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U.C.C. Warranties: Mountaineer Contractors, Inc. v. Mountain State Mack, Inc.

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U.C.C. WARRANTIES:
MOUNTAINEER CONTRACTORS, INC.

v.

MOUNTAIN STATE MACK, INC.

In deciding the recent case of *Mountaineer Contractors, Inc. v. Mountain State Mack, Inc.*, the West Virginia Supreme Court of Appeals interpreted and relied upon certain sections of chapter forty-six of the West Virginia Code, this state's codification of the Uniform Commercial Code.¹ Given the apparent paucity of decisions by the West Virginia court interpreting the U.C.C. in general, and the lack of decisions interpreting article two in particular, the decision at hand is of considerable potential significance to citizens of this state and to those who do business here.

The facts of the case are not complex.² Appellant, Mountain State Mack, Inc. (Mack), is a dealer in heavy equipment, a "merchant" according to the U.C.C. definition of that term.³ Appellee Mountaineer Contractors, Inc. (Mountaineer), owns and operates heavy equipment in conjunction with surface mining and related activity. At Mack's suggestion, representatives of both companies flew to Tennessee to view four used bulldozers which Mack proposed to sell to Mountaineer.

While in Tennessee, Mountaineer's representative observed the equipment in operation, but declined to examine maintenance logs relating to the bulldozers.⁴ It is undisputed that the

¹ [Hereinafter referred to as U.C.C.] Article two of chapter forty-six deals with sales, and is a revision of the Uniform Sales Act. W. VA. CODE § 46-2-313, dealing inter alia with express warranties by promise, § 46-2-314, dealing with implied warranties of merchantability, and § 46-2-316, dealing with exclusion of warranties, are the primary provisions of the U.C.C. invoked by the court in deciding the case at hand.

² 268 S.E.2d 886, 888-89 (W. Va. 1980).

³ W. VA. CODE § 46-2-104 (1966).

⁴ It is unclear from the opinion whether appellee's representative merely declined to avail himself of the opportunity to inspect the logs, or refused to do so after a demand by appellant's representative that he inspect the records. This distinction is of considerable potential significance in light of the language found in section eight of the Official Comment to W. VA. CODE § 46-2-316. The purport of that comment is that in order for the buyer's inspection to exclude an implied

equipment was functional at that time. The representatives reached an agreement during the return flight whereby Mountaineer was to purchase the bulldozers, as well as an endloader which its representative, Mr. Liston, had apparently never seen. Moreover, Mack promised that it would allow buyer to use the equipment for one eight-hour shift, that Mountaineer's mechanic could thoroughly inspect the equipment, and that Mack would bear the cost of any needed repairs discovered during that inspection.

When the equipment was delivered to Mountaineer, some of it after considerable delay, it was found to be defective. Some of the defects were mechanical in nature while some consisted of damage or alterations to the equipment admittedly done after Mountaineer had viewed the machinery in operation.

Upon discovering the defects, Mountaineer immediately telephoned Mack and gave notice that the equipment would not be accepted in that condition. Mack then assured Mountaineer that Mack would pay for all necessary repairs. Relying upon these assurances, Mountaineer accepted the equipment, effected the necessary repairs, and continued to make scheduled payments to Mack. Mountaineer, however, was never reimbursed for the cost of making these repairs.

Although the parties executed a written security agreement signed on October 25, 1974, with regard to this sale, precisely when that document was executed in relation to the delivery of any of the defective equipment is unknown.

In December of 1975, Mountaineer sued in the Circuit Court of Kanawha County on the theory that Mack had breached both an implied warranty of merchantability and an express warranty to repair. The jury rendered a verdict for Mountaineer in the amount of \$28,501.

I.

Mountaineer contended that the sale of the equipment gave rise to an implied warranty of merchantability pursuant to W.

warranty of merchantability arising from a sale of goods, the seller must demand that the buyer inspect the goods, and that it is insufficient that the goods merely be available for inspection.

Va. Code § 46-2-314,⁵ and that Mack breached this warranty by delivering the equipment in defective condition. Mack asserted that any such warranty was excluded pursuant to W. Va. Code § 46-2-316(3)(b),⁶ when Mr. Liston inspected the equipment in Tennessee, and that Mack was therefore entitled to judgment on that issue as a matter of law.⁷ The precise tenor of the court's resolution of this controversy is somewhat unclear, although the end result is arguably supported by a reasonable interpretation of the relevant sections of the U.C.C.

To begin with, the court construed the U.C.C. as providing that a "warranty of merchantability is implied in any contract for the sale of goods where the seller is a merchant with respect to goods of that kind *and assures the buyer that, among other things, the goods are fit for the ordinary purposes for which they are used.*"⁸ In this statement the court combined elements of W. Va. Code § 46-2-313,⁹ dealing with express warranties, and § 46-2-314,¹⁰ dealing with implied warranties. To commingle the elements of these two statutes, if such was the intention of the court, is inappropriate. It is the very essence of an implied warranty of merchantability that it arises by operation of law without regard to any assurances or promises made by the merchant, and regardless of the merchant's intent.¹¹ Thus, it is

⁵ W. VA. CODE § 46-2-314 (1966) provides in pertinent part:

(1) Unless excluded or modified (section 2-316) [§ 46-2-316], a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

⁶ W. VA. CODE § 46-2-316 (1966) provides in pertinent part:

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

⁷ 268 S.E.2d at 889.

⁸ *Id.* (emphasis added).

⁹ W. VA. CODE § 46-2-313 (1966) provides in pertinent part:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

¹⁰ W. VA. CODE § 46-2-314 (1966).

¹¹ *Id.*

unclear whether the latter portion of the court's statement should be regarded as merely superfluous, or as an indication that the court interpreted W. Va. Code § 46-2-314 as requiring this added element. If the latter is true, there is neither textual support for such a position in the statute, nor precedential support in other jurisdictions.¹²

The court next focused on the question of the buyer's observation or inspection of the equipment prior to entering into a purchase agreement, and whether the implied warranty was thereby excluded by operation of law with regard to defects present in the machinery upon delivery.¹³

W. Va. Code § 46-2-316(3)(b) provides in pertinent part that an examination by the buyer of the goods prior to purchase can eliminate an implied warranty "with regard to defects which an examination ought in the circumstances to have revealed to him."¹⁴ As the court recognized, this provision implies that the warranty remains effective as to defects which the examination would not have revealed to the buyer. Thus, Mack's argument that the implied warranty was excluded by law when the buyer observed the equipment in operation prior to making the contract, could have no application to the defects which, as shown by the evidence at trial, were inflicted upon the bulldozers after the examination took place.¹⁵

With regard to the mechanical defects however, careful analysis of W. Va. Code § 46-2-316(3)(b) reveals that the court ignored potentially significant considerations which bear upon

¹² One additional alternative interpretation of the language used by the court would be that which results when the following words are inserted: a "warranty of merchantability is implied in any contract for the sale of goods where the seller is a merchant with respect to goods of that kind *and such warranty assures the buyer that, among other things, the goods are fit for the ordinary purposes for which they are used.*" It is perhaps unlikely that this was the intended meaning of this statement, inasmuch as the court, if it had so intended, could easily have supplied these or similar words. The above statement would, however, comport with both the spirit and the letter of the U.C.C. The plain meaning of the statement, read and accepted at face value, is that which is described in the text above. The court's phraseology is ambiguous at best.

¹³ 268 S.E.2d at 889-90.

¹⁴ W. VA. CODE § 46-2-316(3)(b) (1966).

¹⁵ 268 S.E.2d at 890.

this decision. The court appears to have assumed that because the defects were mechanical in nature, they were perforce latent and undiscoverable by the buyer's representative. Section eight of the Official Comment to the above statute states in part:

The particular buyer's skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination. . . . A professional buyer examining a product in his field will be held to have assumed the risk as to all defects which a professional in the field ought to observe. . . .¹⁶

In the 1973 decision of *Chag Oil Company v. Gardner Machinery Corp.*, the Texas Court of Civil Appeals relied upon this theory,¹⁷ and other courts have applied the same principle in reaching similar results.¹⁸

It would seem reasonable to assume that Mountaineer's representative, the president of that corporation, was quite familiar with heavy equipment. While it may be too much to assume that he was an expert in the field, he undoubtedly possessed far greater knowledge in this regard than a layman. It is at least arguable that in the average commercial sales situation the professional buyer will have roughly the same degree of practical expertise in his or her field as did Mr. Liston. However, the court made no reference to the knowledge or skill of the inspecting buyer. Thus, it would seem that in the future,

¹⁶ W. VA. CODE § 46-2-316 Official Comment (1966).

¹⁷ 500 S.W.2d 877 (Tex. Civ. App. 1973). In this case, the buyer's representative, an engineer, observed a used crawler-tractor in operation prior to approving the purchase of the machine by his employer. The tractor later proved to be mechanically defective. The court then held:

[T]here is no implied warranty of fitness with regard to defects which an examination ought in the circumstances to have revealed to a buyer who before entering the contract has examined the goods as fully as he desires. Mr. Parks testified that he is an engineer and generally acquainted with the mechanics of machinery operation. If, as alleged, the machinery was not in running condition, this should have been apparent to Mr. Parks when the machine was operated in his presence. 500 S.W.2d at 879.

¹⁸ *Young & Cooper v. Vestring*, 214 Kan. 311, 521 P.2d 281 (1974); *Richard Mfg. Co. v. Gamel*, 5 Wash. App. 549, 489 P.2d 366 (1971); *Valiga v. National Food Co.*, 58 Wis. 2d 232, 206 N.W.2d 377 (1973). In *Young*, the court held: "The particular buyer's skill and normal method of examining goods in the circumstances determine what defects are excluded by the examination." 214 Kan. at 323, 521 P.2d at 291.

commercial buyers in similar circumstances with more or less the same level of expertise as Mountaineer's representative, may be judged by a layman's standard when making inspections prior to making a contract for sale.

Some degree of confusion is engendered by the court's formulation of the following rule as arising from this litigation. Syllabus point number one, found also verbatim in the body of the opinion, states:

Where there is evidence in a breach of warranty action which could support the inference that the defects giving rise to the alleged breach did not arise until after the buyer's examination of the goods, the issue of whether the buyer's examination constituted a waiver of the implied warranty of merchantability under W. Va. Code § 46-2-316(3)(b) is a proper question for jury determination.¹⁹

Immediately preceding this statement in the body of the opinion is a different statement of the same theory which is more satisfactory for purposes of conceptual analysis. There the court stated that "[a] determination of whether alleged defects giving rise to an action for breach of warranty should have been discovered by the buyer upon examination of the goods is generally a question of fact for the jury."²⁰ This statement of the rule, which deletes the language referring to defects arising after the inspection, has been used with slight variations by other courts.²¹ Syllabus point number one on the other hand, if not read with great care, appears as a non sequitur in light of an examination of the cited statute.²² If the defects in the goods arose after the buyer's inspection, any inquiry into the possible exclusion of the implied warranty should terminate. Defects arising after the inspection obviously were not discernible by a layman, a professional, or by anyone at the time of the inspection. If, on the other hand, the court merely intended to indicate that the question is one for the jury where some doubt exists as to whether the defects arose after the inspection, this would

¹⁹ 268 S.E.2d at 890.

²⁰ *Id.*

²¹ Georgia Timberlands, Inc. v. Southern Airway Co., 125 Ga. App. 404, 188 S.E.2d 108 (1972); Kronman v. Roush Produce Co., 3 Ga. App. 152, 59 S.E. 320 (1909).

²² W. VA. CODE § 46-2-316(3)(b) (1966).

comport with the spirit of W. Va. Code § 46-2-316(3)(b), and with decisions in other courts faced with the issue.²³

Much of the uncertainty attending the court's treatment of the issue concerning exclusion of the implied warranty by virtue of the buyer's inspection of the goods might have been avoided if the court had relied upon the language in section eight of the Official Comment to W. Va. Code § 46-2-316. There it is stated that "[t]here must in addition be a demand by the seller that the buyer examine the goods fully. The seller by the demand puts the buyer on notice that he is assuming the risk of defects which the examination ought to reveal."²⁴ In stating that it is not sufficient that the goods merely be available for inspection, the Official Comment gives the reader notice that the U.C.C. was intended to reject the long-standing common law tradition to the contrary.²⁵

II.

In addition to the theory of implied warranty of merchantability, Mountaineer at trial relied upon an assertion that assurances by Mack that the cost of all necessary repairs would be borne by the seller gave rise to express warranties pursuant

²³ *Supra* note 21.

²⁴ W. VA. CODE § 46-2-316 Official Comment, sec. 8 (1966).

²⁵ This tradition, in the broadest sense, can be viewed as part of the evolution of the law from the most severe application of the doctrine of caveat emptor, as expressed in the English case of *Jones v. Just*, L.R. 3 Q.B. 196 (1868), to the consumer-oriented principles underlying the U.C.C. Between these two extremes lie many stages of development exemplified by representative decisions by the West Virginia Supreme Court of Appeals. *See, e.g., Showalter v. Chambers*, 77 W. Va. 720, 88 S.E. 1072 (1916); *Lambert v. Armentrout*, 65 W. Va. 375, 64 S.E. 260 (1909); *Watkins v. Angotti*, 65 W. Va. 193, 63 S.E. 969 (1909); *Hood v. Bloch Bros.*, 29 W. Va. 244, 11 S.E. 910 (1886). The court appears to have begun to recognize the existence of an implied warranty of fitness around the year 1909. In *Lambert*, the court held that there was no warranty of quality in sales of chattels. 65 W. Va. at 378, 64 S.E. at 262. In *Watkins*, decided the same year, the court held: "The rule is that where the sale is of a definite existing chattel, specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty." 65 W. Va. at 198, 63 S.E. at 971. Thus, in *Watkins*, the court seems to imply that under certain circumstances there may have been recognized an implied warranty of quality. Subsequent developments in this area of the law are thoroughly discussed in *Rescission for Breach of Seller's Warranty*, 43 W. VA. L.Q. 134 (1937).

to W. Va. Code § 46-2-313.²⁶ Mack argued that any such warranty was excluded by the written security agreement and by W. Va. Code § 46-2-202.²⁷ This statute referring as it does to any prior agreement or contemporaneous oral agreement, together with the written security agreement providing that "[n]o oral agreement, guaranty, promise, representation or warranty shall be binding,"²⁸ would seem to exclude any express warranty which might have arisen at the time the bargain was struck during the return flight from Tennessee. As the court indicated however, neither the statute nor the contractual exclusion clause would negate the effect of the identical assurances made by the seller to the buyer to induce acceptance of the defective goods by the latter, assuming that such assurances were binding.²⁹

Unfortunately, the court's opinion contains little analysis of the negotiations between the parties, and fails to indicate with any clarity precisely when, in the court's opinion, the contract was made. Nor does the opinion provide sufficient data to determine with certainty when the contract arose and how it was affected by the preceding and subsequent negotiations.

From the facts set forth in the opinion,³⁰ it can be assumed that negotiations between the parties began at least in July, 1974. It is clear that the parties reached an agreement during the return flight from Tennessee that same month, and that they executed a security agreement dated October 25, 1974, containing the exclusionary language quoted above. Additionally, the uncontroverted evidence showed that Mack made certain assurances to Mountaineer by phone, and in person, to induce the latter to accept the defective equipment. Significantly, however, it is not revealed when the various pieces of equipment were delivered in relation to the signing of the security agreement, nor whether

²⁶ W. VA. CODE § 46-2-313 (1966).

²⁷ W. VA. CODE § 46-2-202 (1966) provides in pertinent part:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

²⁸ 268 S.E.2d at 891.

²⁹ 268 S.E.2d at 892.

³⁰ 268 S.E.2d at 888.

any of the verbal assurances preceded the signing of the security agreement.

The court stated, with regard to these latter assurances by seller, that "the parties here agreed to a subsequent oral modification of the contract as contained in the written security agreement."³¹ It is unclear however, whether the court viewed the contract as having arisen orally, during the flight from Tennessee, with the security agreement serving as a confirmatory memorandum thereof, or whether the security agreement was a contract in and of itself. It would seem most probable that the former is true. In any event, the court clearly held that such an assurance made by the seller, long after formation of the contract, and after the buyer has expressed an intention to reject the goods, becomes an express warranty relating back to the original contract, and becomes a binding modification of that contract because of the buyer's acceptance.³²

III

At trial, Mack argued that the court should render judgment for it as a matter of law not only with respect to the bulldozers, but with respect to the endloader as well. On appeal, the court considered the bulldozers separately and upheld the jury verdict on the basis of a breach of warranties.³³ With regard to the endloader however, the court held: "The evidence here was clearly insufficient to support a verdict for appellee with respect to the endloader and the trial court erred in submitting the issue to the jury."³⁴ However, this error was not reversible inasmuch as the evidence adduced respecting defects in the bulldozers alone would, in the court's opinion, support the amount of the verdict rendered by the jury.³⁵ Thus, although the jury reached its verdict after hearing evidence of defects in five

³¹ 268 S.E.2d at 892.

³² *Jones v. Abriani*, 350 N.E.2d 635 (Ind. 1976). In *Jones*, involving very similar circumstances, the court held: "Thus, the promises made by the sellers to the Abrianis to induce them to accept the mobile home amount to express warranties. The promise that all defects would be repaired is a promise that amounts to an express warranty under 2-313(1)(a)." 350 N.E.2d at 645.

³³ 268 S.E.2d at 892.

³⁴ *Id.*

³⁵ *Id.*

pieces of heavy equipment, the court held that the verdict should stand in spite of the fact that only four of those pieces of equipment should have been considered by the jury.

In support of the above holding the court cites five of its earlier decisions.³⁶ The most recent of these cases, *Burns v. Goff*, is clearly distinguishable from the case at hand and is not supportive of the court's holding.³⁷ The *Burns* case involved litigation over whether either one party or the other would emerge as having the right to use a disputed strip of land. Arriving at such a verdict involved but two basic alternatives for the jury. In *Mountaineer Contractors* on the other hand, while Mountaineer doubtless prayed for relief in some specific amount, implicit in that form of litigation was the realization that the jurors would consider the evidence and, hopefully, arrive at a monetary award in an amount perhaps lesser or greater than that prayed for. The verdict could theoretically have ranged from some nominal amount to a considerable sum of money. It is not at all unreasonable to assume that, having heard evidence of defects in five pieces of equipment, the jury's verdict was based upon consideration of five pieces of equipment.

Each of the other four cases relied upon by the court merely supports the general proposition that "[t]he error of a lower court must be prejudicial to the complaining party in order to call for a reversal upon appeal."³⁸ It is apparent that these cases could more appropriately be cited in support of the defendant Mack than of the plaintiff in the case at hand.

While none of the aforementioned cases cited by the court lends any significant support to its holding, considerable author-

³⁶ *Burns v. Goff*, 262 S.E.2d 772 (W. Va. 1980); *Whittaker v. Pauley*, 154 W. Va. 1, 173 S.E.2d 76 (1970); *State Rd. Comm'n v. Bowling*, 152 W. Va. 688, 166 S.E.2d 119 (1969); *Roberts v. United Fuel Gas Co.*, 84 W. Va. 368, 99 S.E. 549 (1919); *Miller v. White*, 46 W. Va. 67, 33 S.E. 332 (1899).

³⁷ In *Burns v. Goff*, 262 S.E.2d 772 (W. Va. 1980), the litigation involved a dispute between the owners of adjoining tracts of land over the right of one party, by virtue of prescriptive easement, to use as his own a driveway running between those two parcels and lying partially upon the other party's tract. On appeal the high court held that the trial court's application of the doctrine of estoppel was erroneous, and that the principles of prescriptive easement were controlling, but that this error was harmless inasmuch as the trial court reached the correct result with respect to the rights of the parties vis-a-vis the disputed land.

³⁸ *Whittaker v. Pauley*, 154 W. Va. 1, 173 S.E.2d 76 (1970) (syll. pt. 3).

ity can be found in prior decisions of the court which directly and unequivocally support an opposite result. In *McCallum v. Hope Natural Gas Co.*, a personal injury suit involving an infant plaintiff, the jury was erroneously allowed to consider the item of medical expenses in computing its verdict.³⁹ The court held that this error was clearly prejudicial, and stated:

However, to preserve a judgment so plainly right so far as plaintiff's general right of recovery is concerned, we will reverse this judgment, set it aside, and remand the cause to the Circuit Court of Marion County, with directions that unless the plaintiff will agree on the record to release the sum of \$500 of the verdict . . . the verdict be set aside, and a new trial awarded

. . . .⁴⁰

In *Taylor v. Sturm Lumber Co.*, decided one year prior to *McCallum*, the court in reversing and remanding stated: "Seeing excessiveness in the verdict . . . , the trial court should have put them to their election to remit one third of the amount allowed them or suffer the verdict to be set aside, the amount of the excess being clear and free from doubt."⁴¹

The court's opinion in *Mountaineer Contractors* does not indicate whether the jury's verdict was in such form as would indicate how much, if any, of the verdict was based upon defects in the endloader. Even if this amount is not readily discernible, the earlier cases indicate that this fact should lead the court to consider reversing and remanding for a new trial rather than ignoring the problem altogether.⁴² In *Browder v. The County Court of Webster County*,⁴³ decided by the West Virginia court in 1960, any application of a remittitur was rejected, but in a factual situation clearly distinguishable from that in *Mountaineer Contractors*. In *Browder* there was sharply conflicting evidence respecting damages, thereby necessitating that the jury resolve the dispute. Such resolution involves the formulation of a collective opinion by the jurors as to the facts. The judge, under normal circumstances, should not substitute his opinion for that of

³⁹ 93 W. Va. 426, 117 S.E. 148 (1923).

⁴⁰ *Id.* at 434, 117 S.E. at 151.

⁴¹ 90 W. Va. 530, 538, 111 S.E. 481, 484 (1922).

⁴² *Carlin, Remittiturs and Additurs*, 49 W. VA. L.Q. 1 (1942).

⁴³ 145 W. Va. 696, 116 S.E.2d 867 (1960).

the jury.⁴⁴ In *Mountaineer Contractors* however, the evidence as to the defects was uncontradicted.⁴⁵ This case involved consideration by the jury of an erroneous element of damages, not, as in *Browder*, a controverted degree or amount of damages adhering to an element concededly part of the damage computation.

The court in *Browder* cited with approval the 1900 case of *Chapman v. Beltz*,⁴⁶ one of the earliest statements by the court of the principles which were later relied upon in *Taylor*⁴⁷ and *McCallum*.⁴⁸ It is apparent that *Browder* stands as reaffirmation of these earlier cases and of the same principle enunciated by Mr. Leo Carlin, formerly a professor of law at West Virginia University:

In some cases, where a remittitur would be proper if excess in the verdict were the only error to be considered, a remittitur is refused and the verdict is set aside because of error committed in the course of the trial which may have affected the amount of the verdict; as where . . . illegal evidence is introduced . . . , [b]ut even in these cases there is a tendency to allow a remittitur and refuse a new trial, particularly where it is practicable to segregate the excess due to the error.⁴⁹

As stated earlier, the court in *Mountaineer Contractors* was silent with respect to these earlier cases and the precedent established by their holdings. Thus, it is difficult to say what value and precedential authority remains in these decisions, and what course the court will pursue in the future.

IV

Lastly, Mack asserted that the jury should not have been instructed that it could consider expenses incurred by *Mountaineer* for parts and labor used in repairing the equipment, and for the loss of use of the equipment by the buyer for the time it was being repaired in computing damages.⁵⁰ The court's resolu-

⁴⁴ *Id.*

⁴⁵ 268 S.E.2d at 890, 892.

⁴⁶ 48 W. Va. 1, 35 S.E. 1013 (1900).

⁴⁷ 90 W. Va. 530, 111 S.E. 481 (1922).

⁴⁸ 93 W. Va. 426, 117 S.E. 148 (1923).

⁴⁹ Carlin, *Remittiturs and Additurs*, 49 W. VA. L.Q. 1, 11 (1942).

⁵⁰ 268 S.E.2d at 893.

tion of this issue was based upon certain provisions of the U.C.C.⁵¹ These sections provide that the normal measure of damages in a case of this sort, the difference, at the time and place of acceptance, between the value of the goods accepted and the value they would have had if they had been as warranted, may be rejected under special circumstances. When such circumstances are shown to exist, any reasonable measure of damages may then be used, and both incidental and consequential damages are allowed.⁵²

The "special circumstances" relied upon here are asserted to have arisen as a result of a coal boom occurring at that time which caused the price of used machinery of this sort to be inflated to a level above that for comparable new equipment.⁵³ While the U.C.C. clearly provides for the use, in certain circumstances, of the measure of damages adopted by the court in *Mountaineer Contractors*, it is not absolutely clear that this was an appropriate case for abandoning the standard measure of damages for breach of warranty.

That the coal industry was plagued by inflation in production costs at the time does not detract from the proposition that the value of the equipment at the time the contract was formed could be ascertained. Even if this value was inflated, the formula for computing damages was nonetheless valid within the parameters of that inflation. A determination of the value of the equipment as delivered would proceed upon the usual basis in such cases and might include subtraction of the cost of repairs from

⁵¹ W. VA. CODE § 46-2-714 (1966) provides in pertinent part:

(1) Where the buyer has accepted goods and given notification, he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

See also W. VA. CODE § 46-2-715 (1966).

⁵² *Id.*

⁵³ 268 S.E.2d at 893.

the value of the machinery contracted for.⁵⁴ Consequential damages could then also be considered.⁵⁵ Nonetheless, this case must be viewed as establishing at least one indication of the type of circumstances which will, in the future, justify discarding the standard formula for computing damages pursuant to chapter forty-six.

CONCLUSION

A thorough reading of *Mountaineer Contractors* leaves little doubt of the buyer's right to recover some measure of damages from the seller. Unfortunately, considerable doubt remains with regard to the effect of this decision upon the status and precise meaning of certain sections of chapter forty-six, article two of the West Virginia Code. Is the court's definition of the manner in which an implied warranty of merchantability arises merely a mistake as it appears to be, or an indication that the court has adopted a definition diametrically opposed to that used by the drafters of the U.C.C.? Did the court in the first syllabus point mean to say that where there is evidence indicating that the defects arose *after* the buyer's inspection, there is a jury question as to whether the buyer should have discovered them, or did the court merely intend to say that the question is one for the jury where some doubt exists as to whether the defects arose after the inspection? Has the court implicitly overruled the remittitur cases cited above, or are we to view this case merely as a momentary departure from the rules established in those cases? Is this case indicative of the fact that in the future plaintiffs in breach of warranty actions will be able to abandon with great ease the standard U.C.C. formula for computing damages in such cases? These and other questions are unfortunately left unanswered by the opinion and may well pose problems in the future.

David D. Johnson, III

⁵⁴ See *Neuman v. Spector Wrecking & Salvage Co., Inc.*, 490 S.W.2d 875 (Texas 1973).

⁵⁵ W. VA. CODE § 46-2-714 (1966).