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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

EMPLOYERS MUTUAL CASUALTY COMPANY (also d/b/a EMC INSURANCE COMPANIES),	)	NO. 4:02-cv-30467
Plaintiff,	)	
COLLINS & AIKMAN FLOOR COVERINGS, INC.,	)	RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVE MOTION FOR PARTIAL SUMMARY JUDGMENT
Defendant.	)	

This matter is before the Court on defendant's motion for summary judgment (#46). The case involves carpet manufactured by defendant Collins & Aikman Floor Coverings, Inc. (hereinafter "C&A") and installed in two buildings (one new construction and one renovated) owned by plaintiff Employers Mutual Casualty Company (hereinafter "EMC"). EMC makes claims of (1) breach of implied warranty of fitness for particular purpose (Count I); (2) breach of implied warranty of merchantability (Count II); (3) breach of written express warranty (Count III); (4) negligence (Count IV); (5) negligent misrepresentation (Count V); (6) fraudulent misrepresentation and nondisclosure (Count VI); and (7) breach of oral and marketing express warranty (Count VII).

The Court has diversity jurisdiction. 28 U.S.C. §§ 1332(a). The undersigned has been assigned the case pursuant to 28 U.S.C. § 636(c). Hearing on the motion has been held and it is fully submitted.

I. SUMMARY JUDGMENT

C&A is entitled to summary judgment if the affidavits, pleadings, and discovery materials "show that there is no genuine issue as to any material fact and that [C&A is] entitled to judgment as a matter of law." Erenberg v. Methodist Hospital, __ F.3d ___, ___, 2004 WL 202999, *3 (8th Cir. Feb. 4, 2004)(citing Fed. R. Civ. P. 56(c)). The Court must view the facts in the light most favorable to the nonmoving party, and give that party the benefit of all reasonable inferences which can be drawn from them, "that is, those inferences which may be drawn without resorting to speculation." Mathes v. Furniture Brands Int'l, Inc., 266 F.3d 884, 885-86 (8th Cir. 2001)(citing Sprenger v. Federal Home Loan Bank of Des Moines, 253 F.3d 1106, 1110 (8th Cir. 2001)); see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Erenberg, ___ F.3d at ___, 2004 WL 20299, *3; Tademe v. St. Cloud State University, 328 F.3d 982, 987 (8th Cir. 2003); Lambert v. City of Dumas, 187 F.3d 931, 934 (8th Cir. 1999); Kopp v. Samaritan Health System, Inc., 13 F.3d 264, 269 (8th Cir. 1993). An issue of material fact is genuine if it has a real basis in the record. Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citing Matsushita, 475 U.S. at 586-87 (1986)). A genuine issue of fact is material if it "might affect the outcome of the suit under governing law." Hartnagel, 953 F. 2d at 395 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)); see Hitt v. Harsco

Corp., ___ F.3d ___, ___, 2004 WL 178107, *2 (8th Cir. Jan. 30, 2004); Rouse v. Benson, 193 F.3d 936, 939 (8th Cir. 1999).

It is the non-moving party's obligation to "go beyond the pleadings and by affidavits, depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue of material fact." Rouse, 193 F.3d at 939; see Hitt, ___ F.3d at ___, 2004 WL 178107, *2. In assessing a motion for summary judgment a court must determine whether a fair-minded trier of fact could reasonably find for the nonmoving party based on the evidence presented. Anderson, 477 U.S. at 248; Herring v. Canada Life Assurance Co., 207 F.3d 1026, 1030 (8th Cir. 2000).

II. FACTUAL BACKGROUND

The summary judgment record is lengthy. What follows is a very brief overview of the factual background and nature of the case. In 1995 EMC contracted to construct a new office building in downtown Des Moines and to renovate a neighboring building. The buildings are referred to in the record as the "East Building" and the "West Building." Brooks Borg Skiles Architecture Engineering, L.L.P. ("BBS"), a local firm, was EMC's architect for the project. By the terms of the Owner/Architect Agreement between EMC and BBS, BBS was also EMC's agent on the project. BBS is not a party to this action but its performance is part of C&A's defenses.

In the course of developing its construction plans, EMC held a competitive bid process regarding, among other building details, the sale and installation of carpet in the buildings.[1] EMC wanted a particular color scheme in the buildings. EMC's interior office design consists of cubicles which are moved frequently. EMC desired carpet on which chairs with casters (rolling chairs) could be used without chair mats.

To facilitate the competitive bid process, EMC created a "Design Team" composed of individuals from BBS, subcontractor designers, and individuals from EMC's real estate and facilities divisions. The team contacted selected carpet manufacturers to obtain samples of products for consideration before preparing the Project Manual. C&A was one of the selected manufacturers. The Design Team incorporated the performance specifications for the carpeting submitted by C&A and other selected carpet manufacturers in the Project Manual provided to all bidders. The Project Manual and related contract documents did not specify that the carpet must perform under rolling chairs without mats. However, EMC alleges that during the negotiation and bid process its Facilities Coordinator, Joyce McMickle, advised C&A sales representative James Depke of EMC's need for carpet that could be used under rolling chairs without mats. Mr. Depke allegedly responded that he

[1] C&A states that the bid process was employed for the East Building, but the carpet in the West Building was obtained solely by purchase order.

understood the need and that C&A would bid and sell carpet which met it, the source of the alleged oral express warranty.

C&A ultimately was the successful bidder. The carpet was installed in the buildings beginning in the fall of 1996 and continuing through 1998. A total of 23,931.39 square yards of carpet was shipped.

In January 2000 McMickle wrote to Depke raising concerns about how the carpet was "wearing" in areas under rolling chairs in the "East Building." Specifically, McMickle observed that in many work stations the carpet was whitening and appeared to be losing its color in circular patterns under chairs. On February 10, 2000 Depke came to EMC to perform an inspection and also obtained samples of carpet for testing and analysis by C&A. There were several other meetings between C&A and EMC during the year 2000 while the cause of the problem was investigated. In September 2000 C&A offered to replace the affected carpet tiles. This was not satisfactory to EMC, the parties were unable to resolve their differences, and this lawsuit followed. The problem with the carpet has now been noted in the West Building.

C&A offered a "standard warranty" which warranted against certain types of deterioration for a period of fifteen years. That warranty does not cover EMC's complaint about the carpet's appearance. Though its receipt is disputed, there is evidence that EMC Design Team member Dennis Gooch and EMC's carpet installer

signed C&A "acknowledgment" forms with respect to some significant quantity of the carpet. The reverse side of the form contained a disclaimer of all warranties, express or implied, and specifically mentioned the warranties of fitness for a particular purpose and merchantability.

There is no dispute that the carpet should not appear as it does. There is an ultimate factual dispute about the cause: was it the natural and foreseeable result of using the carpet under rolling chairs without mats, poor maintenance, or perhaps a combination of both. Additional facts are discussed below as they bear on the summary judgment issues.

III. DISCUSSION

The Court will in general address the issues as they are presented by C&A.

A. The Spearin Issue and the Negligence of EMC and BBS

1. Spearin

C&A begins with the overarching argument that it should not be responsible for the failure of EMC and its architect BBS to include a written specification in the Project Manual that the carpet be capable of use under rolling chairs without mats. C&A relies on what it contends is a rule emanating from United States v. Spearin, 248 U.S. 132 (1918) and the Iowa Supreme Court's discussion of it in Midwest Dredging Co. v. McAninch Corp., 424 N.W.2d 216, 221-22 (Iowa 1988) that an owner impliedly warrants the

adequacy of plans and specifications to contractors and suppliers on a building project. If the owner omits material information and the supplier conforms to the specifications given, the risk is on the owner.

Midwest Dredging involved a highway construction project. 424 N.W.2d at 217. The Iowa Department of Transportation (DOT) specified that embankment material used to support the highway pavement was to be hydraulically dredged from a borrow site rather than hauled over city streets which would have risked breaking pipes under the streets. Id. at 217-18. The contractor hired to dredge the material was unable to do so because of subsurface conditions and in attempting to perform became insolvent. Id. at 219. It sued the general contractor and the DOT claiming the DOT had "impliedly warranted the accuracy of the plans and specifications contained in its contract . . . that the borrow pit was hydraulically dredgeable." Id. The Iowa Supreme Court observed:

> In factual settings such as these, there is a risk that the contractor will encounter more subsurface rock than was estimated by the contracting authority and, therefore, incur greater expense than anticipated.

Id. at 221. The court viewed the Spearin case as adopting a rule which allocated "that risk." Id. As articulated by the Iowa Supreme Court:

> The rule provides that the government is not liable to a contractor for breach of implied

> warranty unless it misrepresents material facts through concealment or false statements . . . in essence, this rule establishes that no implied warranty will arise when the government, in good faith, presents all the information it has on subsurface conditions to the contractor.

Id. at 221-22. See Spearin, 248 U.S. at 136. The Iowa Supreme Court noted that in each of the cases it cited a contractor had sued to recover additional expenses because of subsurface rock formations the state's borings had failed to reveal. Midwest Dredging, 424 N.W.2d at 222.

Though the Iowa Supreme Court cited Spearin approvingly, it in fact did not apply the Spearin rule in Midwest Dredging. The DOT's original borings had not shown the subsurface rock formations which bedeviled the contractor's dredging efforts and ultimately made dredging impossible. Had that been all there was to it the contractor would have been stuck with the risk under the Spearin rule. However, the DOT had not only provided test boring results but, the Supreme Court concluded, had gone a step further and impliedly represented that the embankment material could be hydraulically dredged and piped in accordance with its specifications. 424 N.W.2d at 222.

This Court believes Midwest Dredging is limited to its context, government contracts involving unforeseen, usually subsurface conditions. See Morris, Inc. v. State ex rel DOT, 598 N.W.2d 520, 523 (S.D. 1999)(citing Midwest Dredging). As noted, the

discussion in Midwest Dredging indicates the court viewed the Spearin rule as intended to allocate that kind of risk. The Court doubts very much that the Iowa Supreme Court, if given the opportunity, would expand Midwest Dredging to a broad rule of implied warranty for the benefit of contractors and suppliers applicable generally to all sorts of construction contracts.[2]

Though Spearin and Midwest Dredging do not support the broad warranty seen by C&A, the Court has no quarrel with the general proposition that a supplier of material to a building project cannot be held responsible for failing to satisfy the undisclosed requirements of the owner. In this case, if EMC's evidence is believed, despite the lack of a written specification EMC informed C&A of the requirement and C&A said it would supply suitable carpet. Even under Spearin/Midwest Dredging there would be a fact question about whether C&A was fully informed.

2. Negligence of EMC and BBS

C&A contends that the summary judgment record demonstrates BBS was negligent per se in failing to include the rolling chairs without mats specification in the Project Manual and that BBS' negligence is imputed to EMC because the architect is the agent of the owner. It is undisputed BBS did not make its own carpet specifications, but rather relied on the specifications

[2] The brief dicta in Cammack & Son v. Weimer, 181 Iowa 1, 162 N.W. 586 (1917) also cited by C&A is too general to be much use on this issue.

provided by carpet manufacturers. The manufacturers' specifications were copied into the Project Manual without independent analysis or testing. C&A argues this was negligence per se.

Typically, in order for the Court to find negligence per se on summary judgment, the record would have to indisputably establish that BBS violated a statute or ordinance which established a standard of care. See Tim O'Neill Chevrolet, Inc. v. Forristall, 551 N.W.2d 611, 618 (Iowa 1996); Jorgensen v. Horton, 206 N.W.2d 100, 102 (Iowa 1973). C&A does not refer the Court to a relevant statute establishing a standard of care breached by the inclusion of its carpet specifications in the project manual. The Court does not believe the circumstances demonstrate obvious negligence. C&A is a reputable carpet manufacturer and presumably an expert on the technical aspects of its products. The Court cannot assume reliance by an architect on a carpet manufacturer's specifications falls below the standard of care in the profession. Accordingly, any negligence on the part of BBS would require proof of the applicable standard of care of an architect and breach thereof through expert testimony. The summary judgment record does not contain expert testimony on the subject.[3]

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[3] C&A maintains that BBS architect's Nelson's own testimony establishes a breach of Iowa's licensing regulations for architects. The testimony to which C&A refers merely repeats certain statutory definitions in Iowa Code § 544A.16, including the definition of "direct supervision and responsible charge." Id. § 544A.16(5). It is not apparent from these that an architect's (continued...)

C&A also suggests that EMC is itself negligent for breaching the duty of reasonable care for the safety of the public. The appearance and wear problems that this lawsuit is about do not as far as the Court can tell implicate the safety of the public and no one has been injured.

Still, one would think that if rolling chairs without mats was a critical performance requirement for the carpet it would have been specified in the Project Manual. Assuming there was a negligent failure to do so, and assuming also that this negligence is a defense to one or more of EMC's claims, there is a cause-in-fact issue which would preclude summary judgment. If the jury believes Depke was informed of the requirement and said C&A would bid accordingly, the jury might conclude the omission of the rolling chair specification from the Project Manual was not a cause of the failure to supply suitable carpet because C&A was aware of the requirement.

B. The Warranty Claims

1. Disclaimer and Integration Clause(s)

The linchpin of EMC's case is the alleged representation of C&A's agent, Depke, that C&A would furnish carpet capable of being used under rolling chairs without chair mats. EMC contends this amounted to an express warranty and together with the

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[3](...continued)
reliance on a carpet manufacturer's specifications is beyond the pale of professional standards.

surrounding circumstances resulted in an implied warranty of fitness for a particular purpose. C&A maintains that any such warranties are disclaimed or precluded by integration clauses in the contract documents.

At hearing C&A supplemented its briefing with an additional argument. Relying on the testimony of BBS architect Nelson, C&A argues that the Project Manual and General Conditions which it incorporates (AIA Document A201)(collectively the "RFP and Conditions") constituted the parties' agreement. These contain a complete integration clause stating they represent "the entire and integrated agreement between the parties hereto and supercede[] prior negotiations, representations or agreements, either written or oral." They also contain a warranty "that materials and equipment furnished under the Contract will be of good quality, . . . that the Work[4] will be free from defects not inherent in the quality required or permitted . . . ." C&A contends this warranty taken together with the integration clause precludes the alleged express warranty by Depke.[5]

C&A also relies on the "acknowledgment" forms signed by Gooch and EMC's carpet installer after the C&A bid was accepted.

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[4] By contract definition "Work" included "materials." (Def. App. at 282).

[5] EMC's Motion for Leave to File Supplemental Submission (#77) and C&A's Motion for Leave to File Reply in Opposition to Plaintiff's Supplemental Submission (#80) which address this issue will both be **granted**.

The form indicates its purpose was to acknowledge acceptance of purchase orders for carpet. On its face the acknowledgment states "[t]his order is accepted subject to all of the terms and conditions on the face and reverse sides hereof, including . . . the provisions for . . . the exclusion of warranties, all of which are accepted by Buyer, supercede Buyer's order form, if any, and constitute the entire contract between Buyer and Seller." (Emphasis original). Thus, the acknowledgment also purports to be a completely integrated contract.

In addition, the face of the acknowledgment alerts the reader to C&A's limited warranties (also referred to in the record as the "standard warranty") against "(a) excessive surface wear, (b) delamination, (c) edge ravel, or (d) color fastness to light and atmospheric contaminants" and directs the reader to C&A or its dealers for details.

The reverse side of the form sets out eighteen "Sales Contract Terms," one of which is a warranty disclaimer clause which states in relevant part:

> Buyer agrees that there is no warranty by Seller in fact or in law that the merchandise which is the subject of this sale is suitable for any particular use or purpose . . . . THERE ARE NO OPTIONS, WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, STATUTORY OR OTHERWISE, EXCEPT THOSE HEREIN SPECIFICALLY CONTAINED, SELLER SPECIFICALLY DISCLAIMS GENERAL WARRANTY OF MERCHANTABILITY.

(Uppercase original). C&A argues the oral express warranty and implied warranties alleged by EMC are disclaimed by this provision.

There cannot be two different completely integrated contracts for the sale of the same carpet. That there are two candidates with different and conflicting warranty provisions suggests a genuine issue of material fact about which governs and whether either was truly, mutually intended to be completely integrated. Since the carpet was furnished through a bidding process as part of a significant construction contract, the jury might find it more likely that as between the two, the relevant written contract documents are the RFP and Conditions. The jury might be receptive to EMC's argument that the parties had reached agreement concerning the carpet before the acknowledgments were sent. On the other hand, the RFP and Conditions bidding instructions expressly provide that if the carpet bid was accepted, the agreement between EMC and the manufacturer would be "written on an industry standard Purchase Order form." (Pltf. App. at 55). This indicates that the RFP and Conditions were not the entire agreement as to the carpet and raises the question whether the acknowledgments were part of the contemplated Purchase Order form.

More generally, the jury may consider it unlikely given the many contract documents in circulation, the nature and size of the carpet transaction and the circumstances surrounding the selection of C&A to provide the carpet, that the parties mutually

intended the later routine acknowledgment forms with their boilerplate language on the reverse substitute as the entire agreement between the parties concerning the carpet. If the jury decides the acknowledgments were a part of the agreement between the parties but did not form a completely integrated contract, Iowa Code § 554. 2316(1), which is intended to protect buyers from unbargained for disclaimers of a seller's express warranties, may still give effect to the oral express warranty. See id. cmt. 1.

The warranty in the RFP and Conditions does not mention merchantability and therefore does not exclude the implied warranty of merchantability. Iowa Code § 554.2316(2). A general warranty of good quality and freedom from defects also does not in the Court's judgment disclaim any implied warranty of fitness for a particular purpose, id., nor does it negate or limit any express warranty. Id. § 554. 2316(1).

If the RFP and Conditions (or acknowledgments for that matter) are a completely integrated contract, the claimed prior oral express warranty would merge into it and evidence thereof to contradict the contract would run afoul of the UCC parol evidence rule. Iowa Code § 554.2202. Whether an agreement is completely or fully integrated is a question of fact involving the parties' intent to be determined from all of the surrounding circumstances. Equity Control Assoc., Ltd. v. Root, 638 N.W.2d 664, 671 (Iowa 2001); Whalen v. Connelly, 545 N.W.2d 284, 290 (Iowa 1996);

Commercial Trust & Savings Bank v. Toy Nat'l Bank, 373 N.W.2d 521, 523 (Iowa App. 1985). The parol evidence rule does not bar extrinsic evidence to show whether or not a writing is intended to be a completely integrated agreement, even if the written agreement unambiguously appears to be complete on its face. See I.G.L. Racquet Club v. Midstates Builders, Inc., 323 N.W.2d 214, 216 (Iowa 1982); In Re Eickman's Estate, 291 N.W.2d 308, 312 (Iowa 1980); First Interstate Equip. Leasing of Iowa, Inc. v. Fielder, 449 N.W.2d 100, 103 (Iowa App. 1989).

EMC asserts the RFP and Conditions (and the acknowledgment forms) were not the complete agreement between the parties with respect to the performance of the carpet. McMickle's affidavit is to the effect that there was a separate agreement between EMC and C&A that the carpet for which C&A would submit a bid would be carpet that could be used under rolling chairs without mats. In its answers prior to the current Second Amended Complaint C&A admitted "it was aware that the bid was for carpet . . . including the ability to place the carpet underneath chairs with rolling casters without the need for plastic mats." (Pltf. App. at 2). McMickle says EMC relied on Depke's representations concerning the represented ability of the carpet to perform under rolling chairs without mats in accepting C&A's bid. If the jury credits McMickle's testimony in this regard it might reasonably conclude that neither the RFP and Conditions nor the acknowledgment form

were the complete agreement with respect to the performance of the carpet.

There is a genuine issue of material fact as to what written contract documents governed the sale of the carpet and whether either of the alleged completely integrated contracts were in fact intended by the parties to be the completely integrated. Accordingly, the Court cannot grant summary judgment on any of the warranty claims on the basis that the warranty is precluded or disclaimed by written contract provision.[6]

2. EMC's "Alternative" Express Warranty Claim

Count III of the Second Amended Complaint asserts an "alternative" express warranty claim based on C&A's fifteen-year warranty incorporated by the acknowledgment. C&A warranted "against excessive surface wear, edge ravel, zippering, resiliency loss of backing, and delamination of the secondary backing from the primary backing . . . " for a period of fifteen years. (Def. App. at 214). The parties appear to agree that this warranty does not cover the alleged product failure involving the whitening/greying under rolling chairs. EMC's expert has so testified. Rather, EMC contends that the C&A "standard warranty" with its disclaimer of other

[6] It is therefore not necessary at this point to address EMC's argument that the standard warranty and disclaimer were unconscionable because they would leave EMC without a remedy for the problem with the carpet, as well as the related issues involving the limitation of remedies provision in the standard warranty and incorporation of that warranty by reference in the acknowledgment and C&A product specification sheets.

warranties is unreasonable and unconscionable because it would never provide relief to a purchaser experiencing this problem. As noted previously, supra n.6, it is not necessary to determine the unconscionability issue in this ruling. Even if the express warranties given by C&A against wear, in the words of former C&A technical manager Hilton "aren't worth the paper they are printed on," that does not give license to the Court to reform the warranties to add terms that are not there. (Pltf. App. at 461-63). The express "standard warranty" offered by C&A is what it is and does not cover the alleged product failure on which EMC's action is based.

Summary judgment will be granted with respect to Count III.

3. The Warranty Claims -- Merits

(a) Express and Fitness for a Particular Purpose

C&A contends that what passed between McMickle and Depke was not sufficient to show an express warranty because all the record indicates is that C&A was aware EMC intended to use the carpet without chair mats. According to McMickle's affidavit, in response to her statement to Depke that EMC needed carpet that could be used under rolling chairs without mats, Depke said he not only understood the need but that C&A would bid and sell carpet that would meet it. In its original answers C&A said it understood that bid was to be for carpet capable of performing under rolling

chairs without mats, an admission which goes beyond mere knowledge of use. This evidence, if believed, is sufficient to support a finding that Depke made an "affirmation of fact or promise" and provided a "description of the goods" to be furnished which were made a basis of the bargain. Iowa Code § 554.2313(1)(a)(b).

What passed between McMickle and Depke and the subsequent difficulties with the carpet are also sufficient to establish the elements of breach of implied warranty of fitness for a particular purpose. Iowa Code § 554.2315; see Renze Hybrids, Inc. v. Shell Oil Co., 418 N.W.2d 634, 637 (Iowa 1988).

(b) Merchantability

Implied warranty of merchantability "is based on the purchaser's reasonable expectation that goods purchased from a 'merchant with respect to goods of that kind' will be free of significant defects and will perform in the way goods of that kind should perform." Van Wyk v. Norden Laboratories, Inc., 345 N.W.2d 81, 84 (Iowa 1984). To be merchantable goods must be "fit for the ordinary purposes for which such goods are used." Iowa Code § 554.2314(2)(c). The "ordinary purposes for which . . . goods are used" refers to "uses which are customarily made of the goods in question." Iowa Code § 554.2315, cmt. 2.

The Second Amended Complaint pleads that the carpet is not merchantable "due to its susceptibility to significant problems, including but not limited to premature fading/whitening

and excessive wear and tear." (Def. App. at 5). EMC has not directed the Court's attention to any evidence that the carpet was unusually susceptible to these conditions, or to any other defect which would render it unsuitable for its ordinary and customary use as commercial carpet. EMC has said C&A was the only commercial carpet manufacturer that told customers they did not need to use protective chair mats under rolling chairs to maintain warranty protection. This implies that commercial carpet is ordinarily and customarily used with chair mats under rolling chairs to protect the carpet. Indeed, EMC's expert Cooper said as much. (Def. App. at 694-95). He has opined that "the sole cause of the problem was rolling chair traffic on top of the carpets without the use of plastic chair mats." (Pltf. Statement of Disputed Facts ¶ 111). "All carpet will crush, mat, and abrade with this type of usage and wear." (Pltf. App. at 162). As far as the record indicates the carpet in question, like the commercial carpet manufactured by other manufacturers, was perfectly suitable for use with chair mats. The problem with the carpet was not its merchantability as commercial carpet, but its inability to live up to the alleged express warranty that it could be used under rolling chairs without mats and its unfitness for that purpose.

C&A is entitled to summary judgment on the claim of breach of implied warranty of merchantability, Count II of the Second Amended Complaint.

C. Statute of Limitations, Future Performance and Fraudulent Concealment

C&A contends that EMC's warranty and fraud claims are barred by the statute of limitations. The analysis is different under each and they are discussed separately.

1. Warranty

There appears to be no dispute that the relevant statutes are Iowa Code §§ 614.1(4), 554.2725(2). Section 614.1(4) provides that actions "founded on unwritten contracts" must be brought within five years. The express warranty claim is based on an unwritten, oral representation and would fall under the provision. It is well-established that the five-year period applies to implied warranty claims. Richards v. Midland Brick Sales Co., 551 N.W.2d 649, 652 (Iowa App. 1996)(citing Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911, 919 (Iowa 1990)).

Section 554.2725 pertains to the accrual of actions for breach of warranty in a contract for sale. Subparagraph 2 thereof states:

> . . . A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered.

Iowa Code § 554.2725(2). About 90% of the carpet was shipped by C&A more than five years prior to the commencement of this action in state court (prior to removal) on August 6, 2002.

(a) Future Performance

EMC responds first that future performance was warranted and therefore the discovery rule in § 554.2725(2) applies to delay accrual of the cause of action. The Court agrees with C&A that any warranty of future performance under the express and fitness warranties alleged was implicit, not explicit with the result that the statutory discovery rule does not apply.

"Implied warranties cannot, by their very nature, explicitly extend to future performance." Marvin Lumber and Cedar Co. v. PPG Indus. Inc., 223 F.3d 873, 879 (8th Cir. 2000)(applying the same statutory language in the Minnesota version of the UCC). See City of Carlisle v. Fetzer, 381 N.W.2d 627, 629 (Iowa 1986)(". . . the almost universal rule is that a garden-variety implied warranty of fitness will not satisfy [the future performance] limitation on the statutory discovery rule").

The Marvin Lumber court also opined that "an express warranty of the present condition of goods without a specific reference to the future is not an explicit warranty of future performance, even if the description implies that the goods will perform a certain way in the future." 223 F.3d at 879. The court cited an example from Western Recreational Vehicles, Inc. v. Swift

Adhesives, Inc., 23 F.3d 1547, 1553 (9th Cir. 1994), in which the seller promised that an adhesive would work on a new type of vehicle. That promise is, in the Court's judgment, precisely on point with the alleged express warranty in this case. The claim is that C&A warranted that its carpet could be used under rolling chairs without mats, a warranty of "the present condition of goods" with respect to which future performance was entirely implicit. See John Q. Hammons Hotels, Inc. v. Acorn Window Sys., Inc., 2003 WL 22852124, *6 (N.D. Iowa Oct. 15, 2003)("warranty must unambiguously and explicitly indicate that the manufacturer is warranting the future performance of the goods for a specified period of time"); Sudenga Indus., Inc. v. Fulton Performance Products, Inc., 894 F. Supp. 1235, 1239 (N.D. Iowa 1995)(warranty of future performance must "unambiguously and explicitly" warrant future performance of goods "for a specified period of time")(emphasis original).

(b) Fraudulent Concealment

EMC alternatively contends that the running of the statute of limitations was tolled by C&A's alleged fraudulent concealment of material facts. Section 554.2725(4) contains a savings provision stating that the UCC "does not alter the law on tolling the statute of limitations . . . . " The Court agrees with EMC that fraudulent concealment of material facts can toll the running of the limitations period. See Marvin Lumber, 223 F.3d at 877; Zurn Constructors, Inc. v. B.F. Goodrich Co., 746 F. Supp.

1051, 1055-56 (D. Kan. 1990). The Iowa Supreme Court long ago adopted the doctrine of fraudulent concealment and recently reaffirmed its vitality. See Scholte v. Dawson, ___ N.W.2d ___, __, 2004 WL 96774, *7 (Iowa Jan. 22, 2004)(citing Van Overbeke v. Youberg, 530 N.W.2d 273, 276 (Iowa 1995)).

To establish fraudulent concealment sufficient to toll the statute of limitations

> The plaintiff carries the burden of either (1) proving "that the defendant affirmatively concealed the facts on which the plaintiff would predicate [the] cause of action" or (2) proving "a confidential or fiduciary relationship exists between the person concealing the cause of action and the aggrieved party" combined with proof that defendant breached the duty of disclosure.

Rieff v. Evans, 630 N.W.2d 278, 290 (Iowa 2001)(quoting McClendon v. Beck, 569 N.W.2d 382, 385 (Iowa 1997)); see Scholte, ___ N.W.2d at ___, 2004 WL 96774, *7; Marvin Lumber, 223 F.3d at 877; Grove v. Principal Mutual Life Ins. Co., 14 F. Supp. 2d 1102, 1108 (S.D. Iowa 1998). Where there is a fiduciary relationship, no affirmative concealment need be proved, however, absent such a relationship mere nondisclosure does not amount to fraudulent concealment. Grove, 14 F. Supp. 2d at 1108 (citing Cole v. Hartford Accident & Indemn. Co., 242 Iowa 416, 426-27, 46 N.W.2d 811, 817 (1951)); see Marvin Lumber, 223 F.3d at 877. If affirmative acts of concealment are shown, those acts "must . . . be independent of the alleged

acts relied on to establish liability." Schlote, ___ N.W.2d at __, 2004 WL 96774, *8 (quoting Van Overbeke, 540 N.W.2d at 276).

(i) Fiduciary Relationship

EMC asserts there existed a fiduciary relationship between the parties which excuses it from having to show affirmative acts of concealment. Specifically, EMC argues that "silence on the part of C&A in failing to reveal that its carpet could not withstand the usage required by EMC is enough to satisfy the first requirement of the fraudulent concealment doctrine." (Pltf. Brief at 17). The Court cannot agree.

In Kurth v. Van Horn, 380 N.W.2d 693 (Iowa 1986), the Iowa Supreme Court discussed at length the hallmarks of a fiduciary relationship. Relying on commentary in the Restatement (Second) of Torts, the court explained "[a] fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another person on matters within the scope of the relation." Id. at 695 (citing Restatement (Second) of Torts § 874 cmt. a at 300 (1979)). The court continued that a fiduciary relationship is "founded on trust or confidence reposed by one person in the integrity and fidelity of another" and "arises whenever confidence is reposed on one side and domination and influence results on the other . . . . Such relationship exists when there is a reposing of faith, confidence and trust, in the

placing of reliance by one upon the judgment and advice of another." Id. at 695.

> Factors indicating that a fiduciary relationship may exist "include the acting of one person for another; the having and exercising of influence over one person by another; the reposing of confidence by one person in another; the dominance of one person by another; the inequality of the parties; and the dependence of one person upon another."

Weltzin v. Cobank, ACB, 633 N.W.2d 290, 294 (Iowa 2001)(quoting in part Kurth, 380 N.W.2d at 695 (citing First Bank of Wakeeney v. Moden, 235 Kan. 260, 681 P.2d 11, 13 (1984)). The circumstances giving rise to a fiduciary relationship can be diverse, but examples that immediately come to mind include the relationship between attorney and client, guardian and ward, principal and agent, executor and heir, trustee and beneficiary. Kurth, 380 N.W.2d at 696. It is clear that a fiduciary relationship does not result from a simple buyer/seller relationship. Asa-Brandt, Inc. v. ADM Investor Services, Inc., 344 F.3d 738, 744 (8th Cir. 2003).

The existence of a fiduciary relationship must be determined with reference to the facts and circumstances of each case. Kurth, 380 N.W.2d at 696. Whether such a duty arises out of a relationship is ultimately a matter of law. Weltzin, 633 N.W.2d at 292.

The Court does not believe a fiduciary relationship between the parties existed prior to the time the problem with the carpet was noticed. EMC is a large, sophisticated insurance

organization and C&A a sophisticated manufacturer and supplier of large quantities of commercial carpet. The parties were engaged in an arm's-length bidding process involving a significant construction contract. On its side of the transaction EMC was aided by an architect, interior designer, and Design Team. It employs a Director of Facilities, a Facilities Coordinator and presumably a staff of persons under them whose job it is to be knowledgeable about, and adequately provide for EMC's needs with respect to the work environment of its employees.

EMC argues that C&A was more experienced, sophisticated, and had more information about carpet and its performance. (Pltf. Brief at 17). No doubt that is true, but if that were enough to establish a fiduciary duty, a fiduciary duty between buyer and seller of goods would be the norm, not the exception. EMC also says it sought the advice of C&A and consulted with it concerning EMC's carpet needs. The only relevant representation in the record in this regard is Depke's alleged express warranty that the carpet could be used under rolling chairs without mats. A simple warranty or representation as to performance is also not enough to create a fiduciary duty because, again, if it were, the existence of such a duty would become commonplace in the sale of goods. The pre-problem circumstances evince no more than "an arm's-length, business relationship." Oeltjenbrun v. CSA Investors, Inc., 3 F. Supp. 2d 1024, 1053 (N.D. Iowa 1998).

The question becomes closer after EMC told C&A about the problems it had noticed. In her affidavit McMickle says in January 2000 she wrote Depke about the problems and requested assistance. Depke responded by calling McMickle and telling her that C&A had never heard of the problem EMC was experiencing (white/grey circles under rolling chairs) and C&A "would agree to act on behalf of EMC in determining what was causing this problem." (Pltf. App. at 304). McMickle states that following inspection of the carpet by C&A representatives in February and May 2000 C&A again assured EMC that it "would work diligently on EMC's behalf to determine what was causing the problems." (Id.) Trust and reliance on C&A to do so are arguably implicit in the circumstances. An undertaking to act for another, and a reposing of trust and reliance by that person are hallmarks of a fiduciary duty. Weltzin, 633 N.W.2d at 294; Kurth, 380 N.W.2d at 695. There is no evidence that C&A dominated or controlled EMC. EMC certainly had the capacity to make its own decisions, but the absence of these factors is not determinative. See Wilson v. IBP, Inc., 558 N.W.2d 132, 139 (Iowa 1996), cert. denied, 522 U.S. 810 (1997).

EMC's theory of fraudulent concealment is, in essence, that C&A knew all along what the problem was; use of the carpet under rolling chairs without chair mats would cause the appearance of the carpet to quickly deteriorate. Evidence that C&A did not disclose the truth about the carpet and the cause of the problem

could conceivably be seen as betrayal of trust placed by EMC in C&A to determine the cause amounting to fraudulent concealment.

C&A has plenty to argue about on the subject of fiduciary duty. It had an independent interest in finding out what was wrong with the carpet. In addition to satisfying its customer, a potentially large claim loomed ahead. The interests of the parties were foreseeably adverse, something that could not have been lost on EMC. As noted, domination, inequality and dependence are clearly absent. With the factors cutting both ways and viewing McMickle's affidavit and the reasonable inferences that flow from it favorably to EMC, the Court finds it cannot conclude on this record as a matter of law that a fiduciary relationship sufficient for the purposes of the fraudulent concealment doctrine was lacking after the problem was brought to C&A's attention.

(ii) Affirmative Acts

EMC also argues there is evidence of affirmative acts of concealment sufficient to toll the limitations period. The facts concealed must be material to the warranty claims. See Rieff, 630 N.W.2d at 290 (defendant must affirmatively conceal "facts on which the plaintiff would predicate [the] cause of action," quoting McClendon, 559 N.W.2d at 385); Langner v. Simpson, 533 N.W.2d 511, 522 (Iowa 1995); Pride v. Peterson, 173 N.W.2d 549, 555 (Iowa 1970). C&A argues it did not, and could not, hide the whitening/greying condition of the carpet about which EMC

complained. What C&A is alleged to have concealed is its knowledge that the effect would occur and its cause.

EMC has obtained deposition testimony from a former technical manager and a sales director for C&A from which the jury could conclude that C&A knew that using rolling chairs directly on carpet would crush the fibers resulting in a change in the appearance in the affected area like that experienced by EMC, and knew also the phenomenon would occur within a few years of use. EMC's expert, Cooper, has testified that a C&A chair caster test in 1993 showed that carpet used directly underneath rolling casters would fail and become unsightly even with good maintenance within about four years of use. Notwithstanding this alleged knowledge, Depke is said to have initially told McMickle that the company had never heard of this type of problem with this carpet and did not know what its cause was. Later in May 2000 another representative of C&A after a field evaluation of the carpet wrote to EMC stating that C&A was attempting to understand why the condition had developed because it had not seen it occur in other installations. During the same general time frame C&A was conducting evaluations and tests ostensibly to determine the cause of the problem.

EMC claims C&A's internal communications demonstrate the nature and cause of the problem were not a mystery to the company. In a March 2000 claimant report Mr. Depke described extreme crushing under work station chairs. In an internal memorandum he

opined that he may be dealing with "a product failure situation." (Pltf. App. at 146). DuPont performed an analyses which led its representative to conclude that it appeared "the chair casters are giving the fibers more of a pounding than they can be expected to take." (Pltf. App. at 193). According to EMC, C&A did not inform it of the results of the DuPont analyses prior to this litigation. C&A did tell EMC that a chair test it performed did not replicate the problem, however, they did not advise EMC of the earlier chair tests discussed above. According to EMC, it was told a number of times by C&A representatives that maintenance was not the reason for the problem with the carpet, but this suddenly changed at an October 2, 2001 meeting in which C&A attributed the problem to soiling and inadequate maintenance.

The recitation above is limited and selective. There is also evidence from which the jury could conclude there was genuine debate within C&A as to the cause of the problem, it really was unsure, and worked diligently to figure it out. But viewing the evidence in the summary judgment record favorably to EMC, the jury might conclude C&A by the affirmative act of its statements to EMC attempted to mislead EMC to believe that the condition of the carpet was an unusual occurrence of unknown origin requiring time to investigate and test to find out the cause. Implicit in these representations was the possibility the problem might not be with the carpet and was correctable. The alleged facts concealed were

that the condition is what happens when rolling chairs are used on carpet without mats and C&A's knowledge of that fact. That the appearance of the carpet would deteriorate after a short period of time with use under rolling chairs without mats is material, indeed central, to the warranty claims.

C&A's argument that the whitening/greying under chairs was obvious and should have alerted EMC to the untruth of the alleged representations concerning the carpet has considerable force. However, the Eighth Circuit's discussion of two Harvestore cases in Miles v. A. O. Smith Harvestore Products, Inc., 992 F.2d 813, 816-17 (8th Cir. 1993)(Harvestore II) illustrates why knowledge of the condition alone does not necessarily defeat EMC's claim of fraudulent concealment. The other, earlier case was Hines v. A. O. Smith Harvestore Products, Inc., 880 F.2d 995 (8th Cir. 1989)(Harvestore I). The problems in each case were similar. In the first case, Harvestore told the plaintiffs the problem with their silo resulted from faulty seals and could be corrected. 880 F.2d at 997. In reliance on this the plaintiffs let Harvestore attempt to correct the problem. It turned proper sealing was not the solution. Id. at 998. The court held that plaintiffs' claim that Harvestore had lulled them into believing the silos could be made to function properly was a factual issue for the jury.[7] In Harvestore II, on

[7] The issue in Harvestore I was accrual of a fraud cause of action under a Missouri discovery statute. 880 F.2d at 998. Since (continued...)

the other hand, the defendant made no representations to the plaintiffs about the cause of the problem other than circulating a magazine to Harvestore owners "extolling the virtues [its] silo system." 992 F.2d at 815. This was held insufficient to constitute an affirmative act of concealment. The court concluded that in the exercise of reasonable diligence the plaintiffs should have known the quality of their silo was not as represented. Id. at 816.

The evidence of affirmative acts of concealment alleged by EMC is that C&A misled it as to the cause of the carpet problem by falsely asserting the condition was unheard of and would require examination and testing to figure out. There was no explicit assurance the problem could be remedied, but the possibility was implicit in C&A's response. As in Harvestore I, EMC let C&A try to find the cause and come up with a solution while the clock ran. All the while C&A knew the condition of the carpet was the common result of using rolling chairs on carpet without mats. These alleged circumstances are more like Harvestore I than Harvestore II.

It follows there are genuine issues of material fact about whether the statute of limitations was tolled by fraudulent

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[7](...continued)
the issue had to do with Harvestore's alleged conduct in misleading the plaintiffs, the case is a useful analogy.

concealment.[8] C&A is therefore not entitled to summary judgment on the express warranty and implied warranty of fitness claims on the ground they are barred by the statute of limitations.

2. Fraud

EMC's actions for fraud and fraudulent nondisclosure as actions at law for damages are subject to the five-year limitations period in Iowa Code § 614.1(4), and the discovery rule in Iowa Code § 614.4 does not apply. Grove, 14 F. Supp. 2d at 1108; McKinness Excavating & Grading, Inc. v. Morton Buildings, Inc., 507 N.W.2d 405, 410-11 (Iowa 1993); Pride, 172 N.W.2d 554. The parties appear to agree that an action for fraud accrues when the fraud is perpetrated or consummated. See Grove, 14 F. Supp. 2d at 1108 (citing McGrath v. Dougherty, 224 Iowa 216, 223, 275 N.W. 466, 470 (1937)).[9] The principal fraudulent misrepresentation and fraudulent

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[8] C&A notes that EMC did not plead fraudulent concealment. The statute of limitations is pleaded in the Answer as an affirmative defense. Absent court order, a party has no obligation to plead a reply to an answer. Fed. R. Civ. P. 7(a).

[9] Under Iowa Code § 614.1 the limitations period starts running when the cause of action accrues. Generally under Iowa law "no cause of action accrues . . . until the wrongful act produces loss or damage to the claimant." McKinness Excavating, 507 N.W.2d at 408. The Iowa Supreme Court has also said that an action accrues "when the aggrieved party has a right to institute and maintain a suit . . . such a right exists when 'events have developed to a point where the injured party is entitled to a legal remedy.'" Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 462 (Iowa 1984)(quoting Stoller Fisheries, Inc. v. American Title Ins. Co., 258 N.W.2d 336, 341 (Iowa 1977)). It does not seem to the Court that EMC's actions for fraudulent mispresentation or nondisclosure could have accrued prior to installation of the carpet. See Hines, 880 F.2d at 998;(see Def. App. at 366).

nondisclosure argued by EMC in the motion papers are two sides of the same coin: Depke's representation to McMickle that the carpet could be used under rolling chairs without mats (misrepresentation) and C&A's failure to disclose that its carpet could not be used under rolling chairs without mats without a resulting unacceptable appearance in the carpet within a short period of time (the nondisclosure). (Pltf. Brief at 4-7).

The affirmative acts on which EMC relies to establish fraudulent concealment are the same as those the Court has found sufficient with respect to the warranty claims. C&A's alleged concealment of the known cause of the carpet problem is directly material to the fraud causes of action because intentional falsehood and nondisclosure are what fraud is all about.

3. Due Diligence

The final element of fraudulent concealment is the due diligence of EMC. C&A argues that EMC was aware of a potential claim because it knew of the carpet's problems yet delayed in filing this action. EMC responds that when the problems arose it immediately contacted C&A who promised to act on EMC's behalf to determine the cause of the problem. There is evidence that EMC monitored the progress of C&A's various evaluations and tests, and pushed it for an answer to its questions about the cause of the problem. Ordinarily due diligence is a question of fact not suited for summary judgment, and that is the case here. See Hines, 880 F.2d at 999.

D. The Economic Loss Rule

1. Negligence

C&A argues that EMC's negligence claim is barred by the economic loss rule. Count IV alleges C&A was negligent in two general ways, in providing unsuitable carpet and (as refined by EMC's argument) in failing to discharge its undertaking to determine the cause of the carpet problems on behalf of EMC.

There appears to be no dispute that EMC's damages claim is for purely economic loss. The economic loss rule in Iowa comes from Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124 (Iowa 1984). The Iowa Supreme Court in that case adopted the general rule that a plaintiff "cannot maintain a claim for purely economic damages arising out of [a] defendant's alleged negligence." Id., 345 N.W.2d at 128. Our Court has said that to avoid the economic loss rule "physical injury must have occurred or an exception must apply." Audio Odyssey, Ltd. v. United States, 243 F. Supp. 2d 951, 962 (S.D. Iowa 2003). Claims of professional negligence are an exception, but are not involved here. See Kemin Indus. Inc. v. KPMG Peat Marwick L.L.P., 578 N.W.2d 212, 221 (Iowa 1998).

To the extent the alleged negligence is based on EMC's disappointment with the suitability of the carpet furnished by C&A, it seems clear that the economic loss rule applies. The claims in this regard sound in contract, not tort. EMC does not appear to

argue otherwise. EMC does, however, maintain its allegation that C&A negligently performed the duty it undertook to determine the cause of the problems with the carpet is separate and apart from the underlying contract and therefore not barred by the economic loss rule. Citing Kemin Indus. and Determan v. Johnson, 613 N.W.2d 259 (Iowa 2000), EMC contends the line to be drawn is between tort and contract, not between physical harm and economic loss, and once the alleged negligence parts company with the sale of the goods, the economic loss rule no longer applies.

The presence or absence of physical harm will usually tell whether the economic loss rule applies, but that is the frequent effect of the rule, not its analytical basis. EMC is correct that the line is between tort and contract law. The Determan case is instructive, but does in the Court's judgment illustrate why the economic loss rule applies to the negligence claims.

The discussion in Determan starts with the articulation of the general rule from Nebraska Innkeepers quoted above. The opinion continues with the observation that Nelson v. Todd's Ltd., 426 N.W.2d 120 (Iowa 1988), refined the Nebraska Innkeepers rule. 613 N.W.2d at 262.[10] The Nelson court stated:

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[10] In Kemin Industries, the Iowa Supreme Court purported to limit Nelson to its holding that economic loss without an accompanying physical injury is not recoverable under a theory of strict liability. 578 N.W.2d at 220. It did so in response to an (continued...)

> We agree that the line to be drawn is one between tort and contract rather than between physical harm and economic loss . . . when, as here, the loss relates to a consumer's or user's disappointed expectations due to deterioration, internal breakdown or non-accidental cause, the remedy lies in contract.
>
> Tort theory, on the other hand, is generally appropriate when the harm is a sudden or dangerous occurrence, frequently involving some violence or collision with external objects, resulting from a genuine hazard in the nature of the product defect.

426 N.W.2d at 125. The Nelson court then adopted the analysis employed by the Third Circuit in deciding under what part of the tort/contract dichotomy a particular claim fits.

> [T]he line between tort and contract must be drawn by analyzing interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose. These factors bear directly on whether the safety-insurance policy of tort law or the expectation-bargain protection policy of warranty law is most applicable to a particular claim.

Id. at 124-25 (quoting Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1173 (3d Cir. 1981)); see Determan, 613 N.W.2d at 262. In addition, the Iowa Supreme Court requires "at a

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[10](...continued)
argument that a federal case had interpreted Nelson as indicating applicability of the economic loss rule depended upon whether the claim was more like a tort or contract claim. Id. (distinguishing Ethyl Corp. v. BP Performance Polymers, Inc., 33 F.3d 23 (8th Cir. 1994), cert. denied, 513 U.S. 1153 (1995)). It is clear from the discussion in Determan, however, that the distinction in Nelson between tort and contract claims has survived to become of central importance in applying the economic loss rule in cases where there is dissatisfaction with the quality of goods sold.

minimum that the damage for which recovery is sought . . . extend beyond the product itself" in order for tort principles to apply. Determan, 613 N.W.2d at 262.

Application of the analysis articulated in Determan leads to the conclusion that EMC's negligence claim based upon C&A's failure to adequately perform the alleged undertaken duty to find the cause of the problem is subject to the economic loss rule. The claimed injury does not extend beyond the carpet itself, it needs to be replaced according to EMC. The alleged harm that resulted from the failure to promptly find the cause was, as the Court understands it, continued deterioration of the carpet from what C&A ultimately claimed was inadequate maintenance. (Pltf. Brief at 42-43). The loss "relates to [EMC's] disappointed expectations" about the suitability of the carpet due to deterioration from a non-accidental cause. Determan, 613 N.W.2d at 264 (quoting Nelson, 426 N.W.2d at 125). EMC is not attempting to recover damages from a "sudden or dangerous occurrence . . . resulting from a genuine hazard in the nature of a product defect." Determan, 613 N.W.2d at 263 (quoting Nelson, 426 N.W.2d at 125). The gravamen of the negligence action is C&A's failure to perform a noncontractual promise to find the cause of the problem with goods it had sold. This failure remains firmly tethered to the sale of the carpet and EMC's disappointment with it.

2. Negligent Misrepresentation

Count V of the Second Amended Complaint pleads negligent representation. The specifications are essentially the same as those set out for negligence, indeed identical in some respects, except as they relate to the acquisition of the carpet. Here they mirror the fraud claims: C&A's alleged misrepresentation that the carpet could be used under rolling chairs without mats and failure to advise such use would result in a whitening or greying of the carpet.

There is some question in the case law about whether negligent misrepresentation should be treated the same as fraudulent misrepresentation for the purposes of the economic loss rule. See infra at 40-43; Burns Philp, Inc. v. Cox, Kliewer & Co., 2000 WL 33361992, *10 (S.D. Iowa 2000). This Court believes negligent misrepresentation as a species of negligence (essentially good faith but careless statements and omissions) should be subject to the rule. See Maynard Co-op Co. v. Zeneca, Inc., 143 F.3d 1099, 1002-03 (8th Cir. 1998); Burns Philp, 2000 WL 33361992, *10.

3. Fraud Claims

Relying on the Eighth Circuit's opinion in Marvin Lumber, supra, C&A argues that the economic loss rule also bars EMC's claims for fraud. Marvin Lumber did apply the economic loss doctrine to a fraud claim. 223 F.3d at 884-85. Apart from the fact that the Eighth Circuit was dealing with Minnesota law, there is a

significant distinction between Marvin Lumber and this case. Marvin Lumber involved a suit between merchants, a context in the which the economic loss doctrine has its broadest application. Id. at 883-84; see Iowa Code § 554.2104(1)(3). The Eighth Circuit had opined in an earlier case that the Minnesota Supreme Court "would . . . [hold] that in a suit between merchants, a fraud claim to recover economic losses must be independent of the Article 2 contract or it is precluded by the economic loss doctrine." Marvin Lumber, 223 F.3d at 884 (quoting AKA Distributing Co. v. Whirlpool Corp., 137 F.3d 1083, 1087 (8th Cir. 1998)). Marvin Lumber does not hold that the economic loss doctrine applies to fraud claims outside of an action between merchants. EMC was not a dealer in carpet and there is no evidence that it had any particular knowledge or skill concerning commercial carpet. Accordingly, it is not a "merchant" under the UCC. Id. at 883.[11]

In Cunningham v. PFL Life Ins. Co., 42 F. Supp. 2d 872 (N.D. Iowa 1999), District Judge, now Circuit Judge, Melloy predicted that if the Iowa Supreme Court addressed the issue it would adopt a "blanket fraud exception" to the economic loss doctrine. Id. at 887 & n.10. Judge Melloy observed that many jurisdictions had adopted the fraud exception. He did not believe

[11] The Court agrees with C&A that as a general proposition the economic loss rule applies to merchants and consumers, but in the case of fraud the Eighth Circuit in both Marvin Lumber and AKA Distributing stressed the importance of the context as a suit between merchants.

Iowa would follow Florida's narrower "conduct distinct from the contract" exception, essentially what the Eighth Circuit thought the Minnesota courts would adopt in the case of suits between merchants. Id. Judge Melloy pointed out that the Iowa Supreme Court, albeit not addressing the issue because it was apparently not raised, had affirmed a jury award on a fraud claim for economic damages in Midwest Home Distributor, Inc. v. Domco Indus. Ltd., 585 N.W.2d 735, 739-41 (Iowa 1998). Judge Melloy also noted that his colleague in the Northern District, Judge Bennett had held that the economic loss doctrine did not preclude a fraudulent misrepresentation claim. Johnson v. Land O'Lakes, Inc., 18 F. Supp. 2d 985, 1001 (N.D. Iowa 1998).

Particularly in the case of a transaction between persons who have the knowledge and skill of merchants in the goods, see Iowa Code § 554.2104(1), (3), there is some appeal to the result dictated by Marvin Lumber and AKA Distributing that if the fraud claim concerns the suitability of goods sold the disappointed party is limited to contract law for a remedy. A merchant in the goods is less likely to be deceived and has the skill and experience to contractually allocate the risks involved in the transaction.

This Court's function is to assess how the Iowa Supreme Court would treat the issue, and there is very little in Iowa case law to go on. I agree with Judges Melloy and Bennett that the Iowa Supreme Court would be most likely to opt for the broad fraud

exception to the economic loss rule adopted by many courts, at least in the sale of goods where the party claiming fraud is not a merchant. It is correspondingly doubtful the Iowa Supreme Court would consider a fraud claim based on a manufacturer's misrepresentation as to the quality or character of the goods sold to be merely redundant of a warranty claim, a contract claim masquerading as a tort. See Marvin Lumber, 223 F.3d at 885 (citing Huron Tool & Eng. Co. v. Precision Consulting Servs., 209 Mich. App. 365, 373, 532 N.W.2d 541, 545 (1995)).

Fraud in the sale of goods involves much more than disappointed expectations about the quality and performance of the goods. Fraud is an intentional tort, the plaintiff claims to have been cheated. Put more succinctly, there is a fundamental difference between "a statement that is false when made and a promise that becomes false only when the promisor later fails to keep his word." City of Richmond v. Madison Mgt. Group, Inc., 918 F.2d 438, 447 (4th Cir. 1990)(quoting Lissman v. Hartford Fire Ins. Co., 848 F.2d 50, 53 (4th Cir. 1988)). The law regards the former as a more serious wrong. Fraud, of course, is easily and often claimed, but the many elements which must be proved by the higher standard of "clear, satisfactory and convincing" evidence make fraud more difficult to prove as it should be given the gravity of the allegation. See Plymouth Farmers Mut. Ins. Ass'n v. Armour, 584 N.W.2d 289, 291-92 (Iowa 1998). When a buyer has been defrauded,

the manner in which the injury occurs makes it appropriate to take the issues out of the exclusive realm of contract and address the seller's conduct under the tort principles better suited to redress intentional misdeeds.

E. Remaining Merits Issues

1. Fraudulent Misrepresentation and Nondisclosure

Count VI alleges fraudulent misrepresentation and nondisclosure. It sets out six specifications of fraud:

a. failing to inform EMC that the carpet required maintenance procedures that go beyond industry standards and cost significantly more than those procedures recognized to industry standards;

b. failing to provide EMC with a copy of, or to notify EMC about, the C&A approved/required maintenance procedures;

c. failing to notify EMC during most the two-year investigation period that C&A believed maintenance was the cause of the problem, thereby resulting in further deterioration of the carpet;

d. representing that the C&A carpet could be used under rolling chairs without the need for chair mats;

e. failing to notify EMC that if it used rolling chairs on the C&A carpet without chair mats, that it should expect to experience crushing and whitening/greying of the carpet; and

f. failing to advise EMC of tests conducted in April and May 2000 which showed that the carpet had not been inadequately maintained.

(Second Amended Complaint ¶ 48(a)-(f)). The only one of these that is an alleged affirmative misrepresentation is in subparagraph (d), the allegation that C&A represented the carpet could be used under rolling chairs without mats. C&A attacks the sufficiency of the evidence on this ground, asserting that Depke's statement to McMickle that he understood the carpet would be used under rolling chairs without mats was not a representation of fact. As noted many times now, Depke is alleged to have said not only that he was aware of this use, but also that C&A would bid and sell carpet that would meet the need expressed. It is for the jury to determine whether this amounted to a representation of fact. See International Mill Co. v. Gisch, 258 Iowa 63, 72, 137 N.W.2d 625, 631 (Iowa 1965).

All of the other specifications involve nondisclosures. Relying on Wright v. Brooke Group, Ltd., 652 N.W.2d 159 (Iowa 2002), EMC argues C&A had a duty to notify it as alleged in subparagraph (e) that if rolling chairs were used on the carpet without mats, the crushing and whitening/greying experienced by EMC would occur. (Pltf. Brief at 7). Wright holds that a fraudulent nondisclosure claim may lie in a transaction between a buyer and a manufacturer if the manufacturer makes misleading statements of fact intended to influence customers. "[A] manufacturer's failure to disclose material information that would prevent his statement of facts from being misleading can give rise to a fraud claim." 652

N.W.2d at 177 (citing Restatement (Second) of Torts § 551(2)(b), (c)).

As discussed previously, there is evidence from which the jury could find that Depke made a misleading statement to McMickle about the ability of the carpet to perform under rolling chairs without mats, and that the statement in this regard was intended to influence EMC favorably toward C&A's bid. Under Wright, if C&A knew the use of its carpet under rolling chairs without mats would result in the crushing and whitening/greying that occurred a couple of years later, the jury could find C&A had a duty to disclose this information to EMC in connection with the sale. There is thus evidence to support a claim of fraudulent nondisclosure in this regard.

While generally contending that there is sufficient evidence in the summary judgment record to support the other specifications of fraudulent nondisclosure (which EMC describes as allegations of "fraudulent concealment")(Pltf. Brief at 7-10), EMC does not explain how these specifications would be actionable for damages as fraudulent concealment or nondisclosure. The specification in subparagraph (a) that C&A failed to disclose that maintenance required to avoid the whitening/greying condition would be significantly more expensive than the industry standard could be viewed as involving information C&A was required to disclose under Wright to prevent Depke's representation to McMickle from being

misleading. There is evidence that the restorative and maintenance procedures recommended by C&A after it informed EMC in October 2001 that maintenance was the problem were cost-prohibitive. (Pltf. App. at 22, 161-62). It is unclear to the Court, however, that C&A knew this at the time of Depke's alleged representations to McMickle some five years before.

Subparagraph (c) takes C&A to task for allegedly failing to tell EMC for about two years that it believed maintenance was a cause of the problem, resulting in further deterioration of the carpet. EMC does not suggest any reason why C&A would deceive it about its belief that maintenance was the cause, or what it would gain by such a deception. To the contrary, it would seem to be in C&A's interest to attribute the cause of the problem to improper maintenance at the earliest opportunity. On the other hand, there is testimony from C&A's technical services director and claims manager that as early as May and June 2000 they believed the cause of the problem was heavy soiling and improper maintenance. (Pltf. App. at 427, 551-52). It is undisputed that before October 2001 C&A did not tell EMC improper maintenance was a cause of the problem, nor did it recommend a change in EMC's maintenance procedures.

The allegation in subparagraph (b) that C&A failed to tell EMC about its "approved/required maintenance procedure" if referring to the alleged extreme procedures given in October 2001 would be duplicative of subparagraph (a). If the specification

refers to C&A's regular recommended maintenance procedures, the Court is dubious about the sufficiency of the evidence to show concealment or nondisclosure with an intent to deceive, or any damages resulting therefrom. EMC's evidence is that the maintenance procedures it employed met or exceeded C&A's regular recommended procedures.

With respect to the specification in subparagraph (f), it is difficult to see what damages could have resulted from C&A's alleged failure to advise EMC of tests in April and May 2000 which showed that the carpet had not been inadequately maintained. Presumably had C&A told EMC that its tests showed the maintenance was adequate, an opinion EMC says various of C&A's representatives in fact gave EMC from time to time up until the October 2001 reversal of position, EMC would have continued to maintain the carpet just as it did all along.

The Court prefers not to grant piecemeal summary judgments on individual specifications within claims. However, it is appropriate to signal to the parties that the viability of some of the specifications of nondisclosure alleged in the Second Amended Complaint appear doubtful on this record.

2. Negligent Misrepresentation

In Iowa the duty which underlies the tort of negligent misrepresentation "arises only when the information is provided by persons in the business or profession of supplying information to

others." Sain v. Cedar Rapids Comm. Sch. Dist., 626 N.W.2d 115, 124 (Iowa 2001). No such duty arises on the part of those who provide information incidental to selling merchandise. Meier v. Alfa-Laval, Inc., 454 N.W.2d 576, 581-82 (Iowa 1990); see Sain, 626 N.W.2d at 125. Manufacturers are generally not considered to be in the business of supplying information. See Greatbatch v. Metropolitan Fed. Bank, 534 N.W.2d 115, 117 (Iowa App. 1995). Moreover the "business of supplying information to others" "means the tort does not apply when a defendant directly provides information to a plaintiff in the course of a transaction between the two parties, which information harms the plaintiff in the transaction with the defendant." Sain, 626 N.W.2d at 126 (citing Fry v. Mount, 554 N.W.2d 263, 265-66 (Iowa 1996)). The tort "predominantly applies to situations where the information supplied harmed the plaintiff in its relations with third parties . . . ." Sain, 626 N.W.2d at 126.

C&A is in the business of manufacturing and selling commercial carpet. The alleged information it provided to EMC was incidental to that purpose. There is no evidence that C&A is in the business of supplying information to others. Moreover, the alleged misrepresentations which harmed EMC are only those provided by C&A to EMC in connection with the particular carpet transaction between the parties. Accordingly, C&A is entitled to summary judgment on Count V of the Second Amended Complaint.

IV. RULINGS AND ORDERS

In view of the foregoing, defendant's motion for summary judgment or alternative motion for partial summary judgment is **granted in part**. Summary judgment is **granted** with respect to Counts II (implied warranty of merchantability), III (written express warranty), IV (negligence), and V (negligent misrepresentation). Said counts are dismissed. The motion is **denied** with respect to Counts I (breach of implied warranty of fitness for a particular purpose), VI (fraudulent misrepresentation and nondisclosure), and VII (oral express warranty).

EMC's Motion for Leave to File Supplemental Submission (#77) and C&A's Motion for Leave to File Reply in Opposition to Plaintiff's Supplemental Submission (#80) are **granted**.

The Court will rule separately on EMC's Motions to Exclude Evidence and Strike Specified Portions of Defendant's Summary Judgment Materials (#63) and to Strike Deposition Testimony of Nathanael Harrison (#61).

IT IS SO ORDERED.

Dated this 13th day of February, 2004.

ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE

FILED 2/19/2004 9:28:07 AM, USDC, Southern District of Iowa

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

EMPLOYERS MUTUAL CASUALTY COMPANY (also d/b/a EMC INSURANCE COMPANIES),	)	NO. 4:02-cv-30467
Plaintiff,	)	SUPPLEMENT TO RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
COLLINS & AIKMAN FLOOR COVERINGS, INC.,	)	
Defendant.	)	

In the February 13, 2004 Ruling ("February 13 Ruling") on defendant's motion for summary judgment, the Court concluded it was not necessary at this point to address C&A's argument that its standard warranty, with its disclaimer and limitation of remedies provisions, were incorporated by reference in the contract for the sale of the carpet. While that may be the case, on further reflection the Court does not believe that avoidance of the issue gives fair consideration to C&A's arguments, and it would be helpful to the parties for the Court to address the issue prior to trial, which this supplemental ruling is intended to do.

The acknowledgment form discussed at length in the February 13 Ruling states in part as follows on the front:

> . . . Selected C&A floor covering products carry limited warranties against one or more of the following conditions: (a) excessive surface wear, (b) delamination, (c) edge ravel, or (d) color fastness to light and atmospheric contaminants. Warranties applicable are effective from date of installation. For specific warranty details applicable to a particular product, contact

> Collins & Aikman, P.O. Box 1447, Dalton, Georgia, 30722-1447, or our dealer.

C&A contends this language incorporates the terms of its standard warranty. One of these, in capitalized writing, states

> THIS LIMITED WARRANTY AND ANY OTHER LIMITED WARRANTIES ISSUED BY C&A FLOOR COVERINGS FOR THESE PRODUCTS ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

(Def. App. at 214). The warranty also limits C&A's liability "to the actual repair or replacement of the affected area and does not cover incidental or consequential damages." (Id.)

A copy of the standard warranty was not provided to EMC until July 2001. C&A argues that by reason of the statement on the acknowledgment form concerning the warranty, as well as the numerous product specifications sheets it sent to architect BBS prior to acceptance of its bid which included reference to the warranty,[1] EMC should be charged with knowledge of the content of the standard warranty it could, in the exercise of due diligence, have discovered.

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[1] The product specification sheets contain a brief description of the warranties offered and refer the reader to the warranty for details. Though EMC had these through its agent BBS, the warranties were not incorporated in the Project Manual. Accordingly, the incorporation by reference argument properly focuses on the acknowledgment form.

There is not a great deal of case law in Iowa on the doctrine of incorporation. However, recently the Iowa Supreme Court has given the broad outlines.[2]

> Under the doctrine of incorporation, one document becomes part of another separate document simply by reference as if the former is fully set out in the latter. 4 Richard A. Lord, Williston on Contracts § 628 (3d ed. 1961). Where a writing refers to another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing. Id. Whether material is incorporated by reference presents a question of law. 11 Richard A. Lord, Williston on Contracts § 30:25 (4th ed. 1999). We have held clear and specific reference is required to incorporate an extrinsic document by reference. Estate of Kokjohn v. Harrington, 531 N.W.2d 99, 101 (Iowa 1995).

Hofmeyer v. Iowa Dist. Court, 640 N.W.2d 225, 228-29 (Iowa 2001). In view of the Supreme Court's reliance on Williston, it is appropriate to point out the treatise also states that "in order to uphold the validity of terms incorporated by reference, it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms. . . ." Richard A. Lord, Williston on Contracts, § 30:25 (4th ed. 1999).

Though a final determination of the legal issue will be made at trial, the Court is not presently convinced that the

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[2] The acknowledgment states that its validity and interpretation is to be governed by New York law but the parties have not cited the Court to any relevant New York law. The Court thus assumes the relevant New York law is not materially different from that of Iowa.

acknowledgment form incorporates the entire standard warranty applicable to the carpet in question. First, there is no explicit incorporation language. This is not necessarily fatal to the incorporation claim, but mere mention that C&A warrants certain of its products is not sufficient. Viewed in context, the reference must clearly reflect that the parties have agreed to incorporate the warranties "as if [the warranties] are fully set out" in the acknowledgment. Hofmeyer, 640 N.W.2d at 228-29. The acknowledgment does not incorporate any specific document, but rather states that "[s]elected C&A floor covering products" carry warranties against the conditions described. In effect, the acknowledgment says no more than that a warranty may come with the carpet and tells the buyer where to get details. That is not sufficient to signal that the parties agreed the terms of the warranties were incorporated in their agreement.

Second, the only part of any standard warranty referred to in the acknowledgment is that describing the conditions warranted against. No mention is made of the disclaimers and limitation of remedies in the warranty.

Third, taken altogether, the language in the acknowledgment is at least ambiguous, and arguably inconsistent with an intent that the disclaimer and limitation of remedy provisions in the various warranties be incorporated. The acknowledgment purports to "constitute the entire contract between

Buyer and Seller." Under the heading "**IMPORTANT"** (emphasis original) the acknowledgment states on its face that it is subject to the terms and conditions on both sides of the form, including in bold letters, "**the exclusion of warranties"** provision on the reverse side. That provision is ¶ 6 under the heading "Sales Contract Terms." In similar but different language than in the standard warranty disclaimer, it excludes express and implied warranties and states there are no "warranties or conditions" except those "specifically contained" in the acknowledgment. Paragraph 7 of the terms includes a remedies limitation provision quite different than that in the warranties.

The inclusion of an express provision on a subject in the acknowledgment is against an intent to incorporate a different provision in another document on the same subject, particularly when accompanied by language purporting to limit the parties' agreement to the four corners of the acknowledgment.

As discussed in the February 13 Ruling, whether and the extent to which the acknowledgment form constitutes the agreement of the parties with respect to the sale of the carpet is in dispute. However, if it is given contractual effect it is not clear that the parties thereby agreed to incorporate the additional disclaimer and limitation of remedies provisions in the standard warranty pertaining to the carpet.

The motion for summary judgment on the basis of the doctrine of incorporation is also **denied.**

IT IS SO ORDERED.

Dated this 19th day of February, 2004.

ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE