No. _____

In the
Supreme Court of the United States

BEVERLY ZYLSTRA, BERNARD ZYLSTRA,

Petitioners

v.

DRV, LLC

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Magnuson-Moss Warranty Act creates a private right of action for any "consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under [the Magnuson-Moss Warranty Act], or under a written warranty, implied warranty, or service contract." 15 U.S.C. § 2310(d)(1). A claim under the Magnuson-Moss Warranty Act is dependent on the existence of an underlying, viable state law warranty claim. *Kuberski v. Rev Rec. Grp., Inc.*, 5 F.4th 775, 778 (7th Cir. 2021)(citing *Voelker v. Porsche Cars North America, Inc.*, 353 F.3d 516, 525 (7th Cir. 2003)). However, the Magnuson-Moss Warranty Act also requires by its own terms that no court action may be brought for failure to comply with any obligation under any written or implied warranty unless the warrantor is afforded a reasonable opportunity to cure such failure to comply. 15 U.S.C. § 2310(e); *Anderson v. Gulf Stream Coach, Inc.*, 662 F.3d 775, 781 (7th Cir. 2011). Thus, while the Magnuson-Moss Warranty Act operates as a gloss on a consumer's state law breach of warranty claims, it also requires that a consumer provide a warrantor with a reasonable opportunity to cure as an additional element. See *Anderson v. Gulf Stream Coach, Inc.*, 662 F.3d 775, 781 (7th Cir. 2011).

The questions presented are:

1. Is the term "reasonable opportunity to cure" under the Magnuson-Moss Warranty Act a flexible term dependant on the facts and circumstances of each case, or must a consumer provide a warrantor with a numerical minimum of two (2) repair attempts as

the Sixth Circuit has held, or a numerical minimum of three (3) repair attempts as the Seventh Circuit has held?

2. Is the question of what constitutes a "reasonable opportunity to cure" under the Magnuson-Moss Warranty Act an important question of federal law that should be uniform nationwide and decided by this Court?

3. Is a consumer wrongfully denied the right to a jury trial where the district court and circuit court depart from the normal course of judicial proceedings?

PARTIES TO THE PROCEEDING

Petitioners are Beverly Zylstra and Bernard Zylstra. Petitioners were plaintiffs in the district court and plaintiffs-appellants in the court of appeals.

Respondent is DRV, LLC. Respondent was the defendant in the district court and defendant-appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state as follows:

Petitioners Beverly Zylstra and Bernard Zylstra are individuals.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Zylstra v. DRV, LLC*, No. 20-1949 (7th Cir.)(opinion affirming judgment of district court, issued August 10, 2021);
- *Zylstra v. DRV, LLC*, No. 1:18-CV-266 (N.D. Ind.)(order granting motion for summary judgment, entered May 18, 2020).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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This case involves a federal warranty law that gives federal rights and remedies to virtually every consumer in the United States, but whether the consumer can enforce that law and obtain those remedies presently depends on where the consumer lives.

The Magnuson-Moss Warranty Act is a sweeping statute that applies to all consumer products over $5 that come with either a warranty or service contract. The Act's remedial purpose is to provide consumers with additional rights and remedies for a breach of warranty greater than traditionally permitted under state law. The Act has garnered particular attention due to the rise in recreational vehicle sales and subsequent recreational vehicle warranty litigation.

Litigation often revolves around whether the consumer provided the warrantor with a "reasonable opportunity to cure" defects, as required under the Act. The Circuit Courts are currently split on what constitutes a "reasonable opportunity to cure". The term "reasonable" is traditionally left to the trier of fact. However, the Sixth and Seventh Circuits have narrowly construed the term, and effectively rewritten the Act, to require that a numerical minimum number of repair attempts be provided to the warrantor, regardless of the nature of the consumer product, the defects, the days out of service, or the surrounding circumstances. This narrow construction thwarts the Act's purpose by effectively stripping consumers of their federal warranty rights and remedies.

Petitioners respectfully request that the Court grant certiorari in order to resolve the split between the Circuit Courts, to resolve an important question of federal law which should be decided by this Court, and to correct the actions of the Seventh Circuit.

OPINIONS BELOW

The Seventh Circuit's decision affirming the district court's grant of summary judgment is reported at 8 F.4th 597 (7th Cir. 2021) and reproduced in the Appendix ("App.") at 1-25. The district court's opinion is not reported in the Federal Reporter, but is reported at 2020 U.S. Dist. LEXIS 86341 and reproduced at App. 26-47.

JURISDICTIONAL STATEMENT

The judgment of the Seventh Circuit was entered on August 10, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, et seq, are reproduced at App. 61-79.

STATEMENT OF THE CASE

A. Statutory Background

The Magnuson-Moss Warranty Act ("MMWA") creates a private right of action for any "consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under

[the MMWA], or under a written warranty, implied warranty, or service contract." 15 U.S.C. § 2310(d)(1). The MMWA applies to consumer products that come with a warranty and were purchased for more than $5.00. See 15 U.S.C. § 2302(a). And, it is a remedial statute that should be liberally construed in favor of the consumer. See *Walsh v. Ford Motor Co.*, 627 F. Supp. 1519, 1523-24 (D.C. Cir. 1986)(citing *Skelton v. General Motors Corp.*, 660 F.2d 311, 313-14 (7th Cir. 1981)); *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 87 S. Ct. 1199 (1967).

Congress passed the MMWA to create additional remedies for consumers for breach of warranty, *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1006 (D.C. Cir. 1986), to enhance consumer protection, *Automobile Importers of America, Inc. v. Minnesota*, 871 F.2d 717, 722 (8th Cir. 1989)(citing H.R. Rep. No. 1107, 93rd Cong., 2nd Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 7702 and 7722), and to provide consumers with an economically feasible private right of action. *Cunningham v. Fleetwood Homes of Ga.*, 253 F.3d 611, 616 (11th Cir. 2001)(citing *Wilson v. Waverlee Homes*, 954 F. Supp. 1530, 1538 (M.D. Ala. 1997)(quoting 119 CONG. REC. 972 (1973)). Congress was also concerned with addressing the unequal bargaining power between warrantors and consumers in creating the MMWA. *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268, 1277 (11th Cir. 2002)(citing S. Rep. No. 93-151, quoted in 40 Fed. Reg. 60168 (1975)).

A claim under the MMWA is dependent on the existence of an underlying, viable state law warranty

claim. *Kuberski v. Rev Rec. Grp., Inc.*, 5 F.4th 775, 778 (7th Cir. 2021). The MMWA also requires by its own terms that no court action may be brought for failure to comply with any obligation under any written or implied warranty unless the warrantor is afforded a reasonable opportunity to cure such failure to comply. 15 U.S.C. § 2310(e); *Anderson v. Gulf Stream Coach, Inc.*, 662 F.3d 775, 781 (7th Cir. 2011).

Thus, the MMWA operates as a gloss on a consumer's state law breach of warranty claims, but also requires that a consumer provide a warrantor with a reasonable opportunity to cure as an additional element. See *Anderson*, 662 F.3d at 781. Where the applicable state law also requires a "reasonable opportunity to cure" as an element of a breach of warranty, but the state law definition restricts the consumer's rights or remedies under the MMWA, the MMWA definition preempts the state law definition and controls. See *Time Warner Cable v. Doyle*, 66 F.3d 867, 875 (1996); 15 U.S.C. § 2311(b)(1).

B. Factual Background

This case involves a defective 2016 DRV Mobile Suites recreational vehicle ("RV") which was warranted by DRV, LLC, and purchased new by Bernard and Beverly Zylstra, but which DRV, LLC refused to repair, and failed to repair 38 defects within six (6) repair opportunities and 230 days.

On March 6, 2017, the Zylstras purchased a new 2016 DRV Mobile Suites RV for $91,559.15 from Bradley Bourbonnais Chevy Hyundai RV ("Bradley") in Bourbonnais, Illinois. Aff. Zylstra, ¶2 (Ex 2; Doc 28-3;

Appx. P28); Buyer's Order (Ex 4; Doc 28-5).[1] The Zylstras purchased the RV for their own recreational use and enjoyment in their retirement. Aff. Zylstra, ¶3 (Ex 2; Doc 28-3; Appx. P28). The RV came with a 1 year limited warranty from DRV, LLC ("DRV"). Id, at ¶4; Warranty (Ex 7; Doc 28-8; Appx. P25). Under the warranty, DRV warrants the RV, "to be free from defects in materials and workmanship supplied and attributable to DRV during normal use." Warranty (Ex 7; Doc 28-8; Appx. P25). Thus, unless excluded in the "Not Covered Under DRV Warranty" section, a problem is considered to fall within the coverage of the DRV warranty. Id.

The Zylstras left the RV at Bradley after purchase on March 6, 2017 and came back to take delivery of it on April 27, 2017. Aff. Zylstra, ¶7 (Ex 2; Doc 28-3; Appx. P28). While the RV was at Bradley between March 6, 2017 and April 27, 2017, Bradley surreptitiously made repairs to the following defects under the DRV warranty: Oil Leak at Right Rear Axel, Entry Door Will Not Lock, and Rear Reflector Missing. Id, at ¶8; DRV Warranty Claims, pg 137 (Ex 8; Doc 28-9).

On April 29, 2017, after a two day "shakedown" trip, the Zylstras called their Salesman, who told them to bring the RV back to Bradley for repairs. Aff. Zylstra, ¶9-11 (Ex 2; Doc 28-3; Appx. P28). The RV was at Bradley, a factory warranty authorized repair shop, for

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[1] Citations to "Ex" reference exhibits filed in opposition to summary judgment, "Doc" refers to specific district court ECF filing numbers, and "Appx." refers to the appellate court appendix.

about 22 days from April 29, 2017 until May 20, 2017, for repair of the following defects: Grey Tank Valve Not Closing, Over the Air Antenna Showing Codes, Right Rear Storage Compartment Leaks, Overhead Compartments Missing Screw, Kitchen Drawer Slides Not Working Properly, Entry Door Will Not Lock, Fireplace LED Readout Doesn't Show Numbers Correctly, Remote Will Not Turn Fireplace On, Toilet Valve Leaks, Microwave Installed Crooked, TV Installed Crooked, Quarter Round at Stairs Loose, Batteries Do Not Hold Charge, Bathroom Sink Draining Slow, Kitchen Light Cover Missing, Basement Door Lifts Weak, and Bubbles in Roofing on Drivers Side. Id, at ¶12.

Bradley inspected the RV, reported the defects to DRV, and requested warranty authorization on May 3, 2017. Warranty Claims, pg 138 (Ex 8, Doc 28-9). However, about a week after the Zylstras dropped the RV off for repairs, the Bradley Service Manager advised the Zylstras that there was damage to the RV's roof. Aff. Zylstra, ¶13 (Ex 2; Doc 28-3; Appx. P28). A dispute arose between the Zylstras and Bradley regarding the cause of the roof damage. Id. Ultimately, the Zylstras decided to submit the roof damage to their insurance company. Id.

The Zylstras planned to have Bradley repair the RV's roof, but Bradley's repair estimate was extremely high, and DRV offered to repair the RV's roof at its factory in Indiana for about half the price. Id, at ¶15. When Mr. Zylstra told the Bradley Service Manager that he was having the roof repaired at the DRV factory instead, the Service Manager refused to do any

further warranty repairs to the RV. Id, at ¶16. Subsequently, the Zylstras picked up the RV from Bradley on May 20, 2017. Id. at ¶16, 18.

When Mr. Zylstra was scheduling the DRV factory repair in May, he asked DRV to fix the same 17 warranty defects that Bradley had refused to repair at the factory, in addition to replacing the roof. Id. at ¶16. DRV refused. Id.

The Zylstras took the RV to the DRV factory repair shop in Indiana for the scheduled roof repair on June 21, 2017. Id, at ¶18. The RV was in the shop for about 4 days until June 24, 2017 for the roof repair. Id.; DRV Repair Order (Ex 9; Doc 28-10). DRV did not take this opportunity to perform any warranty repairs to the RV, even though the Zylstras had requested and given DRV the opportunity to do so. While the Zylstras were at DRV, they contacted Plaza RV to schedule a third repair of the list of 17 defects that both Bradley and DRV had refused to repair. Aff. Zylstra, ¶19 (Ex 2; Doc 28-3; Appx. P28).

The Zylstras dropped the RV off for repair at Plaza RV, another factory warranty authorized repair shop, on June 27, 2017, for about 51 days for repair of the following 18 defects under warranty: Grey Tank Valve Not Closing, Over the Air Antenna Showing Codes, Right Rear Storage Compartment Leaks, Overhead Compartments Missing Screw, Kitchen Drawer Slides Not Working Properly, Entry Door Will Not Lock, Fireplace LED Readout Doesn't Show Numbers Correctly, Remote Will Not Turn Fireplace On, Toilet Valve Leaks, Microwave Installed Crooked, TV Installed Crooked, Quarter Round at Stairs Loose,

Batteries Do Not Hold Charge, Bathroom Sink Draining Low, Kitchen Light Cover Missing, Basement Door Lifts Weak, Grease Cap Broken, and Hub Cap Missing. Id, at ¶19, 20; Plaza RV Repair Order #1 (Ex 10; Doc 28-11).

The RV had more problems, so on September 11, 2017, the Zylstras took the RV back to Plaza RV for about 102 days for repair of the following 16 defects under warranty: Vent Fan in Bathroom Tries to Close When Already Closed, Fresh Water Tank Indicator Inoperative, LP Detector Panel Not Calibrated, Ceiling Light Cover Loose, Molding in Walk In Closet Not Attached, Over Air Antenna Showing Codes, Door Hold Will Not Stay Open, Quarter Round on Pantry Loose, 7 Way Plug Cover Broken, AM Radio Reception Poor, Black Holding Tank Hard to Close, Black Holding Tank Leaks, Bedroom Drawer Not Closing, Gas Switch on Range Hard to Light, Vent Cap Loose, Overhead Compartments Missing Screw. Aff. Zylstra, ¶22 (Ex 2; Doc 28-3; Appx. P28); Plaza RV Repair Order #2 (Ex 11; Doc 28-12).

On October 16, 2017, frustrated with the repair delay, the Zylstras sent a letter to the President of Heartland RV (who owns DRV) telling him about the problems with the RV, DRV's authorized dealers' failed repair attempts, repair delays, and missteps. Aff. Zylstra, ¶22 (Ex 2; Doc 28-3; Appx. P28); Letter Heartland (Ex 16; Doc 28-17). The Zylstras picked the RV up on December 21, 2017 from Plaza RV– barely in time for their previously planned trip to Texas. Aff. Zylstra, ¶22 (Ex 2; Doc 28-3; Appx. P28).

At the beginning of 2018, the Zylstras left for their trip to Texas. Id, at ¶23. About a week into the trip, after they dumped the grey and black tanks, they started to smell a strong odor. Id. Mr. Zylstra discovered that the black tank valve was leaking at the flange connections and that sewage had been leaking from the tank into insulation throughout the underbelly of the RV. Id. However, none of the DRV authorized dealers that the Zylstras called would come out to their location. Id. Eventually, the Zylstras called a mobile technician service, Gabriel's Maintenance, who agreed to come to them for repairs. Id.

On January 26, 2018, Gabriel's Maintenance repaired the following defect: Black Holding Tank Leaks. Id, at ¶24. The technician from Gabriel's Maintenance took the valve gaskets out, cleaned the valve seals, cleaned the valve, had Mr. Zylstra shut the valve completely, and replaced the valve gaskets between the two flanges. Id. This was actually the second repair to the RV's black holding tank. See Id, at ¶22; Plaza RV Repair Order #2 (Ex 11; Doc 28-12). In fact, the black holding tank was first subject to repair by Plaza RV for 102 days from September 11, 2017 until December 21, 2017 when the Zystras reported that the black tank valve was hard to close and was possibly leaking. Aff. Zylstra, ¶22 (Ex 2; Doc 28-3; Appx. P28); Plaza RV Repair Order #2, Job 11 at pg 3 of 5 (Ex 11; Doc 28-12). This is the very same valve that Gabriel's Maintenance determined was misaligned, Aff. Zylstra, ¶24 (Ex 2; Doc 28-3; Appx. P28), and that RV expert technician Mr. Simmons determined had a defective flange from the time of manufacture. Aff. Simmons, ¶10 (Ex 19; Doc 28-24);

Simmons Depo, 34:23-35:8 (Def Ex E; Doc 23-5); Simmons Am. Report (Ex 19b; Doc 28-26).

Soon after, the Zylstras contacted Mr. Weldon from DRV about the Black Holding Tank Leak and he agreed that DRV would reimburse the Zylstras under the DRV warranty for the repair performed by Gabriel's Maintenance. Id, at ¶25. They also discussed the possibility of the RV going back to the DRV factory to clean up the sewage that had leaked into the RV. Id. However, during a call on February 5, 2018, Mr. Weldon told the Zylstras that DRV would not guarantee that they would be able to clean up the sewage or that the sewage smell would ever go away. Id. Mr. Weldon also told the Zylstras that any cleanup would not be covered under the DRV warranty. Id.

The Zylstras left the RV resort in Texas on March 5, 2018, and stopped using the RV out of concern for their health. Id, at ¶29. Despite the many repairs and numerous days out of service, the following defects were never repaired: Black Tank Sewage Leaked Into Underbelly, Microwave Installed Crooked, TV Installed Crooked, Batteries Do Not Hold Charge, Over Air Antenna Showing Codes, Door Hold Will Not Stay Open, and Gas Switch on Range Hard to Light. Aff. Zylstra, ¶27 (Ex 2; Doc 28-3; Appx. P28). Additionally, the Zylstras later discovered 12 latent defects in the RV, including water leaks at the living room slide out and transition seam. Id, at ¶28.

This RV is not and never has been fit for its ordinary purpose of recreational use because of its many defects. Id, at ¶40, 45. And, according to environmental expert Mr. Althouse, it is certainly not

fit for safe recreational use, nor should it be used until all repairs and moisture damage remediation are complete. Aff. Althouse, ¶20 (Ex 18, Doc 28-19); Althouse CV (Ex 18a, Doc 28-20); Althouse Report (Ex 18b, Doc 28-21); Althouse Supp. Report (Ex 18c, Doc 28-22); Althouse Reb. Report (Ex 18d, Doc 28-23). The RV has had problems from the start and has never been defect free or working 100% as designed. Aff. Zylstra, ¶45 (Ex 2; Doc 28-3; Appx. P28).

Expert RV technician Mr. Simmons and environmental expert Mr. Althouse inspected the RV, and reached some conclusions regarding its condition and multitude of defects. Specifically, with regards to the Black Holding Tank Leak, Mr. Althouse verified the prior persistent wetting of the RV underbelly with black water sewage in a 5 square foot area, determined that moisture damage remediation of the black water sewage stained underbelly was reasonable and necessary, and determined that the Black Holding Tank Leak was caused by a faulty black tank valve flange. Aff. Althouse, ¶12, 13, 19, 23 (Ex 18, Doc 28-19); Althouse Report (Ex 18b, Doc 28-21); Althouse Supp. Report (Ex 18c, Doc 28-22); Althouse Reb. Report (Ex 18d, Doc 28-23). Mr. Simmons verified this defect and came to the same conclusion as to its cause. Simmons Am. Report (Ex 19b, Doc 28-26); Simmons Reb. Report (Ex 19c, Doc 28-27). And, according to Mr. Simmons, the black tank valve flange was defective at the time of manufacture. Aff. Simmons, ¶10 (Ex 19, Doc 28-24); Simmons Am. Report (Ex 19b, Doc 28-26); Simmons Reb. Report (Ex 19c, Doc 28-27).

The Zylstras do not trust that DRV or its authorized dealers can ever fix their RV right. Aff. Zylstra, ¶45 (Ex 2; Doc 28-3; Appx. P28). The Zylstras paid more than $90,000.00 for an RV they have been unable to use or enjoy most of the time that they have owned it and continue to make payments monthly. Id. If the Zylstras had known about the RV's many problems, they never would have purchased it. Id, at ¶44. And, the RV was worth significantly less than what the Zylstras paid for it because of its many defects, time out of service, and failed repairs. Id; Aff. Grismer, ¶13 (Ex 20, Doc 28-28); Grismer Report (Ex 20c, Doc 28-31).

C. Proceedings Below

The Zylstras filed their Complaint on August 27, 2018, alleging claims against DRV for: (1) breach of express and implied warranties under state law, (2) violation of the MMWA, and (3) violation of the Indiana, Illinois, Texas, or Iowa Consumer Protection Acts (Doc 1, SR pg 2).[2] DRV filed its Answer on October 26, 2020 (Doc 12; SR pgs 2-3).

The district court had federal question jurisdiction over this matter, pursuant to 28 U.S.C. § 1331, because a federal claim exists under the MMWA, 15 U.S.C. § 2301 et seq, and the amount in controversy exceeds $50,000 as mandated by 15 U.S.C. § 2310(d)(3)(B).

DRV filed a motion for summary judgment on January 31, 2020 (Doc 22, SR pg 4; Doc 23, SR pg 4). The district court issued an Opinion and Order granting DRV's motion for summary judgment as to all

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[2] Citations to "SR" reference the district court's Short Record.

claims, which was entered, along with final judgment, on May 18, 2020 (App. 26). In doing so, the district court determined that the Zylstras had failed to provide DRV with a "reasonable opportunity to cure" the RV's defects. (App. 46). The Zylstras timely filed their notice of appeal on June 4, 2020 (Doc 49, SR pg 6).

The Seventh Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291, because the appeal was from a final decision of the district court. The Seventh Circuit issued its decision on August 10, 2021, affirming the decision of the district court. (App. 1). In doing so, the Seventh Circuit also determined that the Zylstras had failed to provide DRV with a "reasonable opportunity to cure" the RV's defects. (App. 2). Specifically, the Seventh Circuit held that a quantitative number of three (3) failed repair attempts is necessary to provide a "reasonable opportunity to cure" under the MMWA, and that the days out of service did not cause the warranty to fail of its essential purpose under the MMWA. (App. 8-9).

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's holding is problematic for three main reasons.

First, the Seventh Circuit's holding creates an important conflict between circuit courts as to what constitutes a "reasonable opportunity to cure" under the MMWA. The Sixth Circuit has held that a minimum number of two (2) repair attempts must be provided, while the Seventh Circuit here held that a minimum number of three (3) repair attempts must be provided. No other Circuit Court has defined

"reasonable opportunity to cure" using a numerical minimum number of repair attempts. This Court should resolve the circuit court split to create uniformity nationwide for both warrantors and consumers in the application of the federal law, to prevent forum shopping, and to reach a result on the issue which is consistent with the purpose of the MMWA.

Second, the issue of what constitutes a "reasonable opportunity to cure" under the MMWA is an important question of federal law that has not been, but should be, decided by this Court. As outlined below, RV sales are at an all time high, one recreational vehicle manufacturer has reported sales figures already in excess of $12 billion for 2021 alone, many RV warranties contain unreasonable hoops for consumers to jump through in a short 1 year warranty period, and the average price of an RV is over $95,000. Thus, a lack of uniformity in consumer warranty rights under the MMWA is certainly an important matter for the Court to resolve. Additionally, RV litigation is on the rise. A decision on the issue by this Court would be consistent with the purpose of the Act, would resolve practical and recurring problems, would provide uniformity to both warrantors and consumers alike, and could prevent circuit courts from impeding the effectiveness of the Act.

Third, the Seventh Circuit departed from the accepted and usual course of judicial proceedings by exercising legislative authority, failing to follow precedent, misapplying the summary judgment standard, and improperly making factual

determinations relating to disputed issues of material fact when affirming the district court's grant of summary judgment as to all claims.

Therefore, the Zylstras respectfully request that the Court grant certiorari in order to resolve a conflict between the circuit courts, to resolve an important question of federal law which should be decided by this Court, and to correct the actions of the Seventh Circuit.

I. This Court should resolve the circuit split on what constitutes a "reasonable opportunity to cure" under the Magnuson-Moss Warranty Act

This case presents an important question over which the circuit courts are divided concerning what constitutes a "reasonable opportunity to cure" under the MMWA.

Under the MMWA, "[n]o action...may be brought under subsection (d) for failure to comply with any obligation under any written or implied warranty...unless the person obligated under the warranty...is afforded a reasonable opportunity to cure such failure to comply." 15 U.S.C. § 2310(e). Here, the Seventh Circuit's holding creates a conflict between circuit courts as to what constitutes a "reasonable opportunity to cure" under the MMWA. This Court should resolve the circuit court split to create uniformity for warrantors and consumers nationwide in the application of the federal warranty law.

On one hand, in *Temple v. Fleetwood Enters.*, the Sixth Circuit held that a minimum number of two (2) repair opportunities must be provided to a warrantor

under the MMWA. *Temple v. Fleetwood Enters.*, 133 Fed. Appx. 254, 268 (6th Cir. 2005). In *Temple*, the consumer plaintiffs purchased a 1998 Fleetwood Class A RV. The RV was warranted for 1 year by Fleetwood and the engine was warranted for 7 years / 150,000 miles by Cummins. *Temple*, at 256-257. The Temples presented the RV to a Fleetwood authorized dealership for warranty repairs on two occasions, and presented the RV to a Cummins authorized dealership for warranty repairs on six occasions. *Temple*, at 257-259. There were never more than two (2) repairs to any one defect or nonconformity. *Temple*, at 256-255, 269. And, there was no evidence that any of the defects remained unrepaired. *Temple*, at 269-270. The Sixth Circuit held that, in determining whether a warrantor is given a "reasonable opportunity to cure", the MMWA requires that the warrantor be given at least two (2) chances to repair an alleged defect. *Temple*, at 268-269. And, because there were never more than two (2) repairs to any one defect or nonconformity, and there was no evidence that any of the defects remained unrepaired, the Sixth Circuit affirmed the district court's grant of summary judgment for the defendants on the plaintiffs' MMWA claim. *Temple*, at 269-270.

On the other hand, in the court below, the Seventh Circuit held that a minimum number of three (3) repair opportunities must be provided to a warrantor under the MMWA. (App. 8-9). The Seventh Circuit reserved judgment as to whether a "reasonable opportunity to cure" would require three (3) repair attempts where the defect is a major defect that made the RV unusable. (App. 8).

Aside from the Sixth and Seventh Circuits, no other Circuit Court has defined "reasonable opportunity to cure" using a numerical minimum number. This is not surprising since the MMWA itself does not define "reasonable opportunity to cure" as a quantitative number. See 15 U.S.C. § 2310(e). Certainly, if Congress had intended "reasonable opportunity to cure" under the MMWA to be a specific minimum number of repair attempts or opportunities, Congress could have included that number in the statutory language of the MMWA itself. Instead, Congress chose to use the general phrase "reasonable opportunity". 15 U.S.C. § 2310(e). And, where a statute does not include a specific number of repair attempts, the question of reasonableness of repairs should be one for a jury. See *Venezia v. Bentley Motors, Inc.*, 374 Fed. Appx. 765, 767 (9th Cir. 2010).

Had this case been heard in the Sixth Circuit, the facts would have yielded a different result, since the first two repair attempts alone were refused by both DRV and its authorized dealer Bradley. And, had *Zylstra* been heard in any other circuit where a numerical minimum number of repair opportunities is not required, the result would have been drastically different. In fact, in those circuits, the 230 days out of service between March 6, 2017 and January 26, 2018, the fact that the RV was riddled with 38 different defects, the six (6) different attempts to obtain warranty repairs, and the three (3) different warranty repair refusals would have been considered by the circuit court in determining whether the Zylstras provided DRV with a "reasonable opportunity to cure".

The conflict is not going away, and has a very real world impact on both consumers and warrantors, such as RV manufacturers. RV sales are at an all time high, with the Recreational Vehicle Industry Association ("RVIA") reporting 430,412 RVs sold in 2020,[3] and projecting the numbers to increase to 577,200 by the end of 2021 and 600,200 in 2022.[4] With the average MSRP for an RV at $95,301,[5] it is not surprising that one RV manufacturer is reporting sales figures already in excess of 12 billion for 2021 alone.[6] A large percentage of RVs are manufactured in Indiana,[7] and many RV limited warranties already require that any dispute regarding the limited warranty be filed in the state of manufacture– Indiana. See e.g. *Shearer v.*

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[3] RVIA, December 2020 Market Report, Wholesale Recreation Vehicle Shipments, https://www.rvia.org/system/files/media/file/December%202020%20Market%20Report.pdf.

[4] RVIA, RV RoadSigns Quarterly Forecast, https://www.rvia.org/rv-roadsigns-quarterly-forecast (Last visited Oct. 26, 2021).

[5] LENDINGTREE, *Average RV Cost – and What Else to Know About Buying and Owning an RV*, https://www.lendingtree.com/auto/rv/cost-of-owning-an-rv/ (last updated Mar. 1, 2021).

[6] Press Release, Thor Industries, Inc., Thor Indus. Reports Record Fiscal 2021 Results as Net Sales Top $12.3 With Earnings Per Share of $11.85 (September 28, 2021) (on file with author).

[7] J.L. Seto, *Why Are So Many RVs Made in Indiana*, MOTORBISCUIT (November 23, 2020), https://www.motorbiscuit.com/why-are-so-many-rvs-made-in-indiana/.

Thor Motor Coach, 470 F. Supp. 3d 874, 879 (N.D. Ind. 2020). Should the conflict not be resolved by the Court, forum shopping would inevitably result. RV manufacturers from California, Florida, Iowa, New Hampshire, Oklahoma, Ohio, Pennsylvania, Texas, Virginia, and elsewhere would be held to a different standard than RV manufacturers from Indiana. Consumer warranty rights would depend, in large part, on where their particular RV was manufactured. And, since uniformity in warranty disclosures was a congressional objective in enacting the MMWA, uniformity in consumer warranty rights would certainly be consistent with that objective. See *Cunningham v. Fleetwood Homes of Ga.*, 253 F.3d 611, 623 (11th Cir. 2001)(citing 40 Fed. Reg. 60,168, 60,170 (Dec. 31, 1975)).

Therefore, this Court should resolve the circuit split on what constitutes a "reasonable opportunity to cure" under the MMWA, and clarify that the issue is a fact-intensive and case-specific one that should be left to a jury.

II. This Court should settle what constitutes a "reasonable opportunity to cure" under the Magnuson-Moss Warranty Act

A nationwide answer to the important question of what constitutes a "reasonable opportunity to cure" under the MMWA is needed, now. A nationwide answer is consistent with the purpose of the Act, would resolve practical and recurring problems, would provide uniformity to both warrantors and consumers alike, and will prevent circuit courts from impeding the effectiveness of the MMWA.

A. A nationwide answer would further the purpose of the Magnuson-Moss Warranty Act

First, providing a nationwide answer to the important question of what constitutes a "reasonable opportunity to cure" under the Act would further the purpose of the MMWA.

The stated purpose of the MMWA is "to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products". 15 U.S.C. § 2302(a). As outlined above, Congress also passed the MMWA to create additional remedies for consumers for breach of warranty, to enhance consumer protection, to provide consumers with an economically feasible private right of action, and to address the unequal bargaining power between warrantors and consumers.

Thus, the clear purpose of the MMWA was to enhance consumer warranty rights and remedies. And, providing a nationwide answer as to what constitutes a "reasonable opportunity to cure" under the MMWA would do just that.

B. A nationwide answer would make warranties enforceable in the Seventh Circuit

Second, the issue is recurring, and as a practical matter, makes warranties nearly impossible for consumers to enforce in the Seventh Circuit.

This decision makes warranties nearly impossible for consumers to enforce in the Seventh Circuit, and is

especially egregious for RV consumers. Most RV limited warranties are just a short 1 year in duration.[8] But, many times RV repairs can take months to complete.[9] Worse yet, many RV warranties contain "back up remedies" that a consumer is also required to exhaust before filing suit, along with clauses shortening the consumer's statute of limitations and requiring suit to be filed in Indiana. See e.g. *Mathews v. REV Rec. Grp., Inc.*, 931 F.3d 619, 622 (7th Cir. 2019); *Shearer v. Thor Motor Coach*, 470 F. Supp. 3d 874, 879 (N.D. Ind. 2020). Practically speaking, these factors all make it nearly impossible for many RV consumers to enforce their warranty rights in the Seventh Circuit under the lower court's decision. For instance, where an RV is riddled with defects which cause it to be in the shop for repairs for the entire warranty period, the consumer would be left without any warranty rights or remedies under the MMWA in the Sixth Circuit and Seventh Circuit. Similarly, an RV may be riddled with defects and in and out and immediately back in the repair shop for warranty repairs, yet due to scheduling and repair delays, it may still be impossible for the consumer to effectively present the RV for repair at least three (3) times for

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[8] See Ray Roman, *RV Warranties-Over 90 RV Manufacturers Warranty Information*,GO TRAVEL TRAILERS, https://gotraveltrailers.com/rv-warranties/ (last updated September 18, 2021).

[9] Jason & Rae Miller, *Why Does RV Warranty Work Take So Long?*, GETAWAY COUPLE, (July 25, 2020), https://www.getawaycouple.com/why-does-rv-warranty-work-take-so-long/.

each defect during the short 1 year warranty period. This would leave a consumer without any warranty rights or remedies under the MMWA in the Seventh Circuit.

This issue is also recurring. As outlined above, RV sales are at an all time high, and RVing is becoming a way of life for many consumers. This increase in sales has also resulted in an increase in warranty disputes. In fact, reference to Pacer reveals that there were a total of at least 119 breach of warranty cases filed by consumers against RV manufacturers in 2016, 170 in 2017, 179 in 2018, 215 in 2019, 195 in 2020, and 180 in 2021 so far, putting it on track with recent years. The flux of RV warranty lawsuits is noticeable in the Northern District of Indiana, were only 27 suits were filed in 2016 but 81 suits were filed in 2020. And, approximately 74 suits have been filed to date in 2021. See also *Martin v. Thor Motor Coach Inc.*, 2021 U.S. Dist. LEXIS 186781, *14 (N.D. Ind. 2021)(noting breach of warranty issues in RV cases likely to reoccur). In other words, this issue is not going away. And, it makes this case the perfect vehicle for this Court to use in order to provide a nationwide answer to the important question of what constitutes a "reasonable opportunity to cure" under the MMWA.

C. A nationwide answer would provide uniformity for both warrantors and consumers

Third, providing a nationwide answer to the important question of what constitutes a "reasonable opportunity to cure" under the MMWA would provide uniformity to both warrantors and consumers alike. RV

manufacturers could more readily assess their risks, and consumers could better assess their warranty rights, without regard for where the RV was built. And, RV manufacturers would have the same "reasonable opportunity to cure" and corresponding duty to repair regardless of where the RV was manufactured.

D. A nationwide answer would prevent circuit courts from rewriting the Magnuson-Moss Warranty Act

Fourth, providing a nationwide answer to the important question of what constitutes a "reasonable opportunity to cure" under the MMWA would prevent circuit courts, like the Seventh Circuit, from impeding the effectiveness of and essentially rewriting the MMWA. Here, the Seventh Circuit has essentially rewritten 15 U.S.C. § 2310(e) of the MMWA, by taking the phrase "reasonable opportunity to cure" and replacing it with the phrase "three repair attempts to cure". The Seventh Circuit disregards time out of service even though it is a basis for a breach of warranty under state law. However, pursuant to Article I of the United States Constitution, it is the Congress that is responsible for creating the laws– not the courts. U.S.C.S. Const. Art. I, § 1. While the courts are responsible for interpreting and applying the laws, the Seventh Circuit's decision goes well beyond simple interpretation of 15 U.S.C. § 2310(e). See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2437 (2019).

III. This Court Should Protect A Consumer's Right To Have A Jury Decide Factual Disputes Under The Accepted And Normal Course of Judicial Proceedings

The court below departed from the accepted and normal course of judicial proceedings when it usurped legislative authority by defining as a matter of law that a minimum of three (3) repair attempts must be provided to maintain a claim under MMWA. In addition to acting as the legislature, the Seventh Circuit also deprived the Zylstras of a jury trial to factually determine whether they provided the DRV with a "reasonable opportunity to cure" the RV's defects.

A. The Seventh Circuit Departed from Accepted Judicial Proceedings When It Defined What Constitutes A Reasonable Opportunity to Cure

The Seventh Circuit departed from the accepted and normal course of judicial proceedings when it improperly exercised legislative powers and departed from its long-standing precedent when it numerically defined what constitutes a "reasonable opportunity to cure".

The Seventh Circuit has a history of holding that a determination of what constitutes "reasonable" is a question of fact. *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 763 (7th Cir. 2010)(interpretation of "commercially reasonable" contract language is question of fact); *Learning Curve Toys, Inc. v.*

PlayWood Toys, Inc., 342 F.3d 714, 725 (7th Cir. 2003)(whether a trade secret owner's are reasonable is a question of fact); *Smith v. Great Am. Restaurants, Inc.*, 969 F.2d 430, 439 (7th Cir. 1992)(plaintiff's common law obligation of "reasonable" mitigation of damages is question of fact); *Smith v. Rowe*, 761 F.2d 360, 367 (7th Cir. 1985)(plaintiff's obligation of "reasonable" mitigation of damages is a question of fact); *Ramos v. Haig*, 716 F.2d 471, 474 (7th Cir. 1983)(whether the governmental action is reasonable is a question of fact).

Despite this long-standing precedent, the Seventh Circuit did not hold that there was a question of fact as to whether the Zylstras provided DRV with a reasonable opportunity to cure the RV's defects. Instead, the court below departed from the accepted and normal course of judicial proceedings when it defined that a consumer must provide the RV manufacturer with a minimum of three (3) repair opportunities for each defect as a matter of law in order to maintain a claim under MMWA regardless of the nature of the defects, days out of service, or surrounding circumstances.

Further, the MMWA is typically an RV consumer's only recourse for a breach of warranty, since most state lemon laws do not cover recreational vehicles, and the MMWA allows consumers to recover costs and expenses in a dispute. See 15 U.S.C. § 2310(d)(1); see e.g. Ind. Code §24-5-13-5; Ohio Rev. Code Ann. § 1345.71(D); Iowa Code §322G.2(13); Cal. Civ. Code § 1793.22(e); Ala. Code § 8-20A1(1). Yet, the Seventh Circuit attempted to rewrite the MMWA by applying one

lemon law presumption standard and not another, without regard for an RV's unique nature (i.e. a custom built house on wheels). Thus, the court below improperly exercised legislative authority when it numerically defined what constitutes a "reasonable opportunity to cure".

B. The Seventh Circuit Departed from Accepted Judicial Proceedings When It Decided Material Factual Disputes

The Seventh Circuit departed from the accepted and normal course of judicial proceedings when it misapplied the Rule 56 standard, made factual determinations, and effectively placed a heightened standard on the Zylstras. As a result, the Zylstras were deprived of their right to a jury trial.

It is well-established that the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. Rule Civ. Proc. 56(e); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-289 (1968). Any inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The Seventh Circuit correctly recited the summary judgment standard in its decision. (App. 5-6). However, in order to reach its decision, the Court engaged in fact-finding when determining whether the Zylstras presented DRV and its authorized dealers with a reasonable opportunity to cure the RV's defects. See

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986)("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."). As detailed below, the Court made at least three (3) critical factual determinations.

i. The Court engaged in fact-finding when it determined that DRV and its authorized dealer's refusals to perform warranty repairs were immaterial

First, the Court engaged in fact-finding when it determined that DRV and its authorized dealer's refusals to perform warranty repairs were immaterial and completely disregarded such evidence.

Under the MMWA, the consumer is required to provide the RV manufacturer with a "reasonable opportunity to cure" the RV's defects. Thus, evidence showing that the Zylstras complied with their obligation to provide DRV and/or its authorized dealers with a "reasonable opportunity to cure" is undeniably a material issue to a breach of warranty and MMWA claim. Further, there was a genuine dispute as to whether the Zylstras complied with their obligation to provide DRV and its authorized dealers with a reasonable opportunity to cure the RV's defects given that DRV and its authorized dealer refused to repair the RV's warrantable defects.

During the Second Post-Sale Repair Attempt, the Zylstras reported several defects to Bradley. Aff.

Zylstra, ¶10-12 (Ex 2; Doc 28-3; Appx. P28). Bradley then reported the defects to DRV and requested warranty authorization on May 3, 2017. Warranty Claims, pg 138 (Ex 8, Doc 28-9). A dispute then arose between the Zylstras and Bradley regarding the RV's roof damage. Aff. Zylstra, ¶13-16 (Ex 2; Doc 28-3; Appx. P28). When the Zylstras informed Bradley that DRV was going to repair the RV's roof damage at its factory at a cheaper price than quoted by Bradley, Bradley then refused to perform the requested warranty repairs for which it had already submitted authorization. Id, at ¶16. When scheduling the roof repair with DRV, the Zylstras requested that DRV also repair the list of 17 defects they had already provided to Bradley. Id. DRV refused. Id. There is no evidence that DRV offered an alternative repair date to accommodate the request for warranty repairs. Id.

Thus, the Zylstras presented evidence that they attempted to provide DRV and its authorized dealers with six (6) opportunities to repair the RV's defects. On at least two (2) occasions, the Zylstras reported the RV's defects and requested warranty repairs, but DRV and its authorized dealer Bradley refused to repair the RV's warrantable defects. Aff. Zylstra, ¶16 (Ex 2; Doc 28-3; Appx. P28). However, the Court completely ignored this evidence. This had a trickle down effect in that the Court then determined that the defects were not presented multiple times, which lead to its ultimate conclusion that the Zylstras did not provide DRV with a reasonable opportunity to cure the RV's defects.

A consumer can only provide an opportunity to repair – report defects and request that an RV

manufacturer and/or its authorized dealers repair the defects. A consumer cannot force an RV manufacturer or its authorized dealers to take advantage of the opportunity and actually perform the repairs. Whether an RV manufacturer or its authorized dealers refuse to perform warranty repairs is material issue to a fact-finder tasked with deciding whether the RV manufacturer breached its warranty.

In viewing the warranty refusals in a light most favorable to the Zylstras, a rational trier of fact could find that the Zylstras complied with their obligation to provide DRV with a reasonable opportunity to cure by reporting the defects and requesting warranty repairs, and that DRV breached its warranty when it and its authorized dealer refused to repair the RV's warrantable defects. See *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968)("Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'"). As such, the Court misapplied the Rule 56 standard.

ii. The Court engaged in fact-finding when it determined whether the Zylstras presented DRV with a reasonable opportunity to repair the RV's Black Holding Tank Leak

Second, the Court engaged in fact-finding in determining whether the Zylstras presented DRV with a reasonable opportunity to cure the RV's Black Holding Tank Leak. The Court held that the Zylstras failed to provide DRV with a reasonable opportunity to cure the RV's Black Holding Tank Leak, finding the

Zylstras only presented the Black Holding Tank Leak defects one time during the Fifth Post-Sale Repair Attempt. (App. 11-15). The Zylstras presented evidence, through Mr. Zylstra's affidavit, that DRV represented that the sewage clean up would not be covered under the DRV warranty. Aff. Zylstra, ¶25 (Ex 2; Doc 28-3; Appx. P28). The Seventh Circuit found that Mr. Zylstra's affidavit testimony was not credible, stating that it conflicted with his deposition testimony. (App. 14-15).

In order to reach this conclusion, the Court erroneously made a credibility determination regarding Mr. Zylstra's testimony since Mr. Zylstra's deposition and affidavit testimony do not conflict. In the portion of the deposition testimony cited by the Court, Mr. Zylstra was asked whether DRV indicated it wasn't willing to clean up the sewage. (App. 13). Mr. Zylstra responded that he did not recall DRV indicating they weren't willing to clean up the sewage leak, but said they couldn't guarantee it wouldn't be a biohazard. (App. 13). In contrast, in his affidavit, Mr. Zylstra states that DRV indicated that the clean up would not be covered under the warranty. Aff. Zylstra, ¶25 (Ex 2; Doc 28-3; Appx. P28). This testimony goes to the issue of whether DRV or the Zylstras were responsible for paying for the sewage clean up; not whether DRV was willing or not willing to clean up the sewage (for a fee).

The Zylstras also presented evidence that they provided DRV with at least two (2) opportunities to repair the Black Holding Tank Leak (i.e. Fifth Post-Sale Repair Attempt and Sixth Post-Sale Repair Attempt). Id, at ¶22-25; Plaza RV Repair Order #2 (Ex

11; Doc 28-12). Although DRV refused to repair the Black Holding Tank Leak clean up under its warranty, in viewing the warranty refusals in a light most favorable to the Zylstras, a rational trier of fact could find that the Zylstras complied with their obligation to provide DRV with a reasonable opportunity to cure the Black Holding Tank Leak defect. *Cities Service Co.*, 391 U.S. at 289. Thus, the Court erroneously engaged in fact-finding and misapplied the Rule 56 standard when it determined that the Zylstras request that DRV repair the Black Holding Tank Leak was immaterial, and did not count as a repair opportunity.

iii. The Court engaged in fact-finding in determining how many days the RV was out of service by reason of repair

Third, the Court engaged in fact-finding in determining how many days the RV was out of service by reason of repair. Under the MMWA and Indiana law, a manufacturer breaches its warranty when it fails to repair defects within either a reasonable number of repair attempts or within a reasonable amount of time. *Peterson v. Culver Educational Foundation*, 402 N.E.2d 448, 461 (Ind. App. 1980); 15 U.S.C. § 2310(d)(1). Thus, evidence relating to the amount of time the RV was out of service is a material issue in a breach of warranty and MMWA claim.

In holding that the RV was not out of service an unreasonable amount of time as a matter of law, the Seventh Circuit weighed the evidence and made numerous factual findings as to each time the RV was out of service:

During the First Post-Sale Repair Attempt, the Court found that the 53 days out of service did not count because the Zylstras did not themselves report the defects. (App. 17-18). However, DRV's obligation is to repair warrantable defects that it is put on notice of existing defects. DRV's obligation to repair warrantable defects does not rise or fall depending on who reported the defect.

During the Second Post-Sale Repair Attempt, the Court found that the Zylstras did not inform DRV that Bradley was unwilling to perform the warranty repairs, and thus, found that the 22 days out of service did not count. (App. 18-19). However, the Zylstras presented evidence that they had spoken to DRV about the dealership's warranty repair refusal. Aff. Zylstra, ¶16 (Ex 2; Doc 28-3; Appx. P28).

During the Third Post-Sale Repair Attempt, the Court found that the four days out of service did not count even though the Zylstras presented evidence of DRV's warranty repair refusal. (App. 19-20). The Court also found that the Zylstras "showed up" on DRV's doorstep. However, the Zylstras presented evidence that the service appointment at the DRV factory on June 21, 2017 was made in May 2017, meaning the Zylstras gave DRV nearly a month's notice. Id.

During the Fourth Post-Sale Repair Attempt, the Court found that the 52 days out of service did not count because the Zylstras knew the dealership was short-handed and agreed to such and that non-warranty work was performed. (App. 20). However, the Zylstras presented evidence that the non-warranty work amounted to the installation of a sewage drain

coupling (i.e. one job on a list of 18). Plaza RV Repair Order #1 (Ex 10; Doc 28-11). Further, the Zylstras willingness to leave the RV for warranty repairs is completely irrelevant to the issue of whether DRV had a reasonable opportunity to repair the RV's remaining 17 defects, and failed to do so within a reasonable amount of time.

During the Fifth Post-Sale Repair Attempt, the Court found that the 102 days out of service did not count, finding Plaza RV performed non-warranty repairs and the Zylstras agreed to the time out of service. (App. 21-22). However, the Zystras presented evidence that they were unhappy with the repair delay in mid-October. Letter to Heartland (Ex 16; Doc 28-17). After weighing the letter's credibility and deciding whether it felt the Zylstras would have used the RV, the Court found the letter was unpersuasive. (App. 21). Further, the Zylstras presented evidence that the non-warranty work amounted to the installation of the entry steps (i.e. one job on a list of 16). Plaza RV Repair Order #2 (Ex 11; Doc 28-12).

There was a genuine dispute of a material issue since the parties disputed the days out of service. The Zylstras met their burden to produce evidence of a genuine dispute since the evidence does not unmistakably favor DRV. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986). Instead of viewing the 230 days out of service in a light most favorable to the Zylstras, the Court combed through the evidence and found none of the 230 days counted towards the breach of warranty and MMWA claims. See *First Nat. Bank of Ariz. v. Cities*

Service Co., 391 U. S. 253, 289, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)(the question at summary judgment is whether a jury should "resolve the parties' differing versions of the truth at trial"). The fact finder could certainly find that all, some, or none of the time out of service counted towards the breach of warranty and MMWA claims. However, that was for the jury to decide – not the Court. As such, the Court misapplied the Rule 56 standard.

iv. The Court departed from accepted judicial proceedings by misapply the Rule 56 standard

By misapplying the Rule 56 standard, the Court effectively placed a heightened burden on the Zylstras to establish that a genuine dispute exists by conclusively establishing disputed facts in their favor, as opposed to determining whether genuine issues of material fact exist. The Court noted that there are disputed facts, yet held that the "disputed facts are not material". (App. 5).

"The issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Cities Service Co.*, 391 U.S. at 288-289. In other words, the Zylstras were required to present evidence that genuine disputes of material facts exist. It is a burden of production – not persuasion. The Zylstras did that as evidenced by the extensive record.

The Court twice acknowledged the fact-intensive nature of the parties' dispute. *Zylstra*, at 601, 608 (App. 5, 17). And, whether the Zylstras provided DRV with a reasonable opportunity to cure the RV's defects is certainly a material issue since it is an element of a MMWA claim.

Since the issue of whether the Zylstras provided DRV with a reasonable opportunity to cure the RV's defects is material and the Seventh Circuit acknowledged that there are disputed facts, the effect of the decision was to shift the burden to the Zylstras to conclusively prove the validity of the genuinely disputed material facts. See *Cities Serv. Co.*, 391 U.S. at 288. As a result, the Zylstras were deprived of their right to a jury trial. Thus, the Court erred in affirming the district court's order granting DRV's motion for summary judgment.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

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