

2000

J. Stanley Fry and Beverly Fry v. Duce Sporting Good, Inc. : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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J. STANLEY FRY and BEVERLY FRY, :

Plaintiffs/Appellants, :

vs. :

DUCE SPORTING GOODS, INC., :
a Utah corporation, :

Defendant/Respondent
and Third-Party Plaintiff, :

vs. :

STARFIRE INDUSTRIES, INC., a :
Utah corporation, and HARDIN :
MARINE, :

Third-Party Defendants. :

Case No. 14095

BRIEF OF RESPONDENT AND MOTION FOR ATTORNEY'S FEES

Appeal from the Order and Judgment of the Third Judicial District
Court of the State of Utah, in and for Salt Lake County,

The Honorable Bryant H. Croft, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

J. STANLEY FRY and BEVERLY
FRY,

Plaintiffs/Appellants,

vs.

DUCE SPORTING GOODS, INC.,
a Utah corporation,

Defendant/Respondent
and Third-Party Plaintiff,

vs.

STARFIRE INDUSTRIES, INC., a
Utah corporation, and HARDIN
MARINE,

Third-Party Defendants.

Case No. 14095

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Plaintiff brought this action seeking rescission of a contract for the purchase of a power boat and damages because of alleged breaches of express and implied warranties under the Uniform Commercial Code. Defendant brought a Counterclaim for the unpaid balance of the purchase price of the boat and in defense asserts that there was no breach of any warranty, that Plaintiffs failed to prove any damage resulting from a breach of warranty and failed to prove that there was rescission of the purchase contract or

timely revocation of acceptance of the boat. Defendant brought a third-party action against Starfire Industries, Inc., the hull manufacturer, and Hardin Marine, the engine and jet outdrive supplier.

DISPOSITION IN THE LOWER COURT

The District Court of Salt Lake County, Judge Bryant H. Croft presiding, granted Defendant's Motion to Dismiss Plaintiffs' Complaint, based on Rule 41(b) of the Utah Rules of Civil Procedure, for failure to show that on the facts and the law Plaintiffs had a right to relief, and entered Judgment on Defendant's Counterclaim in favor of Defendant and against the Plaintiffs for the unpaid balance on the purchase contract plus costs and attorney's fees totaling \$9,889.14 plus 8% interest from April 29, 1975, until paid.

RELIEF SOUGHT ON APPEAL

Defendant seeks denial of Plaintiffs' Appeal and affirmance of the Order and Judgment entered by the lower court.

STATEMENT OF THE FACTS

During the spring and summer of 1972, J. Stanley Fry (hereinafter "Fry") contacted Mr. Farrell Holding, a salesman and personal friend of Fry's who worked for Duce Sporting Goods, Inc. (hereinafter "Defendant" or "Duce"), at Defendant's place of business regarding the purchase of a power boat. Fry was interested in purchasing a new high-performance boat and he had been unable to find any boat which he thought would perform satisfactorily for him (R. 181). He had previously owned a 19-foot single-engine Higgins Boat with a propeller outdrive. Defendant did not

have a boat which was satisfactory to Fry (R. 231). Fry wanted a boat which would be large enough to have sleeping quarters but which also would be a fast, high-performance boat, and which could be used for water skiing (R. 148, 232). During the summer of 1972, Fry, his wife, and others made several trips to Defendant's place of business and to other boat dealerships regarding the purchase of a boat (R. 186, 230, 231). Plaintiffs were unable to find a power boat at Defendant's place of business or at any other dealers which was the type of boat they wanted (R. 231). During the course of Fry's shopping for a power boat, he examined boats with different types of hulls and different types of power units, and he discussed this with Farrell Holding (R. 181). In August of 1972, Fry indicated to Mr. Holding that he had found a power unit which consisted of a 440 cubic inch Chrysler engine with a propeller outdrive which he thought would be satisfactory, and he wanted to know if Holding could contact Starfire and see if they could install that unit in a boat for him (R. 185). Mr. Holding then contacted Starfire's place of business in Salt Lake City and arranged a meeting between Fry and Starfire (R. 185).

At the meeting, Mr. Webber of Starfire informed Fry that the Chrysler power unit was not available any more (R. 185, 186). Fry took a tour of the Starfire plant and inspected the boats and different power units. Fry discussed a particular Jacuzzi jet propulsion mechanism with Mr. Webber and explained that since Fry was a water skier he wanted enough power in this boat to be able to ski in the same manner as he had skied with his other boat (R. 186). Mr. Webber stated that he felt the

Jacuzzi unit would propel the boat satisfactorily (R. 186). Starfire then contacted Hardin Marine in California by telephone to see if the Jacuzzi unit was available for installation. Starfire was informed that the Jacuzzi unit and a 455 cubic inch Oldsmobile engine were available, which information was relayed to Fry who then requested a 454 cubic inch Chevrolet engine instead and asked Starfire to see if Hardin could supply that unit (R. 187). Starfire found out from Holding that the Chevrolet engine was available and it could be used with the Jacuzzi Jet. Starfire cautioned Fry at the time that the Chevrolet engine was a very high-performance engine which would not have a warranty (R. 188). The 454 cubic inch Chevrolet engine develops 450 horsepower; the 455 cubic inch Oldsmobile develops 295 to 325 horsepower (R. 415, 419). At this point, Plaintiff had selected a deep "V" 22-foot hull, and he requested that hull, the 454 Chevrolet engine, and the Jacuzzi Jet be put together for him, that Duce order the boat, and stated that if Starfire would guarantee that the boat would be completed by a certain date he would buy it (R. 188). The next day he returned to Defendant's place of business with \$500.00 earnest money. The contract of sale was executed three days later on August 15, 1972 (R. 171, 189).

Plaintiffs brought this action requesting rescission of the contract of sale on September 12, 1973 (R. 3). They had, by the time of trial, kept and used the boat for approximately two years, putting approximately 74 hours running time on the engine (R. 236). Plaintiffs never tendered the boat back to Defendant nor revoked the sale (R. 236, 237). Plaintiffs have

complained that the boat is not satisfactory for water skiing because it does not pull two water skiers well, although it has on occasion pulled two water skiers (R. 233). During the summer of 1973, Defendant made several attempts to improve the performance of the boat, at the request of Fry, by adjusting the power unit (R. 192, 193), installing trim tabs to accelerate planing (R. 203), adjusting the jet (R. 198), and installing a new jet (R. 209). None of these changes or adjustments satisfied Fry. Duce Sporting Goods never made a representation to the Plaintiffs with regard to the boat or power unit and their performance (R. 232, 233). Fry never explained to Defendant what he wanted in a boat in terms of performance and did not request or expect Defendant to furnish a boat that would meet any specific standard of performance. Fry stated in his testimony at trial that he knew what he wanted and that he did not rely on others to provide it (R. 230, 231). Fry selected the engine, jet drive system, and the hull and merely asked Defendant to arrange the assembly and purchase of the package.

At the conclusion of Plaintiffs' presentation of evidence, Defendant moved for dismissal on the grounds that upon the facts and the law Plaintiffs had failed to show any right to relief. The Court granted Defendant's Motion and entered a Judgment in favor of Defendant on Defendant's Counterclaim in an amount equal to the stipulated unpaid balance on the purchase contract, along with attorney's fees and costs.

ARGUMENT

PRELIMINARY STATEMENT

The gravamen of Plaintiffs' Complaint is that the power boat purchased from Defendant failed to consistently maintain sufficient power to pull two water skiers in the manner that Plaintiffs desire (R. 233). However, the boat was purchased as a multi-purpose boat, to be large enough to have sleeping accommodations as well as to pull water skiers (R. 230, 231, 232). Plaintiffs essentially claim that the failure of the craft to perform in accordance with Plaintiffs' specific desires was a breach of express and implied warranties and that Plaintiffs, therefore, should be awarded damages and rescission of the contract. However, the Trial Court ruled that there were no express or implied warranties made which were breached by Defendant, that no damages were proved, and that no rescission or timely revocation was made. The Trial Court stated that "Even when viewed in a light most favorable to plaintiffs, . . . there being no evidence of any breach of any warranty by Duce, . . . Duce's motion to dismiss Plaintiffs' case must be, and is granted." (R. 111, 112).

POINT I

DEFENDANT DID NOT BREACH ANY WARRANTIES.

(a) Express Warranty:

Plaintiffs complain that Defendant breached express warranties to them concerning the boat in question and cite as authority Section 70A-2-313, U.C.A. (1953) and a Utah case, Carver v. Denn, 17 Utah 180, 214 P. 2d 118, (1950). The statute supports Defendant's case rather than

Plaintiffs' case, and Carver v. Denn is clearly distinguishable in the facts.

The statute states:

"(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

"(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

"2. It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty." (§ 70A-2-313, U.C.A. (1953)) (Emphasis added)

Plaintiff's attempt to find an express warranty fails because, as indicated in the record, Defendant never made any affirmation of fact or descriptions contemplated by the statute with regard to the performance of the boat (R. 237).

On Cross Examination, Plaintiff J. Stanley Fry responded to questions asked by Defendant's counsel as follows:

"Q: Now, Mr. Fry, when you went with Mr. Holding and Mr. Malouf down to Starfire, at that point Duce had not made any representations to you as to any boat to buy particularly, had they?

"A: They tried to sell me what they had on the floor, naturally.

"THE COURT: That isn't the question, Mr. Fry.

"THE WITNESS: No, they did not.

"Q: So, that when you went down there, you went through the plant and looked at the different boats that were available there at Starfire; was that not so?

"A: Correct.

"Q: Did anyone at Duce Sporting Goods make any representations to you as to what that motor or pump would do on the boat that you finally purchased?

"A: No.

"Q: Did anyone at Duce make any representation to you that the boat you finally purchased would pull two water skiers?

"A: No."

Plaintiffs further claim that Defendant made warranties by and through sales personnel of Starfire. If any representations were made to Plaintiff, they were made by Starfire (R. 232, 233). Plaintiffs have presented no evidence that Starfire's sales personnel were agents of Defendants and the Trial Court so ruled. Instead of an agency argument, Plaintiff makes the novel, albeit unsupported argument, that representations of Starfire bind Defendant because Defendant was allegedly present when Fry dealt with Starfire, even though Defendant made no representations and did not stock a boat such as the one Plaintiff bought or any of its component parts.

The trier of fact, after hearing the evidence and reading counsels' Memoranda of Law, found:

"In my opinion the evidence, even when viewed in a light most favorable to Plaintiffs, compels a negative answer to that question. It was Fry who found no satisfaction in Duce's supply of boats. It was Fry who canvassed other boat dealers in town. It was Fry who got a line on a Chrysler engine. It was Fry who asked Holding to meet him at Starfire. It was Fry who selected the deep-V hull. It was Fry who chose the Chevrolet engine in place

of the Oldsmobile and the Jacuzzi to go with it. It was Fry who rejected Starfire's suggestion that he use twin jets. It was Fry who was the moving force in putting the boat together to meet his desires. Any opinion that the combination of elements chosen would probably meet Fry's requirements came from Starfire. It was Starfire that contacted Hardin, not Duce, and if Hardin was anyone's 'intermediary,' it was that of Starfire, neither of which is a party Defendant to Plaintiff's complaint.

Thus, in my opinion, there is no evidence to support a finding that Duce employed Starfire as its agent or intermediary so as to make Duce a merchant to whom knowledge or skill peculiar to this boat can be attributed. Nor do I believe that, based on the evidence, reasonable minds could reach a contrary conclusion."

Plaintiff cites the case of Carver vs. Denn, supra, to support the theory of express warranty. In Carver the buyer relied completely on the expertise of the seller to provide a suitable air conditioning system. The court therein states at page 121:

"The Plaintiff (Seller) was aware that Defendant (Buyer) knew nothing about air cooling equipment and he was also aware of the fact that the principal object of the negotiations and subsequent sale was to provide a suitable cooling system for Defendant's jewelry store."

In that fact situation, the court found a warranty. In the instant case, Plaintiff J. Stanley Fry relied on his own expertise. The record is replete with references to the amount of time Plaintiff devoted to boats and water sports. Plaintiff had built one boat, owned four boats, and has ridden in, skied behind, and driven many boats. Plaintiff chose his own equipment. Defendant made no representations to Plaintiff regarding any of that equipment. Plaintiff has failed to show that Starfire or Hardin were agents of Defendant for the purposes of this case. There was no express warranty

made to Plaintiff by Defendant, Duce Sporting Goods, Inc. Even had Duce made a representation to Fry, it would have been, in the words of U.C.A., 70A-2-313(2), ". . . an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods," not a warranty.

(b) Implied Warranty of Fitness for Purpose:

Plaintiffs contend that Defendant breached an implied warranty of fitness for a particular purpose in connection with the sale of the power boat. U.C.A., 70A-2-315 states:

"Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose." (Emphasis added)

This provision expressly requires that the Seller know that the Buyer is relying on the Seller's skill or judgment in selecting or furnishing the goods. In the case of Plaintiffs' power boat, Plaintiffs did not rely on Defendant to select or furnish any of the goods. Plaintiff, J. Stanley Fry, selected the component parts of the power boat, relying on his own expertise. The portions of the record cited below show that Plaintiff did not rely on the expertise of Defendant. The record shows that Plaintiff was the one who suggested that Starfire might have a boat that would fit his needs, and at that time he already had a particular engine in mind (R. 233). Plaintiff never stated in his testimony that he represented to anyone that he specifically wanted a boat to pull up two water skiers. Plaintiffs' boat

does float, go forward on the water, is large enough to sleep on, has a top speed satisfactory to Plaintiffs and does pull water skiers (R. 230, 232, 233, 237, 245, 256 and 272). Plaintiff assumed that Defendant knew what he wanted, when in fact he had not explained what he wanted from the boat in terms of performance, since he stated he "knew what he wanted," (R. 230, 231) and felt that he could recognize the boat that could provide what he wanted. In this case, the Buyer did not rely on the Seller's skill or judgment in obtaining this boat. Plaintiff cites the cases Aluminum Company of America vs. Electro Flo Corporation, 451 F.2d 1115; Mack Trucks of Arkansas, Inc. vs. Jet Asphalt & Rock Company, 437 S.W. 2d 459 (Ark.); and Boeing Airplane Company vs. O'Malley, 329 F.2d 585 (Ca. 8) for the proposition that an implied warranty of fitness should arise in the instant fact situation. These cases are all distinguishable on two separate grounds: (1) In each of these cases the Buyer had advised the Seller of the specific purposes for which the goods were needed, and (2) in each of these cases the Buyer relied on the Seller to furnish goods which would be suitable to perform those functions. In the case at bar, the Plaintiff neither specifically identified what he wanted the boat to do with respect to two skiers (R. 182, 183, 186, 245) nor relied on Defendant to furnish him any boat which would perform to any specific specifications. Plaintiff chose the parts which made up his power boat, relying only on his own expertise. Plaintiff has failed to produce any evidence that Duce had any knowledge or experience which would enable them to know what a 454 cubic inch Chevrolet engine with a jet outdrive

would do in a deep-V hull boat.

67 Am. Jur. 2d, "Sales," § 468, at page 639, states that under the Uniform Commercial Code the test for reliance "is whether the Seller at the time of contracting has reason to know of reliance by the Buyer on the expertise of the Seller." By the time the contract was executed in this case, Fry had personally selected the hull, engine, and jet outdrive (R. 167, 188), and rejected all advice that was offered him:

"A: Now, at this time, we were talking about the 455 cubic inch Olds engine. At this time at my suggestion I told them of this jet Chevrolet engine which is the 454 cubic inch Chevrolet engine with the 450 horsepower."
(R. 187)

* * * * *

"Q: And, in fact, you talked to a number of them, talked to a number of dealers in town to find out what you wanted, did you not?

"THE WITNESS: I did not talk to them as to what I wanted.

"Q: (By Mr. Conder) You knew what you wanted?

"A: I knew what I wanted.

"Q: You were going out shopping for a boat that would meet that quote criteria; is that right?

"A: Correct." (R. 230, 231)

* * * * *

"Q: Did the people at Starfire try to talk you out of a jet? Did they suggest the twin screws were better than the jet?

"A: They tried to talk me into a jet--into twin screws, excuse me.

"Q: And you preferred the jet?

"A: I preferred a single engine." (R. 233)

* * * * *

"Q: So what you were--Is it fair to say, you were looking for a particular hull and then you were going to put the power package into it to meet your specifications?

"A: No, that is not correct. We were looking, actually, for a boat that would come equipped as such.

"Q: And you were originally looking for a boat that came equipped with a Chrysler engine?

"A: No, I looked for the Chrysler engine after talking with Ferral and finding out they had nothing available with the power that I wanted. I liked the boat they had, but the power I didn't." (R. 243)

Plaintiffs have failed to produce any evidence which shows that at any time between Fry's initial contact with Duce and the execution of the contract that Fry did or said anything to suggest he was looking to the skill or judgment of Duce for selecting or providing the parts to the power boat. Pre-UCC law did not provide an implied warranty for goods which were specially ordered or manufactured to specifications, i.e., there was no warranty from defects which were implicit in the order, plans or specifications; the UCC Section 2-315 continues these principles in requiring that, before an implied warranty of fitness for purpose arises, two tests must be met--the Seller must have reason to know the particular purpose for which the goods are required, and the Buyer must be relying on the Seller's skill or judgment to select or furnish the goods. Plaintiffs cannot pass these tests in the instant case.

(c) Implied Warranty of Merchantability:

Section 70A-2-314 provides:

"Unless excluded or modified (section 70A-2-316), 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.

"(2) Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description, and (c) are fit for the ordinary purposes for which such goods are used."

This warranty arises only when these elements exist. Defendant contends: (1) That a warranty of merchantability never arose because Duce is not a merchant with respect to goods such as Plaintiffs' boat, and (2) that if such a warranty was created by operation of law, it was not breached in the instant case.

Duce is a sporting goods store which deals in a particular type of power boat. None of the power boats which Duce had for sale was satisfactory to Fry because Duce does not deal in boats designed for the kind of high performance that Plaintiffs expected from their power boat. The Trial Court stated:

"In my opinion the mere fact that a sporting goods store sells motor boats of a limited kind and variety does not mean such a store is a merchant with respect to all makes and models of motor boats that may exist on the market or of one that might be assembled through the imagination of one man." (R. 109, 110)

Bearing in mind the fact that Fry chose the hull, engine, and jet outdrive himself and the fact that Duce made no representations as to the performance of the parts separately or of the whole, it is helpful to

consider U.C.A., 70A-2-104, which defines "merchant":

"'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill."

Duce did not deal in the kind of high powered, high performance boat that Plaintiffs required. Duce never, during the entire series of contacts with Plaintiffs, held itself out as having knowledge or skill peculiar to the goods involved in the transaction. No employee of Duce made any such representation, and Plaintiffs have not alleged that Starfire or Hardin Marine were agents of Duce. Because Duce was not a merchant with respect to the power boat in question, an implied warranty of merchantability running from Duce to Fry never arose in the instant transaction. In this transaction, Duce was merely a conduit through which Plaintiffs' purchase of a high-performance power boat was arranged. Anderson, Uniform Commercial Code, 2nd Edition, Volume 1, "Sales," page 577, states:

"An implied warranty of merchantability only arises in the case of a sale by a merchant who sells regularly the kind of goods in question."

Plaintiffs have failed to present any evidence showing that Duce is in the business of regularly selling power boats such as the one in this sale.

Even if an implied warranty of merchantability did arise in this transaction, it was not breached by Duce. U.C.A., 70A-2-314(2)(a) and (c) requires that to be merchantable goods must pass without objection in

the trade under the contract description and be fit for the ordinary purposes for which such goods are used. This is a minimum standard, requiring a power boat to function as a power boat. In this case, the power boat purchased by Fry was used by them as a power boat for approximately two years, accumulating 74 hours running time on the engine. Plaintiffs are satisfied with the speed of the boat. Plaintiffs have found occasion to use the boat for some purpose in two years of boating. In short, Plaintiffs complain only that the boat doesn't fulfill adequately one of the several functions that it was purchased for -- specifically, pulling two water skiers up out of the water as Plaintiffs expected the boat to do when they purchased it. Plaintiffs don't complain that any of the individual parts don't function correctly. Instead, Plaintiffs complain that the unit put together to the express instructions of J. Stanley Fry doesn't function because the parts are incompatible. Plaintiffs are therefore complaining about the insufficiency of design of the boat. Anderson, Uniform Commercial Code, "Sales,"

Volume 1, page 579, states:

"The warranty of merchantability does not include **any** warranty as to the sufficiency of the design of the product. The Code does not change the common-law rule that in order for there to be an implied warranty of the sufficiency of the design the seller must be responsible for the design, either by its initiation or adoption. Conversely where the buyer is responsible for the design the seller makes no implied warranty of its fitness or of the fitness of the product generally."

(See also School Supply Service Co. v. J. H. Kenney & Co.,

(Ca. 5 Fla.), 410 F.2d 481, Official Code Comment § 2-316:1 Pt. 9.)

In this case, Plaintiff is complaining about his own design and

no implied warranty of merchantability extends this far. This boat works as a boat; it floats, moves forward and backwards on the water at an adequate speed, it performs all the functions of a boat and would pass without objection in the trade for power boats; it passes the test of merchantability.

POINT II

PLAINTIFFS HAVE NOT RESCINDED THE CONTRACT NOR HAVE THEY MADE TIMELY REVOCATION OF ACCEPTANCE.

Plaintiffs pray for the rescission of the contract. In order to effect rescission, the Buyers must tender back whatever assets they have received by reason of the contract.

In the case of Perry v. Woodall, 20 Utah 2d 399, 438 P.2d 813 (1968), this Court states:

" . . . The law is well settled that one electing to rescind a contract must tender back to the other contracting party whatever property of value he has received. Woodall elected to retain possession of the corporate assets and to carry on the business until it was taken over in the receivership proceedings. We are of the opinion that Woodall waited too long and that he cannot now rescind the contract."

In the principal case, the Plaintiffs have had the boat for two years and, although they have had numerous conferences with the Defendant, they have never once tendered back the boat.

The Idaho Supreme Court, in the case of Wettro vs. White, 232 P.2d 973 (Id. 1954), held that a Plaintiff who remained in possession of property for a period of two years waived any right of rescission on the contract by reason of failure to tender back the property before the

time. The Court said:

"Having thus remained in possession of the property and the business, operating it and treating it as their own during this period of nearly two years, the plaintiffs waived any right they had to rescission of the contract, or to the recovery of the payments made."

Even the Code provision, as quoted by the Plaintiffs in their Brief, U.C.A., 70A-2-608, subparagraph (2), requires that:

"Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it"

Again, the Utah Supreme Court, in the case of Knudsen Music Co. v. Masterson, 121 Utah 252, 240 P.2d 973, stated:

"In further support of the determination made by the trial court, it should be observed that ordinarily where a buyer continues to use a defective machine to derive benefits therefrom he waives his right to rescission (Citing case:) and if he wishes to rescind a contract he must manifest his election to do so without undue delay or the right will be lost. Williston on "Sales," Revised Edition, Sec. 611." (Emphasis added)

Anderson's "Uniform Commercial Code," Volume 2, Section 2-711:24, at page 422, states:

"The Code makes no provision with respect to the return of the goods when there has been a cancellation of the contract. The continuation of the general principles of equity, however, should be regarded as sufficient to retain the pre-Code requirement of the restoration of the status quo as a condition to rescission, unless waived by the party who would be entitled to the return of the goods, namely, the seller. That is, a buyer seeking to cancel must return or offer to return the goods to the seller." (Emphasis added)

The Plaintiffs in this case not only ask for rescission but they

further pray for damages in addition to the rescission of the contract.

67 Am. Jur.2d, "Sales," Section 516, at page 696, states:

"Accordingly, rescission puts an end to any right to recover the contract price or damages for breach of contract, relegating the aggrieved party merely to a right of restitution with respect to any performance rendered by him."

See also 17 Am. Jur.2d, "Contracts," Section 516, page 1002,

which states as follows:

"As a general thing, the effect of a rescission is to extinguish the contract and to annihilate it so effectively that in contemplation of law it has never had any existence, even for the purpose of being broken. Accordingly, it has been said that a lawful rescission of an agreement puts an end to it for all purposes, not only to preclude the recovery of the breach of the contract. An election to rescind a contract waives the right to sue upon it. After rescission for a breach, there is no right to sue on the contract for damages for such breach. A party rescinding for a breach or other good cause may, however, have a right to restitution with respect to any performance on his part.

"The effect of a rescission of an agreement is to put the parties back in the same position they were in prior to the making of the contract. At least, it has the legal effect of entitling each of the parties to be restored as far as is possible to the condition he was in before the contract was made." (Emphasis added)

Plaintiffs at no time notified Duce or any other party that they were rescinding the contract until this lawsuit was filed on the 12th day of September, 1973. In Plaintiffs' Brief, it is alleged that the evidence shows that Plaintiffs rescinded the contract. At no point in the record is there any evidence showing Plaintiffs rescinded the contract. In fact, the record states on pages 236 and 237:

"Q: During this two-year period, have you ever tendered the boat and was offering to give the boat back to Duce's and saying you wanted to get your money back?

"A: I told Mr. Malouf at Duce if he could not make this boat perform as it was represented, I felt I should either get a boat that would function or my money refunded.

"Q: But did you say to him, 'I don't want this boat. It is yours, I--'

"A: No, I did not.

"Q: Or words in that substance?

"A: I don't think so."

Mr. Fry did not tender the boat back or demand his money back until this suit was filed and this was not within a reasonable time. After the time that Mr. Fry made the above statements to Duce, Defendant continued trying to make the boat satisfactory to Plaintiffs through adjustments which did not satisfy Plaintiffs.

Plaintiffs argue as if to suggest that revocation of acceptance and rescission are the same. Plaintiffs cite Anderson on the Uniform Commercial Code to support the motion of revocation, when it is the principle of rescission that is vital to the question of remedy in the instant case. Anderson, Uniform Commercial Code, "Sales," Volume 2, at page 246, states:

"The concept of revocation of acceptance is not to be confused with rescission. Otherwise stated, the requirement of a tender in order to restore the status quo which is essential to a rescission does not apply to a revocation of acceptance."

Rescission requires the tender back of the goods to the seller, as defined by this Court in Perry v. Woodall, supra. The Trial Court, after hearing the evidence, held that there was neither rescission by Plaintiffs, nor revocation of acceptance within a reasonable time, and that filing a lawsuit did not by itself constitute either rescission or revocation. The Trial Court's conclusion should be affirmed.

POINT III

PLAINTIFFS FAILED TO PROVE ANY DAMAGES ARISING FROM BREACH OF WARRANTY.

If we assume, for the sake of argument, that the Plaintiffs are entitled to any damages and since the Plaintiffs in this case are seeking damages for a breach of warranty, it is important to consider the Utah Code Annotated, Section 70A-2-714 (2) which provides:

"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."

Plaintiffs have not shown any difference in value on the merchandise by reason of any claimed breach of warranty. There is a failure of proof of any recoverable damages in this case.

The difference in value means difference in fair and reasonable value but not the difference in value to some one person or for any one use. (Daily v. Holiday, 15 N.W.2d 477) Plaintiffs cite Utah Code Annotated, Section 70A-2-711, to support their argument for damages. A reading of the statute shows that is not applicable to the instant situation. The section

provides the procedure for collecting damages, not for assessing them. In this case, the Plaintiffs have failed to show damages. Plaintiffs contend that the boat is completely unacceptable and the measure of damages should therefore be the purchase price. Plaintiffs' contention is not well taken after two years use of the boat. Plaintiffs have presented no evidence to show any difference in value between the boat as it is and the boat as Plaintiffs allege it was warranted to be. Plaintiffs have also failed to show any breach of warranty diminishing the value of the boat. If there is no breach of warranty, there can be no damages under 70A-2-714. If there was no warranty with regard to the performance factor Plaintiffs complain of, then there can be no damages. Defendant contends that both of these propositions are correct. There was no warranty and there was no warranty breached.

POINT IV

THE LOWER COURT'S JUDGMENT ORDERING PLAINTIFFS TO MAKE PAYMENT OF THE UNPAID BALANCE OF THE PURCHASE PRICE PLUS ATTORNEY'S FEES SHOULD BE AFFIRMED.

Plaintiffs have not argued in their Brief that the Judgment entered by the lower court awarding the Defendant the unpaid balance of the purchase contract plus attorney's fees and costs should be reversed or set aside. Nevertheless, inasmuch as they seek to have that Judgment set aside in the relief they ask this Court to grant on appeal, Defendant herein desires to support its contention that said Judgment should be affirmed.

Defendant filed a Counterclaim in this matter based on Plaintiffs' failure and refusal to continue making payment as required in the contract

of sale (R. 16). After the lower court granted Defendant's Motion to Dismiss Plaintiffs' Complaint for failure to state a cause of action, the parties entered into a stipulation as to the amount of unpaid balance on the contract of sale, attorney's fees and costs. A hearing was held on Duce's Counterclaim and, based on the stipulation regarding unpaid contract price and after argument over the attorney's fees, the Court entered its Findings of Fact and Conclusion of Law and Judgment awarding Defendant the sum of \$8,879.14 principal and interest, \$10.00 costs, and \$1,000.00 attorney's fees. This Court should affirm the lower court's Judgment.

CONCLUSION

The Trial Court, in granting Defendant's Motion to Dismiss, viewed Plaintiffs' evidence in the light most favorable to them and found that they had failed to state a cause of action. Plaintiffs have failed to show a right to relief in the following particulars:

1. There is no evidence of any representations made to the Plaintiffs by this Defendant.
2. There is no evidence of a breach of warranty for merchantability since the boat is usable as a boat and has been used by Plaintiffs for two years and has approximately 74 hours time of actual operation.
3. There is no evidence of any breach of any implied warranty of fitness.
4. There is no evidence of any agency between Starfire and this Defendant.
5. There is no evidence of any affirmative representation made

by Starfire which would be binding upon this Defendant.

6. The Plaintiffs seek rescission and have failed to make a tender and therefore waived the right of rescission.

7. Plaintiffs have failed to prove any damages for any breach of warranty.

8. There is a complete failure of proof of any damages.

9. Judgment for Defendant is supported by the evidence.

Plaintiffs have not argued that it should be set aside, and said Judgment should be affirmed along with the lower court's Order dismissing Plaintiffs' Complaint.

Respectfully submitted,

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Stephen L. Henriod
NIELSEN, CONDER, HENRIOD AND
GOTTFREDSON
Attorneys for Defendant/Respondent
and Third-Party Plaintiff
410 Newhouse Building
Salt Lake City, Utah 84111

MOTION FOR ORDER GRANTING ATTORNEY'S FEES ON APPEAL

Defendant/Respondent, Duce Sporting Goods, Inc., respectfully moves the Court for its Order awarding attorney's fees on appeal in this matter for legal services incurred in connection with the appeal, the amount of said fees to be determined upon remand on the basis of evidence

to be presented to the lower court. All attorney's fees granted to date in the lower court are attributable solely to legal services performed prior to the appeal in this matter. This Motion is made pursuant to the Retail Installment Contract and Security Agreement executed by the parties which provides under Additional Terms, paragraph 2:

"For value received, Debtor by this contract grants a security interest in the personal property described herein . . . The security interest of aforesaid shall also secure payment of court costs, attorney's fees . . . and other charges, as permitted by law, and,

2. . . . In the event said collateral is sold, Debtor shall be liable for any deficiency . . . including secured party's reasonable attorney's fees and legal expenses, if allowed by law."

The above quoted provisions entitle Defendant/Respondent to compensation for attorney's fees incurred in responding to Plaintiffs/Appellants' Appeal, and a failure to award said fees would cause a reduction in the amount of recovery on the unpaid balance of the purchase contract.

DATED this _____ day of December, 1975.

Dean E. Conder
Stephen L. Henriod
NIELSEN, CONDER, HENRIOD AND
GOTTFREDSON
Attorneys for Defendant/Respondent
and Third-Party Plaintiff
410 Newhouse Building
Salt Lake City, Utah 84111

MAILING CERTIFICATE

SERVED the foregoing Brief of Respondent by mailing two copies thereof, postage prepaid, to Carman E. Kipp, Attorney for Plaintiffs, 520 Boston Building, Salt Lake City, Utah 84111, two copies to Paul N. Cotro-Manes, Attorney for Third-Party Defendant Starfire Industries, Inc., 430 Judge Building, Salt Lake City, Utah 84111, and two copies to W. Brent Wilcox, Attorney for Third-Party Defendant Hardin Marine, 600 Deseret Plaza Building, Salt Lake City, Utah 84111, this _____ day of December, 1975.

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