

JONES, JONES, CLOSE & BROWN, CHARTERED
Seventh Floor - Valley Bank Plaza
300 South Fourth Street
Las Vegas, Nevada 89101-6026
(702) 385-4202

MESSAGE FROM PANAFAX UF-250: (702) 384-2276

DATE: February 8, 1991

TO: Mr. Paul Merrell

1.

AT FAX # (503) 528-7151

Bus. phone: (503) 528-7151

2.

AT FAX #

Bus. phone:

3.

AT FAX #

Bus. phone:

4.

AT FAX #

Bus. phone:

FROM: Charles H. McCrea, Sr.

CLIENT/MATTER: Nevada Power v. Monsanto

CLIENT/MATTER NO.: 11927.2

NUMBER OF PAGES (including cover page): 3

COMMENTS:

IF YOU DO NOT RECEIVE ALL OF THIS TRANSMISSION,
please call (702) 385-4202 and ask for: Dale

February 8, 1991

Paul:

In reviewing the February 7 draft just faxed to you, my nagging dissatisfaction with the opening section finally stimulated a response, which I have inserted on page 1. It may not be the final answer, but it seems to me to have a little more cohesiveness.

I do not fully understand the second paragraph; our indemnity claims is valid independent of defendants' fraud and I think it's important to assert this position vigorously.

Please think about these changes and massage them in compiling your comments.

Carol knows that the bottom margin is just a little too short on some of the pages and is fixing it.

Chuck

Nevada Power seeks relief from defendants for fraud and misrepresentation and failure to warn ("fraud claims") and indemnity.

I DISCUSSION

The record in this case shows beyond dispute that defendants (i) are guilty of fraudulent misrepresentation at the time of sale and purchase of their defective PCB-laden equipment, and (ii) actively concealed their fraud, which was not discovered by innocent Nevada Power until 1988. See Def. Br. pg. 23 n. 23 (assuming "assertions concerning the Defendants' knowledge are true"). Defendants do not contend that Nevada Power had actual knowledge before 1988 of their fraudulent sales and their successful concealment of the fraud. Nor can it be said as a matter of law that Nevada Power constructively should have known of defendants' fraudulent sales prior to 1988.

though not unaffected by defendants' fraud,
~~on Nevada Power's indemnity claim, as on the statute of limitations issue, defendants seek to evade the real issue of this case, which is their fraud.~~
is valid and timely even had there been no fraud.

Defendants' brief, like the District Court's opinion below, is premised on legal principles applicable, if anywhere, only outside the forum state of Nevada.¹ Under Nevada law, a trial is required.

A. PRINCIPLES OF DECISION. Defendants address summary judgment's purposes but not its standard. The question before this Court is "whether a jury could reasonably have found that

undersized

¹ Nevada Power lacks space to itemize a response to each of the 78 case decisions defendants were able to cite. By disregarding FRAP 32(a), they crammed their brief with 51 footnotes, many lengthy, all set in small type. Westinghouse Elec. Corp. v. NLRB, 809 F.2d 419, 425 (7th Cir. 1987) (wrong type size in footnotes); Adriana International Corp. v. Thoeren, 913 F.2d 1406, 1417 (9th Cir. 1990) (incorrect line spacing); Anderson v. Alpha Portland Industries, 836 F.2d 1512, 1521 (9th Cir. 1988) (excess footnotes); Flemming v. County of Kane, 855 F.2d 496 (7th Cir. 1988) (general discussion). Because of the volume of defendants' citations, Nevada Power distinguishes defendants' legal theories, and does not catalogue the accompanying citations.