

No. 90086-8

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IN THE SUPREME COURT FOR  
THE STATE OF WASHINGTON

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REGAL MARINE INDUSTRIES, INC

Petitioner

v.

CHUCK BABB,

Respondent

**FILED**  
APR -2 2014  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

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Court of Appeals Case No. 43934-4-II  
Appeal from the Superior Court of the  
State of Washington for Pierce County

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**PETITION FOR REVIEW**

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STATE OF WASHINGTON  
CLERK OF THE SUPREME COURT  
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## **IDENTITY OF PETITIONER**

The petitioner is Regal Marine Industries, Inc. (“Regal”).

## **CITATION TO COURT OF APPEALS DECISION**

Regal seeks review of the Court of Appeals unpublished opinion, *Babb v. Regal Marine Industries, Inc.*, No. 43934-4-II (February 20, 2014) (Appendix (App.) A), which reversed in part the Pierce County Superior Court’s August 17, 2012 order granting Regal’s Motion for Summary Judgment with respect to Mr. Babb’s cause of action based on breach of implied warranty of merchantability. (App. B).

## **ISSUES PRESENTED FOR REVIEW**

Mr. Babb purchased a boat from a local boat dealer who had purchased that boat from manufacturer Regal. He sued Regal, *inter alia*, for breach of implied warranty of merchantability.

The issues presented are:

Can Mr. Babb, a vertical non-privity plaintiff buyer who is in the distributive chain, but who did not buy the boat directly from Regal recover against Regal for alleged damages based upon breach of implied warranty of merchantability?

Does the absence of evidence of an agency relationship between the manufacturer and the dealer and the lack of any direct negotiations between the manufacturer and the buyer prevent the creation of implied warranties?

Does the Court of Appeals decision regarding a manufacturer’s inability to disclaim implied warranties in its written warranty absent direct negotiation with the ultimate purchaser contradict or improperly modify the Uniform Commercial Code by

imposing implied warranties on a non-privity manufacturer while at the same time preventing the non-privity manufacturer from disclaiming them?

### **STATEMENT OF THE CASE**

In 2007, Mr. Babb shopped for a new boat. Mr. Babb visited a local boat dealership, Powerboats NW, which carried Regal boats, and he described to the salesman what he sought, eventually purchasing a Regal-manufactured boat from Powersports NW. Mr. Babb, however, was unsatisfied with the boat's performance, and he sued Regal, *inter alia*, for breach of implied warranties. Regarding implied warranties, Mr. Babb claimed that he never waived any implied warranties and that Regal is liable because he "never received a warranty packet that specifically identifies his boat and the coverage he is entitled to."

### **ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

**WHERE PLAINTIFF SUED THE MANUFACTURER RATHER THAN THE DEALER WHO SOLD HIM AN ALLEGEDLY DEFECTIVE BOAT, HE CANNOT RECOVER FOR BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY UNDER THE UNIFORM COMMERCIAL CODE, SINCE THE REQUIRED SALES CONTRACTUAL PRIVITY BETWEEN PLAINTIFF AND MANUFACTURER WAS ABSENT**

The decision of the Court of Appeals is in conflict with the decision of the Supreme Court in *Tex Enters. v. Brockway Std.*, 149 Wn.2d 204; 66 P.3d 625 (2003).

The petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The appellate court held that, because no evidence suggests that the parties negotiated a waiver of Regal's implied warranty of merchantability, the trial court erred in dismissing Babb's breach of implied warranty claim. However, the court did not

address the vertical privity of sale issue or analyze whether remote manufacturer Regal had ever made an implied warranty of merchantability that could be extended to Mr. Babb.

In its Answer Brief, Regal asserted that “Any ‘implied’ warranty claim against Regal is barred as a matter of law due to lack of privity and Regal’s disclaimers of implied warranty in its written warranty. *See Tex Enterprises, Inc. v. Broackway Standard, Inc.*, 149 Wn.2d 204, 66 P.3d 625 (2003).” (Answer Brief attached as App. C). The Appellate Court never addressed the issue and did not include the word privity or any privity of sale analysis in its decision.

As this Court has explained, “[T]he plain language of both RCW 62A.2-314 and 315 requires that implied warranties only arise out of contractual relationships.” *Tex Enterprises, Inc. v. Broackway Standard, Inc.*, 149 Wn.2d 204, 211, 66 P.3d 625. (emphasis added). RCW 62A.2-314 sets forth that a warranty that the goods shall be merchantable is implied *in a contract for their sale*. (emphasis added). Mr. Babb never entered into a sales contract with Regal. Mr. Babb contracted with Powerboats NW for the purchase of his boat.

Any exchange of monies and title were between Mr. Babb and Powerboats NW. Because there is no sales contractual relationship, Mr. Babb cannot bring any cause of action against Regal based on implied warranties unless Mr. Babb had offered evidence it is otherwise entitled to an implied warranty which he did not. *Id.* at 214 (“we hold that implied warranties do not arise out of express representations made by a manufacturer to a remote commercial purchaser absent privity or reliance on some underlying contract”); *see also Touchet Valley Grain Growers, Inc., v. Opp. & Seibold General Constr., Inc.*,

119 Wn.2d 334, 344, 831 P.2d 724 (1992) (holding that without contractual privity, a remote purchaser can only recover damages for breach of an implied warranty if it is a third-party beneficiary); *Baudino v. Aeroquip*, 1997 Wash. App. LEXIS 1947 (Wn. App. Div. 2 1997) (allowing consumers to proceed with their UCC express warranty claim, but affirming dismissal of the UCC implied warranty claim based on lack of vertical sales privity).

Here, the Appellate Court held that Mr. Babb cannot have agreed to disclaimer of implied warranties as set forth in Regal's express warranty because Mr. Babb did not execute a contract with Regal. That holding supports a finding that Mr. Babb and Regal were never in contractual privity. The Appellate Court's finding of lack of privity with respect to disclaimers is wholly inconsistent with its finding that an issue of fact can exist with respect to Regal and breach of an implied warranty of merchantability.

### CONCLUSION

Petitioner Regal Marine Industries, Inc. respectfully requests that this Court grant this Petition for Review and reverse the appellate court decision which is in conflict with the decision of the Supreme Court in *Tex Enters. v. Brockway Std.*, 149 Wn.2d 204; 66 P.3d 625 (2003).

DATED: March 20<sup>th</sup>, 2014

Respectfully submitted,

DAVID B. ADLER

By   
DAVID B. ADLER

(WSBA No. 16585)

Attorney for Petitioner  
Regal Marine Industries, Inc.

**DECLARATION OF SERVICE**

I, David Adler, certify under the penalty of perjury of the laws of the State of Washington that I served this document via legal messenger on the following parties on March 20, 2014:

Elsner Law Firm, PLLC  
Justin Elsner  
1501 North 200<sup>th</sup> Street  
Shoreline, WA 98133

Signed at Seattle, Washington this 20<sup>th</sup> day of March, 2014.

  
David Adler

# APPENDIX

A

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

CHUCK BABB, an individual,

Appellant,

v.

REGAL MARINE INDUSTRIES, INC., a  
foreign corporation,

Respondent.

No. 43934-4-II

UNPUBLISHED OPINION

JOHANSON, J. — Chuck Babb purchased a boat manufactured by Regal Marine Industries, Inc. (Regal) from a local boat dealer. Babb, however, was unsatisfied with the boat's performance, and he sued Regal on numerous grounds, including violation of Washington's Consumer Protection Act (CPA),<sup>1</sup> as well as breach of express and implied warranties. The trial court dismissed Babb's claims on summary judgment and on reconsideration, and Babb now appeals. Because Babb failed to produce evidence that Regal engaged in an actionable unfair or deceptive act, the trial court did not err in dismissing Babb's CPA claim. And because Babb does not allege any fact, promise, description, sample, or model made by Regal relating to or

<sup>1</sup> Ch. 19.86 RCW.

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describing any of Regal's goods, thus creating any express warranties, the trial court did not err in dismissing Babb's breach of express warranty claims. But because no evidence suggests that the parties negotiated a waiver of Regal's implied warranty of merchantability, the trial court erred in dismissing Babb's breach of implied warranty claim. Accordingly, we affirm the trial court's orders dismissing the CPA and express warranty claims, but we reverse the trial court's order dismissing Babb's implied warranty claim.

#### FACTS

In 2007, Babb shopped for a new boat. He researched the boat market and read product reviews which, according to Babb, rated Regal positively. Consequently, he visited the Regal website and claimed to be impressed with Regal's advertisements. He was drawn to "Regal's commitment to excellence" and how Regal "strive[s] to provide exceptional customer service, Regal is a family business that stands by its products, and the owners have strong Christian values." Clerk's Papers (CP) at 119. Babb viewed approvingly Regal's self-characterization that it would "be honest and do what's right" as well as its motto "[w]ith God's help and a steadfast commitment to integrity, we will develop a team of exceptional people and relationships to provide exceptional customer satisfaction." CP at 119.

Babb visited a local boat dealership, Powerboats NW, which carried Regal boats, and he described to the salesman what he sought, eventually purchasing a Regal. The Regal boat had a Volvo engine.

Regal provides a limited warranty for its boats. The warranty specifies that the dealer will repair or replace any defective parts for one year from delivery. But the warranty lists

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exceptions not covered: engines, aftermarket accessories, gelcoat surfaces, damage caused by user negligence, accident, or misuse, among others. The limited warranty also expressly states, "REGAL MAKES NO WARRANTY, OTHER THAN CONTAINED HEREIN." CP at 95. The Volvo engine had its own warranty.

Babb received his new Regal boat in July 2007. According to Babb, when he first used it, he noticed that it "ran rough" and had a "vibration." CP at 120, 352. In October 2007, Babb first called Regal and spoke with customer service representative Chuck Rainey, who provided information to Babb about how Babb could repair the boat himself.

Over the 2007 to 2008 winter, Babb stored his boat and in spring 2008, his son-in-law, Shane Hagen, used it. Hagen reported that the boat "repeatedly stalled and had to be towed back into shore." CP at 120. Babb phoned Rainey again in July 2008, and Rainey told Babb to take the boat to CSR Marine, a repair shop, and to tell them that Rainey "ok'ed it."<sup>2</sup> CP at 120.

CSR Marine inspected Babb's boat and informed Babb that the boat's engine had a small engine head crack caused by freeze damage. Babb phoned Regal again in December 2008, indicating he needed to repair his boat and that his dealer, Powerboats NW, had gone bankrupt. He spoke with Regal Manager of Customer Service, Mark Skrzypek, and explained the cracked engine head. Skrzypek informed Babb that the cracked engine was caused by improper winterization, not a manufacturing defect. Skrzypek also told Babb that Regal's warranty did not cover the Volvo engine.

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<sup>2</sup> In 2008, Babb also complained of a cracked aftermarket wakeboarding tower on his boat; Rainey ordered a new tower for Babb's boat and shipped it to him.

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Babb was dissatisfied when Skrzypek advised him that Regal would not cover the engine repairs, so he sued Regal on numerous grounds, including a CPA violation, and breach of express and implied warranties, among others.<sup>3</sup> Regarding the CPA claim, Babb contended that Regal engaged in unfair or deceptive acts because Regal claimed to “stand behind their product,” have “exceptional” customer service, and to have pride in being family owned. CP at 110. Regarding express warranties, Babb claimed that Regal made promises in its advertising materials that it failed to satisfy, including touting its customer service satisfaction and product quality awards, as well as advertising its “first-class reputation.” And regarding implied warranties, Babb claimed that he never waived any implied warranties and that Regal is liable because he “never received a warranty packet that specifically identifies his boat and the coverage he is entitled to.” CP at 115.

Regal filed a summary judgment motion. The trial court granted summary judgment to Regal on the CPA claim, reasoning that Regal did not engage in unfair or deceptive actions. The trial court did not immediately grant summary judgment on the warranty issue because in viewing the evidence most favorably to Babb, it was unclear what caused the boat’s vibration, and it may have been caused by something for which Regal was responsible—not the engine. When Babb could not identify evidence in the record tying any of his claims to anything other than engine problems, the trial court granted Regal summary judgment on Babb’s warranty claims. The trial court noted that Regal’s positive “customer satisfaction” claims were “mere puffery” and did not give rise to an express warranty. Report of Proceedings (Aug. 17, 2012) at 12. Babb now appeals the trial court’s orders dismissing his CPA and warranty claims.

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<sup>3</sup> Of Babb’s claims, only the CPA and breach of warranty claims are at issue on appeal.

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## ANALYSIS

### SUMMARY JUDGMENT

We review summary judgment orders de novo. *Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). Trial courts properly grant summary judgment where the pleadings and affidavits show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Questions of fact may be determined on summary judgment as a matter of law only where reasonable minds could reach but one conclusion. *Alexander v. County of Walla Walla*, 84 Wn. App. 687, 692, 929 P.2d 1182 (1997). When reviewing a grant of summary judgment, we consider solely the issues and evidence the parties called to the trial court's attention on the motion for summary judgment. RAP 9.12.

#### A. CONSUMER PROTECTION ACT

Babb first argues that the trial court erred in granting Regal summary judgment on Babb's CPA claim because genuine issues of material fact exist regarding whether Regal failed to provide Babb with the service it claims is paramount to its success. We affirm because Babb fails to establish that Regal's statements were anything other than unactionable puffery.

To prevail in a private action brought under the CPA, the plaintiff must establish that (1) the defendant has engaged in an unfair or deceptive act or practice, (2) in trade or commerce, (3) that impacts the public interest, (4) the plaintiff has suffered injury in her or his business or property, and (5) a causal link exists between the unfair or deceptive act and the injury suffered. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 149, 930 P.2d 288 (1997). Whether a particular action gives rise to a CPA violation is reviewable as a question of law. *Leingang*, 131 Wn.2d at 150.

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Here, Babb argues that Regal engaged in unfair or deceptive practices when it advertised that “they [Regal] stand behind their product, strive for ‘exceptional’ customer service, and pride themselves on being family owned.” Br. of Appellant at 8. These statements, however, constitute mere puffery and do not give rise to an actionable CPA claim.

General, subjective, unverifiable claims about a product or service are “mere puffery” that cannot give rise to false advertising or, in this context, an unfair or deceptive act. *See Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1053 (9th Cir. 2008), *cert. denied*, 557 U.S. 903 (2009).<sup>4</sup>

Babb, however, fails to demonstrate that any of these statements were more than general, subjective, vague statements about Regal’s service that one cannot simply test to verify. Accordingly, these statements were “mere puffery,” and they are not actionable. *See Newcal Indus.*, 513 F.3d at 1053. For example, Babb cannot prove that Regal does not “strive” for exceptional customer service or “pride themselves” on being family owned. Nor can he prove that Regal does not “stand behind” its products and service. These subjective statements, mere puffery, are not actionable. So as a matter of law, Babb failed to establish a CPA claim and the trial court did not err in granting Regal summary judgment on this issue. *See Leingang*, 131 Wn.2d at 149-50.

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<sup>4</sup> Our CPA is intended to complement federal laws that purport to regulate the same activities, here deceptive or fraudulent trade practices. RCW 19.86.920. Accordingly, in construing the CPA, we may find guidance in federal court interpretations of federal statutes regarding deceptive or fraudulent advertising claims. *Newcal Industries* involves the Lanham Act, 15 U.S.C. § 1051 et seq., which regulates false advertising, among other things.

B. BREACH OF WARRANTY ACTIONS

Next, Babb argues that the trial court erred in granting summary judgment because Regal provided express and implied warranties to Babb guaranteeing Babb's satisfaction. Because Babb's express warranty claims all relate to Regal's statements regarding its service and not its products, Babb failed to raise a claim related to goods, a requisite for an express warranty claim. But regarding Babb's implied warranty claim, the evidence does not demonstrate that the parties negotiated to waive any implied warranties, so any waiver would have been invalid. Therefore, the trial court did not err in granting summary judgment to Regal on Babb's breach of express warranty claims, but it improperly granted summary judgment to Regal on Babb's implied warranty claim.

1. EXPRESS WARRANTIES

Babb asserts that Regal's advertising statements constituted express warranties guaranteeing that Babb would be satisfied with his Regal boat.

Express warranties are any affirmation of fact or promise, any description, or any sample or model by a seller relating to or describing the goods when such representation forms the basis of the bargain. RCW 62A.2-313. Here, Babb does not recount any fact, promise, description, sample, or model made by Regal relating to or describing any of Regal's goods. Instead, he cites Regal's stated commitment to customer service and integrity, and its status as a family business with Christian values that stands behind its products. Babb also quotes from Regal's mission, "With God's help and a steadfast commitment to integrity, we will develop a team of exceptional people and relationships to provide exceptional customer satisfaction." CP at 119. None of

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these representations guarantee anything about Regal's products, their quality, or craftsmanship. Accordingly, Babb has failed to set out a prima facie breach of express warranty claim, and the trial court did not err in granting summary judgment to Regal on this claim.<sup>5</sup> See RCW 62A.2-313 (Express warranties are any affirmation of fact or promise, any description, or any sample or model by a seller relating to or describing the *goods*.).

## 2. IMPLIED WARRANTIES

Regarding implied warranties, Babb contends that Regal guaranteed a "seaworthy boat in proper working condition." Br. of Appellant at 22. He claims that Regal implied these warranties in its advertising statements.

Unless excluded or modified, a warranty that goods are merchantable is implied in a contract for their sale, so long as the seller is a merchant with respect to goods of that kind. RCW 62A.2-314; *Tex Enters., Inc. v. Brockway Standard, Inc.*, 149 Wn.2d 204, 208, 66 P.3d 625 (2003). This implied warranty of merchantability assures that the goods are fit for the ordinary purposes for which such goods are used. RCW 62A.2-314(2)(c); *Tex Enters.*, 149 Wn.2d at 208. Similarly, unless excluded or modified, an implied warranty of fitness for a

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<sup>5</sup> Babb cited cases to support his express warranties claim. Each of these cases, however, involved a defendant's representations regarding its products. See *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Constr., Inc.*, 119 Wn.2d 334, 348, 831 P.2d 724 (1992) (builder's products "will be tailor-made and of highest quality"); *Travis v. Wash. Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 404, 759 P.2d 418 (1988) (horse breeder's horses were "healthy and fit for racing and breeding purposes"); *Urban Dev., Inc. v. Evergreen Bldg. Prods., LLC*, 114 Wn. App. 639, 643, 59 P.3d 112 (2002) (brochures advertised the company's "exterior insulation and finish system"), *aff'd*, 151 Wn.2d 534, 90 P.3d 1062 (2004). Thus, these cases do not support Babb's claim.

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particular purpose arises 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. RCW 62A.2-315; *Tex Enters.*, 149 Wn.2d at 208-09. And in order to waive implied warranties in the sale of consumer goods, the parties must specifically negotiate for the waiver and the waiver must state, with particularity, the qualities and characteristics that are not warranted. RCW 62A.2-316; *Thomas v. Ruddell Lease-Sales, Inc.*, 43 Wn. App. 208, 213, 716 P.2d 911 (1986).

Here, Regal expressly excluded all implied warranties in its limited warranty: "REGAL MAKES NO WARRANTY, OTHER THAN CONTAINED HEREIN; TO THE EXTENT ALLOWED BY LAW ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE ARISING IN STATE LAW ARE EXPRESSLY EXCLUDED TO THE EXTENT ALLOWED BY LAW."<sup>6</sup> CP at 95.

But the record does not demonstrate that the parties negotiated this waiver. Because there is no evidence of negotiation, by statute, the waiver is invalid. *See* RCW 62A.2-316. And viewing the facts in a light most favorable to the nonmoving party, here Babb, we hold that Regal, as a boat manufacturer, offered an implied warranty of merchantability that its boats would function properly. Babb offers evidence that his boat never worked right, creating an issue of material fact whether his new Regal boat ever functioned properly. Accordingly, the trial court improperly granted summary judgment dismissing Babb's implied warranty claim.

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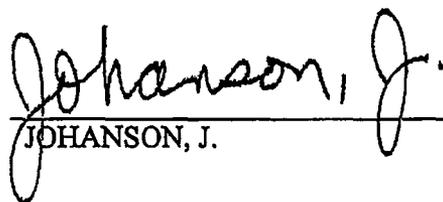
<sup>6</sup> Regal also cites its sales invoice, which included an implied warranties section, stating that the dealer made no warranty to any parts unless warranted by the manufacturer or implied in writing. This "IMPLIED WARRANTY NEGOTIATION" section on the sales invoice, however, had its own signature lines, which neither Babb nor Regal signed. CP at 50. Though Babb and Regal signed the sales invoice itself, neither party signed the "IMPLIED WARRANTY NEGOTIATION," therefore Babb did not waive the implied warranty.

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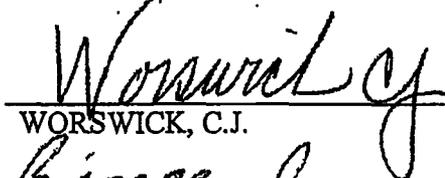
We affirm the trial court's orders dismissing Babb's CPA and express warranty claims.

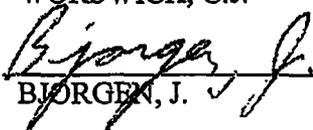
We reverse the trial court's order dismissing Babb's implied warranty claim.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
\_\_\_\_\_  
JOHANSON, J.

We concur:

  
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WORSWICK, C.J.

  
\_\_\_\_\_  
BJORGEN, J.

**B**

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4           IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

5                   IN AND FOR THE COUNTY OF PIERCE

6   Chuck Babb, an individual,         )  
7    ) Plaintiff,                                 )  
8   vs.                                        )    )  
9    )   ) No. 10-2-11385-7  
10   Regal Marine Industries, a         )   ) Appeal No. 43934-4-II  
11   foreign corporation,                 )  
12    ) Defendant.                               )

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**Motion**  
**Verbatim Report of Proceedings**

13 **Appearances:**

14           Justin G. Elsner, Attorney at Law, appeared on behalf  
15 of the Plaintiff.

16           Robert A. Green and Brooks Rathet, Attorneys at Law,  
17 appeared on behalf of the Defendant.

18           BE IT REMEMBERED that on **August 17, 2012**, the  
19 above-captioned cause came on for hearing before the  
20 **Honorable Stephanie A. Arend**, Judge of the Superior Court in  
21 and for the County of Pierce, State of Washington; the  
22 following proceedings were had, to-wit:

23  
24   Jan-Marie Glaze, CCR, RPR, CRR         Official Court Reporter  
25   930 Tacoma Avenue South                Dept. 12, Superior Court  
          Tacoma, Washington 98402         (253) 798-6584

1 Friday, August 17, 2012

2 Morning Session

3 \* \* \*

4 (Mr. Rathet appears via speakerphone.)

5 MR. ELSNER: Justin Elsner.

6 MR. GREEN: Robert Green along with  
7 Mr. Rathet.

8 THE COURT: Plaintiff's motion for  
9 reconsideration. So, Mr. Green, are you arguing for  
10 the defense or...?

11 MR. GREEN: Mr. Rathet will be arguing.

12 THE COURT: Okay.

13 MR. RATHET: Yes, Your Honor, I'll be  
14 arguing.

15 THE COURT: You must be able to hear me okay,  
16 then, because you just responded.

17 MR. RATHET: Yes, Your Honor, I do hear you  
18 quite well. Thank you.

19 THE COURT: Okay. Good.

20 MR. ELSNER: Thank you, Your Honor. Briefly,  
21 just to recap where we're at. Defense had brought a  
22 summary judgment motion. This Court granted partial  
23 summary judgment motion on a few of the issues --  
24 actually, the causes of action, reserved on warranty  
25 claims, express and implied warranties, asks the

1 plaintiff to provide some additional evidence on that  
2 issue. I guess there is a little bit of dispute on  
3 exactly what the Court is looking for. The Court did  
4 not hear oral argument on the supplemental response  
5 from Plaintiff and defense. Mr. Babb did retain his  
6 expert, provide his expert's report to the Court  
7 thinking that was what the Court was looking for. The  
8 Court then went ahead and granted the remainder of the  
9 summary judgment dismissing the express and implied  
10 warranty claims.

11 So our motion is based on, essentially, the  
12 supplemental issue that came up. Since there wasn't  
13 any oral argument, it wasn't 100 percent clear for the  
14 parties to know what triggered the Court in granting  
15 the remainder of the summary judgment, and so our  
16 motion for reconsideration is asking the Court to take  
17 a closer look at some of the cases that deal with  
18 warranties and how it works in conjunction with our  
19 expert report and Mr. Babb's testimony.

20 The Federal Signal Corporation case. In that  
21 case, express warranties are any description of the  
22 goods is the basis of the bargain. And then subsequent  
23 case, the Hartman case, description of seeds as "good"  
24 by a salesman were enough to survive summary judgment  
25 motion for -- or determine whether that was an express

1 warranty that had been created.

2 Regal maintains that the only warranty in this  
3 case is their written document warranty; whereas,  
4 Mr. Babb's maintained that Regal created additional  
5 warranties by their outward advertisement on their web  
6 page. One call is all it takes. Great service.  
7 Exceptional service, training, their numerous awards.  
8 That was the sole basis why he sought out a Regal  
9 dealership because of their history and because of  
10 their advertisements on their website to that effect.  
11 And so that created its own separate express warranty.

12 And then, additionally, the implied warranty. As  
13 the expert pointed out, an implied warranty would go to  
14 the essential purpose of the particular product.  
15 Captain Stephen Carr testified in his report that the  
16 intended purpose of the boat that Mr. Babb purchased  
17 was to have -- you know, he wanted a brand new boat.  
18 He paid for a brand new boat, but that is apparently  
19 not what he got.

20 The evidence was that from Day 1 Mr. Babb had  
21 continual problems with the boat and numerous different  
22 things as outlined in the expert's report. So the  
23 testimony of Mr. Babb and Captain Stephen Carr, I  
24 believe, create an issue of fact for the jury to weigh  
25 different opinions of the experts and to determine

1           whether the additional advertising that Regal presented  
2           on its website that Mr. Babb relied on was the basis  
3           for him choosing a Regal boat did create warranties or  
4           at least a material issue of fact where the jury should  
5           decide whether those were additional express warranties  
6           created in addition to the implied warranties and  
7           should go to the jury on the warranty claims.

8           There was a little discussion about the expert  
9           report and it being disclosed timely, and we addressed  
10          that and believe the reason why we disclosed the expert  
11          report was at the request at the Court. I wasn't sure  
12          in the reply brief on the summary judgment issue, the  
13          defense had gone into great length to address that  
14          issue. Really, what it comes back to is either there  
15          is a difference of opinion in what the Court was  
16          requesting or a misunderstanding or just requesting  
17          that the Court reconsider that based on the expert  
18          reports and the testimony of Mr. Babb that the actions  
19          of Regal did create the express warranties and that the  
20          implied warranties were also breached by failing to  
21          provide a boat that was seaworthy from Day 1.

22                   THE COURT: Okay. You're not arguing, right?  
23           Is it Mr. Rathet?

24                   MR. RATHET: Yes, Your Honor.

25                   THE COURT: Go ahead.

1 MR. RATHET: Thank you, Your Honor. The end  
2 of the previous argument is where I think we need to  
3 begin, and it is procedural, but it's important to the  
4 substance of this matter.

5 Where the Court left us after the initial hearing  
6 and the Court's directions never, as far as Regal  
7 understood or anyone could understand it, was to divert  
8 away from Rule 56 of summary judgment which is the rule  
9 that governs summary judgment; and that rule is clear  
10 that the adverse party, the plaintiff in this case, can  
11 file and serve opposing affidavits, memorandum of law,  
12 other documentation within a certain period of time  
13 before the hearing -- 11 calendar days -- and then  
14 judgment is rendered by the Court, which Your Honor  
15 did, based on the pleadings, the depositions, the  
16 answers to interrogatories, the admissions on file  
17 together with those affidavits and that's what creates  
18 the record evidence for the Court to decide, based on  
19 the record before the Court. And Your Honor did review  
20 the record before the Court, granted summary judgment  
21 on most of the causes of action, and reserved ruling on  
22 express warranty, perhaps also implied warranty -- my  
23 understanding was only on the express warranty, but  
24 reserved ruling in order to allow the defense -- the  
25 plaintiff, I'm sorry -- allow the plaintiff to point

1 out to the Court in the record, the record before the  
2 Court, what, if anything, created an issue of material  
3 fact.

4 Having that as the basis -- you know, Rule 56, in  
5 effect -- and being allowed that opportunity by the  
6 Court, what Plaintiff decided to do was, for the first  
7 time ever, have this vessel, years after the litigation  
8 started, have it inspected by an expert. And it's  
9 true, this expert, his name was disclosed timely. We  
10 knew about his existence, but there had never been an  
11 inspection. There had never been a report, and the  
12 Court, I think rightly, probably perceived that as well  
13 outside its directions and the rules of summary  
14 judgment and the case law as far as unfair prejudice  
15 and improper actions to try to avoid summary judgment.

16 From a substantive standpoint, even if that  
17 report, that late disclosed report -- not even late  
18 disclosed, I mean disclosed after the initial summary  
19 judgment -- but even if that report were allowable and  
20 you just heard the argument of counsel, all that report  
21 did, really, was make the same legal arguments on  
22 behalf of the plaintiff that have already been made.  
23 This expert did not come up with any -- or point to any  
24 issue of material fact that supported the causes of  
25 action. It just basically -- I think Plaintiff relied

1 on this expert almost to double down on the legal  
2 arguments that have been made, but it doesn't change  
3 anything. The expert's opinion as to what a  
4 merchantable boat is or what an implied warranty is  
5 have no bearing on the fact that you need privity of  
6 contract between Regal and the plaintiff for there to  
7 be an implied warranty that Regal has to be held  
8 responsible for. So the implied warranty count,  
9 nothing changes based on the expert opinion that the  
10 boat was not a good boat or had problems from Day 1.  
11 Admittedly, that might be an issue of fact whether the  
12 boat had problems from Day 1, but that has nothing, no  
13 bearing at all on the implied warranty count.

14 We get to the express warranty count and, again,  
15 the record in evidence is this Regal written warranty.  
16 That's the express warranty in this case, and we also  
17 do have, yes, Mr. Babb's deposition and his  
18 interrogatory answers, but that was before the Court  
19 previously where he said Regal told me they were a  
20 God-fearing company, Regal had put their record on the  
21 internet about how they have a good reputation, how  
22 they won awards. None of that amounted to an express  
23 warranty that formed the basis of the bargain in this  
24 case. None of it had to go to the performance of  
25 Mr. Babb's boat or what, if anything, would be covered

1 under Mr. Babb's boat if anything went wrong. It was a  
2 general support of Regal's brand through advertising  
3 which is a normal thing.

4 "Built Ford Tough" is what Ford Motor Company  
5 does. That's not to say that your vehicle will not  
6 have problems and what we'll do to fix it when they  
7 have problems. This expert has offered nothing new in  
8 the record at all even if he were allowed to offer  
9 anything, which we don't think should be permissible.

10 The other issue, of course, is the express  
11 warranty. The written warranty disclaims -- and it's  
12 in the record -- and it disclaims any other warranty.  
13 It says, "This is Regal's only warranty. We make no  
14 other warranty" and this warranty is what covers your  
15 boat expressly.

16 Another element where Plaintiff is still -- the  
17 expert witness and whatever he said is reported is  
18 irrelevant is he pointed to nothing at all -- and this  
19 is what the Court really wanted Plaintiff to go back  
20 and show in the record linking anything about the  
21 materials or workmanship of Regal and the problems  
22 complained of by Mr. Babb.

23 The record is clear that it's an engine issue.  
24 It's a cracked engine. The warranty disclaims engines,  
25 does not include engines, and there's nothing about the

1 expert report that changes any of that. So, Your  
2 Honor, there is really -- Regal's opinion is there is  
3 no reason to reconsider. The Court made the right  
4 ruling the first time, made the right ruling the second  
5 time and should affirm its ruling.

6 MR. ELSNER: Very briefly, Your Honor. Rule  
7 56 does allow for continuances, and that's exactly what  
8 the Court did. In essence, it continued the summary  
9 judgment hearing so the plaintiff could provide an  
10 expert report outlining what our claims were. The  
11 Court was concerned that Mr. Babb would just come in  
12 here and whine and complain and that would be it. But  
13 what the plaintiff did was get his expert to do a full  
14 analysis of the boat and came up with a complete  
15 evaluation and report of the boat.

16 Defense had, a couple weeks prior, done their  
17 evaluation of the boat. The Court gave the defense  
18 ample time to respond to the expert report, and so  
19 there's no dispute on the timeliness of the disclosure  
20 of the expert report and the ability to respond to  
21 that.

22 Lastly, regarding the performance of the boat,  
23 that is exactly what is the issue here and what is the  
24 material issue in dispute is that this isn't about  
25 "Built Ford Tough." It is -- the motto of Regal is

1 "Customer Service is our Motto." It's part of our DNA.  
2 We have all of these great awards, and that is, as  
3 Mr. Babb testified in his deposition, why he sought out  
4 the Regal boat. He sought out a boat and a company  
5 that would stand behind its product, and that didn't  
6 happen here. They created this impression, this  
7 warranty that, you know, we'll take care of you, and  
8 that is why he sought out the Regal company, and a jury  
9 should decide if that is, in fact, an express warranty  
10 and something that Regal should be bound by if it is  
11 going to go to extreme lengths to present itself as  
12 this great company, and that is what didn't happen  
13 here, and that is what a jury should decide.

14 THE COURT: Hmm. Okay. My recollection --  
15 and I don't have a verbatim report of proceedings in  
16 front of me, but my recollection is that there was not  
17 a request for a CR 56(f) continuance of the summary  
18 judgment motion in order to obtain additional evidence;  
19 that I had decided on all aspects of the summary  
20 judgment motion except for the portion of the express  
21 warranty and I believe, as already indicated, that it  
22 was clear there was an engine problem that was excluded  
23 from the warranty by Regal. So the question really  
24 before the Court that the Court was unable to answer  
25 was was there some other portion of the warranty and

1           some other defect with regard to the boat that wasn't  
2           the engine that would cause it to survive summary  
3           judgment, and that's what I was looking for and not to  
4           go get an expert or have a report done or -- because  
5           none of that was requested of the Court, which I  
6           routinely grant if somebody asks for a CR 56(f)  
7           continuance.

8           The difficulty is where does that put us now? I  
9           subsequently got that, felt that it was outside of the  
10          record and that the argument that Mr. Rathet just made  
11          is exactly correct; that is what happened and that is  
12          why I ruled the way I ruled. And, honestly, I don't  
13          think saying that customer satisfaction is in their DNA  
14          can be anything more than mere puffery. I don't know  
15          how that could ever rise to the level of a warranty.  
16          So I'm going to deny your motion for reconsideration.

17                 MR. GREEN: I have an order, Your Honor.  
18          Your Honor, I also have a final order granting Regal  
19          Marine, Inc.'s summary judgment motion on all claims.

20                 THE COURT: Did I not sign an order already?

21                 MR. GREEN: You signed one on all claims  
22          except for the breach of warranty.

23                 THE COURT: Didn't I sign an order on breach  
24          of warranty then?

25                 MR. GREEN: Yes, you signed a summary

1 judgment motion order -- an order granting summary  
2 judgment motion on all claims except breach of  
3 warranty.

4 THE COURT: I got the additional materials  
5 and then I signed another order, didn't I?

6 MR. ELSNER: I believe so.

7 THE COURT: How else are we in here on a  
8 motion for reconsideration?

9 MR. GREEN: That's fine.

10 THE COURT: I thought I did.

11 THE CLERK: There was an order signed on  
12 July 18th. Final order granting motion of Regal Marine  
13 Industries on all claims.

14 MR. GREEN: I'm sorry. I apologize. I  
15 didn't get that.

16 (Proceedings concluded.)

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C

No. 649394-4-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, INC., a foreign corporation

*Respondent.*

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**OPENING BRIEF OF RESPONDENT REGAL MARINE  
INDUSTRIES, INC.**

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**RESPONSE TO ASSIGNMENTS OF ERROR**

1. The trial court did not err when it granted summary judgment dismissing Appellant's Consumer Protection Act claim for failing to prove that Regal's "advertisements" were unfair or deceptive.

2. The trial court did not err when it granted summary judgment dismissing Appellant's warranty claims because the engine was excluded from the warranty, the "advertisements" did not create a warranty, there was no privity of sale between Appellant and Regal required for an implied warranty claim, Regal disclaimed implied warranties, there was no proof of causation or damages.

## STATEMENT OF THE CASE

### A. Background

Appellant filed a five-count Complaint against Regal as follows:

Breach of Contract;

Consumer Protection Act (CPA) Violation;

Breach of Warranty;

Good Faith and Fair Dealing;

Rescission.

On appeal, Appellant has raised issues only with respect to the Consumer Protection Act and Breach of Warranty. Therefore, Appellant has apparently abandoned any claims on appeal regarding breach of contract, good faith and fair dealing and rescission.

Appellant has never had any legal or factual basis to bring any action against Regal. He complained about and sued the wrong party. Appellant appears to have had sales issues, issues with an aftermarket part and non-Regal engine issues caused by lack of or improper maintenance. None of these problems involve Regal factually or legally. For whatever reasons, Appellant did not file a complaint against the seller or the engine manufacturer. Instead, he alleged causes of action against Regal that failed as a matter of law.

The trial court held a summary judgment hearing and dismissed all of Plaintiff's claims other than his warranty claims. The trial court offered Plaintiff additional time to direct the trial court to evidence in the record that created an issue of fact with respect to warranty claims. Instead, on July 13, 2012, 19 days before a scheduled trial, Plaintiff submitted an expert report for the first time. The trial court rejected this attempt to offer new evidence because it did not comport with her directive or to procedure. The trial court allowed Appellant additional time to cite to the existing record with respect to the warranty claims and dismissed them. Appellant failed to do so and the trial court dismissed his claims.

**B. Facts**

On or about July 10, 2007, Appellant purchased the 2007 Regal 2000, HIN RGMFFM356F607 from PowerBoatsNW in Fife, Washington. CP 32, 49-50. The invoice sets forth above the signature block and under the heading "Implied Warranty Negotiation" that the dealer makes no warranty to any parts unless warranted by the manufacturer or implied in writing. CP 32, 49-50. Appellant signed the invoice as did the salesperson for PowerBoatsNW. CP 32, 49-50.

Appellant used the boat without incident from June, 2007 until the first winter layup or storage period in the winter of 2007. CP 33, 97. During the startup of the vessel in the spring of 2008, Appellant noted an

issue with water in his engine oil. CP 33, 98. This was most likely caused by freeze damage. CP 33, 98-99. Plaintiff alleged that “the boat ran rough.” CP 105. Plaintiff’s son noticed “performance issues.” CP 105. Plaintiff’s son-in-law “took the boat out, but found that it repeatedly stalled and had to be towed back into shore.” CP 105.

On or about May 21, 2009, A&J Auto/Truck/Marine performed repairs on Appellant’s engine, including replacing the long block. CP 33, 82-84. On or about July 20, 2009, counsel for Appellant sent an e-mail to Mark Skrzypek of Regal regarding an issue with “the motor on his boat being delivered to him with a cracked block.” CP 33, 85-91. On or about July 23, 2009, Appellant made a “formal claim for warranty repair” to Regal through counsel. CP 33, 85-91. On July 24, 2009, Mr. Skrzypek sent an e-mail to Appellant’s attorney attaching the Regal Limited Warranty applicable to Appellant’s vessel. CP 34, 85-91. The Regal Limited Warranty does not cover engines, damage caused by negligence, or lack of maintenance. CP 34, 92-94.

The Regal Limited Warranty does not cover boats damaged by accident and boats damaged while being loaded onto, transported upon or unloaded from trailers, cradles, or other devices used to place boats in water, remove boats from water or store or transport boats on or over land. CP 34, 92-94. The warranty excludes costs or charges derived from

inconveniences or loss of use, commercial or monetary loss due to time loss, and any other special, incidental or consequential damage of any kind or nature whatsoever. CP 34, 92-94. Regal's warranty excludes all implied warranties. CP 34, 92-94. On or about July 23, 2009, Mr. Skrzypek sent an e-mail to Appellant's attorney notifying him of Regal's position that the Appellant's complaints were based upon faulty winterization services that had nothing to do with Regal. CP 36, 85-91.

#### **ARGUMENT**

Summary judgment is appropriate if the record before the court shows that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). A material fact is one upon which the outcome of the litigation depends. *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). defendant in a civil action is entitled to summary judgment if the defendant shows that the Appellant lacks evidence to support an element essential to the Appellant's claim. *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992) (citing *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989)). Summary judgment in favor of a defendant is appropriate if the Appellant fails to establish a prima facie case concerning an essential element of his claim. *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d

1068 (2001). In response to a motion for summary judgment, the Appellant may not simply rely on the allegations in the pleadings but must set forth specific facts by affidavit or otherwise that show a genuine issue exists. *Id.* An affidavit must contain facts within the affiant's personal knowledge and which are admissible at trial. *Id.*

#### A. CONSUMER PROTECTION ACT

The trial court correctly decided that the first element of Appellant's Consumer Protection Act (CPA) claim had not been met. There is no evidence in the record of an unfair or deceptive act. RP (June 22, 2012) at 25. Appellant argues that Regal's "advertisements" were somehow unfair or deceptive. What he calls advertisements were selected statements found on Regal's website that were in no way deceptive.

Regal was entitled to judgment as a matter of law with respect to Appellant's claim that Regal violated the Consumer Protection Act (CPA). *Aubrey's R.V. Ctr. Inc. v. Tandy*, 46 Wn. App. 595, 731 P.2d 1124 (1987). In order to maintain a private CPA action, Appellant must establish five elements: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) public interest impact, (4) injury to Appellant in his or her business or property, and (5) a causal link between the unfair or deceptive acts and the injury suffered by the Appellant. The CPA does not define "unfair or deceptive act or practice." *Leingang v. Pierce County*

*Med. Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997); *see also Griffith v. Centex Real Estate Corp.*, 93 Wn. App. 202, 214, 969 P.2d 486 (1998).

There is no evidence of an unfair or deceptive act or practice. First, the statements on Regal's website did not specifically address Appellant's purchase, complaints or service. They are general statements of Regal's commitment to its products and customers. Appellant acknowledges he saw that J.D. Power had given Regal high ratings. According to Appellant, Regal expressed on its website a commitment to excellence and that Regal strives to provide exceptional customer service. None of those general statements are inconsistent with a specific scenario where a specific consumer is displeased with the service he receives. There is no evidence in the record that Regal is not committed to excellence or does not strive to provide exceptional customer service. Appellant does not believe Regal lived up to its commitment. There is no evidence that Regal is not a family business, nor that it fails to stand behind its products. In fact, as discussed more fully below, Appellant acknowledges Regal stands behind its products with a warranty. That warranty does not cover the Volvo engine and does not cover damages caused by lack of maintenance. Regal's limits on its warranty and exceptions for another manufacturer's part are not inconsistent with its commitment to its product. There is no evidence that

Regal lacks strong values, business integrity, or honesty. Appellant's subjective belief that Regal did not live up to his expectations does not create a cause of action.

Appellant purchased the boat and, with it, the warranties that covered certain items, excluded others and included warranty procedures. Regal delivered a boat to a boat dealer that transferred it to another dealer that sold it to Appellant. Regal covered the boat under the terms of a Limited Warranty. Regal replaced Appellant's tower and assisted Appellant in finding a repair facility to diagnose engine issues. Regal did all this despite the fact that Appellant did not act in accordance with the terms of the warranty. Regal never refused to address anything covered under the Limited Warranty. Appellant's allegations are that Regal did not pay to fix things on Appellant's boat that were expressly excluded from Regal's Limited Warranty coverage. Regal had no contractual or legal duty to fix things that its warranty expressly said it would not fix and did not have any obligations outside the warranty terms or warranty period.

Appellant's dissatisfaction over Regal not paying to repair his engine damaged due to lack of maintenance or Volvo workmanship, and not covered under Regal's warranty, does not meet the public interest requirement under the CPA. *Aubrey's R.V. Center, Inc. v. Tandy Corp.*, 46 Wn. App. 595, 609-610, 731 P.2d 1124 (1987). Plaintiff offered as

“evidence” *ad hominem* attacks on Regal’s reputation based on two other non-Washington lawsuits involving two of the thousands of boats Regal has sold since Plaintiff bought his. One, a federal case in Ohio, *Risner v. Regal*, is still pending. The other, a Florida state case, *Munns v. Regal*, was dismissed in Regal’s favor on summary judgment. CP 276, 281-301.

Also, to establish CPA causation, Appellant must show that the deceptive act was a cause which “in direct sequence . . . produce[d] the injury complained of and without which such injury would not have happened.” WPI 310.07; *see also Indoor Billboard v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007) (“plaintiff must establish that, but for the defendant’s unfair or deceptive practice, the plaintiff would not have suffered an injury.”). In *Indoor Billboard*, the Washington Supreme Court held that, in CPA cases where a defendant is accused of making affirmative misrepresentations of fact, a plaintiff must establish that the misrepresentation was a proximate cause of the injury. 162 Wn.2d at 83-84 (rejecting plaintiff’s argument that it only needed to demonstrate a causal link between the unfair practice and the injury). Here, Appellant’s alleged injury is a cracked Volvo engine. There is no evidence that Regal’s general website representations caused that damage.

## **B. WARRANTIES**

### **Express Warranties**

Regal was entitled to judgment as a matter of law with respect to Appellant's claim against Regal for Breach of Warranty. Appellant argues that he never waived his warranties with Regal. Waiver was not an issue below. It was not a basis for the trial court's decision. Appellant ignores the valid argument that the limited warranty at issue is exactly that – limited – and excludes certain claims. With respect to the express warranty claims, the Court initially did not grant summary judgment, allowing the Appellant the opportunity to point out where in the record an issue of fact existed with respect to the breach of express warranty claim. RP (June 22, 2012) at 25-26. The trial court later ruled that it was clear that there was an engine problem that was *excluded* from the warranty from Regal. RP 11 (August 17, 2012). The question before the court was whether there was some other portion of the warranty and some other defect to the boat apart from the engine that would allow the case to survive summary judgment. RP 12 (August 17, 2012).

Appellant continues to glaringly omit that Regal's contention, and the trial court's decision, was that there is no record evidence of a defect covered under Regal's warranty and attributed to Regal material or workmanship at the time of delivery. True, Mr. Babb alleges that he had vibration issues early in his ownership. The record

evidence supports the existence of a cracked motor. The record is clear that Regal did not manufacture and did not warrant the Volvo engine. The record also is devoid of any evidence that Appellant has established with reasonable certainty a manufacturing defect as a cause of any damage for him to recover damages from Regal. Moreover, he cannot exclude other causes as required by law.

A manufacturer's liability for breach of an express warranty derives from, and is measured by, the terms of that warranty. Accordingly, the "requirement[s]" imposed by an express warranty claim are not "imposed under State law," but rather imposed by the warrantor. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

At page 21 of his Brief, Appellant refers to an expert report that was properly barred by the trial court. On, July 13, 2012, 19 days before a scheduled trial, Appellant submitted the expert report. The trial court had not granted a continuance to present new evidence, but had rather given Appellant the chance to point out already-existing record evidence in a follow-up hearing. RP (August 17, 2012) at 11-12. Where parties have an opportunity to present evidence at a summary judgment hearing, the parties cannot present evidence after the opportunity passes. *Wagner Dev., Inc. v. Fid. & Deposit Co. of Maryland*, 95 Wn. App. 896, 907, review denied, 139 Wn.2d 1005 (1999). Appellant's failure to follow procedure

and court order by not timely providing the information about the expert precluded use of the report. See *Summer Pond Props. v. Transamerica Title Ins. Co.*, 91 Wn. App. 1031 (1998); *Donald B. Murphy Contrs. v. King Cty.*, 112 Wn. App. 192, 199-200 (2002) (trial court reasonably denied motion to amend filed 10 days before summary judgment where it would affect witnesses, experts, and defenses); *Wallace v. Lewis County*, 134 Wn. App. 1, 26 (2006); *Wilson v. Horsley*, 137 Wn.2d 500, 507 (1999) (after being aware of factual basis for the proposed amendments, raising new issues on the eve of trial is unfair surprise); *Del Guzzi Constr. Co. v. Global Northwest*, 105 Wn.2d 878, 888-89 (1986) (no abuse of discretion when trial court denied a motion to amend pleadings filed a week before summary judgment).

Regardless of any report, the record is absent of any evidence that a Regal manufacturing defect, or indeed any manufacturing defect, existed at the time of delivery. It is the law that the Appellant must establish with reasonable certainty a manufacturing defect as a cause of the damage for him to recover damages from the defendant. In attempting so to do, if the evidence shows that the injury is equally or else with reasonable certainty attributable to other probable causes, he must also exclude such other causes. *Seven Gables Corp v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

In this case, Regal met its burden of showing an absence of a genuine dispute of fact as to the boat's vibration caused by an engine issue. Appellant offered no evidence, not even speculation to show a dispute of fact over whether it was a Regal-covered defect. It is pure speculation on the part of Appellant that any problems he had with his boat were caused by Regal manufacturing defects and it is indisputable that no problems that he reported are related to Regal's manufacturing of Regal parts. Such speculation fails as a matter of law to state a cause of action for breach of warranty. *Seven Gables Corp v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Where there are several alternative reasons why a marine engine can fail, there must be evidence that suggests the defendant's manufactured part caused the failure. *Id.* Here, it is pure speculation that the marine engine failed as a result of any breach of warranty by Regal.

Appellant attempts to circumvent the only Regal warranty in the case by arguing other warranties may exist. With respect to other express warranties, Appellant again refers to "guarantees listed on Regal's website" The record in this case from Appellant's side consists only of Regal's website and Regal's commitment to excellence, telling its customers Regal strives to provide excellent customer service, Regal is a family business that stands by its products, and the owners have strong

values. Appellant also refers to Regal's assertion it has business integrity and the phrase "be honest and do what's right" which accompanies the company's mission "With God's help and a steadfast commitment to integrity, we will develop a team of exceptional people and relationships to provide exceptional customer satisfaction."

The website references and record evidence create no issues of the existence of an express warranty other than Regal's written warranty and certainly no evidence of breach. Moreover, the record evidence includes Regal's Limited Warranty that sets forth in capital letters that it is the only Regal warranty. The statements Appellant references from the website are not a warranty covering repairs to a cracked Volvo engine.

In Washington, an express warranty is created as follows:

- (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.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

RCW 62A.2-313(1). General praise of a product is not a warranty. *Baughn v. Honda Motor Co., Ltd.*, 107 Wn. 2d 127, 150, 727 P.2d 655 (1986). The

general website claims regarding Regal quality and service cited by Appellant are not specific affirmations of fact or promises that the boat would conform to the general statements. The written Regal Limited Warranty contains the specific promises. All of Appellant's claims of dissatisfaction with Regal involve post-sale conversations that were not part of the basis of any bargain. Express warranties rest on "dickered" aspects of the individual bargain. Official cmt. 1, RCWA 62A.2-313. In order for an express warranty to be created, it is not necessary that the manufacturer use the terms "warrant" or "guarantee"; however, "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." RCW 62A.2-313(2). Factors the court can consider to determine whether an express warranty was made are: specificity of the statement, whether the statement related to the quality of the good, the buyer's actual or imputed knowledge of the true conditions of the good, and the nature of the defect. *Fed. Signal Corp. v. Safety Factors, Inc.*, 125 Wn. 2d 413, 424-25, 886 P.2d 172 (1994).

Moreover, Appellant failed to present any evidence of the difference in value damages caused by any alleged breach of warranty. RCW 62A.2-714. The measure of damages for non-revocation claims 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. Plaintiff never presented any evidence of any amount of damages.

### **Implied Warranties**

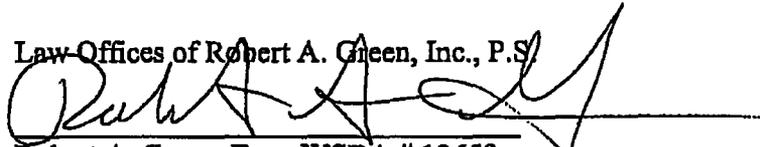
Any “implied” warranty claim against Regal is barred as a matter of law due to lack of privity and Regal’s disclaimers of implied warranty in its written warranty. *See Tex Enterprises, Inc. v. Broackway Standard, Inc.*, 149 Wn.2d 204, 66 P.3d 625 (2003). He cannot bring a claim against Regal for implied warranty breach. Regal’s warranty excludes all implied warranties. CP 92-94. The sales invoice sets forth above the signature block and under the heading “Implied Warranty Negotiation” that the dealer makes no warranty to any parts unless warranted by the manufacturer or implied in writing. CP 50. Appellant signed the invoice as did the salesperson for PowerBoatsNW. CP 50. Moreover, Appellant has not provided evidence that the boat was unfit for normal use.

### **CONCLUSION**

Respondent Regal Marine Industries, Inc. respectfully requests that the Court affirm the decision of the trial court.

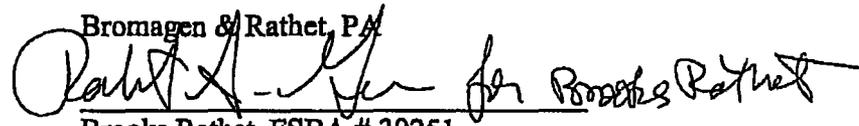
Respectfully, submitted this 3<sup>rd</sup> day of April 2013.

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Declaration of Service

I, Richard Donker, certify under the penalty of perjury, under the laws of the State of Washington that I served the foregoing by fax, email and hand delviery as follows:

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