IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

GLADYS DALTON, PAUL WARWICK, CATHLEEN ROBERTS HOWARD, TERRY & EILEEN BROPHY, CAROL DeFEO, CLEARTIS ROCHESTER, DAVID WHOSTON, and ALBERT G. SACHS Individually, and as representatives of all persons similarly situated,	)	
Plaintiffs,	)	C.A. No.00C-09-155 WCC
v.	)	
FORD MOTOR COMPANY,	)	
Defendant.	)	

Submitted: September 26, 2001
Decided: February 28, 2002

MEMORANDUM OPINION

On Defendants' Motion to Dismiss. Granted.

Christian J. Singewald, Esquire, White & Williams LLP, 824 Market Street, P.O. Box 709, Wilmington, Delaware 19899. Attorney for Defendant.

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CARPENTER, J.

INTRODUCTION

The Plaintiffs have filed a putative class action lawsuit against Ford Motor Company alleging claims of negligence, breach of express and implied warranties, unjust enrichment, fraud, deceit, and a federal Magnuson-Moss Act violation. Ford Motor Company has filed a motion to dismiss Gladys Dalton's (the representative of a putative class of plaintiffs) First Amended Complaint pursuant to Superior Court Civil Rule 12(b)(6) for failure to state a claim upon which relief can be granted. For the reasons set forth below, Ford's motion to dismiss will be granted.

FACTS

Gladys Dalton, Paul Warwick, Cathleen Roberts Howard, Terry & Eileen Brophy, Carol DeFeo, Cleartis Rochester, David Whoston, and Albert G. Sachs (hereinafter "the Plaintiffs") have brought this action against the Defendant, Ford Motor Company (hereinafter "Ford") seeking to recover damages for Ford's alleged negligence, breach of express warranty, breach of an implied warranty of merchantability and fitness for a particular purpose, unjust enrichment, fraud, deceit, and a Magnuson-Moss Warranty Act violation. The Plaintiffs are alleged victims of a putative class, who purchased 1991 through 1994 Ford Mercury Tracers or in the alternative, Ford Escorts, in Delaware, Maryland, and West Virginia.

In 1992, Ford conducted a field study, and discovered that there was a potential

defect in Ford Escorts and Mercury Tracers, model years 1991 through 1994. Apparently, a wiring defect in the vehicles' fuel tank was found to potentially cause damage, which in turn, could cause a fire. To be more specific, when the vehicles came in contact with water, and salt water spray, during winter driving, the salt water combination could apparently corrode the vehicle, which would cause an electrical short resulting in damage to the vehicle. When Ford discovered this potential defect, it recalled these particular automobiles in selected states, including Pennsylvania, New Jersey and Ohio. All but one of the Plaintiffs in this action, reside in Delaware, Maryland or West Virginia, and consequently did not receive notice of this potential defect, nor were their vehicles included in the Ford recall.[1] When this action was commenced, the Plaintiffs had continued to own and operate their Ford vehicles, the possible electrical short had not ever occurred, and it appears that the Plaintiffs had not attempted to re-sell their vehicles.

The heart of this complaint asserts that Ford had a duty to notify all purchasers of Ford Escorts and Mercury Tracers about this "potential danger," and that all the vehicles should have been recalled or minimally repaired by Ford. Because of this failure to recall or repair the potentially defective fuel tank wiring, the Plaintiffs

[1] One plaintiff, Carol DeFeo, resides in Chester County, Pennsylvania, one of the states where Ford conducted a public recall.

assert that they have suffered damages in the decreased value of their vehicles.[2] Specifically the Plaintiffs alleged negligent design and manufacturing, breach of warranty, unjust enrichment, fraud, and Magnuson-Moss violations.

In response, Ford delineates numerous grounds upon which this Court should bar each of the Plaintiffs' claims and grant Ford's motion to dismiss the Plaintiffs' Amended Complaint. The litigation is now in a procedural posture to consider the Defendant's motion. The Court will first address the statute of limitations issues raised in the motion and then will address the remaining issues to the extent necessary.[3]

STANDARD OF REVIEW

In evaluating a motion to dismiss, pursuant to Superior Court Civil Rule 12(b)(6), this Court must accept all well-pleaded allegations as true.[4] The test, which determines whether the facts alleged are sufficient to withstand a motion to dismiss, is a broad one and therefore, a plaintiff may recover under any reasonably

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[2] Plaintiffs' Amended Complaint at ¶ 28.

[3] On September 21, 2000 the Plaintiffs filed their initial complaint, which was followed by a Motion to Dismiss. On February 23, 2001, after several other procedural motions were filed, the Plaintiffs filed a Motion to Amend their First Complaint. On March 7, 2001, the Court granted the Plaintiffs' Motion to Amend their Complaint, and Ford was ordered to re-submit its Motion to Dismiss.

[4] *Spence v. Funk*, 396 A.2d 967, 968 (Del. Super. 1978)(citing *Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, 372 A.2d 168 (Del. 1976)).

conceivable set of circumstances susceptible of proof under the complaint.[5] However, this Court, will only "assume the truthfulness of all well-pleaded (i.e., non conclusory) allegations of the complaint for purposes of the motion."[6] "Conclusions asserted in the complaint . . .will only be accepted as true if there are specific allegations of fact to support them."[7]

DISCUSSION

I. *Statute of Limitations*

A. Negligence Claims

The statute of limitations for a negligence cause of action can be found in 10 *Del. C.* § 8106. That statute specifically provides that a claim "shall [not] be brought after the expiration of 3 years from the accruing of the cause of such action . . . ."[8] Delaware courts have uniformly held that the statute of limitations begins to run when the alleged wrongful act was committed,[9] and ignorance of the facts, which lead to the accrual of the action, is ordinarily not an obstacle to the application of the statute

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[5] 396 A.2d at 968 (citing *Klein v. Sunbeam Corp.,* 47 Del. 526 (Del. 1952)).

[6] *In re Dean Witter Partnership Litigation*, No. 14816, 1998 WL 442456, at *4 (Del. Ch. July 17, 1998).

[7] *Id.*

[8] 10 *Del. C.* § 8106.

[9] *Consolidated American Insurance Co., v. Chiriboga*, 514 A.2d 1136, 1137-1138 (Del. Super. 1986)(citing *Mastellone v. Argo Oil Corporation*, 82 A.2d 379, 383 (Del. 1951)).

of limitations.[10] Since the landmark case of *Layton v. Allen,*[11] however, this seemingly bright line bar for recovery has been slowly lowered to allow particular types of actions, which are (1) "inherently unknowable," and (2) "sustained by a blamelessly ignorant plaintiff."[12] Alternatively, if a plaintiff can show fraudulent concealment, then the plaintiff may go forward on a claim, which would be otherwise barred by 10 *Del. C.* § 8106.

First, it is clear that unless an exception to the general statute of limitations statute is applicable, the Plaintiffs' negligence claims are barred as a matter of law. The Plaintiffs purchased their Ford vehicles between seven and ten years ago but did not file their litigation until September 21, 2000, well beyond the three year time limitation.[13]

Recognizing that the statute would normally bar these claims, the Plaintiffs

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[10] *David B. Lilly Co. v. Fisher*, 18 F.3d 1112, 1117 (3rd Cir. 1994)*; Curran v. Time Ins. Co.,* 644 F.Supp. 967, 972 (D.Del. 1986).

[11] 246 A.2d 794 (Del. 1968).

[12] *David B. Lilly Co.,* 18 F.3d at 1117(citing *Kaufman v. C.L. McCabe & Sons, Inc.,* 603 A.2d 831, 835 (Del. 1992); *Isaacson , Stolper & Co.,* 330 A.2d130, 133 (Del. 1974)(noting that the "[a]pplication of the 'time of discovery' rule is limited, and each case must stand or fall on its own facts, and those facts will determine whether it is an exception [to the general rule].")).

[13] *See Keller v. President, Dirs. & Co. of Farmers Bank*, 24 A.2d 539 (1942)(holding that statutes of limitation begin to run when the proper parties are in existence capable of suing and being sued. . .); *Abramson v. Delrose, Inc.*, 132 F.Supp. 440 (D. Del. 1955); *See also Dofflemeyer v. W.F. Hall Printing Co.,* 558 F.Supp 372 (D.Del. 1983)(holding that under this section, the 3-year period does not begin to run until the cause of action has accrued, which begins when the right to institute a suit arises.).

assert, in an attempt to challenge this harsh outcome, that they were not aware of the alleged defect until 1999, which is when it "manifested itself," thus triggering the statute of limitations. Therefore, the Plaintiffs argue that the "time of discovery" exception to the statute of limitations applies. Alternatively, the Plaintiffs assert that Ford fraudulently concealed this alleged defect in their vehicles which also would toll the statute until the defect was discovered.

The time of discovery rule provides that "injuries or conditions which are inherently unknowable postpone the commencement of the statute of limitations period until the victim discovered or should have discovered the wrong."[14] In this instance, the inquiry is whether the alleged wiring defect was inherently unknowable to the Plaintiffs, and if it was, the question then becomes when did the Plaintiffs learn of the defect, or when could they have reasonably known about the wiring defect in their respective vehicles.[15]

This litigation's principal claim relates to a wiring defect in the fuel tank area, which when exposed to certain adverse environmental conditions, could cause an electrical system malfunction, resulting in a possible fire. It appears that until the malfunction occurred there would be no indication to an unsuspecting driver that a

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[14] *J.V. Hodges v. Smith*, 517 A.2d 299 (Del. Super. 1986)(citing *Layton v. Allen*, 246 A.2d 794 (Del. 1968); *Isaacson, Stolper & Co., v. Artisans Saving Bank*, 330 A.2d 130 (Del. Super. 1974); *Rudginski v. Pullella*, 378 A.2d 646 (Del. Super. 1977)).

[15] *J.V. Hodges,* 517 A.2d at 301.

defect was present, nor was there any action that the owner could have taken to discover the defect. Further, it does not appear that the announcement of the alleged defect was widely distributed to the public, nor would it be one known to a reasonably informed consumer. The recall was limited in scope, and there does not appear to be any attempt to warn others by public pronouncement, beyond the recall area. Under this factual backdrop, it is difficult to accept Ford's argument that the Plaintiffs had the ability or "capacity" to learn of the defect simply because Ford publicly notified others. Of course, since none of the Plaintiffs vehicles have developed a defect, it is difficult to clearly ascertain when the potential problem, which is the subject of this litigation, surfaced to their attention. The Court suspects this revelation, which allegedly occurred in 1999, was attorney generated for the sole purposes of instituting litigation. Regardless of where the information was gained, if the Plaintiffs can support their 1999 "discovery" assertion, the litigation would have been commenced within the statute of limitations, and the claims would not be barred.

While the above decision resolves the statute of limitation issue raised in Ford's motion to dismiss as to the negligence claim, the Court maintains that the Plaintiffs' fraudulent concealment assertion, in the statute of limitations context, is without merit. The best the Plaintiffs can establish, is not a concealment by Ford, but

simply a decision by it, that the vehicles located beyond the re-call area were not exposed to the dangers of environmental elements that may cause the activation of the defect. While this decision may have been unwise, or even incorrect, it does not equate to a fraudulent concealment by Ford.[16] Therefore, if the above decision, as to the time of discovery rule, is subsequently found to be incorrect by an appellate court or the Plaintiff fails to establish the defect was discovered in 1999, the negligence claim should be dismissed as time barred.

B. Breach of Warranty Claims

The Plaintiffs' breach of warranty claims fall squarely under Delaware's version of the Uniform Commercial Code governing the sale of goods.[17] The applicable statute of limitations, 6 *Del. C.* § 2-725, provides that causes of action based upon a breach of "any contract for sale must be commenced within 4 years after the cause of action has accrued."[18] According to subsection (2) of the statute, "a cause of action accrues when the breach occurs, regardless of the aggrieved party's

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[16] "Fraudulent concealment requires the twin showing of (a) the defendant's knowledge of the alleged wrong, and (b) an affirmative act of concealment by the defendant" and "mere silence or failure to disclose does not constitute such fraudulent concealment as will suspend operation of a statute of limitations." *S&R Associates v. Shell Oil Co.,* 725 A.2d 431, 436 (Del. Super.1998).

[17] 6 *Del. C.* § 2-725.

[18] 6 *Del. C.* § 2-725; *See also S&R Associates.*

lack of knowledge of the breach."[19] The statute further states that "[a] breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."[20] This Court has previously held that "[u]nlike the judicial gloss applicable to other statutes in tort law, the clock by express statutory provision ticks in warranty actions when the breach occurs even though the buyer does not know the goods are defective."[21] Thus, the "time of discovery rule," has not been extended to breach of warranty actions.[22]

In this instance, tender of delivery occurred when the Plaintiffs purchased their Ford Escorts and Ford Mercury Tracers. Since the automobiles were "tendered" when purchased, this is when statute of limitations began to run as to any breach of warranty claims. Whether the time was 1991, 1992, 1993, or 1994, the Plaintiffs had four years within which, to bring a claim for breach of implied warranty of merchantability, breach of express warranty, or a breach of implied warranty of

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[19] 6 *Del. C.* § 2-725(2).

[20] 6 *Del. C.* § 2-725(2).

[21] *S & R Associates, L.P.,* 725 A.2d at 435 (citing *Lecates v. Hertrich Pontiac Buick Co.*, 515 A.2d 163, 175 (Del. Super. 1986).

[22] *S & R Associates, L.P.,* 725 A.2d at 435 (citing *Elmer v. Tenneco Resins, Inc.,* 698 F.Supp. 535, 539 (D.Del. 1988).

fitness for a particular purpose. Since the Plaintiffs did not bring their breach of warranty actions within the four year time limitation, the Plaintiffs' claims are barred as a matter of law. The recent case of *S&R Associates, L.P. v. Shell Oil Co.* aptly noted that

> to extend a contract warranty beyond the four-year statute of limitations, there must be evidence of an express warranty extending to, or beginning after, a specific future point in time beyond the four-year window.(citations omitted). An implied warranty, by its very nature, cannot extend to future performance because it makes no explicit warranty that speaks to a specific point in the future falls within this future performance exception.[23]

In this case, the Plaintiffs contend that this "future performance" exception applies to their situation, but they fail to realize that the Court has previously held that "[a]lmost without exception the future performance exception of 2-725(2) has been construed narrowly"[24] and "the [fact that the] plaintiffs' lack knowledge of the defect is irrelevant."[25] Nowhere in the Plaintiffs Amended Complaint is there factual support for the allegation that Ford specifically extended any warranty to future performance. As noted in *S&R Associates*, "to extend a contract warranty beyond the four-year statue of limitations, there must be evidence of an express warranty extending to, or beginning after, a specific future point in time beyond the four-year

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[23] *Id.* at 436.

[24] *Sellon v. Gen. Motors Corp.*, 571 F.Supp. 1094, 1098 (1983).

[25] *Id.* at 1099.

window."[26] Upon a review of the record before the Court, it appears that Ford did not agree to extend the warranty past the usual time period, and thus, the Plaintiffs' claim that their vehicle's warranty was extended to "future performance" is inaccurate, and erroneous.

As such, the Court finds that Count II of the complaint is dismissed as barred by the statute of limitations.

C. Magnuson-Moss Warranty Claims

The Magnuson-Moss Act created a statutory cause of action to allow consumers to sue in state or federal court for alleged warranty and consumer protection claims. In essence, the Act was initiated to provide a basic level of standards to insure honesty and reliability in transactions between consumers, suppliers, and manufacturers. A consumer, who prevailed under the Act, could elect to have the product replaced or request a refund, if the product could not be repaired after reasonable efforts. The Act could be characterized as similar to lemon laws passed by numerous states in the late 21st century as demands for greater consumer protection became a public policy priority.

However, a separate and independent statute of limitations was not created under the Magnuson-Moss Act. As such, the Court must look to this state's statute

[26] *S & R Associates,* 725 A.2d at 436.

of limitations for similar causes of action.[27] In Count V, the Plaintiffs have in essence, attempted to restate their breach of warranty claims set forth in Count II. The Plaintiffs assert in five of their six Magnuson-Moss Act violations that an implied warranty was breached. As such, the Court finds, in line with the holdings of other courts,[28] that the Magnuson-Moss Act is analogous to the Uniform Commercial Code adopted by Delaware, in Title 6 of the Delaware Code. Title 6 *Del. C.* §2-725 provides for a four year statute of limitation, and for the reasons set forth in subsection I(B) above, Count V's Magnuson-Moss claims are also barred as a matter of law, as they were untimely filed. As such, the motion to dismiss Count V is granted.

As a result of the above decision, there remains before the Court the appropriateness of the remaining counts based on other alleged legal deficiencies. The Court will now address those to the extent necessary to resolve the pending motion to dismiss.

II. *Damages*

To successfully bring a negligence cause of action, one of a plaintiff's minimum obligations, is to establish that they have been harmed in some manner by a defendant's negligent conduct. In other words, there must be some reasonable

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[27] *Cosman v. Ford Motor Company*, 674 N.E.2d 61 (Ill. 1996); *Lowe v. Volkswagen of America, Inc.,* 879 F.Supp. 28 (E.D. Pa. 1995).

[28] *Id.*

assertion of damages to sustain a plaintiff's claim. In the instant case, the requirement of damages presents a difficult challenge to the Plaintiffs. First, at the commencement of this litigation, the Plaintiffs' vehicles had been operating without any indication of a defect, and there have not been any out of pocket repair costs incurred, or any inconvenience to the Plaintiffs caused by Ford's 's alleged conduct. Second, since the Plaintiffs' vehicles continue to properly operate, the Plaintiffs have not suffered any personal injuries, nor have they endured any property damage to their vehicles. Without the benefit of traditional damages, the Plaintiffs were forced to turn to the imaginative and creative abilities of their counsel to create an alleged "diminution of value" of their vehicles, should they ever attempt to re-sell them in the future. At the time this complaint was filed, none of the Plaintiffs had sold their vehicles, and thus they were not certain their perception of damages were true, or whether their notion of damage was a fanciful speculation. To place this issue in a legal context, the Court must decide whether the Plaintiffs, who have not sustained any personal injuries, and have not suffered any out of pocket expenses, can recover "damages" to fix an alleged defective product, which has never manifested. The Court finds the answer to this inquiry must be "no."

In resolving this issue, the Court is persuaded by the reasoning and authority

found in *Briehl, et al. v. General Motors Corporation, et al.*[29] In *Briehl*, the plaintiffs asserted similar breach of express and implied warranty, fraudulent concealment, and consumer protection claims, which related to the performance of their cars, trucks, and sport utility vehicle's ABS braking system. The *Briehl* plaintiffs maintained that their ABS breaking systems were defective because the breaks "perform[ed] in a manner completely counter-intuitive to how an average driver is conditioned to respond when a hard braking maneuver is attempted."[30] The plaintiffs' breaking systems however, had performed without failure, and the Eighth Circuit in turn found that the plaintiffs had not suffered any damages. In addressing the alleged loss of resale value argument, the *Briehl* court found

> While the Plaintiffs affirmatively state that they do not seek damages as a result of actual injury or property damage, they do allege that they have suffered economic harm in the form of lost resale value. The Plaintiffs insist that they have suffered damage because the ABS systems installed in their vehicles have diminished the vehicles' resale value. However, the Plaintiffs do not allege in the Original Complaint that any member of the purported class has actually sold a vehicle at a reduced value. The Plaintiffs also fail to state the amount of their damages. Apparently, the Plaintiffs seek to set their damages as the difference between a vehicle with the ABS system that they expected and the system that is actually installed in each of their vehicles.[31]

The Plaintiffs' conclusory assertions that they, as a class, have

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[29] *Briehl v. General Motors Corp.,* 172 F.3d 623 (8th Cir. 1999).

[30] 172 F.3d at 626.

[31] *Id.* at 628-629.

> experienced damages (and the method the Plaintiffs use to calculate the damages) are simply too speculative to allow this case to go forward. The Plaintiffs' assertion that their ABS-equipped vehicles are defective and that they have suffered a loss in resale value as a result of the defect is insufficient as a matter of law to plead a claim under any theory the Plaintiffs have advanced. Even construing all allegations in favor of the Plaintiffs, we find that the District Court was correct when it dismissed the Plaintiffs' Original Complaint for failure to state a claim.[32]

Similar to the *Briehl* situation, the damages in this case are speculative, and to allow the case to go forward would be unjust. The judicial system has been established to allow an aggrieved party a forum to recover for damages allegedly suffered by the actions of a defendant.[33] However, the judicial system is not required to entertain actions where plaintiffs have not suffered any damages.[34] The Plaintiffs in the case at bar have not presented any damages because none have been sustained. As a result, Count I of the Complaint is hereby dismissed.

For the same reasons as set forth above, Count IV's fraud allegations must also be dismissed. Delaware courts have consistently held that to successfully plead a fraud claim, the allegedly defrauded plaintiff must have sustained damages as a result

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[32] *Id.*

[33] *See Briehl* at 628(quoting *Feinstein v. Firestone Tire & Rubber Co.,* 535 F.Supp. 595, 603 (S.D.N.Y. 1982) for the proposition that "[l]iability does not exist in a vacuum; there must be a showing of some damage.").

[34] *See e.g. Pfizer v. Farsian*, 682 So.2d 405, 407 (Ala. 1996)(holding that a plaintiff's belief that a product may possibly fail in the future is not a legal injury sufficient to support a plaintiff's claim.).

of a defendant's actions.[35] Since the Plaintiffs here have not suffered any damages, Count IV unavoidably fails. In essence, Count IV's allegations are simply a general assertion that because some Ford vehicles were re-called and fixed, while others were not, those that were not re-called and fixed must have invariably sustained some damage. This assertion is at best, speculative, but more importantly, it is not based on identifiable facts. The Plaintiffs' vehicles have not sustained any damages. The vehicles have continued to properly operate, and Count IV is merely an attempt to create a claim where one does not exist. As a result, Count IV is dismissed.

[35] *Sterling v. Beneficial Nat. Bank N.A.,* 1994 WL 315365, at *3 (Del. Super. 1994); *Browne v. Robb*, 583 A.2d 949 (Del. 1990).

III. *Unjust Enrichment*

Count III is the lone surviving count, which asserts "unjust enrichment" by Ford in its retention of money that should have been used to repair the Plaintiffs' vehicles.[36] While plead separately, the Plaintiffs' answering brief contends that this count "is merely a measure of the damages for the breach of contract and/or fraud and concealment." This statement by the Plaintiffs is an admission that their dispute with Ford is a contractual one. Because the Plaintiffs, in essence, have conceded this is a breach of contract claim, the remedy they seek, "restitution" or "unjust enrichment" is unavailable to them.[37] Since the unjust enrichment claims underlying assertions have been dismissed, this claim is without merit and fails as well.

Again, the Plaintiffs have failed to sufficiently allege that their vehicles have been damaged, or that their Ford vehicles have exhibited the wiring defect. It is difficult to understand why Ford should be required to repair a vehicle that is, in essence, not damaged. To the extent the Plaintiffs rely upon an "unjust enrichment" theory to support their damage claim, the Court finds these speculative allegations are

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[36] "Unjust enrichment is the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." *ID Biomedical Corp. v. TM Technologies, Inc.,* C.A. No. 13269, 1995 WL 130743, at *15 (Del. Ch. Mar. 16, 1995)(quoting *Fleer Corp. v. Topps Chewing Gum, Inc.,* 539 A.2d 1060, 1062 (Del. 1988)).

[37] *See ID Biomedical Corp.* 1995 WL 130743, at *15 (noting that "courts developed unjust enrichment, or quasi-contract, as a theory of recovery to remedy the absence of a formal contract," and that "[a] party cannot seek recovery under an unjust enrichment theory if a contract is the measure of the plaintiff's right.").

unsupported in the facts as alleged by the Plaintiffs in their amended complaint.

CONCLUSION

For the reasons set forth above, Ford's motion to dismiss is hereby granted as to all counts.[38]

IT IS SO ORDERED.

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Judge William C. Carpenter, Jr.

[38] The Court has not considered the other basis for dismissal asserted by Ford because of the above decisions. The failure to specifically address those claims is not reflective of the Court's opinion concerning the appropriateness of said arguments. It is simply a recognition that they have been mooted by this Court's decision.