THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No.: 2012-213361
Circuit Court Case No.: 2008-CP-27-695

Ralph Thomas and Nancy Thomas.....Respondents,

vs.

Gulf Stream Coach, Inc. and Ridgeland Recreational Vehicles, Inc. d/b/a Boat N RV Megastore.....Defendants,

of whom Gulf Stream Coach, Inc. is the.....Appellant,

and

Ridgeland Recreational Vehicles, Inc. d/b/a Boat N RV Megastore is.....Respondent.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

QUESTIONS PRESENTED

I. **Did the Arbitrator (and Circuit Court on appellate review) err by manifestly disregarding the lack of a contract as between a manufacturer of a good and an ultimate consumer when making an award and upholding the arbitral award, respectively?**

II. **Was it error to allow the remedy of revocation of acceptance and/or rescission to lie as against Gulfstream Motorcoach, Inc., a remote manufacturer and non-retail seller of goods?**

STATEMENT OF THE CASE

The Plaintiffs/Respondents Ralph Thomas and Nancy Thomas (hereinafter referred to as the "Thomases") initiated a breach of implied and express warranty action on or about November 6, 2008 against the Defendants Gulf Stream Coach, Inc. and Ridgeland Recreational Vehicles, Inc. d/b/a Boat N RV Megastore (of whom Gulfstream Coach Inc. is Appellant; hereinafter referred to as "Gulfstream"). **[R.pp. 37-38]** Boat N RV moved to dismiss and/or compel arbitration and Gulfstream Answered. **[R.pp. 39-47]**

While there were some odd procedural maneuvers initially **[R.pp. 139-141]**, as Boat N RV filed a AAA arbitration claim in New York, Plaintiffs moved to stay said arbitration, and Boat N RV moved to compel arbitration (and which Judge Mullen signed an Order compelling such) ultimately all of these issues were consolidated and resolved on or around October 26, 2009 when Judge Mullen signed an Order vacating all prior orders, allowing the Plaintiff to amend their pleadings. **[R.p. 1]**

On or around November 9, 2009, the Plaintiffs filed an Amended Complaint, alleging breach of express and implied warranties as against both Boat N RV and Gulfstream, and additionally alleging causes of action as against Boat N RV for fraud and misrepresentation, Unfair Trade Practices, and violations of the Manufacturers, Distributors, and Dealers Act as against Boat N RV only. **[R.pp.62-66]**

Gulfstream answered again. **[R.pp. 67-77]** Boat N RV again moved to compel arbitration; ultimately, all parties agreed to arbitrate this matter pursuant to the

terms of an Arbitration Agreement with Jon Austen serving as the Arbitrator. **[R.pp. 2-6]**

Following the Arbitration held on October 17, 2011, the Arbitrator found in favor of the Plaintiffs, and awarded 18,000 in actual damages as against Boat N RV, and 275,766.22 in damages against Gulfstream for actual damages, including incidental and consequential damages. **[R.pp. 17-27]** Additionally, he found that it was "equitable and appropriate" for Gulfstream to assume the Plaintiffs' monthly payments, and retrieve the RV from the Plaintiffs at their expense.

Gulfstream then filed a Motion to Vacate, Alter or Amend in the Circuit court on February 17, 2012. **[R.p. 88]** This procedural posturing is confirmed by way of the Plaintiffs' counsel's letter dated April 4, 2012. **[R.pp. 142-143]**

The Circuit Court held oral arguments on June 13, 2012. **[R.pp. 122-138]** On June 29, 2012, an Order signed by Judge Mullen was filed. **[R.pp. 28-33]** Gulfstream moved to reconsider (with supporting memoranda) on or around July 10, 2012 **[R.pp. 103-117]**; this motion was denied without hearing on October 12, 2012. **[R.pp. 34-36]**. Gulfstream then filed a Notice of Intent to Appeal on or around November 2, 2012.

STATEMENT OF THE FACTS

This case stems out of warranty claims made by the Plaintiffs arising out of an allegedly defective 2007 Gulf Stream RV sold by Boat N RV Mega Store by way of a contract between Boat N RV and the Plaintiffs in April of 2008. **[R.pp. 147-148]**. The testimony at the hearing showed that the RV that the Thomases chose to purchase had been sitting n Boat N RV's retail lot for over a year and a half before this purchase. Pursuant to a Verbal Agreement addendum, various repairs were to be undertaken by Boat N RV prior to the transfer of the RV to the Thomases. **[R.pp. 149-150]** There was no evidence presented that the manufacturer had any involvement with the sale of the RV, save and except for the clear and unambiguous manufacturers Limited Warranty that was provided to the Plaintiffs. There was no dispute, in testimony presented during the arbitration or otherwise, that the manufacturer Gulf Stream Coach. Inc.'s Limited Warranty applied to the transaction. **[R.pp. 151-153]**. This Limited Warranty covered,

> "only those defects which occur or exist within the applicable periods referenced above and which are specifically identified to Gulf Stream in the manner specified in Section 4 of this Limited Warranty. All obligations of Gulf Stream pursuant to this Limited Warranty are limited to replacing and/or repairing the defective part or component"
> (Id.)

Additionally, this limited warranty expressly disclaimed, in bold and distinct type face lettering, any other express or implied warranties, **"including, but not limited to, any implied WARRANTY OF MERCHANTABILITY or FITNESS for a particular use"**. In accordance with this Limited Warranty, Boat N RV had obligations to:

"maintain the recreational vehicle until retail sold; to perform a comprehensive pre-retail delivery check procedure and inspection; to repair or replace any defective parts; to correct defects in workmanship which are identified prior to retail delivery check procedure and inspection; to repair or replace any defective parts; to correct defects in workmanship which are identified prior to initial retail purchaser's asking delivery of the recreational vehicle; to present the initial retail purchaser with this limited warranty prior to the initial retail purchaser's entering into any written contract to purchase a recreational vehicle; and to mail to Gulf Stream the signed Gulf Stream Recreational vehicle registration form and the signed limited warranty.

(Id.)

There was no dispute that this Limited Warranty had been received and acknowledged to have been received by the Thomases. Additionally, the Thomases received the Gulf Stream Motorhome Owners Manual that contained an identical Limited Warranty. **[R.pp. 163-193]** The Thomases also signed a recreational vehicle registration on May 5, 2008, indicating that the Limited warranty applied to the sale. **[R.p. 159]** This Limited Warranty expressly disclaimed any liability for consequential damages, to include loss of use.

On or around June 5, 2008, repairs were made to various items as identified by Repair Order 245438. There was no dispute that this Limited Warranty, and the work done in this case on the motorhome, was requested and done in accordance with the terms of this Limited Warranty, at no cost to the Thomases. Nevertheless, according to the Thomases, even after making several trips to Boat N RV, the water leaks experienced by the Thomases were not adequately addressed, despite Boat N RV's attempts. The Plaintiffs testified that the leaks were so bad that the RV began to grow mushrooms inside of it. The RV was taken to Boat N RV during May of 2008 for repairs for problems related

to apparently general "leaking, mushrooms growing, refrigerator leaking, too many problems to name all." **[R.pp. 194-206]** On or around June 4, 2008 a three way conference call occurred among Mr. Thomas, a representative from Gulf Stream, and Boat N Rv. Over the course of the next month, various pictures were sent of the problems to Gulf Stream.

Finally, in July of 2008, the Thomases contacted the manufacturer regarding the water intrusion problems, and after refusing to take the RV for repair back at Boat N RV, agreed to take the RV to Bill Plemmons on or around July 28, 2008. The repairs requested were unquestionably related to the Limited Warranty provided by Gulf Stream to the Thomases; indeed, on the face of the Bill Plemmons Work Order, it notes that the "Warr. Date (Warranty Date) was effective April 9, 2008 – the date that the Thomases purchased the RV. The repairs, as outlined in this work order, were completed in October 6, 2008; two other minor warranty repairs were completed on or around October 15 and October 22of 2008. **[R.pp. 266-276]** There was no factual dispute that the repairs that were a) requested to be done by the Thomases and b) done by Plemmons in accordance with the warranty provided by Gulf Stream to the Thomases.

STANDARD OF REVIEW

When a dispute is submitted to arbitration, the arbitrator determines questions of both law and fact. Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award. An award will be vacated only under narrow, limited circumstances." C-Sculptures, LLC v. Brown, 394 S.C. 519, 716 S.E.2d 678 (Ct.App.,2011)(internal citations omitted). A reviewing court should vacate an arbitrator's decision only when the arbitrator has exceeded his or her authority or has manifestly disregarded or perversely misconstrued the law. Id. "[F]or a court to vacate an arbitration award based upon an arbitrator's manifest disregard of the law, the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable." Id. "[M]anifest disregard of the law occurs when the arbitrator knew of a governing legal principle yet refused to apply it, and the law disregarded was well defined, explicit, and clearly applicable to the case." Id. "The focus is on the conduct of the arbitrator and presupposes something beyond a mere error in construing or applying the law." Id. An arbitrator manifestly disregards the law when he or she appreciates the existence of a clearly governing legal principle and decides to ignore it. Id.

ARGUMENT

I. Did the Arbitrator (and Circuit Court on appellate review) err by manifestly disregarding the lack of a contract as between a manufacturer of a good and an ultimate consumer when making an award and upholding the arbitral award, respectively?

It is respectfully submitted that the Arbitrator (and Circuit court in its Order(s) upholding the arbitral award) clearly and manifestly disregarded the actual facts and applicable law to this matter. The Arbitrator failed to distinguish between the retail seller – Boat N RV - and the manufacturer – Gulfstream – in his Order. It is upon this failure of distinction that the Arbitrator found that that the South Carolina UCC warranties applied to the manufacturer due to a failure of warranty disclaimer on the sales contract as between the retail seller and purchaser. The Arbitrator found that the disclaimer of warranties on the sales contract between the Plaintiff and Boat N RV failed as a matter of law due to its lack of conspicuousness. **[R.p. 8]** Rather than addressing the clear and unambiguous Limited Warranty – and certainly conspicuous as understood by the South Carolina UCC – provided by the manufacturer to the purchaser, the Arbitrator improperly imposed the apparent failure of the disclaimer as between the retail seller and the purchaser upon Gulfstream. By doing so, the Arbitrator "got around" the clear Limited Warranty language that provided for repair or replacement of the alleged problems with the RV.

The Plaintiffs acknowledged having received and accepted the Limited Warranty, and the unequivocal testimony and evidence in the case demonstrated the attempted repairs were done in accordance with Limited Warranty that was provided to the Plaintiffs. Indeed, the testimony showed that after the last repairs

were done by Bill Plemmons in Rural North Carolina, the Plaintiffs filmed a DVD in November and filed a lawsuit on November 6, 2008. The Limited Warranty still applied to the RV at that time (as it was a one year warranty, starting on the date of purchase, April 9, 2008), and the testimony in the case is that the RV could have been repaired at the Gulfstream facility in Indiana. The only evidence concerning cost to repair and ability to repair came from Tony Suddon. Gulfstream, upon being notified by the Plaintiffs, was only given one chance to repair the RV; that was done without any undue delay by Gulfstream in October of 2008. Indeed, according to Mr. Suddons, the Director of Consumer Affairs for Gulfstream, Gulfstream was ready, willing, and able to fulfill its duties as outlined in the Limited Warranty, and was willing to:

Replace the carpet;
Replace the captains chairs;
Repair leaks to all slide outs;
Reseal the window in the slide out;
Replace the side countertop in the bathroom
Repair or replace the bed comforter
Reseal all exterior compartments
Align exterior compartment doors;
Reconnect aqua hot line under dash;
Repair cruise control;
Adjust the screen door latch;
Seal the air leak in the firewall;

There was no testimony adduced that the RV could not be repaired, or that it was impossible to do so. There was also no testimony that there was an unreasonable delay in affecting the terms of the warranty. Without any such testimony of the limited warranty for repair or replacement failing in its essential purpose, repair or replacement in accordance with that Limited Warranty is the

only remedy that the Plaintiffs have as against Gulfstream. Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 843 F.Supp. 1027 (D.S.C.,1993)

Indeed, the only testimony was that the factory service offered by Gulfstream, in accordance with its Limited Warranty, should correct and cure these problems. The only evidence concerning costs to repair came from Mr. Suddons, and the total for such repairs was approximated at $6,325.00. There was no evidence that there was a reasonable delay in affecting repairs, or any evidence that the RV could not be repaired or that it was impossible to do so. Thus, the warranty could not have failed in its essential purpose as a matter of law, given the dearth of evidence concerning such failure.

As an additional ground, the Arbitrator awarded both warranty/failure of essential purpose (with consequential damages) and awarded revocation of acceptance/rescission of contract as remedies for the Thomases. This is wrong as a matter of law, as these are separate and distinct causes of action and have wholly different tests that must be satisfied for such a claim to lie. See Herring v. Home Depot, 350 S.C. 373 (2002) (Court noting that a breach of implied warranty claims assumes a contract, and has an objective test, where the goods must be found not to be merchantable; rescission has a subjective test, whereby a finding must be made that the nonconformity substantially impairs the value of the item.) Here, the Arbitrator skipped over the obvious problem that there is no contract between Gulfstream and the Thomases, found that Gulfstream was a party to the contract (despite no signatures or evidence supporting such a conclusory statement) found that the disclaimer on the contract between Boat N RV and the Thomases failed, and that even if it did not, that the Thomases were

entitled to both warranty damages (including consequential damages i.e. electricity, insurance, taxes, etc) in the amount of the "reimbursement" amount of the entire purchase price plus the trade in value of the coachman. Additionally, and in direct contradiction with the clear legal distinction set forth in Herring concerning warranty remedies and rescission as a remedy, he equitably fashioned the rescission of the contract (to which Gulfstream was not factually or legally a party) coupled with an equitable remedy forcing Gulfstream to take the RV back. In support of this reasoning, he found that the limited warranty of Gulfstream failed in its essential purpose "so as to deprive the Plaintiffs of the substantial value of their bargain." **[R.p. 23]** The substantial value test is the subjective test to be employed in a revocation of acceptance; not a failure of essential purpose under a legal warranty theory. This is clear error.

If the Thomases had intended to revoke acceptance and/or rescind – and they claim that they notified Gulfstream they did (though this fact is disputed by the defendants and it is not pled as a remedy in their complaint filed back in 2008) – it is very telling that they did not raise this issue until after the close of all the evidence in the arbitration. Not only is this highly prejudicial, it is a gross abuse of discretion regarding amendment – especially and acutely so given the legally deficient ruling allowing rescission as a remedy to lie against Gulfstream – an entity who was not even in privity to the contract.

Lastly, the Arbitrator took the precise language of Bishop Logging Co. v. John Deere Indus. Equipment Co., 317 S.C. 520, 455 S.E.2d 183 (Ct. App. 1995) and essentially block quoted it as being applicable to the facts and law in this case. This case simply does not fit the facts of this case, as Bishop dealt with a

direct sale of a piece of swamp tree felling equipment from John Deere (the manufacturer ***and*** retail seller) to an ultimate purchaser, Bishop Logging. In this case, Boat N RV is the seller; Gulf Stream is a manufacturer. If the disclaimer failed on Boat N RV's contractual documents as found by the Arbitrator, then the implied warranties under the UCC would still exist as against them. The "other remedies" could still be pursued against Boat N RV; the ineffective disclaimer does nothing to change or alter the clear, unambiguous, and conspicuous limited warranty from Gulfstream that applies in this case. The Thomases only gave Gulfstream one opportunity – the Bill Plemmons repair – to fix the RV. The only evidence in the case regarding the ability of Gulfstream to effectuate and validate its warranty came from Tony Suddon, who testified that the repairs could be done at the facility in Indiana and that Gulfstream as ready willing and able to effectuate said repairs.

II. Was it error to allow the remedy of revocation of acceptance and/or rescission to lie as against Gulfstream Motorcoach, Inc., a remote manufacturer and non-retail seller of goods?

After the close of all of the evidence and argument, the Arbitrator allowed the Plaintiffs to amend their pleadings to include a claim/remedy of revocation of acceptance/rescission under the UCC. Regardless of the propriety of allowing such an amendment, the Arbitrator ordered that this remedy lie against Gulfstream – a manufacturer that undisputedly has no privity of contract with the purchaser. Because of the failure of the disclaimer as between the retail seller and the purchaser, the Arbitrator found that UCC remedy of rescission of the contract was appropriate, and ordered the return of the RV to Gulf Stream, and found that Plaintiffs were entitled to $293,796.22. Gulf Stream was ordered to pay $275,766.22.

It is well settled in South Carolina that an Arbitrator cannot manifestly disregard the law when rendering an award. C-Sculptures, LLC v. Brown, 394 S.C. 519, 716 S.E.2d 678 (Ct.App., 2011) Gulf Stream is a manufacturer, and had no contract with the Plaintiffs. The only remedies available to the Plaintiffs as against Gulf Stream come from the Warranty that the Plaintiffs acknowledged and accepted. By their signature on various contract documents and by their actions in pursuing warranty work, there can be no dispute that the Limited Warranty applied to this RV. And as a matter of law, there is no question that, "privity of contract is essential to recovery for breach of implied warranty; and there is no such privity between a manufacturer and one who has purchased manufactured article from a dealer." Odom v. Ford Motor Company, 230 S.C. 320, 95 S.E.2d 601 (1956); see also Collum v. Pope & Talbot, Inc., 288 P.2d 75;

Lombardi v. California Packing Sales Co., 112 A.2d 701; Silverman v. Samuel Mallinger Co., 100 A.2d 715; Wood v. General Electric Co., 112 N.E.2d 8; Cohan v. Associated Fur Farms, Inc., 53 N.W.2d 788; Cotton v. John Deere Plow Co., 18 So.2d 727; Dennis v. Willys-Overland Motors, Inc., 111 F.Supp. 875; Torpey v. Red Owl Stores, 228 F.2d 117, 121 (8th Cir.) ("The general rule is that privity of contract is required in an action for breach of an implied warranty and that there is no such privity between a manufacturer and one who has purchased the manufactured article from a dealer or is otherwise a remote vendee.")

By disregarding this principle and lumping both defendants together, the arbitrator found a way to rule for the Plaintiffs that, under our law, was not permissible. The proper remedy – assuming the warranty had ben evaluated and been found to have failed - as against the manufacturer Gulf Stream should have been the cost to repair or replace pursuant to S.C. Code. Ann. §36-2-714. This is the only remedy that may lie against the manufacturer in South Carolina given the facts of this case, and Gulfstream would respectfully request that this Court correct this error.

CONCLUSION

Based on the foregoing, Gulfstream respectfully requests that this Court remand this matter to the Arbitrator with instructions to apply the applicable legal principles applicable to the remedies associated with warranties and to apply the legal principles concerning privity of contract. Additionally, Gulfstream would ask that even if the warranty is found to have failed in its essential purpose, that the Court require the Arbitrator to follow S.C. Code. Ann. §36-2-714 regarding the measure of damages in a warranty action.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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PROOF OF SERVICE

The undersigned counsel hereby certifies that he has served the foregoing Final Brief of Appellant upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on 22 day of November, 2013 addressed to the following:

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