STATE OF MICHIGAN

COURT OF APPEALS

KEITH GAYLE DAVIS,

Plaintiff-Appellee,

v

FOREST RIVER, INC,

Defendant-Appellant,

and

KITSMILLER RV, INC,

Defendant.

FOR PUBLICATION
February 21, 2008

No. 270478
Ingham Circuit Court
LC No. 04-000064-CP

Advance Sheets Version

Before: Owens, P.J., and Bandstra and Davis, JJ.

BANDSTRA, J. (*dissenting*).

I respectfully but heartily dissent from the majority's conclusion that Michigan law allows a person to rescind a contract even though that person never contracted with the person against whom the rescission remedy is imposed. That conclusion is without precedent, contrary to the only precedent on point, illogical, and apparently limitless in its application.

I agree with the majority that, before *Spence v Three Rivers Builders & Masonry Supply, Inc*, 353 Mich 120; 90 NW2d 873 (1958), there was a general rule preventing a person who purchased a good through a middleman from seeking any recovery whatsoever from the manufacturer of that good, because of the privity requirement. *Spence* and its progeny allowed such purchasers to seek *damages* from manufacturers even though there was no privity of contract. However, the majority cites no Michigan case where a rescission remedy was imposed in this context. Thus, *Spence* and its progeny did not abrogate the general rule requiring privity in a rescission case; that general rule still stands.

That conclusion comports with the only Michigan precedent where an out-of-privity plaintiff sought to return a good to a manufacturer, *Henderson v Chrysler Corp*, 191 Mich App 337; 477 NW2d 505 (1991). *Henderson* rejected that attempt under the UCC's revocation of acceptance provisions, MCL 440.2608. *Henderson*, *supra* at 340. *Henderson* noted that the "UCC no longer provides for rescission, but rather *substitutes* revocation of acceptance" instead. *Id*. (emphasis added); see also *Watts v Mercedes-Benz USA, LLC*, 2007 Tenn App LEXIS 580 at

6; 63 UCC Rep Serv 2d 966 at 2 (Tenn App, 2007), quoting *Haverlah v Memphis-Aviation, Inc*, 674 SW2d 297, 302 (Tenn App, 1984) ("the UCC remedy of revocation of acceptance 'for all practical effect replaces the old equitable doctrine of rescission'"); *Ramirez v Autosport*, 88 NJ 277, 288; 440 A2d 1345 (1982) ("[t]he Code eschews the word 'rescission' and substitutes . . . 'revocation of acceptance'"). It would be pointless to allow a plaintiff to avoid the privity requirement imposed by the UCC as a prerequisite to revocation simply by asking for rescission instead.[1] I agree with *Henderson* that the enactment of the revocation-of-acceptance provisions of the UCC here in Michigan constitutes a repudiation of rescission as a remedy for an out-of-privity plaintiff.

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.'" *Lash v Allstate Ins Co*, 210 Mich App 98, 102; 532 NW2d 869 (1995), quoting *Cunningham v Citizens Ins Co of America*, 133 Mich App 471, 479; 350 NW2d 283 (1984). There was no contract involving plaintiff and Forest River, Inc.; Forest River's sale was to Kitsmiller RV and plaintiff's purchase was from Kitsmiller RV.[2] 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," *ante* at ___, 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.

Finally, the majority's decision today has no apparent limitation. Had plaintiff resold the RV to his neighbor, for example, nothing in the majority's opinion suggests that the neighbor could not seek rescission against Forest River. Durable goods are continually resold in our society and the ramifications of the majority's decision seem endless. This case involved just one intermediate purchaser, but the logic of the majority's analysis would apply no matter how many resales occurred. Nor would there be any limitation with regard to the time that has passed since goods left the manufacturer's control. Compare MCL 440.2608(2) ("reasonable time" requirement for revocation of acceptance under the UCC).

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[1] And, of course, the other statutory prerequisites to revocation of acceptance—that the goods' nonconformity substantially impairs their value, that the purchaser did not discover the nonconformity before acceptance, that notice of revocation occurs within a reasonable time, and so forth—are avoided as well. See MCL 440.2608.

[2] Accordingly, plaintiff correctly pursued a revocation of acceptance claim against Kitsmiller RV. Plaintiff chose to forgo any revocation remedy by settling with Kitsmiller RV. That, of course, does nothing to give rise to a similar claim against Forest River.

The trial court granted alternative remedies of rescission and money damages to plaintiff. Only money damages are appropriate because there was no contract between plaintiff and Forest River to rescind. I would reverse the trial court's order to the extent that it ruled otherwise.

/s/ Richard A. Bandstra