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 GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DISMISSING COUNTS I-IV

The above-captioned matter came before the Court on July 28, 2016, pursuant to Defendants' Motion for Summary Judgment. The parties were represented as follows:

Plaintiffs: Northern States Power Company- Timothy R. Thornton and Leah Cee O. Boomsma;
Southern Minnesota Municipal Power Agency- William E. Flynn and Jessica Meyer; and
Other Interested Insurers- Danial W. 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. Defendants' Motions for Summary Judgment on Counts I-IV are GRANTED in their entirety.
2. Counts I-IV are DISMISSED with prejudice.
3. The attached memorandum is incorporated by reference.

IT IS SO ORDERED.

BY THE COURT:

Hawley, Sheridan (Sherburne Judge) 2016.08.08 16:06:33 -05'00'

Dated: August 8, 2016

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 seeking to dismiss the claims against GE Energy Control Solutions on March 1, 2016. The Court denied Plaintiffs' Motion for Summary Judgment on Count V and granted summary judgment in favor of Defendants, thus dismissing Count V on May 31, 2016. This case now comes before the Court pursuant to Defendants' Motion for Summary Judgment, seeking dismissal of Plaintiffs' Amended Complaint with prejudice.

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.

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

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.

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 a failure, on November 19, 2011 of Unit 3, which is a low-pressure turbine (LP), utilized in the process of producing electric power at SHERCO.

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 due to 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).

Defendants argue that summary judgment on Counts I, II, III, and IV should be granted against Defendants and that Counts I-IV should be dismissed. Defendants argue that: (1) the economic loss doctrine bars Plaintiffs from pursuing tort claims; (2) the relationship between the parties is founded in contract, which independently bars Plaintiffs' tort claims; (3) Plaintiffs' fraudulent concealment claim should be dismissed because Plaintiffs have no evidence that Defendants owed or breached any extra-contractual duty; (4) 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; and (5) Plaintiffs professional negligence claim fails because it is unsupported.

Plaintiffs argue that summary judgment is inappropriate here because: (1) the common law economic loss doctrine does not bar Counts I-IV; (2) the statute of repose has no bearing on Plaintiff's claims; and (3) the contractual language does not bar Counts I-IV.

I. Summary judgment on Counts II (Willful and Wanton Negligence), III (Gross Negligence), and IV (Professional Negligence) is granted in favor of Defendants.

Defendants argue that Plaintiffs' negligence claims fail as a matter of law pursuant to the common law economic loss doctrine. Defendants specifically point to the Court's recent ruling applying the common law economic loss doctrine to bar Plaintiffs' tort claim for post-sale failure to warn. Plaintiffs argue that the economic loss doctrine does not apply to their claims. Notably Plaintiffs argue that their claims do not relate to any contract and therefore the economic loss doctrine is not applicable.

The Court adopts its analysis of the Minnesota common law economic loss doctrine from its May 31, 2016 Order Denying Plaintiffs' Motion for Summary Judgment and Granting Summary Judgment for Defendants and Dismissing Count V. This Court held that Minnesota's common law economic loss doctrine is applicable to this case in its May 6, 2014 Order Denying Defendant's Motion to Dismiss.[2] The economic loss doctrine

[2] This Court held that Minnesota's common law economic loss 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.

"precludes a commercial purchaser of a product from recovering economic damages through at least some tort actions against the manufacturer or seller of the product." *Marvin Lumber & Cedar Co. v. PPG Industries, Inc.*, 223 F.3d 873 (8th Cir. 2000).

In its May 31, 2016 Order the Court ruled that the Minnesota common law economic loss doctrine acted to bar Plaintiffs' tort claim for post-sale failure to warn. "[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). Here the Court finds that Plaintiffs' other negligence claims, notably Counts II (Willful and Wanton Negligence), III (Gross Negligence), and IV (Professional Negligence), are also barred under Minnesota's common law economic loss doctrine. *See Marvin Lumber & Cedar Co.*, 223 F.3d 873; *McCarthy Well Co., Inc. v. St. Peter Creamery, Inc.*, 410 N.W.2d 312 (Minn. 1987); *Hapka v. Paquin Farms*, 458 N.W.2d 683 (Minn. 1990).

II. Summary judgment on Count I (Fraudulent Concealment) is granted in favor of Defendants.

Defendants argue that Count I is barred by the common law economic loss doctrine, because the claim does not relate to any conduct outside of or collateral to the contracts between the parties. Defendants argue that Plaintiffs' claims are attempting to circumvent the remedies that were available to them under contract but that expired decades ago. Plaintiffs argue that Count I is wholly unrelated to the sales contact or the GCA and that GE assumed a duty independent of any contact.

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§ 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).

The Minnesota Supreme Court first held that economic losses arising out of commercial transactions are not recoverable under the tort theories of negligence and strict products liability. *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W.2d 159, 160-62 (Minn. 1981). In *Superwood* the plaintiff's tort claims of negligence and strict liability were limited to remedies under contract and the U.C.C. Although the Minnesota Supreme Court has addressed the applicability of the Minnesota common law economic loss doctrine to tort claims of negligence, the Court has failed to address whether the doctrine bars tort claims of fraud and misrepresentation. *AKA Distrib. Co. v. Whirlpool Corp.*, 137 F.3d 1083, 1086 (8th Cir. 1998). Without this precedent lower courts have been forced to reason how the Supreme Court might apply the doctrine to cases of fraud.

In *ETM Graphics, Inc. v. City of St. Paul* the Minnesota Court of Appeals affirmed a grant of summary judgment for an adhesive manufacturer against ETM Graphics. No. C2-91-2103, 1992 WL 61394 (Minn. Ct. App. Mar. 31, 1992), *review denied* (Minn. Jun. 10, 1992) (unpublished opinion). ETM used an adhesive in the installation of murals at Como Park Zoo. The adhesive did not perform as anticipated and the murals had to be taken down. ETM sued the adhesive manufacturer alleging fraud and misrepresentation among other claims.

ETM argued that they were "entitled to bring a claim of misrepresentation outside the purview of the U.C.C." *Id.* at *2. The Court of Appeals rejected this argument and cited *Hapka*, which held "the Uniform Commercial Code must control exclusively with respect to damages in a commercial transaction which involved property damage only." *Id.* (citing *Hapka*, 458 N.W.2d 683, 688). The Court elaborated by stating that where "the

product sold is a highly specialized chemical developed for a specific purpose, it is reasonable for a seller to limit its liability to replacement of the goods." *Id.* at *3.

In *AKA*, the Eighth Circuit, analyzing Minnesota law, affirmed a grant of summary judgment for an appliance manufacturer against a wholesale distributor. *AKA Distrib. Co. v. Whirlpool Corp.*, 137 F.3d 1083 (8th Cir. 1998). AKA alleged that Whirlpool fraudulently told distributors that they would be selling Whirlpool products for a long time. AKA filed suit alleging fraud and misrepresentation, among other claims. The Court held that "a fraud claim independent of the contract is actionable, but must be based upon a misrepresentation that was outside of or collateral to the contract, such as many claims of fraudulent inducement." *Id.* at 1086. The Court found the fraud claim to be related to the contract and thus precluded by the common law economic loss doctrine. The Court further speculated that "we think the Minnesota Supreme Court would resolve the legal issue in this case by holding that, in a suit between merchants, a fraud claim to recover economic losses must be independent of the Article 2 contact or it is precluded by the economic loss doctrine." *Id.* at 1087.

Plaintiffs argue that their fraudulent concealment claim is independent of the contracts and thus the economic loss doctrine is not applicable. Plaintiffs argue that GE assumed a duty, separate of any contact, by issuing TILs (technical information letters) and answering PAC (internal GE help desk) questions. Plaintiffs point to *TCF Nat'l Bank v. Mkt. Intelligence, Inc.* for support, a persuasive albeit non-precedential United States District Court opinion. No. 11-2717, 2012 WL 3031220 (D. Minn. July 25, 2012). The Court in *TCF* granted in part and denied in part a motion to dismiss for failure to state a claim.

The Court granted the motion on claims of consumer fraud and gross negligence, among other claims, and denied the motion on the claim of fraudulent inducement, among other claims. The Court in *TCF* found that the "mere existence of a governing commercial contract does not preempt or eliminate the possibility of a tort claim." *Id.* at *4 (citing *AKA Distrib. Co.*, 137 F.3d at 1086). A tort is independent of a contract and thus not subject to the economic loss doctrine "if a relationship would exist which would give rise to the legal duty without enforcement of the contract promise itself." *Id.*

Plaintiffs argue that their claims are precisely the type of carved out exception discussed in *AKA* and *TFC*. Plaintiffs argue that their relationship with GE would give rise to the legal duty without enforcement of any contact. Similar to Plaintiffs' *TCF* argument, Defendants argue that the Court should consider a persuasive albeit non-precedential case. *Public Service Co. of New Hampshire v. Westinghouse Elec. Corp.*, 685 F. Supp. 1281 (D.N.H. 1988).

In *Public Service*, a public utility company (Public Service) sought damages from a manufacturer of generators (Westinghouse) in connection with the sale of a steam turbine electric generator which subsequently malfunctioned. The six count complaint included a claim of fraud or misrepresentation by omission. Public Service alleged that Westinghouse's failure to report the results of the metallurgical testing of failed blade roots and its failure to disclose reports of turbine blade failures in other power plants constituted fraud. Public Service argued that if they had been informed by Westinghouse of the problems in similar turbines, Public Service would have disassembled their turbine and done the proper inspection and maintenance to prevent their generator from failing.

The Court in *Public Service* found that if "Westinghouse had any duty to warn [Public Service] such duty arose by the terms of the service contract." *Id.* at 1290. The Court reasoned that the claim of fraud was improperly pleaded as a tort claim and should have been brought as a contract claim. The Court found that allowing "the claim to be brought under a theory of intentional tort (herein, fraud) would effectively bypass the entire body of contract law, and sound jurisprudential policy demands otherwise." *Id.*

In *Marvin Lumber,* the Eighth Circuit Court of Appeals, applying Minnesota law, affirmed the grant of summary judgment for a wood preservative manufacturer against a manufacturer of windows and doors. *Marvin Lumber & Cedar Co.*, 223 F.3d 873. Marvin Lumber claimed that PPG misrepresented the effectiveness of their wood preservative. Marvin Lumber filed suit alleging fraud, negligence, misrepresentation, and fraudulent concealment among other theories. The United States District Court for the District of Minnesota found that the economic loss doctrine barred Marvin Lumber's tort claims.

The Eighth Circuit Court of Appeals affirmed this decision and found Marvin Lumber's tort claim for fraudulent concealment to be "indistinguishable from Marvin's general fraud claim and is essentially redundant of its warranty claims." *Id.* at 887. The Court also noted that this "conclusion is buttressed by Minnesota law, independent of the economic loss doctrine, suggesting that such an independent fraudulent concealment claim will not lie where the fraudulent concealment relates to a promisor's duties under the contract. *Id.* (citing *Cheme Contracting Corp. v. Wausau Ins. Cos.*, 572 N.W.2d 339, 345 n.2 (Minn. Ct. App. 1997)).

Plaintiffs' fraudulent concealment claim alleges that Defendants had special knowledge about SCC problems in L-P turbines and that Defendants fraudulently withheld that information. Where "the only misrepresentation by the dishonest party concerns the quality or character of the goods sold 'the economic loss doctrine bars the fraud claims because the fraud claims are substantially redundant with warranty claims.'" *Marvin Lumber & Cedar Co.*, 223 F.3d at 885 (citing *Huron Tool & Eng'g Co. v. Precision Consulting Servs.*, 532 N.W.2d 541, 545 (Mich. Ct. App. 1995)). Plaintiffs' fraud claim only concerns misrepresentations regarding the quality of the goods sold, specifically defects of Unit 3. Although pleaded as a fraudulent concealment claim the Court finds Plaintiffs' fraudulent concealment claim is essentially a warranty claim. Similar to the analysis in *Public Service,* if GE undertook any duty it was under the terms of a contract. An "independent fraudulent concealment claim will not lie where the fraudulent concealment relates to a promisor's duties under the contract." *Marvin Lumber & Cedar Co.*, 223 F.3d at 887.

III. Conclusion

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). Here, Minnesota's common law economic loss doctrine is applicable and Plaintiffs' Counts I, II, III and IV are barred.[3]

[3] Defendants also argue that Plaintiffs' claims are barred or fail based on: (1) contract; (2) lack of evidence regarding any extra-contractual duty; (3) Minn. Stat. § 541.051; and (4) lack of support for the claim of professional negligence. Based on the Court's finding that Plaintiffs' claims are barred based on the economic loss doctrine, the Court will not address Defendants' additional arguments regarding the failure or barring of Plaintiffs' claims.