

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0737

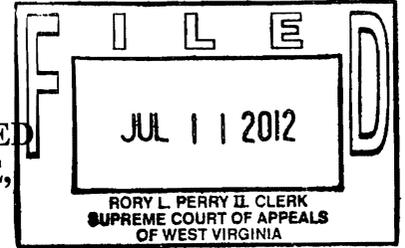
STATE OF WEST VIRGINIA ex rel.
ADVANCE STORES COMPANY, INCORPORATED
dba ADVANCE AUTO PARTS, and DONN FREE,

Petitioners,

v.

HONORABLE ARTHUR M. RECHT, Senior Status Judge of the Circuit Court of Ohio
County; SCOTT MCMAHON and KAREN JOHN, individually and on behalf of others
similarly situated,

Respondents.



**RESPONSE OF SCOTT MCMAHON AND KAREN JOHN
TO PETITION FOR WRIT OF PROHIBITION**

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I. QUESTION PRESENTED

By their *Question Presented*, Petitioners attempt to predicate their argument why this Honorable Court should deny Respondents the opportunity to have this action adjudicated on its merits before a jury. As discussed herein, Petitioners' characterization of matters, both legal and factual, upon which their requested relief is grounded, is infirm.

II. STATEMENT OF THE CASE

Petitioners' *Statement of the Case* omits some material procedural history.

Petitioners omit recounting that the legal setting for the decision in *McMahon v. Advance Stores Co., Inc.*, 227 W.Va. 21, 705 S.E.2d 131 (2010), was a certified question, one that posed a distinct question of law which was central to Trial Court Judge Arthur Recht's granting of summary judgment in favor of plaintiffs, but which was not critical to the survival of the multiple extant causes of action, including the express warranty cause of action.

Omitted by Petitioners was any acknowledgement that at the time summary judgment was granted, there were existing issues of fact relating to whether the "limited express warranty" was ever conveyed or in effect, but that such factual development was not deemed necessary to toward summary judgment, for Judge Recht's ruling was against Petitioners even with the evidence weighed in the light most favorable to them, giving Petitioners the benefit of any factual doubt. In other words, there was no factual determination whether the "limited express warranty" was ever effectively conveyed as the governing express warranty in the battery purchase transaction, because Petitioners were deemed to have lost under established West Virginia law even if the "limited express warranty" were considered in place and governing. Procedurally, had the Trial Court ruled in accordance with the subsequent holding of *McMahon*, then the case would have continued, as Respondents are attempting to do, for the development of facts material to all the causes of action, including the express warranty claim.

Petitioners omit that the Trial Court certified the question over the Respondents' objection that there remained factual matters in dispute surrounding the express warranty. In *Plaintiffs' Response To Defendants' Motion For Certification Of Question*, the protest was asserted in opposition to the motion:

Moreover, certification cannot be accepted unless there is a sufficiently precise and undisputed factual record on which the legal issues can be determined.

...

...The defendants contend that the subject express warranty was limited to the original purchaser. This allegation is disputed by the plaintiffs as the plaintiffs contend that this alleged limitation is never disclosed by the defendants to any consumer.

The West Virginia Supreme Court of Appeals has no jurisdiction to determine a question of fact on certification, and whether this alleged limitation exists is a question of fact.

(Resp. Appx. at 002-003)

Respondents' objection was overruled, and the question was certified.

Respondents' Brief (Resp. Appx. 006-052) filed with this Honorable Court in association with the certified question reasserted the protest that there remain unresolved factual matters.

Furthermore, the petitioners never made their alleged limitation part of the sale by conveying any such limitation directly to the purchaser.

(Resp. Appx. at 016)

...The petitioners contend that the subject express warranty was limited to the original purchaser. However, respondents contend that the question contains facts not established by the petitioners. The respondents dispute whether this limitation actually exists and respondents contend that any such limitation is never conveyed or disclosed to the consumer. The petitioners have offered no proof that this limitation is ever conveyed to the consumer, and simply assert the "visit us at www.advanceauto.com" language in support of their position.

(Resp. Appx. at 022)

Respondents' counsel at oral argument discussed this setting of unresolved factual dispute, a setting which in his dissent Justice Ketchum clearly appreciated.

Petitioners themselves did not previously contend the disposition of Respondents' entire express warranty claim hung on the outcome of the certified question, but only prayed that this Court "clarify" and "modify" *Dawson v. Canteen Corp.*, 158 W.Va. 516, 212 S.E.2d 82 (1975), so as to "place manufacturers and retailers who do business in West Virginia on the same footing as manufacturers and retailers in other states who routinely limit express warranties to the original purchasers of consumer and industrial products." (See, *Brief Of The Petitioners*, Resp. Appx. 053-084, at 083) They did not purport that reversing Judge Recht meant the overall dismissal of the express warranty claim, or the other causes of action for that matter.

In accordance with the procedural posture of the case and with the legal principle that the Supreme Court of Appeals cannot answer a certified question if in doing so it must resolve issues of disputed fact,¹ the Court in *McMahon* answered in the negative the following legal question and, fortunately, the Court's analysis did not necessitate weighing any factual evidence as to whether the "limited express warranty" was ever was conveyed:

Does W.Va. Code § 46A-6-108(a) apply to suits for breach of limited warranty by subsequent purchasers where the limited warranty involved limits its availability to original purchasers?

705 S.E.2d, at 132.

The *Mandate* that followed was that the "matter is remanded to the Circuit Court of Ohio County for further proceedings consistent with this opinion." (Pet. Appx. at 66)

Petitioners' current attack is steeped in the contention of judicial insubordination on the part of Judge Recht. In light of the actual procedural history of the case, the setting of the certified question, the judicial strictures associated with certified questions, and plain readings of the *McMahon* decision and associated *Mandate*, Petitioners' *Statement of the Case* is grossly

¹ See, *Bass v. Coltelli*, 192 W.Va. 516, 453 S.E.2d 350 (1994) and *Hannah v. Teeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003), and the discussion below.

inaccurate in offering the following procedural history and in then contending Judge Recht's ruling defied it:

After plaintiffs lost before this Court regarding their express warranty, consumer protection, and other claims, the case was remanded for litigation on the only purported remaining claim: breach of implied warranty of merchantability.

This is simply an untrue contention of what *McMahon* provided. It is not the true history, yet the one upon which the *Petition* relies.

Petitioners further omit some of the post-*McMahon* procedural history that explains why so much time has elapsed between *McMahon*'s December 27, 2010, *Mandate* and now. Soon following the *Mandate*, on January 31, 2011, to be precise, Respondents moved to amend their complaint to assert a claim under the *Magnuson-Moss Warranty Act*², just as anticipated by Justice Ketchum's dissent. That motion was granted and the *Amended Complaint-Third* (Pet. Appx. at 83-93), which added a *Magnuson-Moss* claim arising from the same underlying operative facts, was consequently served on Petitioners February 15, 2011. Petitioners' response was not to file their *Motion to Dismiss* before the Trial Court, but to again try to escape the jurisdiction of the West Virginia State Court system. Again, Petitioners removed the action to the Northern District Federal Court on contentions of diversity jurisdiction, just like they did in the case before the presentation of the certified question. (See, *Notice Of Removal*, Resp. Appx. 085-092) Just like before, following time consuming, case protracting briefings, because Petitioners had no factual basis for the removal, Judge Stamp of the Northern District granted Respondents' motion to remand. (See, Resp. Appx. at 093) Following the Federal Court rejection came the Trial Court's sound rejection of the *Motion to Dismiss*, and upon that rejection we arrive here with yet another prosecution-thwarting, interlocutory appeal.

² 15 U.S.C. §2301, et seq.

Now, with the instant pursuit of a writ of prohibition, the tally Petitioners may claim in terms of delay and consumption of judicial and party resources involves three attempts at West Virginia interlocutory appellate review (albeit with one success), two unlawful removals to Federal Court, and nearly six years of protraction in the process.

III. SUMMARY OF ARGUMENT

In the current attempt to evade litigation of the longstanding claims on the merits, Petitioners attempt to distort and change the facts and the law by claiming the *McMahon* decision did more than resolve the legally-insulated certified question. They errantly claim the decision weighed the evidence and determined facts in a manner repugnant to the appellate process for addressing a certified question. While Petitioners' arguments are numerous, nearly all are predicated upon the errant contention that *McMahon* laid to rest all the facts germane to the express warranty claim. Instead of saving their arguments until the resolution of the case at the Trial Court level, they improperly argue for an extraordinary remedy by casting the matter as a defiant act of insubordination on the part of the Trial Court against a Supreme Court mandate.

From its inception, this action has involved various claims, based both in contract and in tort, which if proved would lead to a recovery from Petitioners, all arising directly from the purchase of a undisputedly defective motor vehicle battery and the Petitioners' refusal to provide appropriate redress. From the commencement of this action Respondents have contended that the "limited express warranty" upon which Petitioners defend in the express warranty claim was never properly conveyed and never in effect. Rather, any express warranty rights were conveyed by the sales receipt which was provided at the point of purchase, which contained sufficiently particularized information to constitute a warranty, and which said nothing about being limited to original purchasers. Respondents also alternatively contended that, even if it was conveyed and in effect for the transaction at issue, under settled West Virginia law the "limited express

warranty” was invalid to the extent it purported to limit the express warranty to original purchasers.

The Trial Court awarded Respondents summary judgment on the express warranty claim as a pure matter of law considering the facts in the light most favorable to Petitioners. In other words, it made no difference whether the “limited express warranty” was actually in effect, for even if it was, as Petitioners alleged, Petitioners’ reliance upon it was misplaced as a matter of law. Consequently, and over Respondents’ objection, a certified question was presented that framed a legal question as to the status of West Virginia law on limited warranties, and *McMahon* answered the question in the negative, and with a classic general mandate the action was remanded to the Trial Court “for further proceedings consistent with this opinion.” The Court in *McMahon* did not, and could not, resolve and foreclose the very material factual disputes over the “limited express warranty”, and for Petitioners to contend otherwise is to argue the Supreme Court acted beyond its powers.

Given the procedural history of the case, the nature and language of the *McMahon* decision and associated mandate, and the clear law respecting the issue of “limited” versus “general” mandates, as is well described in *State ex rel. Frazier and Oxley, L.C. v. Cummings*, 214 W. Va. 802, 591 S.E.2d 728 (2003), Petitioners’ arguments not only fail, they heighten concerns over the bona fides of Petitioners’ litigation conduct.

As to the *Magnuson-Moss* claim, clearly the Trial Court was correct that it relates back and is a viable claim, and in any event, Petitioners’ grievances over it do not merit extraordinary relief.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Should the Court not decline the *Petition* based solely on the written arguments of the parties, then Respondents would request oral argument under Appellate Rule 20.

V. ARGUMENT

A. Petitioners' Arguments Do Not Warrant Extraordinary Relief

The standards which apply to writs for prohibition are stringent. As Syllabus Point 4 of

State ex rel. Hoover v. Berger sets forth:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

199 W.Va. 12, 14-15, 483 S.E.2d 12 (1996).

Prohibition is denominated an "extraordinary" remedy, for it is available only in very limited, extreme circumstances. "The writ of prohibition will issue only in clear cases where the inferior tribunal is proceeding without, or in excess of, jurisdiction." Syl., *State ex rel. Vineyard v. O'Brien*, 100 W.Va. 163, 130 S.E. 111 (1925) ." Syl. pt. 1, *State ex rel. Johnson v. Reed*, 219 W.Va. 289, 633 S.E.2d 234 (2006) .

[T]his Court has long recognized that prohibition may not be used as a substitute for an appeal. Moreover, prohibition is a drastic, tightly circumscribed, remedy which should be invoked only in extraordinary situations. *Health Management v. Lindell*, 207 W.Va. 68, 72, 528 S.E.2d 762, 766 (1999); *State ex rel. Frazier v. Hrko*, 203 W.Va. 652, 657, 510 S.E.2d 486, 491 (1998); *State ex rel. Allen v. Bedell*, 193 W.Va. 32, 37, 454 S.E.2d 77, 82 (1994) (Cleckley, J., concurring); 72A C.J.S. *Prohibition* § 11 (2004).

State ex rel. W. Virginia Nat. Auto Ins. Co., Inc. v. Bedell, 223 W.Va. 222, 228, 672 S.E.2d 358, 364 (2008)

In the present case, Petitioners cast their arguments with a façade of exasperated disbelief over Judge Recht’s defiance of a supposedly clear mandate. This fabrication of justification for extraordinary appellate relief may be seen for what it plainly is, fabrication, and it should be rejected.

B. Judge Recht Was Right In His Analysis Of The Ramifications Of The *McMahon* Decision And In Rejecting Petitioners’ “Mandate” Argument

The Petition is staked almost entirely upon the patently errant contention that, by his denial of Petitioners’ *Motion to Dismiss* the express warranty claim and “related” other claims, Judge Recht defied the Supreme Court’s mandate associated with the *McMahon* decision.

Tellingly, Petitioners ignore that the *McMahon* legal setting was a certified question, to wit:

Does W.Va. Code § 46A-6-108(a) apply to suits for breach of limited warranty by subsequent purchasers where the limited warranty involved limits its availability to original purchasers?

705 S.E.2d, at 132.

This question was the result of summary judgment being granted based on a question of law, considering the facts in the light most favorable to Petitioners per well-established standards of Rule of Civil Procedure 56. *See, Painter v. Peavy*, 192 W.Va. 189, 192, 451 S.E.2d 755, 758 (1994). In other words, although all along Respondents have contended the “limited express warranty” relied upon by Petitioners was not conveyed and was never in effect, summary judgment was granted against Petitioners even if assuming it had been in effect. Thus, it was not necessary to have the trier of fact resolve the factual issues over whether the “limited express warranty” was ever actually in effect. Had the Trial Court denied the motion, the case would have continued for the development and resolution of these factual issues. (Of course, this is

precisely what Respondents have been attempting to do since the issuance of the *McMahon* decision.)

As recounted above, in relation to Petitioners' pursuit of a certified question, both at the Trial Court and appellate levels, Respondents have persistently objected with the specific concern that the question must not require consideration of any of the factual issues surrounding the express warranty. Even at oral argument this was discussed by Respondents' counsel.

In answering the certified question, the Supreme Court did not weigh any evidence respecting the factual disputes between the parties, and it certainly did not resolve any of the factual disputes. It did not need to, and obviously it appreciated that it could not do so, lest it would plainly be acting beyond its legitimate powers. As stated by Syllabus Point 1 of *Hannah v. Teeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003):

“West Virginia Code, 58-5-2 (1967) , allows for certification of a question arising from a denial of a motion for summary judgment. However, such certification will not be accepted unless there is a sufficiently precise and undisputed factual record on which the legal issues can be determined. Moreover, such legal issues must substantially control the case.” Syllabus Point 5, *Bass v. Coltelli*, 192 W.Va. 516, 453 S.E.2d 350 (1994).

As *Bass v. Coltelli* emphasized,

[I]t is obvious that if the legal issue which is the basis for the certified questions is dependent upon facts which are or may be disputed, this will affect the answer to the certified question. Moreover, where a certified question depends on facts that are not contained in the record, it is not possible for this Court to formulate an appropriate answer to the certified questions.

453 S.E.2d, at 354.

Accordingly, *McMahon* answered the question of pure West Virginia law respecting limited warranties, but left for further development at the Trial Court level the factual disputes concerning the warranty, to be addressed in accordance with the general mandate, stating “. . . and this matter is remanded to the Circuit Court of Ohio County for further proceedings

consistent with this opinion.” With a purely legal phraseology of the certified question, the separability of the legal question from the disputed facts, the clear legal strictures in play regarding the appellate disposition of certified questions, and the phraseology of the mandate, there simply can be no serious contention otherwise.

This is a far cry from what Petitioners now allege. Petitioners go so far to actually assert the Supreme Court specifically remanded the case “for litigation on the only purported remaining claim: for breach of implied warranty of merchantability.” (Pet. p. 8) This cannot be characterized other than as pure fiction.

Petitioners cite to *State ex rel. Frazier & Oxley, L.C. v. Cummings*, supra, to support their contention that the Supreme Court somehow foreclosed the intended further litigation. While *Frazier* is indeed an important decision respecting the interpretation and effect to be given to a Supreme Court mandate, the case actually supports the Respondents’ pursuit of further litigation, rather than support the stifling which Petitioners seek. Syllabus Point 2 of *Frazier* sets forth:

When this Court remands a case to the circuit court, the remand can be either general or limited in scope. Limited remands explicitly outline the issues to be addressed by the circuit court and create a narrow framework within which the circuit court must operate. General remands, in contrast, give circuit courts authority to address all matters as long as remaining consistent with the remand.

In the body of the *Frazier* decision, at page 735, the Court emphasized:

Limited remands explicitly outline the issues to be addressed by the circuit court and create a narrow framework within which the circuit court must operate. General remands, in contrast, give circuit courts authority to address all matters as long as remaining consistent with the remand.

Although there is no universally applicable standard for determining whether a remand is general or limited, and the particular intricacies of each case will bear on the issue, there are certain relevant principles to be applied in making such a determination. *Id.* at 266. For example, a court must look to the entire mandate, examining every part of the opinion to determine if a remand is general or limited, as “[t]he relevant language could appear anywhere in an opinion or order, including a designated paragraph or section, or certain key identifiable

language.” *Id.* at 266-67. We stress though “that individual paragraphs and sentences must not be read out of context.” *Id.* at 267. Moreover, in the absence of explicit instructions, a remand order is presumptively general.

As *Frazier* further explained, “[W]here a case is generally remanded by an appellate court, the case stands as if it had never been tried, and thus the parties are free to amend their pleadings and assert new causes of action.” 591 S.E.2d, at 735.

Petitioners are flatly wrong in arguing the *McMahon* mandate under these legal principles may be characterized as “limited” rather than “general”. As a general remand, Respondents are free to amend their pleadings and the Trial Court is free to address all matters so long as the further litigation does not run afoul of the answer to the certified question. Here, no such danger exists. None of Respondents’ ongoing claims seek relief through the application of the terms of the “limited express warranty.” Far from it, as they have claimed all along, Respondents contend the “limited express warranty” was never in effect.

Judge Recht’s *Memorandum Of Opinion And Order* (hereinafter “*Order*”) (Pet. Appx. at 1-28) cogently described the truth as to *McMahon*’s ramifications, and thoughtfully explained the unsoundness of Petitioners’ interpretation of the *Frazier* decision.

Second, Defendants assert that the “mandate rule” set forth in *Frazier*, 591 S.E.2d 728 (2003), prohibits litigation on remand of Plaintiffs’ Magnuson-Moss claim. In *Frazier*, the predecessor case involved a real estate dispute between a sublessor and sublessee that turned on whether consent to the sublessee’s surrender of the subject real estate was given by the lessor, and the Supreme Court took the case to consider whether a particular settlement agreement constituted such consent. *Id.* at 731-32. In the Opinion, though somewhat opaquely, the Court noted that, but for the agreement, it would merely remand to the Circuit Court for a determination of consent. *Id.* at 732. Moving on and ultimately determining that the settlement agreement did not constitute consent, the Court remanded for proceedings consistent with its Opinion. *Id.*

On remand, the Circuit Court permitted the addition of a new claim based on the Recording Act, and the sublessor filed for a writ of prohibition claiming, *inter alia*, that based on the mandate, the only issue the Court was permitted to consider was consent as it pertained to the underlying claim. *Id.* at 732-33. Granting a subsequent writ of prohibition petition, the Supreme Court opined as follows:

“Upon remand of a case for further proceedings after a decision by this Court, the circuit court must proceed in accordance with the mandate and the law of the case as established on appeal. The trial court must implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces[.]”

Syl.pt. 3, *Frazier*, 591 S.E.2d 728 (W.Va. 2003)).

“Appellate remands are characterized as general or limited. A general remand broadly remands the case and when a cause is broadly remanded for a new trial all of the issues are opened anew as if there had been no trial, and the parties have a right to amend their pleadings as necessary ...Under a limited remand, however, the court on remand is precluded from considering other issues, or new matters, affecting the cause. In other words, when the further proceedings are specified in the mandate, the district court is limited to holding such as are directed. When the remand is general, however, the district court is free to decide anything not foreclosed by the mandate.

* * *

Consequently, we hold that when this Court remands a case to the circuit court, the remand can be either general or limited in scope. Limited remands explicitly outline the issues to be addressed by the circuit court and create a narrow framework within which the circuit court must operate. General remands, in contrast, give circuit courts authority to address all matters as long as remaining consistent with the remand.”

Id. at 735. Subsequently, the Court, noting its prior intimation that, in the absence of the settlement agreement, it would merely remand for a determination of consent to surrender, concluded that, because it held the settlement agreement did not constitute consent, the Mandate required that the remand be limited to that issue. *Id.* at 736-39. Thus, *Frazier* stands for the rather unremarkable position that when a Court includes language in its Opinion that, absent a particular contingency, it would preclude consideration of new issues, and thereafter negates that contingency, it precludes consideration of new issues. In other words, quite simply, actions on remand must be consistent with the Opinion at the Supreme Court of Appeals.

In the instant case, proceeding on the Magnuson-Moss claim is absolutely consistent with the Supreme Court of Appeals' decision. In the instant case, the Supreme Court did not explicitly or implicitly limit the proceedings on remand in any way. In fact, the Supreme Court answered a narrow legal question: whether parties to a consumer transaction may contract to extend a warranty only to the

initial purchaser notwithstanding the Dawson case and its progeny. Thus, the ruling did not limit in any way the factual or legal issues for consideration except insofar as this Court may not relitigate the issue of the validity of the alleged limited warranty as it pertains to Plaintiff John. Accordingly, the remand in the instant case is a general remand, and amendment to the pleadings is not barred by the rule in Frazier.

(Pet. Appx. at 20-22) (underline added)

In Footnote 14, at Pet. Appx. page 22, Judge Recht added the following in rebuttal of Petitioners' over-simplified comparison of *Frazier's* mandate language with that of *McMahon*:

Defendant places great weight on the fact that the mandates in *Frazier* and the instant case permit only proceedings "in accordance with the written opinion" and "consistent with this Opinion," and notes that both cases embrace attempts to amend a complaint on remand to add a new cause of action. This argument misses the mark because it ignores the differences in procedural posture and the substance of the Supreme Court Opinion in each case.

Plainly, the Trial Court was right in the analysis of *McMahon's* mandate arising from the certified question.

In addition to discussing the mandate's ramifications vis-à-vis the amendment bringing the *Magnuson-Moss* claim, Judge Recht further expounded on the Petitioners' contentions respecting the ongoing factual disputes on the express warranty. Upon a proper framing of the issues, His Honor explained the fallacy of Petitioners' contentions:

First, Defendants seek dismissal of Count I of the Third Complaint, sounding in breach of express warranty, on the ground that it is precluded by the doctrine of law of the case. In support of this position, they note that the Supreme Court, in answering the certified question in this proceeding, concluded that "[a]t the moment the original purchaser sold the battery, Advance's limited warranty, by its express terms, ceased to exist." Defendant's Memorandum at 5 (quoting *McMahon*, 705 S.E.2d at 137 (W.Va. 2010)). Accordingly, Defendants claim, Plaintiffs are barred from asserting any claim based upon Advance's limited warranty.

Plaintiffs counter that the express warranty claim they are pursuing is not based upon Advance's limited warranty; rather, they assert that Advance's limited warranty was never conveyed to Plaintiff McMahon, and may not have been in existence at the time of sale. Plaintiffs' Brief at 5-6. As a result, they suggest, the limited warranty was never made part of the transaction, and the terms of the

receipt-24 months free replacement, 72 month prorated-constituted a separate and governing express warranty over this transaction. *Id.* Thus, according to Plaintiffs, because the Supreme Court's decision did not speak to or even consider this warranty, the law of the case does not bar the claim.

The doctrine of law of the case, as applicable in the instant procedural posture, provides that a circuit court “has no power, in a cause decided by the Appellate Court, to re-hear it as to any matter so decided, and, though it must interpret the decree or mandate of the Appellate Court, in entering orders and decrees to carry it into effect, any decree it may enter that is inconsistent with the mandate is erroneous and will be reversed.” *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 591 S.E.2d 728, 734 (W.Va. 2003) (quoting Syl. Pt. 1, *Johnson v. Gould*, 59 S.E. 611 (W.Va. 1907)). To be binding on the circuit court upon remand, a particular conclusion “must be ‘necessary to a decision in the case’ or it is dicta, which neither creates precedent, nor establishes law of the case.” *Frazier*, 591 S.E.2d at 736. Thus, the doctrine works to “generally prohibit[] reconsideration of issues which have been decided in a prior appeal in the same case[,]” and is “grounded in important considerations related to stability in the decision making process, predictability of results, proper working relationships between trial and appellate courts, and judicial economy.” *Id.* at 734.

As Defendants argue, the Supreme Court's conclusion that “[a]t the moment the original purchaser sold the battery, Advance's limited warranty, by its express terms, ceased to exist,” was necessary to its decision in answering the certified question before it—indeed, it is the factual basis for the holding answering the certified question in the negative. Defendants are entirely correct that the law of the case bars this Court from permitting any express warranty claim based on that limited warranty. Such litigation would fly directly in the face of the Supreme Court's Opinion, as well as its Mandate, and would run counter to the policies expressed in *Frazier*—destabilizing the adjudicatory decision making process, rendering as folly any reliance on the Supreme Court's decision, and in some respects flouting that Court's authority.

However, answering a certified question as to the validity of a first-purchaser limited warranty has absolutely no bearing on whether that warranty is applicable or whether additional or different warranties are applicable in any given factual situation. As Plaintiffs note, they are not pursuing a claim based on the limited warranty, but one predicated on the terms of the sales receipt, which they contend constituted the only effective warranty governing the transaction. As to the validity of such a warranty, the Supreme Court has not intimated a view, and so neither the decisional rule nor the policies of the doctrine of law of the case are offended by litigating the matter now properly before the Court. Thus, the Defendants' argument is meritless.

Accordingly, while the decision of the Supreme Court of Appeals precludes a warranty claim based on Advance's limited warranty, the doctrine of law of the case does not bar a claim based on other express warranties that may or may not govern the transaction; consequently, Defendants' Motion to Dismiss should be **GRANTED** insofar as it relates to Advance's limited express warranty opined upon by the West Virginia Supreme Court of Appeals and **DENIED** with

respect to any other applicable express warranty.

(Pet. Appx. at 8-11) (underline added)

In Footnote 4, at Pet. Appx. page 10, the Trial Court added:

In other words, while Defendants are correct that litigating an express warranty claim based upon Advance's limited warranty would not be "consistent with" the Supreme Court's decision, because the decision did not speak to anything but the validity of the alleged limited warranty as to Plaintiff John, they are plainly incorrect that the decision necessarily precludes any express warranty claim whatsoever.

This explication is in lock step with the actual procedural history of this action and the law pertaining to certified questions. Undoubtedly, given the persistently-raised objections of Respondents respecting the unresolved factual disputes, had the Supreme Court perceived any of the disputed facts necessary to answer the posed certified question, it would never have accepted and answered the question. As such, any language of *McMahon* on the disputed facts is merely dicta not justifying the exploitation Petitioners have undertaken.

As the Trial Court correctly ruled, all of Petitioners' contentions based upon their mandate supposition are meritless and unavailing.

C. Petitioners' "Res Judicata" Argument Is Fatally Flawed

Built upon the same unsound foundation of the mandate argument, Petitioners raise *res judicata* as a reason to trigger extraordinary relief. In further disregard for what is actual, they claim Respondents are "relitigating" claims that were, or should have been, brought in "the prior action." (Pet. p. 18) This contention can be quickly dispatched, however, by the recognition we are still in the original action and there has been no final adjudication on the merits for any of the on-going claims. The absence of this essential *res judicata* element was succinctly observed by the Trial Court, at Footnote 3, Pet. Appx. page 8, of the challenged *Order*:

Defendants also assert that the doctrine of *res judicata*, also referred to as claim preclusion, bars proceeding on Count I. Defendant's Reply to Plaintiffs' Response to Defendants' Motion to Dismiss (hereinafter "Defendant's Reply") at 12. *Res judicata* "applies when there is a final judgment on the merits" and "precludes the parties or their privies from relitigating [in a subsequent civil action] the issues that were decided or ...could have been decided" in the prior civil action. *State v. Miller*, 459 S.E.2d 114, 120 (W.Va. 1995). It is wholly inapposite where, as here, there has been no prior action litigating the matter. In other words, the instant claim cannot be considered a "second vexation" of a Defendant over something already adjudicated-while certainly a vexation to Defendants, as far as this Court is aware, it is the first and thus far only action brought in this matter. *Hannah v. Beasley*, 53 S.E.2d 729, 733 (1949).

D. Petitioners Present No Argument To Support Extraordinary Relief Respecting The Fraud And Unjust Enrichment Claim

As a testament to Petitioners' willingness to misconstrue litigation rules, they assert that as a matter of fact the Trial Court should have thrown out the unjust enrichment and fraud claims, and not on the weight of all the evidence pursuant to Rule 56 (summary judgment), but upon a Rule 12 motion to dismiss. Upon this, the Trial Court correctly held,

Plaintiffs counter that

"Defendants ... fail to appreciate the gist of the fraud and unjust enrichment counts For defendants to bait a sale based on the [receipt] warranty and then take it away through terms and conditions [of the limited warranty] that can be found later, if they ever existed, only on the internet, is nothing short of an intentional attempt to defraud customers and make undue profit. While there are facts common to the warranty claims and the fraud/unjust enrichment claims, the fraud and unjust enrichment claims are not parasitic or dependent."

Plaintiffs Brief at 15-16. Thus, the fraud and unjust enrichment counts are not predicated on a fraudulent failure to honor the limited warranty, but rather on the circumstantial nexus of the delivery of the alleged receipt warranty and subsequent limitation in cyberspace, subject to modification at Defendant Advance's whimsy, which Plaintiffs contend constitutes a bait-and-switch. Plainly, this is distinct from the substance of the warranty claim itself. On that basis alone, Defendants' argument is unsuccessful. Moreover, even if Defendants had properly characterized Plaintiffs' claim, this Court's decision *supra* that, if the receipt warranty was the only effective warranty at the time of sale, the Plaintiffs

may proceed on their express warranty claim, vitiates the Defendants' arguments on their own terms.

(Pet. Appx. at 25-26)

As for the argument that no reasonable consumer could be defrauded by the alleged misconduct, and that somewhere in some case the Supreme Court so found, Judge Recht astutely offered:

Second, Defendants argue that “[n]o reasonable consumer, as the Supreme Court ruled, could have been defrauded by such a clear statement of the scope of the express limited warranty,” noting that the receipt indicated that warranty information was available at Defendant Advance's website. To begin, this Court is unaware of any statement by the Supreme Court of Appeals as to the reasonableness of reliance on the receipt in this matter, which would have constituted *obiter dictum*. In any event, Defendants' suggestion that no reasonable person should rely on terms written on a receipt where the receipt also notes that warranty information is available at a website is properly a suggestion to the jury, as this Court is unable to conclude that reliance on an alleged bait-and-switch would be unreasonable as a matter of law.

(Pet. Appx. at 26)

As unwarranted as it is to seek a Rule 12 motion to dismiss claims laden with disputed material facts, it is far worse to submit this rather typical Trial Court procedural scenario warrants a writ of prohibition. This argument is properly left for the finder of fact, and is not the proper substance of a motion to dismiss, nor a petition for extraordinary relief.

E. Respondents' *Magnuson-Moss* Claim Is Not Time-Barred

Respondents acknowledge the applicable statute of limitations for the *Magnuson-Moss* claim is four years. In any event, the original *Complaint* was filed well within that deadline, and West Virginia Rule of Civil Procedure 15(c)(2) clearly relates the *Magnuson-Moss* claim back to the original pleading. Petitioners' argument to the contrary is factually absurd, and even if it possessed any hue, it still would not serve to justify an extraordinary remedy.

Rule of Civil Procedure 15(c)(2) states:

(c) *Relation back of amendments.* — An amendment of a pleading relates back to the date of the original pleading when:

... (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; ...

The *Magnuson-Moss* claim is specifically predicated upon the same conduct, transaction and occurrence involving the sale of a car battery which is thoroughly described in the original *Complaint*. (See, Pet. Appx. at 29-37)

Not only do Petitioners narrow Rule 15 in a manner which is nonsensical by contending the *Complaint* needs to be somehow more precisely focused upon the sales receipt, which it does not, their own faulty contention is defeated by reference to paragraph 8 of the *Complaint* which states “As a part of the sale, the defendant provided an express warranty to cover the battery, which consisted of “24-month free replacement, 72-month pro-rated.” As is undisputable, this is an explicit reference to the sales receipt. Moreover, other paragraphs of the *Complaint* also are devoted to descriptions of a transaction, occurrence, and conduct associated with battery sale that spawned all the causes of action, including the *Magnuson-Moss* claim.

The very law cited by Petitioners, syllabus point 7 of *Dzinglski v. Weirton Steel Corp.*, 191 W.Va. 278, 445 S.E.2d 219 (1994), serves under these facts to defeat Petitioners’ contention.

7. Pursuant to Rule 15, *W.Va.R.C.P.*, amendments relate back when the cause of action sought to be added grows out of the specified conduct of the defendant that gave rise to the original cause of action. If, however, the supplemental pleading creates an entirely new cause of action based on facts different from those in the original complaint, the amended pleading will not relate back for statute of limitations purposes.

Dzinglski v. Weirton Steel Corp., 191 W.Va. 278, 281, 445 S.E.2d 219, 222 (1994) holding modified by *Tudor v. Charleston Area Med. Ctr., Inc.*, 203 W.Va. 111, 506 S.E.2d 554 (1997).

Illustrating the breadth afforded to of Rule 15's "out of the conduct, transaction, or occurrence" language is the following Supreme Court observation from *Brooks v. Isinghood*, where various causes of action grew out of the occurrence of a trench collapse:

The first requirement under Rule 15(c)[] is that the amendment must arise out of the conduct, transaction or occurrence set forth in the original complaint. There is no dispute that the claim or defense to be asserted by the appellant in the amended complaint arises out of the same occurrence, the collapse of the trench, as that contained in the original complaint that she filed in the circuit court in April 1995.

213 W.Va. 675, 685, 584 S.E.2d 531, 541 (2003).

Here, the *Magnuson-Moss* claim arises from the same conduct, transaction, or occurrence giving rise to all other causes of action of the original *Complaint*, the occurrence of the sale of the battery and the attempts by Respondents to obtain warranty relief once the battery quit working, the associated transactions, and the conduct of the Petitioners associated with it all. It is plainly of the same stuff, and so just as plainly the *Magnuson-Moss* claim relates back to the original *Complaint*.

It is inconsistent, however typical, for Petitioners to contend an amendment should especially be disallowed upon a remand when *Frazier*, upon which Petitioners attempt to rely, is emphatic in observing,

Where a case is generally remanded by an appellate court, the case stands as if it had never been tried, and thus the parties are free to amend their pleadings and assert new causes of action.

591 S.E.2d, at 735.

The Trial Court exposed the faults of Petitioners' arguments. With its important footnotes, Judge Recht's *Order* set forth:

The amended complaint's claim under *Magnuson-Moss* is based the identical conduct, transaction and occurrence set forth in the initial complaint's claims-the conduct of Defendant Advance in allegedly extending a warranty,

attempting to limit it in a different document published on the Internet, which was allegedly not conveyed to Plaintiff McMahon, and failing to abide by the terms of the initial receipt, alleged to be a warranty.^{11,12,13} Defendant's notice, investigation of the matter, or defense is not prejudiced in any substantive way. The thrust of Defendants' argument that relation back is not permitted is that Plaintiffs are unfairly being permitted to raise a different legal theory of liability than was initially pleaded on the exact same set of facts. Whatever inconvenience may have inured to Defendants, it is not of a kind prohibited by Rule 15. Thus, Defendants' relation-back argument is without merit.

[Footnote] 11 Defendants argue that Plaintiffs did not allege that the receipt constituted a warranty in their initial complaint. Defendants' Memorandum at 9 (“the factual predicate for plaintiffs' belated Magnuson-Moss claim, ... use of a 'receipt warranty' .. , was not the factual predicate for any of plaintiffs' other claims[.]”). They are incorrect; Plaintiffs directly quoted the receipt warranty in their initial Complaint. Complaint at 3. (“24 month free replacement, 72 month pro-rated”).

[Footnote] 12 Defendants also assert that Plaintiffs have added new factual allegations to Count VI of their complaint. Defendants' Reply at 2. While Plaintiffs indeed added allegations to Count VI, none of these paragraphs added any new facts, transactions, or occurrences, but rather constituted legal characterizations of those facts, transactions, or occurrences set forth in the original complaint.

[Footnote] 13 Defendants also note, as this Court noted *supra*, that relation-back doctrine is underpinned by the rationale of notice pleading and that, ordinarily, the general test is “whether the opposing party has had fair notice of the general factual situation and legal theory upon which the amending party proceeds.” Defendants' Reply at 4 (citing Justice Franklin Cleckley, R. Davis, & L. Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure (Third)* at § 15(c)(2)[2] (2008)). While Defendants are correct as to the general test, the Supreme Court has consistently permitted the addition of new, but related legal theories, where there is no prejudice to Defendant because and he has the ability to adequately prepare a defense. *See, e.g., Roberts v. Wagner Chevrolet-Olds, Inc.*, 258 S.E.2d 901 (W.Va. 1979). *Cf. Syl. pt. 5, Brooks v. Isinghood*, 584 S.E.2d 531, 541 (W.Va. 2003). Accordingly, where a Defendant has before him all the factual information necessary to adequately prepare his defense, a new theory is permissible. Such is the case in the instant matter, where Defendant in preparing his defense to the Magnuson-Moss count will merely need to appraise the legal sufficiency under Magnuson-Moss of documents already at issue in the express warranty claim. Defendants' argument is without merit.

(Pet. Appx. at 19-20)

The Trial Court was plainly right. The *Magnuson-Moss* claim plainly relates back. Moreover, and again, the Petitioners' grievance does not present the qualities that should trigger the use of extraordinary appellate review.

F. Petitioners' "Standing" Argument Is Illogical And Baseless

Petitioners' "standing" argument is baseless on its face, and it suffers the same fundamental flaw that infests the overall *Petition*. It is centered on the contention the Court in *McMahon* did after all do what it could not---resolve issues of material fact. Removing this wholly inaccurate supposition disembowels the whole argument.

Petitioners are right that the *Magnuson-Moss Warranty Act* defines "consumer" as follows:

(3) The term "consumer" means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).

15 U.S.C. § 2301(3) (underline added)

Petitioners are also right that *Magnuson-Moss* requires any written warranty, to have any chance at being effective, to be provided to the consumer at the point of sale.

Rather than help Petitioners, however, these two legal ground rules actually support Respondents' *Magnuson-Moss* claim. Two points, both of which have been long maintained and obvious, are that,

(1) Respondents claim that the "limited express warranty" upon which Petitioners rely was never in effect because it was never provided to the consumer prior to or at the time of purchase. Rather, anyone wishing to obtain the "limited express warranty" would have to divine

that the words on the receipt--“warranty information available”--mean that something beyond what is on the receipt must be located on the internet, and she/he would have to go about leaving the store, access the internet, and search for that “available” information. Among other reasons why Advance Auto’s conduct surrounding the “limited express warranty” negates its effectiveness, the post-sale features of the conduct are in blatant non-compliance with *Magnuson-Moss*. (Interestingly, since these warranty issues have risen Advance Auto changed its receipt language to read “warranty information available at store”. (See, *Defendants’ Answers and Responses to Plaintiff’s Interrogatories and Request for Production of Documents and Things (First Set)*, Resp. Appx. 094-135, at 095, 118) (underline added);

(2) Respondents claim the receipt is actually the only express warranty recognizable by law, especially by *Magnuson-Moss*, for the battery purchase at issue. As described below, this point of sale document contains the type and quality of substance to be properly recognized as a warranty.

Claiming upon the strong evidence that the “limited express warranty” is out and the receipt as express warranty is in, of course Karen John is a “consumer” under *Magnuson-Moss* and may proceed forward in the claim. Consistently, Judge Recht’s *Order* states,

As this Court has noted *supra*, Plaintiff John may have a claim for a breach of express warranty based on the receipt and for a breach of the implied warranty of merchantability. Consequently, because Plaintiff John may have a valid warranty claim, she fits the definition of buyer pursuant to Section 2301 of *Magnuson-Moss*, and Defendants' argument is meritless.

(Pet. Appx. at 23)

Here lies no basis for a writ of prohibition.

G. Petitioners' "Receipt" Argument Cannot Support A Petition For An Extraordinary Appellate Remedy

Again, Petitioners wish to have this Honorable Court permit an extraordinary remedy to be used to weigh evidence that is properly being developed for trier of fact determinations at the Trial Court level. If this is permitted, there would be no limits on what interlocutory matters might run through the writ of prohibition and mandamus gates and flood the Supreme Court docket.

As for the receipt that was given to Respondent McMahon, it did have written upon it sufficient substance to meet the definition of written warranty under *Magnuson-Moss*.

The term "written warranty" means-

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

15 U.S.C. §2301(6)

We are dealing with a car battery. It either works or it doesn't. Petitioners officially admitted the battery sold to plaintiff McMahon was defective. (*Defendants' Answers and Responses to Plaintiff's Interrogatories and Request for Production of Documents and Things (First Set)*, at Resp. App. 098-099, 102, 104-105, 107, repeatedly conceded, at Responses to Requests Nos. 11 and 12, and at Answers to Interrogatories Nos. 3, 10, and 13 the battery at issue was defective.)

Under the circumstances, the language of the receipt committing to “24 MO. FREE REPL 72 MO. PRO.” is a clear affirmation of fact or written promise made in connection with the sale that the battery will work for at least 24 months. Additionally or alternatively, this is a written undertaking provided at the time of sale for the replacement or other remedy respecting the product should it fail during the specified period set forth in the receipt. Clearly, it should be left for a jury to resolve, and despite Petitioners’ contentions, the belief that the receipt may be a warranty is not held only by Respondents, and Judge Recht, and Justice Ketchum, but also by Petitioners themselves as evidenced by the deposition testimony of Donn Free, named defendant and verifier of both defendants’ answers to interrogatories! (Id.)

Mr. Free was deposed June 7, 2012, where among other matters he was questioned about the substance of the receipt and the fact that the receipt reveals all that one needs in order to know her/his warranty rights. He swore (at Resp. Appx. 136-137):

Q. Let's look again at the McMahon receipt, if we could, sir.

A. Okay.

Q. This receipt contains language that says -- oh, about two-thirds of the way down "24 month free replacement 72 month pro". Do you see that?

A. Yes.

Q. And what does that refer to, sir?

A. First, if the battery fails within 24 months of purchase -- ah -- the first purchase of the battery is replaced free of charge. Um -- between 24 and 72 months, it's prorated.

Q. Okay. When you read this receipt -- have you bought products before yourself, personally, that had similar type -- maybe different durations -- but had similar --

A. Uh-huh.

Q. -- type of language on receipts?

A. Yes.

Q. Um -- over the years, even before going to work at Advance?

A. Yeah.

Q. And when you would read that language, you understood that that meant that the battery's expected to work for 24 months at a minimum; correct?

A. Yes.

Q. And, so, it has a specific time period that you, as the customer, could look to and say, "Well, here's the amount of time that they indicate that this ought to work without" -- um -- "without a defect arising"; correct?

MS. KAHLE: Objection to relevance. Lack of foundation. You can answer.

BY MR. WERNER: Q. Let me rephrase.

A. I would agree with your statement.

Q. Okay. And, so, you would consider that language, in and of itself, the only language you needed to see to understand what your warranty rights were; correct?

MS. KAHLE: Objection. Irrelevant. Lack of foundation. You can answer.

A. Um -- no. I mean, you have to have the receipt. I mean, it says right there you have to have the -- "receipt required for replacement" -- for warranty.

BY MR. WERNER: Q. Okay. So you have that on the receipt itself?

A. Uh -- huh.

Q. The re- --

A. It has your name on there.

Q. And, so, it says who the purchaser is; right?

A. Right.

Q. And it has the date of purchase on there, too; doesn't it?

A. Yes.

Q. So this receipt tells you everything you need to know -- for you to know your warranty rights; correct?

MS. KAHLE: Objection. Irrelevant. Lack of foundation. Um -- you can answer.

A. Pretty much so, yes.

BY MR. WERNER: Q. Can't think of anything else you need; right?

MS. KAHLE: Objection. Irrelevant. Lack of foundation. You can answer.

A. Um -- no.

When Petitioners themselves acknowledge the receipt to sufficiently reveal “everything you need to know for you to know your warranty rights”, the current arguments in pursuit of a writ of prohibition are, to say the least, suspicious.

Despite a nationwide search, Petitioners are only able to find a few cases to hold forth for supposed support, and each is not only fact-oriented, but distinguishable. For instance, they look to *Thomas v. Micro Ctr.*, 172 Ohio App. 3d 381, 875 N.E.2d 108 (2007), but the receipt in that Ohio Appellate Court case is materially different than that now at issue, and does not contain any warranty-oriented language as is contained on your instant plaintiffs’ receipt, i.e. “24 MO. FREE REPL 72 MO. PRO.” Likewise, Petitioners’ citation to the Georgia Court of Appeals in *Home Depot U.S.A., Inc. v. Miller*, 268 Ga. App. 742, 603 S.E.2d 80 (2004) offers them no help for that case has absolutely nothing to do with *Magnuson-Moss*, does not relate to a similar product which either works or does not, and does not contain wording similar to our own. Seeking support from *NEC Technologies, Inc. v. Nelson*, 267 Ga. 390, 478 S.E.2d 769 (1996), as defendants do, is also futile. Like the other cases, it too does not involve *Magnuson-Moss* and,

while unclear, it even appears the plaintiff there had knowledge of warranty information prior to the sale, aside from what the receipt referenced, which of course distinguishes the case from our own. In sum, if anything can be gleaned from Petitioners' cases, it is that a far and wide search of all the law of our land fails to come up with any real support for the motion to dismiss and consequently cannot support the instant *Petition*.

So correctly, and succinctly, held Judge Recht, in his *Order* at Pet. Appx. 23-25:

Defendants contend that Count VI should be dismissed because a consumer sales receipt cannot constitute a warranty under the Magnuson-Moss Act. Defendants' Memorandum at 11-13; Defendants' Reply at 20. As defendants note,

“the term warranty is defined under [the Magnuson-Moss Warranty Act of 1975] as any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time” or “any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking.”

Defendants' Memorandum at 11-12 (quoting 15 U.S.C. § 2301(6)). Defendants' cite several examples of persuasive authority, allegedly for the proposition that a receipt is not a warranty pursuant to Magnuson-Moss. Defendants' Memorandum at 13.

Plaintiffs counter that there is sufficient substance in the receipt to satisfy the statutory criteria under Magnuson-Moss. They note

“We are dealing with a car battery .. It either works or it doesn't...Under the circumstances, the language of the receipt committing to '24 MO. FREE REPL 72 MO. PRO.' is a clear affirmation' of fact or written promise made in connection with the sale that the battery will work for at least 24 months. Additionally or alternatively, this is a written undertaking provided at the time of sale for the replacement or other remedy respecting the product should it fail[] during the specified period set forth in the receipt. This is either an easy conclusion for the Court, as it was for Justice Ketchum, or it should be left for the jury to resolve.”

Plaintiffs are correct. This Court is unwilling to declare unilaterally and without clear authority that a receipt indicating “24 MO. FREE REPL 72 MO. PRO.” is not sufficiently definite enough to constitute a warranty under Magnuson-Moss, as this expression, at least in the context of the instant consumer transaction, clearly could indicate to a reasonable person that if the battery fails within 24 months, it will be replaced for free. Thus, Defendants final argument is meritless.

Via Footnote 16, *Order* (Pet. Appx. at 24), the Trial Court explained that, if anything, the cases cited by Respondents support a jury trial.

[Footnote] 16 ... Moreover, the bulk of the cases presented indicate that a sales receipt is not a warranty under Magnuson-Moss, or under state law, where it does not meet the statutorily specified or common law criteria of definiteness. For example, a receipt cannot function as a warranty under Magnuson-Moss, but only where it does not contain any affirmation as to the quality or workmanship of the product. *Thomas*, 875 N.E.2d 108, 112 (Oh. App. 8th 2007). Similarly, a warranty will not be found where a receipt contains a mere handwritten notation of a “10 year warranty.” *Home Depot U.S.A., Inc. v. Miller*, 603 S.E.2d 80, 82 (Ga. App. 2004). Likewise, *NEC Technologies v. Nelson*, 478 S.E.2d 769 (Ga. 1996),

If anything, these decisions would seem to indicate that a receipt that satisfies the statutory criteria can constitute a warranty under Magnuson-Moss.

(underline added.)

As Respondents have long maintained, and as the testimony of Donn Free himself would support, a trier of fact could reasonably, indeed quite easily, determine the receipt to constitute a warranty.

Thus, this issue too offers no justification for an extraordinary remedy.

H. Petitioners Wrongly Assert Karen John Has No *Magnuson-Moss* Claim Because She Has No Express Warranty Claim Under State Law.

Petitioners’ final argument is both flawed and confused. They appear to intertwine the *Magnuson-Moss* and state law express warranty claims so completely, and argue the success of the *Magnuson-Moss* claim is so completely contingent upon the state law claim, that one may wonder what benefit anyone might ever derive in asserting a *Magnuson-Moss* claim on top of a

state law claim. With this premise, they then throw the same haymaker that has failed to make contact throughout the *Petition*---that *McMahon* disposed of the express warranty claim.

Clarification in this area can be found in *Baldwin v. Jarrett Bay Yacht Sales, LLC*, a case to which Petitioners themselves cite in their argument. 683 F. Supp. 2d 385, 389-90 (E.D.N.C. 2009).

The [*Magnuson-Moss Warranty Act*] creates a federal private cause of action for certain breach of warranty obligations. Section 2310(d) of the MMWA states:

(1) Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief-

- (A) in any court of competent jurisdiction in any State or the District of Columbia; or
- (B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

(3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection-

- (A) if the amount in controversy of any individual claim is less than the sum or value of \$25;
- (B) if the amount in controversy is less than the sum or value of \$50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit; or
- (C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

683 F. Supp. 2d, at 389-90. (Underline added)

As reflected in the underlined portion of §2310(d)(1), a cause of action arises from a violation of the provisions of *Magnuson-Moss* itself, as a distinct matter aside from the state law warranty claim. The interplay between the *Magnuson-Moss* and state law claims was discussed by *Baldwin*.

In count two of their amended complaint, plaintiffs seek damages from Hatteras under a “written warranty.” See First Am. Compl. ¶¶ 78-100, prayer for relief. In accordance with 15 U.S.C. § 2301(d), plaintiffs contend that they are “consumers” seeking damages for breach of a written warranty from Hatteras, an alleged “warrantor” or “supplier.” See First Am. Compl. ¶¶ 78-100, prayer for relief. Where a “consumer” seeks relief for breach of a “written warranty” from a “warrantor” or “supplier,” Congress expected courts to look to state warranty law except as expressly modified in the MMWA. See *Sipe v. Workhorse Custom Chassis, LLC*, 572 F.3d 525, 530 (8th Cir.2009) ; *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir.2008) ; *Schimmer v. Jaguar Cars, Inc.*, 384 F.3d 402, 405 (7th Cir.2004) ; *Woodson v. McGeorge Camping Ctr., Inc.*, No. 91-1761, 1992 WL 225264, at *10 n. 16 (4th Cir. Sept. 15, 1992) (unpublished); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1013-14 (D.C.Cir.1986) .

683 F. Supp. 2d, at 390. (Underline added)

On the one hand, as described herein, this case presents a state law warranty claim. Respondents claim the one express warranty that governs for the battery sale is the sales receipt, and that the “limited express warranty” has no effect. On that claim of substantive state law, upon prevailing Respondents may claim attorney fees under *Magnuson-Moss*, just as prescribed by §2310(d)(1). This legal truth was exactly what our West Virginia Supreme Court of Appeals recognized in *Hawkins v. Ford Motor Co.*, 211 W.Va. 487, 566 S.E.2d 624 (2002) where at Syllabus Point 3 it stated:

3. A consumer who prevails on a claim for breach of an implied warranty of merchantability under the Uniform Commercial Code, W.Va.Code §§ 46-2-101, *et seq.*, may recover reasonable attorney fees under the Magnuson-Moss Act, 15 U.S.C. § 2310(d)(2) . The manufacturer is not unduly prejudiced by the failure to plead the Magnuson-Moss Act as long as the plaintiff sets forth sufficient factual allegations to state a claim showing that he or she is entitled to any relief which the court may grant.

It is so that on this particular claim Respondents' claim for attorney fees under *Magnuson-Moss* stands or falls on the state law claim, and so to that extent Petitioners are right.

On the other hand however, and as §2310(d)(1) also prescribes, a separate claim under the substantive provisions of *Magnuson-Moss* also exists. Under that law, what is and is not a “warranty”, and how a warranty must be handled by the warrantor in order to be effective, are items specifically and expressly delineated under the *Act*, and relief is afforded for violations of this substantive law. This is the gist of the amendment to the *Complaint* following the issuance of the *McMahon* decision. To the extent Petitioners confuse or blur the parameters and ramifications of the *Magnuson-Moss* claim, they are errant, just like they are errant in contending the “express warranty and related claims” are extinguished.

In any event, the interplay between the law of *Magnuson-Moss* and state law is the type of matter that may be addressed by the Trial Court going forward, and it clearly does not warrant an extraordinary remedy.

VI. CONCLUSION

Petitioners have made it clear they will resort to any means to avoid an efficient and fair resolution of this case. The current maneuver is clearly unjustified, and yet Petitioners attempt it. While the defense tactics are time consuming and wasteful of resources, they do not shake, but rather strengthen, Respondents' resolve to obtain a just result.

Wherefore, in light of all that is manifest, your Respondents respectfully pray that the Petition be declined so that, at least from here on out to the end, a just result can be expeditiously obtained.



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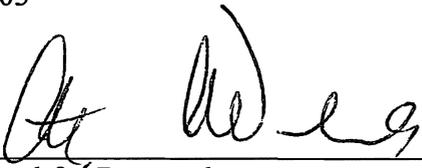
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CERTIFICATE OF SERVICE

Service of the foregoing **RESPONSE OF SCOTT MCMAHON AND KAREN JOHN TO PETITION FOR WRIT OF PROHIBITION** was made upon the Petitioners by mailing a true copy thereof, U.S. Mail, postage prepaid, to their attorneys on this 10th day of July, 2012:

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