[Cite as *Curl v. Volkswagen of Am., Inc.*, 2005-Ohio-6420.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

DAVID CURL,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2004-T-0112**
- vs -	:	
VOLKSWAGEN OF AMERICA, INC.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2002 CV 2904.

Judgment: Affirmed.

Mitchel E. Luxenburg and *David B. Levin*, Krohn & Moss, Ltd., 3 Summit Park Drive, #100, Independence, OH 44131 (For Plaintiff-Appellee).

Robert D. Kehoe and Isaac J. Eddington, Kehoe & Associates, L.L.C., 900 Baker Building, 1940 East Sixth Street, Cleveland, OH 44114-2210 (For Defendant-Appellant).

DONALD R. FORD, P.J.

{¶1} Appellant, Volkswagen of America, Inc. ("Volkswagen"), appeals from the April 30, 2004 judgment entry of the Trumbull County Court of Common Pleas.

{¶2} On December 12, 2002, appellee, David Curl, filed a complaint against Volkswagen for (1) breach of written warranty pursuant to the Magnuson-Moss Warranty Act, (2) breach of implied warranty pursuant to the Magnuson-Moss Warranty Act, and (3) violation of Ohio's Nonconformity New Motor Vehicle Law ("Lemon Law").

On January 17, 2003, Volkswagen filed an answer. On December 23, 2003, Volkswagen filed a motion for partial summary judgment on counts two and three of the complaint. On January 22, 2004, appellee filed a brief in opposition to Volkswagen's motion for partial summary judgment and a cross-motion for partial summary judgment on counts two and three of the complaint. On February 3, 2004, Volkswagen filed a reply to appellee's brief in opposition to Volkswagen's motion for partial summary judgment, and an answer to appellee's cross-motion for partial summary judgment on counts two and three of the complaint.

{¶3} On July 31, 2001, Stadium Lincoln-Mercury ("Stadium"), d.b.a. Stadium Volkswagen, an importer and distributor of vehicles, purchased and took title to a 2002 Volkswagen New Beetle ("Beetle") from Volkswagen, which is engaged in the manufacture, sale and distribution of motor vehicles, and which also is in the business of marketing, supplying, and selling written warranties. Volkswagen's two years or 24,000 mile bumper-to-bumper limited warranty on the Beetle started to run when the vehicle was put into service. Stadium used the Beetle as a rental vehicle.

{¶4} On March 12, 2002, there was a recall on this model due to the wiring harness short-circuiting and damaging the material that insulates the conductors, creating a possibility of fire. The recall was designed to prevent the antilock break system from breaking down. A voluntary recall is typically instituted by the manufacturer when a product defect or malfunction is likely to cause death or severe bodily injury. Dealers are aware when such recalls are issued, yet Stadium did not perform the recall on the Beetle.

{¶5} On June 24, 2002, appellee purchased the Beetle from Stadium. The

purchase contract had the vehicle listed, by checkmark, as a "rental vehicle," rather than a "new" or "used" vehicle. At the time of purchase, there were 10,435 miles logged on the odometer.

{¶6} When the Beetle began to smoke on August 19, 2002, appellee towed it to Stadium for service, complaining of a defective engine and ABS system. At that time, the vehicle had been driven 4,149 miles from appellee's date of purchase, for a total of 14,584 miles. The service technician's report stated that "the ABS light came on, the vehicle would not stay running when restarted, and was smoking from the left side. A recall was performed on the ABS system, replacing the melted wire from the control unit, the wiring harness, [and] the ABS hydraulic pump ***." The repairs took eighty-four days, until November 12, 2002.

{¶7} Pursuant to its April 30, 2004 judgment entry, the trial court granted appellee's cross-motion for partial summary judgment and denied Volkswagen's motion for partial summary judgment. It further ordered Volkswagen to take back the 2002 Volkswagen Beetle, refund all monies paid toward the vehicle's purchase, and pay off any loan with any and all lenders. The court granted appellee a hearing to determine damages and leave to file a petition for attorney fees and costs. A hearing on damages for count three was ordered to be set.

{¶8} On August 3, 2004, by joint stipulation of the parties, count one of the complaint was dismissed, and pursuant to Civ.R. 54(B), the trial court found no just reason to delay an appeal of the April 30, 2004 judgment entry. It is from that judgment entry that Volkswagen filed a timely notice of appeal and raises the following assignments of error:

{¶9} "[1.] The [trial] court erred when it granted summary judgment to [appellee] on his Lemon Law claim and failed to dismiss that claim in summary judgment as [a]ppellant had requested.

{¶10} "[2.] The trial court erred when it did not grant [appellant's] request for summary judgment on [appellee's] claim for breach of implied warranty.

{¶11} "[3.] The trial court erred when it granted [appellee's] request for summary judgment on his implied warranty claim."

{¶12} This court will first address appellant's implied warranty argument. In this assignment of error, Volkswagen argues that appellee cannot sustain a claim for breach of implied warranty since there is no privity between the parties.

{¶13} An appellate court reviews a trial court's decision on a motion for summary judgment *de novo. Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105; *Kruppa v. All Souls Cemetery of the Diocese of Youngstown* (Feb. 22, 2002), 11th Dist. No 2001-T-0029, 2002 Ohio App. LEXIS 773, at 6.

{¶14} In order for a summary judgment to be granted, the moving party must prove:

{¶15} "*** (1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *Mootispaw v. Eckstein* (1996), 76 Ohio St.3d 383, 385.

{¶16} The Supreme Court stated in *Dresher v. Burt* (1996), 75 Ohio St.3d 280,

296, that:

{¶17} "*** the moving party bears the initial responsibility of informing the trial court of the basis for the motion, *and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim*. The 'portions of the record' to which we refer are those evidentiary materials listed in Civ.R. 56(C), such as the pleadings, depositions, answers to interrogatories, etc., that have been filed in the case. ***" (Emphasis sic.)

{¶18} The Magnuson-Moss Warranty -- Federal Trade Commission Improvement Act of 1975 ("MMWA"), Section 2301 *et seq*., Title 15, U.S.Code, with its attendant regulations, Sections 700.1 *et seq*., Title 16, C.F.R., govern consumer product warranties, both written and implied. It was enacted by Congress to address the widespread misuse by merchants of express warranties and disclaimers.

{¶19} The MMWA applies only to a "consumer product," defined as "any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes[.]" Section 2301(1), Title 15, U.S.Code. An automobile comes within this definition. Section 700.1(a), Title 16, C.F.R. "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 *** applicable to the product, and any other person who is entitled by the terms of such warranty *** or under applicable State law to enforce against the warrantor *** the obligations of the warranty ***." Section 2301(3), Title 15, U.S.Code. Appellee would be a consumer under the MMWA.

{¶20} The provisions of the MMWA are aimed at suppliers, warrantors, and service contractors. A "supplier" is "any person engaged in the business of making a consumer product directly or indirectly available to consumers." Section 2301(4), Title 15, U.S.Code. This broad definition includes any party in the chain of production and distribution regardless of privity. *Abraham v. Volkswagen of America, Inc.* (1986), 795 F.2d 238, 247. A warrantor is "any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty." Section 2301(5), Title 15, U.S.Code. Volkswagen would fall within the MMWA's definitions of supplier and warrantor.

{¶21} Appellee would have a private right of action against Volkswagen for breach of warranty pursuant to Section 2310(d)(1), Title 15, U.S.Code, which provides that "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under *** a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief[.]"

{¶22} Nothing in the MMWA requires that a consumer product be warranted. However, if a written warranty is made, the supplier may not disclaim or modify any implied warranty with respect to the product; provided, however, that implied warranties "may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty." Section 2308(b), Title 15, U.S.Code.

{¶23} "Implied warranty" means any implied warranty arising under state law in connection with the sale by a supplier of a consumer product. Section 2301(7), Title 15, U.S.Code.

{¶24} Appellee claimed Volkswagen breached its implied warranty of merchantability under the MMWA. This implied warranty is found in R.C. 1302.27(A), which provides that "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." Goods, to be merchantable, "must be at least such as *** are fit for the ordinary purposes for which such goods are used[.]" R.C. 1302.27(B)(3). A "merchant" is defined in R.C. 1302.01(A)(5), as "a person who deals in goods of the kind or otherwise by the person's occupation holds the person out as having knowledge or skill peculiar to the practices or goods involved in the transaction ***."

{¶25} In the current case, Volkswagen would meet the definition of a merchant. Nonetheless, Volkswagen asserts that it is not liable under an implied warranty because it was not a party to the sales contract between Stadium and appellee, and further was not in "privity" with appellee. Volkswagen claims that Ohio law requires a manufacturer to be in privity with the purchaser in order for a claim of breach of implied warranty to be valid.

{¶26} Ohio courts have often discussed the issue of privity, or lack thereof, between manufacturers and purchasers, arising from claims of breach of express and implied warranties, relating to defective products. The actions filed by purchasers have sounded in contract, tort, and strict liability. Courts have struggled to distinguish cases

where the defective product resulted in personal injury, property damage, and economic loss.

{¶27} One of the earlier cases, before the enactment of the U.C.C., was *Wood v. General Electric Co.* (1953), 159 Ohio St. 273, overruled in part by *Lonzrick v. Republic Steel Corp.* (1966), 6 Ohio St.2d 227. In *Wood*, the purchasers of an electric blanket that caught fire and partially burned their residence sued the manufacturer claiming breach of an implied warranty that the blanket was reasonably fit for use as an article of bed clothing. The Ohio Supreme Court found that they had purchased the blanket from an independent dealer, and held that no action could be maintained based on the implied warranty because there must be contractual privity between the seller and buyer.

{¶28} A few years later, the court relaxed this rule in *Rogers v. Toni Home Permanent Co*. (1958), 167 Ohio St. 244. *Rogers* involved a purchaser of a hair product that caused her hair to fall out. She filed claims of breach of implied and express warranties against the manufacturer. The court recognized that the prevailing rule required privity between buyers and sellers for breach of warranty claims, but then noted the "growing number of cases which, as an exception to the general rule, hold that as to foodstuffs and medicines ***, a warranty of fitness for human consumption carries over from the manufacturer *** to the ultimate consumer, regardless of privity of contract." Id. at 246. The court then stated that "[i]t would seem but logical to extend the rule *** to cosmetics and other preparations *** designed for application to the bodies of humans or animals. Id. at 247. In doing so, the court stated that "[o]ccasions may arise when it is fitting *** to discard legal concepts of the past to meet new

conditions and practices of our changing and progressing civilization. *** The consuming public ordinarily relies exclusively on the representations of the manufacturer in his advertisements. What sensible or sound reason then exists as to why, when the goods purchased by the ultimate consumer on the strength of the advertisements aimed squarely at him do not possess their described qualities and goodness and cause him harm, he should not be permitted to move against the manufacturer to recoup his loss." Id. at 248-249.

{¶29} As the years progressed, the Ohio Supreme Court continued to make exceptions to the privity requirement. In *Inglis v. Am. Motors Corp.* (1965), 3 Ohio St.2d 132, the buyer purchased a defective vehicle from a dealer that was manufactured by American Motors Corporation ("AMC"). The purchaser sued AMC, claiming breach of implied and express warranties. Recognizing that the purchaser and manufacturer were not in privity, the court evaluated the court's reasoning in *Rogers*, and held:

{¶30} "[P]rivity of contract is not necessary in an action based on breach of warranty where one purchases an automobile in reasonable reliance upon representations made in advertising of the manufacturer of such automobile in mass communications media to the effect that its automobiles are trouble-free, economical in operation and built and manufactured with a high quality of workmanship and such purchaser suffers damage in the form of diminution of value of the automobile attributable to latent defects not ascertainable at the time of purchase." Id. at paragraph three of the syllabus.

{¶31} The Ohio Supreme Court has continued to shape, mold, and stretch the privity requirement for defective products. Where there is injury to person or property,

the courts have allowed remedy without privity. See, e.g., *Lonzrick*, supra, (plaintiff injured by defective floor joists was allowed breach of implied warranty claim grounded in tort against manufacturer, even though plaintiff was not buyer of product); *United States Fid. & Guar. Co. v. Truck & Concrete Equip. Co.* (1970), 21 Ohio St.2d 244 (action for breach of implied warranty for property damage recognized, despite lack of privity). One case hinted at allowing an implied warranty claim for economic damage. See *Goddard v. Gen. Motors Corp*. (1979), 60 Ohio St.2d 41 (in construing the effectiveness of an express warranty limiting the manufacturer's remedy to repair and replacement of defective parts, court held that where warranty failed of its essential purpose, remedy may be provided under the general remedy provisions of R.C. 1302).

{¶32} *Chemtrol Adhesives, Inc. v. Am. Manufacturers Mut. Ins. Co*. (1989), 42 Ohio St.3d 40, lays a foundation for deciding cases where breach of warranty for economic damage is claimed, but privity is lacking. In *Chemtrol,* insurers of a commercial purchaser of a defective heat recovery system sought indemnification of economic damages against the seller, asserting several tort and contract claims. One issue the court addressed was whether the insurers, who succeeded to the rights and remedies of the purchaser, were limited to the breach of contract claim, where privity existed, or if they could go outside the contract and assert tort claims sounding in negligence, breach of express and implied warranties, and strict liability. In eventually holding that the insured could assert the warranty claims but not the negligence or strict liability claims, the court conducted a detailed analysis of the laws of both Ohio and other jurisdictions, and adopted language from several cases involving claims for breach of warranty where privity was absent. The court in *Chemtrol* quoted *Santor v. A*

& M Karagheusian, Inc. (1965), 44 N.J. 52, in which a plaintiff who purchased carpeting from a retailer was allowed recovery against the manufacturer for economic loss for breach of implied warranty of merchantability, on the basis that the liability of the manufacturer should not rest "'upon the character of the product (*i.e.*, whether *** it is likely to cause personal injury) but upon the representation[.]'" *Chemtrol*, supra, at 47, quoting *Santor*, supra, at 61. The court stated that it was persuaded by the holding in *Spring Motors Distributors, Inc. v. Ford Motor Co.* (1985), 98 N.J. 555, where the court held that "'a commercial buyer seeking damages for economic loss resulting from the purchase of defective goods may recover from an immediate seller and a remote supplier in a distributive chain for breach of warranty under the U.C.C. ***.'" *Chemtrol*, supra, at 50, quoting *Spring*, supra, at 561.

{¶33} The lower courts have been inconsistent in determining if privity of contract is required to maintain a contract-based claim for breach of implied warranty. See, e.g., *Norcold, Inc. v. Gateway Supply Co*., 154 Ohio App.3d 594, 2003-Ohio-4252 (privity required); *Haynes v. George Ballas Buick-GMC Truck* (Dec. 21, 1990), 6th Dist. No. L-89-168, 1990 Ohio App. LEXIS 5661 (privity required); *Funk v. Montgomery* (1990), 66 Ohio App.3d 815 (privity not required); *Ohio Dept. of Adm. Services v. Robert P. Madison Internatl.* (2000), 138 Ohio App.3d 388 (privity not required).

{¶34} In the case sub judice, this court will follow its previous holding in *Reichhold Chem. Inc. v. Haas* (Nov. 3, 1989), 11th Dist. No. 1983, 1989 Ohio App. LEXIS 4129. In *Reichhold*, Richard Haas ("Haas") purchased from Reichhold Chemical, Inc. ("Reichhold") polyurethane components to make bowling balls. Haas also bought some of the components from two of Reichhold's distributors, upon Reichhold's

recommendation. On appeal from a lawsuit for damages caused from the components causing a softness problem with the balls, this court rejected Reichhold's argument that Haas's claims for breach of express and implied warranties must fail for lack of privity. We noted first that at least part of the time, the parties were in direct privity. We then relied on *Rogers*, supra, in allowing damages for Haas's claim for breach of express warranty, holding that "where there is an expressed warranty, the ultimate consumer may recover even with an absence of direct privity." *Reichhold* at 7. We further noted that other courts have extended this holding to permit recovery for breach of implied warranties without privity, and quoted *Spring Motors*, supra, which held that "'the buyer need not establish privity with the remote supplier to maintain an action for breach of express or implied warranties (under the U.C.C.).'" Id. Finding that an implied warranty existed in this case which was breached, we held that Haas could recover damages under this claim also. Although we did not expressly state that "where there is an implied warranty, the ultimate consumer may recover even with the absence of direct privity," that was the intent of our finding.

{¶35} Therefore, we hold that lack of privity between appellee and Volkswagen does not preclude a claim under the MMWA for breach of implied warranty, and Volkswagen's second assignment of error is without merit.

{¶36} Alternatively, we affirm appellee's claim against Volkswagen under Ohio's Lemon Law, R.C. 1345.71 et seq. In Volkswagen's first assignment of error, it argues that appellee's Lemon Law claim is invalid for two reasons. First, Volkswagen alleges that the Beetle is too old to qualify as a "new motor vehicle" since it was previously owned and operated by the dealership. Second, it claims that the "original delivery

date" is the date when the dealership, not appellee, received the vehicle.

{¶37} R.C. 1345.71 is designed "to protect consumers from chronically defective new automobiles." *Royster v. Toyota Motor Sales, U.S.A., Inc.* (2001), 92 Ohio St.3d 327, 328. "The intent of the statute clearly is to make the consumer whole, and to restore the purchaser to a position he or she occupied before acquiring the lemon." *Fortner v. Ford Motor Co.* (Feb. 9, 1998), 5th Dist. No. 1997CA00177, 1998 Ohio App. LEXIS 752, at 4. "Consumer" means "[t]he purchaser, other than for purposes of resale, of a motor vehicle; [a]ny lessee *** ; [a]ny person to whom the motor vehicle is transferred during the duration of the express warranty that is applicable to the motor vehicle; [or] [a]ny other person who is entitled by the terms of the warranty to enforce the warranty." R.C. 1345.71(A)(1) through (4). Appellee qualifies as a consumer under each but the second category.

{¶38} The repair duty of a manufacturer giving a warranty is found in R.C. 1345.72(A):

{¶39} "If a *new motor vehicle* does not conform to any applicable express warranty and the consumer reports the nonconformity to the manufacturer, its agent, or its authorized dealer during the period of one year following the *date of original delivery* or during the first eighteen thousand miles of operation, whichever is earlier, the manufacturer, its agent, or its authorized dealer shall make any repairs as are necessary to conform the vehicle to such express warranty, notwithstanding the fact that the repairs are made after the expiration of the appropriate time period." (Emphasis added.)

{¶40} The remedy to consumers for breach this duty is set forth in R.C. 1345.72(B):

{¶41} "If the manufacturer, its agent, or its authorized dealer is unable to conform the motor vehicle to any applicable express warranty by repairing or correcting any nonconformity after a reasonable number of repair attempts, the manufacturer, at the consumer's option and subject to division (D) of this section, either shall replace the motor vehicle with a new motor vehicle acceptable to the consumer or shall accept return of the vehicle from the consumer and refund each of the following: (1) The full purchase price; [and] (2) All incidental damages, including, but not limited to, any fees charged by the lender or lessor for making or canceling the loan or lease, and any expenses incurred by the consumer as a result of the nonconformity, such as charges for towing, vehicle rental, meals, and lodging."

{¶42} Volkswagen admits that the Beetle had a condition that substantially impaired its use, safety or value. Volkswagen further admits that the Beetle was not repaired within a reasonable number of attempts. However, Volkswagen disclaims that the Beetle was a "new motor vehicle," as required by R.C. 1345.72(A), because Stadium purchased the vehicle on July 31, 2001, and used it as a rental for eleven months before selling it. Further, there were 10,435 miles logged on the Beetle at the time it was sold.

{¶43} Ohio's Lemon Law does not define a "new" or "used" motor vehicle. R.C. 1345.71(D) defines "motor vehicle" as "any passenger car or noncommercial motor vehicle *** as defined in section 3781.06 of the Revised Code." R.C. 4501.01(B) simply

defines “motor vehicle” as “any vehicle *** that is propelled or drawn by power other than muscular power or power collected from overhead electric trolley wires.”

{¶44} Appellee refers this court to the definition of “new motor vehicle” in R.C. 4517.01(C). R.C. Chapter 4517 governs motor vehicle dealerships. R.C. 4517.01(C) defines “new motor vehicle” as “a motor vehicle, the legal title to which has never been transferred by a manufacturer, remanufacturer, distributor, or dealer to an ultimate purchaser.” “Ultimate purchaser,” as defined in R.C. 4517.01(D) means, “with respect to any new motor vehicle, the first person, other than a dealer purchasing in the capacity of a dealer, who in good faith purchases such new motor vehicle for purposes other than resale.”

{¶45} Were we to use this definition, we would be obliged to find that the Beetle was a “new motor vehicle.” Stadium purchased the vehicle “in the capacity of a dealer,” as evidenced by its purchase receipt showing that the Beetle was assigned a “Batch Number,” and Stadium used its “Resale-New/Used Dealer” tax exemption to purchase it. Therefore, appellee would be the Beetle’s first “ultimate purchaser.”

{¶46} However, the Ohio Supreme Court has held that “all statutes which relate to the same general subject matter must be read *in pari materia*. *** And, in reading such statutes *in pari materia*, and construing them together, this court must give such a reasonable construction as to give proper force and effect to each and all such statutes.” (Citations omitted.) *Johnson’s Markets, Inc. v. New Carlisle Dept. of Health* (1991), 58 Ohio St.3d 28, 35. In reading R.C. 4517.01(C) *in pari materia* with R.C. 1345.72(A), we glean that R.C. 1345.72(A) loses its effect, since it requires a “consumer” to report the new motor vehicle nonconformities, and the term “consumer”

includes not only purchasers, but also lessees, persons to whom a vehicle is transferred during the warranty period, and persons who can enforce the warranty. It is clear from this definition that a consumer need not be the first purchaser of a vehicle to be entitled to the protection of the statute, provided a manufacturer's express warranty was still in place at the time of transfer.

{¶47} Some states differentiate between a "new" and "used" motor vehicle in lemon law statutes by focusing not on the "consumer," but on the mileage of the vehicle or the time it was transferred. See, e.g., N.Y. Gen. Bus. Law 198-b(a)(2), defining "used motor vehicle" as "a motor vehicle *** which has been purchased, leased, or transferred either after eighteen thousand miles of operation or two years from the date of original delivery, whichever is earlier[.]"

{¶48} The Ohio Court of Common Pleas in *Browning v. Am. Isuzu Motors, Inc.*, Case No. 01-CV-4505, 2002 WL 32063978, took this approach one step further, by focusing also on the need to have a valid warranty. In *Browning*, the buyer leased from an Isuzu dealership a vehicle that had 11,488 miles on the odometer at the time of the lease. The court, in deciding if the vehicle was a "new motor vehicle" under the Lemon Law, examined the categories of "consumer" in R.C. 1345.71(A) and found that "the presence of [these categories of consumers] is in conflict with the Defendant's argument that only purchasers of new cars are protected." Id. at 3. Therefore, the court held that "a motor vehicle is 'new' as long as it has a valid warranty, is within its first eighteen thousand miles of operation, and is within one year of the original delivery date." Id. at 4.

{¶49} This court agrees with the reasoning of *Browning*, but would modify its definition in two respects. First, the requirement of a "valid warranty" is surplusage, since R.C. 1345.72(A) applies only if the vehicle has an "applicable express warranty." Second, in order for the second two requirements to be consistent with, and give effect to, the provisions of the Lemon Law, they should be in the alternative. Therefore, this court holds that a motor vehicle is "new" if it is within its first eighteen thousand miles of operation, *or* is within one year of the original delivery date to the consumer, whichever is earlier.

{¶50} Volkswagen's second issue arises from the requirement that the nonconformity be reported within one year following the original delivery date or during the first eighteen thousand miles of operation, whichever is earlier. R.C. 1345.72(A). Since the Beetle had only 14,584 miles when it was presented for repair, Volkswagen's argument is that appellee failed to meet the one-year requirement because Stadium purchased the Beetle on July 31, 2001, and appellee did not present the Beetle for repair until August 19, 2002.

{¶51} We find this argument unpersuasive. It is clear that the protections of the Lemon Law go to the consumer, not to the dealer who obtained the vehicle from a manufacturer. The time periods during which a dealer holds new vehicles could vary greatly with each vehicle, and could conceivably last longer than one year. In such a circumstance, the consumer purchasing the vehicle would have no redress against the manufacturer in the case of a nonconformity, which would defeat the purpose of the Lemon Law.

{¶52} Further, all fifty states have enacted lemon law statutes. The vast majority have statutory language providing that the "delivery date" is to the "consumer," the "buyer," or the "purchaser." Ohio's Lemon Law standards are stricter than most state lemon laws. See *Royster*, supra, at 331. Therefore, consistent with the majority of states, we conclude that the "delivery date" refers to the time the vehicle was first delivered to a "consumer."

{¶53} Volkswagen relies on *Browning*, supra, for the proposition that the original delivery date is the date the dealership acquired the vehicle. In *Browning*, the court of common pleas did not specifically address the issue of the delivery date. Instead, it simply noted in the "facts" section that the plaintiff leased a 1999 vehicle from the dealer on June 27, 2000, and the vehicle's original delivery date was October 6, 1999. This court has no way of ascertaining why the facts were presented as such (e.g., if the vehicle had been previously leased or the parties stipulated or made admissions as to the delivery date). Absent a legal analysis regarding this issue, it is our conclusion that *Browning* is unsupportive of this issue.

{¶54} For the reasons set forth above, Volkswagen's first assignment of error is overruled.

{¶55} In its third assignment of error, Volkswagen argues that assuming arguendo, that appellee does have a viable cause of action for breach of implied warranty, the evidence does not establish that the Beetle was "so riddled with defects" that the written limited warranty "failed of its essential purpose," as established in *Goddard*, supra, which Volkswagen claims must be shown before a limited warranty action is permitted.

{¶56} Volkswagen's reliance on *Goddard* is unfounded. In *Goddard*, General Motors ("GM") provided a written warranty that disclaimed certain damages and limited the purchaser's remedies to repair and replacement, as permitted by R.C. 1302.93(A)(1) and 1302.93(C). The vehicle in question had so many problems that GM was unable to repair them completely, and finally, still within the warranty period, the purchaser gave up and ordered a new vehicle. The purchaser filed suit for breach of express warranty, seeking damages disclaimed by the warranty, including compensatory and punitive damages pursuant to R.C. 1302.88(B) and (C). Although the appellate court recognized GM's right to limit its liabilities under R.C. 1302.93(A)(1) and 1302.93(C), the court ruled that such sections must be read in conjunction with R.C. 1302.93(B), which provides that "'[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in Chapters 1301, 1302 [which includes the implied warranty provision] (***) of the Revised Code.'" *Goddard*, supra, at 45. The court further held that a limited remedy does not achieve its purpose if the seller is unwilling or unable to repair or replace the defective part within a reasonable time. The court concluded that "where a new car express warranty limits a buyer's remedies to repair and replacement of defective parts, but the new car is *so riddled with defects* that the limited remedy *** *fails its essential purpose*, the buyer may institute an action to recover damages for breach of warranty under R.C. 1302.88(B) [difference between goods accepted and value if had been as warranted] and *** incidental and consequential damages under R.C. 1302.88(C) and 1302.89." Id. at 47. (Emphasis added.)

{¶57} Appellee need not prove a "failure of essential purpose," as set forth in

R.C. 1302.93(B) and explained in *Goddard*, to reach its breach of implied warranty claim. There is no evidence that Volkswagen's express limited warranty disclaimed any implied warranties, and even if it did, appellee's implied warranty claim is pursuant to the MMWA, which provides in Section 2308(a) that "[n]o supplier may disclaim or modify *** any implied warranty to a consumer *** if *** such supplier makes any written warranty to the consumer with respect to such consumer product[.]" There is an exception that allows implied warranties to be limited to the duration of a written warranty of reasonable duration, which is irrelevant in this case since appellee's warranty had not yet expired as of the filing of the lawsuit.

{¶58} The evidence in this case establishes that Volkswagen breached its implied warranty that the Beetle was fit for the ordinary purposes for which such vehicle is used. Although Stadium had notice of a recall for a defect likely to cause death or severe bodily injury, it did not perform the recall, and sold the Beetle to appellee with the defect. Less than two months after the purchase, the Beetle failed due to the defect, and it took eighty-four days to repair it. Volkswagen admits that the defect impaired the vehicle's use, safety or value.

{¶59} Therefore, the evidence is sufficient to permit a finding of breach of implied warranty under the MMWA, and Volkswagen's third assignment of error lacks merit.

{¶60} For the foregoing reasons, appellant's assignments of error are not well-taken. The judgment of the Trumbull County Court of Common Pleas is affirmed.

COLLEEN MARY O'TOOLE, J., concurs,

WILLIAM M. O'NEILL, J., concurs with Concurring Opinion.

WILLIAM M. O'NEILL, J., concurring.

{¶61} I concur in the well-reasoned majority opinion but write separately to express a finite concern. There is no question that the implied warranty was breached and that Volkswagen was properly required to stand behind its product. The issue of privity, while compelling, is best reserved for another day with more distinct facts. The argument could readily be made that when one enters a building with the name "Volkswagen" emblazoned over the door with neon lights, and then purchases a vehicle manufactured by Volkswagen, one has entered into privity with Volkswagen.[1] Obviously, if you were then to buy a used Chevrolet inside those premises, the question of privity with Volkswagen has been weakened, but not necessarily extinguished.

{¶62} The more troubling question presented herein is the definition of "new vehicle" for the purposes of Ohio's Lemon Law. Conceptually, I have difficulty attaching that definition to a vehicle that has been used as a rental vehicle for ten thousand miles over a year's time. Appellee availed himself of a "deal" when he purchased a less than new vehicle. It is troubling to extend the term "new" to such a transaction when instinct, law, and common sense dictate otherwise.

{¶63} However, as noted by the majority, the matter is affirmed, and I join in that holding, with reservations concerning definitions.

---

1. See *Hamrick v. DaimlerChrysler Motors*, 9th Dist. No. 03CA008371, 2004-Ohio-3415, at ¶12.