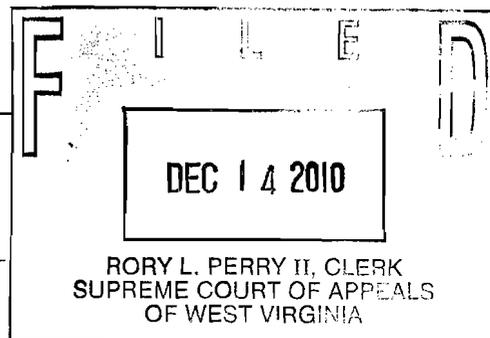


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RESPONDENTS' BRIEF
No. 35702



WILLIAM J. HUSTON AND CONNIE A. HUSTON,

Plaintiffs-Below, Respondents

v.

MERCEDES-BENZ USA, LLC, a foreign corporation, and SMITH MOTOR CARS,
a West Virginia corporation

Defendants-Below, Petitioners

Mark A. Swartz, Esq. (WVSBN 4807)
Mary Jo Swartz, Esq. (WVSBN 5514)
Swartz Law Offices, PLLC
601 Sixth Avenue, Suite 201
Post Office Box 1808
St. Albans, WV 25177-1808
Telephone: (304) 729-9000
Facsimile: (304) 729-0099

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I. PROCEDURAL HISTORY

Respondents filed a Complaint in Kanawha County Circuit Court on October 15, 2008, alleging Petitioners Mercedes-Benz USA, LLC (“MBUSA”) and Smith Motor Cars failed to honor an express warranty to repair or replace their 1999 Mercedes-Benz ML320 sport-utility vehicle (“subject vehicle”). The original manufacturer’s warranty was extended to ten years/150,000 miles as consideration for settlement in a class-action suit, *O’Keefe v. Mercedes-Benz USA, LLC*¹. Respondents were members of the Class and as such were beneficiaries of the settlement agreement (the “Global Class Action Settlement Agreement” or “Agreement”).

Respondents alleged violations of the West Virginia Lemon Law, *W. Va. Code* §§ 46A-6A-1, *et seq.*; breach of express warranty; violation of West Virginia’s 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).

On or about April 24, 2009, Petitioners filed a Motion to Dismiss, citing the Global Class Action Settlement Agreement and the District Court’s Order in support of their assertion that the Circuit Court lacked jurisdiction over Respondents’ claims, and that venue was improper.² After a hearing on the 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 therein deprived the Kanawha County Circuit Court of jurisdiction.³

Subsequently, Petitioners filed a Motion for Partial Summary Judgment, again alleging that Respondents’ claims were barred by the *O’Keefe* Settlement Agreement.

¹ 214 F.R.D. 266; 2003 U.S. Dist. LEXIS 5715 (E.D. Pa. 2003)

² See, Motion to Dismiss.

³ See, Circuit Court’s Order of October 8, 2009, denying Defendants’ Motion to Dismiss.

On May 25, 2010, the Circuit Court granted Petitioners' Motion for Partial Summary Judgment, and certified two questions to this Court.

II. STATEMENT OF FACTS

1. On August 25, 1998, Respondents purchased from Petitioner Smith Motor Cars, a new 1999 Model ML 320 4WD sport-utility vehicle, Vehicle Identification Number 4JGAB54E6XA059233 ("subject vehicle").

2. On or about May 4, 2001, a class action lawsuit captioned *O'Keefe v. Mercedes-Benz USA, LLC*, May Term 2001, No. 01-004629, was filed in the Court of Common Pleas of Philadelphia County, Pennsylvania, and was subsequently removed to the United States District Court for the Eastern District of Pennsylvania, Civil Action 01-2902 ("the class action").

3. The class action was brought on behalf of owners and lessees of certain 1998 through 2001 model year MBUSA vehicles equipped with the "Flexible Service System," which allegedly monitored oil quality and usage and calculated the need for oil changes.

4. The class action alleged that the use of conventional oil in vehicles equipped with the Flexible Service System would result in the formation of oil sludge, excessive oil usage/consumption, and engine damage.

5. On or about August 7, 2002, the parties to the class action filed a proposed Global Class Action Settlement Agreement with the Court.

6. Respondents were members of the class; they did not opt out of the proposed settlement.

7. In September 2002, MBUSA notified class members in writing that a settlement had been reached in the class action. Among other things, MBUSA, in writing, told class members that:

To demonstrate our commitment to superior performance and quality, we will cover your vehicle up to ten years from the date of first purchase or lease or 150,000 miles (whichever occurs first) *under the terms of the existing warranty* or any extended warranty you have purchased from MBUSA in the unlikely event of any future oil sludging or related engine damage, . . .⁴ [Emphasis supplied.]

8. Under the Global Class Action Settlement Agreement filed with the court, the following were the terms and conditions of the warranty coverage to be provided by MBUSA:

a. Coverage shall be under the terms of the original warranty and/or any existing extended warranty purchased by the Settlement Class member from MBUSA;

b. The 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;

c. Warranty coverage shall survive the sale or other transfer of the Vehicle to a new owners or lessee;

d. 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, but cannot guarantee that the dealers will do so;

e. 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 SH 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;

⁴ See, Exhibit A to Petitioners' Brief.

f. If there is a legitimate dispute as to whether oil sludging or related 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;

g. Provided, however, that MBUSA shall not be obligated or required to provide such coverage: 1) where there is evidence of Vehicle abuse or neglect in failing to properly maintain the Vehicle according to MBUSA recommendations, including the recommended service schedule; and 2) to Vehicles with other product alterations that would void the warranty in accordance with its terms.⁵

9. Respondents began to notice, at around 50-60,000 miles, that they needed to add a quart of oil between the 6,000-mile change intervals. Eventually, Respondents were required to add a quart of oil after only every 800 miles of driving. Respondents also noticed sludge buildup.

10. Respondents notified Petitioner dealer about the excessive oil usage and sludge buildup in their 1998 Mercedes. Respondents were told by a service writer that MBUSA did not consider oil consumption to be excessive until a quart of oil needed to be added at a 600-650 mile interval, and the Respondents refused to service the vehicle.

11. Petitioners refused to honor the Mercedes Benz warranty and failed to make the necessary repairs and/or replace the engine, as contemplated by the warranty that was extended by the Global Class Action Settlement Agreement.

III. CERTIFIED QUESTIONS FOR REVIEW

I. 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

⁵ 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 (emphasis added).

District Court that had jurisdiction of that class action expressly retained jurisdiction over the parties thereto? Yes.⁶

II. 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.⁷

IV. DISCUSSION

A. 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*. *Wilson v. Bernet*, 218 W. Va. 628, 625 S.E.2d 706 (2005)(citations omitted).

B. The Circuit Court was correct in its ruling that it has jurisdiction to hear Respondents' warranty claims in an action brought in Kanawha County, West Virginia.

Petitioners argue that jurisdiction over this matter solely lies in the Eastern District of Pennsylvania federal court, the court which certified the class, and accepted and ratified the Global Class Settlement Agreement.

1. The Kanawha County Circuit Court had personal jurisdiction over Petitioners.

When responding to a motion to dismiss for lack of personal jurisdiction where no evidentiary hearing has been held, the party asserting jurisdiction need only make a prima facie showing of personal jurisdiction in order to survive the motion. In

⁶ The Circuit Court's affirmative answer to the first question reflects its ruling on Petitioner's Motion to Dismiss.

⁷ The Circuit Court's answer to the second question reflects its ruling on Petitioner's Motion for Partial Summary Judgment.

determining whether a party has made a prima facie showing of personal jurisdiction, the court must view the allegations in the light most favorable to the party asserting jurisdiction. *Easterling v. American Optical Corp.*, 207 W. Va. 123, 529 S.E.2d 588 (2000).

The trial court, when ruling on a motion to dismiss for lack of personal jurisdiction, may permit discovery to aid in its decision or it may resolve the issue either upon the pleadings and affidavits or through a pretrial evidentiary hearing. *Lane v. Boston Scientific Corp.*, 198 W. Va. 447, 481 S.E.2d 753 (1996).

The Circuit Court correctly found that Respondents made a prima facie showing of personal jurisdiction in this matter. The purchase and sale of the subject vehicle occurred in West Virginia. The injuries complained of occurred in West Virginia. MBUSA does business in West Virginia, and Smith Motor Cars is a West Virginia corporation. *Importantly, Petitioners never asserted that the Circuit Court lacked personal jurisdiction over them in this matter.*

2. **Petitioners' assertion that only the United States District Court for the Eastern District of Pennsylvania has subject matter jurisdiction is without basis in this record and in the law.**

Petitioners allege that the United States District Court for the Eastern District of Pennsylvania retained exclusive jurisdiction of matters arising under the Global Glass Action Settlement Agreement. As a consequence, they contend the case should be dismissed.

The Sixty-Four Thousand Dollar question then is: Why didn't they timely file a removal petition to remove the case to the United States District Court and have the

case transferred to Pennsylvania?⁸ If the Petitioners' posturing in this regard was reality rather than theater, the Petitioners had control of their destiny through removal. Corporate America lunges for federal court at every opportunity—particularly in places that big corporations describe as judicial hellholes. Petitioners' conduct of not filing the knee-jerk motion for removal presents a conundrum for an inquiring mind.

In discussing an objector's concern that there was no specifically defined procedure for reimbursement for previous repairs [to the subject vehicles], the Pennsylvania Federal District Court presiding over the class action said:

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.⁹

Petitioners' argument that the Circuit Court does not have jurisdiction to hear matters involving West Virginia residents who purchase vehicles in West Virginia is baseless. In accordance with the Federal Court's explanation, *supra*, Respondents have brought an independent action here to vindicate their rights under the manufacturer's new car warranty that was extended by the settlement agreement.

Petitioners never offered any authority to the Circuit Court, be it a case, a statute, or even an affidavit, to support their contention that the federal court has exclusive jurisdiction over this warranty claim against Smith Motors and MBUSA. Likewise, they offer none in this Court to support this dubious proposition.

⁸ Petitioners' contempt exposure noted immediately below may provide the answer.

⁹ See, *O'Keefe v. Mercedes-Benz USA, LLC*, Opinion and Order (Apr. 2, 2003), p. 61. (Emphasis added)

3. Petitioners' assertion that a forum selection clause is in play here is likewise baseless.

In their original Petition before this Court, Petitioners contended “the District Court’s continuing jurisdiction over the Settling Parties in the O’Keefe matter, including Class Members who chose not to opt out, operates in effect as a forum selection clause.” See Petitioner’s Brief, p. 8. This is yet another example of MBUSA mumbo jumbo—that not opting out of a class action settlement is an implied forum selection agreement when and if MBUSA subsequently refused to honor its new car warranty. Again, where is the code provision, statute, regulation, or case law citation for this amazing contention? More importantly, where is the Global Class Action Settlement term that allegedly requires Mercedes-Benz owners to travel to Pennsylvania to make warranty claims? Nowhere.¹⁰

In *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991), in addressing the validity of a forum selection clause inserted into a contract, the Supreme Court specifically noted that the question of personal jurisdiction and the question of forum selection were two separate and distinct issues in addressing the lower court’s rulings on both of them:

Because we find the forum-selection clause to be dispositive in this question, we need not consider petitioner’s constitutional argument as to personal jurisdiction.

Carnival Cruise, supra.

In *Caperton v. A.T. Massey Coal Co.*, ___ W. Va. ___, 690 S.E.2d 322 (2009), the West Virginia Supreme Court of Appeals considered in great detail the elements of, varieties of, and enforceability of forum selection clauses. Nowhere in this exhaustive *Caperton* analysis of the common law is there any indication that a mandatory forum

¹⁰ Citing various state and federal cases that address theoretical validity of forum selection clauses in contracts simply does not get us there.

selection clause (the kind that could trigger dismissal) may be implied. Indeed, when one attends to the factors employed by the West Virginia Supreme Court in evaluating such clauses, it is obvious that they may not be implied.

4. In their bizarre litany of reasons why the Kanawha County Circuit Court lacks personal and/or subject matter jurisdiction over this warranty claim, Petitioners cry: ancillary jurisdiction!

In their Briefs before this Court, Petitioners propound yet another theory to support their contention that this matter belongs in the Eastern District of Pennsylvania, to-wit: ancillary jurisdiction.

Petitioners argue that *Marino v. Pioneer Edsel Sales, Inc., et al*, 349 F.3d 746 (2003), is exactly like this case. If Petitioners had actually sought to remove this case to federal court, their ancillary jurisdiction argument might be of interest. But they did not. As most of us know, ancillary jurisdiction is a way to remove a related claim (over which the federal court may not have stand-alone jurisdiction). This ancillary jurisdiction argument is further evidence of the fact that Petitioners do not really want to be in federal court; they just want to talk about it.

Moreover, *Marino* is not really “exactly” like this case. *Marino* was removed (as in by the defendants) and transferred from state court to the Federal court that presided over the settlement of the class action suit. Ms. Marino, an attorney who had worked on the class action, sought her attorney's fees. The Federal court found it had jurisdiction to decide whether Ms. Marino was entitled to attorney's fees as part of its authority to manage its own proceedings, and indeed, it had *expressly* stated in its Order

incorporating the settlement agreement, that it retained jurisdiction over disputes involving attorney's fees.¹¹

The Global Class Action Settlement Agreement states that the Pennsylvania Federal Court retains jurisdiction over the matter. It does not say the Federal Court retains exclusive jurisdiction over the matter, and in fact, sets forth procedures for class members dissatisfied with MBUSA's decisions regarding their vehicles. Indeed, the federal court acknowledged that owners could start a new case in another court on breach of warranty, or pursue a contempt petition in the class action court.

C. Petitioners have violated the manufacturer's warranty as extended by the Global Class Action Settlement Agreement, but they claim they may do so with impunity.

In West Virginia, a breach of express warranty is a claim brought under the West Virginia Consumer Credit and Protection Act, *W. Va. Code* §§46A-6-101, *et seq.*, and under the federal Magnuson-Moss Act, 15 U.S.C. § 2310(d)(1). Respondents' engine was within the warranty mileage (150,000 miles) and time limits (10 years) at the time it began excessive oil consumption and sludging, and when it sustained engine damage. Respondents' sought repair or replacement at the defendant dealership within the manufacturer's warranty periods. Petitioners wrongfully and willfully dishonored their

¹¹In *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994), the United States 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." However, 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." 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."

warranty. Respondents' claims are legitimate and viable in the Circuit Courts of this State.

To all of this, Petitioners advance one last incredible argument in their Brief in this Court. They contend, in essence, that under the Global Class Action Settlement Agreement, Mercedes Benz owners like these Respondents waived any claims they might have *in the future*, if Mercedes Benz welched on its new car warranty obligations as extended *in the future*.

Petitioners allege Respondents' claims, which clearly arose many years and many miles after the class action settlement, must be dismissed under the doctrine of *res judicata*, i.e., the claims asserted have been previously litigated, and Respondents are barred from relitigating them.

This is a claim for breach of warranty. There is a genuine issue of fact as to whether MBUSA has breached its express warranty. MBUSA offers no explanation why this breach of warranty claim is different than any other claim under an express warranty. MBUSA extended its new car warranties for these Respondents and the other class action members to cover oil sludging, excessive oil consumption and resulting engine damage up to 150,000 miles and for ten years.

Respondents sought relief under their new car warranty approximately nine years after the Settlement Agreement. MBUSA's response: "too bad", you can't make a warranty claim because you settled for an extension of your warranty. To add insult to injury, MBUSA contends it is the "final arbiter" in determining whether it will honor its warranty, and that it is in its complete discretion to make that determination. The actual language of the settlement agreement says nothing of the sort. In fact, what it says is:

[i]f there is a legitimate dispute as to whether oil sludging or related 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;¹²

The provision just quoted contemplated future warranty claims; Respondents are making one and they now assert their contractual and statutory remedies. MBUSA could have replaced the engine under the warranty and have been done. Having refused to abide by the express warranty, the Petitioners should not now be allowed to protest that they are not liable in contract and under West Virginia Lemon Law, *W. Va. Code* §§ 46A-6A-1, *et seq.*; West Virginia's consumer protection laws, *W. Va. Code* §§ 46A-6-101, *et seq.*; and under the federal Magnuson-Moss Act, 15 U.S.C. § 2310(d)(1).

V. CONCLUSION

WHEREFORE, Respondents respectfully request that this Court find that the Circuit Court has jurisdiction to hear and determine all of their claims—none of which are barred or limited by the said agreement.

DATED this 14th day of December, 2010.

**WILLIAM J. HUSTON and
CONNIE HUSTON
By Counsel**

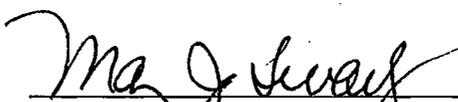

Mark A. Swartz, Esq. (WV SBN 4807)
Mary Jo Swartz, Esq. (WV SBN 5514)
SWARTZ LAW OFFICES, PLLC
601 Sixth Avenue, Suite 201
P. O. Box 1808
St. Albans, WV 25177-1808
(304) 729-9000
(304) 729-0099 (fax)

¹² See, Global Class Action Settlement Agreement (emphasis added).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing
RESPONDENTS' BRIEF was served on counsel of record on the 14th day of
December, 2010, by U.S. Mail deposited postage prepaid and addressed to:

Harry F. Bell, Jr., Esq.
Jonathan W. Price, Esq.
The Bell Law Firm, PLLC
P. O. Box 723
Charleston, WV 25326



Mark A. Swartz, Esq. (WV SBN 4807)
Mary Jo Swartz, Esq. (WV SBN 5514)
SWARTZ LAW OFFICES, PLLC
601 Sixth Ave., Suite 200
P. O. Box 1808
St. Albans, WV 25177-1808
(304) 729-9000
(304) 729-0099 (Fax)
mjswartz@swartzlawoffices.com
miswartz@swartzlawoffices.com