

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

AUTO-OWNERS INSURANCE COMPANY,
LARRY E. LAWSON and SHIRLEY A. LAWSON,

Plaintiffs,

v

File No. 03-6318-NP (Consolidated)
HON. PHILIP E. RODGERS, JR.

ACCUFLEX INDUSTRIAL HOSE, LTD.,
KURI TEC MANUFACTURER'S INC.,
FORGAMEX, S.A. DE C.V., AND
KURIYAMA CANADA, INC.,

Defendants,

and

AUTO-OWNERS INSURANCE COMPANY,
LARRY E. LAWSON and SHIRLEY A. LAWSON,

Plaintiffs,

v

ACCUFLEX INDUSTRIAL HOSE, LTD.,
KURIYAMA OF AMERICA, INC., KURITEC
CORPORATION, FORGAMEX, S.A. DE C.V.,

Defendants,

and

KURITEC CORPORATION,

Cross-Plaintiff,

v

FORGAMEX, S.A. DE C.V.,

Cross-Defendant.

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**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY DISPOSITION
AND DISMISSING THE CASE WITH PREJUDICE**

This action arises out of a propane gas cooker fire that occurred on January 23, 2000 and destroyed the Plaintiffs' home and possessions which were located in Leelanau County, Michigan. The Plaintiffs' Complaint contains a breach of warranty count, a negligence count and a breach of contract count.

The Defendants filed a motion for summary disposition claiming that the Plaintiffs' products liability claim should be dismissed because it is time-barred by the applicable statute of limitations, MCL 600.5805(13). The Defendants further claim that the Plaintiffs' breach of contract claim fails to state a claim upon which relief can be granted and should be dismissed, pursuant to MCR 2.116(C)(8), because there was no express contract between the parties and, by this action, the Plaintiffs' seek to recover for injury to persons or property which cannot be maintained on a contract theory.

The Plaintiffs filed a response to the motion. The Plaintiffs do not dispute that their claim accrued on January 23, 2000. However, they contend that this action is grounded in contract, not tort, and that it is governed by the Uniform Commercial Code ("UCC") because it involves the sale and purchase of a "good" as defined by the UCC and, therefore, the four-year statute of limitations provided by the UCC applies.

On September 29, 2003, the parties waived oral argument and the Court took the matter under advisement. The Court now issues this written decision and order and, for the reasons stated herein, grants the Defendants' motion.

STANDARDS OF REVIEW

MCR 2.116(C)(7)

MCR 2.116(C)(7) sets forth the following grounds for summary disposition:

The claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or

other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

In *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (2000), the Court of Appeals said:

When a motion for summary disposition is premised on MCR 2.116(C)(7), the nonmovant's well-pleaded allegations must be accepted as true and construed in the nonmovant's favor and the motion should not be granted unless no factual development could provide a basis for recovery. *Stabley, supra* at 365; 579 NW2d 374; *Dewey v Tabor*, 226 Mich App 189, 192; 572 NW2d 715 (1997). '[T]he court must consider not only the pleadings, but also any affidavits, depositions, admissions, or documentary evidence that has been filed or submitted by the parties.' *Horace v City of Pontiac*, 456 Mich 744, 749; 575 NW2d 762 (1998). If no facts are in dispute, whether the claim is statutorily barred is a question of law. *Dewey, supra* at 192; 572 NW2d 715.

MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone. Only the legal basis of the complaint is examined. The factual allegations of the complaint are accepted as true, along with any inferences which may fairly be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Mills v White Castle System, Inc*, 167 Mich App 202, 205; 421 NW2d 631 (1988).

I.

The Defendants are correct that a three-year statute of limitations applies to products liability cases, MCL 600.5805(13), breach of warranty claims, MCL 600.5833, and negligence claims, MCL 600.5805(10). The statute of limitations for a general contract action is six years. MCL 600.5907(8).

The Plaintiffs claim, however, that this action is grounded in contract and not tort and is governed by the UCC four-year statute of limitations applies. MCL 440.2725.

The Plaintiffs rely upon *Neibarger v Universal Coop, Inc*, 439 Mich 512; 486 NW2d 612 (1992) and its progeny for the proposition that damages are recoverable under the UCC and that the UCC extends beyond commercial transactions involving sophisticated users to the sale of consumer goods.

It is true that a contract involving the sale of goods is actionable under the UCC. MCL 440.2102; *Citizens Ins Co v Osmose Wood Preserving Inc*, 231 Mich App 40,45; 585 NW2d 314 (1998). Additionally, the UCC has been applied to a transaction in goods sold to a consumer. See, e.g., *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 291; 616 NW2d 175 (2000) (consumer breach of warranty action against manufacturer of a motor coach), *Sherman v Sea Ray Boats Inc*, 251 Mich App 41; 649 NW2d 783 (2002) (boat buyer action against seller for breach of warranty, negligence, and breach of contract, among other claims); and *Farm Bureau Mutual v Combustion Research Corp*, 255 Mich App 715; 2003 WL 1249314 (2003) (radiant heat buyer action against heater seller alleging failure to warn and disclose faulty installation of heater).

In each of these cited cases, the issue was whether the "economic loss doctrine" applied so as to make the UCC applicable to the transaction in question.

The economic loss doctrine provides that "where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only economic losses." *Sherman v Sea Ray Boats Inc*, 251 Mich App 41, 44-44; 649 NW2d 783 (2002). In other words, a plaintiff's exclusive remedy for recovery of an economic loss caused by a defective product is provided by the UCC. Privity of contract is not required. *Farm Bureau*, *supra* citing *Osmose*, *supra* at 45.

The test enunciated by the *Neibarger* Court for deciding whether the economic loss doctrine applies provides that "the proper approach requires consideration of the underlying policies of tort and contract law as well as the nature of the damages." *Sherman*, *supra* at 54.

Economic loss is the equivalent of lost profits or loss of economic expectation in the product. *Sherman*, *supra* at 53. This case is not about economic loss. This case is solely about property loss occasioned by a fire allegedly caused by a defective propane gas cooker. Thus, the economic loss doctrine and the UCC do not provide Plaintiffs with a remedy. The Plaintiffs' sole remedy is in tort. The applicable statutes of limitations are three years. MCL 600.5805(13); MCL 600.5833; MCL 600.5805(10).

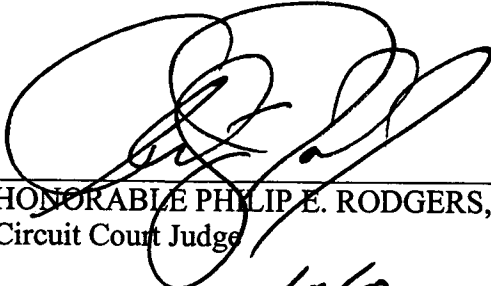
CONCLUSION

The Plaintiffs' action for damages to property caused by an allegedly defective propane gas cooker sound in tort only. The applicable statutes of limitations are three years. The Plaintiffs claim accrued on January 23, 2000. The Plaintiffs filed this action on June 25, 2003, more than three years

after their claim accrued. The Plaintiffs' action is, therefore, time-barred and should be and hereby is dismissed with prejudice. Having dismissed the Plaintiffs' action, the cross-action is rendered moot and likewise should be and hereby is dismissed.

IT IS SO ORDERED.

This Decision and Order resolves the last pending claim and closes the case.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 10/02/03