

1 STATE OF MINNESOTA
2 IN SUPREME COURT

3
4 CASE NO. A06-2227
5

6
7 Gaylord's, Inc.,

8 Appellant,

Date of Filing of Appellate
Decision: 4 December 2007

9 vs.

10 Trial Court

Case No. CT-05-007744

11 Valspar Refinish, Inc.,

12 Respondent.
13

14
15 **OPENING BRIEF OF APPELLANT, GAYLORD'S, INC.**
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1 III. Did the Court of Appeals Ignore Minnesota Law, Which Holds
2 That Summary Judgment is Proper Only When All of the
3 Pleadings, Depositions, Responses to Discovery, and Affidavits
4 on File Show That There are No Triable Issues of Material
5 Fact, by Disregarding Gaylord's Four Uncontradicted Affidavits
6 That Conclusively Prove That Valspar Had Actual Notice of the
7 Defects?

8 Resolution by Court of Appeals

9 The Court of Appeals held that a seller's attempt to remedy defects
10 may toll the reasonable time period available to revoke acceptance, but
11 that the record did not reveal anything but "mere deposition assertions"
12 that Gaylord's gave timely oral notice of the defects [App: 527].

13 IV. Did the Court of Appeals Apply the Wrong Legal Standard in
14 Holding that the Doctrine of Equitable Estoppel May be
15 Determined by the Court as a Matter of Law Even Though the
16 Cases Say That it is a Question of Fact, Particularly Where
17 the Damage Caused by Valspar's Products Far Exceeds the
18 Initial Financial Incentive Gaylord's Received for Entering
19 Into the Contract?

20 Resolution by Court of Appeals

21 The Court of Appeals held that Gaylord's reliance on Valspar's
22 representations that it would remedy the defects was not reasonable in
23 light of the "contradictory, unambiguous provisions in the Supply
24 Agreement and pre-contract testing period", and because Gaylord's
25 received "substantial benefits" as a result of the Supply Agreement [App:
26 530].

27 ///

28 ///

1 V. Did the Court of Appeals Apply the Wrong Legal Standard in
2 Holding That Because the Parties Were "Sophisticated Equals",
3 Gaylord's Tort Claims Failed as a Matter of Law.

4 Resolution by Court of Appeals

5
6 The Court of Appeals held that because the parties were
7 "*sophisticated equals*", Gaylord's could not demonstrate justifiable
8 reliance on Valspar's representations [App: 533-534].

9
10 Statement of the Case

11
12 The action originated in the District Court, Fourth Judicial
13 District, the Honorable Harry S. Crump, presiding.

14
15 On 16 April 2005, Respondent, Valspar Refinish, Inc. (Valspar),
16 sued Appellant, Gaylord's Inc. (Gaylord's), for breach of contract.
17 Gaylord's counterclaimed for damages for: (1) breach of contract; (2)
18 breach of warranty; (3) breach of the implied warranty of fitness for a
19 particular purpose; (4) negligent mis-representation; and (5) fraud in
20 the inducement [App: 1-7; 9-16; 17-22].

21
22 On 10 October 2006, Valspar moved for summary judgment on its
23 breach of contract claim and on Gaylord's counterclaims
24 [App: 25-27].

25
26 On 13 October 2006, the trial court entered its order granting
27 summary judgment to Valspar on its breach of contract claim against
28 Gaylord's, and it granted summary judgment in favor of Valspar on all of
Gaylord's counterclaims. On 3 November 2006, the court entered its order

1 amending the court's 13 October 2006 order granting Plaintiff's summary
2 judgment motion [App: 375-393].

3
4 On 14 November 2006, judgment was entered granting Valspar's motion
5 for summary judgment [App: 394-398].

6
7 On 22 November 2006, Gaylord's filed its Notice of Appeal [App:
8 397-398].

9
10 On 4 December 2007, the appellate court entered its order affirming
11 the District Court's entry of summary judgment for Valspar on its breach
12 of contract claim and against Gaylord's on all of its counterclaims.

13
14 On 4 January 2008, Gaylord's filed its Petition for Review of
15 decision of the Court of Appeals [App: 537-542], and on 19 February 2008,
16 this court granted Gaylord's Petition for Review [App: 543].

17
18 Statement of Facts

19
20 Gaylord's is a California corporation that, prior to using the
21 products supplied to it by Valspar under the terms of the Supply
22 Agreement [App: 314], had an excellent reputation as a manufacturer of
23 fiberglass truck bed lids commonly referred to as tonneaus [App: 311].

24
25 In the spring of 2003, Paul Reid (Reid), Valspar's former top sales
26 representative, approached Gaylord's president, Bill Lunney (Lunney), in
27 an effort to sell, to Gaylord's, Valspar's refinish products consisting
28 of color base coats and clear coats. Clear coats are transparent

1 coatings that harden and protect the color base coat from scratches and
2 other damage [App: 312].
3

4 Valspar coveted the Gaylord's account because of Gaylord's
5 excellent reputation in the industry and because the Gaylord's account
6 would provide entry to Valspar into the truck lid business. Prior to its
7 relationship with Gaylord's, Valspar did not have any fiberglass truck
8 bed lid accounts. Reid was told by another Valspar representative, Jeff
9 Pitts (Pitts), that the truck lid business was expanding and could be
10 very profitable for Valspar. Pitts also told Reid that Gaylord's had a
11 good reputation for manufacturing quality truck bed lids, which could be
12 beneficial to Valspar if the company could obtain Gaylord's business
13 [App: 295-296].
14

15 Concerned about maintaining Gaylord's excellent reputation, Lunney
16 told Reid that Gaylord's required refinish products to be top quality
17 because Gaylord's customers expected the best [App: 312].
18

19 During the testing period, Gaylord's noticed problems with
20 Valspar's products such as poor coverage and a rough, blotchy texture
21 when the base coat was applied to the truck bed lids. When the metallic
22 base coats were sprayed on, they often mottled and were difficult to
23 spray onto the lids. The base coats also "fish-eyed" [App: 297].
24

25 Reid repeatedly told Lunney that Valspar would fix any problems
26 with its products, including color match problems, to Gaylord's
27 satisfaction and encouraged Lunney to enter into the Supply Agreement
28 with Valspar, appointing Valspar as Gaylord's exclusive supplier of base

1 coats and clear coats [App: 312].

2
3 During the testing period, Reid personally spoke to Art Allred
4 (Allred), Valspar's technical application manager at the time, and
5 described the problems with Valspar's products but neither Allred nor
6 anyone else at Valspar were able to fix the problems, unbeknownst to
7 Gaylord's. *Nonetheless, several Valspar representatives, including Reid,*
8 *continued to promise Lunney that Valspar would fix the problems once*
9 *Gaylord's entered into the Supply Agreement* [App: 297-301; 305].
10

11 In Gaylord's experience, it was not unusual to go through an
12 initial trial and error phase when switching from one manufacturer's
13 refinish products to another. Prior to entering into the Agreement,
14 Valspar was able to correct some of the problems with its base and clear
15 coats. When Reid and the other Valspar representatives told Lunney that
16 the remaining problems would be remedied once Gaylord's entered into the
17 Supply Agreement, Lunney believed them. Valspar's representatives
18 assured Lunney that Valspar had the expertise and resources necessary to
19 meet all of Gaylord's needs [App: 297-299; 312-314].
20

21 In October 2003, the parties entered into the *exclusive* Supply
22 Agreement [App: 314]. Subsequently, Gaylord's discovered that Valspar's
23 representatives lied to it because, after entering into the Supply
24 Agreement, Valspar's clear coats and base coats showed no improvement.
25 In particular, the mottling, blotchiness, and poor coverage problems were
26 never resolved despite the efforts of one of Valspar's representatives,
27 Brian Lynch (Lynch). Lynch, on several occasions and on Gaylord's
28 premises, applied the base coat products himself to the tonneaus and

1 experienced the same mottling, failed coverage and other problems that
2 Gaylord's employees encountered when applying the products [App: 298-299;
3 305-306; 322].
4

5 Valspar's clear coats were no better. The clear coats continued to
6 be rough and coarse and required extensive sanding and buffing in order
7 to eliminate the rough texture. The curing time was excessive [App: 306;
8 322]. Curing is the hardening of the clear coat. When, prior to entering
9 into the Supply Agreement with Valspar, Gaylord's used clear coats from
10 other manufacturers, curing took approximately *24 hours*. With Valspar's
11 products, cure time often took up to *4 days* [App: 306]. This delayed
12 Gaylord's delivery of the tonneaus to its customers.
13

14 The defects caused Gaylord's to repaint the lids several times and,
15 as a result, employee overtime soared, increasing to 30 to 60 hours per
16 day. Gaylord's labor costs increased accordingly. Repainting dropped
17 significantly when Gaylord's was forced to switch to another manufacturer
18 [App: 306; 322]. When Valspar's products were used, Gaylord's back
19 orders increased to 500 or more. In contrast, after Gaylord's was forced
20 to stop using Valspar's products, its back orders dropped to 200 to 220
21 [App: 306].
22

23 When Gaylord's used Valspar products, its customers complained
24 about substandard quality of the paint and clear coat and about the
25 delays in the delivery of truck lids. As a result of its use of
26 Valspar's products, Gaylord's steadily lost customers. In 2002 and 2003,
27 prior to switching to Valspar products, Gaylord's averaged approximately
28 1,100 orders per month. By the end of 2004, when Gaylord's was forced to

1 stop buying products from Valspar, Gaylord's sales had dropped to
2 approximately 800 orders per month and its sales are still down
3 approximately 30% from its "pre-Valspar" days because Gaylord's developed
4 a reputation for poor quality and delayed delivery [App: 310-311].
5

6 During the time that Gaylord's purchased products from Valspar,
7 Valspar was aware of all of the problems with its products [App: 307].
8 In fact, Brian Lynch tried to spray the products himself onto the
9 tonneaus on several occasions to determine the source of the problems.
10 He was unsuccessful. Rob Cross (Cross), a Valspar representative, also
11 failed in his attempt to correct the problems. *Valspar tried for nearly a year to*
12 *remedy the defects but failed* [App: 308-309; 314-315; 320-322].
13

14 In December 2004, Valspar sent one of its regional managers, Mr.
15 Winterbottom, to Gaylord's plant to solve the problems. He was
16 accompanied by Brian Lynch, Rob Cross, and two of Valspar's painting
17 technicians. They test painted approximately 12 tonneaus and experienced
18 the same application problems that Gaylord's personnel experienced and
19 were unable to determine how to correct these problems. The test was a
20 failure. After Mr. Winterbottom and his cohorts were unable to
21 successfully paint a single tonneau, Mr. Winterbottom admitted to Lunney
22 that he had seen enough and that he would "get back" to Lunney,
23 presumably with a plan to solve the problems. *He never did* [App: 307-308;
24 316-317]. Instead, Valspar filed this lawsuit.
25

26
27 By November 2004, the damage suffered by Gaylord's as a result of
28 its use of Valspar's products was so severe that Gaylord's was forced to
stop buying Valspar products and it switched to another company. All of

1 the problems created by Valspar were eliminated by the new supplier's
2 paints and coatings [App: 309; 315-316].

3
4 Legal Argument and Authority

5
6 Summary of Argument

7
8 The decision of the Court of Appeals should be reversed because:

9
10 1. The Supply Agreement does not require Gaylord's to give
11 Valspar written notice of the *defects* in Valspar's products.

12
13 2. Gaylord's justifiably revoked acceptance of the defective
14 products and provided timely and unequivocal actual notice of the defects
15 to Valspar.

16
17 3. *If* the Supply Agreement required written notice of defects,
18 Valspar waived that requirement because it had actual notice of the
19 defects and tried, for a year, unsuccessfully, to correct them.

20
21 4. *If* written notice was required under the Supply Agreement, a
22 triable issue of material fact exists as to whether Gaylord's provided
23 timely written notice.

24
25 5. Valspar is equitably estopped from invoking the limitations
26 period and the warranty provision because it fails of its essential
27 purpose.
28

1 6. A triable issue of material fact exists as to whether
2 Valspar's products conform to its published specifications.

3
4 7. All of Gaylord's counterclaims are timely.

5
6 8. Gaylord's provided Valspar with adequate time to try to
7 solve the problems but Valspar failed to do so.

8
9 9. There is a material issue of fact regarding whether the
10 warranty disclaimer was delivered to Gaylord's at the time Gaylord's
11 signed the Supply Agreement.

12
13 10. There is a material issue about whether Valspar owed a duty
14 to Gaylord's.

15
16 11. The appellate court incorrectly upheld the summary judgment
17 on the grounds that Gaylord's was a sophisticated equal. It was not.

18
19 12. A claim for fraudulent representation against Valspar may be
20 based upon the statement of its agents about its capabilities and its
21 products.

22
23 13. The appellate court compounded the error of the trial court
24 by failing to sustain Gaylord's written evidentiary objections submitted
25 in the trial court as part of Gaylord's opposition to Valspar's summary
26 judgment motion.

1 1. Valspar is Not Entitled to Summary Judgment
2 Because the Supply Agreement Does Not Require
3 Gaylord's to Give Valspar Written Notice of the
4 Defects in Valspar's Products.

5 Both the trial court and the Court of Appeals labored under the
6 illusion that the Supply Agreement required Gaylord's to give Valspar
7 written notice of the *defects* in Valspar's products.

8
9 The only thing the Supply Agreement [App: 74-76] says about written
10 notice is that:

11
12 *"Either party may terminate this Agreement upon written*
13 *notice to the other in the event legal control of the other*
14 *party changes, whether voluntary or involuntary, by operation*
15 *of law or otherwise."* [App: 74, ¶6].

16
17 "Notices. *Except as otherwise expressly set forth*
18 *herein, all notices, requests, demands and other*
19 *communications hereunder must be in writing and will be deemed*
20 *to have been duly given..."* [App: 76, ¶10(c)].

21
22 The written termination provision has no application to the facts
23 before this court and the notice provision has no application to the
24 facts before this court because the notice provision pertains only to
25 "...other communications hereunder...", meaning communications required
26 under the terms of the Supply Agreement. There is nothing in the Supply
27 Agreement requiring written notice, or any notice, of defective products.
28

1 The General Warranty, which follows the signature page of the
2 Supply Agreement [App: 77] and which Valspar claims was attached to the
3 Supply Agreement at the time Lunney signed it [*a claim that Lunney*
4 *disputes as discussed below*], says only that:

5
6 "If Buyer discovers a failure of the Products to
7 substantially conform to Seller's published specifications,
8 Buyer must within ten days after discovery (but in no event
9 later than 180 days after receipt) notify Seller in writing...".

10
11 This court will search the record in vain for any admissible
12 evidence about Valspar's "*published specifications*". There is no
13 evidence that Valspar had any published specifications before Lunney
14 signed the Supply Agreement, or at any time thereafter, including now.

15
16 Since neither the District Court, the Appellate Court, nor
17 Gaylord's had any idea whether Valspar had any "*published specifications*"
18 and, if it did, of what they consist, it was impossible for Gaylord's to
19 have "*discovered*" whether Valspar's products failed to "*substantially*
20 *conform*" to those unknown and unspecified "*published specifications*".

21
22
23 If Valspar wanted Gaylord's to inform it in writing of any *defects*
24 in the products that Valspar supplied to Gaylord's, Valspar could have
25 said so in plain English but didn't. That omission must be interpreted
26 against Valspar, which drafted the Supply Agreement, and in favor of
27 Gaylord's, which, by itself, is a reason that the judgment should be
28 reversed.

1 2. Valspar is Not Entitled to Summary Judgment on
2 Gaylord's Breach of Contract Counterclaim Because
3 Gaylord's Justifiably Revoked Acceptance of the
4 Defective Products and Provided Timely and
5 Unequivocal Actual Notice of the Products'
6 Defects.

7 The appellate court upheld the trial court's ruling that Gaylord's
8 may not sue for breach of contract because it failed to provide timely,
9 unequivocal, written notice to Valspar of the products' defects, relying
10 on DeWitt vs. Itasca-Mantrap Co-Op Electric Ass'n., 215 Minn. 551, 10
11 NW2d 715 (1943) [App: 386-388; 527-528].

12 DeWitt does not support the conclusion of the District Court or the
13 Court of Appeals. Gaylord's properly revoked acceptance of the defective
14 products and provided timely actual notice of the products' deficiencies.
15 Therefore, summary judgment was improper.

16
17 Under Minn. Stat. § 336.2-711:

18
19 "(a) Where the seller fails to make delivery or
20 repudiates or the buyer rightfully rejects or justifiably
21 revokes acceptance then with respect to any goods involved,
22 and with respect to the whole if the breach goes to the whole
23 contract..., the buyer may cancel and with or without having
24 done so may in addition to recovering so much of the price has
25 been paid....

26 (b) Recover damages for non-delivery as provided in
27 this article...". (Section 336.2-713).

28 ///

1 Under Minn. Stat. § 336.2-713, the buyer's damages for non-delivery
2 include "the difference between the market price at the time when the
3 buyer learned of the breach and the contract price together with any
4 incidental and consequential damages provided in this article...".

5
6 Consequential damages include "any loss resulting from the general
7 or particular requirements and needs of which the seller at the time of
8 contracting has reason to know and which could not reasonably be
9 prevented by cover...". Minn. Stat. § 336.2-715.

10
11 Pursuant to Minn. Stat. § 336.2-607(2), a buyer may revoke
12 acceptance of goods where the acceptance was based on the reasonable
13 assumption that the nonconformity would be seasonably cured. An action
14 is taken seasonably if it is taken at or within the time agreed, or if no
15 time is agreed, at or within a reasonable time. Minn. Stat. § 336.1-
16 205.

17
18 Similarly, pursuant to Minn. Stat. 336.1-608, a buyer may revoke
19 acceptance of goods whose non-conformity substantially impairs its value
20 to the buyer if it was accepted (a) on the reasonable assumption that its
21 non-conformity would be cured and it has not been seasonably cured; or
22 (b) without discovery of such non-conformity if acceptance was reasonably
23 induced by either the difficulty of discovery before acceptance or by the
24 seller's assurances.

25
26
27 As described in the uncontroverted declarations of **Bill Lunney,**
28 **Dennis Henderson,** and **Hazael Robles,** Gaylord's justifiably revoked
acceptance because Valspar's products were defective and these defects

1 could not have been determined without first using the products, and
2 because Valspar repeatedly assured Gaylord's it would remedy the problems
3 but failed to do so [App: 295-300; 302-309; 311-317; 319-322].
4

5 Despite uncontroverted evidence of actual notice of the defects,
6 the appellate court ignored this evidence and found that Gaylord's was
7 still required to provide written notice, and that it failed to timely do
8 so [App: 527-528]. *The appellate court is wrong because under Minnesota law, written notice is not*
9 *required where actual notice exists. How would written notice have been better than actual notice? The*
10 *only purpose for giving notice is to allow Valspar to try to fix the*
11 *problems. The evidence is uncontroverted that Valspar knew of the*
12 *problems and that it tried for over a year to fix the problems but*
13 *couldn't. Requiring written notice in the face of actual notice is the exhaltation of form over*
14 *substance, which the law does not permit.*
15

16
17 The Court of Appeals committed reversible error in relying on the
18 DeWitt case for the proposition that written notice is required within
19 the period stated in the contract. In DeWitt, the contract was for sale
20 of poles for a rural electrical distribution system. *The contract required the*
21 *purchaser to have an inspector at the point of delivery to determine if the poles had met the contract's*
22 *specifications. The inspector was required to reject the poles at the point of delivery and before incorporation*
23 *into the electrical system if they did not conform to specifications. The purchaser did not have an inspector*
24 *and did not reject the poles at the point of delivery.*
25

26 In DeWitt, the product's conformity to the specifications of the
27 contract could be measured by the buyer at the point of delivery, unlike
28 the paint products sold by Valspar, the defects in which could only be

1 determined after application (use). There was no discussion in DeWitt as
2 to whether written notice of defects is required where actual notice
3 exists. The seller in DeWitt never made repeated assurances to the
4 purchaser that it would remedy the defects thereby convincing the
5 purchaser to wait beyond the time constraints set forth in the contract,
6 like Valspar did here.

7
8 Significantly, the DeWitt court stated that what constitutes a
9 reasonable time to rescind is usually a question of fact for the jury, and
10 acknowledged that even if an agreement expressly defines the period in
11 which a purchaser is required to reject defective merchandise, fraudulent
12 acts on the part of the seller that induce the buyer to report the
13 defects outside the fixed period may be grounds for waiver. Id. at 559-
14 560.

15
16
17 The Court of Appeals reliance on DeWitt is, to be charitable,
18 misplaced.

19
20 3. Valspar Waived its Right to Written Notice Because
21 it Had Actual Notice and it Acted on That Actual
22 Notice.

23 It is undisputed that Valspar had actual knowledge of its defective
24 products because Gaylord's provided uncontroverted evidence that Valspar
25 knew that its products were not working from the beginning of the Supply
26 Agreement in October 2003 and throughout the period Gaylord's purchased
27 products exclusively from Valspar [App: 295-300; 302-309; 319-322].
28

1 Valspar submitted no admissible evidence establishing that it
2 lacked actual knowledge of the defects after the Supply Agreement was
3 entered into. As set forth in *Gaylord's Memoranda of Evidentiary*
4 *Objections*, none of the testimony offered by Brian Lynch, Rob Cross, or
5 Jeffrey Tiedens is admissible [App: 172-181; 331-354]. Valspar offered
6 no evidence disputing its actual knowledge of the defects, or that after
7 the Supply Agreement was entered into, its representatives visited
8 Gaylord's on numerous occasions to attempt to cure the defects [App: 305-
9 308; 314-317; 320-322].

10
11 In Minnesota, the common law rule is that a written contract can be
12 varied or rescinded by an oral agreement of the parties, even if the
13 contract provides that it shall not be orally varied or rescinded.

14 Larson vs. Hill's Heating & Refrigeration of Bemidji, Inc., 400 NW2d 777
15 at 781 (1987).

16
17 In Lamberton vs. Connecticut Fire Insurance Co., 39 Minn. 129, 39
18 NW 76 (1888), the Minnesota Supreme Court held that an insurance company
19 had waived a contract requirement of written notice of abandonment by
20 orally assuring plaintiff that its property was insured, even though the
21 contract had a provision against oral waivers.

22
23 As in Lamberton, Valspar's representatives orally assured Gaylord's
24 representatives that it would fix the many problems with its products
25 [App: 297-299]. Therefore, it has waived its right to require written
26 notice [App: 297-299; 305; 313; 315].

27
28 ///

1 In fact, Fuhr vs. D.A. Smith Builders, Inc. (2005) WL 3371035
2 (Minn. App.) an authority submitted by Valspar, concludes that the
3 requirement of written notice is waived when there is actual notice (App:
4 125-129) "*There is no claim that Fuhrs gave any written notice to
5 Smith's insurer. In an appropriate case, there might be a basis for
6 estoppel or waiver of written notice when the builder or the insurer, as
7 its agent, acknowledges the homeowner's claim*", Id. at *5).

8
9 Valspar acknowledged Gaylord's claim of defective products by the
10 clearest means possible, it repeatedly sent its employees to Gaylord's to
11 try to fix the problems while assuring Gaylord's that it could and would
12 do so. Actions speak louder than words.

13
14
15 The authorities cited by Valspar to try to support its argument
16 that Gaylord's did not timely reject the products don't support that
17 argument [App: 42; 117-118]. In Ames Engineering Corp. vs. Lighthouse
18 Bay Foods, Inc. (1999 WL 595393) [App: 42], the defendant accepted a
19 packaging machine at the invoice price without objection. Later, the
20 defendant objected to the size of a heater unit, but never rejected the
21 packaging machine because of the heater unit and never complained that
22 the packaging machine did not work properly. The defendant only
23 complained about the price of the machine at a later date. Accordingly,
24 the court held that the defendant had not rejected the goods and must pay
25 the contract price. Id. at *2 [App: 118]. In contrast, Gaylord's
26 complained directly to Valspar about the products that Gaylord's rejected
27 and those whose acceptance was revoked [App: 302-310; 311-318; 319-322].

1 Since 1898, Minnesota law has provided that written notice is not
2 required when a party has actual notice. In Nichols Shepard Co. vs.
3 Wiedmann, 72 Minn. 344, 75 NW 208 (1898), the defendant failed to give
4 plaintiff notice at the place or within the time designated in the
5 contract. The threshing machine in controversy failed to properly work
6 from the outset. The plaintiff sent its experts to try and fix the
7 problems over a period of time, but they failed (*sound familiar?*). Based
8 upon the evidence as a whole, the Minnesota Supreme Court held that the
9 formal notice requirement was waived. Id. at 347.

11 Similarly, in New Ulm Building Center Inc. vs. Studtman, 302 Minn.
12 14 at 16, 225 NW 2d 4 (1974), the Minnesota Supreme Court held that where
13 property owners were fully aware that extras would be included as the
14 construction work on their house progressed, they waived the written
15 notice required by the contract.

17 Unlike the situation in Ames or in Northwest Airlines, Inc. vs.
18 Aerospace, Inc., 168 F.Supp.2d 1052 (D. Minn. 2001) [App: 12-13],
19 Gaylord's did not purchase a single delivery of products that could
20 easily be rejected after one use. Instead, Gaylord's received products
21 for nearly a year and timely revoked acceptance after using them and
22 realizing that their non-conformity could not be corrected despite
23 Valspar's repeated promises to do so [App: 302-310; 311-317; 319-422].

25
26 4. A Triable Issue of Material Fact Exists as to
27 Whether Gaylord's Provided Timely Written Notice
28 Pursuant to the Supply Agreement.

 The appellate court failed to follow the law and to interpret the

1 evidence in the light most favorable to Gaylord's because it ignored or
2 discounted *uncontradicted evidence* that Valspar had *actual notice* of the defective
3 products. There still exists a triable issue of material fact as to
4 whether Gaylord's was even required to provide Valspar with written
5 notice of the defects because the only argument that Valspar has that
6 written notice is required is in paragraph 1 of its General Warranty,
7 which it claims was attached to the Supply Agreement at the time it was
8 signed by Gaylord's representative, Bill Lunney.

9
10 Paragraph 1 of the General Warranty states, in pertinent part,
11 that:

12
13 *"Seller warrants to Buyer, and only to Buyer, that the*
14 *products purchased from Seller (Products) conform to Seller's published*
15 *specifications. If Buyer discovers a failure of the Products to*
16 *substantially conform to Seller's published specifications,*
17 *Buyer must within ten days after discovery (but in no event*
18 *later than 180 days after receipt) notify Seller in writing."*

19 Gaylord's is not claiming that the defective products failed to
20 conform to "...Seller's published specifications..." because neither
21 Gaylord's, the trial court, nor the appellate court has any idea what
22 those published specifications are because Valspar never informed
23 Gaylord's, the trial court, or the Court of Appeals whether they ever
24 existed and, if so, what they are.

25
26 Even so, if the foregoing language were to be held applicable,
27 Gaylord's last received Valspar's products in October 2004 [App: 311,
28 315]. Lunney then timely notified Rob Cross in writing by e-mail on 12

1 November 2004 [App: 85, 315]. Therefore, written notice was provided
2 within 180 days of receipt of the last products. Accordingly, there
3 exists a genuine issue of material fact as to whether written notice was
4 actually required and, if so, whether Gaylord's timely gave that notice.

5
6 5. Summary Judgment Should Not Have Been Upheld on
7 Gaylord's Breach of Warranty Claims Because
8 Valspar is Equitably Estopped from Invoking the
9 Limitations Period in the Warranty Provision and
10 Because the Exclusive Remedy Provision of the
11 Warranty Fails of its Essential Purpose.

12 Equitable Estoppel

13 The appellate court incorrectly concluded that the doctrine of
14 equitable estoppel did not apply to Gaylord's breach of warranty claims
15 because Valspar (1) appropriately disclaimed the implied warranty, (2)
16 Gaylord's failed to file an action within the time stated in the
17 warranty, and (3) Gaylord's failed to provide notice of its intent to
18 assert its rights under the warranty.

19 If Gaylord's was required to file an action within the period
20 defined in the warranty, and if Gaylord's failed to do so, Valspar is
21 *equitably estopped* from invoking the limitations provision because of its
22 conduct.

23
24 In order to invoke the doctrine of equitable estoppel, a party must
25 prove three elements: (1) that promises or inducements were made; (2)
26 that the party reasonably relied upon the promises; and (3) that it will
27 be harmed if estoppel is not applied. Hydra-Mac, Inc. vs. Onan Corp.,
28 450 NW2d 913 at 919 (1990).

1 "Equitable estoppel depends on the facts of each case
2 and is ordinarily a fact question for the jury to decide." Northern
3 Petrochemical vs. US Fire Ins. Co., 277 NW2d 408, 410 (1979).
4

5 Throughout the period that Gaylord's purchased products exclusively
6 from Valspar, Valspar repeatedly promised that it would fix the problems,
7 its employees tried repeatedly to do so and finally admitted that they
8 could not in December 2004 [App: 302-310; 310-317; 319-322].
9

10 The evidence is *undisputed* that Gaylord's reasonably relied upon
11 Valspar's promises because it had invested time, money, and effort to try
12 to make the products work, and because Valspar held itself out to be a
13 company with vast experience in the automotive industry with enough
14 resources and expertise to solve the problems.
15

16 Failure of the Exclusive Remedy Provision
17

18 The appellate court committed reversible error by holding that the
19 limitation of remedies clause did not fail of its essential purpose
20 because Gaylord's received a purported financial benefit for entering
21 into the Supply Agreement [App:530]. The appellate court ignored the
22 undisputed fact that Gaylord's was damaged far in excess of the so-called
23 financial benefit that it received.
24

25 The General Warranty states that Valspar will either replace the
26 nonconforming products or refund their purchase price [App: 77].
27 However, where circumstances cause an exclusive or limited remedy to fail
28 of its essential purpose, all remedies provided in the code may be

1 pursued. Minn. Stat. § 336.2-719(1).

2
3 The first question is, what is meant by "nonconforming products"?
4 Conforming to what? Valspar introduced no evidence that it had any
5 standards to which its products must conform, so Gaylord's had no ability
6 or obligation to notify Valspar that Gaylord's received "nonconforming"
7 products.

8
9 An exclusive remedy fails of its essential purpose if circumstances
10 arise to deprive the limiting clause of its meaning or to deprive one
11 party of the substantial value of its bargain. Durfee vs. Rod Baxter
12 Imports, Inc., 262 NW2d 349, 356 (1977). In Durfee, the court held that
13 a repair and replacement remedy in an automobile owner's manual failed of
14 its essential purpose when the plaintiff's car could not be placed in
15 reasonably good operating condition.

16
17 As in Durfee, if Gaylord's is limited to the remedy of replacing the
18 defective products with conforming goods, or return of the purchase
19 price, then the remedy fails of its essential purpose because Gaylord's
20 could not manufacture and paint lids acceptable to its customers.
21 Valspar proved itself incapable of replacing its defective products.
22 Refunding the purchase price of defective goods makes the remedy clause
23 meaningless.

24
25 ///

26
27
28 ///

1 specifications for the products that it sold to Gaylord's; and (2) if so,
2 whether those products conformed to its published specifications.

3
4 More importantly, Gaylord's expert, Dr. Ramesh Kar, determined that
5 Valspar's base coats contained contaminants and that Valspar had serious
6 quality control problems, thereby raising triable issues of material fact
7 as to whether Valspar's products even met its own specifications [if it
8 had any] [App: 324-328]. Dr. Kar's declaration is uncontradicted.

9
10 Even if Gaylord's did not expressly tell Valspar that it was
11 asserting a breach of warranty claim, Valspar knew exactly what was wrong
12 with its products because its own representatives worked at Gaylord's for
13 months and used the products in their failed attempt to cure the defects
14 [App: 295-300; 311-313].

15
16 To this day, Valspar does not claim that it had any published specifications for the products that
17 it sold to Gaylord's or that its products performed in a satisfactory manner. Those failures
18 alone required the denial of its summary judgment motion as to Gaylord's
19 counterclaims for breach of warranty.
20

21
22 Even if Valspar had produced undisputed admissible evidence that
23 its products conformed to its specifications, another issue arises
24 concerning what Valspar meant when it expressly warranted that its
25 products would conform to its published specifications? At the very
26 least, it must be assumed that it warranted that its products would work
27 to some ordinary degree of satisfaction acceptable in the automotive
28 covering industry. To now contend that it never expressly warranted that
its paint products would apply evenly or smoothly, would not vary in

1 color following application or would not properly cure [App: 46] is the
2 equivalent of saying "we never promised that our products would work like
3 normal paint products and our published specifications prove it", which
4 would make the Supply Agreement *illusory*.

5
6 Valspar's representative's oral statements that its products would
7 apply evenly, properly cure, and its colors would match are not barred by
8 the parol evidence rule, as Valspar contends [App: 36-64], because such
9 statements do not contradict the terms of the Supply Agreement. Valspar's
10 oral statements may be admitted to explain or supplement an ambiguous
11 term in a contract. Apple Valley Red-E-Mix, Inc. vs. Mills-Winfield
12 Engineering Sales, 426 NW2d 121, 123 (1989).

13
14 Discovery was still pending and discovery disputes concerning
15 Valspar's refusal to provide relevant information had not been resolved
16 [App: 223-291]. Consequently, oral statements of warranties concerning
17 color matches, application, and cure, etc., are admissible to explain or
18 supplement what is meant by Valspar's warranty that its products would
19 conform to its specifications.

20
21 If Valspar's paint products do not bond or cure properly and if the
22 colors don't match, then the contract is illusory because Valspar is
23 under no obligation to make products that conform to any standard
24 acceptable in the industry. [See, for instance, Federal Motor Truck Sales
25 Corp. vs. Shanus, 190 Minn. 5, 250 NW2 713 (1933), "It must be conceded
26 that a truck...of any sort should be provided with serviceable brakes to
27 make it fit for the purposes for which it is sold". Id. at 10].
28

1 Valspar's contention that it made no particular representations
2 directly contradicts its own employees' repeated promises to match the
3 colors requested by Gaylord's and to fix the other problems concerning
4 uneven application, fish-eyes, blotching, and failure to cure [App: 295-
5 300; 311-313].

6
7 Even if Valspar can maneuver around its failure to prove the nature
8 and extent of its warranty, summary judgment in its favor was improper
9 because a triable issue of material fact exists as to whether Gaylord's
10 failed to give Valspar timely notice of Valspar's breach of warranty as
11 previously discussed.

12
13 Valspar knew of its failed color matches, poor coverage, blotching,
14 fish-eyes, failure to cure, etc. Therefore, its attempt to shield itself
15 from liability by claiming that the Supply Agreement required notice to
16 be only in writing and either hand delivered or served by mail with
17 return receipt is contradicted not only by common sense, but by Minnesota
18 law as stated above.

19
20 **7. Gaylord's Claims are Timely.**

21
22 The limitations period of the general warranty provides that the
23 buyer must bring a lawsuit against Valspar relating to its products
24 within six months of discovery of a claim, but no later than twelve
25 months after receipt of the products [App: 77].

26
27 Gaylord's received numerous shipments of products over a period of
28 time. Valspar repeatedly assured Gaylord's that it would fix the

1 defects. Under Minnesota law, *the time during which the seller tries to remedy the defects is*
2 *not considered in determining whether the buyer timely acted:*

3
4 "It is obvious that if, upon notice of the breach, the
5 seller promises or undertakes to remedy the defect, the time
6 thus consumed should not be deducted from the time within
7 which the buyer must act." Federal Motor Truck Sales Corp.,
8 *supra*, 190 Minn. 5 at 11.

9
10 Because Valspar's agents repeatedly promised to try to fix the
11 defects and because they made efforts to do so, Valspar is barred from
12 asserting either the six-month or the twelve-month limitations period.

13
14 **8. Gaylord's Provided Valspar With Plenty of Time to**
15 **Cure the Defects But it Failed To Do So.**

16 The appellate court also held, erroneously, that Gaylord's cannot
17 recover under its breach of warranty claim because it failed to give
18 Valspar the requisite written cure notice pursuant to the Supply
19 Agreement [App: 529]. The Supply Agreement does not specify the time
20 within which defects must be cured. It states only that they must be
21 cured "*within a reasonable time...*" [App: 77]. The determination of what
22 constitutes a reasonable time is a jury question.

23
24 Valspar claims that it did not have adequate time to cure the
25 breaches because it did not receive timely written notice of any alleged
26 breach [App: 48-49], *but it submitted no evidence to support that claim.*
27 *What would it have done differently if it received written notice?*
28

1 As previously noted, Valspar waived the requirement of written
2 notice because it had actual notice of the defects and repeatedly tried
3 for nearly a year to fix them before Gaylord's was forced to buy products
4 from another company.

5
6 If repairs are not successfully undertaken within a reasonable
7 time, the buyer may be deprived of the benefits of the exclusive remedy.
8 Durfee vs. Rod Baxter Imports, Inc., 252 NW2d 349, 356 (Minn. 1977).

9
10 The cases cited by Valspar do not support its contention that
11 written notice of a breach of warranty is required where actual knowledge
12 exists. For instance, in Production Resources Group, LLC vs. Van Hercke,
13 2004 WL 1445126 *3 (Minn. Ct. App., June 29, 2004) [App: 48], there was
14 no issue as to whether the plaintiff received actual notice of its
15 alleged breach as opposed to written notice. Rather, the court
16 determined only that defendant's e-mails sent to the plaintiff failed to
17 allege a material breach of contract and that they failed to identify any
18 conduct that constituted a breach. Id. *3. In other words, no actual
19 notice was alleged in that case.

20
21 Similarly, in Buchman Plumbing Co., Inc. vs. Regents of University
22 of Minnesota, 215 NW2d 479, 485 (Minn. 1974) [App: 48], the court
23 rejected the mechanical contractor's contention that it did not need to
24 give written notice to the land owner of its claims for damages because
25 the defendant University had actual knowledge. The court found that not
26 only did the plaintiff fail to provide oral notice to the defendant of
27 his intention to sue, he also failed to prove the existence of a breach.
28

1 Cameo Homes vs. Kraus-Anderson Co., 394 F3d 1084 (8th Cir. Minn.
2 2005), is not on point [App: 48] because, in that case, the plaintiff
3 contractor sued the construction management firm for damages resulting
4 from delays allegedly caused by the defendant and others. The contract
5 required the plaintiff to present written notice of any claim within 21
6 days of the event giving rise to the demand to the project architect, who
7 was not a party. The plaintiff claimed he provided notice of his damages
8 by change-orders to the defendant, not the architect, and that was the
9 equivalent of actual notice of his claim to the architect. The court
10 disagreed, finding that the plaintiff had failed to show that the parties
11 knew that its change-order requests to the defendant were effectively
12 equivalent to the submission of claims to the architect. Id. at 1087-
13 1088.

14
15 In stark contrast to the three preceding cases, Gaylord's has
16 presented irrefutable evidence of actual knowledge by Valspar. Therefore, at
17 a minimum, Gaylord's has raised a triable issue of material fact as to
18 whether Valspar was given adequate time to cure the defects.
19 Consequently, the appellate court erred in upholding summary judgment as
20 to Gaylord's counterclaims for breach of express and implied warranties.

21
22 9. Valspar is Not Entitled to Summary Judgment on the
23 Issue of Limitation of Remedies Because the
24 Limitation Clause Fails of its Essential Purpose
25 and Because There is a Material Dispute as to
26 Circumstances Surrounding Delivery of the
27 Disclaimer.

28 As set forth above, Gaylord's properly refused to purchase any more
defective products and justifiably revoked acceptance of the products
after repeated false assurances that Valspar would correct the problems.

1 When a buyer rightfully rejects or justifiably revokes acceptance, the
2 buyer may recover damages for non-delivery. **Minn. Stat. §§ 336.2-711 and**
3 **336.2-713.** Furthermore, as previously noted, the limitations of remedies
4 urged by Valspar fail of their essential purposes because Valspar is
5 incapable of correcting the defects and a refund of the purchase price is
6 meaningless. Accordingly, all remedies provided in the code may be
7 pursued, including lost profits. **Minn. Stat. § 336.2-719(1).**

8
9 *The Disclaimer of Warranties is Not Effective Because it Was Not*
10 *Delivered at the Time of the Sale*

11
12 Minnesota law precludes summary judgment where there is a dispute
13 as to *when the disclaimer of warranties was delivered.* **Noel Transfer & Package Delivery**
14 **Service**, 341 F.Supp. 968 (1972). In **Noel**, the plaintiff entered into one
15 or more contracts with the defendant for the purchase of specially
16 equipped diesel trucks. The issue on summary judgment included whether
17 the plaintiff's claim for breach of warranty was precluded by the
18 disclaimer contained in the new vehicle warranty allegedly covering the
19 vehicles at issue in the case. The limitation of remedies provision
20 limited available remedies to repair and replacement of parts that proved
21 to be defective within 24 months or 24,000 miles. In denying the
22 defendant's motion for summary judgment, the **Noel** court stated:

23
24 *"But the mere existence of these provisions does not*
25 *entitle defendant to recovery. Under Minnesota law since any*
26 *warranty disclaimer must be treated as an affirmative defense,*
27 *the burden is upon the party asserting the disclaimer to*
28 *establish that the disclaimer was delivered at the time of*
sale and constituted an integral part of the transaction. *Id.*
at 970 [emphasis added]

1 ...since the affidavits filed in support of and in
2 opposition to defendant's motion are in dispute as to the
3 circumstances surrounding the delivery of the
4 disclaimer...defendant's motion for summary judgment based
5 upon...limitation of remedy does raise genuine issues of
6 material fact and must also therefore be denied." Id.

7 As set forth in paragraph 6 of the Lunney Declaration, the warranty provision was not delivered at
8 the time the final contract was executed [App: 314]. Instead, it was delivered to him
9 several weeks later. Consequently, because there is a material dispute
10 concerning the circumstances surrounding the delivery of the warranty,
11 summary judgment must be reversed as to the issue of limitation of
12 remedies, including consequential damages, and as to whether the implied
13 warranty of fitness for a particular purpose has been disclaimed
14 (Gaylord's count 3).

15
16 10. The Appellate Court Erred in Upholding Summary
17 Judgment on Gaylord's Claim for Negligent
18 Misrepresentation Because There are Genuine Issues
19 as to Whether Valspar Owed a Duty to Gaylord's.

20 Under Minnesota law, a negligent misrepresentation is made when:

21
22 "[O]ne who, in the course of his business, profession,
23 or employment, or in [any other] transaction in which he has a
24 pecuniary interest, supplies false information for the
25 guidance of others in their business transactions, is subject
26 to liability for pecuniary loss caused to them by their
27 justifiable reliance upon the information, if he fails to
28 exercise reasonable care or competence in obtaining or
 communicating information." Greuling vs. Wells Fargo Home
 Mortgage, Inc., 690 NW2d 757 at 761 (2005).

1 Liability for negligent misrepresentation is found where "the
2 business person manifests an intent to provide information for the type
3 of use that ultimately results in the plaintiff's loss". Posch vs.
4 Kurts, (1997) WL 20303 at *3 (Minn. Court of Appeal 1997) [App: 137-140].
5

6 Minnesota courts distinguish between instances where a defendant
7 supplies information or advice on which the plaintiff justifiably relies
8 and so-called "adversarial" transactions where the parties negotiate at
9 arms length. For instance, in Florenzano vs. Olsen, 387 NW2d 168 (1986),
10 the defendant insurance agent supplied erroneous information regarding
11 social security benefits to the plaintiff who suffered pecuniary loss as
12 a result. Although the defendant's misrepresentations were not
13 intentional, the court found that a negligent misrepresentation is made
14 when the misrepresenter has not discovered or communicated certain
15 information that the ordinary person in his or her position would have
16 discovered or communicated. Id. at 174. The Florenzano court had no
17 trouble finding that the insurance agent had negligently, rather than
18 intentionally, supplied his clients with false information on which they
19 justifiably relied to their pecuniary loss. Id. at 175.
20

21 In contrast, in Safeco Insurance Company of America vs. Dain
22 Bosworth, Inc., 531 NW2d 867, Minn. Court of Appeal (1995), the defendant
23 was an underwriter of municipal bonds that were to be insured by a third
24 party known as a "credit enhancer". Defendant sent background
25 information about the bonds to Safeco. Ultimately, Safeco was forced to
26 pay the bond holders when the bonds went into default. The Court of
27 Appeals upheld the trial court's grant of summary judgment for the
28 plaintiff on the basis that the underwriter did not owe a duty of care in

1 representations made to Safeco. Id. at 874.

2
3 In upholding the trial court, the appellate court noted that other
4 jurisdictions addressing the issue have held that where "adversarial"
5 parties negotiate at arms length, no duty is imposed to hold a party
6 liable for negligent representations. Id. at 871. The court went on to
7 distinguish other commercial transactions from the one at bar, noting
8 that Safeco was not a client of Dain's and that Dain was not supplying
9 information for the guidance of Safeco, but was negotiating with Safeco
10 as part of a commercial transaction that involved another party. Id. at
11 872.

12
13 The court further noted that Safeco did not place its trust in
14 Dain's advice but, instead, used its own analysts who independently
15 investigated the transaction. Id.

16
17 Most significantly, the Safeco court noted that there was no unity
18 of interest between Dain and Safeco. Therefore, summary judgment was
19 appropriate on the issue of negligent misrepresentation. Id.

20
21 In contrast to the parties in Safeco, Valspar and Gaylord's shared
22 a unity of interest - the Supply Agreement. Valspar needed to sell non-
23 defective products so Gaylord's could sell its truck lids and continue to
24 purchase products exclusively from Valspar for the period designated in
25 the Supply Agreement.

26
27 Valspar had a pecuniary interest in the Supply Agreement and made
28 numerous misrepresentations that ultimately resulted in Gaylord's loss.

1 Valspar' agents promised (falsely) that its products would apply evenly,
2 match in color and, at the very least, conform to Valspar's own
3 specifications. Gaylord's relied on these misrepresentations when
4 entering into the contract to its significant pecuniary loss.

5
6 Also, unlike the Safeco defendant, Gaylord's had no third party to
7 independently investigate the information supplied by Valspar. Instead,
8 Gaylord's relied exclusively on the representations of Valspar's agents.
9 A triable issue of material fact exists as to whether Valspar owes a duty
10 to Gaylord's and summary judgment as to the third cause of action for
11 negligent misrepresentation should have been denied.

12
13 11. The Appellate Court Incorrectly Upheld Summary
14 Judgment on Gaylord's Fifth Cause of Action for
15 Fraud Because Gaylord's is Not a "Sophisticated
16 Equal" and it Justifiably Relied on Valspar's
17 Representations.

18 The appellate court held that Gaylord's claim for fraud failed as a
19 matter of law because Gaylord's was a "sophisticated equal" with Valspar.
20 The appellate court erroneously relied on Lassen vs. First Bank Eden
21 Prairie, 514 NW2d 831, 839 (Minn. App. 1994), review denied (Minn. June
22 29, 1994) [App.: 533].

23 In Lassen, the plaintiff was a highly experienced construction
24 lender who, after personally examining the financial records of defendant
25 Kopfman and satisfying himself that Kopfman was creditworthy, loaned him
26 money, which he failed to repay. Plaintiff sued the defendant bank for
27 fraud on the basis that the bank induced plaintiff to lend money to
28 Kopfman by making false statements as to Kopfman's creditworthiness.

1 Unfortunately for the plaintiff, there was no evidence that the bank made
2 any representations intended to induce plaintiff to make Kopfman the
3 loan, thereby precluding plaintiff from justifiably relying on anything
4 the bank said.

5
6 The Lassen court also stated that "*justifiable reliance must be*
7 *established with reference to the specific intelligence and experience of*
8 *the aggrieved party*", and that a knowledgeable party who conducts his own
9 investigation may not rely upon claims made by another party such as the
10 bank. Therefore, because the plaintiff had conducted his own
11 investigation into Koffman's financial status, he could not reasonably
12 rely on anything the bank may have said. Id. at 839.

13
14 The Lassen court did not define what is meant by a "*sophisticated*
15 *equal*" and, in fact, did not describe any of the parties as
16 "*sophisticated equals*". Nonetheless, for the appellate court in this
17 case to deem the parties "*sophisticated equals*", there must be proof that
18 the parties each possess a high degree of knowledge and understanding
19 regarding the relevant aspects of Valspar's products or business.

20
21 In this case, Gaylord's was not a "*sophisticated equal*" to Valspar
22 because it is not in the business of paint manufacturing. *Gaylord's makes and*
23 *sells truck bed lids, not paint*. It does not deal in goods of the kind involved in
24 the transaction with Valspar. *Gaylord's applies paint products, it does not manufacture*
25 *them* [App: 225; 290-291].

26
27
28 Gaylord's is not a sophisticated equal with Valspar and its
economic losses, including lost profits, are recoverable under Minnesota

1 Stat. § 604.10(a).

2
3 12. Fraudulent Representations May be Based on
4 Statements Made About the Capabilities of the
5 Products.

6 To establish a fraud claim, Gaylord's must show that: (1) there was
7 a representation made by a party; (2) the representation had to do with
8 past or existing facts; (3) the representation was false; (4) the fact
9 must be material; (5) it must be susceptible of knowledge; (6) the
10 representer must know it to be false or, in the alternative, must assert
11 it as of his own knowledge without knowing whether it was true or false;
12 (7) the representer must have intended to have the other person induced
13 to act, or justified in acting upon it; (8) the person must have been so
14 induced to act or so justified in acting; (9) the person's action must be
15 in reliance upon the representation; (10) that person must have suffered
16 damage; (11) the damage must be attributable to the misrepresentation,
17 that is, the statement must be the proximate cause of the injury. Minn.
18 Forest Products, Inc. vs. Ligna Machinery, Inc., 17 F.Supp.2d 892 (Dist.
19 of Minn., 1998).

20
21 Minnesota courts allow a cause of action for fraud to be based on
22 statements made by the defendants regarding the capabilities of a
23 product. Id. (See Clements Auto Co. vs. Service Bureau Corp., 444 F.2d
24 169, 181-182 (8th Cir. 1971), in which the defendant's statements that its
25 data processing system would be capable of providing the plaintiff with
26 sufficient information, and that it would be an effective and efficient
27 tool used in inventory control were statements of present fact
28 susceptible to a claim for fraud. See also, National Equipment Corp. vs.

1 Bolden, 190 Minn. 596 at 599, holding that defendant's representations
2 that its machine would work in cooperation with plaintiff's other
3 machines and that it would surpass any machine being used by the
4 plaintiff were representations of present facts and susceptible to claims
5 for fraud.)

6
7 Here, Valspar said that its products were capable of being applied
8 evenly, smoothly, and consistently and that they would cure in a timely
9 manner. These representations were false as evidenced by the complete
10 failure of Valspar's products and its inability to correct the failures.
11 The representations were material because they directly concerned the
12 products' capabilities and were representations that were within the
13 knowledge of Valspar's representatives and they either knew them to be
14 false, or asserted them as of their own knowledge.

15
16 Valspar's representations that its products would work as Gaylord's
17 required were intended to induce Gaylord's to enter into the contract.
18 Gaylord's was justified in relying upon the representations because they
19 were made by agents of a company with extensive experience in the
20 manufacture of automotive refinishes and Gaylord's was not a
21 sophisticated equal with Valspar concerning paint products. Based on
22 Valspar's statements that it could and would correct any problems and
23 that its products would perform in the manner represented, Gaylord's
24 entered into the contract and suffered damages in excess of \$2 million
25 [App: 286-287].

26
27 Valspar's misrepresentations did not begin and end with the
28 execution of the Supply Agreement in October 2003. Valspar continued to
make misrepresentations to Gaylord's that it could and would remedy the

1 product defects. It did so to induce Gaylord's to continue under the
2 Supply Agreement. Because Gaylord's was financially committed to the
3 contract, its reliance on Valspar's representations for a year cannot be
4 considered a waiver of its right to assert a claim for fraud. Gaylord's
5 wanted the products to work, not a lawsuit [App: 315].

6
7 Although a party to a contract who discovers fraud may not continue
8 with the performance of the contract and then later sue for damages,
9 "*[w]here the defrauded party discovers the fraud after substantial*
10 *performance or where it would be economically unreasonable to terminate*
11 *the relationship, he may affirm or continue the contract and then bring*
12 *suit for his entire damages". Clements Auto Co. vs. Service Bureau*
13 *Corp.*, 444 F2d 169 at 184 (8th Cir. 1971).

14
15 In this case, it is for a jury to determine whether Gaylord's good
16 faith efforts to try to allow Valspar to fix the problems were reasonable
17 or whether it should have commenced a lawsuit sooner. *Gaylord's should not be*
18 *punished for its good faith effort to give Valspar a chance to make good on Valspar's promises rather than to*
19 *immediately file a lawsuit.*

20
21
22 Gaylord's fraudulent inducement claim is not the same as its breach
23 of contract claim as Valspar contends [App: 65]. The fifth cause of
24 action is an independent tort that arose when Valspar's agents, including
25 Reid, Lynch, Cross, and Krul, made false promises to Lunney that
26 Valspar's products would conform to Gaylord's needs when they knew, or
27 should have known, that the products would not. They did so for the
28 purpose of inducing Gaylord's to enter into the Supply Agreement.
Therefore, it is the conduct of Valspar's agents that gives rise to

1 Gaylord's damages, not the subsequent failure of the products to perform.

2
3 In Brooks vs. Doherty, Rumble & Butler, 481 NW2d 120 (Minn. Ct.
4 App. 1992), a plaintiff attorney alleged both a breach of employment
5 contract and fraud in the inducement to the contract, among other things,
6 against the defendant law firm from which he was terminated. On appeal,
7 the defendant argued that the plaintiff's claim, and thus his remedy,
8 sounded in contract not in tort. Id. at 127-128.

9
10 The appellate court disagreed and held that the plaintiff may
11 properly allege two independent causes of action: fraud in the inducement
12 to the contract and breach of the contract as long as he has met the
13 burden of proving separate damages for each cause of action. Id. at 128.
14 The plaintiff met that burden by showing a loss of income resulting from
15 the breach of his employment contract and, in addition, demonstrating
16 that the defendant's fraud caused him to suffer emotional distress,
17 damage to his personal and professional reputation, and lost income.

18
19 Here, Gaylord's has suffered damage to its professional reputation,
20 separate from damages suffered through Valspar's breach of contract [App:
21 302,06-307; 311, 315-316; 319, 322]. It has properly alleged both breach
22 of contract and the separate tort of fraud in the inducement and summary
23 judgment on the fifth cause of action must be denied.

24
25 ///

26
27
28 ///

1 13. The Appellate Court Committed Reversible Error in
2 Upholding Summary Judgment on Valspar's Breach of
3 Contract Claim Against Gaylord's.

4 The essence of Valspar's argument is that it had no obligation to
5 do anything for Gaylord's except to supply it with defective products and
6 that Gaylord's should pay it \$2,270,000 for those defective products.

7
8 For the same reasons that Valspar is not entitled to summary
9 judgment on Gaylord's breach of contract and breach of warranty claims,
10 Valspar is not entitled to summary judgment on its contract claim against
11 Gaylord's.

12
13 As demonstrated herein, genuine issues of material fact exist as to
14 whether Gaylord's revoked acceptance of the products, whether written
15 notice of the defects was required, whether Valspar has waived its right
16 to written notice, and whether Valspar is equitably estopped from
17 invoking the limitations period in the Agreement.

18
19 More significantly, a disputed issue of material fact exists as to
20 whether Valspar met its obligations to provide products that actually
21 worked. Valspar has produced no evidence that the products that it
22 supplied to Gaylord's conformed to Valspar's own specifications [whatever
23 those were]. The evidence is uncontradicted that the products were
24 defective [App: 324-330].

25
26 14. The Appellate Court Committed Reversible Error
27 When it Failed to Sustain Gaylord's Objections.

28
Gaylord's submitted evidentiary objections [App: 331-354] to the

1 three declarations submitted by Valspar to attempt to support its motion.
2 The appellate court failed to rule on those objections, thereby
3 committing reversible error because Minnesota law requires that
4 affidavits be founded upon personal knowledge and that they provide
5 admissible evidence that is not founded upon opinion and hearsay. State,
6 Ex. Rel. Sime vs. Pennebaker, 215 Minn. 75, 77, 9 NW2d 257, 258-259
7 (Minn. 1943) [App: 331, lines 19-28].
8

9 For the reasons stated in the evidentiary objections, none of the
10 material found in the declarations submitted by Valspar is probative or
11 admissible evidence that would support the entry of summary judgment.
12

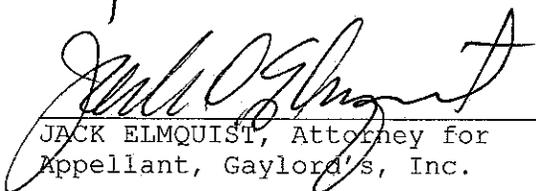
13 Conclusion

14
15 Gaylord's requests that the summary judgment in favor of Valspar be
16 reversed and the case be remanded to the trial court for trial on
17 Valspar's complaint and on all of Gaylord's counterclaims.
18

19 Dated: 13 March 2008

Respectfully submitted,

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22 Law Offices of Michael Leight
By MICHAEL LEIGHT, Attorney for
Appellant, Gaylord's, Inc.

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26 JACK ELMQUIST, Attorney for
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