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February 18, 2021

Mr. Will Seuffert
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, MN 55101

Re: *In the Matter of Application of Northern States Power Company for Authority to* Increase Rates for Electric Service in the State of Minnesota, et al.
Docket Nos. E-002/GR-12-961; E-999/AA-14-579; E-999/AA-16-523; E-999/AA-17-492; E-999/AA-18-373; E-999/AA-13-599

Dear Mr. Seuffert:

Enclosed and e-filed in the above-referenced matters please find Comments of the Minnesota Office of the Attorney General–Residential Utilities Division ("OAG"). [PUBLIC AND TRADE SECRET VERSION]. These Comments were previously filed on January 15, 2021 and referred to the above-entitled dockets[1] in their heading, but were inadvertently electronically filed only in Docket No. E-002/GR-13-868. The attached Comments are the same Comments that were previously filed pursuant to the deadline in the Public Utilities Commission's Notice of Extended Comment Period of November 10, 2020 and are being submitted here only to ensure that they are included in the electronic record for the other relevant dockets. Please note that the OAG informed counsel for Northern States Power Company[2] and the Department of Commerce of this submission, and neither party objected.

By copy of this letter all parties have been served. Certificates of service are also enclosed.

Sincerely,

/s/ **Joseph C. Meyer**
JOSEPH C. MEYER
Assistant Attorney General

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Enclosures

[1] The Comments also listed Docket No E-002/GR-13-868 in the heading.
[2] Northern States Power Company's Reply Comments were filed on January 27, 2021 in the above-entitled matters and responded to the Comments being refiled under this letter.

CERTIFICATE OF SERVICE

Re: *In the Matter of Application of Northern States Power Company for Authority to* Increase Rates for Electric Service in the State of Minnesota, et al.
Docket Nos. E-002/GR-12-961; E-999/AA-14-579; E-999/AA-16-523; E-999/AA-17-492; E-999/AA-18-373; E-999/AA-13-599

I, DEANNA DONNELLY, hereby certify that on the 18th day of February, 2021, I e-filed with eDockets ***both the PUBLIC and TRADE SECRET Comments of the Minnesota Office of the Attorney General—Residential Utilities Division*** and served a true and correct copy of the same upon all parties listed on the attached service lists by e-mail, electronic submission, and/or United States Mail with postage prepaid, and deposited the same in a U.S. Post Office mail receptacle in the City of St. Paul, Minnesota.

/s/ Deanna Donnelly
DEANNA DONNELLY

PUBLIC VERSION

STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

Katie Sieben	Chair
Joseph Sullivan	Vice-Chair
Valerie Means	Commissioner
Matt Schuerger	Commissioner
John Tuma	Commissioner

In the Matter of Application of Northern States Power Company for Authority to Increase Rates for Electric Service in the State of Minnesota, et al.	**DOCKET NOS. E-002/GR-12-961; E-002/GR-13-868; E-999/AA-14-579; E-999/AA-16-523; E-999/AA-17-492; E-999/AA-18-373; E-999/AA-13-599**

COMMENTS OF THE OFFICE OF THE ATTORNEY GENERAL

INTRODUCTION

The Office of the Attorney General—Residential Utilities Division ("OAG") submits the following Comments in response to the Public Utilities Commission's ("Commission") Notice of Comment Period issued on September 30, 2020 ("Notice"). The Notice solicits comments on replacement power costs associated with a catastrophic event ("Catastrophe") at Northern States Power Company, d/b/a Xcel Energy's ("Xcel" or "Company") Sherburne County Generating Station, and specifically one of its three generating units ("Sherco 3").

One thing is objectively certain in this long and complex docket: Minnesota ratepayers did not directly or indirectly cause the Catastrophe. Instead, Xcel bears sole regulatory responsibility for the Catastrophe—based on its own negligent operation and maintenance ("O&M") of Sherco 3 and because its investors receive a significant return to compensate them for the risks of their investments. Notwithstanding, ratepayers have already been improperly charged for replacement power costs because of the Catastrophe. The Commission should be looking out for Minnesota ratepayers—not utilities' bottom lines—during these extraordinary times. Accordingly, the Commission should order Xcel to reimburse ratepayers for all

replacement power costs less the offsets requested by the Company. Otherwise, ratepayers will have subsidized the investment risk that they already compensate Xcel's investors for through the approved rate of return.

BACKGROUND

Sherco 3 is a 900 MW coal-fired generator—the largest in Xcel's fleet.[1] On November 19, 2011, after completing a planned overhaul on Sherco 3's generator, Xcel started Sherco 3 and "[d]uring the startup testing procedure, the turbine and generator instruments reported vibration significantly above normal levels, and the unit shut down. The vibration damaged many of the steam, oil, and hydrogen seals in the unit and started a fire; no one was injured."[2]

The Catastrophe's damage to the generator was extensive and Sherco 3 remained shut down from November 2011 to October 2013.[3] During that outage, Xcel bought both replacement power and additional fuel for other Company-owned generators to offset the lost generation from Sherco 3.[4] These costs were passed on to ratepayers automatically, with no determination of reasonableness or prudency, through the Company's fuel clause adjustment ("FCA") mechanism.[5]

The Catastrophe resulted in both litigation—by Xcel and its insurers to recover damages from General Electric Company ("GE"), the manufacturer of the generator's low-pressure turbine—and regulatory action by the Commission. The OAG will discuss both the legal and

[1] Public Comments of the Department of Commerce, Division of Energy Resources at 1 (Jan. 14, 2019) ("Xcel owns the facility jointly with the Southern Minnesota Municipal Power Agency ([']SMMPA[']), with Xcel owning 59 percent, or 531 MW.") [hereinafter Department Comments].
[2] Department Comments at 1 (citing September 3, 2013 Findings of Fact, Conclusions, and Order at 20 in Docket No. E002/GR-12-961).
[3] Notice of Comment Period at 1 (Sep. 30, 2020).
[4] Notice of Comment Period at 1 (Sep. 30, 2020).
[5] Notice of Comment Period at 1 (Sep. 30, 2020).

regulatory background in greater detail in the subsequent sections. But first, the OAG provides the Commission with a brief overview of the Catastrophe and the relevant facts leading up to that event at Sherco 3.

I. BRIEF OVERVIEW OF THE CATASTROPHE AND THE RELEVANT FACTS LEADING UP TO THAT EVENT AT SHERCO 3.

A. Overview of the Catastrophe.

Sherco 3 is a coal-fired steam turbine/generator with a drum boiler that produces high temperature and high pressure steam, which is directed by nozzles onto the turbine blades—or "buckets"—causing them to rotate and power a generator that produces electricity.[6] In late 2011, Sherco 3 suffered a failure in one of its two low-pressure ("LP") turbines during testing following a maintenance outage.[7] The failure was caused by stress corrosion cracking ("SCC") in the "LP rotor dovetail," which is where the turbine buckets attach to the turbine rotor.[8] When the dovetail failed, turbine buckets broke free—or were "liberated"—resulting in a mass imbalance that caused Sherco 3 to break apart.[9]

SCC results from the combined influence of tensile stress and a corrosive environment—here, meaning turbine steam with too many impurities[10]—when brought to bear on susceptible material.[11] Sherco 3 relies on a "closed-loop" steam-water cycle; after the steam imparts energy to the turbines, it is condensed back to water and returned to the boiler to repeat the cycle, with minimal replenishment of the steam-water.[12] There are several pathways by which contaminants

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[6] Respondents' Brief at 12, *Aegis Ins. Servs., LTD. v. Gen. Elec. Co.*, No. A19-0640, 2020 WL 614775 (Feb. 10, 2020) (citing R.Add.26 (Tr.Ex.1003)) (hereinafter "GE Appellate Brief"), attached as Schedule 1.
[7] GE Appellate Brief at 12 (citing Doc.480 at 577:11-579:21).
[8] GE Appellate Brief at 12 (citing Doc.478 at 737:24-738:13).
[9] GE Appellate Brief at 12.
[10] GE Appellate Brief at 12 (citing Tr.Exs.288; 324; 349).
[11] GE Appellate Brief at 12 (citing R.Add.01-02).
[12] GE Appellate Brief at 12 (citing R.Add.27 (Tr.Ex.1063)).

can enter the steam-water cycle, including source-water impurities, cooling water from condenser tube leaks, and condensate polisher resin leakage.[13]

Prudent steam-turbine owners manage SCC risk primarily in two ways: (1) ensuring that turbine steam chemistry falls within industry standards published in the Electric Power Research Institute's ("EPRI") Steam Chemistry Guidelines; and (2) by conducting periodic inspections for SCC.[14] Additionally, power plant personnel should monitor the plant water chemistry to prevent too many corrosive contaminants from entering the turbine.[15]

The Catastrophe resulted from undetected SCC in Sherco 3's LP dovetails. There were two primary reasons why Xcel failed to detect such SCC. First, Xcel failed to monitor and maintain the steam chemistry within EPRI Guidelines.[16] Second, Xcel failed to discover and repair the SCC because the Company postponed a major LP inspection from 2011 to 2014.[17] Moreover, Xcel also acknowledged that it should have, but did not conduct an engineering study to determine whether LP turbine inspection postponement was prudent.[18] Indeed, Xcel's internal System Health Reports for Sherco 3's LP turbines reflected the understanding that "extending GE recommend[ed] [time between major inspections] increases risk of failure."[19] If Xcel had conducted the 2011 inspection in accordance with GE recommendations and the Company's internal guidelines, Xcel should have discovered the SCC before the Catastrophe.[20]

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[13] GE Appellate Brief at 12 (citing R.Add.28 (Tr.Ex.1064)).
[14] GE Appellate Brief at 12-13 (citing R.Add.03; 30; Doc.483 at 1559:14-1560:6).
[15] GE Appellate Brief at 13 (citing R.Add.03; 30; Doc.483 at 1559:14-1560:6).
[16] GE Appellate Brief at 13 (citing Doc.483 at 1621:1-1622:3).
[17] GE Appellate Brief at 13 (citing Doc.474 at 408:8-21; Doc.480 at 676:11-678:10).
[18] GE Appellate Brief at 13 (citing Doc.480 at 679:10-16; Doc.474 at 410:8-25).
[19] GE Appellate Brief at 13 (citing R.Add.07).
[20] GE Appellate Brief at 13 (citing Doc.485 at 1757:14-17).

B. The Sales Contract for Sherco Unit 3.

Xcel and GE executed the Sherco 3 sales contract in January 1977.[21] That agreement's operative stipulations and conditions included a provision limiting GE's liability to Xcel:

> Limitation of Liability. Except as provided in the clauses entitled Warranty, SC.36 and Patents, GC.12, [GE's] **liability on any claim of any kind, including claims based on negligence**, for any loss or damage arising out of, connected with, or resulting from this contract **or from** the performance or breach thereof, or from the manufacture, sale, delivery, installation, or **technical direction of installation, repair or use of any equipment covered by or furnished under this contract shall in no case exceed the billing price of the equipment**; provided, however, that in all cases where the claim involves defective or damaged equipment supplied under this contract the Company's exclusive remedy and [GE's] sole liability will be limited to the correction of such defect or damage, but not in excess of the billing price of the equipment. In any event, [GE's] liability for all of the aforesaid claims shall terminate four years after initial synchronization of the equipment.[22]

Thus, the contract imposed a purchase-price cap on recoverable damages within four years of initial synchronization; after four years, the agreement entirely exculpates GE from liability for negligence arising from, among other things, its technical direction of repair or use of Sherco 3.[23]

C. Rotor Wheel Dovetail Attachment Methods.

Sherco 3's turbine buckets are affixed to the turbine LP rotors either by "tangential-entry" dovetails or "finger" dovetails.[24] The method and type of inspection for SCC in finger dovetails is more involved and expensive, and GE tells operators that the most reliable method for such an inspection involves removal of the buckets so the interior fingers can be magnetic

[21] GE Appellate Brief at 13 (citing Ct.Ex.1052).
[22] GE Appellate Brief at 13-4 (citing R.Add.15 (Ct.Ex.1052a)).
[23] GE Appellate Brief at 14 (citing R.Add.15 (Ct.Ex.1052a)).
[24] GE Appellate Brief at 14 (citing R.Add.34-35 (Tr.Exs.1006-1007); Doc.478 at 945:4-19).

particle inspected ("MPI").[25] The Catastrophe resulted from SCC at Sherco 3's L-1 location, which had finger dovetails.[26]

D. Xcel Received But Did Not Follow Operation and Inspection Recommendations for Steam Purity and SCC for Sherco 3.

Xcel received operation and inspection recommendations for steam purity and SCC from GE—in the form of a Sherco 3 Operations and Maintenance Manual ("O&M Manual") and periodic Technical Information Letters ("TIL(s)")—and other engineering sources.

GE supplied Xcel with an O&M Manual for Sherco 3 that included various information about SCC, maintenance, and inspection recommendations.[27]

GE also periodically provided its customers, including Xcel, with TILs on many topics,[28] one of which was finger-dovetail inspections. In TIL 1121-3AR1 (Inspection of Steam Turbine Rotor Wheel Dovetails),[29] GE described the removal of buckets for an MPI as the most "reliable" test for SCC and identified five events or operational anomalies that would prompt such a test: (1) caustic or chemical ingestion or contamination; (2) carryover from boiler; (3) leaking condenser heater tube; (4) overspeeds; and (5) water ingestion.[30] GE also issued TIL 1277-2 to Xcel regarding the "Inspection of Low Pressure Rotor Wheel Dovetails on Steam Turbines With Fossil-Fueled Once-Through Boilers."[31] TIL 1277 applies to both tangential entry and finger dovetails in units using once-through boilers ("OTB"), in which the steam is put

[25] GE Appellate Brief at 14 (citing R.Add.30).
[26] GE Appellate Brief at 14 (citing Doc.478 at 954:13-20).
[27] GE Appellate Brief at 15 (citing Tr.Ex.132 (GEK-46354B Maintenance and Inspection of Turbine Rotors and Buckets)); (Tr.Ex.131 (GEK-63355 Turbine-Generator Inspections)); (Tr.Ex.288 (GEK 63430 Turbine Steam Purity)).
[28] Applicable TILs were sent to power plant operators by unit serial number and were also discussed and distributed at Large Steam Turbine Generator Conferences for members of the power generating industry, including Xcel. *See* GE Appellate Brief at 15 n.5 (citing R.Add.29; Tr.Exs.155-157).
[29] GE Appellate Brief at 15 (citing R.Add.30-33 (Tr.Ex.6)).
[30] GE Appellate Brief at 15 (citing R.Add.30-33 (Tr.Ex.6)).
[31] GE Appellate Brief at 16 (citing (Tr.Ex.56)).

through the machine once, and is not recirculated like drum boilers used by Sherco 3. Because steam purity is more difficult to control in OTB units and there is a higher risk of contaminants, TIL 1277 recommends an SCC inspection at the next convenient outage after ten years of service.[32]

Xcel also received information from other sources about two types of tests it could perform to help evaluate whether to remove buckets to inspect rotor finger dovetails for SCC.[33] First, Xcel was aware of a "bucket lift check"—inspecting for any gaps between the bucket and the rotor wheel—to assess SCC.[34] The existence of a gap suggests that "lift" is occurring during operation—an indicator that SCC could be present—thus giving the owner a chance to consider a buckets-off inspection before it develops into a failure-causing catastrophe.[35] Xcel acknowledged that had it not postponed Sherco 3's 2011 LP inspection, the Company could have performed the bucket lift test.[36] Second, Xcel learned of another SCC inspection test from the engineering firm Black & Veatch, which Xcel retained in 2000 to provide long-range planning for Sherco. Black & Veatch recommended that Xcel remove a small group of buckets to inspect for SCC damage during maintenance outages.[37] Xcel failed to follow its retained engineering expert's advised SCC test prior to the Catastrophe.[38]

[32] GE Appellate Brief at 16 (citing (Tr.Ex.56)).
[33] GE Appellate Brief at 16 (citing Doc.474 at 372:2-377:12; 382:10-385:21).
[34] GE Appellate Brief at 16 (citing Doc.474 at 376:19-377:12; R.Add.04).
[35] GE Appellate Brief at 16 (citing Doc.485 at 1760:2-1761:16).
[36] GE Appellate Brief at 16-17 (citing Doc.474 at 377:4-12; 421:12-22; R.Add.04.)
[37] GE Appellate Brief at 17 (citing Tr.Ex.1062 at 3-8; Doc.474 at 375:14-23; 385:7-21).
[38] GE Appellate Brief at 17 (citing Doc.474 at 388:20-389:5).

E. Xcel was Intimately Familiar with the Dangers of SCC and the Inspections Necessary to Detect SCC.

Xcel's internal documents readily acknowledge that "[SCC] in steam turbine rotors has been an issue for every turbine manufacturer for many years."[39] The Company also knew the various short- and long-term risks and consequences by operating Sherco 3 without adequate and timely SCC inspection. Namely, the Company knew the following prior to the Catastrophe:

- Xcel knew about the specific risk of SCC on Sherco 3's finger dovetails.[40]
- Xcel knew that undetected SCC on Sherco 3's finger dovetails could "involve wheel failure and buckets departing the rotor" and that "[r]esulting collateral damage could be severe (i.e. due to mass imbalance)."[41]
- Xcel knew that detecting SCC on Sherco 3's finger dovetails required removing the buckets and inspecting the finger dovetails using an MPI.[42]
- Xcel knew impurities in the water/steam chemistry would cause SCC.[43]
- Xcel knew that GE recommended consideration of bucket removal and finger inspection if the turbine had caustic or chemical ingestion or contamination, carryover from the boiler, or a leaking condenser heater tube.[44]
- Xcel knew that Sherco 3 sustained caustic or chemical ingestion or contamination, carryover from the boiler, and a leaking condenser heater tube from 1999-2011, which should have prompted Xcel to remove the buckets for dovetail inspection.[45]

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[39] GE Appellate Brief at 17 (citing R.Add.01.)

[40] GE Appellate Brief at 17 (citing Tr.Ex.288 (GEK-63430); R.Add.29-33; Doc.474 at 314:17-316:2; Doc.480 at 596:4-597:10). *See also* GE Appellate Brief at 17 n.7 (citing Tr.Ex.56; Tr.Exs.72-73;153;155-157; R.Add.01-03; Tr.Ex.27; Tr.Exs.8a-8e; Tr.Ex.15).

[41] GE Appellate Brief at 17 (citing R.Add.08).

[42] GE Appellate Brief at 18 (citing R.Add.30-33).

[43] GE Appellate Brief at 18 (citing Doc.474 at 326:1-327:24; 330:13-22).

[44] GE Appellate Brief at 18 (citing R.Add.32; Doc.474 at 334:9-23; 335:24-336:21).

- Xcel knew it could perform a bucket lift check or remove a group of buckets to determine whether further inspection was warranted.[46]
- Xcel knew that as Sherco 3's owner and operator, it was responsible for determining time intervals between inspections.[47]

F. Sherco 3's Inspection History and Xcel's 2011 Deferred Maintenance.

In 1999, Xcel hired GE to replace the four rows of L-1 buckets on Sherco 3's LP turbines.[48] During that process, GE performed the TIL 1121-3AR1 MPI after bucket removal,[49] which revealed no indications of SCC.[50] This was the last maintenance work GE performed on the Sherco 3's LP turbines before the Catastrophe.[51]

In 2005, Xcel contracted with a vendor to undertake its next major Sherco 3 inspection.[52] One year prior, Xcel inquired with GE about pricing information for that inspection.[53] Although GE later bid on the 2005 inspection, Xcel rejected that bid because its turbine engineer thought GE's recommendations would be "overly conservative" and result in "[m]ore chance of requiring bucket removal for further (unwarranted) inspections."[54]

Xcel's next scheduled major Sherco 3 inspection was to take place in 2011.[55] During Xcel's 2011 inspection, the Company took at least two unreasonable and imprudent actions that

(Footnote Continued from Previous Page)

[45] GE Appellate Brief at 18 (citing Doc.482 at 1526:13-120;1534:25-1535:3; Doc.483 at 1599:19- 23;1612:11-20).
[46] GE Appellate Brief at 18 (citing Tr.Ex.1062 at 3-8; Doc.474 at 385:7-21).
[47] GE Appellate Brief at 18 (citing R.Add.36; Tr.Ex.132; Doc.480 at 601:1-9; Doc.485 at 1730:17-21).
[48] GE Appellate Brief at 19.
[49] GE Appellate Brief at 19 (citing Doc.474 at 378:17-379:4).
[50] GE Appellate Brief at 19 (citing Doc.480 at 530:3-531:14).
[51] GE Appellate Brief at 19 (citing Doc.474 at 379:5-7).
[52] GE Appellate Brief at 19 (citing Tr.Ex.14.; Doc.474 at 224:21-24).
[53] GE Appellate Brief at 19 (citing Tr.Ex.11).
[54] GE Appellate Brief at 19 (citing Tr.Ex.14).
[55] GE Appellate Brief at 19 (citing Doc.480 at 571:6-9).

failed to prevent the Catastrophe. First, the Company planned to uprate Sherco 3 with a new high-pressure ("HP") and intermediate pressure ("IP") turbine to increase output.[56] As a result of the increased workload to upgrade the HP and IP turbines, Xcel decided to defer Sherco 3's major LP inspection from 2011 to 2014.[57] Second, Xcel did not replace the LP turbines in 2011, even though replacement would have eliminated the risk of SCC failure, because new LP turbines would not increase output.[58] GE was neither involved in the 2011 inspection or Xcel's decision to defer Sherco 3's major LP inspection.[59]

G. GE Informed Xcel to Rely on TIL 1277 When Inspecting Sherco 3.

GE offered its operators who posed power generation equipment inquiries access to GE's Power Answer Center ("PAC"), which functioned as a technical resource.[60] In 2007, after an Xcel inspection revealed SCC in a different generation unit at Sherco (Unit 1), the Company emailed GE inquiring whether a new TIL would be issued for SCC inspections.[61] A witness for GE testified that he orally conveyed to Xcel that a GE engineer had advised Xcel to apply TIL 1277 to units with drum boilers, such as Sherco 3, as evidenced by contemporary internal GE records.[62] While Xcel may dispute that GE advised to apply TIL 1277 to Sherco 3, an internal Xcel email dated after the Catastrophe states that Xcel decided to apply TIL 1277 to finger

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[56] GE Appellate Brief at 19 (citing Doc.480 at 570:18-571:9).
[57] GE Appellate Brief at 19-20 (citing Tr.Ex.29; Doc.480 at 673:12-23; 678:24-679:9).
[58] GE Appellate Brief at 19 (citing Doc.480 at 570:18-571:9).
[59] GE Appellate Brief at 20 (citing Doc.480 at 584:2-585:1.); *see also id.* (Xcel's 2010 internal email explains GE's lack of involvement in the 2011 outage: "We [at Sherco] have basically walked away from GE on the turbine and generator service work[.]") (citing Tr.Ex.1131).
[60] Appellants' Brief at 14-15, *Aegis Ins. Servs., LTD. v. Gen. Elec. Co.*, No. A19-0640, 2020 WL 614775 (Feb. 10, 2020) (citing (Docs. 475 at 162:1-11, 478 at 942:9-24)), (hereinafter "Xcel Appellate Brief"), attached as Schedule 2.
[61] GE Appellate Brief at 20.
[62] GE Appellate Brief at 20-21 (citing Doc.478 at 901:11-25; 893:24-894:3; Tr.Ex.38; Doc.478 at 893:12-894:24).

dovetails in its turbines "years ago," suggesting that Xcel did, in fact, receive GE's recommendation.[63]

II. XCEL AND ITS INSURERS FILE A LAWSUIT AGAINST GE TO RECOVER DAMAGES CAUSED BY THE CATASTROPHE.

On November 15, 2013, Xcel and its insurers[64] sued GE to recover nearly $300 million in damages associated with the Catastrophe, which involved the "failure of a low-pressure steam turbine in" Sherco 3 "due to [SCC] in a rotor wheel."[65] While Xcel settled with GE in 2018,[66] the Company's insurers lost both at the district and appellate court levels, which unanimously found in GE's favor. The remainder of this section focuses first on a brief background of the litigation followed by relevant factual and legal conclusions drawn by Minnesota courts regarding Xcel's role in the Catastrophe.

A. Brief Overview of Xcel's Lawsuit Against GE.

Xcel and its insurers sued GE alleging five specific tort causes of action: (I) Fraudulent concealment; (II) Willful and wanton negligence; (III) Gross negligence; (IV) Professional negligence; and (V) Post-sale failure to warn.[67] Xcel's amended complaint claimed two factors caused the Catastrophe: (1) improper design and manufacture of the turbine's rotor wheel; and (2) GE's failure to warn Xcel about SCC risks and the potential for catastrophic unit failure.[68]

After various dispositive motion filings and hearings, a jury trial, post-trial motion practice, two appeals to the Minnesota Court of Appeals, and the Minnesota Supreme Court's

[63] GE Appellate Brief at 21 n.9 (citing Tr.Ex.30a).
[64] As discussed *supra*, Sherco 3 is co-owned by Xcel and SMMPA, which were both involved in the lawsuit against GE, along with Sherco 3's insurers.
[65] *Aegis Ins. Servs., Ltd. v. Gen. Elec. Co.*, A19-0640, 2020 WL 614775 at *1 (Minn. Ct. App. Feb. 10, 2020).
[66] Notice at 2.
[67] GE Appellate Brief at 4 (citing Add.82-93).
[68] GE Appellate Brief at 4 (citing R.Add.13).

denial of Xcel's Petition for Review, Minnesota courts unanimously ruled in GE's favor. The five counts alleged in Xcel's amended complaint were thus disposed of as follows:

> (1) Count I/Fraudulent concealment—dismissed on post-appeal summary judgment; (2) Count II/Willful and wanton negligence—jury's verdict (Question 1) rejected this count; (3) Count III/Gross negligence—jury's verdict (Question 7) rejected this count; (4) Count IV/Professional negligence—dismissed on summary judgment before first appeal and not raised as an issue in that appeal; and (5) Count V/Post-sale failure to warn—dismissed during trial on motion for JMOL.[69]

In doing so, Minnesota courts effectively concluded that Xcel's negligent O&M of Sherco 3 was the precipitating factor of the Catastrophe.

B. Relevant Factual and Legal Conclusions Drawn by Factfinders and Minnesota Courts Regarding Xcel's Role in the Catastrophe.

The factfinders and Minnesota courts deciding the dispute between GE and Xcel, both at trial and on appeal, made several factual and legal conclusions regarding the Company's O&M of Sherco 3 and knowledge of SCC.

After presenting the evidence to the jury and district court, GE moved the court for a judgment as a matter of law to Count V (post-sale failure to warn). The district court "granted GE's motion for judgment as a matter of law to Count V, reasoning that [Xcel] could not reasonably be assumed to be unaware of the risk of harm."[70] In response, Xcel challenged the district court's decision, arguing that the court "erred and should have applied a standard that ask[ed] whether [Xcel] had knowledge of a very specific time-based risk that plagued L-1 finger dovetail rows in certain low pressure turbines."[71] The district court disagreed—noting that Xcel "again attempts to shift their arguments after trial and misapplies the jury's answers"—and found

[69] GE Appellate Brief at 11.

[70] ORDER DENYING PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL at 11, attached as Schedule 3.

[71] ORDER DENYING PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL at 11.

that Xcel had instead "asked the court to focus on the risk of harm if [Xcel] did not 'perform proper and periodic rotor wheel inspections and maintenance to the LP turbine assembly.'"[72] And "[t]o this question," the district court "concluded that no reasonable jury could find that [Xcel] was unaware of the risk of harm."[73] The district court reasoned that "[t]he jury heard substantial amounts of evidence regarding [Xcel]'s operation of [Sherco] 3 and knowledge of the risk of [SCC]."[74] Specifically, the district court found as a matter of law that no reasonable jury could find that Xcel was unaware of the risk of SCC and the potential harm it may cause to Sherco 3 given the following:

> [Xcel] knew SCC could cause failure to the Wilson Line, resulting in wheel failure and buckets departing from the rotor. [Xcel] also knew the importance of proper steam chemistry to minimize the risk of SCC and how to inspect for SCC. [Xcel] also knew there was an industry-wide problem with SCC. [Xcel] could not reasonably be assumed to be unaware of the risk of harm, because the risk was disclosed in the manual that came with the turbine when it was purchased, because [Xcel] employees had attended numerous seminars where GE discussed the risk, and because [Xcel]'s own employees had advised other [Xcel] employees about the risks of SCC. . . . The evidence establishes that [Xcel] chose not to involve GE in inspecting the turbine because it believed GE would recommend the expensive "buckets off" inspection that was necessary to find SCC. [Xcel] seems to want to hold GE to a standard of predicting exactly when a failure catastrophic failure [sic] would occur without providing GE with the data and access that would have allowed such a prediction.[75]

On appeal, Xcel argued "that it is entitled to a new trial because the district court improperly granted JMOL to GE on [Xcel]'s post-sale failure- to-warn claim before sending it to the jury because the district court used an overly broad definition of the risk of harm about which

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[72] ORDER DENYING PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL at 11 (citing and quoting Pls.' Special Verdict Questions 1 and 2, Sept. 21, 2018).

[73] ORDER DENYING PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL at 12.

[74] ORDER DENYING PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL at 14.

[75] ORDER DENYING PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL at 14-15.

GE had a duty to warn."[76] The Minnesota Court of Appeals affirmed the district court and found Xcel's arguments "misguided."[77] Much like the district court, the Minnesota Court of Appeals found there was "ample evidence" that demonstrated both Xcel's "general awareness of the risks of SCC unrelated to operational anomalies" and "the general risk of SCC on [Sherco] 3 that materialized."[78] Specifically, the Minnesota Court of Appeals noted the following examples of Xcel's knowledge of SCC:

> Here, ample evidence shows [Xcel]'s general awareness of the risks of SCC unrelated to operational anomalies. For example, an [Xcel] System Health Report stated that "[low-pressure turbines] also experience dovetail pin cracking problems, erosion damage and may suffer from an industry-wide problem with rotor wheel cracking . . . . Risks associated with wheel cracking involve wheel failure and buckets departing the rotor. Resulting collateral damage could be severe (i.e. due to mass imbalance and projectiles)." [Xcel] argues that, while GE informed [Xcel] that "certain operational conditions could cause SCC to form in the finger dovetails," [GE] did not inform [Xcel] "that a different, more substantial risk was present in these turbines: the risk of catastrophic failure due to undetected SCC, unrelated to operational anomalies, caused by the mere passage of time." . . . . The district court properly determined that no reasonable jury could find that [Xcel] was unaware of the general risk of SCC on Unit 3 that materialized, and [Xcel] is not entitled to a new trial on that basis.[79]

In addition to the district and appellate courts' findings that Xcel was objectively aware of the risks SCC posed to Sherco 3, GE also provided additional examples of Xcel's SCC knowledge:

> At trial, the Court and jury heard substantial amounts of evidence regarding [Xcel]'s operation of [Sherco 3] and [Xcel]'s knowledge of SCC. One such example was the testimony of Timothy Murray, [Xcel]'s turbine overhaul specialist. Mr. Murray testified about his extensive knowledge of SCC, acquired from his education, training, and experience (T.Tr. 305:16-19), from the Electric Power Research Institute (T.Tr. 306:7-11), and from power generation industry sources (T.Tr. 306:12-14). Murray knew SCC was an industry-wide problem, and not only related to GE equipment. (T.Tr. 307:13-18.) Murray knew about the

[76] *Aegis Ins. Servs., LTD. v. Gen. Elec. Co.*, No. A19-0640, 2020 WL 614775, at *3 (Feb. 10, 2020).
[77] *Aegis Ins. Servs., LTD. v. Gen. Elec. Co.*, No. A19-0640, 2020 WL 614775, at *3 (Feb. 10, 2020).
[78] *Aegis Ins. Servs., LTD. v. Gen. Elec. Co.*, No. A19-0640, 2020 WL 614775, at *4 (Feb. 10, 2020).
[79] *Aegis Ins. Servs., LTD. v. Gen. Elec. Co.*, No. A19-0640, 2020 WL 614775, at *4 (Feb. 10, 2020).

Wilson Line, where it was, and its susceptibility to SCC. (T.Tr. 307:19-309:20.) Specifically as it relates to [Xcel]' allegations in Count V that GE withheld information concerning "the potential for failure in the LP turbine rotor wheel around the Wilson Line or of steps that could be taken to detect SCC damage and to prevent an LP turbine failure," Mr. Murray testified as follows:

> Q. Okay. To summarize, it's fair to say during the period 1999 to 2011 you knew, one, about the risk of stress corrosion cracking in LP turbines?
>
> A. Yes.
>
> Q. Two, what causes stress corrosion cracking in LP turbines?
>
> A. Yes.
>
> Q. Three, how to control steam chemistry to minimize the risk of stress corrosion cracking in LP turbines?
>
> A. Well – that?
>
> MR. EVINGER: Objection, foundation.
>
> THE COURT: Did you know that or did you not know that?
>
> THE WITNESS: More or less, I guess, I could say.
>
> Q. Yeah. And you knew how to inspect for the presence of stress corrosion cracking?
>
> A. Yes, we did.

(T.Tr. 327:3-24.) Mr. Kolb, Sherco turbine engineer, testified to similar knowledge. See, e.g., T.Tr. 593:19-594:7; 595:14-596:3. This testimony, among various other testimony at trial, refuted [Xcel's] allegations that [Xcel] was unaware of the risks of SCC in connection with the operation of [Sherco 3].

The documentary evidence at trial also demonstrated [Xcel] knew well the risk of harm due to SCC and how to inspect for it. See, e.g., GEK-63430 (Tr. Ex. 288); TIL 1121-3AR1 (Tr. Ex. 6); 12/7/10 System Health Report (Tr. Ex. 8(e)). Indeed, [Xcel]'s System Health Report for the [Sherco 3] turbines dated 12/7/2010 (Tr. Ex. 8(e) at 2) states in part: "Risks associated with wheel cracking involve wheel failure and buckets departing the rotor. Resulting collateral damage could be severe (i.e. due to mass imbalance and projectiles)." This is exactly what

> happened on November 19, 2011, which shows prescient knowledge on the part of [Xcel] of the potential risk it faced.[80]

In addition to the legal and factual findings by Minnesota courts, the Special Verdict Form returned by the jury after trial demonstrates that the factfinders made several important factual and legal conclusions about Xcel's O&M of Sherco 3. Of particular importance—and irrespective of the legal relevance these findings and conclusions may or may not have had on the legal claims at issue—the jurors who heard the evidence submitted by GE and Xcel throughout the multiweek trial found as follows, according to the district court: (1) "GE did not discover that the peril of a catastrophic failure due to [SCC] was impending for [Xcel];" and (2) "[Xcel] was negligent in the operation and maintenance of [Sherco] 3, and this negligence was a direct cause of property loss."[81] Specifically, the jurors answered the relevant questions in the Special Verdict Form:

> 1. **You must answer this question:** Did GE discover that the peril of a catastrophic failure due to stress corrosion cracking was impending for NSP?
>
> Yes_____ No___X___
>
> 9. **You must answer this question:** Was NSP negligent in the operation and maintenance of Unit 3?
>
> Yes___X___ No_____
>
> 10. **If your answer to Question 9 was "Yes," then answer this question:** Was NSP's negligence a direct cause of the property loss at Sherco?
>
> Yes___X___ No_____[82]

Put differently, the jury found that Xcel—and not GE—was responsible for the Catastrophe.[83]

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[80] Defendants' MOL Opposing Motion for Judgment as Matter of Law or for New Trial at 16-17, attached as Schedule 4.

[81] ORDER DENYING PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL at 6.

[82] Special Verdict Form at 1-2, attached as Schedule 5.

III. REGULATORY PROCEEDINGS AT THE COMMISSION REGARDING THE CATASTROPHE.

From 2013 until the present, the Commission has taken several relevant regulatory actions concerning the Catastrophe. The Commission's September 3, 2013 Findings of Fact, Conclusions, and Order ("2013 Order") in Xcel's 2012 rate case proceeding addressed insurance proceed and repair cost issues as follows:[84]

> • Required Xcel to remove from rates all direct costs for the Sherco 3, except for property taxes, from the 2013 test year.[85]
>
> • Required Xcel to provide an analysis and report on the Sherco 3 total costs, insurance recoveries, and costs not covered by insurance in its November 2013 rate-case filing.
>
> • Required Xcel to provide a full accounting of repair costs and insurance recovery in its 2013 rate case to ensure that no repair costs reimbursed by insurance would be recovered from ratepayers.[86]

The 2013 Order also stated that "[t]he Commission cannot at this time conclude who should bear the significant costs the Company has incurred for replacement power" and deferred this issue to the FCA proceedings.[87]

On March 31, 2015, Xcel filed its final quarterly Sherco 3 Insurance Recovery Update, which detailed the Company's final Sherco 3 restoration project costs and insurance cost

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(Footnote Continued from Previous Page)

[83] The Court found the apportionment of fault not to be legally relevant.

[84] Department Comments at 1 (citing Docket No. E002/GR-12-961).

[85] Department Comments at 2 (also noting that "This determination focused only on operation and maintenance expenses, not capital costs, and resulted in a $36.6 million reduction to Xcel's revenue requirements as stated on page 21 of the 12-961 order.").

[86] Department Comments at 1 (citing Docket No. E002/GR-12-961).

[87] Department Comments at 2 (also noting that "Under Minn. R. 7825.2390 to .2920, utilities file detailed monthly and annual reports on all automatic rate adjustments made through the fuel clause. These filings receive careful review by interested stakeholders and by the Department, which files a report analyzing the year's fuel-clause activity and highlighting any concerns with accuracy, prudence, or related issues. The Commission holds an annual meeting to examine and act on the utilities' annual reports.").

recovery information.[88] On August 31, 2015, the Commission issued an order requiring Xcel to include Sherco 3 insurance proceeds as an offset to its rate base in the 13-868 proceeding.[89]

On June 2, 2016, the Commission issued an Order Acting on Electric Utilities' Annual Reports and Requiring Additional Filings ("2016 Order").[90] The 2016 Order deferred any decision on the recovery of replacement power costs related to the Catastrophe until there was a sufficient record to determine if recovery was appropriate, and clarified that the Commission may act in the future to remedy any inequities for ratepayers.[91]

On September 20, 2018, Xcel reached a settlement with GE, which Xcel indicated would be credited in its entirety to ratepayers.[92] On December 3, 2018, Xcel updated the Commission by stating that the Company planned on returning its GE settlement sum as a credit to customers through the monthly FCA for the month beginning February 1, 2019.[93]

On December 6, 2018, the Commission issued a Notice of Comment Period requesting comment on the following topics:

- Should the Commission authorize the refund amount and method proposed by Xcel for the GE settlement related to the 2011 - 2013 Sherco 3 outage?
- Are all the issues related to the Sherco 3 outage resolved and, if so, should Xcel be authorized to discontinue providing quarterly litigation updates?
- Are there any other issues or concerns related to this matter?[94]

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[88] Department Comments at 4 (citing Docket No. E002/GR-13-868).

[89] Department Comments at 4 (citing Order Reopening, Clarifying, and Supplementing May 8, 2015 Order Docket No. E002/GR-13-868).

[90] Department Comments at 4 (citing Docket Nos. E999/CI-03-802, E999/AA-12-757, - 13-599 and -14-579).

[91] Department Comments at 4 (also noting that "On November 10, 2014, Xcel filed reply comments in Docket No. E999/AA-13-599 identifying the Company's total incremental replacement power costs due to the Sherco 3 outage, $55,517,206 million, based on the use of a production cost model (Attachment I, pp. 3 and 7 of 49). Xcel's November 10, 2014 reply comments are available online at: Reply Comments").

[92] Notice of Comment Period at 2 (Sep. 30, 2020).

[93] Notice of Comment Period at 2 (Sep 30, 2020).

[94] Notice of Comment Period at 2 (Sep 30, 2020).

In response to the Commission's Notice of Comment Period, the Department of Commerce ("Department") and OAG filed comments. On January 14, 2019, the Department filed comments recommending that: (1) Xcel's request to refund the GE settlement proceeds through the FCA be approved with a minor adjustment; and (2) Xcel be required to return a portion of replacement power costs to ratepayers.[95] The OAG agreed with the Department's first recommendation, and as to the second, recommended that the Commission withhold judgment on the prudency of the replacement power costs resulting from the Catastrophe until the conclusion of the related civil litigation process.[96] The OAG also recommended that Xcel be required to submit a compliance filing reporting all costs and regulatory proceedings related to the litigation after the civil litigation is complete.[97]

On January 29, 2019, Xcel filed reply comments, again recommending that the Commission approve the Company's GE settlement refund proposal but concluding that no additional refunds or credits were necessary in connection with the Sherco 3 outage.[98] Alternatively, Xcel recommended that the Commission allow the pending civil litigation to reach its conclusion, including appeals, before conducting its own factual, legal, and regulatory analysis.[99]

On April 11, 2019, the Commission issued an order that both authorized the refund amount and method proposed by Xcel for its settlement with GE related Sherco 3 and required

[95] Notice of Comment Period at 2 (Sep. 30, 2020).
[96] Notice of Comment Period at 2 (Sep. 30, 2020).
[97] Notice of Comment Period at 2 (Sep. 30, 2020).
[98] Notice of Comment Period at 2 (Sep. 30, 2020).
[99] Notice of Comment Period at 3 (Sep. 30, 2020).

Xcel to submit a compliance filing at the conclusion of the civil litigation concerning the Catastrophe.[100]

ANALYSIS & RECOMMENDATIONS

The Notice seeks input from interested parties on five issues, which the OAG addresses sequentially in the following sections:

- Did [Xcel] provide the required compliance information related to the November 19, 2011 accident at Sherco 3?
- Are all of the issues related to the Sherco 3 outage resolved and, if so, should [Xcel] be authorized to discontinue providing quarterly litigation updates?
- How should the Commission proceed regarding the issue of [Xcel]'s prudency, recoverability of costs related to the accident, and ratemaking treatment of replacement power and additional fuel costs?
- What further procedural steps, if any, do the parties recommend?
- Are there other issues or concerns related to this matter?[101]

I. XCEL PROVIDED THE COMMISSION-REQUESTED COMPLIANCE INFORMATION RELATED TO THE CATASTROPHE.

On April 11, 2019, the Commission issued an order that both authorized the refund amount and method proposed by Xcel for its settlement with GE related to the Catastrophe and required Xcel to submit a compliance filing at the conclusion of the civil litigation.[102] Specifically, the Commission's April 11, 2019 Order required Xcel to submit a compliance filing addressing the following information at the conclusion of the civil litigation against GE regarding liability for damages related to the Catastrophe:

• Total cost to the Company (total company and Minnesota jurisdictional);

[100] Notice of Comment Period at 3 (Sep. 30, 2020).
[101] Notice of Comment Period at 1 (Sep. 30, 2020).
[102] Notice of Comment Period at 3 (Sep. 30, 2020).

> • Identification of which of those costs have been recovered or approved for recovery, including both the mechanisms of recovery and citations to the Commission orders approving those recoveries;
>
> • Identification of any attempts to recover costs that the Commission denied, including citations to the Commission orders denying those recoveries;
>
> • Identification of any costs that the Commission has deferred or delayed final decisions on, including citations to Commission orders deferring or delaying those recoveries; and
>
> • Identification of any insurance proceeds or settlements with third parties, including description of how those proceeds have been returned to ratepayers.[103]

On June 24, 2019, March 10, 2020, and May 26, 2020, Xcel submitted compliance filings regarding the status of the ongoing civil litigation. In its May 26, 2020 filing, Xcel notified the Commission that the Minnesota Supreme Court recently denied the Company's insurers' petition for further review and that the litigation with GE had concluded.[104]

Accordingly, on August 24, 2020, Xcel submitted filing that was intended to comply with Order Point 2 in the Commission's above-referenced April 11, 2019 Order.[105] While the OAG certainly disagrees with the conclusions drawn by Xcel in its compliance filing—as discussed more fully *infra*—the Commission should accept the Company's filing as complete and in compliance with past Commission order.

II. REPLACEMENT POWER COSTS REMAIN UNRESOLVED, BUT THE OAG RECOMMENDS THAT THE COMMISSION ALLOW XCEL TO DISCONTINUE PROVIDING QUARTERLY LITIGATION UPDATES.

Since December 2013, Xcel has filed quarterly compliance filings with the Commission regarding the Catastrophe "[a]s required by Order Point 9 of the Commission's Order in [Xcel's]

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[103] Notice of Comment Period at 3 (Sep. 30, 2020) (citing ORDER AUTHORIZING SHERCO UNIT 3 RATEPAYER REFUND AMOUNT AND METHOD AND REQUIRING COMPLIANCE FILING (Docket No. E-999/AA-17- 492).

[104] Notice of Comment Period at 3 (Sep. 30, 2020).

[105] Notice of Comment Period at 3 (Sep. 30, 2020).

2012 electric rate case (Docket No. E002/GR-12-961)."[106] These quarterly filings have focused on "Sherco Unit 3 total costs, insurance recoveries, and costs not covered by insurance."[107]

While the ratepayer-related replacement power costs associated with the Catastrophe have not yet been resolved—and are discussed in greater detail *infra*—the civil litigation between Xcel, the Company's insurers and GE has reached completion. After a jury trial and post-trial motion practice, the Minnesota Supreme Court declined a petition to review a Court of Appeals order that affirmed the district court's denial of Xcel's insurer's motion for a judgment as a matter of law or a for a new jury trial and dismissing all claims against GE. Likewise, Xcel also settled its lawsuit with GE in 2018 and all settlement funds have been reimbursed to Minnesota ratepayers.

Therefore, since the underlying lawsuit involving GE has run its course, there is no longer a need for Xcel to continue to file quarterly compliance filings. The Commission, however, should order Xcel to notify the Commission of updates related to Sherco 3.

III. THE COMMISSION SHOULD ORDER XCEL TO REIMBURSE MINNESOTA RATEPAYERS FOR ALL OUT-OF-POCKET REPLACEMENT FUEL COSTS RELATED TO THE CATASTROPHE.

The OAG urges the Commission to order Xcel to reimburse Minnesota ratepayers for all out-of-pocket costs incurred as a result of the Catastrophe for two main reasons. First, as a well-capitalized investor-owned utility ("IOU"), Xcel and its investors take on operational risk in exchange for a guaranteed rate of return. It is not reasonable to make ratepayers cover the costs of operational failures when they have already compensated Xcel's investors for these and other risks to their investments. And second, the relevant factual and legal conclusions by Minnesota

[106] Xcel Sherco 3 Compliance Filing – Final Report at 1 (Mar. 31, 2015).

[107] *In the Matter of the Application of Northern States Power Company for Authority to Increase Rates for Electric Service in the State of* Minnesota, Docket No. E002/GR-13-868, FINDINGS OF FACT, CONCLUSIONS, AND ORDER at 47 (Sep. 3, 2013).

courts and factfinders demonstrate that Xcel unreasonably and imprudently operated Sherco 3 and, therefore, is solely responsible for the Catastrophe. Before the OAG discusses why the Commission should order ratepayer reimbursement, we first discuss and define several phrases that will be used throughout this section.

A. Defined Terms.

As a result of the Catastrophe, Xcel was forced to incur an estimated **[TRADE SECRET INFORMATION BEGINS] [TRADE SECRET INFORMATION ENDS]** in replacement power costs that were shifted to ratepayers through the FCA.[108] Given the ownership structure of Sherco and the different states that generating unit serves, however, the amount attributable to Minnesota ratepayers totals **[TRADE SECRET INFORMATION BEGINS] [TRADE SECRET INFORMATION ENDS]**.[109] The OAG will refer to this amount as the "Minnesota Jurisdictional Share of Total Replacement Power Costs."

Xcel's Compliance Filing suggests that "the Company collected more than $226 million from its insurers, covering all but about $12.6 million of the costs necessary to return [Sherco 3] to service."[110] Given the ownership structure of Sherco and the different states that generating unit serves, however, the portion of capital costs not covered by insurance to restore Sherco 3 applicable to Minnesota ratepayers totals **[TRADE SECRET INFORMATION BEGINS] [TRADE SECRET INFORMATION ENDS]**.[111] The OAG will refer to this amount as the "Uninsured Capital Replacement Costs."

When using the phrase "Total Harm to Minnesota Ratepayers from the Catastrophe," the OAG refers to the sum of the Minnesota Jurisdictional Share of Replacement Power Costs plus

[108] Compliance Filing, Sherco Unit 3 at 5, Table 2 (Aug. 24, 2020).
[109] Compliance Filing, Sherco Unit 3 at 5, Table 2 (Aug. 24, 2020).
[110] Compliance Filing, Sherco Unit 3 at 7 (Aug. 24, 2020).
[111] Compliance Filing, Sherco Unit 3 at 3, Table 1 (Aug. 24, 2020).

the Uninsured Capital Replacement Costs, which totals **[TRADE SECRET INFORMATION BEGINS] [TRADE SECRET INFORMATION ENDS]**.

Xcel's Compliance Filing notes that "[i]n the Company's 2012 rate case, the Commission disallowed all direct costs associated with Sherco 3," which amounted to $21.6 million.[112] The OAG will refer to this amount as the "2012 Rate Case Disallowance for Sherco 3."

The Compliance Filing additionally notes that "[t]he Company also negotiated a settlement with GE allowing for the refund of" approximately **[TRADE SECRET INFORMATION BEGINS] [TRADE SECRET INFORMATION ENDS]** "allocated to Minnesota jurisdiction customers."[113] The OAG will refer to this amount as the "2019 Sherco 3 Customer Refund from Xcel's Settlement with GE."

Finally, when using the phrase "Net Harm to Minnesota Ratepayers from the Catastrophe after Offsets," the OAG refers to the sum of the Total Harm to Minnesota Ratepayers from the Catastrophe less the 2012 Rate Case Disallowance for Sherco 3 and less the 2019 Sherco 3 Customer Refund from Xcel's Settlement with GE, which totals **[TRADE SECRET INFORMATION BEGINS] [TRADE SECRET INFORMATION ENDS]**. The OAG recommends that the Commission add interest to the Net Harm to Minnesota Ratepayers from Catastrophe after Offsets figure.

B. The Commission Should Order Xcel to Reimburse Minnesota Ratepayers Because the Company is a Well-Capitalized IOU that Should Bear the Risk for Unplanned Outages Such as the Catastrophe.

Xcel is a well-capitalized IOU that takes on operational risk in exchange for a Commission-approved rate of return. This rate of return compensates Xcel's equity investors for the risks associated with investing their money in a public utility. As Xcel's expert witness

[112] Compliance Filing, Sherco Unit 3 at 6 (Aug. 24, 2020).
[113] Compliance Filing, Sherco Unit 3 at 7 (Aug. 24, 2020).

testified in the company's most recent rate case, a utility's authorized ROE "reflects the risks and prospects *of the utility's operations* and supports the utility's financial integrity . . . ."[114] In this case, Xcel contracted with GE in such a way that the latter escaped any meaningful liability for the Catastrophe, and instead all costs were shifted to ratepayers.[115] Xcel, likewise, apparently failed to obtain sufficient business interruption insurance to cover the cost of replacement fuel costs in the event of an outage such as the Catastrophe.

In this instance, it would be contrary to the public interest and patently unfair to require ratepayers to subsidize the Catastrophe. Unless the Commission orders Xcel to reimburse ratepayers for the Net Harm to Minnesota Ratepayers from Catastrophe after Offsets, IOUs will be incentivized to carry insufficient business interruption insurance policies or take other protective measures and will continue to treat ratepayers as a "backstop." In addition, Xcel's ratepayers would bear the costs of Xcel's operational risks, which are risks that Xcel's investors are compensated to take. Good regulatory public policy dictates that IOUs—not ratepayers—be responsible for the risks associated with an IOU's enterprise. Even if the Commission rejects this argument, sufficient evidence and testimony by Xcel employees taken under oath, and analyzed by Minnesota courts, support a Commission conclusion that Xcel's imprudent and unreasonable O&M of Sherco 3 caused the Catastrophe.

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[114] *In the Matter of the Application of Northern States Power Company for Authority to Increase Rates for Electric Service in Minnesota*, Docket No. E-002/GR-20-723, Direct Testimony of Dylan W. D'Ascendis (Nov. 2, 2020) at 8 (emphasis added).

[115] *See supra*, Background Section I.B.

C. The Commission Should Find a Sufficient Factual Record Exists to Order Xcel to Reimburse Minnesota Ratepayers for all Out-of-Pocket Costs Stemming From the Catastrophe Due to Imprudent and Unreasonable Sherco 3 O&M.

"Generating plant outages . . . raise two issues: Who should pay the replacement power costs and the repair and/or cleanup costs? The cause of the outage is crucial. If due to mismanagement or imprudence, replacement power costs, as well as any related repair and/or cleanup costs, generally are disallowed."[116] The Commission has sufficient factual evidence at its disposal, taken under oath and introduced in courts of law, to determine that Xcel is responsible for the Catastrophe given its unreasonable and imprudent O&M of Sherco 3. While the OAG will not restate the facts provided in the Background in their entirety, there are several important factual determinations provided under oath—and highlighted by Minnesota courts—that demonstrate Xcel's imprudent and unreasonable O&M of Sherco 3:

- Xcel imprudently and unreasonably failed to monitor and maintain Sherco 3's steam chemistry within EPRI Guidelines—which Xcel adopted—[117]and the Company knew impurities in the water/steam chemistry would cause SCC.[118]
- Xcel imprudently and unreasonably postponed a major Sherco 3 LP inspection from 2011 to 2014[119]—contrary to GE's TILs—without conducting an engineering study to determine whether such postponement was prudent.[120]

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[116] Charles F. Phillips, Jr., *The Regulation of Public Utilities*, Chapter 7: Operating Expenses, Depreciation, and Taxes (1988), *available at* 2005 WL 998369 (noting that "[u]nder this standard, Consolidated Edison Company was required to refund $33.7 million (plus interest) in replacement power costs 'because of lack of reasonable care in its management and operation of the Indian Point No. 2 nuclear facility'" and that "[u]nder similar standards, Philadelphia Electric Company had to absorb $53.2 million in replacement power costs as a result of two outages (in 1983 and 1984) at Salem Unit No. 1, and Utah Power & Light Company's cleanup costs from a toxic waste spill were disallowed.").

[117] GE Appellate Brief at 18 (citing Doc.474 at 326:1-327:24; 330:13-22).

[118] GE Appellate Brief at 13 (citing Doc.483 at 1621:1-1622:3); *see also id.* at 3 (citing Doc.483 at 1566:19-23;1597:1-1598:23;1621:1-1622:3; Tr.Exs.324, 349).

[119] GE Appellate Brief at 13 (citing Doc.474 at 408:8-21; Doc.480 at 676:11-678:10).

- Xcel imprudently and unreasonably postponed a major Sherco 3 LP inspection from 2011 to 2014 despite its understanding that "extending GE recommend[ed] [time between major inspections] increases risk of failure."[121]
- Xcel imprudently and unreasonably failed to undertake an MPI—contrary to GE's TIL—during its 2011 Sherco 3 inspection.[122]
- Xcel imprudently and unreasonably ignored other third-party expert advice to test for SCC by failing to perform the bucket lift test[123] or by removing a small group of buckets to inspect for SCC damage during its 2011 maintenance outage.[124]
- Xcel imprudently and unreasonably deferred Sherco 3's LP inspection despite knowing that undetected SCC on Sherco 3's finger dovetails could "involve wheel failure and buckets departing the rotor" and that "[r]esulting collateral damage could be severe (i.e. due to mass imbalance)."[125]
- Xcel imprudently and unreasonably deferred Sherco 3's LP inspection despite knowing that Sherco 3 sustained caustic or chemical ingestion or contamination, carryover from the boiler, and a leaking condenser heater tube from 1999-2011, which should have prompted Xcel to remove the buckets for dovetail inspection.[126]

(Footnote Continued from Previous Page)

[120] GE Appellate Brief at 13 (citing Doc.480 at 679:10-16; Doc.474 at 410:8-25).
[121] GE Appellate Brief at 13 (citing R.Add.07).
[122] GE Appellate Brief at 18 (citing R.Add.30-33).
[123] GE Appellate Brief at 16-17 (citing Doc.474 at 377:4-12; 421:12-22; R.Add.04.)
[124] GE Appellate Brief at 17 (citing Tr.Ex.1062 at 3-8; Doc.474 at 375:14-23; 385:7-21).
[125] GE Appellate Brief at 17 (citing R.Add.08).
[126] GE Appellate Brief at 18 (citing Doc.482 at 1526:13-120;1534:25-1535:3; Doc.483 at 1599:19- 23;1612:11-20).

- Xcel imprudently and unreasonably failed to replace Sherco 3's LP turbines in 2011, even though replacement would have eliminated the risk of SCC failure, because new LP turbines would not increase output.[127]
- Xcel imprudently and unreasonably failed to apply TIL 1277 during the Company's 2011 Sherco 3 inspection, which GE instructed as evidenced by contemporary internal GE records.[128]
- Xcel imprudently and unreasonably deferred Sherco 3's LP inspection given the district court's conclusion that the "evidence establishes that [Xcel] chose not to involve GE in inspecting the turbine because it believed GE would recommend the expensive 'buckets off' inspection that was necessary to find SCC."[129]
- The jurors that heard all the evidence submitted by Xcel and GE over a two-week trial concluded in the Special Verdict Form that "[Xcel] was negligent in the operation and maintenance of [Sherco] 3, and this negligence was a direct cause of property loss."[130]

It is worth noting that this evidence was submitted in a civil case in which Xcel did not allege that GE was ordinarily negligent; had the Company made such an allegation, GE "would have submitted far more evidence of [Xcel's] own negligence."[131]

Xcel claims that "principles of law and equity" preclude the Commission from taking regulatory action on the recovery of replacement power costs without a contested case hearing

[127] GE Appellate Brief at 19 (citing Doc.480 at 570:18-571:9).
[128] GE Appellate Brief at 20-21 (citing Doc.478 at 901:11-25; 893:24-894:3; Tr.Ex.38; Doc.478 at 893:12-894:24).
[129] ORDER DENYING PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL at 14-15.
[130] ORDER DENYING PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL at 6.
[131] GE Appellate Brief at 35.

because Xcel did not participate in the underlying jury trial.[132] The Company is correct that it did not participate as a litigant.[133] But only because Xcel made the decision to settle with GE, presumably after considering the litigation risk of losing at trial. Moreover, Xcel's employees testified under oath to their knowledge regarding the Catastrophe. The facts elicited from this testimony show that Xcel failed to take a number of prudent actions, each of which would likely have prevented the Catastrophe and resulting costs.

It would be contrary to black letter law for Xcel to relitigate its dispute with GE after settlement. Instead, the Company seeks to relitigate using ratepayers as a proxy defendant. In other words, while Xcel settled with GE for less than the full harm of the Catastrophe, it now seeks to recover the remaining costs from ratepayers. Yet it argues that it is entitled to a whole new proceeding if it does not get what it wants. The Commission should not allow the Company to pass its own O&M failures on to ratepayers—the one party that objectively bears no responsibility for the Catastrophe. If the Commission denies a ratepayer reimbursement, such funds will be effectively taken from the pockets of ratepayers and put into the wallets of shareholders.

As a result of Xcel's imprudent and unreasonable O&M of Sherco 3, the Commission should reject the Company's urging to "conclude that no additional refunds or credits are necessary in connection with the Sherco outage."[134] Instead, the Commission should take the Total Harm to Minnesota Ratepayers from the Catastrophe and reduce that amount by both the 2012 Rate Case Disallowance for Sherco 3 and the 2019 Sherco 3 Customer Refund from Xcel's

[132] Compliance Filing, Sherco 3 at 8 n.11 (Aug. 24, 2020).
[133] Instead, as discussed more fully *infra*, knowledgeable Company employees testified under oath to the relevant facts underlying the Catastrophe.
[134] Compliance Filing, Sherco 3 at 8 (Aug. 24, 2020).

Settlement with GE and refund the Net Harm to Minnesota Ratepayers from the Catastrophe after Offsets (with interest).[135]

IV. IF THE COMMISSION DECLINES TO ORDER AN IMMEDIATE RATEPAYER REIMBURSEMENT, THE OAG RECOMMENDS REFERRING THIS MATTER TO THE OFFICE OF ADMINISTRATIVE HEARINGS FOR A CONTESTED CASE HEARING.

The Commission should be reticent of Xcel's desire to hold a "fulsome contested case process,"[136] through which the Company will be given a second chance to show that it acted prudently and pass the risks of its operations onto ratepayers for the Catastrophe at a facility owned, operated, and maintained by Xcel. And even if this matter was referred to the Office of Administrative Hearings ("OAH"), the same relevant Xcel employees that testified under oath during the jury trial would likely be compelled to provide similar testimony to an administrative law judge. It is, therefore, not only possible—it is probable—that the OAH recommends that the Commission reach the same result reached by Minnesota district and appellate courts: that Xcel, not GE, was responsible for the Catastrophe.[137] And there is no basis to conclude that ratepayers are responsible.

That said, if the Commission "finds that all significant issues have not been resolved to its satisfaction," or if the Company can point to "a right to a hearing under statute or rule," then the Commission should "refer the matter to the [OAH] for contested case proceedings" pursuant to Minnesota Rules Part 7829.1000.[138]

For the foregoing reasons, ratepayers should not bear financial responsibility for replacement power costs related to the Catastrophe. Accordingly, any amount that Xcel was

[135] The Commission should apply the same annual interest rate (4.81 percent) used by Xcel to return interim rates back to ratepayers in the Company's last rate case (Docket No. 15-826).
[136] Compliance Filing, Sherco 3 at 8 n.11 (Aug. 24, 2020).
[137] ORDER DENYING PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL at 14-15.
[138] Minn. R. 7829.1000.

unable to excise from GE during settlement negotiations should be borne by the Company and not by blameless Minnesota ratepayers.

Dated: January 15, 2021

Respectfully submitted,

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RESIDENTIAL UTILITIES DIVISION

PUBLIC VERSION

NO. A19-0640

State of Minnesota

In Court of Appeals

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

Appellants,

v.

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

Respondents.

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STATEMENT OF THE ISSUES

1. The jury considered two claims: Count II/Willful and wanton negligence, and Count III/Gross negligence based on assumed duty. The jury answered "No" to verdict questions on essential elements of both. Did the district court correctly order judgment for GE on the verdict?

The district court ordered judgment for GE on the verdict. (Add.005-008.)

Apposite authorities:

John W. Thomas Co. v. Carlson-LaVine, Inc., 189 N.W.2d 197 (Minn. 1971)

Hohenstein v. Goergen, 176 N.W.2d 749 (Minn. 1970)

2. Did the district court correctly order summary judgment on Count I/Fraudulent concealment and JMOL on Count V/Post-sale failure to warn?

The district court ordered judgment for GE on the grounds described. (Doc.236; Doc.485 at 1859:7-1860:3.)

Apposite authorities:

Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520 (Minn. 1986)

Great N. Ins. Co. v. Honeywell Int'l, Inc., 911 N.W.2d 510 (Minn. 2018)

3. Did the trial court commit clear error or abuse its discretion in denying appellants' post-trial motion to amend their complaint under Minn. R. Civ. P. 15?

Minn. R. Civ. P. 15

Buller v. A.O. Smith Harvestore Prods, Inc., 518 N.W.2d 537 (Minn. 1994)

Hohenstein v. Goergen, 176 N.W.2d 749 (Minn. 1970)

4. Does the limited-liability provision in the parties' sales contract provide an alternative ground to affirm the judgment, the orders for summary judgment and JMOL, and the order denying post-trial amendment under Rule 15?

Lyon Fin. Servs., Inc. v. Ill. Paper and Copier Co., 848 N.W.2d 539 (Minn. 2014)

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Brookfield Trade Ctr., Inc. v. Cnty. of Ramsey, 584 N.W.2d 390 (Minn. 1998)

5. Did the trial court err or abuse its discretion in its evidentiary rulings at trial about other-incidents evidence, design evidence, and subsequent-remedial-measures evidence, or in its order denying a new trial on those issues?

Apposite authorities:

Johnson v. Washington Cnty., 518 N.W.2d 594 (Minn. 1994)

Faber v. Roelofs, 212 N.W.2d 856 (Minn. 1973)

6. Did the trial court err or abuse its discretion in its award of costs to GE, the prevailing party?

The district court determined GE was the prevailing party and, as such, was entitled to its costs under applicable law. (Add.030-032.)

Apposite authorities:

Minn. Stat. § 549.04

Jonsson v. Ames Constr. Inc., 409 N.W.2d 560 (Minn. App. 1987), *review denied* (Minn. Sept. 30, 1987)

STATEMENT OF THE CASE AND OF THE FACTS

I. Overview

On November 19, 2011, a 32-year-old commercial coal-fired steam turbine/generator manufactured in the 1970s by respondent General Electric Company ("GE") suffered a failure in one of its Low Pressure ("LP") turbine sections due to stress corrosion cracking ("SCC"). (Doc.474 at 406:13-407:6; Doc.478 at 737:24-738:18.) SCC is a metallurgical phenomenon that has been well known for decades to both steam-turbine manufacturers and power-industry professionals. (R.Add.01.) SCC can occur in any steam turbine if the steam powering it is not adequately monitored and controlled for contaminants. (R.Add.01-02.) Northern States Power Company d/b/a Xcel Energy ("NSP") and Southern Minnesota Municipal Power Agency ("SMMPA") co-owned the turbine/generator, which was located at the Sherburne County Generating Station ("Sherco") and known as "Unit #3." (Ct.Ex.1052.) NSP operated and maintained Unit #3. (Doc.475 at 144:17-145:4;145:25-146:7; Doc.480 at 605:4-10.)

The incident happened because NSP failed to operate and monitor Unit #3's steam turbine within the steam-purity limits established by the Electric Power Research Institute (EPRI) and adopted by NSP.[1] (Doc.483 at 1566:19-23;1597:1-1598:23;1621:1-1622:3; Tr.Exs.324, 349.) The SCC developed between 1999 and 2011, during which time NSP did not engage GE to perform any inspections or maintenance on Unit #3's turbines. (Doc.475 at 304:18-305:15.) Without soliciting any input from GE, and in contravention

[1] EPRI, an industry group, conducts research relating to the generation, delivery, and use of electricity. Most EPRI members are electric utilities. At all relevant times, NSP had access to EPRI's material on SCC. (Doc.478 at 810:18-812:3.)

of its own guidelines, NSP also postponed a major LP turbine inspection of Unit #3 by increasing the inspection interval by three years. (Doc.480 at 678:24-679:9.) This inspection, if not deferred, should have revealed SCC. (Doc.485 at 1757:14-17.) NSP's internal documents demonstrate that NSP knew that "[i]ncreasing inspection interval adds risk" and "[r]isks associated with wheel cracking involve wheel failures and buckets departing the rotor. Resulting collateral damage could be severe (*i.e.*, due to mass imbalance and projectiles)." (R.Add.07-08; Doc.474 at 408:8-21.)

The incident caused approximately $237MM in property damage—$204MM of which was to the steam turbine/generator itself. (Doc.377.) Appellants are certain subrogated property insurers who paid $173 million to restore the damaged turbine/generator.[2] *Id.*

II. NSP's insurers sue GE

Appellants sued GE alleging five specific tort causes of action: (I) Fraudulent concealment; (II) Willful and wanton negligence; (III) Gross negligence; (IV) Professional negligence; and (V) Post-sale failure to warn. (Add.82-93.) Their amended complaint claimed two factors caused Unit #3's failure: (1) improper design and manufacture of the turbine's rotor wheel; and (2) GE's failure to warn NSP about SCC risks and the potential for catastrophic unit failure. (R.Add.13.) The amended complaint did not assert any cause of action sounding in ordinary negligence. (Add.82-93.) This assiduously pled complaint was appellants' apparent legal strategy, because the parties' sales contract contains a

[2] NSP and SMMPA separately claimed uninsured damages. (Doc.377; Doc.308.) They settled their claims with GE before trial. (Doc.348.)

limitation-of-liability provision that expressly imposes a purchase-price damages cap on all negligence claims and bars such claims entirely four years after the turbines initial synchronization, which happened decades ago. (R.Add.15 (Ct.Ex.1052a).) This provision not only bars claims arising out of the sales contract, it more broadly bars "any claim of any kind, including claims based on negligence" resulting from "technical direction of installation, repair or use" of Unit #3. (*Id.*)

III. The first appeal

The district court initially ordered summary judgment for GE, holding that the common-law economic-loss doctrine precluded all tort-based causes of action. (Doc.87; Doc.117.) On appeal, appellants abandoned any design- or manufacturing-defect theory and, as this Court observed, "cast their claims *entirely* in terms of [GE's] voluntary assumption of duties post-sale" to provide NSP with updated "turbine technical information" about the risks of SCC. *N. States Power Co. v. Gen. Elec. Co.*, No. A16-1687, 2017 WL 3013230, *5 (Minn. App. July 17, 2017), *review denied* (Minn. Sept. 27, 2017) (emphasis added) ("*NSP I*").

This Court agreed that the common-law economic-loss doctrine barred appellants' claims to the extent they related to GE's alleged failures to "disclose a product defect present and known at the time of sale." (*Id.*) But the Court held that the economic-loss doctrine would not bar a claim based on an assumed duty to provide updated technical advice and direction to NSP post-sale, reasoning that "[t]he sales contract does not provide for TILs [Technical Information Letters] or require GE to provide updated technical information, and thus any duty to provide that information is not found in the contract."

(*Id.*) The Court limited its analysis and decision to identifying the relevant sale-of-goods contract and determining whether the common-law economic-loss doctrine applied to bar all of appellants' tort claims, since that was the sole basis on which the district court had ordered summary judgment. *Id.* at *6. This Court had no basis to reach—nor did it reach—the merits of such claims or the question whether any defenses, including contractual defenses, limit or preclude such claims. *Id.* at *4 n.4 & *5 n.5. The Court expressly left it to the district court to "decide the remaining issues in the first instance," and granted discretion to reopen the record on remand. *Id.* at *6.

IV. Proceedings on remand and clarification of the record

A. The district court's ruling on GE's renewed motion for summary judgment.

Appellants' amended complaint states only a single cause of action (Count III/Gross negligence) alleging that GE assumed a duty to provide technical direction to NSP. (Add.088.) On remand, GE renewed its summary judgment motion to dismiss Count III/Gross negligence as a matter of law, as well as appellants' other remaining claims. One basis for this motion was the sales contract's limited-liability provision. The court dismissed Count I/Fraudulent concealment for failing to establish an essential element of the claim, but it ruled that Count II/Willful and wanton negligence, Count III/Gross negligence, and Count V/Post-sale failure to warn could proceed to trial. (Doc.217.) The court determined that although contractual limited-liability provisions can apply to bar ordinary-negligence claims, genuine issues of fact existed as to "whether GE's conduct

amount[s] to wanton, willful, and gross negligence," which the court believed would not be subject to contractual limitation. (Doc.236 at 20-22.) [3]

B. Appellants concede that no ordinary negligence claim existed to be tried.

GE thereafter submitted a trial brief reasserting its position that the only count alleging an assumed duty was Count III/Gross negligence. (Doc.343.) Appellants' response clarified their position as follows:

> The three pending claims are ripe for jury resolution: Count II, willful and wanton negligence; Count III, gross negligence; and Count V, post-sale failure to warn. . . . [E]ach involves disputed material fact questions that must be submitted to the jury.

(R.Add.18.) Moreover, appellants' discussion of these claims confirmed that only Count III/Gross negligence involved an assumed-duty allegation. (*Id.* at 19). Appellants earlier confirmed that the duty underpinning Count V/Post-sale failure to warn flowed from Restatement (Third) of Torts: Products Liability section 10. (Doc.339 at 15.)

C. The district court's evidentiary rulings benefitted appellants.

Even though appellants had abandoned any design- or manufacturing-defect claim during their initial appeal, *NSP I*, 2017 WL 3013230 at *5, just before trial they improperly sought to revive that claim by designating exhibits and deposition testimony relevant only

[3] GE sought permission to move for reconsideration based on the Minnesota Supreme Court's subsequent decision in *Great N. Ins. Co. v. Honeywell Int'l, Inc.*, 911 N.W.2d 510 (Minn. 2018). (Doc.245.) On appeal, appellants now point to language in the court's letter denying GE's request, claiming it ruled in the letter that the sales contract's limitation-of-liability does not apply to any "duty created by conduct occurring after the sale and outside of any contract." (App.Br. at 7; Doc.250 at 2.) But the very purpose of the court's letter was to refuse any change to its previous order. That order expressly states that claims of ordinary negligence can be subject to contractual exculpation, while "heightened" negligence (*i.e.*, willful, wanton, or gross negligence) cannot. (Doc.236 at 20-22.)

to turbine design and manufacture. Specifically, appellants sought to introduce various GE internal design-engineering and material-science documents, as well as documents reflecting other instances of SCC, none of which involved a turbine failure like Sherco, and most of which involved differently designed steam-turbine components than those at issue in the Unit #3 incident. (Doc.255; Doc.257.)

Some of these materials might have been relevant to a cognizable product-defect claim, but they had no relevance to the issue of whether GE assumed or breached any duty to issue updated technical direction and advice to NSP. The court issued an order in limine addressing these issues. (Doc.390 at 12-15.) Ultimately, the court permitted much of this evidence to be admitted at trial over GE's objections, including irrelevant "other-incident" evidence and various internal engineering documents. (*See, e.g.*, Doc.478 at 725:9-740:2;753:18-760:12; Doc.479 at 1263:11-1265:19; Doc.482 at 1335:12-1340:22.) During trial, however, the court exercised its discretion to prevent repetition and potential prejudice through the submission of even more duplicative, highly technical exhibits irrelevant to assumed duty. (Doc.482 at 1319:6-17;1328:4-1331:21;1343:14-1355:23;1362:22-1363:20.) Appellants claim error in those rulings.

D. The district dismissed Count V on JMOL.

At the close of the evidence, GE brought a motion for judgment as a matter of law on all remaining counts. As to Count V/Post-sale failure to warn, the district court considered the requisite factors of Restatement section 10, as adopted in *Great N.*, in order to determine as a matter of law whether a post-sale duty to warn existed in the first instance.

Having heard all the evidence, the court ordered JMOL, reasoning that the evidence failed on an element essential to the existence of such a duty:

> So on the post-sale failure to warn motion, I've been researching this one throughout as the trial went on, and have concluded, even before today, that even if it's not precluded by the fact that all the cases on this topic are product liability cases and even if it is not barred by the sales contract, there is no basis to establish legal duty because there's no way a jury could find that NSP was unaware of the risk of harm. And that's applying exactly what *Great Northern* laid out as to how I determine whether there is a legal duty that would therefore warrant that it go to the jury, and I just can't find that duty because there isn't evidence to support that conclusion.

(Doc.485 at 1859:15-1860:3.) The court denied GE's JMOL motion as to Count II/Willful and wanton negligence and Count III/Gross negligence.

E. The special verdict form confirmed no ordinary negligence claim was tried.

The court proposed a verdict that explicitly linked the assumed-duty theory to appellants' gross-negligence claim, just as the amended complaint alleged and as actually tried to the jury. (Add.002.) All parties agreed to this part of the verdict form, (Doc.485 at 1873:12-13;1881:2-4), which was submitted using the elements under Restatement (Second) of Torts § 323 and with gross negligence as the liability-triggering conduct, just as the amended complaint alleged. The jury answered as follows:

> 4. **You must answer this question:** Did GE undertake an obligation after the sale of Unit 3 to render technical information, advice, and recommendations to NSP?
>
> Yes__X__ No_____
>
> 5. **If your answer to Question 4 was "Yes," then answer this question:** Should GE have recognized that such provision of technical information, advice, and recommendations was necessary for the protection of NSP's property and employees?
>
> Yes__X__ No_____

6. **If your answer to Question 5 was "Yes," then answer this question:** Did GE fail to exercise reasonable care in that provision of technical information, advice, and recommendations because (a) GE increased the risk of harm, or (b) NSP relied on the undertaking?

   Yes__X__ No_____

7. **If your answer to Question 6 was "Yes," then answer this question:** Did GE act with gross negligence in that provision of technical information, advice, and recommendations?

   Yes_____ No__X__

8. **If your answer to Question 7 was "Yes," then answer this question:** Was this gross negligence by GE a direct cause of physical harm to NSP?

   Yes_____ No_____

(Add.002.) The sequence of these questions not only matched appellants' pre-trial representations, it followed the court's order on GE's renewed motion for summary judgment.

F. The jury returned a verdict in GE's favor.

The jury rejected Count II/Willful and wanton negligence by its factual finding that GE did not discover that NSP faced an impending peril of catastrophic failure due to SCC. (Add.001.) As to Count III/Gross negligence, the jury found that GE did not act with gross negligence in connection with an undertaking to provide technical information, advice, and recommendations. (Add.002.)

The jury further found that NSP was negligent and a cause of Unit #3's failure (Questions 9, 10). (Add.002.) It also ultimately answered a fault-allocation question because it was instructed to do so "regardless of your answers to any other Questions." (Add.003.) The jury responded: GE 52%; NSP 48%. (*Id.*) As to GE, however, this

allocation was not tied to any of NSP's specific legal claims. Because the jury had rejected all bases for GE's liability on the counts in appellants' amended complaint; and based on appellants' representations that their intent was to try those causes of action and no others; and based on answers to the verdict's liability questions, the trial court found that this allocation of fault did not affect GE's right to a judgment on the verdict. (Add.007) (Conclusion of Law #3). The court thus ordered entry of judgment in GE's favor. (Add.005-008.)

The five counts alleged in appellants' amended complaint were thus disposed of as follows: (1) Count I/Fraudulent concealment—dismissed on post-appeal summary judgment; (2) Count II/Willful and wanton negligence—jury's verdict (Question 1) rejected this count; (3) Count III/Gross negligence—jury's verdict (Question 7) rejected this count; (4) Count IV/Professional negligence—dismissed on summary judgment before first appeal and not raised as an issue in that appeal; and (5) Count V/Post-sale failure to warn—dismissed during trial on motion for JMOL.

G. The district court awarded GE its costs.

Following entry of judgment, GE submitted an application to tax costs as a prevailing party. (Doc.439.) Appellants submitted a memorandum opposing some of the costs sought, and GE submitted a reply. (Doc.441-442.) The district court granted GE's application. (Add.032.)

V. Facts

A. The incident

Sherco Unit #3 is a coal-fired steam turbine/generator. The unit's drum boiler produces high temperature and high pressure steam, which is directed by nozzles onto the turbine blades (known as "buckets"), causing them to rotate and power a generator that produces electricity. (R.Add.26 (Tr.Ex.1003).) In late 2011, Unit #3 suffered a failure in one of its two low-pressure ("LP") turbines during testing following a maintenance outage. (Doc.480 at 577:11-579:21.) The failure was caused by SCC in the "LP rotor dovetail," which is where the turbine buckets attach to the turbine rotor. (Doc.478 at 737:24-738:13.) When the dovetail failed, turbine buckets broke free (were "liberated"), resulting in a mass imbalance that caused Unit 3 to break apart.

SCC is caused by the combined influence of tensile stress and a corrosive environment when brought to bear on susceptible material. (R.Add.01-02.) In the context of this case, "corrosive environment" is another way of saying turbine steam with too many impurities. (Tr.Exs.288; 324; 349.) Unit #3 uses what is known as a "closed-loop" steam-water cycle. (R.Add.27 (Tr.Ex.1063).) After the steam imparts energy to the turbines, it is condensed back to water and returned to the boiler to repeat the cycle, with minimal replenishment of the steam-water. (*Id.*) There are several pathways by which contaminants can enter the steam-water cycle, including source-water impurities, cooling water from condenser tube leaks, and condensate polisher resin leakage. (R.Add.28 (Tr.Ex.1064).)

Prudent steam-turbine owners manage SCC risk both by ensuring that turbine steam chemistry falls within industry standards published in the EPRI Steam Chemistry

Guidelines, and by conducting periodic inspections for SCC. (R.Add.03; 30; Doc.483 at 1559:14-1560:6.) Power plant personnel must keep contaminants as low as reasonably achievable and must monitor and review plant water chemistry to prevent corrosive contaminants from entering the turbine. (*Id.*)

The SCC in the Unit #3 LP dovetails occurred and went undetected because (1) NSP failed to monitor and maintain the steam chemistry within EPRI Guidelines (Doc.483 at 1621:1-1622:3); and (2) NSP failed to discover and repair the SCC because it postponed a major LP inspection from 2011 to 2014. (Doc.474 at 408:8-21; Doc.480 at 676:11-678:10.) NSP also failed to conduct an engineering study to determine whether LP turbine inspection postponement was prudent—something NSP admitted it should have done. (Doc.480 at 679:10-16; Doc.474 at 410:8-25.) NSP's own System Health Reports for the Unit #3 LP turbines acknowledge that "extending GE recommend [sic] [time between overhauls] increases risk of failure." (R.Add.07.) If NSP had conducted the 2011 inspection in accordance with GE recommendations and its own internal guidelines, it should have discovered the SCC before the failure. (Doc.485 at 1757:14-17.)

B. The sales contract for Sherco Unit #3

GE and NSP entered into the sales contract for Unit #3 in January 1977. (Ct.Ex.1052.) The initial unit price was $19,508,183. (*Id.*) The agreement's operative stipulations and conditions include General Condition (GC) 38, entitled Limitation of Liability, which provides:

> Limitation of Liability. Except as provided in the clauses entitled Warranty, SC.36 and Patents, GC.12, the Contractor's[4] **liability on any claim of any**

[4] The sales contract defines GE as "Contractor." (Ct.Ex.1052.)

> **kind, including claims based on negligence**, for any loss or damage arising out of, connected with, or resulting from this contract or from the performance or breach thereof, **or from** the manufacture, sale, delivery, installation, or **technical direction of installation, repair or use of any equipment covered by or furnished under this contract shall in no case exceed the billing price of the equipment**; provided, however, that in all cases where the claim involves defective or damaged equipment supplied under this contract the Company's exclusive remedy and the Contractor's sole liability will be limited to the correction of such defect or damage, but not in excess of the billing price of the equipment. In any event, the Contractor's liability for all of the aforesaid claims shall terminate four years after initial synchronization of the equipment.

(R.Add.15 (Ct.Ex.1052a).) Thus, the contract imposes a purchase-price cap on recoverable damages within four years of initial synchronization, and after four years it entirely exculpates GE from liability for negligence arising from, among other things, its technical direction of repair or use of Unit #3. (*Id.*)

C. Rotor wheel dovetail attachment methods

Turbine buckets are affixed to the turbine LP rotors either by "tangential-entry" dovetails or "finger" dovetails. (R.Add.34-35 (Tr.Exs.1006-1007); Doc.478 at 945:4-19.) Longer and heavier buckets need finger-dovetail attachments because the centrifugal forces are higher. (*Id.*) Unit #3 had finger dovetails at the L-1 location, where the SCC failure occurred. (*Id.* at 954:13-20.) This is important because the method and type of finger-dovetail inspection for SCC is more involved and expensive. GE tells operators that the most reliable method for inspecting finger-dovetail attachments involves removal of the buckets so the interior fingers can be magnetic particle inspected ("MPI"). (R.Add.30.) This inspection is done with the rotors out of the machine during major unit outages. (R.Add.33). Inspection of tangential-entry dovetails is also conducted during major unit outages, but ultrasonic testing (UT) can be done with the buckets in place.

D. Operation and inspection recommendations for steam purity and SCC

1. Sherco Unit #3 GE Operations and Maintenance Manual

The GE-supplied Operations and Maintenance Manual (OMM) delivered with Unit #3 included various information about SCC, maintenance, and inspection recommendations. (Tr.Ex.132 (GEK-46354B Maintenance and Inspection of Turbine Rotors and Buckets)); (Tr.Ex.131 (GEK-63355 Turbine-Generator Inspections)); (Tr.Ex.288 (GEK 63430 Turbine Steam Purity).)

2. Technical Information Letters (TILs)[5]

GE periodically provided its customers with Technical Information Letters ("TILs") on many topics, one of which was finger-dovetail inspections:

- **TIL 1121-3AR1 Inspection of Steam Turbine Rotor Wheel Dovetails (R.Add.30-33 (Tr.Ex.6)).**

This TIL describes an improved test method for SCC, and identifies events or operational anomalies prompting operators to consider removal of buckets for MPI inspection:

a. caustic or chemical ingestion or contamination
b. carryover from boiler
c. leaking condenser heater tube
d. overspeeds
e. water ingestion

[5] Applicable TILs were sent to power plant operators by unit serial number. (*See, e.g.*, R.Add.29.) They were also discussed and distributed at Large Steam Turbine Generator (LSTG) Conferences for members of the power generating industry, including NSP. (*See, e.g.*, Tr.Exs.155-157.)

Appellants assert that this TIL says that MPI is the "only" method to detect SCC in finger dovetails (App.Br.16), but the TIL actually states that it is the most "reliable" test. (R.Add.30.)

- **TIL 1277-2 Inspection of Low Pressure Rotor Wheel Dovetails on Steam Turbines With Fossil-Fueled Once-Through Boilers (Tr.Ex.56)**

This TIL applies to both tangential entry and finger dovetails in units using once-through boilers (OTBs). In such units, with OTBs, the steam is put through the machine once, and is not recirculated like drum boilers (which Unit #3 used). The steam purity is more difficult to control in OTB units and there is a higher risk of contaminants. Thus, TIL 1277 recommends an SCC inspection at the next convenient outage after ten years of service.

3. Recommendations NSP received from others about buckets-off inspection of LP finger dovetails

NSP received information from other sources about tests it could perform to help decide whether to remove the buckets to inspect the rotor finger dovetails for SCC. (Doc.474 at 372:2-377:12;382:10-385:21.) The first test is called a bucket lift check. (Doc.474 at 376:19-377:12; R.Add.04.) It requires the unit owner to determine whether any gap exists between the bucket and the rotor wheel. (*Id.*)The existence of a gap suggests that "lift" is occurring during operation. (Doc.485 at 1760:2-1761:16.) Lift in turn suggests that SCC could be present, thus giving the owner a chance to consider a buckets-off inspection before it develops into a failure-causing catastrophe. (*Id.*) NSP acknowledged

that this testing could have been done had it not postponed the 2011 LP inspection. (Doc.474 at 377:4-12; 421:12-22; R.Add.04.)

The second test came to NSP from engineering firm Black & Veatch, which NSP retained in 2000 to provide long-range planning for the Sherco plant. Black & Veatch recommended that NSP remove a small group of buckets looking for SCC damage during maintenance outages. (Tr.Ex.1062 at 3-8; Doc.474 at 375:14-23; 385:7-21.) NSP never did this. (Doc.474 at 388:20-389:5.)

E. NSP was well-informed about the risks of stress corrosion cracking and the inspections necessary to detect it.

NSP's internal documents admit that, "[s]tress corrosion cracking in steam turbine rotors has been an issue for every turbine manufacturer for many years." (R.Add.01.) NSP knew the various short- and long-term risks it undertook by operating Unit #3 along with the potential consequences. More specifically:

- NSP knew about the specific risk of SCC on Unit #3's finger dovetails. (Tr.Ex.288 (GEK-63430); R.Add.29-33[6]; Doc.474 at 314:17-316:2; Doc.480 at 596:4-597:10.)[7]
- NSP knew that SCC on Unit #3's finger dovetails, if undetected, could "involve wheel failure and buckets departing the rotor. Resulting collateral damage could be severe (i.e. due to mass imbalance)." (R.Add.08.)

[6] NSP's Addendum includes a transmittal letter for TIL 1121-3AR1 that GE provided to Public Service of Colorado (now an Xcel subsidiary, but not at the time), not to NSP. (Add.094-097.) The relevant transmittal letter with TIL 1121-3AR1 sent to NSP is located at Tr.Ex.6 (R.Add.29).

[7] *See also* Tr.Ex.56; Tr.Exs.72-73;153;155-157; R.Add.01-03; Tr.Ex.27; Tr.Exs.8a-8e; Tr.Ex.15.

- NSP knew that detecting SCC on Unit #3's finger dovetails required removing the buckets and inspecting the finger dovetails using magnetic particle inspection. (R.Add.30-33.)
- NSP knew impurities in the water/steam chemistry would cause SCC. (Doc.474 at 326:1-327:24; 330:13-22.)
- NSP knew that GE recommended consideration of bucket removal and finger inspection if the turbine had caustic or chemical ingestion or contamination, carryover from the boiler, or a leaking condenser heater tube. (R.Add.32; Doc.474 at 334:9-23; 335:24-336:21.) Unit #3 sustained each of these events from 1999-2011, which should have prompted NSP to consider removing the buckets for dovetail inspection. (Doc.482 at 1526:13-120;1534:25-1535:3; Doc.483 at 1599:19-23;1612:11-20.)
- NSP knew that it could also perform a bucket lift check or remove a group of buckets to determine whether further inspection was warranted. (Tr.Ex.1062 at 3-8; Doc.474 at 385:7-21.)
- NSP knew that as Unit #3's owner and operator, it was responsible for determining time intervals between inspections. (R.Add.36; Tr.Ex.132; Doc.480 at 601:1-9; Doc.485 at 1730:17-21.)

NSP also employed full-time on-site experts at Sherco: a turbine engineer, Mark Kolb, and a steam-chemistry expert, Duane Wold. (Doc.474 at 435:14-16; 442:9-443:10; Doc.480 at 647:5-7.) Their full-time jobs included responsibility for the operation, maintenance, and monitoring of Unit #3. Furthermore, Xcel Energy Services, Inc., a

separate subsidiary, provided additional engineering services to operating subsidiaries such as NSP, including outage planning, metallurgy, non-destructive examinations, steam chemistry, and construction. (Doc.474 at 302:14-303:8; Doc.480 at 587:18-589:16.)

F. Unit #3 inspection history and the 2011 deferred maintenance

NSP hired GE in 1999 to replace the four rows of L-1 buckets on Unit #3's LP turbines. As part of that engagement, GE performed the TIL 1121-3AR1 magnetic particle inspection after bucket removal. (Doc.474 at 378:17-379:4.) This inspection revealed no indications of SCC. (Doc.480 at 530:3-531:14.) This is the last maintenance work GE performed on the LP turbines before the 2011 failure. (Doc.474 at 379:5-7.)

NSP conducted its next major inspection six years later, in 2005. NSP sent an email to GE in 2004 asking for pricing information for that inspection. (Tr.Ex.11.) GE later bid on the inspection, but NSP rejected the bid because its turbine engineer, Kolb, thought GE's recommendations would be "overly conservative" and result in "[m]ore chance of requiring bucket removal for further (unwarranted) inspections." (Tr.Ex.14.) NSP hired another vendor to conduct the 2005 major inspection. (*Id.*; Doc.474 at 224:21-24.)

NSP's next scheduled Unit #3 inspection was six years later, in 2011. (Doc.480 at 571:6-9.) The 2011 outage included plans to uprate Unit #3 with a new high-pressure ("HP") and intermediate pressure ("IP") turbine to increase output. (*Id.* at 570:18-571:9.) NSP did not replace the LP turbines in 2011, even though replacement would have eliminated the risk of SCC failure, because new LP turbines would not increase output. (*Id.*) NSP also decided to defer the LP major inspection from 2011 to 2014 because of the increased workload to upgrade the HP and IP turbines. (Tr.Ex.29; Doc.480 at 673:12-23;

678:24-679:9.) GE was not involved in the decision to defer the LP major inspection. (Doc.480 at 584:2-585:1.) Kolb's 2010 internal email explains GE's lack of involvement in the 2011 outage: "We [at Sherco] have basically walked away from GE on the turbine and generator service work[.]") (Tr.Ex.1131.)

NSP claimed at trial that none of the triggering events to consider an inspection under TIL 1121-3AR1 occurred between 1999 and 2011. But NSP steam-chemistry expert Wold did not know that TIL 1121-3ARI even existed, and no one ever asked if any of those events had occurred. (Ct.Ex.2001 at time stamp 2:40:40-2:51:13.) The outage planning meeting minutes don't mention TIL 1121-3AR1 or that the committee considered any GE TIL in its decision to defer Unit #3 LP turbine maintenance.

G. Discussions between Murray and Bird in the PAC case

Timothy Murray wrote Xcel Energy's internal inspection recommendation for SCC following NSP's 2007 discovery of SCC in Unit #1.[8] (Tr.Ex.22.) This event prompted Murray to email GE's Josh Bird asking whether GE was going to issue a new TIL for SCC inspections. The insurers contend that Bird failed to forward certain information GE engineer Jim Howenstein provided—to apply TIL 1277 to units with drum boilers—and that Bird did not "otherwise advise NSP" of this information. (App.Br.21.) Bird testified that he did convey this information, but he did not specifically recall the communication from five years earlier. (Doc.478 at 901:11-25; 893:24-894:3.) The contemporaneous

[8] GE was not involved in either the 2007 outage that led to the discovery of SCC in Unit #1, or in the repair.

internal GE record states that a verbal response was provided. (Tr.Ex.38; Doc.478 at 893:12-894:24.)[9]

Appellants argue that "Bird left his role with GE services the next business day." (*Id.*) This assertion is not true. Bird did take on a new role (it was not the next day) but, even then, he also remained in his service job until GE hired his replacement (Paul Pennington) some months later. (Doc.478 at 898:25-899:16.)

SUMMARY OF ARGUMENT

Minnesota law provides that a party may not try its case under a legal theory it alone chooses, and, after losing before a jury, complain that its chosen theory was really not the correct one after all. Shortly before trial, appellants reaffirmed to the district court that "three pending claims are ripe for jury resolution: Count II, willful and wanton negligence; Count III, gross negligence; and Count V, post-sale failure to warn." (Doc.369 at 7.) These claims *exactly* match the three then-remaining claims in appellants' amended complaint. And they exactly match the three claims tried to the jury, two of which the jury rejected by verdict (Counts II and III), and one of which the court dismissed on GE's motion for JMOL (Count V). Having lost at trial, appellants wrongly seek on appeal to change the claims actually tried to include a free-floating "Assumed Duty Claim" sounding in ordinary negligence.

[9] An NSP email dated after the incident, but before the lawsuit, states that NSP decided to apply TIL 1277 to finger dovetails in its turbines "years ago," suggesting that NSP did, in fact, receive Howenstein's recommendation. (Tr.Ex.30a.)

The undisputed procedural history exposes appellants' post-verdict change of claims. Appellants' amended complaint alleges assumed duty *only* in Count III. But the *breach-of-duty* element alleged in Count III is *gross negligence*, which appellants told the court was a claim "ripe" for the parties to try. (Doc.369 at 7.) The parties tried that claim, and the jury rejected it. (Add.002.) Appellants also told the court that under Count V/Post-sale failure to warn, "GE's legal duty to [NSP] flows [] from Restatement Third of Torts [Products Liability] § 10." (Doc.339 at 15.) The parties tried that claim, too, but the court ordered JMOL because appellants' evidence failed on a necessary element under section 10. (Doc.485 at 1859-60.) Now appellants argue that the legal duty under Count V actually flowed from Restatement (Second) of Torts section 323 as an "assumed duty" that floated free of JMOL and onto the verdict. (App.Br.30.)

Only by ignoring this undisputed procedural history can appellants assert on appeal that "[b]y the time of trial it was clear to everyone that the heightened standard of gross negligence was not required. . . ." (App.Br.23). Nothing in the record or the law supports this. Appellants unilaterally tried to maneuver the case at the close of trial by proposing a special verdict with a free-floating "assumed duty" theory, but the district court rejected it for the very reasons appellants now ignore—they pled and chose to try their case on three very specific legal claims, none of which included an ordinary-negligence claim. The district court correctly submitted to the jury a special verdict that explicitly tied appellants' allegation that GE assumed a duty to their further allegation that GE breached that duty through gross negligence. (Add.001).

Nor may a losing plaintiff double back in these circumstances with an after-the-fact motion to amend its complaint. Appellants—and more importantly GE—tried the case based solely on the amended complaint and the representations appellants made to the district court about their intentions. GE made important and strategic trial and pre-trial decisions based on those things. The district court neither erred in submitting the case exactly as appellants presented and tried it nor abused its discretion by refusing to allow appellants to change their theory after they lost. The jury answered "No" to essential elements of each claim, and the court therefore correctly entered a judgment in favor of GE on the verdict.

This Court may also affirm the judgment on the alternative ground that appellants' free-floating "assumed duty" theory, in addition to being invented and injected into the case for the first time post-verdict, would be barred as a matter of law under the limited-liability provision of the parties' sales contract. That provision applies to "liability on any claim of any kind, including claims based on negligence, for any loss or damage arising out of . . . *technical direction of* installation, *repair or use* of any equipment covered by or furnished under this contract." (R.Add.15 (Ct.Ex.1052a)) (emphasis added). As this Court stated in the first appeal, appellants decided to cast their claims *entirely* in terms of GE's alleged failure to provide technical direction. *NSP I*, 2017 WL 3013230 at *5. The limited-liability provision unambiguously bars such claims. Minnesota law routinely upholds contractual limited-liability provisions such as this, and that is particularly so for commercial parties who negotiate at arm's length.

Nor is there legal support for appellants' contention that this Court ruled on the applicability of the parties' limited-liability agreement to the remanded claims. This Court is limited to deciding the questions presented to, and decided by, the trial court. The trial court did not rule at all on the applicability of the limited-liability provision. This Court reviewed a summary judgment order based on a single ruling: The common-law economic-loss doctrine barred all claims in appellants' amended complaint. (Doc.87; Doc.117.) The Court disagreed, holding that appellants' recasting of their claims entirely in terms of assumed duty to provide technical direction avoided the economic-loss doctrine and warranted remand. *NSP I*, 2017 WL 3013230 at *5. This was the only issue presented on appeal or necessary to the Court's decision. Any language suggesting otherwise is dictum, which cannot preclude the presentation of claims or defenses presented to the district court in the first instance. Indeed, this Court ordered the lower court to do just that on remand. *Id*. at *6. The Court should sustain the judgment on the alternative ground that the parties' limited-liability agreement as a matter of law precludes appellants' post-verdict ordinary-negligence claim.

The district court also appropriately dismissed appellants' fraudulent concealment and post-sale failure to warn claims as a matter of law, acted within its broad discretion in making evidentiary decisions, in this matter, and appropriately awarded GE its costs.

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

ARGUMENT

I. THE DISTRICT COURT CORRECTLY ORDERED JUDGMENT IN GE's FAVOR BASED ON THE JURY VERDICT.

A. The court did not commit clear error in ruling under Rule 15.02 that the parties did not try by consent a claim based on ordinary negligence.

The major premise of appellants' appeal is their contention that they are entitled to judgment because they "have proven that GE is liable for negligence in its performance of an Assumed Duty of Care." (App.Br.25). But a plaintiff cannot *prove* a claim for ordinary negligence, and obtain a judgment thereon, unless the parties *tried* a claim for ordinary negligence. To understand the verdict, therefore, it is first necessary to determine what claims the parties *actually* tried. The trial court correctly ruled that the parties did *not* try a claim of ordinary negligence, either expressly or impliedly. (Doc.454 at 5-10; 12-13.) As a matter of law, therefore, appellants neither "proved" a claim of ordinary negligence nor received an ordinary negligence verdict entitling them to judgment.

Minn. R. Civ. P. 15.02 allows post-trial amendment of the complaint if the parties try an issue by express or implied consent, and appellants so moved the court. This Court reviews a ruling on trial-by-consent for clear error, *Buller v. A.O. Smith Harvestore Prods, Inc.*, 518 N.W.2d 537, 541 (Minn. 1994), and a denial of amendment for abuse of discretion, *Johnson v. Paynesville Farmers Union Co-op Oil Co.*, 817 N.W.2d 693, 714 (Minn. 2012). In denying appellants' Rule 15.02 motion, the trial court committed no error or abuse of discretion.

Appellants' amended complaint *expressly* states that Count III/Gross negligence does **not** allege ordinary negligence: "An aggravated act or omission breaching a legal

duty, *as distinguished from the mere failure to exercise ordinary care*, constitutes gross negligence." (Add.088) (emphasis added). The amended complaint specifies the source of the legal duty underlying Count III/Gross negligence as "General Electric Company assumed a duty." (Add.088.) In no other count does the amended complaint allege an assumed duty. *See, e.g.*, *Haugland ex rel. Donovan v. Mapleview Lounge & Bottleshop, Inc.*, 666 N.W.2d 689, 694 (Minn. 2003) ("The primary function of notice pleading is to give the adverse party fair notice of the theory on which the claim for relief is based.").

Fast forward to the week before trial, when, at the court's invitation to clarify the number of claims appellants believed remained for trial (Add.017), they filed a supplemental trial brief. (Doc.369). Under the heading "**All three claims survive**," appellants represented that "[t]he *three pending* claims are ripe for jury resolution: Count II, willful and wanton negligence; Count III, gross negligence; and Count V, post-sale failure to warn." (Doc.369 at 7) (first emphasis original, second emphasis added). Later, under the heading "**D. Gross Negligence**," appellants told the court: "GE concedes that the gross negligence claim must be tried. The assumed duty of care under Restatement of Torts section 323 is riddled with factual issues." (*Id.* at 8) (emphasis original). Nowhere did appellants state that "three" really meant four; that their repeated use of the term "gross negligence" really meant ordinary negligence, or that GE's concession of a need for a trial on "gross negligence" really meant a trial on ordinary negligence, with GE's limited-liability-contractual-clause defense somehow abandoned for good measure.

But now, from whole cloth, comes this on appeal: "By the time of trial it was clear to everyone that the heightened standard of gross negligence was not required . . . ."

(App.Br.23). In fact, this was not clear even for appellants, whose counsel argued in closing that "the gross negligence of GE . . . [was] more than a direct cause [of the catastrophic failure], it's the *only* cause." (Doc.486 at 2000:24-2001:1) (emphasis added). Moreover, the appellants' eve-of-trial *judicial* submissions plainly state that they intended to try their claim for gross negligence; they knew from the emphasis placed on the point in their amended complaint that this meant a claim *distinguished* from the mere failure to exercise ordinary care; they insisted that GE's concession of a need for trial on gross negligence was an undisputed referral of *that claim* for trial; and they told the court that the source of the duty element would be assumed duty as described in Restatement section 323. *See Hohenstein v. Goergen*, 176 N.W.2d 749, 751-52 (Minn. 1970) (fair notice "remains essential, and pleadings will not be deemed amended to conform to the evidence because of a supposed 'implied consent' where the circumstances were such that the other party was not put on notice that a new issue was being raised").

Of course, appellants said nothing (until after trial) about amending the complaint to drastically change Count III from gross negligence to ordinary negligence, a motion that would have drawn a strong objection and a renewed GE motion to apply the contractual limited-liability provision not just to the amendment, but to all other remaining claims as well. The district court did not commit error, much less clear error, in ruling that GE did not consent to try Count III/Gross negligence as a claim for ordinary negligence.

Nor did GE consent to try Count V/Post-sale failure to warn as a claim of ordinary negligence based on an assumed duty. To begin with, the trial court ordered JMOL on Count V *during trial and before submission of the case to the jury*. (Doc.485 at 1859:15-

1860:3.). Yet the legal premise of appellants' argument is that they are entitled to judgment based on a *jury* verdict under Count V. Appellants claim this is possible by "concluding that the directed verdict did not eliminate the Assumed Duty Claim, which is most logically lodged in Count V of the Amended Complaint." (App.Br.30). But the JMOL was *of* Count V. If there was an unstated claim "logically lodged" in Count V, the district court did not except it from the order dismissing that count. Appellants have provided no law under which a claim dismissed as a matter of law can produce a jury verdict. Obtaining a JMOL is preclusive of trial by consent.

Next, as the district court ruled post-trial, appellants' eve-of-trial submissions also belie their argument about Count V. Appellants now contend that an "Assumed Duty Claim" lodged in Count V finds its source of legal duty in Restatement (Second) of Torts section 323, called "Undertaking to Render Services." (App.Br.26-28). But recall that appellants told the trial court in its eve-of-trial submissions that section 323 was the source of duty for their *gross negligence* claim. (Doc.369 at 8) (citing section 323 under the heading, "**D. Gross Negligence**") (emphasis original).

Appellants' trial brief represented, irreconcilably with what they now argue, that under Count V "GE's legal duty to [NSP] flows [] from Restatement Third of Torts [Products Liability] section 10." (Doc.339 at 15). Section 10, not coincidentally, is called "Liability of Commercial Product Seller . . . for Harm Caused by Post-Sale Failure to Warn." And both of appellants' trial briefs quoted the four elements of duty from section 10, as adopted by the Minnesota Supreme Court in *Great Northern*. 911 N.W.2d at 520 (adopting section 10 duty factors in order to best limit the post-sale duty to warn to "special

cases"). (Doc.339 at 15-16; Doc.369 at 10-11.) *Great Northern* expressly cautioned that imposition of a post-sale duty to warn should *avoid* consideration of whether a manufacturer voluntarily undertook a duty. 911 N.W.2d at 521. The trial court committed no clear error in ruling that GE did not consent to try Count V/Post-sale failure to warn as a claim for ordinary negligence based on an assumed duty. (Doc.454 at 8-13) (stating that appellants proceeded to trial while asserting Count V as a product liability claim under Restatement section 10, not as an ordinary negligence claim based on "assumed duty").

B. GE is entitled to judgment because the parties tried appellants' assumed-duty/gross-negligence claim, which ended with a verdict answer of "No" to the question, "Did GE act with gross negligence?"

The parties tried Count III as a claim for *gross negligence* based on a section 323 assumed duty, just as appellants amended complaint pled, just as appellants expressly represented to both the court and GE on the eve of trial, and just as the court ruled post-verdict. The jury answered "No" to verdict Question 7, which states in its entirety:

> "**If your answer to Question 6 was 'Yes,' then answer this question:** Did GE act with gross negligence in that provision of technical information, advice, and recommendations?"

(Add.002) (emphasis original). Because a claim for gross negligence requires a finding of gross negligence, as a matter of law the court correctly entered judgment on Count III in GE's favor. (Add.005-008.) *See Kluge v. Benefit Ass'n of Ry. Emp.*, 149 N.W.2d 681, 688 (Minn. 1967) (stating that "[b]y the special verdict, the jury finds facts, after which it becomes the duty of the court to apply the law to those facts and render a judgment"); *Carlson v. Allstate Ins. Co.*, 749 N.W.2d 41, 45 (Minn. 2008) ("[w]e review the district court's conclusions of law de novo").

Appellants' opening brief not only ignores Question 7 and its answer, it ignores the fact that Questions 4-8 are linked such that the applicability of each successive question requires a "Yes" answer to the previous one. When verdict questions are linked that way, the legal effect is that a single "No" answer defeats the claim. This is how the verdict presented the claim for willful and wanton negligence (Questions 1-3), on which the jury answered "No" to Question 1, and left Questions 2 and 3 blank because the questions were linked by the requirement that the previous answer must be "Yes." (Add.001.) The legal effect of the single "No" answer entitled GE to judgment on that claim. (Add.007.)

The verdict for appellants' Count III claim of assumed duty/gross negligence consisted of Questions 4 through 8. (Add.002). Because the jury answered "No" to Question 7, the claim was defeated. The verdict told the jury to answer Question 8 *only* if it answered Question 7 "Yes," and it specified "gross negligence" as the only breach of duty on which the jury could base a finding of causation. Appellants' brief is misleading because it ignores the express linkage between Questions 4-8.

By ignoring this linkage, appellants also misleadingly argue that "the district court . . . included questions *4 through 6* on the special verdict form" as an ordinary negligence claim. (App.Br.28) (emphasis added). But the trial court did *not* submit a claim of ordinary negligence. (Add.001-002; Add.20-21.) Question 6 does use the term "reasonable care," but that was part of determining whether GE voluntarily assumed a duty. (Add.002.) The existence of a duty is the *first* element of every tort claim. *See State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996). Had the jury rejected either the risk-of-harm or the reliance proposition in Question 6, it would have answered "No" and the claim

would be defeated for want of a duty. Only by answering "Yes" to Question 6 could the jury reach the single *breach-of-duty* theory the trial court allowed them to consider—gross negligence. And only by answering "Yes" to gross negligence could the jury reach the only causation question for that count—Question 8.

A trial court has broad discretion in the way it fashions a special verdict form. *Poppler v. Wright Hennepin Co-op. Elec. Ass'n*, 845 N.W.2d 168, 171 (Minn. 2014). Given the unique way appellants pled and chose to try their case, the court did not abuse its discretion in the way it submitted the assumed duty/gross negligence claim.

As positive confirmation of the above points, the court ruled in its post-trial order that appellants "intentionally decided not to proceed on the [ordinary negligence] claim at trial" and that they "never pled the [ordinary negligence] claim in their well-pleaded complaint, and [] clearly abandoned any such claim on the eve of trial." (Add.20-21.) "[A] party may not try his case under a legal theory chosen by him, and, being unsuccessful therein, subsequently complain upon appeal here that such chosen theory was really not the correct one after all." *John W. Thomas Co. v. Carlson-LaVine, Inc.*, 291 Minn. 29, 33, 189 N.W.2d 197, 200 (Minn. 1971) (quoting *State v. Adams*, 89 N.W.2d 661, 680 (Minn. 1957)). As a matter of law, GE was entitled to the judgment entered in the district court because the jury answered "No" to a question presenting a necessary element of the claim the parties actually tried and the court actually submitted. The trial court correctly so ruled, and it should be affirmed.

C. The jury's allocation-of-fault response is legally irrelevant and cannot support a judgment based on ordinary negligence.

The jury completed Question 11 on allocation of comparative fault because that question instructed them do so "regardless of your answers to any other Questions" on the verdict. (Add.003.) But Question 11 did not tie fault allocation to any claim submitted. The trial court therefore ruled as follows: "[B]ecause the jury determined GE did not act with gross negligence, as would be required for liability to attach with respect to Count III of Plaintiffs' Amended Complaint, the jury's fault comparison is not legally relevant and does not affect the Judgment as to Count III." (Add.007.) This ruling is correct and should be affirmed.

Facts are material only when their resolution will affect the outcome. *See O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996) ("A fact is material if its resolution will affect the outcome of a case."). In the context of a trial, this means that a jury's "No" answer on an essential element defeats the entire claim because that renders all other facts immaterial. This follows from the failure of a plaintiff's burden of persuasion, which "is the obligation to persuade the trier of fact of the truth of a proposition." *Braylock v. Jesson*, 819 N.W.2d 585, 590–91 (Minn. 2012). As the supreme court put it in *Braylock*, "the party bearing the burden of persuasion is the side that stands to lose if it fails to convince the trier of fact on a particular fact or issue." *Id.* at 590; *see also* 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 3.2, at 428 (3d ed. 2007) ("To say that a party bears the burden of persuasion . . . is to say she can win only if the evidence persuades the trier of the existence of the facts that she needs in order to prevail."). Because a finding of "gross negligence" is essential to one's liability for gross negligence, the jury's "No" answer to

Question 7 rendered allocation of fault legally irrelevant to a judgment under Count III, and the trial court correctly so ruled. (Add.007.)

Appellants contend that Question 11 is not merely a comparative fault question, but establishes the elements necessary for an ordinary negligence claim. But Question 11 presents no proposition on ordinary negligence, nor could it, since the trial court did not submit an ordinary negligence claim to the jury. (Add.001-002.) The trial court correctly ruled that the law does not permit a party to use an allocation-of-fault question to piecemeal together an affirmative answer to an essential proposition not submitted to the jury, on a claim intentionally waived and clearly abandoned before trial, and which the court did not submit to the jury at all. (Add.018.)

D. The trial court did not abuse its discretion by refusing post-trial amendment under Rule 15.01.

The decision to allow or deny amendments under Rule 15.01 lies within the trial court's discretion and will not be disturbed absent clear abuse of discretion. *Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 295 (Minn. 2003). "A major consideration in the trial court's decision is the prejudice that may result to the opposing party." *Tjernlund v. Kadrie*, 425 N.W.2d 292, 296 (Minn. App. 1988); *see also Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 179 N.W. 45, 49 (1920) (stating amendments allowed when "defendant was not mislead or prejudiced in his defense"), overruled in part on other grounds, *Borsheim v. Great N. Ry. Co.*, 183 N.W. 519 (Minn. 1921). Another consideration is the potential futility of an amendment, such as when the proposed new claim is not legally viable. *Hunter v. Anchor Bank, N.A.*, 842 N.W.2d 10, 18 (Minn. App. 2013).

1. The court's finding of prejudice is well-supported in the record and its ruling was within its broad discretion.

Like their argument under Rule 15.02, appellants challenge the trial court's denial of amendment under Rule 15.01 by claiming that: (1) "the superfluous and unnecessary allegations of 'gross negligence' [under Count III] should be reduced to ordinary negligence" (App.Br.31); and (2) "all parties knew" that a section 323 assumed duty/ordinary negligence claim floated out of Count V when the trial court ordered JMOL. (*Id*.). The trial court ruled that it would be a "grave injustice to GE to allow [appellants] to shift [their] claims around post-trial and amend the complaint to add a claim for negligent undertaking . . . ." (Add.021.) This ruling is well-supported in the record and far from an abuse of discretion.

The detailed arguments on the trial-by-consent issue, above at pp. 25-29, apply equally here. Briefly, the record shows *without contradiction* that appellants: (1) specifically *excluded* ordinary negligence from their amended complaint; (2) alleged assumed duty in the amended complaint only under Count III/gross negligence; and (3) represented in eve-of-trial submissions that they (a) intended to try Count III as a claim for gross negligence based on section 323; and (b) intended to try Count V as a claim of post-sale failure to warn under *Great Northern* and Restatement: Products Liability section 10. The trial court acted well within its discretion when it concluded not only that these undisputed events misled GE about appellants' secret intentions, but that prejudice—a "grave injustice"—would follow if it were to allow a post-verdict amendment. The court stated:

- "[Appellants]" did not raise the argument Count V was actually a negligent undertaking claim prior to jury deliberations. Rather, [appellants] proceeded to trial with Count V as a products liability claim." (Add.017.)
- "More importantly, [appellants] asked to apply Products Liability § 10 to Count V at trial, *which is what GE prepared to defend against.* . . . Count V was clearly a products liability claim." (Add.018.)
- "Moreover, the Court finds it improbable that [appellants] just simply made a mistake by forgetting to amend the pleadings prior to trial in this complex civil litigation that lasted over five years. Rather, [appellants] *intentionally decided* not to proceed on the [ordinary negligence] claim at trial." (Add.021) (emphasis added).
- The result of this would be a secret strategy, which only appellants understood, to try the case "without giving GE the opportunity to either challenge the [ordinary negligence] claim on legal grounds [under the contractual limited-liability provision] or present evidence to the jury to address the claim on factual grounds." (Add.021.)

On the latter point, had GE known that appellants would intentionally forego a negligence claim only to recast it after seeing the verdict, its trial strategy would have been markedly different. Its defense would have consisted of many more than three witnesses; it would have submitted far more evidence of NSP's own negligence; it would have presented a far different opening statement and closing argument; and it not only would have moved to dismiss the impostor claim as a matter of law under the sales contract's limited-liability provision, it would have renewed its motion to dismiss the two other

claims under that provision as well. But when one also considers the thousands of strategic and tactical decisions defense counsel made during the course of a fluid two-plus-week trial, it cannot be doubted that a complete change in the breach-of-duty standard from heightened misconduct to ordinary negligence would be prejudicial to GE. The trial court was well within its discretion in so ruling.

Rather than address the court's specific rulings and the discretion exercised, appellants conclusorily argue that "GE cannot claim prejudice." (App.Br.31.) This is not an argument that addresses what would be necessary to obtain a reversal—that the *trial court* abused its discretion when it *ruled* that the record shows "grave injustice." (Add.021.) Moreover, appellants base their argument on factual contentions devoid of citations to the record (App.Br.31) and that contradict both the actual record and the findings the district court made in support of its discretionary decision. The trial court's discretionary ruling must be affirmed, and with it the judgment entered on the jury's verdict.

2. Futility provides an alternative ground not only for affirming the trial court's Rule 15 rulings, but for affirming the judgment in GE's favor on the jury's verdict.

A trial court may also refuse amendment when it would be futile to permit one. *Hunter*, 842 N.W.2d at 18. In addition, a judgment must be affirmed if it can be sustained on any ground. *Myers Through Myers v. Price*, 463 N.W.2d 773, 775 (Minn. App. 1990) (this court "will affirm the judgment if it can be sustained on any grounds"). In this case, the Sales Contract's limited-liability provision provides alternative grounds for both rulings.

The parties contracted in their 1977 agreement for GE to have limited liability; in particular, that it would not be liable for "**any** claim of **any** kind, including claims **based on negligence**" resulting from the manufacture or "***technical direction* of installation, *repair or use*** of [Unit 3]." (R.Add.15 (Ct.Ex.1052a)) (emphasis added).

Appellants repeatedly contend that these provisions do "not apply to duties assumed subsequent to and independent of the sales contract." (App.Br.27; *see also* App.Br. at 1;6-8;23.) But there is no law supporting that argument. The plain meaning of the separate terms "installation," "repair," and "use" unambiguously show that the parties anticipated that GE might provide technical direction in the future. *See Brookfield Trade Ctr., Inc. v. Cnty. of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998) (stating that contract "language is to be given its plain and ordinary meaning"). At the time of delivery in 1977, Unit #3 had not been installed; it had never been used; and by definition it did not need repair. The parties could have had no other intent than that the limited-liability provision would apply to future technical direction. *See Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 913 N.W.2d 687, 692 (Minn. 2018) ("[t]he primary goal of contract interpretation is to determine and enforce the intent of the parties."). Were it interpreted otherwise, the cited terms, which could only describe future events, would have no meaning. *See Brookfield Trade Ctr., Inc.*, 584 N.W.2d at 394 (a court must "interpret a contract in such a way as to give meaning to all of its provisions"). Appellants' argument contradicts established contract law.

Appellants also contend this Court ruled in the first appeal on the applicability of the limited-liability provision to the remanded claims. (App.Br.33). This contention could

not be true, however, because the trial court never ruled on the limited-liability provision before the first appeal. *NSP I*, 2017 WL 3013230 at *6 (stating district court ordered summary judgment "on the economic-loss doctrine alone, [and] declined to reach any of the alternative grounds for summary judgment asserted by respondents"); *Peters v. Indep. Sch. Dist. No. 657, Morristown*, 477 N.W.2d 757, 760 (Minn. App. 1991) ("An appellate court must limit its review to only those issues actually presented to and decided by the trial court."). Moreover, because the district court ordered summary judgment on the economic-loss doctrine alone, comments on appeal about the applicability of the limited-liability provision—a defense to the remanded claims—could only be non-binding *dicta*. *See Dickhoff ex rel. Dickhoff v. Green*, 836 N.W.2d 321, 342 (Minn. 2013) (dictum is expression in opinion that goes beyond case presented and is therefore not binding part of decision) (citing *State ex re. Foster v. Naftalin*, , 74 N.W.2d 249, 266 (Minn. 1956)).

And there is no law that would prohibit the parties from contracting for limited liability in the manner they did. Indeed, the result of Minnesota's strong public policy favoring freedom of contract is the rule that parties are "generally free to allocate rights, duties, and risks." *See, e.g.*, *Lyon Fin. Servs., Inc. v. Ill. Paper and Copier Co.*, 848 N.W.2d 539, 545 (Minn. 2014) (applying freedom-of-contract principles to so rule). This is especially true for limited-liability provisions in a contract between commercial contracting parties. Minn. Stat. § 336.2-719; *Indep. Sch. Dist. No. 877 v. Loberg Plumbing & Heating Co.*, 123 N.W.2d 793, 798 (1963) ("It is well established that the parties could, by contract, without violation of public policy, protect themselves against liability resulting from their own negligence."). The parties here allocated the risks associated with GE's

provision of technical direction of repair or use for Unit #3, and appellants have provided no grounds for its non-enforceability.

In fact, the Minnesota federal district court has expressly rejected the argument appellants make here—that a limited-liability clause applicable to duties assumed subsequent to and independent of the parties' contract are somehow unenforceable. In applying a contractual limited-liability provision to facts parallel to those here (subrogation action for property loss allegedly caused by a security vendor's assumed duty), the court ruled that an alleged "assumed duty" did not defeat the contractual limitation on liability:

> Brotherhood argues that ADT exceeded its contractual obligations and *voluntarily assumed a duty* beyond that which was provided for in the contract. Even if ADT exceeded its contractual obligations, however, *the valid and enforceable exculpatory provision in the Contract nonetheless warrants summary judgment for ADT*.

Brotherhood Mut. Ins. Co. v. ADT, LLC, No. 13-1870 (DSD/JJK), 2014 WL 2993728, *6 (D. Minn. July 2, 2014) (emphasis added); *see also Weirick v. Hamm Realty Co.*, 228 N.W.175, 176 (Minn. 1929) (ruling that extra-contractual, voluntarily undertaken duty that allegedly resulted in personal injury barred by contract exculpating tortfeasor's negligence); *Nahra v. Honeywell, Inc.*, 892 F. Supp. 962, 973 (N.D. Ohio 1995) (ruling that existence of independent duty to exercise ordinary care did not preclude party from limiting its liability through contract).

The unambiguous contract language applies exactly to appellants' newly fashioned negligence claims—negligence in the technical direction of repair or use—thus providing alternative grounds not only to affirm the trial court's post-trial refusal to permit an amended complaint, but to affirm the judgment entered on the jury's verdict.

II. APPELLANTS ARE NOT ENTITLED TO A NEW TRIAL.

A. Standard of review

The Court reviews *de novo* a district court's orders for both summary judgment and JMOL. *Riverview Muir Doran, LLC v. JADT Dev. Group, LLC*, 790 N.W.2d 167, 170 (Minn. 2010). "[W]hen the nonmoving party bears the burden of proof on an element essential to the nonmoving party's case, the nonmoving party must make a showing sufficient to establish that essential element." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

A trial court has broad discretion on evidentiary issues "and will only be reversed when that discretion has been clearly abused." *Johnson v. Washington Cnty.*, 518 N.W.2d 594, 601 (Minn. 1994). "Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn. 1990). "An evidentiary error is prejudicial if it might reasonably have influenced the jury and changed the result of the trial." *George v. Estate of Baker*, 724 N.W.2d 1, 9 (Minn. 2006).

B. The court correctly ordered JMOL on appellants' post-sale failure to warn claim (Count V).

1. Appellants failed to establish an essential element of a post-sale duty to warn, as provided in *Great Northern*.

A plaintiff alleging post-sale failure to warn must establish each of the four *Great Northern* duty factors, one of which asks whether "those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm." *Id.* (citing Restatement (Third) of Torts: Products Liability § 10.) The court ordered

JMOL at the close of evidence "because there's no way a jury could find that NSP was unaware of the risk of harm." (Doc.485 at 1859:21-23.)

Appellants claim error in this ruling on the ground that the court failed to examine the "*specific* risk of harm posed by latent SCC in finger dovetails on GE's low-pressure turbines in drum boilers, and of the critical need for testing on time-based intervals[.]" (App.Br.35) (emphasis added). This argument fails at its first word. The court in *Great Northern* adopted Restatement: Products Liability section 10, which specifically cautions that "an unbounded post-sale duty to warn would impose unacceptable burdens on product sellers." *Id.* at § 10, cmt. a. As a reflection of that policy, the Restatement's standard for awareness is *general*, not specific, awareness: "[E]ven if knowledge of the risk reasonably becomes available to the seller only after the original sale, if users and consumers are at that time *generally aware* of the risk, a post-sale warning *is not required*." *Id.* at cmt. f (emphasis added). This standard does not even approach the ground on which appellants claim error. NSP's internal System Health Report, by itself, shows the type of general knowledge that defeats an alleged post-sale duty to warn. The report acknowledges NSP's awareness that undetected SCC could "involve wheel failure and buckets departing the rotor. Resulting collateral damage could be severe (*i.e.*, due to mass imbalance.)." (R.Add.08.) This document alone shows NSP's awareness of the risk that materialized.

But there is a mountain of additional awareness evidence. For example, Sherco's full-time turbine-overhaul expert testified that he has extensive knowledge of SCC, which he acquired from his education, training, and experience, (Doc.474 at 305:16-19), from the Electric Power Research Institute, (*id.* at 306:7-11), and from power generation industry

sources, (*id.* at 306:12-14). He knew that SCC risks applied not just to GE equipment, but that it had been an industry-wide problem for decades. (*Id.* at 307:13-18). He knew about the Wilson Line—the technical name for the location along the turbine continuum where the Unit #3 failure occurred—where it is, and its special susceptibility to SCC. (*Id.* at 307:19-309:20). And Sherco's full-time turbine engineer testified to the same level of knowledge. (*See, e.g.*, Doc.480 at 593:19-594:7; 595:14-596:3.) This evidence shows what the trial court correctly ruled—that no reasonable jury could find that NSP was "unaware" of the risks that led to the Unit #3 failure within the meaning of *Great Northern* and Restatement § 10. JMOL of Count V should be affirmed.

2. Alternative grounds support affirmance of JMOL.

Numerous alternative grounds exist to affirm JMOL. First, a post-sale failure to warn claim requires evidence of a latent product defect. *Great N.*, 911 N.W.2d at 521 ("Like *Hodder*, the Restatement [section 10] requires that a defendant must have had knowledge of the product's defect, the defect must have been hidden, and the defect must have had the potential to cause significant harm."). On the first appeal, this Court recognized that appellants had recast their claims *entirely* in terms of a voluntary assumed duty, that they abandoned any theory of product defect, and that they focused instead on GE's alleged voluntary assumption of duty. *NSP I*, 2017 WL 3013230 at *5.

Second, even if appellants could have pursued a product defect theory—which they could not because, among other things, they disclosed no expert who would establish the existence of a defect—the "defect" is simply the turbine's susceptibility to SCC, which existed before the sale of the turbine, and which GE warned about in the Operations and

Maintenance Manual provided at the time of sale. (*See, e.g.*, Tr.Ex.288 ("It must be recognized that the higher stress levels and the resulting use of stronger materials in the newer, larger utility turbines increased the susceptibility to stress corrosion cracking."). As such, the economic-loss doctrine precludes that claim. *NSP I*, 2017 WL 3013230 at *5 ("To the extent that any of appellants' claims was based on an alleged failure to disclose a product defect present and known at the time of sale, the district court correctly determined that such a claim is barred by the economic-loss doctrine.").

Finally, because a claim for post-sale failure to warn sounds in negligence, the Sales Contract's limited-liability provision also provides alternative grounds for affirming JMOL on Count V. The discussion provided above at pages 36-39 applies equally to this negligence claim as it does to the fictional "ordinary negligence" claim on which appellants base their primary appellate argument.

The trial court correctly ordered JMOL on Count V.

C. The court correctly ordered summary judgment on appellants' fraudulent concealment claim (Count I)

The amended complaint affirmatively alleges that GE committed intentional fraud. It alleges that:

- GE "intentionally withheld any information related to such [other pre-loss] failures." (Add.084);
- GE "intentionally failed to warn about SCC-related risks in LP turbines powered by recirculating boilers." (*Id.*);
- GE "intentionally failed to inform NSP . . . about how to properly and timely detect SCC on LP turbine rotor wheels." (*Id.*);

- GE's "intentional withholding of that [technical] information rendered NSP unable to identify and detect the SCC damage that was compromising Unit 3 rotor integrity." (Add.085);

- GE's "intentional, fraudulent misrepresentation, incomplete disclosures, and withholding of information directly and proximately caused damages." (Add.086.)

Similar to their other invented post-verdict claims, appellants argue that Count I stated a novel claim for "faultless non-disclosure" that should have survived summary judgment under *Florenzano v. Olson*, 387 N.W.2d 168 (Minn. 1986), and that Count I alleges liability under "either an intent-based or negligence-based theory." (Doc.444 at 32; App.Br.46). The record contradicts this argument. The amended complaint could not more clearly allege intentional fraud by omission, which required, among other things, proof that GE affirmatively intended for NSP to rely to its detriment on GE's non-disclosures. *Williams v. Heins, Mills & Olson*, No. A09-1757, 2010 WL 3305017, *3 (Minn. App. Aug. 24, 2010) (citing *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 532 (Minn. 1986)). The district court correctly ordered summary judgment on Count I because appellants produced no evidence supporting an essential element of their fraud claim.

Appellants' brief cites examples of GE's alleged failure to provide technical information. But these examples at most suggest lack of oversight or neglect, not intent to conceal. No evidence even remotely suggests an *intent* to deceive NSP into believing that the (alleged) absence of disclosure signaled NSP's option to do nothing about the risk of LP-turbine SCC between 1999 and 2011. The content of the 2008 PAC note, which GE allegedly failed to pass along to NSP, alone shows that GE did not engage in intentional omissions. As stated in the PAC note, "[a]lthough TIL 1277 is written for once through

boilers *we have been recommending customers with drum boilers* [which includes NSP] *follow the recommendations also.*" (Tr.Ex.38 (emphasis added)).

The record is devoid of evidence showing that anyone at GE intentionally concealed information from NSP, or intended NSP to rely on such concealment to its detriment. The court correctly ruled that appellants' proof of intentional fraud failed as a matter of law.

D. The court's evidentiary rulings were within its discretion, and appellants have, in any event, failed to establish prejudice.

1. Other-incident evidence.

Appellants contend that the court abused its discretion by disallowing some, but not all, other-incident evidence. All of the other incidents involved SCC that was discovered and repaired prior to failure. In denying appellants' motion for a new trial, the court first ruled that "the excluded evidence did not involve similar incidents to the Unit 3 event because the accident at Sherco was the only instance of catastrophic failure due to SCC in a rotor wheel finger dovetail." (Add.025.) This ruling was neither clear error nor an abuse of discretion.

Evidence of other incidents is generally admissible to show notice of a product defect. *Buzzell v. Bliss*, 358 N.W.2d 695, 700 (Minn. App. 1984) . But appellants abandoned any product defect claim in their first appeal. Nevertheless, even in product-defect cases, courts recognize that similar incident evidence threatens to "raise extraneous controversial points, lead to a confusion of issues, and present undue prejudice disproportionate to its usefulness." *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 508 (8th Cir. 1993). The party seeking to admit such evidence has the burden to show that the other

incidents are "substantially similar" to the incident at issue. *Held v. Mitsubishi Aircraft Int'l, Inc.*, 672 F.Supp. 369, 390 (D. Minn. 1987). "Substantial similarity" means that the incidents involve substantially similar circumstances and involved substantially similar components or products. *Id.* (citing *Indep. Sch. Dist. No. 181 v. Celotex*, 244 N.W.2d at 266). Courts determine substantial similarity by conducting a factual inquiry into each of the proffered incidents to examine whether they share a common design, common defect, and common causation with the alleged design defect at issue. *Yang v. Cooper Tire & Rubber Co.*, No. A13-0756, 2014 WL 502959, *4 (Minn. App. Feb. 10, 2014) . The court committed no clear error in ruling that finger dovetails and tangential dovetails do not share a common design or a common "defect," and that appellants failed to establish substantial similarity justifying admission of detailed other-incident evidence.

The court further ruled in its post-trial order that "the excluded evidence [] was cumulative, potentially prejudicial, and confusing to the jury." (Add.025.) Nevertheless, because appellants were unsatisfied with the small population of finger-dovetail SCC—only three such instances in drum boiler units before the Sherco incident, and only two such instances when Murray inquired with Bird—the court allowed the jury to consider a comprehensive listing of *all* SCC rotor-dovetail incidents, meaning those involving both *finger dovetails* and the irrelevant *tangential-entry dovetails*." (Tr.Ex.1224a.) A strong argument could be made that admission of this irrelevant evidence was unduly prejudicial *to GE*—since it appeared there were more instances of cracking relevant to the Sherco incident than there really were. But appellants have not shown: (1) that the court clearly erred in finding that appellants failed to establish substantial similarity; (2) that the court

abused its discretion in excluding cumulative, prejudicial, and confusing evidence; or (3) that they suffered prejudice by the exclusion of evidence relevant only to a claim they abandoned as a tactic to avoid complete dismissal in the first appeal.

2. Design evidence

A similar analysis applies to appellants' claims that the court abused its discretion in admitting some design evidence, but not all. The court permitted testimony and documents regarding design to the extent it related to the GE's and NSP's respective knowledge. As a result, the jury heard much evidence regarding design, materials, and SCC over the two-week span of the trial. But appellants complain that they should have been allowed to introduce far more design and materials evidence than the court allowed.

Again, one cannot ignore the fact that appellants made the tactical decision on the first appeal to avoid any claim of design or manufacturing defect—lest this Court affirm the district court's ruling that the economic-loss doctrine barred all of their claims. Once the case was remanded, however, appellants sought to revive design and manufacturing issues through evidence of design changes, material peculiarities, and other matters the jury could have interpreted as suggestive of a product defect. This was particularly problematic given the fact that appellants did not have an expert to testify about alleged product defect, a person who would be subject to vigorous cross-examination. As with submission of irrelevant evidence concerning tangential entry dovetails, even the evidence appellants were allowed to submit concerning turbine design and materials could have improperly influenced the jury to believe the turbine was defective and that GE should be liable. The court ameliorated this issue, as best it could, with a limiting instruction. (Doc.486 at

1908:1-6.) But such an instruction was not a panacea, and allowing even more irrelevant design and material evidence could have greatly compounded the confusion of the issues and further prejudiced GE's defense.

The fact that GE sought to improve design characteristics of the LP turbine, that GE obtained a patent in connection with that effort, or that GE theoretically could have used different materials in the construction of Unit #3's rotor (each of which would have presented its own particular tradeoff between benefits and drawbacks), had no relevance to appellants' claims. This evidence, which appellants were able to secure through liberal discovery prior to summary judgment, had no proper place at trial, and its purpose was plainly to imply a design defect. The trial court did not abuse its discretion when ruling that it "properly excluded large amounts of complicated, highly technical material that would have improperly influenced the jury." (Add.026.)

3. TIL 1886

Appellants argue they should have been able to introduce evidence regarding TIL 1886—issued more than two years after the Sherco incident—because there was "a pre-failure decision by GE to issue such a TIL." (App.Br.42.) The court properly rejected this argument because, contrary to appellants' unsupported assertion, there is no record evidence of any decision to issue such a TIL prior to 2011 and, by its own terms, TIL 1886 was released in October 2013—nearly two years after the Sherco incident, thus bringing it squarely within the purview of Minn. R. Evid. 407. Appellants attempt to cast Howenstein's internal note that TIL 1277 was on a list to be revised as the "pre-failure decision." But Howenstein did not issue TILs on his own, TIL 1277 was never revised, and

the recommendations in TIL 1886 are different from TIL 1277. (Doc.478 at 949:1-5; 964:7-9; *compare* TIL 1886 (Ct.Ex.3012) *with* TIL 1277 (Tr.Ex.56).) In addition to the TILs being substantively different, the determination to issue TIL 1886 undisputedly did not occur until after the Sherco incident, as the court correctly found. (Doc.454 at 18-19.)

TIL 1886 is a classic subsequent remedial measure under Minn. R. Evid. 407, and appellants sought to introduce it for no reason other than the purposes expressly prohibited by the rule: "to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction." *See* Minn. R. Evid. 407. Rule 407 is based on a well-established social policy of not discouraging parties from taking steps to enhance safety. "[S]ubsequent repairs or precautions should not be viewed as an admission of negligence. After an unexpected accident has occurred, a person may, in the light of his new experience, adopt additional safeguards, even though he exercised due care at the time of the accident." *Faber v. Roelofs*, 212 N.W.2d 856, 859 (1973) (citing *Morse v. Minneapolis & St. L. Ry. Co.*, 16 N.W. 358 (Minn. 1883)). Moreover, even when post-incident remedial measure evidence is admitted for purposes other than demonstrating negligence—i.e., to show the practicability or feasibility of precautionary measures—trial courts must exercise "great caution" before admitting such evidence when the case is being tried to the jury. *Id.* at 860.

Appellants also claim that TIL 1886 should have been admitted as evidence of the feasibility of precautionary measures. (App.Br.44.) But in order to invoke that exception, Rule 407 requires such feasibility to be "controverted" by GE. Minn.. R. Evid. 407. GE never controverted the feasibility of precautionary measures. In fact, GE previously issued

various other precautionary measures through TILs and other written and oral guidance on a number of topics in the past, including but not limited to TIL 1121-3AR1 and TIL 1277. GE did not contend that a recommendation like TIL 1886 could not have been feasibly issued earlier. A straightforward application of Rule 407 mandated exclusion of TIL 1886 and related evidence in this case. The district court ruled consistently with the Rule and well within its discretion.

III. THE DISTRICT COURT PROPERLY AWARDED COSTS.

A. Standard of review

"In every action in a district court, the prevailing party . . . shall be allowed reasonable disbursements paid or incurred." Minn. Stat. § 549.04, subd. 1. The decision to allow costs and disbursements is discretionary and will not be reversed absent an abuse of that discretion. *Jonsson v. Ames Constr. Inc.*, 409 N.W.2d 560, 563 (Minn. App. 1987), *review denied* (Minn. Sept. 30, 1987).

B. GE's costs were reasonable and supported.

GE appropriately followed the process set forth in Minn. R. Civ. P. 54.04 in applying for taxation of its costs, submitting a detailed application with the court administrator using the published form and signed under oath pursuant to Minn. Stat. § 358.116. Appellants submitted objections to that application, and the district court considered all the relevant submissions before taxing costs in favor of GE as the prevailing party. There is no reason to disturb the district court's cost award.

1. Witness fees for Howenstein

Howenstein was a former GE employee, located out-of-state, who appeared at the request of the appellants. He provided specialized testimony concerning steam turbine operation. His costs were appropriately taxed. *See* Minn. R. Civ. P. 45 subpoena form (identifying fees set forth in Minn. Stat. § 357.22, but stating, "Additional fees may be available for out of state witnesses"); *State v. Alvarez*, 820 N.W.2d 601, 625 (Minn. App. 2012) (allowing fees for testimony of forensic specialist, including travel costs, because she "testified mainly as an expert witness").

2. Motion fees

Minn. Stat. § 549.04, subd. 1, contains no requirement that a party must "win" each motion for which it seeks to recover costs, as appellants contend. "Reasonableness" is the relevant inquiry. All of GE's motion fees were appropriately taxed, because none were unreasonable. *See, e.g., Ptacek v. Earthsoils Inc.*, No. 74-CV-08-3731, 2016 WL 923550, *1 (Minn. Dist. Ct. Jan. 12, 2016) (awarding taxation of summary judgment motion fee even though district court denied the motion, because the motion was not unreasonable).

3. Findings of fact

The district court has no affirmative duty to make findings as to costs. Minn. R. Civ. P. 54.04; *Bellboy Corp. v. Richmond Ltd.*, Nos. A05-877 & A05-1116, 2006 WL 290306, *4 (Minn. App. Feb. 7, 2006). Cost awards are typically affirmed "absent a specific finding of unreasonableness." *Jonsson*, 409 N.W.2d at 563. GE filed a detailed application for costs and appellants had no difficulty submitting detailed, written objections to it. The court

considered the relevant submissions and issued an award consistent with Rule 54. No additional findings are necessary.

CONCLUSION

Appellants acknowledge trying three claims in this case: willful and wanton negligence; gross negligence; and post-sale failure to warn. The jury rejected the first two of those claims; the trial court rejected the third on JMOL. Appellants cannot change the record on appeal, nor should they be permitted to rearrange the issues post-trial to claim a judgment to which they are not entitled, given the jury's verdict and the Sales Contract's broad limitation of liability.

The district court effectively presided over this case since its inception nearly six years ago. At trial, the court, along with the jury, heard all the evidence, saw the witnesses and made rulings that, more often than not, favored appellants more than GE. Ultimately, the court acted within the scope of its significant discretion in what was unquestionably a hard-fought, complex case.

Judgment for GE should be affirmed.

Respectfully submitted,

Dated: July 11 , 2019

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FORM AND LENGTH CERTIFICATION

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PUBLIC VERSION

NO. A19-0640

State of Minnesota

In Court of Appeals

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

Appellants,

v.

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

Respondents.

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Statement of the issues

1. **Did the district court err in denying judgment as a matter of law in favor of Plaintiffs when the jury specifically found, in accordance with Restatement (Second) of Torts Section 323, that GE assumed and breached a duty of care, the breached duty increased the risk of harm to Plaintiffs, and GE's breach was 52% of all the fault that directly caused Plaintiffs' damages?**

   The district court acknowledged that Plaintiffs' claims included an Assumed Duty of Care. (Add.45). Despite granting a directed verdict purportedly dismissing the post-sale failure to warn claim, the court nevertheless submitted the related Assumed Duty Claim to the jury for decision. (Add.2). Moreover, the district court recognized that this claim was not based on GE's Sales Contract but an independent tort, and, thus, was not subject to contractual limitations of liability, including any requirement that Plaintiffs prove gross negligence. (Add.43-44;52-53; Doc.250). Nevertheless, the district court treated the Assumed Duty Claim as part of gross negligence and, after the jury found all the elements of an Assumed Duty Claim and that GE's fault was 52% of all of the fault that directly caused the catastrophic failure, the district court refused to enter judgment in favor of the Plaintiffs based on the jury finding of no gross negligence. (Add.5-8). Plaintiffs preserved this issue by seeking judgment on the verdict (Docs.429-431) and seeking judgment as a matter of law by a post-trial motion (Docs.443-444).

   Apposite Authorities:

   - Restatement (Second) Torts § 323 (1965)
   - *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801(Minn. 1979)
   - *ZumBerge v. N. States Power Co.*, 481 N.W.2d 103 (Minn. Ct. App. 1992)
   - *N. States Power Co. v. General Elec. Co.*, No. A16-1687, 2017 WL 3013230 (Minn. Ct. App. July 17, 2017)

2. **To the extent the district court determined that the ordinary-negligence Assumed Duty Claim was not sufficiently pled, did the district court err by denying amendment of the pleadings to conform to the jury's verdict?**

   Although the district court independently recognized that the contractual limitations of liability did not apply to the Assumed Duty Claim, the court declined to allow amendment to add an Assumed Duty ordinary negligence claim to Count V of the Amended Complaint or to otherwise eliminate the superfluous and inapplicable allegation of gross negligence in Count III.

(Add.20-21). Plaintiffs preserved this issue by including an alternative motion to amend the Complaint in their motion for judgment as a matter of law. (Docs.443-444).

Apposite Authorities:

- Minn. R. Civ. P. 15.01, 15.02
- *Roberge v. Cambridge Coop. Creamery Co.*, 67 N.W.2d 400 (Minn. 1954)
- *Johnson v. Paynesville Farmers Union Co-op. Oil Co.*, 817 N.W.2d 693 (Minn. 2012)

3. Did the district court err in denying a new trial for any or all of the following reasons?

a. The court erred in directing a verdict in favor of GE and dismissing Plaintiffs' post-sale failure to warn claim based on the second element defined in *Great N. Ins. Co. v. Honeywell Int'l., Inc.*, 911 N.W.2d 510 (Minn. 2018), even though there was evidence supporting all elements, including evidence that the specific risk of harm known to GE was not known to NSP, and GE knew NSP was unaware.

The district court entered a directed verdict at the close of the evidence on Plaintiffs' post-sale failure to warn claim, incorrectly concluding that there was "no way a jury could find that NSP was unaware of the risk of harm." (Doc.485 at 1859:20-1860:3). The court nevertheless submitted the Assumed Duty Claim to the jury and the jury found for Plaintiff on all necessary elements of that claim. Plaintiffs preserved this issue by opposing summary judgment before trial, (Docs.226-227), opposing GE's directed verdict motion at the close of the evidence (Doc.485 at 1847:17-1848:18), and moving for judgment as a matter of law or a new trial. (Docs.443-444).

Apposite Authorities:

- *Great N. Ins. Co. v. Honeywell Int',l, Inc.*, 911 N.W.2d 510 (Minn. 2018)
- *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988)

b. The district court erred in excluding certain evidence deemed "cumulative" and "confusing" when (1) the evidence was necessary to establish aggravated negligence (if gross negligence was required) or willful and wanton negligence (which would eliminate any comparative fault application), (2) the Court later conceded, near the close of Plaintiffs' case, that the jury could distinguish and understand the evidence it previously deemed "confusing", and (3) the cumulative nature of the evidence was critical to the probative significance of the evidence.

The district court granted various GE motions *in limine* excluding extensive evidence on GE's internal efforts, knowledge, studies, and discussions regarding time-based latent stress corrosion cracking risks in low-pressure turbine rotor wheels. (Add.75-78). Plaintiffs opposed each motion, made offers of proof, continued to seek admission of probative evidence throughout trial, and ultimately renewed their offers in a motion for a new trial. (Docs.329, 407, 408, 409, 443-444).

Apposite Authorities:

- *State v. Bolsinger*, 21 N.W.2d 480 (Minn. 1946)
- *Gage v. HSM Elec. Prot. Servs.*, 665 F.3d 821 (8th Cir. 2011)

c. The district court erred in excluding evidence of the post-failure issuance of technical advice as a "subsequent remedial measure" when the decision to issue that very advice was planned pre-failure, proved pre-failure knowledge, and was further relevant to establish feasibility of warning.

The district court granted GE's motion in limine seeking exclusion of TIL 1886—a post-failure technical-advisory letter issued by GE instructing operators to implement a time-based inspection of certain units—as a subsequent remedial measure. (Doc.390). Plaintiffs preserved objection by opposing that motion (Doc.330) and raising the issue in their post-trial motion for a new trial. (Doc.443, 444).

Apposite Authorities:

- Minn. R. Evid. 407
- *Kociemba v. G.D. Searle & Co.*, 683 F. Supp. 1579 (D. Minn. 1988)
- *Cupp v. Nat'l R.R. Passenger Corp.*, 138 S.W.3d 766 (Mo. Ct. App. 2004)

d. The district court erred in granting summary judgment dismissing Plaintiffs' fraud claim (Count I).

GE renewed its motion for summary judgment following the 2017 remand by this Court. (Docs.217-222). Plaintiffs opposed that motion arguing that factual issues were ripe for jury resolution on all four remaining Counts in the Amended Complaint. (Docs.226-227). As for Count I – Fraud, the district court granted summary judgment in favor of GE concluding that the evidence was insufficient for a jury to find that GE had acted with intent in withholding critical time-based inspection information even though there was evidence that GE knew that information needed to be disclosed, knew NSP did not have the information, and NSP specifically requested any new information from GE. (Add.55-57). Plaintiffs preserved this error by opposing GE's renewed summary judgment request and by including this issue in a motion for a new trial. (Docs.226-227, 443-444).

Apposite Authorities:

- *Florenzano v. Olson*, 387 N.W.2d 168 (Minn. 1986)
- *Davis v. Re-Trac Mfg. Co.*, 149 N.W.2d 37 (Minn. 1967)

4. Did the district court grant excessive costs in favor of GE?

Following the district court's entry of judgment, GE applied for costs and disbursements totaling $252,162.49. (Doc.439). Without hearing or written explanation, the district court granted the entirety of GE's application. (Doc.456; Add.30-32). Plaintiffs preserved this error by filing a written objection challenging GE's requested costs and disbursements. (Doc.441).

Apposite Authorities:

- Minn. Stat. §§ 549.02, 549.04 (2018)
- Minn. Stat. § 357.22 (2018)
- *Stinson v. Clark Equip. Co.*, 473 N.W.2d 333 (Minn. Ct. App. 1991)

Statement of case

On November 19, 2011, a low-pressure turbine failed in the third unit of Northern States Power Company's (NSP) Sherburne County power generation facility in Becker, Minnesota (Sherco 3). (Doc.474 at 407:5-6; 482 at 1439:24-1440:1).[1] The failure occurred when blades on the low-pressure turbine flew off the rotor while being tested at high rotational speeds. (*Id.*). The failure rendered Sherco 3 inoperable, requiring a two-year restoration exceeding $230 million in cost and further caused damages for lost sales and replacement power purchases. (Docs.377; 482 at 1461:18-1462:1). Pursuant to a Stipulation Regarding Damages, the total damages were agreed to be $299,624,502. (Doc.377).

Various General Electric entities (GE) had manufactured and installed the failed turbine, but also provided ongoing advice, safety information, and technical updates on Sherco 3. (Docs.78 at 978:25-979:2; 475 at 160:6-163:1). NSP, along with Sherco 3 co-owner Southern Minnesota Municipal Power Agency (SMMPA) and interested property insurers (hereafter "Plaintiffs"), sued GE, alleging five causes of action: I. Fraudulent Concealment; II. Willful and Wanton Negligence; III. Gross Negligence; IV. Professional Negligence; and V. Post-sale Failure to Warn. (Add.82-93). The Amended Complaint was not based on GE's sale of the turbine, but instead alleged that GE became uniquely aware of turbine-related risks post-sale, undertook a duty to provide ongoing advice to NSP, and failed to disclose risks which, if shared, could have been rectified to avoid the

[1] "Doc.___" refers to the assigned document number on the district court docket.

failure. (Add.82-93 at ¶¶ 65-95). The case was assigned to Judge Sheridan Hawley. (Doc.1).

The district court initially granted summary judgment in favor of GE, holding the economic loss doctrine barred recovery in tort for purely economic loss arising out of the parties' contract for the sale and installation of Sherco 3. (Doc.117 at 7-14). Plaintiffs appealed, arguing that the Amended Complaint was premised on a duty of care GE assumed *after* the sale of Sherco 3, not on the sales contract. (Docs.137, 138). Plaintiffs relied on the Restatement (Second) of Torts § 323 to argue that GE voluntarily assumed a duty to advise NSP and therefore GE was required to continue (or terminate) that ongoing advice provision with reasonable care. *N. States Power Co. v. General Elec. Co.*, No. A16-1687, 2017 WL 3013230, at *5 (Minn. Ct. App. July 17, 2017). This Court agreed, holding that the district court incorrectly determined that Plaintiffs' claims involved a commercial sale of goods, when actually the claims included the post-sale assumption of a duty to provide updated technical information. *Id.* The matter was remanded on all appealed counts.[2] *Id.* at *6.

On remand, GE renewed its summary judgment motion, arguing that sales-contract liability-limitations barred Plaintiffs' claims. (Doc.217 at 36-37). The district court granted summary judgment for GE on Count I – Fraud, but denied summary judgment on Counts II – Willful Negligence; III – Gross Negligence; and V – Post-sale Failure to Warn. (Add.33-59). The district court acknowledged this Court's holding that

[2] Plaintiffs did not appeal the dismissal of Count IV, a claim based on professional engineering negligence. *See id.*

the claims were not based on the sales contract but were based on duty assumptions wholly separate from any contract. (Add.43-54). Importantly, at the time of the Amended Complaint and the post-remand summary judgment order, Plaintiffs' post-sale duty to warn claim was premised on a continuing duty to warn under *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988), based on GE's discovery of a risk post-sale. After the district court's second summary judgment order, but before trial, the Minnesota Supreme Court issued an opinion that created a four-factor test to impose a post-sale duty to warn. *See Great N. Ins. Co. v. Honeywell Int'l, Inc.*, 911 N.W.2d 510 (Minn. 2018).

Two subsequent requests for reconsideration by GE—addressing in part this clarification of the post-sale duty to warn standard—were denied. (Docs.243,250). In the latter denial, the district court specifically stated that the liability-limitation provisions in the sales contract (requiring more than "ordinary negligence") were not applicable to any "duty created by conduct occurring after the sale and outside of any contract." (Doc.250 at 2). Prior to trial, NSP and SMMPA settled their claims with GE for a confidential sum of money. (Doc.381). The remaining plaintiffs consisted of various insurers subrogated to the rights of NSP and SMMPA as a result of payment of portions of NSP's and SMMPA's property losses.

By pretrial order, the district court excluded substantial portions of evidence critical to the Plaintiffs' case on grounds that the evidence was cumulative and confusing.

(Doc.390 at 13-14, Add.60-63, 75-78).[3] Offers of proof followed. (Add.104-124; Docs.407,408,409).

At the close of the evidence, the district court purportedly directed a verdict on Plaintiffs' post-sale failure to warn claim—Count V. (Doc.485 at 1859:15-1860:30). This created unnecessary confusion as to where the Assumed Duty Claim, which the court intended to submit to the jury, fit within the Amended Complaint.[4] The Assumed Duty Claim could fit under part of Count III, Gross Negligence, which included allegations that GE assumed a duty to warn NSP "about potential and foreseeable risks" or about the "need for proper and periodic rotor wheel inspections and maintenance," but also included a heightened negligence standard that was rendered unnecessary and superfluous by contractual liability-limitation inapplicability. (Add.88-89 ¶¶ 85, 86(d)). Plaintiffs did not concede that the Assumed Duty Claim required the proof of gross negligence because, to the contrary, that claim only required a showing of ordinary negligence. (*See, e.g.*, Doc.337 ¶¶ 4-8 (proposing separate questions on Assumed Duty Claim)).

[3] Initially, that order was plagued by internal inconsistencies. For example, the order granted GE's motion to exclude all evidence addressing design and defects, yet denied the exact same motion three paragraphs later. (Add.61-63). The district court amended the memorandum to cure the errors, but nonetheless excluded significant amounts of evidence despite acknowledging Plaintiffs' legitimate need to rely on that evidence. (Add.75-78).

[4] Plaintiffs previously argued, and this Court agreed in its prior remanding opinion, that the assumed duty contemplated under Section 323 was applicable to all remaining negligence-based counts. (Doc.207). The district court acknowledged the same in its summary judgment denial following remand. (Doc.236).

The effect of the confusion was to question whether all of Count V had indeed been dismissed, because the court both instructed on an ordinary-negligence Assumed Duty and included special verdict questions that were to decide the Assumed Duty Claim. (Doc.486 at 1909-1910 (instruction on voluntary undertaking); Add.2).

In post-trial motions, Plaintiffs therefore argued that the Assumed Duty Claim fit within part of Count V, and had been submitted to and decided by the jury despite the directed verdict. (Doc.444). As a precaution, Plaintiffs moved to amend Count V to include the Assumed Duty Claim as part of that Count, which already alleged that if GE had shared its discoveries about the expanded SCC risk, "proper turbine inspection and maintenance could have prevented the substantial property damage caused by SCC in the LP turbine." (Doc.443 at 2; Doc.444 at 10-14; Add.91-92 ¶ 93a).

The jury's special verdict found all of the elements of the Assumed Duty Claim:

> 4. **You must answer this question:** Did GE undertake an obligation after the sale of Unit 3 to render technical information, advice and recommendations to NSP?
>
> Yes__X__ No_____
>
> 5. **If your answer to Question 4 was "Yes," then answer this question:** Should GE have recognized that such provision of technical information, advice, and recommendations was necessary for the protection of NSP's property and employees?
>
> Yes__X__ No_____
>
> 6. **If your answer to Question 5 was "Yes," then answer this question.** Did GE fail to exercise reasonable care in that provision of technical information, advice, and recommendations because (a) GE increased the risk of harm, or (b) NSP relied on the understanding?
>
> Yes__X__ No_____

* * * *

You must answer Question 11 regardless of your answers to any other Questions on this Special Verdict Form:

11. Taking all of the fault that directly caused the explosion and fire involving Unit 3 as 100%, what percentage of fault do you attribute to each of the following:

GE	52%
NSP	48%
TOTAL	100%

(Add.2-3). In a separate question, the jury answered "No" as to whether GE committed "Gross Negligence." (Add.2).

Competing motions for judgment were filed. (Docs.428,429). Plaintiffs sought the entry of judgment in their favor based on the jury's findings of breach of an Assumed Duty. (Docs.429,431). They sought judgment for 52% of the stipulated damages of $299,624,502, or $155,804,741 (less any credit for the NSP/SMMPA settlement, plus prejudgment interest). (Docs.431 at 1-2). But on November 8, 2018, the district court entered judgment in favor of GE, dismissing all claims, presumably based on the erroneous conclusion that gross negligence was required for the Assumed Duty Claim. (Doc.435).

Plaintiffs filed post-trial motions for Judgment as a Matter of Law consistent with the jury's finding of negligent breach of an Assumed Duty of Care, including, if necessary, an amendment of the Amended Complaint to conform the pleadings with the evidence on Assumed Duty, as tried and submitted to the jury. (Doc.443). Alternatively, Plaintiffs sought a new trial on various grounds, including error in granting directed

verdict on the post-sale failure to warn claim, granting summary judgment on the fraud count, excluding evidence of pre-failure decision to revise technical advice to operators, and excluding substantial probative evidence under the guise of duplication and confusion. (Docs.443 at 2).

The district court denied all relief requested by Plaintiffs. (Add.9-29). The district court's order, however, lacked record support on certain critical grounds for relief denial. For example, as to the existence of an Assumed Duty Claim, the district court found that "NSP intentionally decided not to proceed on the claim at trial" and given such a choice, it would be "a grave injustice to GE to allow NSP to shift its claim around post trial." (Add.21). Plaintiffs never made such a decision and—critically—the lower court cites no record basis for that significant purported concession. (Add.20-21). To the contrary, both parties litigated the Assumed Duty Claim, Plaintiffs' proposed jury instructions included a separate claim on Assumed Duty, and the elements were put before the jury in the special verdict form without objection. (Add.1-3; Docs.347).

GE also sought costs and disbursements post-trial. (Doc.439). Plaintiffs opposed that request. (Doc.441). The district court, without written explanation or deviation, granted all costs and disbursements sought by GE. (Add.30-32). Judgment awarding costs followed. (Doc.470).

Statement of facts

On November 19, 2011, Sherco 3 entered the final stages of a planned outage during which NSP replaced the high-pressure and intermediate-pressure turbines with new turbines and performed routine maintenance and inspections of the low-pressure turbines earlier manufactured and installed by GE. (Docs.474 at 269:2-9; 480 at 577:11-579:21). When NSP conducted a mandatory overspeed test, the unit experienced an explosion-like event, violently vibrated and crashed. (Docs.480 at 577:17-578:6, 578:24-579:10; 482 at 1451-54). It was determined that the separation of a row of blades inside the low-pressure turbine caused the catastrophe. (Doc.475 at 146:24-147:16).

Specifically, stress corrosion cracking (SCC) compromised the rotor "dovetail fingers"—where pins fasten the blades of the turbine to the rotor—causing cracks in the rotor wheel. (Doc.478 at 735:4-19, 740:22-741:9, 798:5-16). Centrifugal force fractured the rotor wheel and dislodged at least one blade. (Doc.478 at 738:4-13).

The failure substantially destroyed Sherco 3's two low-pressure turbines, the brand new high and intermediate-pressure turbines, the re-wound generator, and the condensers, and damaged the control room and other facilities and equipment. (Doc.475 at 579:2-10). Fortunately, despite the projection of debris and the danger of a hydrogen explosion, no one was injured. (Doc.475 at 579:19-20).

The required restoration took almost two years and cost more than $230 million. (Doc.482 at 1461:18-20, Doc.377). During the repair period, Sherco 3's owners suffered lost revenues, resulting from the inability to produce and sell electric energy. (Doc.377). The parties stipulated that the total damages were $299,624,502. (*Id.*).

I. Sherco 3

Sherco is NSP's largest electric generating plants-based on physical size as well as power generation. (Doc.474 at 441:9-442:4). The facility was built in the 1970's and initially comprised two electrical generating units—Sherco 1 and Sherco 2—each 100% owned by NSP. (Docs.474 at 453:16-19; 475 at 184:4-5). In 1977, NSP contracted with GE for a third generating unit, Sherco 3. (Doc.474 at 453:8-454:2). In 1983, SMMPA became a 41% owner of Sherco 3. (Doc.475 at 146:2-7). Sherco 3 became operational in 1987. (Doc.474 at 453:21-23).

Sherco 3's boiler is referred to as a "drum" boiler. (Doc.475 at 186:5-8). Steam emanates from a drum in the boiler that acts as a reservoir. (Doc.480 at 527:11-23). From that drum, steam exits, passes through the turbines, condenses back into water, and re-circulates through the boiler. (Doc.475 at 131:8-134:2). Steam from the coal-fired boiler rotates the turbines, which turns a rotor connected to a generator, and ultimately the rotating generator creates electrical energy. (Doc.475 at 131:8-134:2).

The turbines contain a series of blade rows through which steam passes, causing that rotation. (Doc.475 at 134:25-136:6). In the LP turbines, each blade row attaches to a rotor wheel at the center of the turbine by one of two means: four rows have "tangential entry" design and two rows have a "finger attachment" design that employs pins. (*Id.*) The attachment area is referred to as the "dovetail." (*Id.*).

While passing through the LP turbines, steam transitions from dry to wet. (Doc.475 at 167:6-14). Moisture tends to concentrate contaminants, which in

combination with other factors—like stress—contributes to the initiation and propagation of Stress Corrosion Cracking (SCC). (Doc.475 at 167:1-25).

II. GE's industry role

In addition to the information gained from operating Sherco 3, NSP uses GE technical data regarding various GE machines. (Doc.475 at 159:11-24, 160:11-161:21). Unlike NSP, GE has access to fleet-wide, steam turbine history, as well as internal research. (Docs.478 at 743:1-25, 991:15-23; 482 at 1364:3-1365:8, 1468:17-1469:7; Tr.Ex.131). GE tracks operating experience, inspection results, and in-service operating troubles, to identify conditions that may need correction on similar units. (Tr.Ex.131). GE gratuitously undertook to advise turbine operators, like NSP, what GE learned. (Docs.474 at 361:14-21, 455:23-461:7).

For example, GE regularly sent out Technical Information Letters (TILs), recommending specified turbine operations, services, and maintenance. (Doc.474 at 457:15-459:12; Add.94-103). TILs advised operators about best practices, inspections, repairs, and safety. (*Id.*)

GE assigns each TIL a discrete number, and those advisories each address distinct issues. (Doc.474 at 457:8-14). GE determines the applicability of each TIL to specific units, and those TILs are distributed to those specific units based on serial number. Sherco 3 operators welcomed TILs and relied upon their recommendations to plan short- and long-term upkeep. (Docs.474 at 361:14-21, 455:23-461:7).

In addition, GE offered access to the Power Answer Center (PAC), which functioned as a technical resource for operators who posed power generation equipment

inquiries. (Docs.475 at 162:1-11, 478 at 942:9-24). Unique expertise gained from fleet-wide surveillance and internal research enabled GE to voluntarily provide PAC services. (Docs.478 at 951:20-953:9, 482 at 1468:17-1469:7; Tr.Ex.131). Pursuant to PAC procedure, a unit operator could inquire of a field services representative about operations or maintenance. (Doc.475 at 162:1-11). Each inquiry was logged as a PAC case, which GE then forwarded to internal experts. (Doc.478 at 866:6-19). Engineers reviewed PAC cases and made recommendations to the field service representatives who were responsible for answering operator inquiries. (Doc.478 at 942:9-24).

III. GE knew about SCC concerns for Sherco 3 but misled NSP

GE has constructed thousands of power generation units worldwide, including nuclear units and a variety of fossil-fueled-steam-turbine units. (Doc.485 at 1789:20-23). The Sherco 3 turbines were fed with steam from a "drum boiler." (Doc.475 at 186:5-8). GE also constructed fossil fuel units with "once-through-boilers," which are boilers that turn water into steam without a reservoir or recirculation. (Doc.474 at 330:8-12). As noted, Sherco 3's low-pressure turbines had blades connected with dovetails of either "tangential entry" (L-2 to L-5 rows) or "finger" (L-0 and L-1 rows) attachments. (Doc.475 at 134:25-136:6). These differing designs became important because GE's discovery of increased latent-SCC risk evolved over time, starting with concerns about nuclear units that expanded to fossil units with "once-through boilers" and ultimately included drum boiler units like Sherco 3. (Add.94-103; Doc.482 at 1361:6-14).

Fossil-fueled-steam-turbine owner manuals, like Sherco 3's, identified the general SCC risk present in all rotating equipment but provided limited detection instructions and

lacked information on specific latent SCC potential, particularly in rotor wheels and blade attachments. (Tr.Exs.131,132). By the early 1990s, GE realized that SCC plagued fossil-fueled-steam turbines. (Add.94-99; Docs.478 at 963:25-964:9, 482 at 1361:6-14, 1364:3-1365:8, 1366:13-1367:18; Tr.Ex.1224).

As SCC concerns increased, GE formulated new inspection protocols. Specifically, in 1993, GE issued TIL 1121-3AR1. (Add.94-97; Tr.Exs.6,7). This TIL advised that "magnetic particle testing" was the only method to detect turbine-rotor-wheel SCC in *finger* dovetails. (Add.94-97). This "most reliable test" required bucket removal. GE instructed operators to perform magnetic particle inspections upon bucket removal but clarified that the risk did not warrant periodic or time-based bucket removal solely for purposes of inspection. (Add.94). Rather, inspection should be "consider[ed]" only if "abnormal events or operational anomalies . . . cause[d] concern for long term reliability of the unit" or if buckets were being removed for any other reason. (Add.97). Without GE's recommendation, operators seldom removed buckets. (Doc.475 at 157:8-11, 163:14-24; 480 at 520:19-524:13).

As GE's fleet-wide surveillance revealed mounting SCC concerns in all units, GE began to make formal time-based inspection recommendations because GE had learned that SCC can occur with the passage of time, even in the absence of any abnormal events. (Add.98-99; Doc.478 at 949:21-953:9, 962:11-963:13; Tr.Ex.38). But GE relegated that advice to specific units with *once-through boilers* (which did not include Sherco 3). (Doc.482 at 1361:6-14, 1362:22-1363:4). In 1999, GE issued TIL 1277-2, informing owners of once-through-boiler units that a tangential-entry row required ultrasonic

phased-array testing at each outage and that after 10 years of service, the finger-entry dovetail buckets should be removed and a rotor wheel magnetic particle inspection should be performed because other less-intrusive inspections (such as phased array) would not detect latent SCC on the internal fingers of the rotor wheel. (Add.98-99). Because TIL 1277-2 was restricted to once-through-boiler units, GE never sent that advisory to NSP. (Docs.475 at 191:5-7; 478 at 898:18-22).

During this same time, GE was studying the likelihood of SCC failure and determined that there was also a heightened risk of SCC in finger-dovetail attachments, regardless of the operational anomalies listed in TIL 1121-3AR1 and regardless of boiler type. (Docs.478 at 949:21-953:9, 962:11-963:13, 963:25-964:9, 482 at 1366:13-1367:18; Tr.Ex.38). GE came to expect cracking in *drum* boiler units, and not just once-through boiler units, (*id.*), likely because regardless of boiler type, GE's LP turbine rotor wheels were fleet-wide constructed of the same metal and designs. (*See, e.g.*, Add.94-99 (advice reflects same turbine design, but different boilers).

GE knew as early as 2008 that the finger-dovetail rows on drum boiler units should be regularly inspected just like those on once-through boiler units. (Doc.478 at 949:21-953:9, 962:11-964:9; Tr.Ex.38). Despite that recognition, GE let operators believe TIL 1121-3AR1's operational anomalies were the only trigger for SCC and failed to relay—at least to NSP—that time-based magnetic particle inspections were imperative. (Add.94-97; Doc.474 at 255:13-256:8; Tr.Ex.39p.2 (no update forthcoming)). GE's silence was due in part to its concern that increasing the frequency of high cost bucket

removal and magnetic particle inspection of finger dovetails was unlikely to be well received by operators. (*See* Doc.475 at 157:8-11, 480 at 520:19-524:13).

GE *did*—albeit informally—tell drum-unit operators of the need for time-based phased array inspections of the *tangential-entry* dovetail rows, but downplayed any need for the same advice on the more costly magnetic particle inspection of the finger dovetails. (Doc.475 at 191:11-192:20; Tr.Ex.23). The inspection of tangential-entry, as opposed to finger-dovetail, rotor wheels does not require costly bucket removal because tangential entry attachments can be inspected with ultrasonic phased-array technology. (Doc.474 at 270:7-9). NSP's turbine engineer Tim Murray learned of the need to periodically inspect *tangential* entry rows on drum boiler units through industry conferences; but that advice excluded any similar recommendation on the finger-dovetail attachments. (Doc.475 at 191:11-192:20; Tr.Ex.23). That informal expansion of TIL 1277-2's phased-array tangential dovetail inspection recommendation and the exclusion of finger-dovetail inspections, solidified NSP's reliance on the earlier TIL 1121-3AR1 as GE's exclusive inspection directive for finger dovetails, *i.e.* only inspect where "abnormal events or operation anomalies" caused concerns. (Docs.475 at 198:8-200:24, 480 at 564:16-565:17; Tr.Exs.15, 29p.4).

IV. The Sherco 3 failure was caused by SCC damage

GE's own engineers ultimately concluded that latent SCC on the inner finger-dovetails of LP turbine rotor wheels for drum boiler units could form for any number of reasons, including the mere passage of time in operation, and was detectable only through a costly and lengthy magnetic particle inspection that required removal of all buckets

from the rotor wheel. (Docs.475 at 157:8-11 (million dollar cost); 480 at 520:19-524:13 (extensive and lengthy inspection); 485 at 1795:4 ("SCC caused the failure")). Although GE knew this critical information, GE failed to provide that technical knowledge to NSP.

Experts agreed that SCC in the finger dovetails of Sherco 3 caused its failure and that if NSP had done a buckets-off inspection during the 2011 outage, the SCC would have been detected and the failure avoided. (Doc.485 at 1720:24-1721:4, 1766:9-13).

V. NSP did not know of the specific SCC risk

NSP regularly implemented advice from GE regarding the LP turbine. For example, in 1999, after experiencing problems with GE's original bucket design, NSP implemented a GE recommendation to remove and replace all L-1 row buckets on Sherco 3's LP turbines. As part of the bucket removal protocol, NSP followed TIL 1121-3AR1's directive and engaged GE to perform the costly magnetic particle inspection. (Doc.474 at 263:13-20, 378:17-379:10).

In 2001, Tim Murray—NSP's turbine overhaul specialist—attended a conference. During a GE presentation, a GE engineer informally recommended that drum-boiler-unit operators conduct the time-based, TIL 1277-2 inspection of *tangential-entry* bucket attachments (but not finger dovetail attachments). (Doc.475 at 170:5-24; 191:11-192:20). Murray shared that guidance with fellow NSP employees. (Exh.23 p.1). Thereafter, NSP decided to be "a little conservative" and began conducting phased array inspections on all three Sherco units' *tangential-entry-dovetail* rotor-wheel attachments. (Doc.474 at 225:2-227:8; Exhs.12,25).

GE never recommended—formally or informally—that drum-boiler-unit rotor wheels with *finger-dovetail* attachments be periodically inspected. (Doc.475 at 170:5-24; 191:11-192:20). Thus, Murray understood that SCC concerns were focused solely on tangential-entry dovetails and excluded the finger-dovetail row on Sherco 3. (Tr.Exs.10,15,23,39). When seeking outage bids Murray wrote GE that Unit 3 tangential entry (rows L-2 through L-4) would be inspected but that the finger-dovetails (on L-1) would not—*unless* GE recommended differently. (Exh.29 p.4). GE's response included a bid on rows L-2 through L-4, but despite NSP's invitation, GE was silent on NSP's request for a recommendation regarding the L-1 finger-dovetails. (Doc.475 at 198:8-200:24).

In 2007, relying on GE's 2001 informal directive, NSP examined the neighboring Sherco 1's tangential-entry attachments. That inspection revealed SCC, and NSP made necessary repairs. (Doc.480 at 551:9-552:18). Upon completion in January 2008, Tim Murray was tasked with preparing company-wide inspection recommendations. (Docs.474 at 261:-265:1, 346:16-19; Exh.15,22). He inquired to GE about whether TIL 1277-2 should now be extended to drum-boiler, finger-dovetail rotor wheels, such as those in Sherco 3 low-pressure turbines. (Exh.39). That request, sent by e-mail to GE's field services representative Joshua Bird, resulted in a PAC case. (Exh.38). GE forwarded the inquiry to engineer Arthur Howenstein. (*Id.*). For months thereafter, Murray and Bird exchanged emails, but those communications never addressed Murray's TIL 1277-2 inquiry. (*Id.*). Another NSP engineer, Mark Kolb, recalls a phone call from Bird in early February informing him that TIL 1277-2 was not being updated to include

drum-boiler units. (Doc.480 at 560:11-561:4). Kolb shared that answer with Murray, as reflected in Murray's email exchange with Bird. (Exh.39 p.2).

Nevertheless, weeks later on February 29, 2008, GE's Howenstein internally told Bird in response to the PAC query:

> Although TIL 1277 is written for once through boilers we have been recommending customers with drum boilers follow the recommendations also. We have found instances with SCC on drum boiler units also and will likely continue to find more as the age of the units continues to climb. It has been on my list of TIL's requiring a revision for some time now, just hasn't gotten to the top of the priority list.

(Exh.38). Howenstein knew that operators like NSP needed that recommendation. (Doc.478 at 963:25-964:9). Recognizing TIL 1277-2's limitation to once-through-boiler units and the otherwise uncommunicated need for drum-boiler units to be similarly SCC-inspected, Howenstein regarded his recommendation as important. (Doc.478 at 969:25-970:14)

Yet, GE's Bird did not forward Howenstein's communication or otherwise advise NSP. (Docs.474 at 255:13-256:8, 480 at 564:16-565:17). None of GE's further communication touched on this need for time-based inspections of finger dovetails. (Exh.39). Bird left his role with GE services the next business day; GE did not assign a new field service representative until mid-2008. (Doc.478 at 889:17-21). Additionally, GE colleague Mark Peterson inexplicably closed Murray's PAC inquiry without a record of any communication to NSP. (Exh.38 p.2).

Howenstein's recommendation about periodic inspections for SCC was ultimately published post-failure as TIL 1886, a fact excluded from the evidence presented to the

jury on the erroneous ground that it was a "subsequent remedial measure." (Add.77-78, 100-103). GE did not provide that recommendation to NSP anytime until the post-failure issuance of TIL 1886.

VI. If GE had warned NSP, SCC would have been discovered, and the Sherco 3 failure would have been prevented

If GE had provided the recommendation, it would have been followed. (Doc.480 at 582:22-583:5). A buckets-off magnetic particle inspection of the finger dovetails would have been performed, cracking would have been found, and repairs would have been made *before* the November 2011 restart.

The jury agreed; the special verdict established that GE had information on which NSP would have relied but failed to share it. (Add.2). And that failure was 52% of all fault directly causing Sherco 3's catastrophic failure. (Add.3).

Argument

The primary focus at trial was GE's Assumed Duty of Care under Restatement § 323 to correctly update and advise NSP of the previously unknown SCC risks that GE alone had discovered. The proprietary information that GE collected about SCC risks in finger dovetails but failed to disclose to NSP—even though NSP asked—resulted in NSP not knowing about crucial time-based inspection needs for Sherco 3. Because the jury agreed that GE breached its duty, Plaintiffs are entitled to judgment in accordance with the jury findings. This Court should give effect to the jury verdict and remand for entry of judgment as a matter of law in favor of Plaintiffs.

Any confusion about where the Assumed Duty Claim fit within the Complaint was immaterial because the parties knew that it was being submitted to the jury and no objections to the instructions were made. To the extent the district court viewed the claim as being under Count III, the court mistakenly applied a gross negligence standard to an Assumed Duty Claim that only required ordinary negligence. By the time of trial it was clear to everyone that the heightened standard of gross negligence was not required because the Assumed Duty was independent of the sales contract and thus not subject to the liability limitations that might otherwise have required that heightened standard. In fact, the district court recognized this, albeit perhaps incompletely, in its March 2018 order denying GE summary judgment.

Moreover, if the Assumed Duty Claim is viewed as an aspect of Count V for post-sale failure to warn, it was not affected by the directed verdict because it was actually tried and was specifically submitted to and decided by the jury.

In the alternative, if judgment is not entered for Plaintiffs on the verdict, then the district court erred in denying Plaintiffs' motion for a new trial. A new trial is required on several grounds. First, the court erroneously directed verdict at the close of the evidence, dismissing Plaintiffs' post-sale failure to warn claim. The Assumed Duty Claim was actually submitted to the jury, despite the directed verdict, and found in Plaintiffs' favor. But, at a minimum, the reversal of the directed verdict requires a new trial. Second, the district court excluded substantial probative evidence under the mistaken understanding that the evidence was merely cumulative and confusing. If heightened negligence were the required standard, these exclusionary rulings prejudiced Plaintiffs' ability to show the severity of GE's misconduct. Third, the district court mistakenly and prejudicially excluded, as a subsequent remedial measure, the technical information letter issued by GE in 2013 because that letter reflected a decision made by GE in 2008 (prior to the Sherco 3 failure) to disseminate the critical time-based inspection warning. Fourth, the district court erroneously granted summary judgment in favor of GE on Plaintiffs' fraud claim. Each of these reasons, independently and collectively, entitle Plaintiffs to a new trial.

Lastly, if the judgment for GE is affirmed, the district court neglected to properly assess the costs and disbursements requested by GE. The carte blanch grant of all amounts requested, without explanation, was an abuse of discretion that must be cured.

I. THE DISTRICT COURT'S JUDGMENT AGAINST PLAINTIFFS CONTRADICTS THE EXPRESS FINDINGS OF THE JURY

The jury found that GE assumed a duty of care in the provision of technical advice, NSP relied on that duty, and GE breached it. The jury further found that GE's fault was 52% of the total fault that directly caused this failure. Those findings establish as a matter of law that GE is responsible for 52% of this failure. Yet the district court denied judgment for Plaintiffs because the jury's findings did not establish the unnecessary "gross" negligence.

A. Standard of review

This court reviews a district court's decision regarding a motion for judgment as a matter of law de novo. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009). Judgment as a matter of law reversing a jury verdict is rare; but when *enforcing* a jury verdict, it is expected. *Alden Wells Veterinarian Clinics, Inc. v. Wood*, 324 N.W.2d 181, 184 (Minn. 1982) (only "rare case" justifies rejection of jury's negligence allocation); *Brubaker v. Hi-Banks Resort Corp.*, 415 N.W.2d 680, 683 (Minn. Ct. App. 1987) ("If a verdict had reasonable support in the evidence, it must be accepted as final by both the trial court and by this court.") Plaintiffs have proven that GE is liable for negligence in its performance of an Assumed Duty of Care. The jury found every element of that cause of action on the special verdict form, and those findings are supported by the evidence. Judgment for Plaintiffs must follow.

B. Once the contractual liability limitations were held inapplicable to the assumed-duty claim, Plaintiffs needed to only prove ordinary negligence

From initiation, this lawsuit did not invoke a preexisting contractual duty as a basis for liability. Rather, as established in the initial appeal and reaffirmed by the district court in the order denying summary judgment following remand, Plaintiffs premised this litigation on an extra-contractual Assumed Duty of Care: "a person may, by conduct, assume a duty where one did not previously exist and be liable for the failure to exercise due care in the performance of that duty." *State v. Philip Morris Inc.*, 551 N.W.2d 490, 494 (Minn. 1996) (emphasis added); *Williams v. Harris*, 518 N.W.2d 864, 868 (Minn. Ct. App. 1994), *review denied* (Minn. Sept. 28, 1994) ("Minnesota recognizes that, even though there is no duty in the first instance, if a person voluntarily assumes a duty, the duty must be performed with reasonable care or the person will be liable for damages.").

The existence of an Assumed Duty is a distinct negligence theory implicating unique elements. The court of appeals has enumerated the essential elements under Restatement (Second) of Torts § 323 (1965) as follows:

> (1) a defendant undertakes to provide services to plaintiff (gratuitously or for consideration); (2) the services are necessary for the protection of the plaintiff's person or things; (3) there is a breach of reasonable care in performing the undertaking because either (a) the defendant increases the risk of harm, or (b) the plaintiff relies on the undertaking; and (4) physical harm results.

Nelson v. Townhomes at Water's Edge, Inc., A16-1095, 2017 WL 1375285, at *4 (Minn. Ct. App. April 17, 2017). When a plaintiff satisfies those elements, liability follows. *Id.*

Obviously, these elements do not require gross negligence or anything beyond ordinary negligence—*i.e.* the "breach of reasonable care." Restatement (Second) of Torts § 323; *Nelson*, 2017 WL 1375285, at *4 (assumed duty negligence based on the exercise of reasonable care). Restatement (Second) Torts § 323 charges a party who renders services necessary for the protection of another's person or things with a duty, and that assumed duty must be discharged with reasonable care.

Moreover, as the district court recognized in another context, the liability limitations in the sales contract do not apply. (Doc.250). Thus, even though the sale contract's liability limitations only bar claims "based on negligence," (Ct.Ex.1052a at XCEL_Sherco_08_0070593), such limitations do not apply to duties assumed subsequent to and independent of the sales contract. Because this limitation does not apply, there was no legal requirement for Plaintiffs to prove gross negligence.

C. Jury found GE liable for negligent performance of an Assumed Duty of Care

Following remand, GE sought to renew its summary judgment motion, again arguing that the contractual liability limitation applied and required an elevated negligence standard. Plaintiffs opposed that motion arguing jury fact issues existed as to whether GE assumed a duty of care, breached that duty, and caused harm. (Doc.226). The district court agreed that the contract limitations did not apply. (Add.52-54; *see also* Doc.250). Without contractual liability limitations, there was no legal basis for requiring gross negligence.

Leading up to trial, Plaintiffs continually reasserted the Assumed Duty Claim, proposing a distinct set of questions on the jury special verdict form that contemplated liability based on ordinary negligence alone. (Doc.337). The parties tried the case knowing that GE's assumed duty through the provision of technical advice, and GE's breach of that duty, were critical issues for jury resolution. At the close of trial, the district court instructed the jury on the "Undertaking to Render Services" and included questions 4 through 6 on the special verdict form to specifically address the elements required for Section 323 liability:

Undertaking to Render Services

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from this failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

(Doc.486 at 1909:8-18; Final Jury Instructions p.10) (emphasis added). GE did not object to the instruction or the special verdict questions.

The jury answered each corresponding special verdict question in the affirmative: GE assumed the duty; GE failed to exercise reasonable care; GE's failure increased the risk of harm to NSP; and GE's failure was 52% of the fault that caused the Sherco 3 explosion. These jury findings established each of the requisite elements for GE liability for breach of an assumed duty of care.

D. Evidence supports the jury's findings; judgment must follow

Judgment for Plaintiffs should have followed as a matter of law. "[T]he findings of a jury under a special verdict are binding on the court." *Orwick v. Belshan*, 231 N.W.2d 90, 94 (Minn. 1975). A trial court has no discretion to set aside jury findings so long as the findings are supported by the evidence. *Noble v. C.E.D.O., Inc.*, 374 N.W.2d 734 (Minn. Ct. App. 1985) (*citing Newmaster v. Mahmood*, 361 N.W.2d 130 (Minn. Ct. App. 1985)).

The trial evidence supports each of the jury's affirmative special verdict answers. GE voluntarily undertook to give technical advice to equipment operators irrespective of past or existing contracts, or even ongoing payment. (Doc.474 at 361:14-21). The provision of that advice was continuous and systematic such that operators like NSP came to rely upon it. (Doc.480 at 503:2-20, 527:24-528:2, 582:5-583:5; Tr.Ex.57). Despite that reliance, GE neglected to provide operators like NSP with full and candid advice on the time-based inspection needs of finger dovetail rows in GE's low-pressure turbines. (Docs.478 at 963:25-964:9, 480 at 562:19-565:17, 582:5-583:5, 482 at 1361:6-14, 1362:22-1363:4, 1366:13-1367:18). Had GE done so, NSP would have acted and this failure would have been avoided. (Doc.475 at 200:7-9, 480 at 582:22-583:5).

On de novo review, this Court should give effect to the jury's special verdict and remand with instructions to enter judgment in favor of Plaintiffs for 52% of the stipulated damages, or $155,804,741, less an offset for GE's settlement with NSP and SMMPA, plus prejudgment interest.

II. IF NECESSARY, PLAINTIFFS' REQUEST TO AMEND THEIR COMPLAINT SHOULD HAVE BEEN GRANTED

By the time of trial, Plaintiffs' Assumed Duty Claim had evolved in plain sight and, as this Court and the district court both recognized, the sales contract was no longer relevant. Moreover, both parties litigated the Assumed Duty Claim and allowed, without objection, the elements of that claim to be included on the special verdict form. If there is any confusion about the consequences of the jury's verdict, it is best resolved by either concluding that the directed verdict did not eliminate the Assumed Duty Claim, which is most logically lodged in Count V of the Amended Complaint, or alternatively, if the Assumed Duty Claim is forced into the Gross Negligence Claim in Count III, that Count was effectively amended to require only ordinary negligence because the Assumed Duty Claim does not require a showing of gross negligence.

A. Amendments are to be freely granted

Amendments are permitted by Minnesota Rules of Civil Procedure 15.01 and 15.02. Under either rule, a party may seek to amend a pleading post-trial when justice so requires. *Kelbro Co. v. Vinny's on the River, LLC*, 893 N.W.2d 390, 404 (Minn. Ct. App. 2017) (both amendments allowed post-judgment; Rule 15.01 addresses prejudice whereas Rule 15.02 relies on consent). Under Rule 15.01, amendments "shall be freely given," but may be denied where prejudice or futility would result. *See id.*; Minn. R. Civ. P. 15.01. Alternatively, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties," Rule 15.02 controls and such issues "shall be treated in all respects as if they had been raised in the pleadings." Minn. R. Civ. P. 15.02; *see also*

Roberge v. Cambridge Coop. Creamery Co., 67 N.W.2d 400, 403 (Minn. 1954) ("Issues litigated by either express or implied consent are treated as if they had been raised in the pleadings.").

A district court's rejection of a motion to amend is reviewed for an abuse of discretion. *Johnson v. Paynesville Farmers Union Co-op. Oil Co.*, 817 N.W.2d 693, 714 (Minn. 2012).

B. No prejudice or futility grounds justified denial under Rule 15.01

Certain exceptions can justify a court's exercise of discretion to deny a Rule 15.01 amendment to add a claim not otherwise stated in an initial pleading such as prejudice, including notice to the opposing party and ability of that party to present evidence on the newly added claim, and the viability of the added claim to survive.

GE cannot claim prejudice. The Assumed Duty Claim, based on ordinary negligence, was always at issue, vetted throughout discovery and motion practice, and fully litigated at trial. The amendment sought by Plaintiffs to articulate the Assumed Duty Claim as a subpart of Count V merely formalizes the legal issues that all parties knew were at issue and litigated. And, to the extent that the Assumed Duty Claim is considered under Count III, the superfluous and unnecessary allegations of "gross negligence" should be reduced to ordinary negligence.

GE cannot argue that formal inclusion of an ordinary negligence claim based on an Assumed Duty of Care would have necessitated additional evidence, new defenses, or alternative arguments. *See Willmar Gas Co. v. Duininick*, 58 N.W.2d 197, 199 (Minn.

1953) (amendment properly denied where new claims would have required additional evidence); *McNulty Constr. Co. v. City of Deephaven*, No. A09-1625, 2010 WL 2899142, at *7 (Minn. Ct. App. July 27, 2010) (amendments should be allowed in absence of prejudice). Even more, the remand from this Court and the subsequent summary judgment order by the district court put the Assumed Duty Claim squarely before the parties and, by implication, removed the necessity of proving gross negligence in light of the inapplicability of contract limitations. (Add.52-55; Doc.250; *N. States Power*, 2017 WL 3013230, at *5).

Nor can GE argue futility. When an amendment seeks to add a claim that is not viable, amendment denial is appropriate. *See Benson v. Nw. Airlines, Inc.*, 561 N.W.2d 530, 540 (Minn. Ct. App. 1997) ("A motion to amend is properly denied when the additional alleged claim cannot be maintained.") (internal quotation marks omitted). Here, viability cannot be doubted. The jury found the very elements of the ordinary negligence Assumed Duty Claim Plaintiffs seek to clarify in the complaint. (Add.2-3).

C. Consent compels a Rule 15.02 amendment

When both parties try an issue by express or implicit consent, omission of that issue from an initial pleading is not fatal; rather such issue should be treated as if it has been pled. Minn. R. Civ. P. 15.02. "Consent is commonly implied either where the party fails to object to evidence outside the issues raised by the pleadings or where he puts in his own evidence relating to such issues." *Roberge*, 67 N.W.2d at 403; *Willmar Gas Co.*, 58 N.W.2d at 199 ("where an issue has been tried by consent, an amendment to the pleading should be liberally allowed"). The district court's determination as to whether

the parties consented to try the issue is reviewed for clear error. *Buller v. A.O. Smith Harvestore Prods., Inc.*, 518 N.W.2d 537, 541 (Minn. 1994). Here, the district court erred in rejecting Plaintiffs' requested amendment based on GE's consent.

By the time of trial, all parties knew the Assumed Duty Claim was at issue. This Court's 2017 remand was premised on Plaintiffs' extra-contractual, Assumed Duty allegations. The district court echoed that holding in the summary judgment denial (Add.41-55), and its reconsideration request denial, (Doc.250). At trial, the evidence focused on GE's gratuitous undertaking to continuously and systematically provide operators with technical and safety-related updates, operator reliance on those updates, and GE's failure to use reasonable care in the provision of such advice specifically addressing drum-boiler-unit finger-dovetail cracking and inspections. At the close of trial, the jury instructions and the special verdict form included ordinary negligence liability based on an Assumed Duty of Care. (Add.2-3; Doc.486 at 1909:8-18; Final Jury Instructions p.10).

This Court should direct the district court to allow amendment of the complaint, add the Assumed Duty Claim, either as a part of Count V that was unaffected by the directed verdict or by elimination of the allegation of "gross" in Count III, and enter judgment for Plaintiffs.

III. THE DISTRICT COURT ERRED BY DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL

If judgment is not entered on the verdict in favor of Plaintiffs, then multiple grounds compel a new trial.

A party is entitled to a new trial if a district court decision "is not justified by the evidence" or if there were "errors of law occurring at the trial." Minn. R. Civ. P. 59.01(f), (g). Errors of law such as an improper entry of summary judgment or directed verdict are reviewed de novo. *Overocker v. Solie*, 597 N.W.2d 579, 581 (Minn. Ct. App. 1999). In contrast, the exclusion of evidence—although a type of error of law that may compel a new trial—is reviewed for an abuse of discretion. *Clifford v. Geritom Med., Inc.*, 681 N.W.2d 680, 686 (Minn. 2004); *Myers v. Winslow R. Chamberlain Co.*, 443 N.W.2d 211, 215 (Minn. Ct. App. 1989), *review denied* (Minn. Sept. 27, 1989).

A. The district court's directed verdict on Plaintiffs' post-sale failure to warn claim is contrary to the evidence

At the close of Plaintiffs' case, the district court directed a verdict for GE on the post-sale failure to warn claim, concluding that a single element of the claim—that NSP lacked knowledge of the substantial risk of harm known to GE—could not be found by the jury. (TT.1859:15-1860:3). That conclusion was premised on a generalized and overbroad definition of the risk of harm about which a warning was required. As a result, the district court disregarded evidence from which the jury could have found (and in fact did find) that NSP was reasonably unaware of the *specific* SCC risk posed to L-1 finger dovetail rows on GE's low-pressure turbines used with drum boilers like at Sherco 3. As argued above, to the extent the Assumed Duty Claim was a part of the post-sale failure to warn claim, it was actually tried and decided in Plaintiffs' favor, necessitating entry of judgment for Plaintiffs. At a minimum, the directed verdict on Count V requires a new trial.

A post-sale duty to warn exists as a matter of law if the following facts are either undisputed or found by the jury:

> (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
>
> (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
>
> (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
>
> (4) the risk of harm is sufficiently great to justify the burden of providing a warning.

Great N. Ins. Co. v. Honeywell Int'l, Inc., 911 N.W.2d 510, 519-522 (Minn. 2018). Of these four elements, only the first two were disputed and subject to jury consideration.[5] The district court entered a directed verdict on the second element, finding that "there's no way a jury could find that NSP was unaware of the risk of harm." (Doc.485 at 1859:22-23). Because there was ample evidence from which a jury could have concluded NSP was unaware of the specific risk of harm posed by latent SCC in finger dovetails on GE's low-pressure turbines in drum boilers, and of the critical need for testing on time-based intervals, the directed verdict was improper.

Although the general phenomenon of SCC was known industry-wide, GE misled operators into believing the risk of SCC in L-1 finger dovetail attachments exclusively

[5] The final two elements were conceded by GE in pretrial motions and briefing. *See* Def. Mem. to Exclude TIL 1886, 8/31/18, at p.5 ("GE does not controvert the feasibility"). And certainly, given the significant risk of life and property that could result from a SCC-induced turbine failure, the slight burden of disseminating a letter to a known list of operators was undisputedly justified.

resulted from operational anomalies, as defined in TIL 1121-3AR1. GE informed operators that certain operational conditions could cause SCC to form in the finger dovetails and therefore suggested inspections *only if* one of those anomalies occurred. But what GE knew, and did *not* share, was that a *different, more* substantial risk was present in these turbines: the risk of catastrophic failure due to undetected SCC, unrelated to operational anomalies, caused by the mere passage of time, that could only be discovered by periodic time-based inspections. That *specific* and substantial risk was researched, studied, modelled, and tracked by GE, but GE did not share it with NSP. The district court therefore misinterpreted the legal standard establishing a post-sale duty to warn.

Plaintiffs offered ample evidence from which a reasonable jury could find that NSP was unaware of that specific risk, and that GE should have known of NSP's lack of awareness. In particular, NSP's Sherco 3 turbine engineers testified that they were unaware of this specific risk. (Doc.480 at 562:19-565:17). GE's own engineer likewise testified that notice of this specific risk could have been, but was not, disseminated through an official technical information letter (despite his expectation that it would be). (Docs.478 at 963:25-964:9, 480 at 562:19-565:17, 482 at 1362:22-1363:4, 1366:13-1367:18). In fact, NSP's turbine engineer asked GE for up-to-date technical advice for SCC inspections on drum boiler units like Sherco 3, including any changes to inspection standards for finger-dovetail attachments, and the GE sales representative reaffirmed NSP's reliance on the inadequate inspection advice from the outdated TIL 1121-3AR1. (Tr.Exs.38,39). Weeks later, when that sales representative was informed that GE had

learned it should recommend time-based inspections (and not inspections based solely on operational anomalies), he chose not to communicate that information to NSP, even though he knew NSP was unaware of the new advice and had been misled to believe no updated advice was warranted. Likewise, his counterpart closed NSP's inquiry a few months later without ever confirming that NSP had received the time-based inspection advice. GE not only should have known, GE *did* know NSP was unaware of the specific and substantial risk of NSP's ongoing operation of Sherco 3 without periodic inspections. (Docs.478 at 963:25-964:9, 482 at 1361:6-14, 1362:22-1363:4, 1364:3-1365:8, 1366:13-1367:18). The trial evidence was more than sufficient to allow a reasonable jury to find that NSP was, in fact, unaware of that risk.

In fact, the jury effectively *did* reach that finding. The three affirmative responses on the special verdict form establish that the jury found GE knew there was a risk about which NSP should have been advised, NSP relied on GE to provide such advice because NSP had come to rely on GE's ongoing advice and therefore would otherwise be unaware, and GE failed to provide that critical advice. (Add.2). Of course, the post-sale failure to warn claim does not require a showing of gross negligence, so the jury's finding of no gross negligence would not defeat this claim.

On de novo review, this Court should reverse the directed verdict and at a minimum remand Count V for a new trial.

B. If proof of gross negligence or willful wanton negligence were required, the district court erroneously excluded evidence critical to both claims

The district court erred in excluding evidence of GE's research, knowledge, and issue tracking by granting several GE motions *in limine*. (Add.75-78). "An evidentiary error is prejudicial if it might reasonably have influenced the jury and changed the result of the trial." *George v. Estate of Baker*, 724 N.W.2d 1, 9 (Minn. 2006). Here, the district court excluded evidence regarding GE's pre-failure knowledge of other SCC incidents in its turbine fleet; GE's knowledge of dangers associated with the design and materials used in its fleet; and GE's efforts to research and develop solutions for latent SCC, including a time-based inspection protocol that it should have recommended to customers. (Add.74-78). Those exclusions substantially prejudiced Plaintiffs' ability to prove gross negligence and willful and wanton negligence. The only adequate remedy is a new trial at which Plaintiffs may use any and all relevant evidence.

1. Evidence that GE was collecting information concerning incidents of stress corrosion.

The district court erred by granting GE's motion *in limine* to exclude "incomplete and duplicative evidence concerning other incidents of SCC." (Add.76-77). The Court ruled that "any exhibits relating to SCC failure in tangential entry turbines shall be excluded, any exhibits regarding SCC failure after November 19, 2011 shall be excluded, and the parties shall work together to create one exhibit that contains accurate information about SCC known by either party to have occurred in finger dovetail turbines prior to November 19, 2011." (Add.76-77). This ruling prevented Plaintiffs from fully

demonstrating to the jury an essential element of their negligence-based claims—that GE gained extensive knowledge of time-based SCC in drum and once-through boiler units alike. And the use of the same material between tangential and finger attachments, plus exposure to the same steam chemistry, made evidence of cracking in both tangent and finger attachment rotors relevant to GE's closely-held knowledge. The excluded and limited evidence was critical to Plaintiffs' claims, probative to show the extent of GE's risk awareness and severity of GE's choice not to warn operators. Such an erroneous exclusion warrants a new trial.

To prove their post-sale duty to warn claim under the revised legal duty from *Great Northern*, Plaintiffs were required to show that GE knew or reasonably should have known that the product poses a substantial risk of harm to persons or property. *See Great N. Ins. Co.*, 911 N.W.2d at 520 (quoting Restatement (Third) of Torts: Products Liability § 10). To prove willful and wanton negligence, Plaintiffs were required to prove that GE knew of a peril to NSP and failed to exercise ordinary care to prevent the harm suffered. *See Gage v. HSM Elec. Prot. Servs.*, 655 F.3d 821, 826 (8th Cir. 2011). And to prove gross negligence, if required, Plaintiffs were required to prove that GE committed a negligent act or omission of an aggravated character as distinguished from a mere failure to exercise ordinary care—here, that it knew of a peril to NSP that would increase with every passing day, yet deliberately withheld that information from NSP. *See State v. Bolsinger*, 21 N.W.2d 480, 485 (Minn. 1946), *overruled on other grounds by*, *State v. Engle*, 743 N.W.2d 592 (Minn. 2008).

Each of these claims is based on GE's negligent failure to convey its knowledge of a peril to NSP. Therefore, what GE knew about the dangers of SCC in its turbine fleet, and when it gained that knowledge, is unquestionably relevant to and probative of Plaintiffs' negligence claims. It was prejudicial error to exclude or unreasonably limit Plaintiffs' ability to present the extensive evidence showing that GE spent decades actively collecting information regarding occurrences of SCC in its fossil turbine fleet and had ample knowledge from which GE could have warned NSP of the need to perform a buckets-off inspection of its finger dovetails anytime in the 10 years before Sherco 3 failed.

The extensive list of evidence excluded by the court, as listed in the offer of proof (Add.112-116), includes information such as GE's failure forecasting efforts revealing inevitable time-based finger-dovetail cracking as turbines aged, that as predicted SCC had begun to plague GE's low-pressure turbine fleet, and that the risks were sufficiently significant to support expending substantial resources to develop new designs that avoid the latent cracking risk.

The Court's last-minute allowance of Exhibits 1224 and 1224a, which were GE-created spreadsheets listing SCC incidents other than that at Sherco, was an incomplete solution to this error. (Doc.479 at 1080:1-21). First, those exhibits came too late, just prior to Plaintiffs' close of case and after several critical witnesses had already testified. Second, the Court's prior exclusion of the evidence affected designated deposition testimony, for example that of a critical GE engineer—Eloy Emeterio—whose testimony should have included extensive discussion about SCC investigation, tracking, and

knowledge, but was substantially limited based on this exclusion. Third, a single exhibit could not fully reflect the extent of GE's knowledge: the single, post-discovery-created document could not convey to the jury GE's decades of research, by several different internal groups, with mounting concerns over the results, and extensive internal communications and efforts to address—all while keeping the information from NSP. The cumulative nature of the evidence—which was the district court's concern—*was* its probative value.

2. Evidence of design aspects affecting SCC risks

The district court also granted GE's motion in limine to exclude documentary and testimonial evidence "regarding alleged design or manufacturing defects related to Sherco Unit #3." (Add.75-76). The district court acknowledged Plaintiffs "have a legitimate interest in the information contained in the exhibits as it tends to show what Defendants knew about SCC and when it obtained that knowledge," but nonetheless excluded it as too technical and potentially confusing to the jury since design defects were not at issue. (Add.76). The Court indicated that Plaintiffs' witnesses could testify about the evidence solely to demonstrate GE's knowledge, but at trial, the vast majority of the evidence Plaintiffs would have presented was excluded and large portions of testimony designated in depositions were stricken. The Court's erroneous exclusion of this evidence, despite acknowledging Plaintiffs' need for the evidence, unfairly prejudiced Plaintiffs.[6]

[6] For a more detailed description of the wrongfully excluded evidence, *see* Plaintiffs' Offer of Proof Regarding Evidence and Testimony of GE's Knowledge of Dangers

Critically, GE based much of its defense on challenging NSP's steam chemistry quality. Even though steam chemistry can be a contributing factor to the development of SCC, GE came to learn that other factors also affected SCC likelihood (such as material and design). Those elements were completely controlled by GE, and the latent SCC risk of those elements was exclusively known to GE. Evidence showing that GE knew its design and material elements created a situation ripe for time-based SCC failure irrespective of an operator's steam chemistry conditions was highly probative, and not confusing or duplicative. Such evidence was particularly relevant and critical to Plaintiffs' ability to counter GE's steam-chemistry defense.

C. GE's development of time-based inspection recommendations was not a "subsequent remedial measure"

Prior to trial, the district court granted GE's motion in limine to exclude evidence of TIL 1886 as a subsequent remedial measure. The district court found that "there are indications that TIL 1886 was a remedial measure" implemented after the 2011 failure and therefore "Plaintiffs offering evidence of TIL 1886 to show remedial measures after the incident is barred by Rule 407." (Add.77-78). That exclusion—of the TIL and all related evidence—ignored the origin of the TIL and a pre-failure decision by GE to issue such a TIL. Even more, TIL 1886 was offered for purposes other than an attempt to show remedial measures, which independently should have allowed TIL 1886—and all evidence related to TIL 1886—to be used before the jury.

Associated with the Use of its Product and the Appendices to that Offer of Proof. (Add.104-111; Doc.408).

Minnesota Rule of Evidence 407 excludes evidence of measures taken after an event that, "if taken previously, would have made the event less likely to occur" where such evidence would be used to prove negligence, culpable conduct, a product defect, or need for a warning. But Rule 407 does not apply "when the determination to make the change is made prior to a plaintiff's injury." *Kociemba v. G.D. Searle & Co.*, 683 F. Supp. 1579, 1581 (D. Minn. 1988)[7]; *see also Myers v. HearthTechnologies, Inc.*, 621 N.W.2d 787, 792 (Minn. Ct. App. 2001), *review denied* (Minn. Mar. 13, 2001) (actions to change product prior to explosion not inadmissible under Minn. R. Evid. 407). Moreover, Rule 407 does not require exclusion if the evidence is used for other purposes such as demonstrating feasibility of a particular precautionary measure.

Both exceptions apply to TIL 1886. First, the evidence demonstrates that in February 2008—years before the failure—GE knew that TIL 1277 required "a revision [to apply time-based intervals to drum boilers as well] for some time now—just hasn't gotten to the top of the priority list." (Tr.Ex.38). GE employee Howenstein explained at that time, "I can't promise when we will get it done *but we do know that a revision is in order*." (*Id.*) (emphasis added). His deposition testimony (which would have been elicited at trial but for the Court's exclusion of TIL 1886) went further, acknowledging that TIL 1886 was the revision he contemplated in his 2008 statement. (Doc.99 Ex.7, pp. 84:5-85:14).

[7] Minnesota Rule of Evidence 407 parallels the federal rule. *See* Fed. R. Evid. 407; Minn. R. Evid. 407.

A pre-accident decision to provide a warning negates the subsequent nature of a remedy rendering the fact that the warning was issued *much* later a permissible consideration for the jury. *See Kociemba*, 683 F. Supp. at 1581; *Beniek v. Textron, Inc.*, 479 N.W.2d 719, 723 (Minn. Ct. App. 1992), *review denied* (Minn. Feb. 19 & 27, 1992) (no violation of rule 407 where evidence regarding post-sale duty to warn related to defendant's pre-accident actions); *see also Raymond v. Raymond Corp.*, 938 F.2d 1518, 1523 (1st Cir. 1991) (rule 407 does not bar evidence of pre-accident design modification blueprints); *Cupp v. Nat'l R.R. Passenger Corp.*, 138 S.W.3d 766, 776-77 (Mo. Ct. App. 2004) ("The public policy rationale for excluding evidence of post-accident remedial measures does not apply if the measures in question were planned, provided for, or undertaken prior to the accident."); *Thornton v. Nat'l R.R. Passenger Corp.*, 802 So.2d 816, 820 (La. Ct. App. 2001) (post-accident investigation report and safety alerts admissible because measures were known and available prior to accident).

TIL 1886 and related evidence should also have been admissible to prove a precautionary measure was feasible. Minn. R. Evid. 407. Plaintiffs argued throughout trial that GE knew there was a substantial risk to the specific turbines like Sherco 3 and that GE should have warned NSP. Yet GE rebutted that argument in part by contending it was not feasible to issue the type of technical memorandum requested by NSP: according to GE, it "had numerous, appropriate reasons not to issue additional TIL guidance regarding finger dovetail cracking in drum boiler-fed steam turbines . . . because TILs can be expensive and disruptive to plant operations," and that they "knew of only two (2) non-catastrophic incidents of finger dovetail cracking in units with drum

boilers." (Defs.' Tr. Br., Doc.343, p.11 n.5). These arguments, however, ignore that GE issued TIL 1121 (which recommended customers who experience an abnormal condition perform *the same* expensive and disruptive magnetic particle inspection as time-based TIL 1886) after only detecting two non-catastrophic incidents of finger dovetail cracking. (*See* Tr.Ex.6; Add.95-97). Moreover, TIL 1886 refutes several of GE's arguments raised at trial, for example, GE's contention that prior "non-catastrophic incidents" did not justify a warning when TIL 1886 cites 60 incidents of prior failures as the basis for the update, or GE's contention that TIL 1121-3AR1 substantively addressed all necessary inspection standards for L-1 finger dovetails on drum boiler units such that an update was unnecessary. (*See* Add.100-103 (acknowledging 60 incidents and noting TIL 1886 supplements TIL 1121-3AR1)). At the very least, TIL 1886 and the related evidence addresses the fact issue of feasibility, which was before the jury.

Finally, TIL 1886 dictates that an operator is to conduct a magnetic particle inspection after 22 years of service. Sherco 3 went into operation in 1987. In 2009, Sherco 3 would have been in service for 22 years and a magnetic particle inspection should have been performed at the next inspection. GE knew in 2008 that TIL 1886 needed to be implemented and even recommended that certain customers perform magnetic particle inspection on their units. (Tr.Ex.38.) GE failed to provide NSP with this information, resulting in the catastrophic failure. It was prejudicial error for the district court to exclude this evidence.

D. The district court erred by granting summary judgment on Plaintiffs' fraud claim

Following this Court's 2017 remand, the district court granted summary judgment on Count I: Fraud concluding that the evidence shows that GE's actions in withholding critical inspection information was, at most, negligent and not intentional. (Add.55-56). However, the district court misconstrued the applicable law to require facts of intentionality, and even under that standard narrowly construed the evidence. A party may be liable for fraud under either an intent-based or negligence-based theory. The facts, viewed in the light most favorable to Plaintiffs, provided sufficient basis for a jury to find either type of fraudulent concealment. Dismissal was improper and a new trial on Count I is required.

1. Standard of review for summary judgment

A court "may not decide factual issues on a motion for summary judgment; its sole function is to determine whether fact issues exist." *Hamilton v. Indep. Sch. Dist. No. 114*, 355 N.W.2d 182, 185 (Minn. Ct. App. 1984). This Court reviews the lower court's grant of summary judgment de novo, viewing all facts in the light most favorable to Plaintiffs. *See Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010).

2. The district court applied the wrong law on fraud

Count I alleged that GE fraudulently concealed the likelihood of SCC based on the mere passage of time and the resultant need for time-based inspections. (Add.83-86).

GE was amassing information of increased time-based failure risk in low-pressure turbines like Sherco 3, but GE failed to alert operators like NSP. (Add.83-86 ¶¶ 65-74).

Plaintiffs' fraud claim required proof that GE failed to disclose a known fact, the non-disclosed fact was material, and the non-disclosure of that fact was relied upon. *Florenzano v. Olson*, 387 N.W.2d 168, 173 (Minn. 1986). That non-disclosure can either be intentional or negligent, but still amounts to fraud. For example, Plaintiffs could establish that GE was liable for *intentionally* withholding critical inspection information and bolstering reliance on the incomplete advice of TIL 1121-3AR1. *See Florenzano*, 387 N.W.2d at 172 (finding intent based on circumstantial evidence and knowledge); *Davis v. Re-Trac Mfg. Corp.*, 149 N.W.2d 37, 38-39 (Minn. 1967) (defining elements of intentional fraud). But Plaintiffs could also show fraud through omission: (1) GE omitted a past or present material fact unknown to NSP and that GE was under a duty to disclose; (2) GE intended NSP to rely on that omission; (3) NSP did rely on the omission; and (4) Plaintiffs suffered pecuniary damages as a result of that reliance. *Williams v. Heins, Mills & Olson*, No. A09-1757, 2010 WL 3305017, at *3 (Minn. Ct. App. Aug. 24, 2010) (*citing Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 532 (Minn. 1986); *Richfield Bank & Trust Co. v. Sjogren*, 244 N.W.2d 648, 650 (Minn. 1976)); *see also Williams v. Smith*, 820 N.W.2d 807, 816 (Minn. 2012); *Florenzano*, 387 N.W.2d at 177-79 (Simonett, J., concurring); *Schuler v. Meschke*, 435 N.W.2d 156, 161 (Minn. Ct. App. 1989).

The district court rejected the existence of any legal basis for fraudulent concealment other than fraud with intent, despite acknowledging that *Florenzano*

provides for alternative forms of fraud, and *Davis* addresses alternative standards for scienter to support intentional fraud. (Add.55-57).

3. Evidence of fraud was sufficient

Regardless of which legal standard applies in this matter, Plaintiffs put forth ample evidence from which a jury could have found fraud under either standard. GE disseminated TIL 1121-3AR1, which limited inspections to operational anomalies. (Add.94-97). After issuing TIL 1277-2, GE knew that inspections should be time-based, yet TIL 1277-2 only directed once-through-boiler operators, not NSP, to inspect every 10 years. (Add.98-99). At the same time, GE had conducted extensive research to discover that SCC, in *all* rotor-wheel attachment types and *all* boiler types, would inevitably occur. (Doc.99 at Ex.12 pp.56-57, Ex.28 at GE-NSP00421954).

The district court found that "[w]hile [plaintiffs] have provided ample evidence demonstrating GE had knowledge of SCC and more frequent magnetic particle inspections would be unpalatable to operators, [Plaintiffs] have not provided any evidence that demonstrates GE acted with an intent for [NSP] to rely on a material omission." (Add.57). That analysis by the district court was unnecessarily narrowed to a single fact issue: what did GE representative Josh Bird know, or not know, at the time he told NSP no time-based inspections were recommended. But that single question is only one part of GE's fraud.

Assumed duties obligated GE as a whole (not just Josh Bird) to respond to NSP's inspection queries in 2005 and 2008, and to respond fully. (*See* Tr.Exs.15,16,39; Doc.99 at Ex.41 p.291). GE internally altered inspection interval standards, but never informed

NSP. (Tr.Exs.38,39). GE instead advised NSP that an updated TIL would not be issued, implying that no time-based inspections were needed. (Tr.Ex.39 p.2). In short, by 2008, GE knew inspections were needed on drum boiler units, GE had amassed knowledge to that effect, yet GE did not tell NSP *even when directly asked*. (Tr.Exs.38,39; Doc.474 at 255:13-256:8 (recommendation not relayed to NSP); Doc.475 at 157:8-11, 480 at 520:19-524:13 (high cost and timely procedure); Docs.475 at 198:8-200:24, 480 at 564:16-565:17; Tr.Exs.15, 29p.4). Additional evidence proffered in opposition to summary judgment further showed GE's motive: fears of lost work and lost customers. (Docs.99, Ex.33 (time-based inspections not "palatable" to customers), Ex.34 (GE lacked capability to repair the expected number of cracked rotors)).[8]

Ample evidence existed for a jury to find either intentional fraud or negligent misrepresentations. The district court erred in granting summary judgment on Count I; Plaintiffs are entitled to a new trial.

IV. THE DISTRICT COURT GRANTED EXCESSIVE COSTS

If judgment is entered for Plaintiffs, or a new trial is ordered, the judgment for GE's costs should be vacated. But even if judgment for GE is affirmed, the award of costs is excessive and should be reversed.

[8] This critical evidence of motive was also excluded from trial as part of the district court's Order and Amended Order on Motions is Limine and Memorandum, but was nonetheless submitted as part of Plaintiffs' offers of proof. (*See* Add.60-81, 104-124; Docs.407-409).

A. Standard of Review

The prevailing party shall be allowed costs and reasonable disbursements. Minn. Stat. §§ 549.02, .04 (2018). Therefore, upon a specific finding that both the costs and disbursements are reasonable and necessary, the court shall approve the recovery of costs and disbursements. *See Stinson v. Clark Equip. Co.*, 473 N.W.2d 333, 336 (Minn. Ct. App. 1991), *review denied* (Minn. Sept. 13, 1991). But the district court must take a "hard look" while conducting the "exacting task of reviewing and recording with particularity the items claimed." *Id.* at 338 (quotation omitted). This Court reviews a district court's award of costs and disbursements for an abuse of discretion. *Kellar v. Von Holtum*, 605 N.W.2d 696, 703 (Minn. 2000).

GE requested costs and disbursements totaling $252,162.49. (Doc.439). Plaintiffs objected to a substantial portion of the costs sought by GE. (Doc.441). Nonetheless, the district court granted, without explanation, the entirety of GE's request. (Add.30-32).

B. GE's claimed costs are unreasonable and unnecessary

A party's requests for costs and disbursements must be reasonable and necessary. *See Stinson*, 473 N.W.2d at 336. A party seeking to recover costs and disbursements must file an application listing in detail those costs and disbursements needed. Minn. R. Civ. P. 54.04(b). If a party requests expert-witness fees, it must file an affidavit in support of its application including specific details about the expert's hourly rate and time spent preparing for that expert's testimony. *Stinson*, 473 N.W.2d at 336.

GE's application failed to provide the detail required. GE merely listed large totals for broad categories of costs and disbursements and attached a large mass of confusing

and vague invoices. (Doc.439). As a result, it is impossible to establish what costs are in fact reasonable and necessary. GE's request was also devoid of the requisite affidavit detailing the necessary expert witness fees and expenses. The district court erred in awarding costs and disbursements without proper articulated need for and reasonableness of those disbursements, including expert-witness fees, lay-witness fees, reproduction fees, subpoena fees, and deposition fees.

The district court's neglect of detailed scrutiny was further evident in several errors of law.

1. Witness fees were awarded above the statutory limit

Recovery for lay witness fees are capped at $20 per day plus 28 cents a mile from the Minnesota border. Minn. Stat. § 357.22. The district court, however, determined that disbursements totaling $14,976.00 were appropriate to compensate lay witness Jim Howenstein for time spent. Much of this time was for trial preparation and travel to trial, which is not compensable for lay witnesses. *See* Minn. Stat. § 357.22(1). Further, this award of disbursements clearly contravenes the $20 per day limit established by Minn. Stat. § 357.22(1) and was an abuse of the court's discretion. *See Enduracon Techs., Inc. v. Northshore Min. Co.*, No. A09-2332, 2010 WL 3854336, at *12 (Minn. Ct. App. Oct. 5, 2010) (award of witness fees exceeding $20 per witness per day was an abuse of discretion), *review denied* (Minn. Dec. 22, 2010).

The district court also awarded disbursements totaling $7,138.29 to compensate lay witnesses for travel, parking, meals, and rental car expenses. These reimbursements plainly fall outside the scope of Minn. Stat. § 357.22 and were awarded in error. *See also*

State v. Lopez-Solis, 589 N.W.2d 290, 296 (Minn. 1999) (quoting *In re Miller's Estate*, 64 N.W.2d 1, 3 (Minn. 1954) ("[Minn. Stat. § 357.22(2)] clearly does not authorize the payment of travel expense to a nonresident witness for travel outside the state of Minnesota")).

2. GE was not the prevailing party on several motions.

A court shall only award motion costs on motions where the party prevails. *See* Minn. Stat. § 549.04, subd.1; *see also Dennis Drewes, Inc. v. Middle Snake Tamarac River Watershed Dist.*, No. A09-285, 2009 WL 4796467, at *5 (Minn. Ct. App. Dec. 15, 2009), *review denied* (Minn. Feb. 16, 2010) (determining that district court's denial of motion fees for motions on which the party did not prevail was proper).

GE was awarded motion fees for the following motions that were denied: GE's February 11, 2014 Motion to Dismiss; GE's April 14, 2014 related reply memorandum; GE Energy Control Solutions' January 22, 2016 Motion for Summary Judgment; GE's June 15, 2016 Motion for Summary Judgment; GE's December 8, 2017 Renewed Motion for Summary Judgment; GE's August 31, 2018 Motion in Limine regarding subrogation damages; and GE's September 14, 2018 Response to four of Plaintiffs' Motions in Limine which the district court granted.

C. The district court did not make findings of fact to justify its decision

The district court must make findings of fact or state reasons when ruling on a party's claim for an award of costs and disbursements. *See Illinois Farmers Ins. Co. v. Brekke Fireplace Shoppe, Inc.*, 495 N.W.2d 216, 222 (Minn. Ct. App. 1993) (remanding

costs and disbursements issue because district court failed to make specific findings on the reasonableness and necessity); *Beniek v. Textron, Inc.*, 479 N.W.2d 719, 724 (Minn. App. 1992) ("When reviewing a request for costs and disbursements, the district court must make sufficient findings of reasonable and necessary costs and disbursements"), *review denied* (Minn. Feb. 19, 27, 1992); *Stinson*, 473 N.W.2d at 338 (remanding costs and disbursements issue because district court did not make "sufficient findings for review"). This requirement is consistent with the general principal that a district court must express its findings in a manner that will allow an appellate court both to understand the district court's rationale for its decision and to evaluate the correctness or incorrectness of that rationale. *See, e.g., Becker v. Alloy Hardfacing & Engineering Co.*, 401 N.W.2d 655 (Minn. 1987); *In re Commitment of Spicer*, 853 N.W.2d 803, 811 (Minn. Ct. App. 2014); *Metro. Sports Facilities Comm'n v. Minn. Twins P'ship*, 638 N.W.2d 214, 220 (Minn. Ct. App. 2002), *review denied* (Minn. Feb. 4, 2002); *Nat'l Union Fire Ins. Co. v. Evenson*, 439 N.W.2d 394, 398–99 (Minn. Ct. App. 1989), *review denied* (Minn. July 12, 1989).

GE submitted a cursory application for costs and disbursements. The district court summarily accepted GE's asserted costs and disbursements in full, without any analysis or written findings.

If the judgment for GE is affirmed, the issue of costs and disbursements should nevertheless be vacated and remanded to the district court for findings of fact and statements of reasons for its decision.

Conclusion

GE's Assumption of a Duty of Care to NSP, and subsequent breach of that duty, were the paramount issues at trial. All parties knew an Assumed Duty Claim existed following remand by this Court, and all parties litigated that claim. The jury's special verdict, which found all requisite elements of duty, breach, and causation, must be enforced. Judgment for GE should be reversed, and judgment for Plaintiffs should be entered on that verdict. To the extent the Assumed Duty claim was not adequately alleged in the Amended Complaint, the district court's denial of a Rule 15.01 or 15.02 post-trial amendment to the complaint was error.

Even if judgment is not entered on the verdict, several errors—individually and cumulatively—warrant a new trial. Post-sale duty to warn should have been submitted to the jury. Likewise, the fraud claim was supported by sufficient evidence to justify jury resolution. And evidentiary exclusions were prejudicial error that affected the outcome on both willful and wanton negligence and (if required) gross negligence.

Finally, if neither judgment on the verdict or a new trial are granted, the district court's cost award is devoid of any analysis or support. It should be reversed and remanded for proper scrutiny.

Dated: June 11, 2019

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CERTIFICATE OF COMPLIANCE

As counsel for AEGIS Insurance Services, Ltd. and Energy Insurance Mutual Limited, I certify that this brief complies with the requirements of Minn. R. App. P. 132.01 having been printed in 13-point, proportionately spaced typeface using Microsoft Word 2010 and containing **13,975** Word Count words, including headings, footnotes and quotations.

Dated: June 11, 2019

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STATE OF MINNESOTA
COUNTY OF SHERBURNE

DISTRICT COURT
TENTH JUDICIAL DISTRICT

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

Plaintiffs,

v.

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

Defendants.

Court File No. 71-CV-13-1472

ORDER DENYING PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL

The above-entitled matter came before the Honorable Sheridan Hawley on January 4, 2019, for a hearing to consider Plaintiffs' Motion for Judgment as a Matter of Law or Alternatively for a New Trial. The parties were represented by and through the following attorneys: David S. Evinger and Daniel W. Berglund, for Plaintiffs, and Timothy R. Schupp and Robert W. Vaccaro, for Defendants. After considering the evidence, arguments of counsel, and applicable law, the Court makes the following:

ORDER

1. Plaintiffs' Motion for Judgment as a Matter of Law or Alternatively for a New Trial is **DENIED**.
2. The accompanying memorandum is incorporated by reference.
3. Court Administration shall serve a copy of this Order on all parties.
4. Court Administration shall close the file.

IT IS SO ORDERED.

BY THE COURT:

Hawley, Sheridan (Judge)
2019.03.11 12:14:30
-05'00'

Sheridan Hawley
Judge of District Court

Date

MEMORANDUM

This case was tried to a jury that found in favor of Defendants General Electric Company; General Electric International, Inc.; and GE Energy Services, Inc. ("GE"). The Court thereafter entered Judgment for GE. Pending before the Court is Plaintiffs' Motion for Judgment as a Matter of Law, or in the Alternative, for a New Trial, filed on November 30, 2018. For the reasons set forth below, the Plaintiffs' motion is denied.

BACKGROUND

On January 30, 2014, Plaintiffs Northern States Power Company, Southern Minnesota Municipal Power Agency, Aegis Insurance Services, LTD, and other Interested Insurers as subrogees of Northern States Power Company, ("NSP"), filed an Amended Complaint that explicitly declared five causes of action for fraudulent concealment (Count I), willful and wanton negligence (Count II), gross negligence (Count III), professional negligence (Count IV), and post-sale failure to warn (Count V).

In 2016, the Court granted summary judgment to GE on all counts based on the economic-loss doctrine. The Minnesota Court of Appeals thereafter reversed and remanded, stating: "To the extent that any of appellants' claims was based on an alleged failure to disclose a product defect present and known at the time of sale, the district court correctly determined that such a claim is barred by the economic-loss doctrine." *N. States Power Co. v. Gen. Elec. Co.*, No. A16-1687, 2017 WL 3013230, at *5 (Minn. Ct. App. July 17, 2017). "But the bases for appellants' claims were not limited to an alleged product defect and instead included the assumption of a duty to provide updated technical information." *Id.* The Court of Appeals concluded, "Because the undisputed facts demonstrate that the

sales contract does not encompass any bargained-for obligation or allocation of liability related to the post-sale advice and lack of advice at issue in this action, we conclude that alleged tortious conduct is independent of the sales contract." *Id.*[1]

On March 22, 2018, the Court issued an Order, dismissing the fraudulent concealment claim (Count I), reasoning that NSP failed to provide any evidence that GE intended for NSP to rely on a material omission. Order, p. 23. The Court denied GE's motion for summary judgment on the other three remaining counts, stating that a reasonable person could draw different conclusions as to whether GE assumed a duty to update NSP with technical information and subsequently breached that duty. Order, p. 11.

On September 21, 2018, NSP filed their trial brief with four claims. NSP noted its claims for willful and wanton negligence (Count II) and gross negligence (Count III). Pls.' Trial Br. 22. For the post-sale failure to warn claim (Count V), NSP indicated that the cause of action was based on Restatement (Third) of Torts: Products Liability § 10 (Am. Law. Inst. 1998). Pls.' Trial Br. 15-16. Notably, NSP also asserted a fourth claim for a negligent undertaking based on Restatement (Second) of Torts § 323 (1965). Pls.' Trial Br. 16-17. Conversely, GE's trial brief stated that are only three remaining claims—willful and wanton negligence (Count II), gross negligence (Count III), and post-sale failure to warn (Count V). Defs.' Trial Br. 1. On the record, the Court instructed the parties to review the trial briefs because there was a dispute as to the number of remaining claims. NSP indicated that it would review the issue and file a responsive brief if necessary.

[1] NSP did not appeal the dismissal of Count IV for professional negligence.

On October 5, 2018, NSP filed a responsive trial brief recognizing that it had three remaining claims, rather than four. Pls.' Resp. Trial Br. 7. In the responsive brief, NSP agreed with GE that the three remaining claims were for willful and wanton negligence (Count II), gross negligence (Count III), and post-sale failure to warn (Count V). Pls.' Resp. Trial Br. 7. NSP also indicated that Count III was a grossly negligent undertaking claim based on § 323, and the post-sale failure to warn claim (Count V) was based on Products Liability § 10. Pls.' Resp. Trial Br. 8, 10. In the responsive trial brief, NSP made no mention of a negligent undertaking claim based on § 323. Prior to jury deliberation, NSP failed to either mention the claim or attempt to amend the complaint.

On October 16, 2018, the parties delivered their opening statements to the jury. Thereafter, over the next two weeks, NSP called 16 witnesses to testify, and GE called 3 witnesses over a day and half before resting. After hearing the evidence at trial, the Court granted GE's motion for judgment as a matter of law on the post-sale failure to warn claim (Count V). In doing so, the Court found that there is no basis to establish a legal duty because there is no way a jury could find that NSP was unaware of the risk of harm. Tr. 1859:15-1860:3.

The Court allowed the jury to evaluate whether GE should be liable in connection with the claims for willful and wanton negligence (Count II) and gross negligence (Count III). For Count II, the jury was read the following instruction:

> Willful and wanton negligence is a reckless disregard of the safety of the person or property of another by failing after, and not before, discovering the peril, to exercise ordinary care to prevent the impending injury. In other words, if a person fails to exercise ordinary care after (1) the peril was present, and (2) the peril was known to the person, his ordinary negligence

> rises to a higher level of negligence—willful and wanton negligence. Willful and wanton negligence cannot be predicated upon honest misjudgment.

The Special Verdict Form was organized with Questions 1, 2, and 3 for the willful and wanton negligence claim (Count II), Questions 4, 5, 6, 7, and 8 for the gross negligence claim, and Questions 9 and 10 to determine NSP's negligence, as well as Question 11, which allocated comparative fault. On October 31, 2018, the jury returned a special verdict with the following findings:

1. GE did not discover that the peril of a catastrophic failure due to stress corrosion cracking was impending for NSP.
2. GE undertook an obligation after the sale of Unit 3 to render technical information, advice, and recommendations to NSP. GE should have recognized that such provision of technical information, advice, and recommendations was necessary for the protection of NSP's property and employees. GE failed to exercise reasonable care in that provision of technical information, advice, and recommendations because (a) GE increased the risk of harm, or (b) NSP relied on the undertaking. But GE did not act with gross negligence in that provision of technical information, advice, and recommendations.
3. NSP was negligent in the operation and maintenance of Unit 3, and this negligence was a direct cause of property loss.
4. In the allocation of damages, the jury found that GE was at fault for 52% and NSP was at fault for 48%.

On November 7, the Court issued Judgment in favor of GE. In doing so, the Court recognized that there were two counts submitted to the jury: willful and wanton negligence (Count II) and gross negligence (Count III). The Court made the following conclusions of law to arrive at the Judgement. First, GE was entitled to Judgment on the willful and wanton negligence claim because the jury found that GE did not discover that the peril of a catastrophic failure due to stress corrosion cracking was impending for NSP. Second, GE was entitled to Judgment on the gross negligence claim because the jury specifically found GE was not grossly negligent in the provision of technical information, advice, and recommendations. The Court also concluded that, while the jury answered the comparative fault question as instructed, the jury's answer to this question is not legally relevant because the jury found that GE did not act with gross negligence.

DISCUSSION

NSP has filed a Motion for Judgment as a Matter of Law, arguing that judgment should be entered in its favor because the jury verdict establishes a viable post-sale failure to warn claim, and the Court erred in dismissing the post-sale failure to warn claim under *Great Northern* on directed verdict. In the alternative, NSP contends the Court should amend the pleadings. NSP also requests a new trial on several grounds.

I. Judgment as a Matter of Law

The Court has authority to resolve a judgment as a matter of law by allowing the judgment to stand, ordering a new trial, or directing entry of judgment as a matter of law. Minn. R. Civ. P. 50.02. A district court should grant a judgment as a matter of law "only in those unequivocal cases where (1) in the light of the evidence as a whole, it would clearly

be the duty of the district court to set aside a contrary verdict as being manifestly against the entire evidence, or where (2) it would be contrary to the law applicable to the case." *650 N. Main Ass'n v. Frauenshuh, Inc.*, 885 N.W.2d 478, 486 (Minn. Ct. App. 2016). "The evidence must be considered in the light most favorable to the prevailing party." *Harman v. Heartland Food Co.*, 614 N.W.2d 236, 240 (Minn. Ct. App. 2000).

A. Post-Sale Failure to Warn Claim

NSP asserts that Count V effectively stated a claim for assumed duty of care as a negligence claim. NSP contends that *Great Northern Insurance Company v. Honeywell International, Inc.*, 911 N.W.2d 510 (Minn. 2018), did not replace a claim for a negligent undertaking under § 323. NSP therefore argues that Count V was a claim for a negligent undertaking. But in their brief, NSP argues the correct legal standard uses the factors for a product liability claim where there is a "continuing duty to warn," which "arises only in special cases." *See Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 833 (Minn. 1988) ("This products liability case raises a variety of issues."). NSP demonstrates in their arguments that it intended Count V to be treated as a products liability claim, which is what the Court applied at trial. In their brief, NSP quickly demonstrates its confusion as to the law applicable to the separate causes of action for a negligent undertaking and a products liability claim for a post-sale duty to warn.

NSP argues that the Court should have instructed the jury on Count V as a negligent undertaking under § 323. To arrive at this conclusion, NSP speculates that the Court thought that Count V was a negligent undertaking claim based on a prior Order from March 26, 2018. In that Order, the Court denied a motion for summary judgment,

reasoning that there was a question of fact regarding whether GE assumed a duty. Order, pp. 17-19. The denial of summary judgment, prior to the presentation of testimony at trial, is not inconsistent with the Court's granting judgment as a matter of law after the presentation of NSP's evidence.

NSP's argument fails to consider its own actions leading up to trial. Based on the parties' trial briefs, the Court alerted the parties to a discrepancy in the number of remaining claims. In their responsive brief, NSP clarified the issue by recognizing there were only three claims remaining for trial, not four. The claims remaining were willful and wanton negligence (Count II), gross negligence (Count III), and post-sale failure to warn (Count V). While NSP had asserted a claim for a negligent undertaking based on § 323 in its trial brief, NSP did not mention the negligent undertaking claim in the responsive brief. Rather, NSP had taken § 323 and asserted that it was part of their gross negligence claim (Count III). Moreover, Count V was a products liability claim based on Restatement (Third) of Torts: Products Liability § 10. Notably, NSP did not seek to amend the complaint to add a claim for a negligent undertaking based on § 323 and did not raise the argument Count V was actually a negligent undertaking claim prior to jury deliberations. Rather, NSP proceeded to trial with Count V as a products liability claim. NSP now asserts that Count V was a negligent undertaking claim after clearly abandoning the claim on the eve of trial.[2]

[2] NSP also raises the retroactivity argument for the first time now following trial, despite requesting Products Liability § 10 not only in their proposed jury instruction, but also in their responsive trial brief. *See Hoff v. Kempton*, 317 N.W.2d 361 (Minn. 1982).

NSP argues that the language of Count V can be read to be a negligent undertaking under § 323. "The primary function of notice pleading is to give the adverse party fair notice of the theory on which the claim for relief is based." *Haugland ex rel. Donovan v. Mapleview Lounge & Bottleshop, Inc.*, 666 N.W.2d 689, 694 (Minn. 2003). Here, NSP invokes the lenient notice-pleading standard in an attempt to recast the post-sale failure to warn claim (Count V) from a products liability cause of action to a general negligent undertaking claim. To support this argument, NSP points to the factual allegations of its well-pled complaint. Indeed, a well-pled complaint would demonstrate factual allegations of negligence in this case. But NSP fails to consider that it organized its complaint into five distinct causes of action with Count V being clearly a products liability claim. More importantly, NSP asked to apply Products Liability § 10 to Count V at trial, which is what GE prepared to defend against. Despite NSP's creative argument that looks into the factual allegations of a well-pled complaint, Count V was clearly a products liability claim.

NSP contends the jury intended to find GE liable for a negligent undertaking based on the jury instructions and Questions 4, 5, 6, and 11 of the Special Verdict Form. NSP contends that Count V should therefore be construed as a negligent undertaking claim. As previously discussed, NSP asserted Count V as a Products Liability § 10 claim. Moreover, the jury did not find that GE was the direct cause of a negligent undertaking. NSP has also failed to offer any legal support for the conclusion that the fault allocation can be piecemealed together with other answers to establish direct causation for a negligent undertaking claim. The Court therefore denies the motion for judgment as a matter of law based on the argument that Count V was a negligent undertaking claim.

B. Products Liability § 10

NSP argues the Court erred in dismissing the post-sale failure to warn claim based on Products Liability § 10. Minnesota has adopted Products Liability § 10 to determine whether a post-sale duty to warn exists. *Great Northern*, 911 N.W.2d at 520. The Court applied the following four-prong test to determine if GE had the duty to warn:

> (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
> (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
> (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
> (4) the risk of harm is sufficiently great to justify the burden of providing a warning.

Products Liability § 10(b).

After hearing the evidence, the Court granted GE's motion for judgment as a matter of law to Count V, reasoning that NSP could not reasonably be assumed to be unaware of the risk of harm. *See* § 10(b)(2). In speculating as to the Court's decision, NSP argues that the Court erred and should have applied a standard that asks whether NSP had knowledge of a very specific time-based risk that plagued L-1 finger dovetail rows in certain low pressure turbines. In this argument, NSP again fails to consider its actions on the eve of trial. In their proposed special verdict form, NSP asked the court to focus on the risk of harm if NSP did not "perform proper and periodic rotor wheel inspections and maintenance to the LP turbine assembly." Pls.' Special Verdict Questions 1 and 2, Sept. 21, 2018. Indeed, NSP again attempts to shift their arguments after trial and misapplies the jury's answers. "The question of whether a legal duty to warn exists is a question of law

for the court—not one for jury resolution." *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986). To this question, the Court concluded that no reasonable jury could find that NSP was unaware of the risk of harm. NSP's motion for judgment as a matter of law based on Court's decision to dismiss Count V is therefore denied.

C. Amend Pleadings

NSP requests to amend the pleadings to add a cause of action for a negligent undertaking based on § 323. NSP argues that the amendment would conform to the issues tried, consented to by all parties, and addressed in the jury verdict. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Minn. R. Civ. P. 15.02. The pleadings may be amended as "as may be necessary to cause them to conform to the evidence," even after judgment. Minn. R. Civ. P. 15.02. "The decision to permit a party to amend pleadings rests within the discretion of the trial court and will not be reversed absent a clear abuse of discretion." *Tjernlund v. Kadrie*, 425 N.W.2d 292, 296 (Minn. Ct. App. 1988). "A major consideration in the trial court's decision is the prejudice that may result to the opposing party." *Id.*

Here, NSP declares that a negligent undertaking based on § 323 "has always been a part of this lawsuit" and goes to the heart of its claims. Pls.' Reply 2. But, as previously discussed, NSP never pled the claim in their well-pleaded complaint, and NSP clearly abandoned any such claim on the eve of trial. This abandonment illustrates why GE never consented to try the claim. Moreover, the Court finds it improbable that NSP just simply made a mistake by forgetting to amend the pleadings prior to trial in this complex civil

litigation that lastedfor over 5 years. Rather, NSP intentionally decided not to proceed on the claim at trial. It would therefore be a grave injustice to GE to allow NSP to shift its claims around post-trial and amend the complaint to add a claim for a negligent undertaking without giving GE the opportunity to either challenge the claim on legal grounds or present evidence to the jury to address the claim on factual grounds. The Court denies the motion to amend the pleadings.

II. Motion for New Trial

NSP maintains that a new trial is warranted because the Court erroneously dismissed the post-sale failure to warn claim and misapplied the law for willful and wanton negligence in the jury instructions and special verdict form. NSP also argues they were prejudiced and deprived of a fair trial by the Court's decision to grant several motions in limine. NSP further contends the Court erred by dismissing the fraud claim and that cumulative errors require a new trial.

A. Legal Standard

A court may grant a new trial on various grounds, including irregularity in the proceedings, an abuse of discretion, errors of law, or an unjustified decision. Minn. R. Civ. P. 59.01(a), (f), (g). "The purpose of a motion for a new trial is to permit the correction of errors by the trial judge without requiring an appeal." *Custody of Child of Williams v. Carlson*, 701 N.W.2d 274, 281 (Minn. Ct. App. 2005). "The decision to grant a new trial generally lies within the sound discretion of the district court and will not be disturbed absent a clear abuse of that discretion." *Dostal v. Curran*, 679 N.W.2d 192, 194 (Minn. Ct. App. 2004). For the reasons stated below, the Court denies the motion for a new trial.

A. Dismissal of Post-Sale Failure to Warn Claim

NSP argues the Court erred by granting a directed verdict on the post-sale failure to warn claim based on the legal determination that a reasonable person would not provide a post-sale warning. *See* Products Liability § 10. NSP maintains the court erred in its decision to dismiss the claim based on the factor that asks whether "those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm." § 10(b)(2). As previously discussed, NSP asked the Court to focus on the risk of harm if NSP did not "perform proper and periodic rotor wheel inspections and maintenance to the LP turbine assembly." Pls.' Special Verdict Questions 1 and 2, Sept. 21, 2018. Here, there was no way a jury could find that NSP was unaware of the risk of harm. The jury heard substantial amounts of evidence regarding NSP's operation of Unit 3 and knowledge of the risk of stress corrosion cracking ("SCC"). NSP knew SCC could cause failure to the Wilson Line, resulting in wheel failure and buckets departing from the rotor. NSP also knew the importance of proper steam chemistry to minimize the risk of SCC and how to inspect for SCC. NSP also knew there was an industry-wide problem with SCC. NSP could not reasonably be assumed to be unaware of the risk of harm, because the risk was disclosed in the manual that came with the turbine when it was purchased, because NSP employees had attended numerous seminars where GE discussed the risk, and because NSP's own employees had advised other NSP employees about the risks of SCC. *See Great Northern*, 911 N.W.2d at 521 (recognizing the reasonableness standard in § 10(b)(2) depends on whether "the user knows or should know of potential danger"). The evidence establishes that NSP chose not to involve GE in

inspecting the turbine because it believed GE would recommend the expensive "buckets off" inspection that was necessary to find SCC. NSP seems to want to hold GE to a standard of predicting exactly when a failure catastrophic failure would occur without providing GE with the data and access that would have allowed such a prediction. NSP's motion for a new trial related to the Court's legal determination under Products Liability § 10 is therefore denied.

B. Willful and Wanton Negligence

NSP argues the Court erred in the jury instruction and special verdict form for the willful and wanton negligence claim. "A district court has broad discretion in formulating jury instructions." *State v. Onyelobi*, 879 N.W.2d 334, 353 (Minn. 2016). But the trial court "abuses the discretion if the instructions confuse, mislead, or materially misstate the law." *Id.* (internal quotation omitted). The instructions are considered as a whole to determine whether the court "fairly and adequately explain the law of the case." *Gulbertson v. State*, 843 N.W.2d 240, 247 (Minn. 2014). The trial court also has broad discretion to decide the use and form of special verdicts. *Poppler v. Wright Hennepin Co-op. Elec. Ass'n*, 845 N.W.2d 168, 171 (Minn. 2014).

NSP contends that the Court's use of the phrases "reckless disregard" and "impending" in the jury instructions confused the jury and misstated the law.. Willful and wanton negligence is "the failure to exercise ordinary care after discovering a person or property in a position of peril." *Gage v. HSM Elec. Prot. Servs., Inc.*, 655 F.3d 821, 827 (8th Cir. 2011); *see Catlin Underwriting Agencies, Ltd. v. ALLETE, Inc.*, No. A13-2078, 2014 WL 3800595, at *7 (Minn. Ct. App. Aug. 4, 2014) (citing *Gage* in describing willful and wanton

negligence a failure to exercise ordinary care). In *Brannan v. Shertzer*, 64 N.W.2d 755, 757 (Minn. 1954), the Minnesota Supreme Court stated, "Wilful and wanton negligence as defined by this court is a reckless disregard of the safety of the person or property of another by failing [a]fter and not before discovering the peril to exercise ordinary care to prevent the impending injury." The definition, including the phrases contested by NSP, has never been overturned and has been applied by Minnesota courts on several occasions. *See, e.g., Farmers Ins. Exch. v. Vill. of Hewitt*, 143 N.W.2d 230, 238 (Minn. 1966); *see also Peterson v. Honeywell, Inc.*, No. C2-93-1795, 1994 WL 34200, at *4 (Minn. Ct. App. Feb. 8, 1994).

Here, the Court directly applied the definition from *Brannan v. Shertzer* to the jury instructions and Special Verdict Form. Moreover, NSP's argument as to the "reckless disregard" phrase is moot—the jury did not even get to Question 2 on the Special Verdict Form. Rather, the jury answered "No" to Question 1, finding that GE did not discover that catastrophic failure due to SCC was impending for NSP. While the motion includes an objection to the phrase "impending," NSP's counsel himself acknowledged that the peril must be "impending." *See* Trial Tr. 1875:4-21. The jury instructions and verdict questions were therefore not confusing and did not misstate the law. Accordingly, NSP's motion for a new trial based on the definition of willful and wanton negligence is denied.

C. Evidentiary Rulings

NSP argues the Court erred in excluding evidence. "An improper evidentiary ruling resulting in the erroneous admission of evidence will only compel a new trial if it results

in prejudicial error to the complaining party." *George v. Estate of Baker*, 724 N.W.2d 1, 9 (Minn. 2006). "An evidentiary error is prejudicial if it might reasonably have influenced the jury and changed the result of the trial." *Id.* "But the admission of evidence that is cumulative or is corroborated by other competent evidence will be deemed harmless and will not warrant a new trial." *Id.* "The admission of evidence rests within the broad discretion of the trial court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotations omitted).

i. Other Instances of SCC

NSP contends that the Court erred by granting GE's motion in limine to exclude "incomplete and duplicative evidence concerning other incidents of SCC." NSP argues this evidence was necessary to prove their claims. But the excluded evidence did not involve similar incidents to the Unit 3 event because the accident at Sherco was the only instance of catastrophic failure due to SCC in a rotor wheel finger dovetail. Nevertheless, the Court allowed ample evidence of SCC in both finger and tangential entry dovetails. The Court excluded evidence that was cumulative, potentially prejudicial, and confusing to the jury. NSP's motion for a new trial based on the Court's exclusion of certain incidents of SCC is therefore denied.

ii. Design Evidence

NSP argues the Court erred by granting GE's motion in limine to exclude documentary or testimonial evidence "regarding alleged design or manufacturing defects related to Sherco Unit # 3." NSP contends this design, material, and defect evidence was

necessary to show GE's knowledge and actions surrounding a growing SCC problem and of the need for GE to share information regarding time-based inspections. The jury, however, heard some evidence regarding design, materials, and SCC over the two-week trial, presented with a. limiting instruction was also necessary to ensure the jury did not consider the issue of product defect, which was not submitted to the jury. *See Northern States*, 2017 WL 3013230, at *5 (finding the district court properly excluded claims based "an alleged failure to disclose a product defect present and known at the time of sale"). The Court properly excluded large amounts of complicated, highly technical material that would have improperly influenced the jury. The Court therefore denies NSP's motion for a new trial based on the exclusion of design and manufacturing defect evidence.

iii. TIL 1886

NSP argues the Court erred by granting GE's motion in limine to exclude TIL 1886 as a subsequent remedial measure. Minnesota Rule of Evidence 407 provides, "When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction." NSP maintains that the evidence was not offered to show liability, rather to establish knowledge that a revision of TIL 1277 was in order. NSP thus argues that Rule 407 does not bar admission of TIL 1886 because the decision to issue the remedial measure was made prior to the catastrophic failure, even though the TIL was not issued until after the failure. The measures, however, were not taken before the harm, rather TIL 1886 was issued nearly two years after the

Sherco incident. Moreover, the determination to issue the TIL did not occur until after the Sherco incident. TIL 1886 is therefore a classic subsequent remedial measure barred by Rule 407 that NSP wanted to use to prove negligence. *See Faber v. Roelofs*, 212 N.W.2d 856, 859 (Minn. 1973) ("Exclusion of such evidence rests on a social policy of not discouraging people from taking steps in furtherance of added safety.").

NSP also argues that TIL 1886 is a feasible precautionary measure. Rule 407 "does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." Here, GE never controverted the feasibility of precautionary measures, thus the 407 exception does not apply. The Court also finds the probative value of TIL 1886 is substantially outweighed by the dangers of unfair prejudice. *See* Minn. R. Evid. 403. NSP's motion for a new trial based on the exclusion of TIL 1886 is therefore denied.

D. Fraudulent Concealment Claim

NSP argues the Court erred by dismissing the fraudulent concealment claim (Count I) in an Order from March 2018. NSP contends that the Court ignored a reckless misrepresentation that establishes fraud under Minnesota law. To support the argument, NSP cites the following law:

> In order to prevail on his misrepresentation-by-omission claim, NSP was required to prove that: (1) GE omitted a past or present material fact unknown to NSP and that GE were under a duty to disclose; (2) GE intended for NSP to rely on the omission; (3) NSP did rely on the omission; and (4) NSP suffered pecuniary damages as a result of their reliance.

Williams v. Heins, Mills & Olson, PLC, No. A09-1757, 2010 WL 3305017, at *3 (Minn. Ct. App. Aug. 24, 2010). Applying this law, NSP contends that GE knowingly and intentionally withheld from NSP a directive to conduct time-based inspections provided in the form of a specific TIL, that NSP relied on the omission, and that the resulting reliance caused the catastrophic failure to Unit 3. NSP also contends that, in the process, GE made a reckless or negligent misrepresentation.

NSP attempts to now shift the fraudulent concealment claim to a general fraud claim. Without any citation to the record beyond interactions between Josh Bird and Tim Murray, NSP restates prior arguments, demonstrating there is no liability for fraudulent concealment based on the facts in this case. Moreover, like Count V, NSP again attempts to recast a cause of action after trial. Indeed, the fraudulent concealment cause of action (Count I) was not a claim for reckless or negligent misrepresentation, which are different causes of action than fraudulent concealment. *See Florenzano v. Olson*, 387 N.W.2d 168, 177 n.2 (Minn. 1986) ("A reckless misrepresentation occurs when the representer asserts a fact as of his own knowledge without knowing whether it is true or false."); *Willams v. Smith*, 820 N.W.2d 807, 816 (Minn. 2012) (recognizing negligent misrepresentation applies to special "professional relationships such as an accountant/client and attorney/client, and in certain fiduciary relationships involving, for example, guardians, executors, and directors of corporations"). Accordingly, NSP's motion for a new trial based on the dismissal of the fraudulent concealment claim is denied.

E. Cumulative Errors

The Court also denies a motion for a new trial based on cumulative errors.

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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF SHERBURNE TENTH JUDICIAL DISTRICT
Case Type: Other Civil

Aegis Insurance Services, LTD., and other Interested Insurers as subrogees of Northern States Power Co. and Southern Minnesota Municipal Power Agency, Plaintiffs, v. General Electric Company, General Electric International, Inc.; and GE Energy Services, Inc., Defendants.	Court File No. 71-CV-13-1472 Judge: Hon. Sheridan Hawley

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR ALTERNATIVELY FOR A NEW TRIAL

INTRODUCTION

Plaintiffs take a scattershot approach to post-trial motion practice. Plaintiffs try to rewrite this litigation to bring claims that they never brought, that are not permitted as a matter of law, and that this Court has previously rejected—all in an attempt to avoid the jury's rejection of their claims arising from the failure of a more than 30-year old GE turbine. Despite the lack of any finding of liability on the part of GE, Plaintiffs nevertheless contend the Court "must" grant judgment as a matter of law in their favor "because judgment in favor of GE is inconsistent with the jury verdict." (Pls.' Br. at 5.) Plaintiffs argue the Special Verdict Form "established GE's liability pursuant to Plaintiffs' post-sale failure to warn claim" (Pls.' Br. at 5), even though that claim was dismissed as a matter of law and thus never submitted to the jury. Plaintiffs specifically argue that (1) their post-sale failure to warn claim (Count V) was actually an

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"assumed duty" claim; (2) the Court erred in dismissing the post-sale failure to warn claim; and (3) alternatively, the Court should amend Plaintiffs' Complaint to "split Count V post-sale duty to warn" into two separate and distinct legal claims: one under the Restatement (Second) of Torts § 323 (1965), and another under the *Great Northern* decision adopting the four-factor test of the Restatement (Third) of Torts § 10. As set forth below, no reasoned basis exists to disturb the jury's verdict and the Court's resultant judgment against Plaintiffs.

Plaintiffs alternatively seek a new trial on the grounds that the Court erroneously dismissed their Post-Sale Failure to Warn and Fraudulent Concealment claims, misapplied the doctrine of Willful and Wanton Negligence, and unduly prejudiced Plaintiffs through its evidentiary rulings. These arguments should also be rejected because they fail to demonstrate the verdict was contrary to the evidence or improper in any regard.

Plaintiffs' motions should be denied.

A. Plaintiffs Pled Their Complaint to Attempt to Avoid the Economic Loss Doctrine and the Limitations in the Sales Contract

This is Plaintiffs' second attempt to overturn adverse rulings against them—first by the Court, and now by the jury. Plaintiffs brought this lawsuit in an attempt to recover economic losses stemming from the failure of a long out-of-warranty coal-fired steam turbine, most of which was damage to the steam turbine itself. *See* Stipulation as to Damages [Doc. 377]. Recovery of economic loss in tort in the commercial arena has long been barred by the economic loss doctrine, because the law deems commercial parties capable of assessing the risks of product performance and establishing contractual remedies for disappointed commercial expectations. *Hapka v. Paquin Farms*, 458 N.W.2d 683, 688 (Minn. 1990). Recognizing this, and the limitations contained in the parties' Sales Contract, Plaintiffs sought to avoid these strictures by asserting claims of heightened misconduct against GE (*e.g.*, Gross Negligence, Willful and

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Wanton Negligence, and Fraudulent Concealment) in an attempt to avoid the economic loss doctrine and the parties' contractual limitations. Plaintiffs also asserted a Post-Sale Failure to Warn claim under *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988), which permitted courts to impose a product liability post-sale duty to warn in certain "special cases" satisfying a five-factor balancing test. Plaintiffs' claims against GE were predicated on two alleged circumstances: (1) improper design and manufacture of the turbine rotor wheel; and (2) GE's failure to warn NSP "about SCC risks and the potential for catastrophic unit failure" and about "how to detect SCC." (Am. Compl. ¶ 63.)

On summary judgment, this Court held the economic loss doctrine barred all of Plaintiffs' tort claims and dismissed the Amended Complaint. (Court's 5/31/16 & 8/10/16 Summ. Judg. Orders [Doc. 87 and Doc. 117].) On appeal, plaintiffs abandoned any claim that the steam turbine had a defect in its design or manufacture. Instead, plaintiffs "cast their claims entirely in terms of [GE's] voluntary assumption of duties post-sale" to provide NSP with updated "turbine technical information" about the risks of SCC. *Northern States Power Co. v. General Electric Co.*, No. A16-1687, 2017 WL 3013230, *5 (Minn. Ct. App. July 17, 2017). The Court of Appeals endorsed this Court's determination that the economic loss doctrine barred Plaintiffs' claims relating to any product defect existing at the time of sale, but held the economic loss doctrine did not bar the narrow issue of whether GE voluntarily "assumed a duty" to provide technical information to NSP post-sale. *Id.* The Court of Appeals examined and decided the application of the economic loss doctrine only; it left to this Court resolution of whether a duty was assumed and breached, as well all other outstanding issues in the case. *Id.* at *6.

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B. All That Remained on Remand Was the Claim That GE Voluntarily Assumed a Duty

On remand, the Court received supplemental summary judgment briefing, and ultimately allowed three claims to proceed to trial: Willful and Wanton Negligence (Count II); Gross Negligence (Count III); and Post-Sale Failure to Warn (Count V). (3/26/18 Summ. Judg. Order [Doc. 236].) However, Plaintiffs' Gross Negligence claim (Count III) is the only claim that implicated whether GE "assumed a duty" to provide technical information to NSP after the sale of the turbine. (Am. Compl. ¶ 85.) Notwithstanding Plaintiffs' new post-trial assertions that "Count V effectively stated a claim of assumed duty of care negligence claim[,]" (Pls.' Br. at 5), it is plain that neither their Willful and Wanton Negligence nor Post-Sale Failure to Warn claims contained any such allegations. Nor could they. The duties underlying those two claims are imposed as a matter of law, not by voluntarily assumed conduct. GE repeatedly noted its objection to trying these claims, since only Plaintiffs' Gross Negligence claim arguably lies beyond the reach of the economic loss doctrine under the mandate of the Court of Appeals. Notwithstanding GE's objection, (Trial Brief [Doc. 343] at 1-2), the Court allowed these claims to proceed to trial.

C. *Great Northern* Adopted the Four-Factor Test of Restatement (Third) of Torts: Products Liability § 10

During the pendency of this matter on remand from the Court of Appeals, the Minnesota Supreme Court decided *Great Northern Ins. Co. v. Honeywell*, 911 N.W.2d 510 (Minn. 2018). Plaintiffs mischaracterize *Great Northern* as representing "a new, more lenient standard" than *Hodder*. (Pls.' Br. at 1.) In fact, the Court in *Great Northern* examined the viability of a post-sale failure to warn claim in a property damage case, and adopted the four-factor test of Restatement (Third) of Torts: Product Liability § 10 in order "to ***better limit*** the post-sale duty to

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warn to 'special cases.'" 911 N.W.2d at 520 (emphasis added).[1] In contrast to the imprecise balancing test of *Hodder*, courts now must find that each factor of Restatement § 10 is met before imposing a post-sale duty to warn. *Great Northern* declined to find such a duty in the property damage case before it. *Id.* at 522. *Great Northern* and Restatement § 10 clearly articulate a separate and distinct tort and theory of recovery from an assumed duty claim under Restatement (Second) of Torts § 323.

D. The Jury Found No Willful, Wanton, or Gross Negligence on the Part of GE

This case was tried to the jury. After hearing the evidence presented at trial, the Court granted GE's motion for judgment as a matter of law and dismissed Plaintiffs' post-sale failure to warn claim (Count V). The Court determined that, notwithstanding other potential bars to Plaintiffs' claim, no reasonable juror could find that NSP was unaware of the risk of SCC as required by this cause of action. (T.Tr. 1859:15-1860:3.) But the Court allowed the jury to evaluate whether GE should be liable in connection with Plaintiffs' Willful and Wanton Negligence and Gross Negligence claims. (*Id.* at 1860:4-24.)

The jury found GE did not discover that NSP was in a position of impending peril with respect to potential catastrophic failure due to SCC—the legal prerequisite to a Willful and Wanton Negligence claim. The jury also found that, although GE assumed a duty to NSP in its provision of technical information, advice, and recommendations, GE did not act with gross

[1] Plaintiffs contend the post-sale failure to warn doctrine under *Hodder* was a doctrine of voluntary undertaking, which blatantly misstates the case. One of the five factors that the *Hodder* Court considered in assessing whether a post-sale duty to warn should apply was whether the defendant had undertaken to warn of the product's danger. 426 N.W.2d at 833. But post-sale duty to warn is, and always has been, imposed as a matter of law—just like a pre-sale duty to warn. *Germann v. F.L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986). In any event, Plaintiffs' untenable view of *Hodder* is rendered irrelevant by *Great Northern*, which explicitly omitted consideration of "whether a manufacturer voluntarily undertook a duty to warn." 911 N.W.2d at 521. This confirms that Plaintiffs' post-sale failure to warn claim does not involve an assumed duty, and was therefore beyond the mandate of the Court of Appeals.

negligence in the provision of that information. Notwithstanding its finding of no liability, the jury completed a fault allocation question on the Special Verdict Form—Question No. 11—because it was instructed to do so "regardless of your answers to any other Questions" on the form. (Verdict [Doc. 424] at 3.) On this question, the jury found GE 52% at fault and NSP 48% at fault. *Id.* This fault allocation was not tied to any particular legal claim. Because the jury found no underlying liability on the part of GE as to the two legal claims submitted—Gross Negligence and Willful and Wanton Negligence—the jury's fault allocation in Question No. 11 has no legal significance or relevance to the judgment entered. *Croaker ex rel. Croaker v. Mackenhausen*, 592 N.W.2d 857, 860 (Minn. 1999) (failure to meet one required element of tort is fatal to claim); *Mies Equip., Inc. v. NCI Bldg. Sys., L.P.*, 167 F. Supp. 2d 1077, 1081 (D. Minn. 2001) (where plaintiff fails to support an essential element of a claim, judgment "must issue because a complete failure of proof regarding an essential element renders all other facts immaterial.").

ARGUMENT

A. Legal Standard Applicable to Plaintiffs' Motion for Judgment as a Matter of Law

Judgment as a matter of law "may be granted only when the evidence is so overwhelming on one side that reasonable minds cannot differ as to the proper outcome." *Lamb v. Jordan*, 333 N.W.2d 852, 855 (Minn. 1983). In order to apply that standard, (1) all of the evidence, including the evidence favoring the verdict, must be taken into account; (2) the evidence is viewed in the light most favorable to the verdict; and (3) the court does not weigh the evidence or judge the credibility of the witnesses. *Id.* A jury verdict will only be disturbed if it is manifestly and palpably contrary to the evidence. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 256

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(Minn. 1980). The jury here determined that Plaintiffs failed to establish at least one element of each of their claims. (Verdict [Doc. 424] at 1-2 (Question Nos. 2, 3, 8).)

Relying on nonbinding foreign courts' holdings, Plaintiffs ignore the relevant standard and the factors to be analyzed.

B. Plaintiffs Are Not Entitled to Judgment as a Matter of Law.

1. The Jury Verdict Did Not "Establish" Plaintiffs' Post-Sale Failure to Warn Claim, Because the Special Verdict Form Did Not Incorporate Any Elements of a Post-Sale Failure to Warn Claim.

Plaintiffs contend that the Special Verdict Form, as answered, suffices to establish a post-sale failure to warn claim under *Great Northern*, because the Special Verdict Form contained the requisite "post-sale failure to warn elements." (Pls.' Br. at 7.) This is demonstrably false. The "elements" in the Special Verdict Form, as set forth in Question Nos. 4, 5, and 6, relate to the question of assumed duty under Restatement § 323, not to a post-sale duty to warn under *Great Northern* and Restatement § 10. For example, no Special Verdict Form question asked the jury whether a person to whom a warning could be directed was unaware of the risk of harm (*Great Northern* factor #2) nor whether the risk of harm was sufficiently great to justify the burden of providing a warning (*Great Northern* factor #4). Moreover, as previously noted, *Great Northern* rejected voluntary assumption of duty as a factor that a court considers in deciding whether a post-sale duty to warn should be imposed. 911 N.W.2d at 521. The *Great Northern*/Restatement § 10 post-sale duty to warn is a separate and distinct cause of action from a § 323 assumed duty claim. No amount of legal semantics can change that the post-sale failure to warn claim was dismissed, did not appear on the Special Verdict form, and was not decided by the jury.

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2. Plaintiffs' Post-Sale Failure to Warn Claim Was Not Pled As an Assumed Duty Claim.

Contrary to Plaintiffs' newly minted assertion, their post-sale failure to warn claim was never pled nor tried as an assumed duty claim. Plaintiffs now play fast and loose with the Amended Complaint, arguing their Post-Sale Failure to Warn claim (Count V) "effectively stated a claim of assumed duty of care negligence claim [sic]" and "specifically alleged GE undertook a duty to warn, breached its duty, the breach increased the risk of harm, and directly caused Plaintiffs' damages." (Pls.' Br. at 5.) None of those assertions appear in Count V. (Am. Compl. ¶¶ 92-95.) Instead, Plaintiffs alleged in Count V that GE "intentionally breached" an "ongoing" duty to warn because GE knew about turbine damage due to SCC "[s]ince the early 1970s" and the potential for catastrophic failure, but "apparently deliberately" did not share this "special knowledge" with NSP. *Id.* An "ongoing" duty to warn describes a duty imposed by law. *See Hodder*, 426 N.W.2d at 830 (referencing recognition of a "continuing" duty to warn). It certainly does not describe a voluntarily assumed duty, since the extent of any such duty is strictly limited to the duties voluntarily undertaken. *See, e.g.*, *Figueroa v. Evangelical Covenant Church*, 879 F.2d 1427, 1435 (7th Cir. 1989) (any duty allegedly assumed under voluntary undertaking theory must be "limited strictly to the scope of the undertaking"). As noted, the only claim in which Plaintiffs alleged that GE assumed a duty was Count III (Gross Negligence). *See* Am. Compl. ¶ 85.

Count V of the Amended Complaint alleges a product liability failure to warn claim under *Hodder* (as modified by *Great Northern*). Plaintiffs blatantly mischaracterize *Hodder* by suggesting it ***requires*** a voluntary assumption of duty, when the question of whether a manufacturer issued prior warnings is but ***one factor in a five-factor balancing test.*** *Compare* Pls.' Br. at 5 to *Hodder*, 426 N.W.2d at 833 (outlining various circumstances supporting the

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Court's finding that it was a "special case" supporting a continuing duty to warn). Plaintiffs then try to distinguish *Great Northern* as "holding instead that under *certain circumstances* such a duty should be imposed by law." Pls.' Br. at 5-6 (emphasis added). This is just a falsehood. A post-sale duty to warn, whether under *Hodder* or *Great Northern*, always involves a duty imposed by law. *Hodder*, 426 N.W.2d at 832 (holding as a matter of law that a continuing post-sale duty to warn existed and was adequately submitted); *Great Northern*, 911 N.W.2d at 522 ("[W]e conclude as a matter of law that McMillan, the manufacturer of the ventilator's motor, did not have a post-sale duty to warn."); *Germann v. F. L. Smithe Mach. Co.*, 395 N.W.2d 922, 924 (Minn. 1986) (question of whether legal duty to warn exists is a question of law for the court). A post-sale duty to warn, just like an ordinary duty to warn, is and always has been a determination for the Court—not for the jury.

Plaintiffs cite no support for grafting an assumed duty post-sale failure to warn onto Count V's product liability regime for post-sale failures to warn. And recognition of this unstated and separate legal claim would be highly unusual, as well as unduly prejudicial to GE, since that claim could not possibly have been divined by GE before trial. *Haugland ex rel. Donovan v. Mapleview Lounge & Bottleshop, Inc.*, 666 N.W.2d 689, 694 (Minn. 2003) ("The primary function of notice pleading is to give the adverse party fair notice of the theory on which the claim for relief is based."). GE prepared its defense based on the claims that Plaintiffs actually pled and litigated over the five-year course of this litigation. Even under notice pleading, it is incumbent on a plaintiff to fairly apprise a defendant of the legal theory on which plaintiff is proceeding. *Id.*; *Hohenstein v. Goergen*, 176 N.W.2d 749, 751-52 (1970) (Fair notice "remains essential, and pleadings will not be deemed amended to conform to the evidence because of a supposed 'implied consent' where the circumstances were such that the other party

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was not put on notice that a new issue was being raised.") Such a last-ditch theory is also inconsistent with the premise of the Court of Appeals' remand, which involved the issue of whether GE assumed a duty to NSP to provide it with updated "turbine technical information". *Northern States Power Co.*, 2017 WL 3013230 at *5.

Simply put, Plaintiffs never pled an assumed duty theory of liability with respect to their post-sale failure to warn claim (Count V). Plaintiffs' assumed duty theory was contained solely in their Gross Negligence count (Count III). Count III implicates the factors of Restatement (Second) of Torts § 323, while Count V is controlled by *Great Northern* and Restatement (Third) of Torts: Products Liability § 10. These claims should not be conflated because they are separate and distinct legal claims and different legal standards apply to each claim. Allowing an unpled assumed duty post-sale failure to warn claim would circumvent *Great Northern*, removing judicial control over imposition of a duty that is only permitted in "special cases" that meet all of the relevant considerations. The Court appropriately exercised its discretion in analyzing the viability of Count V under the relevant *Great Northern*/Restatement § 10 factors.

3. GE Did Not Try An Ordinary Negligence Claim "By Consent".

Plaintiffs contend that, because GE acknowledged the relevance of Restatement (Second) of Torts § 323 (1965), it tried an ordinary assumed duty negligence claim "by consent." However, review of GE's pretrial briefing and the Special Verdict Form confirms this is also false. *See, e.g.*, GE's Trial Brief [Doc. 343] at 1-2; Verdict [Doc. 424] at 2.

As a preliminary matter, Plaintiffs nowhere referenced Restatement (Second) of Torts § 323 or its factors in any portion of their Amended Complaint. To the extent Plaintiffs raised any semblance of an assumed duty claim, it was solely in their Gross Negligence claim (Count III), which averred that GE "assumed a duty" to advise NSP "about potential and foreseeable

risks" (Am. Compl. ¶ 85), and then in recasting their claims in this light to save them on the prior appeal. This narrow approach is unsurprising, as Plaintiffs pled to assiduously avoid the contractual liability limitation provisions of the Sales Contract.

The jury was appropriately instructed that, in Minnesota, gross negligence is "more than just negligence. It is negligence of the highest degree." (T.Tr. 1908:19-20.) Critically, and consistent with Plaintiffs' theories, the Special Verdict Form submitted to the jury explicitly tied GE's potential voluntary assumption of duty to gross negligence, not ordinary negligence. Questions 4 through 6 of the Special Verdict Form each relate to formation of an assumed duty under Restatement § 323, asking whether GE assumed a duty to NSP "in the provision of technical information, advice, and recommendations[.]" (Verdict [Doc. 424] at 2.) Question 7 then asks whether GE acted with gross negligence in "that" provision of technical information, advice, and recommendations. *Id.* Only a "YES" response to Question 7 required the jury to determine whether "this" gross negligence was a "direct cause of physical harm to NSP[.]" *Id.* The jury left this causation question blank, because it determined that GE was not grossly negligent. *Id.* As such, Plaintiffs failed to establish with the jury the requisite causation element necessary to succeed on their Gross Negligence claim.

Plaintiffs knew that, to stand any chance of prevailing in light of the Sales Contract's limitation of liability, they needed to show GE acted with heightened misconduct in order to justify casting the limitation aside. That is why the allegations of the Amended Complaint reference intentional, deliberate misconduct, and why Plaintiffs argued (without evidence) that this case involved an "orchestrated cover up" transcending the mere potential lapse by Josh Bird in conveying Jim Howenstein's SCC recommendation to Tim Murray. Moreover, Plaintiffs used these allegations of heightened misconduct to their advantage on summary judgment prior to

appeal, arguing that a party "may not contractually 'opt out' of future liability for willful and wanton negligence; gross negligence and fraud" and that "[c]ontractual exculpatory provisions cannot carry the day" when "reckless or intentional conduct gives rise to a gross negligence claim." *See* Pls.' Opp. to Mot. for Summ. Judg. [Doc. 96] at 36-37. Had Plaintiffs requested a question on the Special Verdict Form tying causation to ordinary negligence in the discharge of an assumed duty—which they did not—GE would have objected and requested a Court ruling as to the viability of any such claim in light of the Sales Contract. The Court provided for the Sales Contract to be a Court Exhibit at trial for just such an analysis. *See* Court Ex. 1052a.

4. The Sales Contract Bars Any Negligence-Based Claim.

Because a claim for post-sale failure to warn claim sounds in negligence, had the jury determined GE breached a post-sale duty to warn, GE still would have had viable contract defenses. *See, e.g.*, *Int'l Fin. Serv., Inc. v. Franz*, 534 N.W.2d 261, 269 (Minn. 1995) ("[T]here is nothing that makes it unconscionable to enforce the allocation of risk incorporated into the parties' contract" where parties are both merchants, there is no great disparity in bargaining power, and the claim is for commercial loss); *Indep. School Dist. No. 877 v. Loberg Plumbing & Heating Co.*, 123 N.W.2d 793, 798 (Minn. 1963) ("It is well established that the parties could, by contract, without violation of public policy, protect themselves against liability resulting from their own negligence."); *Transport Corp. of Am. v. Int'l Bus. Mach., Inc.*, 30 F.3d 953, 960 (8th Cir. 1994) (applying Minnesota law) (exclusion of damages set forth in advance in a commercial agreement between experienced business parties represents a bargained-for allocation of risk that is conscionable as a matter of law."); *Taylor Inv. Corp. v. Weil*, 169 F. Supp. 2d 1046, 1059 (D. Minn. 2001) (enforcing contractual damages limitation where parties were "both relatively sophisticated businesses and the claim [ ] is for commercial loss."). Indeed, even in the ordinary

consumer context, limitations of liability will be upheld where they do not purport to release a party from its intentional, willful or wanton acts, and are not otherwise void as against public policy. *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 926 (Minn. 1982).[2]

Here, the parties agreed to a limitation of liability in the Sales Contract with respect to NSP's **use** of Unit #3. (Court Exhibit 1052a at XCEL_Sherco_08_0070593.) The Sales Contract's limitation of liability expressly provides:

> the Contractor's [GE's] liability on any claim of any kind, including claims based on *negligence, for any loss or damage arising out of, connected with, or resulting from* this contract or from the performance or breach thereof, or from the manufacture, sale, delivery, installation, or technical direction of installation, repair or *use of any equipment* covered by or *furnished under* this contract *shall in no case exceed the billing price of the equipment*; provided, however, that in all cases where the claim involves defective or damaged equipment supplied under this contract the Company's exclusive remedy and the Contractor's sole liability will be limited to the correction of such defect or damage, but not in excess of the billing price of the equipment. In any event, the Contractor's liability for all of the aforesaid claims shall terminate four years after initial synchronization of the equipment.

Id. All negligence-based claims "for any loss or damage arising out of, connected with, or resulting from" the "***use of any equipment***" furnished under the Sales Contract are barred, since Plaintiffs undisputedly brought them more than four years after initial synchronization of the equipment in 1987. *Id.* In addition, even if such claims were not so barred, liability for the loss "shall **in no case** exceed the billing price of the equipment[.]" *Id.* (emphasis added). In this case, total liability would amount to the purchase price of the equipment (approximately $20 million) minus the payments made to NSP and SMMPA to settle their claims in this case.

[2] Even if the jury had found GE grossly negligent, GE would have had viable contract defenses. *Doub v. Life Time Fitness*, Civ. No. A17-0322, 2017 WL 4341814, *5 (Minn. Ct. App. Oct. 2, 2017) (claimant cannot sidestep exculpatory clause by alleging greater than ordinary negligence). The Court need not address this issue, since the jury found that GE was not grossly negligent.

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Plaintiffs may argue that their claim was based on an assumed duty "independent" of the contract, and therefore should not be controlled by that contract. But the existence of an independent duty does not resolve the question of whether a contractual limitation-of-liability applies to bar or limit claims that do not specifically involve the performance or breach of the contract. Minnesota favors the freedom of contract, and allows parties to contractually limit their liability, subject to public policy concerns that this matter does not implicate. *See, e.g.*, *Lyon Fin. Servs., Inc. v. Illinois Paper and Copier Co.*, 848 N.W.2d 539, 545 (Minn. 2014) (under freedom of contract principles, parties are "generally free to allocate rights, duties, and risks"); *Bobich v. Oja*, 104 N.W.2d 19, 24 (Minn. 1960) (contracting parties are free to contract as they see fit, and the extent of their liability is governed by the contract they enter into); *Weirick v. Hamm Realty Co.*, 228 N.W. 175, 176 (Minn. 1929) (voluntarily undertaken duty not required by contract that resulted in personal injury was still barred by contract exculpating tortfeasor's negligence); *see also Nahra v. Honeywell, Inc.*, 892 F. Supp. 962, 973 (N.D. Ohio 1995) (existence of independent duty to exercise ordinary care does not preclude a party from limiting its liability through contract). As such, before permitting any ordinary negligence claim, the Court would need to consider whether the Sales Contract's limitation-of-liability provision barred it. Here, the contractual limitation language unambiguously covers Plaintiffs' claims since, by its own terms, it extends beyond "this contract or . . . the performance or breach thereof" to include NSP's use of the turbine and other circumstances. (Court Exhibit 1052a at XCEL_Sherco_08_0070593.)

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C. Legal Standard Applicable to Plaintiffs' Motion for New Trial

"A new trial should not be granted unless the verdict is so contrary to the preponderance of the evidence as to imply that the jury failed to consider all the evidence or acted under some mistake or from some improper motive, bias, feeling or caprice, instead of honestly and dispassionately exercising its judgment." *Lamb*, 333 N.W.2d at 855-56. Plaintiffs' motion ignores this well-established precedent.

1. Plaintiffs' Motion for New Trial Should be Denied.

Plaintiffs alternatively move for a new trial on the following grounds: (1) the Court erroneously dismissed Plaintiffs' post-sale failure to warn claim; (2) the Court misapplied the law of willful and wanton negligence; (3) the Court's evidentiary rulings deprived Plaintiffs of a fair trial; and (4) the Court erred in dismissing Plaintiffs' fraud claim. None of these grounds presents a justifiable basis on which to order a new trial in this case.

2. The Court Appropriately Dismissed the Post-Sale Failure to Warn Claim.

The Court did not commit error by dismissing Plaintiffs' post-sale failure to warn claim at the close of all the evidence, following GE's motion for judgment as a matter of law on this claim.

a. The Court Did Not Abuse its Discretion by Holding Plaintiffs Failed to Show Unawareness of Risk Under *Great Northern*.

Among the factors the Court is to consider to determine whether a post-sale duty to warn exists is whether "those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm." *Great Northern*, 911 N.W.2d at 520. Plaintiffs' post-sale failure to warn claim (Count V) contains the averments about what information GE had of which NSP was allegedly unaware:

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- "Since the early 1970s, General Electric Company knew about turbine damage, and more specifically knew about the area around the Wilson Line being vulnerable to SCC."

- GE "failed to advise NSP" about "the potential for failure in the LP turbine rotor wheel around the Wilson Line or of steps that could be taken to detect SCC damage and to prevent an LP turbine failure[.]"

- GE "failed to adequately warn NSP . . . of the potential for catastrophic failure. In fact, defendants apparently deliberately withheld such information."

(Am. Compl. ¶ 93(a), (b), (c).)

At trial, the Court and jury heard substantial amounts of evidence regarding NSP's operation of the Sherco plant, Unit #3, and NSP's knowledge of SCC. One such example was the testimony of Timothy Murray, NSP's turbine overhaul specialist. Mr. Murray testified about his extensive knowledge of SCC, acquired from his education, training, and experience (T.Tr. 305:16-19), from the Electric Power Research Institute (T.Tr. 306:7-11), and from power generation industry sources (T.Tr. 306:12-14). Murray knew SCC was an industry-wide problem, and not only related to GE equipment. (T.Tr. 307:13-18.) Murray knew about the Wilson Line, where it was, and its susceptibility to SCC. (T.Tr. 307:19-309:20.) Specfically as it relates to Plaintiffs' allegations in Count V that GE withheld information concerning "the potential for failure in the LP turbine rotor wheel around the Wilson Line or of steps that could be taken to detect SCC damage and to prevent an LP turbine failure," Mr. Murray testified as follows:

Q. Okay. To summarize, it's fair to say during the period 1999 to 2011 you knew, one, about the risk of stress corrosion cracking in LP turbines?

A. Yes.

Q. Two, what causes stress corrosion cracking in LP turbines?

A. Yes.

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Q. Three, how to control steam chemistry to minimize the risk of stress corrosion cracking in LP turbines?

A. Well –

MR. EVINGER: Objection, foundation.

THE COURT: Did you know that or did you not know that?

THE WITNESS: More or less, I guess, I could say.

Q. Yeah. And you knew how to inspect for the presence of stress corrosion cracking?

A. Yes, we did.

(T.Tr. 327:3-24.) Mr. Kolb, Sherco turbine engineer, testified to similar knowledge. *See, e.g.*, T.Tr. 593:19-594:7; 595:14-596:3. This testimony, among various other testimony at trial, refuted Plaintiffs' allegations that NSP was unaware of the risks of SCC in connection with the operation of Unit #3.

The documentary evidence at trial also demonstrated NSP knew well the risk of harm due to SCC and how to inspect for it. *See, e.g.*, GEK-63430 (Tr. Ex. 288); TIL 1121-3AR1 (Tr. Ex. 6); 12/7/10 System Health Report (Tr. Ex. 8(e)). Indeed, NSP's System Health Report for the Unit #3 turbines dated 12/7/2010 (Tr. Ex. 8(e) at 2) states in part: "Risks associated with wheel cracking involve wheel failure and buckets departing the rotor. Resulting collateral damage could be severe (i.e. due to mass imbalance and projectiles)." This is exactly what happened on November 19, 2011, which shows prescient knowledge on the part of NSP of the potential risk it faced.

Plaintiffs' argument is not that it was unaware of the risk of harm, but rather that GE should have issued an additional maintenance recommendation mandating NSP to remove the buckets and inspect the rotor dovetails for SCC on a specific time-based interval, which NSP

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claims it would have heeded and thereby prevented the accident. Even if true, this assertion does not demonstrate NSP "was unaware of the risk of harm" under *Great Northern.* Having heard the evidence and reviewed the relevant post-sale duty to warn factors, the Court determined that Plaintiffs' post-sale failure to warn claim (Count V) was not appropriate in this case. This Court properly identified the factors articulated in the *Great Northern* decision, the prevailing authority at the time the Court made its decision, and its ruling need not—and should not—be disturbed.

Plaintiffs' suggestion that this Court failed to conduct an analysis required by *Hoff v. Kempton*, 317 N.W.2d 361, 363 (Minn. 1982) before applying the *Great Northern* decision "retroactively" is an aggressive misstatement of the *Hoff* case. (Pls.' Br. at 15 n.6.) *Hoff* held that the "***general rule is*** that, absent special circumstances or specific pronouncements by the overruling court that its decision is to be applied prospectively only, ***the decision is to be given retroactive effect.***" 317 N.W.2d at 363. The analysis that Plaintiffs identified is to determine whether an ***exception*** should be made to this general rule—*i.e.*, whether a decision should be applied ***prospectively only.*** *Id.* *Great Northern* made no pronouncement that the rule it established should be applied prospectively only and, indeed, *Great Northern* "retroactively" applied the rule to the very case before it. *Great Northern*, 911 N.W.2d at 522 ("Applying the Restatement rule to the undisputed facts here, we conclude as a matter of law that McMillan . . . did not have a post-sale duty to warn.") The Court properly considered and applied the *Great Northern* decision in this case.

b. Other Grounds Exist to Dismiss Plaintiffs' Post-Sale Failure to Warn Claim.

Although the Court based its dismissal of Plaintiffs' post-sale failure to warn claim on the evidence of NSP's knowledge of SCC, numerous other grounds existed to dismiss that claim. First, a post-sale failure to warn claim requires evidence of a latent **product defect**. *Great*

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Northern, 911 N.W.2d at 521 ("Like *Hodder*, the Restatement rule [Restatement § 10] requires that a defendant must have had knowledge of the product's defect, the defect must have been hidden, and the defect must have had the potential to cause significant harm.") On appeal of this Court's summary judgment order dismissing their case, the Court of Appeals expressly recognized and stated that Plaintiffs recast their claims entirely in terms of a voluntary assumed duty and they abandoned any theory of product defect and focused instead on GE's alleged voluntary assumption of duty.

Even if Plaintiffs could pursue a defect theory—which they could not because, among other things, they had no expert as to defect—the "defect" is simply the turbine's susceptibility to SCC, which existed before the sale of the turbine, and which GE warned about in the Operations and Maintenance Manual provided with the turbine as a part of the sale, as well as in TIL 1121-3AR1 after the sale. *See, e.g.*, GEK-63430 (Tr. Ex. 288) ("It must be recognized that the higher stress levels and the resulting use of stronger materials in the newer, larger utility turbines increased the susceptibility to stress corrosion cracking."); TIL 1121-3AR1 (Tr. Ex. 6). As such, the economic loss doctrine precludes that claim. *Northern States Power Co.*, 2017 WL 3013230 at *5 ("To the extent that any of appellants' claims was based on an alleged failure to disclose a product defect present and known at the time of sale, the district court correctly determined that such a claim is barred by the economic-loss doctrine.").

Finally, given that a post-sale failure to warn claim is based on ordinary negligence principles, *Great Northern*, 911 N.W.2d at 521, that claim is, in any event, barred by the limitation of liability in the Sales Contract, as previously discussed.

3. The Court Used the Correct Willful and Wanton Negligence Standard in Its Instructions and the Special Verdict Form.

Plaintiffs contend their claim for Willful and Wanton Negligence was not properly submitted, because willful and wanton negligence is "an ordinary care standard, not reckless." (Pls.' Br. at 18.) The question of whether "reckless disregard" forms a part of a willful and wanton misconduct claim, however, is moot. The jury did not even consider that question on the Special Verdict Form (Question No. 2), because it previously determined that GE did not discover NSP faced impending peril in the form of catastrophic failure due to SCC.[3] (Verdict [Doc. 424] at 1.)

Nevertheless, the jury instruction given properly described this claim, in relevant part, as requiring "a reckless disregard of the safety of the person or property of another by failing after, and not before, discovering the peril, to exercise ordinary care to prevent the impending injury." (T.Tr. 1908:21-25.) This language is a direct quote from the Minnesota Supreme Court's well-established definition of willful and wanton negligence, which has never been overruled and has been applied on several occasions in Minnesota's appellate courts. *Brannan v. Shertzer*, 64 N.W.2d 755, 757 (Minn. 1954); *Farmers Ins. Exchange v. Village of Hewitt*, 143 N.W.2d 230, 258 (Minn. 1966); *Scoles v. Franzen*, Civ. No. C5-91-426, 1991 WL 180037, *2 (Minn. Ct. App. Sept. 17, 1991), *review denied* (Minn. Oct. 11, 1991); *Peterson v. Honeywell, Inc.*, Civ. No. C2-93-1795, 1994 WL 34200, *4 (Minn. Ct. App. Feb. 8, 1994), *review denied* (Minn. Apr. 15, 1994).

[3] Plaintiffs quote Question Nos. 1-3 of the Special Verdict Form, but omit the jury's response to Question No. 1, which was "NO." *See* Pls.' Br. at 18; Verdict [Doc. 424] at 1. Given this response, the jury was not required to and did not answer Special Verdict Form Question No. 2 (which references reckless disregard) or Question No. 3 (causation).

Plaintiffs urge the Court to ignore this controlling Minnesota law because one federal case, *Gage v. HSM Elec. Prot. Serv., Inc.*, 655 F.3d 821 (8th Cir. 2011), omits the term "reckless disregard" from its discussion of the doctrine. But *Gage* does not appear to have considered, and did not cite, either the *Brannan* or *Farmers Ins. Exchange* decisions, and instead cites authority predating those decisions by many years. *See* 655 F.3d at 826. In addition, Plaintiffs' challenge to use of the word "impending" in the instructions and Special Verdict Form—again relying only on *Gage*—similarly runs headlong into *Brannan*, *Farmers Ins. Exchange*, *Peterson*, *Scoles*, and the assortment of other Minnesota decisions which make clear that the "peril" must be "impending." *See, e.g.*, *Brannan*, 64 N.W.2d at 757 (citing numerous other Minnesota authorities on the issue); *Farmers Ins. Exchange*, 143 N.W.2d at 258; *Peterson*, 1994 WL 34200, at *4; and *Scoles*, 1991 WL 180037, at *2. Plaintiffs' counsel himself acknowledged *Brennan*'s requirement that the peril be "impending." (T.Tr. 1875:4-21.)

4. The Court Did Not Abuse Its Discretion With Respect to Evidentiary Rulings

The admission of evidence "rests within the broad discretion of the trial court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). "Evidence which is not relevant is not admissible." Minn. R. Evid. 402. "Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401.

a. Other Instances of SCC

Plaintiffs complain that they were not allowed to introduce certain evidence relating to other instances of SCC, despite the fact that this evidence did not involve situations substantially

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similar to the Sherco event, ***and the fact that plaintiffs were ultimately allowed to introduce evidence of SCC in both finger and tangential entry dovetails—even though the latter dovetails were of an entirely different design that had nothing to do with the incident.*** Plaintiffs' complaint is nothing more than their disagreement with the Court's exercise of its broad discretion on such issues, and the fact that the Court didn't allow into evidence even ***more*** data regarding non-substantially similar incidents. This evidence was properly excluded as cumulative, and potentially prejudicial and confusing to the jury.

Evidence of other incidents is generally admissible to show notice of a **product defect**. *Buzzell v. Bliss*, 358 N.W.2d 695, 700 (Minn. Ct. App. 1984), *review denied* (Minn. Mar. 13, 1985). But, even in those types of cases, courts recognize that similar incident evidence also threatens to "raise extraneous controversial points, lead to a confusion of issues, and present undue prejudice disproportionate to its usefulness. *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 508 (8th Cir. 1993). The party seeking to admit such evidence has the burden to show that the other incidents are "substantially similar" to the incident at issue. *Held v. Mitsubishi Aircraft Int'l, Inc.*, 672 F.Supp. 369, 390 (D. Minn. 1987). "Substantial similarity" means that the incidents involve substantially similar circumstances and involved substantially similar components or products. *Id.* (citing *Indep. Sch. Dist. No. 181 v. Celotex*, 244 N.W.2d 264, 266 (Minn. 1976)). In order to determine whether incidents are substantially similar, the court conducts a factual inquiry into each of the proffered incidents to examine whether they share a common design, common defect, and common causation with the alleged design defect at issue. *Yang v. Cooper Tire & Rubber Co.*, No. A13-0756, 2014 WL 502959 at *4 (Minn. Ct. App. Feb. 10, 2014), *review denied* (Minn. Apr. 15, 2014).

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The Court correctly found that Plaintiffs failed to carry their burden here. First and foremost, there were no substantially similar incidents, because the accident at Sherco was the **only** instance in which catastrophic failure occurred due to SCC in a rotor wheel finger dovetail. Furthermore, Plaintiffs undeniably abandoned any theory of product defect on appeal. Plaintiffs instead claimed only that GE voluntarily undertook a duty to NSP to give NSP updated turbine technical information. The fact that other incidents of SCC cracking occurred—most of which occurred in tangential entry dovetails which were of an entirely different design from the finger dovetails at issue here—was not relevant to the claims Plaintiffs pursued. Thus, the Court properly excluded such evidence.

Following Defendants' motion in limine to exclude evidence of other SCC incidents, the Court ordered creation of an exhibit showing only finger dovetail incidents. (10/8/18 Am. Order and Memo. on Mot. in Limine [Doc. 379] at 14.) Although these incidents were not, strictly speaking, substantially similar because they did not involve any failure at all—let alone catastrophic failure as at Sherco—they at least involved the same type of dovetail design at issue. Because Plaintiffs were unsatisfied with the small population of such incidents—only 3 instances of finger dovetail SCC in drum boiler units before the Sherco incident, and only 2 instances of such SCC when Tim Murray inquired with Josh Bird—Plaintiffs sought to evade the Court's order at trial by introducing evidence regarding tangential entry dovetails. Ultimately, given Plaintiffs' display of certain videotaped deposition testimony from Eloy Emeterio and others, the Court allowed the jury to consider a comprehensive listing of all SCC rotor dovetail incidents—involving both finger dovetails and the irrelevant tangential entry dovetails. Plaintiffs charge that this was "too little, too late" (Pls.' Br. at 23). But the vast majority of the admitted "other incidents" evidence was irrelevant to Plaintiffs' claims which related to a different dovetail

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design. Admission of this irrelevant evidence was unduly prejudicial to GE, since it appeared there were more instances of cracking relevant to the Sherco incident than there really were. As such, Plaintiffs' complaints ultimately miss their mark.

b. Design Evidence

A similar analysis should apply to Plaintiffs' claims that design evidence was improperly excluded. Plaintiffs argue that the Court "wrongfully excluded evidence of GE's research into design and material changes as solutions to the growing SCC problem," which were "critical to Plaintiffs' claims." (Pls.' Br. at 24.) But Plaintiffs fail to explain how such evidence is relevant to a claim of assumed duty.

The Court permitted testimony and documents regarding design inasmuch as such evidence related to the respective knowledge of GE and NSP—and the jury heard evidence regarding design, materials, and SCC over the two-week span of the trial. However, Plaintiffs sought to introduce far more design and material evidence than was relevant to their claims. Critically, Plaintiffs made a tactical decision on appeal to avoid any claim of design or manufacturing defect—lest the Court of Appeals affirm this Court's ruling that the economic loss doctrine barred all of Plaintiffs' claims. Once the case was remanded, however, Plaintiffs improperly sought to revive design and manufacturing claims through submission of evidence of design changes, material peculiarities, and other matters which the jury could have interpreted as suggestive of a product defect. This was particularly problematic in this case, because Plaintiffs did not have an expert opining on product defect, who would presumably explain to the jury the significance of the various design and material evidence bearing on steam turbine rotor and bucket construction, and who would be subject to cross-examination. The Court handled the matter appropriately by allowing Plaintiffs to introduce evidence bearing on corporate

knowledge, but not permitting Plaintiffs' counsel to submit vast amounts of complicated, highly technical material to improperly influence the jury. As with submission of irrelevant evidence concerning tangential entry dovetails, even the evidence Plaintiffs were allowed to submit concerning turbine design and materials could have improperly influenced the jury to believe the turbine was defective and that GE should be liable. The Court ameliorated this issue, as best it could, with a limiting instruction. That was no panacea, however, and allowing Plaintiffs to bring in additional design and material evidence would have greatly compounded the confusion of the issues and further prejudiced GE's defense.

In sum, the fact that GE sought to improve design characteristics of the LP turbine, or that GE obtained a patent in connection with that effort, or that GE theoretically could have used different materials in the construction of Unit #3's rotor (each of which would have presented its own particular tradeoffs between benefits and drawbacks), had no relevance to Plaintiffs' claims of assumed duty. Having jettisoned a product defect case in favor of proceeding on an assumed duty theory of liability, the vast trove of design and material science-related evidence that Plaintiffs were able to secure through liberal discovery rules had no proper place at trial.

c. TIL 1886

Plaintiffs continue to argue they should have been able to introduce evidence regarding TIL 1886, because the decision to issue it was allegedly made "prior to a plaintiff's injury." (Pls.' Br. at 26.) The Court properly rejected this argument since, by its own terms, TIL 1886 was released in October 2013—nearly two years after the Sherco incident, thus bringing it within the purview of Minn. R. Evid. 407. Plaintiffs attempt to cast TIL 1886 as a mere "revision" to TIL 1277, which James Howenstein opined, prior to the incident, was on a list to be revised. But the fact is that TIL 1277 was never revised, and the recommendations in TIL 1886 are different

from TIL 1277. *Compare* TIL 1886 (Vaccaro Aff. in Supp. of Mot. to Exclude Evid. Regarding TIL 1886 [Doc. 277], Ex. A) with TIL 1277 (Tr. Ex. 56). Moreover, in addition to the TILs being substantively different, the determination to issue TIL 1886 undisputedly did not occur until after the Sherco incident.

TIL 1886 is a classic subsequent remedial measure under Minn. R. Evid. 407. Moreover, it is obvious Plaintiffs sought to introduce it for no reason other than the purposes expressly prohibited by the rule: "to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction." *See* Minn. R. Evid. 407. Rule 407 is based on a well-established social policy of not discouraging parties from taking steps to enhance safety. "[S]ubsequent repairs or precautions should not be viewed as an admission of negligence. After an unexpected accident has occurred, a person may, in the light of his new experience, adopt additional safeguards, even though he exercised due care at the time of the accident." *Faber v. Roelofs*, 212 N.W.2d 856, 859 (Minn. 1973) (citing *Morse v. Minneapolis & St. L. Ry. Co.*, 16 N.W. 358 (Minn. 1883)). Moreover, even when post-incident remedial measure evidence is admitted for purposes other than demonstrating negligence—*i.e.*, to show the practicability or feasibility of precautionary measures—trial courts exercise "great caution" before admitting such evidence when the case is being tried to the jury. *Id.*, 212 N.W.2d at 860.

Plaintiffs claim that TIL 1886 should be admitted "as evidence of the feasibility of precautionary measures." (Pls.' Br. at 27.) But in order to invoke that exception, Rule 407 first requires such feasibility to be "controverted" by the opposing side. Fed. R. Evid. 407. In this case, GE never controverted the feasibility of precautionary measures. In fact, GE previously issued various other precautionary measures through TILs and other written and oral guidance on a number of topics in the past, including but not limited to TIL 1121-3AR1 and TIL 1277, a

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time-based inspection protocol for wheel dovetails of turbines with once-through boilers (OTB) calling for inspection of those units with more than 10 years of service. GE did not contend that a recommendation like TIL 1886 could not have been feasibly issued earlier. Thus, the circumstances under which such a subsequent remedial measure could be introduced simply do not exist here. The straightforward application of Rule 407 mandated exclusion of TIL 1886 and related evidence in this case. The Court acted consistently with the letter and spirit of the Rule.

5. Plaintiffs' Fraudulent Concealment Claim Was Properly Dismissed.

Despite not being an issue at or during the trial, Plaintiffs attempt another bite at the apple and argue that the Court incorrectly dismissed their Fraudulent Concealment (Count I) claim, which Plaintiffs now misleadingly refer to as their "fraud claim." (Pls.' Br. at 30.) This argument has no merit. Plaintiffs claim the Court's assessment of their "fraud claim" erred by focusing only on the interactions between Josh Bird and Tim Murray, and ignoring "the other evidence of GE's orchestrated cover up." (Pls.' Br. at 30.) Tellingly, Plaintiffs' "orchestrated cover up" assertion does not contain a single citation to any record evidence—documentary or testimonial—to support it. *Id.* Instead, Plaintiffs simply recycle their previous argument that, although their Amended Complaint alleges GE made "intentional, fraudulent misrepresentations," it is only necessary for Plaintiffs to demonstrate "faultless non-disclosure guidance." (Pls.' Br. at 31.) This alleged "faultless non-disclosure guidance"[4] relates solely to Plaintiffs' claim that Josh Bird did not pass along to NSP the information that James Howenstein conveyed in the PAC note.

Although Plaintiffs concede that any alleged nondisclosure was unintentional, they nevertheless claim that it amounts to actionable reckless misrepresentation. Plaintiffs, however,

[4] This argument is absurd, because there is no liability for "faultless nondisclosure" if it is, in fact, faultless.

asserted a claim for fraudulent *concealment*—not reckless or negligent misrepresentation, both of which require forms of affirmative misrepresentations. (Am. Compl. ¶¶ 65-74.) Plaintiffs' reliance on *Florenzano v. Olson*, 387 N.W.2d 168, 173 (Minn. 1986), is therefore misplaced. *Id.* at 177-79 (Simonett, J., concurring) (reckless misrepresentation occurs when "the representor ***asserts*** a fact as of his own knowledge without knowing whether it is true or false") (emphasis added). Plaintiffs point to no such affirmative assertion of fact, and the trial of this matter did not disclose one. As such, Plaintiffs' fraudulent concealment claim should not be revived.

Instead, to maintain their claim for fraudulent *nondisclosure*, plaintiffs must demonstrate, among other things, that GE had a duty to speak, the relationship or situation giving rise to the duty to speak, what GE gained by withholding the information, and why plaintiff's reliance on the omission was both reasonable and detrimental. *Zimmerschied v. JP Morgan Chase Bank, N.A.*, 49 F. Supp. 3d 583, 596 (D. Minn. 2014) (enumerating the elements necessary for fraudulent concealment) (citation omitted).

The 2008 PAC case note, which Plaintiffs claim was not transmitted to NSP, reveals on its face that no omission was ever intended. In the PAC note, Howenstein flatly states, "Although TIL 1277 is written for once through boilers **we have been recommending customers with drum boilers follow the recommendations also**." (Tr. Ex. 38 at Tr.Ex.NSP0038.002 (emphasis added).) The record is bereft of any evidence showing that Bird and/or Howenstein intentionally concealed this information from NSP and intended that NSP rely on this omission. Even if disclosure was not made, it was obviously unintended since GE was not concealing, but disclosing, these recommendations to customers with drum boilers. And GE had nothing to gain, and in fact gained nothing, by the alleged withholding. Rather, GE stood to gain by disclosing this information, since it presented an opportunity for GE to provide

services to NSP. In addition to being factually deficient, Plaintiffs' argument defies all economic logic of for-profit enterprises conducting business with one another.

Given the undisputed facts, the assertion that GE intended NSP to rely to its detriment on a misleading set of facts about the risk of SCC and appropriate inspection protocols is completely unsupported. The Court was correct the first time in rejecting such unsupportable assertions and dismissing the "fraudulent concealment" claim as a matter of law. *See Mies Equip., Inc. v. NCI Bldg. Sys., L.P.*, 167 F. Supp. 2d 1077, 1081 (D. Minn. 2001) ("If a plaintiff fails to support an essential element of a claim, summary judgment must issue because a complete failure of proof regarding an essential element renders all other facts immaterial.").

CONCLUSION

The Court appropriately dismissed Plaintiffs' Post-Sale Failure to Warn claim for failure to meet the standard required in *Great Northern*. Neither that claim nor its elements were submitted to the jury on the Special Verdict Form, and the jury's responses to the Special Verdict Form cannot be used to bootstrap a non-existent claim. Although Plaintiffs' Gross Negligence claim purported to rely upon an assumed duty, the jury expressly found GE did not act with gross negligence, and therefore the jury did not answer any causation question with respect to that claim. The Willful and Wanton Negligence claim was submitted to the jury, and the jury declined to find the requisite "imminent peril" that is essential to such a claim. The Court did not abuse its discretion in its evidentiary rulings, which allowed Plaintiffs more than they were entitled to regarding other incidents of SCC and design-related information, and in fact prejudiced GE's defense. The Court appropriately excluded TIL 1886 as a classic subsequent remedial measure under Rule 407. Finally, the Court appropriately dismissed Plaintiffs' Fraudulent Concealment claim (Count I) on summary judgment.

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For all these reasons, Plaintiffs' Motion for Judgment as a Matter of Law or Alternatively For a New Trial should be denied.

Dated: December 21, 2018

MEAGHER & GEER, P.L.L.P.

/s/ Robert W. Vaccaro

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PUBLIC VERSION

Filed in District Court
State of Minnesota
Dated 10-31-18

STATE OF MINNESOTA **DISTRICT CO URT**

COUNTY OF SHERBURNE **TENTH JUDICIAL DISTRICT**

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

Plaintiffs,

SPECIAL VERDICT FORM

v.

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

Court File: 71-CV-13-1472

Defendants.

We the jury impaneled and sworn to try the issues in the above-entitled case, do hereby answer the questions submitted by the Court as follows:

1. **You must answer this question**: Did GE discover that the peril of a catastrophic failure due to stress corrosion cracking was impending for NSP?

   Yes_____ No__X__

2. **If your answer to Question 1 was "Yes," then answer this question**: After learning of the peril, did GE act with reckless disregard for the safety of NSP's property by failing to exercise ordinary care to prevent the impending injury?

   Yes_____ No_____

3. **If your answer to Question 2 was "Yes," then answer this question**: Was this willful and wanton negligence by GE a direct cause of the property loss at Sherco?

   Yes_____ No_____

4. **You must answer this question**: Did GE undertake an obligation after the sale of Unit 3 to render technical information, advice, and recommendations to NSP?

   Yes__X__ No_____

5. **If your answer to Question 4 was "Yes," then answer this question**: Should GE have recognized that such provision of technical information, advice, and recommendations was necessary for the protection of NSP's property and employees?

   Yes__X__ No_____

6. **If your answer to Question 5 was "Yes," then answer this question**: Did GE fail to exercise reasonable care in that provision of technical information, advice, and recommendations because (a) GE increased the risk of harm, or (b) NSP relied on the undertaking?

   Yes__X__ No_____

7. **If your answer to Question 6 was "Yes," then answer this question**: Did GE act with gross negligence in that provision of technical information, advice, and recommendations?

   Yes_____ No__X__

8. **If your answer to Question 7 was "Yes," then answer this question**: Was this gross negligence by GE a direct cause of physical harm to NSP?

   Yes_____ No_____

9. **You must answer this question**: Was NSP negligent in the operation and maintenance of Unit 3?

   Yes__X__ No_____

10. **If your answer to Question 9 was "Yes," then answer this question**: Was NSP's negligence a direct cause of the property loss at Sherco?

    Yes__X__ No_____

You must answer Question 11 regardless of your answers to any other Questions on this Special Verdict Form:

11. Taking all of the fault that directly caused the explosion and fire involving Unit 3 as 100%, what percentage of fault do you attribute to each of the following:

GE	52 %
NSP	48 %
TOTAL	100%

Please sign and date this form and return it to the deputy.

Dated this 31 day of October 2018, at 11:55 (a.m.) / p.m.

By: Nicholle Buttliaume
Foreperson

This page need not be used unless after SIX hours of deliberation, 7 of the 8 jurors agree to a Verdict, in which event the 7 jurors so agreeing will sign below in lieu of the signature of the Foreperson. The same 7 jurors must agree on all answers. However, in the event that after six hours of deliberation all 8 jurors arrive at a unanimous Verdict, then, it need only be signed by the Foreperson.

JURORS CONCURRING

_____
Juror

_____
Juror

_____
Juror

_____
Juror

_____
Juror

_____
Juror

_____
Juror

Date & Time: _____

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Minnesota Attorney General Keith Ellison
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January 15, 2021

Mr. Will Seuffert
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, MN 55101

Re: ***In the Matter of Application of Northern States Power Company for Authority to Increase Rates for Electric Service in the State of Minnesota, et al***
MPUC Docket Nos. E-002/GR-12-961; E-002/GR-13-868; E-999/AA-14-579; E-999/AA-16-523; E-999/AA-17-492; E-999/AA-18-373; E-999/AA-13-599

Dear Mr. Seuffert:

Enclosed and e-filed in the above-referenced matter please find both the PUBLIC and TRADE SECRET Comments of the Minnesota Office of the Attorney General–Residential Utilities Division.

By copy of this letter all parties have been served. A Certificate of Service is also enclosed.

Sincerely,

/s/ **Joseph C. Meyer**
JOSEPH C. MEYER
Assistant Attorney General

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CERTIFICATE OF SERVICE

Re: ***In the Matter of Application of Northern States Power Company for Authority to Increase Rates for Electric Service in the State of Minnesota, et al***
MPUC Docket Nos. E-002/GR-12-961; E-002/GR-13-868; E-999/AA-14-579; E-999/AA-16-523; E-999/AA-17-492; E-999/AA-18-373; E-999/AA-13-599

I, JUDY SIGAL, hereby certify that on the 15th day of January, 2021, I e-filed with eDockets ***both the PUBLIC and TRADE SECRET Comments of the Minnesota Office of The Attorney General—Residential Utilities Division*** and served a true and correct copy of the same upon all parties listed on the attached service list by e-mail, electronic submission, and/or United States Mail with postage prepaid, and deposited the same in a U.S. Post Office mail receptacle in the City of St. Paul, Minnesota.

/s/ Judy Sigal
JUDY SIGAL

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James	Canaday	james.canaday@ag.state.mn.us	Office of the Attorney General-RUD	Suite 1400 445 Minnesota St. St. Paul, MN 55101	Electronic Service	Yes	OFF_SL_13-868_Official
John	Coffman	john@johncoffman.net	AARP	871 Tuxedo Blvd. St, Louis, MO 63119-2044	Electronic Service	No	OFF_SL_13-868_Official
Generic Notice	Commerce Attorneys	commerce.attorneys@ag.state.mn.us	Office of the Attorney General-DOC	445 Minnesota Street Suite 1400 St. Paul, MN 55101	Electronic Service	Yes	OFF_SL_13-868_Official
Brooke	Cooper	bcooper@allete.com	Minnesota Power	30 W Superior St Duluth, MN 558022191	Electronic Service	No	OFF_SL_13-868_Official
James	Denniston	james.r.denniston@xcelenergy.com	Xcel Energy Services, Inc.	414 Nicollet Mall, 401-8 Minneapolis, MN 55401	Electronic Service	Yes	OFF_SL_13-868_Official
Sharon	Ferguson	sharon.ferguson@state.mn.us	Department of Commerce	85 7th Place E Ste 280 Saint Paul, MN 551012198	Electronic Service	No	OFF_SL_13-868_Official
Michael	Hoppe	lu23@ibew23.org	Local Union 23, I.B.E.W.	445 Etna Street Ste. 61 St. Paul, MN 55106	Electronic Service	No	OFF_SL_13-868_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
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Richard	Johnson	Rick.Johnson@lawmoss.com	Moss & Barnett	150 S. 5th Street Suite 1200 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_13-868_Official
Sarah	Johnson Phillips	sarah.phillips@stoel.com	Stoel Rives LLP	33 South Sixth Street Suite 4200 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_13-868_Official
Mark J.	Kaufman	mkaufman@ibewlocal949.org	IBEW Local Union 949	12908 Nicollet Avenue South Burnsville, MN 55337	Electronic Service	No	OFF_SL_13-868_Official
Thomas	Koehler	TGK@IBEW160.org	Local Union #160, IBEW	2909 Anthony Ln St Anthony Village, MN 55418-3238	Electronic Service	No	OFF_SL_13-868_Official
Peder	Larson	plarson@larkinhoffman.com	Larkin Hoffman Daly & Lindgren, Ltd.	8300 Norman Center Drive Suite 1000 Bloomington, MN 55437	Electronic Service	No	OFF_SL_13-868_Official
Douglas	Larson	dlarson@dakotaelectric.com	Dakota Electric Association	4300 220th St W Farmington, MN 55024	Electronic Service	No	OFF_SL_13-868_Official
Pam	Marshall	pam@energycents.org	Energy CENTS Coalition	823 7 h St E St. Paul, MN 55106	Electronic Service	No	OFF_SL_13-868_Official
Mary	Martinka	mary.a.martinka@xcelenergy.com	Xcel Energy Inc	414 Nicollet Mall 7th Floor Minneapolis, MN 55401	Electronic Service	Yes	OFF_SL_13-868_Official
Brian	Meloy	brian.meloy@stinson.com	STINSON LLP	50 S 6th St Ste 2600 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_13-868_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
David	Moeller	dmoeller@allete.com	Minnesota Power	30 W Superior St Duluth, MN 558022093	Electronic Service	No	OFF_SL_13-868_Official
Andrew	Moratzka	andrew.moratzka@stoel.com	Stoel Rives LLP	33 South Sixth St Ste 4200 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_13-868_Official
David	Niles	david.niles@avantenergy.com	Minnesota Municipal Power Agency	220 South Sixth Street Suite 1300 Minneapolis, Minnesota 55402	Electronic Service	No	OFF_SL_13-868_Official
Generic Notice	Residential Utilities Division	residential.utilities@ag.state.mn.us	Office of the Attorney General-RUD	1400 BRM Tower 445 Minnesota St St. Paul, MN 551012131	Electronic Service	Yes	OFF_SL_13-868_Official
Kevin	Reuther	kreuther@mncenter.org	MN Center for Environmental Advocacy	26 E Exchange St, Ste 206 St. Paul, MN 551011667	Electronic Service	No	OFF_SL_13-868_Official
Richard	Savelkoul	rsavelkoul@martinsquires.com	Martin & Squires, P.A.	332 Minnesota Street Ste W2750 St. Paul, MN 55101	Electronic Service	No	OFF_SL_13-868_Official
Will	Seuffert	Will.Seuffert@state mn.us	Public Utilities Commission	121 7 h Pl E Ste 350 Saint Paul, MN 55101	Electronic Service	Yes	OFF_SL_13-868_Official
Janet	Shaddix Elling	jshaddix@janetshaddix.com	Shaddix And Associates	7400 Lyndale Ave S Ste 190 Richfield, MN 55423	Electronic Service	Yes	OFF_SL_13-868_Official
Ken	Smith	ken.smith@districtenergy.com	District Energy St. Paul Inc.	76 W Kellogg Blvd St. Paul, MN 55102	Electronic Service	No	OFF_SL_13-868_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Byron E.	Starns	byron.starns@stinson.com	STINSON LLP	50 S 6th St Ste 2600 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_13-868_Official
James M	Strommen	jstrommen@kennedy-graven.com	Kennedy & Graven, Chartered	150 S 5th St Ste 700 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_13-868_Official
Eric	Swanson	eswanson@winthrop.com	Winthrop & Weinstine	225 S 6th St Ste 3500 Capella Tower Minneapolis, MN 554024629	Electronic Service	No	OFF_SL_13-868_Official
Lynnette	Sweet	Regulatory.records@xcelenergy.com	Xcel Energy	414 Nicollet Mall FL 7 Minneapolis, MN 554011993	Electronic Service	Yes	OFF_SL_13-868_Official
Lisa	Veith	lisa.veith@ci.stpaul mn.us	City of St. Paul	400 City Hall and Courthouse 15 West Kellogg Blvd. St. Paul, MN 55102	Electronic Service	No	OFF_SL_13-868_Official
Samantha	Williams	swilliams@nrdc.org	Natural Resources Defense Council	20 N. Wacker Drive Ste 1600 Chicago, IL 60606	Electronic Service	No	OFF_SL_13-868_Official
Patrick	Zomer	Patrick.Zomer@lawmoss.com	Moss & Barnett a Professional Association	150 S. 5th Street, #1200 Minneapolis, MN 55402	Electronic Service	No	OFF_SL_13-868_Official

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Generic Notice	Commerce Attorneys	commerce.attorneys@ag.state.mn.us	Office of the Attorney General-DOC	445 Minnesota Street Suite 1400 St. Paul, MN 55101	Electronic Service	Yes	OFF_SL_14-579_OFF_SL_14-579_AA-14-579
Brooke	Cooper	bcooper@allete.com	Minnesota Power	30 W Superior St Duluth, MN 558022191	Electronic Service	No	OFF_SL_14-579_OFF_SL_14-579_AA-14-579
Marie	Doyle	marie.doyle@centerpointenergy.com	CenterPoint Energy	505 Nicollet Mall P O Box 59038 Minneapolis, MN 554590038	Electronic Service	No	OFF_SL_14-579_OFF_SL_14-579_AA-14-579
Sharon	Ferguson	sharon.ferguson@state.mn.us	Department of Commerce	85 7th Place E Ste 280 Saint Paul, MN 551012198	Electronic Service	No	OFF_SL_14-579_OFF_SL_14-579_AA-14-579
Bruce	Gerhardson	bgerhardson@otpco.com	Otter Tail Power Company	PO Box 496 215 S Cascade St Fergus Falls, MN 565380496	Electronic Service	No	OFF_SL_14-579_OFF_SL_14-579_AA-14-579
Douglas	Larson	dlarson@dakotaelectric.com	Dakota Electric Association	4300 220th St W Farmington, MN 55024	Electronic Service	No	OFF_SL_14-579_OFF_SL_14-579_AA-14-579
Samantha	Norris	saman hanorris@alliantenergy.com	Interstate Power and Light Company	200 1st Street SE PO Box 351 Cedar Rapids, IA 524060351	Electronic Service	No	OFF_SL_14-579_OFF_SL_14-579_AA-14-579
Leann	Oehlerking Boes	lboes@mnpower.com	Minnesota Power	30 W Superior St Duluth, MN 55802	Electronic Service	No	OFF_SL_14-579_OFF_SL_14-579_AA-14-579
Randy	Olson	rolson@dakotaelectric.com	Dakota Electric Association	4300 220th Street W. Farmington, MN 55024-9583	Electronic Service	No	OFF_SL_14-579_OFF_SL_14-579_AA-14-579
Generic Notice	Residential Utilities Division	residential.utilities@ag.state.mn.us	Office of the Attorney General-RUD	1400 BRM Tower 445 Minnesota St St. Paul, MN 551012131	Electronic Service	Yes	OFF_SL_14-579_OFF_SL_14-579_AA-14-579

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Will	Seuffert	Will.Seuffert@state mn.us	Public Utilities Commission	121 7 h Pl E Ste 350 Saint Paul, MN 55101	Electronic Service	Yes	OFF_SL_14-579_OFF_SL_14-579_AA-14-579
Lynnette	Sweet	Regulatory.records@xcelenergy.com	Xcel Energy	414 Nicollet Mall FL 7 Minneapolis, MN 554011993	Electronic Service	No	OFF_SL_14-579_OFF_SL_14-579_AA-14-579
Stuart	Tommerdahl	stommerdahl@otpco.com	Otter Tail Power Company	215 S Cascade St PO Box 496 Fergus Falls, MN 56537	Electronic Service	No	OFF_SL_14-579_OFF_SL_14-579_AA-14-579
Robyn	Woeste	robynwoeste@alliantenergy.com	Interstate Power and Light Company	200 First St SE Cedar Rapids, IA 52401	Electronic Service	No	OFF_SL_14-579_OFF_SL_14-579_AA-14-579

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Generic Notice	Commerce Attorneys	commerce.attorneys@ag.state.mn.us	Office of the Attorney General-DOC	445 Minnesota Street Suite 1400 St. Paul, MN 55101	Electronic Service	Yes	OFF_SL_16-523_AA16-523
Brooke	Cooper	bcooper@allete.com	Minnesota Power	30 W Superior St Duluth, MN 558022191	Electronic Service	No	OFF_SL_16-523_AA16-523
Marie	Doyle	marie.doyle@centerpointenergy.com	CenterPoint Energy	505 Nicollet Mall P O Box 59038 Minneapolis, MN 554590038	Electronic Service	No	OFF_SL_16-523_AA16-523
Sharon	Ferguson	sharon.ferguson@state.mn.us	Department of Commerce	85 7th Place E Ste 280 Saint Paul, MN 551012198	Electronic Service	No	OFF_SL_16-523_AA16-523
Bruce	Gerhardson	bgerhardson@otpco.com	Otter Tail Power Company	PO Box 496 215 S Cascade St Fergus Falls, MN 565380496	Electronic Service	No	OFF_SL_16-523_AA16-523
Douglas	Larson	dlarson@dakotaelectric.com	Dakota Electric Association	4300 220th St W Farmington, MN 55024	Electronic Service	No	OFF_SL_16-523_AA16-523
Samantha	Norris	saman hanorris@alliantenergy.com	Interstate Power and Light Company	200 1st Street SE PO Box 351 Cedar Rapids, IA 524060351	Electronic Service	No	OFF_SL_16-523_AA16-523
Leann	Oehlerking Boes	lboes@mnpower.com	Minnesota Power	30 W Superior St Duluth, MN 55802	Electronic Service	No	OFF_SL_16-523_AA16-523
Randy	Olson	rolson@dakotaelectric.com	Dakota Electric Association	4300 220th Street W. Farmington, MN 55024-9583	Electronic Service	No	OFF_SL_16-523_AA16-523
Catherine	Phillips	Catherine.Phillips@wecenergygroup.com	Minnesota Energy Resources	231 West Michigan St Milwaukee, WI 53203	Electronic Service	No	OFF_SL_16-523_AA16-523

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Generic Notice	Residential Utilities Division	residential.utilities@ag.state.mn.us	Office of the Attorney General-RUD	1400 BRM Tower 445 Minnesota St St. Paul, MN 551012131	Electronic Service	Yes	OFF_SL_16-523_AA16-523
Will	Seuffert	Will.Seuffert@state mn.us	Public Utilities Commission	121 7 h Pl E Ste 350 Saint Paul, MN 55101	Electronic Service	Yes	OFF_SL_16-523_AA16-523
Richard	Stasik	richard.stasik@wecenergygroup.com	Minnesota Energy Resources Corporation (HOLDING)	231 West Michigan St - P321 Milwaukee, WI 53203	Electronic Service	No	OFF_SL_16-523_AA16-523
Lynnette	Sweet	Regulatory.records@xcelenergy.com	Xcel Energy	414 Nicollet Mall FL 7 Minneapolis, MN 554011993	Electronic Service	No	OFF_SL_16-523_AA16-523
Stuart	Tommerdahl	stommerdahl@otpco.com	Otter Tail Power Company	215 S Cascade St PO Box 496 Fergus Falls, MN 56537	Electronic Service	No	OFF_SL_16-523_AA16-523
Robyn	Woeste	robynwoeste@alliantenergy.com	Interstate Power and Light Company	200 First St SE Cedar Rapids, IA 52401	Electronic Service	No	OFF_SL_16-523_AA16-523

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Derek	Bertsch	derek.bertsch@mrenergy.com	Missouri River Energy Services	3724 West Avera Drive PO Box 88920 Sioux Falls, SD 57109-8920	Electronic Service	No	OFF_SL_17-492_OFF_SL_17-492_AA-17-492
Generic Notice	Commerce Attorneys	commerce.attorneys@ag.state.mn.us	Office of the Attorney General-DOC	445 Minnesota Street Suite 1400 St. Paul, MN 55101	Electronic Service	Yes	OFF_SL_17-492_OFF_SL_17-492_AA-17-492
Brooke	Cooper	bcooper@allete.com	Minnesota Power	30 W Superior St Duluth, MN 558022191	Electronic Service	No	OFF_SL_17-492_OFF_SL_17-492_AA-17-492
Marie	Doyle	marie.doyle@centerpointenergy.com	CenterPoint Energy	505 Nicollet Mall P O Box 59038 Minneapolis, MN 554590038	Electronic Service	No	OFF_SL_17-492_OFF_SL_17-492_AA-17-492
Sharon	Ferguson	sharon.ferguson@state.mn.us	Department of Commerce	85 7th Place E Ste 280 Saint Paul, MN 551012198	Electronic Service	No	OFF_SL_17-492_OFF_SL_17-492_AA-17-492
Bruce	Gerhardson	bgerhardson@otpco.com	Otter Tail Power Company	PO Box 496 215 S Cascade St Fergus Falls, MN 565380496	Electronic Service	No	OFF_SL_17-492_OFF_SL_17-492_AA-17-492
Douglas	Larson	dlarson@dakotaelectric.com	Dakota Electric Association	4300 220th St W Farmington, MN 55024	Electronic Service	No	OFF_SL_17-492_OFF_SL_17-492_AA-17-492
Samantha	Norris	saman hanorris@alliantenergy.com	Interstate Power and Light Company	200 1st Street SE PO Box 351 Cedar Rapids, IA 524060351	Electronic Service	No	OFF_SL_17-492_OFF_SL_17-492_AA-17-492
Leann	Oehlerking Boes	lboes@mnpower.com	Minnesota Power	30 W Superior St Duluth, MN 55802	Electronic Service	No	OFF_SL_17-492_OFF_SL_17-492_AA-17-492
Randy	Olson	rolson@dakotaelectric.com	Dakota Electric Association	4300 220th Street W. Farmington, MN 55024-9583	Electronic Service	No	OFF_SL_17-492_OFF_SL_17-492_AA-17-492

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
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Generic Notice	Residential Utilities Division	residential.utilities@ag.state.mn.us	Office of the Attorney General-RUD	1400 BRM Tower 445 Minnesota St St. Paul, MN 551012131	Electronic Service	Yes	OFF_SL_17-492_OFF_SL_17-492_AA-17-492
Will	Seuffert	Will.Seuffert@state mn.us	Public Utilities Commission	121 7 h Pl E Ste 350 Saint Paul, MN 55101	Electronic Service	Yes	OFF_SL_17-492_OFF_SL_17-492_AA-17-492
Richard	Stasik	richard.stasik@wecenergygroup.com	Minnesota Energy Resources Corporation (HOLDING)	231 West Michigan St - P321 Milwaukee, WI 53203	Electronic Service	No	OFF_SL_17-492_OFF_SL_17-492_AA-17-492
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Lynnette	Sweet	Regulatory.records@xcelenergy.com	Xcel Energy	414 Nicollet Mall FL 7 Minneapolis, MN 554011993	Electronic Service	No	OFF_SL_17-492_OFF_SL_17-492_AA-17-492
Stuart	Tommerdahl	stommerdahl@otpco.com	Otter Tail Power Company	215 S Cascade St PO Box 496 Fergus Falls, MN 56537	Electronic Service	No	OFF_SL_17-492_OFF_SL_17-492_AA-17-492
Robyn	Woeste	robynwoeste@alliantenergy.com	Interstate Power and Light Company	200 First St SE Cedar Rapids, IA 52401	Electronic Service	No	OFF_SL_17-492_OFF_SL_17-492_AA-17-492

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Derek	Bertsch	derek.bertsch@mrenergy.com	Missouri River Energy Services	3724 West Avera Drive PO Box 88920 Sioux Falls, SD 57109-8920	Electronic Service	No	OFF_SL_18-373_AA -18-373
Generic Notice	Commerce Attorneys	commerce.attorneys@ag.state.mn.us	Office of the Attorney General-DOC	445 Minnesota Street Suite 1400 St. Paul, MN 55101	Electronic Service	Yes	OFF_SL_18-373_AA -18-373
Brooke	Cooper	bcooper@allete.com	Minnesota Power	30 W Superior St Duluth, MN 558022191	Electronic Service	No	OFF_SL_18-373_AA -18-373
Marie	Doyle	marie.doyle@centerpointenergy.com	CenterPoint Energy	505 Nicollet Mall P O Box 59038 Minneapolis, MN 554590038	Electronic Service	No	OFF_SL_18-373_AA -18-373
Sharon	Ferguson	sharon.ferguson@state.mn.us	Department of Commerce	85 7th Place E Ste 280 Saint Paul, MN 551012198	Electronic Service	No	OFF_SL_18-373_AA -18-373
Bruce	Gerhardson	bgerhardson@otpco.com	Otter Tail Power Company	PO Box 496 215 S Cascade St Fergus Falls, MN 565380496	Electronic Service	No	OFF_SL_18-373_AA -18-373
Douglas	Larson	dlarson@dakotaelectric.com	Dakota Electric Association	4300 220th St W Farmington, MN 55024	Electronic Service	No	OFF_SL_18-373_AA -18-373
Samantha	Norris	saman hanorris@alliantenergy.com	Interstate Power and Light Company	200 1st Street SE PO Box 351 Cedar Rapids, IA 524060351	Electronic Service	No	OFF_SL_18-373_AA -18-373
Leann	Oehlerking Boes	lboes@mnpower.com	Minnesota Power	30 W Superior St Duluth, MN 55802	Electronic Service	No	OFF_SL_18-373_AA -18-373
Randy	Olson	rolson@dakotaelectric.com	Dakota Electric Association	4300 220th Street W. Farmington, MN 55024-9583	Electronic Service	No	OFF_SL_18-373_AA -18-373

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Catherine	Phillips	Catherine.Phillips@wecenergygroup.com	Minnesota Energy Resources	231 West Michigan St Milwaukee, WI 53203	Electronic Service	No	OFF_SL_18-373_AA -18-373
Generic Notice	Residential Utilities Division	residential.utilities@ag.state.mn.us	Office of the Attorney General-RUD	1400 BRM Tower 445 Minnesota St St. Paul, MN 551012131	Electronic Service	Yes	OFF_SL_18-373_AA -18-373
Isabel	Ricker	ricker@fresh-energy.org	Fresh Energy	408 Saint Peter Street Suite 220 Saint Paul, MN 55102	Electronic Service	No	OFF_SL_18-373_AA -18-373
Will	Seuffert	Will.Seuffert@state mn.us	Public Utilities Commission	121 7 h Pl E Ste 350 Saint Paul, MN 55101	Electronic Service	Yes	OFF_SL_18-373_AA -18-373
Richard	Stasik	richard.stasik@wecenergygroup.com	Minnesota Energy Resources Corporation (HOLDING)	231 West Michigan St - P321 Milwaukee, WI 53203	Electronic Service	No	OFF_SL_18-373_AA -18-373
Kristin	Stastny	kstastny@taftlaw.com	Taft Stettinius & Hollister LLP	2200 IDS Center 80 South 8th St Minneapolis, MN 55402	Electronic Service	No	OFF_SL_18-373_AA -18-373
Lynnette	Sweet	Regulatory.records@xcelenergy.com	Xcel Energy	414 Nicollet Mall FL 7 Minneapolis, MN 554011993	Electronic Service	No	OFF_SL_18-373_AA -18-373
Stuart	Tommerdahl	stommerdahl@otpco.com	Otter Tail Power Company	215 S Cascade St PO Box 496 Fergus Falls, MN 56537	Electronic Service	No	OFF_SL_18-373_AA -18-373
Robyn	Woeste	robynwoeste@alliantenergy.com	Interstate Power and Light Company	200 First St SE Cedar Rapids, IA 52401	Electronic Service	No	OFF_SL_18-373_AA -18-373

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Generic Notice	Commerce Attorneys	commerce.attorneys@ag.state.mn.us	Office of the Attorney General-DOC	445 Minnesota Street Suite 1400 St. Paul, MN 55101	Electronic Service	Yes	OFF_SL_13-599_13-599
Brooke	Cooper	bcooper@allete.com	Minnesota Power	30 W Superior St Duluth, MN 558022191	Electronic Service	No	OFF_SL_13-599_13-599
Marie	Doyle	marie.doyle@centerpointenergy.com	CenterPoint Energy	505 Nicollet Mall P O Box 59038 Minneapolis, MN 554590038	Electronic Service	No	OFF_SL_13-599_13-599
Sharon	Ferguson	sharon.ferguson@state.mn.us	Department of Commerce	85 7th Place E Ste 280 Saint Paul, MN 551012198	Electronic Service	No	OFF_SL_13-599_13-599
Bruce	Gerhardson	bgerhardson@otpco.com	Otter Tail Power Company	PO Box 496 215 S Cascade St Fergus Falls, MN 565380496	Electronic Service	No	OFF_SL_13-599_13-599
Douglas	Larson	dlarson@dakotaelectric.com	Dakota Electric Association	4300 220th St W Farmington, MN 55024	Electronic Service	No	OFF_SL_13-599_13-599
Samantha	Norris	saman hanorris@alliantenergy.com	Interstate Power and Light Company	200 1st Street SE PO Box 351 Cedar Rapids, IA 524060351	Electronic Service	No	OFF_SL_13-599_13-599
Leann	Oehlerking Boes	lboes@mnpower.com	Minnesota Power	30 W Superior St Duluth, MN 55802	Electronic Service	No	OFF_SL_13-599_13-599
Generic Notice	Residential Utilities Division	residential.utilities@ag.state.mn.us	Office of the Attorney General-RUD	1400 BRM Tower 445 Minnesota St St. Paul, MN 551012131	Electronic Service	Yes	OFF_SL_13-599_13-599
Will	Seuffert	Will.Seuffert@state mn.us	Public Utilities Commission	121 7 h Pl E Ste 350 Saint Paul, MN 55101	Electronic Service	Yes	OFF_SL_13-599_13-599

First Name	Last Name	Email	Company Name	Address	Delivery Method	View Trade Secret	Service List Name
Lynnette	Sweet	Regulatory.records@xcelenergy.com	Xcel Energy	414 Nicollet Mall FL 7 Minneapolis, MN 554011993	Electronic Service	No	OFF_SL_13-599_13-599
Stuart	Tommerdahl	stommerdahl@otpco.com	Otter Tail Power Company	215 S Cascade St PO Box 496 Fergus Falls, MN 56537	Electronic Service	No	OFF_SL_13-599_13-599
Robyn	Woeste	robynwoeste@alliantenergy.com	Interstate Power and Light Company	200 First St SE Cedar Rapids, IA 52401	Electronic Service	No	OFF_SL_13-599_13-599