IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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NICHOLAS ADAMANY, a minor,
by Next best friend, Coreen Adamany,
WILLIAM ADAMANY, JR. and
COREEN ADAMANY, individually
and as parents of NICHOLAS ADAMANY,

ORDER

Plaintiffs,

04-C-0224-C

MIDWEST SECURITY INSURANCE,

Involuntary Plaintiff,

v.

CUB CADET CORPORATION, MTD
PRODUCTS INC. and MTD
CONSUMER GROUP INC.,

Defendants.

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This is a civil action for damages arising out of an accident in which plaintiff Nicholas Adamany was hit by a riding lawn mower. Defendants Cub Cadet Corporation, MTD Products Inc. and MTD Consumer Group Inc. have moved for judgment on the pleadings, arguing that plaintiffs cannot pursue a cause of action for strict products liability and for breach of implied warranties. Plaintiffs have not opposed the motion.

Defendants rely on Austin v. Ford Motor Co., 86 Wis. 2d 628, 644-646, 273 N.W.2d 233, 240 (1979), a case brought both in breach of warranty and strict liability in tort. In dicta, the Supreme Court of Wisconsin stated

> [W]e believe it appropriate to discuss the applicability of the theory of breach of warranty where the cause of action is strict liability in tort. We conclude that, in view of this court's development of the jurisprudence of products liability, it is inappropriate to bring an action for breach of warranty where a tort remedy is sought. See, Howes v. Hansen, 56 Wis. 2d 247, 201 N.W.2d 825 (1972); Dippel v. Sciano,[37 Wis. 2d 443, 155 N.W.2d 55 (1967]; and Prosser, The Fall of the Citadel (Strict Liability to the Consumer ), 50 Minn. L. Rev. 791 (1966).
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> The warranty theory was a transitional rationale which appeared to be appropriate prior to the adoption of sec. 402A of the Restatement of Torts 2d and, in this state, before the definitive statement of this court in Dippel v. Sciano, supra, which set forth this court's position on strict liability.
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> A breach of warranty theory is encumbered with the ancient baggage of contract actions and should not be employed where the recovery is one for tort. As we have previously said, a warranty theory, if utilized or permitted, presents additional hurdles to the plaintiff. Where a strict liability action is alleged, the plaintiff need not prove specific acts of negligence by the defendant, and the defenses of notice of breach of warranty, disclaimer of warranty, and privity of contract are not available. Greiten v. LaDow, 70 Wis .2d 589, 599, 235 N.W.2d 677 (1975).
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> It has long been basic to the pleading of a cause of action that a particular theory on which recovery may be based is not of great significance if the facts alleged or noticed are sufficient to state a cause of action or to assert a claim on which relief can be based. To assert a cause of action for breach of warranty or implied warranty in a tort action is not fatal to the pleader's cause, but the interest of justice and the adjudication of claims will be expedited if warranty claims, as such, are rejected and the case pursued as one for strict liability in tort. See, Prosser, Law of Torts (Hornbook series, 4th ed. 1971), sec. 98, p. 656.
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> The legal fiction of warranty which was useful in the transitional stage of the

development of products liability law should be rejected; and where the action is one in tort, the only appropriate action is that of strict liability in tort, as set forth in Dippel, supra. As we said in Dippel:

> The third cause of action of the plaintiff's complaint is grounded upon a theory of an abolition of the rule of privity of contract in actions for breach of implied warranty. Because we have determined that physically injured users or consumers of unreasonably dangerous defective products should pursue their remedy under the rule of strict liability in tort, we conclude that the third cause of action in the complaint does not state facts sufficient to constitute a cause of action and the order sustaining the demurrer should be affirmed but with leave to plead over.

Id. 37 Wis. 2d at 463, 155 N.W.2d at 65.

Under the rationale of Dippel, therefore, where an action is brought in tort but denominated as breach of implied warranty, the cause of action may be maintained if sufficient facts are alleged to state a claim for strict liability in tort but the warranty action as such should be dismissed.

ORDER

IT IS ORDERED that the unopposed motion of defendants Cub Cadet Corporation,

MTD Products, Inc. and MTD Consumer Groups Inc. to dismiss plaintiffs' breach of warranty claim (count II) is GRANTED.

Entered this 5th day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge