

**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,

Docket No. 136114

Court of Appeals No. 270478

Lower Court No. 04-64-CP

v.

FOREST RIVER, INC.,
a foreign corporation,

Defendant-Appellant.

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

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

APPELLANT'S REPLY BRIEF

(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

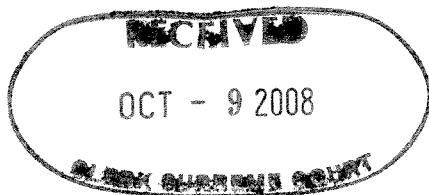


TABLE OF CONTENTS

Index of Authorities	ii
Statement of Issues on Appeal	iii
Jurisdictional Statement	v
Statement of Facts	1
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 Require- ments for Privity	4
Standard of Review	4
Merits	4
Argument II:	
The UCC Requires Privity of Contract for Revocation of Acceptance and Only the Direct Seller to the Buyer is Subject to Revocation	7
Standard of Review	7
Merits	7
Relief Requested	10

INDEX OF AUTHORITIES

CASES:

<i>Bates v Gilbert</i> , 479 Mich 451; 736 NW2d 566 (2007)	7
<i>In re Petition of Attorney General for Investigative Subpoenas</i> , 274 Mich App 696; 736 NW2d 594 (2007)	4
<i>Toll Northville, Ltd v Twp of Northville</i> , 408 Mich 6; 743 NW2d 902 (2008)	7
<i>Walsh v Ford Motor Co</i> , 627 F Supp 1519 (DCC 1986)	5

OTHER AUTHORITY:

15 USC 2310(d)(1)	4
15 USC 2303	5
15 USC 2304(a)(4)	5, 6
67 AmJur 2d, Reformation of Instruments, §20.	5
MCL 440.1103	8
MCL 440.2318	10
MCL 440.2606	7
MCL 440.2606(A)	8
MCL 440.2606(C)	7
MCL 440.2608	7
MCL 440.2711(1)	8
MCR 7.301(A)(2)	v

STATEMENT OF ISSUES ON APPEAL

- I. **Whether the Federal Magnuson-Moss Warranty Act Provides a Cause of Action for Breach of Warranty and a Remedy of Rescission to Parties Not in Privity of Contract, if Such Remedies are Not Available Under State Law?**

Appellant answers NO.

Appellee answers YES.

The Trial Court answered YES, although in the context of revocation of acceptance not rescission.

The Court of Appeals did not answer this question as it found Appellee was entitled to rescission under state law.

- II. **Does the Michigan Common Law Allow a Plaintiff to Pursue a Claim for Breach of Warranty and Recover in Rescission When He is Not in Privity of Contract With the Defendant?**

Appellant answers NO.

Appellee answers YES.

The Trial Court held Plaintiff could pursue a claim for breach of warranty without regard to privity, but did not rule on the issue of rescission, having found that Plaintiff could revoke acceptance under Magnuson-Moss.

The Court of Appeals answered YES.

- III. **Does the Economic Loss Doctrine and the Uniform Commercial Code Apply to Davis' Claims Against Forest River for Breach of Warranty?**

Appellant answers YES.

Appellee answers NO.

The Trial Court did not rule on this issue.

The Court of Appeals answered NO.

IV. Assuming the Uniform Commercial Code Applies is Revocation of Acceptance Available in the Absence of Privity of Contract, and Does Revocation Supplant the Common Law Remedy of Rescission?

Appellant answers YES.

Appellee answers NO.

The Trial Court held that revocation of acceptance was not available under Michigan law, but was available under Magnuson-Moss, and did not rule on the issue of rescission.

The Court of Appeals did not rule on this issue, as it had determined that the UCC did not apply.

V. Assuming the UCC Applies is Privity of Contract or Third-Party Beneficiary Status Required for an Action for Breach of Warranty?

Appellant answers YES.

Appellee answers NO.

The Trial Court held that privity was not required for an action for breach of warranty.

The Court of Appeals held that privity was not required for an action for breach of warranty, but did not discuss this issue in the context of the Uniform Commercial Code as it held that the UCC did not apply.

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.

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, p 3), 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 identify 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,¹ Mr. Kitsmiller was unable to verify 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).

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

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 that he could not take the motor home in for further warranty service. (Appellee's Brief, p 4). 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).

Finally, with respect to the implication by Appellee that rescission was appropriately granted because of all of the problems with the RV, Appellee's 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).

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 damages and equitable remedies for breach of a consumer warranty, every type of damages and/or equitable remedy is available as a matter of law under Magnuson-Moss, even if they would not otherwise be recoverable.² Therefore, since rescission is an equitable remedy it is per se available under Magnuson-Moss, regardless of the lack of privacy.

There are, however, two problems with this argument. The first general problem 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 therefor available merely upon proof of a breach of warranty. For example, tort damages such as

²"The MMWA allows for ANY relief, legal and equitable, for a violation of its terms." (Appellee's Brief, p 9). (Emphasis in original).

mental anguish and emotional suffering should not be recoverable, nor are punitive damages,³ even though a claim is asserted under Magnuson-Moss. Further, reformation is an equitable remedy, but a unilateral mistake by a consumer, for example, his belief that a seller has to provide a refund for breach of warranty, will not justify reforming the contract to so provide merely because that is an “equitable remedy,” as reformation requires a mutual mistake.⁴ When Congress provided for damages and equitable relief under Magnuson-Moss, it did not intend to completely revise and eliminate traditional limitations and restrictions on the type of damages and equitable relief available for breach of contract, in this case a consumer warranty. 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 2303.⁵ 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). If Congress intended to allow rescission

³*Walsh v Ford Motor Co*, 627 F Supp 1519 (DCC 1986).

⁴“Where reformation is sought solely on the ground of mistake, mutuality of the mistake is essential.” 67 AmJur 2d, Reformation of Instruments, §20.

⁵Forest River’s warranty was a limited warranty. (Apx. pg.59).

whenever there was a breach of warranty, either limited or full, there would have been no need to specifically provide for a refund under 15 USC 2304(a)(4). That Congress expressly provided 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.

Therefore, the mere fact that Magnuson-Moss allows one to recover damages, and obtain equitable remedies, does not mean that state law, or traditional common law, limitations on those remedies and when they are available, do not apply. While rescission is an equitable remedy, privity is still required therefor under Magnuson-Moss, just as a mutual mistake is required for reformation, and tort damages are excluded.

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.⁶ 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 the reference to buyer and seller in 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

⁶"Under these definitions which are controlling, Forest River, a seller, is liable to Plaintiff, a buyer, and revocation of acceptance is allowable." (Appellee's Brief, p 38).

ownership, he could only so act with respect to Kitsmiller, the then owner of the RV. 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 that nonexistent contract.

That revocation of acceptance is available only against a buyer’s direct, and not remote, seller is also shown by the ability of a revoking buyer to recover the purchase price from the seller. MCL 440.2711(1). If revocation, as Davis argues, is the equivalent of rescission, and restores the parties’ status quo, it can only be available against the buyer’s immediate seller, as only the immediate seller received payment of that purchase price from the revoking buyer. A retailer, or other direct seller to a buyer, normally marks up the price from what it paid a manufacturer to cover its overhead and costs, and to provide a measure of profit. Therefore, allowing revocation against a remote seller usually will result in that seller paying more to the buyer than that seller originally received from the retailer. Thus, revocation of acceptance only makes sense when it, like rescission, it is limited to parties in privity of contract, as only then does it undo a contract and restore the status quo. Since there was no contract of sale of the RV from Forest River to Davis, there was no contractual acceptance to revoke.

Davis also argues that because the UCC does not specifically mention or require privity, privity is not required. (Appellee’s Brief, p 37). However, privity has always been a requirement for an action 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 a reference to privity, if anything, is evidence that the UCC did not eliminate the requirement therefor.

Davis also makes a general policy argument that allowing revocation of acceptance, or rescission, is only fair or equitable as between a manufacturer who gives a written warranty, and the person who purchases the product to use the same, for example, a consumer. (Appellee's Brief, pp 29-30, 31). However, as previously stated, the price one pays a retailer is usually in excess of what the retailer paid a manufacturer. Further, even defective goods normally are not worthless, and one's damages for breach of warranty are usually far less than the purchase price for the goods. What then is fair and equitable with requiring a remote seller to pay more via revocation than the purchaser's damages, and more than the remote seller received when it sold the goods. Revocation may be fair with respect to the direct seller, as it merely undoes the transaction and restores the parties' status quo. However, that is not the case with a remote seller/ manufacturer, even one that provides a written warranty enforceable by a consumer purchaser. Further, 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 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.

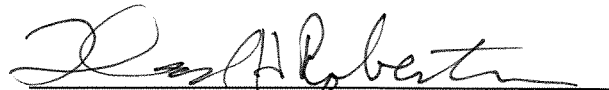
RELIEF REQUESTED

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 rescission/revocation, in the absence of privity, is not available under Michigan common law, the UCC, and the Magnuson-Moss Warranty Act. Further, this Court should hold that the economic loss doctrine applies to any transaction governed by the UCC, regardless of privity, and that the UCC requires privity of contract, or third-party beneficiary status for claims of breach of express or implied warranty. Finally, this Court should hold that, unless the parties' contract otherwise provides, only the parties expressly mentioned in MCL 440.2318 have third-party beneficiary status for warranty claims governed by the UCC. Therefore, this Court should remand this case to the Court of Appeals for further proceedings consistent with these holdings, and consideration of the issues raised by Forest River in its appeal, but not decided by the Court of Appeals, including whether the Trial Court erred in allowing Davis to recover as damages for breach of warranty, finance charges, and non-economic loss of use, and whether the Trial Court erred in denying remittitur.

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

Dated: October 9, 2008

By:


Donald H. Robertson (P30498)

PREPARED BY: Donald H. Robertson (P30498), WINEGARDEN, HALEY, LINDHOLM & ROBERTSON, P.L.C., G-9460 S. Saginaw Street, Suite A, Grand Blanc, MI 48439; (810) 579-3600
F:\APPS\Rital\F\Forest River\Davis\Appeal\Pleadings\10-1-08 Supreme Court Reply Brief.wpd