

**STATE OF MICHIGAN
IN THE SUPREME COURT**
(ON APPEAL FROM THE COURT OF APPEALS)

Keith Gayle Davis,

Plaintiff-Appellee,

vs.

FOREST RIVER, INC.,

Defendant-Appellant,

Supreme Court No. 136114

Court of Appeals No. 270478

L.C. Case No. 04-64-CP

**AMICUS CURIAE BRIEF OF THE MICHIGAN MANUFACTURERS
ASSOCIATION AND THE ALLIANCE OF AUTOMOBILE
MANUFACTURERS, INC. IN SUPPORT OF APPELLANT**

Submitted by:

David D. Grande-Cassell (P49359)

Paul C. Smith (P55608)

Clark Hill PLC

212 East Grand River

Lansing, MI 48906

(517) 318-3100

Counsel for the Michigan Manufacturers Association
and The Alliance of Automobile Manufacturers

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TABLE OF CONTENTS

	<u>Page</u>
Index of Authorities	ii
Statement of Question Involved.....	iv
Statement of Interest of <i>Amici Curiae</i>	1
Introduction.....	2
Statement of Facts.....	4
Argument	4
I. The Magnuson-Moss Warranty Act does not provide for a remedy of rescission absent privity of contract.....	4
II. Michigan law does not provide for a remedy of rescission where the parties are not in privity of contract and logic precludes the creation of such a remedy now.....	5
III. The economic loss doctrine applies to all claims seeking economic damages based on frustrated expectations arising from a sales transaction, including a claim for breach of warranty	12
IV. The remedy provisions in the UCC supplant any common law action for rescission.....	15
V. Under the UCC, privity is required for a breach of warranty action, subject to one exception.....	17
Conclusion	18

INDEX OF AUTHORITIES

	Page(s)
Cases	
<i>Cova v Harley-Davidson Motor Co</i> , 26 Mich App 602, 603; 182 NW2d 800 (1970)	11
<i>Davis v Forest River</i> (Bandstra, J., dissenting), advance sheet, p. 2 (internal citations and footnote omitted).....	6
<i>DMR Financial Services, Inc</i> , 274 BR 465, 472 (Bankr ED Mich 2002)	6
<i>Goodwin, Inc v Orson E Coe Pontiac, Inc</i> , 392 Mich 195; 220 NW2d 664 (1974).....	7
<i>Henderson v Chrysler</i> , 191 Mich App 337; 477 NW2d 505 (1991)	10
<i>Hill v Harbor Steel</i> , 374 Mich 194; 132 NW2d 54 (1965).....	10
<i>Hoerstman General Contractors, Inc v Hahn</i> , 474 Mich 66, 74; 711 NW2d 340 (2006).....	15, 17
<i>Lash v Allstate Ins Co</i> , 210 Mich App 98, 102; 532 NW2d 869 (1995)	6
<i>Leahan v Stroh Brewery Co</i> , 420 Mich 108, 112; 359 NW2d 524 (1984).....	7
<i>Lenawee County Bd of Health v Messerly</i> , 417 Mich 17, 33; 331 NW2d 203 (1982)	6
<i>Manzoni v Detroit Coca-Cola Bottling Co</i> , 363 Mich 235; 109 NW2d 918 (1961)	10
<i>Miller v Chapman Contracting</i> , 477 Mich 102, 108 n 1; 730 NW2d 462 (2007).....	18
<i>Neibarger v Universal Coops, Inc</i> , 439 Mich 512; 486 NW2d 612 (1992)	12, 13, 15
<i>Pack v Damon Corp</i> , 434 F3d 810 (6th Cir. 2006).....	11
<i>Piercefield v Remington Arms Co</i> , 375 Mich 85; 133 NW2d 129 (1965).....	11
<i>Qwest Diagnostics, Inc v MCI Worldcom</i> , 254 Mich App 372; 656 NW2d 858 (2002).....	13, 14
<i>Southgate Comm Sch Dist v Westside Constr Co</i> , 399 Mich 72; 247 NW2d 884 (1976)	11
<i>Spence v Three Rivers Builders & Masonry Supply, Inc</i> , 353 Mich 120; 90 NW2d 873 (1958) ...	9
<i>Stefanac v Cranbrook Educational Community</i> , 435 Mich 155, 208; 458 NW2d 56 (1990).....	7
<i>Stellberger v Scaduto</i> , 264 Mich 199, 203; 249 NW 825 (1933)	6

<i>Sullivan Industries, Inc v Double Seal Glass Co</i> , 192 Mich App 333; 480 NW2d 623 (1991)	14
<i>Wall v Zynda</i> , 283 Mich 260, 264; 278 NW 66 (1938)	6
<i>Wickersham v John Hancock Mut Life Ins Co</i> , 413 Mich 57, 60; 318 NW2d 456 (1982).....	7

Statutes

15 USC § 2301(7)	4
15 USC § 2310(d)(1)	5
MCL 440.1103	15
MCL 440.2102	15
MCL 440.2318	17
MCL 440.2608	17
MCL 440.2701	17
MCL 440.2711	15, 17
MCL 440.2714	16

Other Authorities

<i>Black’s Law Dictionary</i>	6
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STATEMENT OF THE QUESTION INVOLVED

Did the Court of Appeals err in holding that the remedy of equitable rescission can exist in the absence of contractual privity?

Plaintiff answers “No”

Defendant answers “Yes”

Amici MMA and AAM answer “Yes”

STATEMENT OF INTEREST OF AMICI CURIAE

Michigan Manufacturers Association (“MMA”) is a business association composed of more than 3,000 Michigan businesses, organized and existing to (1) study matters of general interest to its members, (2) promote its members’ interests, as well as the interests of the general public, in the proper administration of the laws relating to its members, and (3) otherwise promote the general business and economic welfare of Michigan. An important part of MMA’s activities is representing the interests of its members in matters of importance before the courts, Congress, the Michigan Legislature, and state agencies.

The Alliance of Automobile Manufactures, Inc., is a nonprofit trade association incorporated in Delaware, with its principal place of business in Washington, D.C. The Alliance’s members, all of whom are engaged in the manufacture and/or distribution of motor vehicles and related goods and services throughout the United States, are: BMW Group, Chrysler LLC; Ford Motor Company; General Motors Corporation; Mazda North American Operations; Mitsubishi Motors North America, Inc.; Porsche Cars North America, Inc.; Toyota Motor North America, Inc.; and Volkswagen of American, Inc.

The Alliance represents the interest of manufacturers with regard to a variety of public policy issues concerning the motor vehicle industry. The Alliance articulates and advocates the common needs and interests of its members before the public as well as legislative, administrative, and judicial branches of local, state, and national governments. It has participated as *amicus curiae* in both state and federal courts, including the United States Supreme Court, the United States Circuit Courts of Appeals, and the Supreme Courts of many states. Members of the Alliance sell their products by contract to independently owned and operated dealerships throughout the United States. Accordingly, they have a significant interest

in judicial interpretations of the duties owed by manufacturers to the independent businesses to whom they sell their products.

This case presents an important question regarding the scope of a manufacturer's liability for breach of implied warranty. In this case, the Court of Appeals held that a consumer who purchases a manufactured product from a retailer may seek common law equitable rescission against the manufacturer of the product despite the fact that the consumer has no contractual relationship with the manufacturer. Contrary to the Court of Appeals holding, Michigan courts have always required the existence of a contract as a necessary precondition to the remedy of equitable rescission. This requirement is entirely logical because it is *the contract* that is rescinded when equitable rescission applies. A rule allowing for "rescission" without a contract would create confusion.

A second reason why this case is important to manufacturers is that the Court of Appeals opinion allows a consumer to recover against a manufacturer in tort for purely economic damages arising out of sale of goods. To the extent that Plaintiff's claim sounds in tort, it should be barred by the economic loss doctrine, which precludes tort recovery for parties whose claimed injury is economic damages arising from the sale of goods. Manufacturers in Michigan have an interest in seeing that the rationale underlying the economic loss doctrine is applied in all appropriate cases and that the scope of the economic loss doctrine be clarified to reduce confusion over its application.

INTRODUCTION

The Court of Appeals concluded that "Michigan law has, for half a century, unambiguously afforded the remedy of rescission to purchasers against remote, out-of-privity manufacturers on a theory of breach of implied warranty." This statement is wrong and requires

correction. No Michigan case holds that the equitable remedy of rescission is available in the absence of a contractual relationship. To the contrary, the case law stands uniformly for the proposition that rescission is a remedy that *requires* a contractual relationship, and this makes perfect sense.

By definition, rescission cannot exist in the absence of a contract. Rescission is the undoing of a contract. Where there is no contract, there is nothing to undo. Besides the assault on logic, allowing rescission in the absence of a contract necessarily creates confusion. How can one effectuate a rescission where there is no contract to undo? In a typical case involving a manufacturer, a dealer, and a customer, there are two contracts—one being the sale from the manufacturer to the dealer and the other being the sale from the dealer to the customer. If the customer were allowed to obtain rescission directly from the manufacturer, which of these two sales transactions would be undone? Would the manufacturer return the money that it received from the dealer, or would the customer recover from the manufacturer the money that it paid to the dealer?

Even more confusion arises when one considers the possibility of a subsequent sale from one customer to another. Without a privity requirement, why would a third or fourth generation purchaser be treated any differently than the original customer? And again, which sales transaction in the chain from manufacturer to final buyer would be undone? If the entire chain must be undone, would all participants in the chain of sales transactions be necessary parties? These questions demonstrate the sort of confusion the Court of Appeals has fostered by removing the equitable remedy of rescission from its natural mooring to the existence of a contract between the parties to the lawsuit. If the Court of Appeals' opinion is left uncorrected, Michigan's manufacturers will face a new, uncertain, and illogical form of liability.

Moreover, under the economic loss doctrine, the remedy for a purchaser who suffers economic loss as a result of frustrated expectations in the sale of goods lies in contract only. Here, the Court of Appeals wrongly used tort principles to allow Plaintiff to recover economic damages in the absence of a contract. Plaintiff's recovery under the Court of Appeals' tort-based theory of rescission should have been barred by the economic loss doctrine.

In sum, the Court of Appeals holding is bad law and should be fixed.

STATEMENT OF FACTS

Amici curiae adopt by reference the factual statement of Defendant Forest River, Inc.

ARGUMENT

I. The Magnuson-Moss Warranty Act does not provide for a remedy of rescission absent privity of contract.

The Magnuson-Moss Warranty Act ("MMWA") neither provides for nor precludes a rescission remedy where the parties are not in privity of contract. In fact, the MMWA never once includes any mention of the words "rescission" or "rescind." If Congress had intended to create a federal rescission remedy in the absence of privity, it could have—and would have—expressly so stated. Because rescission is universally understood to be a remedy that undoes a contract, logic dictates that a contract must first exist between the parties. Where no contract exists, there is nothing to be accomplished by a rescission; there is nothing to rescind. Accordingly, for Congress to expressly create a federal "rescission" remedy in the absence of privity, it would have to explicitly define what it means by "rescission." A logical impossibility demands an explicit explanation. There is no such definition or explanation in the MMWA.

While the MMWA does not expressly create a federal rescission remedy, the availability of rescission is not necessarily precluded by the MMWA. The MMWA defines "implied warranty" as "an implied warranty arising under State law." 15 USC § 2301(7). As set forth in

Defendant's brief, this language has been reasonably interpreted by a number of courts to incorporate whatever state-law privity requirements exist within the definition of "implied warranty". As for remedies, the MMWA merely states that a party damaged by a breach of warranty "may bring suit for damages and other legal and equitable relief" in state or federal court. 15 USC § 2310(d)(1). The MMWA does not further define "equitable relief." Again, as set forth in Defendant's brief, a number of courts have properly interpreted this language to incorporate the state-law rules about what remedies are available for breach of an implied warranty. Since the implied warranty itself is defined by state law, it makes perfect sense for the scope of the remedy also to be defined by state law.

II. *Michigan law does not provide for a remedy of rescission where the parties are not in privity of contract and logic precludes the creation of such a remedy now.*

Although the Court of Appeals' opinion has the potential to create great confusion, the error in the majority's resolution of the issue is very simple and could be fixed quite easily. If this Court were inclined to do so, it could resolve the present dispute in two sentences:

Equitable rescission is a remedy by which a court orders that a contract be unmade. There being no contract existing between the parties in this case, equitable rescission was not an appropriate remedy.

Judge Bandstra's well-reasoned dissent goes directly to the heart of the problem with the Court of Appeals majority opinion:

The majority does not explain how a contract can be rescinded when there was no contract in the first place. The purpose of the rescission remedy is "to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made." There was no contract involving plaintiff and Forest River; Forest River's sale was to Kitsmiller RV and plaintiff's purchase was from Kitsmiller RV. Thus, there is no contract involving Forest River and plaintiff to "annul" and no precontract "relative positions" to which these parties can be returned. The majority speaks of "rescission on the

theory of breach of implied warranty,” but the contract plaintiff seeks to rescind is not that arising from Forest River’s implied warranty. Instead, plaintiff seeks to rescind a sale and, again, plain and simply, no sale involving plaintiff and Forest River exists.

Davis v Forest River (Bandstra, J., dissenting), advance sheet, p. 2 (internal citations and footnote omitted). Judge Bandstra is exactly right.

Black’s Law Dictionary defines “rescission” as “a party’s unilateral unmaking of a contract for a legally sufficient reason, such as the other party’s material breach,” and defines “equitable rescission” as “[r]escission that is decreed by a court of equity.” See *Black’s Law Dictionary* (7th ed., 1999), p 1308. Since rescission is a remedy that necessarily requires a contract to be “unmade,” there can be no rescission without a contract to rescind. Michigan authorities are in accord with the universal view that rescission, by definition, requires the existence of a contract. See *Stellberger v Scaduto*, 264 Mich 199, 203; 249 NW 825 (1933) (explaining that “[r]escission is a remedy properly restricted to the cancellation of contracts involving mutual obligations”); *Wall v Zynda*, 283 Mich 260, 264; 278 NW 66 (1938) (defining rescission as the termination, abrogation and undoing of a contract so as to restore the parties to the relative positions they would have occupied if no such contract had ever been made); *Lash v Allstate Ins Co*, 210 Mich App 98, 102; 532 NW2d 869 (1995) (defining the “nature of rescission” as the termination, abrogation and undoing of a contract); *In re DMR Financial Services, Inc*, 274 BR 465, 472 (Bankr ED Mich 2002) (“[r]escission [is] the cancellation of a contract and the return of the parties to the positions they would have occupied if the contract had not been made....”); see also, e.g., *Lenawee County Bd of Health v Messerly*, 417 Mich 17, 33; 331 NW2d 203 (1982) (discussing availability of rescission of land sale contract). There are several examples of this Court applying the rescission doctrine within the context of a contractual dispute. See, e.g., *Stefanac v Cranbrook Educational Community*, 435 Mich 155,

208; 458 NW2d 56 (1990) (involving availability of rescission of severance settlement agreement in absence of tender); *Wickersham v John Hancock Mut Life Ins Co*, 413 Mich 57, 60; 318 NW2d 456 (1982) (involving availability of rescission for life insurance contracts); *Goodwin, Inc v Orson E Coe Pontiac, Inc*, 392 Mich 195, 218; 220 NW2d 664 (1974) (discussing availability of rescission of buy-sell contract in absence of fraud or mutual mistake); *Leahan v Stroh Brewery Co*, 420 Mich 108, 112; 359 NW2d 524 (1984) (discussing availability of rescission of release agreement).

Contrary to the incorrect assertion of the Court of Appeals majority that “Michigan law has, for half a century, unambiguously afforded the remedy of rescission to purchasers against remote, out-of-privity manufacturers on a theory of breach of implied warranty,” the actual truth appears to be that no case has afforded the remedy of rescission in the absence of a contract.¹ The Court of Appeals majority reached the wrong result because it asked the wrong question. Instead of considering whether the remedy of equitable rescission could ever have any application in the absence of a contract, the Court of Appeals jumped ahead to analyze only whether privity is required to bring a claim under an implied warranty theory.

On the basis of this Court’s holdings that privity is not required in implied warranty claims seeking *damages* within the products liability realm, the Court of Appeals majority concluded that the remedy of equitable rescission based on implied warranty can exist in the absence of a contract (i.e., in the absence of privity). The Court of Appeals majority erred in assuming that establishing grounds for some relief for breach of an implied warranty necessarily

¹ The problematic Court of Appeals’ holding was not based on Defendant’s express warranty. In the Court of Appeals’ summary of the state of Michigan law over the past half century, it specifically tied its theory of extra-contractual rescission to breach of *implied* warranty. (Court of Appeals slip op. at p 8.) Accordingly, *amici* will not address issues regarding the express warranty in this brief.

entitled the plaintiff to all possible remedies (damages, rescission, etc.) that might be associated with the type of liability in question.

As the Court of Appeals majority noted, the legal theory in a given case “must be appropriate to the kind of wrong allegedly suffered.” (Court of Appeals slip op p 7). But then the Court of Appeals failed to heed its own advice. Where there is no contract to rescind, it stands to reason that there can be no rescission. The existence of a contract is “the wrong” that is remedied by rescission. The offending contract is undone. Because the remedy of rescission, by definition, necessarily requires a contract in order to operate, the remedy of rescission necessarily comes with a built-in privity requirement. The privity exists independently of the fact that proof of privity is not necessary to establish breach of an implied warranty. It is part and parcel of the remedy, not an element of the cause of action.

The Court of Appeals began its analysis by recasting Plaintiff’s revocation of acceptance claim against the dealer into a “common law” rescission claim against Defendant. This was problematic for two reasons. First, there is no such *cause of action* as “common law rescission.” Rescission is a type of *remedy*, not a basis for liability. Treating “common law rescission” as a free standing cause of action muddles the analysis and unnecessarily causes confusion. Second, in recasting Plaintiff’s “revocation of acceptance” claim as a “rescission” claim, the Court of Appeals failed to recognize that the existence of a contract is just as important to rescission as it is to revocation. All parties agree that revocation of acceptance must be brought against the party from whom the plaintiff made the acceptance (*i.e.*, the dealer). By simply re-casting Plaintiff’s narrow “revocation of acceptance” claim as a broad new form of extra-contractual “common law rescission,” without asking whether rescission *also* requires a contract, the Court of Appeals avoided the any analysis of the key question. In a nutshell, the Court of Appeals

majority wrongly focused its attention on lack-of-privity as a defense to implied warranty *liability* rather than the independent need to have a contract (*i.e.* privity) in order to allow for the rescission *remedy*. The remedy-liability distinction is of crucial importance in analyzing the legal issues presented by this case.

Because the Court of Appeals majority asked the wrong question, it failed to recognize that the cases offered as supporting authorities actually do not stand for the proposition that the remedy of rescission can be applied in the absence of contractual privity. The primary case upon which the Court of Appeals majority relied, *Spence v Three Rivers Builders & Masonry Supply, Inc*, 353 Mich 120; 90 NW2d 873 (1958), did not address the need for privity within the context of a claim seeking the remedy of rescission. Instead, the *Spence* court addressed the lack-of-privity defense within the context of a products liability claim *for damages*. The Court explained that “in Michigan—whatever the rule may be elsewhere—there is authority for treating actions of this kind based upon implied warranty by the manufacturer as though they were explicitly grounded upon negligence.” *Id.* at 130. Thus, reasoned the Court, it is not the existence of lack of privity that should determine whether the defendant is to be held liable, but rather questions related to “doctrines of the law of torts,” such as “lack of foreseeability, want of actual negligence, or the fact that the injury was not proximately caused by [the defendant’s] conduct” that govern when the Defendant is to be held liable *Id.* at 133, quoting 46 Am Jur, Sales, § 812, p 48. In other words, *Spence* was, at its core, a negligence case. It stands for the unexceptional conclusion that a lack of privity is not a defense to a products liability case *sounding in tort*. That conclusion is not relevant to the entirely separate question of whether the remedy of rescission can or should be applied in the absence of a contract between the parties. *Spence* is inapposite.

The next case relied upon by the Court of Appeals majority was *Manzoni v Detroit Coca-Cola Bottling Co*, 363 Mich 235; 109 NW2d 918 (1961). It too was a products liability case addressing the question of whether negligence and implied warranty were distinct theories within the realm of products liability. The case involved a plaintiff injured as a result of drinking a bottle of Coca Cola, and the court never addressed the question whether the equitable remedy of rescission could operate in the absence of a contract. *Manzoni* is inapposite.

The Court of Appeals majority then analyzed *Hill v Harbor Steel*, 374 Mich 194; 132 NW2d 54 (1965). Like *Manzoni*, the *Hill* case also involved an injured plaintiff pursuing a products liability claim against the manufacturer. Although this Court agreed that the plaintiff was not required to establish privity of contract to recover damages on a breach of implied warranty theory, the *Hill* court never had reason to address the question of whether rescission is an available remedy in the absence of a contract. *Hill* is inapposite.

The Court of Appeals next relied on the decision in *Henderson v Chrysler*, 191 Mich App 337; 477 NW2d 505 (1991), for the proposition that rescission is “an equitable remedy distinct from the contractual remedy now provided for in the UCC.” The Court of Appeals’ citation to *Henderson* for this purpose is misleading. Nowhere in the *Henderson* decision did the court opine that rescission could exist *without* a contract. Instead, the *Henderson* court, on appeal from the district court, held that revocation of acceptance under the UCC was an action at law, while rescission was an equitable remedy. This distinction was important in *Henderson* because the defendant sought dismissal for lack of subject matter jurisdiction by arguing that the plaintiff was, in fact, seeking an equitable remedy, over which the district court did not have subject matter jurisdiction. Contrary to the implication of the Court of Appeals majority in the instant case, the *Henderson* court never addressed the question whether rescission could exist as

a remedy without a contractual relationship. *Henderson* is thus inapposite on the question for which it was offered by the Court of Appeals majority.

Likewise, the cases cited by Plaintiff do not address privity as a requirement for the remedy of rescission, but instead only address privity as a requirement for implied warranty liability in general. See *Pack v Damon Corp*, 434 F3d 810 (6th Cir. 2006) (holding that privity is not required for an implied warranty claim without specifically addressing the question of rescission); *Southgate Comm Sch Dist v Westside Constr Co*, 399 Mich 72; 247 NW2d 884 (1976) (holding that three-year tort statute of limitations applied to products liability action for damages on implied warranty theory); *Piercefield v Remington Arms Co*, 375 Mich 85; 133 NW2d 129 (1965) (explaining that privity not required to establish damages for personal injury under breach of warranty theory); *Cova v Harley-Davidson Motor Co*, 26 Mich App 602, 603; 182 NW2d 800 (1970) (damages case).

Despite this inability to identify a single case in which *any* court afforded the remedy of rescission to a plaintiff suing an out-of-privity manufacturer, the Court of Appeals concluded its analysis of the issue by stating that Michigan law has “unambiguously” afforded such a remedy “for half a century.” This incorrect holding, if left in place, will cause confusion and expand the liability of manufacturers for no coherent reason.

Because rescission in the absence of a contractual relationship is a remedy without any legal precedent or logical mooring, its potential scope is unknowable. Arguably, under the Court of Appeals’ reasoning, *any* subsequent purchaser of an allegedly defective product would be able to get its money back from the manufacturer provided that his or her claim was not otherwise barred by the statute of limitations. This makes no sense and has no basis in the law.

III. *The economic loss doctrine applies to all claims seeking economic damages based on frustrated expectations arising from a sales transaction, including a claim for breach of warranty.*

There is no question that the cause of action identified by the Court of Appeals majority in this case is not contractual in nature, nor is it statutory. Accordingly, the only possible remaining source of any possible duty of Defendant to Plaintiff lies in tort. This is consistent with the Court of Appeals' reliance on tort-based products liability decisions such as *Spence, supra*.

It also appears that Plaintiff suffered purely economic damages arising from a sales transaction, particularly, his frustrated expectations arising from the purchase of the motor home from the dealer. Because the Court of Appeals' theory allows the Plaintiff to recover in tort for purely economic damages arising from frustrated expectations associated with a sale of goods, the economic loss doctrine is implicated.

This Court, in *Neibarger v Universal Coops, Inc*, 439 Mich 512; 486 NW2d 612 (1992), explained:

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.

Id. at 520-521 (footnotes omitted; emphasis added). On its face, this logical rule bars any sort of extra-contractual (i.e., tort-based) rescission cause of action. In this case, Plaintiff is alleging a frustration of expectations arising from a sales transaction. Under these circumstances, any remedy Plaintiff has can only be based on contract. By allowing Plaintiff to recover on a tort-

like theory of rescission, the Court of Appeals side-stepped this Court's clear ruling about the economic loss doctrine.

The Court of Appeals majority, however, found two grounds upon which to distinguish the *Neibarger* rule in the present case. (Court of Appeals slip op p 7-8). First, the Court of Appeals concluded that the economic loss doctrine only applies between sophisticated commercial entities, which excluded Plaintiff. In reaching this conclusion, the Court of Appeals ignored the fact that an earlier Court of Appeals opinion had noted that the economic loss doctrine has been expanded beyond commercial transactions involving sophisticated users to the sale of consumer goods. See *Qwest Diagnostics, Inc v MCI Worldcom*, 254 Mich App 372, 378; 656 NW2d 858 (2002). Under the broader rule noted in *Qwest*, Plaintiff's tort-based rescission claim would not be excluded from the application of the economic loss doctrine. This Court should re-emphasize that the economic loss doctrine is in no way tied to the sophistication of the parties. It is a logical principle of jurisprudence. The UCC exists as society's legal mechanism for protecting economic expectations in sales transactions. Because the UCC applies to both sophisticated and unsophisticated parties, the economic loss doctrine should likewise apply to both sophisticated and unsophisticated parties. This does not necessarily deny a remedy to unsophisticated parties, it merely defines the scope of the remedy available.

Second, the Court of Appeals concluded that, despite the existence of a sale of goods, the economic loss doctrine did not apply because no express contract existed between the end user (Plaintiff) and the manufacturer (Defendant). In reaching this similarly erroneous conclusion, the Court of Appeals also ignored the fact that an earlier Court of Appeals opinion had held that the absence of privity between a manufacturer and end-user did *not* preclude application of the economic loss doctrine. *Sullivan Industries, Inc v Double Seal Glass Co*, 192 Mich App 333,

341-344; 480 NW2d 623 (1991). Under the broader rule noted in *Sullivan*, Plaintiff's tort-based rescission claim would not be excluded. The *Sullivan* case makes perfect sense. Where a person's sole remedy lies in contract, the person must have a contract in order to recover. The mere absence of a contract logically cannot provide the basis for the imposition of even greater liability in the form of tort. By providing that an injured party must look to the law of contract to recover for frustrated expectations arising from a sales transaction, the economic loss doctrine necessarily imposes a requirement that a contract exist between the plaintiff and defendant. Where no contract exists, there can be no contract cause of action and no recovery for frustrated expectations. It simply does not follow that the absence of a contract is the key to opening the door to tort liability.

In sum, the Court of Appeals' treatment of Plaintiff's rescission claim should fail for one of two reasons: Either rescission cannot exist in the absence of a contract or the Court of Appeals' newly-minted remedy of *extra-contractual* rescission is a tort subject to the economic loss doctrine.

If this Court concludes that a rescission claim may be asserted in the absence of contractual relationship, then *amici* respectfully request that the Court undertake to define the scope of the economic loss doctrine and adopt the well-reasoned extensions of the economic loss doctrine noted in *Qwest* (i.e., economic loss doctrine applies to ordinary consumer transactions) and *Sullivan* (i.e., strict privity not required for application of economic loss doctrine where there has been a sales transaction between the plaintiff and a dealer).

IV. *The remedy provisions in the UCC supplant any common law action for rescission.*

As noted, it is undisputed that rescission is a remedy—not a separate cause of action or basis for recovery. By definition, rescission is a remedy that requires a contract to operate. One cannot rescind what does not exist.

The law applicable to sales contracts is set forth in Article 2 of the UCC. See *Niebarger, supra* at 519 (“Article 2 of the code governs the relationship between the parties involved in “transactions in goods.”); MCL 440.2102 (“Unless the context otherwise requires, this article applies to transactions in goods...”). This case is governed by Article 2, because the sale of the motor home was a sale of goods and Plaintiff’s claims arise from Plaintiff’s frustrated expectations involved with the sale.

“The legislature has authority to displace the common law.” *Hoerstman General Contractors, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). Whether a statutory scheme preempts the common law is a question of legislative intent. *Id.*

In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter.

Id., citing 2A Sands, Sutherland Statutory Construction (4th ed), § 50.05, pp 440-441. The legislature has specifically provided that the general provisions of law and equity supplement the provisions of the UCC, except where “displaced by the particular provisions” of the UCC. See MCL 440.1103.

The remedies available to an aggrieved buyer who does not accept the goods, or revokes acceptance, are set forth in MCL 440.2711:

(1) Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (section 2612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid

(a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or

(b) recover damages for nondelivery as provided in this article (section 2713).

(2) Where the seller fails to deliver or repudiates the buyer may also

(a) if the goods have been identified recover them as provided in this article (section 2502); or

(b) in a proper case obtain specific performance or replevy or recover the goods as provided in this article (section 2716).

(3) On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller (section 2706).

The remedies for a buyer *after* acceptance are set forth in MCL 440.2714:

(1) Where the buyer has accepted goods and given notification (subsection (3) of section 2607) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under the next section may also be recovered.

These remedy provisions comprehensively cover the range of situations in which a buyer could be injured. The argument that the remedy provisions of the UCC supplant common law remedies for sales transactions is bolstered by the language of MCL 440.2701, which provides that the remedies for breaches of promises *collateral or ancillary* to the actual sale are “not impaired” by the provisions of Article 2. The obvious implication is that other remedies for breach of the *actual sales contract* are impaired by the provisions of Article 2.

Revocation of acceptance under MCL 440.2608 is not a “remedy” per se, but instead is the means by which a buyer can undo, i.e., rescind, a contract before seeking the additional buyer’s remedies set forth in MCL 440.2711. Through these provisions, the UCC comprehensively addresses the rights and remedies of a buyer in a sales transaction. Accordingly, this Court should hold that the revocation of acceptance and buyer’s remedy provisions have displaced common law remedies for breach of contract, including rescission. Cf. *Hoerstman General Contractors, supra*.

V. Under the UCC, privity is required for a breach of warranty action, subject to one exception.

The primary interest of *amici* in this appeal is to urge the Court to reverse the Court of Appeals’ erroneous and illogical conclusion that the remedy of rescission can be ordered in the absence of contractual privity. The Court can resolve that discrete question without addressing whether privity is required for all breach of warranty claims under the UCC. The Court could hold that privity, by definition, requires the existence of a contract. The Court could also hold that the common law remedy of rescission is displaced by the revocation and buyer’s remedies sections of the UCC. Should the Court decide, however, to address the broader whether privity or third-party beneficiary is always required to show a breach of warranty under the UCC, *amici* contend that the answer is yes, subject to the limited extension set forth in MCL 440.2318.

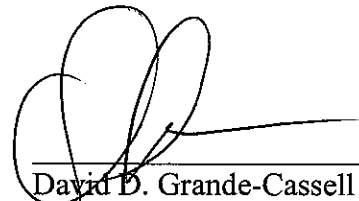
MCL 440.2318 extends warranty protection to “any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.” By specifically extending warranty protection beyond the parties to the contract to the distinct class of persons described in MCL 440.2318, the legislature has indicated that this distinct class alone may sue to recover for breach of warranty (apart from those with a specific contractual right to do so either through contractual privity or third-party beneficiary status). The legislature has done so under the principle “*expressio unius est exclusio alterius*,” which means, “the expression of one thing is the exclusion of another.” See *Miller v Chapman Contracting*, 477 Mich 102, 108 n 1; 730 NW2d 462 (2007). The exclusion of warranty protection to any other parties not in privity of contract is dispositive on the issue of whether privity or third-party beneficiary is always required to show a breach of warranty under the UCC

CONCLUSION

For the reasons stated above and in Defendant’s brief, this Court should reverse the holding of the Court of Appeals and clarify that the equitable remedy of rescission necessarily requires the existence of a contract to be rescinded.

Respectfully submitted,

By:



David D. Grande-Cassell (P49359)
Paul C. Smith (P55608)
Clark Hill PLC
212 East Grand River Avenue
Lansing, Michigan 48906
Attorneys for *Amici Curiae* Michigan
Manufacturers Association and the Alliance of
Automobile Manufacturers, Inc.

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