

35467

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

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

Plaintiffs,

v.

Civil Action No. 06-C-~~200~~209-2006  
Judge Recht

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

Defendants.

CIRCUIT COURT  
OF OHIO COUNTY  
2009 OCT 2 PM 1 45  
BRENDA L. MILLER

CERTIFIED QUESTION ORDER

On a former day, came the defendants, Advance Stores Company, Incorporated, dba Advance Auto Parts, and Donn Free, by counsel, with a motion for certified question; thereafter, came the plaintiffs, Scott McMahon and Karen John, by counsel, with their response in opposition to the defendants' motion for certified question; and finally, came the defendants, by counsel, with their reply to the plaintiffs' response to defendants' motion for certification of question.

Upon consideration whereof, the Court is of opinion to and doth hereby grant the defendants' motion as follows:

1. On December 8, 2008, this Court entered an Rule 54(b) order in this matter for purposes of permitting interlocutory review of a ruling on the viability of a provision in a limited warranty limiting its availability to the original purchaser.

2. On May 13, 2009, however, the Supreme Court issued its opinion in C&O Motors, Inc. v. West Virginia Paving, Inc., No. 34330 (W. Va. May 13, 2009), in which issued the following new syllabus



point: "3. An order determining liability, without a determination of damages, is a partial adjudication of a claim and is generally not immediately appealable. However, an immediate appeal from a liability judgment will be allowed if the determination of damages can be characterized as ministerial. That is, a judgment that does not determine damages is a final appealable order when the computation of damages is mechanical and unlikely to produce a second appeal because the only remaining task is ministerial, similar to assessing costs."

3. The plaintiffs do not dispute that this Court's Rule 54(b) order was "an order determining liability, without a determination of damages" and, therefore, "not immediately appealable" pursuant to the C&O Motors decision, but dispute that a certified question in this case is procedurally proper.

4. First, the plaintiffs argue that, "questions arising upon the sufficiency of a motion for summary judgment are certifiable only where such motion is denied." Response at 2.

5. Our Court, however, specifically rejected this argument in Smith v. State Consolidated Public Retirement Board, 222 W. Va. 345, 348 n.3, 664 S.E.2d 686, 689 n.3 (2008), stating as follows:

Another argument made by the petitioner in his brief is that the Court should dismiss the certified question because it does not meet the jurisdictional requirements of W. Va. Code § 58-5-2 and because the certificate does not meet the requirements of West Virginia Rule of Appellate Procedure 13(b). For support, the petitioner cites Syllabus Point 3 of Bass v. Coltelli, 192 W. Va. 516, 453 S.E.2d 350 (1994) in which this Court held:

Questions subject to certification pursuant to W. Va. Code, 58-5-2 (1967), are limited to any question

arising upon the sufficiency of a summons or return of service, upon a challenge of the sufficiency of a pleading or the venue of the circuit court, upon the sufficiency of a motion for summary judgment where such motion is denied, or a motion for judgment on the pleadings, upon the jurisdiction of the circuit court of a person or subject matter, or upon failure to join an indispensable party.

The petitioner indicates that the instant question does not arise from any of the pleadings enumerated in Syllabus Point 3 of Bass. Also, the petitioner notes that according to Rule of Appellate Procedure 13(b), the certificate shall state whether the question arises in accordance with the provisions of W. Va. Code § 58-5-2, and the certificate in this case does not so state.

We find the petitioner's argument to be without merit. The case and rule relied upon by the petitioner concerned a previous version of W. Va. Code § 58-5-2. The current version of that statute provides that "[a]ny question of law" may be certified, not just questions arising from the pleadings enumerated in the statute.

(emphasis supplied).

6. Second, the plaintiffs argue that, "certification cannot be accepted unless there is a sufficiently precise and undisputed factual record on which legal issues can be determined." Response at 2.

7. This argument, likewise, has no merit because this Court, in its previous Rule 54(b) Order, stated as follows:

The facts are not in dispute, nor for that matter is the law that shapes the efficacy of its warranty policy.

The Plaintiff, Scott McMahon, purchased a car battery from Advance which contained a twenty-four (24) month free replacement/seventy-two (72) month pro-rated warranty in the event the battery was defective. McMahon installed the battery in

a motor vehicle which he subsequently sold to Karen John.

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 no in privity with Advance by being the subsequent purchaser, the warranty failed. Advance is wrong.

8. These undisputed facts are all those necessary for certification of the same question of statutory interpretation previously attempted by the Court pursuant to its Rule 54(b) order.

9. As noted in the defendants' motion, the certified question statute has been frequently used, with success, where issues of statutory interpretation, such as the one in the instant case, are involved.<sup>6</sup>

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<sup>6</sup> See, e.g., Preussag Intern. Steel Corp. v. March-Westin Co., 221 W. Va. 472, 655 S.E.2d 494 (2007) (certified question regarding whether steel supplier to fabricator who assembled structural steel components offsite for a new public building could recover on bond posted by general contractor under the public construction bond statute); Copier Word Processing Supply, Inc. v. WesBanco Bank, Inc., 220 W. Va. 39, 640 S.E.2d 102 (2006) (certified questions relating to whether the continuing tort theory may be applied to toll the three-year statute of limitations); T. Weston, Inc. v. Mineral County, 219 W. Va. 564, 568, 638 S.E.2d 167, 171 (2006) ("The certified question from the District Court asks this Court to determine the meaning of a statute.") (emphasis supplied); Swiger v. UGI/AmeriGas, Inc., 216 W. Va. 756, 758, 613 S.E.2d 904, 906 (2005) ("This case is before us on certified questions from the Circuit Court of Monongalia County and presents issues concerning application of certain regulatory provisions of the state fire code to a commercial vendor.") Barefield v. DPIC Companies, Inc., 215 W. Va. 544, 550, 600 S.E.2d 262, 262 (2004) ("We discern that there are two separate issues under the Unfair Trade Practices Act contained within the district court's certified question."); Shaffer v. Fort Henry Surgical Associates, Inc., 215 W. Va. 453, 456, 599 S.E.2d 876, 878 (2004) ("This case is before this Court upon certified questions from the Circuit Court of Ohio County, West Virginia, concerning the application of the West Virginia Wage Payment and Collection Act."); Killen v. Logan County Comm'n, 170 W. Va. 602, 295 S.E.2d 689 (1982) (certified question on the constitutionality of a statute that would allow county assessors to value property in a manner that was not equal and uniform).

10. Indeed, in One Valley Bank of Oak Hill, Inc. v. Bolen, 188 W. Va. 687, 688, 425 S.E.2d 829, 830 (1992), the certified question dealt specifically with "the way the West Virginia Consumer Credit and Protection Act affects the general holder in due course rules," which is similar to the issue in this case, i.e., the way in which the Consumer Credit and Protection Act affects the express warranty provisions of the Uniform Commercial Code.

11. This Court has used certified questions in previous cases where, as in the instant case, important legal issues were central to the claims being litigated.<sup>7</sup>

12. Neither this Court nor the litigants could have anticipated that the Supreme Court would depart from long-standing precedent and rule that it would not consider appeals from Rule 54(b) orders unless the subject ruling resolved issues of both liability and damages.

13. As neither of the plaintiffs' arguments in opposition to certification have any merit, it appears that the relief requested by the defendants is appropriate.

WHEREFORE, this Court certifies the following question of law to the Supreme Court of Appeals:

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

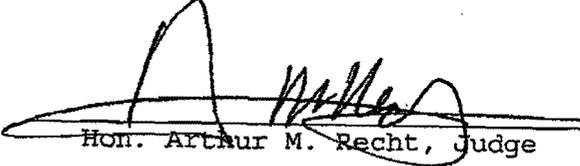
The Court answers this question in the affirmative.

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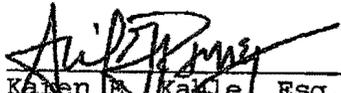
<sup>7</sup> See In re Tobacco Litigation, 218 W. Va. 301, 624 S.E.2d 738 (2005); Shaffer v. Ft. Henry Surgical Associates, Inc., 215 W. Va. 453, 599 S.E.2d 876 (2004); Brooks v. Isinghood, 213 W. Va. 675, 584 S.E.2d 531 (2003); Dunn v. Doe, 206 W. Va. 684, 527 S.E.2d 795 (1999); Brooks v. City of Weirton, 202 W. Va. 246, 503 S.E.2d 814 (1998).

The objections and exceptions of the parties are duly noted and the Clerk of this Court is hereby directed to provide a copy of this Certified Question Order to all counsel of record upon its entry.

Entered this 2<sup>nd</sup> day of October, 2009.

  
Hon. Arthur M. Recht, Judge

Presented by:

  
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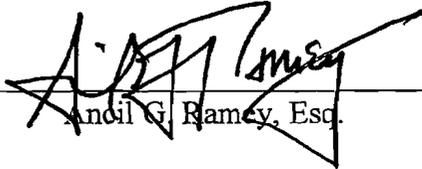
  
Brenda L. Miller  
Circuit Clerk

**CERTIFICATE OF SERVICE**

I, Ancil G. Ramey, Esq., do hereby certify that on October 9, 2009, I served the foregoing "PETITION FOR CERTIFIED QUESTION REVIEW" by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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