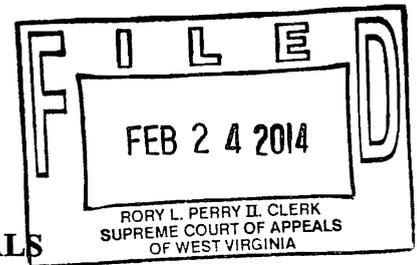


NO. 13-1247

**IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA**



CHARLESTON, WEST VIRGINIA

APPALACHIAN LEASING, INC.
A West Virginia corporation, Plaintiff Below,
Petitioner

v.

No. 13-1247

MACK TRUCKS, INC., a foreign corporation,
And WORLDWIDE EQUIPMENT, INC., a
Foreign corporation, Defendants Below,
Respondents

(CIRCUIT COURT OF MERCER COUNTY)
(CASE NO. 08-C-527)

PETITIONER'S BRIEF

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ASSIGNMENT OF ERROR

Did the Circuit Court of Mercer County, West Virginia, err in granting Defendants' Motion for Summary Judgment?

STATEMENT OF THE CASE

Procedural History Of The Case

Petitioner/Plaintiff Appalachian Leasing, Inc. ("Appalachian"), filed its Complaint against Respondents/Defendants Mack Truck, Inc. ("Mack"), and Worldwide Equipment, Inc. ("Worldwide"), in 2008. (Joint Appendix ["JA"] 423.) The Complaint seeks damages and revocation of acceptance arising from the sale of four new but nonconforming Mack 2008 off-road coal trucks, Model GU713, which vehicles were manufactured by Mack and purchased by Appalachian from Worldwide. (JA 423-29.) Defendants warranted that the off-road coal trucks were free of any defects. (JA 71.) Yet none of the four new Mack vehicles purchased by Appalachian was ever functional. (JA 237-38, 295.)

Defendants Mack and Worldwide filed a Motion for Summary Judgment on September 5, 2013. (JA 19.) Appalachian filed a Response in Opposition to the Motion for Summary Judgment on October 3, 2013. (JA 109.) A hearing was held on Defendants' Motion for Summary Judgment before the Mercer County Circuit Court on October 7, 2013. (JA 170-208.) On November 12, 2013, the trial court entered its Order Granting Defendants' Motion for Summary Judgment. (JA 1-11.)

Petitioner's Notice of Appeal was duly filed on December 4, 2013.

Statement Of Facts

Appalachian was formed in 2005 and is a small West Virginia coal-hauling company that works with coal-producing companies in West Virginia to haul their coal. (Dep. of Kenny Compton ["KC Dep."] 1:14-23; JA 230.) The president of Appalachian, Lynn Compton, handles the financial matters for the company but does not work directly with the companies Appalachian hauls coal for. (Dep. of Lynn Compton ["LC Dep."] 22:11-20; JA 213.) Mrs. Compton left school after the ninth grade and never received a GED. (LC Dep. 9:10-12; JA 211.) Kenny Compton is the general manager of Appalachian. Mr. Compton also never graduated from high school, but he did earn a GED degree after he left high school to join the workforce in the coal industry. (KC Dep. 10:5; JA 230.) Mr. Compton has worked only in the coal industry. (KC Dep. 10:5; JA 230.)

Mr. Compton entered into a sales agreement with Worldwide, which is an authorized dealer of Mack trucks, to purchase four Model GU713-series off-road coal transport trucks manufactured by Mack. (KC Dep. 30-32; JA 235.) Three of the trucks cost Appalachian \$165,000 each, and it bought one truck for \$175,000. (JA 425.) In addition, Appalachian incurred numerous other costs related to the purchase of the four vehicles, including licenses and registration fees. (JA 425.)

Defendant Mack expressly warranted that the Mack coal trucks were sold "free from defect in material and workmanship under normal use and service." (JA 71.) The Mack express warranty further states that "its obligation under this warranty [is] limited to repairing or replacing . . . at its option . . . any part or parts of the Vehicle found to the Manufacturer's satisfaction to be defective." (JA 71.) Mack's warranty also disclaims all

other express warranty and disclaims all implied warranty and any liability for consequential or incidental damages. (JA 71.)

Defendant Worldwide's Truck-Equipment Sales Agreement states that it

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. . . . SELLER [WORLDWIDE] SPECIFICALLY DISCLAIMS ANY IMPLIED WARRANTY OF MERCHANT ABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND ANY LIABILITY FOR CONSEQUENTIAL DAMAGES OR ANY BREACH OF WARRANTY.

(JA 49-52.)

At the time Appalachian purchased the trucks, neither Defendant spoke about the warranties nor gave any explanation to Kenny Compton about the scope of the warranties. (KC Dep. 46:6-9; Dep. of Thomas Franklin Brown ["Brown Dep."] 42-43; Dep. of Randy Polk ["Polk Dep."] 48; JA 239, 240, 295, 374-75.) Immediately after the purchase of the Mack coal trucks, Appalachian experienced a multitude of problems with the trucks, which made the trucks substantially worthless and unusable in Appalachian's trade. (LC Dep. 26-27; KC Dep. 38; JA 216, 237.) Appalachian notified both Worldwide and Mack about the numerous express warranty violations with the trucks. (LC Dep. 26-27; KC Dep. 38; JA 216, 237.) Mack refused to replace the coal trucks, opting only to "repair" them through its dealer, Worldwide. (Brown Dep. 17:6-7; JA 349.) Worldwide representatives were sent to Appalachian in an attempt to repair the trucks, but the repairs attempts were unsuccessful and meaningless because the trucks were unrepairable. (JA 216, 237.)

Neither Worldwide nor Mack could conform the trucks to their express warranties, and neither party replaced the trucks with new vehicles. In fact, both Mack's representative

and Worldwide's representative admitted that while numerous repairs were made on the Appalachian trucks, the repairs were not successful. (Polk Dep. 40; Brown Dep. 19, 27-35; JA 295, 349, 359-66.) Mr. Polk stated that while they tried to do the best they could, "there were a lot of problems with these trucks . . . multiple problems." (JA 295.) Mr. Brown testified that while Mack's warranty philosophy is to repair customer problems "correctly the first time," where a truck comes into repair 15 times for an engine problem, the trucks are not functioning as promised. (Brown Dep. 19, 27-34, 38; JA 351, 359-66, 370.)

Appalachian suffered numerous injuries and damages as a result of the nonconforming and useless Mack off-road coal trucks it purchased from Worldwide, including the purchase price of the useless trucks, loss of business income, loss of use, and annoyance and inconvenience proximately caused by the nonconforming goods. (JA 215, 232, 426-27.)

SUMMARY OF ARGUMENT

The trial court erred in granting Defendants' Motion for Summary Judgment because genuine issues of material fact exist as to Defendants' breach of the manufacturer's express warranties and as to the enforcement and unconscionability of the implied warranty disclaimers and the disclaimers of consequential damages. Judgment in favor of Defendants is not proper as a matter of law, because the warranty disclaimers and limitations failed as to their essential purpose and Appalachian was precluded from any remedy for the Defendants' breaches and wrongdoings.

STATEMENT REGARDING ORAL ARGUMENT

Petitioners request an oral argument pursuant to West Virginia Rule of Appellate Procedure 19 because the issues involve a substantial assignment of error in a settled area of law, but which area of law has a significant impact and interest in the commercial sector of West Virginia. In addition, the lower court's erroneous decision is against the great weight of the evidence and is likely to lead to confusion about the application of the Uniform Commercial Code ("U.C.C.") Sales provisions regarding warranties and the limitations and disclaimers of warranties.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE DEFENDANTS BREACHED THEIR EXPRESS WARRANTIES THAT THE COAL TRUCKS WERE FREE FROM DEFECT.

A. The Manufacturer's Limited Express Warranty Is Unconscionable And Unenforceable Because It Fails Its Essential Purpose.

The Circuit Court of Mercer County, West Virginia, erred in granting Mack and Worldwide's Motion for Summary Judgment and in dismissing Appalachian's Complaint for damages both as a matter of West Virginia warranty law, which the court failed to apply properly, and because of the significant and numerous material issues of fact in the record.

Each of the four off-road coal trucks purchased by Appalachian was sold with an express warranty by Mack, the manufacturer, that each vehicle was "free from defects in material or workmanship under normal use and service." (JA 71.) The seller, Worldwide, adopted Mack's express warranty. (JA 49-51.) Yet it is uncontested that none of the four vehicles sold with this express warranty ever functioned in any way. (JA 216, 237.) None of the Mack trucks was free from defect, and even after numerous and substantial repairs were attempted on each truck, each was considered to be completely worthless. (JA 216, 237.) Defendants admit that the repairs were not successful and that the trucks could not be used as promised. (JA 295, 370.) For these reasons, Appalachian seeks damages and revocation of acceptance for Defendants' breach of express warranty.

While Defendants concede that the Mack coal-hauling trucks were never free from defect as they promised, their sole defense is that the manufacturer's express warranty was

limited and that they complied with the limited warranty. (JA 293-95, 349.) Yet the facts in the record plainly show that the repair attempts failed, and the trial court failed to review the record before it when it granted summary judgment in favor of Defendants. Indeed, it is uncontested that all of the repair attempts failed of their basic purpose, which was to bring the trucks up to the condition they were promised to be in at the time of purchase. (JA 293-95, 349.) The vehicles were simply incapable of being repaired. The trucks were never remedied and never conformed to their promised condition. (JA 216, 237, 295.)

Under West Virginia Code § 46-2-719(2), an express warranty limitation to repair or replacement, like the manufacturer's warranty in the instant case, is unenforceable and unconscionable if the limitation fails of its essential purpose under the factual circumstances. *JPS Elastomerics, Corp. v. Indus. Tool, Inc.*, 65 F. Supp. 2d 376 (W.D. Va. 1998). This is because under any sales contract, there must exist at least "minimum adequate remedies available." *See* W. Va. Code § 46-2-719 cmt. 1. The trial court in the present case erred in failing to address the fact that under the factual circumstances of the case, Defendants deprived Appalachian of an adequate remedy for the four unusable trucks it purchased.

To determine whether a limited warranty has failed of its essential purpose, the evidence must be viewed in a light most favorable to the plaintiff. *JPS Elastomerics Corp.*, 65 F. Supp. 2d at 380 (decided under California's version of U.C.C. art. 2). "[A] limited remedy of repair or replacement can fail of its essential purpose where the seller's repair or replacement is unsuccessful." *Figgie Int'l, Inc. v. Destileria Serrales, Inc.*, 190 F.3d 252, 257 (4th Cir. 1999); *see also Pierce v. Catalina Yachts, Inc.*, 2 P.3d 618 (Alaska 2000) (the

limited remedy of repair or replacement fails of its essential purpose when the seller is either unwilling or unable to conform the goods to the parties' agreement).

In *Given v. Mack Truck, Inc.*, 569 S.W.2d 243 (Mo. Ct. App. 1978), a case factually similar to the present case, plaintiff purchased a 1972 Mack truck from a dealer. The sales agreement contained a limited express warranty identical to the limited warranty in the present case. Under both, the manufacturer limited its express warranty to repairs or replacement at the sole option of the manufacturer. As in the present case, the Mack truck at issue was plagued with innumerable problems, including a faulty transmission, loss of engine power, faulty clutch, two wheels that fell off, leaks in the engine, and a broken defroster and heating system. The plaintiff reported at least 30 problems in two months, and the truck was in the repair shop for 107 days, but the numerous problems with the truck persisted and could not be repaired.

The court in *Given* held that under U.C.C. § 2-719, because the truck's nonconformities were never resolved, notwithstanding a good-faith effort by the manufacturer to repair the truck, the limited express warranty failed of its essential purpose under § 2-719(2). Mack was not able to demonstrate that the defects were permanently remedied as promised by the limited warranty in order for the warranty to be enforceable.

The *Figgie International* court stated:

Section 36-2-719(1)(a) specifically contemplates that parties to an agreement may, as they did in this case, limit available remedies in the event of a breach to "return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts." Section 36-2-719(2), however, provides that the general remedies of the UCC will apply, notwithstanding an agreed-upon exclusive remedy, if the "circumstances cause [the remedy] . . . to fail of its essential purpose." Under this provision, "where an apparently fair

and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of [the Code].'" *Bishop Logging Co. v. John Deere Indus. Equip. Co.*, 317 S.C. 520, 455 S.E.2d 183, 190 (S.C.Ct.App.1995) (quoting S.C.Code Ann. § 36-2-719, Official Comment 1).

190 F.3d at 257.

In the present case, the facts plainly demonstrate that Appalachian was deprived of a substantial, if not the entire, value of its bargain with Defendants. Both Lynn Compton, the president of Appalachian, and Kenny Compton, its general manager, testified about the extensive operational problems they incurred with the Mack off-road coal trucks. Lynn Compton testified that the trucks exhibited problems immediately after they were purchased and that the trucks were sent to Worldlife for repair more than 10 times. (LC Dep. 26:1-11, 27:1-11; JA 216.) Kenny Compton testified that while Defendants never refused to try to repair the trucks, "they could never make them run." (KC Dep. 39:20-23; JA 237.) When asked what "caused" the trucks not to run, Kenny Compton testified:

Q. Was there any specific component or process that you felt was primarily responsible for it?

A. I think the name on the front of it, to be honest with you. Really, its just . . . it's a number of things. The . . . we couldn't keep the hoods on them. The hoods fell off of them. The cabs fell apart. The regeneration on the trucks, you—you couldn't get them to regenerate. We had, we had transmission issues, clutch issues, rear end issues.

(KC Dep. 39:10-19; JA 237.) In addition, Kenny Compton testified that one of the trucks went into the repair shop because its motor blew up. (KC Dep. 38:20-24; JA 237.) Another time, Mack loaned a truck to Appalachian to use while one of the defective trucks was being repaired, but Mack took the trader truck away and never repaired the defective trucks. Kenny Compton testified:

Q. And they made a deal with me that they were going to fix those trucks for me. They were going to make it right. And we were going to bring those trucks in to them one at a time, and they were going to go through them and rebuild them. They were going to give me a truck to use while they done that.

They gave me a truck to use. I delivered one of my trucks over there for them to fix it. I kept that truck that they had loaned me for about two weeks. They snuck in in the middle of the night and stole that truck that they had loaned me and drove it off. And I've had no dealings with Mack since they done that.

(KC Dep. 40:9-21; JA 237.)

Ultimately, Worldwide realized that despite its best repair efforts, the Mack trucks purchased by Appalachian could not be repaired. Specifically, Mr. Polk stated: "I know there were a lot of problems with these trucks and we did the very best we could with what we had to get them done." When asked whether, if a problem is not fixed after repeated attempts, it indicates a manufacturing defect, Mr. Polk responded that yes, it could mean that. (Polk Dep. 40:8-24; JA 295.) Yet both Mack and Worldwide refused to replace the trucks.

As the authorities cited above state, contrary to the trial court's Order, it is not enough simply to repair a good if the repairs never bring the good up to its promised standard. Because Defendants were never able to bring the trucks up to their promised standard, Defendants breached the express limited warranty, and Appalachian never received the value of the original bargain. Defendants cannot shield themselves from liability behind an express warranty disclaimer that plainly failed of its essential purpose. Under West Virginia law, the trial court erred in granting summary judgment in favor of Defendants on the issue of the breach of the express warranties. The case should be remanded to the trial court to determine Defendants' liability for breach of its express warranties.

B. Genuine Issues Of Material Fact Exist On The Enforcement Of Mack's Express Warranty.

It is axiomatic that issues regarding the enforcement of express and implied warranties, and the disclaimers and limitations to the warranties, are questions of fact that should be decided in most cases by the trier of facts. *Mountaineer Contractors, Inc. v. Mtn. State Mack, Inc.*, 165 W. Va. 292, 268 S.E.2d 886 (1980). In that case, the court concluded that numerous issues of fact existed with respect to the seller's contention that the buyer had waived all implied warranties of merchantability. In *Anderson v. Chrysler Corp.*, 184 W. Va. 641, 403 S.E.2d 189 (1991), the issues involving the breach of warranties were all determined to be issues of fact, which may be proven by either direct or circumstantial evidence.

In the present case, Defendants contend that Appalachian cannot demonstrate that Defendants failed to honor the terms of their express warranties that cover the vehicles at the time of the sale. Again, their defense is based solely on Kenny Compton's testimony that Defendants never refused to carry out repairs. (*See* Mem. Supp. Mot. Summ. J. 6; JA 27.) In its Order Granting Defendants' Motion for Summary Judgment, the court applies West Virginia Code § 46-2-719(1), which allows express warranties to be limited. Yet the trial court erroneously refused to consider the substantial evidence presented by Appalachian that the repairs were unsuccessful and meaningless. (JA 1-11.) By failing to consider and acknowledge the genuine issues of material fact in dispute on this issue, the court also failed

to consider the important fact that under § 46-2-719(2), the express warranty limitations failed of their essential purpose.

The trial court also erred in failing to address the unconscionability of the express warranty limitations under U.C.C. § 2-719. The court concluded that Appalachian's claim for breach of express warranty was without merit solely based on the fact that Defendants performed truck repairs. (JA 9.) The trial court blatantly ignored the U.C.C. law that holds that repair work is not enough if the goods are never brought to the standard promised, as well as the uncontested facts that Defendants' repair efforts were unsuccessful.

In determining a motion for summary judgment, the court is required to review all of the evidence in a light most favorable to the nonmoving party, Appalachian in the present case. *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994); *Collard v. Smith News, Inc.*, 915 F. Supp. 805 (S.D. W. Va. 1996). Importantly, "[a] motion for summary judgment should be granted *only* when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y.*, 148 W. Va. 160, 133 S.E.2d 770 (1963). In the present case, the trial court failed to apply these basic standards for determining summary judgment.

For each of these reasons, the trial court erred in granting summary judgment in favor of Defendants on the issue of Defendants' breach of the express warranty that the trucks were free from defect in material or workmanship under normal use and service. In addition to numerous issues of material fact in the record, the trial court applied the wrong standard to Appalachian's breach-of-express-warranty claim. As explained in detail above, it is not

enough to show that Defendants opted to repair the trucks. Under the U.C.C., because the repairs were never able to bring the vehicles up the promised condition, Appalachian was deprived of the substantial value of the bargain with Defendants, and the general remedy provision of the U.C.C. applies.

II. THE CIRCUIT COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THE IMPLIED WARRANTY DISCLAIMERS ARE UNENFORCEABLE AS A MATTER OF LAW.

A. The Trial Court Erred In Not Concluding That The Implied Warranty Disclaimers Left The Buyers Without A Remedy And Were Unconscionable.

The trial court also erroneously enforced Defendants' unconscionable implied warranty disclaimers. In this case, Worldwide, the seller, disclaimed all warranties, express or implied, except as to the manufacturer's warranties on new vehicles. (JA 49-52.) Mack expressly warranted that the trucks were free from defects in material or workmanship but disclaimed the implied warranty of merchantability and fitness for a particular purpose. (JA 71.) Also, both parties disclaimed consequential and incidental damages. (JA 71.) Again, under the factual circumstances of this case, both the limitations to the express warranties and the complete disclaimer of the implied warranties left Appalachian with no remedy to address well over \$670,000 worth of broken and worthless equipment.

Under West Virginia Code § 46-2-316, a seller or manufacturer may limit or exclude implied warranties, but the limits must be reasonable and conspicuous, and the buyer must be clearly notified of the disclaimers. Further, under § 46-2-302, warranty disclaimers may be considered unconscionable because of the specific circumstances of the sale. *Troy Mining Corp. v. Itman Coal Co.*, 176 W. Va. 599, 346 S.E.2d 749 (1986). To determine whether a sales agreement is unconscionable, the court is required to examine "[t]he particular facts involved . . . since certain conduct, contracts or contractual provisions may be unconscionable in some situations but not in others." *Orlando v. Fin. Once of W. Va., Inc.*,

179 W. Va 447, 450, 369 S.E.2d 882, 885 (1988) (quoting Unif. Consumer Credit Code § 5.108 cmt. 3, 7A U.L.A. 170 (1974)). Because the determination of unconscionability is so fact-specific, summary judgment on the application of ' 46-2-302 is usually denied. *Blue Circle Atl., Inc. v. Falcon Materials, Inc.*, 760 F. Supp. 516 (D. Md. 1991).

Warranty disclaimers are unconscionable when the disclaimer leaves the buyer with a defective, unusable product and no meaningful remedy or actual resource against the seller or lessor. *Irving Leasing Corp. v. M&H Tire Co.*, 16 Ohio App. 3d 191, 475 N.E.2d 127 (1984). Under these circumstances, even if the warranty disclaimer is valid on its face under U.C.C. §§ 2-316 and 2-719, it may still be considered unconscionable in practice as a matter of law. *Hahn v. Ford Motor Co.*, 434 N.E.2d 943 (Ind. Ct. App. 1982). If a valid disclaimer is too oppressive, it will be considered unconscionable under U.C.C. § 2-302. *FMC Fin. Corp. v. Murphee*, 632 F.2d 413 (5th Cir. 1980).

The record in the present case demonstrates that the warranties as presented to Appalachian left the company without a remedy or any meaningful recourse against either Worldwide, the seller, or Mack Truck, the manufacturer. By disclaiming all implied warranties of merchantability and fitness for a particular purpose, and then limiting the express warranties to repairs that proved to be meaningless, Appalachian was left with hundreds of thousands of dollars of defective equipment with no recourse against either Defendant. It is precisely this scenario that West Virginia Code § 46-2-302 was intended to address. Section 46-2-302 states:

- (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract

without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

W. Va. Code § 46-2-302.

This section was enacted specifically to make it possible for courts to guard against contracts or clauses that they found to be unconscionable. Subsection (2) of § 46-2-302 makes it proper and appropriate for a court to hear evidence on the question of unconscionability. "The basic test is whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." U.C.C. § 2-302 off. cmt. 1.

Yet incredibly, in the present case, the trial court fails to address the fact that Appalachian was left with defective equipment that never met the manufacturer's express warranties and with no remedy against either the seller or the manufacturer. Instead, the court addressed only whether the warranties presented a surprise to Appalachian. (JA 9.) The court determined only that Kenny Compton's years hauling coal, alone, made him a sophisticated purchaser and that the warranty information was conspicuously placed on the documents. (JA 9.)

In addition to not considering the fact that Appalachian was left with no remedies, the court failed to consider the uncontested fact that Defendants themselves did not understand

the warranty disclaimers and never informed Appalachian about the consequences of the disclaimers. Mr. Brown testified that the warranty information is simply placed in the sales agreement but that Mack does nothing else to either understand the warranty information or instruct purchasers about the warranties. (JA 374-75.) Likewise, Mr. Polk testified that Worldwide has no role in providing information about the warranties it offers through the manufacturer. (JA 301.) For these reasons alone, the trial court erred in granting Defendants' Motion for Summary Judgment.

B. The Trial Court Erred In Ignoring Material Facts About The Unequal Bargaining Powers Of The Parties, The Unreasonableness Of The Warranty Disclaimers, And The Defendants' Failure to Advise The Seller About The Disclaimers.

The trial court ignored substantial evidence in the record of other procedural unconscionability, including the unequal bargaining power of the parties. In its Order granting Defendants' Motion for Summary Judgment, the court dismissed Appalachian's argument that the wholesale implied warranty disclaimer was unconscionable because, in part, the bargaining powers of the parties was so unequal. (JA 9.)

In fact, the record clearly shows that the president of Appalachian is Lynn Compton, not her husband, Kenny Compton, as the trial court states. (JA 213.) Lynn Compton was not schooled past the ninth grade and has no background in negotiating contracts. (JA 213.) Further, Kenny Compton, the company's general manager, also left high school and never graduated. (JA 230.) His only work experience is hauling coal. (JA 230.) In comparison, it is public knowledge that Defendant Mack is a huge international manufacturing corporation

with business sales in at least 45 countries. Likewise, Defendant Worldwide, a large certified Mack dealer, operates in at least six different states. In light of these basic factual comparisons, the trial court erred in concluding that the parties had equal bargaining powers. (JA 9.) No interpretation of the evidence in the present case can support the trial court's conclusion on this point.

Contrary to the trial court's faulty legal analysis, the mere fact that a seller's warranty disclaimer arises in a commercial context does not, by itself, preclude concluding that the warranty disclaimers and limitations are unconscionable. Further, contrary to the trial court's order, it is not uncommon in a commercial setting in which the U.C.C. warranty provisions are applied uniformly across the country that, as in the present case, where the seller is a large corporation and the buyer is a small company with no meaningful bargaining power, the seller's warranty disclaimers will be considered unconscionable. *See* 3A Lary Lawrence, *Lawrence's Anderson on the Uniform Commercial Code* §§ 2-316:83, -302:137 (3d ed. 2009 & Westlaw database updated 2013); *see also Sarfati v. M.A. Hittner & Sons*, 35 A.D.2d 1004, 318 N.Y.S.2d 352 (1970) (holding that where a commercial entity is tantamount to an ordinary consumer as against a large corporation, an unreasonable warranty disclaimer may be considered unconscionable); *Constr. Ass'n v. Fargo Water Equip. Co.*, 446 N.W.2d 237 (N.D. 1989) (holding that there can be a disparity of bargaining power between parties in traditional commercial transactions and that experienced but legally unsophisticated businessmen may be surprised by unconscionable contract terms).

In determining Defendants' Motion for Summary Judgment and whether the warranty disclaimers were unconscionable, the trial court also failed to consider the uncontested facts

that no representatives from either Worldwide or Mack made any effort to explain the extremely limited express warranty in the contract and the total disclaimer of implied warranties and most damages. (JA 295, 374-75.) On any motion for summary judgment, it is axiomatic that all matters submitted to the court by both parties should be considered. *Aetna Cas & Sur. Co.*, 148 W. Va. 160, 133 S.E.2d 770. In this case, while Mack publicizes that the consumer should understand its warranties, the representatives from both Mack and Worldwide did not understand the scope of the warranties themselves. In *Construction Ass'n*, the court held that where the manufacturer was an enormous, highly diversified international corporation but failed to take the time to apprise the small business buyer at the time of the execution of the contract that its remedies were being limited or excluded, except for repair which could prove unsuccessful, the disclaimer was unconscionable.

Granting summary judgment in favor of Defendants should also be reversed and the matter remanded because, viewing all underlying facts and inferences in favor of Appalachian, genuine issues concerning material facts are in dispute regarding both procedural and substantive unconscionability and the rights of Appalachian under the U.C.C. Syl Pt. 2, *Smith v. Apex Pipeline Servs.*, 231 W. Va 620, 741 S.E.2d 845 (2013). Viewing the totality of the evidence presented to the trial court, sufficient evidence exists for a rational trier of fact to find for Appalachian, the nonmoving party. Syl. Pt. 3, *Painter*, 192 W. Va. 189, 451 S.E.2d 755 ("The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.")

CONCLUSION

For each of the reasons stated herein, Plaintiff Appalachian Leasing, Inc., respectfully requests this Court to enter an order reversing the lower court on the ground that summary judgment is not proper due to the existence of genuine issues of material fact, remanding the case back to the lower court for a full and complete trial on the merits, and granting whatever further relief this Court deems proper at this time.

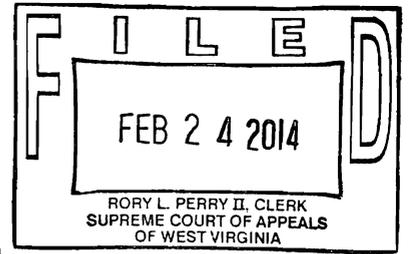
Dated: February 10, 2014

Respectfully submitted,

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NO. 13-1247

IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

APPALACHIAN LEASING, INC.
A West Virginia corporation, Plaintiff Below,
Petitioner

v.

No. 13-1247

MACK TRUCKS, INC., a foreign corporation,
And WORLDWIDE EQUIPMENT, INC., a
Foreign corporation, Defendants Below,
Respondents

CERTIFICATE OF SERVICE

Plaintiff Appalachian Leasing, Inc., certifies that on this 20th day of February 2014, it caused a true and correct copy of the foregoing Petitioner's Brief to be mailed, first-class postage prepaid, to Harry F. Bell, Esquire, and to Jonathan Price, Esquire, The Bell Law Firm, PLLC, Post Office Box 1723, Charleston, WV 25326.


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