

No. 43934-4-II

COURT OF APPEALS - DIVISION TWO  
IN AND FOR THE STATE OF WASHINGTON

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CHUCK BABB, an individual

*Appellant,*

v.

REGAL MARINE INDUSTRIES, a foreign corporation

*Respondent.*

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**REPLY BRIEF OF APPELLANT**

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STATE OF WASHINGTON

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## ARGUMENT

### A. CONSUMER PROTECTION ACT

Regal's main contention in rebuttal to the CPA claim is that the advertisements it presents on its website are not deceptive. Regal may believe that its advertisements are not deceptive, but as demonstrated by Mr. Babb the advertisements clearly deceived him since they were the basis for his decision to purchase a Regal boat. Mr. Babb chose the Regal product because of its advertising. Mr. Babb traveled two hours from his house to go to a Regal specific dealer based on the promises contained on the Regal website. There is a genuine issue of material fact whether the advertisements were unfair or deceptive or at least had the capacity to deceive.

Regal next argues that the injury suffered by Mr. Babb is not related to the advertising so he has no basis of recovery. Respondent's Brief Pg 8. This argument is flawed. As argued previously, Mr. Babb was damaged because he did not receive a boat in a new, operable condition and when he made Regal aware of the boat's problems they refused to address his concerns. His injuries are as a direct result of purchasing a Regal boat that was defective from the first minute he used the boat.

## **B. WARRANTIES**

Regal focuses its arguments on the written warranty that it asserts is controlling on all of Mr. Babb's claims. Regal ignores significant issues that invalidate its limited warranty.

### **1. Mr. Babb did not waive his implied warranties when he purchased the boat.**

Regal improperly asserts that Mr. Babb signed the invoice waiving his implied warranty rights. As stated in Mr. Babb's opening brief, and is evident by reviewing the purchase documents, Mr. Babb did not sign the waiver of warranty section. Additionally, despite Regal's contention, Mr. Babb did argue waiver in response to Regal's Motion for Summary Judgment so waiver is a valid issue on appeal. CP 103-274.

### **2. Regal ignores the fact that Mr. Babb never received the written Regal limited warranty when he purchased the boat.**

Regal does not dispute that Mr. Babb never received the written warranty that it wants the court to use as the basis to deny all of Mr. Babb's warranty claims. Regal's arguments hinge on Mr. Babb being held to a warranty that he never received. There is no evidence to demonstrate that Mr. Babb agreed to be bound to the terms of the limited warranty. The trier of fact should decide

whether Mr. Babb should be held to the terms of an agreement that he never saw nor had a chance to negotiate.

Regal attempts to escape liability on the implied warranty claim arguing a lack of privity. As previously argued in Touchet Valley Grain Growers, Inc. V Opp Seibold 119 Wash.2d 334, 831 P.2d 724 (1992) implied warranties can extend to the manufacturer when there has been a beneficiary that is not in direct relation to the original purchaser (here the dealer).

**3. The expert report should have been considered by the court because it initially permitted Mr. Babb to obtain additional evidence.**

Regal doesn't want the court to consider the expert report arguing that the trial court did not request it. The court's oral ruling on the first summary judgment demonstrates that the court wanted additional evidence. It wasn't until the second hearing, when the court didn't have a report of the proceedings in front of it to review, that it decided to disregard the expert report. In the initial hearing the court stated "I am granting the defendant's motion as to all but the warranty claim, and I will allow Plaintiff an opportunity to present further evidence in a reasonable time." RP 26. Plaintiff then obtained an expert report to which the trial court disregarded at the second hearing. Plaintiff's expert report identified numerous deficiencies with the boat as well as the breach of warranties based

on the advertisements. The expert report further supports Mr. Babb's contentions and should be considered on summary judgment and by the trier of fact to determine Regal's liability.

### CONCLUSION

Appellant Babb never received a boat in good working condition despite it being labeled as new. A trier of fact should determine whether Regal violated the Consumer Protection Act and what warranties that Mr. Babb should be entitled to. Mr. Babb respectfully requests that this court reverse the decision of the trial court.

RESPECTFULLY PRESENTED this 3<sup>rd</sup> day of May, 2013.

ELSNER LAW FIRM, PLLC

By   
Justin Elsner, WSBA No. 39251  
Attorney for Appellant



Declaration of Service

I, Justin Elsner, certify under the penalty of perjury of the laws of the state of Washington that I served this document via the following methods on the following parties on May 3, 2013.

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Law Offices of Robert A. Green, Inc., P.S.  
1900 West Nickerson Street  
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*Via email per party's agreement*

And to:

Washington Court of Appeals  
950 Broadway, Suite 300,  
Tacoma, Washington 98402-4454  
*Via legal messenger*

Signed at Shoreline, Washington this 3rd day of May, 2013.

A handwritten signature in black ink, appearing to be 'Justin Elsner', written over a horizontal line.

Justin Elsner