

No. 1-12-0544

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

VAPOR POWER INTERNATIONAL, LLC,)	
)	
Plaintiff-Counter-Defendant-Appellant,)	Appeal from the
)	Circuit Court of
v.)	Cook County.
)	
)	No. 09 M1 162100
POLYURETHANE SPECIALTIES COMPANY,)	
LLC,)	The Honorable
)	Joyce Marie Murphy Gorman,
Defendant-Counter-Plaintiff-Appellee.)	Judge Presiding.
)	

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Neville and Mason concurred in the judgment.

ORDER

¶ 1 *HELD:* A New Jersey company's counter-claim against an Illinois boiler manufacturer for breach of contract based on an extended warranty for boiler coil parts was barred in part for four out of five coil failures by the contract terms providing that the warranty was

for five years from date of shipment. The trial court's finding that the parties had agreed to a low-emissions boiler specification was against the manifest weight of the evidence, and its ruling that the boiler coil extended warranty period began to run only from the date a conforming boiler was delivered was legally erroneous. The boiler delivered was the same boiler model that was ordered by the company, and the manifest weight of the evidence established that the Illinois boiler manufacturer had no knowledge of the low-emissions specification the New Jersey company sought until after the delivery of the boiler. One coil failure was covered by the warranty period and the counterclaim based on that coil failure would have been saved from the four-year statute of limitations applicable to sales of goods under section 2-725 of the Uniform Commercial Code (810 ILCS 5/2-725 (West 2000)), pursuant to the savings provision of section 13-207 of the Illinois Code of Civil Procedure (735 ILCS 5/13-207 (West 2000)), but the evidence at trial established that the New Jersey company could not state a *prima facie* case where there was no actual breach because a formal warranty claim was never made, where there was no evidence of the proximate cause of the coil failure, and where the New Jersey company was barred by waiver and estoppel from maintaining its counterclaim by paying for that coil instead of pursuing the warranty remedy and waiting years to assert such claim. The court's entry of judgment in favor of the New Jersey company was reversed and the case was remanded with instructions to enter judgment in favor of the Illinois boiler manufacturer for its original claim for the cost of a coil that was delivered and never paid for.

¶ 2

BACKGROUND

¶ 3 Plaintiff Vapor Power International (VPI) appeals from a judgment against it after trial in the amount of \$95,375.49 on defendant Polyurethane Specialties Company, LLC's (PSC) counterclaim. VPI is an Illinois corporation with its principal place of business in Franklin Park, Illinois. VPI manufactures and sells industrial boilers, as well as parts and equipment for boilers, including heat transfer coils. PSC is a New Jersey corporation in the business of manufacturing polymers used in the urethane industry. VPI brought suit against PSC for failure to pay for the cost of a coil ordered from VPI, and PSC brought a counterclaim for the cost of coil failures based on breach of warranty for alleged failures and other problems with the boiler. The court found in favor of PSC, ruling that VPI breached an extended warranty for the boiler's heat

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transfer coils.

¶ 4 In *lieu* of a report of proceedings, VPI submitted an agreed statement of material facts pursuant to Supreme Court Rule 323(d) (Ill. S. Ct. R. 323(d) (eff. Dec. 13, 2005)). The trial exhibits are part of the record. We summarize the facts of this case based on the agreed statement of facts and the trial exhibits.

¶ 5 Between July 2000 and September 2000, PSC solicited bids for a 600 BHP boiler through its agent, Magnum Solutions and Service, Inc., a company located in New Jersey. On September 5, 2000, Cape Sales, Inc., acting as VPI's authorized sales agent, presented an initial quote dated September 4, 2000, to PSC for a Model TRG-5905-AHK-600 Circulative Steam Generator at a price of \$143,000. The quote included all specifications for the boiler, including the horsepower of 600 BHP,¹ capacity, design and operating pressures, steam quality, motor power, and the fact that the burner was fueled by "No. 2 oil" and "Natural gas."

¶ 6 John Nolan, the Director of Operations for PSC, maintains that he told VPI's agent at Cape Sales that the boiler had to be "Lo-NOx." "NOx" refers to oxides of nitrogen (NOx), which has a role in the production of smog and acid rain as well as indoor air pollution. The "Lo-NOx" boilers have lower NOx emissions. Nolan testified that he and a PSC purchasing agent, Paul Hine, had a telephone discussion with John Stiles of Cape Sales on or about September 11, 2000. During this conversation, Nolan maintains he informed Stiles that PSC required that the boiler have low a Lo-NOx burner to meet New Jersey's emission requirements. Nolan testified that

¹ BHP refers to the boiler horsepower (BHP), which is the amount of energy required to produce 34.5 pounds of steam per hour.

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Stiles responded by saying, "Okay." Nolan testified that he understood that to mean that the boiler would meet New Jersey's Lo-NOx requirements. However, neither Stiles nor Hine testified at trial. The September 4, 2000 quote did not indicate any Lo-NOx emissions specifications.

¶ 7 On September 15, 2000, Cape Sales presented another quote to PSC for a Vapor Model TRG 5905 600 HP Circulatic Steam Generator boiler, at the price of \$133,000. This second quote also did not include any Lo-NOx emissions specification. The quote is as follows:

"We are pleased to quote:

One Vapor model TRG-5905 600 HP Circulatic Steam Generator, rated at 20,700 lbs/hr from & @ 212 °F 250 psi design, 200 psi safety valve setting, 175psi operating.

Fireye E340 system

Main gas pressure regulator for 2-5 psi supply

IRI code

Price: \$133,000.00

This price includes:

EXTENDED WARRANTY. The standard Vapor warranty is amended to provide for a warranty period of five (5) years from *date of shipment* for failure of any heat transfer coil, as long as Vapor's water treatment requirements are met. Copy Attached[.]" (Emphasis added.)

The attached five-year extended warranty on the heating transfer coils provided as

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follows:

"EXTENDED WARRANTY. The standard Vapor warranty is amended to provide for a warranty period of five years (5 years) from the *date of shipment* for failure of any heat transfer coil as long as Vapor's water treatment requirements are met. Copy Attached."
(Emphasis added.)

¶ 8 VPI's quote included its "ORDER ACCEPTANCE TERMS AND CONDITIONS." The order terms and conditions that are relevant to this case are as follows:

"DAMAGE OR LOSS CLAIMS. ***

Claims for errors, deficiencies or imperfections shall not be considered unless made within ten (10) days after receipt of the goods against which claim is made. All claims must be in writing and expressly refer to the appropriate bill of lading and factory order numbers.

* * *

WARRANTY. Vapor warrants all products of its manufacture to be free of defects in material and workmanship if properly installed, cared for, and operated under normal conditions, with competent supervision, and in accordance with Vapor installation, operating and maintenance instructions. Vapor's only obligation under this warranty is to repair or replace at its factory such Vapor products which shall, within one year after startup, or 18 months after shipping date (whichever comes first) of the product, be returned by the original buyer to Vapor factory, after receipt of written approval from Vapor and with transportation charges prepaid, and which upon examination shall appear

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to Vapor's satisfaction to have been defective in material and workmanship. Correction of such defects by repair or replacement shall constitute fulfillment of all obligations to Representative or buyer, and Vapor shall not be liable for loss or damage, or expense directly or indirectly arising from the use of its products or from any other cause. Vapor assumes no liability for labor and/or any other expenses incurred by anyone without Vapor's express written consent. This warranty does not cover any parts replacement due to damage in shipment, exposure to weather or improper installation."

* * *

"VAPOR LIABILITY. Vapor will use its best efforts to fill all orders given and accepted but it shall not be responsible or liable for delays or defaults occasioned by strikes, fires, floods, differences with workmen, accidents, the exercise of governmental authority, inability to obtain, or shortage of materials, fuel, labor or transportation, for any reason, and all causes unavoidable or beyond Vapor's control.

Vapor's failure to object to provisions contained in the customer's order or other communications shall not be deemed a waiver of terms or conditions hereof nor acceptance of such provisions. *No representations or guarantees other than those contained herein shall be binding upon Vapor unless in writing and signed by an official of Vapor.*" (Emphasis added.)

¶ 9 On a copy of the above September 15, 2000 quote from VPI, PSC's purchasing agent, Paul Hine, made the following notation: "must be in writing."

¶ 10 However, on or about September 18, 2000, Hine prepared and submitted PSC's purchase

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order to VPI that did not state "Lo-NOx" in writing. The order was for the same Vapor Model TRG-5905 600 HP Circulatic Steam Generator boiler unit for the price of \$133,000, with the same specifications, with no mention of Lo-NOx.

¶ 11 The purchase order written and placed by Hine is as follows:

"Vapor model TRG-5905 \$133,000.00

600 HP circulatic steam

Generator, rated at

20,700 lbs 1/hr from []

212 °F 250 psi design

200 psi safety valve setting

175 psi operating

Natural gas / # 2 oil firing

(switchable from one system to the other).

Fireeye [sic] E340 system

IRI Code

Extended warranty - 5 yrs from

date of shipment for failure of any heat

transfer coil."

¶ 12 The terms were F.O.B. VPI's plant and included payment terms. The purchase order did not, however, indicate anything regarding any Lo-NOx requirement or any particular emissions requirement. The purchase order was handwritten and signed by Paul Hine.

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¶ 13 VPI accepted the purchase order in an order acceptance form for the same model boiler, with the same specifications, and again without any indication of any special emissions Lo-NOx requirement. VPI's order acceptance form included the standard start-up services VPI agreed to provide PSC as well as VPI's standard warranty.

¶ 14 The payment terms for the boiler were as follows: \$33,250 was due immediately; \$33,250 was due 15 days prior to shipping; and \$66,500 was due 30 days from the shipping date.

¶ 15 The boiler was shipped by VPI at PSC's instruction to PSC's agent Magnum Solutions on December 28, 2000. The boiler received from VPI was the same model boiler specified in PSC's written purchase order submitted to VPI.

¶ 16 PSC then refused to pay the remaining balance for the boiler.² In a letter dated April 15, 2001, from Larry S. Clark, the regional sales manager for VPI, to Paul Hine of PSC, VPI noted that it had contacted PSC repeatedly for payment for the boiler, without success. The letter did not indicate that there had been any communication or complaint from PSC regarding any issue with the boiler.

¶ 17 Nolan testified, however, that the purchase order did not contain all the specifications of the order. Nolan testified that it is common in the industry for a transaction to occur without certain basic terms ever being put in writing. Nolan maintained that nothing about the price or

² The parties' agreed statement of facts does not indicate whether the final balance for the boiler was ever paid. However, the fact that VPI filed its claim for only the cost of the boiler coil (\$18,741.17) that PSC refused to pay for indicates that at some point PSC did pay the remaining balance for the boiler.

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other information conveyed by Stiles suggested to Nolan that the boiler in question would not be Lo-NOx.

¶ 18 PSC began the process of obtaining New Jersey state permits to run the boiler after receiving the boiler. Nolan testified that it is typical for the permit process to take several months. According to PSC, it learned by May 14, 2001, that the boiler was not Lo-NOx. PSC asked VPI what it would cost to convert the boiler to Lo-NOx.³

¶ 19 Nolan testified that he had conversations with a VPI representative named Larry Clarke, who repeatedly promised that VPI would do something to fix the Lo-NOx issue. Clarke did not testify at trial.

¶ 20 An e-mail from a "Brian" at VPI to other VPI employees dated May 14, 2001 (PSC Exhibit 7) in reference to the PSC order stated as follows:

"HELP!!

Now the customer (PSC) is sending me the 'STATE OF THE ART (SOTA) MANUAL FOR BOILERS' stating what they want the emission from our boiler to be NOX, CO, and VOC's.

* * *

This changes the request I outlined to you in my email from Friday. At that time I was only told they needed to meet 60 ppm on NOX for gas firing and that they did not care about the oil firing.

³ The agreed statement of facts does not indicate the identity of the individuals at PSC or VPI who had this conversation.

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I have attached the 'SOTA' and a letter they wrote to Larry Clark.

They want two things: 1) What will they get (NOX, CO, and VOC's) from their boiler as is?, and 2) what would it cost to convert the boiler to meet the levels indicated for NOX, CO, and VOC's?"

¶ 21 Although PSC claims it revoked its acceptance of the boiler, there is no evidence to this effect in the record. VPI's contract terms required that any revocation be in writing, and there is no revocation in the record.

¶ 22 In a telephone call on or about June 12, 2001, VPI suggested de-rating the boiler to limit fuel input to 20,000,000 btu/hr⁴ and to de-rate the boiler from 600 BHP to 475 BHP, thus lowering the boiler's horsepower to a level below New Jersey's requirement for Lo-NOx. PSC agreed. VPI agreed to de-rate the boiler by March 2002. PSC did not ask for an extension of the one-year general warranty period.

¶ 23 An e-mail dated January 9, 2002, from a Marc Dupuis of VPI to Bob Forslund at VPI concerning the PSC order (PSC Exhibit 9), stated the following:

"John,

I received a call from John Nolan at PSC yesterday afternoon regarding the 600 BHP Circulatic sold to them awhile back. He called to say he was ready for start up and wanted to resolve the outstanding emissions issue. If I remember correctly there is a Nox limit of 42 ppm on boilers over 20,000,000 btu/hr input and 84 ppm on boilers under

⁴ "Btu" is an acronym for "British Thermal Units" and refers to the boiler's capacity in terms of the heat transferred over time.

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20,000,000 btu/hr input. As we have discussed, Vapor was not aware of this emission limit and it was never specified to us until well after delivery. Could you please contact John Nolan at 201-438-2325 ext247 to begin resolution of their issues."

¶ 24 The parties agreed to de-rate the boiler during the standard start-up procedures, which would be performed on March 8, 2002. There was no evidence offered at trial to explain why the boiler was not started up until March 8, 2002.

¶ 25 On March 8, 2002, VPI's technician performed the start-up procedures and de-rated the boiler. The VPI technician's notes indicated that during the start-up procedures he observed that PSC had no strainers in its feed water line to the boiler, which were required. The technician also noted that preventative maintenance and service should be performed by a factory representative after the first year of operation to enhance performance and extend the service life of the boiler. VPI's technician worked on the boiler and represented to PSC that the BHP had been lowered to be within New Jersey requirements as agreed. There is no evidence in the record that the required strainer for the feed water line was ever installed by PSC or that it had the required maintenance on the boiler after its first year of operation.

¶ 26 PSC's counterclaim claims that VPI breached both the general warranty of merchantability and the warranty of fitness for a particular purpose (counts I and II) because of the following malfunctions and/or failures: the boiler's "mod motor," gas valve and Fireeye flame safeguard, all of which failed between August 22, 2002, and September 5, 2002; the recirculation pump motor failed on February 28, 2003; the recirculation pump itself later had to be replaced on February 24, 2004, and a seal had to be installed on August 3, 2005; a water level control on the

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boiler failed on or about February 10, 2005. PSC claims the water level control failed due to the original piping not having been done correctly. These mechanical failures are not at issue in this appeal.

¶ 27 At issue in this appeal is PSC's claim that VPI breached the extended warranty for the heat transfer coils (count III) due to failures of five heat transfer coils.

¶ 28 The first heat transfer coil failure occurred on or about January 19, 2005, when a coil cracked and needed to be re-welded. PSC paid \$1,600 in labor to re-weld this coil. There is no indication in the record that PSC ever objected to paying this labor cost. There is also no evidence as to what caused this coil to need to be re-welded.

¶ 29 The second and third heat transfer coil failures occurred on June 26, 2006. PSC paid \$57,269.64 in labor and parts to replace these two coils. PSC ordered the replacement coils directly from VPI and the payment was authorized by Nolan of PSC.

¶ 30 The fourth heat transfer coil failed on or about February 5, 2007. PSC paid \$36,505.85 in labor and parts to replace this coil. Nolan approved the payment for this coil as well.

¶ 31 VPI told PSC that the second, third, and fourth heat transfer coil failures were out of warranty. PSC did not make any formal warranty claims for the coils.

¶ 32 The following year there was a fifth heat transfer coil failure. On February 15, 2008, PSC submitted a purchase order to VPI for another heat transfer coil. VPI shipped a coil on February 18, 2008, and billed PSC \$18,741.17 but PSC did not pay for the fifth coil, claiming it was entitled to that replacement. VPI refused PSC's claims for any repair or replacement of the failed coil on the ground that the warranty had expired.

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¶ 33 On June 30, 2009, VPI filed a complaint and then an amended complaint against PSC for failure to pay for the heating coil, seeking damages in the amount of \$18,741.17.

¶ 34 PSC filed an answer and a three-count counterclaim on June 15, 2010 for: (1) breach of the implied warranty of merchantability (count I), seeking \$155,072 plus interest for its repair costs for all the non-coil parts; (2) breach of the implied warranty of fitness for purpose (count II), seeking \$133,000 in damages for the cost of the boiler itself because it was not a Lo-NOx boiler; and (3) breach of the five-year extended warranty for the heat transfer coils (count III), seeking \$95,321 plus interest for the costs related to the five heat transfer coils.

¶ 35 VPI filed a motion for partial summary judgment, contending that all three counts of the counterclaim were barred by the four-year statute of limitations set forth in the Uniform Commercial Code (810 ILCS 5/2-725 (West 2000)). As to count III specifically, VPI argued that the five-year extended warranty on the heat transfer coils expired five years from the December 28, 2000 date of delivery, on December 28, 2005. The trial court granted VPI summary judgment as to counts I and II and on PSC's claims under count III for the February 24, 2004 and August 3, 2005 recirculation pump failures, the water level control failure, and the December 19, 2007 coil failure. The court denied summary judgment on the claims in count III for the January 19, 2005, June 26, 2006, and February 5, 2007 coil failures and for the mod motor, gas valve, fireye, and February 28, 2003 recirculation pump claims.

¶ 36 The case proceeded to trial on VPI's claim for non-payment of the coil shipped on February 28, 2008 and PSC's remaining claims in count III of its counterclaim for the coil failures under the five-year extended warranty.

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¶ 37 PSC admitted it did not know the cause of the coil failures that occurred after the expiration of the original five-year warranty from the date of delivery. There was no evidence showing that any of the coil failures resulted from defects in manufacturing or workmanship. Nolan did not know the cause of the coil failures and no expert testimony was presented by either party as to the cause of the coil failures.

¶ 38 The trial court found that the original boiler delivered on December 28, 2000 did not conform to the Lo-NOx emissions specification verbally requested by PSC and, because, the court found the product was non-conforming, the court construed the date of delivery as the date the boiler became operational fourteen months later on March 8, 2005. Because the terms of the extended warranty for the heat transfer coils specified that the warranty was for five years from the date of delivery, the court's ruling extended the warranty period's expiration date to March 8, 2007, instead of the five-year expiration period from the date the boiler actually shipped. Applying this warranty period, the trial court ruled that VPI breached the warranty by not repairing coil failures that occurred after the original five-year warranty period.

¶ 39 Regarding damages, despite the fact that PSC admitted that it did not know the cause of the coil failures and the absence of any evidence showing that the coil failures were the result of any defects in manufacturing or workmanship, the court excused PSC's inability to prove the cause of the failures because VPI had previously rejected its warranty claims as untimely.

¶ 40 The court entered judgment in favor of PSC on September 16, 2011, for \$93,775.49 for PSC's costs for re-welding the coil in January 19, 2005, as well as its costs for obtaining and installing all the remaining heating coils on June 26, 2006 and February 5, 2007. VPI filed a

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motion to vacate the judgment.

¶ 41 In an order entered on January 25, 2012, the court denied VPI's motion to vacate the judgment and granted PSC's motion for additur, resulting in an additur of \$1,600, for a total judgment amount to PSC of \$95,375.49.

¶ 42 VPI appealed the portion of the order of March 2, 2011, denying VPI's summary judgment motion for PSC's claims in count III of its counterclaim for the January 19, 2005, June 26, 2006, and February 5, 2007 coil failures, as well as the order of April 28, 2011, again denying VPI summary judgment. VPI also appeals the judgment order, and the order of January 25, 2012, granting PSC an additur and denying VPI's motion to reconsider.

¶ 43 ANALYSIS

¶ 44 Generally, the standard of review of judgments after a bench trial is whether the judgment is against the manifest weight of the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002). A judgment is found to be against the manifest weight of the evidence only where the opposite conclusion is apparent, or where the findings are arbitrary, unreasonable, or not based upon the evidence. *International Capital Corp. v. Moyer*, 347 Ill. App. 3d 116, 122 (2004). A trial court's application of the UCC to uncontroverted facts presents a question of law reviewed *de novo*. *Henry v. Waller*, 2012 IL App (1st) 102068, ¶ 43. A trial court's purely legal findings are thus reviewed *de novo*, but its determinations of fact are reviewed under the manifest weight of the evidence standard. *Id.*

¶ 45 VPI argues that the judgment of the trial court in favor of PSC on count III of its

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counterclaim⁵ must be reversed because it is both factually against the manifest weight of the evidence and erroneous as a matter of law. VPI first argues that the court erred in entering judgment in favor of PSC on PSC's counterclaim for breach of the extended warranty for the coils because it confused the general warranty of merchantability with VPI's general and extended repair warranties. VPI also argues that the statute of limitations began to run when the boiler was tendered by VPI to PSC.

¶ 46 PSC argues that even though PSC did not specifically order a Lo-NO_x boiler in its purchase order VPI, through its agent John Stiles, assured PSC that the boiler would be "Lo-NO_x," and the boiler PSC received was non-conforming. PSC argues that it did not receive a conforming product until March 8, 2002, and that this is the date that the contract's extended warranty began to run thus extending the five year-warranty expiration from March 8, 2002 to March 8, 2007. PSC then concludes the extended warranty covered the failures that occurred on January 19, 2005, June 26, 2006, and February 5, 2007. The trial court so ruled. However, its ruling was erroneous and contrary to the terms of the contract.

¶ 47 In construing a contract, the primary objective is to give effect to the intention of the parties. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). A court will first look to the language of the contract itself to determine the parties' intent. If the words in the contract are clear and

⁵ Count III was solely for breach of contract based on the separate written extended warranty for the coils. Although PSC sought its repair and replacement costs for the boiler and the non-coil parts, the judgment in favor of PSC was based solely on the extended warranty for the coils. We therefore limit our analysis to only the extended coil warranty.

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unambiguous, they must be given their plain, ordinary, and popular meaning. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). "[A] court cannot alter, change or modify existing terms of a contract, or add new terms or conditions to which the parties do not appear to have assented." *Thompson*, 241 Ill. 2d at 449 (citing *Gallagher*, 367 Ill. App. 3d at 301).

¶ 48 Contracts for the sale of goods which are movable at the time of sale are governed the Uniform Commercial Code (UCC) (810 ILCS 5/1-101 *et seq.* (West 2000)). See 810 ILCS 5/1-102, 2-105 (West 2000). Here, the industrial boiler was movable at the time of sale and, indeed, was shipped from Illinois to New Jersey. The UCC governs this case.

¶ 49 Section 2-725 of the UCC provides for a four-year statute of limitations:

"§ 2-725. Statute of Limitations in Contracts for Sale. (1) An action for *breach of any contract for sale must be commenced within 4 years after the cause of action has accrued*. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered." (Emphasis added.) 810 ILCS 5/2-725 (West 2000).

¶ 50 A promise to repair is a contractual undertaking that the seller will perform in a certain way during the period of the warranty, not a warranty that the product will behave in a certain

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way. *Cosman v. Ford Motor Co.*, 285 Ill. App. 3d 250, 257 (1996). A promise to repair or replace defective parts is only good during the warranty period, and the latest a breach of warranty can occur is at the very end of that period. *Mydlach v. DaimlerChrysler Corp.*, 226 Ill. 2d 307, 325 (2007). An action for breach of a written warranty is timely if it is brought within four years of the seller's failure or refusal to make the repairs for failures covered by the warranty period. *Mydlach*, 226 Ill. 2d at 324. Accordingly, the UCC's four-year statute of limitations period applicable to a breach of a warranty providing for the repair or replacement of defective parts will expire "at the latest, four years after the warranty period has run." *Mydlach*, 226 Ill. 2d at 325-26. "If breach of a repair warranty occurs earlier in the warranty period, the limitations period for that breach will expire sooner, but in no event will the warrantor's exposure extend beyond the warranty period, plus four years." *Mydlach*, 226 Ill. 2d at 326. A claim for breach of a written warranty accrues when promised repairs are refused or unsuccessful, rather than at tender of delivery. *Mydlach*, 226 Ill. 2d at 323-24.

¶ 51 PSC could only prevail on count III of its counterclaim for breach of the extended warranty on the coils if VPI breached its contractual promise to repair coil failures during the extended warranty period. The extended warranty specified that it was for five years from the date of delivery. The date of delivery was December 28, 2000, and so the extended warranty on the coils expired on December 28, 2005.

¶ 52 PSC argues, and the trial court found, that the warranty did not begin to run on the date of delivery because PSC told VPI verbally that it needed a Lo-NOx boiler and the boiler delivered was non-conforming because it was not Lo-NOx. According to PSC and the trial court's ruling,

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the warranty did not begin to run until VPI tendered a conforming good.

¶ 53 Under the UCC, a buyer is entitled to "conforming goods." *Great Western Sugar Co. v. World's Finest Chocolate, Inc.*, 169 Ill. App. 3d 949, 956 (1988). Section 2-313 of the UCC provides: "Any affirmation of fact or promise made by the seller to the buyer which related to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." 810 ILCS 5/2-313 (West 2000). If the tender of delivery fails in any respect to conform to the contract, the buyer may cancel the entire contract and is entitled to a return of any money paid by him and to recover damages. 810 ILCS 5/2-601(a), 2-711(1), and 2-715 (West 2000).

¶ 54 Under the UCC, an agreement modifying a contract needs no consideration to be binding; however, it must be in writing signed by the party against whom enforcement is sought. See 810 ILCS 5/2-201, 2-209(1) and (3) (West 2000). Section 2-202 of the UCC explicitly provides the following:

"§ 2-202. Final written expression: parol or extrinsic evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of performance, course of dealing, or usage of trade (Section 1-303); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement." 810 ILCS 5/2-202 (West 2000).

¶ 55 Comment 3 further provides: "If the additional terms are such that if agreed upon, they would certainly have been included in the document in the view of the court, then evidence of their alleged making must be kept from the trier of fact." 810 ILCS 5/2-202 Comment 3 (West 2000).

¶ 56 The trial court's finding that the Lo-NOx specification for the boiler was agreed to was both against the manifest weight of the evidence and also legally erroneous. The evidence in this case shows that the Lo-NOx term was never made part of the parties' contract. The course of dealing of the parties and communications in emails demonstrate that VPI had no knowledge that PSC wanted a Lo-NOx boiler. In fact, VPI was surprised to learn of this "requirement" by PSC and only first learned of it after the boiler had been delivered. The only evidence relied upon by PSC is one conversation between Nolan and VPI. And, even concerning this conversation, the best that Nolan could say was that "*he* understood" (emphasis added) the conversation to mean that VPI understood their Lo-NOx requirement. The manifest weight of the evidence indicates that PSC "dropped the ball" and did not timely tell VPI of the New Jersey Lo-NOx emissions requirement for boilers. The trial court's finding was against the manifest weight of the evidence.

¶ 57 Moreover, under the parol evidence, or "four corners" rule, as adopted in UCC section 2-202, the court's consideration of the alleged verbal conversation regarding Lo-NOx was error, as the order form and acceptance form constituted a fully integrated contract, and the Lo-NOx

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specification was a material modification of the parties' agreement that section 2-202 required to be in writing. Whether an agreement is fully integrated is a question of law, to the extent that the agreement is unambiguous, so we consider it *de novo*. *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999). "The effect of integration is to 'preclude[] evidence of understandings, not reflected in a writing, reached before or at the time of its execution which would vary or modify its terms.'" *Midwest Builder Distributing, Inc. v. Lord and Essex, Inc.*, 383 Ill. App. 3d 645, 661-62 (2007) (quoting *J & B Steel Contractors, Inc. v. C. Iber & Sons, Inc.*, 162 Ill. 2d 265, 269 (1994)). "Even the introduction of additional consistent terms is barred. *Midwest Builder Distributing, Inc.*, 383 Ill. App. 3d at 662 (citing *J & B Steel*, 162 Ill. 2d at 273; *Eichengreen v. Rollins*, 325 Ill. App. 3d 517, 523-24 (2001)). "As the Illinois Supreme Court has said, 'parol evidence cannot be admitted to add another term to the agreement although the writing contains nothing on the particular term to which the parol evidence is directed.'" *Midwest Builder Distributing, Inc.*, 383 Ill. App. 3d at 662 (quoting *Armstrong Paint & Varnish Works v. Continental Can Co.*, 301 Ill. 102, 106 (1921)). "This is sometimes referred to as the 'four corners' rule: when interpreting an integrated contract, courts are limited to considering material that lies within the four corners of the text, rather than resorting to extrinsic evidence." *Midwest Builder Distributing, Inc.*, 383 Ill. App. 3d at 662 (citing *Air Safety*, 185 Ill. 2d at 462). Hence, to the extent that an agreement is integrated, its terms will override any other prior or contemporaneous negotiations between the parties relating to their subject matter. *Midwest Builder Distributing, Inc.*, 383 Ill. App. 3d at 662.

¶ 58 "Under the UCC, the test to be applied is whether the terms of the alleged parol

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agreement 'would certainly have been included in the document'; if so, then evidence of such an agreement is inadmissible. *Midwest Builder Distributing, Inc.*, 383 Ill. App. 3d at 662-63 (quoting 810 ILCS Ann. 5/2-202, Comment 3 (West 2006)). "If not, then the parol agreement may be considered by the trier of fact as long as its terms are not inconsistent with the terms of the primary agreement." *Midwest Builder Distributing, Inc.*, 383 Ill. App. 3d at 663.

¶ 59 Here, a specific boiler model was ordered and all the boiler's specifications were clearly delineated on the purchase order and confirmatory memorandum. The particular model boiler's specifications showed it had btu at a level which triggered the New Jersey Lo-NOx requirement. The purchase order clearly stated it was a gas/oil boiler. The terms and conditions specifically included an integration clause that established the agreement was fully integrated:

"No representations or guarantees other than those contained herein shall be binding upon Vapor unless in writing and signed by an official of Vapor." (Emphasis added.)

¶ 60 The Lo-NOx requirement was material and it altered the bargain, as PSC could not use a boiler at all if it did not meet this requirement. Under UCC section 2-202 and Comment 3, this term would most certainly have been included in the order. Thus, it had to be expressly included in the agreement.

¶ 61 Any alleged modification from the boiler model that was ordered to a Lo-NOx boiler had to be in writing and signed by VPI, as PSC is seeking enforcement against VPI. See 810 ILCS 5/2-201, 2-209(1) and (3) (West 2000). There is no such signed writing by VPI acknowledging this modification. Hine even noted on a copy of the quote that the Lo-NOx had to be in writing. Inexplicably, despite the material Lo-NOx requirement, Hine wrote and signed the purchase

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order with no mention of Lo-NOx. PSC cannot simultaneously argue that this requirement was so material to PSC that the boiler delivered was a nonconforming good, but that the absence of the Lo-NOx specification from the written purchase order by PSC should be excused. The parties' agreement was fully integrated and the boiler that was delivered was the same model boiler that was ordered by PSC and, therefore, was a conforming good. The trial court's consideration of parol evidence (the alleged verbal discussion adding the Lo-NOx specification) was error.

¶ 62 Moreover, there was no exercise of any right concerning non-conforming goods. Under section 2-507 of the U.C.C., upon proper tender a buyer has a duty to accept the goods and to pay for them. 810 ILCS 5/2-507(1) (West 2000). If there is improper tender, section 2-508 of the UCC provides:

"§ 2-508. Cure by Seller of Improper Tender or Delivery; Replacement. (1)

Where any tender or delivery by the seller is rejected because non-conforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery."

810 ILCS 5/2-608 (West 2000).

¶ 63 In this case, PSC did not reject the boiler as non-conforming, but accepted the boiler. PSC then agreed to the subsequent modification of the boiler. Because the boiler that was delivered was the same model boiler that was ordered by PSC and was a conforming good, and because there was no rejection, the extended warranty period for the coils began to run on the date the boiler was delivered.

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¶ 64 The date of delivery was December 28, 2000, and so the extended warranty on the coils expired on December 28, 2005. The coil failures on June 26, 2006 and February 5, 2007 were well beyond December 28, 2005, and were not covered by the extended warranty. Only coil failures up to December 28, 2005 were covered, which includes only the January 19, 2005 coil failure. PSC brought its counterclaim on June 15, 2010, beyond the limitations period, more than four years after the January 19, 2005 coil failure.

¶ 65 PSC argues that its counterclaim was preserved by the savings provision of section 13-207 of the Illinois Code of Civil Procedure (735 ILCS 5/1-101 *et seq.* (West 2000)), which provides as follows:

"A defendant may plead a set-off or counterclaim barred by the statute of limitation, while held and owned by him or her, to any action, the cause of which was owned by the plaintiff or person under whom he or she claims, before such set-off or counterclaim was so barred, and not otherwise." 735 ILCS 5/13-207 (West 2000).

¶ 66 Under section 13-207, a plaintiff who brings an action waives its statute of limitations defense against any counterclaim brought by an opponent, as long as the counterclaim was not barred when the cause of action forming the basis of the claims in the primary complaint arose. *Cameron General Corp. v. Hafnia Holdings*, 289 Ill. App. 3d 495, 506 (1997).

¶ 67 In order for PSC's counterclaim for breach of the extended warranty for the January 19, 2005 coil failure during the warranty period to have been saved, it must have not been barred by the statute of limitations at the time VPI's claim against PSC accrued. VPI's claim against PSC arose when PSC failed to pay for the coil 30 days after receiving it. According to the invoice,

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payment was due within 30 days of shipment. The coil was shipped on February 18, 2008, and so payment was due by March 21, 2008. PSC failed to pay by March 21, 2008, and so VPI's cause of action accrued on March 22, 2008. As of March 22, 2008, PSC's counterclaim based on the covered January 19, 2005 coil failure was not barred by the statute of limitations. If there was a breach, PSC would have been entitled to recover only \$1,600 for its cost for only the January 19, 2005 coil re-welding.

¶ 68 However, there was no actual breach. A breach of a written warranty accrues when promised repairs are refused or unsuccessful. *Mydlach*, 226 Ill. 2d at 323-24. " 'Since express warranties are contractual in nature, the language of the warranty itself is what controls and dictates the obligations and rights of the various parties.' " *Oggi Trattoria and Caffè, Ltd. v. Isuzu Motors America, Inc.*, 372 Ill. App. 3d 354, 360 (2007) (quoting *Hasek v. DaimlerChrysler Corp.*, 319 Ill. App. 3d 780, 788 (2001)). The extended warranty was an amendment to its general warranty, which required written consent by VPI and specifically provided that VPI "assumes no liability for labor and/or any other expenses incurred by anyone without Vapor's express written consent." PSC never in fact made any formal warranty claims to VPI for any of the coils. Thus there was no breach of the written extended five-year coil warranty for the coil that was covered. Also, as noted above, the remaining coil failures were all beyond the extended warranty period and were not covered, and so there was could be no breach regarding those coils.

¶ 69 There was also no evidence as to causation, as PSC admitted it did not know what caused any of the coil failures. Absent any evidence of causation, PSC failed to establish a *prima facie* case. See *Tokar v. Crestwood Imports, Inc.*, 177 Ill. App. 3d 422 (1988) (allegedly defective

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automobile concerning grinding noise in transmission was insufficient to create *prima facie* case of breach of express warranty to repair or replace defective parts, as such testimony, including testimony of buyer's expert witness, failed to establish that cause of grinding noise was defect in his auto which manufacturer failed to remedy). The trial court's finding and judgment in favor of PSC was against the manifest weight of the evidence.

¶ 70 Further, PSC waived any claim for breach of the extended warranty by paying for the labor repair cost for the January 19, 2005 coil failure and should be barred by estoppel from asserting a claim for breach years later. PSC paid the \$1,600 labor cost to re-weld this coil and did not object at that time. The parties continued their dealings regarding the boiler, with continued repairs of each problem that arose. We hold PSC is barred from raising this only remaining non-time-barred claim by waiver and estoppel. "Waiver is the voluntary and intentional relinquishment of a known right inconsistent with an intent to enforce that right." *R & B Kapital Development, LLC v. North Shore Community Bank & Trust Co.*, 358 Ill. App. 3d 912, 922 (2005). "Estoppel arises when a party, by his words or conduct, intentionally or through culpable negligence, induces reasonable reliance by another on his representations and thus leads the other, as a result of that reliance, to change his position to his injury." *Schwinder v. Austin Bank of Chicago*, 348 Ill. App. 3d 461, 472 (2004). Had PSC desired to enforce its extended warranty right, it should have done so at that time, rather than pay for the repair and wait years later, after VPI files a claim for non-payment against PSC, to assert its right. PSC is not entitled to any damages.

¶ 71

CONCLUSION

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¶ 72 The boiler was a conforming good under the parties' agreement, as it was the same model boiler that was ordered by PSC. The trial court's finding that the parties agreed that the boiler would be a Lo-NOx boiler was against the manifest weight of the evidence. The contract terms were fully integrated and there was no subsequent effective modification to add the materially altering Lo-NOx term. Therefore, the five-year extended warranty for the heat transfer coils began to run on the date of delivery of the boiler, December 28, 2000, through December 28, 2005. Only one coil failure occurred during this covered period, on January 19, 2005. The remaining coils were not covered. A claim for the January 19, 2005 coil failure would have been timely under section 13-207's savings provision for counterclaims that are time-barred, but there was no actual breach concerning that coil, as there was no formal warranty request and PSC paid the labor cost to repair the coil. There also was no evidence of proximate cause of the failure of the coil. In addition, PSC is barred by waiver and estoppel from bringing any claim based on that coil because it paid for the labor costs without objection and then waited until years later to assert a claim for breach. PSC is not entitled to any damages for any of the coils.

¶ 73 Rather, based on the evidence in the record, VPI is entitled to payment from PSC on its claim in this action for the coil that was ordered by PSC and delivered, in the amount of \$18,741.17.

¶ 74 Therefore, we reverse and remand this case and instruct the trial court to vacate the judgment in favor of PSC and enter judgment in favor of PSC in the amount of \$18,741.17, plus interest. VPI also sought attorneys' fees, but the court below made no findings concerning attorneys' fees and VPI makes no argument on appeal concerning fees. Moreover, the order

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acceptance terms and conditions provided that "if suit or action is filed, the amount of reasonable attorneys["] fees should be fixed by the court or courts in which the suit or action, including any appeal, is tried, heard or decided." The issue of attorney fees should be addressed by the trial court.

¶ 75 Reversed and remanded, with instructions.