includes a monthly invoice for the 825 that stated "needs to be credit[ed] back." App. 96. Bauer testified P.E.I. was entitled to such credit. Tr. II, p. 12-14. Nevertheless, Titan failed to provide P.E.I. with any credit for the invoice. Id.

[¶25] The parties also disputed the rental obligation, if any, owed by P.E.I. on the Terex scraper. According to Hinricher, the parties agreed to $15,000 per month in rent. Tr. I, p. 42. Pummill testified P.E.I. had concerns about the scraper before delivery but accepted it based upon the agreement P.E.I. could use it on a trial basis. Tr. II, p. 195-96 ("It was my understanding that we would pay for the transportation cost to give it a try, and on a probationary period, if we didn't like it or it didn't perform, that Titan would take it back at no cost to us."). If P.E.I. kept the scraper, Pummill testified the parties agreed to a rental rate of $12,500 per month. Id. Exhibit 1 indicated $12,500 per month in rent, despite Hinricher's testimony. App. 36.

[¶26] Titan's Exhibit 1 indicated a rental period for the scraper from April 14 to September 19, 2011. App. 36. Exhibit 1's author, Bauer, testified he had no personal knowledge of whether the rental period was correct. Tr. II, p. 9-10. Pummill testified P.E.I. rejected the scraper in late April or early May, about two weeks after the drive shaft was fixed for a second time. Tr. II, p. 202-03. "[I]t was very clear that [scraper] was called off of rent within the first month, rental month period, and that it was never rented again, that it was never requested again, that it was never used after that." Id. at 205-06. Pummill stated the scraper sat on side of the road for four or five weeks after being called off rent and before Titan picked it

up. Id. at 204. Titan employee Schumacher also testified he recalled picking up the scraper in "spring of 2011." Tr. II, p. 103. According to Pummill, P.E.I. owed nothing on the Terex, because it rejected the machine after the trial period. Tr. II, p. 205-06. Despite Pummill and Schumacher's testimony, Exhibit 1 indicated Titan had applied $28,412.50 in payments towards the scraper and P.E.I. still owed $20,331.50. App. 36.

[¶27] The parties also disputed whether P.E.I. received credit for the Terex's poor performance. Bauer testified Titan provided P.E.I. with a one month credit for the Terex scraper in the amount of $10,500, even though Titan billed $12,500 per month. Tr. II, p. 11-12. Bauer acknowledged none of the invoices or other payment records introduced into evidence showed Titan actually provided P.E.I. with the promised credit. Id.

[¶28] Finally, P.E.I. objected to Titan's application of moneys paid towards finance charges. The witnesses uniformly acknowledged the parties entered into a single written lease during the relevant period. See Tr. I, p. 129; Tr. II, p. 133-34 (acknowledging Exhibit 61 was the only signed contract). The written lease contained a provision whereby the parties agreed Titan could impose a "finance charge" in the amount of 1.5 percent per month on all outstanding balances owed by P.E.I. under that specific lease Id.

[¶29] The parties did not agree to the imposition of finance charges as part of any oral equipment leases. As Bauer testified:

> Q: And so this agreement [Exhibit 61] includes the provision for 1.5 percent monthly interest; correct?
> A: Correct.
> Q: So this is the only place where a Patterson employee or agent agreed to the imposition of that interest; correct?
> A: Correct.

Tr. II, p. 17. The evidence established P.E.I. paid Exhibit 61 in full, and Titan did not impose any finance charges related to the one written lease. Id. Nevertheless, Titan applied payments by P.E.I. to finance charges to which P.E.I. did not agree. See App. 105-107. Specifically, the "Customer Ledger Card" for P.E.I. showed Titan had applied payments totaling $5,617.63 towards finance charges on oral leases. Id. Bauer acknowledged P.E.I. would be entitled to reimbursement for this amount. Tr. II, p. 39.

[¶30] The district court issued Findings of Fact, Conclusions of Law and Order for Judgment. In discussing Titan's claim, the court referred to the total debt claimed in Exhibit 1. App. 21. The district court found "Titan's billing system was not reliable." App. 23. On P.E.I.'s counterclaims, the court also found "P.E.I. failed to prove a breach of any implied warranty of merchantability," and "P.E.I. did not provide evidence to establish the standard of merchantability that exists in the lease and use of heavy construction equipment." Id. at 23-24. The district court did not address the issue of Titan's collection of finance charges. The court concluded Titan was entitled to the principal amount of $73,012.41, plus six percent prejudgment interest in the amount of $11,100, for a total judgment of $84,112.41. App. 26-27.

LAW AND ARGUMENT

[¶31] Upon application of the below law to the above facts, this Court should conclude: (1) the district court abused its discretion by admitting Titan's Exhibit 1, because it did not comply with N.D.R.Ev. 1006; (2) the district court committed reversible error in its application of the law regarding the imposition of finance charges by Titan; and (3) the district court committed reversible errors through its findings and conclusions on P.E.I.'s claim for breach of the implied warranty of merchantability.

I. The District Committed Reversible Error by Admitting Titan's Exhibit 1 into Evidence.

[¶32] This Court should conclude the district court abused its discretion by admitting Titan's Exhibit 1 into evidence, because such document was inadmissible under N.D.R.Ev. 1006.

A. Standard of Review.

[¶33] This Court explained its standard of review regarding a district court's decision to admit evidence in Harfield v. Tate, 2004 ND 45, ¶ 18, 675 N.W.2d 155:

> As we concluded in Olander Contracting Co. v. Gail Wachter Invs., 2002 ND 65, ¶ 35, 643 N.W.2d 29 (quoting State v. Leinen, 1999 ND 138, ¶ 7, 598 N.W.2d 102), "[t]he trial court has broad discretion in evidentiary matters and, absent an abuse of discretion, [this Court] will not reverse its decision." A trial court's decision admitting evidence will be reversed on appeal only if the court has abused its discretion by acting in an arbitrary, unconscionable, or unreasonable manner. State v. Klose, 2003 ND 39, ¶ 28, 657 N.W.2d 276."

B. Exhibit 1 was Inadmissible under Rule 1006.

[¶34] This Court should conclude Exhibit 1, the summary of the debt allegedly owed by P.E.I., was inadmissible under N.D.R.Ev. 1006. The rule states in relevant part:

> The proponent may use a summary . . . to prove the contents of voluminous writings, records or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place.

N.D.R.Ev. 1006 (emphasis added). The comment to the rule states: "It is a condition precedent to the invocation of the rule that the component parts of the summary be made available for examination or copying. This is intended to give the party against whom the summary is offered a chance to analyze the underlying data and prepare any challenges to the summary he may wish to make." Explanatory Note, Rule 1006. "Rule 1006 does not permit the admissibility of summaries where the individual writings are themselves inadmissible." Id. See also White Indus., Inc. v. Cessna Aircraft Co., 611 F.Supp. 1049, 1070 (W.D. Mo. 1985) (stating it is "clear" that Fed.R.Evid. 1006 requires the information underlying a summary be admissible into evidence) (citing Ford Motor Co. v. Auto Supply Co., 661 F.2d 1171, 1175 (8th Cir. 1981)).

[¶35] Rule 1006, N.D.R.Ev., is based upon Fed.R.Evid. 1006. Explanatory Note. The federal courts have provided persuasive authority regarding the rule:

> Rule 1006 requires, as a condition precedent to the introduction of summaries and calculations, the originals or duplicates of the underlying documents be made available to opposing counsel at a

> reasonable time and place, and the summaries and calculations are inadmissible if the party who offers them does not make the underlying documentation available prior to their introduction. A party's right to examine underlying documentation and to prepare necessary challenges is not limited by his failure to request such documents during discovery.

Square Liner 360, Inc. v. Chisum, 691 F.2d 362, 376 (8th Cir. 1982) (citing 5 Weinstein's Evidence PP 1006(04)-(05) (1978)). As the Eighth Circuit Court of Appeals has noted, summaries admitted under Rule 1006 "may include assumptions and conclusions, but said assumptions and conclusions must be based upon evidence in the record." U.S. v. Green, 428 F.3d 1131, 1134 (8th Cir. 2005) (internal quotation omitted) (emphasis added).

[¶36] This Court should conclude Exhibit 1 was inadmissible under Rule 1006 because Titan did not make the information underlying the summary available for inspection at a reasonable time or place prior to the trial, and Titan did not establish the information upon which it based the summary was itself admissible into evidence. This Court should also conclude the introduction of Exhibit 1 affected P.E.I.'s substantial rights, because no other evidence established the total debt allegedly owed by P.E.I., and the inability to review the underlying information prevented P.E.I. from being able to adequately defend itself.

[¶37] P.E.I. objected to the introduction of Exhibit 1. See Tr. I, p. 158; Tr. I. 167-68. The original objection provided in relevant part:

> Under Rule 1006 of the North Dakota Rules of Evidence . . .
> . . .

> the proponent must make the originals or duplicates available for examination or coping [sic] or both by other parties at a reasonable time and place.
>
> I received [Exhibit 1] via email after 9:00 p.m. last night. There was no reasonable time and place in which I could have inspected the underlying information.
>
> And lastly, perhaps most importantly, Mr. Bauer hasn't actually identified where all of this individual information came from. He's generically said that he looked over the information in Titan's records but you actually have to specifically identify what writings this would be summarizing.

Tr. I, p. 158-59. The district court sustained the objection "on foundation grounds." Id. at 159.

[¶38] Titan attempted to provide additional foundation by asking credit manager Bauer to explain the sources of information underlying the summary. Id. at 160-63. Bauer testified the rental terms and rates were pulled from invoices, while "[t]he paid and unpaid areas are pulled right from [Titan's] business system where the payments are applied." Id. at 160-61. Bauer also testified the credits on Exhibit 1 were "pulled from our business system." Id. at 166.

[¶39] Titan then attempted to introduce Exhibit 1 for a second time, and P.E.I. persisted in its objection. P.E.I. objected because Titan did not "specifically identify the documents being summarized" in Exhibit 1, nor did Titan make the documents available for review to P.E.I. Id. at 167. P.E.I. also objected because Titan's witness did not provide adequate foundation for the summary. Id. at 167-78. Importantly, Titan did not dispute that it had not provided P.E.I. with the summary until after 9:00 p.m. the night before trial. In addition, despite Bauer's testimony that the paid column, unpaid column, and credits were all taken from

Titan's "business system," Titan's counsel incorrectly instructed the district court that Exhibit 1 summarized Exhibits 57 to 62. Id. at 168. While counsel for the parties were continuing to engage in dialogue about admissibility, the district court interrupted to take a recess. Id. at 168-69. Upon return from the recess, the district court overruled P.E.I.'s objection to Exhibit 1 without explanation. Id.

[¶40] This Court should conclude the district court abused its discretion by admitting Exhibit 1, because Titan failed to make the information upon which the document was based available to P.E.I. at a reasonable time and place prior to the trial. Titan provided a copy of Exhibit 1 to P.E.I. after 9:00 p.m. the day before the trial began. Titan did not provide P.E.I. with any opportunity to review the information upon which the summary was based, likely because there was no reasonable time to complete such review with the trial beginning less than 12 hours later. Titan also did not even identify the specific documents in its "business system" being summarized in Exhibit 1.

[¶41] The Explanatory Note to N.D.R.Ev. 1006 specifically states a "condition precedent" to introduction of a summary "the component parts of the summary be made available for examination or copying" to allow "the party against whom the summary is offered a chance to analyze the underlying data and prepare any challenges to the summary he may wish." Explanatory Note, Rule 1006. See also Square Liner 360, Inc., 691 F.2d at 376 (stating summaries "are inadmissible if the party who offers them does not make the underlying documentation available prior to their introduction"). The record is undisputed

regarding Titan's failure to provide P.E.I. with a reasonable opportunity to review the information underlying Exhibit 1 prior to trial. As this is a condition precedent to admissibility, Exhibit 1 was therefore inadmissible under Rule 1006, and the district court abused its discretion by admitting it over P.E.I.'s objection.

[¶42] Furthermore, this Court should conclude the district court abused its discretion by admitting Exhibit 1, because Titan failed to establish the information underlying the summary was itself admissible. As explained above, while Bauer generically referred to Titan's "business system," the system actually constituted multiple computer software accounting systems utilized by Titan. Tr. I, p. 188. Bauer clearly explained the information in the "business system" and upon which Exhibit 1 was based was not actually introduced into evidence. See Tr. II, p. 27-30; Tr. II, p. 12. Bauer did not even know who input the information regarding P.E.I. into Titan's business system. Tr. I, p. 186.

[¶43] Titan did not produce, much less seek to introduce, any documentary evidence regarding the information Bauer pulled from its business system, beyond the summary of that information in Exhibit 1. Therefore, the district court did not have the opportunity to determine whether the underlying information was itself admissible into evidence. See White Indus., Inc., 611 F.Supp. at 1070 ("the proponent of the summary must establish that the underlying 'writings, recordings or photographs' are themselves admissible in evidence."). P.E.I. specifically objected to the lack of foundation for the summary, noting Titan had failed to even identify the specific documents upon which the summary was based. This Court

should conclude the district court abused its discretion by overruling such objection, because it could not determine whether the information underlying Exhibit 1 was itself admissible.

C. The Introduction of Exhibit 1 Affected P.E.I.'s Substantial Rights.

[¶44] Finally, this Court should conclude the introduction of Exhibit 1 affected P.E.I.'s substantial rights and justifies remanding this matter back to the district court for another trial. Under N.D. R. Civ. P. 61, even if the district court abused its discretion by wrongfully admitting evidence, this Court will not grant a new trial "unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

[¶45] The admission of Exhibit 1 affected P.E.I.'s substantial rights, because it was the only evidence Titan introduced by which the district court could determine the balance allegedly due and owing by P.E.I. The district court specifically referenced the amount claimed due and owing in Exhibit 1 in its decision. App. 21, ¶ 3. While Titan also introduced invoices it claimed were paid and unpaid, Bauer testified the classification was not entirely correct, because some of the so-called unpaid invoices were actually partially paid, but the payments were not noted on the invoices themselves. See, e.g., Tr. II, p. 27-30. Similarly, Bauer acknowledged none of the invoices or other Titan exhibits

showed the application of credits to P.E.I.'s accounts; the credits were noted in the business system and summarized on Exhibit 1. Tr. II, p. 12. While Titan also introduced Bauer's testimony about the total debt, Bauer clearly testified he did not have any firsthand knowledge regarding P.E.I.'s leases, and everything he knew was based upon a review of Titan's business system. Tr. I, 185-86, 191. Thus, while Bauer testified about Titan's total damages, his testimony was entirely based upon his review of Titan's business system and Exhibit 1.

[¶46] Thus, it is not an exaggeration to state that Titan's entire case relied upon Exhibit 1. Besides Exhibit 1, Titan did not introduce any evidence from which the district court could have determined the debt allegedly due and owing by P.E.I. Not only did Titan's invoices not show the application of any payments, the invoices themselves contained duplicative and contradictory information regarding rental periods. The district court specifically found Titan's billing system was "not reliable." App. 23, ¶ 10. P.E.I. disagreed with the rental rates and periods on multiple invoices. Without Exhibit 1, P.E.I. likely would have been entitled to a directed judgment at the close of Titan's case, because Titan did not introduce any other evidence from which the district court could reasonably calculate its damages.

[¶47] In addition, the stated purpose behind the disclosure requirement of Rule 1006 is to allow the other party the opportunity to review the information underlying the summary in order to prepare rebuttal evidence. By disclosing the summary less than 12 hours before trial and never providing P.E.I. an opportunity

to review the underlying documentation, Titan deprived P.E.I. of this right. To this date, P.E.I. still does not know the specific information in Titan's "business system" upon which the summary was based. By denying P.E.I. this opportunity, Titan also deprived P.E.I. the chance to properly defend itself at trial. As such, this Court should conclude P.E.I.'s substantial rights.

[¶48] As Titan's entire case relied upon Exhibit 1, and such document should not have been admitted into evidence, this Court should conclude it affected P.E.I.'s substantial rights and remand the matter for a new trial.

II. The District Court Erred in Its Application of the Law Regarding Finance Charges Collected by Titan.

[¶49] This Court should further conclude the district court erred in its application of the law regarding finance charges collected by Titan. As explained above, the evidence indicated Titan applied $5,617.63 in payments by P.E.I. towards "finance charges." Titan's written lease agreements include a provision regarding the imposition of finance charges, but the parties only entered into a single written lease during the relevant time period, and P.E.I. timely paid that lease in full. The evidence established the parties did not agree to any finance charges as part of any oral lease. As a result, P.E.I. argued the district court should credit the company for $5,617.63 wrongfully applied by Titan towards finance charges to which P.E.I. did not agree. See Dkt. No. 176 (closing brief); Dkt. No. 209 (post-trial motion).

[¶50] The district court specifically found: "With the exception of one piece of equipment [over] which there was no dispute, each lease was oral and most arrangements were made over the phone." App. 23. The district court concluded Titan was entitled to prejudgment interest at a rate of 6 percent per annum from December 2, 2011 on all amounts due and owing. App. 27. The district court did not explain the basis for the interest rate, but it was presumably based upon N.D.C.C. § 47-14-05. Thus, the district court implicitly found the parties did not agree to the imposition of 18 percent finance charges on any principal amount owed by P.E.I. to Titan. However, the district court did not make any findings or reach any conclusions about Titan wrongfully applying prior payments towards finance charges. Upon review, this Court can determine as a matter of law that Titan was not entitled to collect finance charges, and P.E.I. was entitled to a credit in the amount $5,617.63 plus interest against any moneys due and owing to Titan.

[¶51] In cases where the parties have not reached a specific agreement regarding the imposition of finance charges, this Court has held the provisions of N.D.C.C. §§ 13-01-14 and 13-01-15 control. See Industrial Fiberglass v. Jandt, 361 N.W.2d 595, 600 (N.D. 1985). The first statute, N.D.C.C. § 13-01-14, provides in relevant part:

> 1. A creditor may charge, receive, and collect a late payment charge on all money due on account from thirty days after the obligation of the debtor to pay has been incurred. . . .
> . . .
> 3. The late payment charge allowed under this section may not be charged unless, when the obligation was incurred, the creditor

> did not intend to extend credit beyond thirty days and any late payment of the obligation was unanticipated.

In addition, N.D.C.C. § 13-01-15 states in relevant part:

> 1. A creditor may not charge the account receivable late payment charge provided for under section 13-01-14 . . . unless the creditor promptly supplies the debtor with a statement as of the end of each monthly period, or other regular period agreed upon by the creditor and the debtor, in which there is any unpaid balance.

Section 13-01-15(2), N.D.C.C., provides the mandatory requirements for such statements, including the rate, unpaid balance, and any payments made by the debtor.

[¶52] In this case, Titan did not produce any evidence indicating it provided P.E.I. with the statement required by N.D.C.C. § 13-01-15. As a party cannot assess finance charges unless they provide such statement, this Court should conclude the district court should have found Titan was not authorized to collect $5,617.63 in finance charges, and P.E.I. was entitled to a credit in that amount plus prejudgment interest.

[¶53] Even if Titan had provided the statement, this Court should conclude Titan could not collect a finance charge under N.D.C.C. § 13-01-14. The statute prohibits the collection of finance charges if, "when the obligation was incurred, the creditor did not intend to extend any credit beyond thirty days and any late payment of the obligation was unanticipated." N.D.C.C. § 13-01-14(3). As explained above, Titan continued to rent equipment to P.E.I. in 2012 despite simultaneously claiming P.E.I. had failed to pay in full for prior rentals. The rental

history defeats any claim by Titan that it did not intend to extend credit beyond thirty days or anticipate late payment. As such, this Court should conclude Titan could not collect a finance charge under N.D.C.C. § 13-01-14 even if it had introduced evidence of the statements required by N.D.C.C. § 13-01-15.

[¶54] Therefore, this Court should remand the case back to the district court with direction to credit P.E.I. in the amount of $5,617.63, plus six percent interest, for moneys wrongfully applied by Titan towards finance charges.

III. The District Court Committed Reversible Error Related to Its Findings and Conclusions on P.E.I.'s Claim for Breach of the Implied Warranty of Merchantability.

[¶55] This Court should conclude the district court was clearly erroneous to find Patterson Enterprises failed to produce evidence in support of its claim for breach of implied warranty of merchantability and erred in its application of the law regarding the implied warranty. As a result, this Court should remand this matter back to the district court with direction to apply the correct law and make new findings under such law.

A. Standard of Review.

[¶56] A district court's finding of facts are subject to the clearly erroneous standard of review. Keller v. Bolding, 2004 ND 80, ¶ 22, 678 N.W.2d 578. "A finding is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, on the entire record, we are left with a definite and firm conviction a mistake has been made." Hanson v. Boeder, 2007 ND 20, ¶ 7, 727 N.W.2d 280. "This Court reviews both conclusions of law and

mixed questions of law and fact under the de novo standard of review." Burlington N. R.R. Co. v. Fail, 2008 ND 114, ¶ 5, 751 N.W.2d 188.

B. The District Court's Findings Regarding P.E.I.'s Breach of Implied Warranty of Merchantability.

[¶57] The district made the following findings regarding PEI's claim for breach of the implied warranty of merchantability:

> [¶17] P.E.I. failed to prove a breach of any implied warranty of merchantability. P.E.I. acknowledged that used equipment breaks down from time to time and that P.E.I. was responsible for ordinary maintenance of equipment leased from Titan. The Court finds this to be a fact.
>
> [¶ 18] P.E.I. did not provide evidence to establish the standard of merchantability that exists in the lease and use of heavy construction equipment.

App. 23-24.

[¶58] However, in at least two other findings, the district court indicated the evidence did in fact establish the standard of merchantability in the equipment rental business. First, the district court found: "All parties agree, and the Court finds, that the implied agreement of the parties included the requirement that the equipment needed to be in working order when possession was given to P.E.I. as lessee." Id. at ¶ 19 (emphasis added). Second, the district court found: "The agreement between Titan and P.E.I., and the standard in the equipment rental business, was for the equipment to be in working order when delivered." Id. at ¶ 22 (emphasis added). The district court did not provide any further findings, such as whether P.E.I. proved any damages related to its implied warranty claim. The

district court did not explicitly make any conclusions of law related to the implied warranty claim or even identify the applicable law.

[¶59] As demonstrated by the above, the district court's findings patently contradict themselves. The court specifically found an "implied" term of the rental agreements "included the requirement that the equipment needed to be in working order when possession was given to P.E.I.," and this implied term was "standard in the equipment rental business." Yet the district court also found P.E.I. failed to establish the standard of merchantability in equipment rentals. If P.E.I. established the leases implicitly required the equipment be in working order when delivered to the lessee, the district court was clearly erroneous to also find P.E.I. failed to establish the standard of merchantability.

[¶60] In addition, as explained at length above, P.E.I. produced substantial evidence about how the equipment provided by Titan breached this implied term of the parties' lease agreements. P.E.I. presented evidence regarding serious problems with numerous pieces of equipment at the time of or shortly after delivery, including the D8 dozer, 815F compactor, D65 dozer, SD84 roller, SD66 roller, 825 compactor, Terex scraper, and D85 dozer. Therefore, this Court should conclude the district court's finding that P.E.I. failed to present evidence establishing its claim for breach of the implied warranty is clearly contrary to the record. The district court's failure to find evidence about the breach prevented the court from further analyzing P.E.I.'s damages for such claim.

[¶61] The district court also erred in its application of the law regarding the implied warranty of merchantability, because it failed to recognize the standard of merchantability is provided by statute. Section 41-02.1-21(2), N.D.C.C., provides:

> 2. Goods to be merchantable must:
>
> > a. Pass without objection in the trade under the description in the lease agreement;
> > b. In the case of fungible goods, be of fair average quality within the description;
> > c. Be fit for the ordinary purposes for which goods of that type are used;
> > . . . .

The statutory definition of merchantability is therefore broader than the district court's finding about the leases implicitly requiring the equipment being in "working order" upon delivery. The district court did not consider how this broader definition applied to the evidence.

[¶62] As a result, this Court should conclude the district court erred in its application of the law regarding P.E.I.'s claim for breach of the implied warranty, because not only did it erroneously find P.E.I. failed to produce evidence regarding the standard of merchantability, it also failed to apply the standard provided by N.D.C.C. § 41-02.1-21(2). P.E.I. raised the issue of the district court's erroneous findings and failure to apply the standard of merchantability under N.D.C.C. § 41-02.1-21 as part of its post-judgment motion, see Dkt. No. 209, but the district court failed to address the issue. See Dkt. No. 214.

[¶63] P.E.I. presented substantial evidence regarding pieces of equipment that did not meet the statutory definition of merchantability. For example, P.E.I.

presented evidence about the Terex scraper failing to adequately cut the ground and perform basic scraping duties. P.E.I. also presented evidence about multiple machines, including the D8 dozer and 815 compactor, which suffered catastrophic failures. P.E.I. presented evidence indicating other machines suffered breakdowns that, while not catastrophic, caused P.E.I. to incur serious downtime and increased operational costs. All of this evidence tended to establish such equipment would not pass without objection in the heavy equipment rental field, was not of average quality, and was not fit for its ordinary purpose. Yet the district court did not apply the evidence to such standard of merchantability, because the court made an incorrect determination about the applicable law.

[¶64] Therefore, this Court should reverse and remand the district court's decision with directions to make findings about P.E.I.'s claim for breach of the implied warranty using the definition of "merchantable" provided by N.D.C.C. § 41-02.1-21(2).

CONCLUSION

[¶65] Based upon the district court's wrongful admission of Exhibit 1, this Court should reverse the district court judgment and remand the matter back for a new trial. As part of the remand, this Court should also direct the district court to provide P.E.I. with credit in the amount of $5,617.63, plus six-percent prejudgment interest, for moneys wrongfully applied by Titan towards finance charges, and to make additional findings regarding P.E.I.'s claim for breach of the

implied warranty of merchantability after applying the proper standard of merchantability under N.D.C.C. § 41-02.1-21(2).

Dated this 4th day of June, 2015.

KENNELLY & O'KEEFFE, LTD

/s/Sean T. Foss

SEAN T. FOSS (ND ID # 06422)
720 Main Avenue
P.O. Box 2105
Fargo, ND 58107-2105
Phone: (701) 235-8000
Fax: (701) 235-8023
Attorney for Appellant
sean@kennellylaw.com

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Titan Machinery, Inc., Plaintiff, Appellee and Cross-Appellant, v. Patterson Enterprises, Inc., Defendant, Appellant and Cross-Appellee,	Supreme Court No. 20150025 Cass County District Court No. 09-2012-CV-02183

CERTIFICATE OF SERVICE

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF CASS)

Abby Hammes hereby certifies under N.D.R.Civ.P. 5(f), that on June 8, 2015 she served the attached:

BRIEF OF APPELLANT PATTERSON ENTERPRISES, INC.

upon Jon R. Brakke, attorney for Appellee, by e-mail to the address:

jbrakke@vogellaw.com

Abby Hammes

Subscribed and sworn to before me this 8th day of June, 2015

MANDY SEIGEL
Notary Public
State of North Dakota
My Commission Expires July 2, 2015

(SEAL)

Mandy Seigel, Notary Public
Cass County, North Dakota
My Commission Expires: 07/02/2015

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Titan Machinery, Inc., Plaintiff, Appellee and Cross-Appellant, v. Patterson Enterprises, Inc., Defendant, Appellant and Cross-Appellee,	Supreme Court No. 20150025 Cass County District Court No. 09-2012-CV-02183

CERTIFICATE OF SERVICE

STATE OF NORTH DAKOTA)
)ss.
COUNTY OF CASS)

Abby Hammes hereby certifies under N.D.R.Civ.P. 5(f), that on Thursday, June 4, 2015 she served the attached:

BRIEF OF APPELLANT PATTERSON ENTERPRISES, INC., and;
APPELLANT'S APPENDIX

upon Jon R. Brakke, attorney for Appellee, by e-mail to the address:

jbrakke@vogellaw.com

Abby Hammes

Subscribed and sworn to before me this 4th day of June, 2015

Mandy Seigel, Notary Public
Cass County, North Dakota
My Commission Expires: 07/02/2015

MANDY SEIGEL
Notary Public
(SEAL) State of North Dakota
My Commission Expires July 2, 2015