IN THE SUPREME COURT OF MISSOURI

Case No. SC90258

RENAISSANCE LEASING LLC, et al.,

Plaintiffs/Appellants

v.

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

Defendants/Respondents

APPELLANTS' SUBSTITUTE BRIEF

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

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Jurisdictional Statement

This appeal is from the final judgment dated September 25, 2007 of the Circuit Court of Jackson County, Missouri. Appellants filed their notice of appeal on October 12, 2007. LF0240-43. This Court has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution because this case was transferred on November 17, 2009 from the Court of Appeals by Order of this Court.

Statement of Facts

A. Procedural Background

Plaintiffs/Appellants John Uhlmann ("Uhlmann")[1], Renaissance Leasing, LLC ("Renaissance"), and TEAM Excavating, LLC ("TEAM"), filed suit against Defendants/Respondents Vermeer Manufacturing Co. ("Manufacturing") and Vermeer Great Plains, Inc. ("Great Plains") on May 12, 2005 in the United States District Court for the Western District Court of Missouri. The federal court granted Manufacturing's and Great Plains' motions to dismiss Appellants' Lanham Act claim, and dismissed the remaining state law claims for lack of subject matter jurisdiction. LF0858.

On August 7, 2006, Plaintiffs filed the present case in Jackson County Circuit Court. LF0008. Uhlmann asserted claims for fraudulent and negligent

[1]Pursuant to this Court's November 17, 2009 Order, Patricia Werthan Uhlmann has been substituted as a party Plaintiff/Appellant for John Uhlmann, who died on August 21, 2009.

misrepresentations made by Manufacturing. LF00008-21. Renaissance and TEAM each asserted claims for fraudulent and negligent misrepresentations made by Manufacturing. LF00008-21. Renaissance and TEAM each asserted claims for breach of express and implied warranties against Manufacturing and Great Plains. LF0008-21.

Manufacturing filed a motion for summary judgment on December 26, 2006. LF0057. Great Plains filed a motion for summary judgment on January 8, 2007. LF0095. Plaintiffs filed a joint opposition to each summary judgment motion. LF0114-55. On June 29, 2007 the trial court entered a one sentence order granting Manufacturing's summary judgment motion. LF0237. On September 5, 2007, the trial court entered another one sentence order granting Great Plains' summary judgment motion. LF0238. On September 25, 2007, the trial court entered final judgment in favor of Manufacturing and Great Plains and against each Plaintiff on all claims asserted. LF0239.

On September 20, 2007, Manufacturing filed a Motion for Costs. LF2169-2208. Pursuant to Sixteenth Judicial Circuit Local Rule 33.5.1. Plaintiffs filed a motion for review of Manufacturing's bill of costs under Mo. R. Civ. P. 77.05, LF2209-11, arguing that $10,022.20 in videography fees was not a permissible cost. LF2210. Great Plains filed a bill of costs (LF2278-2300), which also included $712.40 in videography fees. Plaintiffs filed a motion for review of Great Plains' bill of costs and challenged the taxing of videography fees. LF2301-02. Both Manufacturing and Great Plains conceded in their briefs filed with the Court of Appeals that the trial court's granting of costs for videotape

expenses was error. Vermeer Great Plains, Inc.'s Respondent's Brief at 24; Brief of Respondent Vermeer Manufacturing Company at 40.

The Court of Appeals treated the trial court's judgment "as one for the grant of a motion to dismiss for lack of subject matter jurisdiction" and affirmed the granting of summary judgment "on the basis that the plaintiffs to this suit lacked standing." Slip op. at 15. The Court of Appeals granted Appellants' point on appeal related to the cost issue, and reversed and remanded the judgment with directions to reduce the cost award by $10,022.20. *Id.*[2]

B. <u>Plaintiffs' Standing</u>

This case involves a T1055TL Terrain Leveler manufactured by Manufacturing and sold through Great Plains to Crush Tech, LLC ("Crush"). Crush paid for the T1055TL in two installments with three checks payable to Great Plains – a $600,000 payment on October 8, 2002 and a $70,000 payment on October 25, 2002. LF0285. The last payment completed the purchase. LF0280; LF1479. Although there was a sales order identifying what Crush was purchasing from Great Plains, Crush received no bill of sale or title document from Manufacturing or Great Plains when the T1055TL was purchased. LF0508.

The funds used to purchase and operate the T1055TL were the proceeds of a loan

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[2]The Court of Appeals did not include the $712.40 in videographer fees by Great Plains in this amount. The cost award should have been reduced by $10,734.60.

from Uhlmann individually which were advanced on his behalf by The Uhlmann Company. LF0291. Uhlmann personally guaranteed The Uhlmann Company's advances to Crush. LF0291; LF0265; LF0271-72. The money was a loan to Crush, not an equity investment. LF0291.

Crush was formed in April 2002. LF1322-23. Crush's members executed an Amended and Restated Operating Agreement in December 2002, by which Uhlmann became a Crush member owning 92.5%. LF0263, 0291; LF1357-95. Gary Watts, a Crush member, denies executing the Amended and Restated Operating Agreement and testified that his signature and the signature of his brother, Terry Watts, were forged. LF0382-83. There was evidence before the trial court, however, that Gary Watts executed the document, LF1316-17, and evidence that affirmatively identified his signature on another document. LF0297. The signature identified as that of Gary Watts can be compared to the "Gary Watts" signature on the Amended And Restated Operating Agreement. LF1391, 1404. Further, William Venable, Crush's Executive Vice-President, testified that there were meetings of Crush's members which the Watts brothers attended to sign documents, and Venable imagined that the Amended and Restated Operating Agreement was one of those documents. LF0506-07. Venable testified that an executed Amended and Restated Operating Agreement was kept in Crush's office. LF0507.

In December 2002, Renaissance was formed to own and lease equipment, including the T1055TL, which it acquired at that time from Crush. LF0290; LF1817.

Title to the T1055TL was conveyed to Renaissance. LF0508. As with Crush's purchase, was no evidence of a bill of sale or title document when Crush transferred ownership of the T1055TL to Renaissance. There was, however, a January 2003 written lease by which Renaissance, as the owner of the T1055TL, leased the equipment back to Crush. LF0290-91; LF0733-41; LF1774 ¶ 4; LF1785 ¶ 14; LF1817. Renaissance owned the T1055TL after the transfer. LF0297; LF0299; LF0313; LF1817.

In April 2003, Crush changed its name to "Mo-Kan Rock and Gravel Company LLC" ("Mo-Kan"). LF0296; LF1317. Crush/Mo-Kan's Amended and Restated Operating Agreement provided that the company could be dissolved upon approval of more than 66 2/3% in interest. LF1362, 1387. On September 2, 2003, Uhlmann, who owned 92.5% of Crush/Mo-Kan, sent to the Watts brothers and others a notice of Crush/Mo-Kan's meeting to dissolve the company and to distribute the assets according to each member's capital account. LF1084-85. Crush/Mo-Kan was dissolved, LF1400-03, and the Missouri Secretary of State issued a Certificate of Termination in October 2004, LF1086. At the time of dissolution, Uhlmann was the only Crush member with a positive capital account balance, and therefore 100% of Crush/Mo-Kan's assets were distributed to him. LF0297-98. On June 3, 2004 Uhlmann transferred to TEAM all assets he received from the Crush/Mo-Kan dissolution. LF1409-10; LF1794 ¶ 7; LF1817. TEAM was a member of a family of companies, including Renaissance, all owned by a holding company wholly owned and controlled by Uhlmann, and the T1055TL was

shown as an asset on TEAM's balance sheet simply for bonding and lending purposes. LF0293-94; LF0298-99.

C. <u>Contract and Warranty Claims</u>

The Great Plains September 30, 2002 T1055TL sales order included a manufacturer's warranty. LF0502; LF0629. In connection with the purchase of the T1055TL, Crush completed a limited warranty form "to validate warranty coverage" and acknowledged reading and agreeing to the terms of the express limited warranty. LF0502-03; LF0633. That warranty coverage was an express written limited warranty provided by Manufacturing. LF0634. Manufacturing's express written limited warranty provided:

> Vermeer MFG. Company (hereinafter "Vermeer") warrants each new Industrial product of Vermeer's manufacture to be free from defects in material and workmanship under normal use and service for one (1) full year after initial purchase/retail sale or 1000 operating hours, whichever occurs first.

LF0634. The warranty was not limited to the initial purchaser and instead applied "for (1) one full year after initial purchase/retail sale or 1,000 operating hours." LF0634.

The express warranty obligated Manufacturing to, at its option, repair or replace the T1055TL at its cost if there was a defect in material or workmanship. LF0634. Under the terms of the written warranty, Manufacturing was not obligated to repair or replace the T1055TL if the defect was caused by "other than normal use." LF0634.

Manufacturing's written warranty also provided, "Except for the warranties expressly and specifically made herein, Vermeer [Manufacturing] makes no other warranties, and any possible liability of Vermeer [Manufacturing] hereunder is in lieu of all other warranties, express, implied, or statutory, including, but not limited to any warranties of merchantability or fitness for a particular purpose." LF0634. By it express terms, the written warranty is neither given by Great Plains nor does any purported limitation of liability in that warranty apply to Great Plains. LF0634.

Plaintiffs' expert testified that the T1055TL was defective in that, among other things, it would not cut hard rock, which it was purportedly designed to do. LF1536. Plaintiffs' expert also testified that the T1055TL was defective because, Manufacturing 1) used improper loads and calculations in designing the T1055TL, LF1539-40, 1549, 2) failed to consider deflection in designing the machine, LF1554-55, 4) failed to test and modify the T1055TL prior to selling it, LF1547, 1554, LF1575-76, 5) used non-standard welds, LF1560, and 6) failed to design for vibration, LF1561. Plaintiffs' expert noted that due to its defective design the T1055TL failed under normal operating conditions and that to avoid permanent deformation the machine needed to be redesigned, and the problem of permanent deformation could not be addressed by repairs. LF1546-47. He also noted that 44% of all Vermeer Terrain Levelers were discontinued or "scrapped out," while the "norm for off-highway vehicles is ½% a year." LF1547-48.

The T1055TL experienced intense vibration, cracks, failures, and malfunctions such that the machine could not level terrain, could not sufficiently cut rock, did not

reduce the need for additional material handling, and could not perform surface mining under normal conditions. LF1821-22. The T1055TL "broke down on all three projects" on which it was "engaged under contract." LF1456. One witness who observed the T1055TL operate testified that "it destroyed itself." LF1636.

Great Plains' repair and warranty claim documentation covers from October 2002 to July 2003 and shows that Great Plains spent hundreds of hours performing repairs on the T1055TL. LF1516-33. Neither Great Plains nor Manufacturing took the position that the repairs were not covered by the warranty because the T1055TL was being used abnormally or for some purpose other than for which it was sold.

Among the repairs performed were the following: 1) "The digging chain was cracking at a side link. The drum shaft retaining bolts had broken and the shaft slid to the side, causing an uneven load on the digging chain. This is the second time the bolts have gave way. There are no codes for any of this work;" LF1517; 2) "[t]he right drum had damaged seals. New seals were installed;" LF1517; 3) "the shield was not made straight and had to be repaired in order to fit properly;" LF1520; 4) "[t]he right side did not secure the shaft and the left strap broke the end of the boom frame off the frame. The weld securing the left side did not have adequate welds;" LF1521; 5) "[t]he shields kept getting bent from the way they were designed. So [Manufacturing representative] said to cut and shorten them to resolve the problem. And after that did not work, [Manufacturing's representative] said to just remove them and he will have to redesign the shields so they will work later." LF1531.

In July 2003, after months of attempted repairs, Great Plains' repair technician who had worked on the T1055TL observed, **"Most of this labor is due to us doing all of the r&d for the factory on all the problems this machine has."** LF1531 (emphasis added). "R&D" refers to research and development. LF1513. With respect to that research and development, Kevin Brooks, a Great Plains employee, testified**, "I felt that we were being used as the design team for the factory."** LF1513 (emphasis added). He testified that work done on the T1055TL was "to redesign the machine." LF1514. According to Brooks, Great Plains would get involved in redesign of the T1055TL "[i]f it's required to get the machine to meet the demand of what it's to do." LF1514. Great Plains never objected to making any repair and Manufacturing never objected to any redesign efforts on grounds that the T1055TL was being used for something other than its intended use.

Despite the numerous and various attempted repairs, the T1055TL never worked as represented. LF0304. As Uhlmann testified, "They weren't replacing it. Every time I started to use it, it wasn't doing what it said it would perform. It wasn't even close, kept breaking down repeatedly. It broke down. I had three customers, Emery Sapp, who is the largest construction people in the state, one of the largest people, Clarkson, which is the largest in Kansas City road construction, and Mid-States Excavating, which is Al Swearingen. Again, with our own property at 250 – at 40 and 291, we would start it would break down." LF0304. Uhlmann asked Manufacturing to repurchase the T1055TL for the $670,000 purchase price, but Manufacturing refused. LF0304.

Respondents provided printed promotional material to Crush prior to the October 25, 2007 final payment for the T1055TL. LF0284, 1854. The T1055TL was promoted as a "rock solid solution" which can be "utilized for soil mixing and remediation, rock excavation, concrete removal, and road construction applications." LF1503. Manufacturing's promotional materials promised without qualification that the T1055TL has "unmatched production" rates for "surface mining," LF1716-17, and that it is "just as productive (or more so) than traditional mining processes… without all of the associated costs, restrictions, extra support equipment and labor requirements." LF1718. Manufacturing advertised that the "tilting cutter drum… allow[s] the leveler to take on jobs that were not possible before—**regardless of ground conditions**." LF1716 (emphasis added). Manufacturing advertised that the T1055TL would cut hard limestone. LF0321. Manufacturing's Mark Cooper is unaware of any disclaimers in brochures, websites, or advertisements to the effect that "the terrain leveler will cut some rock but not others" or that it is "up to the customer to make that determination." LF1705-06.

In July or August 2002, Great Plains gave Crush a video that Great Plains had received from Manufacturing showing a machine identified as "Terrain Leveler" performing rock excavation work. LF1487-90. Prior to Crush deciding to purchase the T1055TL, Jeff Hall, a Crush employee, showed Uhlmann a video of the T1055TL. LF0271; LF0284. Uhlmann saw the terrain leveler cutting limestone on the video. LF0321; LF1465; LF1854. In addition, at some point Manufacturing showed to its dealers a "Monster Machine" video of a program on the Learning Channel and gave

copies of that video to some of its dealers. LF1724-26. Manufacturing made no effort to determine if there were any inaccuracies in the Monster Machine video. LF1724-27. That video shows a Terrain Leveler breaking runway concrete at Stapleton Airport. LF1726-27, 1751.

D. <u>Misrepresentation Claims</u>

Prior to August 2002, Crush obtained promotional materials on the T1055TL. LF1781. Prior to purchasing the T1055TL, Crush had the T1055TL at the Phenix Quarry for demonstration. LF0366. At the Phenix Quarry, Crush attempted to use the T1055TL on "real hard" rock. LF0367. The T1055TL chipped the real hard rock. LF0367. Although it was difficult to cut through the real hard rock, that demonstration on real hard rock at the Phenix Quarry did not reveal any stress on the T1055TL. LF0367.

Prior to the final payment, Uhlmann visited the Phenix Quarry and observed that the T1055TL had difficulty cutting hard rock like the limestone at Phenix Quarry. LF0321. At that time, Great Plains and Manufacturing assured Uhlmann that the T1055TL would work as advertised, which was on hard limestone and reinforced airport runway concrete. LF0321. Prior to the final purchase payment, Uhlmann was guaranteed that the T1055TL would be reengineered if necessary to cut through limestone. LF0323. Uhlmann made the decision for Crush to purchase the T1055TL, and it was made based on the recommendation of Jeff Hall, a Crush employee, and on what Manufacturing and Great Plains were representing the machine could do. LF0273.

On October 17, 2002, Uhlmann visited Manufacturing's headquarters where he

was assured that any problem with the T1055TL would be addressed so that the machine would reliably function as promised. LF0285. Uhlmann was accompanied on that visit by, among others, Mark Sonnenberg and Mark King, Great Plains employees. LF0282. Uhlmann obtained brochures during his visit to Manufacturing's headquarters. LF0284. Sonnenberg testified about the promise to modify the T1055TL to the satisfaction of Uhlmann to induce him to approve payment of the final $70,000 of the purchase price. LF1496. In approving final payment, Uhlmann relied on the assurances made to him by Manufacturing and Great Plains. LF0285.

After making the final payment for the T1055TL, Plaintiffs continued to rely on Manufacturing's representations and assurances. LF1825-26. Plaintiffs repeatedly communicated to Defendants about the T1055TL's failures, and Defendants repeatedly represented that they could and would repair and/or redesign the T1055TL to perform as promised and advertised to cut hard rock. LF1761-66; LF1808-11; LF1819. Relying on Defendants' ongoing representations, Plaintiffs continued "to make monetary and time investments in the business, by seeking out customers and by attempting to perform terrain leveling projects rather than seeking alternative machines or methods." LF1872.

Crush purchased the T1055TL with the expectation that it would be used throughout the Midwest for, among other things, surface mining. LF1786l; LF1435-37. Great Plains and Manufacturing knew from having been to Phenix Quarry and from the meeting at Manufacturing's headquarters that Crush intended to use the T1055TL to quarry "real hard rock" like that in the Phenix Quarry. LF0581; LF0323. Uhlmann

loaned and guaranteed funds to Crush with the expectation that it would be used to quarry virgin limestone as well as perform excavating, other surface mining, road reconstruction, soil remediation, and other terrain leveling functions. LF1318-19.

Plaintiffs relied on the truthfulness and correctness of all of Manufacturing's brochures advertisements and other representations. LF1863. Uhlmann testified that in July or early August 2002 he was shown by Crush's Jeff Hall a "Monster Machine" video from a program that ran on the Learning Channel. LF0265-66. Uhlmann saw this video not on the Learning Channel but on a video cassette prepared by Hall. LF0267. While there is hearsay evidence that the Learning Channel did not air the Monster Machine video until November 2002, LF2023, that is a factual issue to be determined by the jury in weighing that hearsay evidence, if it were deemed admissible.

Although the Monster Machine video identified the machine depicted in it as a T1055TL, in fact the machine shown was the larger and more powerful T1255TL. LF1712. Manufacturing knew that the Terrain Leveler shown at Stapleton Airport was cutting concrete which had first been broken with a "guillotine" machine before the T1255TL, represented as the T1055TL, was driven over it, LF1708, but that fact was not disclosed. Contrary to Manufacturing's fact representation that the Terrain Leveler "basically rubbeliz[ed] every runway layer that it encountered" at Stapleton Airport, LF1744, Manufacturing knew the Terrain Leveler was in fact "not feasible to operate" in hard concrete at Stapleton, LF1707. Manufacturing never disclosed that the contractor at Stapleton Airport did not purchase the Terrain Leveler because it failed to perform in hard

concrete. LF1709.

Based on Manufacturing's representations, Uhlmann understood that the T1055TL would work not just on "scrap rock," but also for quarrying. LF1443, 1446. Relying on Defendants' representations about the T1055TL's abilities, Uhlmann personally guaranteed $1,762,000 loaned by The Uhlmann Company to Crush for the purchase and operation of the T1055TL. LF1318 ¶¶ 10-12; LF1641-85.

POINTS RELIED ON

I. The trial court erred in granting Defendants' motions for summary judgment on Plaintiffs' breach of warranty claims because Plaintiffs Renaissance and TEAM showed that genuine issues of disputed material fact exist precluding judgment as a matter of law in that:

1. the summary judgment record contains evidence from which a reasonable jury could conclude that Crush transferred ownership of the T1055TL and the associated warranty rights to Renaissance and that all of Crush's assets, including any breach of warranty claims, were later transferred to TEAM, making Renaissance and TEAM proper parties with standing; and
2. disputed material facts show that Manufacturing breached its express written warranty on the T1055TL and that Great Plains breached implied warranties of merchantability and fitness for a particular purpose.

Rule 74.04

Mo. Rev. Stat. § 400.2-314

Mo. Rev. Stat. § 400.2-315

J.C.W. v. Wyciskalla, 275 S.W.3d 249 (Mo. 2009)

Givan v. Mack Truck, Inc., 569 S.W.2d 243 (Mo. Ct. App. 1978)

Groppel Co., Inc. v. U.S. Gypsum Co., 616 S.W.2d 49 (Mo. Ct. App. 1981)

Plunk v. Hedrick Concrete Prod. Corp., 870 S.W.2d 942 (Mo. Ct. App. 1994)

II. The trial court erred in granting Manufacturing's motion for summary judgment on Plaintiffs' claims for fraudulent and negligent misrepresentation because Plaintiffs Uhlmann and TEAM showed that genuine issues of disputed material fact exist precluding judgment as a matter of law in that:

1. Uhlmann loaned money and guaranteed loans to Crush for the purchase and operation of the T1055TL based on Manufacturing's misrepresentations and, therefore, had standing to pursue misrepresentation claims;
2. the summary judgment record contains evidence from which a reasonable jury could conclude that Crush transferred its assets to TEAM, including Crush's claims for misrepresentation and, therefore, TEAM has standing to assert the misrepresentation claims previously owned by Crush;
3. material facts exist showing that Uhlmann and TEAM can establish each element of their fraud and negligent misrepresentation claims; and
4. the economic loss doctrine does not apply to Plaintiffs' fraud and negligent misrepresentation claims.

Rule 74.04

Mo. Rev. Stat. § 400.2-721 (1994).

ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371 (Mo. 1993).

Greening v. Klamen, 652 S.W.2d 730, 733 (Mo. Ct. App. 1983)

Miller v. Big River Concrete, LLC, 14 S.W.3d 129 (Mo. Ct. App. 2000).

III. Alternatively, the trial court erred in granting Defendants' costs and denying Plaintiffs' motions to review Defendants' costs because those rulings violated Rule 57.03 in that Rule 57.03 precludes recovery of videography expenses and Manufacturing subsequently filed an amended Bill of Costs abandoning the videography expenses.

Mo. R. Civ. P. 57.03(c)(6)

In re: J.P., 947 S.W.2d 442 (Mo. Ct. App. 1997).

Argument

I. The trial court erred in granting Defendants' motions for summary judgment on Plaintiffs' breach of warranty claims because Plaintiffs Renaissance and TEAM showed that genuine issues of disputed material fact exist precluding judgment as a matter of law in that:

1. the summary judgment record contains evidence from which a reasonable jury could conclude that Crush transferred ownership of the T1055TL and the associated warranty rights to Renaissance and that all of Crush's assets, including any breach of warranty claims

were later transferred to TEAM, making Renaissance and TEAM proper parties with standing; and

2. disputed material facts show that Manufacturing breached its express written warranty on the T1055TL and that Great Plains breached implied warranties of merchantability and fitness for a particular purpose.

A. Standard of Review

This court reviews the grant of summary judgment *de novo*. *ITT Commercial Financial Corp. v. Mid-America Marine Supply Corp.,* 854 S.W.2d 371, 376 (Mo. 1993). The trial court may only grant summary judgment "where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law." *Id.*; *accord* Mo. R. Civ. P. 74.04(c)(6). The movants "bear the burden of establishing a legal right to judgment and the absence of any genuine issue as to any material fact required to support that right to judgment." *Id.* at 378. The movant must state facts "with particularity." Mo. R. Civ. P. 74.04(c)(1). "[I]f the movant requires an inference to establish his right to judgment as a matter of law, and the evidence reasonably supports any inference other than (or in addition to) the movant's inference, a genuine dispute exists and the movant's prima facie showing fails." *ITT,* 854 S.W.2d at 382. The non-movant is "given the benefit of all reasonable inferences." *Id.*

B. Breach of Warranty and Contract

1. Renaissance and TEAM Have Standing

Defendants argued in the trial court that no plaintiff had standing to assert the warranty rights that existed by virtue of the sale of the T1055TL. Crush, the original purchaser of the T1055TL, was dissolved in October 2004. Defendants argued in the trial court that ownership of the T1055TL, and thus ownership of warranty rights and claims arising out of those rights, remained with and apparently expired with Crush. Accordingly, Defendants argued that Plaintiffs' warranty claims failed as a matter of law because no plaintiff had standing to assert the warranty rights.

The Court of Appeals addressed this standing argument *sua sponte* as a matter of subject matter jurisdiction. Slip op. at 8, 15. That approach was erroneous. *J.C.W. v. Wyciskalla*, 275 S.W.3d 249, 254 (Mo. 2009)(holding that questions that "go to the court's authority to render a particular judgment in a particular case" are not questions of subject matter jurisdiction); *State ex rel. State of Missouri v. Parkinson*, 280 S.W.3d 70, 75 (Mo. 2009) (holding alleged error regarding adherence to statutory requirements does not equate with jurisdictional defect); *McCracken v. Wal-Mart Stores East, L.P.*, No. SC90050, 2009 WL 3444894, *6 (Mo. Oct. 27, 2009) (question of whether delivery driver was statutory employee of defendant for purposes of the exclusive remedy provisions of the Missouri Worker's Compensation Act "is not a question of the circuit court's subject matter jurisdiction to decide his claim"); *State ex rel. Unnerstall v. Berkemeyer*, No. SC89982, 2009 WL 3833437, *3 (Mo. Nov. 17, 2009) (question of whether purported will was properly admitted or rejected to probate was not a matter of subject matter jurisdiction). By addressing standing as an issue of subject matter

jurisdiction rather than a summary judgment issue, the Court of Appeals acted as a fact-finder and applied an erroneous legal standard. Thus, the Court of Appeals erred in affirming the trial court's judgment based on its lack of subject matter jurisdiction.

The only question in this appeal pertaining to Renaissance's and TEAM's standing to pursue claims for breach of warranty is whether genuine issues of disputed fact exist from which a reasonable jury could conclude that Renaissance or TEAM owned the T1055TL and the associated warranty rights, or obtained Crush's claims for breach of warranty, or both. The summary judgment record contains evidence of the following facts: (1) ownership of the T1055TL was transferred in December 2002 from Crush to Renaissance; and (2) any breach of warranty claims arising prior to Crush's transfer of the T1055TL to Renaissance were either transferred to Renaissance with the machine or remained with Crush and were, upon Crush's dissolution, distributed to Uhlmann who subsequently transferred those claims in June 2004 to TEAM. A reasonable fact-finder could conclude that as of December, 2002, Renaissance owned the machine and had the warranty rights and claims that exist by virtue of ownership. Either TEAM or Renaissance owns the warranty rights and claims arising by virtue of Crush's purchase of the machine.[3]

[3] Whether Crush's warranty claims were transferred to Renaissance as part of the transfer of the equipment or to TEAM following Crush's dissolution is immaterial to the issues on appeal. Under either scenario, Renaissance or TEAM has standing to assert the warranty

Defendants' challenges to Renaissance's ownership of the T1055TL and to the distribution of Crush's warranty claims to Uhlmann and subsequent assignment to TEAM reiterate material factual disputes the resolution of which are necessary to determine which plaintiff has standing to assert what claims. For example, Defendants argued in their summary judgment motion that there was no written bill of sale or other document effecting the transfer of the machine from Crush to Renaissance. That fact is unremarkable, however, given that there was no bill of sale documenting the transfer of the T1055TL from Great Plains to Crush.

Under Missouri law, a bill of sale is not required and oral testimony is sufficient to prove ownership. *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"). This Court observed in *Smith v. Spradling*, 532 S.W.2d 202 (Mo. 1976), "With most types of personal property, the evidence of ownership of that property can take a variety of forms, including invoices, bills of sale, oral and written transfer agreements and even physical possession." *Id*. at 205 (*quoting* Burke & Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment*, 47 So. Cal. L. Rev. 1, 119 (1973)).

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claims and recover the associated damages that arose by virtue of Crush owning the T1055TL.

Uhlmann testified that ownership was transferred from Crush to Renaissance in December 2002 and that Renaissance owned the T1055TL following that transfer. William Venable, former Crush Executive Vice President, testified that although he could not recall a specific document transferring the equipment to Renaissance, "there's a list – an inventory list of every asset that we could find that was purchased… at an auction or outright by [Crush] **that was conveyed into Renaissance Leasing**," LF507-508, and that included the T1055TL. (emphasis added). Venable also testified, "We put the – aggregated the assets that were – what I thought were secured by promissory notes to [Crush], and the title was conveyed to Renaissance Leasing as another arm to aggregate all the assets." LF508 (emphasis added).

The Master Lease Agreement between Renaissance and Crush evidences Renaissance's ownership of the T1055TL, and Crush's lack of ownership, following the transfer to Renaissance. LF733-44. The Master Lease, signed by Crush's Executive Vice President, lists the Vermeer equipment in the schedule of equipment owned by Renaissance that is being leased to Crush. If Crush owned the T1055TL, it would not be leasing it from Renaissance. The Master Lease Agreement is inconsistent with Crush owning the T1055TL after December 2002. Uhlmann testified that the purpose of the lease was to protect the T1055TL from creditors and to capitalize the loan which had been made to Crush. LF0292-93. The jury could conclude from that evidence that the

T1055TL had been transferred to Renaissance because that would have been reasonable to do so.[4]

Defendants also argue that there is no evidence of Renaissance's ownership because the T1055TL is shown as an asset on TEAM's balance sheet. As Uhlmann explained, however, "The 1055 legally is not, according to the details of the law and all that, would not legally be a part of the assets of TEAM." LF0294. TEAM was a member of a family of companies, including Renaissance, owned by a holding company wholly owned and controlled by Uhlmann, and the T1055TL was shown as an asset on TEAM's balance sheet simply for bonding and lending purposes. LF0293-94; LF0298-99. At best for Defendants, the evidence showing the T1055TL as an asset on TEAM's balance sheet should be weighed by the jury with the evidence of Uhlmann's testimony and the other evidence in determining whether the T1055TL was transferred to Renaissance.

Defendants' challenge to TEAM's standing turns on whether Uhlmann became a 92.5% Crush member in December 2002. Neither Manufacturing nor Great Plains disputes that if Uhlmann became a 92.5% member then he had the authority to dissolve

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[4] Manufacturing gave an express warranty in connection with the purchase of the T1055TL. There is nothing in Manufacturing's express warranty prohibiting Crush from transferring that warranty with the T1055TL if the warranty otherwise did not go with or was not part of the equipment.

Crush and by that dissolution distribute to himself Crush's assets, including Crush's warranty rights and claims, and to then transfer those assets from himself to TEAM.

There is no dispute that there is an Amended and Restated Operating Agreement that *prima facie* shows Uhlmann a 92.5% Crush member in December 2002. LF1357-95. To avoid the import of that document, Manufacturing and Great Plains rely solely on Gary Watts' testimony that his signature and the signature of his brother, Terry Watts, on that Agreement are forged. Gary Watts also testified that Uhlmann's signature appeared forged. LF0387. Contrary to Gary Watts' testimony, there is testimony identifying Gary Watts' signature on a proxy document, LF0297 and LF1404, and there is a similar proxy document that *prima facie* has Terry Watts' signature, LF1403. The Watts brothers' signatures on the proxies match the signatures on the Amended and Restated Operating Agreement. LF0722, 0731. A fact finder can properly determine whether the signatures on the Amended and Restated Operating Agreement are authentic by comparing them to the proxy signatures. *See Kramer v. Johnson*, 238 S.W.2d 416, 422 (Mo. 1951).

Venable testified that Gary Watts and Terry Watts attended Crush meetings to sign documents and that an Amended and Restated Operating Agreement was executed. LF0506-07. Venable testified that it took an extended time for the people involved with the Amended and Restated Operating Agreement to sign it, LF0506, and that there was an executed copy in Crush's files, LF0507. That evidence alone permits the reasonable

conclusion that the Amended and Restated Operating Agreement was executed by Gary Watts and Terry Watts. [5]

Gary Watts and Terry Watts were sent notice that a meeting of Crush members would be held to consider and act upon a plan of dissolution, and that notice identified Uhlmann as a Crush member. LF1084-085. There is no evidence that either Gary Watts or Terry Watts at that time disputed that Uhlmann was a Crush member or disputed Crush's dissolution. Manufacturing recognizes that Uhlmann fired Hall from Crush and that Terry Watts and Gary Watts left Crush after being told to do so by Uhlmann. Manufacturing's Court of Appeals Brief at 11. The jury could reasonably infer in light of all of the evidence that if Uhlmann had not been the controlling member of Crush with the ability to dissolve Crush, then the Watts brothers would have resisted Uhlmann when he "told them they were out."

Watts' testimony that every signature on the Amended and Restated Operating Agreement is forged does not establish that to be the fact. Simple denial of one's signature creates a question of fact for the jury. *Woods v. Standard Personal Loan Plan, Inc.*, 420 S.W.2d 380, 382-83 (Mo. Ct. App. 1967); *Johnson v. Crown Fin. Corp.*, 222

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[5] Manufacturing stated in its Court of Appeals' brief that although "*their* signatures appear on the document, . . . *they* have testified that they did not sign it. ..." Manufacturing's Court of Appeals Brief at 21-22 (emphasis added). There is no support in the record for that statement. There is no Terry Watts testimony.

S.W.2d 525, 529 (Mo. Ct. App. 1949); *accord* Mo. Rev. Stat. § 400.3-308 (1994) (on negotiable instrument, signature is presumed valid); Mo. R. Civ. P. 55.23 (execution of written instrument is deemed confessed unless specifically denied). There is substantial evidence here which permits a reasonable jury to reject Gary Watts' forgery claim and conclude that the Amended and Restated Operating Agreement was properly executed.

If the fact finder concludes that the Amended and Restated Operating Agreement was executed by Gary Watts and Terry Watts, then the terms of that Agreement undisputably permit Uhlmann to dissolve Crush and distribute Crush's assets, including warranty rights and claims, to himself as the only Crush member with a positive capital account. LF1362,1387, 1366. As a 92.5% member, Uhlmann did not need the agreement of any other Crush member to take that action. LF1362, 1387, 1366. There is a written document by which Uhlmann assigned to TEAM all of his rights and interests in the Crush assets distributed to him. LF1409-10. Thus, TEAM has standing to assert all claims which Crush had against Manufacturing or Great Plains.

2. Manufacturing's Express Warranties

a. Express Warranties Not Limited to Crush

Manufacturing expressly warranted in writing that the T1055TL would be "free from defects in material and workmanship, under normal use and service for one (1) full year after initial purchase/retail sale or 1000 operating hours, whichever occurs first." LF1481. In the trial court, the only argument other than standing raised by Manufacturing in support of its motion for summary judgment on Plaintiffs' breach of express warranty claim was that the warranty covered only Crush, the initial retail purchaser. By its express terms, however, the written warranty extended for one full year or 1000 operating hours, whichever occurred first without regard to ownership of the machine. The warranty's express terms refute the argument that the warranty did not cover a subsequent owner, in this case Renaissance.

Crush transferred the T1055TL to Renaissance, and the fact finder could conclude that in doing so the written warranty was also transferred. Contracts can be assigned and transferred orally, *see Kershner v. Hilt Truck Line, Inc*., 637 S.W.2d 769, 771-72 (Mo. Ct. App. 1982), and there was nothing in Manufacturing's express written warranty prohibiting Crush from transferring the warranty to Renaissance. Based on the evidence, a reasonable jury could conclude that, given the nature of the warranty, it was transferred when the T1055TL was transferred. In that case, Renaissance stands in Crush's shoes. The only reference in Manufacturing's express warranty to the "retail purchaser" is a provision imposing on the retail purchaser obligations to perform regular maintenance.

LF0634. That provision in no respect limits Crush's right to transfer the express written warranty. If Manufacturing had wanted to prohibit transferring its warranty, then it would have provided for such a prohibition on its printed form.

Manufacturing recognizes that Crush is the "retail purchaser," Manufacturing's Court of Appeals Brief at 24, so TEAM, as the holder of Crush's claims, can assert a breach of warranty claim against Manufacturing as the "retail purchaser," assuming such a requirement. Renaissance, as a transferee of Crush's warranty, can also assert a breach of warranty claim. The fact that the original retail purchaser, Crush, had to affirmatively validate the warranty, so it became applicable, does not alter the warranty terms so as to prohibit transferring the warranty. If the jury concludes that the warranty was not transferred from Crush to Renaissance, then TEAM owns Crush's claims for breach of Manufacturing's express warranty.

b. <u>Renaissance and TEAM Can Prove Each Element Of Their Breach Of Express Warranty Claims Against Manufacturing</u>

The elements of a claim for breach of an express warranty are: "a) there was a sale of goods, b) the seller made a statement of fact about the kind or quality of those goods, c) the statement of fact was a material factor inducing the buyer to purchase the goods, d) the goods did not conform to that statement of fact, e) the nonconformity injured the buyer, and f) the buyer notified the seller of the nonconformity in a timely fashion."[6] *Stefl v.*

[6] In moving for summary judgment, Manufacturing did not challenge plaintiffs' ability to

Medtronic, Inc., 916 S.W.2d 879, 882-83 (Mo. App. 1996); MAI 25.07 [1991 Revision] (6th ed. 2002). There are material facts in the summary judgment record from which a jury could conclude that Manufacturing breached the express written warranty it gave with theT1055TL. Plaintiffs can meet each and every element of their claim.

1. <u>There was a sale of goods</u>

There is no dispute that the sale of the T1055TL to Crush was a sale of goods.

2. <u>The seller made a statement of fact about the kind or quality of those goods</u>

There is no dispute that Manufacturing stated that the T1055TL would be "free from defects in material and workmanship under normal use for one (1) full year after initial purchase/retail sale or 1000 operating hours, whichever occurs first." That statement is undisputedly about the quality of the T1055TL.

3. <u>The statement of fact was a material factor inducing the buyer to purchase the goods</u>

The September 30, 2002 sales order for the T1055TL identifies that, in addition to the machine itself, Crush was purchasing a "12 month/1000 hour manufacturer parts warranty." LF0629-502. Crush received the written warranty and completed and signed the form validating the warranty on October 8, 2002, the delivery date of the T1055TL for the purpose of the warranty. On that same date, Crush paid its first installment on the

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prove these elements.

T1055TL. This evidence shows that when Crush placed its order for the machine, it wanted the one year/1000 hour warranty it purchased. Crush took action necessary to obtain the warranty and reviewed and accepted the terms of the warranty. Accordingly, there is evidence from which the jury can conclude that Manufacturing's warranty that the equipment would be "free from defects in material and workmanship under normal use" was a material factor inducing Crush to purchase the T1055TL.

4. <u>The goods did not conform to that statement of fact</u>

The record is replete with facts showing that the T1055TL had numerous defects in material and workmanship under normal use and service. Crush withheld a portion of the purchase price because of problems encountered at the Phenix Quarry. Uhlmann visited Manufacturing's headquarters in Pella, Iowa in October 2002 where he was assured that the defects in the machine could and would be repaired so that it would function as promised to cut hard rock. Mark Sonnenberg of Great Plains accompanied Uhlmann on the trip to Iowa. He testified that Manufacturing promised Uhlmann that it would repair or redesign the T1055TL so that it would cut hard rock. Manufacturing's promise to redesign the T1055TL in October 2002 constitutes evidence that the machine was not free from defects in material and workmanship when it was sold.

Great Plains' work order invoices and warranty claim forms on the T1055TL from October 2002 through July 2003 document hundreds of hours spent to repair the machine. These repair reports record a litany of defects with the machine. The repairs were done at no cost to Plaintiffs under the express warranty Manufacturing provided. Because the

warranty required Manufacturing to repair only "defects' that did not arise from "other than normal use," a jury could reasonably conclude, given that repairs were performed at no charge to Plaintiffs, that the T1055TL possessed "defects in material and workmanship under normal use."

Plaintiffs' engineering expert testified that the T1055TL was defective in workmanship because it had not been properly tested and developed. That expert opinion is confirmed by a statement from Great Plains' repair technician in a July 2003 work order invoice that "**Most of this labor is due to us doing all the r & d for the factory on all the problems this machine has.**" LF1531 (emphasis added). A jury could reasonably conclude that equipment on which there was inadequate research and development is defective. Great Plains personnel testified that they were being used by Manufacturing to design the T1055TL. A machine that has to be redesigned to do what it was intended to do is defective and non-conforming.

Although Manufacturing may dispute the cause of the persistent and numerous problems with the T1055TL, there exists sufficient evidence from which a jury could conclude that the T1055TL did not conform to Manufacturing's statement of fact that it would be "free from defects in material and workmanship in normal use and service for one (1) full year . . ."

5. <u>The nonconformity injured the buyer</u>

The factual record contains sufficient evidence of injury. The T1055TL "broke down on all three projects" Plaintiffs had engaged under contract for the machine. LF1456. Uhlmann explained:

> I was getting disheartened about the fact that this machine was not working. I was losing money. They weren't replacing it. Every time I was starting to use it, it wasn't doing what it said it would perform. It wasn't even close, kept breaking down repeatedly. It broke down. I had three customers, Emery Sapp, who is the largest construction people in the state, one of the largest people, Clarkson, which is the largest in Kansas City road construction, and a Mid-States Excavating, which is Al Swearingen. Again, with our own property at 250 – at 40 and 291, we would start, it would break down.

LF1455.

In addition, there is sufficient evidence that Manufacturing did not fulfill its obligation to repair or replace the T1055TL.[7] After numerous repair attempts and

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[7] Defendants argued in the trial court that summary judgment should be entered because plaintiffs could not prove that the written express warranty failed of its essential purpose. Defendants' failure to repair or replace the machine, however, shows exactly that. The failure of essential purpose doctrine, however, is significant only to the amount of damages Plaintiffs can recover for breach of the express warranty, and has nothing to do

hundreds of labor hours spent to repair the design deficiencies in the machine, it still could not be used to level terrain. Uhlmann demanded that Manufacturing repurchase the T1055TL and refund the $670,000 he paid for it, but Manufacturing refused. Plaintiffs finally resorted to retrofitting the machine with a trencher attachment in an attempt to get some use from it. The trencher attachment, however, did not meet Plaintiffs' excavating and quarrying needs that the T1055TL was supposed to meet. Accordingly, a jury can reasonably conclude from the evidence that Renaissance and TEAM were injured.

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with Manufacturing's *liability* for breach of its warranty. In other words, even if Plaintiffs could not show that Manufacturing's express warranty failed of its essential purpose, they could still bring a claim for breach of express warranty and recover damages. Proving failure of essential purpose, however, allows Plaintiffs to recover incidental and consequential damages in addition to damages related to the replacement cost of the machine. In that the trial court granted Manufacturing's motion for summary judgment on *liability*, the failure of essential purpose doctrine is irrelevant to the issues on appeal.

6. The buyer notified the seller of the nonconformity in a timely fashion

The evidence is undisputed that upon the first sign of trouble with the T1055TL, Uhlmann traveled to Manufacturing's headquarters in Pella, Iowa and reported problems Crush was having with the machine. Manufacturing assured Uhlmann that the T1055TL could and would be repaired to function reliably. The repair records provide additional evidence that Plaintiffs timely notified Defendants that their machine was breaking down repeatedly. The jury could reasonably conclude from these facts that Plaintiffs notified Defendants of the nonconformity.

In sum, there exists evidence in the summary judgment record sufficient to show that a reasonable jury could find for Renaissance and TEAM on their claim for breach of Manufacturing's express written warranty. Summary judgment on that claim, therefore, was improper.

c. Great Plains' Implied Warranties

Great Plains asserted only two arguments in the trial court in support of its motion for summary judgment on Plaintiffs' breach of warranty claims. First, Great Plains argued that Plaintiffs waived their right to bring a cause of action for breach of any implied warranties by executing the written express warranty offered by Manufacturing. Second, Great Plains argued that there is no valid, enforceable contract between it and Plaintiffs because Crush, not plaintiffs, bought the T1055TL from Great Plains. Neither argument has merit.

1. There was a valid, enforceable contract between Crush and Great Plains, and Renaissance and/or TEAM can assert Crush's contract rights

Great Plains argued in the trial court that it had no agreement with TEAM or Renaissance and, therefore, they can assert no claim for breach of implied warranty. Great Plains admits it entered a contract with Crush for the sale of the T1055TL. For the same reasons that TEAM and Renaissance have a breach of express warranty claim against Manufacturing, they have breach of implied warranty claims against Great Plains. Under Missouri law, implied warranties are not limited to the original purchaser in privity with the seller. *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); *Groppel Co., Inc. v. U.S. Gypsum Co.*, 616 S.W.2d 49, 58 (Mo. Ct. App. 1981); *Collegiate Enter., Inc. v. Otis Elevator Co.*, 650 F. Supp. 116, 118 (E.D.Mo. 1986) (owner of building may sue elevator subcontractor under Mo. Rev. Stat. §§ 400.2-314 & 400.2-315, despite lack of privity).

2. Great Plains cannot rely on Manufacturing's written express written warranty to escape liability it has for breach of the implied warranties imposed by the UCC

The written express Limited Warranty was given by, and applies only to, Manufacturing. The disclaimers of implied warranties and purported limitations of liability in Manufacturing's express written warranty do not apply to Great Plains. LF0633-34. Manufacturing's express limited warranty, therefore, cannot bar an action for breach of implied warranties against Great Plains. Absent an express disclaimer of the warranties of merchantability and fitness for a particular purpose, they are implied in the sale of the T1055TL by Great Plains. Mo. Rev. Stat. § 400.2-314(1).

The only evidence on which Great Plains relies for its argument is the express written warranty given by Manufacturing. That warranty provided: "Vermeer Mfg. Company (hereinafter "Vermeer)" warrants. ..." LF0634. The warranty was given by Manufacturing, not Great Plains. The exclusion of warranties in Manufacturing's express written warranty provided:

> EXCEPT FOR THE WARRANTIES
> EXPRESSLY AND SPECIFICALLY MADE
> HEREIN, VERMEER [MANUFACTURING]
> MAKES NO OTHER WARRANTIES, AND
> **ANY POSSIBLE LIABILITY OF**
> **VERMEER [MANUFACTURING]**

> **HEREUNDER** IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS, IMPLIED, OR STATUTORY, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

LF0634.

By its terms, the exclusion in Manufacturing's express warranty was given by and applies only to Manufacturing. Great Plains gave no warranties in Manufacturing's express written warranty and it excluded no implied warranties. If the exclusion in Manufacturing's express written warranty applies to Great Plains, then so does the express warranty and TEAM and Renaissance could bring breach of express warranty claims against Great Plains.

a. <u>The Implied Warranty of Merchantability</u>

The implied warranty of merchantability provides that goods "must be at least such as… are fit for the ordinary purposes for which the goods are used." Mo. Rev. Stat. § 400.2-314(2)(c), (f) (Supp. 2007). To prove a claim for breach of implied warranty of merchantability, a plaintiff must show: (1) defendant sold and plaintiff acquired the product; (2) when sold by defendant the product was not fit for its ordinary purpose; (3) plaintiff used such product for such a purpose; (4) within a reasonable time after plaintiff knew or should have known the product was not fit for such purpose, plaintiff gave

defendant notice thereof; (5) as a direct result of such product being unfit for such purpose, plaintiff was damaged.[8] MAI 25.08 [1980 New] (6th ed. 2002). Plaintiffs have presented evidence sufficient to prove each element.

i. Great Plains sold and Plaintiffs acquired the T1055TL

There is no dispute Great Plains sold the T1055TL to Crush. There are disputed facts showing that Renaissance subsequently acquired the T1055TL from Crush.

ii. When sold by Great Plains the T1055TL was not fit for its ordinary purpose

Informational brochures show that the ordinary purposes for which the T1055TL was to be used include "rock excavation" and "surface mining" LF1503; LF1716-17. The T1055TL was promoted as being just as productive "or more so" than traditional mining processes and that it could take on all jobs "regardless of conditions." LF1716-18.

"Lack of merchantability may be proven either by showing a specific defect in goods or by circumstantial evidence." *Plunk v. Hedrick Concrete Prod. Corp.*, 870 S.W.2d 942, 947 (Mo. Ct. App. 1994). As discussed in connection with the express warranty, the factual record contains evidence of specific defects, as well as extensive

[8] In moving for summary judgment, Great Plains did not argue Plaintiffs' proof was lacking as to any of these elements in its motion for summary judgment.

circumstantial evidence—such as the repeated and serious breakdowns—that the T1055TL was not fit for its ordinary purpose, but instead failed to perform reliably in every application.

Relying on Mo. Rev. Stat. § 400.2-316(b), Great Plains has argued that Crush's testing of the T1055TL at the Phenix Quarry as a matter of law precludes an implied warranty. Great Plains' Court of Appeals Brief at 15. Section 400.2-316(b) provides that "there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed." What defects ought in the circumstances to have been revealed is a factual issue to be resolved by the jury. For example, there is evidence that the T1055TL was defective because its design failed to account for deflection and vibration, which prevented using the equipment in a reasonable fashion for a reasonable period of time without it "destroying itself." A Great Plains employee testified that all of the repairs being made long after the T1055TL left the Phenix Quarry were effectively part of a redesign required for the equipment to perform as intended. LF1513-14. Unlike Great Plains, Crush was not an expert in the T1055TL, and a reasonable jury could conclude that defects, like failing to design for deflection and vibration, would not have been revealed during the demonstration period at Phenix Quarry.

iii. Plaintiffs used the T1055TL for such a purpose

The evidence is undisputed that Renaissance and TEAM used the T1055TL for surface mining and rock excavation – uses promoted by in their brochures and otherwise by Manufacturing and Great Plains. Plaintiffs' engineering expert testified that Plaintiffs used the T1055TL in normal operating conditions. Accordingly, a jury could reasonably conclude from this evidence that the T1055TL was used for its ordinary purpose.

iv. Within a reasonable time after Plaintiffs knew the T1055TL was not fit for such purpose, Plaintiffs gave Great Plains notice thereof

As early as October 2002, Uhlmann traveled to Pella, Iowa with Great Plains' representatives and gave notice that the T1055TLwas breaking down when used in ordinary operating conditions. Over the next nine months, as documented in Great Plains' work order invoices and warranty claim forms, Plaintiffs notified Great Plains of numerous breakdowns and failures of the machine. A jury could reasonably conclude from this evidence that Plaintiffs gave Great Plains notice that the T1055TL was not fit for its ordinary purpose.

v. As a direct result of the T1055TL being unfit for such purpose, Plaintiffs were damaged

As discussed above in connection with the express warranty, Plaintiffs were losing money as a result of the T1055TL breaking down on all three projects on which it was used. In addition, Plaintiffs were stuck with a machine that could not be used to level

terrain as had been planned. Although Plaintiffs demanded a refund of the purchase price, Manufacturing refused. A jury could reasonably conclude from this evidence that Plaintiffs were damaged.

b. The Implied Warranty of Fitness for a Particular Purpose

The implied warranty of fitness for a particular purpose applies, "[w]here the seller at the time of contracting has reason to know any particular purpose for which the goods are required and… the buyer is relying on the seller's skill or judgment to select or furnish suitable goods." Mo. Rev. Stat. § 400.2-315 (Supp. 2007). "Whether or not this warranty arises in any individual case is basically a question of fact." Mo. Rev. Stat. § 400.2-315 cmt. 1 (Supp. 2007).

To prove a claim for breach of the implied warranty of fitness for a particular purpose, a plaintiff must show: (1) defendant sold the product; (2) defendant then knew or should have known of the use for which the product was purchased; (3) plaintiffs reasonably relied upon defendant's judgment that the product was fit for such use; (4) when sold by defendant, the product was not fit for such use/ (5) within a reasonable time after it knew or should have known the product wad not fit for such use, plaintiffs gave defendant notice thereof; and (6) as a direct result of the product being unfit for such use, plaintiff was damaged.[9] The same evidence that establishes the elements of Plaintiffs'

[9] Great Plains did not argue in its summary judgment motion that plaintiffs' proof was lacking as to any of these elements.

breach of express warranty and breach of implied warranty of merchantability claims also establishes the elements of Plaintiffs' breach of implied warranty of fitness for a particular purpose. For brevity's sake, Plaintiffs will argue their proof as to elements (2) and (3) which are slightly different.

i. Great Plains then knew or should have known of the use for which the T1055TL was purchased

The record shows Great Plains knew that, at a minimum, one particular purpose for the T1055TL was quarrying very hard limestone rock. LF1759. Great Plains' employee Mark Sonnenberg knew from his first conversation with Gary Watts in July or August 2002 that Crush intended to quarry rock. LF0581-82.

Great Plains argued in the trial court that the "particular purpose" for which the T1055TL was purchased was to quarry only at the Phenix Quarry. Although it is true that the T1055TL was used at the Phenix Quarry, it is also true that Great Plains was aware that in January 2003 the T1055TL was moved to 40/291 Highway and that Great Plains continued to try to repair the T1055TL without ever objecting that it was being used for a purpose other than it was sold. A jury could reasonably conclude from this evidence that Great Plains knew or should have known that the T1055TL was purchased for the purpose of cutting hard rock at not only Phenix Quarry but also at other locations.

ii. Crush reasonably relied upon Great Plains' judgment that the T1055TL was fit for such use

The factual record demonstrates that Crush relied on Great Plains' judgment in purchasing the T1055TL. Gary Watts asked Great Plains about an appropriate machine for quarrying. LF0581. Sonnenberg "suggested the 1055 Terrain Leveler for the purpose of grinding materials in a quarry application" at Phenix quarry. LF0588. In making his recommendation, Sonnenberg did not distinguish between grinding scrap rock "as opposed to actually doing surface mining in the quarry." LF0588. Sonnenberg understood that Crush needed a machine "to do the job" at Phenix, LF0587, and suggested the T1055TL was appropriate for "whatever they do in quarries," LF0588. A jury could reasonably conclude from this evidence that Crush relied on Great Plains' judgment that the T1055TL was fit for use in rock quarries. Accordingly, the record contains facts from which a jury can conclude that Plaintiffs have proven their breach of implied warranty claims against Great Plains.

II. The trial court erred in granting Manufacturing's motion for summary judgment on Plaintiffs' claims for fraudulent and negligent misrepresentation because Plaintiffs Uhlmann and TEAM showed that genuine issues of disputed material fact exist precluding judgment as a matter of law in that:

1. Uhlmann loaned money and guaranteed loans to Crush for the purchase and operation of the T1055TL based on Manufacturing's misrepresentations and, therefore, had standing to pursue misrepresentation claims;
2. the summary judgment record contains evidence from which a reasonable jury could conclude that Crush transferred its assets to TEAM, including Crush's claims for misrepresentation and, therefore, TEAM has standing to assert the misrepresentation claims previously owned by Crush;
3. material facts exist showing that Uhlmann and TEAM can establish each element of their fraud and negligent misrepresentation claims; and
4. the economic loss doctrine does not apply to Plaintiffs' fraud and negligent misrepresentation claims.

A. Standard of Review

This Court reviews the grant of summary judgment *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). The trial court may only grant summary judgment "where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law." *Id.*; *accord* Rule 74.04(c)(6). The movants "bear the burden of establishing a legal right to judgment and the absence of any genuine issue as to any material fact required to support that right to judgment." *Id.* at 378. The movant must state facts "with particularity." Rule 74.04(c)(1). "[I]f the movant requires an inference to establish his right to judgment as a matter of law, and the evidence reasonably supports any inference other than (or in addition to) the movant's inference, a genuine dispute exists and the movant's prima facie showing fails." *ITT*, 854 S.W.2d at 382. The non-movant is "given the benefit of all reasonable inferences." *Id.* Manufacturing argued that summary judgment was appropriate because Plaintiffs lacked standing to assert their misrepresentation claims, that the economic loss doctrine bars those claims, and that facts relating to select elements of the fraud and negligent misrepresentation claims were uncontroverted and supported summary judgment.

B. Fraudulent and Negligent Misrepresentation Claims

1. Standing

a. Patricia Werthan Uhlmann, Substituted Plaintiff For John Uhlmann, Deceased, Has Standing to Assert John Uhlmann's Claims for Misrepresentation

Manufacturing argued that Uhlmann had no standing to assert claims for fraud and misrepresentation because "Uhlmann never dealt with Manufacturing as an individual ... ." Manufacturing's Court of Appeals Brief at 26. Manufacturing contends that "any representations to Uhlmann by Manufacturing were made to him in his capacity as a representative of Crush, Renaissance, or TEAM, [and therefore] they cannot form the basis of a claim by Uhlmann in his individual capacity." *Id.* The Court of Appeals recognized that Uhlmann was a lender and guarantor on a loan to Crush, but held Uhlmann had no standing based on a perceived *per se* rule that a lender or guarantor has no standing to assert claims for fraud and misrepresentation as an individual against a party whose false representation induced the loan or guaranty. Slip op. at 10. The Court of Appeals provided no explanation for this *per se* rule, and its holding conflicts with *Empire Bank v. Walnut Products, Inc.*, 752 S.W.2d 404 (Mo. Ct. App. 1988), which held that creditors and guarantors have standing in their individual capacity to sue third parties for misrepresentations that induce extending credit. *Id.* at 408.

Uhlmann's loan losses are not the same as losses suffered by the entity to whom the loans were made. Uhlmann's losses flow from his personal decision to loan money to

Crush and become a Crush creditor. The court in *Empire Bank* reversed dismissal of a creditor's claims for deceit, stating that although a creditor generally may not sue for damages to the debtor, a creditor may "sue for deceit against a third person whose false representation induced the giving of credit." *Id.*; *c.f. Warren v. Mercantile Bank of St. Louis, N.A.*, 11 S.W.3d 621, 623 (Mo. Ct. App. 1999) (finding no individual standing because plaintiffs "never signed a guarantee making them personally liable for the debt"); *see generally* 38A C.J.S. Guaranty § 132 (Supp. 2007) ("A guarantor ordinarily may pursue individual actions to recover damages for injuries to the corporation if the guarantor can show… that the injury suffered by the guarantor is personal to him or her and distinct from the injury sustained by the corporation itself."). This principle applies even if the guarantor or creditor is a shareholder of the corporation. *Greening v. Klamen*, 652 S.W.2d 730, 733 (Mo. Ct. App. 1983) (holding that both the company and individual shareholders have standing to sue where the shareholders suffer injury distinct from that of the company).

The Court of Appeals wrongly relied upon *Curt Ogden Equipment Co. v. Murphy Leasing Co.*, 895 S.W.2d 604 (Mo. Ct. App. 1995). *Curt Ogden* did not establish the *per se* rule applied by the Court. In *Curt Ogden*, there was no evidence that the lenders dealt directly with the plaintiffs and therefore the court concluded that any alleged representations were made only to the corporation and not to the individuals. *Id.* In this case, there is evidence that Uhlmann directly dealt with Respondents' representatives individually when misrepresentations on which his claims were based were made. L.F.

282-285, 1496. The fact that Uhlmann later became a member of Crush does not bar him from asserting claims for injury he suffered as a lender to Crush that is distinct from any injury to Crush. *Greening*, 652 S.W.2d at 733. The court in *Curt Ogden* cited *Empire Bank* with approval. *Id.* at 610.

Before becoming a Crush member in December 2002, Uhlmann loaned Crush money and guaranteed loans made to Crush by the Uhlmann Company for the purpose of Crush buying the T1055TL. Crush purchased the T1055TL in October 2002. Uhlmann did not become an owner and member of Crush until December 2002. LF0263, 0291, 1322-23. At the time the representations were made on which Uhlmann relied in loaning and guaranteeing the funds to Crush for the purpose of purchasing the T1055TL, Uhlmann was not a Crush member. A Crush member, Hall, and a Crush officer, Venable, attended and represented Crush at the October 17, 2002 meeting in Pella, Iowa at which Manufacturing made representations to Uhlmann in his individual capacity. LF0282-83. Because neither Renaissance (formed in December 2002) nor TEAM (formed in August 2003) existed at the time the representations were made to Uhlmann. LF0290, 1405, Uhlmann could not have been acting as their representative.

The representations made by Manufacturing to Uhlmann could not have been made to him in his capacity as a member or shareholder of Crush, Renaissance, or TEAM. Uhlmann suffered personal financial loss when Crush failed to repay those loans because of the problems with the T1055TL.

b. <u>TEAM Has Standing to Assert Claims for Misrepresentation</u>

TEAM has standing to sue for misrepresentation because Crush's claims were assigned or transferred to TEAM after Crush's dissolution. The same facts showing that TEAM has standing to sue for beach of the express written warranty also support standing to sue for misrepresentation.

2. <u>Fraud</u>

As to the substance of Plaintiff's fraud claims, Manufacturing argued only three bases for summary judgment; (1) Plaintiffs could not establish that the claimed representations were false; (2) Plaintiffs could not show Defendants knew the representations were false when made; and (3) Plaintiffs could not prove reliance. The summary judgment record shows evidence of disputed facts from which a jury could find in Plaintiffs' favor as to each of these elements. As an initial matter, fraud "may be proven in its entirety by circumstantial evidence." *Chesus v. Watts*, 967 S.W.2d 97, 113 (Mo. Ct. App. 1998). Fraud "has to be established by a number and variety of circumstances, which, although apparently trivial and unimportant, when considered singly, afford, when combined together, the most irrefragable and convincing proof of a fraudulent design." *Id.*

Manufacturing made two critical false representations, continuing in nature, that form the bases of Plaintiffs' fraud and negligent misrepresentation claims. The first misrepresentation – made to Crush's Jeff Hall and Gary Watts, and to John Uhlmann **before** the sale of the T1055TL – was that the T1055TL would cut and excavate hard rock while leveling terrain regardless of ground conditions. This representation was in the video produced and distributed by manufacturing which was given to Crush and shown to

Uhlmann in July or August 2002. The representation was repeated orally by Manufacturing representatives to Crush members and Uhlmann during the demonstration period while the T1055TL was used in the Phenix quarry and later during Uhlmann's visit to Manufacturing's headquarters in Pella, Iowa on October 17, 2002 prior to Crush's final payment for the machine. Manufacturing perpetuated this false representation through distribution to its dealers, including Great Plains, of a "Monster Machines" video depicting a Vermeer Terrain Leveler chewing up on a runway at Stapleton Airport. The Terrain Leveler depicted in the video was identified as a T1055TL, when in fact it was the larger, more powerful, T1255TL.

The second representation, made to Uhlmann during his visit to Manufacturing's headquarters, was that even though the T1055TL was having some problems cutting rock when it was used on the hard rock at the Phenix quarry, the T1055TL could be repaired and, if necessary, redesigned so that it could cut and excavate hard rock with no problems. This representation and assurance was repeated on numerous occasions by Manufacturing throughout the period from October 2002 to July 2003 when the T1055TL was subjected to numerous repairs. As demonstrated below, the summary judgment record contains evidence from which a reasonable jury could conclude the representations were false, Manufacturing knew they were false when made, and Crush, whose assets were later transferred to TEAM, and Uhlmann relied on them.[10]

[10] As stated previously, the above-stated elements were the only elements for which

a. Manufacturing's Representations Were False

i. The T1055TL Could Not Cut and Excavate Hard Rock While Leveling Terrain

Uhlmann testified that the T1055TL broke down on three jobs on which it was used. Plaintiff's engineering expert testified that the T1055TL was defective because, among other things, it would not cut hard rock. Documentation of the sordid repair history of the T1055TL shows failure of the T1055TL while being used in normal operation. Forty-four percent of all Vermeer Terrain Levelers were discontinued or "scrapped out" while the norm for off-highway vehicles is one-half percent per year. LF1547-48. This evidence proves that, as designed, the T1055TL could not cut and excavate hard rock without "destroying itself." LF1636. A jury could reasonably conclude from this evidence that Manufacturing's representations were false.

ii. The T1055TL Could Not Be Repaired or Redesigned So That It Could Cut and Excavate Hard Rock

Manufacturing and Great Plains made repeated failed attempts to repair the T1055TL, but the T1055TL was never repaired so it could be used to level terrain and excavate hard rock. The reason was obvious – Manufacturing's design of the T1055TL

Manufacturing argued in the trial court Plaintiffs' evidence was lacking. The summary judgment record contains evidence from which a reasonable jury could find in Plaintiffs' favor on all elements of Plaintiffs' fraud and negligent misrepresentation claims.

was flawed and inadequate for the job it was represented to do. According to Great Plains' work order invoices and warranty claim forms, Manufacturing's research and development on the design of the T1055TL was inadequate. Great Plains' Kevin Brooks testified, "I felt we were being used as the design team for the factory." LF1513. Plaintiff's engineering expert testified that Manufacturing failed to conduct adequate testing on the T1055TL prior to selling it. Essentially, Manufacturing's customers, including Crush, became Manufacturing's field testing laboratory for its "new technology." "New technology" is not a defense to inadequate research, development, and testing. A jury could reasonably conclude from this evidence that Manufacturing's statement that the T1055TL could be repaired or redesigned to cut hard rock was false.

In its summary judgment motion, Manufacturing argued that Plaintiffs could not sustain their fraud claim based on Manufacturing's representation that the T1055TL could be fixed to work in hard rock because it was a statement of future performance. "It is well settled in Missouri, however, that a promise made without the present intention to perform is a misrepresentation sufficient to demonstrate fraud." *Info. Tech., Inc. v. Cybertel Corp.*, 66 S.W.3d 126, 128 (Mo. Ct. App. 2002), *citing Sofka v. Thal*, 662 S.W.2d 502, 507 (Mo. 1983). "A false representation of intention is actionable if the statement is reasonably interpretable as expressing a firm intention and not merely as… 'puffing.'" *Emerick v. Mut. Benefit Life Ins. Co.*, 756 S.W.2d 513, 519 (Mo. 1988), *quoting* 86 C.J.S. Torts § 26 (Supp. 2007) cmt. a, and holding false intention did not apply because the evidence showed only that the party stating the intention "changed its mind" after making the

statement. *Accord Restatement (Second) Torts* § 530 cmt. c ("The rule stated in this Section finds common application when the maker misrepresents his intention to perform an agreement made with the recipient.").

In *Chesus v. Watts* this court held that promises that a real estate development was to be "first class" and "that specific amenities and common areas would be provided" were false because "Watts had total control over whether the inducements he made ever came to fruition." 967 S.W.2d at 112. Manufacturing had control over whether it took steps to fulfill its promises to fix the T1055TL to perform as represented. As in *Watts*, "The success of the project was entirely in [Manufacturing's] hands." *Id*. Therefore, Manufacturing's false statement that the T1055TL could be repaired or redesigned to cut hard rock provides a proper basis for a fraud claim.

b. Manufacturing Knew the Statements Were False At The Time They Were Made Or Made The Statements Without Knowing Whether They Were True or False

i. Manufacturing Either Knew That The T1055TL Would Not Cut Hard Rock Or Did Not Know One Way or Another Whether The T1055TL Would Cut Hard Rock

The summary judgment record contains facts from which a reasonable jury could conclude that Manufacturing knew that the T1055TL, as designed, would not cut hard rock. For example, Manufacturing distributed a misleading video that misrepresented a T1255TL as a T1055TL working on hard concrete at Stapleton Airport. In addition,

Manufacturing distributed this video even though it knew that portions of the concrete at Stapleton Airport were first broken with a "guillotine" machine before the T1255TL was used on it. LF1708.

The larger T1255TL could produce at a rate of only one foot per minute in the hard concrete at Stapleton. LF1707. Manufacturing personnel concluded that the T1255TL was "not feasible to operate" in hard concrete. LF1707. Because Manufacturing was present at the filming of the Stapleton video, the jury could reasonably conclude from Manufacturing's knowledge that the larger T1255TL struggled to cut hard concrete even after it was chopped up with a "guillotine" that Manufacturing knew that the smaller T1055TL could not cut hard rock.

At a minimum, Manufacturing made the representations without knowing one way or another whether the T1055TL could cut hard rock. There is no evidence of testing by Manufacturing during research and development of the T1055TL that would support representing the T1055TL could cut hard rock. Plaintiffs' engineering expert testified that Manufacturing's testing of the T1055TL was inadequate. Great Plains' repair records show that Manufacturing's research and development on the design was inadequate. The jury could reasonably conclude from this evidence that Manufacturing was using Crush as a "guinea pig" to test how the T1055TL would perform in hard rock without knowing one way or another whether, in fact, it would perform.

ii. <u>Manufacturing Either Knew The T1055TL Could Not Be Repaired or Redesigned To Cut Hard Rock Or Did Not Know</u>

One Way Or Another Whether The T1055TL Could Be Repaired To Cut Hard Rock

The repair records of attempts to fix the T1055TL are sufficient for the jury to infer that Manufacturing did not know one way or another whether the T1055TL could be repaired to cut hard rock. Again, Manufacturing's failure to completely perform research and development prior to selling the T1055TL supports this conclusion. Given that the T1055TL's design was inadequate to allow it to cut hard rock, it is reasonable for a jury to conclude that Manufacturing knew that the machine would never cut hard rock no matter what repairs were done, or did not know one way or another whether the machine could be repaired or modified to cut hard rock.

c. Plaintiffs Relied on Manufacturing's False Representations

Manufacturing argued in the trial court that Plaintiffs could not show reliance because, after trying the T1055TL at the Phenix quarry, Plaintiffs cannot be deemed to have relied on Manufacturing's misrepresentations. "The reasonableness of [one's] reliance, [however], 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). Manufacturing argued that Uhlmann cannot show reliance because he made the decision that Crush should purchase the machine based on the recommendation of Jeff Hall. Disputed facts in the summary judgment record, however, show that Uhlmann relied on Manufacturing's false representations.

First, it is undisputed that the Vermeer video stating that the T1055TL would cut hard rock was shown to Crush's Jeff Hall and Gary Watts **before** Crush purchased the machine. In addition, Uhlmann testified that he saw the video in July or August 2002, **before** he decided to make or guarantee loans to Crush for the purchase of the T1055TL. Thus, from a timing standpoint, Plaintiffs can show that Crush and Uhlmann relied on Manufacturing's false representations in making the decision to purchase the machine and loan the money.

In addition, Plaintiffs can show that Crush and Uhlmann relied on Manufacturing's representations that the T1055TL could be repaired or redesigned to cut hard rock because the documentary record shows that they gave Manufacturing every opportunity to do so before demanding a refund of the purchase price. Immediately following Manufacturing's representations in October 2002 that the T1055TL would be repaired, Uhlmann approved and Crush released the final installation on the purchase price.

Based on Manufacturing's representations, Uhlmann understood that the T1055TL would work not just on "scrap rock," but also for quarrying. LF1443, 1446. Relying on Manufacturing's representations about the T1055TL's abilities, Uhlmann personally guaranteed $1,762,000 loaned by The Uhlmann Company to Crush for the purchase of the T1055TL and for Crush to operate the T1055TL in its business. The jury can reasonably conclude from Uhlmann's continued guarantee of substantial loans to Crush from The Uhlmann Company that Uhlmann relied on Manufacturing's continuing representations to fix the T1055TL so that it would cut hard rock.

Crush's use of the T1055TL during the demonstration period in the Phenix quarry does not absolve Manufacturing from liability for fraud. During the demonstration period, Crush noticed that the T1055TL did not perform acceptably in excavating hard rock. Specifically the quality of the crushed rock was not as good as Crush desired. Uhlmann told Manufacturing about that problem during his meeting in Pella, Iowa. In addition, Uhlmann refused to approve final payment until Manufacturing promised and assured him that all problems would be corrected. The T1055TL did not, however, completely break down, deform and "destroy itself" during the demonstration period in the Phenix quarry as it did upon later use in other jobs. Thus, Plaintiffs cannot, based on the limited use of the T1055TL during the demonstration period, be charged with knowing of the design deficiencies which later manifested.

Manufacturing relied on *Brown v. Bennett*, 136 S.W.3d 552, 556 (Mo. Ct. App. 2004), for the proposition that a party who undertakes an independent investigation does not have the right to rely on the misrepresentation of another. But the exceptions expressly set forth by the *Brown* court govern here:

> [T]here are three exceptions to this rule: (1) the investigating party makes only a partial investigation and relies upon both the results of the inspection and the misrepresentation; (2) the buyer lacks equal footing for learning the truth and the facts are not easily ascertainable, but peculiarly within the knowledge of the seller; and (3) the seller makes a specific and distinct misrepresentation.

Id. All three exceptions apply in this case, and any one of them precludes summary judgment.

First, Plaintiffs tested the T1055TL only in the Phenix quarry before purchase. The T1055TL was purchased with the expectation that it would be used for projects at a number of different locations. Plaintiffs relied on Manufacturing's representations regarding the T1055TL's capabilities in other environments, such as the video and brochure and website representations about road reconstruction. Plaintiffs' limited testing of the T1055TL in the Phenix quarry is no legal bar to reliance where that testing was limited in scope and Manufacturing affirmatively represented they would repair the problems that arose through that testing.

Second, Uhlmann and Crush lacked equal footing with Manufacturing and Great Plains for learning about how the T1055TL would perform **over time** while excavating hard rock. For example, Manufacturing knew that despite the video depicting success in excavating hard concrete at Stapleton Airport, the Terrain Leveler, in fact, was "not feasible to operate" in hard concrete. Manufacturing knew that portions of the concrete at Stapleton Airport were first broken with a "guillotine" machine before the Terrain Leveler was driven over it, LF1708, and that the contractor at Stapleton Airport refused to purchase the Terrain Leveler because of its failure to perform. Uhlmann and Crush knew none of those facts and thus relied on the truth of Manufacturing's representations.

Finally, under the third exception recognized in *Brown*, Manufacturing made specific representations to Uhlmann and Crush about the capabilities of the T1055TL,

distinct from the testing at the Phenix quarry and the video. Manufacturing stated that the T1055TL provides production rates equal to blasting, stating its Terrain Levelers are "just as productive (or more so) than traditional mining processes… without all of the associated costs, restrictions, extra support equipment and labor requirements." LF1718. Manufacturing promised that the T1055TL "can perform site preparation/excavation, mine material, stabilize contaminated soil, remove roads, crush rock, crush concrete, perform reclaiming and more." LF1720. Manufacturing's video advertised that the T1055TL was useful for "soil mixing and remediation, rock excavation, concrete removal, and road construction applications." LF1503. It promised that the "tilting cutter drum… allow[s] the leveler to take on jobs that were not possible before—***regardless of ground conditions***." LF1716 (emphasis added). These representations are specific and distinct from the testing Crush did at the Phenix quarry. Accordingly, Plaintiffs presented sufficient evidence from which the jury could conclude that Plaintiffs can show reliance.

3. <u>Negligent Misrepresentation</u>

The same facts showing falsehood and reliance on fraud apply equally to Plaintiffs' negligent misrepresentation claims. In addition to their outright falsehoods, Manufacturing distributed its video without making "any effort to determine whether there were any inaccuracies in the video." LF1726. Manufacturing represented that the T1055TL would excavate hard rock without undertaking sufficient testing and other research and development to have any reasonable basis for making such representation.

The same is true with respect to Manufacturing's representation that the T1055TL could be redesigned to perform as had been previously represented.

Manufacturing also argued in the trial court that negligent misrepresentation does not lie here because the misrepresentations were not related to "a particular transaction." Manufacturing argued that the "only business transaction that transpired between Vermeer [Manufacturing] and any other party with respect to the T1055 was the sale of the machine to Great Plains." LF0074.[11] Privity, however, is not required to establish a negligent misrepresentation claim. *Miller v. Big River Concrete, LLC*, 14 S.W.3d 129, 134 (Mo. Ct. App. 2000). In *Miller*, the Court of Appeals applied a factor test to conclude that lack of privity between plaintiffs and defendants did not bar liability, because defendants "knew the [representations] would be relied on by Plaintiffs and could foresee the harm to plaintiffs." *Id.* As in *Miller*, Manufacturing knew that Plaintiffs were relying on the repeated promises, including those made at Manufacturing's headquarters before the final payment for the T1055TL, that the T1055TL could excavate hard rock and, if not, would

[11] Manufacturing also argued that its misrepresentations post-date the sale of the T1055TL. That contention is refuted by the record. In the most obvious example, Crush employees and Uhlmann relied *before the sale* on the video that was produced and distributed by Manufacturing. LF0130; LF1438; LF1465; LF1824. Additionally, Manufacturing's post-sale misrepresentations are another basis of Plaintiffs' misrepresentation claims.

be fixed and redesigned to do so. Prior to making the final payment, during Uhlmann's visit to Manufacturing's headquarters he was assured that the T1055TL could and would be repaired to reliably function as promised. LF1319 ¶ 17; LF1449-50. As in *Miller*, it is sufficient that Manufacturing benefitted financially from the sale of the T1055TL.

4. <u>The Economic Loss Doctrine Does Not Bar Plaintiffs' Claims</u>

Manufacturing sought summary judgment on Plaintiffs' misrepresentation claims on the basis that those claims are barred by the economic loss doctrine. The economic loss rule exists to bar converting contract suits into negligence or strict tort liability suits. Intentional torts, as opposed to negligence, are not subject to the economic loss doctrine: "exceptions to the economic loss rule exist for professional malpractice, fraudulent inducement, freestanding statutory causes of action, *intentional tort claims such as fraud*, conversion, intentional interference, civil theft, abuse of process, and other torts requiring proof of intent." 86 C.J.S. Torts § 26 (Supp. 2007) (citing cases). "The rule does not apply… where a tort independent of a breach of contract was committed." *Id*. "One who, in the course of his business, profession or employment,… supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." *Restatement (Second) of Torts* § 552(1) (1977). As the United States District Court for the Western District of Missouri correctly noted, "claims for fraud are an exception to the

economic loss doctrine." *Curt Ogden Equipment Co. v. Murphy Leasing Co.*, 895 S.W.2d 604 (Mo. Ct. App. 1995)

Thus the economic loss rule applies to bar a plaintiff from relying on negligence or strict tort liability to recover losses that are purely contractual in nature. The cases Defendants cited on summary judgment illustrate the point: *Sharp Bros. Contracting Co. v. Am. Hoist & Derrick Co.*, 703 S.W.2d 901, 903 (Mo. 1986) (applying economic loss rule to bar claim for strict tort liability); *Lois M. Crowder v. Arthur Vandendeale*, 564 S.W.2d 879, 884 (Mo. 1978) (applying economic loss rule to bar claim for negligent housing construction); *Wilbur Waggoner Equip. & Excavating Co. v. Clark Equip. Co.*, 668 S.W.2d 601, 601-02 (Mo. Ct. App. 1984) (applying economic loss rule to bar claim for negligent design); *Murphy*, 2005 WL 1421789 at *2-3 (denying summary judgment for defendants on misrepresentation claims, because misrepresentation is an exception to economic loss rule).

Plaintiffs claim damages for fraud and negligent misrepresentation, two of the well recognized exceptions to the economic loss doctrine. *See* 86 C.J.S. Torts § 26 (Supp. 2007) (citing cases). Pecuniary loss in a business transaction is an element of a negligent misrepresentation claim. *Hartford Accident and Indemnity Company v. Contico International, Inc.*, 901 S.W.2d 210, 212 (Mo. Ct. App. 1995). Accepting Defendants' argument would permit commercial sellers of goods or services to commit fraud and negligent misrepresentations with impunity simply because they can point to a contract relating to those goods or services. On the contrary, Missouri's adoption of the U.C.C.

expressly contemplates the coexistence of fraud and breach of contract claims: "Remedies for material misrepresentation or fraud include all remedies available under this article for nonfraudulent breach." Mo. Rev. Stat. § 400.2-721 (1994); *accord Carpenter v. Chrysler Corp.*, 853 S.W.2d 346, 359 (Mo. Ct. App. 1993) ("The same evidence deemed sufficient to support the Carpenters' claim for breach of express warranty also supports their claim for fraudulent misrepresentation"). Defendants' attempt to stretch the economic loss rule beyond its recognized limits is unsupported by Missouri law and should be rejected.

III. Alternatively, the trial court erred in granting Defendants' costs and denying Plaintiffs' motions to review Defendants' costs because those rulings violated Rule 57.03 in that Rule 57.03 precludes recovery of videography expenses and Manufacturing subsequently filed an amended Bill of Costs abandoning the videography expenses.

A. Standard of Review

This court reviews the grant of costs *de novo*. *In re: J.P.*, 947 S.W.2d 442, 444 (Mo. Ct. App. 1997) ("The concept of costs is a creature of statute…. Courts have no inherent power to make an award of costs.").

B. Costs

No costs may be recovered except those that are expressly allowed by statute, and "[t]he statutes allowing for costs are to be strictly construed. Unless it is specifically authorized by statute or by agreement of the parties, an item is not taxable as a cost." *In re: J.P.*, 947 S.W.2d 442, 444 (Mo. Ct. App. 1997). "Courts have no inherent power to make an award of costs." *Id.* In its Motion for Costs, Manufacturing improperly sought

videography fees of $10,022.20 (LF2176). Great Plains likewise improperly included $712.40 in videography fees in its bill of costs. Rule 57.03(c)(6) provides, "Unless otherwise stipulated to by the parties, the expense of video taping is to be borne by the party utilizing it and shall not be taxed as costs." No such stipulation between the parties exists, and Defendants must bear their own videography expenses. Respondents conceded this point in their brief filed with the Court of Appeals, and the Court of Appeals granted this single point of Appellants' appeal.

Conclusion

Plaintiffs request that this court grant points I and II by reversing and vacating the judgment of the trial court, including the trial court's award of costs to Defendants, and remand this case for further proceedings. Alternatively, if this court denies points I and II, then Plaintiffs request this court grant Point III, and reverse and vacate the trial court's rulings awarding costs to the Defendants.

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 PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served by hand delivery this 11th day of December, 2009, 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 14,769 words, as counted by Corel WordPerfect. 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 Corel WordPerfect format.

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Attorney for Appellants