

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILADELPHIA ELECTRIC COMPANY : CIVIL ACTION  
:   
v. :   
:   
GENERAL ELECTRIC POWER GENERATION :   
SERVICE DIVISION, GENERAL ELECTRIC :   
INDUSTRIAL POWER SYSTEMS & :   
GENERAL ELECTRIC COMPANY : NO. 97-4840

MEMORANDUM and ORDER

Norma L. Shapiro, S.J.

December 21, 1999

Plaintiff Philadelphia Electric Company ("PECO"), alleging negligence, breach of warranty and misrepresentation, filed this action against defendants General Electric Company, General Electric Power Generation Service Division and General Electric Industrial Power Systems (collectively "General Electric"). General Electric has moved for summary judgment on all claims. For the reasons stated below, General Electric's motion will be granted in part and denied in part.

BACKGROUND

PECO operates a fossil fuel powered electrical generation facility at Eddystone, Pennsylvania. At Eddystone, PECO has two electrical generation units located side-by-side. "Eddystone No. 2" was installed and began operating in 1960; it consists of two General Electric turbines driving two electrical generators.

The turbine obtains steam, under pressures up to super-critical pressure of 3500 lbs. per square inch, from either a coal- or oil-fired boiler or a nuclear steam supply system. The steam causes the turbine

rotor and its blades (or "buckets") to rotate at very high speeds, often 3600 revolutions per minute. The energy thus created is transferred to the generator, which converts this energy to electricity. This electricity is passed, first through a transformer and then through transmission lines, to the electrical user.

Ebasco Servs., Inc. v. Pennsylvania Power & Light Co., 460 F.

Supp. 163, 172-73 (E.D. Pa. 1978) (Becker, J.).

One of the General Electric turbines, the primary shaft, is called the "21 Shaft." The other General Electric turbine, the secondary shaft, is called the "22 Shaft." Each of the two shafts has five sections; the "Second Reheat Section" is involved in this litigation.

PECO engineers maintain the Eddystone turbines, but General Electric engineers and supervisors provide technical assistance and repair the turbines. There are planned outages; PECO contracts with General Electric to provide engineering assistance and supervision of planned outages approximately every two years, to inspect and repair the turbines.

During a planned outage in the mid 1980s, PECO determined the rotor blades in the 21 Shaft 14th Stage reheat bowl (located in the first stage of the Second Reheat Section) had "suffered some foreign object damage and were in need of replacement." (Pltff.'s Brief at 4). The rotor blades "are the rotating louvers on a rotor the steam blows through in order to drive the main shaft to deliver the power to the generator." (Dep. of Paul

Weyhmuller at 12, attached as Ex. B to Pltff.'s Brief ["Weyhmuller Dep."]). PECO purchased replacement rotor blades from Mal Tool, a supplier of General Electric turbine parts.

In 1985, PECO determined that both the 21 and 22 Shaft 14th Stage reheat bowl outer shells were cracked beyond repair. PECO placed an oral order with General Electric for the manufacture and delivery of replacement outer shells. (Decl. of John Roche ¶ 3, attached as Ex. A to Defs.' Brief ["Roche Decl."]).<sup>1</sup> The replacement of the outer shells was to occur during a subsequent planned outage.

PECO's oral order of the outer shells, priced in excess of \$6,000,000, was confirmed by written purchase order. (3/19/86 Purchase Order, attached as Ex. A.1 to Defs.' Brief). The purchase order stated the terms and conditions applicable to the order were "to be negotiated." (DGE-4776, attached as Ex. A.1 to Defs.' Brief). In April, 1987, the parties agreed to terms and conditions for the manufacture and delivery of the outer shells. (Terms & Conditions, attached as Ex. A.2 to Defs.' Brief).

General Electric provided the following outer shell warranty:

The Seller warrants to the Buyer that the Renewal Parts to be delivered hereunder or the factory repair work to be performed hereunder will be free from

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<sup>1</sup>General Electric was aware of PECO's concern that the turbine operating temperatures sometimes exceeded the recommended temperature of 1,050° F. (Weyhmuller Dep. at 25).

defects in title, material or workmanship and will be of the kind and quality designated or specified in the quotation and purchase order. The renewal parts are warranted to be fit for the ordinary purpose for which they are purchased, and that they are suitable for the particular purpose for which purchased in accordance with the Purchase Order requirements....

This warranty (except as to title) shall apply to defects appearing within one year from the date of shipment by the Seller of the renewal parts or repaired parts. If the Seller by contract agrees to install the renewal parts or repaired parts or to supply technical direction of installation and if the renewal parts or repaired parts have been properly stored and maintained, this warranty shall apply to defects appearing within one year after completion of installation or four years from the date of shipment by the Seller, whichever first occurs....

If the renewal parts or repaired parts do not meet the above warranty, and if the Buyer promptly notifies the Seller, the Seller shall thereupon correct any defect, including non-conformance with the specification, either (at its option) by repairing at no charge to Buyer any defective or damaged parts furnished hereunder, or by making available at the Buyer's Station necessary replacement parts.

The liability of the Seller under this warranty (except as to title) shall constitute the exclusive remedy of the Buyer and the exclusive liability of the Seller with respect to claims based on warranty however instituted.

...

The foregoing warranty is exclusive and in lieu of all other warranties, whether written, oral, implied or statutory, (except as to title). NO IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE SHALL APPLY.

(Id. § 1.10).<sup>2</sup>

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<sup>2</sup> PECO and General Electric attempted during the course of their dealings to develop a "global set of terms and conditions

General Electric delivered the two outer shells FOB common carrier at its manufacturing plant in Schenectady, New York on October 30 and December 12, 1987. (Shipment Invoices, attached as Exs. B.1 & B.2 to Defs.' Brief). PECO and General Electric decided in 1988 that the outer shells would be replaced during a scheduled outage in 1990. PECO planned to use General Electric engineers and specialists to assist in the installation of the outer shells, but no formal agreement was reached at that time.

On April 10, 1989, General Electric sent PECO a letter detailing its hourly rate for field engineering and other terms and conditions for General Electric services. (Decl. of Lawrence Micci, attached as Ex. C to Defs.' Brief ["Micci Decl"]). Attached to the letter were Conditions for Sale of Services stating:

The sale of any service and incidental goods ordered by the Customer is expressly conditioned upon the terms and conditions contained or referred to herein. Any additional or different terms and conditions set forth in the Customer's purchase order or similar communication are objected to and will not be binding upon GE ... unless specifically assented to in writing by GE's authorized representative. Authorization by the Customer, whether written or oral, to furnish services and incidental goods will constitute acceptance of these terms and conditions.

(Conditions of Sale, attached as Ex. C.1 to Defs.' Brief).

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for their ongoing relationship," Pltff.'s Brief at 6, rather than negotiate each individual contract as in this instance, but they never did so. (Dep. of Lawrence Micci at 14, attached as EX. E to Pltff.'s Brief ["Micci Dep."]; Dep. of Allen DiDonato at 13-15, attached as Ex. F to Pltff.'s Brief ["DiDonato Dep."]).

General Electric's offer was to apply whenever it "elects to perform the services covered by the quotation in response to an order placed 30 or more days after the date of the quotation." (Id.). If General Electric's services were performed in a defective manner, it agreed to "correct the failure by reperforming any defective service, and either repairing or replacing (at its option) any defective goods furnished and any damage to the equipment upon which the service was performed resulting from defective service." (Id.). This service warranty applied to defects "appear[ing] within one year from the ... completion of services." (Id.).

In January, 1990, PECO, recognizing that "the replacement of two turbine shells is a critical task which requires specific knowledge and expertise," requested General Electric's services during the installation. (Record of Transaction, attached as Ex. D to Pltff.'s Brief).<sup>3</sup> On February 5, 1990, during the scheduled outage, General Electric engineers began providing Eddystone with field engineering services.<sup>4</sup> The installation team, comprised of PECO and General Electric engineers, was headed by Paul Weyhmuller ("Weyhmuller"), a PECO maintenance engineer.

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<sup>3</sup> The written record of transaction was not prepared until November, 1990.

<sup>4</sup> "Field engineering is engineering and technical guidance, advice and counsel based upon GE's current engineering, manufacturing, installation and operating practices, as related to work performed by others." (Conditions of Sale).

On March 29, 1990, PECO issued a written purchase order for the engineering services General Electric had been and would be providing for the outer shell replacement. (3/29/90 Purchase Order, attached as Ex. D to Pltff.'s Brief). General Electric, specifically conditioning its continued services upon the terms contained in its April 10, 1989 letter, acknowledged PECO's purchase order. (4/10/90 Acknowledgment of Order, attached as Ex. G to Defs.' Brief).

On April 19, 1990, during the replacement of the 21 Shaft outer shell, the installation team discovered that improper machining of the new outer shell's inlet bowl led to metallurgical defects. An inspection of the 14th Stage reheat bowl rotor, in the Second Reheat Section, showed that the rotor blades were tilted in the direction of the steam flow. The rotor was removed by crane and transported to General Electric's facility in Philadelphia, Pennsylvania for a thorough examination. (Dep. of Normand Roux at 27, attached as Ex. H to Pltff.'s Brief ["Roux Dep."]).

After the turbine's 14th Stage rotor was replaced, the installation team noticed excess metal in the interior of the Second Reheat Section bowl. PECO "had concern that it would block the steam path off to some degree causing a lack of performance of the turbine, a premature wear of some of the parts because of the steam having to go through a small slot."

(Weyhmuller Dep. at 56). General Electric assured PECO that the excess metal would result only in a nominal loss of kilowatt output without harm to the turbine. (Id.). PECO then decided to defer repair of the outer shell until the next planned maintenance outage. (Micci Dep. at 40; Weyhmuller Dep. at 58). By letter dated August 20, 1990, General Electric confirmed its representation to PECO that "the effects of the obstruction to the steam path would not cause problems to the rotating components" and maintenance could be deferred for five years. (8/20/90 Roux letter, attached as Ex. J to Pltff.'s Brief).

At 7:56 a.m. on July 20, 1992, the rotor blades in the 14th Stage, Second Reheat Section, detached from the 14th Stage rotor wheel and caused over \$2,400,000 in catastrophic damage to the 21 Shaft turbine. (Amended Compl. ¶ 20). PECO assigned a Root Cause Analysis Team, led by John Kaldon ("Kaldon"), a high-school educated PECO quality assurance employee, to investigate the causes of the catastrophe. As part of its investigation, the team sent part of the 14th Stage rotor and blades to PECO's metallurgical laboratories, headed by Frank Cebular ("Cebular"), for detailed study of any possible metallurgical causes of the accident. (Dep. of Frank Cebular at 12, attached as Ex. K to Pltff.'s Brief ["Cebular Dep."]).

In April, 1993, the Root Cause Analysis Team issued a final Report on the 21 Shaft Second Reheat Turbine Failure of July 20,

1992. (Final Report, attached as Ex. K to Defs.' Brief). The team determined that "the 14th stage buckets (blades) on the 21 Shaft Second Reheat Turbine failed during operation ... because of time-dependent and temperature-dependent plastic deformation of the rotor wheel. This phenomenon is referred to as third-stage creep." (Id. at 1). The report continued:

An examination of the trended data on the second hot reheat temperature revealed that the unit had been operated over its design temperature of 1050° F about 34 percent of the time during its service life, with most of the over-design operation occurring in the first ten years of operation which began in 1960. This has been identified as a major contributing factor in reducing the service life of the rotor. Additionally, turbine seal clearances greater than design were also a factor in accelerating the rate of damage in the 14th stage rotor wheel.

(Id.). The team identified three reasons for the third-stage creep failure: "(1) approximately 32 years or 195,000 hours of operation; (2) periodic operation above the design temperature; (3) evidence of third-stage creep damage was not recognized during the 1990 outage." (Id.).

The team, on which no turbine experts served and whose leader knew "virtually nothing" of metallurgical imperfections, (Dep. of John Kaldon at 41-42, attached as Ex. L to Pltff.'s Brief ["Kaldon Dep."]), did not identify excess metal or a machining error in the 21 Shaft's outer shell as a cause of the rotor blade detachment. However, plaintiff's expert, Harry Gangloff, Ph.D. ("Dr. Gangloff"), submitted a report rejecting

the team's finding of third-stage creep and identifying the outer shell as the cause of the accident. According to Dr. Gangloff, the rotor blades on the 21 Shaft's 14th Stage failed because of "stress fatigue and rupture." (Dr. Gangloff's Report at 21, attached as Ex. N to Defs.' Brief). The rotor blades' "stress fatigue and rupture" occurred because the "improperly machined outer shells resulted in excess steam bowl material which caused a significant reduction and peripheral variation of the turbine inlet throat opening directly upstream of the 14th stage diaphragm, and this resulted in irregular steam admission to the 14th stage rotating blades." (Id.).

On July 19, 1994, PECO filed a Praecipe for Summons in the Montgomery County Court of Common Pleas listing the opposing parties but not the nature of PECO's claims. PECO did not file its Complaint until July 10, 1997. The Complaint claimed: 1) negligence; 2) breach of express and implied warranties; 3) products liability; and 4) misrepresentation. General Electric removed the action to this court. PECO withdrew its products liability claim; the court struck PECO's claim for misrepresentation without prejudice for failure to plead fraud with specificity. PECO filed an Amended Complaint claiming: 1) negligence; 2) breach of express and implied warranties; and 3) misrepresentation. General Electric moved for summary judgment on all three claims.

## DISCUSSION

### **I. Standard of Review**

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant moving for summary judgment bears the initial burden of demonstrating there are no facts supporting the plaintiff's claim; then the plaintiff must introduce specific, affirmative evidence there is a genuine issue for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-324 (1986). "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

The court must draw all justifiable inferences in the non-movant's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. at 248. The non-movant must present sufficient evidence to establish each element of its

case for which it will bear the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

## **II. Negligence**

Count I of PECO's Amended Complaint seeks to recover for General Electric's negligence in: 1) "the design, planning, engineering, manufacturing, assembly, erection, and installation of the subject turbine's component parts, including the improperly machined outer shell"; 2) the failure "to furnish appropriate drawings, diagrams, instructions, bulletins and other information for operation, maintenance, inspection, trouble shooting, testing and servicing of the turbine"; 3) the representation "that the subject turbine would be safe and proper for operation until September or October, 1992, despite reasons to believe to the contrary"; and 4) the failure "to perform, direct and supervise proper and periodic inspections, maintain, overhaul, tear down, retrofit and repair modification of the turbine."

Under Pennsylvania law, when the tort involves actions arising from a contractual relationship, the plaintiff is limited to an action under the contract. See, e.g., Damian v. Hernon, 157 A. 520, 521 (Pa. Super. 1931). "Breach of contract, without more, is not a tort." Windsor Securities Co. v. Hartford Life Ins. Co., 986 F.2d 655, 664 (3d Cir. 1993). "[T]he important

difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus." Phico Ins. Co. v. Presbyterian Medical Servs., 663 A.2d 753, 757 (Pa. Super. 1995).

To maintain a tort action, "the wrong ascribed to defendant must be the gist of the action with the contract being collateral.'" Bash v. Bell Tele. Co., 601 A.2d 825, 829 (Pa. Super. 1992) (citation omitted). "A claim ex contractu cannot be converted to one in tort simply by alleging that the conduct in question was wantonly done." Closed Circuit Corp. v. Jerrold Electronics Corp., 426 F. Supp. 361, 364 (E.D. Pa. 1977); see Nirdlinger v. American Dist. Telegraph Co., 91 A. 883, 886 (Pa. 1914).

PECO's allegations of negligence are fundamentally interwoven with the contractual relationship it had with General Electric. General Electric's duties to PECO did not arise "as a matter of social policy," Phico, 663 A.2d at 757, but only through the negotiated contract obligating General Electric to perform according to its terms.

PECO admits that, "although sounding in tort, the essence of Plaintiff's cause of action is contractual." Pltff.'s Brief at 27. PECO's claims for negligence are "an impermissible attempt to convert a contract claim into a tort claim." USX Corp. v.

Prime Leasing, Inc., 988 F.2d 433, 440 (3d Cir. 1993).

There is no recovery on a tort claim where the only damage was caused to the product itself. "The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the 'luck' of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products.'" East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 871 (1986) (citation omitted). "Tort law is intended to compensate individuals where the harm goes beyond failed expectations into personal and other property injury." Sea-Land Serv., Inc. v. General Elec. Co., 134 F.3d 149, 155 (3d Cir. 1998).

When the only damage is to the product itself, "the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs, or, as in this case, experiences increased costs in performing a service. Losses like these can be insured." East River, 476 U.S. at 871. In fact, PECO does carry turbine insurance providing coverage for losses such as those incurred here.

Losses incurred as a result of a product's destruction, where there has been no related personal damage or damage to

unrelated property, are breach of contract claims. “‘Even where the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of the bargain--traditionally the core concern of contract law.’” Aloe Coal Co. v. Clark Equip. Co., 816 F.2d 110, 117 (3d Cir.) (quoting East River, 476 U.S. at 870), cert. denied, 484 U.S. 853 (1987).

Damage to components of an integrated piece of machinery is not damage to “other property” falling outside the economic loss rule. See Saratoga Fishing Co. v. J.M. Martinac & Co., 117 S. Ct. 1783, 1788 (1997). Otherwise, there would be “‘property damage’ in virtually every case where a product damages itself.” Id. When the parties negotiate the sale of a machine and “contemplate the integration of replacement parts subsequent to purchase,” those replacement parts become integrated to the machine as a whole. Sea-Land, 134 F.3d at 154. Any damage to replacement component parts, such as the replacement rotor blades, is not damage to “other property.” The economic loss for the damage caused to the turbine cannot be recovered by a tort claim for negligence.

The prohibition against recovery for negligence regarding the defects in the outer shell extends to any claim against General Electric for negligently providing advice and services.

See Lower Lake Dock Co. v. Messinger Bearing Corp., 577 A.2d 631, 635-36 (Pa. Super. 1990); see also Allied Fire & Safety Equip. Co. v. Dick Enter., Inc., 972 F. Supp. 922, 938 (E.D. Pa. 1997); Sun Co. v. Badger Design & Constructors, Inc., 939 F. Supp. 365, 373 (E.D. Pa. 1996). PECO cannot recover in negligence for the alleged defective outer shell or General Electric's inadequate advice and services. Summary judgment will be granted on Count I, the negligence claims.

### **III. Breach of Warranty**

#### **A. The Outer Shell**

Because the General Electric turbines were manufactured and installed in 1960, PECO does not seek recovery under any of the original turbine warranties. PECO claims General Electric breached implied and express warranties pertaining to the replacement 21 Shaft outer shell because of metallurgical defects in the 21 Shaft outer shell's inlet bowl. An implied warranty of merchantability ensures that goods are merchantable or "fit for the ordinary purposes for which such goods are used." 13 Pa. Cons. Stat. Ann. § 2314. An implied warranty of fitness for a particular purpose arises when the seller has reason to know the particular purpose for which the buyer desires the goods and that the buyer is relying on the judgment of the seller to select an appropriate product; the seller warrants the goods will be fit for that particular purpose. See 13 Pa. Cons. Stat. Ann. § 2315.

Implied warranties of merchantability and fitness for a particular purpose can be waived, as long as language is clear and conspicuous. See 13 Pa. Cons. Stat. Ann. §§ 2316(b), (c). "A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals ... is conspicuous. Language in the body of a form is conspicuous if it is in larger or other contrasting type or color." Borden v. Advent Ink Co., 701 A.2d 255, 259 (Pa. Super. 1997). Whether a purported waiver of implied warranties is conspicuous is a question of law. See 13 Pa. Cons. Stat. Ann. § 1201.

Here the warranty states that "NO IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE SHALL APPLY." (Terms & Conditions § 1.10). This waiver in capital letters is conspicuous. The language waived any implied warranties of merchantability or fitness for a particular purpose as a matter of law. Summary judgment will be granted on Count II, PECO's claim for breach of implied warranties for the defective outer shell.

General Electric provided express written warranties in the April, 1987 outer shell purchase agreement. General Electric warranted that the 21 Shaft outer shell would be "of the kind and quality designated or specified in the quotation and purchase order," fit for the ordinary purpose of outer shells and suitable

for the particular needs of the 21 Shaft. (Id.). In accordance with those express warranties, General Electric agreed to "repair[] at no charge to Buyer any defective or damaged parts furnished hereunder, or [make] available at the Buyer's Station necessary replacement parts." (Id.). The parties agreed that General Electric's duty to repair or replace a defective outer shell "shall constitute the exclusive remedy of the Buyer and the exclusive liability of the Seller with respect to claims based on warranty however instituted." (Id.).

Contracts may "limit or alter the measure of damages recoverable ... as by limiting the remedies of the buyer to return of goods and repayment of the price or to repair and replacement of nonconforming goods or parts." 13 Pa. Cons. Stat. Ann. § 2719(a)(1). If the parties agree that repair or replacement of defective goods will be the exclusive remedy, "it is the sole remedy." 13 Pa. Cons. Stat. Ann. § 2719(a)(2).

"Limitation of liability clauses are routinely enforced under the Uniform Commercial Code when contained in sales contracts negotiated between sophisticated parties and when no personal injury or property damage is involved. This is true whether the damages are pled in contract or tort." Valhal Corp. v. Sullivan Assoc., Inc., 44 F.3d 195, 203 (3d Cir. 1995); see Westinghouse, 564 A.2d at 924 (citing cases). Parties "[a]re at liberty to fashion the terms of their bargain." Vasilis v. Bell

of Pa., 598 A.2d 52, 54 (Pa. Super. 1991).

In Pennsylvania, "the intent of the parties to a written contract is to be regarded as being embodied in the writing itself." Steuart v. McChesney, 444 A.2d 659, 661 (Pa. 1982). "[T]he law declares the writing to be not only the best, but the only evidence" of the parties' agreement. Gianni v. Russell & Co., Inc., 126 A. 791, 792 (Pa. 1924); see Lenihan v. Howe, 674 A.2d 273, 275 (Pa. Super. 1996).

PECO and General Electric, both sophisticated commercial enterprises, "specifically allocated the risks of uncertain events and consequences," Westinghouse, 564 A.2d at 925, in negotiating the terms and conditions of General Electric's 21 Shaft outer shell warranty. PECO's remedies were restricted to repair or replacement of the defective outer shell. General Electric did re-machine the defective portion of the outer shell during the outage after the turbine calamity. (Weyhmuller Dep. at 94).

The court may not "read[] into the contract something it does not contain and thus make a new contract for the parties" or impose additional obligations on General Electric for which PECO did not bargain. Snellenberg Clothing Co. v. Levitt, 127 A. 309, 310 (Pa. 1925); see Banks Engineering Co. v. Polons, 697 A.2d 1020, 1023 (Pa. Super. 1997), appeal granted, 706 A.2d 1210 (Pa. Feb. 24, 1998). Under the terms of the April, 1987 warranty,

General Electric did not agree to insure PECO for any future damage to the turbines.<sup>5</sup> Summary judgment will be granted on Count II, PECO's claim for breach of the April, 1987 express warranty for the 21 Shaft outer shell.

General Electric Engineers made statements to PECO in the spring of 1990 during the replacement of the 21 Shaft outer shell that the metallurgical defects of the outer shell would not affect the safety or performance of the turbine. General Electric's assurance that the outer shell would operate effectively without "problems to the rotating equipment" for at least five years was confirmed in writing by a letter dated August 20, 1990 from a General Electric official. (Roux Letter). Because General Electric's April 10, 1989 letter excepted additional or different warranty terms "assented to in writing by GE's authorized representative," (Conditions of Sale, attached as Ex. C.1 to Def.'s Brief), this written statement by General Electric was a subsequent express warranty regarding the outer shell.

General Electric's written statement after the installation of the replacement outer shell may have warranted that the outer shell would operate effectively without harm to the rotors for five years from the installation date. The letter of August 20,

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<sup>5</sup> PECO did contract with an insurer, Hartford Steam Boiler, for such coverage.

1990 could be considered a written assent by an authorized General Electric representative to an additional term or condition contemplated by the April 10, 1989 letter. If PECO's expert report is credited, the outer shell's metallurgical defects altered the steam flow through the turbine and caused the rotor blades to detach from the rotor. It is possible a jury would find General Electric breached an express warranty that the outer shell would pose no "danger to the turbine." (Id.). Issues of material fact preclude summary judgment on PECO's claim for breach of General Electric's written warranty made subsequent to the replacement of the outer shell in the spring of 1990.

#### **B. Services**

PECO claims General Electric breached implied and express warranties in the April, 1990 Sale of Services contract when installing the 21 Shaft outer shell by failing to provide reasonable and accurate advice, conduct a thorough investigation, or warn PECO of the dangers of operating the 21 Shaft with a defective outer shell until the next scheduled outage.

There are no implied warranties applicable to contracts for services. See Lane Enter., Inc. v. L.B. Foster Co., 700 A.2d 465, 471 n.6 (Pa. Super. 1997); Kaplan v. Cablevision of Pa., Inc., 671 A.2d 716, 724 (Pa. Super.), appeal denied, 546 A.2d 645 (Pa. 1996); Whitmer v. Bell Tele. Co., 522 A.2d 584, 587 (Pa. Super. 1987). PECO has no claim for breach of implied warranties

for General Electric's services.

General Electric may have provided an express warranty for its services in assisting with the installation of the replacement outer shell. In General Electric's April 10, 1989 statement of the terms and conditions for its services, General Electric agreed to re-perform any defective service and to replace or repair any defective goods and all damage to equipment on which the service was performed resulting from defective service. The warranty extended one year from completion of performance of the services. The conditions for sale of General Electric services expressly stated that authorization by the customer for General Electric to furnish services would constitute acceptance of General Electric's terms and conditions.

In response to PECO's request for installation assistance, General Electric's engineers began performing services at Eddystone on February 5, 1990, before PECO's written purchase order was issued on March 29, 1990. An "offer may be accepted by conduct and what the parties d[o] pursuant to th[e] offer" is germane to show whether the offer is accepted. Gum, Inc. v. Felton, 17 A.2d 386, 389 (Pa. 1941). PECO "had a duty to speak when confronted with a document providing, unequivocally, that receipt of [General Electric's] services would be tantamount to assenting to the binding nature" of General Electric's terms. Accu-Weather, Inc. v. Thomas Broadcasting Co., 625 A.2d 75, 79

(Pa. Super. 1993). When PECO requested General Electric engineering services in February, 1990, it accepted the General Electric April 10, 1989 Conditions for the Sale of Services and is bound by its terms and conditions.

General Electric's service warranty extended for one year from completion of the services. (Conditions of Sale). "The law is clear that such a clause, setting time limits upon the commencement of suits to recovery ..., is valid and will be sustained." General State Auth. v. Planet Ins. Co., 346 A.2d 265, 267 (Pa. 1975). "This is not a statute of limitation imposed by law; it is a contractual undertaking between the parties and the limitation on the time for bringing suit is imposed by the parties to the contract." Lardas v. Underwriters Ins. Co., 231 A.2d 740, 741-42 (Pa. 1967); see Hospital Support Servs., Ltd. v. Kemper Group, Inc., 889 F.2d 1311, 1315 (3d Cir. 1989).

General Electric completed its services during a scheduled outage in the spring of 1990. (Record of Transaction). PECO discovered the defect in General Electric's services when the 21 Shaft rotor blades separated from the rotor and the turbine was destroyed on July 20, 1992. Although the service warranty was only valid for one year following the completion of service (Conditions of Sale), PECO argues the warranty period should not begin to run until it actually discovered the defect. But even

if PECO were entitled to file suit within one year after it discovered the defect, it did not do so until July 19, 1994, two years later. Contractual time limits agreed upon by the parties are not statutes of limitation subject to equitable tolling. See Lardas, 231 A.2d at 741-42. PECO's claim for breach of an express service warranty is time-barred; summary judgment will be granted on this warranty claim of Count II.

#### **IV. Misrepresentation**

PECO's Count III claims General Electric misrepresented that maintenance on the replaced outer shell could be deferred for five years and that it would operate properly from the date of its installation until the next scheduled maintenance outage in the fall of 1992. To establish a claim of negligent misrepresentation,<sup>6</sup> a plaintiff must establish:

1) misrepresentation of a material fact; 2) the representation either was made knowingly, without knowledge as to its truth or falsity, or under circumstances in which its falsity should have been known; 3) the representor intended to induce the plaintiff

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<sup>6</sup> PECO's Amended Complaint does not specify whether it claims negligent misrepresentation or intentional misrepresentation/fraud. However, PECO does not make any allegation in its Amended Complaint that General Electric knowingly or even recklessly made misrepresentations regarding the safety of the outer shell or intended to mislead PECO, as required under Pennsylvania law for a claim of fraud. See Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994); Wilson v. Donegal Mut. Ins. Co., 598 A.2d 1310, 1315 (Pa. Super. 1991). Therefore, the court has assumed PECO's claim is premised on the less exacting standards of negligent misrepresentation.

to act on the misrepresentation; 4) the plaintiff acted in justifiable reliance on the misrepresentation; and 5) injury resulted to the plaintiff. See Gibbs, 647 A.2d at 890.

PECO claims General Electric misrepresented the viability of the 21 Shaft outer shell sold to PECO and PECO, reasonably relying on General Electric's expertise, installed the metallurgically flawed outer shell to its detriment. General Electric denies it had any knowledge of the falsity of its representations concerning the safety of the defective outer shell. PECO's response to the motion for summary judgment has no evidence to the contrary and does not argue General Electric either knew or should have known of its mistake at the time it made the representations. Therefore, PECO has not established a prima facie case of misrepresentation.

But even if PECO has established a prima facie case for negligent misrepresentation, it suffers from the same infirmity as its general negligence claim: the alleged misrepresentation is intertwined with its contractual relationship with General Electric. General Electric made representations regarding the safety of the 21 Shaft outer shell's inlet bowl as part of its contractual obligation to provide and install replacement outer shells for the 21 and 22 Shafts if defective. Apart from that contractual relationship, General Electric had no obligation to make any representations to PECO about the outer shell. PECO's

misrepresentation claim merges into its claim for breach of warranty.

As with PECO's general negligence allegations, this claim is an impermissible attempt to convert to tort an action for breach of General Electric's warranties made during and after the replacement of the 21 Shaft outer shell. See USX Corp., 988 F.2d at 440; Windsor Securities, 986 F.2d at 664; Closed Circuit Corp., 426 F. Supp. at 364; Phico, 663 A.2d at 757; Damian, 157 A. at 521. A party cannot make bald allegations of fraud or misrepresentation "as nothing more than a subterfuge to avoid the clear impact of its freely negotiated agreements." New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp., 564 A.2d 919, 929 (Pa. Super. 1989) (en banc). While allegations of fraud in the inducement may allow a party to claim a tort separate from the underlying contract, here PECO has made no allegation that General Electric fraudulently induced it to enter into the agreement to purchase a replacement 21 Shaft outer shell; the alleged misrepresentations involve statements made during installation after PECO purchased the outer shell from General Electric. Therefore there was no fraud in the inducement; summary judgment will be granted on PECO's Count III.

#### **CONCLUSION**

PECO's negligence claim is barred as an impermissible attempt to create a tort remedy for a breach of warranty in

violation of the economic loss rule. PECO's misrepresentation claim merged into its claim for breach of warranty and is not sustainable as a separate tort action. PECO's claims for breach of the April, 1987 express warranties and any implied warranties are barred by the contractual time limitation and limitation of liability clauses. PECO will be permitted to proceed on a claim for breach of an express written warranty made after the installation of the replacement 21 Shaft outer shell.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHILADELPHIA ELECTRIC COMPANY : CIVIL ACTION  
: :  
v. : :  
: :  
GENERAL ELECTRIC POWER GENERATION :  
SERVICE DIVISION, GENERAL ELECTRIC :  
INDUSTRIAL POWER SYSTEMS & :  
GENERAL ELECTRIC COMPANY : NO. 97-4840

ORDER

AND NOW, this 21st day of December, 1999, upon consideration of defendants' motion for summary judgment, plaintiff's response thereto, defendants' reply, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. Defendants' motion for summary judgment is **GRANTED IN PART AND DENIED IN PART**.

2. Defendants' motion for summary judgment on Count I (negligence) and Count III (misrepresentation) is **GRANTED**.

3. Defendants' motion for summary judgment on Count II (breach of implied and express warranties) is **GRANTED** as to PECO's claims for breach of implied warranties and breach of the express warranties contained in the April, 1987 agreement. The motion is **DENIED** as to PECO's claim for breach of General Electric's written guarantee made in the August 20, 1990 letter.

4. A status conference will be held in chambers on **January 7, 2000 at 2:00 PM**.

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S.J.