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JULIE BALL  
CLERK CIRCUIT COURT  
MERCER COUNTY

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

**APPALACHIAN LEASING, INC.,  
a West Virginia Corporation,**

**Plaintiff,**

v.

**Civil Action No. 08-C-527-WS**

**MACK TRUCKS, INC., a foreign corporation,  
and WORLDWIDE EQUIPMENT, INC.,  
a foreign corporation,**

**Defendants.**

**ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This matter came before the court on October 7, 2013, for a pre-trial conference and motions hearing. At that time, the parties presented their arguments regarding Defendants' Rule 56 motion for summary judgment and on the plaintiff's motions in limine. The plaintiff appeared by counsel, Stephen New. The defendants appeared by counsel, Jonathan Price. For the reasons set forth below, the Court GRANTS the motion for summary judgment which, in turn, renders the plaintiff's motions in limine moot.

I. Factual and Procedural Background

This civil action arises from a commercial transaction between the plaintiff, Appalachian Leasing, Inc. ("Appalachian"), and the defendants Mack Trucks, Inc. ("Mack") and Worldwide Equipment, Inc. ("Worldwide"). Specifically, Appalachian purchased four GU-series vehicles manufactured by Mack and sold by Worldwide. Appalachian alleges that these vehicles failed to conform to their express warranties and that the defendants breached the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

The defendants contend that they honored the terms of the express warranty and that the plaintiff's claims for breaches of the implied warranties are precluded because the plaintiff

voluntarily waived those claims at the time it purchased the vehicles. Both the sales agreements between Appalachian and Worldwide and the express manufacturer's warranties contained language that clearly and conspicuously stated the limitations with respect to the four vehicles.

Plaintiff, on the other hand, argues it is entitled to revoke its acceptance of the four vehicles, receive a refund of the purchase price, and obtain an award of consequential damages. Appalachian also contends it is entitled to attorney's fees and costs pursuant to West Virginia's "Lemon Law."

## II. Standard of Review

Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary judgment is appropriate when there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W.Va. R. Civ. Pro. 56(c); *see also, Hager v. Marshall*, 202 W.Va. 577, 505 S.E.2d 640 (1998). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In determining whether a material fact is in dispute, the court must view all facts and reasonable inferences in the light most favorable to the nonmoving party. *Painter v. Peavy*, 192 W.Va. 189, 192-93, 451 S.E.2d 755, 758-59 (1994). Ultimately, where the totality of the evidence presented would not lead a rational trier of fact to find for the nonmoving party, such as where the plaintiff has failed to make a sufficient showing on an essential element of the case that it has the burden to prove, the defendant is entitled to summary judgment. Syllabus Point 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

## III. Findings of Fact

1. During late 2007 and early 2008, Appalachian entered into a commercial transaction with Worldwide for the purchase of four Mack. Worldwide is an authorized dealer of vehicles manufactured by Defendant Mack;
2. Appalachian's purchase of the four vehicles was subject to certain terms set forth in certain sales agreements between Appalachian and Worldwide.
3. The bills of sale for each of the four vehicles bore a disclaimer of warranties.<sup>1</sup> The disclaimer was forth inside a box on the form, which was located a few lines above where the President of Appalachian, Kenny Compton, signed it. The disclaimer stated in all-capital letters:

DISCLAIMER OF WARRANTIES: SELLER MAKES NO WARRANTIES AS TO THE PROPERTY, EXPRESS, IMPLIED OR IMPLIED BY LAW EXCEPT, AS TO NEW VEHICLES ONLY THE MANUFACTURER'S STANDARD VEHICLE WARRANTY, WHICH IS INCORPORATED HERE IN BY REFERENCE. SELLER SPECIFICALLY DISCLAIMS ANY IMPLIED WARRANTY OF MERCHANT ABILITY (sic) OR FITNESS FOR A PARTICULAR PURPOSE AND ANY LIABILITY FOR CONSEQUENTIAL DAMAGES OF ANY BREACH OF WARRANTY;

4. Similar disclaimers also appeared on the invoices for the four vehicles.<sup>2</sup> This disclaimer was set forth in capital letters inside a box on lower left corner of the form. The disclaimer stated:

DEALER HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. BUYER SHALL NOT BE ENTITLED TO RECOVER FROM THE SELLER ANY CONSEQUENTIAL DAMAGES, DAMAGES TO PROPERTY,

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<sup>1</sup> The bills of sale are entitled "WORLDWIDE EQUIPMENT, INC. TRUCK-EQUIPMENT SALES AGREEMENT."

<sup>2</sup> The "invoices" are the documents listing the date, invoice number, stock number, and customer number on the top, right hand of the document.

DAMAGES FOR LOSS OF USE, LOSS OF TIME, LOSS OF PROFITS OR INCOME OR ANY INCIDENTAL DAMAGES.<sup>3</sup>

5. In addition to the aforementioned documents associated with the sale and delivery of the subject vehicles, the four vehicles were also subject to an express warranty and a disclaimer of all other express and implied warranties by Mack itself.<sup>4</sup> Mack's express warranty stated, in relevant part, that:

THIS WARRANTY IS MADE EXPRESSLY IN LIEU OF ANY OTHER WARRANTIES OR CONDITIONS, EXPRESSED OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OR CONDITION OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND OF ANY OTHER OBLIGATION OR LIABILITY ON THE PART OF THE MANUFACTURER INCLUDING, WITHOUT LIMITATION OF THE FOREGOING, CONSEQUENTIAL AND INCIDENTAL DAMAGES;

6. In addition, Mack's Standard Warranty also warranted the subject vehicles "to be free from defects in material or workmanship under normal use and service."<sup>5</sup> Mack's obligation under the Warranty is "limited to repairing or replacing, as hereinafter provided, at its option, at the

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<sup>3</sup> The full text of the disclaimer stated:

Any warranties applicable to a new motor vehicle ordered hereunder are the Manufacturer's warranties only and not the Dealer's. DEALER HEREBY EXPRESSLY DISCLAIMS ALL WARRANTIES, EITHER EXPRESS OR IMPLIED INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. BUYER SHALL NOT BE ENTITLED TO RECOVER FROM THE SELLER ANY CONSEQUENTIAL DAMAGES, DAMAGES TO PROPERTY, DAMAGES FOR LOSS OF USE, LOSS OF TIME, LOSS OF PROFITS OR INCOME OR ANY INCIDENTAL DAMAGES. The Seller neither assumes nor authorizes any other person to assume for it any liability in connection with the sale of such vehicle. This disclaimer in no way affects the terms of the Manufacturer's warranty.

<sup>4</sup> The express warranty is located on page 7 of the "Pedigreed Protection Plan." Each Mack truck contains the Protection Plan when it leaves the manufacturing facility.

<sup>5</sup> "Pedigreed Protection Plan," p. 6.

Manufacturer's authorized truck repair facility any part or parts of the Vehicle found to the Manufacturer's satisfaction to be defective upon examination by it. . . ."

7. Appalachian's President, Mr. Kenny Compton, acknowledged in his deposition that although he was dissatisfied with the performance of the subject vehicles, the Defendants had never failed to provide warranty service. He also admitted he did not read the sale documents before signing them.
8. President Kenny Compton has extensive business background in the coal industry itself, and more particularly, in hauling coal. He began working with coal in 1976, worked his way up to mine foreman and superintendent of underground mines, and served in those positions until 1998. In 1998 he switched into the towing business for a few years, and ultimately began working with Jim Walter Resources in 2004 or 2005. During his time there, Mr. Compton ran a barge facility and a unit train facility and hauled all the coal to each facility. Mr. Compton then formed Appalachian Leasing Company in 2005 or 2006, a corporation designed specifically to haul coal. As of June 6, 2013, Appalachian employed approximately seventy five workers, and its customers included Mechel Bluestone coal and James Justice.
9. The Warranty and exclusions at issue were standard contract terms for which there was no bargaining.

#### IV. Legal Authorities

1. Appalachian has made claims against the Defendants pursuant to various provisions of the West Virginia Uniform Commercial Code, specifically, W.Va. Code § 46-2-313 (breach of express warranty); W.Va. Code § 46-2-314 (breach of implied warranty of merchantability); and W.Va. Code § 46-2- 313 (breach of implied warranty of fitness for a particular purpose);

2. West Virginia Code §46-2-313, entitled “Express warranties by affirmation, promise, description sample,” provides that

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

3. W.Va. Code §46-2-314<sup>6</sup> states that “[u]nless excluded or modified...a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .”

4. W.Va. Code §46-2-315<sup>7</sup> states “[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section [2-316] an implied warranty that the goods shall be fit for such purpose.”

5. Parties to a commercial transaction can exclude or modify implied warranties when certain language is included. Specifically, “to exclude or modify the implied warranty of

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<sup>6</sup> This Code section is entitled “Implied warranty: Merchantability; usage of trade.”

<sup>7</sup> W.Va. Code §46-2-315 is entitled “Implied warranty: Fitness for particular purpose.”

merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.” W.Va. Code § 46-2-316(2)<sup>8</sup>;

6. Further, the parties to a commercial transaction can also limit the remedies for a breach of warranty. West Virginia Code §46-2-316(4) permits the “[r]emedies for breach of warranty [to] be limited in accordance with the provisions of this article on liquidation of damages and on contractual modification of remedy (sections 2-718 and 2-719).” W.Va. Code § 46-2-316(4).
7. The contractual modification or limitation of damages as codified in West Virginia Code §46-2-719<sup>9</sup> provides that the agreement may limit or alter the measure of damages recoverable under this article by limiting the buyer's remedies to repair and replacement of nonconforming goods or parts. W.Va. Code §46-2-719(1)(a). However, such a remedy is optional unless it is expressly agreed to be exclusive, in which case it is the sole remedy. W.Va. Code §46-2-719(1)(b).
8. Consequential damages are also subject to limitation or exclusion by the parties to a commercial transaction as long as that limitation or exclusion is not unconscionable. W.Va. Code §46-2-719(3). In other words, subsection 3 recognizes the validity of clauses limiting or excluding consequential damages yet makes it clear that they may not operate in an unconscionable manner. See *Hill v. Joseph T. Ryerson & Son, Inc.*, 165 W. Va. 22, 39, 268 S.E.2d 296, 307 (1980)(holding, in part, that where purchase order contained exculpatory language on reverse side and where there was no evidence of any bona fide bargaining over

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<sup>8</sup> W.Va. Code §46-2-316 is entitled “Exclusion or modification of warranties.”

<sup>9</sup> This Code section is entitled “Contractual modification or limitation of remedy.”

the terms and conditions of the sale, the exculpatory language was not an essential part of the sale, and, therefore, not unconscionable).

9. To be unconscionable, the clauses must be both procedural and substantive unconscionable. Procedural unconscionability is concerned with the bargaining process and the formation of the contract, and includes an inquiry into the sophistication of the parties and the complexity of the agreement. *Brown v. Genesis Healthcare Corp.*, 229 W.Va. 382, 729 S.E.2d 217 (2012). Substantive unconscionability involves an inquiry into the fairness of the agreement itself. *Id.* at Syl. Pt. 12. In performing an analysis of substantive unconscionability, a court should consider “the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns. *Id.*
10. Prior to the pretrial conference on October 7, 2013, Plaintiff sought to recover its attorney’s fees and costs via application of the W.Va. Code §46A-6A-1, *et. seq.*, which is more commonly known as the “Lemon Law.” The Lemon Law affords protection for consumers of new vehicles being used “primarily for personal, family or household purposes.” W.Va. Code §46A-6A-2(1). The Code specifically defines a “consumer” as “the *purchaser*, other than for purposes of resale, of a new motor vehicle purchased in this state, used primarily for personal, family or household purposes, a person to whom the new motor vehicle is transferred for the same purposes during the duration of the expressed warranty applicable to the motor vehicle and any other person entitled by the terms of the warranty to enforce the obligations of the warranty.” W.Va. Code §46A-6A-2(1)(emphasis added); *McLaughlin v. Chrysler Corp.*, 262 F. Supp. 2d 671, 680 (N.D.W. Va. 2002) *aff’d*, 47 F. App’x 659 (4th Cir. 2002) (concluding that “consumers” are limited to purchasers of new motor vehicles, which are purchased in this State, and used primarily for personal, family or household purposes).

In such a case the consumer may be awarded “reasonable attorney’s fees.” W.Va. Code §46A-6A-4(4).

V. Conclusions of Law

1. The warranty exclusions for implied warranties and consequential or incidental damages were conspicuously set forth in writing in the standard Mack warranty and in the Worldwide sales documents governing the four subject vehicles. Thus, the requirements of W.Va. Code §46-2-316(2) were fulfilled. As a result, Appalachian’s ability to pursue claims for breaches of implied warranty and its ability to recover consequential or incidental damages was disclaimed at the time Appalachian purchased the vehicles;
2. The defendants’ obligation pursuant to Mack’s express warranty was limited to repair or replacement of any vehicle components that Defendant Mack found to be defective. Appalachian’s President Kenny Compton gave sworn testimony that the Defendants had never failed to perform warranty service upon the subject vehicles. Accordingly, Appalachian’s claim for breach of express warranty is without merit;
3. Plaintiff’s argument in support of its claim of unconscionability is that because there was no discussion of the limitation of remedies at the time of the sale, and because Mr. Compton did not read the documents he signed, the terms of the sale were per se unconscionable. This argument fails. First, Mr. Compton has extensive business background and years of experience hauling coal. Likewise, Plaintiff is a sophisticated purchaser engaged for many years in the business of hauling coal, for which the subject vehicles were purchased. Second, the Warranty was a standard contract terms in the purchase of Mack vehicles. All Warranty language and exclusionary/limitation language was conspicuously placed on the documents, and Plaintiff can proffer no evidence of surprise about its terms; The only element of surprise

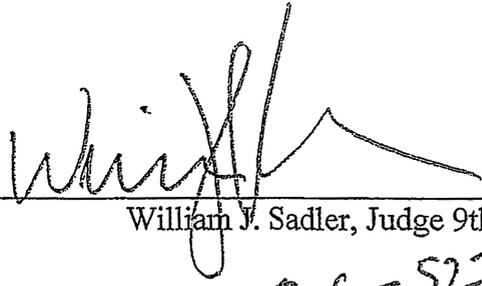
in the inclusion of the challenged clause was created by Appalachian's President failing to read the documents he signed. An experienced businessman's failure to read a contract is not the type of surprise that would justify a finding that a valid warranty and limitation of remedy was unconscionable. Third, the plaintiff offers no evidence that Mr. Compton was unable to read the sales agreement or understand the documents he signed. And lastly, the plaintiff has not presented any evidence indicating that the limitations at issue were commercially unreasonable with respect to the sale of heavy diesel equipment used for hauling. Thus, the Court concludes as a matter of law that the warranty and the limitations of remedy were not unconscionable.

4. Finally, even though Appalachian conceded at the pretrial hearing that it could not recover its attorney's fees under W.Va. Code §46A-6A-1 *et seq*, the Court will still rule on the issue. The Court finds that the term "consumers" does not include purchasers who buy vehicles that will be used primarily for business purposes. W.Va. Code § 46A-6A-2(1). *McLaughlin*, 262 F.Supp.2d 671, 681. Hence, the provisions of Chapter 46A, Article 6A do not apply to the sale of the subject vehicles and Plaintiff's claims for attorney's fees and costs based thereon fail.

## VI. Ruling

1. Based upon all the foregoing, the Court hereby **GRANTS** the Defendants' Motion for Summary Judgment.
2. The plaintiff's complaint is dismissed with prejudice.
3. The circuit clerk shall provide a copy of this Order to counsel of record and remove this matter from the docket.

ENTERED the 12 day of November 2013.



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William J. Sadler, Judge 9th Circuit

08-C-527