

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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AUTO CLUB GROUP INSURANCE  
COMPANY,

UNPUBLISHED  
March 20, 2008

Plaintiff-Appellant/Cross-Appellee,

v

No. 272864  
Oakland Circuit Court  
LC No. 2005-069355-CK

AMANA APPLIANCES,

Defendant-Appellee/Cross-  
Appellant,

and

GOODMAN COMPANY, L.P., and GOODMAN  
MANUFACTURING COMPANY, L.P.,

Defendants.

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Before: Wilder, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted from the trial court's order granting partial summary disposition in favor of defendants with regard to the breach of warranty claim. Defendants cross appeals from the denial of their motion for summary disposition with regard to the tort claim sounding in negligence. We affirm in part and reverse in part.

This case arises from a dispute surrounding the operation of a furnace. Homeowners James and Nancy Matlis own a residence in Milford, Michigan. During the winter of 2002-2003, the couple spent the time in Florida and returned to their Michigan residence on May 23, 2003, to find extensive damage to their home. Allegedly, the furnace had malfunctioned during the winter, causing pipes to burst, leaving water and mold damage to the lower level of the home. Plaintiff, the couple's insurance company for the Michigan premises, paid \$203,024.40 in insurance proceeds for home repairs and other covered expenditures. On September 23, 2005, plaintiff filed this action, as subrogee of the homeowners, to recover for the payment amount made to the insured. The complaint filed by plaintiff contained two counts, but the causes of action were not labeled. The first count contained allegations of negligence, specifically alleging a duty, breach, causation, and damages. However, this negligence claim also asserted that there

were errors in design and manufacture. The second count alleged “breaches of warranty and product defects.”

Defendants moved for summary disposition, alleging that the claims were barred because they were raised after the expiration of the applicable statute of limitations and based on the economic loss doctrine. Plaintiff asserted that the case law cited by defendants was distinguishable, and that the type of damage alleged was not governed by the economic loss doctrine. The trial court issued a written opinion, holding that dismissal of the breach of warranty claim was proper where plaintiff failed to dispute the applicability of the Uniform Commercial Code (UCC) and its period of limitation. Therefore, the breach of warranty claim was untimely filed. However, the trial court ruled that the first tort claim, sounding in negligence, was not barred by the economic loss doctrine. We granted plaintiff’s delayed application for leave to appeal, and defendant filed a cross appeal.

Summary disposition decisions are reviewed de novo on appeal. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). Summary disposition of a claim is proper based on MCR 2.116(C)(7) when the action is time barred. *Citizens Ins Co v Scholz*, 268 Mich App 659, 662; 709 NW2d 164 (2005). Unless disputed questions of fact are presented, whether a cause of action is time barred by the statute of limitations presents a question of law subject to de novo review. *Id.*

The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id.* The nonmoving party may not rely on mere allegations or denials in the pleadings. *Id.* Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a disposition motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). We may affirm the trial court’s decision, albeit on other grounds. See *Adell Broadcasting Corp v Apex Media Sales, Inc*, 269 Mich App 6, 12; 708 NW2d 778 (2005).

Based on the record presented, we conclude that plaintiff failed to meet its burden of demonstrating a genuine issue of disputed fact with admissible evidence with regard to the commencement of the statutory period. *Maiden, supra*; *Quinto, supra*. Therefore, summary disposition in favor of defendants was proper with regard to the breach of warranty claim. In support of their request for summary disposition, defendants presented stipulated facts as follows:

1. Plaintiff’s subrogors James Matlis and Nancy Matlis own a residence at 1710 South Milford Road, Milford, Michigan 48381.
2. Plaintiff alleges that on May 23, 2003 its insureds (subrogors James Matlis and Nancy Matlis) “returned to Michigan from their winter home in Florida” and discovered frozen plumbing and water damage. (Plaintiff’s Complaint ¶ 6).

3. Plaintiff alleges in ¶7 of its Complaint (but Defendant disputes) that the damage was caused by the failure of a furnace door switch.

4. The furnace door switch on which Plaintiff bases its claims, and the furnace in which it is incorporated, were installed in the Matlis residence no later than July 1989.

Defendants asserted that the applicable statute of limitations was governed by the UCC. Specifically, in *Baker v DEC Int'l*, 458 Mich 247, 251; 580 NW2d 894 (1998), the Supreme Court held that a breach of warranty occurs, and the statute of limitations begins to run, when tender of delivery of the product occurs. The Supreme Court further held that the statute of limitations for purposes of a breach of warranty claim is four years, citing to MCL 440.2725. MCL 440.2725 provides, in relevant part:

(1) An action for breach of any contract for sale must be commenced within 4 years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than 1 year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

In the present case, there were no allegations of a warranty extending to future performance of the goods. Thus, the breach of any warranty agreement commenced in 1989 when the furnace was installed and ended in 1993. MCL 440.2725(2).

Plaintiff contends that the claim at issue was not based on the UCC, but rather, a claim of common law products liability was alleged, and the statute of limitations did not begin to run until the damages to the premises occurred. Indeed, in pharmaceutical product defect cases, a cause of action accrues when the plaintiffs discovers, or should have discovered, a possible cause of action. *Moll v Abbott Laboratories*, 444 Mich 1, 11-13; 506 NW2d 816 (1993). See also MCL 600.5833 ("In actions for damages based on breach of a warranty of quality or fitness the claim accrues at the time the breach of the warranty is discovered or reasonably should be discovered.") However, plaintiff has presented no documentary evidence to establish that the breach of warranty occurred in the winter of 2002-2003. Rather, plaintiff opined that a breach of warranty occurred based on its conclusion that an electrical short with regard to the furnace caused the damage to the insured's premises. Plaintiff has submitted no documentary in accordance with MCR 2.116(G)(5) to establish that the discovery statute for breach of warranty applies. Documentary evidence to support the conclusion that a breach of warranty by defendants was not submitted to allow this case to be removed from the UCC period. A blanket assertion, without more, is insufficient to invoke the discovery statute of limitations for breach of warranty. See *Quinto, supra*. Accordingly, summary disposition of the breach of warranty claim was proper.

We also note that, at the hearing regarding defendants' motion for summary disposition, plaintiff asserted that "this particular furnace did have 3 service calls and at least 3 items that were changed out as a result of the service calls." However, plaintiff did not allege who performed the service on these occasions, did not reveal the service performed on the three occasions, and did not name the service provider as a defendant. Under the circumstances, it was imperative for plaintiff to support its assertion that the damages were the result of a product defect and that there was no supervening cause as a result of the service calls.

With regard to the tort claim sounding in negligence or products liability, the trial court erred in denying defendants' motion for summary disposition. "Statutes of limitation are procedural devices intended to promote judicial economy and the rights of defendants." *Stephens v Dixon*, 449 Mich 531, 534; 536 NW2d 755 (1995). Statutes of limitation are designed to protect defendants and the courts from having to address cases that are seriously impaired due to the loss of evidence. *Id.* The limitations period is also designed to preclude a plaintiff from sleeping on his rights, by requiring a defendant to prepare a defense long after the event arose. *Id.* To determine whether to strictly enforce the statute of limitations or to apply the discovery rule, a balancing of factors occurs. *Brennan v Edward D Jones & Co*, 245 Mich App 156, 159; 626 NW2d 917 (2001). Specifically, the courts must analyze and balance when the plaintiff learned of the injuries, whether the plaintiff was given a fair opportunity to bring the suit, and whether the defendant's equitable interests would be unfairly prejudiced by tolling the statute of limitations. *Id.* The discovery rule has been applied to product liability cases based on asbestos related injuries or pharmaceuticals. *Id.* at 159-160. The discovery rule may be applied in cases where the dangers of flawed evidence, fading memories, and unrecoverable documents are less prevalent. *Id.* at 160.

Plaintiff's negligence action is premised on an underlying theory of products liability. The statute of limitations for a products liability claim is three years from the accrual of such claim. MCL 600.5805(13). A claim accrues when four elements occur and could be properly pleaded. *Thomas v Process Equipment Corp*, 154 Mich App 78, 86; 397 NW2d 224 (1986). The elements of a products liability claim involve the existence of a duty by the defendant to the plaintiff, a breach of said duty, there is a proximate cause between the breach of duty and the plaintiff's injuries, and the plaintiff suffered damages as a result of the breach. *Id.* However, once again, we note that plaintiff failed to present any proofs, only blanket assertions, that defendants caused the breach of duty with regard to the injuries sustained by plaintiff's insured.

In the present case, the furnace had been installed in the home for approximately thirteen years when the damages to the premises occurred. Plaintiff concludes, without more, that a furnace malfunction occurred and that constitutes a product defect that was not realized until the winter of 2002-2003. However, without evidentiary support, we cannot conclude that such activity constitutes a product defect that commenced the statute of limitations at that time. Rather, by the very nature of the product at issue, it would be logical that the furnace would stop operating to prevent a fire to the premises and arguably such action would not be construed as a "defect." Plaintiff failed to present documentary evidence to indicate that the statute of limitations for product defects is applicable in this case where the product was purchased and installed in 1989 and operated for nearly thirteen years. See *Brennan*, *supra*. Accordingly, the trial court erred in denying defendants' motion for summary disposition with regard to the tort claim of negligence/products liability.

Affirmed in part, reversed in part, and remanded for entry of an order granting defendants' motion for summary disposition. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Karen M. Fort Hood