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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-0992**

OneBeacon Insurance Company,  
as Subrogee of Blue Cross  
Blue Shield of Minnesota,  
Appellant,

vs.

Datalink Corporation,  
Respondent,

Hitachi Data Systems Corporation,  
Respondent.

**Filed May 12, 2009**

**Affirmed in part, reversed in part, and remanded;  
motion granted  
Klaphake, Judge**

Hennepin County District Court  
File No. 27-CV-07-10004

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Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Crippen, Judge.\*

## UNPUBLISHED OPINION

**KLAPHAKE**, Judge

One Beacon Insurance Company, subrogee of Blue Cross Blue Shield of Minnesota, appeals from the district court’s grant of summary judgment in favor of respondents Hitachi Data Systems Corporation and Datalink Corporation. Because we conclude that the district court abused its discretion in failing to allow additional time for discovery, we reverse summary judgment with respect to the breach of contract and breach of warranty claims, but WE affirm summary judgment with respect to the negligence and strict liability tort claims.

## DECISION

The district court shall grant summary judgment if the pleadings, discovery, and affidavits show that there are no genuine issues of material fact and that either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. On appeal from summary judgment, this court reviews whether there are any genuine issues of material fact and whether the district court erred in applying the law. *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). We must consider the evidence in a light most favorable to the party against whom summary judgment was granted. *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002). “[E]vidence which merely creates a metaphysical doubt as to a

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions" does not constitute a material fact. *DHL, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). "The party opposing summary judgment may not establish genuine issues of material fact by relying upon unverified and conclusory allegations, or postulated evidence that might be developed later at trial, or metaphysical doubt about the facts." *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004).

1. *Request for Continuance to Conduct Further Discovery*

The first issue we address is the failure of the district court to rule on appellant's request for additional time for discovery. The district court noted in its order that the issue was raised by appellant, but the court then failed to analyze or make any ruling with respect to this issue, and granted summary judgment on each of appellant's claims.

We review the denial of a request for a continuance to conduct discovery in conjunction with a motion for summary judgment under an abuse of discretion standard. *Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466, 473 (Minn. App. 2006). "Continuances should be liberally granted, especially when the continuance is sought because of a claim of insufficient time to conduct discovery." *Id.* There is a presumption in favor of granting a continuance to allow sufficient time for discovery before ruling on the motion for summary judgment. *Cargill Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 231 (Minn. App. 2006). When determining whether to grant a continuance in order to conduct additional discovery before ruling on a motion for summary judgment, the court considers, first, whether the moving party was diligent in obtaining or seeking discovery

and, second, whether the moving party seeks further discovery with the good faith belief that material facts will be uncovered. *Id.*

Appellant raised the request for more time to complete discovery both in the affidavit of its expert, as well as in its statement of undisputed facts submitted in opposition to the motion for summary judgment. In both instances, appellant set forth specific facts it expected to discover and thus did not appear to be conducting a “fishing expedition.” A court may deny a motion for summary judgment or order a continuance if it appears “from the affidavits of a party opposing the motion that the party cannot for reasons stated present, by affidavit, facts essential to justify the party’s opposition.” Minn. R. Civ. P. 56.06. “A rule 56.06 affidavit must be specific about the evidence expected, the source of discovery necessary to obtain the evidence, and the reasons for the failure to complete discovery to date.” *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 919 (Minn. App. 2003).

Our review of the record indicates that there is ample reason for the district court to permit further discovery on the causation issue before the case is decided by the blunt instrument of summary judgment. But the district court never considered or ruled on this issue. This is especially problematic in this case, which will ultimately be determined by expert testimony, because expert depositions are generally not conducted until after completion of other written discovery and document production. We conclude that the district court abused its discretion by failing to consider or rule on appellant’s request, and reverse the grant of summary judgment with respect to the claims for breach of contract and breach of warranty.

2. *Economic Loss Doctrine*

Appellant also argues that the district court erred in dismissing its tort claims under the economic loss doctrine because it claims that there are genuine issues of material fact on whether the contract at issue was one for the sale of goods or was predominantly one for services. We disagree.

Minn. Stat. § 604.10 (2008) provides that a plaintiff may not recover in tort for the economic damages caused by a defective product to the product itself unless the tort claim is based upon fraud or fraudulent or intentional misrepresentation, circumstances that do not exist here. All other tort claims for damage to the product itself are barred. *Id.* This statute operates to limit recovery regardless of whether the Uniform Commercial Code (U.C.C.) applies. Thus, absent fraud and fraudulent misrepresentation, appellant's tort claims are barred by the restrictions set forth in Minn. Stat. § 604.10.

Appellant's claims are also barred because the contract at issue here is governed by the exclusive remedies of the U.C.C. It is well settled that Article 2 of the U.C.C. provides the exclusive remedy for economic losses arising from commercial transaction for the sale of goods not involving personal injury or damage to other property. *Hapka v. Paquin Farms*, 458 N.W.2d 683, 688 (Minn. 1990). When a contract involves both goods and services, it is generally referred to as a hybrid contract. *Valley Farmers' Elevator v. Lindsay Bros. Co.*, 398 N.W.2d 553, 556 (Minn. 1987) (finding claims for negligence and strict liability on contract of sale of goods barred by U.C.C.), *overruled on other grounds by Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990). The classification of a hybrid contract is a question of law. *Id.* Minnesota courts use the

“predominant factor” test in deciding whether the essence of the contract is primarily a sale of goods or the provision of services. *Id.* If the predominant purpose of the contract is the sale of goods, the U.C.C. governs and tort claims are barred; if the predominant purpose of the contract is the provision of services, the U.C.C. does not apply. *McCarthy Well Co., Inc. v. St. Peter Creamery, Inc.*, 410 N.W.2d 312, 315 (Minn. 1987) (finding contract to maintain well was predominantly one for service even though contract involved sale of well equipment). The “predominant factor” test is whether the, purpose, reasonably stated, is the rendition of a service, with goods incidentally involved, or is a sales transaction, with labor incidentally involved. *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974) (ruling that installation of a water heater was incidental to the sale of the device). Comparison of price rendered for goods versus services is also a consideration in the “predominant factor” analysis. *Valley Farmers Elevator*, 398 N.W.2d at 556 (concluding that sale and construction of three-bin grain storage and aeration system was predominantly a sale of goods); *Bonebrake*, 499 F.2d at 959 (noting substantial amount of labor does not necessarily take a transaction for sale of goods out of the U.C.C.).

Here, appellant has failed to present any evidence of a material issue of fact regarding the predominant purpose of the contract, or regarding any additional evidence that would change this result. The record indicates that, while the contract here involved both the sale of goods (the Hitachi unit, for \$1,791,527) and the provision of services (installation and servicing of the Hitachi unit, for \$198,726), the predominant purpose of the contract was for the sale of the Hitachi unit. Accordingly, we conclude that the

contract is governed by the U.C.C. and the district court did not err in dismissing appellant's tort claims.

3. *Motion to Strike Documents Not in the Record*

Respondent Hitachi moved the court to strike two documents contained in appellant's appendix to its brief that were not submitted to the district court. *See* Minn. R. Civ. App. P. 110.01. We agree that the two documents should be stricken as being outside the district court record; however, because other evidence in the record supports the facts asserted therein, no portion of appellant's brief itself will be stricken.

We conclude that the district court abused its discretion by failing to rule on appellant's request for additional time for discovery and accordingly reverse the grant of summary judgment with respect to the claim for breach of contract and breach of warranty, but affirm the grant of summary judgment with respect to the tort claims for negligence and strict liability.

**Affirmed in part, reversed in part, and remanded; motion granted.**