**STATE OF MINNESOTA** **DISTRICT COURT**
**COUNTY OF SHERBURNE**  **TENTH JUDICIAL DISTRICT**

Northern States Power Company, Southern Minnesota Municipal Power Agency, Aegis Insurance Services, LTD., and other Interested Insurers as subrogees of Northern States Power Co.

**Plaintiffs,**

**v.**

General Electric Company; General Electric International, Inc.; GE Energy Services, Inc.; and GE Energy Control Solutions, Inc.

**Defendants.**

District Court File No. 71-CV-13-1472
Judge: Sheridan Hawley

**ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING SUMMARY JUDGMENT FOR DEFENDANTS AND DISMISSING COUNT V**

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The above-captioned matter came before the Court on March 18, 2016, pursuant to Plaintiffs' Motion for Summary Judgment. The parties were represented as follows:

Plaintiffs: Northern States Power Company- Timothy R. Thornton; Southern Minnesota Municipal Power Agency- Jessica Meyer; and Other Interested Insurers- Dan Berglund and David Evinger.

Defendants: Robert W. Vaccaro and Timothy R. Schupp.

After considering the evidence, arguments of counsel, and applicable law, the Court makes the following:

**ORDER**

1. Plaintiffs' Motion for Summary Judgment on Count V is DENIED in its entirety.

2. Summary Judgment is GRANTED in favor of Defendants and Count V is DISMISSED with prejudice.

3. The attached memorandum is incorporated by reference.

**IT IS SO ORDERED.**

**BY THE COURT:** Hawley, Sheridan (Sherburne Judge) 2016.05.31 11:41:14 -05'00'

Dated: _____

Honorable Sheridan Hawley
Judge of District Court

## MEMORANDUM OF LAW

On November 15, 2013, Plaintiffs commenced this suit alleging five causes of action: fraudulent concealment, willful and wanton negligence, gross negligence, professional negligence, and post-sale failure to warn. In response, Defendants filed a motion for a more definitive statement pursuant to Minn. R. Civ. P. 12.05. Plaintiffs subsequently filed an amended complaint by stipulated agreement on January 30, 2014. The Court denied Defendants' motion to dismiss pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim upon which relief can be granted on May 6, 2014. The Court denied Defendants' Motion for Summary Judgment on March 1, 2016. This case now comes before the bench pursuant to Plaintiffs' Motion for Summary Judgment, as to Count V of the Amended Complaint.

## STATEMENT OF FACTS[1]

### I. The Parties

A. Plaintiff Northern States Power Company (NSP) is a subsidiary of Xcel Energy, Inc (Xcel). NSP operates generating facilities in eight states that use fuel sources such as coal, natural gas, water, wind and nuclear energy.

B. The General Electric Company (GE) is an American multinational conglomerate. GE has at least 90 subsidiary companies owned directly or indirectly by GE. GE and its subsidiaries produce products and services in numerous sectors including: healthcare, transportation, finance, aviation, and energy.

[1] The parties have not stipulated to the facts.

## II. Background

A. One of NSP's facilities is the Sherburne County Generating Station (SHERCO), located in Becker, Minnesota. SHERCO has three (3) coal-fired G3 tandem compound steam turbine trains manufactured by GE, designated as Units 1, 2 and 3. Unit 3 is jointly owned and operated by NSP and Southern Minnesota Municipal Power Agency (SMMPA).

B. This matter generally concerns a dispute arising out of the failure of Unit 3, a low-pressure turbine (LP), utilized in the process of producing electric power at SHERCO on November 19, 2011.

## III. Manufacture, Sale and Service of Unit 3

A. Unit 3 was sold in the late 1970's and installed at SHERCO by a third party in 1984. GE and GE-related entities manufactured, assembled, and sold the LP turbine and other related parts within Unit 3 to NSP. Since installation, GE and other GE-related entities, at varying times, have performed inspections, maintenance, and repair on Unit 3.

B. In 1993, GE formally entered into a General Conditions Agreement (GCA) with NSP for equipment, parts, and service. GE performed commercial service work on Unit 3 pursuant to the GCA and other individual contracts, subject to the GCA, from 1993 through 2011.

## IV. Stress Corrosion Cracking and the Failure of Unit 3

A. It is generally agreed that the turbine at issue failed catastrophically as a result of stress corrosion cracking (SCC); a phenomenon that occurs when

certain materials utilized in the construction of steam powered turbines are subjected to contaminants in the steam. Over time, depending upon the materials used, the size of the turbine, the purity of the water, the environment of the turbine, and the stress placed on the component parts, metal can crack due to SCC and lead to failures such as that which occurred in this instance. It appears to be generally agreed that the cause of this failure was SCC in a rotor wheel inside the LP turbine of Unit No. 3.

B. SCC in fossil steam engines, such as the one in Unit No. 3, occurs when the steam begins to condense to a liquid near the end of the LP turbine and concentrates contaminates that may exist in the steam at a predictable area known as the phase transition zone or "Wilson Line." This zone or line is the most vulnerable to failure by SCC.

## V. Plaintiffs' Claims and Damages

A. Plaintiffs claim that two factors contributed to the Unit 3 LP turbine failure: (1) improper design and manufacture of the rotor wheel, and (2) Defendants' failure to disclose technical information or recommend timely service inspections that would have mitigated the likelihood of failure in the LP turbine.

B. Plaintiffs claim the failure in the LP turbine resulted in damages to: (1) the Unit 3 turbine and generator controls, instrumentation, and auxiliary systems; (2) the Unit 3 HP turbine; (3) the Unit 3 IP turbine; (4) the Unit 3 LP turbines; (5) the Unit 3 generator; (6) the Unit 3 exciter; (7) the Unit 3 condensers; (8)

mechanical and electrical equipment; (9) ductwork and control wiring; (10) various portions of the roof; (11) the Unit 3 control room; (12) various tools and equipment located in the vicinity of Unit 3; and (13) SHERCO's facility, as a result of smoke and soot. Plaintiffs further claim consequential damages, including lost profits for the two-year period Unit 3 remained inoperable and SHERCO was forced to purchase energy on the open market.

## CONCLUSIONS OF LAW

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03. The party moving for summary judgment must demonstrate that no genuine issue of material fact exists. *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988). Pleadings, depositions, affidavits, and other submitted documentation are contemplated in determining whether the burden has been met. *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955).

A fact is material if its resolution will affect the outcome of the case. *Zappa v. Fahey*, 245 N.W.2d 258, 259-60 (Minn. 1976). Facts, inferences, and conclusions that may be drawn by a jury are fact issues which may not be resolved by the district court. *Rathbun v. W.T. Grant Co.*, 219 N.W.2d 641, 646 (Minn. 1974). If the moving party makes out their prima facie case the burden of producing facts, that raise a genuine issue, shifts to the opposing party. *Thiele*, 425 N.W.2d at 583.

"All doubts and factual inferences must be resolved against the moving party." *Anderson v. Twin City Rapid Transit Co.*, 84 N.W.2d 593, 605 (Minn. 1957). "It is axiomatic that on a summary judgment motion a court may not weigh the evidence or make factual determinations, but must take the evidence in a light most favorable to the nonmoving party." *Murphy v. Country House Inc.*, 240 N.W.2d 507, 512 (Minn. 1976). Even if the state of the record shows that a party is not likely to prevail following a trial, that fact alone is not a sufficient basis to deny that party the opportunity to present their case at trial absent any issues that would be so insubstantial or frivolous that it would be futile to try them. *City of Coon Rapids v. Suburban Engineering, Inc.*, 167 N.W.2d 493, 497 (Minn. 1969).

Plaintiffs argue that summary judgment should be entered against Defendant General Electric on Count V of the Amended Complaint because: (1) General Electric undertook a duty to warn of ongoing SCC risks; (2) General Electric breached that duty by allowing hidden SCC problems to persist; and (3) General Electric's breach of duty caused Plaintiffs to suffer significant damages.

Defendants argue that summary judgment is inappropriate here. Defendants argue that: (1) the economic loss doctrine bars the application of tort claims in this dispute between sophisticated entities; (2) the relationship between the parties is founded in contract, which independently bars Plaintiffs' post-sale failure to warn claims; (3) Unit #3 constitutes an improvement to real property subject to Minn. Stat. §541.051, which bars claims arising ten years after substantial completion of the improvement; (4) NSP was fully aware of the risk of SCC; and (5) the *Hodder* factors do

not support imposition of a post-sale duty to warn. *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 833 (Minn. 1988). The Court will first address Defendant's argument that Plaintiffs' claim is barred, because if the claim is barred then it is immaterial to examine whether the duty to warn arose.

## I. Summary judgment on Plaintiffs' Count V post-sale failure to warn claim shall be granted in favor of Defendants.

The Court can grant summary judgment to either party under Minn. R. Civ. P. 56.03 where there is no genuine issue of material fact. "This rule gives the court authority to enter judgment for either party, including a non-moving party." *Leidall v. Grinnell Mut. Reinsurance Co.*, 374 N.W.2d 532, 535 (Minn. Ct. App. 1985) (citing *Anderson v. Lappegaard*, 224 N.W.2d 504 (Minn. 1974)). Defendants argue that Minnesota's common law economic loss doctrine and the sales contract between the parties independently preclude Plaintiffs' post-sale duty to warn claim.

### A. Minnesota's Common Law Economic Loss Doctrine

This Court held that Minnesota's common law economic loss doctrine is applicable in this case in its May 6, 2014 Order Denying Defendant's Motion to Dismiss.[2] The economic-loss doctrine is the "principle that a plaintiff cannot sue in tort to recover for purely monetary loss - as opposed to physical injury or property damage - caused by the defendant." *Ptacek v. Earthsoils, Inc.*, 844 N.W. 2d 535, 538 (Minn. Ct. App. 2014) (citing *Black's Law Dictionary 589-90* (9th ed. 2009) and defining "economic

[2] This Court held that Minnesota's common law economic doctrine applied to this case because Unit 3 was sold prior to the enactment of Minnesota's statutory economic loss doctrine, codified in Minn. Stat. § 604.10. There is no statutory indication that Minn. Stat. § 604.10 was to apply retroactively. *See Marvin Lumber & Cedar Co. v. PPG Industries, Inc.*, 223 F.3d 873 (8th Cir. 2000).

loss" in a products liability suit as "includ[ing] the cost of repair or replacement of defective property, as well as commercial loss for the property's inadequate value and consequent loss of profits or use"). "[F]ailure-to-warn claims are based on a concept of negligence." *Bilotta v. Kelly Co., Inc.*, 346 N.W.2d 616, 622 (Minn. 1984).

Generally, the "economic loss doctrine provides a balance between conflicting societal goals: that of encouraging marketplace efficiency through the voluntary contractual allocation of economic risks with that of discouraging conduct that leads to physical harm." *80 South Eighth St. Ltd. P'ship v. Carey-Canada, Inc.*, 486 N.W.2d 393, 396 (Minn. 1992). Here, there have been no claims of physical harm. The doctrine recognizes that tort actions and contract actions protect different interests and thus impose different duties. *Id.* at 395-96. Contract law effectuates agreements and protects the expected interests of parties to private bargained-for exchanges. *Starlite Ltd. P'ship v. Landry's Rests., Inc.*, 780 N.W.2d 396, 398 (Minn. App. 2010). The duties associated with contract arise solely from the terms of an agreement between parties and are owed only to the parties named in the contract. *See id.*; *80 South Eighth St.*, 486 N.W.2d at 395-96.

In contrast, tort law protects the public from unreasonable actions or unreasonably dangerous products. *80 South Eighth St.*, 486 N.W.2d at 395-96. Tort duties are imposed by law, and "owed to all those within the range of harm, or to a particular class of people." *Id.* Application of the economic loss doctrine maintains the distinct functions of tort and contract law, and is based on an understanding that contract law is better suited than tort law for dealing with pure economic loss in the commercial arena. *See id.* at 396-97; *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858

(1986). The first question when evaluating the appropriateness of the application of the economic loss doctrine is: did the contract between the parties involve the sale of goods and was the sale a commercial transaction. *McCarthy Well Co., Inc. v. St. Peter Creamery, Inc.*, 410 N.W.2d 312 (Minn. 1987).

### i. Sale of Goods vs. Sale of Services

"Most complex commercial transactions are not easily categorized, as many involve combinations of goods, services, or other agreements." *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 34 F.Supp.2d 738, 745 (D. Minn. 1999), *reversed in part by Marvin Lumber & Cedar Co.*, 223 F.3d 873. The Minnesota Supreme Court adopted the predominant purpose test in order to evaluate whether the economic loss doctrine applies and whether a contract falls under the U.C.C. *McCarthy Well Co., Inc.*, 410 N.W.2d at 315. If "the predominant purpose of the contract is the sale of goods, then the U.C.C. governs; if the predominant purpose of the contract is the rendition of services, then the U.C.C. does not govern". *Id.* (citing *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974)).

Here, Plaintiffs and Defendants entered into multiple agreements pertaining to both the sale of goods and the rendition of services. GE and NSP entered into a sales contract on January 19, 1977 for the sale of Unit 3. In 1993, GE and NSP also entered into the GCA for additional equipment, parts, and service. Although GE undeniably rendered services to NSP, the predominant purpose of the parties' relationship was for

the sale of goods, notably at issue here, the sale of Unit 3.[3] As such, the transaction between the parties was governed by the U.C.C. and an analysis under the common-law economic loss doctrine is therefore appropriate.

### ii. Commercial Transaction

In order for the economic loss doctrine to apply, after establishing that a contract involved the sale of goods, the sale must have been a commercial transaction. If the sale was both a commercial transaction and involved a sale of goods then the U.C.C. governs and the economic loss doctrine is applied. A transaction is commercial when the product is sold by "a merchant dealing with another merchant in goods of the kind." *Lloyd F. Smith Co. v. Den-Tal-EZ, Inc.*, 491 N.W.2d 11, 17 (Minn. 1992).

In *Regents of Univ. of Minn. v. Chief Indus., Inc.*, The University of Minnesota had purchased a grain drying unit from Chief Industries, and the unit allegedly failed and started a fire. 106 F.3d 1409 (8th Cir. 1997). After analyzing Minnesota case law, the court concluded that a "party is thus a 'merchant' of goods for purposes of the U.C.C. either: (1) by dealing in those goods; or (2) by way of specialized knowledge of the goods." *Id.*

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[3] In *McCarthy Well* a well repair company was hired to restore a creamery's well to its original capacity. *McCarthy Well*, 410 N.W.2d at 313-15. Although the services provided included the sale of a new pump and other goods, the court decided that the primary purpose of the contract was the rendition of services. Therefore, the U.C.C. did not apply, the transaction was not deemed a commercial transaction, and the creamery was not bared from recovering under a tort theory. *Id.* In *OneBeacon Ins. Co.* the Minnesota Court of Appeals affirmed a district court's order dismissing tort claims under the economic loss doctrine based on the predominant purpose test. *OneBeacon Ins. Co. v. Datalink Corp.*, No. A08-0992, 2009 WL 1311787, at *3 (Minn. Ct. App. May 12, 2009) ("Here, appellant has failed to present any evidence of a material issue of fact regarding the predominant purpose of the contract, or regarding any additional evidence that would change this result. The record indicates that, while the contract here involved both the sale of goods (the Hitachi unit, for $1,791,527) and the provision of services (installation and servicing of the Hitachi unit, for $198,726), the predominant purpose of the contract was for the sale of the Hitachi unit. Accordingly, we conclude that the contract is governed by the U.C.C. and the district court did not err in dismissing appellant's tort claims.).

at 1411. Because the University had specialized knowledge in grain dryers, including having hired a leading expert as a consultant for the transaction, the University was a merchant with respect to grain dryers, and therefore the economic loss doctrine applied. Judge Lay dissented, arguing for a narrower interpretation of "merchant in goods of the kind" that included only dealers in the goods at issue. See *id.* at 1413–15.

In *Jennie-O-Foods, Inc. v. Safe-Glo Prods. Corp.*, the Minnesota Court of Appeals rejected the Eight Circuit's *Regents* analysis. 582 N.W.2d 576 (Minn. Ct. App. 1998). *Jennie-O* involved a suit between a turkey farmer and the manufacturer of heaters used in the turkey farm. *Jennie-O* found that the farm operation was not a merchant with respect to heaters. The Court held that "[i]n accord with *Den-Tal-Ez* and the *Regents* dissent... we hold that Jennie-O was not a merchant in goods of the kind with respect to heaters and is not barred from recovering in tort." *Jennie-O*, 582 N.W.2d at 579.[4]

In applying *Jennie-O* and Minnesota common law the Eighth Circuit found that the economic loss doctrine limited a wood preservative manufacturer's tort liability. *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 223 F.3d 873 (8th Cir. 2000). Marvin Lumber "sells custom windows and doors made of wood, and one component of that woodwork is a wood preservative to ensure that the windows and doors are long-lasting." *Id.* at 883. The preservative at issue was manufactured by PPG Industries, and was allegedly defective, causing premature wood rot in Marvin's wood products. The court in *Marvin Lumber* found that:

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[4] In *Den-Tal-Ez*, the court allowed tort recovery against a dental chair manufacturer for fire damage caused by a dental chair, on the grounds that the dentist who purchased the chair, second-hand, was not a merchant in goods of the kind. 491 N.W.2d 11 (Minn. 1992).

> Marvin's specialized knowledge... combined with Marvin's sales of a product containing the very good that it bought from PPG, convinces us that Marvin is a dealer... within the meaning of the economic loss doctrine consistent with the narrower definition set out in *Jennie-O* and Judge Lay's *Chief Industries* dissent to the extent they interpret the common law of Minnesota. If the definition of dealer were so narrow as to include only purchasers who resold a product unaltered, like a broker or distributor, the economic loss doctrine would be nearly meaningless. Marvin has little in common with the turkey farm in *Jennie-O,* which bought a heater. [The farmers were] consumers with respect to those goods; a turkey farm is not in the heater business. Thus, if those goods fail, the buyers may seek consumer remedies. Marvin, by contrast, is in the business of selling treated wood products. Where a manufacturer with sophisticated knowledge of a component purchases and incorporates that component into its product, the manufacturer is a not merely a dealer with respect to the finished product, but with respect to the component part as well. Thus, Marvin was a dealer with respect to the transactions here in issue and the economic loss doctrine operates to limit Marvin's claims.

*Id.* at 883- 84. Here, Plaintiffs are more analogous to *Marvin Lumber* or *Regents* than *Jennie-O* or *Den-Tal-Ez.* Plaintiffs have purchased, operate, and maintain hundreds of generating units, including at least 25 fossil turbines. NSP is not a regular consumer like the farmer buying heat lamps in *Jennie-O* or the dentist buying a dental chair in *Den-Tal-Ez.* NSP is in the business of producing and selling energy. NSP operates power generation plants in eight states. NSP was a sophisticated purchaser with specialized knowledge. Therefore, the sale between NSP and GE was a commercial transaction and the economic loss doctrine is applicable.[5]

[5] The Court will also address the argument that the economic loss doctrine should be applied to Unit 3 only and that tort theories should be allowed for damage to property other than Unit 3. The "other property" exception was applied in *Superwood. Superwood Corp.,* 311 N.W2d 159. The *Superwood* Court held "that economic losses that arise out of commercial transactions, except those involving personal injury or damage to other property, are not recoverable under the tort theories of negligence or strict products liability. *Id.* at 162. However, the Minnesota Supreme Court later elaborated on their *Superwood* holding by stating that "the exception for economic losses arising out of personal injury or damage to other property... [is] an exception applicable to consumer actions only." *Hapka,* 458 N.W.2d 683, 686. Therefore, the exception is not applicable to commercial transactions and thus not applicable here.

### iii. Conclusion

"Courts applying versions of the economic doctrine similar to Minnesota's have held that failure to warn claims are subject to preclusion of consequential economic damages." *McGregor v. Uponor, Inc.*, 2010 WL 55985, at *8 (D. Minn. Jan. 4, 2010). (citing *Sea-Land Serv., Inc. v. Gen. Elec. Co.*, 134 F.3d 149, 155-56 (3d Cir.1998) (applying the Supreme Court's articulation of the economic loss doctrine in *East River Steamship Corp.*, and holding that the rule against a tort action when the damage from an alleged product defect is limited to the product itself and is solely economic "is as true for strict liability and negligence cases as it is for failure to warn cases.")).

The relationship between Plaintiffs and Defendants was one between knowledgeable parties with relatively equal bargaining power. "It is at the time of the contract formation that experienced parties define the product, identify the risks, and negotiate a price of the goods that reflects the relative benefits and risks to each." *Hapka v. Paquin Farms*, 458 N.W.2d 683, 688 (Minn. 1990) *reversing in part Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159 (Minn. 1981). "There is no reason to... heap tort theories of negligence... atop those remedies already provided by the [Uniform Commercial Code] U.C.C." *Id.*

Plaintiffs were entirely free to negotiate sale terms that allocated the risk of loss. *See Metalmasters of Minneapolis. Inc. v. Liberty Mut. Ins. Co.*, 461 N.W.2d 496, 499 (Minn. Ct. App. 1990). If contracting parties are permitted to rely on tort remedies for recovery, the predictability of contract liability is greatly reduced and the ability to negotiate meaningful terms is compromised. *See Dannen & Janssen, Inc. v. Cedarapids,*

*Inc.*, 573 N.W.2d 842, 849 (Wis. 1998).[6] Here, Minnesota's common law economic loss doctrine is applicable and Plaintiff's Count V failure to warn claim is barred.

[6] Defendants also argue that Plaintiffs' claim is barred based on: (1) contract; (2) Minn. Stat. § 541.051; and (3) Defendants' knowledge of the risk. Based on the Court's finding that Plaintiffs' duty to warn claim is barred based on the economic loss doctrine, the Court will not address Defendants' additional arguments to bar Plaintiff's claim.