2012 IL App (4th) 120042-U

Filed 9/11/12

NO. 4-12-0042

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ROBERT J. ZAFFIRI and JAMES A. ZAFFIRI, Plaintiffs-Appellants, v. PONTIAC RV, INC.; MECHANICAL BREAKDOWN ADMINISTRATORS, INC.; HERITAGE WARRANTY MUTUAL INSURANCE RISK RETENTION GROUP, INC.; and CRANE COMPOSITES, INC., Defendants-Appellees, and ALFA LEISURE, INC., Defendant.	)	Appeal from Circuit Court of Sangamon County No. 08L319
	)	Honorable Patrick W. Kelley, Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: With the exception of count IV, the trial court did not err in granting defendants' motions to dismiss and for summary judgment.

¶ 2 In December 2011, plaintiffs, Robert J. Zaffiri and James A. Zaffiri, filed their fifth-amended complaint against defendants, Pontiac RV, Inc. (Pontiac), Mechanical Breakdown Administrators, Inc. (MBA), Heritage Warranty Mutual Insurance Risk Retention Group, Inc. (Heritage), Crane Composites, Inc. (Crane), and Alfa Leisure, Inc. (Alfa), relating to defendants' failure to remedy defects in a motor home purchased by plaintiffs. The trial court granted defendants' motions to dismiss counts I, II, and IV of plaintiffs' fifth-amended complaint for failure to state a legally sufficient cause of action. The court also granted defendants' motions for

summary judgment as to counts III, VIII, IX, X, XI, and XII. Plaintiffs appeal. We affirm in part, reverse in part, and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 On February 26, 2005, plaintiffs purchased a new Alfa Leisure motor home from Pontiac for $161,000. Plaintiffs understood the purchase price included a "Limited One-Year Warranty" from Alfa as well as an MBA "four-year service agreement–insurance policy," which began upon the expiration of the Alfa warranty. The MBA agreement covered the motor home for four years or until the motor home reached 70,000 miles. The MBA service agreement was insured by Heritage.

¶ 5 On or before January 28, 2008, plaintiffs noticed problems with the exterior panels on the walls of the motor home, which were described as blistering, popping, and delaminating. Crane manufactured the walls of the motor home. Plaintiffs returned the motor home to Pontiac for inspection and repair. At that point, the motor home had been driven approximately 6,400 miles. Pontiac informed plaintiffs they would have to remove and replace the sides of the motor home. The insulation also needed to be replaced because of water infiltration.

¶ 6 It is unclear from the record whether Pontiac ever refused to repair the motor home. Instead, it appears plaintiffs maintain Pontiac never called them back regarding the repair work. MBA denied the four-year service agreement was valid because the agreement between MBA and Alfa (referred to by the parties as an "inboard service agreement") allowing Pontiac to offer such policies to its customers had expired by the time plaintiffs purchased the motor home.

¶ 7 Thereafter, plaintiffs filed multiple complaints realleging largely the same issues in each complaint. According to plaintiffs, "the defective walls of the motor home allowed

moisture to form inside the walls and this resulted in mold forming throughout the motor home causing the plaintiffs illness and injury rendering the $160,000 motor home worthless and unusable." We note on appeal it appears plaintiffs have abandoned their respiratory-ailment arguments. The following counts are at issue in this appeal.

¶ 8 A. Count I—Product Liability Claim Against Pontiac

¶ 9 Count I of plaintiffs' complaint alleged a product liability claim against Pontiac. According to plaintiffs' complaint, Pontiac allowed the motor home to leave its control "in an unreasonably dangerous and defective condition."

¶ 10 On September 7, 2010, Pontiac filed a motion to dismiss this product liability claim pursuant to section 2-621 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-621 (West 2008)) because it was a nonmanufacturing defendant who certified the identity of the manufacturer. We note the record contains no reports of the proceedings for any of the hearings on plaintiffs' complaints.

¶ 11 On October 15, 2010, the trial court dismissed count I from plaintiffs' third-amended complaint, finding section 2-621 of the Procedure Code required Pontiac's dismissal because more than one manufacturer had been identified by Pontiac. The court gave plaintiffs leave to replead the allegation "should the circumstances warrant."

¶ 12 On November 14, 2011, plaintiffs requested leave to file a fifth-amended complaint, which the trial court granted. Plaintiffs repleaded this claim in their fifth-amended complaint.

¶ 13 On December 12, 2011, the trial court dismissed count I of plaintiffs' fifth-amended complaint for the same reason it had done so previously.

¶ 14 B. Count II—Pontiac's Alleged Breach of Implied Warranty of Merchantability Claim

¶ 15 Count II of plaintiffs' complaint alleged Pontiac breached an implied warranty of merchantability. Plaintiffs alleged the motor home "would not pass without objection in the trade" and was "not fit for the ordinary purpose for which it was designed" because of the motor home's faulty exterior walls.

¶ 16 On April 7, 2010, Pontiac filed a motion to dismiss count II pursuant to section 2-615 of the Procedure Code (735 ILCS 2-615 (West 2008)), arguing plaintiffs' allegations failed to state a cause of action because they did not allege sufficient facts to establish the motor home was defective at the time it left Pontiac's control.

¶ 17 On May 18, 2010, the trial court granted Pontiac's motion with regard to plaintiffs' second-amended complaint, and gave plaintiffs leave to replead the allegation only if discovery led to evidence the motor home was defective at the time of sale.

¶ 18 In their fifth-amended complaint, plaintiffs repleaded their implied warranty-of-merchantability allegation. On December 12, 2011, the trial court again dismissed this claim, finding plaintiffs' pleading did not support a cause of action against Pontiac for breach of an implied warranty of merchantability.

¶ 19 C. Count III—Pontiac's Alleged Breach of Implied Warranty of Fitness for a Particular Purpose

¶ 20 In count II of their third-amended complaint (count III of the fifth-amended complaint), plaintiffs alleged Pontiac breached an implied warranty of fitness for a particular purpose. Plaintiffs alleged Pontiac "knew at the time the plaintiffs purchased the motor home in question the particular purpose for which the motorhome [*sic*] would be used."

¶ 21 On September 7, 2010, Pontiac filed a motion for summary judgment on this count of plaintiffs' third-amended complaint, arguing it was entitled to judgment as a matter of law because plaintiffs "did not use their motorhome [*sic*] for any purpose other than the ordinary purpose for which motorhomes [*sic*] are commonly used."

¶ 22 On September 27, 2010, the trial court granted Pontiac's motion, finding plaintiffs' allegations did not establish Pontiac knew the motor home was intended to be used for a particular purpose.

¶ 23 Plaintiffs repleaded this allegation in count III of their fifth-amended complaint.

¶ 24 On December 12, 2011, the trial court granted Pontiac's motion for summary judgment on count III of plaintiffs' fifth-amended complaint for the same reason it had granted summary judgment on count II.

¶ 25 D. Count IV—Pontiac's Alleged Failure To Provide an Extended-Warranty Insurance Policy

¶ 26 In count III of their fourth-amended complaint (count IV of the fifth-amended complaint), plaintiffs alleged Pontiac failed to provide plaintiffs an "extended warranty-insurance policy." When plaintiffs purchased the motor home, Pontiac provided a service agreement (which plaintiffs refer to as an extended-warranty insurance policy) through MBA. However, MBA maintained Pontiac was unable to offer plaintiffs such an agreement on February 26, 2005, *i.e.*, the date plaintiffs purchased the motor home, because the inboard service agreement between MBA and Alfa, which allowed Pontiac to offer the service agreements to its customers, expired on December 31, 2004.

¶ 27 On May 19, 2011, Pontiac filed a motion to dismiss count III pursuant to section 2-

615 of the Procedure Code, arguing plaintiffs' allegations failed to state a cause of action. Specifically, Pontiac contended plaintiffs failed to allege sufficient facts to show Pontiac owed plaintiffs a duty to sell them a valid contract for coverage.

¶ 28 On June 2, 2011, the trial court dismissed count III of plaintiffs' fourth-amended complaint with prejudice, finding plaintiffs failed to allege a cognizable theory of recovery.

¶ 29 Plaintiffs repleaded the allegation in count IV of their fifth-amended complaint.

¶ 30 On December 12, 2011, the trial court dismissed count IV of plaintiffs' fifth-amended complaint for the same reason it previously dismissed count III.

¶ 31 E. Counts V through VII—Allegations Against Alfa

¶ 32 Counts V through VII of plaintiffs' fifth-amended complaint contain various allegations against Alfa. However, on November 14, 2011, plaintiffs filed a motion to voluntarily dismiss all claims against Alfa pursuant to section 2-1009 of the Procedure Code (735 ILCS 5/2-1009 (West 2008)) because "Alfa ceased doing business several years ago" and "all of its assets have been liquidated." On December 12, 2011, the trial court granted plaintiffs' motion. Thus, Alfa is not a party to this appeal.

¶ 33 F. Count VIII—Product Liability Claim Against Crane

¶ 34 In count VII of their fourth-amended complaint (count VIII of the fifth-amended complaint), plaintiffs alleged a product liability claim against Crane. According to plaintiffs' complaint, Crane's "defective panels caused Plaintiffs and others to scratch themselves and cutting [*sic*] themselves with the defective walls while touching the walls of same causing themselves personal injury."

¶ 35 On April 25, 2011, Crane filed a motion for summary judgment, arguing plaintiffs'

injuries were *de minimis*. On June 2, 2011, the trial court granted Crane's motion for summary judgment.

¶ 36 Plaintiffs repleaded their product liability claim against Crane in count VIII of their fifth-amended complaint. On December 12, 2011, the trial court, reiterating its prior ruling, found *inter alia*, plaintiffs' allegations demonstrated only a "*de minimus* [*sic*] injury." The court also found any damage from the defective walls was not a result of a sudden occurrence. As a result, the court concluded count VIII of plaintiffs' fifth-amended complaint was barred by the doctrine of economic loss, *i.e.*, a plaintiff cannot recover under a negligence theory when they only suffered an economic loss.

¶ 37 G. Count IX—Crane's Alleged Breach of Implied Warranty of Merchantability

¶ 38 In count VIII of their fourth-amended complaint (count IX of the fifth-amended complaint) plaintiffs alleged Crane breached an implied warranty of merchantability.

¶ 39 On April 25, 2011, Crane filed a motion for summary judgment, arguing plaintiffs could not sustain a cause of action for breach of an implied warranty of merchantability because plaintiffs were not in vertical privity with Crane. Instead, Crane contended plaintiffs could only bring a breach of warranty action against Pontiac, which sold the motor home to plaintiffs.

¶ 40 On June 2, 2011, the trial court granted Crane's motion for summary judgment. Plaintiffs repleaded the claim in count IX of their fifth-amended complaint. On December 12, 2011, the court, stating its prior ruling, found no vertical privity shown between plaintiffs and Crane.

¶ 41 H. Count X—Crane's Alleged Breach of Implied Warranty of Fitness for a Particular Purpose

¶ 42 In count IX of their fourth-amended complaint (count X of the fifth-amended complaint), plaintiffs alleged Crane breached an implied warranty of fitness for a particular purpose.

¶ 43 On April 25, 2011, Crane filed a motion for summary judgment, arguing plaintiffs had no communication with Crane prior to the instant lawsuit. As a result, Crane had no knowledge of plaintiffs' intended uses for the motor home.

¶ 44 On June 2, 2011, the trial court granted Crane's motion for summary judgment. Plaintiffs repleaded the claim in count X of their fifth-amended complaint.

¶ 45 On December 12, 2011, the trial court, consistent with its prior rulings, found plaintiffs' claim failed because plaintiffs did not inform Crane of their anticipated use of the motor home for a particular purpose.

¶ 46 I. Count XI—MBA's Alleged Breach of Contract

¶ 47 In count X of their third-amended complaint (count XI of the fifth-amended complaint), plaintiffs alleged MBA breached its contract with plaintiffs by failing to comply with the warranty-insurance policy. According to plaintiffs' complaint, MBA refused to repair the motor home's walls despite the fact plaintiffs had a signed extended warranty-insurance policy (service agreement) from MBA.

¶ 48 On September 20, 2010, MBA filed a motion for summary judgment, arguing the service agreement was unenforceable because the "inboard service agreement" between MBA and Alfa allowing Pontiac to provide service agreements to its customers expired approximately two months prior to plaintiffs' motor home purchase. MBA maintained it did not represent to Alfa, Pontiac, or plaintiffs it would undertake any contractual obligations of the customer service

agreement after its contract with Alfa to provide such agreements expired on December 31, 2004. The trial court granted MBA's motion.

¶ 49 Plaintiffs repleaded the claim in count XI of their fifth-amended complaint. On December 12, 2011, the trial court granted MBA's motion for summary judgment, finding as follows:

> "The Inboard Service Agreement between [Alfa] and MBA expired on December 31, 2004, and MBA was not required to cover claims related to [the] 'service agreement' issued by Pontiac RV after termination of the Inboard Service Agreement with [Alfa] on December 31, 2004. The uncontradicted affidavit of Gaylen Brotherson establishes that no premium was ever paid to MBA for plaintiffs' 'service agreement.' Accordingly, even if plaintiffs' 'service agreement' had been issued prior to December 31, 2004, it could not be enforced against MBA for lack of consideration."

¶ 50 J. Count XII—Heritage's Alleged Breach of Contract

¶ 51 In count XI of their third-amended complaint (count XII of the fifth-amended complaint), plaintiffs alleged Heritage, like MBA, breached its contract with plaintiff by failing to comply with the warranty insurance policy.

¶ 52 On September 20, 2010, Heritage filed a motion for summary judgment, which the trial court granted for the same reasons it granted MBA's motion for summary judgment.

¶ 53 Plaintiffs repleaded the claim in count XII of their fifth-amended complaint. On December 12, 2011, the trial court again granted Heritage's motion for summary judgment for the

same reasons it granted MBA's motion for summary judgment on count XI.

¶ 54 This appeal followed.

¶ 55 II. ANALYSIS

¶ 56 On appeal, plaintiffs make the following arguments with regard to their fifth-amended complaint. The trial court erred by (1) dismissing their product liability claim against Pontiac (count I), (2) finding plaintiff failed to state a cause of action against Pontiac for breach of an implied warranty of merchantability (count II), (3) finding Pontiac was entitled to summary judgment on plaintiffs' cause of action for breach of an implied warranty of fitness for a particular purpose (count III), (4) finding plaintiffs failed to state a cause of action against Pontiac for failing to supply plaintiffs with a valid insurance policy or service contract to cover the motor home (count IV), (5) granting summary judgment for Crane on plaintiffs' product liability claim against Crane (count VIII), (6) granting summary judgment for Crane on plaintiffs' claim Crane breached an implied warranty of merchantability (count IX), (7) granting summary judgment for Crane on plaintiffs' claim Crane breached an implied warranty of fitness for a particular purpose (count X), (8) granting summary judgment in favor of MBA on plaintiffs' claim MBA breached its contract with plaintiffs by failing to comply with the warranty insurance policy (count XI), and (9) granting summary judgment in favor of Heritage on plaintiffs' claim Heritage breached its contract with plaintiffs by failing to comply with the warranty insurance policy (count XII).

¶ 57 A. Standards of Review

¶ 58 We apply a *de novo* standard of review to the trial court's decision to grant a motion for summary judgment. *Hernandez v. Alexian Brothers Health System*, 384 Ill. App. 3d 510,

519, 893 N.E.2d 934, 941 (2008). " 'Summary judgment is proper where, when viewed in the light most favorable to the nonmoving party, the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " *Hernandez*, 384 Ill. App. 3d at 518, 893 N.E.2d at 940 (quoting *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305, 837 N.E.2d 99, 106 (2005)).

¶ 59 We also review *de novo* an order granting a motion to dismiss pursuant to section 2-615 of the Procedure Code (735 ILCS 5/2-615(a) (West 2008)). *Green v. Rogers*, 234 Ill. 2d 478, 491, 917 N.E.2d 450, 459 (2009). "A section 2-615 motion to dismiss tests the legal sufficiency of the complaint. On review, the question is 'whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted.' " *Green*, 234 Ill. 2d at 491, 917 N.E.2d at 458-59 (quoting *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81, 806 N.E.2d 632, 634 (2004)).

¶ 60 B. Count I—Product Liability Claim Against Pontiac

¶ 61 Count I of plaintiffs' fifth-amended complaint alleged a product liability claim against Pontiac. Pontiac filed a motion to dismiss pursuant to section 2-621 of the Procedure Code (735 ILCS 5/2-621 (West 2008)). The trial court granted Pontiac's motion, finding section 2-621 required Pontiac's dismissal because more than one manufacturer had been identified by Pontiac. On appeal, plaintiffs argue the court erred in dismissing count I. We disagree.

¶ 62 Ordinarily, in a product liability action, all persons in the distribution chain, *i.e.*, suppliers, distributors, wholesalers, and retailers, may be liable for injuries resulting from a defective product. *Hammond v. North American Asbestos Corp.*, 97 Ill. 2d 195, 206, 454 N.E.2d

210, 216 (1983). However, under section 2-621 of the Procedure Code, a nonmanufacturing defendant may be dismissed from a product liability action where it files an affidavit certifying the correct identity of the product's manufacturer. 735 ILCS 5/2-621(a), (b) (West 2008). In *Murphy v. Mancari's Chrysler Plymouth, Inc.*, 381 Ill. App. 3d 768, 770-71, 887 N.E.2d 569, 573 (2008), the First District Appellate Court explained section 2-621 as follows:

> "Pursuant to section 2-621, also known as the 'seller's exception,' a nonmanufacturer defendant in a strict product liability action may be dismissed from the action if it certifies the correct identity of the manufacturer of the product which allegedly caused the injury. [Citations.] Once the plaintiff has sued the product manufacturer and the manufacturer has answered or otherwise pleaded, the court must dismiss the strict liability claim against the certifying defendant(s). [Citations.] When a defendant complies with the requirements of section 2-621, its dismissal from a strict liability action is mandatory. [Citations.] A plaintiff may move at any time for reinstatement of a previously dismissed defendant if an action against the product manufacturer would be impossible or unavailing. [Citations.]
>
> Section 2-621(c) provides three exceptions to the mandatory dismissal of a complying defendant. [Citations.] A plaintiff can forestall dismissal of a defendant if it shows one of the following:
>
> '(1) That the defendant has exercised some

> significant control over the design or manufacture of the product, or has provided instructions or warnings to the manufacturer relative to the alleged defect in the product which caused the injury, death or damage; or
>
> (2) That the defendant had actual knowledge of the defect in the product which caused the injury, death or damage; or
>
> (3) That the defendant created the defect in the product which caused the injury, death or damage.' [Citation.]"

¶ 63 In this case, Pontiac attached to its motion to dismiss the affidavit of its general manager Kent Kafer, who identified both Alfa and Crane as manufacturers of the motor home. Plaintiffs brought product liability claims against both Alfa and Crane. While plaintiffs voluntarily dismissed their claims against Alfa, their claims against Crane remained. Although plaintiffs' product liability action against Crane was ultimately dismissed by the trial court at the summary judgment stage, Crane was otherwise available for purposes of filing the initial complaint. We note plaintiffs argue on appeal that because of these circumstances, they run "a big risk of having a cause of action without a defendant." However, *plaintiffs* moved to dismiss Alfa shortly before filing their fifth-amended complaint and did not move to reinstate Alfa as a defendant. Moreover, plaintiffs' inability to maintain a successful cause of action against Crane is not the same as Crane's unavailability.

¶ 64 Here, Pontiac correctly identified a manufacturer of the motor home, against which plaintiffs filed a claim. Where a manufacturing defendant is identified, the trial court *shall dismiss* the nonmanufacturing defendant, unless certain exceptions exist. 735 ILCS 5/2-621(b) (West 2008).

¶ 65 Kafer's affidavit demonstrated, and plaintiffs do not argue otherwise, none of the section 2-621 exceptions apply to this case. Specifically, it is undisputed Pontiac did not (1) exercise control over the design or manufacture of the motor home or otherwise provide instructions or warnings to the manufacturer relating to the motor home's alleged defect, (2) have actual knowledge of the motor home's alleged defect until notified by plaintiffs, or (3) create the defect. As a result, the record does not establish the trial court erred in dismissing count I of plaintiffs' fifth-amended complaint.

¶ 66 C. Count II—Pontiac's Alleged Breach of Implied Warranty of Merchantability

¶ 67 Plaintiffs next argue the trial court erred in granting Pontiac's section 2-615 motion to dismiss plaintiffs' claim Pontiac breached the motor home's implied warranty of merchantability. We disagree.

¶ 68 In Illinois, the sale of goods is governed by article 2 of the Uniform Commercial Code (UCC). 810 ILCS 5/2-101 to 2-725 (West 2008). Under section 2-314 of the UCC, unless excluded or modified, every sale of goods includes an implied warranty of merchantability. 810 ILCS 5/2-314 (West 2008). "To succeed on a claim of breach of implied warranty of merchantability, a plaintiff must allege and prove: (1) a sale of goods (2) by a merchant of those goods, and (3) the goods were not of merchantable quality." *Brandt v. Boston Scientific Corp.*,

204 Ill. 2d 640, 645, 792 N.E.2d 296, 299 (2003); 810 ILCS 5/2-314(1) (West 2008). A product is not of merchantable quality if it is not " 'fit for the ordinary purposes for which such goods are used.' [Citation.]" *Alvarez v. American Isuzu Motors*, 321 Ill. App. 3d 696, 703, 749 N.E.2d 16, 22 (2001). An implied warranty of merchantability applies to the condition of the goods at the time of sale and is breached only if the defect existed when the goods left the seller's control. *Lipinski v. Martin J. Kelly Oldsmobile, Inc.*, 325 Ill. App. 3d 1139, 1150, 759 N.E.2d 66, 75 (2001). A defect may be proved inferentially by circumstantial evidence. *Alvarez*, 321 Ill. App. 3d at 703, 749 N.E.2d at 23. Thus, plaintiffs may recover for breach of an implied warranty of merchantability if they can show the defective walls existed when the motor home left Pontiac's control. See *Alvarez*, 321 Ill. App. 3d at 702-03, 749 N.E.2d at 22.

¶ 69 In this case, plaintiffs did not plead sufficient facts to show the defect existed at the time Pontiac sold the motor home to plaintiffs in 2005. See *Teter v. Clemens*, 112 Ill. 2d 252, 256, 492 N.E.2d 1340, 1342 (1986) (in Illinois a plaintiff must allege sufficient facts to bring his claim within the scope of a legally recognized cause of action). While the motor home had 6,400 miles on it when plaintiffs returned it to Pontiac, plaintiffs alleged the problems developed three years after delivery, *i.e.*, 2008. Plaintiffs did not allege this defect existed when Pontiac sold them the motor home. This three-year span suggests the defect could have occurred over time and cuts against any inference the motor home's walls were defective *at the time* Pontiac sold it to plaintiffs. As a result, the trial court did not err in dismissing plaintiffs' claim Pontiac breached an implied warranty of merchantability.

¶ 70 D. Count III—Pontiac's Alleged Breach of Implied Warranty of Fitness for a Particular Purpose

¶ 71 Plaintiffs next argue the trial court erred in granting Pontiac's motion for summary judgment regarding plaintiffs' claim Pontiac breached an implied warranty of fitness for a particular purpose. We disagree.

¶ 72 Under section 2-315 of the UCC, an implied warranty of fitness for a particular purpose is inferred where the seller has reason to know the buyer requires goods for a particular purpose and knows the buyer is relying on the seller's skill in selecting those goods. 810 ILCS 5/2-315 (West 2008). To show the existence and breach of an implied warranty of fitness for particular purpose, a plaintiff must show "(1) a sale of goods, (2) that the seller had reason to know of any particular purpose for which the goods are required, (3) that plaintiff, as buyer of the goods, was relying upon seller's skills or judgment to select suitable goods, and (4) that the goods were not fit for the particular purpose for which they were used." *Maldonado v. Creative Woodworking Concepts, Inc.*, 342 Ill. App. 3d 1028, 1034, 796 N.E.2d 662, 666 (2003); 810 ILCS 5/2-315 (West 2008). It is long recognized in Illinois that even where a seller has reason to know of a buyer's particular purpose, no warranty for a particular purpose is created if the intended use is no different from the ordinary use of the product. *Wilson v. Massey-Ferguson, Inc.*, 21 Ill. App. 3d 867, 869-70, 315 N.E.2d 580, 582 (1974).

¶ 73 In this case, plaintiffs alleged they informed the salesperson at the time of the purchase they intended to use the motor home for traveling, camping, entertaining clients, and as a mobile office as well "as an outward appearance for their business," Zaffiri Concrete. In response, Pontiac attached to its motion to dismiss an affidavit from its general manager, Kent Kafer, who stated based on his years of experience the motor home is ordinarily used for "camping, traveling, and entertaining." We note plaintiffs did not file their own affidavit to

counter Pontiac's affidavit on this matter. " ' "[W]here a party moving for summary judgment files supporting affidavits containing well-pleaded facts and the party opposing the motion files no counteraffidavits, the material facts set forth in the movant's affidavits stand as admitted." ' " *Bright Horizons Children's Centers, LLC., v. Riverway Midwest II, LLC.*, 403 Ill. App. 3d 234, 249, 931 N.E.2d 780, 794 (2010) (quoting *Werckenthein v. Bucher Petrochemical Co.*, 248 Ill. App. 3d 282, 288, 618 N.E.2d 902, 907 (1993), quoting *East Side Fire Protection District v. City of Belleville*, 221 Ill. App. 3d 654, 657, 582 N.E.2d 755, 758 (1991)). Thus, the trial court was entitled to rely on Pontiac's affidavit and find plaintiffs did not use the motor home for a particular purpose.

¶ 74 The only arguable particular use presented for the mobile home by plaintiffs was as a mobile office or as the "outward appearance" for plaintiffs' business. However, according to plaintiffs' response to MBA's request to admit facts, plaintiffs denied ever using the motor home as a mobile office or for any commercial purposes related to their business. See *Anderson v. Farmers Hybrid Cos., Inc.*, 87 Ill. App. 3d 493, 502, 408 N.E.2d 1194, 1200 (1980) (where ordinary use was made of the goods, the buyers are limited to proceeding under a warranty of merchantability and not a warranty for a particular purpose). Moreover, plaintiffs have not pleaded any facts to show they relied on the salesperson's skill or judgment to select a particular motor home to suit any particular purpose. Here, plaintiffs did not inform Pontiac of any plans to use the motor home in a particular manner beyond the uses ordinarily associated with a motor home. As a result, the trial court did not err in granting Pontiac's motion for summary judgment.

¶ 75 E. Count IV—Pontiac's Alleged Failure To Provide an Extended-Warranty Insurance Policy

¶ 76 Plaintiffs argue the trial court erred in dismissing plaintiffs' claim Pontiac failed to supply plaintiffs with a valid warranty. We agree.

¶ 77 For the reasons stated *infra*, the agreement between Alfa and MBA to allow Pontiac to provide warranties to customers purchasing motor homes expired prior to plaintiffs' purchase. When broadly construed in a light most favorable to plaintiffs, their allegations state a promissory estoppel claim. See *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46, 59, 906 N.E.2d 520, 528 (2009) (Illinois law allows promissory estoppel as an affirmative cause of action).

¶ 78 To establish a claim based on promissory estoppel, a claimant must show (1) the other party made an unambiguous promise to them, (2) the claimant relied on the other party's promise, (3) the claimant's reliance was expected and foreseeable by the other party, and (4) the claimant relied on the promise to their detriment. *Quake Construction, Inc. v. American Airlines, Inc.*, 141 Ill. 2d 281, 309-10, 565 N.E.2d 990, 1004 (1990). In this case, plaintiffs alleged the following facts, which we must take as true *(Miner v. Gillette Co.*, 87 Ill. 2d 7, 19, 428 N.E.2d 478, 484 (1981)), in their fifth-amended complaint: (1) Pontiac was in the business of selling motor homes, (2) Pontiac was an authorized agent for procuring the extended warranty, (3) Pontiac presented plaintiffs with the extended warranty, (4) Pontiac represented the purported warranty coverage was included in the $161,000 purchase price of the motor home, (5) Pontiac signed the agreement in plaintiffs' presence, (6) Pontiac represented the service agreement was a valid service contract, (7) plaintiffs relied upon Pontiac's representations, (8) and as a result, Pontiac had a duty to provide a valid extended warranty.

¶ 79 Thus plaintiffs allege, at the time of the purchase, Pontiac represented to plaintiffs

they had obtained four years of warranty coverage from MBA. Pontiac represented the purported warranty coverage was included in the $161,000 purchase price and that a valid service agreement existed. Plaintiffs were entitled to rely on Pontiac's representations. Accordingly, we reverse the trial court's dismissal of count IV and remand the cause for further proceedings as to count IV.

¶ 80 F. Count VIII—Product Liability Claim Against Crane

¶ 81 Plaintiffs argue the trial court erred by granting Crane's motion for summary judgment on their product liability claim by finding the cuts to their hands were *de minimis* injuries. We note plaintiffs appear to have abandoned their respiratory-ailment-injury claim on appeal.

¶ 82 The trial court granted Crane's motion for summary judgment on count VIII of plaintiffs' fifth-amended complaint, finding the following:

> "Count VIII of the plaintiffs' Fifth Amended Complaint sought recovery based upon a theory of product[] liability. Defendant Crane's motion for summary judgment as to Count VIII is allowed. The court finds that plaintiffs' claim of a finger cut shows a *de minimus* [*sic*] injury. Plaintiffs have failed to demonstrate any causal connection with regard to their respiratory ailments. The court further finds that any property damage resulting from Defendant Crane's manufacture of allegedly defective walls was not the result of a sudden occurrence. Consequently, Count VIII is barred by the economic doctrine as set forth in *Moorman Manufacturing* [*Co.*] *v.*

National Tank Co[.], 91 Ill. 2d 69[, 435 N.E.2d 443] (1982)."

¶ 83 In *Moorman*, the supreme court held a "plaintiff cannot recover for solely economic loss under the tort theories of strict liability, negligence, and innocent misrepresentation." *Moorman*, 91 Ill. 2d at 91, 435 N.E.2d at 453. Economic damages are " 'damages for inadequate value, costs of repair and replacement of the defective product, or consequent loss of profits—without any claim of personal injury or damage to other property ***' [citation]." *Moorman*, 91 Ill. 2d at 82, 435 N.E.2d at 449. There are three exceptions to the *Moorman* doctrine:

> "(1) where the plaintiff sustained damage, *i.e.*, personal injury or property damage, resulting from a sudden or dangerous occurrence [citation]; (2) where the plaintiff's damages are proximately caused by a defendant's intentional, false misrepresentation, *i.e.*, fraud [citation]; and (3) where the plaintiff's damages are proximately caused by a negligent misrepresentation by a defendant in the business of supplying information for the guidance of others in their business transactions [citation]." (Emphasis omitted.) *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 199, 680 N.E.2d 265, 275 (1997).

Here, however, only the first exception is at issue. To apply the "sudden or dangerous occurrence" exception and recover economic damages in a tort action, (1) the economic damages must result from "a sudden, dangerous, or calamitous event," and (2) the event must also cause "personal injury or property damage." *Chicago Flood*, 176 Ill. 2d at 200, 680 N.E.2d at 275; see also *Trans States Airlines v. Pratt & Whitney Canada, Inc.*, 177 Ill. 2d 21, 26-27, 682 N.E.2d 45,

48 (1997).

¶ 84 In this case, despite a number of opportunities to amend their complaint, plaintiffs failed to plead any facts showing the defective walls resulted from a sudden event. In their brief on appeal, plaintiffs make *no* reference to the *Moorman* economic-loss doctrine, the trial court's application thereof, or the court's reasoning for doing so. Instead, plaintiffs concede their injuries were "minor." We agree.

¶ 85 However, plaintiffs endeavor to make a vague policy argument as to where the line should be drawn with regard to a *de minimis* injury. We are wholly unpersuaded. Plaintiffs' deposition testimony demonstrates whatever cuts they sustained to their fingers were in fact *de minimis* injuries. See *People v. Durham*, 391 Ill. App. 3d 1100, 1103, 915 N.E.2d 40, 42 (2009) ("The maxim *de minimis non curat lex* ('The law does not concern itself with trifles' [citation] retains force in Illinois."). In his deposition, James Zaffiri stated he got a piece of fiberglass underneath his fingernail one day when he was washing the motor home. He did not seek medical attention, instead pulling out the fiberglass splinter and placing a Band-Aid on his finger. The cut healed by itself. Robert stated in his deposition he was cut by a piece of fiberglass while cleaning the motor home. Like James, Robert placed a Band-Aid on his finger and did not seek medical attention. The trial court did not err in granting Crane's motion for summary judgment on count VIII of plaintiffs' fifth-amended complaint.

¶ 86 G. Count IX—Crane's Alleged Breach of Implied Warranty of Merchantability

¶ 87 Plaintiffs next argue the trial court erred in granting Crane's motion for summary judgment as to plaintiffs' claim Crane breached an implied warranty of merchantability. We

disagree.

¶ 88 In Illinois, actions for breach of an implied warranty of merchantability are governed by section 2-314 of the UCC (810 ILCS 5/2-314 (West 2008)). Under the UCC, a plaintiff must be in vertical privity of contract with the seller in order to file a claim for economic damages for breach of an implied warranty of merchantability. *Mekertichian v. Mercedes-Benz U.S.A., L.L.C.*, 347 Ill. App. 3d 828, 832, 807 N.E.2d 1165, 1168 (2004) (citing *Szajna v. General Motors Corp.*, 115 Ill. 2d 294, 311, 503 N.E.2d 760, 767 (1986); *Rothe v. Maloney Cadillac, Inc.*, 119 Ill. 2d 288, 292, 518 N.E.2d 1028, 1029-30 (1988)). Thus, pursuant to the UCC, a buyer of goods seeking purely economic damages for a breach of an implied warranty has " 'a potential cause of action only against his immediate seller.' " *Mekertichian*, 347 Ill. App. 3d at 832, 807 N.E.2d at 1168 (quoting *Rothe*, 119 Ill. 2d at 292, 518 N.E.2d at 1028). Accordingly, under the UCC, plaintiffs would only have a cause of action against Pontiac and not against Crane.

¶ 89 In their brief on appeal, plaintiffs concede the current state of Illinois law requires plaintiffs be in privity with Crane before they may successfully state a claim for breach of an implied warranty of merchantability. However, plaintiffs do not argue they were in privity with Crane. Instead, plaintiffs invite this court to abandon the current state of Illinois law by arguing "most states hold that the existence of privity in order to enforce an implied warranty is not necessary."

¶ 90 We decline plaintiffs' request. Although the vertical privity requirement has been challenged on a number of occasions, our supreme court has consistently declined to abolish the doctrine in cases where, as here, purely economic damages are sought. See, *e.g.*, *Rothe*, 119 Ill.

2d at 292, 518 N.E.2d at 1029-30; *Szajna*, 115 Ill. 2d at 311, 503 N.E.2d at 767. In this case, plaintiffs were not in vertical privity with Crane. Section 2-314 of the UCC requires such privity. Thus, the trial court did not err in granting Crane's motion for summary judgment.

¶ 91 H. Count X—Crane's Alleged Breach of Implied Warranty of Fitness for a Particular Purpose

¶ 92 Plaintiffs argue the trial court erred in granting Crane's motion for summary judgment as to their claim Crane breached an implied warranty of fitness for a particular purpose. We disagree.

¶ 93 As previously stated, to successfully state a claim for breach of an implied warranty of fitness for a particular purpose, a party must show, *inter alia*, the seller had reason to know of any particular purpose for which the goods are required. See *Maldonado*, 342 Ill. App. 3d at 1034, 796 N.E.2d at 666.

¶ 94 In this case, even ignoring the fact Crane did not sell plaintiffs this motor home, it is undisputed plaintiffs never informed Crane of their intention to use the motor home for anything. While plaintiffs alleged in their fifth-amended complaint Crane knew at the time of purchase the particular purpose for which plaintiffs were buying the motor home, plaintiffs' deposition testimony (attached to Crane's motion for summary judgment as exhibit Nos. 1 and 2) shows otherwise. In his deposition, plaintiff Robert Zaffiri admitted having never communicated at all with Crane prior to purchasing the motor home. Further, plaintiff James Zaffiri stated in his deposition he and Robert kept the purposes they had in mind for the motor home to themselves and did not even discuss its intended use with the salesperson at Pontiac. As a result, the trial court did not err in granting Crane's motion for summary judgment.

¶ 95 I. Count XI—MBA's Alleged Breach of Contract

¶ 96 Plaintiffs argue the trial court erred in granting MBA's motion for summary judgment on their breach of contract claim. We disagree.

¶ 97 A breach of contract claim requires a valid and enforceable contract, a plaintiff's performance, a defendant's breach, and a plaintiff's injury. See *Henderson-Smith & Associates, Inc. v. Nahamani Family Service Center, Inc.*, 323 Ill. App. 3d 15, 27, 752 N.E.2d 33, 43 (2001).

¶ 98 In this case, no valid or enforceable contract existed between plaintiffs and MBA. To begin, MBA attached to their motion for summary judgment the affidavit of Gaylen Brotherson, the chief executive officer of MBA. In his affidavit, Brotherson states MBA's agreement with Alfa expired December 31, 2004. We note, plaintiffs have not included an affidavit from Alfa stating the agreement had not expired.

¶ 99 Instead, plaintiffs argue the "warranty" issued by Pontiac is valid because the inboard service agreement, *i.e.*, the agreement between MBA and Alfa to provide "warranties" to retail customers purchasing Alfa motor homes, was in force at the time of their purchase pursuant to paragraph 15 of that agreement. Paragraph 15 of the inboard service agreement states: "This Agreement shall remain in full force and effect for three (3) years and shall automatically renew itself for successive one (1) year terms unless terminated by MBA or Manufacturer in accordance with Section 16."

¶ 100 However, as MBA argues, the second amendment to paragraph 15 specifically limits the term of the inboard service agreement between Alfa and MBA, stating "the Agreement shall remain in full force and effect for one year, starting January 1, 2004." Thus, by its own language, the agreement between Alfa and MBA to provide "warranties" to customers purchasing

motor homes terminated on December 31, 2004, *i.e.*, prior to the February 26, 2005, purchase by plaintiffs. As a result, the "warranty" offered to plaintiffs by Pontiac cannot be enforced against MBA.

¶ 101 Plaintiffs also argue section 16.3 of the agreement supports their position because it obligated Alfa to pay MBA for service agreements on motor homes manufactured and shipped to dealers prior to the effective date of termination. However, the agreement further provides MBA is obligated to perform all obligations only with respect to service agreements in force prior to termination of its agreement with Alfa. Because plaintiffs purchased their motor home after MBA's agreement terminated with Alfa, their service agreement could not have taken effect prior to the termination. Thus, Alfa's obligation to pay MBA for certain service agreements does not affect MBA's performance obligations as set forth in section 16.3. Accordingly, the trial court did not err in granting MBA's motion for summary judgment on plaintiffs' breach of contract claim.

¶ 102 J. Count XII—Heritage's Alleged Breach of Contract

¶ 103 Plaintiffs argue the trial court erred in granting Heritage's motion for summary judgment on their breach of contract claim. We disagree.

¶ 104 Because we have found MBA did not have a duty to plaintiffs because no valid contract between Pontiac and MBA to provide "warranties" to customers existed at the time plaintiffs purchased the motor home, Heritage, as the insurer of the MBA customer agreements, also did not have an obligation to cover plaintiffs' claims. Accordingly, the trial court did not err in granting Heritage's motion for summary judgment on plaintiffs' breach of contract claim.

¶ 105 III. CONCLUSION

¶ 106 For the reasons stated, we affirm in part, reverse in part, and remand for further proceedings as to count IV.

¶ 107 Affirmed in part and reversed in part; cause remanded for further proceedings.