IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

TELEDYNE TECHNOLOGIES INCORPORATED Plaintiff	: MAY TERM, 2000
v.	: No. 3398
FREEDOM FORGE CORPORATION d/b/a STANDARD STEEL, GREEN RIVER STEEL CORPORATION, and CSC, LIMITED	:
	: (Commerce Program)
Defendants	:
v.	:
LOUISVILLE FORGE and GEAR WORKS, LLC Additional Defendant	: Control Nos. 010579, 102343 : 102673, 102717, 102726.

O R D E R

AND NOW, this 19th day of April 2002, upon consideration of the numerous cross-Motions for Summary Judgment filed by plaintiff, Teledyne Technologies, Incorporated ("Teledyne"), and the defendants, Freedom Forge Corporation d/b/a Standard Steel, Green River Steel Corporation ("Green River") and CSC, Limited ("CSC"), and additional defendant, Louisville Forge & Gear Works, Inc. ("LF&G"), and the responses in opposition of each party pertinent to each Motion and the respective Memoranda of Law, all other matters of record and following oral argument on two occasions, and in accord with the Opinion being filed contemporaneously with this Order, it is **ORDERED** as follows:

1. Teledyne's Motion for Summary Judgment: (a) as to the claims of breach of the implied warranties against Standard Steel is **Denied**, it appearing that there are disputed issues of material fact, (b) as to the claims of breach of the implied warranties against Green River and CSC is **Denied**, in that privity of contract is required under both Kentucky and Ohio law but is absent here;

2. Teledyne's Motion for Summary Judgment as to its claims of negligence, strict liability, and negligent misrepresentation against Standard Steel, Green River, and CSC is **Denied**, there being disputed issues of fact and, with regard to the negligent misrepresentation claim against CSC, privity of contract or a sufficient nexus between Teledyne and CSC is required under Ohio law, and neither is present;

3. Teledyne's Motion for Summary Judgment as to the claims of intentional misrepresentation against Standard Steel, Green River, and CSC is **Denied**;

4. Standard Steel's Motion for Summary Judgment as to Teledyne's claims of breach of the implied warranties is **Denied**, there being disputed issues of material fact;

5. Standard Steel's Motion for Summary Judgment as to Teledyne's claims of negligence, strict liability, and negligent misrepresentation is **Denied, in part,** and **Granted, in part,** in that Teledyne may **not** recover damages associated with Teledyne's recall of its crankshafts, because of the application of the economic loss doctrine;

6. Standard Steel's Motion for Summary Judgment as to Teledyne's claims of intentional misrepresentation is **Denied**, there being disputed issues of material fact;

7. Green River's Motion for Summary Judgment as to Teledyne's claims of breach of the implied warranties is **Granted**, in that privity of contract is required under Kentucky Law and is absent here;

8. Green River's Motion for Summary Judgment as to Teledyne's claims of negligence, strict liability, and negligent misrepresentation is **Denied, in part,** and **Granted, in part,** in that Teledyne may **not** recover damages associated with Teledyne's recall of its crankshafts, because of the application of the economic loss doctrine;

9. Green River's Motion for Summary Judgment as to Teledyne's claim of intentional misrepresentation is **Denied**;

10. CSC's Motion for Summary Judgment as to Teledyne's claims of breach of the implied warranties is **Granted,** in that privity of contract is required under Ohio Law and is absent here;

11. CSC's Motion for Summary Judgment as to Teledyne's claims of negligence and strict liability, is **Denied, in part,** and **Granted, in part,** in that Teledyne may not recover damages associated with Teledyne's recall of its crankshafts, because of the application of the economic loss doctrine;

12. CSC's Motion for Summary Judgment as to Teledyne's claim of negligent misrepresentation is **Granted,** in that Ohio law requires either privity of contract or a sufficient nexus between the parties, neither of which is present here;

13. CSC's Motion for Summary Judgment as to Teledyne's claim of intentional misrepresentation is **Denied**.

14. Standard Steel, Green River, and CSC's Motions for Summary Judgment as to Teledyne's request for attorney's fees are **Granted.**

It is further **ORDERED,** upon consideration of the Motion for Summary Judgment filed by defendant, Standard Steel, as to the claims, cross-claims and counterclaims of additional defendant Louisville Forge & Gear Works, LLC ("LF&G"), and as between Standard Steel and LF&G, only, that:

15. Standard Steel's Motion for Summary Judgment as to LF&G's claims of breach of the implied warranties is **Denied**, there being disputed issues of material fact;

16. Standard Steel's Motion for Summary Judgment as to LF&G's claims of negligence, strict liability, and negligent misrepresentation is **Denied, in part,** and **Granted, in part,** in that

damages associated with the recall of the crankshafts are not recoverable, because of the application of the economic loss doctrine;

17. Standard Steel's Motion for Summary Judgment as to LF&G's claims of intentional misrepresentation is **Denied**, there being disputed issues of material fact.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

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O P I N I O N

Albert W. Sheppard, Jr., J. ..... April 19, 2002

Motions for Summary Judgment were filed by all the parties. Defendants, Freedom Forge Corporation d/b/a Standard Steel ("Standard Steel"), Green River Steel Corporation ("Green River") and CSC, Limited ("CSC"), moved for judgment as to all counts of the Second Amended Complaint of plaintiff, Teledyne Technologies, Inc. ("Teledyne"). Teledyne filed a Motion for Summary Judgment against all defendants. Further, Standard Steel moved for judgment as to the cross-claims and counterclaims of the additional defendant, Louisville Forge & Gear Works, LLC ("LF&G").

BACKGROUND

Teledyne manufactures piston engines for aircraft. These engines use steel crankshafts to rotate the propellers. Teledyne heat treats, nitrides, and assembles these crankshafts made from steel forgings obtained from LF&G. To produce the forgings, LF&G heat treats and forges steel bar stock it receives from Green River or CSC. Both Green River and CSC obtain their steel ingots to make the steel bar stock from Standard Steel.

The present action arose when, in 1999, Teledyne began to experience in-flight fatigue failures in the connecting rods of the crankshafts. As a result, the engines containing these crankshafts failed causing personal injuries and damage to the aircraft, the engines, and the crankshaft component parts.

Teledyne investigated the crankshaft fatigue strength and concluded that these crankshafts were weakened by the alleged improper chemical composition, heating, rolling and processing of the steel. This investigation revealed that thirteen broken crankshafts were made from LF&G forgings manufactured from Green River and CSC steel bar stock, which originated from steel ingots made by Standard Steel. Because of these problems, Teledyne instituted a recall of its engines and tested the crankshafts. In instances where Teledyne found a defective crankshaft, the engine was reassembled with a new crankshaft.

On October 19, 2001, Teledyne filed its Second Amended Complaint against Standard Steel, Green River and CSC, asserting claims of negligence, strict liability, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, fraudulent misrepresentation, and negligent misrepresentation.

DISCUSSION

I. Choice of Law Analysis.

A. Breach of Implied Warranty Claims.

The merits of the motions depend upon which state law applies to Teledyne's claims.

Teledyne argues that Pennsylvania law applies to its claims of breach of the implied warranty of merchantability and implied warranty of fitness for a particular purpose against all defendants. Standard Steel agrees with Teledyne. However, Green River asserts that Kentucky law applies to Teledyne's breach of implied warranty claims against Green River and CSC argues that Ohio or Kentucky law applies to Teledyne's claims against CSC.

"In Pennsylvania, choice of law analysis first entails a determination of whether the laws of the competing states actually differ. If not, no further analysis is necessary." Ratti v. Wheeling Pittsburgh Steel Corp., 758 A.2d 695, 702 (Pa. Super. 2000). However, if a court determines a conflict is present, it must then "analyze the governmental interests underlying the issue and determine which state has the greater interest in the application of its law." Id.

In Pennsylvania, Kentucky and Ohio, the right of a consumer to recover economic loss from a manufacturer of a defective product in a breach of warranty action is well established. Moscatiello v. Pittsburgh Contractors Equipment Co., 407 Pa. Super. 378, 389, 595 A.2d 1198, 1203 (1991); Riffe v. Black, 548 S.W.2d 175, 177 (Ky. App. 1997); Bruns v. Cooper Industries, Inc., 605 N.E.2d 395, 397 (Ohio Ct. App. 1992). In all three jurisdictions, to recover for a breach of the implied warranty of merchantability, a plaintiff must show that the seller was a merchant, as defined by the Uniform Commercial

Code ("UCC"), and that the goods were not merchantable at the time of the sale. 13 Pa.C.S.A. §2-314[1]; KRS §355.2-314[2]; R.C. 1302.1.[3] An implied warranty of fitness for a particular purpose is breached

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[1] 13 Pa.C.S.A. § 2-314 reads:
(a) Sale by merchant.--Unless excluded or modified (section 2-316), 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.
(b) Merchantability standards for goods.--Goods to be merchantable must be at least such as:
(1) pass without objection in the trade under the contract description;
(2) in the case of fungible goods, are of fair average quality within the description;
(3) are fit for the ordinary purposes for which such goods are used;
(4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved;
(5) are adequately contained, packaged, and labeled as the agreement may require; and
(6) conform to the promises or affirmations of fact made on the container or label if any.
(c) Course of dealing or usage of trade.--Unless excluded or modified (section 2-316) other implied warranties may arise from course of dealing or usage of trade.

[2] KRS §355.2-314 reads:
IMPLIED WARRANTY: MERCHANTABILITY; USAGE OF TRADE
(1) Unless excluded or modified (KRS 355.2-316), 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 (KRS 355.2-316) other implied warranties may arise from course of dealing or usage of trade.

[3] R.C. 1302.27 IMPLIED WARRANTY; MERCHANTABILITY; USAGE OF TRADE
(A) Unless excluded or modified as provided in section 1302.29 of the Revised Code, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with

when a seller, on whose skill and judgment a buyer relies and who has reason to know at the time of contracting the particular purpose for which the goods are required, fails to provide goods that perform to the specific use contemplated by the buyer. Gall v. Allegheny County Health Department, 521 Pa. 68, 73, 555 A.2d 786, 788 (1989);13 Pa.C.S.A §2-315[4]; KRS § 355.2-316[5], R.C. 1302.28.[6]

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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.
(B) Goods to be merchantable must be at least such as:
(1) pass without objection in the trade under the contract description; and
Footnote 3 (continued)
(2) in the case of fungible goods are of fair average quality within the description; and
(3) are fit for the ordinary purposes for which such goods are used; and
(4) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
(5) are adequately contained, packaged, and labeled as the agreement may require; and
(6) conform to the promises or affirmations of fact made on the container or label if any.
(C) Unless excluded or modified as provided in section 1302.29 of the Revised Code, other implied warranties may arise from course of dealing or usage of trade.

[4] 13 Pa.C.S.A 2-315.reads:
Implied warranty: fitness for particular purpose:
Where the seller at the time of contracting has reason to know:
(1) any particular purpose for which the goods are required; and
(2) that the buyer is relying on the skill or judgment of the seller to select or furnish suitable goods; there is unless excluded or modified under section 2316 (relating to exclusion or modification of warranties) an implied warranty that the goods shall be fit for such purpose.

[5] KRS § 355.2 - 316 reads:
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 KRS §355.2-316 an implied warranty that the goods shall be fit for such purpose.

[6] R.C. 1302.28
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 section 1302.29 of the Revised Code an implied warranty that the goods shall be fit for such purpose.

These jurisdictions differ, however, as to the requirement of privity of contract in asserting breach of warranty claims. In Pennsylvania, for recovery for breach of warranty, privity of contract is not required. Spagnol Enterprises, Inc. v. Digital Equipment Corp., 390 Pa. Super. 372, 377, 568 A.2d 948, 950 (1989) (citations omitted). However, the Kentucky Supreme Court has held that privity between the buyer and seller is a required element of claims for breach of express or implied warranties arising under the Kentucky Uniform Commercial Code. Williams v. Fulner, 695 S.W.2d 411, 413 (Ky. 1985). Moreover, Kentucky courts have held that a "breach of warranty is not a viable theory in a personal injury claim for a product sold in a defective condition unless there is privity of contract, except in limited circumstances specified in the statute." Real Estate Marketing, Inc. v. Franz, 885 S.W.2d 921, 925 (Ky. 1994) (citing KRS 355.2-318[7]).

Ohio has further distinguished between breach of implied warranty claims based on the UCC and those in tort. As in Kentucky, in Ohio, "[p]rivity between the buyer and seller is a prerequisite to a breach of warranty claim brought under the Uniform Commercial Code." Bruns, 605 N.E.2d at 397 (citing R.C. 1302.31[8]). However, like Pennsylvania, privity is not required for a claim of breach of implied warranty

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[7] KRS § 355.2-318 reads:

THIRD PARTY BENEFICIARIES OF WARRANTIES EXPRESS OR IMPLIED

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

[8] R.C. 1302.31 reads:

THIRD PARTY BENEFICIARIES OF WARRANTIES EXPRESS OR IMPLIED

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume, or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

based in tort. Ohio Dep't of Administrative Services v. Robert P. Madison International, Inc., 741 N.E.2d 551, 555 (Ohio Ct. App. 2000), appeal denied, 736 N.E.2d 27 (Ohio 2000).[9] Thus, since all three states differ in their approach to requiring privity, there is a true conflict.

Where a true conflict exists, a court must apply a choice of law analysis and determine which jurisdiction has the greater interest in the application of its law. Viva Vino Import Corp. v. Farnese Vini S.R.L., 2000 WL 1224903, at *1 (E.D. Pa. 2000).[10] Pennsylvania's choice of law analysis combines the approach of the Restatement (Second) of Conflict of Laws, known as the "significant relationship test," and the theory known as "governmental interest analysis." Celebre v. Windsor-Mount Joy Mutual Ins. Co., 1994 WL 13840, at *1 (E.D. Pa 1994) (citations omitted). Therefore, "the state which has the most interest in settling the dispute and which is the most concerned with its outcome is the state whose law should be applied. Id. at *1. In determining which state has the greater interest in a contract dispute, Pennsylvania courts consider the following:

> (1) the place of contracting, (2) the place of negotiation of terms, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties.

Viva Vino Import Corp., at *2 (citing Benevento v. Life USA Holding, Inc., 61 F.Supp.2d 407, 414-15 (E.D. Pa. 1999)).

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[9] The court making this distinction was the Ohio Court of Appeals, not the Supreme Court of Ohio.

[10] Although federal court decisions analyzing Pennsylvania law are not binding, they are persuasive. Hutchinson v. Luddy, 763 A.2d 826, 837 n.8 (Pa. Super. 2000); In re Insurance Stacking Litig., 754 A.2d 702, 705 (Pa. Super. 2000). See also Moore v. Sims, 442 U.S. 415, 429 (1979) (stating that "[s]tate courts are the principal expositors of state law").

1. Pennsylvania Law Applies to Teledyne's Claims of Breach of Implied Warranties Against Standard Steel.

It is undisputed that Pennsylvania has the greatest interest in resolving Teledyne's claims against Standard Steel. Oral Arg. 1/29/02, 5:18. Specifically, Standard Steel:

> [S]old the subject steel pursuant to Sales Orders created in and delivered from Pennsylvania in response to purchase requests that were transmitted into Pennsylvania. The VAR ingots were made in Pennsylvania and shipped in finished form from Pennsylvania to the entity (Green River and/or CSC) that purchased the steel. Moving defendant [Standard Steel] maintained its principal place of business in Pennsylvania.

Standard Steel's Mem. of Law at 7. Accordingly, Pennsylvania law applies to Teledyne's breach of implied warranty claims against Standard Steel.

2. Kentucky Law Applies to Teledyne's Claims of Breach of Implied Warranties Against Green River.

Kentucky has the most interest in settling Teledyne's breach of implied warranty claims against Green River. To begin with, LF&G was the only party with whom Teledyne had contracted ("Teledyne contract") to purchase the crankshafts. Green River's Mem. of Law, Ex. D at §15. Further, the Teledyne contract was expressly governed by Kentucky law. Id. Moreover, the location of the subject matter of the Teledyne contract, as well as the contract between Green River and LF&G, was Kentucky. Not only did Green River process the steel bars in Kentucky, but Green River also delivered the final product to LF&G in Kentucky. Id. Then, pursuant to the Teledyne contract, LF&G used the steel bars to create the crankshaft forgings to be used by Teledyne.

Kentucky has an interest in the outcome of this litigation since LF&G is a Kentucky corporation, and both it and Green River have their principal places of business in Kentucky. Id.[11] Kentucky has a governmental interest in evaluating and safeguarding the commercial transactions that occur not only within it borders, but also involving its citizens. Thus, Kentucky law applies to Teledyne's breach of implied warranty claims against Green River.

Notwithstanding this, Teledyne continues to urge that Pennsylvania law should apply to its implied warranty claims against Green River. Pl's Response to Green River's Mot. for Summ. J. at 4. In support of its argument, Teledyne refers to the underlying contracts between Standard Steel and both Green River and CSC which contained Pennsylvania choice of law provisions. Id. at 4; Ex. 1. However, these contracts are not dispositive, because no where is it asserted that Teledyne was a party to either the contract Standard Steel had with Green River or with CSC, nor the contract LF&G had with Green River. As such, these choice of law clauses cannot be successfully asserted by Teledyne. In re Mushroom Transportation Co., 247 B.R. 395, 399 n.4 (E.D. Pa 2000) ("It stretches logic and reason to assert that non-party parties with absolutely no rights or obligations under a contract (indeed, who were nowhere in the picture when the contract was signed) should be allowed to enforce a clause against a party to the contract in later litigation.").

[11] It is unclear who owned Green River at the time of the alleged improper processing. Teledyne asserts that for the relevant period Green River's "principal office location" was in Pittsburgh, Pennsylvania, since its owner, Allegheny Ludlum, is located there. Pl's Reply to Green River's Mot. Summ. J at 4. But, according to Green River, its owner was AII Investment Corp., a Delaware company, with its principal place of business in Delaware. Green River's Reply to Pl's Mot. Summ. J. at 5, n.2. However, for purposes of resolving which state's law applies to the breach of implied warranty claims against Green River, where Green River's owner resides is not controlling.

Teledyne also argues that since the contract between LF&G and Green River was to provide steel, Green River substantially performed this contract, not in Kentucky, but in Pennsylvania where it purchased the steel from Standard Steel. Oral Arg. 1/29/02, 51:24 - 52:9. Specifically, Teledyne contends that upon agreeing to provide steel to LF&G:

> Green River in turn turned around and selected a Pennsylvania company [Standard Steel]. Could have gone to Ohio. Could have stayed in Kentucky. Could have gone anywhere else and found steel, but they came to Pennsylvania, selected a Pennsylvania company, and then interacted with that Pennsylvania company on the critical point that we say caused the defect.
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> They [Green River] want to ignore the fact that they selected this company in Pennsylvania to make steel and when we say the predominant work in making the steel occurred in Pennsylvania, that's exactly what we're saying.

Id. at 49:19-50:17. However, Teledyne mistakenly relies upon the contract between Standard Steel and Green River to determine where Green River substantially performed its contract with an entirely different party, LF&G ("Green River/LF&G contract"). While it is true that Green River went to Pennsylvania to purchase the VAR340 steel from Standard Steel, this act is but one transaction in a series to complete performance of the Green River/LF&G contract. To hold that this fact alone justifies application of Pennsylvania law would be to ignore the place where the contract was made and was to be performed. Pursuant to the Green River/LF&G contract, Green River processed the steel bars in Kentucky, and then delivered the final product to LF&G in Kentucky. As such, the place of performance of the Green River/LF&G contract was in Kentucky, not Pennsylvania.

Contrary to Teledyne's assertions, Pennsylvania has no significant relationship to Teledyne's breach of implied warranty claims against Green River. Aside from Teledyne's choice of forum, the only relationship Pennsylvania has with this matter is that Standard Steel is headquartered in Pennsylvania. Second Amended Complaint at ¶ 3. No where is it alleged that any of the in-flight failures of these crankshafts occurred in Pennsylvania. Further, this court agrees with Green River's assessment that "Pennsylvania does not have any discernible governmental interest in resolving a dispute between Plaintiff, a corporation headquartered in California, and Green River, a corporation headquartered in Kentucky, concerning an alleged dispute arising in Kentucky." Green River's Mot Summ. J. at 13.

In sum, this court concludes that Kentucky law applies to Teledyne's breach of the implied warranties claims against Green River.

3. Ohio Law Applies to Teledyne's Claims of Breach of the Implied Warranties Against CSC.

CSC argues that Ohio or Kentucky law applies to Teledyne's claims against it.

Under Pennsylvania law, if there is no material difference between the laws of competing jurisdictions, there is a "false conflict" and the court need not decide the choice of law issue. In re Complaint of Bankers Trust Co., 752 F.2d 874, 882 (3rd Cir. 1984). Here, both Ohio and Kentucky laws require privity of contract to support a breach of implied warranty claim based upon the UCC. Bruns, 605 N.E.2d at 397 (citing R.C. 1302.31); Williams, 695 S.W.2d at 413 (Ky. 1985). There is no true conflict then in this regard between Ohio or Kentucky law.

But, Teledyne argues Pennsylvania or Ohio law, and not Kentucky law applies to its claims against CSC. Teledyne asserts that "[h]aving not limited its warranty claims to the provisions of the commercial

code" there is no conflict between Pennsylvania and Ohio law. Pl's Reply to CSC's Mot. Summ. J. at 7 (relying on Robert P. Madison Int'l Inc., 741 N.E.2d at 558.). However, Teledyne's Second Amended Complaint reveals that this contention is off the mark in that both Counts IV and V clearly rely upon the commercial code. First, the allegations of Count IV - - "Breach of Implied Warranty of Merchantability" - - not only assert the elements of the commercial code, but follow the precise framework and language of 13 Pa.C.S.A. § 2-314, cited supra n.1. See Second Amended Complaint at ¶¶ 72 - 80. Similarly, the allegations of Count V- - "Breach of Implied Warranty of Fitness for a Particular Purpose" - - not only assert the elements of the commercial code, but follow the precise framework and language of 13 Pa.C.S.A. §2-315, cited supra n.4. See Second Amended Complaint at ¶¶ 81 - 87. As such, Counts IV and V should be construed to be limited to the provisions of the UCC and implicate Ohio law which specifically requires privity of contract for breach of implied warranty claims based on the UCC.

Although there is no conflict between Ohio and Kentucky law regarding privity, there is a true conflict between Ohio and Pennsylvania law - - the latter not requiring privity of contract for breach of implied warranty claims. Therefore the court must determine which state, Ohio or Pennsylvania, has the greater interest in settling the dispute. Here, CSC maintained its principal place of business in Warren, Ohio and processed its steel bars in Ohio, before shipping them to LF&G in Kentucky. CSC's Supp. Mem. of Law to CSC's Mot. Summ. J. at 4. Further, CSC's contract with LF&G contained a choice of law provision stating "the contract resulting hereunder shall be construed according to the laws of the State of Ohio." Id. at Exh. A. Moreover, Ohio has a governmental interest in evaluating and safeguarding the commercial transactions that occur not only within its borders, but also involving its citizens.

On the other hand, aside from this forum, the only relationship Pennsylvania has with this matter is that defendant, Standard Steel, is headquartered in Pennsylvania.

Accordingly, this court concludes that Ohio has the greater interest in settling this dispute, and therefore, Ohio law applies to Teledyne's breach of implied warranty claims against CSC.[12]

B. Pennsylvania Law Applies to Teledyne's Tort Claims Against Standard Steel, Green River and CSC, With the Exception That Ohio Law Applies to the Negligent Misrepresentation Claim Against CSC.

Next, the plaintiff has alleged claims based on negligence, strict liability, intentional and negligent misrepresentation. Standard Steel contends that Pennsylvania law should apply to these tort claims. Green River contends that Kentucky law should apply, and CSC asserts that Ohio or Kentucky law should apply. Green River's Resp. to Pl's Mot. Summ. J. at 12; CSC's Supp. Mem. To Pl's Mot. Summ. J. at 15-16. As discussed above, "Pennsylvania choice of law analysis first entails a determination of whether the laws of the competing states actually differ. If not, no further analysis is necessary." Ratti v. Wheeling Pittsburgh Steel Corp., 758 A.2d 695, 702 (Pa. Super. 2000).

There is no conflict of law for negligence, strict liability and intentional misrepresentation claims among Pennsylvania, Kentucky and Ohio. Thus, this court will apply Pennsylvania law for those claims. The claim of negligent misrepresentation differs under Ohio law, however, from that of Pennsylvania and Kentucky. Therefore, a true conflict exists regarding the plaintiff's negligent misrepresentation claim against CSC, the only defendant based in Ohio. This court holds that Ohio law applies to the negligent misrepresentation claim against CSC, but as to the remaining tort claims against CSC, as well as the tort

[12] The court acknowledges that Kentucky law could also be applied here.

claims against Standard Steel and Green River, Pennsylvania law applies.

In Pennsylvania, Kentucky and Ohio, the elements of negligence and strict liability are the same. To state a cause of action based on negligence, a plaintiff must establish a duty on the defendant, a breach of that duty, and a causal connection between the breach of the duty and an injury suffered by the plaintiff. Petrongola v. Comcast Spectator, L.P., 789 A.2d 204, 209 (Pa. Super. 2001); Lewis v. B&R Corp., 56 S.W.3d 432, 436 (Ky. App. 2001); Donegal Companies v. White, No. 98-CO-1, 1999 WL 159222, at *2 (Ohio Ct. App. 1999) (citations omitted). Moreover, to prevail on a strict liability claim, a plaintiff must meet the requirements of section 402(A) of Restatement (Second) of Torts, which imposes strict liability on one who sells any product in a defective condition unreasonably dangerous to the user or consumer, even though the seller has exercised all possible care in preparation and sale of the products. Craley v. Jet Equipment & Tools, Inc., 778 A.2d 701, 704 (Pa. Super. 2001); Leslie v. Cincinnati Sub-Zero Products, Inc., 961 S.W.2d 799, 801 (Ky. App. 1998); White v. Depuy, Inc., 718 N.E.2d 450, 454 (Ohio App. 1998).

Under the laws of Pennsylvania, Kentucky and Ohio, to establish a claim for intentional misrepresentation, a plaintiff must allege: (1) a representation, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false, (4) with the intent of misleading another into relying on it, (5) justifiable reliance on the misrepresentation, and (6) the resulting injury was proximately caused by the reliance. Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999) (citations omitted); United Parcel Services Co. v. Rickert, 996 S.W.2d 464, 468 (Ky. 1999) (citations omitted); Carpenter v. Scherer Mountain Ins. Agency, 733 N.E.2d 1196, 1204 (Ohio Ct. App. 1999).

The tort of negligent misrepresentation is treated slightly differently in Pennsylvania and Kentucky, and materially differently in Ohio. Under Pennsylvania law, to state a claim for negligent misrepresentation, the plaintiff must allege:

> (1) a misrepresentation of a material fact, (2) made under circumstances in which the misrepresenter ought to have known its falsity, (3) with an intent to induce another to act on it, and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation . . . . Moreover, like any action in negligence, there must be an existence of a duty owed by one party to another.

Bortz, 556 Pa. at 500, 729 A.2d at 561.

Kentucky law has evolved to recognize the tort of negligent misrepresentation by adopting Section 552 of the Restatement (Second) of Torts,[13] the elements of which are similar to those in Pennsylvania. Initially, in Miller's Bottled Gas, Inc. v. Borg-Warner Corp., 955 F.2d 1043, 1053 (6th Cir. 1992), a split Sixth Circuit court predicted that Kentucky would not recognize the tort of negligent misrepresentation in a products liability case in a commercial setting "based on [its] conclusion that Kentucky would preclude Miller's claim for negligence resulting in purely economic injury". Id. At 1053. The court acknowledged that at the time of its decision, Kentucky had neither rejected nor adopted the tort of negligent

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[13] Section 552 of the Restatement (Second) of Torts states:
INFORMATION NEGLIGENTLY SUPPLIED FOR THE GUIDANCE OF OTHERS
(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

misrepresentation. Id. at 1052.

However, in Mirco Industries, Inc. v. Dan Clark Leasing, Inc., 129 F.3d 1264 (Table, Unpublished Text in Westlaw), No. 96-5707, 96-5750, 1997 WL 720438, at *7 (6th Cir. Nov. 13, 1997), the Sixth Circuit court recognized that Kentucky had adopted the tort of negligent misrepresentation in a commercial setting based on Section 552 of the Restatement (Second) of Torts, despite its affirmance of the lower court's dismissal of the claim following a bench trial. In Seigle v. Jasper, 867 S.W.2d 476, 483 (Ky. App. 1993), a case involving a land sale, the Kentucky Court of Appeals recognized the tort of negligent misrepresentation and relied on the Restatement for the tort's elements. Similarly, the federal district court in Anheuser Busch, Inc. v. Ford Motor Co., No. 93-526, 1997 WL 594498, at *5 (W.D. Ky. Feb. 10, 1997), held that a Kentucky court would apply Section 552 of the Restatement (Second) of Torts and allow a commercial purchaser of industrial real estate to assert a claim of negligent misrepresentation against the commercial seller. Finally, in Scheck Mechanical Corp. v. Borden, Inc., 186 F.Supp.2d 724, 734 (W.D. Ky. 2001), a contractual dispute between a contractor and owner, the federal district court denied a motion for summary judgment on a negligent misrepresentation claim and again held that Kentucky would recognize Section 552 of the Restatement (Second) of Torts as its standard for that tort. In comparing the elements of negligent misrepresentation required in Pennsylvania and the elements of Section 552 of the Restatement (Second) of Torts, there is no apparent conflict between the two states regarding the law applicable to the tort of negligent misrepresentation.[14]

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[14]Green River argues that Kentucky law requires privity of contract as an element of the tort of negligent misrepresentation. Green River Reply to Pl's Reply to Defs' Mot. Sum. J. at 13. The case upon which Green River relies, Clark v. Danek, 64 F.Supp.2d 652 (W.D. Ky. 1999), does not stand for that proposition. The federal district court in Clark specifically held that "Kentucky is one of those

The elements of negligent misrepresentation under Ohio law differ materially from those under Pennsylvania and Kentucky law. Ohio case law holds that:

> One who, in the course of his business, . . . or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Gene W. Ross & Associates, Inc. v. Carrier Corp., No. 96CA006512, 1997 WL 576371, at *2 (Ohio Ct. App.1997) (citation omitted). Unlike Pennsylvania and Kentucky law, Ohio law gives the definition of negligent misrepresentation a strict application, and requires a plaintiff to establish privity of contract between plaintiff and defendant to recover under this tort. "Absent privity of contract or a substitute therefore, no cause of action exists to recover economic damages resulting from a negligent misrepresentation." Id. (citation omitted). If actual privity of contract does not exist, a plaintiff may establish a "sufficient nexus" between the parties "to substitute for the lack of contractual privity." Laurent v. Flood Data Services, Inc., 2001 WL 1339026, at *5 (Ohio Ct. App. 2001). However, "[s]uch a nexus will usually exist only when the plaintiff is a member of a limited class whose reliance is specially foreseen."

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states whose tort law does not require strict privity between the defendant and the ultimately defrauded party." Id. at 655-56. In that case, the court denied plaintiff's motion to amend its complaint to include a claim for negligent misrepresentation.

Footnote 14 - (continued)
Plaintiff's claim alleged that the defendant had misrepresented to the United States Food and Drug Administration ("FDA") the proposed use of a spinal system in its application for approval by the FDA. While recognizing that Kentucky does not require privity of contract for a negligent misrepresentation claim, the court held that the plaintiff's claim that defendant had made misrepresentations to the FDA was too tangential. Id. at 656. The instant case is not analogous to Clark because here, Teledyne alleges that Green River (and the other defendants) made misrepresentations to Teledyne, not just to a remote third party.

Id. Therefore, to prove negligent misrepresentation under Ohio law, a plaintiff must prove privity of contract (or, at least a "sufficient nexus" between the parties). This would **not** have to be established under Pennsylvania or Kentucky law. The privity of contract requirement for a negligent misrepresentation claim gives rise to a true conflict between Pennsylvania and Kentucky law, on the one hand, and Ohio law, on the other.

The court recognizes that this choice of law conflict is narrow in focus, because it applies only to plaintiff's negligent misrepresentation claim against CSC, the only Ohio defendant. As noted, CSC maintains its principal place of business in Warren, Ohio and processed its steel bars in Ohio, before shipping them to LF&G in Kentucky. CSC's Supp. Mem. of Law to Pl's Mot. Summ. J. at 4. Also, CSC's contract with LF&G contained a choice of law provision stating that the contract should be construed according to Ohio law. Id. Further, in requiring privity of contract for the tort of negligent misrepresentation, Ohio has shown an added interest in limiting recovery under this tort. On the other hand, Pennsylvania merely happens to be the forum for this dispute and only defendant Standard Steel is headquartered in Pennsylvania. Weighing the interests of Ohio and Pennsylvania, this court concludes that Ohio has the greater interest in plaintiff's negligent misrepresentation claim against CSC.

The choice of law analysis does not end with a comparison of the elements of negligence, strict liability, intentional misrepresentation and negligent misrepresentation under Pennsylvania, Kentucky and Ohio laws because the defendants also argue that the economic loss doctrine bars each of plaintiff's tort claims. Green River's Resp. to Pl's Mt Summ. J. at 12; CSC's Supp. to Pl's Mot. Summ. J. at 8. Therefore, this court must determine whether there is an apparent conflict in the way Pennsylvania, Kentucky and Ohio apply the economic loss doctrine.

In Pennsylvania, the purpose of the economic loss doctrine is to "maintain[ ] the separate sphere of the law of contract and tort." New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp., 387 Pa. Super. 537, 550, 564 A.2d 919, 925 (1989). This Commonwealth's version of the doctrine precludes recovery for economic losses in a negligence action where the plaintiff has suffered no physical injury or property damage. Spivack v. Berks Ridge Corp., 402 Pa. Super. 73, 78 586 A.2d 402, 405 (1991) ("economic losses may not be recovered in tort (negligence) absent injury or property damage").[15]

Recently, this court examined the application of the economic loss doctrine to intentional misrepresentation claims. In First Republic Bank v. Brand, 50 Pa. D. & C. 4th 329 (2000) (Herron, J.), the court noted the absence of Pennsylvania case law on the subject and the conflicting decisions in Pennsylvania federal courts. The court ultimately concluded that the economic loss doctrine did not bar intentional misrepresentation claims "if the representation at issue is intentionally false." 50 Pa. D. & C. 4th at 343 (2000) (quoting North Am. Roofing & Sheet Metal Co. v. Building & Constr. Trades Council, No. Civ. A. 99-2050, 2000 WL 230214, at *7 (E.D. Pa. Feb. 29, 2000).[16] Therefore, if Pennsylvania law

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[15] Originally the economic loss doctrine applied to strict liability torts but has gradually been extended to negligence claims and, by some courts, to intentional torts as well. See Steven C. Tourek, Thomas H. Boyd & Charles J. Schoenwetter, Bucking the "Trend": The Uniform Commercial Code, The Economic Loss Doctrine and Common Law Causes of Action for Fraud and Misrepresentation, 84 Iowa L.Rev. 875, 885-891 (1999) (tracing the history of the economic loss doctrine nationwide).

[16] In reaching its conclusion, the Court relied on All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d 862 (7th Cir. 1999); KNK Medical-Dental Specialties, Ltd. v. Tamex Corp., No.Civ. A. 99-3409, 2000 WL 1470665 (E.D. Pa. Sept. 20, 2000); Sunquest Info. Sys. v. Dean Witter Reynolds, 40 F.Supp.2d 644 (W.D. Pa. 1999); Budgetel Inns, Inc. v. Micros Sys. Inc., 34 F. Supp. 2d 720 (E.D.Wis. 1999); Stoughton Trailers, Inc. v. Henkel Corp., 965 F.Supp. 1227 (W.D.Wis. 1997); Palco Linings, Inc. v. Pavex, Inc., 755 F.Supp. 1269 (M.D. Pa. 1990); Comptech Int'l, Inc. v. Milam Commerce Park, Ltd., 735 So. 2d 1219 (Fla. 2000); R. Joseph Barton, Drowning in a Sea of Contract: Application of the Economic Loss Rule to Fraud and Negligent Misrepresentation Claims, 41 Wm. & Mary L. Rev. 1789 (2000); Tourek, Boyd & Schoenwetter, 84 Iowa L. Rev. 875.

were to apply, the economic loss doctrine would not bar the plaintiff's intentional misrepresentation claim.[17]

Although the Supreme Court of Kentucky has yet to "adopt or reject" the economic loss doctrine, federal courts applying Kentucky law have held that the "Kentucky Supreme Court would adopt the economic loss doctrine and not allow recovery for purely economic losses in a product liability action based upon negligence or strict liability." Gooch v. E.I. du Pont de Nemours & Co., 40 F.Supp.2d 863, 874-75 (W.D. Ky. 1999) (citations omitted). Although Green River argues that Kentucky's version of the economic loss doctrine applies to bar all of the plaintiff's tort claims, nowhere does Green River cite Kentucky case law supporting such a broad application of the doctrine to include intentional misrepresentation. Green River's Resp. to Pl's Mot. Summ. J. at 12. Further, this court has been unable

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[17] CSC contends that the Third Circuit in Werwinski v. Ford Motor Co., No. 00-4323, 2002 WL 553838 (3d Cir. Apr. 15, 2002), found that there is no exception to the economic loss doctrine for intentional misrepresentation claims. This is not entirely correct. Werwinski followed "an emerging trend in these and other jurisdictions 'recogniz[ing] a limited exception to the economic loss doctrine for fraud claims, but only where the claims at issue arise independent[ly] of the underlying contract.'" 2002 WL 553838, at *13 (quoting Raytheon Co. v. McGraw-Edison Co., 979 F. Supp. 858, 870 (E.D. Wis. 1997). This test is remarkably similar to Pennsylvania's "gist of the action" doctrine, under which a plaintiff pursuing a tort action must show that "the wrong ascribed to the defendant must be the gist of the action with the contract being collateral." Phico Ins. Co. v. Presbyterian Med. Servs. Corp., 444 Pa. Super. 221, 228, 663 A.2d 753, 756 (1995) (citing Bash v. Bell Telephone Co., 411 Pa. Super. 347, 601 A.2d 825 (1992), and noting further that "the important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus"). Although the Werwinski court did not see itself as relying on the gist of the action doctrine, 2002 WL 553838, at *17 n. 8, it is difficult to see how the test adopted does anything more than apply a gist of the action test in an economic loss doctrine context. Indeed, Werwinski appears, in essence, to follow this court's holdings in Amico v. Radius Communications, No. 1793, 2001 WL 1807924, at *2-*4 (Pa. Com. Pl. Jan. 9, 2001), and First Republic Bank v. Brand, 50 Pa. D. & C. 4th 329, 340-45 (2000), by finding an exception to the economic loss doctrine for intentional misrepresentation and fraud claims and barring only those claims that are already precluded under the gist of the action doctrine.

to find Kentucky case law to support Green River's position with regard to plaintiff's intentional misrepresentation claim.

Ohio law similarly adopts and applies the economic loss doctrine. The Ohio Supreme Court held in Chemtrol Adhesives, Inc. v. American Mfgrs. Mut. Ins., 537 N.E.2d 624 (Ohio 1989), that in the "absence of injury to persons or damage to other property, the commercial buyer may not recover for economic losses premised on tort theories of strict liability or negligence." Id. at 636. In addition, as CSC asserts, the Ohio Products Liability Act supports Ohio case law on this point. CSC's Supp. Mem. To Pl's Mot. Summary J. at 12-13. That Act states that a claimant may recover for economic loss that proximately resulted from the defective aspect of a product, and that the compensatory damages include "physical damage to property other than the product involved." O.R.C. §§ 2307.79(A) and 2307.71(M). CSC does not cite any Ohio case law stating that in the absence of injury to persons or injury to other property, the economic loss doctrine would bar an intentional misrepresentation claim, and this court has not found any Ohio case law extending the doctrine to intentional misrepresentation claims. Thus, there is no apparent conflict among Pennsylvania, Kentucky and Ohio laws regarding each state's adoption and application of the economic loss doctrine.

In conclusion, as to plaintiff's claims of negligence, strict liability, and intentional misrepresentation against Standard Steel, Green River and CSC, this court will apply Pennsylvania law because no conflict exists between the laws of Pennsylvania, Kentucky and Ohio for those claims. As to plaintiff's claim of negligent misrepresentation against Standard Steel and Green River, this court will apply Pennsylvania law because no conflict exists between the Pennsylvania and Kentucky for that claim. However, as to plaintiff's claim of negligent misrepresentation against CSC, this court will apply Ohio law because a choice of law

analysis makes clear that Ohio has a greater interest than Pennsylvania in the resolution of plaintiff's negligent misrepresentation claim against CSC.

II. The Cross-Motions for Summary Judgment of Teledyne, Standard Steel, Green River and CSC.

A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense. Basile v. H & R Block, Inc., 777 A.2d 95, 100 (Pa. Super. 2001). Under Pa.R.C.P. 1035.2(2), if a defendant is the moving party, he may make the showing necessary to support the entrance of summary judgment by pointing to materials which indicate that the plaintiff is unable to satisfy an element of his cause of action. Id. The non-moving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party. Id. When the plaintiff is the non-moving party, "summary judgment is improper if the evidence, viewed favorably to the plaintiff, would justify recovery under the theory [he] has pled." Id. However, "[s]ummary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super.1999) (citing, Pa.R.C.P. 1035.2). Summary judgment may only be granted in cases where it is "clear and free from doubt that the moving party is entitled to judgment as a matter of law." Id. (citations omitted).

A. Teledyne's Breach of Implied Warranties Claims

1. The Motion for Summary Judgment as to the Claims of Breach of Implied Warranties Against Standard Steel is Denied Because There Are Disputed Issues of Material Facts.

Teledyne argues that it is entitled to judgment as a matter of law since it has proven all the elements of its claim of breach of implied warranties. Standard Steel, on the other hand, argues that because Teledyne is unable to satisfy several elements of its cause of action, Standard Steel's Motion for Summary Judgment should be granted.

There is a genuine issue of disputed material fact whether Standard Steel's steel ingot was defective and unmerchantable. On the one hand, the record reflects that the steel ingot manufactured by Standard Steel was unmerchantable because, inter alia, "the steel. . . was not in conformity, insofar as safety is concerned, with steel used in the normal course of business." Second Amended Complaint at ¶ 77c. Specifically, the chemistry of the steel did not allegedly conform to the descriptions on the accompanying certifications. Pl's Mot. Summ. J. at 30, n.82. However, the record offers no clear evidence that, as a result of the change in chemistry, the steel ingot Standard Steel produced was defective, unmerchantable or not suitable for Teledyne's use in the crankshafts. Standard Steel's Reply to Pl's Mot. Summ. J. at 10.

There is evidence to suggest that a number of factors, perhaps none relating to Standard Steel, may have caused the crankshaft failures. Second Amended Complaint at ¶¶ 11-20; Standard Steel's Mot. Summ J. at 26. Specifically, the record reflects that following Standard Steel's sale of its steel ingot, Green River and CSC heated, pressed and/or rolled it into steel bars. Standard Steel Reply to Pl's Mot. Summ. J. at 11, n.7. Then, once the steel bars were sold to LF&G, they were heated, cold straightened, heat

treated, and then forged into crankshaft forgings. Id. at 12, n.7. Finally, these crankshaft forgings, when sold to Teledyne, were then heat treated, machined, subjected to nitride treatment, and attached to other parts. Id. Given all these intervening events, there is a genuine issue of disputed fact as to whether Standard Steel's ingot was unmerchantable and defective causing the crankshafts to fail, or whether the subsequent processing caused the crankshafts' damage.

Another genuine issue of a disputed material fact is whether Standard Steel knew that Teledyne was relying on Standard Steel's skill and judgment when Teledyne purchased the crankshaft forgings from LF&G. On the one hand, the record contains allegations by Teledyne that Standard Steel "knew that their [Standard Steel's] skill and judgment would be relied upon and were, in fact, relied upon by the purchaser and chain of purchasers." Second Amended Complaint at ¶ 82. Teledyne asserts that Standard Steel was informed in writing of the steel specifications it desired to be used in its aircraft engines. Id. at ¶¶ 27, 30, 32; Pl's Mot. Summ. J. at Exh. B(1) 41; Exh. B(3) 172, 364; Exh. B(5) 21, 31, 64, 127. However, there is testimony on the record that Teledyne "has not shown that it relied specifically on [Standard Steel's] 'skill or judgment' in making the ingots, much less that [Standard Steel] knew of such reliance." Standard Steel's Mot. for Summ. J. at 27, n.8, Exh. G at 127.. Since these genuine issues of disputed material facts exist, it not clear and free from doubt that Teledyne is entitled to judgment as a matter of law on its breach of implied warranty claims against Standard Steel. Therefore, both Teledyne's and Standard Steel's Motions for Summary Judgment are **denied**.

2. The Motions for Summary Judgment as to the Claims of Breach of Implied Warranties of Green River and CSC Are Granted Since There Is No Privity of Contract Between Teledyne and Either Green River or CSC As Required Under Kentucky and Ohio Law.

Green River and CSC argue that the absence of privity of contract between Teledyne and Green River and CSC supports granting their respective Motions for Summary Judgment. Green River's Mem. of Law at 21; CSC's Mot. Summ. J. This court agrees.

As discussed, in Ohio and Kentucky, privity of contract between the buyer and seller is a required element of claims for breach of implied warranties arising under the UCC. Bruns, 605 N.E.2d at 397; Williams v. Fulner, 695 S.W.2d 411, 413 (Ky. 1985). There is no contract between Teledyne and Green River or between Teledyne and CSC. The only contract to which Teledyne is a party, is the "Sale/Purchase Contract," entered into by Teledyne and LF&G only. Green River's Mot. Summ. J., Exh. D at §15. Since Teledyne is not in privity of contract with either Green River or CSC, it cannot sustain actions for its breach of implied warranty claims against Green River or CSC. Accordingly, this court grants Green River and CSC's Motions for Summary Judgment on the claims for breach of warranty.

B. Teledyne's Tort Claims.

1. The Economic Loss Doctrine Does Not Bar All Recovery Under Teledyne's Tort Claims Because Teledyne Has Shown Damage to "Other Property."

All defendants argue that the economic loss doctrine bars Teledyne's recovery in tort of purely economic losses, including recall costs. Specifically, defendants urge that the only damage that Teledyne sustained was to the crankshaft itself, and that because no "other property" was damaged, the economic loss doctrine bars Teledyne from recovering damages in tort. Standard Steel's Mot. Summ. J. at 9-13;

Green River's Response to Pl's Mot. for Summ. J. at 12-22.

As discussed, under Pennsylvania, Kentucky and Ohio law the economic loss doctrine precludes recovery for economic losses in a tort action where the plaintiff has suffered no physical injury or other property damage. Spivack v. Berks Ridge Corp., 402 Pa. Super. 73, 78, 586 A.2d 402, 405 (1991); Gooch v. E.I. du Pont de Nemours & Co., 40 F.Supp.2d 863, 874 (W.D. Ky 1999); Chemtrol Adhesives, Inc. v. American Manufacturers Mutual Insurance Co., 537 N.E.2d 624 (Ohio 1989). In determining whether the economic loss doctrine applies, courts first must define "the product," denying recovery for damages to the product itself, then must determine if there is damage to "other property" for which the economic loss doctrine would **not** bar recovery.[18] East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 869 (1986); REM Coal Co. v. Clark Equip. Co., 386 Pa. Super. 401, 402, 563 A.2d 128 (1989); Mt. Lebanon Personal Care Home, Inc. v. Hoover Universal, Inc., 276 F.3d 845, 848 (6th Cir. 2002). Although there is little Pennsylvania, Kentucky, or Ohio law precisely defining the terms "product" and "other property" in this context, there is case law which is instructive.

[18] Whether determining what constitutes "product"or "other property" is a matter of law for this court to decide, or an issue of fact for a fact-finder is unclear. While none of the parties direct this court to case law on the issue, other courts applying the economic loss doctrine in deciding a motion for summary judgment have determined, as a matter of law, what constitutes the "product" or "other property" for purposes of the economic loss doctrine. See 2-J Corp., v. Tice, III, 126 F.3d 539 (3rd Cir. 1997) (granting a motion for summary judgment that contents of warehouse was "other property" for purposes of economic loss doctrine); REM Coal Co., Inc. v. Clark Equipment Co., 563 A.2d 128 (Pa. Super.1989) (granting motion for summary judgment when economic loss doctrine barred recovery in tort for damage done to product itself, a front end loader); Gooch v. E.I. du Pont de Nemours & Co., 40 F.Supp.2d 863 (W.D. Ky. 1999) (granting motion for summary judgment after determining that economic loss doctrine barred recovery for damage done to a corn crop. Guided by these principles, this court believes that determining what constitutes "product" or "other property" is a matter of law for the court to decide.

In Saratoga Fishing Co. v. J.M. Martinac & Co., 520 U.S. 875 (1997), a fishing vessel was initially bought by Joseph Madruga, who added extra equipment to the vessel. After the vessel was sold to the plaintiff, it caught fire and sank because of a defective hydraulic system which was in place when Madruga made his original purchase. When the plaintiff brought suit against the designer of the hydraulic system and the builder of the vessel, the defendants argued that the economic loss doctrine barred the plaintiff's tort claims. After reviewing East River,[19] the United States Supreme Court concluded:

> When a manufacturer places an item in the stream of commerce by selling it to an Initial User, that item is the "product itself" under East River. Items added to the product by the Initial User are therefore "other property," and the Initial User's sale of the product to a Subsequent User does not change these characterizations.

520 U.S. at 879. Thus, the Saratoga court concluded that for purposes of applying the economic loss doctrine, the "product" was the fishing vessel, and the "other property" was the equipment added on to the vessel. There, the plaintiff was not barred from recovering for damages to this added-on property.

The Third Circuit Court also relied on East River in King v. Hilton-Davis, 855 F.2d 1047 (3rd Cir. 1988). In that case, two farmers brought actions in tort against the seller of seed potatoes, and the manufacturer of sprout suppressant used on seed potatoes, arguing that the suppressant was defective and caused the potato crop to fail. In reversing the district court, the King court held that for purposes of applying the economic loss doctrine, "one must look to the product purchased by the plaintiff." King, 855

[19] In East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986), charterers of a supertanker sought damages for repair costs and lost income resulting from a defective turbine engine that stopped functioning. The Court held that a manufacturer had no duty to prevent a product from injuring itself, and thus could not be liable for such damages under a theory of strict liability. Id. at 871. Accordingly, the Court denied recovery in tort for economic losses suffered.

F.2d at 1051. After reviewing East River, the King court reasoned that:

> [I]t is the character of the plaintiff's loss that determines the nature of the available remedies. When loss of the benefit of a bargain is the plaintiff's sole loss, the judgment of the Supreme Court [in East River] was that the undesirable consequences of affording a tort remedy in addition to a contract-based recovery were sufficient to outweigh the limited interest of the plaintiff in having relief beyond that provided by warranty claims. The relevant bargain in this context is that struck by the plaintiff. It is that bargain that determines his or her economic loss and whether he or she has been injured beyond that loss.

King, 855 F.2d at 1051. The King court applied the economic loss doctrine to bar a recovery in tort. The court determined that the product was the seed potatoes purchased from one of the defendants and that "[t]he Kings lost the expected performance of the seed potatoes, no more and no less." Id. at 1052.

The Third Circuit Court relied on Saratoga in 2-J Corp. v. Tice, 126 F.3d 539 (3rd Cir. 1997), where a warehouse built using the defendant's materials and design collapsed, destroying the plaintiff's inventory that was stored inside. The court noted that Saratoga essentially defined "the product" for the purposes of the economic loss doctrine as "no more and no less than whatever the manufacturer placed in the stream of commerce by selling it to the initial user."126 F.3d at 543.[20]
Using this rationale the 2-J Corp court defined the "product" as the entire warehouse as it was no more and no less than what was sold to the plaintiff. The court then allowed the plaintiff to proceed on its tort

[20]Courts in Ohio and Kentucky have also followed the East River and Saratoga courts in determining what constitutes a "product" and "other property" for purposes of applying the economic loss doctrine. See Chemtrol Adhesives Inc. v. American Manufacturers Mutual Insurance Co., 537 N.E.2d 624 (Ohio 1989) (holding that absent injury to persons or damage to property other than the arch dryer system purchased, a commercial buyer could not recover for economic losses premised on tort theories of strict liability or negligence); Gooch v. E.I. du Pont de Nemours & Co., 40 F.Supp.2d 863 (W.D. Ky. 1999) (holding that damage to a corn crop resulting from the plaintiff's purchase of defective herbicide does not constitute "other property").

claims for recovery as to the "other property," the damaged inventory contained within the warehouse.

Similarly, this court in Waterware Corp. v. Ametek/US Gauge Division, PMT Products, 51 Pa. D. & C. 4th 201 (C.P. Phila. April 17, 2001), relied upon Saratoga and 2-J in determining whether the economic loss doctrine barred the plaintiff from recovering the costs associated with replacing other component parts of a sewer system that were damaged by defective sensors purchased from the defendants. In Waterware, the court determined that for purposes of applying the economic loss doctrine, the product was the sensors provided by the defendant Ametek. However, "other property" included all the component parts not manufactured by Ametek which were damaged. Waterware, 51 Pa. D. & C. 4th at 216. As a result, the plaintiffs were permitted to proceed on their tort claims and recover the costs of replacing the component parts.

This court submits that the "product" bargained for by Teledyne was the crankshaft forging purchased from LF&G by Teledyne.[21] Therefore, the damage to "other property" for which Teledyne may recover, if proven, includes: (1) damage to aircraft caused by the failure of engines containing the defective crankshafts, (2) personal injuries (at least three people have asserted personal injury claims against Teledyne arising from defective crankshafts), (3) damage to the engines into which the crankshafts were assembled and the component parts of those engines, and (4) damage to the components added to the

[21] CSC argues that at a minimum the product is no less than the engine Teledyne manufactured. However, in King v. Hilton-Davis, 855 F.2d 1047 (3rd Cir. 1988), the court held that in applying the economic loss doctrine, the court must look to the product purchased by the plaintiff. King, 855 F.2d at 1051. Other courts have also followed this approach. The court in Saratoga decided the product was the fishing vessel, in 2-J Corp. it was the warehouse, and in Waterware the sensors. Here, the item purchased from LF&G, the crankshaft forging, is the "product" for purposes of the economic loss doctrine, and not the engine.

crankshafts by Teledyne in assembling the finished crankshaft.[22] Pl's Reply to Defs' Mots. for Summ. J. at 8-9.

However, the analysis does not end there. The court must determine whether any of the remaining damages sought by Teledyne are truly economic losses. If so, Teledyne would be precluded, as discussed above, from recovery for those losses in tort.

Courts in Pennsylvania, Kentucky and Ohio do not differ in how they define economic loss for purposes of the economic loss doctrine. Specifically, Pennsylvania courts have held that economic losses include the loss of profits and repair costs. Lower Lake Dock v. Missinger Bearing, 395 Pa. Super. 456, 464, 577 A.2d 631, 634 (1990); N.Y. State Elec. & Gas v. Westinghouse, 387 Pa. Super. 537, 550, 564 A.2d 919, 925 (1989). Similarly, in Kentucky, economic losses include losses resulting from failed

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[22] Green River argues that since Teledyne did not own the "other property" damaged when the crankshafts failed in-flight, Teledyne cannot recover for these losses. In support of this contention, Green River directs this court to Bowling Green Municipal Utilities v. Thomasson Lumber Co., et al, 902 F.Supp 134 (W.D. Ky 1995). In Bowling Green, the plaintiff bought and installed wooden utility poles for use throughout its district. Soon thereafter, certain wooden poles collapsed and it was discovered that the copper napthenate treatment used to preserve the wood had actually weakened and decayed them. The plaintiffs were forced to replace these and other parts attached to the wooden poles, and were suing in tort to recover the costs.

Green River argues that, in applying, the economic loss doctrine to plaintiff's tort claims, the Bowling Green court expressly limited the recovery for "other property" to only that property owned by plaintiff or "his property." Green River's Reply Mem of Law. However, this Court can find nothing in Bowling Green that suggests such a limitation on recovery. In fact, the Bowling Green court, applying the economic loss doctrine, held that "the damaged 'other' property for which Plaintiff may recover in tort means anything other than the poles themselves. This definition includes any property owned by Plaintiff that a defective pole proximately harmed, including any items attached to the poles by Plaintiff or a company other than either Defendant." Id. at 139 (emphasis added).

Similarly, this court holds that regardless of whether at the time of the failures Teledyne owned all the "other property," under Kentucky law, Teledyne may recover for anything other than the 13 in-flight failed crankshaft forgings, including subsequent damage to the added-on crankshaft components, engines, planes and personal injury.

expectations arising from a commercial transaction. Gooch v. E.I. du Pont de Nemours & Co., 40 F.Supp.2d 863, 876 (W.D.Ky. 1999). In Ohio, economic losses have been described as both direct losses, "the difference between the actual value of the defective product and the value it would have had had it not been defective," and indirect losses, "consequential losses sustained by the purchaser of the defective product, which may include the value of production time lost and the resulting lost profits." Chemtrol Adhesives Inc. v. American Manufacturers Mutual Insurance Co., 537 N.E.2d 624, 629 (Ohio 1989) (citations omitted). Finally, in Ready Food Products v. APV Crepaco, 28 Phila. Co. Rptr. 194, 203 (C.P. Phila. August 10, 1994), this court determined that economic losses, not recoverable in tort included the plaintiff's lost profits, gross earnings, credits to consumers, business interruption, cost of repair, interest on additional loans taken by the plaintiff, cost of price reduction to recapture customers, damage to goodwill and damage to reputation. Id. at 203.

As an element of its tort claims, Teledyne alleges that it has suffered damages in the recall of aircraft engines, the testing of 900 crankshafts and, where necessary, the replacement of those crankshafts. Pl's Mot. for Summ. J. at 17. Teledyne asserts that the inspection process applied to over 3,000 engines with 38% having required the replacement of new crankshafts. Id. In addition, Teledyne argues that it has satisfied certain claims related to third party losses associated with the failed crankshafts and recall procedure, and that it has also suffered damage to its reputation as a result of the necessary recall. Id. at 40.

While there is no case law on point in Pennsylvania, Kentucky, or Ohio discussing the nature of a recall and whether it is an economic loss for purposes of the economic loss doctrine, there is case law in other jurisdictions suggesting that recall damages are economic in nature and are therefore precluded

from recovery under the economic loss doctrine. Southwest Pet Products, Inc. v. Koch Industries, 89 F.Supp.2d 1115, 1123 (D. AZ. 2000) (holding that a plaintiff may not recover losses in the form of a recall of defective dog food because the only losses alleged, the recall, are economic in nature); Rich Products, Inc. v. Kemutec, Inc., 66 F.Supp.2d 937, 968 (E.D. Wis. 1999) (recall costs of food products resulting from failed conveyor belts are not recoverable in tort as they are economic losses); ETV, Inc. etal. v. Ross Gear Division of TRW, Inc. et al, 1989 WL 308036, *2 (W.D. Mich. 1989) (economic loss doctrine bars plaintiffs from recovering in tort economic damages resulting from a recall of its trucks); Unifoil Corp. v. Cheque Printers and Encoders Limited, 622 F.Supp. 268, 270 (D. N. J. 1985) (losses resulting from a recall of defective lottery tickets not recoverable on theories of negligent or intentional misrepresentation).

Guided by these decisions that hold that recalls are considered to be economic in nature, this court concludes that Teledyne may not recover the costs associated with the recall and testing of the 900 crankshafts. Although Teledyne alleges that it recalled the crankshafts and tested them as a preventive measure, these recall damages -- the recall itself, the testing, the replacement costs of the crankshaft itself, the damages to reputation -- are all economic in nature, and may not be recovered in tort.

Although Teledyne may not recover for the recall costs in tort, Teledyne may still pursue its recall costs in warranty against Standard Steel.[23] As the Pennsylvania Superior Court stated in REM Coal Co.:

> [W]arranty law is suited to economic loss cases because in such cases, the parties have the opportunity to have set the terms of their agreement regarding product value and quality in advance . . . . Pennsylvania's breach of warranty law supplies a suitable framework for regulating and enforcing the expectations and obligations of the parties as to product

[23] As discussed above, under Ohio or Kentucky law, Teledyne lacks privity with CSC and Green River, and therefore is prevented from pursuing its breach of warranty claims against CSC and Green River.

> performance. It provides a disappointed purchaser a complete remedy for loss of the product itself and of its use within the limits of the parties' contractual understandings. [citation omitted] To impose tort liability in addition would erode the important distinctions between tort and contractual theories, including their different objectives.

REM Coal Co., 386 Pa. Super. at 410-11, 563 A.2d at 133.

C. Plaintiff's Intentional Misrepresentation Claims Against Standard Steel, Green River and CSC, and Plaintiff's Negligent Misrepresentation Claims Against Standard Steel and Green River Survive Summary Judgment.

Teledyne asserts that defendants made representations in the form of steel certifications and that those certifications fraudulently misrepresented and negligently misrepresented that the steel complied with Teledyne and LF&G's specifications. Second Amended Complaint at ¶¶ 89-107; 108-113. As discussed, this court will apply Pennsylvania law to the intentional misrepresentation claims against all defendants, as well as to the negligent misrepresentation claims against Standard Steel and Green River. (The negligent misrepresentation claim against CSC will be addressed in the following section of this opinion.)

To state a claim for intentional misrepresentation, a plaintiff must allege: (1) a representation; (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false, (4) with the intent of misleading another into relying on it, (5) justifiable reliance on the misrepresentation, and (6) the resulting injury was proximately caused by the reliance. Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999) (citations omitted). Pennsylvania does not require that there be strict privity between the plaintiff and the defendant who allegedly made the fraudulent misrepresentation. Woodward v. Dietrich, 378 Pa. Super. 111, 126, 548 A.2d 301, 308 (1988); United

Parcel Service Co. v. Rickert, 996 S.W.2d 464, 468 (citing Restatement (Second) of Torts § 534).[24] Instead, the plaintiff must show that his reliance on the defendant's alleged misrepresentation was "specially foreseeable." Woodward at 127-32, 548 A.2d at 309-11.

To state a claim for negligent misrepresentation, the plaintiff must allege: "(1) a misrepresentation of a material fact, (2) made under circumstances in which the misrepresenter ought to have known its falsity, (3) with an intent to induce another to act on it, and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation . . . . Moreover, like any action in negligence, there must be an existence of a duty owed by one party to another." Bortz, 556 Pa. at 500, 729 A.2d at 561.

In support of its intentional and negligent misrepresentation claims, Teledyne argues that the written steel certifications issued by the defendants represented that the steel was manufactured in accordance with Teledyne and LF&G's specifications. Second Amended Complaint at ¶ 89 and Exh. F, G, H; Pl's Mot. Summ. J. At Exh. B(1), 41; Exh B(2), 19, 75; Exh. B(3), 172, 364; Exh. B(5), 21, 25, 31, 64, 127. After relying on these certifications and purchasing the steel for its crankshafts from LF&G, Teledyne later discovered that these certifications misrepresented the actual metallurgical and chemical composition of the steel. Pl's Mot. Summ. J. at 24-25; Exh. B(2), 100, 110; Exh. B(3), 172, 364. Furthermore, Teledyne avers that the "defendants had a duty to disclose, but failed to disclose, that their steel" did not meet the certifications represented. Pl's Mot. Summ. J. at 27, Exh. B(2), 99; Exh. B(3), 371; Second Amended

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[24] Section 534 of the Restatement (Second) of Torts states:

One who makes a fraudulent misrepresentation intending or with reason to expect that more than one person or class of persons will be induced to rely on it, or that there will be action or inaction in more than one transaction or type of transaction, is subject to liability for pecuniary loss to any one of such persons justifiably relying upon the misrepresentation in any one or more of such transactions.

Complaint at ¶¶ 96, 98. As a result, Teledyne asserts that it suffered damages to aircraft and engines which contained the defective crankshafts and to the components that Teledyne had added to the crankshafts. Second Amended Complaint at ¶ 44; Pl's Reply to Defs' Mot. Summ. J. at Exh. 4, 136, 243; Exh. 5, 23. Teledyne repeatedly alleges that the defendants had knowledge that their steel would be used for forging crankshafts for installation into aircraft engines. Second Amended Complaint at ¶¶ 92-94, 100, 109; Pl's Mot. Summ. J. at Exh. B(3), 172, 364; Exh. B(5), 21, 31, 64, 127.

The evidence presented, viewed favorably to the plaintiff, raises disputed issues of material fact as to whether Standard Steel, Green River and CSC made intentional misrepresentations to plaintiff, and whether Standard Steel and Green River made negligent misrepresentations to plaintiff. Thus, summary judgment on these claims is **denied**.

D. CSC's Motion for Summary Judgment on Plaintiff's Negligent Misrepresentation Claim is Granted.

Plaintiff's claim of negligent misrepresentation against CSC is treated separately because Ohio law applies to this claim. To state a claim for negligent misrepresentation under Ohio law, a plaintiff must establish privity of contract or, at least, a "sufficient nexus" between the parties to recover under this tort. Laurent, 2001 WL 1339026, at *5 (Ohio Ct. App. 2001). "Such a nexus will usually exist only when the plaintiff is a member of a limited class whose reliance is specially foreseen." Id. at *5.

The determination of whether a plaintiff has established privity of contract or a "sufficient nexus," is a question of law for the court, rather than a question for a jury. Id. at *5 (court held that privity of contract and nexus were absent on a motion for summary judgment); Kenney v. Henry Fischer Builder, Inc., 716 N.E.2d 1189, 1191 (Ohio Ct. App. 1998) (court held that privity of contract was absent and

affirmed the grant of judgment on the pleadings); Gene W. Ross & Associates, Inc., 1997 WL 576371, at *2 (court held that privity of contract and a sufficient nexus were absent and affirmed the lower court's grant of summary judgment for defendants).

Here, CSC and Teledyne did **not** enter into a contract. CSC processed steel bars which it provided to LF&G. LF&G then treated and forged the steel bar stock for Teledyne. CSC did not provide the steel bars to Teledyne directly. Therefore, privity of contract between Teledyne and CSC is absent.

Further, Teledyne has failed to show a "sufficient nexus" between it and CSC for purposes of establishing a negligent misrepresentation claim. In Laurent v. Flood Data Services, Inc., 2001 WL 1339026 (Ohio Ct. App. 2001), the plaintiff homeowner's negligent misrepresentation claim failed because, in addition to the absence of privity of contract, no sufficient nexus existed between the homeowner and the defendant lender service company or the defendant real estate company. Id. at *5. In that case, the homeowner claimed that the lender services company and real estate company had misrepresented that the property at issue was not on a flood plain. It was the homeowner's bank, however, that had ordered a flood determination to comply with federal law. Id. at *5. The homeowner had never requested that either the lender services company or the real estate company perform a flood determination. There was no evidence that the lender services company or the real estate company thought that the flood determination was for the homeowner's benefit. Id. at *5. The evidence presented showed only that the lender and the real estate company believed that the flood determination was for the bank to comply with its legal obligations.

Similarly, here there is no evidence that Teledyne ordered steel bars from CSC. There is also no evidence that Teledyne asked CSC for certifications for the steel bars Teledyne had received from LF&G. Further, any assertion that CSC knew that its certifications to LF&G were actually for Teledyne's benefit, does not constitute a "sufficient nexus." Otherwise, it would follow that manufacturers would be presumed to know that their certifications were for the benefit of all future users down the line with whom they did not contract, and such an analysis would nullify Ohio's privity requirement. Absent privity of contract or a "sufficient nexus" between Teledyne and CSC, Teledyne has failed to satisfy a requirement of negligent misrepresentation under Ohio law.

Therefore, summary judgment as toTeledyne's negligent misrepresentation claim against CSC is **granted** in favor of CSC.

E. The Motions for Summary Judgment As to the Plaintiff's Request for Attorney's Fees Are Granted.

In Pennsylvania, the parties to litigation are responsible for their own counsel fees unless otherwise provided by statutory authority, agreement of the parties, or some other recognized exception. Hart v. O'Malley, 781 A.2d 1211, 1216 (Pa. Super. 2001). Similarly, in Kentucky, a party to a civil action may not recover attorney fees from an adverse party "[a]bsent a written agreement or authorizing statute." Motorists Mutual Ins. Co. v. Glass, 996 S.W. 2d 437, 455 (Ky. 1997).

Here, there is no pertinent statute and no written agreement that would support a recovery of attorney fees. The Motions are **granted** as to this claim.

III. Standard Steel's Motion for Summary Judgment Against LF&G

Standard Steel has filed a Motion for Summary Judgment directed to LF&G. In its memorandum of law accompanying the motion, Standard Steel incorporated by reference all the arguments set forth in its Motion for Summary Judgment as to Teledyne.

For the reasons discussed, this Motion for Summary Judgment, is **granted**, **in part**, and **denied, in part**, in accordance with this Opinion.

CONCLUSION

For the reasons set forth, this court will enter a contemporaneous Order that comports with the conclusions stated above.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.