

STATE OF MICHIGAN
IN THE SUPREME COURT

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

KEITH GAYLE DAVIS,

Plaintiff-Appellee,

v.

FOREST RIVER, INC.,
a foreign corporation,

Defendant-Appellant.

Supreme Court Docket No. 136114

Court of Appeals No. 270478

Lower Court No. 04-64-CP

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BRIEF AMICUS CURIAE OF
FORD MOTOR COMPANY

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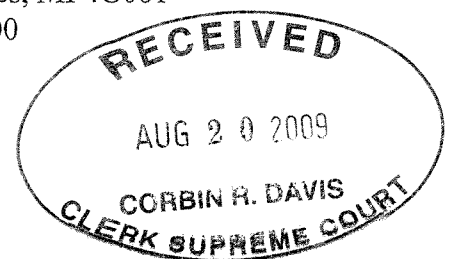


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STATEMENT OF ISSUES ON APPEAL

I. Does The Uniform Commercial Code, MCL 440.1101 et seq., Apply To The Purchase Contract Between Plaintiff And The Dealer, Kitsmiller RV?

The Trial Court did not expressly rule on this issue.

The Court of Appeals did not directly rule on this issue.

Amicus answers YES.

Appellant answers YES

Appellee answers YES to the specific question, but addresses additional issues.

II. Does The UCC Provide The Exclusive Remedy For Revoking Acceptance Of The Purchase Contract Between The Consumer And The Seller?

The Trial Court did not directly address this issue.

The Court of Appeals answered NO.

Amicus answers YES.

Appellant answered YES

Appellee answered NO.

III. Is Privity Is Required For An Action For Revocation Of Acceptance?

The Trial Court answered YES.

The Court of Appeals answered YES.

Amicus answers YES.

Appellant answered YES

Appellee answered NO.

IV. Does Third Party Beneficiary Status Confer Only Rights Expressly Passed Through The Seller To The Consumer?

The Trial Court answered YES, holding that the express warranty also conferred rights under the Magnuson-Moss Warranty Act.

The Court of Appeals answered NO, holding that Plaintiff had a common law right of rescission and rights under the Magnuson-Moss Warranty Act.

Amicus answers YES

Appellant answered YES

Appellee answered NO.

V. Do the Economic Loss Doctrine and the UCC Apply to Consumer Claims for Breach of Warranty

The Trial Court did not address this issue.

The Court of Appeals answered NO.

Amicus answers YES.

Appellant answered YES.

Appellee answered NO.

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 in this case on March 23, 2006. A Motion for Remittitur was filed on April 12, 2006, and the Order denying that Motion was entered on May 10, 2006. The Court of Appeals, by Opinion dated February 21, 2008, denied Forest River's appeal, and affirmed the Circuit Court's judgment. This Court by Order dated June 25, 2008, granted Forest River's Application for Leave to Appeal.

INTEREST OF AMICUS CURIAE

Ford Motor Company (“Ford”) is a worldwide manufacture of automobiles, trucks and other automotive products. Ford’s interest in this matter is that as with defendant Forest River RV, Ford does not sell vehicles directly to the public. Instead, Ford, like Forest River, sells its vehicles to independent retailers located throughout the world, including the United States and Michigan. Also like Forest River’s RVs, Ford vehicles are frequently re-sold multiple times over the course of a vehicle’s life, which may be over a period of many years.

Ford, like other manufacturers, does not have control of its products after they are initially sold to dealers. Once a vehicle has been sold and delivered to a dealer, the manufacturer no longer has control over the vehicle. Vehicles are frequently altered after delivery to the dealer, or subsequently to meet a subsequent purchaser’s specifications. Vehicles are subject to abuse, alteration, wear and tear, forces of nature, improper maintenance, and other variables resulting in damage to the product.

The issues involved in this appeal directly affect Ford as the manufacturer of products sold for resale. Ford provides certain limited warranties on its products, and as such is often sued in actions brought under breach of warranty theories that claim the right to damages as defined or allowed by the Michigan Consumer Protection Act or the Magnuson-Moss Warranty Act. Under the lower court’s ruling, a vehicle’s purchaser, regardless of their point in the chain of title, or the existence of a warranty of any sort, may seek to set aside a sale at the manufacturer’s expense. This is an unfair, unpredictable, and undue burden on manufacturers who are not part of the sales agreement for their products to consumers.

The importance of this case is immense and cannot be understated. The Court of Appeals apparently has concluded that a purely contractual remedy for economic loss (rescission of contract) has been extended to a non-party to a contract. This flies in the face of common sense, logic, and fact as there is no contract to be rescinded, and in practice essentially eliminates the economic loss doctrine, eliminates privity requirements, and eviscerates the UCC. There are dramatic implications for many other cases – this would force manufacturers of any product to pass on to consumers the additional costs associated with the exposure that comes with the added liability risks (including costs and attorney fees). Under this pretext, Ford, or any manufacturer, could be held contractually obligated to virtually any person who ever claims ownership of one of its products.¹

It is Ford's position that the Trial Court and the Court of Appeals erred as follows:

1. By holding that a plaintiff in an action for damages that do not involve personal injury, and which arise out of an allegedly defective product, is not limited to contract remedies allowed by the Uniform Commercial Code, MCL §440.2301, et seq., and that equitable remedies are available to a consumer under such circumstances.

¹ It should also be pointed out that these cases do not involve consumers *per se*, but in almost every instance – including this one – involve insurance companies in subrogation actions. Actual consumers rarely, if ever, are Plaintiffs in these types of claims.

2. By holding that privity of contract is not required for a consumer to maintain a breach of implied warranty action against a remote manufacturer.

STATEMENT OF FACTS

Ford Motor Company adopts the facts as set forth by Appellant Forest River, Inc.

ARGUMENT

INTRODUCTION

The issue in this case involves remedies available to a purchaser of goods that do not reasonably meet the purchaser's expectations. More importantly, the matter before this Court has nothing to do with legal remedies for personal injuries caused by defective goods.

It is proposed by the Appellee that where a buyer is not satisfied with goods purchased, the buyer can seek remedy from the retailer and up the chain of sales to and including the manufacturer regardless of privity. *Amicus* Chrysler, in briefs previously filed with this Court for the first hearing, pointed out how Oklahoma has become the capital of class action lawsuits against Michigan automotive companies. Oklahoma courts have read Michigan sales law as not requiring privity, and even allow owners who purchased used vehicles that had exchanged hands numerous times after the sale by the dealer into class action lawsuits. That is but one example of how the elimination of the privity requirement will affect Michigan business and litigation. Other examples of the depths the elimination of privity could reach can be seen in asbestos litigation and or underground fuel tank cases.

There is world of difference in regard to public policy between protecting a purchaser of goods who, for example, is dissatisfied with an automobile because it will not start on cold mornings, and a purchaser who sustains catastrophic physical losses because a manufacturer ignored a defect. Economic loss cannot be confused with loss due to injury, no matter how large the economic loss. While this particular case involves an expensive product, a motor home, the impact of this ruling will not draw a distinction

between expensive complicated goods, and every day purchases, like shoe polish or deodorant.

The current law, which requires privity, governs a marketing system that works. Typically, if a purchaser is not satisfied the purchaser will take the product back to the seller, and the seller will remedy the problem. When that does not happen to the purchaser's satisfaction a lawsuit may be initiated against the seller. The seller is then left to deal with the manufacturer, assuming the manufacturer caused the problem, and the buyer has usually been adequately protected. The system may not be perfect, but the impact of removing privity requirements will be the lawyers' boon, while, like asbestos litigation, our courts will be overwhelmed with little increased benefit to the ultimate consumer.

I

THE UNIFORM COMMERCIAL CODE, MCL 440.1101 *ET SEQ.*, APPLIES TO THE PURCHASE CONTRACT BETWEEN PLAINTIFF AND THE DEALER, KITSMILLER RV.

Amicus Appellant, Ford Motor Company concurs with Appellant Forest River, and Appellee Davis who agree that the UCC applies to the purchase contract between Appellee Davis and the seller, Kitsmiller RV.²

The Court of Appeals and Supreme Court have both held that the only remedies for damages not involving personal injuries that arise out of the sale of an allegedly defective or non-conforming product are for economic loss as defined by the Uniform Commercial Code, MCL §440.2301 et seq. *Neibarger v Universal Cooperatives*, 439 Mich 512, 520-521; 486 NW2d 612 (2002), held that the exclusive remedy for non-injury

² *Amicus* Ford Motor Company does not agree with Appellee Davis' position on the UCC's interaction with common law, and adopts Appellant Forest River's response on that position.

damages arising out of the sale of goods is contractual in nature. *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41; 649 NW2d 783 (2002), clarified that the UCC applies to transactions between a retail seller and a consumer purchaser.

II

THE UCC PROVIDES THE EXCLUSIVE REMEDY FOR REVOKING ACCEPTANCE OF THE PURCHASE CONTRACT BETWEEN THE CONSUMER AND THE SELLER

The UCC provides the exclusive remedy between the seller and the purchaser for damages arising out of the sale of goods that do not conform to the sales contract. *Neibarger v Universal Cooperatives*, 439 Mich 512, 520-521; 486 NW2d 612 (2002), held as follows:

In *McGhee v General Motors Corp*, 98 Mich App 495, 505; 296 NW2d 286 (1980), the first such decision, the Court adopted the rationale expressed in *S M Wilson & Co v Smith Int'l, Inc*, 587 F2d 1363, 1376 (CA 9, 1978):

“Where the suit is between a non-performing seller and an aggrieved buyer and the injury consists of damage to the goods themselves and the costs of repair of such damage or a loss of profits that the deal had been expected to yield to the buyer, it would be sensible to limit the buyer's rights to those provided by the Uniform Commercial Code. To treat such a breach as an accident is to confuse disappointment with disaster. Whether the complaint is cast in terms of strict liability in tort or negligence should make no difference. [Citations omitted.]”

The premise for applying the UCC as the exclusive remedy is that there is no personal injury, and that damages can be defined by economic measures. *Neibarger v Universal Cooperatives*, *supra*, p 520-521, held,

The economic loss doctrine, simply stated, provides that “[w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only ‘economic’ losses.” This doctrine hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective

products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts.”

The UCC provides a purchaser with numerous remedies in non-injury situations in the event the seller breaches the sales contract, including, but not limited to revocation, repair, exchange, refund and rescission.

When the Court of Appeals ruled on remedies available to Appellee Davis, it held that the UCC had abrogated the common law remedy of rescission, and replaced it with revocation of acceptance. That is accurate to the extent that the UCC’s application of rescission did replace the traditional common law application. “Rescission,” is allowed by the UCC (MCL 440.2720), however, it has only been “abrogated” in the sense that it is not enforced in the traditional common law manner in which the rescinding party gives up all rights and remedies under the contract.

Unless the contrary intention clearly appears, expressions of “cancellation” or “rescission” of the contract or the like shall not be construed as a renunciation or discharge of any claim in damages for an antecedent breach. *MCL 440.2720*

As Appellee Davis noted, “refund” under the UCC also may be interchangeable with “revocation” or “rescission.” Thus, a contract between a seller and a buyer can be “rescinded” per *MCL 440.2720*, but the buyer continues to have other remedies allowed under the UCC, unless those remedies are expressly waived.

III.

PRIVITY IS REQUIRED FOR AN ACTION FOR REVOCATION OF ACCEPTANCE.

The Court of Appeals found that the UCC required privity of contract for revocation, and for that reason Davis could not request revocation from Forest River

because there was no privity of contract. It is an elementary principle that there must first be a contract before a contract can be revoked.

In this case, Appellee Davis purchased a motor home from the seller, Kitsmiller. In addition, certain written warranties from manufacturer Forest River were included as part of the sales agreement. These warranties did not include an implied warranty of merchantability, and in fact, the written warranty by Forest River expressly excluded implied warranties of merchantability, as permitted by *MCL 440.2316*. Any implied warranty came from Kitsmiller, as the UCC is clear that implied warranty of merchantability comes from the seller that contracts with the buyer. The UCC defines it as *the seller's* implied warranty of merchantability. *MCL 440.2314* states the following:

- (1) Unless excluded or modified (section 2316), 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 the goods of that kind . . .

This Court has repeated that when statutory language is clear and unambiguous, the courts must assume the Legislature intended its plain meaning, and enforce the statute as written. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192; 694 NW2d 544 (2005). The key words of *MCL 440.2314(1)* are (1) the warranty is implied in a “contract for their [the good’s] sale,” and (2) “the seller.” Thus, the sale was the passing of title of the goods from Kitsmiller to Davis per *MCL 440.2106*, and the contract was between those parties for that sale. *Id.* No entity other than Kitsmiller sold a motor home to Davis. Under the language of *MCL 440.2314(1)*, that was when the implied warranty arose. It was also the point at which any express warranty sold as part of the package by Forest River became effective. The statute does not refer to “a” seller of the goods, and it does not state that an implied warranty of merchantability is generated by the manufacturer by

distributing goods into the stream of commerce. Instead the implied warranty, per the Legislature, is part of the contract between buyer and seller.

The Court of Appeals recognized that there was no privity between the remote manufacturer and the buyer. It recognized that the buyer did not have an action in contract or tort against the manufacturer. The Court of Appeals also reasoned that the “gravamen” of the action was that the Plaintiff wanted to revoke his acceptance of the motor home and get his money back. All were accurate statements, and are not disputed by the parties.

Nonetheless, the Court of Appeals then used the tort reasoning behind extending the implied warranty of merchantability as found in injury-related products liability actions, and extended the implied warranty to Forest River, thereby abrogating privity requirements.

This Court and the Court of Appeals have repeatedly held that where an aggrieved buyer seeks remedy for non-conforming goods, the remedy lies exclusively within the UCC. See *Neibarger*, *Sherman*, *McGhee*. As set forth in discussions in *Neibarger*, *McGhee* and other cases, the damages sustained from personal injuries requires a theory to allow the injured person go after the so-called deep pocket. Lawsuits against the manufacturer for a defective injury-causing product will theoretically lead to design modification and safer products. Lawsuits against the manufacturer are not necessary to make a manufacturer make better products, “better” meaning products that meet the customer’s satisfaction. Those changes come through capitalism, i.e., lack of sales. Quality, outside of safety, should be left to the free market. Lawsuits arising out of non-conforming/poorly performing goods under circumstances where the damage is

dissatisfaction and not personal injury does not warrant a policy of extending the risk of lawsuit to a remote manufacturer. *See Neibarger, supra*, p 42.

IV

THIRD PARTY BENEFICIARY STATUS CONFERS ONLY RIGHTS EXPRESSLY PASSED THROUGH THE SELLER TO THE CONSUMER

Amicus Appellant Ford agrees with Appellee Davis that he is a third party beneficiary of the express warranty, and the UCC does not exclude Davis' action against Forest River as a third party beneficiary of the express warranty. Davis purchased that warranty as part of the package for the motor home. There is express language that defines the warranty made by Forest River and the warranty's limitations.

Amicus Appellant Ford disagrees, however, that Davis' third party beneficiary status confers every right on Davis that is held by Kitsmiller. Kitsmiller's benefits were not part of the bargain reached between Kitsmiller and Davis, and Kitsmiller's contract with the manufacturer did not contain an agreement that all Kitsmiller's contractual rights bargained for with Forest River were extended to the consumer purchaser. In fact, the contract expressly limited rights that passed to the customer, and then only the first purchaser.

To find otherwise could have vast and overwhelming consequences. The reason, again, is that the UCC applies to all goods of all sizes, from toothbrushes to jets, and all things in between. There is no clause that allows customers to take manufactures to task over only large items, like motor homes or motor vehicles. As a general rule, the seller is best equipped logistically and financially to handle a customer's complaints, make the customer whole, and then deal with the manufacturer under the threat of refusing to

further purchase the defective product from the manufacturer. Typically, sellers and manufacturers have agreed to their own methods of remedy. For the Court to find that a customer obtains all rights of the seller against the manufacturer would legally allow disgruntled customers to wheel washing machines up to Whirlpool, or return sour milk to Borden. For manufacturers, like auto manufacturers that are not simultaneously retailers to the public, this would be overwhelming and it would not make it easier for the consumer. Also, as noted by both Appellee and Appellant Forest River, by the time of the sale to the customer, the sales terms, and particularly price are significantly different from when the good was originally sold by the manufacturer.

Sellers have the choice of products they sell to the public. Manufacturers depend on Sellers' decisions on which merchandise to buy. Sellers demand merchandise of different qualities, and generally, price products accordingly. It may be demanded by the seller that a lower quality and less expensive product be supplied by the manufacturer for the seller to retail.

Wilkie v Auto-Owners Ins Co, 469 Mich 41; 664 NW2d 776 (2003), held that the freedom to contract is a fundamental and "bedrock principle of American contract law" that must be respected and preserved. Michigan common law has always held that privity of contract is necessary to find breach of warranty.

"Neither an express contract nor one by implication can come into existence unless the parties sustain contract relations, and the difference between the two forms consists in the mode of substantiation and not in the nature of the thing itself." *Woods v. Ayres*, 39 Mich. 345, 1878 Mich. LEXIS 297 (1878) citing *Marzetti v. Williams*, 1 B. & Ad., 415; *Beirne v. Dord*, 1 Seld. 95.

"To constitute either the one or the other the parties must occupy towards each other a contract status and there must be that connection, mutuality of will and interaction of parties, generally expressed though not very clearly by the term 'privity.' Without this a contract by implication is quite impossible." *Id.*

The Legislature in enacting *MCL 440.2314* recognized that sellers have the right to choose the quality of the products they sell, and that the seller must bear the burden of its actions by providing an implied warranty that the goods it sells is at least of average quality. If the seller becomes overwhelmed with the burden of selling, or the lack of the ability to sell a particular poor-quality product, the seller will stop purchasing it from the manufacturer, or the seller will demand that the manufacturer include an express warranty that passes to the buyer. That is the control. A manufacturer should not be prevented by legislation or the courts from manufacturing low quality goods (in which quality does not affect safety), if that is what the market demands.

V

ECONOMIC LOSS DOCTRINE AND UCC CLAIMS APPLY TO CONSUMER BREACH

Appellee stated in his brief that this matter has always been about economic loss. There has never been a claim for non-economic damages, such as those found in a tort claim.

It is *Amicus* Appellant Ford Motor Company's position that limiting consumer claims for economic loss to economic loss is elementary. An aggrieved customer should be made whole economically. This is consistent with *Neibarger*, which held that the decision in *Auto Owners v Chrysler Corp*, 129 Mich App 38, 42; 341 NW2d 223 (1983), which held that negligence theories in a non-injury products action were appropriate, was wrongly decided. "Since *McGhee*, the validity of this [economic loss] approach has been recognized in virtually every published opinion applying Michigan law to the issue of economic loss stemming from a commercial sale of goods." *Neibarger*, p 524.

Neibarger relied on *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 344; 480 NW2d 623 (1991), stating:

Most recently, in *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 344; 480 NW2d 623 (1991), the Court held that “[a]llegations of only economic loss do not implicate tort law concerns with product safety, but do implicate commercial law concerns with economic expectations.”

Even where the Court of Appeals refused to apply the economic loss doctrine to bar a plaintiff's claim, in *Auto-Owners Ins Co v Chrysler Corp*, 129 Mich App 38, 42; 341 NW2d 223 (1983), the Court implicitly recognized the rationale supporting the doctrine, holding only that it "fails when there is no contractual relationship between the parties." In a strong dissent, Chief Judge Danhof stated his belief that "plaintiff's negligence claim should be barred for the reasons stated in *McGhee, supra*." 129 Mich App 44. His dissent was later adopted by the Court in *Sullivan, supra* at 339.”
Id. p 525.

The economic loss doctrine provides that "where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, *his remedy is said to be in contract alone*, for he has suffered only 'economic' losses." *Huron Tool & Engineering Co v Precision Consulting*, 209 Mich. App. 365, 368; 532 N.W.2d 541 (1995). [Emphasis added.]

Sherman, p 44.

Rejection of the economic loss doctrine would, in effect, create a remedy not contemplated by the Legislature when it adopted the UCC by permitting a potentially large recovery in tort for what may be a minor defect in quality. On the other hand, adoption of the economic loss doctrine will allow sellers to predict with greater certainty their potential liability for product failure and to incorporate those predictions into the price or terms of the sale.

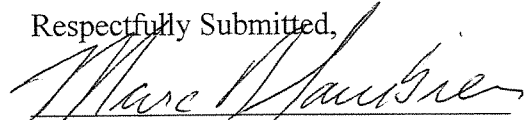
Sherman, p 45.

Accordingly, the economic loss doctrine and the UCC apply to cases in which consumers sustain economic loss from products that do not conform to the contract or meet the implied warranty that the product is at least of average quality.

RELIEF REQUESTED

Amicus Appellant Ford Motor Company respectfully requests the relief requested
by Appellant Forest River, Inc.

Respectfully Submitted,



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