

NO. A09-2171

State of Minnesota
In Court of Appeals

United Taconite, LLC,

Appellant,

v.

Atlas Copco Drilling Solutions, LLC, Atlas Copco Construction
Mining Technique, LLC and Atlas Copco Customer Finance, LLC,
Respondents.

RESPONDENTS' BRIEF AND ADDENDUM

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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).

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ISSUES STATEMENT

- 1. Did the District Court properly grant summary judgment on UTAC's fraud claim where UTAC has no evidence of reliance or out-of-pocket damages?**

The district court dismissed with prejudice the fraud claim.

Apposite Authorities:

Rien v. Cooper, 211 Minn. 517, 1 N.W.2d 847 (1942)

Sit v. T & M Properties, 408 N.W.2d 182 (Minn. Ct. App. 1987)

Bryan v. Kissoon, 767 N.W.2d 491 (Minn. Ct. App. 2009)

Lobe Enterprises v. Dotsen, 360 N.W.2d 371 (Minn. Ct. App. 1985)

- 2. Did the District Court properly grant summary judgment on UTAC's misrepresentation by omission and rescission claims where Atlas Copco had no duty to disclose and UTAC has no evidence of reliance or materiality?**

The district court dismissed with prejudice the misrepresentation and rescission claims.

Apposite Authorities:

Klein v. First Edina Nat. Bank, 293 Minn. 418, 196 N.W.2d 619 (1972)

Midland Nat'l Bank of Minneapolis v. Perranoski, 299 N.W.2d 404 (Minn. 1980)

Children's Broadcasting Corp. v. Walt Disney Co., 245 F.3d 1008 (8th Cir. 2001)

American Computer Trust Leasing v. Boerboom Intern., Inc., 967 F.2d 1208 (8th Cir. 1992)

- 3. Did the District Court properly grant summary judgment on UTAC's implied warranty claims where the claims as pleaded are product defect claims barred by the economic loss doctrine, UTAC has no evidence of breach, reliance or causation, and UTAC waived these claims through extensive pre-purchase testing of the drill?**

The district court dismissed with prejudice the warranty claims.

Apposite Authorities:

Minn. Stat. § 604.101, Subd. 3

Minn. Stat. § 336.2-316(3)(b)

Int'l Fin. Servs., Inc. v. Franz, 534 N.W.2d 261 (Minn. 1995)

Peterson v. Bendix Home Systems, Inc., 318 N.W.2d 50 (Minn. 1982)

Willmar Cookie Co. v. Pippin Pecan Co., 357 N.W.2d 111 (Minn. Ct. App. 1984)

Trans-Aire Int'l v. Northern Adhesive Co., 882 F.2d 1254 (7th Cir. 1989)

4. **Did the District Court clearly abuse its discretion by denying UTAC leave to seek punitive damages where UTAC provided insufficient clear and convincing evidence that Atlas Copco acted in deliberate disregard for the rights or safety of others and UTAC's proposed punitive damages claim is barred as a matter of law?**

The district court denied UTAC leave to seek punitive damages.

Apposite Authorities:

Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan, 494 N.W.2d 261 (Minn. 1992)

Shetka v. Kueppers, Kueppers, Von Feldt and Salmen, 454 N.W.2d 916 (Minn. 1990)

Independent School Dist. No. 622 v. Keene Corp., 511 N.W.2d 728 (Minn. 1994)

Eisert v. Greenberg Roofing & Sheet Metal Co., 314 N.W.2d 226 (Minn. 1982)

5. **Did the District Court abuse its discretion by determining that Atlas Copco waived the attorney-client privilege with respect to an internally generated privileged document that was inadvertently produced in discovery?**

The district court held that the privilege had been waived.

Apposite Authorities:

Kobluk v. Univ. of Minn., 574 N.W.2d 436 (Minn. 1998)

Minn.R.Civ.P. 26.02(f)(2)

STATEMENT OF THE CASE

After the close of discovery, Appellees Atlas Copco Drilling Solutions, LLC, (“ACDS”) Atlas Copco Construction Mining Technique, LLC (“ACCMT”) and Atlas Copco Customer Finance, LLC (“ACCF”) (collectively “Atlas Copco”) filed a motion for partial summary judgment, on the claims brought by Appellant United Taconite (“UTAC”). After extensive briefing and oral argument,¹ the district court granted Atlas Copco’s motion in full and denied UTAC’s motion for leave to assert punitive damages against Atlas Copco.

This case arises from a workplace accident on April 18, 2007 in which a mining drill tipped over on a steep slope, and the operator, Deane Driscoll, was killed. This appeal, however, is based solely upon mine operator UTAC’s claims against Atlas Copco. Atlas Copco settled all claims brought by the Estate of Deane Driscoll.

UTAC and Atlas Copco are sophisticated business entities who engaged in an arms-length transaction for two consecutive six-month “test” leases and subsequent purchase of the Atlas Copco Pit Viper 351 (“PV351”) drill, a large piece of mining equipment. During the lease, UTAC tried to use the PV351 on a steeply sloped and unprepared, or “first pass,” mining bench, however, Atlas

¹ The summary judgment and punitive damages motions were argued at the same hearing.

Copco informed UTAC that such use fell outside the PV351's safety limitations and violated the PV351 operating manual's explicit instructions.

Despite these warnings, after UTAC purchased the drill, UTAC: (1) again used the drill on a steeply sloped first pass bench causing the April 2007 accident; (2) operated the drill immediately after it had suffered a significant loss of hydraulic fluid without performing a thorough and adequate inspection; and (3) improperly repaired the drill's operator cab windshield, resulting in its inability to prevent Mr. Driscoll's fatal injury.

In an attempt to deflect evidence of wrongdoing, UTAC brought several claims against Atlas Copco, including claims for fraud, misrepresentation, negligence, strict liability, breach of warranty, and rescission.² Despite the contractual relationship, UTAC's claims sound in tort. At the summary judgment hearing, UTAC's counsel acknowledged his attempt to artfully plead around Minnesota's economic loss doctrine:

I'm going to be right up front, Your Honor. That economic loss rule is out there, and I did my very best to plead around it, and I think we have.

(T.68).

² UTAC also brought a claim for indemnification of the worker's compensation benefits it paid as a result of Mr. Driscoll's death. Atlas Copco did not seek summary judgment on that claim. Also, not all of the claims on appeal were brought against each Atlas Copco entity.

Those efforts notwithstanding, the district court concluded that UTAC's negligence and strict liability claims were barred by the economic loss doctrine. Regarding the fraud claim, the court concluded that UTAC could not demonstrate either reliance or that it had suffered cognizable damages. The court dismissed the misrepresentation claim, concluding that the parties' commercial relationship did not create an affirmative "duty to disclose" information regarding field repairs to other Atlas Copco units. Concluding that UTAC's warranty claims were merely disguised product defect claims, the district court also granted Atlas Copco summary judgment on those claims. With no underlying claim remaining, the court also dismissed the rescission claim. UTAC appeals the dismissal of its fraud, misrepresentation, breach of warranty, and rescission claims.

UTAC's decision to sound its claims in tort may have been motivated in part by its attempt to seek punitive damages against Atlas Copco – damages which are not available for a breach of contract claim.³ The district court saw through UTAC's machinations and denied its motion for leave to amend its complaint to seek punitive damages, holding "the evidence presented is not sufficient to show

³ See *Wild v. Rarig*, 302 Minn. 419, 442, 234 N.W.2d 775, 789-90 (1975). While UTAC attempts to misdirect the Court with allegations of Atlas Copco's purported misrepresentations and misconduct, it is axiomatic that an alleged malicious or bad faith breach of contract does not convert the claim from a contract claim to one sounding in tort. See *Wild*, 302 Minn. at 442, 234 N.W.2d at 790; *Deli v. University of Minnesota*, 578 N.W.2d 779, 782 (Minn. Ct. App. 1998).

that Atlas Copco's actions were intended to cause the damages suffered to the property of United Taconite." UTAC also appeals that ruling.

As the case approached trial, UTAC listed on its exhibit list an inadvertently produced privileged document of Atlas Copco's. In a subsequent hearing, the court held that the document was privileged, but that Atlas Copco had waived the privilege to that specific document. Atlas Copco filed a notice of review of the district court's holding on the waiver issue only.

STATEMENT OF FACTS

I. THE PV351 DRILL

The PV351 is a blasthole production drill, weighing approximately 380,000 pounds. (R.A.300.) A blasthole production drill is designed to drill holes on prepared surfaces at mines, which are later filled with explosives and detonated to harvest ore. (R.A.381.) When designed from 1997-2000 by the twenty-plus year experienced rotary drill engineering team at Ingersoll Rand (which became part of ACDS⁴ in 2004), the PV351 was the largest and most advanced blasthole drill the

⁴ There are three Atlas Copco entities at issue in this case. ACDS, which manufactured the drill and supports field representatives (the drill was designed by Ingersoll-Rand, which was acquired by ACDS); ACCMT, which is responsible for the marketing and sales; and ACCF, which is the entity that financed the lease and the entity from whom UTAC purchased the drill. UTAC has made no allegations that the corporate form of any of these entities should be disregarded or that the entities should be liable for each others' acts.

company produced. (App.112.)⁵ The PV351 is diesel powered (most large drills are electrically powered), hence, it can operate throughout a mine without a supporting electrical grid. (App.2-3.)

The PV351 is self propelled, through a crawl system underneath the drill's mainframe. (R.A.300.) Once it is positioned in the desired location, the operator extends four hydraulic jacks connected to the mainframe, and the drill's weight is transferred to those jacks. (R.A.381, 383-384.) The jacks can be extended to different heights, allowing the PV351 to level prior to drilling, a requirement for operation.

The jacks function by increasing pressure inside the hydraulic cylinder, contained within a cylindrical sleeve (the "jack tube"). (*See, generally*, R.A.378-386; *see also* Demonstrative Diagram of a PV351 Jack, Respondent's Addendum at 3). The jack's upper portion is referred to as the jack cap assembly. (R.A.381.) The lower flange of this assembly is welded to the jack tube (the "lower flange weld"), and contains a hollow center. (R.A.381.) The hydraulic cylinder connects to the assembly's upper flange. (R.A.381, 386.) The flanges are bolted together by four Grade 8 bolts supplied by defendant Standard Hardware (which is not a party to this appeal). (App.1490-1492, 1508-1509.) As the pressure within the

⁵ A list of witnesses is provided at Respondent's Addendum, pages 1-2.

hydraulic cylinder increases, the cylinder expands against the upper flange and lifts the drill up off of its tracks. (R.A.381.)

As noted, the PV351 is a “production drill”; not a “pioneering” drill.

(R.A.300.) A “production” drill is designed and intended to drill holes on *level* surfaces – not steep, angled slopes. (R.A.440.) By contrast, “pioneering” drills are much smaller than a PV351 and are used for (among other purposes) preparing and leveling surfaces that have not been mined, hence the label “first pass” or “first cut” benches, to allow the operation of a production drill on those surfaces.

(R.A.440.) First pass benches have the overburden (trees, shrubs, topsoil) cleared, but are otherwise unprepared and are frequently angled or uneven. (R.A.444.)

The importance of operating the PV351 on “flat and firm” benches is clearly set forth in the operating manual, which states: “WARNING Set up the PV351E Blasthole drill on a level surface. If this is not available, prepare the site and the way to the site before set up and drilling”, “[t]he PV351 is designed exclusively for production blasthole drilling ... on prepared benches which are flat and firm” and “[t]he PV351 drills are not designed for pioneering/earthmoving applications.”

(R.A.303.)

II. UTAC’S DECISION TO TEST THE PV351’S DRILLING CAPABILITIES

UTAC, and its corporate parent Cleveland Cliffs, operate the Thunderbird Mine in Virginia, Minnesota. Before 2005, UTAC used electric-powered drills.

(App.2-3.) In 2005, UTAC sought to purchase another drill to increase production and to replace a 25 year-old Gardner Denver drill. (*Id.*; R.A.31, 43-54.) The PV351 was potentially a good fit for UTAC's plans because of its advanced drilling capabilities and ability to drill without electrical infrastructure, saving UTAC between one and five million dollars in expense UTAC would have incurred to extend the electrical infrastructure. (App.3; R.A.57-48.) At the time it decided to lease the PV351, UTAC did not consider any other drills. (R.A.31-32.) In fact, UTAC blasthole engineer Bill Everett testified that no similarly performing diesel powered blasthole drill then existed. (App.296.)

During the negotiations for the PV351, Atlas Copco representatives, including Ed Borchardt, an employee of ACCMT, met with UTAC representatives and provided a Technology Agreement proposal and Machine Specification proposal, which together with the Master Equipment Lease formed the lease agreements between UTAC and ACCMT. (R.A.61-65.) Over the course of negotiations and based on UTAC's feedback, Atlas Copco made numerous amendments to these documents. (App.305-311.) Neither document mentions any requirement that the machine be able to drill on steeply-sloped terrains. (R.A.61-65.)

By December 2, 2005, UTAC and Cleveland Cliffs had committed to leasing a PV351 from Atlas Copco for six months. (App.3.) Joseph Carrabba, Cleveland

Cliffs Vice President of Operations, confirmed this in a December 2, 2005 email to Atlas Copco stating that UTAC “just concluded a meeting with the local Atlas Copco reps and have *decided to lease the drill.*” (emphasis added). (R.A.92-93.) On March 22, 2006, Atlas Copco and Cleveland Cliffs/UTAC executed a six-month lease agreement consistent with this agreement.⁶ (R.A.66-73.)

The initial lease agreement included the option to extend the lease for one additional six month term and an option to buy the drill at the end of either lease term. (R.A.66-73.) According to Mike Smith, UTAC Area Manager for Pit Operations, and Bryan Wittman, UTAC Controller, UTAC agreed on the lease “test” period approach rather than a straight purchase because it could be beneficial to both parties. (R.A.30, 33-34, 76, 79.) UTAC was interested in drilling 16 inch holes and in finding a drill that could operate in Northern Minnesota’s cold weather conditions. (R.A.33-35, 80-82, 86-87.) Atlas Copco was interested in placing a drill in a “hard rock” or iron mine. (R.A.33, 77.) Because the PV351 had no production history for analogous mines, UTAC wanted a year’s production to assess whether the drill would actually meet UTAC’s needs. (R.A.33-34, 59-60, 78-79.) Testing the drill’s capabilities on steep slopes was one factor UTAC specifically contemplated in recommending the lease option internally. (R.A.79-82.)

⁶ By March 22, 2006, the PV351 had already been in operation at the UTAC facility for about two weeks.

Two weeks *after* committing to leasing the drill, UTAC representatives inquired as to the PV351's slope limitations. Borchardt responded in part that the "angle drilling feature" could be used "to drill on your [UTAC's] 20% slope." (R.A.95.) Angle drilling refers to the PV351's capability to alter the drilling tower's angle, allowing the PV351, *when located on flat terrain*, to drill angled blastholes – beneficial for certain mining applications. (App.369.) The drilling described by Borchardt, however, required using cables to stabilize the PV351 while it operated on a steep slope, and using an angled drilling tower to compensate for the slope. Notwithstanding Borchardt's statement, UTAC never intended and never did use the angle drilling feature as Borchardt described it. According to UTAC's Senior Mining Engineer Mike Indihar, such use of angle drilling "just was a non issue. We weren't going to drill that way." (R.A.436.)

III. UTAC'S USE OF THE PV351 AND ATTEMPTED MISUSE OF THE DRILL AS A "PIONEERING" DRILL

Atlas Copco delivered the drill at the end of February 2006, and the lease began on March 22, 2006. (App.3-4; R.A.66-73, 83.) By letter dated June 1, 2006, UTAC exercised its option to extend the lease for another six months, to March 2007. (App.4.) Under the agreement, Atlas Copco retained responsibility for maintaining the drill and providing operating instructions throughout both lease periods. (App.3-4.) An ACCMT employee, Steve Beck, remained on site and

available at the mine, with few exceptions, 24 hours a day, seven days a week throughout the two lease terms. (R.A.36-37.)

UTAC used the PV351 on well-prepared and relatively level benches during the first lease period. In late July 2006, however, UTAC attempted to use the PV351 on Bench 1575 in a mine area known as the Dairy Queen Hill. (App.4.) The 1575 Bench had been cleared of overburden, but had never been drilled, and thus the attempted drilling was considered “first level” or “first pass” drilling. (R.A.39-40.) Upon seeing the drill on the 1575 Bench, Beck expressed concern about the safety of use on such a steep and unprepared surface, and UTAC pulled the drill off the slope. (R.A.98-99, 109-117.) UTAC instead subcontracted for a pioneering drill to drill the first pass of the 1575 Bench area of the Dairy Queen Hill. (R.A.106.)

After this incident, UTAC requested specific information on the PV351’s slope and leveling capabilities. (App.4; R.A.100-104.) UTAC advised Atlas Copco that the slopes where UTAC was attempting to use the PV351 were 10 to 12 degrees. (R.A.119-121.) Atlas Copco (ACCMT) responded that the end-to-end leveling limitation for the drill was 6.25 degrees or 10.95%. (App.4; R.A. 88-91.)

Following these exchanges, Brian Scoggin, ACCMT’s lead trainer, traveled to the mine to assess the slope issue. Scoggin confirmed the PV351’s slope and leveling limitations, and informed operators they should not exceed six percent

slope when drilling. (R.A.124-127, 135-137.) Scoggin specifically informed UTAC that the PV351 could not be safely leveled or used on first pass benches like those on Dairy Queen Hill because the slope exceeded safe limits. (App.4-5; R.A.124-127, 135-137.) Scoggin warned UTAC that the drill might be unstable and it would be unsafe for the operator to use the PV351 on Dairy Queen Hill's first-pass slopes. (R.A.124-131.) UTAC admits that in August 2006 Scoggin informed UTAC that Bench 1575 in the Dairy Queen Hill area of the mine exceeded the PV351's slope leveling capacity and that the parties agreed that the drill would not be used on that hill. (R.A.105-106, 130-133.) Further, for safety reasons Scoggin rejected the idea of using angle drilling on steep slopes, and he also discussed with Beck and UTAC representatives different options to reduce Bench 1575's slope so the PV351 could operate on it safely. (R.A.128-129, 133, 139.)

IV. UTAC'S DECISION TO PURCHASE THE DRILL

Notwithstanding its slope limitations, the PV351 was one of the most productive drills at the UTAC mine. (R.A.254-255.) Accordingly, despite UTAC's undisputed knowledge that the PV351 could not drill on steeply-sloped or first pass benches, UTAC still contemplated purchasing the drill, but wanted to further test the drill through the winter months to see how it performed. (R.A.38.) Some months later, by letter dated January 18, 2007, UTAC informed Atlas Copco

that it would purchase the drill at the end of the lease term. (R.A.141.) UTAC purchased the PV351 from ACCF in March 2007, at the end of the second lease term for the full price contemplated by the March 2006 master lease agreement. (App.10, 329, 438.) Before closing on the purchase, UTAC thoroughly inspected the drill and required Atlas Copco to perform certain repairs. (R.A.117-118, 465-67.)

V. THE ACCIDENT

Shortly after UTAC completed the PV351's purchase and just a few days after Steve Beck left the mine, UTAC sent the drill back onto a steep bench (1540) for "first pass" drilling – the same type of drilling it attempted in July 2006 on the 1575 Bench. (R.A.39-42.) On April 18, 2007, Mr. Driscoll was operating the PV351 on a first pass of 1540 Bench adjacent to Dairy Queen Hill's 1575 Bench. (R.A.41-42; App.6.) Mr. Driscoll was in the process of leveling the drill when the remaining bolts on the down-hill, drill end jack failed. Investigation later revealed that all four bolts connecting the upper and lower flange on the jack cap assembly of the affected jack broke. When the bolts failed, the upper flange was no longer connected to the jack cap assembly, and the jack no longer could bear the weight of the PV351's mainframe. (R.A.272, 276.)

The parties have extensively investigated and analyzed the cause of the bolt failure – the undisputed proximate cause of the jack failure. All experts agree that

there was intergranular cracking in the bolts that failed on UTAC's PV351.

(R.A.3-4, 9-10, 12-23.) Further, Atlas Copco's (Hanke) and UTAC's (Barsom) experts agree that the cracking occurred sometime during the bolts' manufacturing or plating process, and that the cracking caused or hastened the bolts' failure.

(R.A.13, 21-22.)

The Federal Mine Safety and Health Administration's ("MSHA") accident investigation revealed that the slope of the 1540 Bench where UTAC was attempting to use the PV351 at the time of the accident was 11.8 degrees, from end-to-end of the drill, almost double the 6.25 degree limit which Atlas Copco communicated to UTAC in writing. (R.A.275-277.) The side-to-side slope was 7.8 degrees, also in excess of the communicated limits of the PV351. (*Id.*) In fact, the slope was so steep that the drill operator on the shift immediately prior to the accident refused to drill that exact hole, stating that it exceeded his "pucker factor." (R.A.297.) Because of this steep slope, the downhill jack's failure caused the PV351 to tip on its side. When this happened, Mr. Driscoll was thrown into a window of the drill cab, the window popped out, and Mr. Driscoll was killed instantly when he landed on the rocks below. (R.A.272.)

Besides operating the PV351 on a steep and first pass bench, UTAC had a multitude of other safety lapses. The MSHA investigation revealed that one of the defective bolts on the failed jack had broken off during the earlier work shift.

(R.A.275.) MSHA regulations, mining best practices and the PV351 Operating Manual all require pre-operation inspection for equipment safety, including inspection for loose or missing bolts. (R.A.245, 304.) The missing bolt was readily visible from the walkway around the drill used for access and inspection. (R.A.309, 323-324.)

The MSHA investigation⁷ also revealed that on the same shift as the bolt was lost, the PV351 was completely shut down for loss of hydraulic jack fluid. (R.A.236.) Despite its admission that it should have taken the drill out of production for inspection following a hydraulic leak, UTAC conducted only a cursory machine inspection, then simply pumped in more fluid and sent the drill back out on the hill. (R.A.237-238, 256.)

Moreover, when the PV351 tipped over, Mr. Driscoll fell into the windshield of the drill's cab, which then popped out. The laminated glass windshield had previously been broken, and UTAC's employees replaced the windshield, securing its corners with duct tape. (R.A.242-244, 432-434.) Well before the accident, an Atlas Copco employee told UTAC employees that this windshield repair was substandard and not to factory specifications. (R.A.242-244.) Post-accident testing established that a windshield meeting factory specifications would not have

⁷ Initially, MSHA cited both ACCMT and UTAC for the accident. After further investigation, MSHA withdrew the citation against ACCMT and proceeded with the two citations against UTAC. UTAC has since reached a settlement with MSHA regarding these citations.

popped out when Mr. Driscoll fell into the window, and would have prevented his fatal injury. (R.A.358.)

Despite the accident, in the fall of 2007, UTAC ordered a new PV351 to replace the PV351 damaged in the accident. (R.A.442.) However, UTAC then cancelled this order in December 2007, apparently because UTAC and its parent Cleveland Cliffs, took issue with Atlas Copco actively defending itself regarding the incident. (*Id.*)

VI. UTAC'S ATTEMPTS TO SHIFT THE BLAME TO ATLAS COPCO

Throughout this litigation, UTAC has attempted to deflect criticism from itself by pointing at Atlas Copco. Two specific accusations – that Atlas Copco did not properly react to field reports regarding the PV351 and that Atlas Copco was aware of specific design flaws in the PV351 yet took no action – require a response.

A. Atlas Copco's "Knowledge" Regarding Bolt and Weld Failures

UTAC asserts that there were a number of PV351 "failures" in the field that should have put Atlas Copco on notice of structural problems with the jacks prior to the April 18, 2007 accident. The parties do not dispute the timing or location of the incidents; rather the materiality of each is the only disputed aspect. The relevant incidents occurred in Indonesia (February 2007); Chile (April 12, 2007), and Canada (April 17, 2007). It is undisputed that only one of these incidents

(Chile) resulted in a jack which no longer functioned, and that before these incidents, the PV351s had been successfully operating in the field for nearly six years without any known jack issues. A full recitation of the communications and Atlas Copco's actions for each incident is included in the briefing below and derived from the documents cited in the appendix. Below is a summary of the events.

Indonesian PV351: In February 2007, ACDS engineers were notified through an ACDS field representative that there were visible cracks on the lower flange weld of one of the jacks. (R.A.423.) The visible evidence of the cracks indicated it was due to poor welding by the vendor that supplied that specific jack assembly. (R.A.249-250.) The engineers designed a field repair for the cracks, (R.A.361-363) but based on the evidence of the poor weld and the fact that weld cracks do not typically pose a risk of catastrophic failure (because they progress slowly, allowing them to be discovered and field repaired), the engineers took no further action. (R.A.378.)

Chilean PV351: On April 12, 2007, ACDS's engineers received a report from a Chilean mine that bolts had broken on a PV351's jack assembly. (App.439-450.) The investigation into this report revealed the mine may have used weaker Grade 5 bolts, rather than the Grade 8 bolts specified in the machine design. (App.451.) As part of the investigation into the bolt failures, on April 17

ACDS field representatives reported cracks in the lower flange welds of the jacks on the Chilean PV351s, a condition that could also have been caused by the use of wrong grade bolts. (App.451-453.) Despite the indication that the problems were possibly caused by weaker bolts, the Atlas Copco engineers developed a repair and also began looking at potential design changes to avoid bolt breakages on the jacks. The design team completed the first iteration of this analysis a week later on April 20. (App.233-254.)

Canadian PV351: On the evening of April 17, ACDS technical representatives at a Canadian mine discovered cracked lower flange welds on PV351 jacks. (R.A.421.) On this drill there was no issue with improper bolts and there was no jack failure. ACDS Technical Service Representative Mike Cash received the report from the Canadian mine when he arrived at work on the morning of April 18. (R.A.420.) Based on this report and the Chilean reports from that same week, Cash ordered a field inspection of all drills and began drafting a Technical Service Bulletin that would explain the inspection process. (R.A.420; App.1362-1363.) Cash also personally contacted field representatives to inspect the drills for cracks that morning. (App.1370-1371.) Cash reached Steve Beck about checking the UTAC drill at approximately 9 a.m. on April 18, only to learn that Beck was no longer at the UTAC mine. (App.1375.) Less than two hours

later, the accident occurred. The Technical Service Bulletin that Cash began preparing that morning was issued on the evening of April 18. (App.1342-1343.)

B. UTAC's Other Irrelevant and Unsupported Allegations

UTAC asserts that Atlas Copco should have been aware of the potential for the accident as a result of a Finite Element Analysis ("FEA") prepared by ACDS engineer Stephen Ma in September 2005. A review of Ma's analysis, however, demonstrates that it was focused on stress borne by the portions of the jack tube surrounding the cutouts below the jack cap assembly—an area which *did not fail* on the UTAC PV351.⁸ (App.153-169.) Ma testified that because his analysis was focused on stresses in the cutout region of the jack tube, he did not accurately model other areas of the jack cap assembly, including the bolts and the lower flange weld. (R.A.259-260, 266-268, 415.) In short, Ma's analysis did not specifically address the part of the jack that failed on the UTAC drill.

UTAC also asserts that ACDS used lower grade steel to construct the jack tubes on the UTAC PV351. Prior to that drill's manufacture, ACDS learned from a supplier that it could no longer obtain the 1026 CD steel originally specified for the PV351 jack tube. (R.A.262-263.) ACDS therefore decided to substitute a specific lot of ASTM A106 steel for the 1026 CD steel. (R.A.425-429.) In many ways the substituted material was stronger, as it has a higher tensile strength and

⁸ Hydraulic hoses passed through the jack tube cutouts which allowed hydraulic fluid to enter and exit the hydraulic cylinder, allowing the jack to function.

better properties which would create stronger welds. (R.A.447.) Regardless, it is undisputed that the jack tube never failed on any PV351.

ARGUMENT

I. THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT WAS PROPER

A. Standard of Review

This Court reviews an order granting summary judgment *de novo*. *Sentinel Mgmt. Co. v. Aetna Cas. and Surety Co.*, 615 N.W.2d 819, 827 (Minn. 2000). Summary judgment's purpose is "to separate the wheat from the chaff and relieve the system of the burden and expense of unfounded litigation" when the facts are undisputed. *Cook v. Connelly*, 366 N.W.2d 287, 292 (Minn. 1985). In opposing summary judgment, the non-moving party must do more than rest on mere averments or unsupported conclusory allegations that simply summarize its theory of the case. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

B. The District Court Properly Dismissed UTAC's Fraud Claim⁹

For its fraud claim, UTAC alleges that Atlas Copco induced UTAC into leasing the PV351 by misrepresenting its ability to drill on sloped mining surfaces. By UTAC's definition, its fraud claim does not extend beyond the lease period of the drill. To withstand summary judgment, UTAC must demonstrate the existence

⁹ The fraud claim was brought only against ACDS and ACCMT, and is based solely on the drill's *lease*.

of a genuine issue of material fact as to *every* element of its fraud claim. *Goward v. City of Minneapolis*, 456 N.W.2d 460, 464 (Minn. Ct. App. 1990); *Hanson v. Ford Motor Co.*, 278 F.2d 586, 591 (8th Cir. 1960) (applying Minnesota law).

Therefore, UTAC must demonstrate evidence that Atlas Copco:

- (1) Made false representation of a past or existing material fact;
- (2) With knowledge of the falsity of the representation;
- (3) With the intent to induce UTAC to act in reliance;
- (4) UTAC actually relied; and
- (5) UTAC suffered pecuniary damages as a result of the reliance.

Hoyt Properties, Inc. v. Production Resource Group, L.L.C., 736 N.W.2d 313, 318 (Minn. 2007).

To fulfill the reliance element, UTAC must produce evidence to demonstrate that its reliance was reasonable or justified. *Id.* at 320-21. To prove any alleged representation was material, UTAC must demonstrate that the alleged misrepresentation was “germane to the fraud alleged” and actually influenced UTAC’s decision to lease the PV351. *Rien v. Cooper*, 211 Minn. 517, 523, 1 N.W.2d 847, 851 (1942). *See also Sit v. T & M Properties*, 408 N.W.2d 182, 186 (Minn. Ct. App. 1987) (“A representation of a fact untruly asserted or wrongfully suppressed is material if it influenced a party’s judgment or decision.”)

i. UTAC Did Not Rely on Atlas Copco’s Representations Regarding the PV351’s Slope Capability When Deciding to Lease the Drill

Ignoring its size, extensive industry knowledge, and commercial sophistication, UTAC claims that it accepted without question Atlas Copco's purportedly misleading representations. UTAC and Cleveland Cliffs are sophisticated mining entities with significant experience with blasthole drills. Indeed, UTAC acknowledged that it chose to lease the drill (rather than buy it) exactly because UTAC was *not* relying on the representations of Atlas Copco. Instead, UTAC wanted to test the drill before committing to its purchase; thus, its executives specifically contemplated testing all aspects of the PV351 during the lease period, including the PV351's slope capabilities. UTAC's demonstrated unwillingness to accept at face value Atlas Copco sales pitches regarding the PV351's slope capability absolutely refutes the reliance element of UTAC's fraud claim. *Hoyt*, 736 N.W.2d at 320-321.

UTAC's lack of reliance on alleged misrepresentations regarding the PV351's slope capability is confirmed by the timeline of events. According to UTAC, Atlas Copco mischaracterized the slope capabilities of the PV351 to UTAC twice, first in Borchardt's email on December 15, 2005, and second, during Everett's visit to Atlas Copco's manufacturing facility in early 2006. (App.296-97.) The record demonstrates, however, that these communications occurred *after* UTAC made the decision to lease the drill on December 2, 2005. As UTAC acknowledges, Cleveland Cliffs' Vice President of Operations stated on

December 2, 2005 that UTAC had “just concluded a meeting with the local Atlas Copco reps and have *decided to lease the drill.*” (emphasis added). (R.A.93.) The testimony of UTAC’s then Vice President and General Manager, confirms the date UTAC decided to lease the PV351:

Q: Do you think that by December 2, 2005, the date of Mr. Carrabba's e-mail, that you were in agreement that United Taconite should move ahead with a lease of the Pit Viper drill from Atlas Copco?

A. Yes.

(R.A.155.) And, while the lease itself was not signed until later, the point for UTAC’s fraud claim (and any possible reliance) is the date on which UTAC reached the decision to lease the Pit Viper. UTAC cannot claim that its decision to lease the drill was influenced by statements that were made after that decision, much less that it relied upon those statements.

UTAC has also failed to demonstrate that any Atlas Copco representations regarding the PV351’s slope capabilities were material to UTAC’s lease decision. *Rien*, 211 Minn. at 523, 1 N.W.2d at 851; *Sit*, 408 N.W.2d at 186. The PV351 represented a significant advancement over the 25 year-old Gardner Denver electric drill it was slated to replace in UTAC’s fleet – and allowed UTAC to expand its drilling operations without incurring the significant costs of expanding the electrical grid. In fact, the PV351’s acquisition had the potential to save UTAC between \$1 to \$5 million dollars in additional electrical infrastructure expenses

alone. UTAC's assertion that the drill's slope capabilities were material to its decision to enter the lease is not supported by documents contemporaneous to the lease. None of the documents comprising the lease mention any requirement for the machine to be able to drill on steeply-sloped terrain. Further, although UTAC now relies heavily on Borchardt's representation that the PV351's "angle drilling" feature, in combination with using cables to stabilize the drill, could be used on steep slopes, the record is clear UTAC never relied on Borchardt's statement. UTAC's Senior Mining Engineer testified that such use of the angle drilling feature "just was a non issue. We weren't going to drill that way." (R.A.436.) And it is undisputed that UTAC never employed cables to stabilize the PV351. Accordingly, UTAC has failed to demonstrate a genuine fact issue as to the materiality element of its fraud claim.

ii. UTAC Did Not Suffer Any Cognizable Damages Resulting from Its Reliance on Atlas Copco's Purported Misrepresentations

Even assuming UTAC has demonstrated all other elements of its fraud claim, it has not demonstrated that it suffered damages as a result of its decision to lease the PV351, failing to meet the claim's fifth element. As UTAC acknowledges, Minnesota applies the "out-of-pocket-loss" rule with respect to damages. *Raach v. Haverly*, 269 N.W.2d 877, 881 (Minn. 1978). As stated in

Raach, “[w]here a purchase is involved, normally this rule will be applied by subtracting from the amount plaintiff paid, the value of what was received.” *Id.*

To establish its damages element, UTAC must put forward evidence from which a court or jury could calculate whether it suffered an actual out-of-pocket loss. See *Bryan v. Kissoon*, 767 N.W.2d 491, 496 (Minn. Ct. App. 2009); *Lobe Enterprises v. Dotsen*, 360 N.W.2d 371, 373 (Minn. Ct. App. 1985). For purposes of this case, UTAC was required to come forth with evidence, sufficient to withstand summary judgment, that the actual fair market value of the PV351 lease was less than the amount that UTAC paid to lease the drill. *Bryan*, 767 N.W.2d at 496; *Lobe*, 360 N.W.2d at 373. “[I]f the property is worth what a party paid for it, then that party has suffered no damages.” *Bryan*, 767 N.W.2d at 496 (citing *Berg v. Xerxes-Southdale Office Bldg. Co.*, 290 N.W.2d 612, 615 (Minn. 1980)).

Despite that it bears the burden of proof, UTAC has offered *no* evidence that the actual fair market value of the year-long lease of the PV351 was less than \$1,020,000, the total amount of the lease payments.¹⁰ Indeed, UTAC has offered no evidence whatsoever as to the PV351’s actual fair market value during the lease period. It also offered no such calculation in its discovery responses, (R.A.165), and UTAC never disclosed a damages expert witness.

¹⁰ It is undisputed that UTAC leased the PV351 for 12 months at the rate of \$85,000 per month. (App.329.)

Nor could UTAC demonstrate that the PV351's actual fair market value was less than what UTAC paid to lease the drill. In this respect, UTAC concedes that throughout the one-year lease period, the PV351 was as productive as any drill UTAC had in operation:

Q. Is it the -- In the year or so it was in operation in the mine, was it the most productive drill there?

A. It was one of the more productive drills, yes.

(R.A.254-255.)

Absent any evidence of the PV351's actual fair market value, a jury could not subtract "the value of what was received", *Raach*, 269 N.W.2d at 881, from the amount UTAC paid to lease the drill so as to determine UTAC's actual out-of-pocket loss. Stated otherwise, UTAC has failed to put forth sufficient evidence to illustrate that it suffered damages and as such, fails to satisfy this essential element of the fraud claim. UTAC's failure to carry its affirmative burden is reason alone to affirm summary judgment on this count. *See, e.g., Reinke v. Harold Chevrolet-Geo, Inc.*, No. A03-1148, 2004 WL 1152700 at *4 (Minn. Ct. App., May 20, 2004) (summary judgment properly granted where appellant failed to provide evidence of actual out-of-pocket damages); *Hamline Park Plaza Partnership v. Northern States Power Co.*, No. C8-98-881, 1998 WL 811534 at *3 (Minn. Ct. App., Nov. 24, 1998) (same); *Crews v. Jordan*, No. C4-95-1012, 1995 WL 687691 at *3, 5 (Minn.

Ct. App., Nov. 21, 1995) (same); *Thomas W. Lyons, Inc. v. Sonus-USA, Inc.*, Civil No. 07-4227 (DWF/SRN), 2009 WL 306703 at * (D. Minn., Feb. 9, 2009) (same)

Moreover, the damages claims UTAC asserts are not out-of-pocket damages. For the first time on appeal, UTAC is claiming the lease payments themselves are also “fraud damages.”¹¹ As discussed above, these lease payment damages are not out-of-pocket losses since UTAC seeks to recover the entire amount of lease payments and makes no attempt to set-off the value that UTAC received through its indisputably profitable use of the drill throughout the lease period. UTAC’s only other measure of purported damages are its expenditures for leveling and preparing the 1575 Bench. These expenses are not out-of-pocket losses; rather, they most resemble property repair costs, which are *not* out-of-pocket losses. *See Bryan*, 767 N.W.2d at 496; *Lobe*, 360 N.W.2d at 373. Moreover, assuming *arguendo* it was necessary for UTAC to drill the 1575 Bench, had UTAC not leased the PV351, it would have needed to extend the electrical infrastructure of the mine to use the Gardner Denver drill on Bench 1575. This would have caused UTAC considerable additional expense – which expense UTAC has made no effort

¹¹ UTAC did *not* argue this claimed measure of damages (the lease payments) before the district court. (R.A.165.)

to compute or to offset against the bench preparation expenses so that a jury could properly assess whether the latter expenses are true out-of-pocket losses.¹²

In sum, UTAC has not put forth the evidence required to carry its burden of proof that it suffered any out of pocket loss due to its lease of the drill. This failure is fatal to UTAC's fraud claim.

C. The District Court Properly Dismissed the Misrepresentation By Omission Claim¹³

UTAC's misrepresentation claim asserts that Atlas Copco had an affirmative duty, and failed to meet that duty, to disclose certain information about the drill prior to its sale to UTAC. Specifically, UTAC alleges that Atlas Copco knew prior to the sale that the PV351's jacks were improperly designed, and withheld that information from UTAC.¹⁴

A party asserting a claim for misrepresentation by omission must prove that the omitting party had a duty to disclose the information at issue. *Richfield Bank & Trust Co. v. Sjogren*, 309 Minn. 362, 365-66, 244 N.W.2d 648, 650 (1976).

Whether a duty exists is a question of law for the court to determine. *Service*

¹² In fact, the only estimate for the cost of extending the electrical grid was provided by UTAC VP Todd Roth as somewhere between one and five million dollars. (R.A.57.)

¹³ The misrepresentation claim was asserted only against ACDS and ACCMT

¹⁴ Although UTAC asserted in its Amended Counterclaim that Atlas Copco also misrepresented the PV351's slope capabilities, it has abandoned that assertion, conceding that UTAC was aware of the drill's slope limitations prior to its purchase. UTAC's intentional misrepresentation claim does include a bare bones allegation related to the bolts and welds on the jacks.

Master v. GAB Business Services, Inc., 544 N.W.2d 302, 307 (Minn. 1996). The “general rule” in Minnesota is that “one party to a transaction has no duty to disclose material facts to another” absent special circumstances. *Klein v. First Edina Nat. Bank*, 293 Minn. 418, 420, 196 N.W.2d 619, 622 (1972). Under limited circumstances, when a “party has special knowledge of material facts to which the other party does not have access,” a duty to disclose may arise. *Id.*

In its briefing to this Court, UTAC ignores this critical step of evaluating whether a duty existed. Instead UTAC muddles the issue by stating that the district court erred by weighing the testimony on summary judgment. The district court, however, did exactly as required. It first looked at the relationship and circumstances of the sale to determine *as a matter of law* whether Atlas Copco owed UTAC a duty. *See Service Master*, 544 N.W.2d at 307. Concluding it did not, the court needed to proceed no further to conclude summary judgment was warranted.

i. No Duty to Disclose Exists Based Upon the Atlas Copco - UTAC Relationship

The hallmark case of *Klein v. First Edina Nat. Bank* illustrates the extremely narrow circumstances under which a duty to disclose arises in contractual relationships. In *Klein* the plaintiff was an alcoholic who had been repeatedly institutionalized. *Id.* at 420, 196 N.W.2d at 621. The defendant had been plaintiff’s bank for over twenty years and plaintiff had a social relationship with

the bankers. *Id. at 421, 196 N.W.2d at 622.* Plaintiff agreed to pledge stock to assist her employer's ailing business and went to her bank to execute the documentation. *Id. at 419-20, 196 N.W.2d at 621.* The bank failed to explain or disclose to the plaintiff the terms of the documents, and did not disclose that her employer had another outstanding loan with the bank. *Id. at 420, 196 N.W.2d at 621.* The bank further failed to explain that the proceeds from plaintiff's stock were to be used to pay off the earlier loan, or that the bank intended (and did) release the assignment on the loan and keep only the plaintiff's stock as security (specifically so it could avoid litigation against the owner of the earlier security interest who had been appointed to the board of another bank). *Id.*

The plaintiff testified that had she been aware of these facts she would not have entered the agreement, and that she relied on her relationship with the bank in entering them. *Id. at 421, 196 N.W.2d at 622.* Despite all this, the Supreme Court held that the bank owed no duty to the plaintiff, stating that, "[a]bsent a prima facie showing that defendant knew or ought to have known that plaintiff was placing her trust and confidence in defendant and was depending on defendant to look out for her interests" there is no duty to disclose. *Id. at 422, 196 N.W.2d at 623.*

UTAC and Cleveland Cliffs own multiple mining operations through which they purchase and operate dozens of drills. Their sophistication is illustrated by their corporate approval process and decision to lease (rather than buy) the drill

until satisfied that it met their needs. The sale of a multi-million dollar piece of equipment between two such sophisticated commercial parties does not fall outside the “general rule” and create an affirmative duty for Atlas Copco to disclose knowledge regarding the PV351 during the course of its sale to UTAC. Indeed, courts applying Minnesota law frequently reject imposing a duty to disclose in similar commercial transactional contexts.¹⁵ Imposing a duty to disclose on Atlas Copco under these circumstances would dramatically alter commercial transactions in this State. In essence, UTAC’s argument turns the well established Minnesota case law on its head, a result that this Court should reject. The district court correctly concluded that there is no such duty here. As such, summary judgment was appropriate.

ii. Atlas Copco Had No Knowledge of the Potential for Jack Failure on UTAC’s PV351

Even assuming that Atlas Copco had a duty to disclose during the course of the sale of the drill, UTAC cannot show Atlas Copco possessed the knowledge at that time such that it could have breached or complied with the duty.

¹⁵ See *Midland Nat’l Bank of Minneapolis v. Perranoski*, 299 N.W.2d 404, 413 (Minn. 1980); *Noble Systems Corp. v. Alorica Central, LLC*, 543 F.3d 978, 985-86 (8th Cir. 2008); *Baer Gallery, Inc. v. Citizen's Scholarship Foundation of America, Inc.*, 450 F.3d 816, 821 (8th Cir. 2006); *Children's Broadcasting Corp. v. Walt Disney Co.*, 245 F.3d 1008, 1021 (8th Cir. 2001); *AKA Distributing Co. v. Whirlpool Corp.*, 137 F.3d 1083, 1087 (8th Cir. 1998); *American Computer Trust Leasing v. Boerboom Intern., Inc.*, 967 F.2d 1208, 1211-12 (8th Cir. 1992); *Taylor Inv. Corp. v. Weil*, 169 F.Supp.2d 1046, 1064-65 (D. Minn. 2001).

Viewing the evidence in the light most favorable to UTAC, UTAC committed to Atlas Copco to purchasing the PV351 in January of 2007, and completed the purchase in March of 2007. UTAC alleges that Atlas Copco had knowledge of defects in the jack design before the purchase, based upon (1) Dr. Ma's analysis of the jack tube cutout in 2005, (2) the change of the type of steel used in the PV351 jack tubes, and (3) knowledge of weld cracks on an Indonesian drill in February 2007. In reality, the record demonstrates that UTAC's connect-the-dots (with the benefit of hindsight) theory falls far short of an actionable intentional misrepresentation claim.

UTAC would like the Court to use hindsight to piece together items that were both separate and unrelated at the times of their occurrence. First, with respect to Dr. Ma's work, his analysis was focused on the cutout section of the jack tube, which did not fail. Dr. Ma's work did not focus on the other areas of the jack assembly. ACDS engineers examined Dr. Ma's analysis at the time and determined – based both on the PV351's service history and the shortcomings of his modeling – that the analysis did not demonstrate a design problem in the PV351 jacks. Therefore, there was nothing to report.

The same is true for the change in steel. ACDS engineer Law approved a change in the type of steel used in the PV351 jack tubes because the type called for in the original specifications was no longer available. Law analyzed the mill

certificate for the steel and determined that it would have no impact on the jack tubes' structural integrity. Law testified unequivocally that he believed there was no change in the structural integrity and, accordingly, there was nothing to report.¹⁶

Finally, while in February of 2007 ACDS was aware of the cracks discovered in the lower flange weld of the jack on an Indonesian drill, the engineers believed it was nothing more than typical wear to be expected on a piece of mining equipment. These weld cracks did not implicate the bolts on the drill's jack cap assembly, and certainly did not alert ACDS of a design problem with the PV351 jacks.¹⁷ Moreover, it is undisputed that ACDS was not aware of the lower flange weld cracks on the Indonesian drill until *after* UTAC made the decision to purchase the PV351.

Therefore, even if the Court concludes that the business relationship between UTAC and the various Atlas Copco entities created a special duty to disclose, the record is clear that at the time of sale Atlas Copco had nothing to disclose.

¹⁶ And, as a practical matter, UTAC has no damages related to the change in the jack tubes' steel because it is undisputed that the jack tubes did *not* fail.

¹⁷ Notably, all of the purported "knowledge" UTAC asserts Atlas Copco was under a duty to disclose is unrelated to the two factors that combined to cause the accident in this case – the failure of Standard Hardware's substandard bolts and UTAC's operation of the PV351 on a slope that exceeded communicated safe operational limits. Of course, when Atlas Copco did become aware of a potentially systematic problem related to failures of the bolts on PV351 jacks, it immediately sent a notice to all drill operators to discontinue using the drill and inspect the jacks.

At bottom, UTAC accuses Atlas Copco of nothing more sinister than failing to connect the dots between a series of different and distinguishable events – the steel change in the jack tubes, Ma’s analysis of the cut-out section, and the cracks in the Indonesian drill’s lower flange weld – to arrive at a conclusion that there was a systemic design problem in the PV351’s hydraulic jacks. This is not evidence of intentional misrepresentation; at most, it is evidence of negligence and, as the district court correctly held (and UTAC did not appeal) UTAC’s negligence and negligent misrepresentation claims are barred by the Economic Loss Doctrine. *See* Minn. Stat. § 604.101, subds. 3 & 4.

iii. Even Assuming a Duty Exists and Atlas Copco Breached It, UTAC Cannot Prove Reliance or Materiality

For the materiality and reliance components of its misrepresentation claims, UTAC relies on the conclusory affidavit of Smith, which states that had UTAC known of the slope limitation of the drill, UTAC would not have purchased it. As an initial matter, UTAC must provide more than simply a conclusory allegation in an affidavit to avoid summary judgment and it can point to no contemporaneous documentation to support its claim. *Urbaniak Implement Co. v. Monsrad*, 336 N.W.2d 286, 287 (Minn. 1983) (internal quotation omitted). This claim is further undercut by the fact that post-accident UTAC entered into negotiations with Atlas Copco and agreed to purchase a replacement PV351. Certainly by that time, UTAC was aware of the slope limitations of the drill and any alleged jack problem

and yet, contrary to Smith's assertion, it still made the purchase decision. This provides yet another basis for the Court to affirm summary judgment.

D. The District Court Properly Dismissed UTAC's Warranty Claims¹⁸

UTAC brings its warranty claims based on its purchase of the PV351, at the conclusion of its one-year lease of the drill. Noticeably absent from UTAC's brief is any statement on the elements of a Minnesota warranty claim. Instead, UTAC seeks to convince this Court to dramatically expand Minnesota law by allowing a party to a commercial contract to bring a warranty claim based on nothing more than allegations of a "design defect."

Atlas Copco does not assert that Minnesota law prohibits a party such as UTAC from bringing a warranty claim had the PV351 failed to perform as warranted. But the law does not allow UTAC to bring a products liability claim by merely relabeling it as a warranty claim. UTAC's "warranty" claims are not based upon any warranty, express or implied, regarding the PV351's performance, but instead are an attempt to contort Minnesota warranty law to incorporate claims for "design defects." The legal authority cited by UTAC – a law review article and the

¹⁸ The warranty claims were made only against ACDS and ACCF.

notes to the Minnesota Jury Instruction Guides – CIVIL (CIV JIG)¹⁹ – does not support such an expansion.

i. UTAC’s Implied Warranty Claims Were Properly Dismissed Pursuant to the Economic Loss Doctrine.

To the extent the Court evaluates UTAC’s claim as it is plead, it is barred by the economic loss doctrine. Before the district court, UTAC stated that its implied warranty claims are not based on any Atlas Copco representations about the drill’s capabilities, but instead are based entirely on the fact that the “Pit Viper’s jacks were defectively designed.” (App.75.) Here, UTAC alleges that the PV351 was defectively designed, that the design defect caused the drill to fail, and that UTAC’s property (the drill) was damaged by this failure, so Atlas Copco should be liable to UTAC for those damages. This is a textbook products liability claim involving pure economic damage to UTAC, and as such is barred by the economic loss doctrine’s ban on “product defect tort claims.” Minn. Stat. § 604.101, Subd. 3.

ii. UTAC’s Implied Warranty of Fitness For a Particular Purpose Claim Fails for Lack of Reliance.

When treated as actual breach of warranty claims, UTAC’s claims fare no better. Breach of the implied warranty of fitness for a particular purpose is a statutory remedy. Minn. Stat. § 336.2-315. To prevail, UTAC must demonstrate

¹⁹ Notably, the explanatory notes to the CIVJIG state that the publication is a “guide” and “reliance on the CIVJIG as a repository for the substantive law may be misplaced.” 4 Minn. Practice, Jury Instruction Guides—Civil, Explanatory Note at XXVI.

that evidence exists to show: (1) Atlas Copco knew or had reason to know of any particular purpose for which the drill would be used; (2) Atlas Copco knew or should have known that UTAC was relying on Atlas Copco's skill or judgment to select an appropriate drill; and (3) that UTAC actually relied on Atlas Copco in making its decision about the drill. *Willmar Cookie Co. v. Pippin Pecan Co.*, 357 N.W.2d 111, 115 (Minn. Ct. App. 1984). As an initial matter, UTAC has to this day failed to identify what the "particular purpose" they allege they bought the drill for (beyond drilling itself), making it hard to understand how Atlas Copco could have known that unidentified purpose. Even assuming for purposes of summary judgment that UTAC has alleged sufficient evidence to satisfy the first element, the district court correctly concluded that UTAC cannot satisfy the actual reliance requirement as a matter of law. (DC at 17.)

UTAC admits that it leased the PV351 for one year to allow it to test the drill's capabilities, thereby demonstrating that UTAC was using its *own* judgment as to the PV351's ability to operate at the mine. Further, there can be no reasonable argument that by March 2007 (when UTAC purchased the drill from ACCF), UTAC was still relying on anything Atlas Copco represented prior to the drill's lease. *See Willmar Cookie*, 357 N.W.2d at 115. By then, UTAC had operated the drill for over a year and concedes that it knew the drill's capabilities and limits, including slope limitations. (App.60.) Similarly, given both UTAC and

Cleveland Cliff's significant experience as well as their decision to lease rather than buy the PV351, there can be no credible allegation that Atlas Copco knew that UTAC was relying on its skill or judgment – in any way. For these additional reasons, the Court should affirm the district court's grant of summary judgment on UTAC's implied warranty for fitness for a particular purpose claim.

iii. The Implied Warranty of Merchantability Claim Fails as a Matter of Law

UTAC likewise cannot prevail on the warranty of merchantability claim. An implied warranty of merchantability, to the extent one exists, requires that products “are fit for the ordinary purposes for which goods of that type are used.” Minn. Stat. § 336.2A-212. To establish a claim for breach of the implied warranty of merchantability, UTAC must demonstrate evidence of (1) the existence of a warranty; (2) a breach of that warranty; and (3) a causal link between the breach and the alleged harm. *Peterson v. Bendix Home Systems, Inc.*, 318 N.W.2d 50, 52-53 (Minn. 1982).

UTAC purchased the PV351 to drill 16 inch blastholes in hard taconite. It is undisputed that the PV351 did just that and did it well. UTAC can point to nothing – not its own Capital Expenditure Request form, not the Technology Agreement, not the Machine Specification Proposal or even the testimony of UTAC's own witnesses of another “ordinary purpose” for which UTAC purchased the PV351.

In fact, UTAC's decision post-accident to purchase a replacement PV351 further illustrates that the drill functioned well for its intended purpose.

UTAC's alleged "ordinary purpose" notwithstanding, Atlas Copco was explicit that the PV351 was designed for production drilling on well prepared benches and UTAC admits that by the time it purchased the drill it was aware of this limitation. The PV351 operating manual, which UTAC had in its possession since March of 2006, repeatedly stated that the PV351 was only to be used to drill on flat, level and well prepared benches. There is no doubt the PV351 was fit for that purpose, and in fact was the most valuable drill on UTAC's fleet when it was used as instructed. As a matter of law, UTAC cannot demonstrate the first and second elements of its merchantability claim, and the district court properly dismissed this legally infirm claim.

UTAC has also failed to present any evidence in support of the causation element of a merchantability claim. "Minnesota has long recognized that mere proof of a breach of the warranty of merchantability is not enough to sustain an action for breach of warranty and that the plaintiff must show not only the breach but also a causal relationship between the breach and the loss sustained." *Int'l Fin. Servs., Inc. v. Franz*, 534 N.W.2d 261, 266 (Minn. 1995). Here, the PV351 tipped when it was being operated on a bench well outside the drill's limitations – limitations UTAC admits that it knew about. Therefore, there is no causal link

between the “ordinary purpose” of the drill and the damages UTAC claims since those damages occurred when the drill was being operated outside specifications. Even assuming an implied warranty of merchantability arose under these facts, it was UTAC’s misuse of the PV351 under conditions that exceeded the drill’s ordinary purpose that caused the accident. For this additional reason, UTAC’s merchantability claim cannot withstand summary judgment.

iv. UTAC’s Warranty Claims Fail Because UTAC’s Year-Long Test Of The PV351 Waives Any Claim.

Even if UTAC could satisfy the elements of its merchantability or particular purpose warranty claims, UTAC’s year-long trial of the drill negates any warranties that might have otherwise arisen. No implied warranty of fitness for a particular purpose or warranty of merchantability can exist when the buyer has the opportunity to inspect the goods before entering the contract. Minn. Stat. § 336.2-316(3)(b).

The plain language of Section 336.2-316(3)(b) states:

[W]hen the buyer before entering into the contract has examined the goods or the sample or model as fully as he 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 to him.

Here, UTAC tested the PV351 for an entire year before purchasing it. UTAC had complete access to the drill throughout this period. Moreover, UTAC sought this test precisely because it wanted to confirm for itself the PV351’s

capabilities and limitations before committing to purchase the machine. UTAC representatives also acknowledge that before completing the purchase of the PV351 they inspected the machine and insisted that Atlas Copco perform certain repairs as a condition of the sale. Under these circumstances, the statute is explicit that implied warranties of fitness for a particular purpose and of merchantability do not arise. Minn. Stat. § 336.2-316(3)(b).

Applying Section 336.2-316(3)(b)'s language, courts have consistently held that buyers having the opportunity to inspect the goods assume any risk of defect and waive any implied warranty claims. For example, in *Trans-Aire Int'l v. Northern Adhesive Co.*, 882 F.2d 1254, 1259 (7th Cir. 1989), the buyer took a recommendation from the seller about an adhesive that would replace its current product. *Id.* at 1256. The seller sent a number of adhesive samples to the buyer and gave the buyer the opportunity to use and test them as the buyer saw fit. *Id.* The buyer eventually selected and purchased one of the adhesives, but later encountered a number of problems with delamination, resulting in need to repair numerous products. *Id.* The buyer sued the seller claiming both a warranty of merchantability and a warranty of fitness for a particular purpose. The district court dismissed the claims and the Seventh Circuit affirmed because the buyer had the opportunity and ability to inspect and test the samples before making the purchasing decision. *Id.* at 1259. Under those circumstances, and despite the fact

that the buyer did not *actually* conduct the tests to discover the defect, it assumed all risk of defect because it had the opportunity to do so.²⁰ *Id.*; *see also Sobiech v. Int'l Stable & Machine Co.*, 867 F.2d 778, 782-83 (2d Cir. 1989) (extensive pre-sale use of machine and knowledge of defects precluded implied warranty claims under New York UCC §2-316(3)(b)); *O'Connor v. Judith B. & Roger C. Young Inc.*, No. C-93-4547, 1995 WL 415138 at *5 (N.D. Cal., Jun. 30, 1995) (buyer's test ride and veterinary inspection of horse barred claims for implied warranties of merchantability and fitness for a particular purpose under California UCC § 2316(3)(b)). (R.A.143-150.)

UTAC's opportunity to test the PV351 far exceeded the analogous opportunities in the cases discussed above. UTAC tested the drill for an entire year, and its representatives acknowledged that UTAC initially leased the drill expressly so that UTAC could test the drill's capabilities and limitations pre-purchase. During the one-year lease period, the PV351 was one of the most productive drills in the UTAC fleet. The jacks that UTAC now alleges were "defective," including the exterior welds, jack tubes, and bolts, were plainly visible at all times. In fact, UTAC drillers *inspected the PV351 multiple times every day* for a year. UTAC maintenance personnel were trained in drill maintenance and participated in a final walk-through inspection before purchase, resulting in UTAC

²⁰ That section of the Illinois UCC, 810 Ill. Comp. Stat. 5/2-316(3)(b) (2008), is worded identically to Minn. Stat. § 336.2-316(3)(b).

requiring that certain repairs be done. By insisting on a yearlong “test” period to assess for itself the drill’s capabilities, UTAC waived any warranty of merchantability or fitness for a particular purpose claims that it might otherwise have possessed. Minn. Stat. § 336.2-316 (3)(b). For this additional reason, the Court should affirm the district court’s grant of summary judgment on UTAC’s implied warranty claims.

E. The District Court Properly Dismissed UTAC’s Rescission Claim²¹

UTAC alleges that Atlas Copco withheld material information about the PV351’s operation, and that UTAC is therefore entitled to rescind the purchase agreement. Under Minnesota law, “a contract is voidable if a party’s assent is induced by either a fraudulent or a material misrepresentation by the other party, and is an assertion on which the recipient is justified in relying.” *Carpenter v. Vreeman*, 409 N.W.2d 258, 260-61 (Minn. Ct. App. 1987). As a practical matter, the elements of UTAC’s rescission claim are the same elements required for its fraud and misrepresentation claims. *Id.* See also *Carstedt v. Grindelund*, 306 N.W.2d 105, 110 (Minn. 1981) (rescission not appropriate because plaintiff could not prove intentional or reckless misrepresentation). Accordingly, because the district court correctly granted Atlas Copco summary judgment on UTAC’s fraud

²¹ UTAC brought the recession claim against all three Atlas Copco entities.

and misrepresentation claims, it also properly granted summary judgment on the rescission claim.

Additionally, the PV351's sale was between ACCF and UTAC. (App.438). No claim for rescission of a contract can lie against an entity who was not a party to the contract. *See Marso v. Mankato Clinic, Ltd.*, 278 Minn. 104, 116, 153 N.W.2d 281, 290 (1967). (“[W]here one *party* to a contract refuses to perform a substantial part of the contract the other *party* may rescind it[.]”) (Emphasis added). Thus, the rescission claims against ACDS and ACCMT must be dismissed. Because UTAC points to *no evidence* suggesting ACCF misled it, no claim for rescission can exist against ACCF.

The district court's summary judgment order should be affirmed in all respects.

II. THE DISTRICT COURT DID NOT CLEARLY ABUSE ITS DISCRETION BY DENYING UTAC LEAVE TO ASSERT A CLAIM FOR PUNITIVE DAMAGES²²

A. The District Court Applied the Correct Legal Standard

The district court did not clearly abuse its discretion in denying UTAC's motion for leave to amend to add a claim for punitive damages. Absent a *clear*

²² UTAC sought to amend its complaint to add a claim for punitive damages against ACDS and ACCMT only. Of course, should the Court affirm the dismissal of UTAC's fraud and misrepresentation claims, this aspect of UTAC's appeal would be rendered moot. *See, e.g., Olean v. Pomroy*, No. A08-0878, 2009 WL 511757 at *8 (Minn. Ct. App., Mar. 3, 2009).

abuse of discretion, this Court will not disturb the district court's denial of UTAC's motion. *Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 267-68 (Minn. 1992). *See also Sharma v. Edina Realty, Inc.*, No. A08-0407, 2009 WL 910864 at *3 (Minn. Ct. App., Apr. 7, 2009). This stringent standard of review reflects the fact that punitive damages are an extraordinary and disfavored remedy; one to be allowed with caution and only within narrow limits. *Lewis v. Equitable Life Assurance Soc'y of the United States*, 389 N.W.2d 876, 892 (Minn. 1986); *J.W. ex rel. B.R.W. v. 287 Intermediate Dist.*, 761 N.W.2d 896, 904 (Minn. Ct. App. 2009).

UTAC attempts to sidestep the proper clear abuse of discretion standard of review by arguing that, in denying UTAC's motion, the district court "applied an incorrect legal standard", which error purportedly entitles UTAC to *de novo* review.²³ Not so. When considering a motion for leave to seek punitive damages, the district court must independently ascertain whether there exists clear and convincing *prima facie* evidence that the defendant acted with deliberate disregard of the rights or safety of others. *Shetka v. Kueppers, Kueppers, Von Feldt and Salmen*, 454 N.W.2d 916, 918 n.1 (Minn. 1990); *J.W.*, 761 N.W.2d at 904; *Swanlund v. Shimano Indus. Corp.*, 459 N.W.2d 151, 154 (Minn. Ct. App. 1990).

²³ Notably, the cases UTAC cites in support of its argument for *de novo* review are two family law cases, *see Ayers v. Ayers*, 508 N.W.2d 515 (Minn. 1993) and *Thompson v. Thompson*, 739 N.W.2d 424 (Minn. Ct. App. 2007), neither of which involved a motion for leave to assert a punitive damages claim.

This is precisely the standard the district court cited in concluding that UTAC “has provided insufficient evidence to allow a jury to reasonably conclude by clear and convincing evidence that Fourth-Party Atlas Copco acted in deliberate disregard for the rights or safety of others.” (Add.20.)

Moreover, the district court both recited *and applied* the correct standard. Consistent with the Supreme Court’s admonition not to merely “rubber stamp” UTAC’s allegations, *see Shetka*, 454 N.W.2d at 918 n.1, the district court independently assessed the evidence and found it did not meet the clear and convincing showing of deliberate disregard. In so doing, the district court considered the following undisputed record facts:

- UTAC and Atlas Copco are large and sophisticated business enterprises that were engaged in an arms length transaction.
- UTAC had possessed and made exclusive use of the PV351 for more than 12 months before the accident.

(Add.25.) While UTAC insists that the district court improperly considered this undisputed evidence; it offers no legal authority demonstrating that the district court clearly abused its discretion in considering these factors.

Furthermore, in evaluating UTAC’s motion, the district court was not confined to the sanitized record presented by UTAC – a carefully cherry-picked record that sought to purge the abundant evidence of UTAC’s knowledge and

culpability in these events. Instead the court could have properly considered

UTAC's own testimony and statements, which established that:

- At least nine months before the accident, Atlas Copco had expressly warned UTAC *not* to use the PV351 for first cut drilling in unprepared benches.
- At the time of the accident, UTAC *was using the PV351 for first cut drilling on an unprepared bench.*
- Deane Driscoll was killed after he crashed through the cab window of the PV351, which window UTAC replaced and held in place with duct tape after it had been broken some months before the accident.
- The night before the accident, the PV351 had been completely shut down for loss of hydraulic jack fluid. While admitting that it should have taken the drill out of production for inspection following the hydraulic leak, UTAC only conducted a cursory inspection and then simply pumped in hydraulic fluid and sent the drill back into production.

Each of these facts is established by the testimony and statements of UTAC's own agents and employees, and the district court could have properly considered this evidence notwithstanding UTAC's failure to submit this evidence in its own motion papers. *See Olson v. Snap Products, Inc.*, 29 F.Supp.2d 1027, 1033 n.1 (D. Minn. 1998) ("We seriously doubt that our role could be anything but that of a 'rubber stamp' were we to allow the Plaintiff to exclude his own personal testimony from our consideration, simply because he has chosen not to submit the evidence for our review.")

Nevertheless, UTAC argues that the district court should have ignored all of these facts and simply rubber stamped the allegations of UTAC's motion papers. Even the cherry-picked allegations UTAC submitted, however, did not provide clear and convincing evidence in support of UTAC's arguments that Atlas Copco deliberately disregarded UTAC's rights or safety by: (1) doing and saying whatever it took to sell the PV351 to UTAC; (2) failing to provide critical safety information to UTAC; and/or (3) failing to disclose relevant information regarding other jack failures. (Add.22.) The district court independently assessed these contentions and correctly found them lacking in the requisite clear and convincing evidentiary support. (Add.25.)

B. As a Matter of Law, UTAC Was Not Entitled to Seek Punitive Damages

As discussed *supra*, the district court did not clearly abuse its discretion in denying UTAC leave to assert a punitive damages claim. In fact, the nature of claims and remedies upon which UTAC attempts to tie its punitive damages claim provide independent bases for denying the motion. A products liability claim with only property damage cannot support a punitive damages claim. Nor can a fraud claim seeking rescission. Hence, had the district court so elected, it could have properly determined that UTAC was not entitled to seek punitive damages as a matter of law.

First, UTAC's claims are indisputably products liability claims. Under Minnesota's economic loss doctrine, a "product defect tort claim" is "a common law tort claim for damages caused by a defect in the goods" Minn. Stat. § 604.101. The PV351 is unquestionably a "good"²⁴ and UTAC's claims unquestionably allege that the drill was "defective".

These allegations should be dispositive of the punitive damages inquiry since even UTAC admits that the Supreme Court has stated unequivocally that punitive damages are unavailable in products liability cases where – as here -- the plaintiff claims to have suffered property damage only. *See Independent School Dist. No. 622 v. Keene Corp.*, 511 N.W.2d 728, 728, 732 (Minn. 1994); *Eisert v. Greenberg Roofing & Sheet Metal Co.*, 314 N.W.2d 226, 228 (Minn. 1982). UTAC cannot evade this prohibition by limiting its punitive damages claim to its fraud and misrepresentation claims. The plaintiff in *Keene* sued for fraud, obtaining a favorable jury verdict on the fraud count; nevertheless, the Supreme Court held that punitive damages were unavailable since the case was, in essence, a products liability case; accordingly, the Court "reverse[d] the award of punitive damages in its entirety." *Keene*, 511 N.W.2d at 732.

²⁴ "Goods" are defined to mean "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (article 8) and things in action." Minn. Stat. § 336.2-105(1).

Nowhere in its brief does UTAC explain why this case is any different than any other case alleging property damage resulting from a defective product. Minnesota does not allow punitive damages recoveries in such property damage-only product liability cases for reasons of public policy; specifically, the concern “that the threat of large punitive damages awards in product liability actions may prevent the introduction of beneficial products to the marketplace and impede research and development of new products.” *Jensen v. Walsh*, 623 N.W.2d 247, 251 (Minn. 2001). These concerns are fully implicated in this case; however, UTAC never articulates why *Keene* and *Eisert* do not apply, and why UTAC should be allowed to seek punitive damages in this products liability case.

The district court also properly concluded that neither *Jensen v. Walsh* nor *Molenaar v. United Cattle Co.*, 553 N.W.2d 424 (Minn. Ct. App. 1996) alters this result or otherwise provides legal support for UTAC’s proposed punitive damages claim. Both *Jensen* and *Molenaar* involve fact patterns that bear no reasonable resemblance to this case’s facts. *Molenaar* involved a defendant that deliberately and consciously stole and subsequently sold the plaintiff’s cattle. *Molenaar*, 553 N.W.2d at 426. The plaintiff sued the defendant for conversion and this Court concluded that “a litigant may recover punitive damages for conversion of property if the conversion is in deliberate disregard of the rights or safety of others.” *Id.* at 425-26.

As for *Jenson*, that case involved a dispute between riverfront neighbors where the undisputed evidence demonstrated that the defendants repeatedly and deliberately vandalized the plaintiffs' houseboat and other property in an unsuccessful effort to either drive the plaintiffs off their property altogether or to force them to remove their houseboat (which defendants maintained obstructed their access to the river). *Jenson*, 623 N.W.2d at 248. The only issue before the Supreme Court was "whether punitive damages are available in an action for intentional damage to property where the only damage is to property," *id.*, and the Supreme Court affirmatively answered this question.

Jenson and *Molenaar* are of no help to UTAC. Not only is this case a property damages-only products liability action, but here, unlike in *Jenson* and *Molenaar*, there is no evidence that Atlas Copco stole or intentionally caused damage to UTAC's property. In fact, there is no evidence that Atlas Copco acted intentionally or deliberately in disregard of UTAC's rights. Atlas Copco sold UTAC a drill after UTAC had unfettered access to test and inspect it for a year. It is not surprising, therefore, that the district court distinguished this case from *Jenson* and *Molenaar* and properly concluded that, "the evidence is insufficient to show that Atlas Copco's actions were intended to cause the damages suffered to the property of [UTAC]." (Add.25.) *See also Admiral Merchants*, 494 N.W.2d at

268 (leave to seek punitive damages properly denied where no direct evidence of any fraud, deceit, bad faith or maliciousness on defendant's part).

Second, as a matter of law, UTAC is not entitled to punitive damages because of the remedy it seeks – rescission of the PV351 purchase agreement.²⁵ The Supreme Court is clear that punitive damages are unavailable where, as here, a plaintiff seeks to rescind a contract due to purported fraud and misrepresentation.

See Estate of Jones by Blume v. Kvamme, 449 N.W.2d 428, 432 (Minn. 1989);

Jacobs v. Farmland Mut. Ins. Co., 377 N.W.2d 441, 445-46 (Minn. 1985).

Rescission's purpose is to restore the parties to the *status quo ante*, and such a restoration "should not be accompanied by a punitive damage award" since that would alter the *status quo*. *Estate of Jones*, 449 N.W.2d at 432. By seeking the rescission remedy, UTAC has disqualified itself as a potential punitive damages claimant.

²⁵ A defrauded party may either seek to recover "out-of-pocket" damages or it may sue for rescission of the contract. *See Estate of Jones by Blume v. Kvamme*, 449 N.W.2d 428, 431-32 (Minn. 1989). In this case, UTAC seeks to recover the full amount of cost UTAC claims it incurred to purchase a replacement for the PV351--\$3,042,332.46. (R.A.165.) This is clearly not a claim for out-of-pocket damages; if UTAC sought actual out-of-pocket damages, it would be obligated to offset this ostensible replacement cost by the amount of the PV351's actual fair market value following the accident; and Atlas Copco has offered unrebutted evidence that the PV351 has a \$1.5 million post-accident fair market value. (R.A.160.) Assuming these replacement cost damages are cognizable, they would be so as rescission damages.

C. The District Court's Decision to Allow the Driscoll Estate to Seek Punitive Damages From Atlas Copco Did Not Require Granting UTAC Leave to Seek Punitive Damages

Finally, UTAC argues that because the district court granted the Driscoll wrongful death estate leave to seek punitive damages, the district court clearly abused its discretion by denying UTAC leave to assert a punitive damages claim against Atlas Copco. In making this argument, UTAC ignores several fundamental principles of punitive damages jurisprudence, and further disregards the evidence of its own culpability.

First, punitive damages are intended to punish and deter wrongful conduct and not to compensate injured plaintiffs. *Shetka*, 454 N.W.2d at 920. Given that the district court granted the Driscoll wrongful death estate leave to seek punitive damages from Atlas Copco, the district court could properly conclude that no additional deterrence was necessary; hence, the district court's recognition that UTAC's alleged injuries "can be sufficiently addressed through compensatory damages." (Add.25.)²⁶

²⁶ To be sure, Atlas Copco opposed the estate's motion for leave to seek punitive damages and continues to believe that the record evidences no deliberate disregard of *anyone's* rights or safety on Atlas Copco's part. But given that the estate's claim against Atlas Copco has been settled, the district court's allowance of the estate's punitive damages claim is water under the bridge -- except to the extent that it demonstrates the lack of *any* plausible deterrence rationale for UTAC's purported punitive damages claim.

Second, UTAC ignores the fact that while punitive damages are available to product liability plaintiffs who suffer personal injury – such as the Driscoll wrongful death estate – they are unavailable to product liability plaintiffs such as UTAC, which only claims to have suffered economic injury. *See Keene*, 511 N.W.2d at 728, 732; *Eisert*, 314 N.W.2d at 228.

Finally, regardless of whether the Driscoll wrongful death estate was an appropriate punitive damages claimant, UTAC most certainly is not. Indeed, UTAC's argument reeks of hypocrisy. The MSHA expressly determined that the PV351 toppled over – and Deane Driscoll died – because UTAC negligently misused the drill. Because of the exclusive remedies provided by the Workers Compensation Act, the Driscoll estate could not sue UTAC for its negligence but instead was restricted to recovering the much more modest death and injury benefits afforded by the Act. *See, e.g., Stringer v. Minnesota Vikings Football Club, LLC*, 705 N.W.2d 746, 754 (Minn. 2005). Accordingly, given that by operation of the Workers' Compensation Act, UTAC has largely escaped the financial consequences of its own negligence – negligence that resulted in the death of one of UTAC's own employees – it is hardly unjust or unfair that the district court declined to reward UTAC's negligence and hypocrisy by allowing it to assert a punitive damages claim against Atlas Copco.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN CONCLUDING THAT ATLAS COPCO WAIVED THE ATTORNEY-CLIENT PRIVILEGE WITH RESPECT TO DOCUMENT ACDS0003127-29

On June 2, 2009, Atlas Copco's counsel requested in writing the return or destruction of all copies of a document Bates numbered ACDS0003127-29. (R.A.462-463.) Atlas Copco inadvertently produced this three-page document in discovery among the estimated 18,500 pages of documents Atlas Copco produced after reviewing more than 300,000 pages of material. At UTAC's behest, the district court reviewed the document to determine if it was protected by the attorney-client privilege and, if so, whether Atlas Copco had waived the privilege's protection. The district court concluded that the document was privileged but found that the privilege had been waived. In so doing, the district court abused its discretion. *See State v. Gianakos*, 644 N.W.2d 409, 415 (Minn. 2002) (describing standard of review).

The document is a working draft of responses, prepared collectively by Atlas Copco employees, to a number of questions MSHA posed to Atlas Copco through its outside counsel in connection with MSHA's accident investigation. The draft responses were prepared at Atlas Copco's in-house counsel's request, and provided to that counsel. The final response is a July 3, 2007, letter from Atlas Copco's counsel to MSHA's William Owen. (R.A.456-460.) The internal draft document

used the letter from MSHA investigator Owen, but included truncated draft responses to Owen's questions using a different font.

The district court correctly determined that this document was protected by the attorney-client privilege since the development of a responsive communication from an attorney is protected from disclosure under the attorney-client privilege. *See Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 441 (Minn. 1998) (internally reviewed drafts of tenure denial letter were privileged). The district court abused its discretion, however, in concluding that the privilege had been waived. Under Minn.R.Civ.P. 26.02(f)(2), "[i]f information is produced in discovery that is subject to a claim of privilege ..., the party making the claim may notify any party that received the information of the claim and the basis for it." Once Atlas Copco became aware of ACDS0003127-29's privileged nature and realized that UTAC intended to use it at trial, Atlas Copco immediately notified all parties of the document's privileged and protected nature.

Atlas Copco's inadvertent disclosure must be analyzed in this case's context. This document constituted three pages of an estimated 18,500 pages Atlas Copco produced. While UTAC used this document during the deposition of an Atlas Copco witness, the draft letter at issue was between employees and in-house counsel, so it was not until the eve of trial that outside counsel became aware of the document's genesis after UTAC's designation of it as a trial exhibit. At that point,

Atlas Copco learned of its privileged nature and promptly followed Rule 26.02(f)(2)'s procedures to retrieve the document. This understandable delay should not be deemed a waiver under Rule 26.02(f)(2).

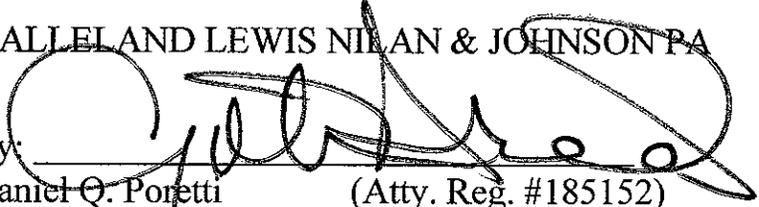
ACDS0003127-29 was an inadvertently disclosed, privileged document. Atlas Copco did not waive the protections of the attorney-client privilege with respect to this document. The district court's contrary determination constitutes an abuse of discretion and should be reversed.

CONCLUSION

For the reasons set forth above, the Court should affirm the district court's orders granting Atlas Copco's motions for summary judgment and denying UTAC's motion for leave to seek punitive damages, and reverse the district court's order determining that Atlas Copco waived the attorney-client privilege with respect to document ACDS0003127-29.

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Dated: February 5, 2010.

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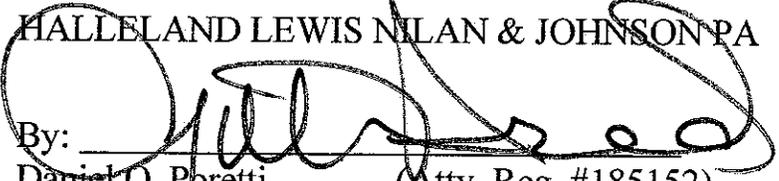
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with monospace font. The length of this brief is 13,700 words. This brief was prepared using in a proportionally spaced typeface using Microsoft Word Version 2003 in 14-point Times New Roman font.

Dated: February 5, 2010.

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