

18-8835

No. \_\_\_\_\_

**ORIGINAL**

IN THE

SUPREME COURT OF THE UNITED STATES

FILED

APR 10 2019

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

SABRINA D DAVIS

— PETITIONER

(Your Name)

vs.

KIA MOTORS AMERICA INC

— RESPONDENT(S)

KIA MOTORS OF AMERICA, INC

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS 4TH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Sabrina D Davis

(Your Name)

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Clinton, SC 29325

(City, State, Zip Code)

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(Phone Number)

## QUESTION/S PRESENTED

1. ARE THE LOWER COURT ABUSING THE JUDICIARY ACT OF 1925 TO IGNORE FRAUD ON THE COURT ?
2. ARE THE LOWER COURTS USING THE JUDICIARY ACT OF 1925 AS AN ALTERNATIVE MEANS TO DECLARE A FEDERAL LAW UNCONSTITUTIONAL?
3. ARE THE LOWER COURTS ABUSING THE JUDICIARY ACT OF 1925 TO ENFORCE DISCRIMINATORY RULINGS THAT CONFLICT WITH PRIOR RULINGS BECAUSE THE LITIGANT IS POOR?

## **LIST OF PARTIES**

**All parties appear in the caption of the case on the cover page**

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## CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

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### Amendment V of the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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### Amendment XIV of the United States Constitution

#### Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

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### 15 USC § 2302(4)

- (a) Full and conspicuous disclosure of terms and conditions; additional requirements for contents In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. Such rules may require inclusion in the written warranty of any of the following items among others:

(4)

A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warranty—at whose expense—and for what period of time  
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28 USC § 453

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: “I, \_\_\_\_\_, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as \_\_\_\_\_ under the Constitution and laws of the United States. So help me God.”  
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UCC§ 2-302(2)

- (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
- (2) When it is claimed or appears to the court that the contractor any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.  
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**SC CODE SECTION 36-2-316. Exclusion or modification of warranties.**

- (1) If the agreement creates an express warranty words disclaiming it are inoperative.
- (2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude the implied warranty of merchantability or of fitness for a particular purpose must be specific, and if the inclusion of such language creates an ambiguity in the contract as a whole it shall be resolved against the seller  
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**SC CODE SECTION 36-2-719. Contractual modification or limitation of remedy.**

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section (Section 36-2-718) on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measure of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is no

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## STATEMENT OF THE CASE

### Background:

Sabrina D Davis purchased a 2003 Kia Rio Cinco from Kia of Greer around October 23, 2003.

The vehicle came with a manufacturers' warranty that covered the entire vehicle for 60,000 and a Powertrain Warranty that covered specific parts for 100,000 mile or 10 years whichever occurred first. In February 2007 the vehicle was serviced at Kia of Greer Maintenance Center during this time A recalled part was replaced on the vehicle and a service representative provided information that the timing belt needed to be changed at 60,000 miles. She stated that Kia Motors America, Inc./Kia Motors of America, Inc(hereafter referred to as Kia Motors) would have provided this replacement for free if the car was brought in before it reached over 60,000 miles. Because the vehicle had over 70,000 miles on it, a payment of \$471 would be necessary to have this service performed. The offer was refused. Around April 6, 2007 the vehicle stopped operating and the vehicle was towed to Kia of Greer, and it was revealed that the engine needed to be replaced. Kia of Greer claimed that lack of proper maintenance caused the engine failure, therefore the warranty offered by Kia Motors would not cover the cost of the repairs. A complaint was filed against Kia Motors November 2008. A request for summary judgment was requested and later voluntarily withdrawn when evidence revealed that because the timing belt was not replaced at 60,000 miles this caused the destruction of the engine, yet Kia Motors

100,000/10-year Powertrain Warranty specifically covers the timing belt and all the parts of the engine. The vehicle had 85,279 miles and ownership was 3 years, 6 months, therefore the vehicle was still covered under Kia Motors Powertrain Warranty. After David Marshall (Kia Motors attorney) withdrew the motion for summary judgment, Judge Harwell issued a sua sponte to determine if the case satisfied the federal required minimum for diversity cases. Briefs were submitted by both parties. Ms. Davis received notice that the case was dismissed for lack of subject-matter jurisdiction on November 19, 2009. This case was appealed and re-appealed unsuccessfully. A letter was submitted to Judge Harwell telling him that the limited liability clause that was used to limit the amount-in controversy violated the federal warranty law. He refused to re-open the case stating that a year had passed after the judgment and the court could not vacate based on fraud committed by Kia Motors. I submitted a motion to vacate for fraud on the court in August 2018. The motion was denied. Appealed to the Court of Appeals 4<sup>th</sup> Circuit August 2018, denied on January 22, 2019.

The Fraud on the Court charge was not investigated at all by the lower courts. A sua sponte is was issued by the district court questioning the amount of damages being claimed and Kia Motors is allowed to use a limited liability clause that restrict damages for an implied warranty against their breach of an expressed warranty, yet no court will investigate the sua sponte. Judge Harwell abused the sua sponte to use lack of subject-matter jurisdiction to get rid of this case, however, the limited liability clause Kia Motors presented to the courts was for an implied warranty when in fact the suit was for Kia Motors breach of their expressed warranty. Judge Harwell's haste to get rid of this case caused his ruling to violate the Magnuson-Moss Warranty Act because this act was passed by Congress to stop the abuses of auto manufacturers that often-

employed ambiguous warranties. The district court's ruling not only violated 28 USC 2302 but a number of other factors that conflicted with prior rulings of both lower courts.

### Unconscionability

Unconscionability was mentioned in my brief submitted to the district court. The lower courts have ruled that consumers are equal with auto manufacturers in negotiating warranty coverage and conditions. Judge Harwell decided that Kia Motors and I were equal bargaining partners based solely on the briefs submitted (See Myrtle Beach Pipeline Corporation v. Emerson Electric Company 843 F. Supp 1027 Dist Court D. South Carolina (1993), Carlson v. General Motors 883 F. 2d 287 Court of Appeals 4<sup>th</sup> Circuit(1989), Kaplan v. RCA Corp 783 F.2d 463, 467(4<sup>th</sup> Cir 1986), and Thomas v. Matrix System Automotive Finishes) . Under UCC§ 2-302(2) the court by a matter of law cannot resolve questions of unconscionability on the bare bones of the briefs in which parties are not given the opportunity to present relevant evidence of the circumstances surrounding the original consummation of their contractual relationship (See Carlson v. General Motors and Kaplan v. RCA Corp). Neither the district court or the appeals court applied a test of unconscionability which could determine the presence or absence of unfair bargaining against a consumer.

### Sole Remedy Failure of Essential Purpose

The sole remedy and failure of essential purpose doctrine was not applied. According to SC Code 36-2-719 Kia Motors sole remedy of repair and replacement of defective parts is allowed and consequential damages can be excluded unless it is unconscionable (See Myrtle Beach Pipeline Corporation v. Emerson Electric Company, Beal v. General Motors, Herbstman v. Eastman 330 A. 2d 384, Walter v. Massey Ferguson Inc. 775 F. 2d 587(4<sup>th</sup> Circuit 1985)). Kia Motors did not exclude consequential damages if their warranty failed of its essential purpose and the warranty did fail of its essential purpose simply because Kia Motors refused to repair or replace any defective parts. The only limited liability Kia Motors stated “specifically does not include any expense for or related to transportation to such a dealer or payment for loss of use of the Kia Vehicle.” This limited liability clause states nothing about limiting any consequential, special or economic damages as a result of Kia Motors failure to repair or replace defective parts. Kia Motors guaranteed that their vehicle was free of defects, but insisted that the timing belt be changed before 60,000 miles occurred.

### Ambiguity

According to SC Code 36-2-316(2) any ambiguity in a disclaimer will be construed against the seller. This clause that lies at the very heart of this case contains an exclusion that both courts decided to ignore. This exclusion is what is making the sua sponte issued by Judge Harwell fraud on the court because the judge is forcing a limited liability clause to be used against damages for an express warranty when in fact it only restricts damages for an implied warranty (See Exhibit A & B). Kia Motors made a statement in its limited liability clause that must be taken as it was written.

THESE WARRANTIES ARE GIVEN IN LIEU OF ALL OTHER EXPRESSED WARRANTIES (EXCEPT ANY SET FORTH SEPARATELY IN THIS MANUAL). What does Kia Motors mean when they say “EXCEPT ANY SET FORTH SEPARATELY IN THIS MANUAL”? There are warranties on different pages throughout Kia Motors Manual. Kia Motors never referenced this exclusion to any specific warranty or any specific page/pages in their manual. According to SC Code 36-2-316(2) this ambiguity must be construed against Kia Motors, therefore all the warranties listed in Kia Motors Manual are excluded from this limited liability disclaimer, therefore the only warranties this limited liability clause can restrict are Kia Motors implied warranties. The 14<sup>th</sup> Amendment of the Constitution hold states accountable to enforce their laws equally, yet the ambiguity that exist in Kia Motors limited liability disclaimer is being construed against the buyer.

## REASONS FOR GRANTING THE WRIT

In the many cases involving breach of warranty both the Court of Appeals 4<sup>th</sup> Circuit and the South Carolina Federal District Court have consistently ruled the same on key issues. Issues such as sole remedy, unconscionability, failure of essential purpose, and contract laws. Particularly in *Walter v. Massey Ferguson Inc.* 775 F.2d 587(Fourth Cir 1985). In *Walters*, Judge Wilkinson determined that two breaches occurred. The promise of receiving non-defective goods and the promise of repair and replacement. He determined that the exclusion of consequential damages did not apply to the failure of repair and replacement. The lower court have not adequately explained why the departure from an accepted approach regarding remedies

for a breach of an expressed warranty that contains a sole remedy in which the manufacturer has refused to honor their sole remedy.

The use of the sua sponte allows judges to violate federal laws, court precedents, and twist The Due Process Clause into legal blackholes that can make cases disappear from dockets. The courts allow both parties to present evidence, but if the judge can decide to ignore laws to grant a favorable ruling to a represented litigant over an unrepresented litigant then the Due Process Clause is just a formality that gives the appearance of resembling justice for all. If the court has decided to enter into issues that neither party has bothered to address, then it is owed to both parties that the judge conduct the sua sponte in a manner that is impartial and fair to all. The judge should not approach an issue through a sua sponte in which the judge has no intention of enforcing the law or deciding to veer from case precedent because there is a Poor or Unrepresented Litigant involved in the case. 28 US Code § 453 demands that judges administer justice regardless of the financial condition of the litigants, however the lower courts refuse to obey this oath when one party is represented and the other is not. The abuse of the sua sponte is a legal loophole that is being used to distort the Due Process Clause of the 5<sup>th</sup> Amendment by allowing judges to pick and choose what laws to enforce. The Magnuson-Moss Warranty Act was passed in 1975 and requires that written warranties inform the consumer what damages are included or excluded in the event the manufacturer breach the warranty. 15 USC 2302(a)(4) states that a warrantor must provide a statement of what will be done in the event of defect, malfunction, or failure to perform the written warranty-- at whose expense and for what period of time. Laws that are unconstitutional can be ignored by the court as if these laws do not exist, and because the lower court have decided to ignore the consumer protections granted by the Magnuson-Moss Warranty Act then the law must be unconstitutional. The lower courts have

swept away all of the protections of the Magnuson-Moss Warranty Act and can rule against consumers discriminately by treating warranty cases as if it is pre-1975 and any limited liability clause can be used against any warranty regardless of any ambiguity or unconscionability. The lower courts will not issue an order or judgment that declare that the Magnuson-Moss Warranty Act is unconstitutional but relies on the Judiciary Act of 1925 to keep ruling issued by the lower courts that violate federal law enforced against Poor and Unrepresented litigants. The Judiciary Act of 1925 allows the US Supreme court to use its discretion in deciding which cases it grants certiorari, therefore it highly unlikely that the Supreme Court will hear a case for issues that the court believes does not need revisiting. But the lower courts are using this legal loophole against Poor and Unrepresented Litigants by treating a federal law as unconstitutional simply by refusing to enforce the law for all because the belief among the lower court is that the Supreme Court will not bother to correct any errors or fraud the courts have decided to protect. The lower courts have departed from the accepted judicial proceeding and is using the Judiciary Act of 1925 to avoid a ruling that declare the Magnuson-Moss Warranty Act as unconstitutional. The Bill of Rights were included to help install the judiciary as “guardians” of individual rights against the other branches, but it seems the “guardians” of our rights need to police themselves to ensure that the judiciary is not engaging in discriminatory rulings against the Poor and the Unrepresented and relying on the Judiciary Act of 1925 to kept erroneous rulings “swept under the carpet.” The integrity and impartibility of our courts should never be placed in a position of doubt and must be seen as a beacon where all can obtain justice and not be discriminated against because they are Poor and Unrepresented. But, when the lower courts fail to question a sua sponte in which a judge has ignored federal law to grant lack of subject-matter in favor of a represented litigant over a poor and unrepresented litigant, the court’s integrity and impartibility

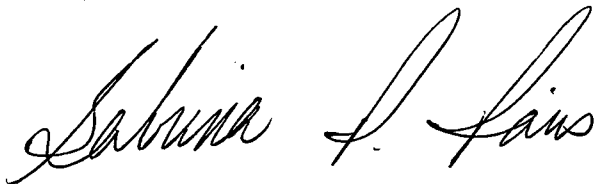
is thrown into more than just doubt but is literally drowned in an ocean of discrimination and bigotry.

## Conclusion

The sua sponte issued by Judge Harwell lies at the very heart of this case because it allows the judge to engage in bias and discriminatory rulings without the appeals court questioning the authority of the sua sponte because the litigant is poor and unrepresented. The sua sponte allowed for the lower courts to strip away the protections of the Magnuson-Moss Warranty Act by ignoring the law and treating this law as if it is unconstitutional. The sua sponte is a tool that the courts are using to deny justice to Poor and Unrepresented Litigants by issuing erroneous decision that conflict with prior rulings of the same court and judges that anticipates that the Judiciary Act of 1925 will not grant certiorari to Poor and Unrepresented Litigants.

I respectfully submit this Writ of Certiorari,

Sabrina D Davis

A handwritten signature in cursive script, reading "Sabrina D Davis". The signature is written in black ink and is positioned below the printed name.