

NO. A09-2171

8

State of Minnesota
In Court of Appeals

Nancy Driscoll, as Trustee for the Next-of-Kin
of Deane Driscoll, Deceased,

Plaintiff,

v.

Standard Hardware, Inc.,

Defendant,

and

Atlas Copco Drilling Solutions LLC (incorrectly denominated
as USA Holdings, Inc. d/b/a Atlas Copco),

Defendant and Third-Party Plaintiff,

v.

United Taconite, LLC, Intone Industrial Co., Ltd., and
Brighton-Best Socket Screw, Inc.,

Third-Party Defendants,

and

United Taconite, LLC,

Appellant,

v.

Atlas Copco Construction Mining Technique, LLC and
Atlas Copco Customer Finance, LLC,

Respondents.

APPELLANT'S BRIEF AND ADDENDUM

(All Counsel Listed on Following Page)

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

BASSFORD REMELE
A Professional Association
Edward F. Fox (#003132X)
Mark R. Bradford (#335940)
33 South Sixth Street, Suite 3800
Minneapolis, Minnesota 55402-3707
(612) 333-30000

and

JONES DAY
Richard J. Bedell, Jr.
Jeffrey D. Ubersax
Matthew P. Silversten
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939

Attorneys for Appellant

Daniel Q. Poretti (#185152)
Cynthia Arends (#301735)
Andrew J. Sveen (#388738)
400 One Financial Plaza
120 South Sixth Street
Minneapolis, Minnesota 55402-4501
(612) 305-7500
dporetti@hallelend.com
carends@hallelend.com

Attorneys for Respondents

Thomas R. Thibodeau
800 Lonsdale Building
302 West Superior Street
Duluth, Minnesota 55802
Tel: (218) 722-0073
Fax: (218) 722-0390
trt@trialgroupnorth.com

Attorney for Defendant Standard Hardware

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF LEGAL ISSUES	1
STATEMENT OF THE CASE.....	3
STATEMENT OF FACTS.....	6
I. ATLAS COPCO'S SALES PITCH—THE PIT VIPER CAN HANDLE THE SLOPES AT THE MINE.....	6
II. THE PARTIES NEGOTIATE A ONE-YEAR LEASE AGREEMENT WITH AN OPTION TO BUY	8
III. THE DESIGN AND DEVELOPMENT OF THE PIT VIPER	9
IV. THE PIT VIPER ARRIVES AT THE MINE AND ATLAS COPCO TRAINS UNITED TACONITE'S DRILLERS.....	11
V. THE PIT VIPER FAILS TO LIVE UP TO ATLAS COPCO'S PROMISES	12
VI. ATLAS COPCO'S KNOWLEDGE OF BOLT AND WELD FAILURES ON OTHER PIT VIPERS.....	13
SUMMARY OF ARGUMENT	17
ARGUMENT	21
I. THE DISTRICT COURT ERRED IN GRANTING ATLAS COPCO'S MOTION FOR SUMMARY JUDGMENT.....	21
A. Standard Of Review	21
B. The Economic Loss Doctrine Does Not Apply To Bar United Taconite's Warranty Claims	21
1. The economic loss doctrine does not bar warranty claims seeking economic damages	22
2. The District Court misapplied the concept of merger	24

C.	The District Court Erred In Dismissing United Taconite’s Fraud Claim On The Grounds That United Taconite Failed To Show Reliance And Did Not Suffer Damages During Lease Period	28
1.	This record contains evidence that United Taconite reasonably relied on Atlas Copco’s misrepresentations in deciding to enter into the lease agreement.....	28
2.	This record contains evidence that United Taconite sustained damage as a result of Atlas Copco’s misrepresentations	30
D.	The District Court Erred In Dismissing United Taconite’s Intentional Misrepresentation Claim By Ignoring Evidence And Failing To Consider Other Evidence In A Light Most Favorable To United Taconite	31
1.	The Ma Report illustrates Atlas Copco’s knowledge of the Pit Viper’s design defect.....	33
2.	The district court ignored other evidence demonstrating Atlas Copco’s knowledge of the Pit Viper’s design defect.....	35
E.	Because The District Court Erred In Dismissing United Taconite’s Intentional Misrepresentation Claim, It Necessarily Erred In Dismissing United Taconite’s Rescission Claim.....	36
II.	THE DISTRICT COURT ERRED IN DENYING UNITED TACONITE LEAVE TO AMEND ITS COMPLAINT TO ADD A CLAIM FOR PUNITIVE DAMAGES	37
A.	The District Court Applied An Incorrect Legal Standard For Determining Whether A Party Is Entitled To Assert A Claim For Punitive Damages.....	37
B.	The District Court Erred By Failing To Grant United Taconite Leave After The Court Found <i>Prima Facie</i> Evidence That Atlas Copco Acted With Deliberate Disregard For The Rights Or Safety Of Others	41
	CONCLUSION	45

TABLE OF AUTHORITIES

	Page
Cases	
<i>Albright v. Henry</i> , 174 N.W.2d 106 (Minn. 1970)	33
<i>Ayers v. Ayers</i> , 508 N.W.2d 515 (Minn. 1983)	37
<i>Bilotta v. Kelley Co.</i> , 346 N.W.2d 616 (Minn. 1984)	26
<i>Bjerke v. Johnson</i> , 727 N.W.2d 183 (Minn. Ct. App. 2007).....	37
<i>Bogatzki v. Hoffman</i> , 430 N.W.2d 841 (Minn. Ct. App. 1988).....	36
<i>Carlson v. Sala Architects, Inc.</i> , 732 N.W.2d 324 (Minn. Ct. App. 2007).....	21
<i>Dougall v. Brown Bay Boat Works & Sales, Inc.</i> , 178 N.W.2d 217 (Minn. 1970)	24
<i>Eisert v. Greenberg Roofing & Sheet Metal Co.</i> , 314 N.W.2d 226 (Minn. 1982)	38
<i>Hapka v. Paquin Farms</i> , 458 N.W.2d 683 (Minn. 1990)	22
<i>Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.</i> , 736 N.W.2d 313 (Minn. 2007)	28
<i>Independent School District No. 622 v. Keene Corp.</i> , 511 N.W.2d 728 (Minn. 1994)	38
<i>Jensen v. Walsh</i> , 623 N.W.2d 247 (Minn. 2001)	passim
<i>Klein v. First Edina Nat'l Bank</i> , 196 N.W.2d 619 (Minn. 1972)	32
<i>Koch v. W.W. Holes Mfg. Co.</i> , No. C3-97-616, 1997 WL 666047 (Minn. Ct. App. Oct. 28, 1997).	31

<i>Lloyd F. Smith Co. v. Den-Tal-Ez, Inc.</i> , 491 N.W.2d 11 (Minn. 1992)	22, 23
<i>Lynd v. Picket</i> , 7 Minn. 184 (1862)	38
<i>Matteson v. Munroe</i> , 83 N.W. 153 (Minn. 1900)	38
<i>Molenaar v. United Cattle Co.</i> , 553 N.W.2d 424 (Minn. Ct. App. 1996).....	39, 40
<i>Olson v. Snap Prods., Inc.</i> , 29 F. Supp. 2d 1027 (D. Minn. 1998).....	44
<i>Peterson v. Arellono</i> , 185 N.W.2d 282 (Minn. 1971)	32
<i>Piotrowski v. Southworth Prods. Corp.</i> , 15 F.3d 748 (8th Cir. 1994)	27
<i>Raach v. Haverly</i> , 269 N.W.2d 877 (Minn. 1978)	30
<i>Richfield Bank & Trust Co. v. Sjogren</i> , 244 N.W.2d 648 (Minn. 1976)	31, 32
<i>Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.</i> , 615 N.W.2d 819 (Minn. 2000)	21
<i>State by Cooper v. French</i> , 460 N.W.2d 2 (Minn. 1990).	21
<i>Superwood Corp. v. Siempelkamp Corp.</i> , 311 N.W.2d 159 (Minn. 1981)	22
<i>Teffeteller v. Univ. of Minn.</i> , 645 N.W.2d 420 (Minn. 2002)	33
<i>Thompson v. Thompson</i> , 739 N.W.2d 424 (Minn. Ct. App. 2007).....	37
<i>Tysk v. Griggs</i> , 91 N.W.2d 127 (Minn. 1958)	30

<i>Watkins v. Lorenz</i> , 119 N.W.2d 482 (Minn. 1963)	30
---	----

Statutes

Minn. Stat. § 549.191 (2009)	41
Minn. Stat. § 549.20 (2009)	38, 40
Minn. Stat. § 549.20, subd. 1(a)	41
Minn. Stat. § 604.101, Reporter’s Notes—Role and Scope of the Statute (2009)	22

Rules

Minn. Gen. R. Prac. 115.03(c)	22
-------------------------------------	----

Other Authorities

4 Minn. Practice, Jury Instruction Guides—Civil § 22.25 (5th ed.) use notes	24
4 Minn. Practice, Jury Instruction Guides—Civil § 22.70	24
4 Minn. Practice, Jury Instruction Guides—Civil pt. III, category 75, introductory note	24, 25, 27
Ralph C. Anzivino, <i>The Economic Loss Doctrine: Distinguishing Economic Loss From Non-Economic Loss</i> , 91 MARQ. L. REV. 1081 (2008)	23
J. David Prince, <i>Defective Products and Product Warranty Claims in Minnesota</i> , 31 WM. MITCHELL L. REV. 1677 (2004-05)	25

STATEMENT OF LEGAL ISSUES

1. Did the district court err in holding that United Taconite's breach of warranty claims were "merged" into its strict liability claim and barred by the economic loss doctrine, leaving United Taconite with no remedy for the loss it suffered as a result of purchasing a defective drill?

Most apposite authority:

Bilotta v. Kelley Co.,
346 N.W.2d 616 (Minn. 1984);

Lloyd F. Smith Co. v. Den-Tal-Ez, Inc.,
491 N.W.2d 11 (Minn. 1992);

Piotrowski v. Southworth Prods. Corp.,
15 F.3d 748 (8th Cir. 1994).

2. Did the district court err in concluding that the record contained no evidence that United Taconite relied on Atlas Copco's misrepresentation or that United Taconite sustained damage during the lease period?

Most apposite authority:

Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.,
736 N.W.2d 313 (Minn. 2007).

3. Did the district court err in dismissing United Taconite's misrepresentation claim by ignoring evidence favorable to United Taconite and weighing other evidence in the light most favorable to Atlas Copco?

Most apposite authority:

Richfield Bank & Trust Co. v. Sjogren,
244 N.W.2d 648 (Minn. 1976);

Klein v. First Edina Nat'l Bank,
196 N.W.2d 619 (Minn. 1972).

4. Because the district court erred in dismissing United Taconite's intentional misrepresentation claim, did it also err in dismissing United Taconite's rescission claim?

Most apposite authority:

Bogatzki v. Hoffman,
430 N.W.2d 841 (Minn. Ct. App. 1988).

5. Did the district court err by denying United Taconite's motion for leave to amend to add a claim for punitive damages when it applied an incorrect legal standard and ignored its own finding that the record contained *prima facie* evidence that Atlas Copco acted in deliberate disregard for the rights or safety of others?

Most apposite authority:

Jensen v. Walsh,
623 N.W.2d 247 (Minn. 2001);

Molenaar v. United Cattle Co.,
553 N.W.2d 424 (Minn. Ct. App. 1996);

Minn. Stat. § 549.191 (2009).

STATEMENT OF THE CASE

Deane Driscoll died on April 18, 2007, when the large blasthole drill he was operating experienced a catastrophic failure of one of its leveling jacks and tipped over. Following the accident, Nancy Driscoll, as trustee of the next-of-kin of Deane Driscoll, brought a wrongful death action against Atlas Copco Drilling Solutions LLC (“ACDS”), the drill’s manufacturer, and Standard Hardware, Inc., the entity that supplied the bolts for the leveling jack. Atlas Copco then brought third-party claims for indemnity and contribution against United Taconite, Deane Driscoll’s employer and the owner of the mine where the accident occurred.

In turn, United Taconite asserted counterclaims against Atlas Copco, including fraud, misrepresentation, negligence, strict liability,¹ breach of warranty, and rescission as a result of Atlas Copco’s lease and eventual sale of the defective drill.² In addition, United Taconite filed a fourth-party complaint against two other Atlas Copco entities, Atlas Copco Construction Mining Technique, LLC (“ACCMT”) and Atlas Copco Customer Finance, LLC (“ACCF”), that were involved in the lease and sale of the

¹ United Taconite asserted negligence and strict liability claims against the drill’s manufacturer, ACDS, because the economic loss doctrine applies only to the “seller” of defective goods and there was no evidence that ACDS sold anything. In addition, even if the economic loss doctrine applied to ACDS, United Taconite could still bring negligence and strict liability claims to recover damage the Pit Viper drill caused to “other tangible personal property or real property,” *i.e.*, the loss of an area of the Mine where I-Beams were installed to stabilize and raise the Pit Viper. (App. 510-12, 515.) The district court nonetheless concluded that the economic loss doctrine barred these claims against ACDS, and United Taconite does not appeal that ruling.

² United Taconite also brought a claim for indemnification of the worker’s compensation benefits it paid as a result Deane Driscoll’s death. Atlas Copco did not seek summary judgment on this claim and it is still pending (but stayed) before the district court.

defective drill (collectively the three Atlas Copco entities are referred to as “Atlas Copco”).

On March 23, 2009, Atlas Copco filed a motion for partial summary judgment on United Taconite’s fraud, misrepresentation, negligence, strict liability, breach of warranty and rescission claims. United Taconite responded on April 10, 2009. On April 16, 2009—just five days before oral argument—Atlas Copco raised for the first time several new arguments that were not included in its original motion.

On April 3, 2009, Driscoll and United Taconite filed separate motions for leave to amend to add claims for punitive damages. Discovery had revealed that Atlas Copco blatantly misrepresented the drill’s capabilities and failed to disclose known design defects in the leveling jacks even after receiving report after report of leveling jack failures.

On April 21, 2009, the district court, the Honorable Gary J. Pagliaccetti presiding, heard the motions for leave to amend and Atlas Copco’s motion for partial summary judgment. On May 6, 2009, the district court granted Driscoll’s motion for leave to add a claim for punitive damages, finding that Driscoll had “provided sufficient evidence to allow a jury to reasonably conclude by clear and convincing evidence that . . . Atlas Copco acted in deliberate disregard for the rights and safety of others.” The following day, though, the district court denied United Taconite’s same motion, finding that United Taconite had “provided insufficient evidence to allow a jury to reasonably conclude by clear and convincing evidence that . . . Atlas Copco acted in deliberate disregard for the rights and safety of others.” Finally, on May 28, 2009, the district court granted Atlas

Copco's motion for partial summary judgment and dismissed United Taconite's fraud, misrepresentation, negligence, strict liability, breach of warranty, and rescission claims.³

At a June 11, 2009, pre-trial conference, Driscoll settled her claims against Atlas Copco. The remaining parties stipulated—and the court agreed—that the most efficient course was to stay the pending claims and direct entry of a final partial judgment against United Taconite on its dismissed claims so that United Taconite could immediately appeal the summary judgment order and the order denying United Taconite's motion for leave to amend to add a claim for punitive damages. On September 23, 2009, the district court entered an order directing entry of a final partial judgment against United Taconite pursuant to Rule 54.02 of the Minnesota Rules of Civil Procedure. Judgment was entered on October 8, 2009. United Taconite then filed this timely appeal.

³ On June 1, 2009, United Taconite requested permission to bring a motion to reconsider based on the district court's clear misapplication of Minnesota law. The district court denied the request, but issued an Amended Order to correct "clerical errors" on June 3, 2009.

STATEMENT OF FACTS

I. ATLAS COPCO'S SALES PITCH—THE PIT VIPER CAN HANDLE THE SLOPES AT THE MINE.

United Taconite operates the Thunderbird Mine, a taconite mine in Eveleth, Minnesota (the "Mine"). (App. 532.)⁴ The Mine consists of a series of "benches" that correspond to elevations within the Mine. (*Id.*) A series of planned drill holes on a particular bench is referred to as a "pattern." (*Id.*) These benches, and particular patterns on the benches, have slopes that vary from near level to ten degrees or more. (*Id.*)

In 2005, United Taconite utilized three electric-powered drills to drill blastholes into the ore body of the Mine. (*Id.*) On benches with steeper slopes, United Taconite used a drill manufactured by Gardner Denver that was over 25 years old. (*Id.*) In late 2005, United Taconite planned to drill in the North Auburn area of the Mine, which did not have the electrical infrastructure necessary to power its current fleet of drills. (*Id.*) Thus, United Taconite had to either extend the electrical infrastructure into the North Auburn area or purchase a new drill that was powered by something other than electricity. (*Id.*)

Atlas Copco, which was looking to break into the Iron Range market, approached United Taconite and claimed that it could offer United Taconite a solution to its North Auburn issue—a diesel-powered drill called the Pit Viper. (App. 288, 524-25.) On December 1, 2005, Atlas Copco employee Ed Borchardt, who was familiar with United

⁴ References to Appellant's Appendix are denoted "App." followed by corresponding page number(s). References to Appellant's Addendum are denoted "Add." followed by the corresponding page number(s).

Taconite through his frequent visits to the Mine to sell drill bits, made a sales presentation to United Taconite. (App. 291.) At this meeting, United Taconite made clear that it was interested in a new drill to replace its Gardner Denver drill, and that the new drill needed to have at least the same slope capability. (App. 532-33.) The United Taconite employees who heard Atlas Copco's sales pitch testified that they would not have even considered the Pit Viper if it was not able to drill on the slopes of the Mine. (App. 533.) With that knowledge, Borchardt contacted the "head design engineer" for the Pit Viper and reported back that the Pit Viper should not have a problem drilling on 20% (11.5 degrees) slopes at the Mine. (App. 292.)

Around this same time, Bill Everett, United Taconite's blasthole engineer, was invited to visit Atlas Copco's factory in Garland, Texas, to learn more about the Pit Viper. (App. 296.) Everett again told Atlas Copco representatives that United Taconite was looking to replace its aging Gardner Denver drill and needed a drill that could handle the same slopes. (App. 297.) Atlas Copco represented to Everett that the twelve-degree slopes that the Gardner Denver worked on would be no problem for the Pit Viper. (App. 296, 297.) In fact, Atlas Copco told Everett that the drill could operate on slopes as steep as twenty degrees. (App. 296.) Atlas Copco also told Everett that it was conducting "tip tests" to verify the maximum angle on which the Pit Viper could operate. (App. 297.) Atlas Copco later sent United Taconite a picture of the tip test showing the Pit Viper positioned at an extreme angle. (App. 299-300.)

II. THE PARTIES NEGOTIATE A ONE-YEAR LEASE AGREEMENT WITH AN OPTION TO BUY.

After the December 1, 2005 sales presentation, Borchardt testified that there was no binding agreement, but rather the parties had only started to negotiate the Pit Viper deal. (App. 289.) Atlas Copco provided a proposal to United Taconite that would allow United Taconite to lease the Pit Viper for one year before United Taconite had to decide whether it wanted to buy the drill. (App. 301-04.) The parties negotiated terms for several months. (*See, e.g.*, App. 305-07, 308-11.)

Because the drill would cost about \$3 million, United Taconite had to receive corporate authority before it could enter into a contract with Atlas Copco, which it did not receive until mid-February 2006. (App. 318-20, 330-33.) In its request for authority to the corporate office, United Taconite explained the reasons for wanting to bring the Pit Viper to the Mine—the Pit Viper “has the ability to drill into the steep scarps that are being exposed in the new part of our pit” and it has a “‘live’ mast to allow the operator to adjust the mast to drill a vertical hole on a slope that the drill itself cannot level on.” (App. 332.)

A lease agreement was finally entered into in late February 2006 that provided for two consecutive six-month terms and an option to buy at the end of the year. (App. 323-29.) United Taconite employees involved with the negotiations testified that if, at any point during the negotiations, Atlas Copco would have told United Taconite that the Pit Viper could not handle the Mine’s slopes, the negotiations would have ended and United Taconite would not have leased the drill. (App. 533.)

Atlas Copco viewed the lease as a chance to greatly increase its revenue because it had never before been able to sell a drill to a mine in the Minnesota Iron Range. (App. 334.) In Atlas Copco's estimation, the lease could lead to "potentially 40 million worth of new business for Atlas Copco CMT USA over the next 1-3 years" and word went out to the company's employees that they needed to do what was necessary to make the lease successful. (*Id.*; App. 519-25.)

III. THE DESIGN AND DEVELOPMENT OF THE PIT VIPER.

The Pit Viper 351 drill was the largest blasthole drill Atlas Copco ever built. (App. 112.) Weighing in at over 400,000 pounds, the Pit Viper had a ninety-foot-tall mast and was propelled by bulldozer-like tracks. (App. 996.) The Pit Viper used four hydraulic jacks, each with approximately six feet of extension, to lift the drill off of its tracks and level it over the hole to be drilled. (App. 996-97, 1001.) Not only must the jacks carry the entire weight of the Pit Viper, they must also withstand vibrations and other cyclic loads that can result in fatigue cracking of the jack components. (App. 870.)

The jacks of the Pit Viper were designed by Marcus Hammack, a recent engineering graduate with no prior experience designing jacks for heavy equipment. (App. 111-12, 115.) Hammack testified he was not aware of any applicable codes governing the design of the jacks and stated, "It was strictly based on what we knew worked from previous designs and going from there." (App. 113-14.) Hammack stated that, rather than starting from scratch, he basically copied the design of the jacks used on the smaller machines. (App. 113, 121.) Hammack admitted that he did not consider cyclic loading when he designed the jacks. (App. 117, 118, 516-18.) He sized the

components of the jacks, including the welds and bolts, such that stresses exceeded allowable limits for fatigue. (App. 990.) There is no evidence that anyone at Atlas Copco checked Hammack's calculations prior to the Driscoll accident.

In 2005, Atlas Copco considered changing the material used to manufacture the Pit Viper's jacks to a lower grade/strength of steel. (App. 147.) Jeff Hamner, the Pit Viper project manager, asked Dr. Stephen Ma, an Atlas Copco engineer, to conduct a structural analysis to determine whether it would be safe to use the lower grade of steel. (App. 146-47.) Dr. Ma's analysis showed that the new material would yield when maximum pressure was applied and that there was virtually no safety factor for anticipated loads. (App. 148, 151, 161.) Dr. Ma also observed that even when using the original, stronger steel, the stress placed on the jack under maximum load was close to yield conditions. (App. 148-50, 160.) Based on his analysis, Dr. Ma concluded that the jack needed to be reinforced. (App. 151.)

Despite Dr. Ma's observations, Hamner conceded that he did not review the original design calculations for the jacks and did not ask Dr. Ma to undertake any additional analysis. (App. 179, 1451.) Instead, Arnold Law, Atlas Copco's Vice-President of Engineering, approved the use of the lower grade steel. (App. 226-27.) Atlas Copco did not share with United Taconite either Dr. Ma's analysis or the fact that the drill it was receiving was made with a lower grade of steel—making the jacks even more susceptible to fatigue cracking. (App. 533.)

IV. THE PIT VIPER ARRIVES AT THE MINE AND ATLAS COPCO TRAINS UNITED TACONITE'S DRILLERS.

The Pit Viper drill arrived at the Mine on March 2, 2006, and was operational by March 16, 2006.⁵ Atlas Copco's Bill Walker and Steve Beck began training United Taconite's drill operators on March 17, 2006. (App. 335-43.) Walker left the Mine on April 5, 2006. (*Id.*) For an extra \$10,000 per month, Beck remained at the Mine to continue training the operators and to serve as the Pit Viper's mechanic during the lease period. (App. 354.)

The Operating, Safety and Maintenance Manual for the drill provided no instructions related to slope limitations for drilling. (App. 401-05.) Consistent with Atlas Copco's previous representations, however, the manual did state that "[t]he drill comes equipped for operation on slopes *not exceeding 20 degrees inclination*" and that the drill was "not designed for use on inclined surfaces greater than those defined in the PV351E Blasthole Stability/Gradeability Chart." (App. 366, 367 (emphasis in original).) In addition, the manual stated that a Pit Viper with the "angle drilling" option could drill holes "as much as 30 degrees beyond vertical." (App. 369.)

For the first few months of the lease period, United Taconite operated the Pit Viper on relatively flat patterns. (App. 533.) On June 19, 2006, United Taconite exercised the six-month renewal provision in the lease because the drill had yet to operate in the winter and United Taconite wanted to see if it could handle -40°F temperatures. (App. 370, 533.) According to United Taconite's mine manager, the drill would have

⁵ At this time, there were only twenty Pit Viper's in the field worldwide. (App. 138-40.)

been useless to United Taconite if it could not handle the Iron Range's winter temperatures. (App. 533.)

V. THE PIT VIPER FAILS TO LIVE UP TO ATLAS COPCO'S PROMISES.

In July 2006, United Taconite was planning to drill pattern 1575-0602, the first pattern on which United Taconite would utilize the slope capabilities promised by Atlas Copco. (App. 533.) Steve Thompson, one of United Taconite's drill operators, moved the Pit Viper to the 1575-0602 pattern, but was uncomfortable drilling on the slope and decided to remove the drill from the pattern. (App. 376-78.) United Taconite's drilling and blasting engineer, Mike Indihar, asked Atlas Copco to verify that the Pit Viper could drill on the slope. (App. 386.)

On August 2, 2006, Borchardt sent an e-mail to Indihar saying that Atlas Copco was going to send Brian Scoggin, a drill trainer who had operated the Pit Viper on 10-degree slopes, to assist United Taconite with the 1575-0602 pattern. (App. 407.) When Scoggin arrived at the Mine, Beck took him to the 1575-0602 pattern, and Scoggin measured it to have, at its steepest point, a 17-degree slope. (App. 414-16.) Scoggin told United Taconite that the Pit Viper was not capable of drilling on a 17-degree slope. (*Id.*) Scoggin recommended that the drill not be used on drill end-to-drill end slopes exceeding 6.25 degrees. (App. 416.) Scoggin said this was only his recommendation, not the drill's actual limit. (App. 416, 417-19.) Atlas Copco later disclosed that the Pit Viper could level on about a 10 degree slope. (App. 424-26.)

After Scoggin left the Mine, United Taconite hired an outside contractor to terrace the 1575-0602 pattern and reduce its slope. (App. 515, 537.) United Taconite moved the

Pit Viper to another bench while the contractor was working on 1575-0602, and when the contractor was done, United Taconite finished drilling 1575-0602 with the Pit Viper and the assistance of Atlas Copco's Steve Beck. (App. 537.)

Over the next several months, the Pit Viper worked on several different patterns in the North Auburn area. (App. 537.) United Taconite never put the Pit Viper back on a pattern with a 17-degree slope and did not operate the drill where it could not be leveled. (*Id.*) Many of the patterns drilled in this period had slopes similar to the slope of the pattern where the accident later occurred. (*Id.*) Beck, the Atlas Copco mechanic and trainer, went with the Pit Viper to each of these patterns, and he never voiced concern over the slopes of these patterns. (App. 350-51, 352-53, 355, 356, 379, 537.) In fact, Beck testified that he never saw the Pit Viper operated in an unsafe manner on any of these patterns. (App. 355-56.)

VI. ATLAS COPCO'S KNOWLEDGE OF BOLT AND WELD FAILURES ON OTHER PIT VIPERS.

In mid-February 2007, approximately two months before the jack failure that killed Deane Driscoll, Atlas Copco received a report that a jack on a Pit Viper sold to a mine in Indonesia had cracks in the welds connecting the jack tube to the flange. (App. 427-30.) No one from Atlas Copco informed United Taconite of this failure. (App. 534.)

In March 2007, United Taconite decided to purchase the Pit Viper drill. Despite its disappointment with the drill's inability to handle slopes beyond its leveling capacity, United Taconite had several reasons for purchasing the Pit Viper: (1) the North Auburn area did not have electrical infrastructure; (2) the Pit Viper had the apparent capability of

handling the Iron Range's winters and drilling 16-inch holes; and (3) it would take 12-18 months for United Taconite to obtain another new drill. (App. 534.) One of the Atlas Copco entities, ACCF, tried to get United Taconite to sign a purchase agreement that incorporated the warranty disclaimers in the lease, but United Taconite refused to do so. (App. 434-37.) Instead, ACCF sent an invoice without disclaimers and United Taconite paid it. (App. 438.) At no point during these discussions did anyone from Atlas Copco disclose their knowledge of the weld cracks on the Indonesian Pit Viper or the fact that these cracks were in known high-stress areas. (App. 534.) The United Taconite employees involved in the sale, however, testified that had they known about the information being concealed by Atlas Copco, they would not have purchased the Pit Viper and would not have operated the drill until the deficiencies were corrected. (*Id.*)

On April 11, 2007, a week before Driscoll's death, Atlas Copco received another report that jacks on two Pit Vipers in Chile had failed. (App. 439-50, 451-53.) Pictures of the precise area of the jacks that had been analyzed by Dr. Ma showed broken bolts and a cracked jack cap. (App. 442-50.) Odee Daigle, an Atlas Copco engineer with significant experience in drill design, examined the Chilean failure and within 24 hours made several suggestions to Hamner about how to fix the Chilean drill and make modifications to new drills in production. (App. 462-64, 468.) Arnold Law, the Vice-President of Engineering, admits that he knew Atlas Copco had a problem. (App. 215-19.) Yet, no one from Atlas Copco contacted United Taconite employees to inform them of the problem. (App. 534.) If Atlas Copco would have warned United Taconite, United

Taconite employees testified that they would have shut down the drill and checked its jacks for broken bolts and cracked welds. (*Id.*)

Five days before the Driscoll accident, Hamner contacted Atlas Copco's India design team and asked them to repeat Ma's 2005 analysis to determine whether the Indian team could develop a solution that could avoid replacing all the jacks in the field.

(App. 231.) Hamner stated:

Steven found high stress in the bolts and at the toe of the tube welds adjacent to the bolts. Your model should show the same results as Steven's as a starting point. Then I want to see if we can find a less radical solution . . . to a failure problem besides replacing all the jacks in the field.

(*Id.* (emphasis added).)

On April 17, 2007, the day before the accident, Atlas Copco's Engineering Department received another report of a broken jack on one of the Chilean Pit Viper drills. (App. 451-53.) The report also stated that the other jacks on the two Pit Vipers from the April 11 report were checked and an additional six to eight broken bolts were found on the jacks. (*Id.*) Still, no one from Atlas Copco contacted United Taconite to inform it of the problem. (App. 534.)

Finally, on the morning of the accident, Atlas Copco received information that yet another Pit Viper—this one in Canada—experienced a jack failure.⁶ (App. 221, 482.) Again, no one from Atlas Copco informed United Taconite of the failure or suggested that the Pit Viper's jacks be inspected for cracks. (App. 534.) Instead, pursuant to Atlas

⁶ Atlas Copco later determined that between 25% and 50% of the approximately twenty Pit Vipers in the field on the day of the accident had broken jacks. (App. 222.)

Copco's practice of "control[ing] the flow of information" to the customer, the decision was made to contact Atlas Copco's sales and service representatives and have them inspect the Pit Viper jacks in their region. (App. 103-04, 483-85, 491-500.) Mike Cash, Atlas Copco's product support supervisor for the Pit Viper contacted Beck to have him check the jacks on United Taconite's Pit Viper, but, by this time, Beck was in Nevada at another job site, so Cash moved on to the next region's representative. (App. 486-87.) Neither Cash nor anyone else from Atlas Copco contacted United Taconite directly to warn them about the broken bolts and cracked jacks. (*Id.*; App. 534.)

Just before 11:00 a.m. on April 18, 2007, Deane Driscoll was operating the Pit Viper on a well-prepared bench in the Mine. (App. 534.) As Driscoll was in the process of leveling the Pit Viper, one of the drill end jacks failed catastrophically. (*Id.*) The jack failure resulted in Driscoll's death and a total loss of United Taconite's \$3 million drill as it tipped over the edge of the Mine. (*Id.*)

SUMMARY OF ARGUMENT

Issue No. 1—The district court erred in dismissing United Taconite’s U.C.C. warranty claims.

The district court dismissed United Taconite’s claims for breach of warranty by invoking the economic loss doctrine. This was error because the economic loss doctrine is inapplicable to warranty claims and is intended only to prevent a party to a sales contract from bringing tort claims to recover economic damages. The doctrine not only allows, *but requires*, parties to a contract to recover economic damages through contract and U.C.C. breach of warranty remedies. As required by the economic loss doctrine, United Taconite asserted U.C.C. warranty claims and properly sought to recover its economic losses.

The district court also erred by applying the concept of “merger.” This concept was developed merely to assist district courts in selecting jury instructions that afford the plaintiff the broadest relief possible while at the same time avoiding duplicative instructions. The district court applied merger at the summary judgment stage, and did so in a manner that gave United Taconite no avenue for relief rather than the broadest relief possible, concluding that United Taconite’s warranty claims were “merged” into its strict liability claim and therefore barred by the economic loss doctrine.

Finally, even if the concept of merger somehow applied, the district court erred in merging United Taconite’s breach of warranty for fitness of particular purpose claim, which, under Minnesota law, cannot be merged into strict liability or negligence claims.

Issue No. 2—The district court erred in dismissing United Taconite’s fraud claim.

The district court dismissed United Taconite’s fraud claim on the grounds that United Taconite did not provide evidence that it relied on Atlas Copco’s misrepresentations. This was error because United Taconite presented ample evidence to raise a fact question for the jury on the issue of reasonable reliance. The district court ignored this evidence and improperly based its decision on evidence that United Taconite did not learn about until *after* the parties entered into the lease agreement.

The district court also ruled that United Taconite’s fraud claim should be dismissed because United Taconite did not suffer any damages as a result of Atlas Copco’s misrepresentations during the lease period. This was error because the district court ignored evidence of damages United Taconite suffered as a result of Atlas Copco’s misrepresentations about the Pit Viper being able to drill on the same slopes as the Gardner Denver drill (*i.e.*, the contractor brought in to level one of the patterns). These costs were incurred during the lease period.

Issue No. 3—The district court erred in dismissing United Taconite’s intentional misrepresentation claim.

The district court dismissed United Taconite’s misrepresentation claim because, in the court’s view, Atlas Copco did not know that the Pit Viper’s jacks were dangerous. This was error for two reasons. First, the district court improperly weighed the evidence, and did so in a light that was not most favorable to United Taconite, the non-moving party. The evidence viewed in a light most favorable to United Taconite shows that Atlas Copco knew that the Pit Viper’s jacks were improperly designed. In fact, two Atlas

Copco engineers conceded this fact. Second, the district court ignored additional evidence that showed Atlas Copco was aware that the Pit Viper was defectively designed prior to the sale of the drill to United Taconite, including reports of jacks breaking on other Pit Vipers in the same high-stress area identified in the Ma Report. At a minimum, this evidence creates a genuine issue of material fact regarding Atlas Copco's knowledge of the jack's dangerous design.

Issue No. 4—The district court erred in dismissing United Taconite's rescission claim.

The district court erred in dismissing United Taconite's intentional misrepresentation claim. In light of the genuine issues of material fact that exist with respect to the intentional misrepresentation claim, the district court necessarily erred in dismissing United Taconite's rescission claim.

Issue No. 5—The district court erred in denying United Taconite's motion to amend to add claims for punitive damages.

The district court held that United Taconite was not entitled to punitive damages because it suffered property damage only. This was error because, under Minnesota law, a plaintiff is entitled to recover punitive damages so long as it can show that the defendant acted with deliberate disregard for the rights or safety of others regardless of the type of damage suffered. In cases such as this one, the district court must focus on the defendant's conduct, not the harm suffered by the plaintiff. The district court applied an incorrect legal standard.

Further, Minnesota law mandates that a court grant a moving party permission to amend its pleadings to claim punitive damages when the court finds that the record

contains *prima facie* of a deliberate disregard for the rights and safety of others. Here, the district court erred in denying United Taconite's motion for leave to add a claim for punitive damages when the Court had already determined (for Plaintiff Driscoll) that the same evidence established that Atlas Copco acted with a deliberate disregard for the rights and safety of others.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING ATLAS COPCO'S MOTION FOR SUMMARY JUDGMENT.

A. Standard Of Review.

A district court's decision on a motion for summary judgment is subject to *de novo* review on appeal. *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 827 (Minn. 2000). This Court has recognized that summary judgment is a blunt instrument that "should be employed only where it is perfectly clear that no issue of fact is involved, and that it is not desirable [or] necessary to inquire into facts which might clarify the application of the law." *Carlson v. Sala Architects, Inc.*, 732 N.W.2d 324, 329 (Minn. Ct. App. 2007) (quoting *Donnay v. Boulware*, 144 N.W.2d 711, 716 (Minn. 1966)). On an appeal from summary judgment, the reviewing court must view the evidence in a light most favorable to the party against whom judgment was granted and ask two questions: (1) whether there are any genuine issues of material fact, and (2) whether the district court erred in its application of the law. *Id.*; *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Application of these principles here compels reversal.

B. The Economic Loss Doctrine Does Not Apply To Bar United Taconite's Warranty Claims.

The district court dismissed United Taconite's warranty claims, concluding that such claims were barred by the economic loss doctrine. The district court erred because

it (1) misapplied the economic loss doctrine, and (2) misapplied the “merger” concept to improperly recast warranty claims as strict liability claims.⁷

1. The economic loss doctrine does not bar warranty claims seeking economic damages.

The economic loss doctrine establishes a line between contract and tort law, requiring courts to distinguish between economic loss and non-economic loss. Minn. Stat. § 604.101, Reporter’s Notes—Role and Scope of the Statute (2009). Economic losses are those damages (including incidental and consequential damages) suffered by a purchaser when, because of a defect in the product, the product fails to function as it should and the purchaser loses the bargained for value of the product. *Lloyd F. Smith Co. v. Den-Tal-Ez, Inc.*, 491 N.W.2d 11, 15 (Minn. 1992). In contrast, non-economic losses are damages suffered by a purchaser when a defective product causes damage, not to itself, but to a person or other property. *Id.* The distinction between non-economic loss and economic loss establishes the particular avenue available for recovery—damages determined to be economic loss are recoverable only under contract theories, and damages considered to be non-economic loss are recoverable only under tort theories. *Id.*

The purpose of the economic loss doctrine is to protect contract remedies from being emasculated by tort law. *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159, 162 (Minn. 1981), *overruled by Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990). The doctrine expresses a philosophy that parties to sales contracts are able to

⁷ In violation of Rule 115.03(c) of the Minnesota General Rules of Practice for the District Courts, Atlas Copco raised the “merger” defense for the first time in its reply brief, which did not allow United Taconite an opportunity to respond in writing. (App. 553-54.)

allocate the risk associated with a product failing to perform, and the doctrine prevents parties from using tort law to alter or avoid the bargain struck between them in the sales agreement. As the Minnesota Supreme Court has stated: “When there is a claim by a buyer for damages to the defective product itself (and this includes consequential damages), the U.C.C. remedy is exclusive and tort will not lie.” *Lloyd F. Smith Co.*, 491 N.W.2d at 15; *see also* Ralph C. Anzivino, *The Economic Loss Doctrine: Distinguishing Economic Loss From Non-Economic Loss*, 91 MARQ. L. REV. 1081, 1082 (2008) (“According to the economic loss doctrine, a buyer who purchases a defective product and suffers ‘solely economic loss’ is required to recover his damages through contract law, including the Uniform Commercial Code (U.C.C.).”).

Here, United Taconite asserted U.C.C.-based warranty claims and sought to recover economic loss under these contract theories:

- For its Breach of Warranty of Merchantability claim, United Taconite sought to recover the difference in value of the Pit Viper at the time of sale and the value the drill would have had if it would have worked properly to drill in mines in the Minnesota Iron Range (plus incidental and consequential damages). (App. 11.)
- For its Breach of the Warranty of Fitness for a Particular Purpose claim, United Taconite sought to recover the difference in value of the Pit Viper at the time of the sale and the value the Pit Viper would have had if it had been fit for the particular purpose warranted by Atlas Copco (plus incidental and consequential damages). (App. 12.)

Under Minnesota law, a seller whose product breaches implied warranties is liable for the economic loss caused by the breach, *i.e.*, the difference between the value the purchaser paid for the product and the value of the product the purchaser received (plus

incidental and consequential damages).⁸ 4 Minn. Practice, Jury Instruction Guides—Civil § 22.70 (5th ed). United Taconite asserted the exact type of claims and seeks the exact type of damages that the economic loss doctrine allows. The district court erred as a matter of law in dismissing United Taconite’s warranty claims on the grounds that they are barred by the economic loss doctrine.

2. The District Court misapplied the concept of merger.

The district court compounded its error by concluding that United Taconite’s U.C.C. warranty claims were “merged” into its strict liability claim. The district court misapplied the concept of merger. Minnesota’s Jury Instruction Guides (“JIGs”) reflect that the purpose of “merger” is merely to assist the district court in selecting the appropriate jury instructions. See 4 Minn. Practice, Jury Instruction Guides—Civil pt. III, category 75, introductory note. The JIGs state that a district court should not give both warranty of merchantability and strict liability instructions in the same case. *Id.* In certain cases, it is appropriate to use the warranty of merchantability instruction, and in other cases, a court should use the negligence or strict liability instruction. 4 Minn. Practice, Jury Instruction Guides—Civil § 22.25 use notes. The JIGs state that in cases such as this one, where the injured party suffers damage that is not covered under product liability theories—for example, economic loss unaccompanied by physical injury—a court should use the warranty of merchantability instruction, not the strict liability or

⁸ In Minnesota, implied warranties are interpreted broadly so as to promote high standards in business relations. *Dougall v. Brown Bay Boat Works & Sales, Inc.*, 178 N.W.2d 217, 222 (Minn. 1970) (quoting *Beck v. Spindler*, 99 N.W.2d 670, 680 (Minn. 1959)).

negligence instructions. 4 Minn. Practice, Jury Instruction Guides—Civil pt. III, category 75, introductory note.

The concept expressed in the JIGs makes sense because virtually all breach of warranty of merchantability claims are based on a product defect either in its design or manufacture. As one commentator explained:

The warranty most likely to arise out of the sale of a product is an implied warranty of merchantability. A claim for breach of this warranty is, however, the least likely to add anything to tort-based claims for product defect. This is the case simply because a product that is “defective” in tort law terms is not merchantable and vice-versa. Indeed, the courts have gone so far as to say that, in cases of personal injury, strict product liability tort claims have effectively preempted implied warranty claims. *However, there may be some instances in which the breach of an implied of merchantability claim will succeed where a tort claim that the product is defective will not. That would be the case, for example where the buyer suffers only an economic loss. Then she may not pursue tort claims at all and must resort to a warranty theory for recovery of such losses.*

J. David Prince, *Defective Products and Product Warranty Claims in Minnesota*, 31 WM.

MITCHELL L. REV. 1677, 1690-91 & n.63 (2004-05) (emphasis added) (citation omitted).

To declare, as the district court did here, that *any* breach of warranty of merchantability claim based on a product being defective is really a strict liability claim and thus barred by the economic loss doctrine, is to effectively declare that all warranty of merchantability claims are barred by the economic loss doctrine. There is no precedent in Minnesota law to support such a sweeping result. Indeed, as discussed above, the district court’s decision runs counter to the very purpose of the economic loss doctrine—preserving the distinction between contract and tort remedies.

The sole case the district court cited for its sweeping decision, *Bilotta v. Kelley Co.*, 346 N.W.2d 616 (Minn. 1984), does not support the district court's holding. *Bilotta* involved an appeal of a jury verdict against a manufacturer. *Id.* at 618-19. On appeal, the manufacturer argued that the district court provided the jury with improper instructions for the plaintiff's design defect claim, and that, as a result of the district court submitting both strict liability and negligence instructions, it was unclear whether the jury answered the special verdict form based on the district court's erroneous design defect instruction. *Id.* at 623. The supreme court agreed and held a new trial was required on the issue of liability. *Id.* In analyzing the district court's design defect instruction, the supreme court stated in dicta that strict liability and negligence claims may "merge" into one theory of recovery for purposes of jury instructions in order to avoid confusion and inconsistent verdicts, so long as the court's instructions ensure the plaintiff the broadest possible theory of recovery. *Id.* at 622-23.

The district court's reliance on *Bilotta* to dismiss United Taconite's warranty claims outright cannot be countenanced. The dicta in *Bilotta* involves simplifying jury instructions to avoid jury confusion and inconsistent verdicts, *not* the merging of claims at the summary judgment stage for the purpose of eliminating claims. In fact, the *Bilotta* court emphasized that the jury should be instructed so as to provide the plaintiff with the broadest theory of recovery. *Id.* at 623.

Here, instead of providing United Taconite with the broadest theory of recovery, the district court used the concept of "merger" to bar United Taconite's warranty claims altogether. United Taconite spent over \$3 million on a drill that, as a result of being

defectively designed, catastrophically failed a year after it was delivered to the Mine and killed one of United Taconite's employees. The district court concluded, however, that United Taconite cannot recover in either tort or contract because both theories are barred by the economic loss doctrine. United Taconite is thus left without a remedy for its purchase of a \$3 million drill that even the manufacturer concedes was defectively designed. Neither *Bilotta* nor the JIGs support such a radical departure from existing law.

Even if it were appropriate to morph United Taconite's breach of warranty of merchantability claim into a strict liability claim at the summary judgment stage, the district court erred in also merging United Taconite's claim for breach of the implied warranty of fitness for a particular purpose. In fact, under the dicta in *Bilotta*, claims for breach of the implied warranty of fitness for a particular purpose are *not* merged into strict liability or negligence claims. *Piotrowski v. Southworth Prods. Corp.*, 15 F.3d 748, 751 (8th Cir. 1994) (holding that, even under the dicta in *Bilotta*, the implied warranty of fitness for a particular purpose is distinct from a strict liability claim and as such does not merge into strict liability when submitting case to the jury); 4 Minn. Practice, Jury Instruction Guides—Civil pt. III, category 75, introductory note (stating that instructions for the implied warranty of fitness for a particular purpose are not preempted by the product liability instructions).

An implied warranty of fitness for a particular purpose is "similar to an express warranty, where statements or representations may provide grounds for imposing liability even if the product was not defective in the sense of a design defect." *Piotrowski*, 15 F.3d at 751 (citation omitted). As such, the district court erred in concluding that United

Taconite's warranty of fitness for a particular purpose claim was really a strict liability claim and barred by the economic loss doctrine. The district court's misapplication of law must be reversed.

C. The District Court Erred In Dismissing United Taconite's Fraud Claim On The Grounds That United Taconite Failed To Show Reliance And Did Not Suffer Damages During Lease Period.

1. This record contains evidence that United Taconite reasonably relied on Atlas Copco's misrepresentations in deciding to enter into the lease agreement.

Under Minnesota law, the reasonableness of a party's reliance is ordinarily a fact question for the jury. *Hoyt Props., Inc. v. Prod. Res. Group, L.L.C.*, 736 N.W.2d 313, 321 (Minn. 2007) (citation omitted). Here, United Taconite presented ample evidence to raise a fact question for the jury on the issue of reasonable reliance. The evidence demonstrates that United Taconite told Atlas Copco that the ability to drill on the same slopes as its aging Gardner Denver drill was a crucial issue in the lease negotiations. In response, Atlas Copco represented on numerous occasions that the Pit Viper could handle the same slopes as the Gardner Denver drill:

- Atlas Copco's salesman, Ed Borchardt, who was familiar with the Mine represented to United Taconite that the Pit Viper would have no problem drilling on 20% (11.5 degrees) slopes.
- Atlas Copco invited Bill Everett, United Taconite's then-blasthole engineer, to its factory to learn more about the Pit Viper drill. Atlas Copco represented to Everett that the 12-degree slopes that the Gardner Denver worked on would be no problem for the Pit Viper. In fact, Atlas Copco told Everett that the drill could operate on slopes as steep as 20 degrees.
- Atlas Copco also told Everett that it was conducting "tip tests" to verify the angle on which the Pit Viper could operate.

- Atlas Copco later sent United Taconite a picture of the tip test showing the Pit Viper positioned at an extreme angle.

Prior to signing the lease agreement, Atlas Copco did not correct its misrepresentations. It was not until July 2006—after United Taconite was already locked into the second of the two six-month lease terms—that United Taconite learned that the Pit Viper could not handle the same slopes as its Gardner Denver drill. Under these circumstances, whether United Taconite reasonably relied on Atlas Copco’s misrepresentations is properly a question for the jury.

In fact, the district court acknowledged that United Taconite reasonably relied on Atlas Copco’s misrepresentations, stating that “it is likely that had the slope limitations been presented at the lower figure prior to the lease the deal would not have come to fruition.” (Add. 12.) The district court’s non-reliance holding seems to be based on a misunderstanding of the nature and scope of the fraud claim. As its Amended Counterclaim and Opposition to Atlas Copco’s Motion for Summary Judgment explain, United Taconite’s fraud claim is focused on the misrepresentations that induced it to enter into the lease agreement. (App. 7, 20.) The district court, however, focused on information United Taconite learned *after* the lease agreement was signed and renewed to discount United Taconite’s reasonable reliance. (Add. 12.) When its fraud claim is properly viewed as involving only those representations made before the lease was executed and renewed, United Taconite has satisfied its burden to establish a genuine issue of material fact as to reasonable reliance.

2. This record contains evidence that United Taconite sustained damage as a result of Atlas Copco's misrepresentations.

In fraud actions, Minnesota applies the "out-of-pocket-loss" rule with respect to damages. *Raach v. Haverly*, 269 N.W.2d 877, 881 (Minn. 1978); *Watkins v. Lorenz*, 119 N.W.2d 482, 487 (Minn. 1963). Under this rule, the measure of damages "is the loss naturally and proximately resulting from the fraud," including "any incidental damages flowing from the fraud or misrepresentation." *Watkins*, 119 N.W.2d at 487 (internal quotation omitted); *see also Raach*, 269 N.W.2d at 881. The out-of-pocket loss rule is flexible in its application where "it is not a question of what the plaintiff might have gained through the transaction but what he lost by reason of defendant's deception." *Tysk v. Griggs*, 91 N.W.2d 127, 134 (Minn. 1958) (citation omitted); *see also Raach*, 269 N.W.2d at 881.

United Taconite provided the district court with evidence that demonstrated that, after Atlas Copco's misrepresentation was discovered, (1) United Taconite would not have leased the drill in the first place and (2) United Taconite was forced to hire an outside contractor to terrace the 1575-0602 pattern to a level at which the Pit Viper could safely operate. The monthly lease payments and the expense of the terracing, both of which were incurred during the lease period, are plainly losses naturally and proximately resulting from Atlas Copco's misrepresentation.

Viewing the evidence in a light most favorable to United Taconite, a genuine issue of material fact exists on the issue of damages. As such, the district court's dismissal of United Taconite's fraud claim should be reversed.

D. The District Court Erred In Dismissing United Taconite's Intentional Misrepresentation Claim By Ignoring Evidence And Failing To Consider Other Evidence In A Light Most Favorable To United Taconite.

In contrast to its fraud claim, which focuses on misrepresentations made to induce United Taconite to lease the Pit Viper, United Taconite's intentional misrepresentation claim is premised on Atlas Copco's failure to disclose information about the Pit Viper that it was under a duty to disclose before the *sale* of the Pit Viper at the conclusion of the one-year lease. Under Minnesota law, plaintiffs need not prove an affirmative misrepresentation to hold defendants liable for intentional misrepresentation and fraud. The Minnesota Supreme Court has held that a party is under a duty to disclose information under at least the following two circumstances:

- 1) If a party provides information, he must provide enough information as to not mislead the other party.
- 2) If a party has special knowledge of material facts to which the other party does not have access, he has a duty to disclose this information to the other party.

Richfield Bank & Trust Co. v. Sjogren, 244 N.W.2d 648, 650 (Minn. 1976); *see also Koch v. W.W. Holes Mfg. Co.*, No. C3-97-616, 1997 WL 666047, at *2 (Minn. Ct. App. Oct. 28, 1997).

“[T]he concealment of material and substantial facts . . . amounts to a fraud on the plaintiff.” *Peterson v. Arellono*, 185 N.W.2d 282, 284 (Minn. 1971) (quotation omitted).

It is well-settled that

if a party conceals a fact material to the transaction, and peculiarly within his own knowledge, knowing that the other party acts on the presumption that no such fact exists, it is as much a fraud as if the existence of such fact were expressly denied, or the reverse of it expressly stated.

Richfield Bank, 244 N.W.2d at 650 (quoting *Thomas v. Murphy*, 91 N.W. 1097, 1098 (1902)). The possession of “special knowledge of material facts to which the other party does not have access” is, *by itself*, sufficient to generate a duty to disclose. *Klein v. First Edina Nat’l Bank*, 196 N.W.2d 619, 622 (Minn. 1972) (citation omitted).

The evidence United Taconite presented to the district court created a genuine issue of fact as to whether Atlas Copco knew that the Pit Viper’s jacks were defectively designed. The district court initially appeared to agree, concluding that “the Court is of the opinion that information regarding the bolts and welds tending to crack or break, to the extent that information was known prior to the purchase of the drill by [United Taconite] would create [a duty to disclose.]” (Add. 15.) Indeed, the Court acknowledged that “[s]uch information was material to the transaction in the sense that such a safety concern would be material to a purchaser of the machine,” and that “the information was particularly within the knowledge of Atlas [Copco].” (*Id.*)

Inexplicably, the district court then backed off of this analysis when it continued:

The only evidence that has been shown with regard to the knowledge of the existence of a safety defect prior to the sale of the drill to [United Taconite] was the Ma report. It is the

opinion of the Court that this information, without more, is insufficient to remove the present case from the general rule. While it may have been true that based upon the Ma report Atlas [Copco] was aware that of all possible jack designs theirs may not have been the best, it is not enough to say that they were aware that the jack was so dangerous and likely to create a safety hazard that disclosure was required.

(*Id.*). In so holding, the district court erred for two reasons: (1) it improperly weighed the Ma Report and did so in a light that was *not* most favorable to United Taconite, the non-moving party, and (2) it ignored other evidence presented by United Taconite that showed Atlas Copco was aware that the Pit Viper was defectively designed prior to the sale of the drill to United Taconite.

1. The Ma Report illustrates Atlas Copco's knowledge of the Pit Viper's design defect.

In deciding a summary judgment motion, the district court “may not weigh the evidence or make factual determinations, but is required to view the evidence in the light most favorable to the nonmoving party.” *Teffeteller v. Univ. of Minn.*, 645 N.W.2d 420, 432 (Minn. 2002) (Gilbert, J., concurring in part and dissenting in part). The trial court’s duty in considering a summary judgment motion is not to resolve factual issues, but simply to determine whether the material facts are disputed. *Albright v. Henry*, 174 N.W.2d 106, 113 (Minn. 1970). Here, it was not for the district court to provide its “opinion” as to whether Atlas Copco had enough knowledge of the jack’s defective design to trigger a duty to disclose. Rather, the court’s only obligation was to consider whether the Ma Report constituted knowledge of the design defect.

The Ma Report did far more than simply indicate to Atlas Copco that the Pit Viper's jacks were not the "best" of "all possible designs"; rather, the Ma Report showed that the jacks were designed in such a way that they put too much stress on certain areas of the jack, which would ultimately lead to jack failure. (App. 148, 151, 231, 1005-10.) The drill's jacks are a safety-critical part of the Pit Viper, which should have been conservatively designed. (App. 1020.) Instead, the Pit Viper's jacks were designed by a recent engineering graduate with no prior experience designing jacks and little, if any, supervision.

And before Atlas Copco changed the design to utilize a lower strength of steel, Dr. Ma's analysis showed that the new material would yield when maximum pressure was applied, and that there was virtually no safety factor for anticipated loads. Dr. Ma also observed that even when using the original, stronger steel, the stress placed on the jack under maximum load was close to yield conditions. Dr. Ma testified that he would not have designed a drill where the maximum stress exceeded the design's allowable stress and that the Pit Viper's jacks needed to be reinforced.⁹ Accordingly, in his report, Dr. Ma recommended a new design for the Pit Viper's jacks that would correct the design problem observed in his analysis. (App. 162-69.)

United Taconite also provided the district court with the expert report of engineer Donald O. Dusenberry that discussed the significance of the Ma Report in detail. (App.

⁹ In addition, shortly before Deane Driscoll's death, Hamner acknowledged that Dr. Ma had found high stresses in the jacks and commissioned a new Ma report. The purpose of the new report was to find a "less radical solution" than to replace all of the jacks in the field with newly designed jacks. (App. 231.)

1005-10.) Dusenberry concluded that “the stresses that Dr. Ma calculated in 2005 are directly associated with, but by far exceed, the appropriate fatigue stress allowable.” (App. 1010.) Essentially, the Pit Viper’s jacks as designed were an accident waiting to happen, and Atlas Copco knew it. Even if, as the district court incorrectly stated, the Ma Report were the only evidence presented, it alone creates a genuine issue of material fact.

2. The district court ignored other evidence demonstrating Atlas Copco’s knowledge of the Pit Viper’s design defect.

The district court also erred in concluding that the Ma Report was the only evidence presented regarding Atlas Copco’s knowledge of jack design defects before the sale of the Pit Viper to United Taconite. In fact, United Taconite presented significant, additional evidence of Atlas Copco’s knowledge.

First, United Taconite provided the district court with Dr. Ma’s deposition testimony, where he conceded that he knew that the Pit Viper’s jacks needed to be reinforced. (App. 151.)

Second, Dr. Ma testified that he was asked to create his report to determine whether it would be safe to use a lower strength of steel. The report showed that the new material would yield when maximum pressure is applied and that there was virtually no safety factor for anticipated loads. Hamner, the Pit Viper project manager, testified it was not “advisable” to use the strength grade steel because the stress in the jack would be too high. (App. 186-87.) Yet, even after reviewing the Ma Report, Arnold Law, Atlas Copco’s Vice-President of Engineering, ordered United Taconite’s Pit Viper to be constructed with the weaker steel that the Ma report showed was not safe to use.

Third, prior to the sale, Atlas Copco received reports of jacks that had broken in the very same high-stress area identified by the Ma Report. In fact, prior to Driscoll's death, Atlas Copco received reports that the jacks on at least five Pit Vipers (out of approximately 20 that were in the field at the time) had broken in the high-stress area identified by the Ma Report. Yet, no one from Atlas Copco ever contacted any of the customers to warn them of the design problem. Instead, pursuant to Atlas Copco's practice of "control[ling] the flow of information" to the customer, the decision was made to contact Atlas Copco's sales and service representatives and have them inspect the Pit Viper jacks in their region.

United Taconite plainly presented sufficient evidence regarding Atlas Copco's knowledge of the jack's safety and design issues to defeat summary judgment on its claim for intentional misrepresentation. The district court's holding to the contrary must be reversed.

E. Because The District Court Erred In Dismissing United Taconite's Intentional Misrepresentation Claim, It Necessarily Erred In Dismissing United Taconite's Rescission Claim.

As outlined above, because the district court erred in granting Atlas Copco summary judgment as to United Taconite's intentional misrepresentation claim, it also erred in granting summary judgment on the rescission claim. *See Bogatzki v. Hoffman*, 430 N.W.2d 841, 846 (Minn. Ct. App. 1988) (concluding that summary judgment on rescission claim is not appropriate when disputed factual issues exist in claim of mutual mistake upon which rescission claim rests).

II. THE DISTRICT COURT ERRED IN DENYING UNITED TACONITE LEAVE TO AMEND ITS COMPLAINT TO ADD A CLAIM FOR PUNITIVE DAMAGES.

After the close of discovery, Nancy Driscoll and United Taconite both moved the District Court for leave to add claims for punitive damages against Atlas Copco. The basis for both parties' motions was the same—Atlas Copco's knowledge of and failure to communicate the design defect in the Pit Viper's jacks. The district court granted Driscoll's motion, but denied United Taconite's motion. The court's denial of United Taconite's motion should be reversed.

A. The District Court Applied An Incorrect Legal Standard For Determining Whether A Party Is Entitled To Assert A Claim For Punitive Damages.

An order denying a motion to amend a complaint to add a claim for punitive damages is normally reviewed for abuse of discretion. *Bjerke v. Johnson*, 727 N.W.2d 183, 196 (Minn. Ct. App. 2007). But a determination of whether the district court applied the appropriate legal standard is a question of law and is reviewed *de novo*. *Thompson v. Thompson*, 739 N.W.2d 424, 430 (Minn. Ct. App. 2007) (“[W]hether the district court applied the correct legal standard is a question of law, which we review *de novo*.”) (citing *Ayers v. Ayers*, 508 N.W.2d 515, 518 (Minn. 1983)).

Here, the district court denied United Taconite's motion to amend based, in large parts, on the fact that United Taconite sustained property damage only. Simply categorizing the type of damage suffered by the plaintiff, though, is not the standard for a punitive damages motion. Indeed, since the 1860s, Minnesota courts have permitted punitive damage awards in cases where a party's losses are limited to property damage.

See, e.g., *Lynd v. Picket*, 7 Minn. 184 (1862) (conversion action); *Matteson v. Munroe*, 83 N.W. 153 (Minn. 1900) (wrongful taking action). In the 1970s, punitive damage awards caused a crisis in the product liability insurance industry. *Jensen v. Walsh*, 623 N.W.2d 247, 250 (Minn. 2001). “Against this backdrop of concern over the increasing number of punitive damages awards in product liability cases, [the Minnesota] legislature enacted section 549.20.” *Id.* The statute (as amended in 1990) provided that punitive damages may be awarded “in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.” Minn. Stat. § 549.20 (2009). Section 549.20 provides:

(b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

(1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or

(2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Id. subd. 1.

In two cases, *Eisert v. Greenberg Roofing & Sheet Metal Co.*, 314 N.W.2d 226 (Minn. 1982) and *Independent School District No. 622 v. Keene Corp.*, 511 N.W.2d 728 (Minn. 1994), the Minnesota Supreme Court held that punitive damages were not allowed in *product liability actions* where the plaintiff suffered only damage to property. *Eisert*, 314 N.W.2d at 228; *Keene Corp.*, 511 N.W.2d at 732.

In *Molenaar v. United Cattle Co.*, 553 N.W.2d 424 (Minn. Ct. App. 1996), decided shortly after *Keene*, this Court held that *Eisert* and *Keene* stand “for the proposition that ‘[a]bsent personal injury, a party *injured by a product* may not recover punitive damages.’” 553 N.W.2d at 428 (quoting *Keene*, 511 N.W.2d at 728) (emphasis added by the *Molenaar* court). This Court stated that limiting *Eisert* and *Keene* to product liability cases established consistency between case law and statutory law. *Id.* The statute permitted punitive damages for “deliberate disregard for the *rights* or safety of others.” *Id.* Because “[v]iolations of rights do not necessarily involve personal injuries, . . . the statute allows punitive damages for both property damage and personal injury.” *Id.* In sum, the “focus lies on the defendant’s wrongful conduct that must be deterred, not the specific outcome of the conduct.” *Id.* at 429.

In *Jensen v. Walsh*, the Minnesota Supreme Court was confronted with the same issue this Court resolved in *Molenaar*—whether a plaintiff in a non-product liability case who suffers only damage to property may recover punitive damages. 623 N.W.2d at 249. As did the court in *Molenaar* court, the supreme court held in *Jensen* that such a plaintiff could recover punitive damages if he could show that the defendant acted with deliberate disregard for the rights or safety of others. *Id.* at 251. The court discussed *Eisert* and *Keene*, and observed that those two prior decisions were limited to product liability cases where the only damage was to property, and noted: “We did not conclude [in *Eisert* and *Keene*] that the security of property is unimportant, nor did we intend that punitive damages claims be barred in all actions where the only damage is to property.” *Id.* at 251. The court continued: “While *Eisert* and *Keene* reflect an intent to control escalating

lawsuits and awards *in product liability actions where the only damage is to property*, other claims of property damage may be protected through an award of punitive damages.” *Id.* (emphasis added).

After distinguishing *Eisert* and *Keene*, the *Jensen* court concluded that in determining whether punitive damages are appropriate, the focus should be on the wrongdoer’s conduct rather than on the type of damages that resulted from the conduct. *Id.* The supreme court stated that a plain reading of § 549.20 shows that punitive damages are allowed when there is clear and convincing evidence that a defendant acted with deliberate disregard for the rights or safety of others “regardless of the nature of the resulting damage.” *Id.* If punitive damages were not allowed in such a situation, “one who acts with deliberate disregard of the rights or safety of others faces no greater penalty than a well-meaning but negligent offender.” *Id.*

Here, the district court, citing *Jensen*, incorrectly stated that a party that suffers only damage to property may not recover punitive damages unless he shows that the defendant intended to cause damage to the party’s property. (Add. 25.) Such is not the holding in *Jensen*; indeed, quite the opposite is true. The *Jensen* court (and the *Molenaar* court before it) held that in non-product liability cases the focus is on the defendant’s conduct, not the type of damages that resulted from that conduct. *Jensen*, 623 N.W.2d at 251; *Molenaar*, 553 N.W.2d at 429. Under Minnesota law, outside of the product liability context, a plaintiff is entitled to recover punitive damage so long as he or she can show that the defendant acted with “deliberate disregard for the rights or safety of

others.” Minn. Stat. § 549.20, subd. 1(a). The district court erred by imposing a different, more stringent standard on United Taconite.

B. The District Court Erred By Failing To Grant United Taconite Leave After The Court Found *Prima Facie* Evidence That Atlas Copco Acted With Deliberate Disregard For The Rights Or Safety Of Others.

In addition to applying the wrong legal standard, the district court abused its discretion by denying United Taconite’s motion for leave to add a claim for punitive damages when *prima facie* evidence was presented establishing that Atlas Copco acted with deliberate disregard for the rights and safety of others. Under § 549.191, the court must determine if the moving party has presented *prima facie* evidence that the defendant acted with deliberate disregard for the rights or safety of others. Minn. Stat. § 549.191 (2009). Then, “if the court finds *prima facie* evidence in support of the motion, the court *shall grant* the moving party permission to amend the pleadings to claim punitive damages.” *Id.* (emphasis added). Here, United Taconite provided the district court with sufficient evidence that Atlas Copco acted with deliberate disregard to *both* the rights *and* safety of others.

Indeed, United Taconite based its motion on the same course of conduct as Plaintiff Driscoll based her motion for punitive damages—Atlas Copco’s knowledge of and failure to address the Pit Viper’s defective design. (*Compare* App. 606-07 *with* App. 1108-13.) At the hearing on its motion, United Taconite’s counsel stated that United Taconite was relying on the same facts as Driscoll was in her motion. (4/21/2009 Tr. at 98-99.)

In ruling on Plaintiff Driscoll's motion, the district court found the evidence to be sufficient to establish a *prima facie* case that Atlas Copco acted with deliberate disregard for the rights and safety of others. (Add. 32.) Ironically, in granting Plaintiff Driscoll's motion, the district court highlighted that *Atlas Copco failed to disclose to United Taconite* the many "email communications outlining or discussing problems experienced with the jacks." (*Id.*)

When the district court turned to United Taconite's motion, this same evidence was no longer sufficient to establish a *prima facie* case. Instead, the district court considered factors unrelated to Atlas Copco's conduct to deny United Taconite's motion:

- (1) Both United Taconite and Atlas Copco were large companies that were engaged in a commercial transaction;
- (2) United Taconite had been in possession of the Pit Viper for several months prior to the accident that killed Deane Driscoll; and
- (3) United Taconite's damages can be sufficiently addressed through an award of compensatory damages.

(Add. 25.) These are not factors that the district court was allowed to consider in deciding whether to grant United Taconite's motion.

First, neither the size of the parties nor the fact that the parties were engaged in a commercial transaction are relevant to whether Atlas Copco acted with deliberate disregard for the rights or safety of others. United Taconite's employment of a couple hundred miners in the Minnesota Iron Range does not change the fact that Atlas Copco's reckless conduct endangered United Taconite's employees and equipment, and in fact, resulted in the death of one of United Taconite's employees.

In addition, the district court's holding undermines a principal purpose of punitive damages—to deter others from engaging in similar behavior. *Jensen*, 623 N.W.2d at 251. If the district court is correct that punitive damages are not available in cases between corporations in commercial transactions even where one of the companies acts with deliberate disregard for the rights and safety of others, an important element of the deterrent effect of punitive damages would be lost. The district court's ruling means that Minnesota law is willing to punish egregious conduct only after an individual is harmed. This is a dangerous precedent that takes away the possibility of deterring wrongful conduct before individuals are harmed.

Second, if the fact that United Taconite had possession of the drill for several months prior to Deane Driscoll's death has any relevance to whether Atlas Copco acted with deliberate disregard of the rights and safety of others, it is evidence that should have only *supported* granting United Taconite's motion. During the time period between when United Taconite came into possession of the drill and the jack breaking and killing Driscoll, Atlas Copco knew the drill was defective and continued to receive additional information about the dangers posed by the defective jacks, including no less than five reports of jacks breaking on other drills. Instead of warning its customers, Atlas Copco chose to remain silent.

Third, it is always true that a party does not need punitive damages to sufficiently compensate it for its actual damages. The purpose of punitive damages is not to compensate the plaintiff, but to punish the wrongdoer and deter similar conduct. *Jensen*, 623 N.W.2d at 251. The type of conduct that Driscoll and United Taconite based their

motions for punitive damages on is the type of conduct that deserves to be punished and must be deterred. *See, e.g., Olson v. Snap Prods., Inc.*, 29 F. Supp. 2d 1027, 1036 (D. Minn. 1998) (“Punitive damages are available against a manufacturer of a product that abuses its control over information about product risks in a manner that shows a disregard for public safety.”).

None of the factors considered by the district court have any bearing on whether a *prima facie* showing has been made that Atlas Copco acted with deliberate disregard for the rights or safety of others. The evidence presented to the district court showed unequivocally that (1) Atlas Copco knew the Pit Viper was defectively designed by an inexperienced engineer who received little supervision; (2) with knowledge that the drill was defectively designed, Atlas Copco’s Vice-President of Engineering decided to exacerbate the design flaw by authorizing the use of inferior material to build the drill delivered to United Taconite; (3) Atlas Copco received multiple reports of Pit Vipers breaking in the area predicted by Dr. Ma; and (4) Atlas Copco tried to control the flow of negative information, and so never warned United Taconite or any of its other customers. (App. 483-84, 534.) Tellingly, this same evidence was sufficient for the district court to find Atlas Copco acted with deliberate disregard when raised by Driscoll’s motion to amend. A similar conclusion was required with respect to United Taconite’s motion.

Minnesota law *mandates* that a court grant a moving party permission to amend its pleadings to assert a claim for punitive damages when the court finds that the record contains *prima facie* evidence of a deliberate disregard for the rights and safety of others (“... the court *shall grant* the moving party permission to amend the pleadings to claim

punitive damages.”). Here, the district court erred in denying United Taconite’s motion for leave to add a claim for punitive damages when it had determined that the very same evidence established a *prima facie* case of Atlas Copco’s deliberate disregard in Driscoll’s motion. Accordingly, the denial of United Taconite’s motion for leave to add a claim for punitive damages should be reversed.

CONCLUSION

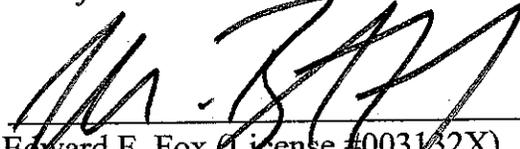
For the reasons set forth above, United Taconite respectfully requests that the district court’s order dismissing United Taconite’s fraud, intentional misrepresentation, breach of warranty of merchantability, breach of warranty of fitness for a particular purpose, and rescission claims be reversed in all respects. United Taconite also requests that the district court’s order denying United Taconite’s motion for leave to add a claim for punitive damages be reversed. This case should be remanded for trial on each of United Taconite’s counterclaims and with instructions to allow United Taconite leave to assert a claim for punitive damages against Atlas Copco.

Respectfully submitted,

BASSFORD REMELE
A Professional Association

Dated: January 6, 2010

By:


Edward F. Fox (License #003132X)
Mark R. Bradford (License #335940)
33 South Sixth Street, Suite 3800
Minneapolis, Minnesota 55402-3707
Telephone: (612) 333-3000

And

Richard J. Bedell, Jr.
Jeffrey D. Ubersax
Matthew P. Silversten
JONES DAY
901 Lakeside Avenue
Cleveland, Ohio 44114
Telephone: (216) 586-3939

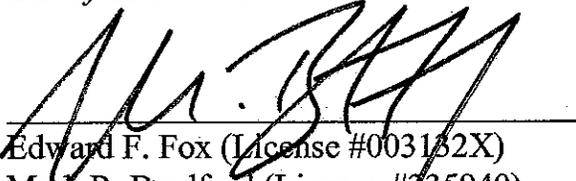
*ATTORNEYS FOR APPELLANT UNITED
TACONITE, LLC*

CERTIFICATE OF BRIEF LENGTH

The undersigned counsel for Appellant United Taconite L.L.C. certifies that this Brief complies with the requirements of Minn. R. Civ. App. P. 132.01 in that it is printed in proportionately spaced typeface utilizing Microsoft Word 2003 and contains 11,897 words, excluding the Table of Contents and Table of Authorities.

BASSFORD REMELE
A Professional Association

Dated: January 6, 2010



Edward F. Fox (License #003182X)
Mark R. Bradford (License #335940)
33 South Sixth Street, Suite 3800
Minneapolis, Minnesota 55402-3707
Telephone: (612) 333-3000