

NO. A09-2171

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 Copso 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 and Cross-Respondent,

v.

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

Respondents and Cross-Appellants.

APPELLANT AND CROSS-RESPONDENT'S REPLY BRIEF

(All Counsel Listed on Following Page)

BASSFORD REMELE
A Professional Association
Edward F. Fox (#0031332X)
Mark R. Bradford (#335940)
33 South Sixth Street, Suite 3800
Minneapolis, Minnesota 55402-
3707
(612) 333-3000

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 and
Cross-Respondent*

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

and

PATTON BOGGS, LLP
Henry Chajet
R. Brian Hendrix
2550 M. Street, NW
Washington, DC 20037
(202) 457-6543

*Attorneys for Respondents and
Cross-Appellants*

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

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**STATEMENT OF LEGAL ISSUES
RAISED BY ATLAS COPCO'S CROSS-APPEAL**

1. Did the district court abuse its discretion by concluding Atlas Copco waived any purported attorney-client privilege with respect to a document when: (1) Atlas Copco did not object to the use of the document when presented to an Atlas Copco witness at a deposition; (2) the document was submitted as an exhibit in support of two motions; (3) the document was identified in United Taconite's Trial Exhibit List; and (4) Atlas Copco waited more than seven months to request a return of the document.

Most apposite authority:

National Texture Corp. v. Hymes,
282 N.W.2d 890 (Minn. 1979).

INTRODUCTION

About the only thing that Atlas Copco accomplishes in its 60-page brief is to highlight that this record is replete with disputed issues of material fact. Atlas Copco offers no support for the proposition that the economic loss rule applies to bar warranty claims and makes the same mistake as the district court by construing hotly disputed facts in a light most favorable to the *moving* party. Atlas Copco's failure to defend the district court's rulings stems from its inability, particularly at this stage in the litigation, to refute three fundamental points:

- (1) The Pit Viper's leveling jacks broke (United Taconite's warranty claims).
- (2) Atlas Copco misrepresented the Pit Viper's slope capabilities (United Taconite's fraud claim and claim for punitive damages).
- (3) Atlas Copco knew, but failed to disclose, that the Pit Viper's leveling jacks were defective (United Taconite's misrepresentation claim and claim for punitive damages).

These three points form the basis for United Taconite's claims. And, with respect to the punitive damages order, Atlas Copco has utterly failed to explain how, under Minn. Stat. § 549.191, the district court could conclude on the one hand that Atlas Copco acted with deliberate disregard for the rights or safety of others, but on the other refuse to grant United Taconite's motion to amend.

Finally, the district court's ruling, challenged in Atlas Copco's cross-appeal, that Atlas Copco waived any privilege that may have attached to the document Bates-stamped ACDS 0003127-29 was certainly not an abuse of discretion. The document was specifically reviewed by Atlas Copco when it was produced as part of a small, follow-up

production seven months before Atlas Copco sought the document's return. In the intervening time period, the document was used in a deposition of the document's author and in the presence of Atlas Copco's counsel, and later was used as an exhibit to two motions before the district court and placed on United Taconite's trial exhibit list. Atlas Copco did nothing to get the document back until the eve of trial. There can be no abuse of discretion under these facts.

United Taconite respectfully requests that this Court reverse the district court's summary judgment and punitive damages orders and affirm the district court's ruling on waiver.

ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ATLAS COPCO ON UNITED TACONITE'S WARRANTY CLAIMS.

A. The Pit Viper Failed To Perform As Warranted As It Broke Only A Few Weeks After United Taconite Purchased It.

Atlas Copco acknowledges that Minnesota law does not prevent "a party such as UTAC from bringing a warranty claim had the PV351 failed to perform as warranted." (Resp. Br. at 36.) This is exactly what happened here. The Pit Viper failed to perform as warranted because an integral safety and operating component, the drill's leveling jack, catastrophically failed. Indeed, the fact that the leveling jack broke may be the only undisputed fact in this case. Atlas Copco's response to this plain fact is generally to say that United Taconite is precluded from asserting a warranty claim because Atlas Copco thinks a product liability claim is more appropriate. Atlas Copco cites no authority for this proposition and, not surprisingly, none exists.

United Taconite provided the district court with evidence supporting each element of its claim for breach of the implied warranty of merchantability:

(1) Existence of a Warranty. Atlas Copco does not dispute the existence of an implied warranty of merchantability, nor can it, because Minnesota provides this warranty for every sale of goods. Minn. Stat. § 336.2-314 (2009). United Taconite provided the district court with a copy of the sales agreement for the Pit Viper, and Atlas Copco did not disclaim any implied warranties in this document or anywhere else. (App. 438.) Instead of insisting that the Pit Viper be purchased “as is,” Atlas Copco accepted \$2.1 million from United Taconite.

(2) Breach of the Warranty. A few weeks after United Taconite purchased the Pit Viper, one of its leveling jacks broke. As Atlas Copco concedes in its brief, the drill cannot be operated without its leveling jacks.¹ (Resp. Br. at 7.)

¹ Atlas Copco contends that United Taconite’s warranty of merchantability claim cannot survive summary judgment because “it was UTAC’s misuse of the PV351 under conditions that exceeded the drill’s ordinary purpose *that caused the accident.*” (Resp. Br. at 41 (emphasis added).) First, this was not an argument raised before the district court and should be disregarded. *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 130 (Minn. 2007) (“Generally, we will not consider an issue raised for the first time on appeal.”); *Thiele v. Stich*, 425 N.W.2d 580, 584 (Minn. 1988) (reversing appellate court for considering issue not presented and considered by trial court); *Thompson v. Thompson*, 739 N.W.2d 424, 431 (Minn. Ct. App. 2007) (refusing to consider argument raised for the first time on appeal). Second, United Taconite disputes that Mr. Driscoll was using the drill in conditions that exceeded the parameters represented to it by Atlas Copco. (App. 1017, 1020.) Third, Atlas Copco does not claim, nor did it provide the district court with any evidence showing, that the jack broke *because* Mr. Driscoll was allegedly operating the Pit Viper outside of the drill’s parameters.

Similarly, throughout its brief, Atlas Copco references MSHA’s investigation of the accident and citation issued against United Taconite for using mining equipment beyond the design capacity intended by the manufacturer. This is a diversion intended to deflect

(3) Causal Link between Breach and Damages. United Taconite paid over \$2 million dollars for a drill that could not be operated because it had a broken jack.

Atlas Copco does not deny any of these statements. Instead, Atlas Copco contends that United Taconite's claim is not one for breach of the implied warranty of merchantability, as United Taconite pled and supported with evidence. Rather, Atlas Copco contends the claim is one for product liability because it is based on a "design defect."² (Resp. Br. at 36.) This argument ignores black-letter Minnesota law allowing the purchaser of a defective product to recover damages based on a warranty claim, including damages for the defective product and consequential damages. *Lloyd F. Smith Co. v. Den-Tal-Ez, Inc.*, 491 N.W.2d 11, 15 (Minn. 1992). If the implied warranty of

attention away from its own culpable conduct. Regardless, the Secretary of Labor subsequently vacated this citation.

² Atlas Copco cannot make up its mind. Sometimes Atlas Copco argues that United Taconite's claims are all strict product liability claims. (*See, e.g.*, Resp. Br. at 37 ("This is a textbook products liability claim . . .").) At other times, when it suits Atlas Copco's purposes, United Taconite's claims suddenly become contract-based. (*See, e.g.*, 4/21/09 Hearing Tr. at 105 ("As I argued before and I won't argue again, [United Taconite's] claims really are for breach of contract.")) In reality, United Taconite is the master of its own complaint, and it was free to plead in the alternative. Minn. R. Civ. P. 8.05; *see also First Nat'l Bank of St. Paul v. Shallern Corp.*, 309 N.W.2d 316, 318 (Minn. 1981). As long as United Taconite can produce evidence to support the elements of its various claims, it should be allowed to survive summary judgment on each, even if some are in the alternative of others. And certainly, it is not Atlas Copco's decision to select United Taconite's theory of recovery. *Tysk v. Griggs*, 253 Minn. 86, 98, 91 N.W.2d 127, 136 (1958) ("It is not for the wrongdoer to dictate the remedy to be pursued by his victim in order to secure redress." (internal quotation omitted)); *Shallern Corp.*, 309 N.W.2d at 319 ("By alleging alternative claims a claimant does no more than allege one of several claims to be presented in the order of priority *assigned by the claimant . . .*") (emphasis added).

merchantability has any purpose, it is to protect buyers, such as United Taconite, who pay for a product that breaks a few weeks after the sale.

Likewise, United Taconite presented evidence to support each element of its claim for breach of the implied warranty of fitness for a particular purpose:

(1) Atlas Copco knew or should have known the particular purpose for which the drill would be used. United Taconite did not want the Pit Viper just to drill blastholes; it wanted the Pit Viper to drill blastholes on inclined surfaces, which are common on Minnesota's Iron Range. United Taconite's need for a drill that could operate on inclined surfaces was made known to Atlas Copco multiple times prior to the drill's purchase. (*See, e.g., App. 296-97, 532.*)

(2) Atlas Copco knew or should have known that United Taconite was relying on Atlas Copco's skill or knowledge to select the appropriate drill. United Taconite told Atlas Copco what it needed and asked Atlas Copco if the Pit Viper could handle the slopes on the Iron Range. (*App. 296-97, 532.*) Atlas Copco specifically pitched the drill as being able to operate on slopes and repeatedly confirmed this sales pitch during the lease period. (*App. 296, 384-85.*) In fact, Steve Beck, Atlas Copco's trainer and mechanic, accompanied the Pit Viper onto sloped patterns on an almost daily basis during the one-year lease period, and with one exception, never voiced a concern over the slopes on which the drill was operating. (*App. 352-55, 379, 537.*)

(3) United Taconite relied on Atlas Copco in making its decision to purchase the Pit Viper. Because Atlas Copco represented that the Pit Viper was safe to operate on inclined surfaces, United Taconite purchased the drill. (*App. 534.*)

While it is true that, after the lease was entered into but before the purchase, United Taconite learned that the Pit Viper could not be operated on slopes as steep as Atlas Copco had originally represented, Atlas Copco never indicated—as it does now—that the drill could not be operated on inclined surfaces at all. (Resp. Br. at 8, 40.) Post-accident analysis, however, showed (1) Pit Viper jacks around the world failed prematurely due to fatigue cracking, and (2) when the Pit Viper’s jack broke, the drill would tip over, even when operated on an inclined surface within the parameters Atlas Copco represented to United Taconite as being safe. (App. 1005, 1008-12, 1020.) A large blasthole drill that cannot be operated safely on inclined surfaces is worthless to a mining company on the Iron Range. (App. 533.)

The fact that Atlas Copco takes the position that the Pit Viper “was only to be used on flat, level and well prepared benches,” (Resp. Br. at 40), strains even the faintest notions of credibility. If the drill could only be used on flat ground, why was it necessary for Atlas Copco to build the Pit Viper with leveling jacks that extended *six feet*? After Deane Driscoll was killed, why did Atlas Copco update the Pit Viper’s operating manual to include “leveling limits” showing the full six feet of extension on inclined surfaces up to ten degrees? (App. 424-26.) Atlas Copco’s position cannot be squared with the facts.

B. A Pre-Sale Inspection Of A Product Does Not Waive Implied Warranties If The Inspection Does Not Uncover A Latent Defect In The Product.

Atlas Copco also argues that United Taconite’s implied warranty claims fail because no such warranties exist when a buyer “has the opportunity to inspect the goods

before entering the contract.” (Resp. Br. at 41.) But Atlas Copco ignores the portion of the Minnesota statute fatal to its defense:

[W]hen the buyer before entering into the contract has examined the goods or the sample or model as fully as desired or has refused to examine the goods there is no implied warranty with regard to defects *which an examination ought in the circumstances to have revealed.*

Minn. Stat. § 336.2-316(3)(b) (emphasis added). The comments to the statute provide that the “particular buyer’s skill and the normal method of examining goods in the circumstances determine what defects are excluded by the examination.” *Id.* at advisory cmts. ¶ 8. Implied warranties are not waived when a pre-purchase inspection fails to reveal latent defects in the product. *H Window Co. v. Cascade Wood Prods., Inc.*, 596 N.W.2d 271, 277 (Minn. Ct. App. 1999) (affirming trial court’s refusal to instruct jury regarding waiver of implied warranty where product had a latent defect).

Here, United Taconite was not equipped to conduct the type of sophisticated (and in some cases, destructive) tests necessary to have ascertained the inferior design and construction of the Pit Viper’s jacks. It is this inferior design and construction that led to the jack’s failure. Atlas Copco does not even claim, nor could it, that United Taconite was aware that the Pit Viper’s jacks were improperly designed prior to purchasing the drill or that such a detection could be made by a visual inspection. Consequently, Atlas Copco’s reliance on Minn. Stat. § 336.2-316(3)(b) is misplaced.³

³ In an apparent attempt to shift blame to Standard Hardware, the bolt distributor, Atlas Copco states that its expert and United Taconite’s expert agree that the Pit Viper’s jack’s bolts experienced intergranular cracking, which caused or hastened the bolts’ failure. (Resp. Br. at 15.) Atlas Copco further claims that both its expert and United Taconite’s

The cases from other jurisdictions that Atlas Copco cites are not relevant because they involve buyers who either did know or could have known about the product defect prior to purchasing the product. *See, e.g., Sobiech v. Int'l Staple & Mach. Co.*, 867 F.2d 778, 782-83 (2d Cir. 1989) (buyer inspected product and acquired "actual knowledge" of the product defects prior to purchasing the product); *O'Connor v. Judith B. & Roger C. Young, Inc.*, No. C-93-4547, 1995 WL 415138, at *5 (N.D. Cal. June 30, 1995) (horse's alleged drastic and common behavior should have been detected by the several experienced riders who rode the horse for the purchaser prior to the sale, by the purchaser who watched hours of videotape of the horse prior to the sale, or the veterinarian who conducted a pre-sale inspection of the horse); *Trans-Aire Int'l, Inc. v. N. Adhesive Co.*, 882 F.2d 1254, 1258-59 (7th Cir. 1989) (U.C.C. § 2-316(3)(b) barred breach of warranty claim for adhesive that failed under summer conditions where buyer's engineer recommended testing adhesive under summer conditions and buyer's president refused, proceeding with purchase without finding out if the product would work in summer

expert "agree that the cracking occurred sometime during the bolt's manufacturing or plating process." (*Id.*) This is a flat out misrepresentation of United Taconite's expert's opinion; Dr. Barsom's opinion clearly indicated that he thought the cracking was a result of corrosion caused by Atlas Copco's actions. As support for its position, Atlas Copco cites an equivocal statement from Dr. Barsom: "The presence of intergranular cracking in these bolts is an indication of hydrogen induced damage. The source of the hydrogen in the bolts is either from corrosion or from insufficient baking of the bolts after plating, or both." (R.A. 13.) Dr. Barsom later stated that "corrosion was a significant contributing mechanism" to the cracking and that corrosion "should not have occurred had the bolts been installed properly and/or the bolted connections designed properly." (App. 985-86.) This misrepresentation of the record, however, shows just how difficult it would have been for United Taconite to have detected the drill's latent defect, as the intergranular cracking was detected post-accident by using scanning electron microscopy to analyze the Pit Viper's bolts. (*Id.*)

conditions). Because United Taconite did not and could not have known about the improperly designed jacks on the Pit Viper prior to the accident, these cases are factually distinguishable and cannot carry the day.

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ATLAS COPCO ON UNITED TACONITE'S FRAUD CLAIM.

A. United Taconite Provided The District Court With Evidence That It Relied On Atlas Copco's Misrepresentation About The Pit Viper's Slope Capabilities; Indeed, The District Court Found That United Taconite Reasonably Relied On Atlas Copco's Misrepresentation.

During its negotiations with Atlas Copco, United Taconite made clear that it was looking to replace its Garner Denver drill, and it would be interested in acquiring the Pit Viper only if the drill could handle the slopes at the Mine. Atlas Copco repeatedly told United Taconite that the Pit Viper could handle the same slopes as the Gardner Denver despite the fact that Atlas Copco knew that these statements were false. Based on Atlas Copco's representations, United Taconite agreed to lease the Pit Viper starting in March 2006. Not until August 2006, when United Taconite was already locked into the six-month renewal lease, did United Taconite learn that the Pit Viper could not handle slopes as steep as Atlas Copco represented. As a result of Atlas Copco's misrepresentations, United Taconite suffered damages, including the cost of hiring a contractor to terrace the 1575-0602 pattern.

To rebut this *prima facie* showing of fraud, Atlas Copco does not even argue that it told the truth about the slope capabilities of the Pit Viper. Instead, Atlas Copco claims that United Taconite did not rely on its misrepresentation. (Resp. Br. at 23.) Atlas Copco

bases this argument on two pieces of evidence: (a) United Taconite's decision to lease the drill instead of buying it, and (b) an e-mail in which Joe Carrabba, the president of United Taconite's parent company, tells two Atlas Copco employees that he spoke with United Taconite's General Manager and that the Mine was going to lease the Pit Viper drill. (*Id.*) This purported evidence does not bar United Taconite's claims for two reasons.

First, the district court acknowledged that United Taconite reasonably relied on Atlas Copco's misrepresentation, 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.)

Second, 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). Here, United Taconite presented sufficient evidence to raise a question of fact for the jury on reasonable reliance.

Contrary to Atlas Copco's assertions, testing the drill's ability to operate on inclined surfaces was not one of the reasons United Taconite wanted to lease the Pit Viper.⁴ (App. 331.) Instead, United Taconite leased the Pit Viper to test its capabilities

⁴ Atlas Copco claims that "[t]esting the drill's capabilities on steep slopes was one factor UTAC specifically contemplated in recommending the lease option internally." (Resp. Br. at 10.) This is a misrepresentation of the record evidence. To support this statement, Atlas Copco cites to a portion of the deposition transcript of Cleveland Cliff's Director of Finance Services, Bryan Wittman, discussing United Taconite's Expenditure Request Form to Cleveland Cliffs. (*Id.*) Wittman did not testify that one of the reasons United Taconite wanted to lease the drill was to test its ability to drill on steep slopes (R.A. 79-82), nor does the document being discussed support Atlas Copco's statement. (App. 330-33.) In fact, the Expenditure Request Form supports United Taconite's position that it relied on Atlas Copco's misrepresentation and that the statement was material to United

to drill 16-inch holes, handle rock as hard as taconite, and weather conditions as cold as those found on the Iron Range. (App. 331-32, 533.) Because the drill had no track record in these areas, United Taconite wanted to confirm these specific capabilities during the lease period. (App. 331-32, 533.) Indeed, if the Pit Viper could only have been used on flat surfaces, as Atlas Copco now contends, United Taconite would not have even considered the drill. (App. 532-33.)

With respect to Carrabba's e-mail, his statement was not a binding commitment to lease the drill. Atlas Copco's salesman, Ed Borchardt, acknowledged as much, admitting that there was no commitment to lease the drill at that point and that negotiations between the two sides were just beginning. (App. 289.) In fact, as of the date of Carrabba's email, United Taconite had not even received corporate authorization to enter into the lease agreement with Atlas Copco. (App. 330.) Such authorization was not granted until mid-February 2006. (*Id.*) The negotiations over the lease took several months and, if at any point during those negotiations Atlas Copco would have said that the Pit Viper could not handle the slopes at the Mine, the negotiations would have ended. (App. 305-11, 533-34.)

Taconite's decision to lease the drill. This form states in one section the Pit Viper's "unknowns" that needed to be tested—*notably, slope capabilities is not listed as an unknown.* (App. 331.) In another section, the form states: "Acquisition of the drill on a rental basis will provide the following benefits: * * * Sideline of the 9039 drill [the Gardner Denver drill]. The Pit Viper has the ability to drill into the steep scarps that are being exposed in the new part of our pit. 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.) Thus, United Taconite took Atlas Copco's representations about slope capabilities as a benefit of renting the drill, not as something that needed to be tested.

B. United Taconite Provided The District Court With Evidence That The Pit Viper's Slope Capabilities Were Material To Its Decision To Lease The Drill.

Atlas Copco contends that the Pit Viper's ability to operate on slopes was not material to United Taconite's decision to lease the drill. (Resp. Br. at 24-25.) United Taconite, however, provided the district court with ample evidence to support this element of its fraud claim:

- United Taconite told Atlas Copco that it was looking to replace its Gardner Denver drill and needed a drill that could handle the same types of slopes. (App. 532-33.)
- Atlas Copco represented that the Pit Viper could handle the same slopes as the Gardner Denver and that it was conducting "tip tests" to confirm its capabilities. (App. 296-97, 532-33.) Atlas Copco followed up by sending United Taconite pictures of the tip test showing the drill tilted at an extreme angle. (App. 299-300.)
- United Taconite informed Cleveland Cliffs that one of the Pit Viper's benefits was that it could replace the Gardner Denver because it could drill "on the steep scarps that are being exposed in the new part of our pit." (App. 332.)
- United Taconite employees testified that the Pit Viper would not have been considered if it could not handle the Mine's slopes. (App. 533.)

At a minimum, this evidence creates a genuine issue of material fact as to whether the Pit Viper's ability to operate on slopes was material to United Taconite's decision to lease the drill.

C. United Taconite Provided The District Court With Evidence That It Sustained Damages As A Result Of Atlas Copco's Misrepresentations.

Atlas Copco argues for the first time on appeal that United Taconite did not suffer any damages as a result of its misrepresentation. (App. 32-37, 542-45.) For this reason alone, the argument should not be considered. *Lee*, 741 N.W.2d at 130; *Thiele*, 425 N.W.2d at 584; *Thompson*, 739 N.W.2d at 431. If this Court considers this new argument, it should be summarily rejected.

First, to survive summary judgment, United Taconite does not need to prove the exact amount of its damages. Rather, United Taconite must only show that it suffered damage. *Crenlo v. Austin-Romtech*, No. A03-851, 2004 WL 948352, at *4-5 (Minn. Ct. App. May 4, 2004) (reversing trial court's grant of summary judgment because the plaintiff came forward with evidence that it suffered damage and finding that a genuine issue of fact existed as to the amount of those damages) (App. 1824.). Indeed, Atlas Copco does not actually deny that United Taconite suffered damages. Rather, Atlas Copco disputes the amount of damages suffered as a result of its misrepresentation. Its arguments, however, are ones that properly should be made to the jury at trial.

Second, the costs United Taconite incurred to level and prepare the 1575-0602 pattern after it was learned that Atlas Copco misrepresented the Pit Viper's capabilities are recoverable out-of-pocket costs under Minnesota law. The Minnesota Supreme Court has stated that the "out-of-pocket-loss" rule is "very flexible" in its application. *Raach v. Haverly*, 269 N.W.2d 877, 881 (Minn. 1978). For almost 100 years, it has been the rule in Minnesota that "the party guilty of fraud is liable to respond in such damages as

naturally and proximately resulted from the fraud,” including consequential damages. *Id.* at 882 (quoting *Townsend v. Jahr*, 147 Minn. 30, 32-33, 179 N.W. 486, 487 (1920)).

Here, the 1575-0602 pattern was within the Pit Viper’s capabilities as represented by Atlas Copco. However, Atlas Copco’s representations were false, and as a result, United Taconite had to hire outside contractors to reduce the pattern’s slope so that mining in the area could continue. The costs United Taconite incurred to reduce 1575-0602’s slope flowed naturally and proximately from Atlas Copco’s misrepresentation and are therefore recoverable. *Id.* (allowing plaintiff to recover consequential damages unrelated to the value of the property that was purchased as a result of the misrepresentation).⁵

⁵ Atlas Copco cites *Bryan v. Kisson*, 767 N.W.2d 491 (Minn. Ct. App. 2009) and *Lobe Enterprises v. Dotsen*, 360 N.W.2d 371 (Minn. Ct. App. 1985) to claim that the outside contractor costs United Taconite incurred were not out-of-pocket losses, but were more in the nature of property repair costs for which these two case did not allow recovery. (Resp. Br. at 28.) Not surprisingly, neither case supports Atlas Copco’s argument. First, *Bryan*, while mentioning the out-of-pocket-loss rule in dicta, has nothing to do with the rule. Rather, the court held that the damages the plaintiff sought to recover were not proximately caused by the defendant’s misrepresentation. *Bryan*, 767 N.W.2d at 496. Second, in *Lobe*, the plaintiff attempted to value the property at issue by subtracting repair costs from the purchase price. The court held that this was not an accurate way to value the property. *Lobe*, 360 N.W.2d at 373. With respect to the outside contractor’s costs, United Taconite is not using this figure to calculate the value of the Pit Viper (as in *Lobe*), but claims that these costs would not have been incurred had Atlas Copco told the truth.

III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ATLAS COPCO ON UNITED TACONITE'S MISREPRESENTATION CLAIM.

A. For Over 140 Years, Minnesota Has Recognized A Duty To Disclose Material Information In Commercial Settings.

Atlas Copco claims that imposing a duty to disclose on sellers under these circumstances “would dramatically alter commercial transactions in this State.” (Resp. Br. at 32.) This should serve as a stark warning to all of Atlas Copco’s potential customers that it does not think it has a duty to disclose known safety defects in its products. Fortunately, Atlas Copco’s position is inconsistent with Minnesota law and common sense.

Minnesota has long recognized that when a party has special knowledge of material facts to which the other party does not have access, it has a duty to disclose this information to the other party. *Richfield Bank & Trust Co. v. Sjogren*, 309 Minn. 362, 366, 244 N.W.2d 648, 650 (1976); *Klein v. First Edina Nat’l Bank*, 293 Minn. 418, 421, 196 N.W.2d 619, 622 (1972). Here, Atlas Copco had special knowledge that a critical safety and operating component of the Pit Viper was defective and would fail, yet it concealed this information from United Taconite.

This case is analogous to the Minnesota Supreme Court decision, *Marsh v. Webber*, 13 Minn. 109 (1868), that originally recognized the principle that a party has a duty to disclose a fact material to a transaction that is peculiarly within his own knowledge. In *Marsh*, the defendant knowingly sold diseased sheep to the plaintiff without revealing to the plaintiff that the sheep were diseased. Here, Atlas Copco sold

United Taconite a drill that had jacks known to be defective, and Atlas Copco concealed the defect from United Taconite.⁶

In fact, the district court determined that to the extent Atlas Copco had knowledge that the jacks were defective, Atlas Copco had a duty to disclose that knowledge. (Add. 15.) The district court ultimately concluded, however, that no disclosure was necessary because there was insufficient evidence to show that Atlas Copco knew the jacks were defective.⁷ (*Id.*) As explained in United Taconite's opening brief, the district court erred in reaching this conclusion because it disregarded relevant evidence and weighed other evidence in a light most favorable to Atlas Copco. (App. Br. at 31-36.)

Atlas Copco also claims that Minnesota courts frequently reject "imposing a duty to disclose in similar commercial transactional contexts." (Resp. Br. at 32.) But again, Atlas Copco misrepresents the caselaw as none of the cited cases involve a situation

⁶ The *Marsh* rule is still followed by Minnesota courts. *See, e.g., Commercial Prop. Invs., Inc. v. Quality Inns Int'l, Inc.*, 938 F.2d 870, 877 (8th Cir. 1991) (reversing grant of summary judgment on fraud claim and holding that defendant's failure to disclose material information raised issues of fact that prevented the trial court from dismissing plaintiff's fraud claim); *Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517, 1526 (D. Minn. 1989) (holding that, despite defendant's warning that pelvic infection was a possible adverse reaction, the failure to reveal that its own clinical trials showed that pelvic inflammatory disease was the second most common disorder associated with the product's use was sufficient to allow jury to conclude that defendant had intentionally misrepresented the safety of the product by concealing a material fact).

⁷ This conclusion is inconsistent with the district court's order granting Plaintiff Driscoll leave to plead a claim for punitive damages. In its punitive damages order, the district court discussed in detail the evidence showing Atlas Copco's knowledge of the jack defect and that Atlas Copco kept this information secret. (Add. 29-30, 32-33.) The court concluded that it had been provided with "a substantial amount of evidence that when viewed in the light of the present motion could 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." (Add. 32 (emphasis added).)

where the seller knew its product was defective and yet remained silent. *See, e.g., Midland Nat'l Bank of Minneapolis v. Perranoski*, 299 N.W.2d 404 (Minn. 1980) (plaintiff claimed fiduciary relationship and court found no such relationship existed); *Noble Sys. Corp. v. Alorica Central, LLC*, 543 F.3d 978 (8th Cir. 2008) (holding defendant did not have a duty to disclose information to third party with whom it had no relationship); *Baer Gallery, Inc. v. Citizen's Scholarship Found. of Am., Inc.*, 450 F.3d 816 (8th Cir. 2006) (defendant owed plaintiff no duty to disclose defendant's intended use of proceeds when parties entered into contract where plaintiff agreed that defendant could use proceeds in any manner it saw fit); *Children's Broad. Corp. v. Walt Disney Co.*, 245 F.3d 1008 (8th Cir. 2001) (parties to a contract have no duty to disclose their understanding of contract's terms to the other party); *AKA Distrib. Co. v. Whirlpool Corp.*, 137 F.3d 1083 (8th Cir. 1998) (defendant had no duty to disclose to its distributor its business plans for marketing products not sold by the distributor); *Am. Computer Trust Leasing v. Boerboom Int'l, Inc.*, 967 F.2d 1208 (8th Cir. 1992) (defendant had no duty to disclose royalty agreement between defendant and manufacturer as part of sale of computer equipment to manufacturer's distributor); *Taylor Inv. Corp. v. Weil*, 169 F. Supp. 2d 1046 (D. Minn. 2001) (defendant had no duty to disclose problems other customers were having with its computer software).⁸

⁸ There is nothing unusual about fraudulent concealment claims between commercial entities as Minnesota courts have allowed such claims to go to the jury in cases involving negotiations between two corporate entities where there were questions of fact regarding the defendant's concealment of material information. *See, e.g., Appletree Square I Ltd. P'ship v. Investmark, Inc.*, No. C6-95-2386, 1997 WL 65523, at *3 (Minn. Ct. App. Feb. 18, 1997) (App. 1829.); *Commercial Prop. Invs., Inc.*, 938 F.2d at 877.

Contrary to Atlas Copco's claims, there is nothing dramatic about requiring a seller who knows its product poses a serious safety risk to disclose this knowledge prior to sale. In fact, such a disclosure is required under Minnesota law. *Marsh*, 13 Minn. 109. The remarkable thing would be if Minnesota law required otherwise.

B. Atlas Copco's "Connect-The-Dots" Defense Shows That A Genuine Issue Of Material Fact Exists, Which Should Have Barred The District Court From Dismissing United Taconite's Misrepresentation Claim.

Atlas Copco claims it had no knowledge that the Pit Viper's jacks were defective. (Resp. Br. at 32.) United Taconite provided ample evidence from which a trier of fact reasonably could conclude just the opposite, including evidence that Dr. Ma, one of Atlas Copco's chief engineers, admitted that the jacks were not strong enough to withstand the pressures put on them and needed to be re-designed. (App. 151.) In light of this evidence, this is clearly a disputed question of fact that should be left to the jury to decide. *Appletree Square I Ltd. P'ship*, 1997 WL 65523, at *3 (holding that trial court correctly submitted misrepresentation by omission claim to the jury where a question of fact existed related to defendant's knowledge; defendant had a duty to disclose if it had knowledge of the information, but it was for a jury to decide if defendant had knowledge).

Atlas Copco contends, however, that United Taconite is asking the Court to apply hindsight to "connect-the-dots" of a series of unrelated events.⁹ (Resp. Br. at 33.) Atlas

⁹ The fact Atlas Copco admits there are dots to connect is an acknowledgment that the district court erred when it concluded that the "only evidence that has been shown with

Copco claims that there was nothing “sinister” about its failure to connect-the-dots, and its failure is at most evidence of negligence. (*Id.* at 35.) This connect-the-dots defense is not supported by Atlas Copco’s own witnesses and documents, which demonstrate that Atlas Copco had “connected-the-dots” long before Deane Driscoll died.

Atlas Copco tries to downplay the scope and significance of the analyses performed by Dr. Ma in September 2005. Atlas Copco now says that Dr. Ma was “focused on the cutout section of the jack.” (Resp. Br. at 33.) While that may have been one location of high stress reported by Dr. Ma, it was by no means the only high stress area. Dr. Ma had generated data showing stresses for *all* parts of Dr. Ma’s model of the jack. This data showed that there were stresses far in excess of allowable fatigue stresses at the location of the welded connection between the jack cap and jack tube. (App. 1006, 1010, 1018, 1020.) Atlas Copco was well aware of these stresses as confirmed by the employee in charge of the Pit Viper line, Jeff Hamner, when he wrote in 2007 (before the accident) that Dr. Ma “found high stress in the bolts and at the toe of the tube welds adjacent to the bolts.” (App. 231.) Atlas Copco’s “cutout” point is nothing other than a smokescreen.

Atlas Copco also downplays Dr. Ma’s conclusion that a lower grade of steel should not be used. Atlas Copco cavalierly states, without citation to anything, that there

regard to the knowledge of the existence of a safety defect prior to the sale of the drill to UTAC was the Ma report.” (Add. 15 (emphasis added).)

was no change in the structural integrity,¹⁰ and “that the jack tube did *not* fail.” (Resp. Br. at 34 & n.16 (emphasis in original).) United Taconite disputes both points.

First, as Atlas Copco’s head design engineer concluded, each of the components of the Pit Viper’s jacks—the bolts, welds, tubes, cutouts, etc.—work together as one integrated unit, and a change in one component impacts the others. (R.A. 260.) For example, if the steel in the jack tubes is replaced with a lower grade of steel, it will bend or stretch at a lower load and this deformation will place more stress on the jack’s welds and bolts. (App. 1018.)

Second, the lower grade steel jack tube did, in fact, crack. United Taconite’s expert metallurgist found cracks near the bolts at the toe of *every* weld. (App. 886.) These cracks propagated into the weaker jack tube material, and according to United Taconite’s expert, Dr. Barsom, these cracks would have propagated through the jack tube and caused the jack to fail if the bolts remained intact. (*Id.*) Consequently, the cracks in the jack tubes are hardly “typical wear to be expected on a piece of mining equipment” as

¹⁰ At page 34 of its brief, Atlas Copco states: “Law testified unequivocally that he believed [that, by changing the steel,] there was no change in the structural integrity.” Atlas Copco fails to provide record support for this statement. Moreover, the statement is simply not believable. Dr. Ma was asked to analyze the jack to determine if it would be safe to use the new steel, and he concluded that it was not. (App. 146-47, 148-51, 160-61.) Law disregarded the analysis of one of his top engineers because, according to Law’s post-accident testimony, Law thought Dr. Ma had performed the analysis incorrectly. (App. 213-14.) Instead of having the analysis run “correctly” and getting an answer to whether it was safe to use the new steel, Law simply decided to substitute the new, lower-grade steel into United Taconite’s Pit Viper. (App. 226-27.) Law’s alleged belief about the new steel’s impact on the jack’s structural integrity is either untrue or incredibly reckless. Of course, Dr. Ma’s analysis turned out to be correct as the jacks on Pit Vipers all over the world broke, (App. 222, 231, 439-41, 451), and Atlas Copco redesigned and replaced all of the Pit Viper jacks. (App. 1558-60.)

Atlas Copco suggests (Resp. Br. at 34)—they are potentially fatal defects that were exacerbated by Atlas Copco’s decision to use weaker steel.

Finally, Atlas Copco ignores Dr. Ma’s testimony that, based on his analysis, he concluded that the jacks needed to be reinforced. (App. 151.) Thus, Atlas Copco’s engineers connected the dots over 18 months before United Taconite’s Pit Viper broke. The district court was provided with all of this information, which was further supplemented by United Taconite’s expert reports, yet the district court disregarded the evidence.¹¹

Atlas Copco asserts that imposing a duty to disclose known product defects “would dramatically alter commercial transactions” in Minnesota. (Resp. Br. at 32.) The record suggests otherwise. Atlas Copco had in its possession information that showed impermissibly high stresses in the jack bolts and welds. This information was not unique to one Pit Viper, but applied to each of the approximately 20 Pit Vipers then in service. In February 2007, the Indonesian Pit Viper showed cracks in the welds that connect the jack cap to the jack tube—just where Dr. Ma predicted. (App. 428-33.) Instead of informing the 20 or so Pit Viper owners, Atlas Copco kept this information secret and set

¹¹ Atlas Copco claims that when it finally connected the dots, “it immediately sent a notice to *all drill operators* to discontinue using the drill.” (Resp. Br. at 34 n.17 (emphasis added).) Nothing could be further from the truth. In fact, the record shows that, in accord with its practice of “control[ling] the flow of information” to the customer, Atlas Copco did not contact the drill operators, but instead asked its employees to inspect the drills in their regions. (App. 103-04, 483-85, 491-500.) Because the Atlas Copco representative that had been in United Taconite’s region had moved to Nevada, no one contacted United Taconite to warn of the jack’s defect. (App. 486-87, 534.)

out to find a “less radical solution” that would save Atlas Copco the cost of having to replace the jacks altogether. (App. 231.)

C. United Taconite Provided The District Court With Evidence That Atlas Copco’s Failure To Disclose Its Knowledge Of The Pit Viper’s Defective Jack Was Material And Relied Upon; Atlas Copco’s Attempt To Undercut United Taconite’s Evidence, At Most, Shows The Existence Of Genuine Issues Of Material Fact.

Atlas Copco argues that United Taconite failed to provide any evidence that Atlas Copco’s failure to inform United Taconite that the Pit Viper’s jacks were dangerously defective was material to the sale or that United Taconite would have relied on the information. (Resp. Br. at 35.) This is not accurate. United Taconite provided the district court with sworn testimony via an affidavit from Mike Smith, United Taconite’s Area Manager of Pit Operations, that had Atlas Copco told United Taconite that the jacks were unsafe, United Taconite would not have purchased the drill. (App. 534.) Sworn testimony of this nature may establish the reliance and materiality elements of a misrepresentation claim. *See, e.g., Raach*, 269 N.W.2d at 880 (finding the plaintiffs’ testimony that they would not have bought the property if they had known the true facts supported jury’s finding that the misrepresentation was material and that plaintiffs’ relied on it).

Atlas Copco cites *Urbaniak Implement Co. v. Monsrud*, 336 N.W.2d 286 (Minn. 1983), to claim that Smith’s testimony cannot be used to survive summary judgment. *Monsrud* involved an attempt to collect a debt and a defense of usury. *Id.* at 287. The plaintiff moved for summary judgment on the usury defense and, in opposition, the defendant merely submitted an affidavit asserting the legal conclusion that the debt was

usurious. *Id.* The court held that this conclusory statement failed to create a genuine issue for trial. *Id.* In contrast, Smith's affidavit, like the sworn testimony in *Raach*, states what impact Atlas Copco's disclosure of the withheld information would have had on United Taconite's decision makers. Not surprisingly, if United Taconite would have been told the drill was dangerously defective, Smith testified that the drill would not have been purchased.¹² (App. 534.)

Atlas Copco further asserts that United Taconite's evidence of materiality and reliance is "undercut by the fact that post-accident UTAC entered into negotiations with Atlas Copco and agreed to purchase a replacement PV351." (Resp. Br. at 35.) This is a particularly disingenuous argument. Atlas Copco knows that the Pit Viper it was trying to sell United Taconite after the Driscoll accident was not the same Pit Viper that United Taconite purchased in March 2007. This is because after the accident, Atlas Copco spent millions of dollars to redesign the Pit Viper's jacks and retro-fit every Pit Viper in the field throughout the world. (App. 1097, 1104-05, 1345, 1391, 1558-60, 1569-71.) The redesign made the Pit Viper jacks "stronger and visually different" as Atlas Copco made many changes to the jacks, including:

[T]he thickness of the jack tubing and upper and lower flange was increased and different weld techniques were specified to connect the lower flange and the jack tube. Additionally, the

¹² Atlas Copco also complains that United Taconite "can point to no contemporaneous documentation to support its claim" that it would not have purchased the drill if Atlas Copco would have told it the jacks were defective. (Resp. Br. at 35.) Of course, there is no requirement that a claim be supported by "contemporaneous documentation" to survive summary judgment. Minn. R. Civ. P. 56.03. Moreover, in a fraudulent omissions case, it should not be surprising that the plaintiff does not have documentation showing how it would have reacted to information that it never received.

jack cap assembly was modified away from a square design, with four bolts at each corner, to an octagonal design with eight bolts around the periphery.

(App. 1558.)

Moreover, the post-accident negotiations referred to in Atlas Copco's brief occurred before United Taconite learned about the Ma Report, the substituted steel, and the other jack failures. Consistent with its prior conduct, Atlas Copco was still not willing to disclose information about its knowledge of the Pit Viper's defective condition. It was only through discovery in this litigation that United Taconite learned that Atlas Copco's hid this critical safety information.

At trial, Atlas Copco is free to try to "undercut" United Taconite's sworn testimony with evidence of post-accident negotiations for a Pit Viper with completely redesigned jacks. At the summary judgment stage, however, credibility determinations are not appropriate. Atlas Copco's attempt to "undercut" United Taconite's evidence, at best, highlights the existence of genuine issues of material fact and is further evidence that the district court erred in granting summary judgment.

IV. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ATLAS COPCO ON UNITED TACONITE'S RESCISSION CLAIM.

Because Atlas Copco has not demonstrated that summary judgment was proper as to United Taconite's intentional misrepresentation claim, it has not established that summary judgment on United Taconite's rescission claim was warranted. *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).

Atlas Copco now argues that, because the sale of the Pit Viper was between ACCF and United Taconite, no claim for rescission can lie against ACDS and ACCMT.¹³ (Resp. Br. at 45.) This is yet another smokescreen. United Taconite purchased a drill from Atlas Copco and was in no position to evaluate the corporate relationship between the Atlas Copco entities. Nor did ACCF make clear to United Taconite that it would not be bound by all the representations made by other Atlas Copco entities. Indeed, Ed Borchardt, United Taconite's principal Atlas Copco sales contact, routinely consulted with personnel from the various Atlas Copco entities. (*See, e.g.*, App. 526-30.) Now that the drill has broken and Deane Driscoll is dead, Atlas Copco should be estopped from leveraging its corporate shell game.

V. THE DISTRICT COURT ERRED IN DENYING UNITED TACONITE'S MOTION TO AMEND TO ADD A CLAIM FOR PUNITIVE DAMAGES.

A. Minnesota Law Prohibited The District Court From Considering The Supplemental Evidence Atlas Copco Submitted In Opposition To United Taconite's Motion To Amend.

Atlas Copco argues that, in determining whether it acted in deliberate disregard of the rights and safety of others, the district court was free to consider any evidence that could be "established" by the testimony of United Taconite's employees. (Resp. Br. at 48.) In support of this position, Atlas Copco cites a footnote from a single federal district court decision, *Olson v. Snap Products, Inc.*, 29 F. Supp. 2d 1027 (D. Minn. 1998).

¹³ Atlas Copco did not include this argument in its voluminous summary judgment briefing to the district court, and it should accordingly be disregarded by this Court.

Minnesota law (including the *Olson* decision), however, unequivocally prohibited the district court from considering the type of evidence that Atlas Copco contends the district court properly considered.

First, Minnesota courts have held repeatedly that a party's proffered evidence in support of a motion to amend to add a claim for punitive damages should be considered without rebuttal or challenge.¹⁴ See, e.g., *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 870 F. Supp. 1499, 1502-03 (D. Minn. 1994) (explaining that "evidence in support of the [motion to amend to add punitive damages claim] should be thoroughly examined, without considering evidence submitted in opposition"); *Swanlund v. Shimano Indus. Corp.*, 459 N.W.2d 151, 154 (Minn. Ct. App. 1990) (concluding that trial court applied correct legal standard on motion to amend to add punitive damages claim when it considered plaintiff's evidence without cross-examination or other challenge).

In an attempt to rebut and challenge United Taconite's *prima facie* case, Atlas Copco grossly misrepresents the *Olson* decision. *Olson* involved a plaintiff who was injured when he attempted to weld a tire rim, while the tire, filled with gases from the defendant's fix-a-flat product, was still attached. *Id.* at 1029. Although the product was labeled "non-explosive," it contained flammable chemicals that were ignited by the

¹⁴ Despite clear Minnesota law providing that the district court may not consider evidence rebutting or challenging the plaintiff's *prima facie* case for punitive damages, Atlas Copco's joint opposition to Plaintiff Driscoll's and United Taconite's motions for punitive damages stated that the district court must "conduct an objective review of the record," and Atlas Copco submitted 27 pages of its version of the facts. (R.A. 170-96.) While United Taconite disputes the inferences that Atlas Copco attempts to draw from its supplemental evidence, Atlas Copco's supplemental evidence was clearly an improper attempt to rebut United Taconite's *prima facie* case.

plaintiff's welding torch. *Id.* The plaintiff filed suit alleging unlawful trade practices, negligent misrepresentation, and strict products liability, and later moved to amend to add claims for punitive damages. *Id.*

In addressing the motion to amend, the federal district court stated that, in addition to the plaintiff's proffered *prima facie* evidence in support of his motion, it would also consider the plaintiff's deposition testimony where he provided his recollection of how the labeling of the defendant's product affected his decision to proceed with the welding. *Id.* at 1033. The court refused, however, to consider any other evidence submitted by the defendant:

We have not, however, considered the other evidence, which the Defendants have submitted, and which attempts to rebut, or impeach, the Plaintiff's proffered *prima facie* showing. To actually weigh the credibility, or probative weight, of the competing contentions would result in far more than a searching inquiry of the Plaintiff's *prima facie* evidence. In ruling upon the propriety of a claim for punitive damages, the Court does not act as factfinder, but only determines whether the Plaintiff's evidence, *if unrebutted*, would support an award of punitive damages in his favor.

Id. at 1033 n.1.

It is important to point out that *Olson* allowed only a limited supplementation of the plaintiff's *prima facie* case. Because *Olson* involved a claim that the defendant's product was mislabeled, the court allowed the defendant to supplement the *prima facie* record with plaintiff's own testimony about how the labeling affected his use of the product. But in doing so, the *Olson* court explicitly refused to consider any of the defendant's other evidence. *Id.* at 1033 n.1, 1037.

The equivalent exception to the rule in this case would be if Atlas Copco sought to provide the district court with testimony from a United Taconite employee about how Atlas Copco's failure to disclose its knowledge of the Pit Viper's defective jack affected its decision to purchase the drill. Atlas Copco does not seek to supplement United Taconite's *prima facie* record with evidence of this type. Instead, Atlas Copco wants the Court to consider claims that duct tape and leaking hydraulic fluid killed Mr. Driscoll (despite admitting elsewhere that the bolts caused the accident (Resp. Br. at 14)).¹⁵ None of this evidence has anything to do with Atlas Copco's failure to disclose its knowledge about the defective jack, and so, even under the limited exception stated in *Olson*, the court may not consider it.¹⁶

¹⁵ Atlas Copco states that the drill lost hydraulic fluid the night before the accident, and claims that United Taconite admitted that the drill should have been taken out of production as a result of this leak. (Resp. Br. at 16, 48.) The operator, however, testified that he did not see a leak coming from the machine or signs of a leak on the ground. (R.A. 238.) Atlas Copco misrepresents the record when it claims United Taconite admitted the drill should have been taken out of production. To support this position, Atlas Copco cites the testimony of United Taconite's blasthole engineer who, when asked generally (and not in the specific context of the Pit Viper, which had no established leak) if he would expect a drill that had a "significant hydraulic leak" to be inspected to find the leak, responded: "I would assume. I mean, I can't speak for our maintenance department." (R.A. 256.)

Similarly, Atlas Copco claims that the window Deane Driscoll fell through after the drill's leveling jack broke was "secure[ed]" with duct tape, and that post-accident testing established that a window without duct tape would not have popped out when the drill tipped over. (Resp. Br. at 16-17.) This again is a misrepresentation of the record evidence. First, Atlas Copco's citations do not support that the window was "secured" by duct tape, only that the window had duct tape on it. Second, United Taconite disputed Atlas Copco's expert's opinion regarding the force exerted on the window during the accident and the ability of the window to have handled that force. (App. 1027.)

¹⁶ Minnesota courts have stated that they must not "rubber stamp" the plaintiff's motion to amend. This does not mean that the defendants are allowed to supplement the

Not only does the *Olson* decision *not* support Atlas Copco's argument that the district court properly considered its evidence challenging United Taconite's *prima facie* case, it, in fact, supports the argument that United Taconite should have been allowed to amend its complaint. After considering the plaintiff's *prima facie* evidence, the *Olson* court granted the plaintiff's motion to amend, holding that "[p]unitive damages are available against the manufacturer of a product that abuses its control over information about product risks in a manner that shows a disregard for public safety." *Id.* at 1036.

Second, Atlas Copco's attempt to shift the focus to United Taconite's alleged actions is improper. Under Minn. Stat. § 549.20, the issue is whether Atlas Copco acted with deliberate disregard for the rights or safety of others. United Taconite's actions are not relevant. United Taconite presented evidence that Atlas Copco acted with deliberate disregard for the rights or safety of others in failing to disclose, particularly in the face of mounting evidence, that the Pit Viper's jacks were defective. The district court was presented with the limited question of deciding whether United Taconite established a

plaintiff's record, as the same courts that state that they must not rubber stamp the plaintiff's motions also hold that the district court must only consider the plaintiff's evidence without cross-examination, rebuttal or other challenge. *See, e.g., Olson*, 29 F. Supp. 2d at 1033 n. 1, 1037; *Nw. Airlines, Inc. v. Am. Airlines, Inc.*, 870 F. Supp. 1499, 1502-03 (D. Minn. 1994); *Swanlund v. Shimano Indus. Corp.*, 459 N.W.2d 151, 154 (Minn. Ct. App. 1990). The admonition that the plaintiff's motion not be rubber-stamped means that the district court must consider the *prima facie* evidence and ascertain whether it shows that the defendant acted with deliberate disregard for the rights or safety of others. *Olson*, 29 F. Supp. 2d at 1034.

prima facie case—in deciding this question, the district court’s focus should have been on Atlas Copco’s conduct only.¹⁷

To consider the plaintiff’s status or actions would undermine the purpose of punitive damages, which is to punish the defendant and discourage others from acting in a similar manner. *Rosenbloom v. Flygare*, 501 N.W.2d 597, 601 (Minn. 1993). Under Minnesota law, punitive damages are awarded because the defendant acted with deliberate disregard for the rights or safety of others. The plaintiff who seeks punitive damages is a party to the litigation by unfortunate happenstance; a different individual or entity could have just as easily been the party harmed by the defendant’s conduct. To conclude that the defendant acted with deliberate disregard for the rights or safety of others—for, by example, failing to disclose that its product was dangerously defective—but refusing to award punitive damages because of something the plaintiff did allows the defendant to escape punishment for its reprehensible conduct. Public safety is not promoted by considering the plaintiff’s conduct. This is why Minnesota courts have held that § 549.20 requires the district court to focus solely on the defendant’s conduct.

¹⁷ Minn. Stat. § 549.20 as well as the Minnesota Jury Instructions Guidelines provide a list of factors to be considered in determining whether to award punitive damages. MINN. CIV JIG § 94.10. These factors focus exclusively on the defendant and its conduct. The jury is not told to consider anything about the plaintiff’s actions or injuries.

Further, Minn. Stat. § 549.20 states that a party may assert a claim for punitive damages upon a showing that the defendant acted with “deliberate disregard for the rights or safety of *others*.” (Emphasis added.) The fact that the statute refers to “others” rather than “plaintiff” reinforces that the court’s focus should be on the defendant’s conduct, not on the plaintiff’s.

Molenaar v. United Cattle Co., 553 N.W.2d 424, 429 (Minn. Ct. App. 1996) (stating that the “focus lies on the defendant’s wrongful conduct that must be deterred”).

B. Atlas Copco’s Attempt To Equate United Taconite’s Misrepresentation Claim With A Product Liability Claim Lacks Merit.

Atlas Copco claims that United Taconite was not entitled to assert a claim for punitive damages because Minnesota law prohibits a party who suffered only property damage from seeking punitive damages on product liability theories. (Resp. Br. at 49.) This is a strange argument because United Taconite’s motion to amend clearly stated that it was seeking punitive damages on its fraud and misrepresentation claims.¹⁸ (App. 605.) In other words, United Taconite’s misrepresentation claim is not based on the fact that the Pit Viper broke, but on Atlas Copco knowing that the drill was defective and not disclosing this information. This is clearly not a product liability claim; it is a misrepresentation claim, and it is no different than knowingly selling diseased livestock without disclosing knowledge of the livestock’s true condition. *Marsh v. Webber*, 13 Minn. 109 (1868).

Atlas Copco next argues that *Independent School District No. 622 v. Keene Corp.*, 511 N.W.2d 728 (Minn. 1994) prohibits a plaintiff from seeking punitive damages under a fraud theory when the case is “in essence” a product liability case. (Resp. Br. at 50.) This argument misconstrues *Keene*’s holding. Nowhere in *Keene* did the court state that punitive damages are unavailable on a fraud theory because “the case was, in essence, a

¹⁸ This argument is also inconsistent with Atlas Copco’s statement at oral argument when it told the trial court that it thought United Taconite’s claims were all based in contract. 4/21/09 Hearing Tr. at 105.

product liability case.” Rather, the *Keene* court considered whether a plaintiff, regardless of the theory of recovery, could seek punitive damages if it suffered only property damages. 511 N.W.2d at 732. The court held that such a plaintiff could not recover punitive damages no matter what its theory. *Id.*

As explained in United Taconite’s opening brief, *Jensen v. Walsh* overruled *Keene*. (App. Br. at 37-41.) *Jensen* and its progeny made clear that *Keene*’s holding was limited to product liability claims. *See, e.g., Jensen*, 623 N.W.2d at 251 (“While *Eisert* and *Keene* reflected 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.”); *Markegard v. Von Ruden*, No. A05-616, 2006 WL 163508, at *7 (Minn. Ct. App. Jan. 24, 2006) (affirming an award of punitive damages based on claim of fraud where plaintiff did not suffer personal injury) (App. 1837.). In fact, the *Jensen* court specifically noted that the *Keene* plaintiff brought claims other than strict product liability, including negligence, warranty and fraud, and that “the theory on which the jury based its [punitive damages] award in *Keene* is not apparent from the opinion.” *Jensen*, 623 N.W.2d at 251 n.4. To the extent *Keene* was not limited to product liability claims, *Jensen* overruled it. *Id.*

C. United Taconite Is Allowed To Select Its Remedy; Atlas Copco’s Rescission Argument Is Improper And Premature.

As with many of its other arguments, Atlas Copco claims for the first time *on appeal* that because United Taconite has sought rescission as a possible remedy, it has

somehow “disqualified” itself from pursuing punitive damages. (Resp. Br. at 53). This Court should reject this argument for two reasons.

First, again the Court of Appeals should not consider an argument raised for the first time on appeal. *Lee*, 741 N.W.2d at 130; *Thiele*, 425 N.W.2d at 584; *Thompson*, 739 N.W.2d at 431. Nowhere below did Atlas Copco mention that United Taconite was precluded from seeking punitive damages because it had pled a rescission claim. (App. 42, 556.) Because Atlas Copco has raised this argument for the first time on appeal, this Court should disregard it.

Second, Atlas Copco mischaracterizes the law on which it so heavily relies. Neither *Estate of Jones by Blume v. Kvamme*, 449 N.W.2d 428, 432 (Minn. 1989), nor *Jacobs v. Farmland Mutual Insurance Co.*, 377 N.W.2d 441 (Minn. 1985), stand for the proposition that punitive damages are unavailable where a plaintiff seeks to rescind a contract due to fraud or misrepresentation. See *Estate of Jones*, 449 N.W.2d at 432 (holding that punitive damages were improper after *imposition* of constructive trust); *Jacobs*, 377 N.W.2d at 446 (holding that punitive damages were not allowed where actual or compensatory damages were not established). In fact, in *Estate of Jones*, the first amended complaint sought out-of-pocket-damages and, *in the alternative*, rescission of the fraudulent transaction, as well as punitive damages. *Estate of Jones*, 449 N.W.2d at 430. And as is apparent from the procedural history of *Estate of Jones*, merely seeking rescission in the alternative does not preclude a claim for punitive damages.

Moreover, Minnesota law provides that a party may seek inconsistent or alternative remedies “until one remedy is pursued to a determinative conclusion.”

Christensen v. Eggen, 577 N.W.2d 221, 224 (Minn. 1998) (quoting *Vesta State Bank v. Indep. State Bank*, 518 N.W.2d 850, 855 (Minn. 1994)); see also *Estate of Jones*, 449 N.W.2d at 431-32. Here, at this stage in the litigation, United Taconite has not had an opportunity to pursue any of its remedies to a determinative conclusion. Thus, United Taconite is under no current obligation to make an election between its out-of-pocket damages or rescission damages. See *Sander & Co. v. N. Capital Ins.*, No. A06-971, 2007 WL 1893063, at *3 (Minn. Ct. App. July 3, 2007) (noting that plaintiff elected contract damages following jury verdict on both negligence and breach of contract) (App. 1844.). It is not for Atlas Copco to determine which remedy United Taconite should pursue. *Tysk v. Griggs*, 253 Minn. 86, 98, 91 N.W.2d 127, 136 (1958) (“It is not for the wrongdoer to dictate the remedy to be pursued by his victim in order to secure redress.” (internal quotation omitted)). Because an election of remedies has not been made, United Taconite is not precluded from seeking punitive damages.

D. Having Concluded That Atlas Copco Acted In Deliberate Disregard For The Rights Or Safety Of Others, The District Court Was Required Under Minnesota Law To Grant United Taconite’s Motion To Amend.

Finally, Atlas Copco argues that, in deciding United Taconite’s motion to amend, the district court could properly conclude that, by granting Plaintiff Driscoll’s motion to amend, “no additional deterrence was necessary.” (Resp. Br. at 54.) Atlas Copco fails to provide a single citation in support of this argument, which is not surprising since it is inconsistent with the Minnesota statute governing motions to amend to add claims for punitive damages.

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).

The statute gives the district court a specific issue to address: Is there *prima facie* evidence supporting a finding that the defendant acted with deliberate disregard for the rights or safety of others? If the answer to this question is “yes,” the statute mandates that the district court grant the moving party permission to amend. The statute does not give the district court the authority to consider how much deterrence is necessary or which plaintiff is more deserving of being allowed the opportunity to plead a claim for punitive damages.

Here, United Taconite and Plaintiff Driscoll based their motions to amend on the same course of conduct—Atlas Copco’s knowledge of and failure to address the Pit Viper’s defective design. (*Compare* App. 606-07 with App. 1108-13.) Having found Atlas Copco acted with deliberate disregard for the rights or safety of others by granting Plaintiff Driscoll’s motion, the district court was required under the statute to grant United Taconite’s motion based on the same evidence as well. To the extent the district court considered factors or evidence outside of United Taconite’s *prima facie* records, the district court erred as a matter of law and should be reversed. Minn. Stat. § 549.191.

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT ATLAS COPCO HAD WAIVED THE ATTORNEY-CLIENT PRIVILEGE FOR THE DOCUMENT PRODUCED BY ATLAS COPCO AND BATES-STAMPED ACDS 0003127-29.

In Minnesota, “communications that seek to elicit legal advice from an attorney acting in that capacity, that relate to that purpose, and that are made in confidence by the client are protected from disclosure, *unless the privilege is waived.*” *Nat’l Texture Corp. v. Hymes*, 282 N.W.2d 890, 895 (Minn. 1979) (emphasis added) (citing *Brown v. St. Paul City Ry.*, 241 Minn. 15, 22, 62 N.W.2d 688, 700 (1954)). Consistent with Minnesota law, in its August 12, 2009, Order and Memorandum,¹⁹ the trial court found that any privilege that had attached to the document produced by Atlas Copco and bates-stamped ACDS 0003127-29 “was subsequently waived through the disclosure of that document and its subsequent use in the proceedings.” (App. 1704.) Atlas Copco now urges this Court to reverse the trial court’s August 12, 2009 order, claiming the trial court abused its discretion in determining that Atlas Copco had waived any attorney-client privilege that may have attached to the document. Atlas Copco’s attempts to characterize the document as “inadvertently disclosed” and its actions as “prompt” pursuant to Minn. R. Civ. P. 26.02(f)(2) do nothing to discount the propriety of the trial court’s finding of waiver.

Atlas Copco acknowledges that the disclosure of the document must be analyzed in the context of this case, yet the “context” provided by Atlas Copco in its brief is

¹⁹ Atlas Copco did not include the August 1, 2009 Order and Memorandum in its Cross-Appellant’s Appendix, as required by Minn. Civ. App. R. 130.01 subd. 1. United Taconite has included it in its Supplemental Appendix.

deceptively incomplete. A proper history of the document's use in this matter reveals that the trial court's decision was anything but an abuse of discretion.

The document was originally produced by Atlas Copco on November 4, 2008, months after its initial document production, as part of a relatively small production of less than 750 pages. (App. 1731.) Rather than being inadvertently disclosed, as Atlas claims, the document was clearly reviewed, as it was marked as "Confidential" prior to its production. (App. 1051.)

Three weeks after the document was produced, it was marked as an exhibit at the deposition of Arnold Law, Atlas Copco's Vice-President of Engineering and the highest ranking Atlas Copco employee deposed in this case. (App. 1754, 1760.) Law was represented at his deposition by Daniel Q. Poretti, Atlas Copco's lead trial counsel in this case. (App. 1757, 1762.) Law was questioned about the document multiple times by counsel for several parties to the litigation. (App. 1763-69.) As the transcript shows, Law gave no indication that the document involved a privileged communication with counsel, nor did Poretti make any objection or indicate that the document was privileged. (*Id.*)

Atlas Copco neglected to inform this Court that, in addition to being used during Law's deposition, the document was also used as an exhibit not once, but twice without objection, in support of motions filed by United Taconite. Over five months after the production of the document, United Taconite referenced the document in support of its reply to its motion for leave to amend to add claims for punitive damages. (App. 1032,

1051-53.) After receiving that brief, Atlas Copco still gave no hint that it deemed the document to be privileged.

Five weeks later, on May 26, 2009, United Taconite cited the document for a second time in support of a motion *in limine* to exclude certain MSHA material related to the Driscoll accident from being admitted at trial. (App. 1796, 1808.) That same day, United Taconite also listed the document on its Trial Exhibit List. (App. 1822.) It was not until June 2, 2009—nearly seven months after the production of the document and over a week after its reference in United Taconite’s motion *in limine* and on United Taconite’s Exhibit List—that counsel for United Taconite first received a letter from Atlas Copco demanding the return of the document and accusing United Taconite of inappropriately using a document it knew to be privileged.²⁰ (App. 1779-80.)

It was based on these very facts that the trial court concluded in its August 12, 2009 order and memorandum that any privilege that at one time had attached to the document had been subsequently waived through its disclosure and use in the proceedings. (App. 1704, 1709-10.) In reaching this decision, the trial court relied on the particular circumstances of the case, noting both that “approximately seven months had passed before the document was identified as privileged” and that “the documents appear[ed] to have been used several times both in motion practice and in deposing key witnesses.” (App. 1709.)

²⁰ Apparently, United Taconite was supposed to know that Atlas Copco considered the document privileged when, according to its brief, Atlas Copco didn’t even know that the document was privileged until the eve of trial. (Resp. Br. at 57.)

If the trial court abused its discretion in finding that these facts and circumstances constitute waiver, then the concept of waiver has no meaning under Minnesota law. If disclosure was inadvertent, the request for return was far from prompt; Atlas Copco did nothing to rectify the disclosure for over seven months. During that time, the document was used at the deposition of one of the key witnesses in the case and filed more than once with the trial court. Any last-second effort by Atlas Copco to retrieve the document before its use at trial cannot overcome the repeated use of the document that occurred in this case. The trial court did not abuse its discretion under these circumstances and should be affirmed on this issue.

CONCLUSION

For these reasons, and for the reasons set forth in its opening brief, Appellant United Taconite respectfully requests that the district court's orders (1) dismissing United Taconite's fraud, intentional misrepresentation, breach of warranty of merchantability, breach of warranty of fitness for a particular purpose, and rescission claims, and (2) denying United Taconite's motion for leave to add a claim for punitive damages, be reversed in all respects. 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.

Further, Appellant United Taconite respectfully requests that this Court affirm the district court's ruling that Atlas Copco waived any privilege that might have attached to

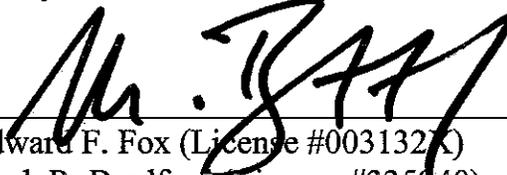
the document it produced, specifically analyzed to identify as "Confidential," and Bates-stamped ACDS 0003127-29.

Respectfully submitted,

BASSFORD REMELE
A Professional Association

Dated: March 8, 2010

By:


Edward F. Fox (License #0031327)
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

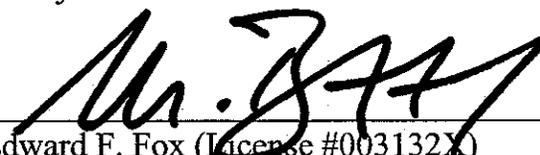
*ATTORNEYS FOR APPELLANT UNITED
TACONITE, LLC*

CERTIFICATE OF COMPLIANCE

I certify that this reply brief was prepared using 13-point font and conforms to Minn. R. App. P. 131.01, subd. 5(d)(7). The length of this appellant reply/cross-respondent brief is 9,255 words, excluding the Table of Contents and Table of Authorities. It is printed in proportionately spaced typeface utilizing Microsoft Word 2003.

BASSFORD REMELE
A Professional Association

Dated: March 8, 2010


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