IN THE SUPREME COURT OF MISSOURI

Case No. SC90258

RENAISSANCE LEASING LLC, et al.,

Plaintiffs/Appellants

v.

VERMEER MANUFACTURING CO., &
VERMEER GREAT PLAINS, INC.

Defendants/Respondents

APPELLANTS' SUBSTITUTE REPLY BRIEF

Respectfully submitted,
Kirk T. May, MO #31657
William D. Beil, MO #33922
Rouse Hendricks German May PC
1010 Walnut, Suite 400
One Petticoat Lane
Kansas City, Missouri 64106
816-471-7700
816-471-2221 (fax)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

I. WARRANTY CLAIMS

A. Standing to Assert Warranty Claims

Manufacturing concedes that the Court of Appeals' treatment of the standing issue as a matter of subject matter jurisdiction was "faulty," but nonetheless contends that it did not act "as a fact-finder nor appl[y] an erroneous legal standard." Manufacturing's Substitute Brief at 16. Great Plains refuses to acknowledge that the Court of Appeals addressed the standing question incorrectly as an issue of subject matter jurisdiction and maintains that "in this case, standing is a pre-requisite to subject matter jurisdiction." Great Plains Substitute Brief at 5. Under *J.C.W. v. Wyciskalla*, 275 S.W.3d 249 (Mo. 2009) and its progeny, the Court of Appeals erred in treating standing as an issue of subject matter jurisdiction, and that error resulted in the Court of Appeals acting as a fact-finder and applying an erroneous legal standard to the standing question. To the extent Great Plains relies on *Farmer v. Kinder*, 89 S.W.3d 447 (Mo. 2002), for the proposition that standing in the present case presents a subject matter jurisdiction issue, *Farmer* has been implicitly overruled by *Wyciskalla*. To the extent *Farmer* addresses a party's standing, it is sound, but has nothing to do with the present case because it involved no factual disputes on which standing turned but only a question of interpreting a statute and a Missouri constitutional provision to determine if the statute constitutionally vested the treasurer with authority to bring the claim.

The Court of Appeals did not review the standing in light of the standards and burdens applicable to a party seeking summary judgment on the issue, even though that was the posture in which this case came to the Court of Appeals. That also was error. *See ITT Commercial Financial Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 378 (Mo. 1993). The Court of Appeals recognized and acknowledged that factual disputes existed on the standing question. In reciting the facts the court noted, "Per UHLMANN'S deposition testimony, the T1055 ... was transferred from Crush to RENAISSANCE without a bill of sale or document evidencing the transfer of ownership[,]" and "RENAISSANCE execute[d] a master lease, leasing the Machine to Crush." Op. at 6. In its analysis, the court concluded "the record is devoid of any evidence, *apart from the conflicting assertions of UHLMANN* that would support a finding that either RENAISSANCE or TEAM can establish ownership." *Id.* at 11 (emphasis added). In the face of conflicting evidence on material issues, the Court of Appeals could not properly resolve those issues and determine standing. Thus, the Court of Appeals appreciated that it could not affirm the trial court's judgment applying the standards governing summary judgment and, in its view, though erroneous, the *only* way to affirm the judgment was to treat it as a dismissal for lack of subject matter jurisdiction.

The sole question on this appeal with respect to Renaissance's and TEAM's standing is whether the evidence demonstrates the existence of a material factual issue as to whether Renaissance or TEAM owned the T1055TL or any of the warranty rights or claims originally held by Crush, the original purchaser.

1. TEAM'S Standing

The Amended and Restated Operating Agreement shows Uhlmann as a member of Crush. Gary Watts' testimony that his signature and Terry Watts' signature on the document were forged is contradicted by evidence that the alleged forged signatures are similar to other signatures which have been positively identified as those of Gary Watts and Terry Watts appearing on proxy documents. In addition, Gary Watts' forgery testimony is disputed by Venable's testimony that Gary Watts and Terry Watts attended Crush meetings to sign documents and that the Amended and Restated Operating Agreement was executed and put in Crush's files. Thus, there is evidence that TEAM properly acquired Crush's assets, including any claims it had against Respondents, following Crush's dissolution.

2. Renaissance Standing

There are at least three items of evidence from which a reasonable jury could conclude that Renaissance had an ownership interest in the T1055TL. First, John Uhlmann ("Uhlmann") testified and Appellants presented other evidence that Renaissance was formed to own and lease equipment, including the T1055TL, and "the equipment and other things [owned by Crush] were put into Renaissance Leasing ... ." LF290; LF1817. Second, William Venable, former Executive Vice-President of Crush, testified that, "[w]e ... aggregated the assets ..., and title was conveyed to Renaissance Leasing ... ." LF508. Third, there is a January 2003 Master Lease Agreement whereby

Renaissance, as owner and lessor of the T1055TL, leased the machine to Crush. LF290-91; LF733-41; LF1817.

In response to this evidence, Manufacturing states, "Although Uhlmann claimed that Renaissance owns the T1055, and TEAM and Renaissance entered into a lease agreement under which TEAM purported to lease the T1055 from Renaissance, there is no explanation of how Renaissance came to be the owner of the machine." Manufacturing's Substitute Brief at 15. In fact, the original Master Lease Agreement was between *Crush* and Renaissance, not TEAM and Renaissance. LF733-41. A jury could reasonably conclude that Crush would not have signed an agreement to lease a piece of equipment that it owned and, from that evidence, conclude that Crush transferred the machine to Renaissance. Uhlmann testified that Renaissance was formed to own and lease equipment, including the TI055, that had been owned by Crush, LF0290; LF817, and a jury could reasonably infer from that testimony that Uhlmann's purpose had been accomplished. That evidence is in addition to Venable's and Uhlmann's testimony that Renaissance owned the TI055 and title to the TI055 was conveyed from Crush to Renaissance.

Appellants are not required to show *how* Renaissance came to be owner of the machine, only that facts exist from which a jury could conclude that it *became* the owner of the machine. Even so, Manufacturing's argument ignores Venable's testimony which explains *how* Renaissance came to own the machine: Crush's assets were aggregated and title in the equipment was conveyed to Renaissance. This Court cannot

affirm summary judgment in this case in the face of this evidence when, as the Court of Appeals recognized, "There seems to be an agreement among all parties here that no title procedure such as for motor vehicles is necessary for this heavy equipment[,]" Op. at 2, and under Missouri law, a bill of sale is not required and oral testimony is sufficient to prove ownership, *see Galemore v. Mid-West National Fire and Casualty Insurance Co.*, 443 S.W.2d 194, 198 (Mo. Ct. App. 1969); *see also State v. Pullis*, 579 S.W.2d 395, 399 (Mo. Ct. App. 1979) (oral testimony is sufficient to prove ownership and "[o]wnership… can be proven by circumstantial evidence"). Respondents can argue to the jury that the absence of a bill of sale or any document other than a lease undercuts Uhlmann's and Venable's credibility, but the absence of such documents does not entitle Respondents to summary judgment. Credibility is for the jury to determine.

In its attempt to distinguish *Pullis*, Great Plains admits: "Appellants may arguably have standing to sue if the 1055 had been *stolen* ... ." Great Plains Substitute Brief at 13 (emphasis in original). If Uhlmann's testimony, Venable's testimony, and the Master Lease agreement are sufficient for Appellants to prove ownership of the T1055TL giving them standing to sue if the T1055TL had been stolen, then the same evidence is sufficient to prove ownership and give them standing to sue in a case where the T1055TL has not been stolen.

Great Plains cites *Midwestern Health Management v. Walker*, 208 S.W.3d 295 (Mo. Ct. App. 2005) for the proposition that where there was no evidence to establish that plaintiff was the assignee of unpaid medical accounts, plaintiff lacked standing to sue

for collection of those accounts. Great Plains' Substitute Brief at 13. The court in *Walker* specifically stated, "Midwestern presented no evidence of [the] assignment[,] [and] failed to establish that it was the assignee of the accounts ... ." 208 S.W.3d at 299. Of course, in this case, Appellants have presented evidence that the T1055TL was transferred to Renaissance and Crush's assets were assigned to TEAM.

Manufacturing recognizes there was no bill of sale for Crush's original purchase of the T1055TL, but admits that "the transaction [transferring ownership from Manufacturing to Crush] is reflected in a Sales Order and Limited Warranty Registration." Manufacturing's Substitute Brief at 17. Thus, Manufacturing concedes that a sales order and a limited warranty registration are documents from which a jury could reasonably infer that Crush owned the T1055TL by virtue of a transaction with Manufacturing. For the same reason, the Master Lease is a document from which, along with Uhlmann's and Venable's testimony, a jury could reasonably infer that Renaissance owned the T1055TL by virtue of a transaction with Crush. Manufacturing asks the question, "Did Crush simply give [the T1055TL] to Renaissance?" *id.* at 19, implying that if Crush simply gave the machine to Renaissance, Renaissance has standing. Certainly, the jury can infer from the evidence presented that is exactly what happened and Renaissance obtained ownership of the machine.

Similarly, Manufacturing's argument that Uhlmann never had the authority to transfer ownership of the T1055TL is also one for the jury and not a basis for summary judgment. Appellants' evidence showed that *Crush*, not Uhlmann, transferred the

T1055TL to Renaissance. Thus, Renaissance's ownership of the T1055TL is not dependent upon proof that Uhlmann became a member of Crush, although that proof certainly exists.

B. Express Warranty Claims Against Manufacturing

Manufacturing argues that even if Renaissance or TEAM has standing to assert breach of express warranty claims, neither can prove the elements of their express warranty claims because: (1) Manufacturing's Limited Warranty applies only to Crush; and (2) neither Renaissance nor TEAM can prove damages. As to the first argument, Crush was dissolved in 2004, and for that reason is not a party. Neither Manufacturing nor Great Plains dispute that the warranties given to Crush and Crush's claims for breach of warranty are assets that are transferable and assignable. The warranties given to Crush and Crush's claims for breach of warranty were transferred and assigned, and now reside with TEAM and/or Renaissance.

Manufacturing's argument that neither TEAM nor Renaissance can prove damages also fails. In the trial court, Manufacturing identified three specific bases entitling it to summary judgment on the breach of express warranty claim. Those bases did not include an alleged inability to prove damages. See LF0040, 0043. Mo. R. Civ. P. 74.04(c)(1) requires that a summary judgment motion set forth "the legal basis for the motion." That requirement ensures that the non-movant is given notice in order to fully, yet efficiently, respond so as to conserve judicial resources by focusing the evidentiary presentation and issues. In addressing an appeal from a summary judgment, the court in

City of Cuba v. Williams, 17 S.W.3d 630 (Mo. Ct. App. 2000), stated, "On appeal, a party is bound by the position she took in the trial court, and [this court] can only review the case upon those theories." *Id*. at 632. Because Manufacturing never advanced in the trial court the theory that TEAM and Renaissance could not recover damages, it is precluded from advancing that theory on appeal.

Because Manufacturing and Great Plains did not argue that TEAM and Renaissance could not prove damages in moving for summary judgment, the evidentiary record is not fully developed with respect to damages. For example, TEAM and Renaissance have a damages expert, see, e.g., LF1777-78, who was deposed, but his testimony was not presented as part of the summary judgment record because it was not responsive to the legal bases stated in Manufacturing's and Great Plains' summary judgment motions.

Nonetheless, there is evidence in the record that TEAM and Renaissance suffered lost profits, lost investment, lost business opportunities, and the difference in value between the T1055TL as warranted and as actually sold. LF1759-60, 1832, 1834, 1838; *see e.g.* Mo. Rev. Stat. § 400.2-713 and § 400.2-714 ("measure of damages for breach of warranty is the difference . . . between value of goods accepted and value they would have had if they had been as warranted"). TEAM and Renaissance are not permitted to recover identical damages and, if supported by the evidence, the jury will be instructed accordingly. Renaissance and TEAM, although seeking the same type of damages like lost profits and lost business opportunities, are not seeking the same

damages. For example, Renaissance could have lost profit from losing rental income and TEAM could have lost profit from being unable to excavate and sell rock. Section 400.2-714 provides that diminution in value is recoverable for breach of warranty. Appellants recognize that the same diminution in value cannot be recovered by more than one party, but the evidence is such that determining which party is entitled to recover what damages turns on the jury resolving factual issues.[1]

C. Breach of Contract/Implied Warranty Claims Against Great Plains

Great Plains argues that because it had no agreement with TEAM or Renaissance, neither can have a claim for breach of contract against it. Great Plains' Substitute Brief at 14-16. Great Plains' argument ignores that the breach of contract claim owned by Crush, with whom Great Plains admittedly did have an agreement, was

---

[1] Manufacturing refers to the limited warranty as excluding consequential damages and limiting relief to repair and replace. Manufacturing's Substitute Brief at 21. Because the trial court entered summary judgment on liability, the trial court never addressed the issue of whether Manufacturing's attempt to limit its damages is enforceable or whether the limiting provision was unenforceable because it failed of its essential purpose, in which case consequential damages are recoverable. *See Givan v. Mack Truck, Inc.*, 569 S.W.2d 243, 247 (Mo. Ct. App. 1978). There is sufficient evidence from which the jury could conclude that Manufacturing's limited warranty failed of its essential purpose.

transferred either to Renaissance with the conveyance of the machine or to TEAM when Crush was dissolved and all of Crush's assets were distributed to Uhlmann who then transferred them to TEAM. Thus, either Renaissance or TEAM can sue Great Plains for breach of contract.

Great Plains relies on *Moore Equipment Co. v. Halferty*, 980 S.W.2d 578 (Mo. Ct. App. 1998), for the proposition that neither TEAM nor Renaissance are a "purchaser" or "buyer" under the Missouri UCC and therefore have no breach of contract or implied warranty claim. Great Plains' Substitute Brief at 15. Accepting that argument as true, it nonetheless misses the mark because it ignores the transfer to Renaissance and the dissolution of Crush and distribution of its rights ultimately to TEAM. TEAM and/or Renaissance had the rights of Crush, the purchaser.

Great Plains argues that it "disclaim[ed] the warranties of merchantability and fitness for a particular purpose via the conspicuous language on the Limited Warranty." Great Plains' Substitute Brief at 16. The "Limited Warranty" to which Great Plains refers, however, was given by Manufacturing, not Great Plains. *See e.g.* Manufacturing's Substitute Brief at 28 ("Crush purchased the TI055 from Great Plains with the Limited Warranty from Manufacturing"). Great Plains disclaimed nothing because it did not give the Limited Warranty containing the disclaiming language and it did not disclaim its warranties. *Karr-Bick Kitchens & Bath, Inc. v. Gemini Coatings, Inc.*, 932 S.W.2d 877 (Mo. Ct. App. 1996) held:

> As to implied warranties, a manufacturer's disclaimer of warranties and a reseller's disclaimer of warranty are conceptually different:
>
> "When the manufacturer sells the goods to a dealer who resells the goods to the ultimate purchaser, the latter cannot sue the manufacturer if the manufacturer ha[s] made a disclaimer of warranties that satisfied UCC § 2-316. *The fact that the manufacturer is thus protected from liability does not protect the dealer who resells without making his own disclaimer of warranties. That is, the manufacturer's disclaimer of warranties does not run with the goods so as to protect any subsequent seller of them. To the contrary, each subsequent seller must make his own independent disclaimer in order to be protected from warranty liability.*"

Id. at 879, *quoting* 3 Anderson, Uniform Commercial Code (1983) 365-366, § 2-316:62 (emphasis added).

Great Plains does not dispute that if it cannot take advantage of Manufacturing's disclaimer in its express limited warranty, the implied warranties of merchantability and fitness for a particular purpose were given to Crush with the sale of the T1055TL. In that Crush's breach of warranty claim accrued at the time the T1055TL was delivered to it, Mo. Rev. Stat. § 400.2-725(2); *Buttice v. G.D. Searle & Co.*, 938 F. Supp. 561, 568 (E.D. Mo. 1996), Crush's existing claim was an asset that was transferred to Uhlmann and then to TEAM upon Crush's dissolution. Thus, TEAM owns Crush's breach of implied warranty claim against Great Plains and can assert it in this litigation.

Great Plains attempts to distinguish *Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41, 55 (Mo. 1963), *Ragland Mills, Inc. v. Gen'l Motors Corp.*, 763 S.W.2d 357, 360 (Mo. Ct. App. 1989), and *Groppel Co., Inc. v. U.S. Gypsum Co.*, 616 S.W.2d 49, 58 (Mo. Ct. App. 1981) on the ground that those cases involved a suit against the manufacturer of a product, not the seller, suggesting that the privity requirement would not be relaxed against a seller.[2] Great Plains offers no authority for the proposition that although Missouri courts do not require privity in claims against manufacturers under sections 400.2-314 and 400.2-315, they would require privity if the case was against a seller. Certainly, other jurisdictions which do not require privity of contract to bring a claim under UCC 2-314 or 2-315 against a manufacturer also do not require a direct sale to bring such a claim against the seller. *E.g., Koken v. Black & Veatch Const., Inc.*, 426 F.3d 39, 51 (1st Cir. 2005).

Great Plains argues that as a matter of law the evidence establishes that it did not breach the implied warranties of merchantability and fitness for a particular purpose. Great Plains' Substitute Brief at 17-21. That was not a basis on which Great Plains moved for summary judgment, see LF0083-84, 0097, and it is therefore precluded

[2]Appellants also cited *Collegiate Enter., Inc. v. Otis Elevator Co.*, 650 F. Supp. 116, 118 (E.D.Mo. 1986) in which the court held that the owner of building may sue an elevator subcontractor under Mo. Rev. Stat. §§ 400.2-314 & 400.2-315 despite lack of privity. Great Plains made no effort to distinguish that case.

from pursing that theory on appeal. *City of Cuba*, 17 S.W.3d at 632. Because Great Plains did not argue before the trial court that it did not breach implied warranties, the record was not fully developed by Appellants on that issue in opposing summary judgment. Nonetheless, there is sufficient evidence in the current summary judgment record to permit a reasonable jury to conclude that Great Plains breached implied warranties.

For example, T1055TL promotional materials represented that the equipment could be used for surface mining and rock excavation. The T1055TL, however, failed in those applications. Manufacturing's obligation to repair the T1055TL arose under Manufacturing's warranty only if the T1055TL was in "normal" use. Great Plains performed repairs at Manufacturing's expense and, from that evidence, the jury could conclude the T1055TL broke in "normal" use or otherwise it would not have been repaired at Manufacturing's cost. Neither Great Plains nor Manufacturing ever objected to performing repairs because using the T1055TL at a location other than the Phenix Quarry was not a normal use for the equipment.[3]

---

[3] Great Plains makes much of the fact that the T1055TL was exempted from sales tax because it was to be used in a quarry operation. Great Plains' Substitute Brief at 19-20. Of course, the sales tax exemption afforded to a quarry operation is not dependent on the quarry being Phenix Quarry. The fact that the T1055TL was fit for use in a quarry does not exclude it from being fit for other the applications as represented in its

Great Plains was informed that a purpose for which the T1055TL was purchased was to quarry very hard rock, and that there were assurances the equipment was fit for that purpose as well as quarrying reinforced concrete airport runways. *See, e.g.* LF1759, 0581-82, 0321. The fact that the T1055TL quarried the overburden pile at the Phenix Quarry does not establish that the equipment fulfilled the implied warranties of merchantability and fitness for the particular purposes asserted by Appellants and supported by the evidence. Great Plains' argument from evidence favorable to its position ignores contrary evidence and the reasonable inferences a jury could make.

II. FRAUD AND NEGLIGENT MISREPRESENTATION CLAIMS

A. Standing to Assert Fraud and Negligent Misrepresentation Claims

1. Uhlmann's Standing

Manufacturing's argument that Uhlmann has no standing to assert claims for fraud and misrepresentation rests on the unsupported factual premise that "Uhlmann never dealt with Manufacturing as an individual" and "Uhlmann *as Uhlmann* never dealt with Manufacturing ... ." Manufacturing's Substitute Brief at 22 (emphasis in original). Manufacturing contends that the "question of capacity is critical" and agrees that "Uhlmann's status as investor, owner, or creditor is less than clear, [and] analysis of this issue is complicated." *Id.* If the evidence concerning Uhlmann's capacity is "less than

---

promotional materials, videos, and oral statements.

clear" and the analysis is complicated, then the Court cannot affirm summary judgment on the ground that Uhlmann does not have standing. Accepting Manufacturing's characterization of the record means the jury will have to undertake the complicated analysis of the facts, sift through the "less than clear" evidence, and make a determination as to whether Uhlmann was acting in his individual capacity. The summary judgment standards require the movant to show an absence of genuine issues of material fact, and Manufacturing's admission shows precisely the opposite with respect to the evidence concerning Uhlmann's capacity.

Manufacturing admits that Uhlmann could have been acting as a potential creditor of Crush. *Id.* There is no dispute that at the time the relevant misrepresentations were made Uhlmann was not a Crush stakeholder and neither TEAM or Renaissance existed. There is also no dispute that Uhlmann loaned and guaranteed loans to Crush for the purchase of the TI055. Manufacturing does not dispute that under *Empire Bank v. Walnut Products, Inc.*, 752 S.W.2d 404 (Mo. Ct. App. 1988), a creditor may sue a third person for deceit whose false representations induced the extension of credit. *Id.* at 408. Manufacturing argues, however, that the creditor must hear the misrepresentations directly. Manufacturing's Substitute Brief at 22-23. Appellants have presented evidence that Uhlmann heard directly the misrepresentations upon which he sued Manufacturing. For example, Uhlmann himself personally spoke with Manufacturing's representatives when he visited the Phenix Quarry and observed the T1055TL and again on October 17,

2002 when he visited Manufacturing's headquarters. Thus, this case fits squarely within the *Empire Bank* case.

Manufacturing relies on *Warren v. Mercantile Bank of St. Louis, N.A.*, 11 S.W.3d 621 (Mo. Ct. App. 1999) and *Jones v. Rennie*, 690 S.W.2d 164 (Mo. Ct. App. 1985) for the unremarkable proposition – which is inapplicable here – that a shareholder does not have standing to sue in his individual capacity for damages to the corporation. Neither *Warren* nor *Rennie* stand for the proposition that a shareholder, who is also a lender, never has standing to sue in his individual capacity as a lender for fraudulent or negligent misrepresentations inducing a loan or an investment that takes place before the lender becomes a shareholder. It is well-established that stockholders have standing to seek damages in their own right for misrepresentations made to them *before* they were shareholders for the purpose of inducing their investment. *Temp-Way Corp. v. Continental Bank*, 139 B.R. 299, 317 (E.D. Pa. 1992).

In *Warren*, Ray Warren, in his capacity as owner and president of the Associated Lifestyle Homes ("ALH"), approached a vice president of Mercantile Bank to discuss a loan to restore ALH's liquidity. 11 S.W.3d at 622. The bank made representations upon which Warren relied by investing $118,000. *Id.* The bank failed to fulfill its representations, and Warren sued. The court found significant that "the Warrens never signed a guarantee making them personally liable for the debt they sought on behalf of ALH." *Id.* at 623. The court concluded:

> *Based on these facts* and the reasoning of prior cases, this Court concludes that any alleged misrepresentations were made to ALH and not to Mr. Warren as an individual and any resulting damages were sustained by ALH and not by the Warrens individually. Thus, this Court holds that misrepresentation claims based upon an agreement between two corporations and/or statements made to the officers or sole shareholders of a corporation belong to the corporation, not the individual officers or sole shareholders.

Id. (Emphasis added.)

Rennie involved the same fact pattern as *Warren* – president and 100% shareholder of a corporation sued the bank for misrepresentations which induced the corporation to give the bank a chattel mortgage on certain manufacturing equipment owned by the corporation. 690 S.W.2d at 166. The court held that the president and 100% shareholder had no standing to sue because "any wrong done by reason of the misrepresentations was done to TSE [the corporation] and not to Jones individually." *Id.*

In contrast to the plaintiffs in *Warren* and *Rennie*, Uhlmann was not an officer, shareholder, or member of Crush, Renaissance, or TEAM at the time he had discussions with Manufacturing about the capabilities of the T1055TL. Uhlmann was an individual contemplating lending and guaranteeing money to Crush. Uhlmann personally guaranteed the loan made by The Uhlmann Company to Crush for the purchase of the

equipment. Unlike plaintiffs in *Warren* and *Rennie* whose losses were the same as those of the corporation, Uhlmann incurred personal financial losses from June – December 2002 because the T1055TL failed to perform as represented, and those loses are reflected on his personal 2002 income tax return, LF0291. Uhlmann's loss on his loan is distinct from losses suffered by Crush and separate from subsequent investment losses he incurred after he became a Crush owner. *See Greening v. Klamen*, 652 S.W.2d 730, 733 (Mo. Ct. App. 1983). Manufacturing acknowledges in its brief that Uhlmann's loss is a "cognizable injury." Manufacturing's Substitute Brief at 23 ("The only cognizable injury that Uhlmann could have sustained as a result of any alleged misrepresentation would have arisen out of his ... loan to, Crush."). Uhlmann therefore has standing to sue Manufacturing for misrepresentation.

2. TEAM's Standing

Manufacturing does not address TEAM's argument that it has standing to assert claims for fraud and misrepresentation.

B. <u>Elements of Fraud Claim</u>

1. Falsity

Appellants' fraud and negligent misrepresentation claims are based on two representations by Manufacturing: (1) that the T1055TL would cut and excavate hard rock while leveling terrain regardless of ground conditions, and (2) that the T1055TL could be repaired and, if necessary, redesigned, to cut and excavate hard rock with no

problems.[4] Manufacturing argues that Appellants cannot prove these representations were false for two reasons: (1) "[t]he T1055TL performed well in the terrain leveling applications for which it was purchased by Crush" in the Phenix Quarry; and (2) Appellants never attempted to use the machine to level terrain at the 350 Highway location. Manufacturing's Substitute Brief at 25-26.

Even if the evidence cited by Manufacturing is undisputed, it does not follow that Appellants cannot prove falsity. Appellants' expert testified that the T1055TL was defectively designed because the equipment was subject to excessive vibration and permanent deformation when used to cut hard rock, a task which Manufacturing

---

[4]Manufacturing identifies the first representation as "that the T1055TL would perform terrain leveling." Manufacturing's Substitute Brief at 24-25. The interrogatory answer from which that phrase was taken also identified promotional brochures and advertisements, including the brochure that represented the T1055TL could cut hard rock "regardless of ground conditions." LF 0550-51; 1716. In addition, the interrogatory answer stated that Plaintiffs were "[r]eserving the right to identify additional representations and/or advertisements as Plaintiffs' recollections are refreshed during the course of discovery." LF0550. The interrogatory answers were served on November 18, 2005. LF0563. Uhlmann's deposition was taken subsequently on February 16, 2006, LF0249, and he testified that Manufacturing and Great Plains represented the T1055TL would "cut into hard limestone." LF0321.

represented the equipment would do. LF1535-36. He testified that the T1055TL "doesn't cut hard rock." LF1536. The T1055TL failed in normal operating conditions, including leveling terrain and cutting hard rock. LF1546-47. Design deficiencies led to the numerous breakdowns and failures that are documented in Great Plains' repair and warranty claim records concerning the T1055TL. LF1516-33. That evidence is sufficient to raise a jury question as to whether Manufacturing's representations were false.

The fact that the T1055TL did not *immediately* break during its use in the Phenix Quarry on overburden scrap rock does not, as a matter of law, defeat Appellants' ability to prove falsity. Manufacturing represented that the T1055TL would excavate and cut hard rock while leveling terrain "regardless of ground conditions." The fact that the machine did not break down and did cut overburden scrap rock during a short, initial demonstration period in the Phenix Quarry does not make true the representation that the T1055TL would cut hard rock without breaking regardless of ground conditions. If the T1055TL had broken immediately while being used in the Phenix Quarry, then it would have not been purchased. Manufacturing did not simply represent that the T1055TL *might* be able to cut hard rock while leveling terrain once or twice. The T1055TL was not a custom designed machine to be used only to work on overburden scrap rock in the Phenix Quarry. Regardless of how one characterizes the T1055TL's performance in the Phenix Quarry during the initial demonstration period, the T1055TL "destroyed itself" shortly thereafter when Appellants attempted to use it to attempt to cut hard rock on terrain leveling jobs.

The truth or falsity of a representation is judged "'in the light of the meaning which the plaintiffs would reasonably attach to them in existing circumstances and the words employed must be considered against the background and in the context in which they were used.'" *Haberstick v. Gordon A. Gundaker Real Estate Co.*, 921 S.W.2d 104, 109 (Mo. Ct. App. 1996) (*quoting Toenjes v. L.J. McNeary Const. Co.*, 406 S.W.2d 101, 105 (Mo. Ct. App. 1966)). A reasonable jury could believe that Appellants reasonably concluded based on the context in which it was made that Manufacturing's representation that the T1055TL would cut hard rock while leveling terrain regardless of ground conditions meant that the T1055TL could be used to quarry virgin limestone without destroying itself.

The fact that Appellants never used the machine at the 350 Highway location does not negate falsity. After the Phenix Quarry, the T1055TL was used at the 40 and 291 Highways location. LF0316. Uhlmann testified that Appellants contemplated using the T1055TL at the 350 Highway location, but did not do so because the equipment did not work. LF0316. After a few weeks of use at the 40 and 291 Highway location "the whole machine started breaking apart, so there was no possibility [to use it at the 350 Highway location]. It was certainly contemplated." *Id.* Evidence that the defects in the T1055TL caused it to break down before it could be used at the 350 Highway location does not tend to prove that Manufacturing's representations were true.

Finally, neither of the facts cited by Manufacturing negates falsity of the second representation. Manufacturing failed to complete its research and development on

the T1055TL, LF1531, which led Great Plains to conclude, "I felt that we were being used as the design team for the factory," LF1513. A reasonable jury could conclude from that evidence that Manufacturing's representation that the T1055TL could be repaired or redesigned to cut hard rock was false.

2. Reliance

Manufacturing argues that Uhlmann cannot show reliance because he decided that Crush should purchase the T1055TL on the recommendation of Jeff Hall, Crush's president, and not on any representations by Manufacturing. Manufacturing ignores the evidence that the Vermeer video stating that the T1055TL would cut hard rock was shown to Jeff Hall before Crush purchased the machine. Further, Uhlmann testified that he saw a video touting the T1055TL's capabilities in July or August 2002, before deciding to make or guarantee loans for Crush to purchase the T1055TL. Uhlmann did not testify that Hall's recommendation was the sole basis for his decision:

> [I] bought into it *not* on the basis of what Jeff Hall or Gary Watts, or whomever else was involved with Crush. I bought into it on the basis of what *Vermeer* was saying that this product could do, would do, did do ....

LF0273 (emphasis added). A jury could reasonably conclude from the evidence that Uhlmann and Crush relied on Manufacturing's representations.

Manufacturing argues that the demonstration period in the Phenix Quarry defeats Plaintiffs' ability to prove reliance. That argument ignores that a reasonable jury could conclude that the Phenix Quarry demonstration was not long enough for the design

deficiencies in the T1055TL to manifest. Those design deficiencies were such that when the machine was put to normal use, it destroyed itself and broke apart in a relatively short period of time. Manufacturing's argument is akin to arguing that test driving an automobile for thirty minutes negates a buyer's ability to prove fraud when the engine quits running after one hundred miles.

Brown v. Bennett, 136 S.W.3d 552, 556 (Mo. Ct. App. 2004) sets forth three exceptions to the inspection rule relied on by Manufacturing. Those exceptions apply to the present case because a reasonable jury could conclude (1) the Phenix Quarry demonstration was only a partial inspection; (2) Uhlmann and Crush lacked equal footing with Manufacturing for learning the truth of how the T1055TL would perform over time while excavating hard rock; and (3) Manufacturing made specific and distinct misrepresentations apart from what the demonstration in the Phenix Quarry would show. Manufacturing's statement that "Crush did not rely upon representations by Manufacturing in deciding to purchase the machine; Crush (and therefore Uhlmann) relied upon what it learned from the nearly two-month period during which it evaluated the machine at the Phenix quarry" (Manufacturing's Substitute Brief at 27) is mere jury argument.[5] Uhlmann did not loan the money to Crush, and Crush did not make final

[5]In its brief, Manufacturing disputes only Appellants' ability to prove falsity and reliance. No other elements are disputed and, therefore, no other elements are addressed in this reply.

payment for the T1055TL until *after* Uhlmann's conversations with Manufacturing's representatives about the machine at the Phenix quarry and *after* Uhlmann's visit to Manufacturing's headquarters at which times the crucial misrepresentations were made.

C. Elements of Negligent Misrepresentation Claim

Manufacturing argues that summary judgment was proper on Appellants' claim for negligent misrepresentation because Appellants cannot establish that (1) Manufacturing communicated false information due to its failure to exercise reasonable care or competence, (2) Appellants justifiably relied on the information, and (3) the information was supplied for the guidance of a group of persons in a particular business transaction.

1. False Information Due to a Failure to Exercise Due Care

As shown previously, sufficient evidence exists to prove that Manufacturing's misrepresentations were false. Appellants showed that Manufacturing failed to undertake sufficient research and development to know whether the T1055TL could withstand the rigors of cutting hard rock without breaking apart. Even if the jury does not conclude that the misrepresentations were made intentionally or recklessly, it could conclude that Manufacturing failed to exercise due care in making the representations because Manufacturing said that the T1055TL could cut hard rock

regardless of ground conditions even though Manufacturing had not done the necessary research and development.

2. Justifiable Reliance

Manufacturing argues that Appellants cannot show justifiable reliance because it "could not have foreseen that Appellants would launch a new business premised on production capabilities of a machine for which Appellants admit the production capacities were yet unknown." Manufacturing's Substitute Brief at 29. This argument misconstrues Appellants' negligent misrepresentation claim. Appellants are not claiming that Manufacturing represented that the T1055TL could level "x" square yards of hard rock terrain per hour, and the machine actually could level only "x minus 50" square yards of hard rock terrain per hour. Appellants' claim is not based on the T1055TL's failure to meet any particular represented production capacity. Rather, Appellants are claiming that Manufacturing misrepresented fundamental, qualitative capabilities regarding the T1055TL – namely, that it could cut hard rock regardless of ground conditions without breaking apart. Manufacturing misrepresented the essential design characteristics of the T1055TL in that the equipment was not designed to perform the job that Manufacturing said it could.

"The reasonableness of reliance is normally an issue of fact, a matter for the jury's determination." *Miller v. Big River Concrete, LLC,* 14 S.W.3d 129, 133 (Mo. Ct. App. 2000). At a minimum, the evidence presents a jury question as to whether Uhlmann and Crush reasonably relied on Manufacturing's representations that the T1055TL would

cut hard rock while leveling terrain regardless of ground conditions and that the T1055TL could be repaired to do that after the demonstration period in the Phenix Quarry.

3. Information Provided for the Guidance of Others in a Particular Transaction

Manufacturing argues that Appellants cannot establish this element because the only business transaction in which it was involved related to the T1055TL sale to Great Plains, and that transaction was completed prior to Manufacturing making representations to Uhlmann and Crush. Manufacturing erroneously assumes that the only relevant business transaction in which it was involved was its sale to Great Plains. Manufacturing was heavily involved in persuading Crush to purchase the T1055TL from Great Plains. Manufacturing personnel met with Uhlmann and Crush personnel at the Phenix Quarry during the demonstration period and at Manufacturing's headquarters in Iowa prior to the final payment to purchase the T1055TL. Manufacturing provided information for the use of Crush and Uhlmann in connection with Crush's purchase. In doing so, Manufacturing made false representations.

D. Economic Loss Doctrine

The question of whether claims for fraudulent inducement and negligent misrepresentation are exceptions to the economic loss doctrine has not been addressed by the Missouri Supreme Court. Decisions from the Missouri Court of Appeals, Eighth Circuit Court of Appeals, and the U.S. District Court for the Western District of Missouri applying Missouri law support the conclusion that the economic loss doctrine does not bar Plaintiffs' tort claims.

In *B.L. Jet Sales, Inc. v. Alton Packaging Corp.*, 724 S.W.2d 669 (Mo. Ct. App. 1987), plaintiff purchased an allegedly defective jet aircraft. *Id.* at 670. Plaintiff sued the company who serviced the aircraft on a theory of negligent misrepresentation based on the defendant's failure to record certain maintenance and repair information in the aircraft's logbook. *Id.* The trial court dismissed the petition for failure to state a claim. *Id.* at 670. The defendant argued in that case, like Manufacturing here, that Missouri law barred recovery of purely economic losses on any tort theory, unless the case involved personal injury, damage to other property, or destruction of the property due to some violent occurrence. *Id.* at 672. The Missouri Court of Appeals reversed, holding that damages for purely economic loss could be recovered under a theory of negligent misrepresentation. *Id.* at 673.

In *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818 (8th Cir. 1983), an office building owner and a general contractor sued the glass and aluminum framing suppliers for supplying defective materials. *Id.* at 820-21. Plaintiffs sued for breach of contract, breach of warranty, negligently supplying defective material, and fraudulent misrepresentation. *Id.* The district court dismissed the case for failure to state a claim, deciding that the contract, warranty, and misrepresentation claims were time barred, and the negligence claim was barred by the economic loss doctrine. *Id.* at 820, 822, 826, 829-30. After reviewing "all of the available data" related to Missouri law on the negligence question, the Eighth Circuit agreed with the district court that Missouri law prohibited recovery of purely economic losses on the negligence claim. *Id.* at 828-29.

The district court in *R.W. Murray* also dismissed the misrepresentation claim based on plaintiffs' contention "that Shatterproof misrepresented the quality of the glass panels it designed, manufactured, and supplied for appellants' building." *Id.* at 829. The Eighth Circuit reversed that decision.

The Eighth Circuit found that Mo. Rev. Stat. § 400.2-721 provides that the remedies for material misrepresentation or fraud are available and not limited by other remedies (such as rescission of the contract or rejection of the goods) under the UCC. *Id.* at 830. The court noted that Missouri "clearly recognizes ... a cause of action" for fraudulent inducement to enter a contract, and "claims based on misrepresentation or fraud are distinct from and contain different elements than claims grounded on breach of warranty or contract." *Id.* at 830-31. The Eighth Circuit allowed both the warranty and fraud claims to proceed even though it found the negligence claim to be barred by the economic loss doctrine. *See also Murphy v. Northwest Ins. Co.*, No. 03-0864CV-W-HFS, 2005 WL 1421789 at *2 (W.D. Mo. June 13, 2005) ("claims for fraud are an exception to the economic loss doctrine").

The cases cited by Manufacturing in support of its economic loss doctrine argument are inapposite. *Crowder v. Vandendeale*, 564 S.W.2d 879 (Mo. 1978) (no recovery of purely economic losses based on strict liability in tort), *Sharp Bros. Contracting Co. v. American Hoist & Derrick Co.*, 703 S.W.2d 901 (Mo. 1986) (no recovery on theory of strict liability in tort where the only damage is to the product sold), and *Rockport Pharmacy, Inc. v. Digital Simplistics, Inc.*, 53 F.3d 195 (8th Cir. 1995)

(applying Missouri law, economic loss doctrine bars recovery of purely economic losses on a negligence theory) do not apply here because Appellantss are not suing on theories of general negligence or strict tort liability.

Marvin Lumber and Cedar Co. v. PPG Industries, Inc., 223 F.3d 873 (8th Cir. 2000) is not controlling because it was decided under Minnesota law. *Id.* at 876. The Eighth Circuit's task in that case was to predict how the Minnesota Supreme Court would decide the issue. *Id.* at 885. The court noted that although the economic loss doctrine clearly barred plaintiff's claims for negligence and strict liability, "[w]hether the [economic loss] doctrine also bars fraud and misrepresentation claims, however, is more controversial." *Id.* at 884. The court noted that fraud in the inducement was recognized as a "non-controversial" exception to the economic loss doctrine under Minnesota law and then reviewed other cases in an effort to predict how the Minnesota Supreme Court would define the parameters of the exception. *Id.* at 885-86.

Manufacturing cites two cases from the United States District Court for the Eastern District of Missouri that involved fraud claims under Missouri law: *Self v. Equilon Enterprises, LLC,* No. 4:00CV1903TA, 2005 WL 3763533 (E.D. Mo. March 30, 2005) and *Dubinsky v. Mermart, LLC*, No. 4:08-CV-1806(CEJ), 2009 WL 1011503 (E.D. Mo. April 15, 2009). In *Self*, the district court predicted that this Court would hold that "in a suit involving a commercial transaction between merchants, a fraud claim to recover economic losses must be independent of the contract or such claim would be precluded by the economic loss doctrine." *Id.* at *11. *Dubinsky* relied heavily on *Self* and *Marvin*

Lumber, and also predicted that this Court would hold that "the economic loss doctrine applies to a fraud in the inducement claim when the alleged misrepresentation only concerns the quality of the subject matter at issue in the contract." 2009 WL 1011503 at *7.

Self and *Dubinsky* conflict with the holding in *Murphy* by the U.S. District Court for the Western District of Missouri that "when a plaintiff's damages are proximately caused by a defendant's intentional, false representation, the plaintiff is not barred from recovering economic damages because of the economic loss doctrine." *Murphy*, 2005 WL 1421789, at *2. In addition, *Self* is inapposite because the sale of the T1055TL to Crush was not "a commercial transaction between merchants." Crush was not in the business of building or developing terrain levelers, but rather was a consumer of the machine who purchased it for its own use. LF0328. This Court should hold that the economic loss doctrine, therefore, does not bar Appellants' claims for fraudulent and negligent misrepresentation.

Even if this Court agreed with the rationale of the federal court in the Eastern District of Missouri, the economic loss doctrine would not bar Uhlmann's or Renaissance's misrepresentation claims because neither had a contract with Respondents. *Dubinsky* recognized the general rule that "the economic loss doctrine does not preclude fraudulent inducement claims." 2009 WL 1011503 at *7. The exception to the general rule is when the alleged misrepresentation "only concerns the quality of the subject matter at issue in *the contract*." *Id.* (emphasis added). Because "the contract" at issue here is

Crush's contract with Respondents, claims based on misrepresentations which induced Uhlmann's loan and Renaissance to continue to use the machine would not be barred.

Respectfully submitted,

ROUSE HENDRICKS GERMAN MAY PC

By_____

Kirk T. May MO # 31657
William D. Beil MO # 33922
1010 Walnut Street, Suite 400
Kansas City, MO 64106
Tele: (816) 471-7700
Fax: (816) 471-2221

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by first class mail, along with an electronic copy on CD, this 22nd day of January, 2010, upon the following persons:

Gary J. Willnauer, Esq.
Ryan R. Cox, Esq.
Morrow, Willnauer & Klosterman, LLC
10401 Holmes, Ste. 300
Executive Hills East, Bldg. A
Kansas City, MO 64131-4509

W. Perry Brandt, Esq.
Robert J. Hoffman, Esq.
Michael P. Lewis, Esq.
Bryan Cave LLP
1200 Main Street, Ste 3500
Kansas City, MO 64105

_____
Attorney for Appellants

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

I certify that this brief complies with Rule 84.06(b). This brief contains 7464 words, as counted by WordPerfect X3. An electronic copy on CD of this brief is being filed along with the paper copies. The disk has been scanned for viruses using eTrust Threat Management Agent Ver. 8.1.637.0, and is virus free. The electronic copy of the brief is in WordPerfect X3 format.

_____
Attorney for Appellants