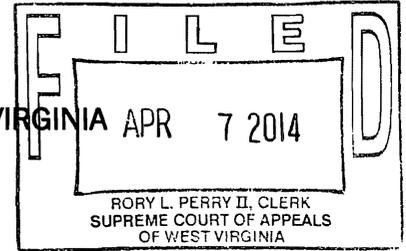


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-1247



APPALACHIAN LEASING, INC.,  
Plaintiff Below, Petitioner,

v.

MACK TRUCKS, INC., and  
WORLDWIDE EQUIPMENT, INC.,  
Defendants Below, Respondents.

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RESPONDENTS' BRIEF

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CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA  
CIVIL ACTION NO. 08-C-527

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## I. STATEMENT OF THE CASE

### A. Procedural History

This matter comes before the Court on appeal from the Circuit Court of Mercer County, West Virginia, following the Honorable William Sadler's award of summary judgment to the Respondents, Mack Trucks, Inc. ("Mack") and Worldwide Equipment, Inc. ("Worldwide"). The Petitioner, Appalachian Leasing, Inc. brought suit in 2008 against the Respondents, claiming breach of express and implied warranties and seeking damages including, *inter alia*, revocation of acceptance, refund of purchase price and associated expenses, past and future lost profits, incidental and consequential damages, damages for cost of repair, and damages for loss of use, annoyance and inconvenience. See Complaint, J.A. at pgs. 36-42. The vehicles in question were covered by a manufacturer's limited warranty, whereby necessary repairs were carried out by Respondent Worldwide Equipment, which in turn was compensated by Respondent Mack. During the time the subject vehicles were in service with the Petitioner,<sup>1</sup> warranty repairs were performed on them at various times, although Petitioner's representation that the subject vehicles were never functional at any time is untrue.

In September, 2013, following approximately five years of litigation, the Respondents filed their Motion for Summary Judgment in accordance with the Circuit Court's Scheduling Order. Oral argument on the Respondents' Motion was heard by the Circuit Court on October 7, 2013. See Hearing Transcript, J.A. at pgs. 170-208.

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<sup>1</sup> Three of the subject vehicles were destroyed in an arson fire. No one affiliated with the Petitioner was charged in connection with the incident fire (J.A. at 202-203). The fourth vehicle was resold by Respondent Worldwide Equipment after being made available for inspection in this civil action.

The Circuit Court gave Respondents an opportunity to file a post-hearing Supplemental Reply brief following Petitioner's untimely filing of its Response in Opposition to Respondents' Motion for Summary Judgment. lines 22-23 and pgs. 184, line 12 to pg. 185, line 8 (J.A. at pg. 172).

Following submission of the aforementioned Supplemental Reply, the Circuit Court made its ruling granting summary judgment to the Respondents. The parties were notified of the Court's ruling by letter on October 15, 2013, and the Circuit entered its Order Granting Defendants' Motion for Summary Judgment November 12, 2013. (J.A. at pgs. 1-11).

**B. Statement of Facts**

In late 2007 and early 2008, Kenny Compton, President<sup>2</sup> of Appalachian Leasing purchased four Mack GU-series vehicles from Respondent Worldwide Equipment. See Complaint, J.A. at pgs. 36-42; Deposition of Kenny Compton at page 18, lines 12-17 (J.A. at pg. 232). The vehicles, which bore Vehicle Identification Numbers 1M2AX04C88M002566, 1M2AX04CX8M002567, 1M2AX04C58M002573 and 1M2AX04C18M002585 were sold by Respondent Mack as incomplete units, and Respondent Worldwide outfitted the four as coal hauling trucks as directed by Mr. Compton. See Deposition of Michael Pendleton, page 33, lines 1-8 (J.A. at pg. 48). Mr. Compton testified that in addition to the four subject vehicles, he also had

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<sup>2</sup> Petitioner claims in its Brief that identification of Mr. Compton as President of Appalachian Leasing is erroneous and that he is the company's general manager while his wife serves as president. However, West Virginia Secretary of State business licensing information clearly identifies Kenny Compton as the company's president. See West Virginia Secretary of State Business Organization Detail, attached hereto as Exhibit A.

purchased from Heritage Equipment<sup>3</sup> and from another source he was unable to remember, trucks manufactured by other companies. Deposition of Kenny Compton, page 15, page 17, lines 1-13 (J.A. at pg. 231), page 31, lines 2-6 (J.A. at pg. 235).

Mr. Compton has decades of experience in the coal business, having worked in the coal industry for almost 40 years. See Deposition of Kenny Compton, page 10, line 15 to page 12, line 15 (J.A. at pg. 230). Mr. Compton, who testified in his deposition that he was the only representative of the Petitioner that had any involvement in the purchase of the subject vehicles, executed certain documents during the transactions. See Deposition of Kenny Compton, page 18, lines 12-17 (J.A. at pg. 232); Worldwide Equipment, Inc. Truck-Equipment Sales Agreements (J.A. at pgs. 49-52). The Sales Agreements contain the following language, set forth in all capital letters immediately above the line provided for the customer's signature:

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 HEREIN BY REFERENCE. SELLER SPECIFICALLY DISCLAIMS ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE AND ANY LIABILITY FOR CONSEQUENTIAL DAMAGES FOR ANY BREACH OF WARRANTY. ALL USED VEHICLES ARE SOLD "AS IS".

J.A. at pgs 49-52.<sup>4</sup>

Mr. Compton also placed his signature upon the delivery instruction forms for each of the subject vehicles, each of which noted that the manufacturer's warranty was applicable to the transaction. See Worldwide Equipment, Inc. Delivery Instructions, J.A. at 53-56. Additionally, the bills of sale for each of the four vehicles

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<sup>3</sup> Heritage Equipment is, upon information and belief, a dealer in heavy diesel trucks located in Beckley, W.Va.

<sup>4</sup> The four subject vehicles were new, and Respondents do not contend that the last sentence of the disclaimer, regarding used vehicles, is relevant to the Court's consideration of the Petitioner's appeal.

contained the following disclaimer, which was set forth inside a box on the form and set 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.

J.A. at pgs 61-64. Moreover, Mr. Compton signed receipts acknowledging delivery of the four subject vehicles, and again acknowledged that the subject vehicles were not sold subject to any implied warranties. J.A. at pgs 57-60.

Each of the subject vehicles was covered by an express warranty that was included with each when it left Mack's manufacturing facility. See Deposition of Thomas Brown, page 77, lines 1-14 (J.A. at pg. 409). Respondent Mack's Warranty warranted the subject vehicles "to be free from defects in material or workmanship under normal use and service." See Mack Pedigreed Protection Plan, J.A. at pgs. 67-75. However, under the terms of the Warranty, Respondent Mack's obligation is "limited to repairing or replacing, as hereinafter provided, at its option, at the 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..." J.A. at pg. 71.

Mr. Compton has testified that while he was not satisfied with the performance of the subject vehicles, Respondents never refused to make repairs to the subject vehicles during the applicable warranty periods. See Deposition of Kenny Compton, page 39, lines 17-22 (J.A. at pg. 237).

Respondent Mack's Warranty also contained explicit limitations on claims for breach of implied warranties, and for consequential/incidental damages. The Warranty states, 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.

J.A. at pg. 71 (emphasis in original).

Based upon the acceptance of the subject vehicles pursuant to the terms of the sales agreements and the Warranty, Petitioner, by and through its President, Mr. Compton voluntarily waived several categories of damages that might arguably be available. The Circuit Court of Mercer County, West Virginia rightly decided the issues set forth in the Motion for Summary Judgment, and the Respondents respectfully request that this Honorable Court affirm the Circuit Court's ruling.

## II. SUMMARY OF ARGUMENT

The Circuit Court of Mercer County correctly recognized that Petitioner's President, Kenny Compton, an individual with decades of experience in the coal industry, at the time of purchase that the subject vehicles were subject to an express warranty that specifically excluded any claims for breach of implied warranties, and that clearly excluded any liability on the part of the Respondents for incidental or consequential damages. Despite the Petitioner's repeated attempts to blur the distinction between commercial law and the laws of West Virginia protecting individual consumers, the Circuit Court rightly found that the manufacturer's warranty

was not unconscionable and that the Respondents met their contractual obligations.

### III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondents waive oral argument, as the relevant facts and legal arguments are adequately set forth in the parties' briefs and on the record, and oral argument will not significantly aid the Court's decisional process in this matter.

### IV. ARGUMENT

#### A. THE CIRCUIT COURT WAS CORRECT IN RECOGNIZING THAT RESPONDENTS DID NOT BREACH ANY APPLICABLE WARRANTY

As set forth *supra*, the manufacturer's limited warranty to which Petitioner agreed when it purchased the subject vehicles from Respondent Worldwide provided that the Respondents' obligations under the warranty were "*limited to repairing or replacing, as hereinafter provided, at its option, at the 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...*" J.A. at pg. 71 (emphasis added). As set forth in the Respondents' Motion for Summary Judgment, Mr. Compton admitted in his deposition that the Respondents never failed to honor the warranty. While Mr. Compton was clearly dissatisfied with the four subject vehicles, he was unable to point to any instance where the Respondents failed to repair or replace any parts that were found to be defective. J.A. at pg. 237.

W.Va. Code § 46-2-316 provides, and the Circuit Court correctly recognized, that parties to a transaction may exclude the implied warranty of merchantability and/or the implied warranty of fitness for a particular purpose. "[T]he 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). Interestingly, while the Petitioner attempted to argue in its Response in Opposition to the Respondents’ Motion for Summary Judgment that the warranty limitations at issue “are in fine print on a contract of adhesion and are not discussed or negotiated,” the Circuit Court recognized that the limitations were set forth on multiple documents generated during the transactions.

Petitioner has often repeated the argument that no one at either Mack or Worldwide ever explained the terms of the warranties to him. The Petitioner states in its brief that “limits must be reasonable and conspicuous, and the buyer must be clearly notified of the disclaimers.” Section 46-2-316 actually reads:

**§ 46-2-316. Exclusion or modification of warranties.**

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (section 2-202) [§ 46-2-202] negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of 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. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this article on liquidation or limitation of damages and on contractual modification of remedy (sections 2-718 and 2-719) [§§ 46-2-718 and 46-2-719].

Nowhere in Section 46-2-316 is it required that the buyer must be, in the Petitioner's words, "clearly notified." The requirement is that the exclusion must be made in writing, and that it must be conspicuous. The only other express requirement set forth in Section 46-2-316 is that with respect to excluding the implied warranty of merchantability, the word "merchantability" must be used. W.Va. Code § 46-2-316(2).

Moreover, Mr. Compton, and by extension, the Petitioner, cannot be excused for suggesting he failed to read the documents he signed. Although it strains credulity for the Petitioner to suggest that a businessman of Mr. Compton's experience would fail to read sales agreements and other documents in a transaction involving hundreds of thousands of dollars' worth of heavy diesel equipment, or to inquire about the warranty applicable to that equipment, if that was indeed the case, his actions were extremely ill-advised. "A person who fails to read a document to which he places his signature does so at his peril." Sedlock v. Moyle, 222 W.Va. 547, 551, 668 S.E.2d 176, 180 (2008) (quoting Reddy v. Community Health Found. of Man, 171 W.Va. 368, 373, 298 S.E.2d 906, 910 (1982)).

Petitioner cites Mountaineer Contractors, Inc. v. Mountain State Mack, Inc.,

165 W.Va. 292, 268 S.E.2d 886 (1979) for the principle that “[i]t 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.” Petitioner’s Brief at p. 11. Mountaineer Contractors contains no such syllabus point, and the case is distinguishable from the matter *sub judice* in that it involved the question of whether a buyer’s failure to examine goods at the time of delivery operated as a waiver of implied warranties rather than written disclaimers. Id. at 296, 889-90. In fact, the case specifically recognizes that W.Va. Code § 46-2-316 “anticipates that the parties, by agreement or by deed, may limit or exclude entirely the warranty of merchantability otherwise implied in a contract for the sale of goods.” Id. at 296, 889.

According to the express language of the manufacturer’s warranty, Respondents’ obligation with respect to providing vehicles that were free from defect in materials or workmanship was limited to repair or replacement of parts that Respondents found to be defective. Had Respondents failed to honor this obligation, Petitioner would have had recourse by bringing an action to enforce the warranty. However, as Mr. Compton agreed to these terms by executing the sales agreements for the subject vehicles, and further given that he testified under oath that the Respondents never failed to make repairs when the subject vehicles were presented for warranty service, the Respondents cannot be said to have breached the terms of the express warranty, as the Circuit Court correctly recognized.

**B. THE CIRCUIT COURT WAS CORRECT IN CONCLUDING THAT THE APPLICABLE WARRANTY WAS NOT UNCONSCIONABLE**

Petitioner also attacks the Circuit Court’s ruling that the manufacturer’s

express warranty, the waiver of implied warranties and the limitation on damages was not unconscionable. Again, the Circuit Court, in examining the facts in the light most favorable to the Petitioner, correctly determined that the agreement between the parties was neither procedurally nor substantively unconscionable.

**1. The Determination of Unconscionability is a Question of Law.**

While Petitioner suggests in its Summary of Argument that the Circuit Court erred in its ruling because, *inter alia*, issues of material fact exist as to the “unconscionability of the implied warranty disclaimers and the disclaimers of consequential damages,” West Virginia law recognizes that “[u]nconscionability is an equitable principle, and the determination of whether a contract or a provision therein is unconscionable *should be made by the court.*” Syl. Pt. 7, Brown v. Genesis Healthcare Corp., 229 W.Va. 382, 729 S.E.2d 217 (2012) (Brown II) *citing* Syl. Pt. 1, Troy Mining Corp. v. Itmann Coal Co., 176 W.Va. 599, 346 S.E.2d 749 (1986) (*emphasis added*). Accordingly, it was proper for the Circuit Court to rule on the issue of purported unconscionability.

**2. To Be Unconscionable, an Agreement Must Be Both Procedurally and Substantively Unconscionable.**

“The doctrine of unconscionability means that, because of an overall and gross imbalance, one-sidedness or lop-sidedness in a contract, a court may be justified in refusing to enforce the contract as written. The concept of unconscionability must be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case.” Brown II at Syl. Pt. 4, *citing* Brown v. Genesis Healthcare Corp., 228 W.Va. 646, 724 S.E.2d 250 (2011) (“Brown I”) at Syl. Pt. 12. “A contract term is unenforceable if it is both procedurally and

substantively unconscionable. However, both need not be present to the same degree. Courts should apply a 'sliding scale' in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa." Brown II at Syl. Pt. 9, citing Syl. Pt. 20, Brown I. In examining a contract, "[i]f a court, as a matter of law, finds a contract or any clause of a contract to be unconscionable, the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause to avoid any unconscionable result." Brown I at Syl. Pt. 16.

This Court has defined procedural unconscionability as being concerned with "inequities, improprieties, or unfairness in the bargaining process and formation of the contract." Brown II at Syl. Pt. 17, Brown I at Syl. Pt. 17. In elaborating on this area of inquiry, the Court has explained that:

Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract."

Brown II at Syl. Pt. 17, Brown I at Syl. Pt. 17. For purposes of analysis, procedural unconscionability is to be determined *at the time the contract is formed*. Credit Acceptance Corp. v. Front, 745 S.E.2d 556, 565 (2013), 2013 W.Va. LEXIS 725, 727-28 (June 19, 2013) (emphasis added) *citing* Brown I, *supra*.

**3. The Circuit Court Was Correct in Determining that the Warranty Was Not Procedurally Unconscionable.**

With respect to these criteria, the Circuit Court correctly recognized that Mr. Compton was a knowledgeable businessman with decades of experience in the coal industry, including the business of coal hauling. Indeed, Mr. Compton testified at his deposition that he has worked in the coal industry since 1976, that he had worked as a mine foreman and as a mine superintendent, that he had worked in the towing business, that he had operated a coal loading facility in Alabama where he “hailed all the coal into the barge facility,” and that he had run a unit train facility where he loaded coal and hauled coal into the facility. Deposition of Kenny Compton, page 10, line 15 to page 11, line 21 (J.A., pg. 230). Mr. Compton also testified that at one time in his capacity as a mine supervisor, he had approximately 600 employees. *Id.* at page 8, lines 17-18 (J.A., pg. 229). The Circuit Court’s determination that Mr. Compton has an extensive business background and that he was an experienced purchaser were well-founded.<sup>5</sup>

Moreover, it is evident from the record that the warranty provisions, disclaimers and limitations of which the Petitioner complains were neither hidden nor unduly complex. In making its ruling, the Circuit Court noted its Order that:

[A]ll 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 document 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

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<sup>5</sup> Mr. Compton testified at his deposition that he was “continually buying trucks” and that he was the only representative of Appalachian Leasing involved in the purchase of the four subject vehicles. Deposition of Kenny Compton, page 30, lines 14-21 (J.A. pg. 235), page 18, lines 9-16 (J.A. pg. 232).

was unconscionable.

Order Granting Defendants' Motion for Summary Judgment (J.A. at pgs. 9-10).

The Circuit Court also noted that the Petitioner failed to present in response to the Respondents' Motion for Summary Judgment any evidence "that Mr. Compton was unable to read the sales agreement or understand the documents he signed." *Id.* (J.A. at pg. 10).

Given the evidence presented by the Plaintiff, the Circuit Court's finding of no procedural unconscionability was well-founded and should be affirmed.

**4. The Circuit Court Was Correct in Finding that the Warranty Was Not Substantively Unconscionable.**

This Court explained in Brown I that:

"Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party. The factors to be weighed in assessing substantive unconscionability vary with the content of the agreement. Generally, courts 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."

Brown I, *supra*, at Syl. Pt. 19. This Court also has recognized that, according to the Uniform Commercial Code's drafters, that "[t]he basic test [for unconscionability] is whether, *in the 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." Troy Mining, *supra*, 176 W.Va. at 604, 346 S.E.2d at 753 (emphasis in original) (*citing* W.Va. Code § 46-2-302, comment 1). Further, this Court has acknowledged that:

A bargain is not unconscionable merely because the parties to it are

unequal in bargaining position, nor even because the inequality results in allocation of risks to the weaker party. But gross inadequacy in bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that *the transaction* involved elements of deception or compulsion or may show that the weaker party had no meaningful, no real alternative, or did not in fact assent or appear to assent to the *unfair terms*.

Troy Mining, *supra*, at 604, 753 (*citing* Restatement (Second) of Contracts § 234 comment d at 111 (Tent. Draft. No. 5, 1970) (emphasis added by Court), quoted with approval in John W. Lodge Distrib. Co. v. Texaco, Inc., 161 W.Va. 603, 608 n. 2. 245 S.E.2d 157, 160 n.2 (1978). Here, although the Petitioner claims that it was left without a remedy with respect to the four subject vehicles, it is actually complaining about the allocation or risk to which it agreed. This Court also has noted that courts have suggested that “[m]utuality of obligation is the locus around which substantive mutuality analysis revolves. In assessing substantive unconscionability, the paramount consideration is mutuality.” Brown I, *supra*, at 683, 287.

The Petitioner has failed to show any evidence of inequality of bargaining power, save for its conclusory “David versus Goliath” characterization itself as a small business run by unsophisticated officers with little in the way of education, of Respondent Mack as “a huge international manufacturing corporation with business sales in at least 45 countries” and Respondent Worldwide as “a large certified Mack dealer, operat[ing] in at least six different states.” As the Circuit Court noted, the Petitioner failed to present any evidence in its Response to Respondents’ Motion for Summary Judgment “indicating that the limitations at issue were commercially unreasonable with respect to the sale of heavy diesel equipment used for hauling.” Order Granting Defendants’ Motion for Summary Judgment, page 10 (J.A. at pg. 10). It is also notable that Mr. Compton testified that he had purchased other trucks from

other sources. Deposition of Kenny Compton, page 15, page 17, lines 1-13 (J.A. at pg. 231), page 31, lines 2-6 (J.A. at pg. 235). As the Plaintiff is precluded from introducing new arguments on appeal pursuant to Syl. Pt. 1 of Wang-Yu Lin v. Shin Yi Lin, 224 W.Va. 620, 687 S.E.2d 403 (2009), it is precluded from doing so now, and this Court should affirm the Circuit Court's ruling.

Petitioner also argues that the warranty was unconscionable because of its limitation of consequential damages in the event of a breach. This limitation, it argues, essentially left it without a remedy with respect to the subject vehicles. This is untrue. As stated previously, Respondent Mack's liability under the terms of the warranty was limited to repair and/or replacement of parts, and Mr. Compton acknowledged that the Respondents had met this obligation, although he was not satisfied with the overall performance of the subject vehicles.

As this Court has recognized with respect to unconscionability in the commercial context,<sup>6</sup> "the principle is one of the prevention of oppression and unfair surprise." Newell v. High Lawn Memorial Park Co., 164 W.Va. 511, 519 at n. 5, 264 S.E.2d 454, 459 at n. 5 (1980) (*citing* W.Va. Code § 46-2-302, comment 1). As the Circuit Court recognized, Petitioner cannot claim to have been unfairly surprised by the limitations set forth in the warranty, had he bothered to make further inquiry rather than signing sales documents without reading them. Further, the warranty did contain an aspect of mutuality in that the Respondents were required to repair and/or replace parts of the subject vehicles found to be defective. Had they failed to

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<sup>6</sup> Throughout this litigation, Petitioner has conflated West Virginia consumer law with commercial law, denying at one point Respondents' discovery request that it admit that remedies under West Virginia's "Lemon Law," W.Va. Code § 46A-6A-1 were not available to it regarding a claim concerning commercial vehicles. J.A. at pg. 72. It was not until the Pretrial Hearing of this matter that Petitioner finally conceded that it could not bring a consumer law claim. J.A. at pg. 176-177, J.A. at pg. 10.

do so upon presentation of the vehicles for repair, Petitioner would have had the ability to pursue a claim for such failure. As explained in Comment 1 to W.Va. Code § 46-2-719, “it is of the very essence of a sales contract that at least minimum adequate remedies be available.” Those remedies would have been available to the Petitioner in the event that the Respondents failed to meet their warranty obligations, but given Mr. Compton’s testimony, there was no such failure on the part of the Respondents. It is clear that the Petitioner had a remedy available under the warranty, just not the remedy it would have preferred.

**5. A Majority of Jurisdictions Have Recognized that a Finding of Unconscionability Pursuant to Uniform Commercial Code § 2-719(3) Must be Made Independently of a Finding of Unconscionability Under U.C.C. § 2-719(2).**

Should this Court find that a question of fact exists as to whether the warranty failed of its essential purpose, it does not logically follow that Petitioner is entitled to incidental or consequential damages should the trier of fact find the warranty was breached. Although this Court does not appear to have ruled on the issue of whether a limitation of damages provision pursuant to W.Va. Code § 46-2-719(3) survives a determination of a contract’s overall unconscionability under W.Va. Code § 46-2-719(2), a majority of jurisdictions appear to have adopted an approach that recognizes the independence of the two provisions as expressed in the Uniform Commercial Code, and hold that a limitation on consequential damages must be found to be unconscionable in its own right. Razor v. Hyundai Motor Am., 222 Ill.2d 75, 89, 854 N.E.2d 607, 616 (Ill. 2006), Pierce v. Catalina Yachts, 2 P.3d 618, 622 at n. 16 (Alaska 2000), 2000 Alas. LEXIS 50, p. 9, n. 16 (collecting cases). Should the trier of fact determine that the warranty was breached, and should this Court find

that the limitation on incidental/consequential damages was not unconscionable, the trier of fact would still have the ability to award damages for the difference in value between the vehicles at the time they left Petitioner's service and the value of equivalent, conforming vehicles. W.Va. Code § 46-7-714(2).

**V. CONCLUSION**

For the reasons set forth above, Respondents Mack Trucks, Inc. and Worldwide Equipment, Inc. respectfully request that this Court affirm the ruling of the Circuit Court of Mercer County, West Virginia, and that it grant any other relief it deems appropriate.

Respectfully submitted,

**RESPONDENTS/DEFENDANTS BELOW  
MACK TRUCKS, INC. and WORLDWIDE  
EQUIPMENT, INC.**

**BY COUNSEL,**



\_\_\_\_\_  
Harry F. Bell, Jr., Esquire (WVSB # 297)  
Jonathan W. Price, Esquire (WVSB # 10868)  
**THE BELL LAW FIRM, PLLC**  
Post Office Box 1723  
Charleston, West Virginia 25326  
Telephone: 304-345-1700  
Facsimile: 304-344-1956

## West Virginia Secretary of State — Online Data Services

### Business and Licensing

Online Data Services Help

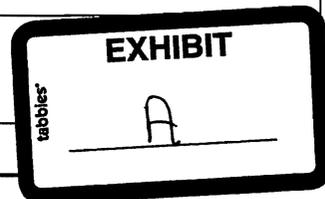
### Business Organization Detail

*NOTICE: The West Virginia Secretary of State's Office makes every reasonable effort to ensure the accuracy of information. However, we make no representation or warranty as to the correctness or completeness of the information. If information is missing from this page, it is not in the The West Virginia Secretary of State's database.*

#### APPALACHIAN LEASING INC.

<b>Organization Information</b>							
Org Type	Effective Date	Filing Date	Charter	Class	Sec Type	Termination Date	Termination Reason
C   Corporation	12/28/2007	12/28/2007	Domestic	Profit			

<b>Organization Information</b>			
<b>Business Purpose</b>	4842 - Transportation and Warehousing - Truck Transportation - Specialized Freight Trucking		<b>Capital Stock</b> 100.0000
<b>Charter County</b>			<b>Control Number</b> 98946
<b>Charter State</b>	WV	<b>Excess Acres</b>	
<b>At Will Term</b>	<b>Member Managed</b>		
<b>At Will Term Years</b>	<b>Par Value</b> 1.0000		
<b>Authorized Shares</b>	100		



<b>Addresses</b>	
Type	Address
<b>Mailing Address</b>	8310 WILDERNESS RD BLAND, VA, 24315 USA
<b>Notice of Process Address</b>	LYNN COMPTON 301 IND PARK RD BLUEFIELD, VA, 24605 USA
<b>Principal Office Address</b>	PO BOX 5586 PRINCETON, WV, 24740 USA
Type	Address

<b>Officers</b>	
Type	Name/Address
<b>Incorporator</b>	KENNY COMPTON, JR. 7567 SPRINGER ROAD MCCALLA, AL, 35111 USA
<b>President</b>	KENNY COMPTON, JR PO BOX 5586 PRINCETON, WV, 24740 USA
Type	Name/Address

<b>Annual Reports</b>	
Date	Filed For
<b>10/10/2013</b>	2014
<b>6/13/2012</b>	2013
	2012
<b>4/14/2010</b>	2011
<b>7/24/2009</b>	2010

<b>10/30/2008</b>	2009
<b>Date</b>	<b>Filed For</b>

<b>Images</b>				
<b>View</b>	<b>Name</b>	<b>Date Added</b>	<b>Date Effective</b>	<b>Type</b>
View	APPALACHIAN LEASING INC.	1/7/2008	12/28/2007	S - Company Formation
<b>View</b>	<b>Name</b>	<b>Date Added</b>	<b>Date Effective</b>	<b>Type</b>

Monday, April 7, 2014 — 10:55 AM

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-1247

APPALACHIAN LEASING, INC.,  
Plaintiff Below, Petitioner,

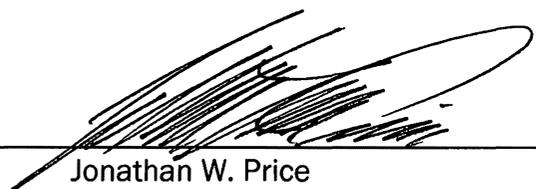
v.

MACK TRUCKS, INC., and  
WORLDWIDE EQUIPMENT, INC.,  
Defendants Below, Respondents.

CERTIFICATE OF SERVICE

I, Jonathan W. Price, counsel for Respondents/Defendants below, hereby certify that I caused a true and exact copy of the foregoing **RESPONDENTS' BRIEF** to be served upon counsel for the Petitioner by first-class mail, postage prepaid, this the 7<sup>th</sup> day of April, 2014.

Stephen P. New, Esquire  
114 Main Street  
P.O. Box 5516  
Beckley, WV 25801



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Jonathan W. Price