The Court of Appeals [in *Richards v. Goerg Boat and Motors Inc.*, 179 Ind.App.102, at 112, 384 N.E.2d 1084, at 1092] summarized this view well:

Generally privity extends to the parties to the contract of sale. It relates to the bargained for expectations of the buyer and seller. Accordingly, when the cause of action arises out of economic loss related to the loss of the bargain or profits and consequential damages related thereto, the bargained for expectations of buyer and seller are relevant and privity between them is still required. Implied warranties of merchantability and fitness for a particular use, as they relate to economic loss from the bargain, cannot then ordinarily be sustained between the buyer and a remote manufacturer.

We think that this rationale has eroded to the point of invisibility as applied to many types of consumer goods in today's economy.

⁵ See, below.

822 N.E.2d 947, 957-58 (Ind.2005) (bold added).

Consistently, in the context of an express warranty claim, the North Carolina Supreme Court historically described the descent of privity as a component of warranty law. *Kinlaw v. Long Mfg.*, 259 S.E.2d 552 (N.C. 1979).

Privity is a child of contract law, delivered by the courts to limit the responsibilities of contracting parties to those persons consensually involved in the primary transaction. It was originally felt that without such a limitation on liability, “the most absurd and outrageous consequences” would ensue in litigation caused by a flood of spurious claims. *Winterbottom v. Wright*, 10 M&W 109, 114, 152 Eng.Rep. 402, 405 (Exch.1842). The *Winterbottom* rationale is justified in warranty cases, however, only to the extent that the warranty sued on is inherently an element of a true contract. Regarding the tort aspects of a false warranty claim, the rule of privity has itself produced absurd consequences and has no real application. Courts have long struggled to contrive ingenious “exceptions” to avoid unjust results in particular cases. See *Gillam*, *Products Liability in a Nutshell*, 37 Ore.L.Rev. 119, 153-155 (1958). In many states today these exceptions have so swallowed the rule as to lead to the total abandonment, whether by judicial fiat or legislative decree, of the privity requirement in warranty actions. The erosion of the doctrine is by now familiar and well documented history. See *Frumer and Friedman*, *Products Liability* s 16.03 (1979); *Prosser*, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn.L.Rev. 791 (1966); *Prosser*, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960).

259 S.E.2d, at 554-55.

The Court then held,

Plaintiff has alleged an express warranty running directly to him, breach of that warranty, and damages caused by the breach. The absence of an allegation of privity between plaintiff and the warrantor in the sale of the warranted item is not fatal to the claim.

259 S.E.2d, at 561-62.

Permitting an express warranty claim to proceed despite the lack of privity, and citing *Kinlaw* for support, in a 2009 decision Florida’s Southern District Federal Court noted, succinctly enough: “Many states have done away with the privity requirement in cases involving a

manufacturer's express warranty." *Smith v. Wm. Wrigley Jr. Co.*, 663 F.Supp.2d 1336, 1343 (S.D. Fla. 2009) Its further rationale is compelling.

The privity bound procedure whereby the purchaser claims against the retailer, the retailer against the distributor, and the distributor, in turn, against the manufacturer, is unnecessarily expensive and wasteful. We find no reason to inflict this drain on the court's time and the litigants' resources when there is an express warranty directed by its terms to none other than the plaintiff purchaser.

Id.

The Supreme Court of Nebraska was mostly accurate, and certainly could have considered the position of the West Virginia Supreme Court of Appeals as well as our Legislative enactments, when it reflected back in 1981, "It is possible that lack of privity as a defense to a cause of action will be only a historic relic in the year 2000. It is a doctrine in hasty retreat[.]" *Koperski v. Husker Dodge, Inc.*, 302 N.W.2d 655, 664 (Neb. 1981).

Offering an excellent analysis to support its holding that a remote buyer, lacking privity, may maintain a purely economic damages claim based on breach of express warranty, is the New Jersey Supreme Court in *Spring Motors v. Ford Motor Co.*, 489 A.2d 660 (1985). The Court noted the waning effect of privity (or the lack thereof) in warranty cases generally, including the recognition that,

With respect to vertical privity, the drafters [of the Uniform Commercial Code] specifically state that the section is "neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain." Official Comment 3, § 2-318.

489 A.2d, at 675.

In defending its decision to reject a lack of privity defense, the Court noted some of the other jurisdictions that too have made similar observations.

Our conclusion also is consistent with the proposition that the Code drafters have left it to the courts to determine whether vertical privity should be required in a warranty action between a seller and a remote buyer. *See, e.g., Omaha Pollution Control Corp. v. Carver-Greenfield*, 413 F.Supp. 1069, 1088-90 (D.Neb.1976) (the Code did not intend to set any limits regarding vertical privity); *Autrey v. Chemtrust Industries Corp.*, 362 F.Supp. 1085, 1092 (D.Del.1973) (section 318 has no effect on Florida's developing case law when a nonconsumer seeks to recover economic loss damages from a remote manufacturer on breach of warranty); *Morrow v. New Moon Homes, Inc.*, *supra*, 548 P.2d at 287-88 (the Code leaves to the courts the extent to which vertical privity will be required); *J.G. Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848, 856 (1968) (nothing prevents judicial abolition of vertical privity in breach of warranty actions for property damage); *Nobility Homes of Texas, Inc. v. Shivers*, *supra*, 557 S.W.2d at 81 (vertical privity is not a requirement for a consumer to recover economic losses in a U.C.C. breach of implied warranty action); *White & Summers*, *supra*, § 11-3 at 403 (many courts have gone well beyond Alternative A in permitting horizontal and vertical nonprivity plaintiffs to recover).

Thus, petitioners' suggestion that *Dawson* is either an errant or rogue decision is grossly inaccurate. In fact, *Dawson* placed West Virginia in the vanguard of the trend to abolish privity in express and implied warranty settings. While petitioners might dislike the law, pretending it does not exist is irrational.

Furthermore, petitioners continually argue that this claim should not be governed by the Consumer Protection Act and it is "contractual in nature". Even if contractual in nature, the express warranty limitation must be a part of the contract or "basis of the bargain". Here, Advance never gives the alleged limitation to the consumer at the time of purchase. The consumer only sees the advertisements and promotions claiming "24 month free replacement" and the sales receipt stating "24 month free replacement". Advance never provides this alleged limitation in their ads or on the sales receipt. It hides this alleged limitation on its website and then claims it is part of the contract. To be part of the contract, the alleged limitation has to be meaningfully conveyed and given to the consumer at the time of purchase, which was admittedly not done in this case. One must wonder

why Advance would not put on the sale receipt that the warranty only applied to the original purchaser. The answer is most likely it would not sell as many batteries to West Virginia consumers.

Advance Auto knows very well that consumers come to Advance to buy parts to place in their vehicles and often times to prepare the vehicle for sale. To lead the consumer to believe that he or she has a specific express warranty, in order to promote and sell the product, and then to try to take it away, not with just fine print, but with fine print available only in cyberspace, is unlawful. Advance Auto got caught cheating the public and must be held accountable.

What is most disturbing in this case is that Advance Auto takes the position that respondent John cannot obtain any relief because she was not the original purchaser of the battery, and respondent McMahon cannot obtain any relief either because he no longer owns the battery. Thus, in petitioners' view, despite all the consumer protection laws and case law in West Virginia, the consumer and user are stuck with a defective product while Advance Auto reaps the benefits. Having induced a sale with an express warranty on its receipt, Advance wants to renege. In other words, Advance wants West Virginia law to allow it to sell defective products and get away with it.

CONCLUSION

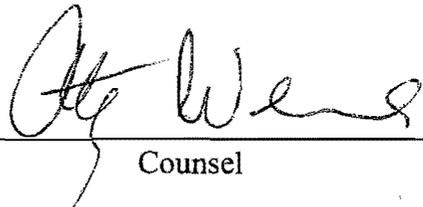
Judge Recht did not err by following the law as clearly set out in *Dawson* and *Sewell* and by holding that Advance Auto could not refuse to honor an express warranty based upon the defense of "lack of privity".

The requirement of privity has been both judicially and statutorily abolished in West Virginia. Advance Auto's policy attempts to circumvent West Virginia law and require privity when the law says that it cannot. Advance Auto's policy only protects Advance Auto and not the consumers who purchase or use the defective products that it sells. When Advance Auto sells a defective product, it must bear the consequences, not the consuming public.

PRAYER FOR RELIEF

Wherefore, your respondents respectfully pray that the lower court's ruling in favor of the respondents be upheld and affirmed and this Court find that W.Va. Code 46A-6-108(a) applies in this case as found by the lower court and for such other and further relief as this Court deems just and proper.

Respectfully submitted,
Scott McMahon and Karen John,
Respondents

By:  _____
Counsel

JOSEPH J. JOHN, ESQ.
W. Va. State Bar No. 5208
JOHN LAW OFFICES
80 - 12th Street
Board of Trade Building, Suite 200
Wheeling, WV 26003
Telephone: (304) 233-4380
Fax: (304) 233-4387

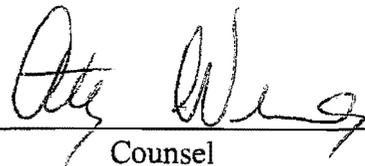
ANTHONY I. WERNER, ESQ.
W.Va. State Bar No. 5203
BACHMANN, HESS, BACHMANN & GARDEN, P.L.L.C.
1226 Chapline Street
P. O. Box 351
Wheeling, WV 26003
Telephone: (304) 233-3511
Fax: (304) 233-3199

CERTIFICATE OF SERVICE

Service of the foregoing respondents' brief to the certified question review was made upon the petitioners by mailing a true copy thereof, U.S. Mail, postage prepaid, to their attorneys on this 31ST day of March 2010:

Ancil G. Ramey, Esq.
P.O. Box 1588
Charleston, WV 25326-1588

Karen E. Kahle, Esq.
P.O. Box 751
Wheeling, WV 26003

By: 
Counsel

JOSEPH J. JOHN, ESQ.
W. Va. State Bar No. 5208
JOHN LAW OFFICES
80 - 12th Street
Board of Trade Building, Suite 200
Wheeling, WV 26003
Telephone: (304) 233-4380
Fax: (304) 233-4387

ANTHONY I. WERNER, ESQ.
W.Va. State Bar No. 5203
BACHMANN, HESS, BACHMANN & GARDEN, P.L.L.C.
1226 Chapline Street
P. O. Box 351
Wheeling, WV 26003
Telephone: (304) 233-3511
Fax: (304) 233-3199

EXHIBITS

ON

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