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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

PETITIONER'S BRIEF
No. 35702

WILLIAM J. HUSTON AND CONNIE A. HUSTON,

Respondent/Plaintiffs

vs.

MERCEDES-BENZ USA, a Foreign Corporation, and SMITH MOTOR CARS, a West Virginia Corporation

Petitioner/Defendants

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STATEMENT OF FACTS

On October 15, 2008, William J. and Connie A. Huston ("Respondent") filed a Complaint against Mercedes-Benz USA, LLC ("MBUSA" and "Petitioner") and Smith Motor Cars ("Smith") alleging violations of the West Virginia Lemon Law, W.Va. Code § 46A-6A-1, *et seq.*; breach of express warranty, violation of West Virginia's general consumer protection laws, W.Va. Code § 46A-6-101, *et seq.*; and violation of the federal Magnuson-Moss Act, 15 U.S.C. § 2310(d)(1). The suit alleged mechanical problems with their 1999 Mercedes-Benz ML320 sport-utility vehicle, VIN # 4JGAB54E6XA059233 ("the vehicle") and demanded repurchase of the vehicle and other damages. At the time they filed their Complaint, Respondents had owned the vehicle for approximately 10 years[1] and had enjoyed well over 100,000 miles of use on the vehicle.

Respondents specifically bring their claims against Petitioners based upon a class action settlement previously reached[2] in the case of O'Keefe v. Mercedes-Benz USA, LLC, Civil Action No. 01-CV-2902, United States District Court for the Eastern District of Pennsylvania.[3] The O'Keefe class action litigation was brought on behalf of owners or lessees of certain Mercedes-Benz automobiles whose vehicles were equipped with the Flexible Service System ("FSS"), which monitors oil quality and usage and calculates the need for oil changes, and which the Class Plaintiff maintained was causing engine damage when conventional motor oil was used in FSS-equipped vehicles. As part of the O'Keefe settlement, MBUSA provided Class Members with an extended paid service covering engine

[1] See, Complaint, page 2, paragraph 6.
[2] See Plaintiffs' Proposed Certified Questions, No. 1.
[3] See, Complaint, page 4, paragraph 24; also see, Opinion and Order of the District Court, attached as Exhibit A to Defendants/Petitioners' Amended Memorandum of Law in Support of Defendants' Motion for Partial Summary Judgment.

damage caused by the use of API SH or SJ conventional motor oil.[4] The settlement provided coverage for any such damage for 150,000 miles or ten years from the date of purchase, whichever occurred first. Id. However, the settlement does not extend the original vehicle warranty[5] on a general basis. The terms of the Agreement with regard to the extended paid service read as follows:

> 11.1 Warranty Coverage. MBUSA will cover engine damage caused by the use of API SH or SJ conventional motor oil in its model year 1998, 1999, 2000 and 2001 (first sold or leased on or before March 31, 2001) Mercedes-Benz vehicles equipped with the FSS system sold or leased in the United States, Puerto Rico and any U.S. territory, as follows:
>
> 11.1.1 Warranty coverage shall be under the terms of the original warranty and/or any existing extended warranty purchased by the Settlement Class member from MBUSA;
>
> 11.1.2 Such warranty coverage shall apply up to 150,000 miles or ten years from the date of original purchase or lease of the Vehicle, whichever occurs first;
>
> 11.1.3 Such warranty coverage shall survive the sale or other transfer of the Vehicle to a new owner or lessee;
>
> 11.1.4 MBUSA will encourage its dealers to provide loaner vehicles or whatever customer care benefits are ordinarily extended to customers of those dealerships whose vehicles are being repaired under warranty;
>
> 11.1.5 If requested by any Settlement Class member, MBUSA will review any previous engine repair performed by a Mercedes-Benz dealer involving certain specific types of engine problems or damage that could have been caused by the use of API or SJ conventional motor oil (in particular, oil sludging or piston ring repairs) paid for by the Settlement Class member (and not otherwise covered by a warranty or goodwill adjustment by MBUSA or its dealer) and, if determined by MBUSA to have been caused by the use of API SH or SJ conventional motor oil prior to December 2001, MBUSA shall cover the repair by reimbursing the Settlement Class member for such repair;

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[4] See, Global Class Action Settlement Agreement, attached as Exhibit B to Defendants/Petitioners' Amended Memorandum of Law in Support of Defendants' Motion for Partial Summary Judgment.

[5] The Mercedes-Benz original new vehicle limited warranty is for a term of 4 years or 50,000 miles, whichever occurs first.

> 11.1.6 If there is a legitimate dispute as to whether engine damage was caused by the use of API SH or SJ conventional motor oil, MBUSA will err on the side of the Settlement Class member in determining whether to provide such coverage; Provided, however, that MBUSA shall not be obligated or required to provide such warranty coverage;
>
> 11.1.7 Provided, however, where there is evidence of Vehicle abuse or neglect in failing to properly maintain the Vehicle according to MBSUA recommendations, including the recommended service schedule; and 2) to Vehicles with product alterations that would void the warranty in accordance with its terms. [6]

Terms of the O'Keefe settlement expressly stipulate that both the Class Plaintiff and members of the Class who did not opt out of the Global Class Action Settlement Agreement release MBUSA "from any and all claims, demands, causes of action for every kind and nature, obligations, damages, losses and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, that were or could have been asserted or sought in the Actions, relating in any way to the use of conventional motor oil in Vehicles equipped with the FSS [Flexible Service System], including, but not limited to, claims for negligence, strict liability, breach of express or implied warranty, and violation of state consumer protection or deceptive trade practices statutes."[7]

Both Petitioners and Respondents agree that the Respondents are members of the O'Keefe Class. As members of that Class who did not elect to opt out of the Global Class Action Settlement Agreement, Respondents are bound by its terms, including the above-stated release. Further, Respondents are required to seek enforcement of the O'Keefe settlement in the United States District Court for the Eastern District of Pennsylvania, which upon agreement of the Settling Parties and by the District Court's own Order, expressly

[6] See, Global Class Action Settlement Agreement, pages 8-9.
[7] See, Global Class Action Settlement Agreement, pages 13-14, paragraph 18.

retained jurisdiction over the O'Keefe matter. Under terms of the Agreement, the District Court's continuing jurisdiction includes jurisdiction over, *inter alia*, "all members of the Settlement Class, the administration and enforcement of the settlement, and the benefits to the Settlement Class."[8]

In seeking to enforce the O'Keefe settlement, the Respondents are seeking both tort and statutory remedies, including, incredibly, a full-value Lemon Law buyback of the subject vehicle,[9] which at the time of their Complaint was a decade old and had, as of July 22, 2009, been driven for 124,036 miles. The remedies sought are expressly barred by the O'Keefe settlement as the release to which Respondents are self-admittedly bound includes breach of warranty and state consumer law actions. Furthermore, Plaintiff's action was filed more than 10 (ten) years after the date of the initial purchase of the vehicle and well after the expiration of the Manufacturer's express warranty term. As such, all of the Plaintiffs' claims are barred by the applicable statute of limitations and the O'Keefe settlement agreement provides no basis for filing and instituting such claims.

On or about April 24, 2009, Petitioners filed their Motion to Dismiss Respondents' Complaint, citing the Global Class Action Settlement Agreement and the District Court's Order in support of their assertion that the Circuit Court of Kanawha County lacked jurisdiction over Respondents' claims and that venue was improper.[10] After a hearing on Petitioners' Motion to Dismiss conducted on September 22, 2009, the Circuit Court denied the Motion, ruling that neither the O'Keefe Settlement Agreement nor the District Court's Order deprived the Circuit Court of jurisdiction.[11]

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[8] See, Global Class Action Settlement Agreement, page 17, paragraph 29.
[9] See, Complaint, page 6.
[10] See, Motion to Dismiss.
[11] See, Circuit Court's Order of October 8, 2009, denying Defendants' Motion to Dismiss.

Following the Circuit Court's denial of Petitioners' Motion, discovery in this matter continued and upon its completion, Petitioners filed their Motion for Partial Summary Judgment. In keeping with the Circuit Court's denial of their Motion to Dismiss, Petitioners sought summary judgment on Respondents' claims for relief outside the terms of the O'Keefe Settlement. On May 25, 2010, the Circuit Court granted Petitioners' Motion for Partial Summary Judgment and certified two questions to this Court.

The first Certified Question proposed by the Circuit Court reads and was answered as follows:

> "Does the Circuit Court of Kanawha County, West Virginia, have jurisdiction over a lawsuit wherein the Plaintiffs purport to be seeking to enforce the terms of a federal class action settlement, where the federal District Court that had jurisdiction of that class action expressly retained jurisdiction over the parties thereto?" Yes.

The Circuit Court's affirmative answer to the first question in the affirmative reflects its ruling on Petitioners' Motion to Dismiss.

The second question was stated and answered by the Circuit Court as follows:

> "Are members of a federal court class who released all asserted or potential claims in exchange for the relief granted to the class under the federal court settlement barred from nonetheless pursuing claims, including a statutory "lemon law" claim under West Virginia law under the guise of enforcing the settlement and which could result in affirmative relief well beyond what is available under the settlement terms? Yes.

The Circuit Court's answer to the second question reflects the Circuit Court's ruling on Petitioners' Motion for Partial Summary Judgment.

Petitioners respectfully assert that the Circuit Court was incorrect in its position regarding the first Certified Question, but was correct with regard to its answer to the second Certified Question. Although the Circuit Court correctly recognized that Respondents' decision to remain members of the O'Keefe class limited their remedies to those outlined

above, the Circuit Court erred in allowing Plaintiffs/Respondents to maintain their claim outside the Eastern District of Pennsylvania whereby unexplainably ignoring (1) the prevailing law on jurisdiction, which is discussed in Section I, *infra*, and (2) the District Court's April 2, 2003, Order which expressly retains jurisdiction over any and all claims arising out of the O'Keefe settlement agreement.

STANDARD OF REVIEW

It is established that "[w]hen called upon to consider certified questions, {The West Virginia Supreme Court of Appeals] employ[s] a plenary review and examine[s] anew the answers provided by the circuit court. The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*."[12]

LAW

I. THE CIRCUIT COURT ERRED IN RULING THAT RESPONDENTS MAY PURSUE THEIR ACTION IN KANAWHA COUNTY, WEST VIRGINIA WHERE THE PLAINTIFFS ARE SEEKING TO ENFORCETHE TERMS OF A FEDERAL CLASS ACTION SETTLEMENT AND THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA RETAINS EXCLUSIVE JURISDICTION OVER THE MATTER.

A. CONTROLLING LAW ON JURISDICTION DICTATES THAT THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA RETAIN EXCLUSIVE JURISDICTION OVER ANY CLAIMS BY THE RESPONDENT/PLAINTIFFS ARISING OUT OF THE O'KEEFE SETTLEMENT.

It is well known that as a general rule, a federal district court does not retain jurisdiction to enforce a settlement agreement unless the court, typically as part of its order of dismissal, orders the parties to comply with the terms of the settlement agreement or incorporates terms of a settlement agreement explicitly retaining jurisdiction into one of its orders.[13]

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[12] Wilson v. Bernet, 218 W.Va. 628, 631625 S.E.2d 706, 709 (2005) (citations omitted).
[13] See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381-82 (1994).

When faced with legal issues very similar in nature to the ones presently before this Honorable Court, the United States Court of Appeals for the Fourth Circuit applied the U.S. Supreme Court decision in Kokkonen and properly enforced jurisdiction previously retained by a federal court. In the matter of Marino, the United States District Court for the District of Maryland oversaw the settlement negotiations in a class action lawsuit brought by various Honda dealers against American Honda Motor Company, Inc.[14] Following the approval of the Settlement and Order of Dismissal, Antionette Marino, a defense attorney for Honda, brought suit in a California state court seeking attorney's fees for work she allegedly performed but for which she was never compensated. Because the Maryland District Court, specifically Judge Motz, retained jurisdiction over the matter following settlement and dismissal, Marino's suit was removed to Maryland. Ms. Marino resisted the removal and Judge Motz' jurisdiction and did not prevail. In reiterating the prior ruling of the US Supreme Court in Kokkomen, the Court provided this important explanation of the law:

> "It is well-settled that a federal court may exercise ancillary jurisdiction to enforce its judgments. Peacock v. Thomas, 516 U.S. 349, 354, 133 L. Ed. 2d 817, 116 S. Ct. 862 (1996); see also 28 U.S.C. ß 1367(a) ("In any civil action over which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action . . . that they form part of the same case and controversy."). While a federal court has the power to retain jurisdiction to enforce its decision, the Supreme Court has cautioned against the exercise of ancillary jurisdiction "over proceedings that are entirely new and original." Peacock, 516 U.S. at 358 (citation and internal quotation marks omitted). Indeed, ancillary jurisdiction "may extend to claims having a factual and logical dependence on the primary lawsuit, . . . but that primary lawsuit must contain an independent basis for federal jurisdiction." Id. at 355 (citation and internal quotation marks omitted). The Peacock Court reasoned that, while a proper exercise of enforcement jurisdiction will result in efficiencies which outweigh comity concerns, an exercise of enforcement jurisdiction over a factually independent proceeding has no practical benefit for judicial economy.

[14] Marino v. Pioneer Edsel Sales, Inc. et al, 349 F.3d 746, 752 (4th Cir. 2003).

> In Kokkonen v. Guardian Life Insurance Co., 511 U.S. 375, 128 L. Ed. 2d 391, 114 S. Ct. 1673 (1994), the Supreme Court explained that "enforcement of [a] settlement agreement . . . is more than just a continuation or renewal of the dismissed suit, and hence requires its own basis for jurisdiction." Id. at 378. In so holding, the Kokkonen Court found that the exercise of ancillary jurisdiction over a mere breach of a settlement agreement would further neither of the purposes for which the Court had exercised ancillary jurisdiction in the past: "(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent, ...; and (2) to enable a court to function success-fully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees." Id. at 379-80. The Court did observe, however, that a district court's ancillary jurisdiction "to manage its proceedings, vindicate its authority, and effectuate its decrees" provides such an independent jurisdictional basis to enforce a settlement agreement if "the parties' obligation to comply with the terms of the settlement agreement has been made part of the order of dismissal." Id. at 381. The Court specified two ways in which a court may make a settlement agreement part of its dismissal order: "either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order.""[15]

Given the precedent set in Kokkomen, the 4th Cir. Court ruled that Judge Motz unquestionably had jurisdiction over Ms. Marino's claim that she was entitled to attorney's fees from Honda for work she allegedly performed in connection with the Honda Class Action.[16] Because the Order of Final Settlement Approval in the Honda class action specifically mentioned the Court's continuing jurisdiction over the matter, a dispute over attorney's fees arising from the Honda Class Action made it "incumbent upon Judge Motz to resolve the dispute."[17]

Finally, in *dicta*, the Fourth Circuit in Marino summed up the essence of its ruling by stating," [b]ecause conflicting results could occur across the country, it makes intuitive sense to conclude that Judge Motz appropriately assumed jurisdiction in this case."[18] The arguments made in Marino and the holdings coming therefrom are wholly applicable to the

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[15] Marino at 752.
[16] Id.
[17] Id at 752-753.
[18] Id at 754.

present matter. To allow a state court to rule on a dispute arising out of a prior settlement agreement, especially one that remains within the exclusive jurisdiction of a federal court, would open the door to the relitigation of dozens, if not hundreds, of similar suits being filed across the country. Not only would this completely invalidate the entire purpose of a class action settlement, it would offend the fundamental laws of jurisdiction, the controlling precedent set by the US Supreme Court in Kokkomen, the controlling precedent later set by the 4th Circuit in Marino, and ultimately all notions of justice.

In emphasizing the importance of a Court's *intent* to maintain exclusive jurisdiction over a matter, even the federal court sitting in our sister state of Virginia has restated and enforced the principle: "[t]he obligation to comply with a settlement's terms must be expressly made part of a court's order for jurisdiction to enforce the settlement after dismissal of the action to exist. A judge's mere awareness and approval of the terms of the settlement agreement do not suffice to make them part of his order. Either incorporation of the terms of the agreement or a separate provision retaining jurisdiction over the agreement will suffice for this purpose."[19]

The jurisdictional designation in the Settlement Agreement is clearly mandatory. This Court has noted that "[t]o be enforced as mandatory, a forum-selection clause must do more than simply mention or list a jurisdiction; in addition, it must specify venue in mandatory language, or contain other language demonstrating the parties' intent to make jurisdiction exclusive.[20]

The Global Class Action Agreement by which Respondents are bound clearly states that the District Court is to retain continuing jurisdiction over the action and the parties

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[19] Smyth v. Rivero, 282 F.3d 268, 283 (WD Va. 2002).
[20] Caperton, __ W.Va. at __, 690 S.E.2d at 338.

thereto. There is no language indicating that any party merely has *the option* of litigating in the Eastern District of Pennsylvania. Respondents are intelligent, sophisticated adults who, after receiving notice of the proposed settlement, had every opportunity to fully investigate its terms and opt out of the settlement. The law does not excuse them from a duty to become fully informed of all the details of an agreement to which they bound themselves.[21]

The claims and parties involved in this matter are clearly governed by the forum-selection clause. Respondents in their Complaint clearly concede that the terms of the O'Keefe settlement apply to them. They must, as they have no other avenue by which to argue that the West Virginia Lemon Law or their other asserted, noncontractual causes of action could conceivably apply to their decade-old vehicle except to contend that the O'Keefe settlement extended their vehicle's warranty. And while that assertion is incorrect as will be shown, *infra*, Respondents themselves have demonstrated that they consider the O'Keefe settlement to be at the heart of their claims. They cannot selectively seek the benefit of the settlement on one hand while on the other hand ignoring provisions of the agreement that are unfavorable to them. To this end, Petitioner respectfully argues that neither may the Circuit Court choose to enforce certain portions of the settlement agreement while ignoring others.

B. THE GLOBAL CLASS ACTION SETTLEMENT AGREEMENT IN O'KEEFE IS A VALID CONTRACT AND THEREFORE ITS TERMS, INCLUDING, BUT NOT LIMITED TO, THE FORUM SELECTION CLAUSE, MUST BE STRICTLY ENFORCED.

In addition to the arguments on jurisdiction, it must be noted that settlement agreements are contracts, and have long been recognized and protected as such under West Virginia law. "The law favors and encourages the resolution of controversies by

[21] Reddy v. Community Health Foundation of Man, 171 W.Va. 368, 373, 298 S.E.2d 906, 910 (1982) ("[I]n the absence of extraordinary circumstances, the failure to read a contract before signing it does not excuse a person from being bound by its terms.")

contracts of compromise if they are fairly made and are not in contravention of some law or public policy."[22] Respondents, who by their own admission did not opt out of the O'Keefe Class Action,[23] thereby bound themselves to the terms of the Global Class Action Settlement pursuant to the operation of Rule 23 of the Federal Rules of Civil Procedure.[24] Their decision not to opt out serves as "tacit consent to the [District Court's] jurisdiction." [25]

The Global Class Action Settlement Agreement expressly provides that jurisdiction remains with the District Court:

> Without affecting the finality of the Final Judgment, the Court shall retain continuing jurisdiction over the Action and the Settling Parties, including all members of the settlement class, the administration and enforcement of the settlement, and the benefits to the Settlement Class hereunder, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of this Settlement Agreement, the order preliminarily approving the settlement, and the Final Judgment, and hearing and determining an application by Settlement Class Counsel for an award of attorneys' fees and reimbursement of reasonable costs and expenses. Any disputes or controversies arising with respect to the interpretation, enforcement or implementation of the Settlement shall be presented by motion to the Court.[26]

The Settlement Agreement defines the Settling Parties as the Class Plaintiff, all Settlement Class members who exclude themselves from the Settlement, and MBUSA.[27] Respondents admit in their Complaint that they received notice of the potential settlement – notice that described the O'Keefe litigation, the proposed settlement and that informed them of their ability to opt out.[28] However, they consciously chose to remain Settling Parties

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[22] Syl. Pt. 4, Horkulic v. Galloway, 222 W.Va. 450, 665 S.E.2d 284 (2008), *citing* Syl. Pt. 1, Sanders v. Roselawn Memorial Gardens, 152 W.Va. 91, 159 S.E.2d 784 (1968).
[23] See, Complaint at page 3, paragraph 17.
[24] See, Kay Co. v. Equitable Prod. Co., 2010 U.S. Dist. LEXIS 41892 (S.D. W.Va. 2010) at *29-30 recognizing that a class action objector dissatisfied with the terms of a proposed settlement but who failed to opt out is bound by the terms of the settlement.
[25] Id. at *13 (internal citation omitted).
[26] See, Global Class Action Settlement Agreement, page 17, paragraph 29.
[27] See, Global Class Action Settlement Agreement, page 5, at paragraph 1.10.
[28] See, Complaint, page 3, paragraph 17.

and are precluded from bringing their action outside the Eastern District of Pennsylvania.[29]

Indeed, the terms of the Global Class Action Settlement Agreement relating to the District Court's continuing jurisdiction over the Settling Parties in the O'Keefe matter, including Class Members who chose not to opt out, operate in effect as a forum selection clause. The United States Supreme Court has upheld a forum selection clause even when it obligated the plaintiffs, who were private citizens and residents of the state of Washington, to litigate all disputes in the state of Florida.[30]

In West Virginia, this Court has addressed the issue of forum-selection clauses and set forth an analysis by which they can be evaluated, noting that "[w]hile forum-selection clauses historically were disfavored, such is no longer the case, so long as the clause is fair and reasonable." [31] In the four-part analysis set forth by this Court, it must first be determined whether or not the clause was reasonably communicated to the party against which enforcement is sought. Second, the clause must be identified as being either mandatory, requiring that suit be instituted in conformity with the clause; or permissive, in which suit may be initiated in one forum or the other. Third, it must be determined whether the claims and parties involved in the dispute are in fact subject to the forum-selection clause. "If the forum selection clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is presumptively enforceable." [32] Finally, it must be determined whether the party opposing enforcement has rebutted the presumption of enforceability "by making a sufficiently strong

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[29] See, Providian National Bank v. Pritchett, 846 So.2d 1072 (2002) holding that effect of class action settlement and doctrine of *res judicata* barred relitigation of plaintiffs' claims.
[30] Carnival Cruise Lines v. Shute, 499 U.S. 585 (1991) (superseded by statute only as applied in the passenger context as noted in Oran v. Fair Wind Sailing, 2009 U.S. Dist. LEXIS 110350 at *21, note 5 (November 23, 2009)).
[31] Caperton v. A.T. Massey Coal Co., ___ W.Va. ___, 690 S.E.2d 322, 335 (2009).
[32] Caperton at 336.

showing that enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching."[33]

Applying the Caperton analysis, it is apparent that the Global Class Action Settlement Agreement's provision regarding the District Court's continuing jurisdiction operates as a valid and enforceable forum-selection clause. First, it is clear that the Hustons received adequate notice of the proposed Class Action Settlement. Class Members were notified of the general terms of the settlement, of their right to opt out of the proposed settlement, and that they could review settlement documents either through the District Court or on the Internet by visiting the website of Class Plaintiff's lead counsel.[34]

Finally, Respondents cannot make a showing that enforcement of the Global Class Action Settlement Agreement's provision regarding the District Court's continuing jurisdiction is in any way unreasonable or unjust, or that it is the product of fraud or overreaching. It is clear from the District Court's Order that careful consideration was given by the Court with regard to resolution of the O'Keefe litigation. Further, it is difficult to see how requiring Plaintiffs to pursue a remedy in the Eastern District of Pennsylvania would be prohibitively unreasonable or unjust. It is doubtful that Respondents or their counsel would be required to travel with enough frequency for the travel to be considered unreasonably burdensome. Respondents' counsel could certainly associate with counsel admitted to practice in the Eastern District of Pennsylvania, the advent of electronic filing in the federal courts and the ease of communications by means of the Internet since the U.S. Supreme Court decided the Shute case further lessens any purported inconvenience to the Respondents. Even if repeated trips to the Eastern District of Pennsylvania would be necessary, the distance

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[33] Id.

[34] See, Notice of Pendency of Class Action and Proposed Settlement, attached hereto as Exhibit A.

between Kanawha County, West Virginia and the Eastern District of Pennsylvania means the burden would not be nearly as heavy as the Shute plaintiffs were required to bear in traveling from the state of Washington to the state of Florida.

II. THE CIRCUIT COURT WAS CORRECT IN RULING THAT THE GLOBAL CLASS ACTION SETTLEMENT AGREEMENT LIMITS THE RESPONDENTS TO THE RELIEF CONTAINED THEREIN AND DOES NOT PERMIT THEM TO AVAIL THEMSELVES OF REMEDIES OUTSIDE THE AGREEMENT.

Respondents, by seeking statutory remedies rather than merely seeking to enforce the terms of the O'Keefe settlement, are in effect attempting to relitigate the claims put to rest by the O'Keefe litigation. The doctrine of *res judicata* precludes Respondents from relitigating the causes of action put to rest by the O'Keefe settlement and gives them absolutely no basis for attempting to force Petitioner to repurchase a decade-old automobile with more than 100,000 miles on it.

This Court has described the doctrine of *res judicata* as "precluding relitigation of the same cause of action,"[35] explaining that "[t]he rationale underlying the preclusive effect of *res judicata* is to avoid 'the expense and vexation attending relitigation of causes of action which have been fully and fairly decided.[36]

This Court has identified a three-part test for the application of the doctrine of *res judicata*.[37] First, "there must have been a final adjudication on the merits in the prior action by a court having jurisdiction of the proceedings."[38] "Second, the two actions must involve either the same parties or persons in privity with those same parties."[39] Finally, "[t]he cause of action identified for resolution in the subsequent proceeding either must be identical to

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[35] Blake v. Charleston Area Medical Center, 201 W.Va. 469, 476, 498 S.E.2d 31, 48 (1997), *quoting* Christian v. Sizemore, 185 W.Va. 409, 412, 407 S.E.2d 715, 718 (1991).
[36] Blake, *supra*, at 48, 476, *quoting* Sattler v. Bailey, 184 W.Va. 212, 217, 400 S.E.2d 220, 225 (1990).
[37] Id. at Syl. Pt. 1.
[38] Id.
[39] Id.

the cause of action determined in the prior action or must be such that it could have been resolved, had it been presented, in the prior action." [40]

The O'Keefe settlement satisfies all three elements. There was a final adjudication, as evidenced by the Court's certification of the Class and approval of the Global Class Action Settlement Agreement. Second, both O'Keefe and Respondents' claim involve Respondents (members of the O'Keefe Class) and Petitioner Mercedes-Benz USA. Respondents affirmatively state in their Complaint that they are members of the O'Keefe Class and that they did not opt out of the Class. As such, and as previously stated, they were and remain parties to that litigation. Finally, with respect to Respondents' attempt to use the terms of the Global Class Action Settlement Agreement as a smokescreen to attempt to secure the full-value buyback of their well-used vehicle, their claims pursuant to the Lemon Law, the general provisions of the West Virginia Consumer Protection Act and the Uniform Commercial Code parallel those issues asserted in the O'Keefe case because claims were asserted therein for, *inter alia*, violation of various state consumer protection statutes and breach of express warranty.[41] [42]

In the O'Keefe matter, Defendant MBUSA was fair in its dealings, generous in its settlement and expeditious in the handling of the suit. MBUSA agreed to a settlement worth approximately $32,645,220.00 to the class members, in addition to paying $4,896,783.00 in Plaintiffs' attorney's fees and $159,312.37 in costs and expenses. As noted by the Court in its April 2, 2003, Opinion and Order, MBUSA agreed pay to certain litigation expenses that

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[40] Id.

[41] See, Opinion and Order of the District Court, page 3.

[42] Respondents might argue that the doctrine of *res judicata* would not preclude them from bringing their Magnuson-Moss claim because that count of the O'Keefe Second Amended Complaint was dismissed without prejudice pursuant to 15 U.S.C. § 2310(d)(3)(c). See, Opinion and Order of the District Court, Page 2. However, the O'Keefe settlement was a general release of all claims. See, Global Class Action Settlement Agreement, pages 13-14, paragraph 18.

are normally borne by the class in Rule 23(b)(3) class actions. MBUSA agreed to pay class counsel reasonable court awarded attorney's fees and not appeal any fee award under $7.5 million, paid for the printing and initial mailing of notifications to the class members and then paid for the re-mailing that was necessitated when a database error was discovered.[43]

In exchange for its concessions, MBUSA was entitled to receive some assurance in return. The settlement provided for the cessation of ALL litigation activity outside the Eastern District of Pennsylvania. In fact, so important was the cessation of ALL litigation outside those matters being managed by the EDPA, that MBUSA was actually entitled to set aside the settlement and rescind the entire settlement agreement if Plaintiffs failed to meet this term of the agreement.[44]

It should be clear to this Honorable Court, in light of the many millions of dollars spent by MBUSA in litigating and settling this matter once in O'Keefe, and in light of the agreement by ALL Plaintiffs to the class, which includes the Respondents herein, to cease ALL litigation activity prior to the settlement and to refrain from EVER pursuing said claims against MBUSA again, the Circuit Court below was correct in ruling that the Global Class Action Settlement Agreement limits the Respondents to the relief contained therein and does not permit them to avail themselves of remedies outside the agreement.

It is also clear from the terms of the Global Class Action Settlement Agreement that there was no intent to include the repurchase of covered vehicles as a remedy, which is exactly what the Respondent/Plaintiffs herein are seeking. Petitioners intend to show at trial that Respondents cannot offer sufficient evidence that any problems they are experiencing with the subject vehicle are the result of using API SH or SJ conventional motor

[43] See, Opinion and Order of the District Court, page 5.
[44] See, Global Class Action Settlement Agreement, page 13, at paragraph 17.4.

oil prior to December 2001. In fact, upon deposition of the Mercedes Benz Master Technician who inspected the vehicle, it was discovered that the vehicle's engine block "looked to be just fine"[45] and there was no evidence of sludging to a degree that would have caused excess oil consumption.[46] The vehicle exhibited none of the tell-tale signs of significant sludge buildup in the engine, which include, but are not limited to a rattle or noise at startup, a rattle after the engine had been warmed up, excessive smoking from the tailpipe and overheating of the vehicle.[47] Furthermore, it was discovered at Mr. Schultz' deposition that the first time Plaintiffs noticed allegedly "excessive" oil consumption was on a rare long-distance trip. Mr. Schultz explained that taking a vehicle that isn't accustomed to long trip on such a trip would be expected to result in excessive oil consumption, this, he described, as "normal."[48] Also discovered at Mr. Schultz's deposition is that the vehicle was found to be without a necessary fan shroud, the result of which could be heating up the engine, burning excessive oil and eventually causing sludge to form.[49] Finally, Mr. Schultz's inspection of the vehicle uncovered a trailer hitch that was not installed by Mercedes-Benz, and therefore lacked a necessary oil cooler.[50] The oil cooler serves to cool the oil when a vehicle is under a strain that it was not designed for, such as towing a trailer. Without it, the oil can overheat, break down, burn and turn to ash, which is a big factor in resulting engine sludge.[51]

Despite all of the above-stated facts, if Respondents are to somehow prevail at trial, they are entitled at most to the cost of repairs as described in Paragraph 11.1.5 of the

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[45] See, March 11, 2010 Deposition of Richard Alexander Schultz at page 12, ln 12-13.
[46] Id. at pg 36, ln 13-17.
[47] Id. at pgs 23-24.
[48] Id. at pg 24, ln 3-23.
[49] Id. at pg 25, ln 1-18.
[50] Id. at pg 34, ln 1-5.
[51] Id. at pg 34, ln 11-14.

Settlement Agreement, *supra*.

Furthermore, in their Response to the Petition before this Court, the Respondents change their tune with regards to the underlying basis for this suit, claiming they merely seek to enforce the provision of the settlement agreement, citing language from the Federal District Court's Order regarding Class Members' ability to seek redress for purported breaches of the Global Class Action Settlement Agreement. In the relevant portion of the settlement agreement and the Court's Order, the provision states:

> The settlement requires MBUSA to "err on the side of the Settlement Class Member" regarding a "legitimate dispute as to whether to provide" reimbursement. Global Class Action Settlement Agreement at ¶ 11.1.6. If owners or lessees are dissatisfied with the outcome of a "look back" application, they are free to pursue compensation through the courts. They may bring an independent suit or a contempt proceeding before this court. The settlement does not release MBUSA from violations of the settlement agreement.[52]

MBUSA does not argue, nor has it ever argued, that Respondents do not have the right, pursuant to the O'Keefe settlement, to seek redress for their claim.[53] MBUSA simply argues that the Respondents, who saw a benefit in Class membership and who by their own admission did not elect to opt out of the Class, are bound by its terms. At a fundamental level, it simply defies common sense for the District Court to have expressly retained ongoing jurisdiction over the class action and class members if it intended to have claims litigated outside the Eastern District of Pennsylvania. Respondents misread the District Court's Order in such a way as to confer an advantage to themselves that was not intended by the District Court. The Circuit Court should not have permitted this, and the Respondents should be held to the bargain they made.

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[52] O'Keefe v. Mercedes-Benz USA, LLC, Opinion and Order of April 2, 2003 (emphasis added).

[53] Although as previously stated, the statute of limitations would prevent any claim by the Respondents as more than 10 years passed from the time they purchase the vehicle until this suit was filed.

CONCLUSION

"Without affecting the finality of the Final Judgment, the Court shall retain continuing jurisdiction over the Action and the Settling Parties, including all members of the settlement class, the administration and enforcement of the settlement, and the benefits to the Settlement Class hereunder, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of this Settlement Agreement, the order preliminarily approving the settlement, and the Final Judgment, and hearing and determining an application by Settlement Class Counsel for an award of attorneys' fees and reimbursement of reasonable costs and expenses. Any disputes or controversies arising with respect to the interpretation, enforcement or implementation of the Settlement shall be presented by motion to the Court."

The above-stated passage contains the entire basis for this Court's overturn of the first Certified Question before it, as well as affirmation of the second Certified Question. Paragraph 29 of the Global Class Action Settlement Agreement, which is again iterated in the District Court's Opinion and Order closing the case, is entitled 'Continuing Jurisdiction' and contains the pertinent facts necessary to resolve this matter. It is clear from a plain reading of the text that Respondents have brought improper claims, and what's more, have brought them in the wrong Court. Respondents knew or by exercise of minimal diligence should have known that they were binding themselves to the Global Class Action Settlement Agreement's jurisdictional requirements. They now claim they were merely pursuing a dispute over enforcement of the settlement agreement, but also seek full-value repurchase of the subject vehicle after more than a decade of use. Once again, the final sentence of

the text above states: "Any disputes or controversies arising with respect to the interpretation, enforcement or implementation of the Settlement shall be presented by motion to the [EDPA Appeals] Court." There is no ambiguity as to the intended meaning of the agreed upon terms, nor is there any question as to the validity and enforceability of the contract as a whole.

RELIEF REQUESTED

For the foregoing reasons and for all other reasons on the face of the record, Petitioner/Defendants, Mercedes -Benz USA, LLC and Smith Motor Cars, move this Honorable Court to overturn the Circuit Court's answer to the first Certified Question and affirm the Circuit Court's answer to the second Certified Question.

RESPECTFULLY SUBMITTED,
PETITIONERS/DEFENDANTS BELOW
MERCEDES-BENZ USA, LLC and
SMITH MOTOR CARS, INC.,
by counsel,

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CERTIFICATE OF SERVICE

I, Harry F. Bell, hereby certify that on this the 15th day of November, 2010, caused service of the foregoing PETITIONER'S BRIEF to be made upon counsel of record by depositing true and accurate copies of the same in the regular course of the United States mail, postage prepaid, in an envelope addressed as follows:

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EXHIBITS

ON

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CLERK'S OFFICE