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 No. 136114

Court of Appeals No. 270478

Lower Court No. 04-64-CP
Hon. James R. Giddings

CHRYSLER LLC'S AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT-APPELLANT

(Oral Argument Requested)

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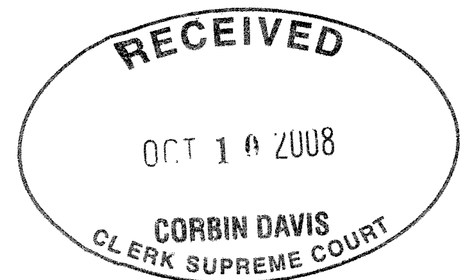

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ORAL ARGUMENT REQUESTED

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INTEREST OF AMICUS CURIAE

Chrysler LLC ("Chrysler") is a world-wide manufacturer of automobiles, trucks and automotive parts. Chrysler, like virtually every other automobile manufacturer in this country, does not sell vehicles directly to the public. Rather, Chrysler wholesales vehicles to a distributor, which, in turn, sells the vehicles to independent dealers throughout the world for re-sale to the public. Those vehicles are then frequently re-sold many times over the course of the vehicle's life.

As detailed below, whether privity is required to maintain a claim for economic loss in breach of implied warranty cases under Michigan's UCC is of critical importance to Chrysler, as well as to other American automotive manufacturers. In recent years, these manufacturers have been subjected to massive class actions not only in Michigan, but other states as well. State trial courts in Oklahoma have granted certification in many of these cases, and, in doing so, have effectively written the privity requirement out of MCLA § 440.2314. These Oklahoma state courts have concluded that class certification is proper based on their belief that class members living throughout the United States can seek economic damages under Michigan's UCC against a remote vehicle manufacturer. Therefore, this Court's ruling on whether privity is required to maintain a claim for breach of implied warranty seeking economic damages under Michigan's UCC will significantly impact pending, and future, class actions. Chrysler therefore submits this brief in support of Forest River, Inc.

ORAL ARGUMENT REQUESTED

In light of the importance of the issues presented in this brief, counsel for Chrysler requests a brief oral argument.

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to MCR 7.301(A)(2). Final Judgment was entered by the Circuit Court 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 granted leave to appeal in an order dated June 25, 2008.

STATEMENT OF QUESTION INVOLVED

1. Whether privity is required to maintain a claim for economic loss in breach of implied warranty cases under the Michigan UCC where the plain wording of the governing statute requires privity for such claims?

Trial court answered: No.

Court of Appeals held the UCC did not apply to Davis' claims and therefore did not decide this issue.

Amicus answers: Yes.

STATEMENT OF FACTS

Amicus Curiae Chrysler LLC adopts the statement of facts and proceedings as set forth by Forest River, Inc.

ARGUMENT

A. THE VITAL IMPORTANCE OF THE PRIVITY ISSUE BEFORE THIS COURT.

In granting the application for leave to appeal in this case, this Court stated that it would take up the issue of "whether, if the plaintiff is confined to the UCC, either privity or third-party beneficiary status [is] required for an action for breach of warranty." *Davis v Forest River, Inc*, 481 Mich 918; 750 NW2d 592 (2008). The resolution of this issue has ramifications which bear significantly on the American automotive industry. The most severe impact of this Court's decision will result, not from the type of single-plaintiff case presented in the court below, but from the massive class actions that have been filed, and continue to be filed, against American vehicle manufacturers in states such as Oklahoma. The state trial courts in Oklahoma have effectively rewritten Michigan's UCC implied warranty statute so as to eliminate the privity requirement.

Oklahoma state courts have certified ***nationwide*** classes of vehicle owners for purposes of pursuing economic losses in implied warranty claims against Chrysler, as well as Ford and GM, even though there is no privity between the class members and the vehicle manufacturers. The classes are comprised of hundreds of thousands (and in some cases more than one million) individual vehicle owners. In many, if not most, of these cases economic damages are sought even though the defect alleged to exist has never manifested in any way, and the vehicles have performed perfectly for many years. The economic "damages" claimed generally consist of nothing more than not-yet-incurred repair costs or purported diminution in value.

The courts in Oklahoma have found that certification of a class in these types of cases is appropriate because Michigan law applies to every class member's claim against the vehicle

manufacturer — even to the claims asserted on behalf of those persons purchasing their vehicles in California, or New York, or Florida, or Canada. The Oklahoma courts reason that, because the American vehicle manufacturers are headquartered in Michigan, Michigan law should be used to determine if the vehicle owners are entitled to damages for economic losses for breach of implied warranty under the Uniform Commercial Code ("UCC"). *See, e.g., Ysbrand v DaimlerChrysler Corp*, 81 P3d 618, 626 (Okla 2003) ("Michigan's interest in the conduct of its manufacturer, and thus its connection to the warranty issues, is greater [than the home state of each consumer]. Michigan law applies").

In recent years there has been an onslaught of cases in Oklahoma in which Chrysler, Ford, and GM have been exposed to potential liabilities of hundreds of millions of dollars for breach of implied warranty claims brought by individuals who are not in privity with them. Moreover, the lack of privity is not simply the matter of a "once-removed" relationship (*i.e.*, manufacturer sold vehicle to independent authorized dealer who sold to consumer/class member). Indeed, in most of these cases, Oklahoma courts have determined that, under Michigan law, purchasers of used vehicles can pursue implied warranty claims against Chrysler, Ford, and GM even though the relationship between the consumer and the manufacturer is remote by multiple degrees (*i.e.*, manufacturer sold to independent authorized dealer who sold to buyer 1, who sold to buyer 2, who sold to "current owner"/class member). *See, e.g., Montgomery v Chrysler Corp*, Case No. 104,098, slip op (Okla Ct App Apr 14, 2008) (finding that each "current owner" of 15-18 year old vehicles had a claim against manufacturer-defendant for economic damages on theory of breach of implied warranty "because implied warranties do not terminate on resale"), *cert denied* (Okla Oct 6, 2008) (attached as Exhibit 1).

By certifying classes of all purchased-new and purchased-used "current" vehicle owners to pursue breach of implied warranty claims against remote automobile manufacturers, the Oklahoma courts are legislating the "privity" requirement out of Michigan's UCC. A non-exhaustive list of cases, wherein an Oklahoma court declared that Michigan law would be applied to the breach of implied warranty claims of all class members, includes: *Masquat v DaimlerChrysler Corp*, -- P3d --, 2008 Okla LEXIS 75 (Okla July 1, 2008) (affirming certification of nationwide class of "current" owners of various 1993-2001 model-year defects seeking economic damages for alleged defect in steering system) (attached as Exhibit 2); *Ysbrand*, 81 P3d at 618 (affirming certification of nationwide class of 1,000,0000+ "current" minivan owners seeking economic damages for alleged defect in steering system); *Cuesta v Ford Motor Co*, Case No. CJ-2004-511 (Okla Dist Ct March 1, 2007) (certifying nationwide class of "purchasers" and "current owners" of trucks to seek economic damages for breach of implied warranty for alleged accelerator pedal defect; although certification was reversed by lower appellate court, the petition for leave to appeal to the Oklahoma Supreme Court was granted on Oct 6, 2008) (trial court order and order granting petition, attached as Exhibit 3); *Montgomery*, Case No. 104,098, slip op (affirming certification of nationwide class of "current owners" of hundreds of thousands of 1993-95 Jeep vehicles); *Ford v General Motors Corp*, Case No. 100,474, slip op (Okla Ct App 2004) (affirming certification of nationwide class of "current owners" of various vehicles seeking economic damages for allegedly defective airbags) (attached as Exhibit 4); *NES Equip Serv Corp v. Ford Motor Co*, Case No. 100,738, slip op (Okla Ct App 2004) (affirming certification of nationwide class of "current owners" of 1999-2002 F-Series Trucks and 2000-2002 Excursions for purposes of seeking economic damages for alleged defects in "hydro boost" system) (attached as Exhibit 5).

As is evident, this Court's ruling on the issue of whether privity is required to maintain a claim for breach of implied warranty seeking economic loss under Michigan's UCC will have far-reaching affects, even outside the state of Michigan.

B. THE PLAIN WORDING OF THE MICHIGAN UCC REQUIRES PRIVITY FOR BREACH OF IMPLIED WARRANTY CLAIMS.

The Michigan UCC ("MUCC") statutorily creates implied warranties. The MUCC provision creating the implied warranty of merchantability provides, in relevant part, as follows:

> Unless excluded or modified [ ] 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.

MCLA § 440.2314.

The MUCC expressly defines the terms referenced in its various provisions, including those used in creating the implied warranty of merchantability. The "seller" is the "person who sells or contracts to sell goods." MCLA § 440.2103(d). The "contract" is one "relating to the present or future sale of goods." MCLA § 440.2106(1). And, a "sale" is defined to require a "passing of title from the seller to the buyer for a price." *Id.* These definitions, together with the plain wording of § 440.2314, require privity to bring a claim for breach of implied warranty.

First, under the express wording of the governing statute an implied warranty is created only when there is a "sale." *See* MCLA § 440.2314. That is, a person has no implied warranty to enforce unless, and until, there is a "passing of title from ***the*** seller to ***the*** buyer for a price." MCLA § 440.2106(1). To avoid the need for privity, § 440.2314 would have to be interpreted to mean that once there is a "passing of title" from "***the*** seller" to "***the*** buyer" an implied warranty is created in favor of the buyer, which is imposed against every person in the upstream distribution chain. But, the plain wording of the MUCC does not countenance such an

interpretation. Indeed, it refers only to "***the*** seller," and not to anyone upstream in the chain of distribution. *See* MCLA § 440.2314. That the required "sale" is expressly contemplated to be only between the direct seller and the direct buyer makes clear that privity is a necessary prerequisite to a breach of implied warranty claim.

Second, by the express wording of the governing statute, a "contract" is a necessary prerequisite to the creation of an implied warranty. *See* MCLA § 440.2314. And, a "contract" creating an implied warranty is only one "relating to the ***present*** or future sale of goods." *See* MCLA § 440.2106(1); *see also Lorenz Supply Co v American Standard Inc*, 100 Mich App 600, 607-08; 300 NW3d 335 (1980) ("To summarize these provisions, the code applies to a present sale of existing and identified goods or to a contract where the parties agree to the sale of goods at a future time."). There is nothing in the statute itself which suggests that an implied warranty can be imposed on a non-party to the "***present*** or future sale" of goods. Nor is there anything in the statute itself suggesting that a downstream remote buyer can enforce an implied warranty against those who previously sold the goods to other parties. The fact that an implied warranty is created based on a "***present*** sale," without reference to any past sale, makes clear that implied warranties do not extend to those upstream in the distribution chain, and that privity is required to enforce the warranty.

Third, the MUCC expressly imposes the implied warranty only on "***the*** seller." *See* MCLA § 440.2314 (emphasis added). A party not in privity with a buyer is simply not "***the*** seller" who, by statute, impliedly warrants the product sold. In fact, when it comes to implied warranties, the MUCC does not establish any legal relationship between non-privity parties. Under the express wording of the MUCC, "***the*** seller" responsible for the statutorily-created

implied warranty is only the person who sold or contracted to sell the goods. *See* MCLA § 440.2103(d). This wording clearly demonstrates the requirement of privity.

"In interpreting statutory language, courts must determine and give effect to the intent of the Legislature." *Wold Architects & Engineers v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006). "The first step in ascertaining legislative intent is to look at the words of the statute itself. *Id.*; *see also Bukowski v City of Detroit*, 478 Mich 268, 274; 732 NW2d 75 (2007) ("We give the words of a statute their plain, ordinary meaning unless the Legislature employs a term of art."). "[A] court should refrain from speculating about the Legislature's intent beyond the words employed in the statute." *In re MCI Telecomm*, 460 Mich 396, 414; 596 NW2d 164 (1999). When a statute "is clear and unambiguous, judicial construction is precluded." *Frankenmuth Mut Ins Co v Marlette Homes, Inc*, 456 Mich 511, 515; 573 NW2d 611 (1998).

Here, the plain wording of the provision creating an implied warranty of merchantability under the MUCC, combined with the mandated meaning to be ascribed to the words used in that statutory provision, lead to only one conclusion: privity is a necessary element of a claim for economic damages brought under the MUCC for breach of implied warranty. The statute cannot be read to create an implied warranty between a seller and some unknown third-party without effectively rewriting it.[1/]

[1/]Many of the state courts that have abolished the privity requirement in regard to implied warranty claims have done so based on their state's version of UCC § 2-318, which is different from MCLA § 440.2318. Unlike other states, MCLA § 440.2318 only extends third-party beneficiary status to certain persons who suffer personal injuries. The fact that claims involving economic damages were intentionally excluded from § 440.2318 is further proof that the legislature intended to require privity for claims brought under § 440.2314 for economic damages, and that it did not intend to allow third-party beneficiary status to be extended to persons seeking economic losses. In any event, those court's reliance on § 2-318 is misplaced because that section of the UCC has nothing to do with the ***creation*** of an implied warranty. Rather, § 2-318 starts with the assumption that an implied warranty already exists between two

In fact, other states that have seen fit to abolish the privity requirement for implied warranty claims have expressly amended their state's version of UCC § 2-314 to do so. For example, Maryland's version of UCC § 2-314 provides:

> (1) Unless excluded or modified [ ] 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. ... Notwithstanding any other provisions of this title
>
> (a) ... "seller" includes the manufacturer, distributor, dealer, wholesaler or other middleman or the retailer; and
>
> (b) Any previous requirement of privity is abolished as between the buyer and the seller in any action brought by the buyer.

MD. CODE ANN., COM. LAW. § 2-314. Unlike Maryland, the Michigan legislature has not amended § 440.2314 to abolish privity. This Court must interpret § 440.2314 as written, and not legislate the privity requirement out of the statute.

In its Order granting the petition for leave to appeal, this Court also raised the issue of whether "third-party beneficiary status" would be sufficient, in the absence of privity, to support an action for breach of warranty. But, implied warranties are creatures of statute; they are not contractual in nature. And, the only warranty created by MCLA § 440.2314 is one between the

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parties (*i.e.*, between two people in a direct seller/buyer relationship), and it then acts to extend that ***existing*** implied warranty to other persons in the buyer's household who suffer injury as a result of their use of the product. In other words, once a court finds that there is vertical privity between a seller and a buyer so that § 2-314 has created an implied warranty in favor of the buyer, § 2-318 allows that buyer's family to sue for breach of that existing warranty even though they are not in privity with the seller (*i.e.*, the statute eliminates the need for horizontal privity for certain persons). *See* official comment to UCC § 2-318 ("The purpose of this section is to give the buyer's family, household and guests the benefit of ***the same warranty which the buyer received*** in the contract of sale, thereby freeing any such beneficiaries from any technical rules as to privity."). In Michigan, those protections are extended only to family members and guests seeking damages for some type of personal injury. *See* MCLA § 440.2318. Section 440.2318 does not eliminate the requirement of vertical privity in § 440.2314, nor does it apply to persons seeking economic losses. *Id.*

seller and the buyer. Without effectively rewriting that statutory provision, it cannot be read to create an implied warranty between a seller and some third-party unknown to that seller.

C. OTHER STATE COURTS HAVE HELD THAT PRIVITY IS REQUIRED FOR UCC BREACH OF IMPLIED WARRANTY CLAIMS.

One of the purposes enunciated by the Michigan legislature in enacting the MUCC was "to make uniform the law among the various jurisdictions." MCLA § 440.1102(2)(c). Holding that privity is necessary for breach of implied warranty claims will further this purpose, as a multitude of states have expressly held that privity is required for breach of implied warranty claims under the UCC. These states include: California (*Blanco v Baxter Healthcare Corp*, 158 CalApp4th 1039, 1058-59, 70 CalRptr3d 566, 582 (2008)); Connecticut (*Kahn v Volkswagen of America, Inc*, 2008 WL 590469, *8 (Conn Super 2008)); Florida (*Rentas v DaimlerChrysler Corp*, 936 So2d 747, 751 (Fla App 2006)); Georgia (*McQueen v Minolta Bus Solutions, Inc*, 620 SE2d 391, 393 (Ga App 2005)); Idaho (*Oats v Nissan Motor Corp*, 879 P2d 1095 1102 (Idaho 1994)); Kentucky (*Compex Int'l Co v Taylor*, 209 SW3d 462, 465 (Ky 2006)); Ohio (*Curl v Volkswagen of America, Inc*, 871 NE2d 1141, 1147-48 (Ohio 2007)); Washington (*Baughn v Honda Motor Co*, 727 P2d 655, 669 (Wash 1986)); and Wisconsin (*Northridge Co v WR Grace & Co*, 471 NW2d 179, 187 (Wis 1991)).

Other state courts, while holding that privity is necessary for claims brought under the UCC for breach of implied warranty, have limited the privity requirement to cases in which a plaintiff seeks economic damages only. Among these states are: Alabama (*Rhodes v General Motors Corp*, 621 So2d 945, 947 (Ala 1993)); Arizona (*Flory v Silvercrest Indus, Inc*, 533 P2d 383, 388 (Ariz 1981)); Illinois (*Rothe v Maloney Cadillac, Inc*, 518 NE2d 1028, 1029 (Ill 1988)); Iowa (*Tomka v Hoechst Celanese Corp*, 528 NW2d 103, 108 (Iowa 1995)); Kansas

(*Professional Lens Plan, Inc v Polaris Leasing Corp*, 67 P2d 887, 898-99 (Kan 1984)); New York (*Adirondack Combustion Technologies, Inc v Unicontrol, Inc*, 17 AD3d 825, 827 (NYApp 2005)); North Carolina (*Energy Investors Fund, LP v Metric Constructors, Inc*, 525 SE2d 441, 446 (NC 2000)); Oregon (*Davis v Homasote Co*, 574 P2d 1116, 1117 (Or 1978)); Tennessee (*Walker Truck Contractors, Inc v Crane Carrier Co*, 405 F Supp 911, 919 n. 12 (ED Tenn 1975)); and Vermont (*Mainline Tractor & Equip Co v Nutrite Corp*, 937 F Supp 1095, 1108 (D Vt 1996)).

This Court should join the multitude of courts in other states which, interpreting UCC provisions similar, if not identical, to MCLA § 440.2314, have held that privity is required for a claim of breach of implied warranty under the UCC.

D. REQUIRING PRIVITY WILL NOT LEAVE CONSUMERS WITHOUT SUFFICIENT RECOURSE.

This Court has long recognized 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." *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 520; 486 NW2d 612 (1992). This Court explained the rationale behind the economic loss doctrine:

> [I]n a commercial transaction, the parties to a sale of goods have the opportunity to negotiate the terms and specifications, including warranties, disclaimers, and limitation of remedies. Where a product proves to be faulty after the parties have contracted for sale and the only losses are economic, the policy considerations supporting products liability in tort fail to serve the purpose of encouraging the design and production of safer products.

439 Mich at 523; 486 NW2d 612. After expressly adopting the economic loss doctrine in *Neibarger*, this Court further held that where a plaintiff seeks to recover for economic loss

caused by a defective product, "the exclusive remedy is provided by the UCC." 439 Mich at 527; 486 NW2d 612.

Limiting aggrieved buyers of goods who seek only economic losses to the MUCC — with its attendant privity requirements for implied warranty claims — will not leave consumers without an adequate remedy. Indeed, it will not effect the type or amount of relief consumers may seek at all; it will only impact who they may seek that relief from. If MCLA § 440.2314 is enforced as written to require privity, aggrieved buyers can still assert implied warranty claims against the seller of defective goods, and seek all of the available remedies under the MUCC. *See, e.g.*, MCLA § 440.2712 (cover); § 440.2713 (contract/market damages); § 440.2715 (incidental and consequential damages); § 440.2716 (specific performance); § 440.2608 (revocation of acceptance). Permitting an implied warranty claim against a remote manufacturer does not provide any additional form of relief to a consumer. That is, any recovery of economic losses from a remote manufacturer would merely be duplicative of that which could be recovered from the seller under MCLA § 440.2314.

Nor does requiring privity for implied warranty claims leave an aggrieved buyer without any recourse to seek any remedy from a remote manufacturer. *First*, to the extent the manufacturer issues an express warranty to the buyer (as is the case with many motor vehicles and other consumer goods), the buyer can still sue the manufacturer directly for breach of that warranty. *See* MCLA § 440.2313. Indeed, that is exactly what the buyer of the allegedly defective RV did in this case. *See Davis v Forest River, Inc*, 278 Mich App 76, 94 n 2; 748 NW2d 887 (2008) (Bandstra, J. dissenting). In this day and age, manufacturers' express warranties are highly competitive, and consumers routinely take into account the terms of those warranties when purchasing goods. Moreover, for almost all goods, and certainly with motor

vehicles, there is a competitive market for extended warranties and service contracts that provide additional protection from economic losses resulting from the purchase, assuming the buyer bargains for such additional protections. Buyers of extended warranties and service contracts can likewise sue the issuer (whether a remote manufacturer or another third party) for breach of such extended warranties or service contracts.

Second, to the extent that a buyer suffers personal injuries or other non-economic losses from the purchase of a defective product, in addition to any other remedy that may be available, the buyer can sue the manufacturer directly, whether in tort or under Michigan's product liability statute, neither of which require privity. *See, e.g.*, *Prentis v Yale Mfg Co*, 421 Mich 670; 365 NW2d 176 (1985); MCLA § 600.2945.

Third, in the case of allegedly defective automobiles, the legislature has authorized remote buyers to sue a manufacturer directly for economic damages via its enactment of Michigan's "Lemon Law." *See* MCLA 257.1401, *et seq*. Not only does the Lemon Law provide an avenue for remote purchasers to sue a motor vehicle manufacturer directly, it demonstrates that the legislature is more than capable of abolishing the privity requirement if that is what it intends to do. *Compare id.* to MCLA § 440.2314.

CONCLUSION AND REQUEST FOR RELIEF

In sum, abolishing the privity requirement for implied warranty claims under the MUCC would be contrary to the express language of the statute and the legislature's intent, would provide no additional remedies that are not already available to aggrieved buyers against sellers under the MUCC, and would make manufacturers absolute insurers of their products thereby subjecting them to limitless and unpredictable liability to any person who ever owns one of its products.

Consequently, for all of the reasons stated above, Amicus Curiae Chrysler LLC respectfully requests this Honorable Court to hold that privity is required to maintain a claim for breach of implied warranty seeking economic loss under the Michigan UCC.

Respectfully submitted,

BUSH SEYFERTH & PAIGE PLLC
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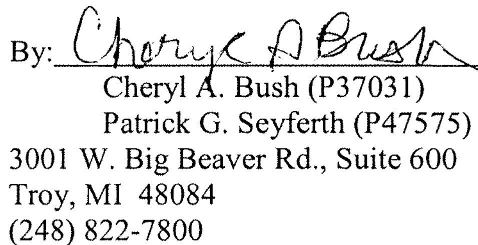
Dated: October 10, 2008



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