FOURTH DIVISION
October 29, 2015

1-14-2697 and 1-14-2812, Consolidated

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BERNIECE H. HUTTON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 10 L 13777
	)	
THE BOEING COMPANY,	)	
	)	
Defendant-Appellee	)	
	)	
	)	
(Southwest Airlines Company,	)	Honorable
	)	John H. Erhlich,
Defendant).	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court of Cook County's judgment granting defendant's motion for summary judgment is affirmed; plaintiff airline passenger's strict product liability claims are barred by the statute of repose where defendant manufacturer delivered the airplane more than 20 years before plaintiff's alleged injury, plaintiff failed to produce

evidence of an express or implied warranty as to the airplane, or of defendant's negligence in designing the airplane, and plaintiff failed to produce evidence any negligence was a proximate cause of her injuries.

¶ 2 Plaintiff, Berniece H. Hutton, acting *pro se*, filed a complaint against defendant, the Boeing Company, for injuries plaintiff allegedly suffered on a flight aboard an airplane defendant manufactured. Plaintiff was allegedly injured when a "filler panel" above her seat fell, striking plaintiff on the head. Following extensive discovery, defendant moved for summary judgment. The circuit court of Cook County granted the motion as to all of plaintiff's claims against defendant. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On July 16, 2009, plaintiff was a passenger on a Southwest Airlines (Southwest) flight to Chicago's Midway Airport (Midway). The airplane was a Boeing model 737-300. Boeing sold the airplane to Southwest in 1988. While in flight, a flight attendant noticed a panel above plaintiff's seat was loose. The panel was adjacent to the passenger service unit. The passenger service unit includes the passenger's light and air controls. Two flight attendants tried unsuccessfully to push the panel back into place. When the airplane touched down, the panel fell and struck plaintiff and another passenger, Anthony Ware. Both passengers received medical attention aboard the airplane. Only plaintiff requested to be transported to a hospital. Ware initially estimated the panel weighed one or two pounds. An airline mechanic and several other witnesses testified during discovery that the panel weighs two to three ounces, and Ware would not disagree with that testimony. Ware described his injuries from being struck by the panel as minor to nonexistent.

¶ 5 On December 3, 2010, plaintiff, acting *pro se,* filed her initial 13-count complaint against defendant, Southwest, a paramedic employed by the city of Chicago who attended to plaintiff on the airplane, and Holy Cross hospital, where the paramedics transported plaintiff. On June 11, 2012, the trial court granted plaintiff leave to file her fourth amended complaint. Plaintiff's fourth amended complaint alleges seven counts against defendant, which we identify in the same manner as plaintiff labeled them in her complaint and we briefly summarize:

1. STRICT LIABILITY. Defendant is strictly liable to her because the subject airplane was being operated for the purpose and in the manner for which it was designed and built, the airplane was being operated in a condition without substantial change from its original condition when defendant sold the airplane, the airplane was defective and unreasonably dangerous and unsafe, and her injuries were caused by the unsafe condition of the airplane. Plaintiff further alleged there was a dangerous and defective lack of procedures and systems related to the overhead ceiling panels. Plaintiff also alleged defendant intentionally or recklessly violated a 2005 Federal Aviation Administration (FAA) Airworthiness Directive (Directive) concerning overhead ceiling panels "that were apt to dropping into [the] passenger cabin." (Count VII.)
2. BREACH OF IMPLIED AND EXPRESS WARRANTY. Defendant breached its express or implied warranty that the airplane including its overhead ceiling panels and component parts thereof were free from defects and safe for the purposes for which they were designed and manufactured. Plaintiff alleged defendant knew or should have

known the airplane was not properly inspected or maintained based on the FAA Directive. (Count IX.) (The complaint does not contain a Count VIII.)

3. NEGLIGENCE—STRICT LIABILITY IN TORT—FAILURE TO WARN. Defendant failed to warn of the possible adverse consequences of the known defective condition of the airplane's overhead ceiling panels, assemblies, and component parts thereof, and failed to provide proper and adequate inspection and maintenance of the overhead passenger cabin, after having been forewarned of the danger by the FAA Directive. Plaintiff also alleged defendant negligently and carelessly failed to provide proper and adequate inspection, procedures, and maintenance to prevent overhead ceiling panels from dropping into the passenger cabin. (Count X.)
4. INTENTIONAL MISREPRESENTATION. Defendant knowingly and willfully misrepresented material facts concerning the airworthiness of the airplane where the dangerous condition of the airplane was known to defendant because of the FAA Directive, and plaintiff boarded the airplane in reliance on those misrepresentations. (Count XI.)
5. NEGLIGENT MISREPRESENTATION. Defendant negligently or recklessly misrepresented material facts relating to the airworthiness of the airplane where the airworthiness of the airplane was known to defendant because of the FAA Directive, and plaintiff boarded the airplane in reliance on those misrepresentations. (Count XII.)
6. NEGLIGENCE—MISREPRESENTATION. Defendant negligently misrepresented facts by concealing information concerning defects in the airplane's ceiling panels,

brackets, parts, components, and assemblies and represented that they were safe and free of defects. Defendant knew of defects in ceiling panels as evidenced by a Boeing Service Bulletin, the FAA Directive, and other sources. Defendant knowingly concealed the defect from plaintiff. (Count XIII.)

7. NEGLIGENCE. Defendant negligently designed, built, and maintained the airplane, including but not limited to the ceiling panels, failed to warn of its dangers, and failed to correct known problems that would prevent the dangerous condition of the airplane that caused plaintiff's injury. Defendant also negligently failed to test and service the airplane, including the ceiling tile and components, and failed to provide accurate and complete manuals and instructions. (Count XIV.)

¶ 6 Plaintiff alleged she suffered blunt head trauma, traumatic brain injuries, sleep disturbances, closed head injury, depressed skull fracture, nerve injuries, cervical nerve injuries, spinal cord injuries, partial hearing loss, TMJ injuries, optical nerve injuries, physical pain, mental injuries, and anxiety. Plaintiff's prayer for relief sought an amount in excess of 35 million dollars in damages on Counts VII, IX, XI, XII, and XIV, and in excess of 25 million dollars in damages on Counts X and XIII.

¶ 7 On July 18, 2012, defendant filed a motion to dismiss portions of plaintiff's fourth amended complaint pursuant to section 2-615(a) of the Code of Civil Procedure (735 ILCS 5/2-615(a) (West 2012)). Defendant moved to dismiss plaintiff's claims for intentional misrepresentation (Count XI), negligent misrepresentation (Count XII), and "negligence misrepresentation" (Count XIII) on the grounds the allegations in those counts were insufficient to state a claim. Defendant generally noted that plaintiff failed to plead facts

demonstrating misrepresentations defendant made or that defendant knew any statements were false. Rather plaintiff alleged misrepresentations were demonstrated by the fact the airplane was in operation despite not being airworthy. Defendant also argued plaintiff failed to allege a duty to report information to plaintiff. The trial court granted defendant's motion to dismiss Count XI because plaintiff failed to plead the existence of a financial transaction between herself and defendant. The court granted defendant's motion to dismiss Count XII because plaintiff failed to allege what misrepresentations defendant made or what material facts were involved. With regard to plaintiff's allegations that defendant's misrepresentations were found in the fact the airplane was in operation in violation of an FAA Directive, the court found plaintiff did "not allege which FAA Directives Defendants violated, how Defendants' operations constituted misrepresentations to Plaintiff, or how Plaintiff relied on those representations." The court granted defendant's motion to dismiss Count XIII because, while the complaint alleged the general subject matter of defendant's alleged misrepresentations, plaintiff failed to allege what specific misrepresentations defendant made to her, how defendant made the misrepresentations, or when the misrepresentations were made to plaintiff.

¶ 8 On December 31, 2012, plaintiff filed a motion for leave to file a fifth amended complaint and for joinder of additional defendants. On January 11, 2013, the trial court entered plaintiff's motion for leave to file a fifth amended complaint and ordered defendant to respond to the motion. Defendant filed a response in opposition to plaintiff's motion for leave to file a fifth amended complaint "ostensibly to add certain component part manufacturers as unnamed Doe Defendants" on the grounds plaintiff's request was "untimely

and futile." On January 22, 2013, the trial court denied plaintiff's motion for leave to file a fifth amended complaint. On March 1, 2013, the court entered plaintiff's motion to amend complaint to add a punitive damages claim.

¶ 9 On March 21, 2014, defendant filed a motion for summary judgment on Counts VII, IX, X, and XIV of plaintiff's fourth amended complaint. Defendant argued plaintiff "concedes that she has no knowledge or evidence that [defendant] exercised any control over the airplane involved after [defendant] sold the plane in 1988, and she cannot establish that the 21-year-old airplane was in substantially the same condition at the time of [the] incident as when it left [defendant's] possession. Her claims fail as a matter of law on this basis alone, and the strict liability claims are also barred by the applicable statute of repose."

¶ 10 Defendant also asserted that the FAA Directive on which plaintiff based her claims was a 2005 Directive "which directed certain investigative/corrective actions in order to 'prevent loosened or disconnected overhead ducts from causing ceiling panels to drop below the minimum height of the evacuation zone for the passenger cabin.' " Defendant asserted this Directive related to the ceiling panels "that run down the center aisle of the airplane, in the area where passengers and crew walk when moving through the passenger cabin." In support of that assertion defendant attached an affidavit by Walter G. West. Defendant argued plaintiff and Ware testified in depositions that "the panel that fell in this incident was located directly above their passenger seats, *i.e.*, not in the center aisle but instead part of the paneling on the underside of the overhead luggage compartment. Thus the 2005 [Directive] has absolutely no connection or relevance to the incident or the condition of the panel identified by [plaintiff.]"

¶ 11 West's affidavit is dated March 13, 2014. West averred that in the course of his employment with defendant he regularly reviews FAA Airworthiness Directives and defendant's Service Bulletins. He is familiar with the Directive and defendant's related Service Bulletin that are involved in this case. He also averred that he is familiar with the layout and components of the interiors and passenger cabins of Boeing model 737-300 airplanes. West testified he reviewed plaintiff and Ware's depositions, including a photograph on which plaintiff marked the area from which the panel fell. West averred that the ceiling panels referenced in the 2005 Directive and related Service Bulletin "are completely unrelated to, and different from, the panels immediately above the passenger seats on the underside of the overhead storage bins." He averred the ceiling panels addressed by the 2005 Directive run down the center aisle of the airplane. Moreover, "the investigative/corrective actions that the FAA directed in the 2005 [Directive] have no connection to and would have no impact or relevance to the condition of the panels in the area identified by [plaintiff] on the underside of the overhead storage bins."

¶ 12 Defendant's motion for summary judgment also argued that, based on plaintiff's deposition, her theory of liability against defendant is premised solely on (1) the 2005 Directive to owners and operators of defendant's model 737-300 airplane advising them of the possibility that ceiling panels might drop below minimum height requirements and requiring corrective action, and (2) the fact the panel fell on her head. Defendant argued plaintiff's product liability claim fails as a matter of law because plaintiff has no evidence from which a jury could conclude that the overhead panels on the airplane were in the same condition in July 2009 as they were when they left defendant's control in 1988. In fact, plaintiff's own

discovery disclosed extensive maintenance and repairs to the airplane by Southwest, and two Southwest employees altered the condition of the panel in flight on the day it fell. Defendant also argued plaintiff's failure to warn claim fails as a matter of law because plaintiff cannot plead or prove that defendant sold the airplane in 1988 "with knowledge of any relevant danger relating to the overhead panel which allegedly fell and struck [her.]" Not only does plaintiff lack evidence, defendant argued, the length of service of the airplane "belies any credible assertion that the airplane possessed dangerous propensities of the sort asserted by [plaintiff] at the time it was sold." Moreover, not only does the 2005 Directive not apply to the panel that allegedly struck plaintiff and Ware, but because the FAA issued the Directive in 2005, the Directive is not probative of what defendant knew in 1988. Regardless, both strict product liability claims are barred by the Illinois statute of repose.

¶ 13 Defendant argued plaintiff's negligence claim in Count XIV fails as a matter of law because plaintiff has no evidence from which a jury could conclude defendant breached any relevant duty to plaintiff under any applicable law. Defendant argued that plaintiff's negligence claim asserts defendant breached its duty of care to plaintiff by allowing the airplane to operate after the 2005 Directive warned of the issue with the center-aisle ceiling panels. Defendant asserts that argument fails because the Directive is not relevant to any issue in this case. Further, plaintiff concedes defendant did not exercise control over the airplane in 2005 or thereafter; thus it could not have allowed the airplane to operate in violation of the Directive. The Directive, in fact, applies to owners and operators of the airplane, not to defendant, therefore defendant could not have violated the Directive.

¶ 14 Finally, defendant argued the breach of express warranty claim in Count IX fails because plaintiff failed to attach an express warranty to her complaint. The implied warranty claim fails because plaintiff has no evidence a defect existed at the time the airplane left defendant's control.

¶ 15 On July 29, 2014, the trial court granted defendant's motion for summary judgment as to all remaining counts against defendant (Counts VII, IX, X, and XIV) in "the operative fourth amended complaint." Specifically, the court found that Counts VII and X are barred by the statute of repose, and Count XIV "cannot proceed because there is no evidence that [defendant] owed any duty to plaintiff following its sale of the airplane." The court also found that plaintiff "lacks standing to pursue" Count IX because plaintiff failed to attach an express warranty or identify evidence that she was an intended beneficiary of any warranty.

¶ 16 Plaintiff's complaint contained claims against Southwest that are still pending in the trial court. But the court found its order granting summary judgment in favor of defendant was final and appealable, and that no just reason existed to delay enforcement or appeal of the order. This appeal followed.

¶ 17 ANALYSIS

¶ 18 "Summary judgment is appropriate where the pleadings, depositions, admissions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Hawkins v. Capital Fitness, Inc.*, 2015 IL App (1st) 133716, ¶ 10. "The movant may meet his burden of proof either by affirmatively showing that some element of the case must be resolved in his favor or by establishing that there is an absence of evidence to support the nonmoving party's case. [Citations.]" (Internal quotation

marks omitted.) *Midwest Gaming & Entertainment, LLC v. County of Cook*, 2015 IL App (1st) 142786, ¶ 47. To withstand a summary judgment motion, the nonmoving party need not prove her case at this preliminary stage but must present some factual basis that would support her claim. *Siegel Development, LLC v. Peak Construction LLC*, 2013 IL App (1st) 111973, ¶ 110. "We may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct. [Citation.]" *Midwest Gaming & Entertainment, LLC*, 2015 IL App (1st) 142786, ¶ 47.

¶ 19 Whether an alleged defect constitutes a breach of an express warranty is a factual question. *Neppl v. Murphy*, 316 Ill. App. 3d 581, 591 (2000). "Whether an implied warranty has been breached is a question of fact." *Federal Insurance Co. v. Village of Westmont*, 271 Ill. App. 3d 892, 897 (1995). Where the matter can be decided as a question of law, the case is a proper one for summary judgment. *First of America Bank, Rockford, N.A. v. Netsch*, 166 Ill. 2d 165, 176 (1995). The applicability of a statute of repose is a question of law. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 13.

¶ 20 Before turning to the substantive merits of the appeal, we address plaintiff's arguments concerning her fifth amended complaint. Plaintiff argues the trial court erred in granting summary judgment in favor of defendant because the court could not grant summary judgment on the fourth amended complaint after plaintiff filed a fifth amended complaint. The record clearly establishes that the trial court denied plaintiff's motion for leave to file a fifth amended complaint. Plaintiff argues this court may grant leave to amend a pleading at any time to achieve substantial justice. To the extent plaintiff intended to appeal the trial

court's judgment denying leave to file a fifth amended complaint or to ask this court for leave to file a fifth amended complaint, the order denying plaintiff's motion is affirmed.

¶ 21 Plaintiff sought to amend the complaint to add "Doe" defendant manufacturers of ceiling components of the airplane. Plaintiff's motion for leave to file the proposed fifth amended complaint asserted plaintiff sought to add as defendants "additional manufacturers of the [passenger service unit] overhead ceiling panel and component parts thereof." Plaintiff claimed to make "new allegations against Jane or John Doe Unknown Defendant (manufacturer(s) of parts/components that failed or manufacturer(s) of those parts/component parts that caused other parts/components to fail) in more detail." Plaintiff claimed defendant and Southwest had refused to produce pertinent information about parts and/or component parts and associated manufacturers thereof.

¶ 22 Plaintiff's proposed fifth amended complaint adds "Doe" defendants to claims against defendant for "Strict Liability," breach of implied and express warranty, negligence (failure to warn), negligent misrepresentation, and negligence. With the exception of the negligence count, the allegations in the proposed fifth amended complaint mirror the identical claims against defendant and allege conduct by defendant, not "Doe." Defendant objected on the grounds it identified the manufacturers of those components after the trial court ordered defendant to respond to a special interrogatory prior to the expiration of the statute of limitations for personal injury claims. Defendant argued the addition of those parties now would be futile because the statute of limitations expired before plaintiff took action to add those named parties as defendants.

¶ 23 We hold the trial court did not abuse its discretion in denying plaintiff leave to file a fifth amended complaint.

> "Although Illinois has a liberal policy of allowing the amendment of pleadings, this right is not unlimited. [Citation.] The decision whether to grant leave to file an amended complaint is within the sound discretion of the circuit court. [Citation.] In exercising its discretion, the circuit court should consider whether (1) the proposed amendment would cure the defects in the original pleading; (2) the amendment would surprise or prejudice other parties; (3) the proposed amendment is timely; and (4) previous opportunities to amend the pleading can be identified." *Steenes v. MAC Property Management, LLC*, 2014 IL App (1st) 120719, ¶ 38.

¶ 24 Defendant's response to the special interrogatory is not dispositive. The response objects to the interrogatory as vague, noting that plaintiff and defendant "may not have the same understanding of the referenced terms." Defendant has made a significant point of the fact the "ceiling panels" that were the subject of the FAA Directive are different from the "filler panel" that fell on plaintiff. The answer to the special interrogatory is unclear as to which component defendant referred when it answered that its sub-division "is the supplier of the ceiling panels." Regardless, if defendant's response to the special interrogatory was unsatisfactory, plaintiff could have sought leave to amend her complaint to add Doe defendants prior to the time she filed the motion for leave to file the fifth amended complaint. Defendant answered the special interrogatory on June 29, 2011. On March 29, 2012, the trial court granted plaintiff leave to amend her claims against defendant. On May 18, 2012,

plaintiff filed a motion for leave to file her fourth amended complaint. Plaintiff did not file her motion for leave to file a fifth amended complaint until December 31, 2012. "Since a trial court has broad discretion in motions to amend pleadings prior to entry of final judgment, this court will not find that denial of a motion to amend is prejudicial error unless there has been a manifest abuse of such discretion." (Internal quotation marks omitted.) *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273-74 (1992). Under the circumstances we cannot say a manifest abuse of discretion occurred in denying plaintiff's motion to file a fifth amended complaint while defendant's partial motion to dismiss was pending where plaintiff had the opportunity to amend sooner.

¶ 25 Plaintiff also argues (1) defendant is collaterally estopped from seeking summary judgment on the remaining claims in plaintiff's fourth amended complaint, and (2) the trial court erred in granting summary judgment in favor of defendant because defendant failed to answer plaintiff's fifth amended complaint. Plaintiff argues defendant's motion for summary judgment seeks "to dismiss the same claims that had been previously ruled by the trial court to stand in plaintiff's 4th Amended Complaint." Plaintiff is arguing that because the trial court did not dismiss Counts VII, IX, X, and XIV of her fourth amended complaint when defendant moved to dismiss some counts, defendant is barred from "relitigating" whether the remaining counts should be "dismissed."

¶ 26 The first flaw in plaintiff's argument is that defendant did not move to dismiss the counts in the fourth amended complaint that are the subject of its motion for summary judgment. Thus, collateral estoppel does not apply. *Schandelmeier-Bartels v. Chicago Park District*, 2015 IL App (1st) 133356, ¶ 35 ("the judgment in the first suit operates as an estoppel

only as to the point or question actually litigated and determined and not as to other matters which *might* have been litigated and determined" (Emphasis in original.) [Citation.]). More fundamentally, plaintiff has failed to recognize the difference between a motion to dismiss for failure to state a claim—the motion defendant filed against Counts XI, XII, and XIII—and a motion for summary judgment. "A significant difference between section 2–615 motions, as compared to *** motions for summary judgment is that a section 2–615 motion is based on the pleadings rather than on the underlying facts." *Barber-Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1068 (1992).

¶ 27 Finally, with regard to proposed amendments, plaintiff filed a motion for leave to amend her fourth amended complaint to add claims for punitive damages, and she argues the trial court erred in granting summary judgment where the record creates a question of law "regarding whether this motion should have been brought before the court in determining if the existing evidence supports a punitive damage claim." We construe plaintiff's assertion as an argument that the trial court should not have decided the summary judgment motion where the possibility of punitive damages exists. "If a plaintiff wishes to pursue a claim for punitive damages, the law requires him or her to first seek leave of court to amend his or her complaint to add a prayer for such damages. A court may allow the amendment only when a plaintiff has established at a hearing that he or she has a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. [Citation.]" (Internal quotation marks omitted.) *Vincent v. Alden-Park Strathmoor, Inc.*, 241 Ill. 2d 495, 499 (2011). Plaintiff's suggestion her motion to add a claim for punitive damages somehow should have precluded an entry of summary judgment in defendant's favor fails. The trial court's order granting

summary judgment in favor of defendant on all remaining claims against it rendered plaintiff's motion moot and, for the reasons set forth below, the trial court properly granted summary judgment in defendant's favor. Therefore, there is no need to address the issue of punitive damages any further. We now turn to plaintiff's claims.

¶ 28 1. Product Liability Counts

¶ 29 Counts VII and X of plaintiff's fourth amended complaint allege plaintiff is strictly liable because its product was defective and defendant failed to warn of the defect. The defect alleged in a strict product liability action may be a manufacturing defect or a design defect. *Chraca v. U.S. Battery Manufacturing Co.*, 2014 IL App (1st) 132325, ¶ 3. Plaintiff alleged both. To establish a strict product liability claim under either of these theories, a plaintiff must establish:

(1) a condition of the product that results from manufacturing or design;

(2) the condition made the product unreasonably dangerous;

(3) the condition existed at the time the product left the defendant's control;

(4) the plaintiff suffered an injury; and

(5) the injury was proximately caused by the condition. *Salerno v. Innovative Surveillance Technology, Inc.*, 402 Ill. App. 3d 490, 498 (2010).

¶ 30 "A failure to warn of a product's known danger or instruct on the proper use of the product may also result in strict liability." *Salerno*, 402 Ill. App. 3d at 497-98. "Under a failure to warn theory, a plaintiff must demonstrate that the manufacturer did not disclose an unreasonably dangerous condition or instruct on the proper use of the product as to which the average consumer would not be aware." *Salerno*, 402 Ill. App. 3d at 499. The design

defect must be present at the time of sale to trigger a duty to warn. *Jablonski v. Ford Motor Co.*, 2011 IL 110096, ¶ 111 ("when a design defect is present at the time of sale, the manufacturer has a duty to take reasonable steps to warn at least the purchaser of the risk as soon as the manufacturer learns or should have learned of the risk created by its fault"). "Nevertheless, a manufacturer is under no duty to issue postsale warnings or to retrofit its products to remedy defects first discovered after a product has left its control. [Citation.]" (Internal quotation marks omitted.) *Jablonski*, 2011 IL 110096, ¶ 112. "Illinois has rejected the imposition of any post-sale duty to warn if the product was not defective at the time of sale." (Internal quotation marks omitted.) *Jablonski*, 2011 IL 110096, ¶ 116 (quoting Restatement (Third) of Torts: Products Liability § 10, Reporters' Note, cmt. a, at 198 (1998)).

¶ 31 The trial court granted defendant's motion for summary judgment on Counts VII and X based on the statute of repose. The Illinois product liability statute of repose states, in pertinent part, as follows:

> "[N]o product liability action based on any theory or doctrine shall be commenced except within the applicable limitations period and, in any event, within 12 years from the date of first sale, lease or delivery of possession by a seller or 10 years from the date of first sale, lease or delivery of possession to its initial user, consumer, or other non-seller, whichever period expires earlier." 735 ILCS 5/13-213(b) (West 2008).

¶ 32 "A defendant has the burden of proof in showing that an affirmative defense such as a statute of repose applies. [Citation.] If a defendant makes a showing that the statute of repose applies, then the plaintiff has the burden to show facts that operate to toll or create an

exception to the repose period." *South Side Trust & Savings Bank of Peoria v. Mitsubishi Heavy Industries, Ltd.*, 401 Ill. App. 3d 424, 438-39 (2010). Plaintiff admits defendant sold the airplane to Southwest in 1988. Plaintiff suffered her alleged injuries in 2009, more than 21 years after defendant sold the airplane. Plaintiff does not attempt to show that the Illinois statute of repose was tolled or that any exception applies. Plaintiff argues that a different statute of repose—one that is not applicable in this case—does not apply to defendant, therefore the trial court erred in finding her claims barred.

¶ 33 Plaintiff argues that the statute of repose under the General Aviation Revitalization Act does not apply to the airplane on which she was injured. Plaintiff is correct. The General Aviation Revitalization Act is an 18–year statute of repose that protects manufacturers of a "general aviation airplane." *South Side Trust & Savings Bank of Peoria*, 401 Ill. App. 3d at 429. "A 'general aviation airplane' is any airplane for which the FAA has issued a type or airworthiness certificate; has a maximum seating capacity of 20 passengers at the time the FAA issues the certificate; and is not engaged in 'scheduled' passenger carrying activity at the time of the accident." *South Side Trust & Savings Bank of Peoria*, 401 Ill. App. 3d at 429, n.3 (citing General Aviation Revitalization Act of 1994, Pub. L. No. 105–102, § 3(e), 111 Stat. 2216 (amended 1997)).

¶ 34 We agree that the statute of repose in the General Aviation Revitalization Act does not apply. But plaintiff has not argued that the Illinois statute of repose does not apply either. Nor does she argue the Illinois statute tolled or that an exception applies to her strict product liability claims. We find the statute does apply. Therefore, summary judgment in favor of

defendant on Counts VII and X was proper. See generally *Willett v. Cessna Aircraft Co.*, 366 Ill. App. 3d 360, 370 (2006).

¶ 35 2. Breach of Warranty

¶ 36 Plaintiff's fourth amended complaint alleged defendant breached both express and implied warranties of merchantability.

> "In an express warranty action, plaintiff must show breach of an affirmation of fact or promise which was made part of the basis of the bargain. [Citations.] Express warranties are contractual in nature. [Citations.] Documents, brochures, and advertisements may constitute express warranties. [Citations.] Such affirmations made during the bargain are presumed to be a part of it unless clear, affirmative proof shows otherwise. [Citations.]" *Wheeler v. Sunbelt Tool Co.*, 181 Ill. App. 3d 1088, 1100 (1989).

¶ 37 In this case, plaintiff alleged defendant expressly warranted to her that the airplane and its component parts were fit and safe for the purposes for which they were designed and manufactured, and that she relied upon such warranties "in occupying a seat on the subject airplane on July 16, 2009."

¶ 38 "[E]xpress warranties are contractual in nature, [therefore,] the language of the warranty itself is what controls and dictates the obligations and rights of the various parties." *Hasek v. DaimlerChrysler Corp.*, 319 Ill. App. 3d 780, 788 (2001). Thus, "[t]o state a claim, the terms of the express warranty must be stated or attached to the complaint [citations], and failure to do so renders the claim invalid." *Board of Education of City of Chicago v. A, C & S, Inc.*, 131 Ill. 2d 428, 460-61 (1989). Plaintiff did not allege the substance of defendant's alleged

affirmation of fact or promise. Plaintiff did not point to evidence of the terms of defendant's alleged express warranty. Defendant satisfied its initial burden of persuasion to establish plaintiff lacks sufficient evidence to prove an essential element of her cause of action based on express warranty. *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 688-89 (2000). Plaintiff had the burden to present some factual basis that would arguably entitle her to judgment as a matter of law. *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 33. Plaintiff pointed to no terms of an express warranty. Therefore, summary judgment in favor of defendant was proper.

¶ 39 Plaintiff also alleged defendant breached implied warranties of merchantability and fitness for the purpose of safe flight.

> "A product breaches the implied warranty of merchantability if it is not fit for the ordinary purposes for which such goods are used. [Citations.] *** An implied warranty of merchantability applies to the condition of the goods at the time of sale and is breached only if the defect in the goods existed when the goods left the seller's control. [Citation.] Plaintiff is not required to prove a specific defect; rather, a defect may be proven inferentially by direct or circumstantial evidence. [Citation.] A prima facie case *** is made by proof that in the absence of abnormal use or reasonable secondary causes[,] the product failed to perform in the manner reasonably to be expected in light of its nature and intended function. [Citations.]" (Internal quotation marks omitted.) *Oggi Trattoria & Caffe, Ltd. v. Isuzu Motors America, Inc.*, 372 Ill. App. 3d 354, 361 (2007).

¶ 40 Plaintiff has not alleged or pointed to evidence of a specific defect in the filler panel. To establish that a product was defective when it left the manufacturer's control, where no specific defect in the product is alleged, the plaintiff is required to prove the product was *not* used in an unreasonable manner and that no reasonable secondary causes of the defect existed. *Alvarez v. American Isuzu Motors*, 321 Ill. App. 3d 696, 704 (2001). A plaintiff may prove her case inferentially by establishing that the product malfunctioned and by excluding other reasonable causes of the malfunction. *Alvarez*, 321 Ill. App. 3d at 704[1]. The burden is on the plaintiff to "present evidence of absence of abnormal use" of the product and to "exclude any possible secondary causes of the alleged defects." *Alvarez*, 321 Ill. App. 3d at 704.

> "[P]roof of a malfunction during normal use which tends to exclude other extrinsic causes is sufficient to make a prima facie case on the issue of the existence of a defective condition. [Citations.] Such a malfunction need not manifest immediately ***. Rather, evidence of reasonable and proper handling of a product between the time it left the possession and control of the defendant manufacturer or seller and the time of the occurrence of the injury is an indication that the defect alleged to have existed at the time of the injury did not come into being in the interim, but existed prior thereto." *Alvarez*, 321 Ill. App. 3d at 704.

---

[1] *Alvarez* was decided under the Magnuson-Moss Act, but any difference between the Act and other principles of implied warranties is immaterial here. "Magnuson-Moss broadens the reach of the UCC article II implied warranties, affording consumers substantially greater protection against defective goods." *Rothe v. Maloney Cadillac, Inc.*, 119 Ill. 2d 288, 295 (1988); *Alvarez*, 321 Ill. App. 3d at 702 ("The Magnuson-Moss Act imposes on manufacturers the same implied warranties that state law imposes on the buyer's immediate seller.").

¶ 41 The record does not contain evidence of proper handling, nor is there direct or circumstantial evidence excluding any possible secondary causes of the alleged defect. Plaintiff has not adduced evidence that the cause of the falling panel was a defect which defendant failed to remedy or warn against. The evidence shows that defendant delivered the airplane more than 20 years ago and was maintained by Southwest. Wilbur Abbott, an airplane mechanic employed by Southwest, testified in his deposition that, with regard to filler panels generally, airplane maintenance has "removed them and reinstalled them."

> "Although plaintiff need not disprove every alternative cause of her injury [citation], liability may not be based on mere possibility [citation]. The test to be applied is whether the circumstances shown were such as to justify an inference of probability as distinguished from mere possibility. [Citation.] A jury may not engage in mere speculation and conjecture." (Internal quotation marks omitted.) *Alvarez*, 321 Ill. App. 3d at 706.

¶ 42 The circumstances shown by plaintiff's evidence do not justify an inference the panel that struck her was defective when it left defendant's control. Therefore, summary judgment in favor of defendant on plaintiff's breach of implied warranty claim was proper.

¶ 43 3. Negligence Count

¶ 44 Plaintiff's complaint alleged defendant negligently designed and built the airplane, negligently maintained and serviced the airplane, negligently obtained certification for and sold the airplane, negligently failed to warn of known dangerous conditions, negligently wrote manuals and procedures for the airplane, and negligently failed to inspect, test and repair the airplane.

> "For a plaintiff to state a cause of action for negligence in Illinois, the complaint must allege facts sufficient to establish three elements: (1) the existence of a duty of care owed to the plaintiff by the defendant; (2) a breach of that duty, and (3) an injury proximately caused by that breach. [Citations.] The key distinction between a negligence claim and a strict liability claim *** lies in the concept of fault. [Citations.] While the focus in a strict liability claim is primarily on the condition of the product, a defendant's fault is at issue in a negligence claim, in addition to the product's condition. [Citations.]" *Guvenoz v. Target Corp.*, 2015 IL App (1st) 133940, ¶¶ 89-90.

¶ 45 "Unlike strict liability, under a theory of negligence it is not sufficient to show that the product is defective or not reasonably safe; the plaintiff must also show that the defendant breached a duty owed to plaintiff. [Citation.] Further, not only must plaintiff prove that the product was not reasonably safe, but also that the defendant knew, or in the exercise of ordinary care should have known, of that unsafe condition. [Citation.]" *Brobbey v. Enterprise Leasing Co. of Chicago*, 404 Ill. App. 3d 420, 430 (2010).

¶ 46 a. Negligent Design

¶ 47 For a negligent design claim, the crucial questions are whether the manufacturer exercised reasonable care in the design of the product and " 'whether in the exercise of ordinary care the manufacturer should have foreseen that the design would be hazardous to someone.' " [Citations.] A plaintiff must show that the manufacturer knew or should have known of the risk posed by the design at the time of the manufacture to establish that the

manufacturer acted unreasonably based on the foreseeability of harm. [Citation.]" *Sobczak v. General Motors Corp.*, 373 Ill. App. 3d 910, 923 (2007).

> "[T]o establish a negligence claim for a defective design of a product, a plaintiff must prove that either (1) the defendant deviated from the standard of care that other manufacturers in the industry followed at the time the product was designed, or (2) that the defendant knew or should have known, in the exercise of ordinary care, that the product was unreasonably dangerous and defendant failed to warn of its dangerous propensity." *Blue v. Environmental Engineering, Inc.*, 215 Ill. 2d 78, 96 (2005).

"Because products liability actions involve specialized knowledge or expertise outside of a layman's knowledge, the plaintiff must provide expert testimony on the standard of care and a deviation from that standard to establish either of these propositions. [Citation.]" *Salerno v. Innovative Surveillance Technology, Inc.*, 402 Ill. App. 3d 490, 501 (2010).

¶ 48 Plaintiff did not produce expert testimony that the design of the panel that struck her deviated from the standard of care in the airline manufacturing industry or that defendant knew or should have known the design of the panel was unreasonably dangerous when it left defendant's control. Plaintiff argued defendant knew or should have known the design of the panel at issue was unreasonably dangerous based on the 2005 FAA Directive requiring inspection and remedial maintenance of ceiling panels in this model airplane. Defendant argues it presented unrebutted evidence that Directive referenced totally different ceiling panels and had nothing to do with the panel which struck plaintiff. West averred the ceiling panels addressed by the 2005 Directive run down the center aisle of the airplane, and plaintiff

and Ware did both testify the panel that fell in this incident was located directly above their passenger seats. Plaintiff attacks West affidavit on the grounds it violates Illinois Supreme Court Rule 213(f) (eff. Jan. 1, 2007) because defendant produced an opinion witness for the first time in its motion for summary judgment.

¶ 49 In its reply to plaintiff's response to defendant's motion for summary judgment, defendant argued plaintiff's "interrogatories in the case requested the identities of witnesses to the July 2009 incident or individuals with knowledge of the incident. Mr. West was and is neither. Nor was [defendant] required to identify Mr. West as an 'opinion' witness before filing its motion. [Plaintiff] never issued an interrogatory asking about opinion witnesses, and no (f)(2) or (f)(3) deadlines have yet been set in this case." Plaintiff failed to cite an insufficient response to an interrogatory requesting defendant to identify its opinion witnesses. Nevertheless, Rule 213(f) applies only to trial testimony, not to affidavits. *Pogge v. Hale*, 253 Ill. App. 3d 904, 919 (1993) (applying former Rule 220 (134 Ill. 2d R. 220)). "Supreme Court Rule 191 applies to affidavits. An affiant may testify to anything, as long as he or she is competent to do so." *Pogge*, 253 Ill. App. 3d at 919. This rule "requires a showing only that the witness *could* testify to the matters contained in the affidavit, not that he or she *will* testify. [Citation.] We hold that Rule 191 affiants are not required to be disclosed as expert trial witnesses under [former] Rule 220." (Emphases in original.) *Pogge*, 253 Ill. App. 3d at 919.

¶ 50 Even under the "stricter standard of compliance" with disclosure requirements imposed by Rule 213 (*Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 110 (2004)), assuming

defendant failed to comply with a discovery request, striking the affidavit would be an abuse of discretion in this case.

> "In determining whether the exclusion of a witness is a proper sanction for nondisclosure, a court must consider the following factors: (1) the surprise to the adverse party; (2) the prejudicial effect of the testimony; (3) the nature of the testimony; (4) the diligence of the adverse party; (5) the timely objection to the testimony; and (6) the good faith of the party calling the witness." *Sullivan*, 209 Ill. 2d at 110.

¶ 51 Plaintiff has failed to establish her own diligence in seeking the identity of plaintiff's opinion witnesses by failing to point to an appropriate interrogatory. Compare *Phelps v. O'Malley*, 159 Ill. App. 3d 214, 221 (1987) (specific request for names of the plaintiff's expert witnesses was neither answered nor objected to). Defendant's dispute over the applicability of the Directive to the filler panel that struck plaintiff was no surprise and any prejudice to plaintiff from West's affidavit was small. The pilot of the airplane testified, over objection, that he did not believe the Directive had anything to do with the "filler panels" of the type that fell on plaintiff.[2] Multiple deponents in addition to the pilot referred to the panel that

---

[2] After the trial court granted defendant's motion for summary judgment, plaintiff deposed Joe Lipien, who repaired the panel on the night it fell. Plaintiff attached a transcript of Lipien's deposition to her brief, but it is not a part of the record on appeal. Plaintiff asked Lipien if there was a difference between a ceiling panel and a filler panel. Lipien testified "[a] ceiling panel is overhead which would be all the way at the top and it would be in the aisle." Plaintiff has pointed to no evidence of a contrary interpretation of the 2005 FAA Directive. Plaintiff complained to this court about her inability to depose Lipien. (Lipien is no longer employed by Southwest and therefore was out of its control.) Now that she has, in light of all

struck plaintiff as a filler panel, and there is some evidence the panel may sometimes be referred to as a spacer panel, but plaintiff has pointed to nothing in the record to identify the panel that struck her as a ceiling panel. The FAA Directive expressly refers to "ceiling panels." Plaintiff has offered no evidence that the Directive does apply to the panel that struck her and the evidence of record implies that it does not. Therefore, plaintiff has failed to demonstrate prejudice from the admission of West's affidavit that the Directive does not apply to the panel. "[T]the party challenging the admission of opinion testimony as a violation of Rule 213 must show some prejudice arising from the alleged error. [Citation.] Absent a showing of prejudice, the judgment need not be reversed on appeal." *Bauer ex rel. Bauer v. Memorial Hospital*, 377 Ill. App. 3d 895, 914 (2007).

¶ 52 Nor did any surprise resulting from the affidavit prevent plaintiff from presenting her case. The Directive does not establish that defendant's design of the airplane or any of its components deviated from the standard of care that other manufacturers in the industry followed at the time the product was designed, or that the defendant knew or should have known, in the exercise of ordinary care, that the product was unreasonably dangerous before it left defendant's control and defendant failed to warn of its dangerous propensity. *Blue*, 215 Ill. 2d at 96. The Directive contains nothing about industry standards in 1988 and there is no evidence defendant should have known of the danger of ceiling panels lowering into the evacuation zone in 1988, especially given that the FAA did not issue the Directive until 2005,

---

the evidence before the court, it is certain plaintiff is unable to establish the applicability of the Directive to the filler panel at issue.

more than 20 years after the airplane model was put in service. Summary judgment in favor of defendant on plaintiff's claim defendant negligently designed the airplane was proper.

¶ 53 b. Negligent Manufacture

¶ 54 As to plaintiff's negligent manufacture claim, the trial court found that Count XIV could not proceed because plaintiff failed to produce evidence defendant owed any duty to plaintiff following defendant's sale of the airplane.

> "In Illinois a manufacturer is under a nondelegable duty to produce a product that is reasonably safe. [Citation.] Thus, the breach of duty is the same in both a negligence and strict products liability claim, but the key distinction between a negligence claim and a strict liability claim lies in the fault concept. In a negligence claim, the focus is on the fault of the defendant. In a strict products claim, the focus is on the condition of the product, regardless of fault. [Citations.]" *Phillips v. U.S. Waco Corp.*, 163 Ill. App. 3d 410, 417 (1987).

¶ 55 On appeal, defendant argues plaintiff failed to "affirmatively and positively show" that its alleged negligence caused her injuries, because the mere fact that she suffered an injury on an airplane defendant manufactured over twenty years earlier does not support a negligence claim.

¶ 56 To prevail on a negligence claim the plaintiff must establish by way of some evidentiary material that the injury the plaintiff sustained was the proximate result of the defendant's alleged breach of a duty owed to the plaintiff in connection with the defendant's product. *Phillips*, 163 Ill. App. 3d at 417. The mere occurrence of a product failure is insufficient to establish a manufacturer's negligence or that the product was defective where

the failure can be attributed to a myriad of causes. *Phillips*, 163 Ill. App. 3d at 418. In this case, plaintiff acknowledges a latch on the panel that fell was replaced by Southwest, and she asserts the "old latch is missing, destroyed by defendants." Plaintiff deposed the airline mechanic who replaced the latch (and later the mechanic who initially repaired the panel) and failed to elicit any evidence the panel was defective prior to it falling. Nor has plaintiff pointed to any other evidence of a defect. Summary judgment is appropriate where the record conclusively demonstrates that the plaintiff could never prove, either by direct or circumstantial evidence, the incident was caused by a defect. *Phillip*, 163 Ill. App. 3d at 418. Such is the case here. To withstand a summary judgment motion plaintiff had to present some factual basis that would support her claim. *Siegel Development, LLC*, 2013 IL App (1st) 111973, ¶ 110. Plaintiff has failed to do so with regard to her negligence claim generally and specifically with regard to whether any negligence by defendant was a proximate cause of her injury. Accordingly, defendant is entitled to summary judgment on plaintiff's negligent manufacture claim as a matter of law. *Brooks v. Brennan*, 255 Ill. App. 3d 260, 262 (1994) ("When a defendant files a motion for summary judgment, as in this case, the plaintiff must then come forward with evidence to support each and every element of its causes of action in order to avoid summary judgment.").

¶ 57 Plaintiff cites numerous federal regulations in support of her claims. Plaintiff generally contends defendant failed to comply with federal reporting requirements. We do not find any of these arguments germane in this appeal.

¶ 58 CONCLUSION

¶ 59 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 60 Affirmed.