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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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FOREST RIVER, INC., a corporation,

Appellant,

v.

WILLIAM THORN AND DARLENE THORN, a married couple,

Respondents.

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**REPLY BRIEF OF APPELLANT**

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## I. REPLY

### A. **The trial court's failure to enter an Order containing definite reasons of law and fact, as required by CR 59(f), warrants reversal of the Order granting Respondents a new trial.**

1. The oral opinion of record does not sufficiently explain the trial court's rationale for its Order.

Respondents contend the "oral ruling of record evinces all of the reasons for the trial court's order granting a new trial." Respondents' Opposition at p. 21. During the hearing on Respondents' motion, however, the trial court failed to explain its rationale for granting a new trial. Judge Serko merely claimed she made an error and should have taken a stronger position on the law. She did not explain what she felt she should have done or what the legal position would have been. Lacking a proper explanation from Judge Serko as to why she overturned the nearly unanimous jury verdict in favor of Forest River, the verdict should be reinstated.

Respondents cite *State v. Casey*, 7 Wn. App. 923, 503 P.2d 1123 (1972) for the proposition that, where a trial court order fails to explain its rationale for granting a new trial, the Appellate Court can instead rely on the oral record. However, *Casey* is distinguishable from the instant case as the new trial was clearly granted due to the "apparent false testimony of the complainant," who had lied in open court. *Id.* at 930. The court's rationale in *Casey* is not instructive to the instant case where the trial court claims it

should have taken a “stronger position” on the law (presumably by giving a certain jury instruction) yet fails to state the law in question or which instruction should have been given or why.

*Knecht v. Marzano*, 65 Wn.2d 290, 396 P.2d 782 (1964) and *Gestson v. Scott*, 116 Wn. App. 616, 67 P.3d 496, 500 (2003), cited by Respondents for the same rationale as *Casey*, also do not support granting a new trial. The court in both of those cases held the trial court order granting a new trial was made in error.

*Snyder v. Sotta*, 3 Wn. App. 190, 191–92, 473 P.2d 213 (1970) also does not support Respondents’ argument as the court in that case provided specific reasons for its order under CR 59(f):

Pursuant to CR 59(f) the court set forth its reasons in support of the order: (A) Plaintiffs’ proposed instructions were (1) inadvertently submitted to, (2) read, and (3) discussed by the jury during their deliberations; (B) three incidents of misconduct by defendants’ counsel, so flagrant and prejudicial that plaintiffs were not required to seek a curative instruction or move for a mistrial; and (C) observations made, and comments heard, by the trial judge during the course of trial, which matters are not contained wholly within the record.

In *Spyder*, the plaintiffs’ proposed jury instructions being mistakenly provided to, read and then deliberated upon by the jury was error significant enough to need no explanation from the trial court. Here, there is no such obvious error.

Although Respondents claim the oral ruling provides “explicit reasons” for its Order, that is not the case. When asked to explain the rationale for her Order, Judge Serko refused to provide any explanation other than stating she made a mistake. This Court can only speculate as to what mistake the trial court felt it made. Lacking a proper explanation from the trial court regarding its decision to override the will of the jury, the jury’s verdict should be affirmed.

2. The written order and record are not sufficient under CR 59(f) for purposes of granting Respondents a new trial.

Respondents contend the Order Granting a New Trial is sufficient on its face because it incorporates the parties’ briefing by reference. This argument should be rejected as the parties’ briefing still fails to explain the rationale for Judge Serko’s order. The purpose of CR 59(f) is to ensure the parties and the appellate court do not need to speculate as to why a new trial was granted. One can only speculate as to Judge Serko’s rationale as the Order contains no explanation for her ruling.

Respondents cite *Bensen v. S. Kitsap Sch. Dist. No. 402*, 63 Wn.2d 192, 386 P.2d 137 (1963) for the proposition that documents incorporated by reference in a trial court order may be reviewed in determining the trial court’s rationale for granting a new trial. However, *Benson* is distinguishable from the instant case as the document incorporated by

reference in *Benson* was a detailed memorandum of decision prepared by *the court*:

[The memorandum] stated the reason [it was granting a new trial], namely, error in giving instruction No. 10. The parties were informed of the reason for the order, and this court is likewise so informed. We hold this to be compliance with the rule.

*Id.* at 196. Contrary to *Benson*, the trial court in this case did not issue a detailed memorandum explaining the decision and there is no explanation of why the trial court overturned a nearly unanimous jury verdict.

*Benson* does not support an appellate court divining what may have been the trial court's intent in granting a new trial by reviewing the parties' briefing. Even if this Court undertook this task, the written record is insufficient. The Thorns raised at least five different arguments in their Motion for New Trial. *See* CP at 299. Without more, this Court would be required to engage in the exact type of speculative exercise the Washington Supreme Court intended CR 59(f) to prevent.

3. Appellant's authority supports reversal of the trial court Order.

Contrary to Respondents' claim in their Opposition, the authority cited in Forest River's moving papers supports reversal of the trial court Order Granting a New Trial. CR 59(f) and the case law interpreting it are clear: "definite reasons of law or fact" must be given to sustain a trial court

order granting a new trial. Here, the trial court Order is insufficient. Neither the written record or oral ruling provides the necessary explanation.

*Sdorra v. Dickinson*, 80 Wn. App. 695, 910 P.2d 1328 (1996), discussed in Appellant's moving papers is on point and supports reversal of the trial court Order in this case. Like the court in *Sdorra*, Judge Serko failed to identify specific jury instructions she felt should have been given and why. *See Sdorra*, 80 Wn. App. At 700. Even assuming Judge Serko only considered two of Respondents' arguments made in its Motion for New Trial, this Court is still left to speculate which argument led to Judge Serko's ruling. This error warrant reversal of the Order Granting a New Trial.

**B. There was no error in failing to give Respondents' proposed instruction 64.**

1. The Lemon Law does not require manufacturers to provide a warranty, but rather, creates a minimum time period for a consumer to report vehicle defects and obtain warranty repairs.

Respondents argue RCW 19.118.031 requires manufacturers of new motor vehicles issue a minimum one year, 12,000-mile warranty for all new motor vehicles.

RCW 19.118.031 provides:

(3) *For the purposes of this chapter*, if a new motor vehicle does not conform to the warranty and the consumer reports the nonconformity during the term of the eligibility period

or the period of coverage of the applicable manufacturer's written warranty, whichever is less, to the manufacturer, its agent, or the new motor vehicle dealer who sold the new motor vehicle, the manufacturer, its agent, or the new motor vehicle dealer shall make repairs as are necessary to conform the vehicle to the warranty, regardless of whether such repairs are made after the expiration of the eligibility period. Any corrections or attempted repairs undertaken by a new motor vehicle dealer under this chapter shall be treated as warranty work and billed by the dealer to the manufacturer in the same manner as other work under the manufacturer's written warranty is billed. *For purposes of this subsection, the manufacturer's written warranty shall be at least one year after the date of the original delivery to the consumer of the vehicle or the first twelve thousand miles of operation, whichever occurs first.*

RCW 19.118.031(3) (emphasis added).

This subsection protects consumers by creating a minimum one year, 12,000-mile period within which a consumer can report a nonconformity and obtain warranty repairs. It also protects consumers by requiring manufacturers to continue performing warranty repairs for timely reported nonconformities, *even after the eligibility period or warranty period expires*. In such a case, RCW 19.118.031 prevents the manufacturer from ceasing attempts to repair the nonconformity based on the warranty expiration. Rather, the manufacturer must continue to attempt to repair the issue as if it is covered by the warranty.

Since the statute requires the consumer “report” the nonconformity during the lesser of the warranty period or the eligibility period (which

RCW 19.118.021(6) defines as two years or 24,000 miles, whichever comes first), the Legislature deemed the warranty period “for purposes of this subsection” must be one year or 12,000 miles. This prevents manufacturers from using a shorter warranty period to avoid application of this subsection. For example, even if the manufacturer warranty was only 60 days long, “for purposes of this subsection,” the consumer would have one year or 12,000 miles to report a nonconformity and obtain warranty coverage.

Conversely, this provision also protects manufacturers. Even if the manufacturer has a ten-year, 100,000-mile warranty, if the consumer does not report the nonconformity within the eligibility period (two years or 24,000 miles, whichever comes first) the protections of RCW 19.118.031 no longer apply.

Respondents misread RCW 19.118.031 to mandate that manufacturers provide with the vehicle an *independent* one year “lemon law” warranty, presumably in the form of some kind of document. Respondents make this argument, *even though they never requested Lemon Law relief and could not have satisfied the elements of a Lemon Law claim.* Respondents argue RCW 19.118.031 requires manufacturers issue a warranty in order to create an argument Appellants violated a requirement of the Lemon Law, thereby arguably satisfying certain elements of the Consumer Protection Act, RCW 19.86 *et seq.*

The assertion that the statute requires an independent warranty must be distinguished from what the statute actually does. RCW 19.118.031(3) does not mandate manufacturers draft and provide a one year/12,000-mile warranty. Rather than requiring manufacturers issue an independent warranty, RCW 19.118.031 simply *extends* the manufacturer warranty to one year/12,000-miles in the event a manufacturer warranty is less in duration. This extension means the consumer has at least one year or 12,000 miles to report a nonconformity, and if reported during that period, the manufacturer must repair that issue and cannot cease repairs based on the expiration of the manufacturer warranty. In fact, RCW 19.118.031(3) would render Respondents' requirement of an independent one year/12,000-mile warranty superfluous and redundant.

RCW 19.118.041(3)(a) duplicates the warranty extension of .031(3). This subsection applies the same reasoning of .031(3). It grants consumers one year or 12,000 miles, whichever comes first, to obtain warranty repairs under the protection of the Lemon Law. If the manufacturer is not able to timely repair the vehicle, and if the consumer completes the requirements of .041(3)(a), the Lemon Law will require the manufacturer to repurchase or replace the vehicle. Neither RCW 19.118.031(3) nor .041(3)(a) require manufacturers to create and provide some kind of independent "Lemon Law Warranty" document.

2. Reading a mandatory warranty requirement into RCW 19.118.031 leads to strange and absurd circumstances.

Had the Legislature drafted an independent mandatory minimum warranty requirement into the Lemon Law, it would be a first in the United States to require manufacturers to issue mandatory minimum express warranties. Such a statute would have presumably been the subject of great debate, industry input, and the Legislature would have set forth the requirements of such a statute in great detail.

The omission of any such statutory detail coupled with the level of detailed language imposed by the Legislature in other parts of the statute belies the notion that the Legislature, or the Attorney General intended the Lemon Law to require an independent warranty document.

The Lemon Law specifies a three-dollar fee will be charged for all new motor vehicles upon execution of a retail sale or lease agreement in order to fund the state's Lemon Law program. RCW 19.118.110. This statute is also very clear about where the money is to be directed and how it is to be used. Sellers must notify consumers this \$3.00 fee is intended to fund the Lemon Law program in purchase and sale documents.

Pursuant to RCW 19.118.031, a new motor vehicle dealer is required to provide a Notice of Consumer Rights to a consumer at the time of purchase or lease of a 'new motor vehicle'. Failure to provide the Notice

of Rights is a per se violation of Chapter 19.86 RCW, the Unfair Business Practices Act. Notices of Consumer Rights are provided by the Attorney General's Office and Lemon Law Administration. Dealerships can order a supply of Notice of Rights by completing and submitting a form or by calling the Office of Attorney General Lemon Law Program.<sup>1</sup>

WAC 44-10-170 sets forth the powers and duties of arbitrators. WAC 44-10-180 governs the arbitration process. WAC 44-10-200 governs the arbitration decision. WAC 44-10-200 requires all decisions shall be written, in a form to be provided by the Lemon Law administration, dated and signed by the arbitrator, and sent by certified mail to the parties. This form prevents arbitrators from using their own language and from considering legal issues outside of the four-corners of the statute (for example, there is no provision for an arbitrator to challenge the statute or its procedure). The form is titled "Findings of Fact, Conclusions of Law, and Decision." The form provides language setting forth findings of fact and conclusions of law. The arbitrators are required to check boxes and circle findings and are not permitted to stray from the form to address legal issues outside the realm of what the Attorney General deems an appropriate Lemon Law issue.

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<sup>1</sup> See <https://www.atg.wa.gov/lemon-law-0>, and <https://www.atg.wa.gov/manufacture-and-dealer-services> for a description of the detailed process dictated by the attorney general and for the method of obtaining forms from the attorney general via a toll free number.

In the event the arbitrator checks the boxes necessary to warrant repurchase or replacement of a motorhome under RCW 19.118.041(2), then RCW 19.118.061 and WAC 44-10-221 set forth in detail the manufacturer's obligations when repurchasing a vehicle and require manufacturers and dealers use specific forms authored by the Attorney General. RCW 19.118.061 provides:

**Vehicle with nonconformities or out of service—  
Notification of correction—Resale or transfer of title—  
Issuance of new title—Disclosure to buyer—Intervening  
transferor.**

(1) A manufacturer is prohibited from reselling any motor vehicle determined or adjudicated as having a serious safety defect unless the serious safety defect has been corrected *and the manufacturer warrants*<sup>2</sup> upon the first subsequent resale that the defect has been corrected.

(2) Before any sale or transfer of a motor vehicle that has been replaced or repurchased by the manufacturer after a determination, adjudication, or settlement of a claim under this chapter, the manufacturer must:

(a) Notify the attorney general upon receipt of the motor vehicle;

(b) Submit a title application to the department of licensing in this state for title to the motor vehicle in the name of the manufacturer within sixty days; and

(c) Notify the attorney general and the department of licensing if the nonconformity in the motor vehicle is corrected.

(3) Before the first subsequent resale, either at wholesale or retail, or transfer of title of a motor vehicle previously returned after a final determination, adjudication, or settlement under this chapter or under a similar statute of any

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<sup>2</sup> That the Legislature did not include the term “for purposes of this subsection” in this language implicitly evidences its use of this phrase in RCW 19.118.031(3) and clarifies Appellant’s interpretation of the statute is correct.

other state, the manufacturer, its agent, or a motor vehicle dealer, as defined in RCW 46.70.011(4), who has actual knowledge of said final determination, adjudication, or settlement must:

(a) Obtain from the attorney general and attach to the motor vehicle a resale window display disclosure notice. Only the retail purchaser may remove the resale window display disclosure notice after execution of the resale disclosure form required under this subsection; and

(b) Obtain from the attorney general, execute, and deliver to the buyer before sale or other transfer of title a resale disclosure form setting forth information identifying the nonconformity and a title brand.

(4)(a) When a manufacturer reacquires a vehicle under this chapter, the department of licensing *must issue a new title with a title brand* indicating the motor vehicle was returned under this chapter and information that the nonconformity has not been corrected.

Consistent with RCW 19.118.061, WAC 44-10-221(1)(a) provides:

The Lemon Law administration will provide the manufacturer with the "Lemon Law resale documents" necessary to resell or otherwise transfer the vehicle together with instructions regarding compliance with RCW 19.118.061 and applicable rules....

Also consistent with RCW 19.118.061, WAC 44-10-222 requires, upon receipt of a returned vehicle, a manufacturer must notify the Lemon Law administration and the department of licensing of receipt of the vehicle, execute the appropriate sections of the Lemon Law resale documents identifying corrections made to serious safety defects and nonconformities.

Upon resale of a reacquired vehicle, RCW 19.118.061 and WAC 44-10-222(3) require manufacturers/sellers to attach the "Lemon Law

Resale Windshield Display" to the lower center of the front windshield or window on the driver's side of the vehicle in a manner so as to be readily visible from the exterior of the vehicle. The administrative code does not leave it up to the manufacturer to decide the language of the windshield display, but rather, the Lemon Law administration provides one with specific language. The Attorney General specifies the exact language and provides forms for every stage of the Lemon Law process from \$3.00 fee explanation, to the Notice of Consumer Rights, to the actual arbitration Findings of Fact, Conclusions of Law, and Decision, to the resale disclosure form to the Lemon Law Resale Windshield Display.

The Attorney General did not simply overlook what language would be necessary in a warranty had the Legislature mandated an independent warranty document the explanation is that RCW 19.118.031(3) does not mandate a warranty be provided. Rather, it merely extends the statutorily defined "warranty period" for "purposes of this subsection" to allow consumers at least one year/12,000 miles to report vehicle nonconformities and obtain warranty repairs. If the Lemon Law required manufacturers issue *their own* warranty, the Legislature and the Attorney General would have crafted a "Lemon Law One Year Warranty" or at a minimum specified its requirements.

The specific details posed by a statutory requirement of an independent “Lemon Law Warranty” present particular difficulties in the context of a recreational vehicle. Recreational vehicles come with numerous warranties covering everything from the chassis to the coach to the slide outs, air conditioning, appliances and tires. VRP at 998:16-23; 505:8 to 506:2 (Respondents’ expert, Douglas Walsh, opined there are a “constellation of warranties” across the various components that make up an RV).

In this case, even without the Forest River warranty, several warranties remained applicable to the Respondents’ vehicle, including the chassis warranty supplied by Freightliner. *Id.* In this regard, the recreational vehicle in this case would have satisfied Respondents’ purported Lemon Law Warranty requirement even without a Forest River warranty on the coach body. This reveals the difficulties posed by the purported independent Lemon Law Warranty requirement proposed by Respondents. Manufacturers would need to specify what each component would be required to warrant and how long. Even components seemingly unrelated to the driving portion of the motorhome could be impacted.

Respondents assert RCW 19.118.130 further supports the mandatory nature of the manufacturer’s warranty. However, this statute in no way suggests a manufacturer is required to provide an express warranty with the

sale of a vehicle. It merely prevents manufacturers from waiving protection of the Lemon Law by way of a contract.

Respondents claim Forest River's interpretation of the Lemon Law would allow manufacturers to circumvent the statute by cancelling warranties on vehicles they believe are unsafe or defective, thus subjecting consumers to all of the risk. Respondents' Opposition at p. 34. Presumably, the consumer would have also benefitted from the sale of the vehicle without a warranty by way of a lower price – reflecting one of the positive qualities of the freedom of contract. That aside, Respondents' argument is misleading in terms of a manufacturer's ability to avoid liability merely by selling a vehicle without a warranty. Even if a manufacturer sold a particular vehicle "used, as-is" and without a warranty, a consumer would still have available causes of action under the Washington Product Liability Act, RCW 7.72 *et seq.*, the Uniform Commercial Code, RCW 62A *et seq.*, and the Consumer Protection Act, RCW 19.86 *et seq.*, just to name three.

The lack of a cause of action against Appellant would not have denied Respondents legal redress. Respondents sued more than eight different entities including the dealership and Appellant. As far as claims against defendants *other than Appellant*, a partial list of Respondents' claims includes: negligence, breach of contract, violation of the Auto Dealers Act, violation of vehicle service contract laws, breach of implied

warranties, rescission, lender liability under the “Holder Rule,” injunctive relief and violation of the Consumer Protection Act.

Ironically, despite the abundance of claims Respondents asserted against the dealership in the underlying case, they failed to assert violation of express verbal warranty. The dealership, Sunset RV, in affirmatively representing the RV was covered by a Forest River warranty made an express warranty to Respondents. Respondents could have sued Sunset for violation of this express warranty and could have sought the value of equivalent warranty coverage as well as potential diminution in value as damages. Indeed, Sunset RV offered Respondents exactly that relief after determining they had mistakenly represented the vehicle came with a Forest River warranty. VRP at 718:15-23.

3. Respondents’ remaining arguments do not support their assertion of a mandatory minimum warranty.

Respondents claim Forest River’s policy is deceptive to consumers. However, there is nothing more deceptive about Forest River’s policy of selling certain motorhomes “used, as-is” than would be deceptive about the sale of any other used vehicle.<sup>3</sup> Forest River contracted with Sunset to

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<sup>3</sup> Contrary to Respondents’ assertions, Forest River does not consider these RVs “presumptively defective.” However, after an RV sits on a dealer’s lot for several years, it becomes impossible for the manufacturer to distinguish what, if any, items are due to the manufacture of the RV as opposed to dealer neglect. Using Respondents’ rationale, all “used” vehicles could be considered “presumptively defective.”

notify consumers at the time of sale there was no express warranty. As with any used car purchase, consumers can conduct a risk-benefit analysis. The benefit is a cheaper price, but there is risk the consumer may have to pay for repairs.<sup>4</sup> If the consumer does not want to risk having to pay for repairs, then it makes sense to purchase a vehicle with a warranty—or purchase a service plan just as the Thorns did in the instant case.<sup>5</sup> Notably, Forest River’s written warranty is not a warranty against defects, simply a warranty to cover the cost of repairs.<sup>6</sup>

Respondents further assert they were stripped of their ability to pursue a claim under the Lemon Law as a result of Forest River’s contract with Sunset. However, they had the opportunity to file a request for arbitration with the Lemon Law Administration and chose not to do so. It is disingenuous for them to argue their Lemon Law rights were stripped when they never even attempted to pursue them in the first place. The

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<sup>4</sup> Notably, Respondents fail to address Appellant’s argument at pages 29-30 of its moving papers regarding the fact a mandatory minimum warranty requirement would be a violation of the parties’ freedom of contract. Respondents’ failure to address this argument is telling.

<sup>5</sup> Forest River’s express warranty for the body structure of its RVs is only one year/12,000 miles. This is a common warranty period in the RV industry. In order to gain greater protection, consumers often purchase service plans from a third-party provider. VRP 505:15-18; *see also* VRP at 584:3 to 585:15.

<sup>6</sup> Here, since Sunset agreed to step into the shoes of Forest River’s warranty and cover the cost of repairs, Respondents were not damaged in any way. They also acknowledged in their testimony that they received a “deal” on this RV because of how long it had lingered on Sunset’s lot. VRP at 167:15 to 168:3.

failure to first seek redress under the Lemon Law also constitutes a waiver of that claim.

Respondents cite *Chrysler Motors Corp. v. Flowers*, 116 Wn.2d 208, 215, 803 P.2d 314 (1991) to support the claim a “demonstrator” can only be sold used if it has accrued more than 12,000 miles. However, *Flowers* is inapposite to the Court’s analysis in the instant case. *Flowers* merely held a demonstrator with less than 24,000 miles, which was not sold “used, as-is,” fell within the statute’s definition of “new motor vehicle.” *Flowers* did not address the situation presented in this case where the vehicle warranty was removed prior to sale and the vehicle was to be sold “used, as-is” by the dealer.

Appellant agrees the Lemon Law applies to used vehicles covered by warranties and meeting the criteria of the statute. Nothing in the Lemon Law states used vehicles are *not* covered by the statute. RCW 19.118.021(12) plainly states they are covered. However, the Washington Supreme Court’s opinion in *Flowers* does not hold every “demonstrator” must be sold with a warranty if it falls within a certain number of miles, and it does not hold a manufacturer cannot sell a demonstrator “used as-is” with appropriate notice to a consumer.

Likewise, Forest River does not dispute a vehicle’s mileage is relevant in determining whether it is a “new motor vehicle” under the statute. Even if a

vehicle has a valid manufacturer's warranty, it does not fall under this definition unless the repairs occurred during the eligibility period of two years or 24,000 miles, whichever occurs first. But this does not mean a manufacturer cannot sell a vehicle as "used, as-is" without a warranty.

As for footnote 15 on page 34 of Respondent's brief which quotes a Senate Bill Report stating, "Manufacturers are required to provide a warranty of 24 months or 24,000 miles, whichever occurs first," Respondents omit important language from that report. The paragraph before describes which vehicles are "covered" by the Lemon Law:

**SUMMARY:**

**Any self-propelled motor vehicle *for which a warranty is provided, except motorcycles and trucks with 19,000 pounds or more gross vehicle weight rating, are covered.***  
The self-propelled vehicle and chassis of motor homes are covered, but not the housing structure.

CP at 366-67 (emphasis added). Aside from the fact that this report is at odds with the language of the statute which refers to the "eligibility period" of two years and 24,000 miles, the prior paragraph clarifies, consistent with Appellants position, a vehicle is not "covered" if no warranty is provided. If the intent of the Senate was to apply the Lemon Law to vehicles that had no warranty, the report would have said "Any self-propelled motor vehicle ... except motorcycles and trucks with 19,000 pounds or more gross vehicle weight rating, are covered." In any case, this language merely addresses the

period within which the statute should apply (like RCW 19.118.031), it falls far short of suggesting the existence of an independent “Lemon Law Warranty.”

**C. It was not error to omit Respondents’ Proposed Instruction 43 regarding the negation of express warranties under RCW 62A.2-316(1).**

Respondents argue that “to the extent Forest River and Sunset could have lawfully reached and executed an agreement to sell the motor vehicle “used, as-is,” that did not occur here.” Respondents’ Opposition at p. 40. This argument attacks the validity of Forest River’s contract with Sunset. However, as the trial court recognized in *motions in limine*, Respondents lack standing to do so. This argument should, therefore, be disregarded.

Even if the Court considers this argument, it does not support Respondents’ claim of error in the trial court failing to provide Respondents’ Proposed Instruction No. 43. Respondents claim that “even if Sunset had complied with Forest River’s request and attempted to sell the Berkshire ‘as is,’ that alone would not constitute an effective waiver of the express warranty.” Respondents’ Opposition at p. 40. Even assuming a “used, as-is” clause, without more, would have been insufficient for purposes of waiving the express warranty, the duty of carrying out the sale in accordance with state law fell on Sunset as the “seller,” not the remote manufacturer, Forest River. Sunset’s mistake and/or deceptive conduct

does not bind Forest River as a completely separate entity which was not a party to the sale.

Sunset was not Forest River's agent for purposes of selling this vehicle. In the absence of actual exercise of control, a principal-agent relationship only exists if the principal has the right of control over the manner and means by which the work is accomplished. *Chapman v. Black*, 49 Wn. App. 94, 99 (1987) (the right of control is the "crucial factor"); *O'Brien v. Hafer*, 122 Wn. App. 279, 283 (2004) (same holding). Here, Sunset is an independent dealer. Forest River does not have the ability to control the manner in which Sunset operates its business, including the sale of this RV to Respondents. Respondents, therefore, cannot in good faith claim Sunset's actions bound Forest River into providing an express warranty.

In further support of this erroneous argument, Respondents cite to *Shelton v. Farkas*, 30 Wn. App. 549, 635 P.2d 1109 (1981), for the assertion an "as-is" clause is not sufficient to waive an express warranty that has attached to a product. Respondents' argument takes for granted that an express warranty automatically attached to this sale beyond the oral misrepresentations of Sunset. Lacking a contractual provision promising an express warranty as a condition of sale, a seller can disclaim any express warranties. Under such circumstances, the seller can rely upon the parol

evidence rule contained in section 2-202 of Washington's UCC, which reads, in pertinent part:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement....

RCW 62A.2-202; *see also Spokane Helicopter Service, Inc. v. Malone*, 28 Wn. App. 377, 623 P.2d 727, (1981) (In the absence of accident, fraud or mistake, parol evidence is not admissible for the purpose of contradicting, striking from, adding to, or varying the terms of an unambiguous written statement).

The parol evidence rule prevents the buyer from proving and relying on the alleged oral express warranty as to the manufacturer. Thus, the oral express warranty would be inconsistent with the disclaimer in a written agreement intended by the parties as the final expression of their written agreement. Here, had Sunset properly sold the RV "used, as-is," such a disclaimer would have been valid because there was no written agreement promising an express warranty as a condition of sale.<sup>7</sup>

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<sup>7</sup> Respondents assert "Forest River needs to pursue any available remedies for breach of contract against Sunset." However, Respondents' sole claim against Forest River is for violation of the CPA. Therefore, Respondents must demonstrate ***Forest River's conduct***, not Sunset's, was in violation of the law. Such arguments merely highlight the fact

This Court should also note the holding in *Shelton* does not relate to warranty disclaimers. The focus was on whether the product at issue, a violin, had been accepted and, if so, whether revocation was proper:

.... Mr. Shelton's action does not concern warranty, rather the threshold question is whether Mrs. Owen accepted the violin, and if it was accepted, whether she properly revoked her acceptance.

*Id.* at 554. The court's ruling in *Shelton* simply has no bearing on the instant case.

The trial court did not commit error in failing to give Respondents' Proposed Instruction No. 43 as there was no basis for the jury to conclude Forest River disclaimed an express warranty it had promised as a condition of sale. To the extent there was confusion regarding the warranty status of the subject vehicle, it was the result of Sunset's misrepresentations, and those claims were resolved by Respondents prior to trial.

## II. CONCLUSION

The trial court Order in this matter is insufficient to support its Order Granting a New Trial. CR59(f). The Court of Appeals should overturn the Order on this basis.

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Respondents are attempting to double-dip by settling claims against Sunset (which included rescission) and then pursuing the same damages against Forest River, based upon Sunset's conduct.

In addition, the Court of Appeals should find there was no error in failing to grant Jury instructions that RCW 19.118 *et seq.* requires manufacturers provide a “Lemon Law Warranty” or that manufacturers cannot sell new vehicles without warranties. RCW 19.118.031(3) and .041(3)(a) protect consumers by providing a one year, 12,000-mile period within which consumers can report vehicle nonconformities and within which the manufacturer has an opportunity to perform repairs. These statutes protect consumers. Given this statutory framework, an independent “Lemon Law Warranty” document would be redundant. A ruling the statute requires a warranty would offer little additional protection to consumers than that already provided. It would, however, lead to a host of other difficulties relating to the nature and scope of the Lemon Law Warranty – especially in the context of recreational vehicles involving multiple manufacturers.

As for Respondents’ argument regarding an alleged unlawful disclaimer of the warranty, no Forest River warranty attached to the vehicle at the time of sale. There is simply no merit to that argument.

For the foregoing reasons, Forest River requests this Court to reverse the trial court’s Order Granting a New Trial and re-affirm the nearly unanimous jury verdict in favor of Forest River.

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DATED this 3rd day of August 2020.

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