

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

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Appeal from the Court of Appeals  
(Richard A. Bandstra, Donald S. Owens and Alton T. Davis)

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KEITH GAYLE DAVIS,  
  
Plaintiff-Appellee,

Docket No. 136114  
  
Court of Appeals No. 270478  
  
Lower Court No. 04-64-CP

v.

FOREST RIVER, INC.,  
a foreign corporation,

Defendant-Appellant.

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JONATHAN A. GREEN (P51461)  
Attorney for Plaintiff-Appellee  
30300 Northwestern Highway, Suite 345  
Farmington Hills, Michigan 48334  
(248) 932-3500

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WINEGARDEN, HALEY, LINDHOLM  
& ROBERTSON, P.L.C.  
Attorneys for Defendant-Appellant  
By: Donald H. Robertson (P30498)  
Rita M. Lauer (P53075)  
G-9460 S. Saginaw Street, Suite A  
Grand Blanc, Michigan 48439  
(810) 579-3600

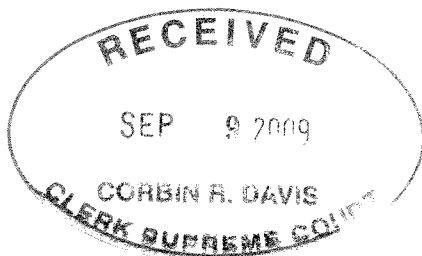
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**APPELLANT'S REPLY BRIEF ON APPEAL**

*(Oral Argument Requested)*

Prepared By:

Donald H. Robertson, Esq.  
WINEGARDEN HALEY LINDHOLM  
& ROBERTSON, P.L.C.  
G-9460 S. Saginaw Street, Suite A  
Grand Blanc, MI 48439  
(810) 579-3600  
[dhr@winegarden-law.com](mailto:dhr@winegarden-law.com)



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## STATEMENT OF ISSUES ON APPEAL

**I. Whether the Uniform Commercial Code, MCL 440.101 et. seq., Applied to the Purchase Between Davis and the Dealer, Kitsmiller RV?**

The Trial Court did not expressly rule on this issue.

The Court of Appeals also did not directly address this issue.

Appellant answers YES.

Appellee answers YES.

**II. Assuming the UCC Applies, Does it Abrogate the Common Law Remedy of Rescission, Replacing it With Revocation of Acceptance?**

The Trial Court did not directly address this issue.

The Court of Appeals did not directly address this issue, as it held the UCC did not apply to Davis' claim of rescission against Forest River.

Appellant answers YES.

Appellee answers NO.

**III. Whether the UCC Requires Privity for Revocation of Acceptance?**

The Trial Court answered YES, following Court of Appeals' precedent, but indicated that it disagreed therewith.

The Court of Appeals answered YES based on prior Court of Appeals' precedent.

Appellant answers YES.

Appellee answers NO.

**IV. Whether Davis' Status as Third-Party Beneficiary Under Forest River's Written Limited Warranty Confers on Him Any Rights Independent of the Warranty?**

The Trial Court answered YES, on the basis that Forest River's warranty gave Davis the right to revocation under the Federal Magnuson-Moss Warranty Act.

The Court of Appeals answered YES, on the basis that Forest River's warranty gave Davis the right to rescission under Michigan common law, and the Federal Magnuson-Moss Warranty Act.

Appellant answers NO.

Appellee answers YES.

**V. Does the Economic Loss Doctrine and the UCC Apply to Davis' Consumer Claims for Breach of Warranty?**

The Trial Court did not directly address this issue.

The Court of Appeals answered NO.

Appellant answers YES.

Appellee answers NO to the application of the economic loss doctrine, and answers that the UCC does not provide the sole basis for Davis' claims.

**VI. Assuming the UCC Does Not Apply Does the Common Law and/or the Magnuson-Moss Warranty Act Authorize Rescission/Revocation in the Absence of Privity?**

The Trial Court did not directly address this issue, but did hold that Magnuson-Moss gave an independent federal right of revocation.

The Court of Appeals answered YES.

Appellant answers NO.

Appellee answers YES.

## **JURISDICTIONAL STATEMENT**

This Court possesses jurisdiction to hear this Appeal pursuant to MCR 7.301(A)(2). A final Judgment was entered by the Circuit Court on March 23, 2006. A Motion for Remittitur was filed on April 12, 2006, and an Order denying that Motion was entered on May 10, 2006. A timely Claim of Appeal was filed with the Court of Appeals, who by Opinion dated February 21, 2008, denied Forest River's appeal, and affirmed the Circuit Court's Judgment. Forest River then filed an Application for Leave to Appeal with this Court, which was granted by Order dated June 25, 2008. This Court then entered an Order dated December 19, 2008 reversing and remanding the case to the Court of Appeals. Both Forest River and Davis filed Motions for Reconsideration, which were granted by a May 1, 2009 Order vacating the December 19, 2008 Order, reconsidered the Application for Leave to Appeal, and upon reconsideration granted it.

## STATEMENT OF FACTS

Appellee in his Counter-Statement of Facts makes various inaccurate, misleading, and/or irrelevant statements. Due to the limits on the length of this Reply Brief, Appellant cannot respond to all of them. However, a few need to be responded to.

With respect to the claims of a “massive” number of defects in the RV, (Appellee’s Brief, pg.2), Davis testified that a lot of the initial problems were merely cosmetic. (Apx. pg.61a, 12-15-05 TR, pg.86). Before releasing the RV to Davis, Kitsmiller went through that list, made certain that all repairs were completed, the RV was in good shape, and all Davis’ initial complaints had been taken care of. (Apx. pg.58a, 12-15-05 TR, pg.34). The second time Davis sent it in he listed 9 problems. (Apx. pg.59a, 12-15-05 TR, pg.41). With respect to the third list of 17 problems, Davis did not give either Kitsmiller or Forest River an opportunity to repair these alleged defects. (Apx. pg.66a, 12-16-05 TR, pg.69). Further, as to that third list, Davis’ own expert, Mr. Kitsmiller, was only able to verify two problems that were covered by the warranty, a problem with the power step, and stains on the curtains in the driver’s compartment, and while Davis claimed the gas tank was leaking,<sup>1</sup> Mr. Kitsmiller was unable to confirm that. (Apx. pg.51a, 12-13-05 TR, pg.132). Everything else worked just fine, (Apx. pg.47a, 12-13-05 TR, pg.124), and the RV was fit for camping or any ordinary recreational use, (Apx. pg.52a-53a, 12-13-05 TR, pg.134-135). Even including a new gas tank, it would cost less than \$2,000 to fix those three problems. (Apx. pg.50a, 12-13-05 TR, pg.131).

As to Davis’ failure to bring in the RV for repair of the final two covered warranty problems, Davis stated that a written extension of the warranty was needed, and without

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<sup>1</sup>The gas tank was not covered by Forest River’s warranty. (Apx. pg.74a-75a, 12-19-05 TR, pg.90-91).

that he could not take the motor home in for further warranty service. (Appellee's Brief, pg.3). However, Mr. Kitsmiller did not state a written authorization is required, only that they typically get written authorization. (Apx. pg.42a, 12-13-05 TR, pg.96). Carrie Kennedy, the warranty administrator and service writer of Kitsmiller RV, (Apx. pg.54a, 12-13-05 TR, pg.144), testified that a written extension was not required for continued warranty work. (Apx. pg.55a, 12-15-05 TR, pg.16). Further, she never told Davis that they would not do any warranty work without a written extension. (Apx. pg.56a, 12-15-05 TR, pg.17). Mr. Davis also acknowledged that Forest River told him it would extend the warranty, and that Carrie Kennedy told him that Forest River would extend the warranty. (Apx. pg.64a,65a, 12-16-05 TR, pg.51,54).

With respect to the amount of time the RV was in at Forest River for work on the second list of repairs, Ms. Kennedy testified that Davis told her he was not in a hurry to get his RV fixed, and she told that to Forest River. (Apx. pg.60a, 12-15-05 TR, pg.47). She spoke to Davis several times in the fall of 2002 and Davis was not concerned about getting the RV back at any particular time, as he had an injury and would not be able to drive it anyway. (Apx. pg.72a, 73a, 12-19-05 TR, pg.67,72). Mr. Davis acknowledged that he told Carrie Kennedy of the physical problems he was having, and that was impacting his ability to get around. (Apx. pg.62a-63a, 12-15-05 TR, pg.141-142).

With respect to the implication by Appellee that rescission was appropriately granted because of all of the problems with the RV, Appellee's own expert, Mr. Kitsmiller, testified that it is a given when a new motor home leaves the lot that it is going to come back with problems. (Apx. pg.48a, 12-13-05 TR, pg.127). Carrie Kennedy also testified that any RV that is sold "will come back with a list of problems," and you could get a list with 50 or 100

things that might have gone wrong. (Apx. pg.57a, 12-15-05 TR, pg.23). Tom Locie, a customer service representative who had 15 years experience in that job, (Apx. pg.69a, 12-19-05 TR, pg.15), stated that new motor homes always have problems, like a punchlist on a new home. (Apx. pg.70a, 12-19-05 TR, pg.24). He explained “it’s a house on wheels that goes down the road.” (Apx. pg.71a, 12-19-05 TR, pg.46). Mr. Kitsmiller also stated the unit was of average quality for the industry, and did not have any more problems than he has run into in the past with other RVs. (Apx. pg.49a, 12-13-05 TR, pg.129).

Davis argues on page 16 of his Appellee’s Brief that he was entitled to a refund because Forest River’s written limited warranty expressly provides for a refund. (Appellee’s Brief, pg.16). This is a misstatement of the terms of the warranty, and the relief requested in the Trial Court. The warranty (Apx. pg.5a-6a) provides inter alia, that: “Warrantor shall elect to remedy the defect from among the following: repair, replacement or refund.” Thus, the warranty gives Forest River the option to provide a refund in lieu of repair, it does not give Davis a contractual right to demand a refund.

Further, any claim for a refund as a contractual remedy would be in the nature of a request for specific performance, not for damages. Damages for breach of an agreement to provide a refund would be measured by the difference between the amount of the refund and the value of the RV, not the amount of the refund. However, Plaintiff’s Complaint, (Apx. pg.7a-22a), did not include a count for specific performance of a contractual obligation to provide a refund.

## ARGUMENT

### I.

**THERE IS NO INDEPENDENT FEDERAL REMEDY OF RESCISSION FOR BREACH OF A CONSUMER WARRANTY UNDER MAGNUSON-MOSS, AS RESCISSION IS LIMITED BY STATE AND COMMON LAW REQUIREMENTS FOR PRIVACY.**

#### *Standard of Review*

What remedies are available under the Magnuson-Moss Act involves interpretation of a federal statute, which is reviewed de novo. *In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich App 696, 698; 736 NW2d 594 (2007).

#### *Merits*

Appellee's argument with respect to Magnuson-Moss, although somewhat diffuse and difficult to understand, seems to be that because Magnuson-Moss provides for equitable remedies for breach of a consumer warranty, every type of equitable remedy is available as a matter of law under Magnuson-Moss, even if they would not otherwise be recoverable. Therefore, since rescission is an equitable remedy it is per se available under Magnuson-Moss, regardless of the lack of privity.

There are, however, two problems with this argument. The first is that while Magnuson-Moss does provide for damages and equitable remedies, 15 USC 2310(d)(1), it does not follow that every type of damage or equitable relief is available for a breach of warranty. For example, tort damages such as mental anguish and emotional suffering should not be recoverable for a claim under Magnuson-Moss, nor are punitive damages.<sup>2</sup> Further, unilateral mistake by a consumer will not justify reforming a warranty merely

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<sup>2</sup>*Walsh v Ford Motor Co*, 627 F Supp 1519 (DCC 1986).

because reformation is an “equitable remedy,” as reformation requires a mutual mistake.<sup>3</sup> When Congress provided for damages and equitable relief under Magnuson-Moss, it did not eliminate the traditional limitations on the type of damages and equitable relief available for breach of contract. As set forth in Forest River’s Appellant’s Brief, Congress deferred to state law in this regard, and even if there are independent federal remedies under Magnuson-Moss, the traditional common law limitations thereon, for example, no mental anguish and emotional suffering, and privity for rescission, are retained.

Furthermore, even if Congress intended to create a unique federal law of damages and equitable remedies for a breach of a consumer warranty, that federal law does not always allow rescission. A warrantor under Magnuson-Moss is required to give either a “full warranty” or a “limited warranty.” See 15 USC 2303.<sup>4</sup> If a full warranty is given and a defective product is not remedied after a reasonable number of attempts, a consumer purchaser has the right “to elect either a refund for, or replacement without charge, of such product or part . . . .” 15 USC 2304(a)(4).<sup>5</sup> If Congress intended to allow rescission whenever there was a breach of warranty, either limited or full, there would have been no need to specifically provide a refund for full warranties under 15 USC 2304(a)(4). The express provision for a refund in 15 USC 2304(a)(4), shows that rescission/refund was not intended to be automatically available for breach of a limited warranty.

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<sup>3</sup>“Where reformation is sought solely on the ground of mistake, mutuality of the mistake is essential.” 67 AmJur 2d, Reformation of Instruments, §20.

<sup>4</sup>Forest River’s warranty was a limited warranty. (Apx. pg.59).

<sup>5</sup>This is in contrast to Forest River’s warranty which gives the option to decide on a refund to the warrantor, not the purchaser.

## II.

### THE UCC REQUIRES PRIVITY OF CONTRACT FOR REVOCATION OF ACCEPTANCE AND ONLY THE DIRECT SELLER TO THE BUYER IS SUBJECT TO REVOCATION.

#### *Standard of Review*

Whether the UCC requires privity of contract for revocation of acceptance involves an issue of statutory interpretation, which is reviewed de novo. *Toll Northville, Ltd v Twp of Northville*, 408 Mich 6; 743 NW2d 902 (2008); *Bates v Gilbert*, 479 Mich 451; 736 NW2d 566 (2007).

#### *Merits*

Davis' argues that the only requirement under MCL 440.2608 for revocation of acceptance is that the claim be brought by a buyer of the goods against a seller thereof. (Appellee's Brief, pg.12,28-29). However, merely because Davis and Forest River are buyer and seller with respect to Kitsmiller does not mean they are a buyer and seller with respect to each other. Forest River did not sell to Davis, nor did Davis purchase from Forest River. As between Forest River and Davis, Forest River is not the seller of the goods.

That MCL 440.2608 refers to a direct, and not a remote seller, is shown in part by the definition of acceptance of goods. MCL 440.2606 governs acceptance, and provides inter alia, that acceptance happens when a buyer, "does any act inconsistent with the seller's ownership. . . ." MCL 440.2606(C). However, Forest River was not the owner of the RV at the time of acceptance by Davis, Kitsmiller was. Therefore, Davis could not do an act inconsistent with Forest River's nonexistent ownership, he could only so act with respect to Kitsmiller. Also, MCL 440.2606(A) allows acceptance if a seller is notified "that

the goods are conforming.” However, since there was no contract of sale between Forest River and Davis, how could Davis inform Forest River that the goods conformed to their nonexistent contract. Also if revocation, as Davis argues, is the equivalent of rescission,<sup>6</sup> and rescission undoes a contract and restores the parties’ status quo ante, it should only be available against the buyer’s immediate seller, as there is no contract between a purchaser and remote manufacturer to undo, or status quo to be restored. Prior to Kitsmiller’s sale to Davis, Forest River’s status quo was that Kitsmiller owned the RV, and Forest River had Kitsmiller’s payment therefor. Allowing rescission/revocation against Forest River does not restore that status quo.

Davis argues that revocation or rescission against a remote manufacturer is not inequitable or inappropriate because whatever price a consumer paid for the goods is the value thereof. (Appellee’s Brief, pg.36-37). Therefore, for rescission/revocation against a remote manufacturer, while the manufacturer refunds what the retailer received, he gets goods of equal value in return. While this argument has some surface appeal, it will not withstand close scrutiny, as every buyer of a car knows that the car’s “value,” i.e. what one can sell it for, immediately drops once it becomes a “used” vehicle, and drops further when the new model year comes out.

Under the UCC the measure of damages for breach of warranty is the difference between the value of the goods (not the price one paid therefor) and the value they would have had if they had been as warranted. MCL 440.2714(2). Further, in revocation the buyer’s remedy is not to recover the “value” of the goods, but “. . . so much of the price that has been paid . . . .” MCL 440.2711(1). (Emphasis added). Thus, the UCC recognizes that there is a difference between the “value” of goods and the “price” one paid therefor.

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<sup>6</sup>“Revocation and rescission are the same relief.” (Appellee’s Brief, pg.9).

The value of goods may, depending on various factors, be more than, equal to, or what one assumes is normally the case, less than the purchase price.

This highlights the fundamental difference between an action for breach of warranty and a request for rescission/revocation. That is, a warranty action seeks to recover damages caused by the breach, while rescission/revocation seeks to undue a transaction. While it is appropriate in determining damages to look at values, when undoing a transaction, one looks at what was paid by one party and received by another, and damages and price are not, except perhaps by coincidence in a particular case, the same thing.

Davis also argues that because the UCC does not specifically require privity, privity is not required.<sup>7</sup> However, privity has always been a requirement for breach of contract and/or rescission. Therefore, the assumption should be that the UCC has retained the requirement for privity, unless it expressly provides otherwise. Cf. MCL 440.1103. Thus, the lack of an express reference to privity, if anything, is evidence that the UCC did not eliminate the requirement therefor.

Davis also argues at pages 48-49 of his Appellee's Brief that allowing rescission or a refund as a remedy for breach of warranty is fair because a provider of a warranty receives consideration therefor, that more than offsets the refund. However, no evidence was presented in this case with respect to manufacturers' pricing of goods to dealers/retailers, and what impact a warranty has thereon. Also, while one may assume that any addition to the price for a warranty is designed to cover anticipated costs for warranty repairs, that would not cover refunds. If instead of having to cover warranty work

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<sup>7</sup>"Since Section 2608 does not require privity, and the statutory conditions that are present were satisfied, that should end the inquiry and provide the answer--privity is NOT required." (Appellee's Brief, pg.32). (Emphasis in original).

on a RV, Forest River, and any other manufacturer, also had to cover refunds, they would either eliminate any warranty, or increase their price to compensate. Whether this would ultimately benefit society as a whole, or consumers in particular, is a policy decision best addressed by the Legislature, and not this Court, which does not even have a factual record from which it can begin to evaluate this issue.

Revocation/rescission may be fair with respect to the direct seller, as it merely undoes their transaction and restores the parties' status quo. However, if revocation is available without regard to privity, then the third or fourth purchaser/user of industrial equipment can also bring an action for revocation, as the UCC does not limit revocation to initial consumer purchasers. Also Forest River questions how it is fair or equitable to hold a manufacturer liable for breach of an implied warranty to persons they did not contract with or intend to be benefitted thereby. In any event, how to weigh and resolve these competing policy claims and fairness arguments is an issue for the Michigan Legislature, not this Court.

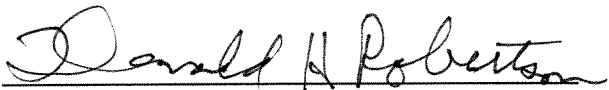
### **RELIEF REQUESTED**

For the reasons set forth herein and in Forest River's prior Appellate Brief, Forest River respectfully requests that this Court reverse the decision of the Court of Appeals and hold that the UCC and the economic loss doctrine applies to Plaintiff's claims against Forest River, that the UCC provides the exclusive remedy for revoking acceptance, and requires privity of contract therefor. Further, this Court should hold that Davis is not a third-party beneficiary of Forest River's implied warranty of merchantability, but only has that status with respect to Forest River's express written warranty, which does not provide Davis with any rights independent of the warranty. Finally, if Davis' claims are not

governed by the UCC, he still is not entitled to rescission or revocation in the absence of privity under Michigan common law or the Magnuson-Moss Warranty Act. Therefore, this Court should reverse the Court of Appeals' holding that Davis is entitled to rescission, and remand for further proceedings consistent with these holdings, and consideration of the issues raised by Forest River in its appeal that were not decided by the Court of Appeals, including whether the Trial Court erred in allowing recovery by Davis of finance charges, and non-economic loss of use as damages for breach of warranty, and whether the Trial Court erred in denying remittitur.

WINEGARDEN HALEY LINDHOLM  
& ROBERTSON, P.L.C.  
Attorneys for Forest River

Dated: September 9, 2009

By:   
Donald H. Robertson (P30498)  
G-9460 S. Saginaw Street, Suite A  
Grand Blanc, MI 48439  
(810) 579-3600  
[dhr@winegarden-law.com](mailto:dhr@winegarden-law.com)