

STATE OF MICHIGAN
SAGINAW COUNTY CIRCUIT COURT
BUSINESS COURT

BIG ROCK CORP d/b/a SIX LABS,
a Michigan corporation,

Plaintiff,

v.

WARREN SYSTEMS, INC.,
a Michigan corporation,

Defendant/Cross and Third-Party Plaintiff,

and

MDA ENGINEERING, INC, a foreign corporation,

Defendant/Cross-Defendant,

and

DAIKIN NORTH AMERICA, LLC,
a foreign limited liability company, and
WILLIAMS DISTRIBUTING CO, a Michigan corporation,

Third-Party Defendants.

Case No. 23-002433-CB

Judge: M. Randall Jurrens (P27637)

**OPINION AND ORDER
SUBSTANTIALLY GRANTING
THIRD-PARTY DEFENDANTS'
MOTIONS FOR SUMMARY
DISPOSITION**

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Big Rock Corp d/b/a Six Labs (Six Labs) operates a cannabis grow facility in Chesaning.

Six Labs engaged Warren Systems, Inc. (Warren) to make HVAC improvements to the facility.

Warren hired MDA Engineering (MDA) to perform an engineering analysis and recommend appropriate mechanical systems to satisfy Six Lab's requirements.

Ultimately, Warren purchased selected HVAC equipment from Williams Distributing Co. (Williams). The equipment was manufactured by Daikin North America, LLC (Daikin).

When the HVAC system failed to satisfy Six Labs's needs, Six Labs sued MDA for negligent misrepresentation and professional negligence, and sued Warren for breach of contract, breach of express warranties, and breach of implied warranty.

In turn, Warren filed a cross-complaint against MDA for professional malpractice and breach of contract, and a third-party complaint against Williams and Daikin on claims of negligent misrepresentation, indemnity, contribution, breach of implied contract, breach of express and implied warranties, and/or product liability.

Daikin and Williams have filed separate, but similar, motions to summarily dismiss all claims against them.

For reasons indicated below, the court is granting each motion, save for one claim.

Summary Disposition Standards

The present motions are brought pursuant to MCR 2.16(C)(8).

MCR 2.116(C)(8) authorizes summary dismissal of complaints that “fail[] to state a claim on which relief can be granted”. Such motions test the *legal* sufficiency of a claim. *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). Such motions are determined on the pleadings alone, MCR 2.116(G)(5), including any written instrument upon which the claim is based that is attached or referred to as required by MCR 2.113(F). *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007). All well-pleaded factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts, and are construed in the light most favorable to the nonmoving party. *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012). “However, conclusory statements that are unsupported by allegations of fact on which they may be based will not suffice to state a cause of action”, *Gurganus v CVS Caremark Corp*, 496 Mich 45, 63; 852 NW2d 103 (2014). The motion should be granted when the plaintiff’s claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Clohset v No Name Corp*, 302 Mich App 550, 558; 840 NW2d 375 (2013).

Analysis

Negligent Misrepresentation

Count 1 of Warren’s third-party complaint asserts a negligent misrepresentation claim against both Williams and Daikin. Specifically, Warren alleges:

28. MDA, W[illiams], and Daikin made material representations of fact regarding the load requirements and the ability of the Daikin Products to meet the Project owner’s needs regarding heating, cooling, ventilation, humidification and dehumidification for the Project.

Negligent misrepresentation sounds in negligence, not fraud. 10 Mich Civ Jur, Fraud and Undue Influence § 5.

To state a claim for negligent misrepresentation, a plaintiff must allege that it justifiably relied to its detriment on information prepared without reasonable care by a defendant who owed plaintiff a duty of care. *Fejedelem v Kasco*, 269 Mich App 499, 502; 711 NW2d 436 (2006). “This tort claim does not require any privity of contract to succeed”. *Sayo, Inc v CTM Group, Inc*, unpublished opinion per curiam of the Court of Appeals issued May 29, 2003 (Docket No. 232868). “The cause of action protects foreseeable third parties who are injured when a contracting party negligently performs his or her contractual duty.”¹ *Auto-Owners Ins Co v Lepp*, unpublished opinion per curiam of the Court of Appeals issued July 19, 2011 (Docket No. 297534), citing *Williams v Polgar*, 391 Mich 6, 20–23; 215 NW2d 149 (1974). Broken down, “[t]he elements of

¹ Since adoption in Michigan in the context of title abstractors, *Williams v Polgar*, 391 Mich 6; 215 NW2d 149 (1974), the tort of negligent misrepresentation has been applied where defendants breach a business or professional duty of care to provide accurate information: e.g. *Law Offices of Lawrence J. Stockler, PC v Rose*, 174 Mich App 14; 436 NW2d 70 (1989) (attorneys); *Haji v Prevention Ins Agency, Inc*, 196 Mich App 84; 492 NW2d 460 (1992) (insurance agents); *Fejedelem v Kasco*, 269 Mich App 499; 711 NW2d 436 (2006) (accountants); *Mercantile Bank of Michigan v CLMIA, LLC*, unpublished opinion per curiam of the Court of Appeals issued February 12, 2015 (Docket No. 316777) (financial advisors). Upon inquiry at oral argument, Warren could not identify legal authority supporting a claim of negligent misrepresentation in the context of a commercial sale of goods.

negligent misrepresentation are: (1) the defendant made a material misrepresentation; (2) the representation was false; (3) the defendant was negligent in making the misrepresentation, i.e. the defendant breached a business or professional duty of care to provide accurate information to those who employ him; and (4) the plaintiff suffered damages as a result.” *Cleveland Indians Baseball Co, LP v New Hampshire Ins Co*, 727 F3d 633 (CA 6, 2013), citing *Law Offices of Lawrence J. Stockler PC v Rose*, 174 Mich App 14; 436 NW2d 70 (1989).

Here, Daikin and Williams argue dismissal of Warren’s negligent misrepresentation claim is compelled by operation of the economic loss doctrine (Daikin Brief, pp 5-7; Williams Brief, pp 7-9; Daikin Reply Brief, pp 1-2; Williams Reply Brief, p 1).

In *Neibarger v Universal Coops, Inc*, 439 Mich 512, 520-521; 486 NW2d 612 (1992), our Supreme Court described the doctrine:

The economic loss doctrine, simply stated, provides that where a purchaser’s expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only “economic” losses. This doctrine hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts. [(cleaned up)]

And the doctrine applies not just to litigation involving transactions in goods directly, but also indirectly. *Quest Diagnostics, Inc v MCI WorldCom, Inc*, 254 Mich App 372, 379; 656 NW2d 858 (2002). And privity of contract is not necessarily required for the doctrine to apply. *Sullivan*

Indus, Inc v Double Seal Glass Co, Inc, 192 Mich App 333, 344; 480 NW2d 623 (1991)²; *Quest*, 254 Mich App 372 at 380.³

Accordingly, here, where there is an underlying commercial transaction, the court concludes that the economic loss doctrine bars Warren from maintaining negligent misrepresentation claims against Williams and Daikin.⁴

Indemnity

Count 2 of Warren’s third-party complaint asserts an indemnity claim against both Daikin and Williams.

Michigan courts recognize three possible sources of a right to indemnity: the common law, implied contract, and express contract. *Skinner v D-M-E Corp*, 124 Mich App 580, 584; 335 NW2d

² Curiously, Warren selectively quotes language from *Sullivan* to support its proposition that the economic loss doctrine applies only “where the suit is between an aggrieved buyer and a nonperform[ing] seller” (Warren Brief, p 9) but fails to acknowledge the appellate court’s subsequent analysis expanding the doctrine’s application and its conclusion that “the **trial court clearly erred in finding that the absence of privity** between Sullivan and Norton **precluded [] application** of the economic-loss doctrine” (*Sullivan* at 344).

³ The court is not unaware of *Auto-Owners Ins Co v Chrysler Corp*, 129 Mich App 18; 341 NW2d 223 (1983) where the majority of a Court of Appeals panel held that privity of contract was a prerequisite for application of the economic loss doctrine. But *Auto-Owners* was a tort action brought by a *consumer* against a remote seller; not, as here, a dispute among commercial parties. Moreover, although research does not disclose any formal reversal or overruling of *Auto-Owners*, *Sullivan* and *Quest* enjoy greater precedential value. MCR 2.715(J)(1).

In *Sullivan*, embracing dicta from *Great American Ins Co v Paty’s, Inc*, 154 Mich App 634; 397 NW2d 853 (1986), the Court of Appeals concluded a contractual relationship was unnecessary to invoke the economic loss doctrine and reversed a lower court’s finding that the absence of privity precluded application of the doctrine. In *Quest*, the Court of Appeals concluded that parties to a transaction for goods were precluded recovery in tort for economic loss where “the parties or others closely related to them had the opportunity to negotiate the terms of [] sale”.

⁴ Given its embrace of their economic loss doctrine argument, the court finds it unnecessary to address Williams and Daikin’s additional, but analogous, argument that the third-party complaint fails to allege they owe an independent duty of care (Daikin Brief, p 8; Williams Brief, pp 9-10; Daikin Reply Brief, p 2; Williams Reply Brief, pp 1-2).

90 (1983). Here, although less than clear on the face of its complaint, Warren asserts it has adequately pled claims for common law and implied contractual indemnification (Warren Brief, p 12).

Common-law indemnification is based on the equitable theory that where the wrongful act of one party results in another party being held liable, the latter party is entitled to restitution for any losses. *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 531; 644 NW2d 765 (2002).

Common-law indemnity is intended only to make whole again a party held vicariously liable to another through no fault of his own. This has been referred to as “passive” rather than “causal” or “active” negligence. It has long been held in Michigan that the party seeking indemnity must plead and prove freedom from personal fault. This has been frequently interpreted to mean that the party seeking indemnity must be free from active or causal negligence. Therefore, a common-law indemnification action cannot lie where the plaintiff was even .01 percent actively at fault. [*Botsford Continuing Care Corp v Intelistaf Healthcare, Inc*, 292 Mich App 51, 62-63; 807 NW2d 354 (2011) (cleaned up)]

On the other hand, an implied contract to indemnify arises where there is a special relationship between the parties or a course of conduct whereby one party undertakes to perform a certain service and impliedly assures indemnification. *Skinner*, 124 Mich App at 585.

Like the common law variety, implied contractual indemnification is not available to a party who was actively negligent in causing the primary plaintiff’s injury. *Isabella Co v Michigan*, 181 Mich App 99, 107; 449 NW2d 111 (1989).

In general, whether a party is “passively” (vicariously) liable or “actively” liable for purposes of determining the availability of common-law or implied contractual indemnity is to be determined from the primary plaintiff’s complaint. *Botsford*, 292 Mich App at 63; *Isabella Co*, 181

Mich App at 107. Here, in the primary complaint, Six Labs has sued Warren for breach of contract⁵, breach of express warranties⁶, and breach of implied warranty⁷; all of which implicate Warren's own affirmative conduct in a commercial sales transaction. Accordingly, it appears that Warren has not been sued for negligence, much less passive negligence.

Contribution

Count 3 of Warren's third-party complaint seeks contribution from both Daikin and Williams.

Contribution is an equitable remedy based on principles of natural justice. *Lorimer v Julius Knack Coal Co*, 246 Mich 214, 217; 224 NW 362 (1929).

"Contribution distributes a loss among joint tortfeasors, requiring each to pay its proportionate share", *Langley v Harris Corp*, 413 Mich 592, 597; 321 NW2d 662 (1981)⁸.

Upon reflection, Warren now concedes that because the primary complaint does not include an action based on tort, it cannot maintain a claim against Williams or Daikin for contribution (Warren Brief, p 15).

⁵ Six Labs alleges that it entered into a written agreement with Warren whereby "Warren [] agreed to select, furnish, and install new HVAC systems at Six Labs' marijuana grow facility" (Complaint ¶ 5).

⁶ Count 2 of the primary complaint alleges Warren affirmatively warranted that certain statements it made to Six Labs were true and accurate (Complaint ¶44) as well as provided its own written express warranty (Complaint ¶ 45 and Complaint Ex 1, "Exhibit A").

⁷ By using phrases like "for this particular application", "specified purpose", and "fit for the purpose intended" (Complaint ¶¶ 54-56), Six Labs presumably claims, specifically, breach of the implied warranty of fitness for a particular purpose, *MCL 440.2315*.

⁸ In this regard, contribution differs from indemnity which shifts the entire loss (not just an aliquot share) from the party who has been forced to pay to the party who should properly bear the burden, *Langley*, 413 Mich at 597.

Implied (or, on second thought, Express) Contract

Count 6 of Warren’s third-party complaint is entitled “Implied Contract”. However, Warren sheepishly offers this was a mistake and now characterizes its claim against Daikin as one for breach of an express contract (Warren Brief re: Daikin MSD, pp 15-16)⁹.

An express contract is “an actual agreement of the parties, the terms of which are openly uttered or declared at the time of making it, being stated in distinct and explicit language either orally or in writing.” *Benson v Dep’t of Mgt and Budget*, 168 Mich App 302, 307; 424 NW2d 40 (1988) (cleaned up).

To state a claim for breach of contract a plaintiff must allege (1) the existence of a contract, (2) the other party’s breach, and (3) damages to the party claiming breach. *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014).

“A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation.” *AFT Mich v Michigan*, 497 Mich 197, 235; 866 NW2d 782 (2015) (citations omitted).

Here, the third-party complaint alleges –

62. Daikin directed Warren to perform additional work at the Project in order to correct [] deficiencies with the Daikin Products [].
63. Daikin agreed to pay Warren for the additional work on a time and material basis.
64. Warren has completed the additional work as directed by Daikin and has requested payment from Daikin for the additional work as Daikin had promised.
65. Daikin has refused, failed, and neglected to pay Warren for the additional work performed by Warren.

⁹ As Warren points out (Warren Brief re: Daikin MSD, p 15), “[a] party’s choice of label for a cause of action is not dispositive”, *Norris v Lincoln Park Police Officer*, 292 Mich App 574, 582; 808 NW2d 578 (2011).

66. Warren has been damaged by having expended over \$800,000.00 to perform the additional work as Daikin directed and Daikin has now refused to pay the amounts Warren expended.

“Michigan is a notice-pleading state” and “[a]ll that is required is that the complaint set forth allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend.” *Johnson v QFD, Inc*, 292 Mich App 359, 368; 807 NW2d 719 (2011) (cleaned up). Here, although more robust allegations would be welcomed, the court cannot presently say that Warren’s claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.¹⁰ *Clohset*, 302 at 558.

Express and Implied Warranties

Count 7 of Warren’s complaint purports to state claims for breach of express and implied warranties against both Daikin and Williams. Specifically, the third-party complaint alleges:

21. Warren purchased the Daikin Products through Daikin’s distributor, W[illiams].

70. W[illiams] and Daikin, in order to induce the sale of Daikin Products to the Project owner and to Warren made certain express warranties to Warren and the Project owner, both orally and in writing, that the Daikin Products would meet the needs of the Project owner.

71. These warranties, both express and implied, included recommendations to use certain Daikin Products to meet the heating, cooling, ventilation, humidification and dehumidification to meet the Project owner’s needs.

Express warranties in commercial sales transactions are governed by MCL 440.2313¹¹. As Daikin points out, privity is required to enforce an express warranty (Daikin Brief, pp 14-15),

¹⁰ Although Daikin points out that, contrary to the requirement of MCR 2.113(C)(1), Warren failed to attach a copy of a written instrument upon which its breach of express contract claim is based (Daikin Reply Brief, p 4), Warren advises that the parties’ purported agreement is unwritten (Warren Brief, p 16 fn 72).

¹¹ MCL 440.2313 states (emphasis added):

cont’d

Heritage Resources, Inc v Caterpillar Fin Servs Corp, 284 Mich App 617, 633; 774 NW2d 332 (2009) (“An express warranty may be created only between a seller and a buyer, and any such express warranty becomes a term of the contract itself”). Acknowledging it hasn’t alleged privity with Daikin, Warren now concedes it cannot maintain a breach of express warranty action against it (Warren Brief re: Daikin MSD, pp 16-17).

On the other hand, Warren enjoys privity with Williams so, theoretically, it could be potentially liable on an express warranty. However, there is a factual dispute whether any exist (Williams Brief, pp 13-14; Warren Brief re: Williams MSD, p 15). But it is the legal sufficiency of the third-party complaint that is presently before the court. *Nuculovic*, 287 Mich at 61. Here, Warren’s allegations of express warranty are limited: (1) in order to induce the sale, Williams made “certain express warranties” to Warren, “both orally and in writing”, that the goods would meet expectations (Third-Party Complaint, ¶ 70) and that the warranties included “recommendations” to use Daikin products (Third-Party Complaint ¶ 71). However, if a warranty is writing, Warren is required to attach the instrument to its complaint, MCR 2.113(C)(1). And, in any event, MCR 2.111(B)(1) requires complaints to contain “[a] statement of the facts, without repetition, on which

(1) Express warranties by the seller are created as follows:

- (a) **An affirmation of fact or promise made by the seller** to the buyer which relates to the goods and **becomes part of the basis of the bargain** creates an express warranty **that the goods shall conform to the affirmation or promise.**
 - (b) A description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
 - (c) A sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
- (2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warrant” or “guarantee” or that he or she have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty [].

the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend”. When measured against this standard, Warren’s attempt to state a claim against Williams for breach of express warranties is found wanting.

Beyond express warranties, the third-party complaint also purports to state a claim for breach of implied warranties; which, upon inquiry at oral argument, Warren specified as the implied warranty of merchantability, *MCL 440.2314*¹², and implied warranty of fitness for a particular purpose, *MCL 440.2315*¹³. On their face, these statutory obligations are imposed on “the

¹² MCL 440.2314 states (emphasis added):

- (1) Unless excluded or modified (section 2316), a warranty that the goods shall be merchantable is implied in a contract for their sale if **the seller** is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
- (2) Goods to be merchantable must be at least such as
 - (a) pass without objection in the trade under the contract description; and
 - (b) in the case of fungible goods, are of fair average quality within the description; and
 - (c) are fit for the ordinary purposes for which such goods are used; and
 - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
 - (e) are adequately contained, packaged, and labeled as the agreement may require; and
 - (f) conform to the promises or affirmations of fact made on the container or label if any.
- (3) Unless excluded or modified (section 2316) other implied warranties may arise from course of dealing or usage of trade.

¹³ MCL 440.2135 states (emphasis added):

Where the **seller** at the time of contracting **has reason to know any particular purpose** for which the goods are required **and** that the **buyer is relying on the seller's skill or judgment to select or furnish suitable goods**, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

seller”¹⁴. Here, Warren alleges that it purchased the subject goods from Williams (Third-Party Complaint, ¶ 21). Accordingly, Warren has also failed to state a claim against Daikin based on either of these statutory obligations.¹⁵

Warren’s implied warranty claims against Williams are also problematic.

Importantly, Warren is not alleging that there was anything inherently wrong with the HVAC system purchased from Williams. There is no allegation that the equipment is not “fit for ordinary purposes for which such goods are used” or otherwise not merchantable, *MCL 440.2314(2)*. Rather, Warren alleges that the HVAC system simply doesn’t meet Six Labs’ needs (Third-Party Complaint, ¶ 22). Accordingly, Warren has failed to state a claim against Williams for breach of the implied warranty of merchantability.

On the other hand, the implied warranty of fitness for a particular purpose may, at first blush, hold greater potential. Admittedly, there is nothing peculiar about buying HVAC equipment to satisfy “heating, cooling, ventilation, humidification and dehumidification” needs (Third-Party Complaint, ¶ 71). But, potentially, the HVAC requirements in a cannabis grow facility may be so peculiar as to justify a buyer “relying on the seller’s skill or judgment to select or furnish suitable

¹⁴ Although a different rule may apply in cases involving personal injury, *Piercefield v Remington Arms Co, Inc*, 375 Mich 85, 98; 133 NW2d 129 (1965), the court is not aware of (and at oral argument, Warren could not identify) any case allowing a plaintiff who has suffered only economic loss to maintain a breach of implied warranty action against a remote seller. See *Heritage Resources, Inc v Caterpillar Fin Servs Corp*, 284 Mich App 617, 638-639; 774 NW2d 332 (2009). Accordingly, the court need not address whether Daikin effectively disclaimed implied warranties (Daikin Brief, pp 15-16; Warren Brief, p 18).

¹⁵ In light of this conclusion, the court need not consider Daikin’s argument that it effectively disclaimed all implied warranties (Daikin Brief, p 16; Daikin Reply Brief, p 4).

goods”, *MCL 440.2315*.¹⁶ “Whether or not [the implied] warranty [of fitness for a particular purpose] arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting”, *MCL 440.2315*, Comment 1.

Here, however, Warren engaged MDA to perform an engineering analysis and recommend an HVAC system to achieve Six Labs’s requirements (Third-Party Complaint, ¶ 14; Third-Party Complaint, Ex 1). So, even assuming (without deciding) that a “particular purpose”, peculiar to the nature of the equipment’s use, has been sufficiently pled, Warren would seem hard-pressed to allege reliance on Williams’s skill or judgment in selecting suitable goods. And, perhaps unsurprisingly then, review of Warren’s complaint against Williams does not disclose an allegation of this critical element of *MCL 440.2315*.

In any event, the claim has not been sufficiently pled. Count 7 is a jumble of understated allegations of divergent warranties. Again, *MCR 2.111(B)(1)* requires complaints to contain, “specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend”. When again measured against this standard, Warren’s claim against Williams for breach of the implied warranty of fitness falls short.¹⁷

¹⁶ Counsel did not provide legal authority regarding how to differentiate “ordinary” from “particular” use, and the court’s independent research proved of limited success. “For example, shoes are generally used for the purpose of walking upon ordinary ground, but a seller may know that a particular pair was selected to be used for climbing mountains”, *MCL 440.2315*, Comment 2. Similarly, while there is nothing peculiar on its face about purchasing an accounting machine to perform accounting functions, a claim for breach of the statutory warranty may nonetheless lie where a buyer relies on the seller’s judgment to furnish a suitable machine for its known particular purpose. *Nat’l Cash Register Co v Adell Indus, Inc*, 57 Mich App 413; 225 NW2d 785 (1975).

¹⁷ In light of the conclusion that Warren has failed to state a claim against Williams for breach of any warranty, express or implied, the court need not address Williams’s argument that it effectively disclaimed all warranties (Williams Brief, pp 13-14; Williams Reply Brief, p 5).

Product Liability

Count 8 alleges Daikin breached duties owed to Warren in the manufacture, testing, and recommendation of its products that resulted in Warren suffering economic loss.

Products liability law is designed to protect society from the dangers of unsafe products. Its primary purpose is to encourage the design of safer products and thereby reduce the incidence of injuries.

The statutory definition of "product liability action" is an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product[, *MCL 600.2945(h)*]. Under Michigan law, the threshold requirement of any products liability action is identification of the injury-causing product and its manufacturer. [Mich Civ Jur, Products Liability, § 1]

Daikin argues that, in the absence of personal injury, the economic loss doctrine also bars this claim (Daikin Brief, p 17; Daikin Reply Brief, p 5), and Warren similarly re-asserts its arguments against application of the doctrine (Warren Brief, p 18). In light of the court's prior analysis – and, although not addressed by counsel, in recognition that the third-party complaint fails to state a product liability action by definition, *MCL 600.2945(h)* – Daikin is entitled to summary dismissal of this claim.

Implied Warranty

Finally, Count 9 of Warren's third-party complaint purports to state a claim against Daikin for breach of an implied warranty of fitness.

Although Daikin's motion asserts, generally, that "Warren's breach of implied warranties claim^[18] should be dismissed" (Daikin Motion, ¶ 6), its argument regarding implied warranties is expressly limited to Count 7 (Daikin Brief, p 14). Unsurprisingly then, Warren's brief was similarly silent regarding Count 9. However, at oral argument, Warren conceded Count 9 did not add

¹⁸ Notably stated in the singular.

anything to Count 7's effort to sue Daikin for breach of the implied warranty of fitness and implicitly recognized the futility of pursuing the issue. Accordingly, as a matter of judicial economy, the court will grant Daikin's motion to dismiss this second effort also.

Conclusion

Warren Systems, Inc. has filed third-party claims against Williams Distributing Co. and Daikin North America, LLC for negligent misrepresentation, indemnity, contribution, breach of implied contract, breach of express and implied warranties, and/or product liability.

Having considered the parties' written and oral arguments, the court concludes that Warren's third-party complaint fails to state a claim against either Williams or Daikin, save for the breach of express warranty claim against Daikin (Count 6).

Accordingly Counts 1, 2, 3, 7, 8, and 9 of Warren's third party complaint are being dismissed.¹⁹

IT IS SO ORDERED.²⁰

Date: April 16, 2024

 (P27637)
M. Randall Jurrens, Business Court Judge

¹⁹ Counts 4 and 5 are against cross-defendant MDA Engineering only and are not affected by the present motions.

²⁰ The court recognizes that MCR 2.116(I)(5) requires that parties be given an opportunity to amend their pleadings when the grounds for summary disposition are based on, as here, MCR 2.116(C)(8). However, this right to amend is neither automatic nor absolute. *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006).