

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 7, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

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**Appeal No. 2005AP275**

**Cir. Ct. No. 2000CV3941**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**U-LINE CORPORATION,**

**PLAINTIFF-APPELLANT,**

**v.**

**RANCO NORTH AMERICA, LP,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 CURLEY, J. U-Line Corporation (U-Line), appeals from a judgment entered against it, after a jury rendered a special verdict, that found no liability on part of Ranco North America, LP (Ranco), because it concluded that hot gas bypass valves purchased by U-Line from Ranco did not fail as a result of a

design defect called residual magnetism. U-Line contends that the trial court erred in excluding: (1) evidence of valve failures experienced by other Ranco customers, because that evidence (a) showed that the valve suffered from a design defect, (b) was critical to U-Line's fraud claim, and (c) was necessary to impeach a Ranco witness; (2) evidence of fraud, including statements that Ranco's V16 valve was compatible with U-Line's new refrigerant, life-test data examining the performance of the new refrigerant with valve tip materials, and statements that an alternative design was not available; and (3) evidence of damages suffered by U-Line, specifically damages arising out of warranty repairs and products returned to U-Line from its customers. U-Line also contends that the trial court erred in submitting to the jury a special verdict form that excluded U-Line's claim for breach of implied warranty of fitness. Lastly, U-Line submits that as a result of the trial court's allegedly erroneous evidentiary ruling the real controversy was never tried and justice miscarried. Based on the errors that U-Line alleges were committed by the trial court, U-Line maintains it is entitled to a new trial.

¶2 We conclude that the trial court did not erroneously exercise its discretion when it excluded evidence of other customers' valve failures, fraud and damages; that the trial court properly excluded U-Line's claim for breach of implied warranty of fitness from the special verdict form; and that the real controversy was tried. Accordingly, we affirm the trial court's judgment.

### **I. BACKGROUND.**

¶3 U-Line is a family-owned Wisconsin corporation that specializes in the design and manufacture of residential refrigeration products that fit "undercounter," including refrigerators, ice makers, and wine coolers. Many of U-Line's refrigeration products contain "frost-free" technology, a technology that

periodically clears the refrigeration unit of frost so that no maintenance or manual defrosting by the consumer is required. In 1992, U-Line sought to launch two new combination icemaker and refrigerator units, called “combo units,” the 29-FF and the 75-FF, that were to contain the same “frost-free” technology. These two products are the focus of this dispute.

¶4 The frost-free technology requires a component called a hot gas bypass valve, which is located between the evaporator and condenser components in the refrigerator. When electricity passes through a copper coil in the valve, a magnetic field is created and causes a needle to open the valve, and when the electricity is removed, the valve closes. When the valve is closed, the unit functions normally, with refrigerant moving from the condenser, to the dryer, to the evaporator and back to the condenser, and the unit remains cold because nothing passes through the valve. When the valve is open, hot gas from the compressor enters through the valve, causing the ice on the evaporator to melt and the unit to defrost. A timer opens and closes the valve at particular intervals. In the 29-FF and 75-FF, the valve is closed for six hours and then open for thirty minutes, a cycle that allows the unit to defrost slightly every six hours so as to avoid manual defrosting.

¶5 U-Line purchases components for its products from outside manufacturers. Ranco, a valve manufacturer, has been selling valves to U-Line since 1989. In the fall of 1992, U-Line representatives met with Ranco’s Sales Engineer, Randy Allen, because U-Line needed to select a valve for its 29-FF and 75-FF combo units. Allen recommended Ranco’s V16 valve. U-Line entered into a contract with Ranco to purchase the V16 valve for its FF units. U-Line was provided with a copy of the Ranco Selling Policy, which includes a Commercial Warranty, promising that “each of its products ... will be free from defects in

material and workmanship for a period of 12 months.” After deciding on the V16 valve, U-Line performed a number of tests on the two products, including assessing the products’ performance at different temperatures and levels of humidity. In late 1992, U-Line put the 29-FF and the 75-FF on the market.

¶6 Other manufacturers of refrigeration products, including Whirlpool and Scotsman, also purchased V16 valves and valves similar to the V16 from Ranco. Between 1992 and 1996, both Whirlpool and Scotsman reported problems with the Ranco valves, specifically that the valves sometimes failed to close properly and remained stuck in the open position. Ranco identified various manufacturing defects as the reasons for all of the problems experienced by Whirlpool and Scotsman, including “nicks in the valve seat,” a misassembled valve component, a valve seat problem, and a “split ring washer” problem.

¶7 In 1996, to comply with a government mandate, U-Line changed the refrigerant in its refrigeration products from R12 to R134A. U-Line had concerns about the compatibility of R134A with components in its refrigerators, including the V16 valve. U-Line contacted Ranco to determine whether the refrigerant was compatible, and Ranco assured U-Line that R134A and the V16 valve were indeed compatible. As a result, U-Line continued to use the V16 valve in the 29-FF and 75-FF.

¶8 At about the same time, Ranco was investigating whether the nylon needle used in the V16 valves was compatible with the oils used in the R134A system. In February of 1996, a German affiliate of Ranco’s also performed so-called “life-tests,” comparing the performance of two valve tip materials, nylon and Teflon, with the R134A system.

¶9 Following the change in refrigerants, U-Line started to receive complaints about the 29-FF and 75-FF. Customers reported that the ice cubes in the bucket intended to collect ice cubes from the icemaker, melted and then either refroze into a block of ice or remained in the form of warm water.

¶10 As a result of these product failures, in June 1996 U-Line started to perform tests to ascertain why the units were not functioning properly. The tests showed that bypass valves intermittently failed to close, causing them to hang open. U-Line believed there were two possible reasons: excessive oil circulation or a problem with the valve itself. U-Line informed Ranco about its problems and asked Ranco whether the V16 was indeed the correct type of valve or whether a spring-loaded valve would work better, and whether any other customers had reported similar problems. Allen responded in writing that the V16 valve was the correct valve, that a spring-loaded valve was not needed and also not available through Ranco, and that other customers had not reported the same problem. Ranco suggested that the problem could be contaminants present in the system. U-Line was not told that a Japanese affiliate of Ranco's was in fact developing a spring-loaded valve and promoting it to other manufacturers.

¶11 In August 1996, U-Line sent ten valves from units that had failed to Ranco for testing. The tests concluded that the valves were free of contaminants. This led U-Line to conclude that the problem had to be oil circulation, and prompted U-Line to redesign the combo units so as to minimize oil flow. U-Line continued to purchase V16 valves from Ranco. After tests indicated that the redesigned models operated for a lengthy period of time without failure, U-Line started to formally produce the combo units in April 1997. U-Line also devised "field fix kits" for service technicians to be able to modify the older versions. After the redesigned units were put on the market, U-Line continued to perform

tests, including using a spring-loaded valve manufactured by Parker, a competitor of Ranco's.

¶12 On April 22, 1997, Ranco's Italian affiliate, the supplier of the V16 valves, issued an internal report about the ten valves that U-Line had returned to Ranco in August 1996, which Ranco had determined were free of contaminants. The report contained an analysis based on further tests that had been performed on the valves in Italy, and included the comment: "Both tests carried out in Italy and U.S.A. have confirmed that the samples are free of faults. The only personal doubt [sic] I can immagin [sic] is related to the magnetic circuit of the [needle] if a too high residual magnetism [is] still present after the switch off operation of the same coil." The next day, on April 23, 1997, the report was shared with Ranco's American branch that sold U-Line the valves. Ranco did not inform U-Line of the report.

¶13 In May 1998, one of the redesigned units exhibited problems similar to those seen in the original combo units: ice cubes in the bucket melted and refroze. U-Line contacted Ranco and informed them of the failure. Ranco again told U-Line that they had received no similar complaints from other customers, and U-Line again returned defective valves to Ranco for evaluation. U-Line performed further tests that indicated that it was in fact a problem with the valve itself that had caused them to not close.

¶14 In October 1998, U-Line switched to using the spring-loaded Parker valve in its combo units, and since then, has not received complaints about warm water or frozen blocks of ice in the ice buckets.

¶15 U-Line filed a complaint against Ranco on May 15, 2000, and an amended complaint on April 6, 2001. The amended complaint alleged: breach of

express warranty; breach of implied warranty of fitness; breach of implied warranty of merchantability; misrepresentation; and fraudulent inducement. Ranco filed a motion for summary judgment on July 5, 2001. The motion was denied. Nearly three years later, on March 18, 2004, Ranco filed motions in limine, as is relevant to this appeal, to exclude evidence of: (1) complaints by other manufacturers, including Whirlpool and Scotsman; (2) alleged residual magnetism or valves sticking open in U-Line models other than the 29-FF and the 75-FF; (3) residual magnetism or valves sticking open prior to 1996; and (4) R134A compatibility with nylon or Teflon as valve tip materials. On April 5, 2004, Ranco filed an additional motion in limine to exclude evidence of: (1) misrepresentation and fraudulent inducement claims; and (2) the punitive damages request. The trial court denied Ranco's motions in limine.

¶16 A jury trial began on August 16, 2004. In its opening statement, U-Line told the jury that the evidence would show that Ranco is responsible for U-Line's losses for two reasons: contract and fraud. Breach of contract would be proven by showing that Ranco failed to keep its promises made to U-Line in the course of their dealings. Fraud would be proven through evidence that the new refrigerant, R134A, is not compatible with the V16 valve, even though Ranco told U-Line that it was; evidence of Ranco's life test data, according to which the needle should be Teflon rather than nylon; evidence of the need for a spring-loaded valve, even though Ranco told U-Line that there was no such need; and evidence of other Ranco customers, specifically Whirlpool and Scotsman, experiencing failures similar to U-Line's.

¶17 U-Line then introduced evidence about U-Line's use of frost-free technology in the 29-FF and the 75-FF, and its decision to use the V16 valve. The jury learned that Ranco had recommended the V16, had said it would meet

U-Line's requirements, and had assured U-Line that the V16 was compatible with the new R134A refrigerants.

¶18 On the second day of trial, U-Line called two expert witnesses: Dr. Albert Karvelis and Dr. Lyle Hoppie. Dr. Karvelis explained to the jury how the valves work when the units function properly; that is, when electricity passes through a copper coil, a magnetic field is created that causes a needle to open the valve, allowing hot gas to defrost the evaporator; and when the electricity is turned off, the magnetic field is removed, causing the needle to fall and the valve to close, thereby stopping the flow of gas.

¶19 Dr. Karvelis then told the jury about a phenomenon called residual magnetism. He explained that it occurs when the valve fails to close even though the electricity is removed, allowing hot gas to keep passing through and causing the ice in the ice buckets to melt. Dr. Hoppie similarly discussed residual magnetism and the methods he used to test it in the combo units.

¶20 Dr. Karvelis testified that he had observed a defect in the V16 valve: "That [the valve] hung up, it hung during the defrost cycle, and that defect caused the defrost cycle to continue on in an unplanned manner." He testified that, in his opinion, the Ranco V16 had a "residual magnetism susceptibility" defect that caused it to fail, and that residual magnetism was the only reason for U-Line's failures.

¶21 Dr. Karvelis further testified that anything other than residual magnetism could not have been the cause of the valve failures:

[COUNSEL FOR RANCO]: Let me ask you hypothetically, if someone were to suggest that Teflon/Nylon as an issue related to valve redesign or valve



hang-up was a factor in this case, you would say no, it's a residual magnetism case correct?

[DR. KARVELIS]: Correct. I have not found the material of the plug relevant in any of my work.

....

[COUNSEL FOR RANCO]: But you as an engineer have not concluded that a manufacturing defect is contributing to the valve hang-up issue. That is also true, isn't it?

[DR. KARVELIS]: Yeah. I'd agree with that statement.

....

[COUNSEL FOR RANCO]: ...

If someone were to say that a welding problem we had in 1992 had something to do with residual magnetism in this case, you would say there is no correlation, correct?

[DR. KARVELIS]: I haven't found any correlation between any welding problem and the hang-ups.

[COUNSEL FOR RANCO]: And you have not found any correlation between the split ring washer problems and the hang-ups?

[DR. KARVELIS]: That's true.

....

[COUNSEL FOR RANCO]: ... [T]here isn't any relationship between the form or forming of the valve seat and the residual magnetism that you say affects valve performance; that's likewise true?

[COUNSEL FOR RANCO]: That's correct. Out of all the 50 that I saw, there were no manufacturing defects that were causative.

¶22 Dr. Hoppie likewise testified that he had detected residual magnetism, and that the residual magnetism was strong enough to hold the valves open when the electricity was turned off. U-Line did not call other expert witnesses to testify as to the reason for the failures.

¶23 At the end of the second day of the trial, based on the testimonies of Dr. Karvelis and Dr. Hoppie, the trial court decided to exclude evidence of reasons other than residual magnetism for the failure of the valves. The court explained that other possible reasons for the failures were not relevant because these were the parameters that U-Line's own experts had established, and because U-Line had been unable to "show the nexus ... between that which happened to [Whirlpool and Scotsman] and you in terms of it being applicable in your system." The court thus asked the parties to "re-focus and ... to get only into the problems concerning the residual magnetism issue..."

¶24 The next day, U-Line attempted to explain to the trial court why it felt evidence of other customers' failures and other reasons for the failures should be permitted, noting specifically that the evidence the court now wanted to exclude had survived summary judgment and motions in limine. The court disagreed and stated that those rulings were made before the facts were known, and that now, after hearing from U-Line's experts, it had become clear that the evidence was not relevant because only residual magnetism had been presented as a reason for the valve failures.

¶25 The court explained that the issue was one of notice: when Ranco first became aware that the problem was or could be residual magnetism. For this reason, the trial court focused on April 23, 1997, the date on which Ranco was informed of the Italian report which first mentioned residual magnetism as a possible reason, and explained that "from this time forward, April 23rd, '97, your situation changed with Ranco, and they had a duty at that time to bring this up knowing well that you were still experiencing all these problems." U-Line made an offer of proof.

¶26 The jury heard more evidence of the problems U-Line experienced in 1995 and 1996: the fact that U-Line returned the failing valves to Ranco, and Ranco's response that U-Line need not replace the V16 valves with spring-loaded valves, that Ranco does not offer spring-loaded valves, and that no other customers had reported similar problems. The jury also heard evidence about U-Line's testing, which had concluded that the problem was not the valve, the resulting redesign of the combo units and the field fix kits, the subsequent failure of the redesigned units, and the eventual determination by U-Line that the valves were in fact to blame for the failures. The jury learned of the April 22, 1997, report by Ranco's Italian affiliate, which found that residual magnetism could have been the reason for U-Line's problems, and that Ranco never shared these results with U-Line. The jury was also told about U-Line's tests of the Parker valve, U-Line's ultimate decision to use the Parker valve, and that since then, U-Line no longer experienced problems with its combo units.

¶27 U-Line also wanted to present the evidence it had discussed in its opening statement, and had planned to use to support its fraud claim. As a result of the trial court's decision to exclude evidence unrelated to residual magnetism, U-Line was precluded from introducing much of it. In particular, U-Line was not allowed to introduce: evidence about failures of V16 valves that Whirlpool and Scotsman had experienced between 1992 and 1996; Ranco documents addressing whether the nylon needle in the V16 valve is compatible with oils used in R134A systems; life-test data from Ranco's German affiliate, addressing the compatibility of two valve tip materials with R134A; and evidence that a Japanese Ranco affiliate had a spring-loaded valve available and had promoted it to other manufacturers.

¶28 U-Line also wanted to present evidence that its damages were as high as five million dollars. The trial court ruled, however, that U-Line could introduce evidence only about damages resulting from units that had been replaced, thus excluding expenses from warranty repairs and returned units. A U-Line expert, Ralph Ells, was thus able to testify only that U-Line had suffered \$486,302 in damages as a result of the failures of the combo units.

¶29 Ranco then presented an expert witness, electrical engineer Dr. John Brauer, who testified that the residual magnetism that U-Line's experts, Dr. Karvelis and Dr. Hoppie, had detected would have been insufficient to cause the valves to hang open: "[T]he force of gravity is almost 100 times greater than the residual force, so the force of gravity down is almost 100 times greater than any residual magnetic force up; and therefore, the conclusion is that the solenoid will not hang due to residual magnetism."

¶30 Deposition testimony by a former Ranco mechanical engineer, Josh Fribley, who had examined the valves that U-Line returned to Ranco, was read into evidence. Fribley found that the valves were contaminated with debris, specifically, "desiccant and other fragments," and that, in his opinion, "there were instances where the contamination probably did contribute to the random nature of the valves sticking open."

¶31 Ranco's fluid mechanics expert, Dr. Carl Johnson, testified that, in his opinion, excess oil or thickening of the oil tended to cause the valve to fail to close. He testified that these occasional failures were caused by "a time-related increase in viscosity of the refrigerant oil due to either the shedding of microspheres of dryer desiccant into the oil ... or moisture in the oil used with the R-134A refrigerant ... or excessive oil used in the R-134A system." He also

testified that the residual magnetism levels he had measured were far too low to cause the valves to stick open, because the needle weighs eight grams while the magnetism had a holding force of only one tenth of one gram.

¶32 At the end of the trial the court explicitly declined to instruct the jury regarding an implied warranty of fitness, and told counsel.

[T]he concept of essential purpose I just didn't feel was applicable in this particular case based upon the information and the evidence as derived... [The] fitness for use, that type of thing, I felt there was not enough information in there because of the multiple use concepts involved in the product. Apparently, it was good for one application, not good with another, or not as good as it were. Also it would work with some units but didn't work with others. And so I just didn't feel that the essential issue was involved there.

U-Line objected.

¶33 On August 31, 2004, after a fourteen-day trial, the first question the jury was asked on the special verdict form was: "Did Ranco's V16-245 hot gas bypass valves purchased by U-Line after, 1996, fail as a result of residual magnetism?" The jury unanimously answered "no," and as a consequence, did not answer the remaining questions.

¶34 On October 11, 2004, U-Line filed post-verdict motions requesting a new trial, arguing that the trial court's errors denied U-Line its right to present the majority of its case. The motions were denied. Judgment was entered on December 21, 2004, in accordance with the jury's finding that Ranco was not liable. This appeal follows.

## II. ANALYSIS.

### A. *Exclusion of Evidence.*

¶35 U-Line’s main argument is that the trial court erroneously exercised its discretion by excluding evidence that did not relate to residual magnetism.

¶36 A trial court has broad discretion in determining the relevance and admissibility of evidence and its decision will not be reversed absent an erroneous exercise of discretion. *State v. Oberlander*, 149 Wis. 2d 132, 140-41, 438 N.W.2d 580 (1989); see *State v. Weed*, 2003 WI 85, ¶9, 263 Wis. 2d 434, 666 N.W.2d 485. “[T]he question on appeal is not whether this court, ruling initially on the admissibility of the evidence, would have permitted it to come in....” *State v. Stinson*, 134 Wis. 2d 224, 232, 397 N.W.2d 136 (Ct. App. 1986). Rather, we “will uphold a decision to admit or exclude evidence if the circuit court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion.” *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Thus, we will not find an erroneous exercise of discretion if there is a rational basis for the trial court’s decision. *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983).

#### 1. *Evidence of Whirlpool and Scotsman failures.*

¶37 U-Line first contends that the trial court erred by excluding evidence of Ranco valve failures experienced by Whirlpool and Scotsman.

##### a. *Probative of a Design Defect*

¶38 U-Line asserts that not allowing evidence of valve failures that occurred prior to 1997 resulted in the exclusion of evidence of failures identical to

U-Line's, experienced by Whirlpool and Scotsman, which would have proven that Ranco's V16 valve in fact suffered from a residual magnetism design defect – as opposed to Ranco's theory, that the valves stuck open due to factors unrelated to its design. U-Line maintains that among the wrongly excluded evidence was: a 1993 Ranco memorandum about a leaking valve by Whirlpool; tests performed by Whirlpool after their units “stop[ped] producing ice” when the V16 was used; evidence of five Ranco valves that Whirlpool had returned to Ranco in 1994 that exhibited problems similar to those later experienced by U-Line; and an internal Ranco memorandum that found the failures reported by Whirlpool and Scotsman to be similar: “[t]he valves either lock in the closed position or stick in the open position.” U-Line also refers to the trial court's initial decision to allow the evidence to survive Ranco's motion in limine, and submits that the court should not have reversed its own decision, particularly because in product defect cases evidence of other failures is highly probative.

¶39 Ranco claims the exclusion was proper because the valve problems reported by Whirlpool and Scotsman were not sufficiently similar to U-Line's, were not relevant, and would have been unduly prejudicial and confusing to the jury. We agree.

¶40 In determining whether to admit evidence of other incidents to show the probability of the defect in question, similarity is critical. *See Netzel v. State Sand & Gravel Co.*, 51 Wis. 2d 1, 9, 186 N.W.2d 258 (1971). In *Netzel*, our supreme court explained:

Evidence of other accidents or similar occurrences at the same place or under similar conditions and circumstances may be admissible to show the probability of the defect in question, that the injury was caused by the defect and that the person responsible knew or should have known of the existence of the defect.

*Id.* (citation and footnote omitted). “The assumption underlying the rule is that similarity of product and similarity of circumstance renders the comparison probative of the material issues in dispute.” *Bittner v. American Honda Motor Co.*, 194 Wis. 2d 122, 144, 533 N.W.2d 476 (1995). Admissibility of prior incidents is generally left to the discretion of the trial court. *Lobermeier v. General Tel. Co. of Wis.*, 119 Wis. 2d 129, 150, 349 N.W.2d 466 (1984).

¶41 U-Line had the burden to show similarity between the valve failures experienced by U-Line and those experienced by Whirlpool and Scotsman. The trial court ruled the evidence inadmissible because it found that U-Line had been unable to meet that burden, and failed to show what it termed the “nexus” between its experiences and those of Whirlpool and Scotsman.

¶42 The record shows that between 1992 and 1996, Ranco identified manufacturing defects that explained all of Whirlpool’s and Scotsman’s valve failures. Here, however, both of U-Line’s two expert witnesses, Dr. Karvelis and Dr. Hoppie, testified that, in their opinion, the only reason for U-Line’s valve failures was a design defect called residual magnetism. Dr. Karvelis explicitly testified that manufacturing defects akin to those that had been established as the reasons for Whirlpool’s and Scotsman’s failures between 1992 and 1996 could not have been the cause of U-Line’s failures because this case involved only residual magnetism. No evidence suggested that Ranco did not correctly identify the problems reported by Whirlpool and Scotsman and that the real reason for the valve failures was residual magnetism. Although we find it curious that one valve manufacturer had so many problems and complaints related to one of its products, that does not change the fact that U-Line’s expert testimony leads to the conclusion that the problems complained of by Whirlpool and Scotsman were not sufficiently similar to those of U-Line. *See Netzel*, 51 Wis. 2d at 9. We cannot



agree with U-Line that the mere fact that Whirlpool and Scotsman valves exhibited problems that *appeared* similar means that evidence of Whirlpool's and Scotsman's problems was probative of what caused U-Line's failures, given the strong testimony to the contrary from U-Line's own experts.

¶43 It is significant that it was U-Line's own experts who gave the testimony that unequivocally restricted the realm of relevant, and thus admissible, evidence to that concerning residual magnetism. Having itself provided the testimony that limited the relevant evidence, U-Line cannot now complain that the trial court improperly excluded evidence of other reasons for the failures. The trial court did not erroneously exercise its discretion in ruling, based on the expert testimony presented by U-Line, to exclude evidence about Whirlpool and Scotsman as irrelevant.

¶44 The trial court's denial of Ranco's motions in limine does not influence the result. The court exercised proper discretion in first allowing the evidence to survive motions in limine and after hearing expert testimony concluding that the evidence should be excluded as irrelevant. *See, e.g., Farrell v. John Deere Co.*, 151 Wis. 2d 45, 61, 443 N.W.2d 50 (Ct. App. 1989) (after initially denying the defendant's motion in limine to exclude evidence, at trial the court rejected the evidence because it did not find the other incidents to be sufficiently similar).

¶45 Even if the evidence were relevant, that would not guarantee its admissibility. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time,

or needless presentation of cumulative evidence.” WIS. STAT. § 904.03 (2003-04).<sup>1</sup>

“Since evidence of other similar conditions or occurrences under similar circumstances involves proof of collateral matters, a good deal of discretion is necessarily vested in the trial judge on the question of whether the evidence should be admitted. The usual considerations of undue distraction or prejudice, surprise, or undue consumption of time are inherent....”

*Netzel*, 51 Wis. 2d at 9 (citation omitted).

¶46 Here, even if the evidence had been relevant, its admission likely would have led to an undue consumption of time and would have been unduly prejudicial and distracting. *See* WIS. STAT. § 904.03; *Netzel*, 51 Wis. 2d at 9. Particularly since, as Ranco notes, Ranco would have had to separately defend against Whirlpool and Scotsman, the result would have been a trial within a trial, which no doubt would have been confusing to the jury in a case that already involved a great deal of technical detail. *See Netzel*, 51 Wis. 2d at 9. The risk of juror misuse of the evidence and juror confusion about the evidence certainly would have outweighed its probative value. *See id.*

*b. Fraud*

¶47 U-Line next contends that evidence of Whirlpool and Scotsman failures should have been admitted because it was critical to U-Line’s fraud claims. Because U-Line is seeking only economic damages, we address the applicability of the economic loss doctrine.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶48 The economic loss doctrine is a judicially created rule, introduced in Wisconsin by *Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.*, 148 Wis. 2d 910, 437 N.W.2d 213 (1989), which provides that a commercial purchaser of products may not, via certain tort theories, recover from the product manufacturer damages that are solely “economic” in nature, *id.* at 921; *see Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis. 2d 395, 400, 573 N.W.2d 842 (1998). The doctrine is “based on an understanding that contract law and the law of warranty, in particular, is better suited than tort law for dealing with purely economic loss in the commercial arena.” *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶26, 270 Wis. 2d 146, 677 N.W.2d 233 (citation omitted). “[E]conomic loss” means “damages resulting from inadequate value because the product ‘is inferior and does not work for the general purposes for which it was manufactured and sold.’” *Daanen*, 216 Wis. 2d at 400-01 (citation omitted). Recovery for “economic loss” refers to recovery as a result of a product failing in its intended use, *id.* at 405-06, or failing to live up to a contracting party’s expectations, *see Tietsworth*, 270 Wis. 2d 146, ¶24.

¶49 In Wisconsin, the economic loss doctrine bars misrepresentation claims based on negligence, *Prent Corp. v. Martek Holdings, Inc.*, 2000 WI App 194, ¶21, 238 Wis. 2d 777, 618 N.W.2d 201, and strict liability, *Van Lare v. Vogt, Inc.*, 2004 WI 110, ¶28, 274 Wis. 2d 631, 683 N.W.2d 46. At the time of the trial in this case, it was unclear to what extent the economic loss doctrine barred claims for fraud in the inducement.

¶50 In 1995, the Michigan Court of Appeals in *Huron Tool & Eng’g Co. v. Precision Consulting Servs., Inc.*, 532 N.W.2d 541 (Mich. App. 1995), established a narrow exception for fraud in the inducement to the economic loss doctrine. *Id.* at 545. *Huron Tool* differentiates between two types of fraud: fraud

that is “interwoven with the breach of contract,” where “the misrepresentations relate to the breaching party’s performance of the contract,” which is barred by the economic loss doctrine, and fraud that is “extraneous to the contract,” which is not barred. *Id.* In 2003, the Wisconsin Supreme Court issued a split decision in *Digicorp, Inc. v. Ameritech Corp.*, 2003 WI 54, 262 Wis. 2d 32, 662 N.W.2d 652, where “[a] majority [held] that a fraud in the inducement exception to the economic loss doctrine exists, but there [was] an even split as to what the fraud in the inducement exception entails.” *Id.*, ¶5 n.2. This was the law at the time of the trial in this case.

¶51 In 2005, the supreme court resolved the question in *Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, 283 Wis. 2d 555, 699 N.W.2d 205. The court “adopt[ed] a narrow fraud in the inducement exception, akin to that established in *Huron Tool*” and “h[e]ld that a fraud in the inducement claim is not barred by the economic loss doctrine ‘where the fraud is extraneous to, rather than interwoven with, the contract.’” *Id.*, ¶42 (quoting *Digicorp*, 262 Wis. 2d 32, ¶47; *Huron Tool*, 532 N.W.2d at 545). For the exception to apply, the fraud must concern “matters whose risk and responsibility did not relate to the quality or the characteristics of the goods for which the parties contracted or otherwise involved performance of the contract.” *Id.* *Kaloti* explained that:

misrepresentations that concern “the quality or character of the goods sold,” are either: (1) expressly dealt with in the contract’s terms, or (2) if they are not dealt with explicitly in the contract’s terms, they go to reasonable expectations of the parties to the risk of loss in the event the goods purchased did not meet the purchaser’s expectations....

*Id.*, ¶43 (citations omitted).

¶52 Against this backdrop, U-Line acknowledges the economic loss doctrine, but claims its loss falls under the *Huron Tool* exception. U-Line maintains that the fact that Ranco told U-Line in writing that “no other customer has returned or complained about V16 hot gas valves sticking open,” establishes that Ranco lied to U-Line, and argues that such statements by Ranco were “extraneous to the purchase order contracts U-Line entered into with Ranco to purchase V16 valves” and are the kind of extraneous statements that can form the basis for a fraud claim.

¶53 Ranco asserts that U-Line’s fraud claim is barred by the economic loss doctrine. Ranco submits that because the alleged misrepresentation – that no other customers had problems with the valves – relates to the quality of the valves, and because the Commercial Warranty in Ranco’s Selling Policy addresses the quality of the valves, these losses are not extraneous to the contract between U-Line and Ranco. We agree.

¶54 It appears undisputed that the valves U-Line purchased from Ranco were covered by the contract between U-Line and Ranco. U-Line, however, appears to distort what is at issue by asserting that “the contract documents in this case said nothing about other customer’s complains and returns.” The focus is thus Ranco’s V16 hot gas bypass valves and why they failed. The alleged fraud – that Ranco lied about other customers’ problems with the valves – goes to the alleged failure of Ranco’s valves, in other words, the “quality” of the valves. This matter was addressed in Ranco’s Selling Policy: by promising that each of Ranco’s products “will be free from defects in material and workmanship,” Ranco’s Selling Policy speaks directly to the quality of the product. *See, e.g., United Vaccines, Inc. v. Diamond Animal Health, Inc.*, 409 F. Supp. 2d 1083, 1094 (W.D. Wis. 2006) (concluding that fraud in the inducement exception was

inapplicable because claim rested on defendants' allegedly fraudulent statements that they were capable of producing vaccines in sufficient quantities and potency, which were memorialized in the Manufacturing Agreement). Here, the alleged fraud is not extraneous to the contract but rather interwoven with the contract. *See Kaloti*, 283 Wis. 2d 555, ¶42. Thus, U-Line's fraud claims regarding Whirlpool and Scotsman is barred by the economic loss doctrine.

*c. Impeachment*

¶55 U-Line next asserts that evidence of complaints by Whirlpool and Scotsman was necessary to impeach Ranco's Sales Engineer, Allen. When asked by Ranco's counsel: "There has been an allegation that you lied to U-Line in April of 1997 and thereafter. Have you ever lied to these people about the performance of the V16 valve and anything about residual magnetism?" Allen answered "No, sir." U-Line argues that it should have been allowed to show that Allen was not telling the truth, by asking Allen to read aloud first the letter he wrote to U-Line in October 1996, stating, "Ranco advises that no other customer has returned, nor complained about V16 hot gas valves sticking open," and second, an internal Ranco memorandum from April of 1994 stating, "The above mentioned customers [Whirlpool and Scotsman] have returned V16 valves stating similar failure modes. The valves either lock in the open position or stick in the closed position."

¶56 Ranco counters that evidence of Whirlpool and Scotsman experiences should not have been admissible to impeach Allen because, prior to April 1997, Allen had no information about the possibility of residual magnetism affecting valve performance, so nothing about the pre-1996 Whirlpool and Scotsman problems is inconsistent with Allen's answer. Ranco also asserts that

even if the record did contain inconsistent statements, U-Line waived its right to assign error to the exclusion of the evidence for impeachment purposes because U-Line did not make an offer of proof. We agree with both arguments.

¶57 Impeachment evidence is relevant if it will be “useful to the trier of fact in appraising credibility of the witness....” *Rogers v. State*, 93 Wis. 2d 682, 689, 287 N.W.2d 774 (1980). “The scope of cross-examination allowed for impeachment purposes is discretionary with the trial court.” *Id.*

¶58 There appears to be nothing inherently untruthful about Allen’s answer that “in April of 1997 and thereafter” he did not lie to U-Line “about the performance of the V16 valve and anything about residual magnetism.” All Allen had in April 1997 was a cautious report from its Italian affiliate, which, for the most part, concluded that the valves U-Line had returned to Ranco were error-free, and in which the tester stated that the only personal doubt he was able to imagine was that residual magnetism could have been the cause. The report, in other words, was a mere suggestion about what the reason might be, it was not an authoritative opinion. Moreover, it is still unclear what exactly caused Ranco’s valves to fail in U-Line’s combo units.

¶59 However, even assuming that U-Line had been able to establish that Allen was not telling the truth when he testified that he did not lie to U-Line “about the performance of their V16 valve and anything about residual magnetism,” U-Line fails to recognize that evidence of the valve problems Whirlpool and Scotsman experienced prior to 1997 does not contradict Allen’s answer. U-Line is trying to compare statements Allen made to U-Line prior to 1997 about the performance of other customers’ valves, with testimony about U-Line’s V16 valve and residual magnetism from April 1997 forward. In so

doing, U-Line ignores both the fact that, prior to April 22, 1997, no one at Ranco had brought forth residual magnetism as a possible reason for U-Line's valve failures, and the fact that the question Allen was asked pertained only to events following April 1997. As such, a negative answer to a question about residual magnetism post-1997—even if it were untrue—cannot possibly contradict unrelated statements about valve problems faced by Whirlpool and Scotsman prior to 1996. Evidence of Whirlpool and Scotsman would therefore not have been helpful to the jury in assessing Allen's credibility and was properly excluded. *See id.*

¶60 Moreover, here, an erroneous evidentiary ruling cannot be the basis for a reversal unless a substantial right of the party is affected and the party who seeks to introduce the evidence provides an offer of proof. WIS. STAT. § 901.03(1)(b). U-Line's failure to make an offer of proof setting forth the testimony constituted a waiver of its right to assign error to the exclusion of the Whirlpool and Ranco evidence on impeachment grounds.

## 2. Evidence of Fraud

¶61 U-Line's second argument is that the trial court erred by excluding evidence of fraud. U-Line maintains that, in addition to evidence of Whirlpool and Scotsman's problems, the trial court erred in excluding three more categories of evidence that, while subject to the economic loss doctrine, should have been admitted under the *Huron Tool* exception. *See Kaloti*, 283 Wis. 2d 555, ¶42. U-Line asserts that the trial court mistakenly excluded: (1) evidence that Ranco lied about the compatibility of its V16 valve with the R134A refrigerant; (2) life-test data about the performance of nylon and Teflon as valve tip materials with the R134A refrigerant; and (3) evidence that Ranco misrepresented the



existence of an alternative valve, when Ranco told U-Line that a spring-loaded valve was neither offered by Ranco nor necessary for U-Line, while a Ranco affiliate was in fact developing and promoting such a valve. U-Line therefore argues that “[e]ach of these misrepresentations, independently and together, caused U-Line to continue submitting purchase orders to Ranco for the V16 valve when the truth would have caused U-Line to purchase a by-pass valve from a vendor other than Ranco.” U-Line emphasizes that the only contract between the parties was the Ranco Selling Policy, which made no mention of these subjects, and that, as a result, “these issues are separate from the duties the parties settled on during contract negotiations,” and fall under the *Huron Tool* exception.

¶62 Ranco responds that the three categories of evidence are barred by the economic loss doctrine because the V16 valve’s compatibility with R134A, life-test data, and an alternative design, all relate to the quality or character of the V16 valves, and for that reason, are covered by Ranco’s Selling Policy and do not qualify under the *Huron Tool* exception.

¶63 Ranco also submits that all three categories are irrelevant as well. Evidence regarding the compatibility of the V16 valve with R134A is irrelevant, Ranco claims, because U-Line’s own experts testified it was not an issue with respect to the performance of the V16 in the FF models, and indicated that only residual magnetism could have caused the valves to malfunction. So, too, Ranco claims the life-test data are irrelevant because the tests examined the material of the valve tip, which U-Line’s own experts had testified played no role in the valve failures, and because not only has U-Line not shown that Ranco lied about the results of the tests, but also because U-Line did not claim that the valves it purchased were wearing out prematurely (what the life-test was ultimately testing). As to the existence of an alternative valve, Ranco claims it is also

irrelevant because U-Line's was aware of the existence of spring-loaded valves even when it first considered using the V16 valve, and because U-Line has not shown "that Ranco ever had such a valve available for sale to U-Line," or "that Randy Allen intentionally misrepresented the availability of Ranco spring-loaded valves."

¶64 Once again, the parties do not dispute the fact that the V16 valves that U-Line purchased from Ranco were purchased under the contract between them. In arguing that because Ranco's Selling Policy did not address the compatibility of the V16 valve with R134A, life-test data, or alternative valves, the "issues are separate from the duties the parties settled on during contract negotiations," U-Line skews the issue. The issue is Ranco's V16 hot gas bypass valves and why they failed. The alleged fraud—that Ranco: lied about the compatibility of the V16 valve with the R134A refrigerant; did not disclose life-test data; and misrepresented the existence of an alternative valve—relates to the performance, or alleged failure to perform, of Ranco's valve. More specifically, the evidence of the compatibility of the V16 valve with R134A examined the quality of the V16 valve. Similarly, the life-test data testing the valve tip materials' performance with the new refrigerant also concerns the quality of the V16 valve. The existence of an alternative, spring-loaded valve by contrast concerns the character of the valve. The Ranco Selling Policy, by assuring that each valve "will be free from defects in material and workmanship," addresses the quality and the character of the valves, and as such covers the three categories of evidence that U-Line sought to introduce to show fraud. *See Kaloti*, 283 Wis. 2d 555, ¶43. Evidence of compatibility between the V16 valve and R134A, life-test data, and the availability of a spring-loaded valve, thus do not fit under the *Huron*

*Tool* exception, and are barred by the economic loss doctrine. See *Kaloti*, 283 Wis. 2d 555, ¶42.

¶65 We also agree that the three categories of evidence could likewise have been excluded as irrelevant. U-Line’s own experts testified that only residual magnetism—not the compatibility of the V16 valve with R134A refrigerant—could have caused the valve failures in question. The same expert testimony is the reason why the life-test data, which examined the valve tip materials in the R134A system—not residual magnetism—are not relevant.

¶66 Evidence of Ranco’s misrepresentation about the existence of an alternative valve, would have been equally irrelevant, because even before U-Line made its initial decision to purchase the V16 from Ranco, U-Line knew that other manufacturers had spring-loaded valves on the market. Had it wanted to, U-Line easily could have chosen to use a spring-loaded valve.

### *3. Evidence of U-Line’s Damages*

¶67 U-Line next contends that the trial court erred by excluding evidence of U-Line’s damages when it limited testimony to allow only expenses from valves that were replaced and only those expenses that were incurred after April 23, 1997.

¶68 First, U-Line contends that the trial court improperly excluded testimony, by its expert, Ralph Ells, about warranty repair costs, and claims that because the reason for the failures was difficult to ascertain, U-Line’s expenditure was “millions more than would be the case if the true cause of the problem had been known,” and that such evidence should have been admitted to show “consequential damages.”

¶69 Second, U-Line contends that the trial court erroneously excluded testimony about damages resulting from units returned by customers. It was U-Line's policy to replace a unit free of charge if it failed more than twice. U-Line asserts that the trial court erroneously refused to permit testimony that would have quantified the millions of dollars U-Line claims it suffered in expenses as a result of providing customers with new units. It maintains that the trial court's ruling was based on the mistaken conclusion that Ells lacked the foundation to testify because there were 9,000 entries for the 75-FF, and 2,000 entries for the 29-FF, and "[r]ather than looking at each and every document, [Ells] reasonably looked at a sample of the documents in the database to confirm the accuracy of the entire database."

¶70 Ranco responds that any error with respect the exclusion of evidence pertaining to U-Line's damages was harmless because the jury never reached the question of damages. Ranco also observes that damages from warranty repair expenses are excluded by the Ranco Selling Policy, and that the claim that warranty repairs constitute consequential damages "is too attenuated to allow recovery."

¶71 This issue, as so much of this case, comes down to U-Line's own experts' unmistakable testimony that only residual magnetism could have been the cause of the valve failures, and the subsequent ruling by the trial court excluding evidence from before April 23, 1997, the day Ranco was first informed of the possibility that residual magnetism could be blamed for the failures. Naturally, the implication of the ruling on the issue of damages is that any expenses that stem from events that took place prior to April 23, 1997, are not recoverable.

¶72 Moreover, an error does not require reversal unless it affects the substantial rights of the party, WIS. STAT. RULE 805.18(2); *Town of Geneva v. Tills*, 129 Wis. 2d 167, 184-85, 384 N.W.2d 701 (1986). An error is harmless if it did not affect the jury's verdict, *Weed*, 263 Wis. 2d 434, ¶29, that is, the court must conclude "beyond a reasonable doubt that a rational jury would have [reached the same result] absent the error," *State v. Harvey*, 2002 WI 93, ¶44, ¶48 n.14, 254 Wis. 2d 442, 647 N.W.2d 189 (quoting *Neder v. United States*, 527 U.S. 1, 15-16, 18 (1999)).

¶73 Here, the jury concluded that residual magnetism did not cause the valve failures, and accordingly, never addressed the question of damages. As a result, absent the errors that U-Line alleges with respect to damages, the jury clearly would have reached the same result, and any error that might have occurred was harmless.<sup>2</sup> See WIS. STAT. § 805.18. We therefore need not address whether the trial court should have allowed U-Line to present evidence of consequential damages resulting from warranty repairs, or whether the trial court erroneously determined that Ells lacked the foundation to testify about the damages U-Line incurred from the replacement of units under U-Line replacement policy.

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<sup>2</sup> U-Line concedes that the jury never reached the question of damages after answering "no" to the first question of the special verdict form, but notes that it is raising the issue of damages on appeal in order to be able to ask for the more than five million dollars in damages it sought, but was not allowed, to preserve the issue, should this court grant a new trial. Because we affirm the judgment and thus deny U-Line's request for a new trial, any error that might have occurred with respect to damages is harmless.

*B. Special Verdict Form that Excluded Breach of Implied Warranty of Fitness*

¶74 Next, U-Line contends that the trial court erred in submitting to the jury a special verdict form that excluded U-Line’s claim for breach of implied warranty of fitness.

¶75 This court accords “substantial deference to the manner in which a trial court frames a special verdict.” *Schwigel v. Kohlmann*, 2002 WI App 121, ¶10, 254 Wis. 2d 830, 647 N.W.2d 362. If, however, the special verdict question does not fairly represent the material issue of fact to the jury, we must reverse. *Id.*

¶76 U-Line maintains that when the trial court submitted to the jury a special verdict form that did not include a claim for breach of implied warranty of fitness, this effectively granted Ranco a directed verdict on that claim, and asserts that the jury should have been allowed to at least consider the claim. U-Line claims it presented “substantial evidence in support of its implied warranty claims,” including that, in 1992, U-Line communicated to Randy Allen the requirements for its valves, that Allen presented himself as a Sales engineer, and that “U-Line informed Allen that it was relying on his particular skill and judgment to pick a valve that would meet the needs of U-Line.”

¶77 Ranco responds that U-Line failed to create jury questions on essential elements of a claim of breach of the implied warranty of fitness because testing negates an implied warranty of fitness and U-Line performed extensive testing and thus waived any warranty. In the alternative, Ranco notes that if the exclusion was error, that error was harmless because the jury would never have reached the question since it concluded that the valves did not fail as a result of residual magnetism. Once again, we agree with Ranco.

¶78 WISCONSIN STAT. § 402.315 sets forth the requirements for implied warranty of fitness:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under s. 402.316 an implied warranty that the goods shall be fit for such purpose.

¶79 An exception to the implied warranty of fitness is set forth in WIS. STAT. § 402.316(3)(b), which provides:

When the buyer before entering into the contract has examined the goods or the sample or model as fully as the buyer desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to the buyer.

¶80 U-Line's claim that it relied on Ranco's representation of the valve in such a way as to give rise to an implied warranty of fitness is contradicted by testimony from its own witnesses. U-Line's vice-president of operations and service manager both testified that prior to beginning production of the 29-FF and the 75-FF, U-Line manufactured prototypes of the two models, on which it then ran a series of tests to assess the units' performance, including ice production and temperature. Logically, such tests assessed the performance of the individual components within the units, including the V16 valve. This is precisely the type of testing that eliminates an implied warranty of fitness. WIS. STAT. § 402.316(3)(b). *See, e.g., Nelson v. Boulay Bros. Co.*, 27 Wis. 2d 637, 641, 135 N.W.2d 254 (1965) (seller not liable under implied warranty of fitness where buyer's examination of the product prior to use either did reveal or ought to have revealed defect); *Valiga v. National Food Co.*, 58 Wis. 2d 232, 255-59, 206 N.W.2d 377 (1973) (no implied warranty running from supplier to seller who

physically examined mink food sample and based upon results of tests proceeded to sell it to plaintiffs). While we agree with U-Line that an implied warranty of witness might well have arisen under WIS. STAT. § 402.315, its own tests disqualified it from the coverage of that warranty. We cannot agree that the trial court erred in concluding that the circumstances did not give rise to an implied warranty of fitness. The implied warranty of fitness was properly excluded from the special verdict form.

¶81 Furthermore, had an error occurred, any such error would have been harmless, since, like the question of damages, the jury would never have gotten as far as addressing the implied warranty of fitness since it answered “no” to the first question. *See* WIS. STAT. § 805.18.

### *C. Real Controversy Was Tried*

¶82 Finally, U-Line maintains that as a result of the trial court’s allegedly mistaken evidentiary ruling, the real controversy was never tried and justice miscarried. It claims the trial court incorrectly viewed the case as being about residual magnetism and made an “off the cuff unsupported finding” that resulted in the exclusion of evidence unrelated to residual magnetism. U-Line maintains the evidentiary ruling kept the jury from seeing the truth, and alleges that this case was really about “Ranco valves that were consistently failing, and a seller that lied about what it knew of other customer failures and its own internal test results.” The timing of the trial court’s ruling, U-Line claims, magnified the prejudicial impact by “requir[ing] a mid-trial change of U-Line’s entire case strategy,” because relying on the denials of Ranco’s motions in limine, it assumed its fraud evidence would be allowed in.



¶83 Ranco disagrees and claims “U-Line’s predicament ... is of its own creation” because U-Line failed to show that other customers’ reports of valve failure were sufficiently similar to the alleged residual magnetism problem. Ranco also notes: “U-Line now stunningly, argues: ‘The heart of U-Line’s case was fraud.’ That ignores U-Line’s counsel’s argument to the jury: ‘This case is about circumstances when there is sufficient residual magnetism to hold up the valve.’” We agree with Ranco.

¶84 The trial court’s ruling to exclude evidence unrelated to residual magnetism, following U-Line’s expert’s testimony that only residual magnetism could be to blame for U-Line’s valve failures, was not erroneous. For the reasons set forth in Part A, the ruling was neither “off the cuff” nor “unsupported.” U-Line’s claim on appeal that the case was not about residual magnetism is odd and appears to be a last-ditch effort by U-Line to distance itself from the decisive testimony of its own experts. We are convinced that the real controversy was tried and that justice was achieved. Accordingly, we affirm.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.

