Case No. SC90258

IN THE SUPREME COURT OF MISSOURI

RENAISSANCE LEASING LLC, et al.,

Plaintiffs/Appellants.

vs.

VEMEER MANUFACTURING COMPANY and VEMEER GREAT PLAINS, INC.,

Defendants/Respondents,

RESPONDENT VERMEER GREAT PLAINS, INC.'S SUBSTITUTE BRIEF

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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, Division 9, the Honorable Kelly Moorhouse presiding. Legal File ("LF") 0239. Appellants timely 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

Appellants filed their Petition in this action on August 7, 2006. LF0008. In their Petition, Appellants allege six (6) causes of action against the Respondents, four (4) of which are directed towards Vermeer Great Plains, Inc. ("Great Plains"). LF0018.

Vermeer is a heavy equipment manufacturing company. LF0009. Great Plains is a franchise dealer of Vermeer's construction equipment in Kansas and Missouri. LF0874. In 2002, Jeffrey Hall ("Hall") was President of a company called Crush Tech, L.L.C. ("Crush"). LF0255. Crush was formed by Hall with its initial members being Sylvester Holmes, Gary Watts, Terry Watts, Jeffrey Hall and Ben Childress. LF0890; LF0263. After Crush was formed, Gary Watts ("Watts") acted as Crush's Project Manager. LF0362; LF0448.

Crush was started with the thought of making aggregate for cement from the Phenix Quarry. LF0340. The business plan of Crush also included plans to "expand its current opportunity with Phenix rock quarry in Greene County, Missouri, and to excavate

and produce premium native Missourian limestone products." LF0448. According to Crush's business plan, the Phenix Quarry was "an extremely unique piece of property." LF0448; LF0260. The rock at the Phenix Quarry had 99.03% calcium carbonite which qualified it for use in pharmaceutical and food processing. LF0341. In years past, since the mid 1800's while the quarry was in operation, a stock pile of "overburden" or scrap rock was built up, becoming quite large over time to approximately 400 x 800 feet and forty (40) feet high. LF0368; LF0369. The overburden rock had several uses, including using it as an aggregate in cement. LF0340.

The aggregate from the Phenix Quarry was tested by Maxim Technologies, Inc., and its properties exceeded Standards specifications for concrete, Portland cement and other class designations under specific ASTM and AASHTO standards. LF0981-LF1013. Mr. Watts believed that crushed rock sold at an average of $7.00 a ton, but that the rock from the Phenix Quarry could be sold for up to $500.00 a ton. LF0341.

POINTS RELIED ON

I. RESPONSE TO APPLLANTS' POINT I: THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON APPELLANTS' CLAIMS BECAUSE THE UNDISPUTED FACTS SHOW THAT GREAT PLAINS IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

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

Groppel Co., Inc. v. U.S. Gypsum Co., 616 SW2d. 49 (Mo. App. E.D. 1981)

McCracken v. Wal-Mart Stores East, L.P., No. SC900050, 2009 WL 3444894 (Mo. Oct. 27 2009)

State v. Pullis, 579 SW2d 395 (Mo. App. S.D. 1979)

RSMo 400.2-314

RSMo 400.2-316

MAI 25.08 [1980 New] (6th ed. 2002).

II. RESPONSE TO APPELLANTS' POINT II: THE TRIAL COURT DID NOT ERR IN GRANTING MANUFACTURING'S SUMMARY JUDGMENT ON APPELLANTS' MISREPRESENTATION CLAIMS BECAUSE THE UNDISPUTED FACTS SHOW THAT MANUFACTURING IS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT PLAINTIFF UHLMANN HAS NO STANDING TO ASSERT SUCH CLAIMS, APPELLANTS CANNOT ESTABLISH ESSENTIAL ELEMENTS OF THE CLAIMS, AND THE ECONOMIC LOSS DOCTRINE BARS THE CLAIMS

III. RESPONSE TO APPELLANTS' POINT III: THE TRIAL COURT DID ERR IN DENYING APPELLANTS' MOTION TO REVIEW MANUFACTURING'S COSTS BECAUSE RULE 57.03 PRECLUDES RECOVERY OF VIDEOGRAPHY EXPENSES

ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON APPELLANTS' CLAIMS BECAUSE THE UNDISPUTED FACTS SHOW THAT GREAT PLAINS IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

A. Standard of Review

This court reviews the grant of summary judgment *de novo*, and the record is viewed in the light most favorable to the party against which judgment was entered, giving the non-moving party the benefit of all reasonable inferences from the record. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp*., 854 S.W.2d 371, 376-78 (Mo. banc 1993); *American Standard Ins. Co. v. Hargrave*, 34 S.W.3d 88, 92 (Mo. banc 2000). Summary judgment will be upheld if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *ITT Commercial*, 854 S.W.2d at 377. *See* Rule 74.04(c), Mo. R. Civ. P. "An order of summary judgment will not be set aside on review if supportable on any theory." *Zafft v. Eli Lilly & Co*., 676 S.W. 2d 241, 243-44 (Mo. banc 1984). "If the trial court's grant of summary judgment can be sustained on any theory as a matter of law, we cannot reverse." *Moran v. Kessler*, 41 S.W. 3d 530, 537 (Mo. App. 2001) (*footnote citing supporting authority omitted*). The trial court's decision, if correct, will not be disturbed on appeal because the trial court gave wrong or insufficient reasons for the decision. *See Robinson v. Health*

Midwest Development Group, 58 S.W. 3d 519, 523 (Mo. banc 2001) (*citing Hargrave*, 34 S.W.3d at 92) (decision granting summary judgment was correct even though based on different reasoning).

B. Renaissance and TEAM lack standing

Standing is a jurisdictional matter antecedent to the right to relief. *State ex rel. Williams v. Marsh*, 626 S.W.2d 223, 227, n. 6 (Mo. banc 1982). It asks whether the persons seeking relief have a right to do so. *State ex rel. Twenty-Second Judicial Circuit v. Jones*, 823 S.W.2d 471, 475 (Mo. banc 1992). Where, as here, a question is raised about parties' standing, courts have a duty to determine the question before reaching substantive issues, for if the parties lacks standing, the court must dismiss the case. *Chipman v. Counts*, 104 S.W.3d 441, 445 (Mo. App. S.D. 2003). Lack of standing cannot be waived. *Foreclosure for Delinquent Land Taxes by Action in REM*, 947 S.W.2d 90, 93 (Mo. App.1997).

Appellants assert that the Court of Appeals incorrectly addressed the "standing argument" as a matter of subject matter jurisdiction. (App. Subst. Brief at 19). Appellants cite several recent cases in which this Court has vacated decisions from the Court of Appeals because the lower Court wrongly determined that the trial court lacked subject matter jurisdiction in the first instance. The cases cited by Appellants are readily distinguished because, in this case, standing is a pre-requisite to subject matter jurisdiction. Ultimately, even if the Court of Appeals erred in holding that the circuit court lacked subject matter jurisdiction, Appellants still lack standing in any event.

Stated differently, if the circuit court did not lack subject matter jurisdiction due to Appellants lack of standing, that same circuit court could not "entertain" Appellants' claims because they seek relief without having a legally cognizable interest. *White v. White,* 293 S.W.3d 1, 8 (Mo. App. W.D. 2009).

As a preliminary matter, this Respondent appreciates the confusion surrounding subject matter jurisdiction, as evident by recent Supreme Court decisions admonishing lower courts for their failure to appreciate the broad authority granted by the Missouri State Constitution for subject matter jurisdiction. Although this area of the law can be somewhat nebulous when a party fails to satisfy a statutory prerequisite to filing suit, in this case, the Western District Court of Appeals correctly determined the issue of standing. Even if the Western District is technically incorrect when it states the circuit court lacked subject matter jurisdiction, that finding does not change the fact that Appellants in this case lack standing to file suit. Neither Uhlmann, TEAM, or Renaissance are aggrieved parties.

Turning to the cases cited by Appellants, in *J.C.W. v. Wyciskalla,* 275 S.W.3d 249 (Mo. banc 2009), this Court emphasized the "courts of this state should confine their discussions of circuit court jurisdiction to constitutionally recognized doctrines of personal and subject matter jurisdiction; there is not third category of jurisdiction cased 'jurisdictional competence.'" *Id.* This Court vacated the judgment of the circuit court and remanded for a new hearing for determining the evidence regarding what, if anything, father owed in arrearage at the time he filed his motion to modify, which in turn would assist the trial court to determine whether RSMo 425.455.4 applied. *Id.* at 258.

Unlike the Court of Appeals in *J.C.W.*, here, the Court did not rule that a party failed to meet some statutory prerequisite that would divest the circuit court of subject matter jurisdiction. On the contrary, the Court in the instant action examined the evidence and granted summary judgment because the would-be "Plaintiffs" lacked standing in the first place.

A few key procedural points bear emphasis. First, both Respondent Great Plains and Manufacturing raised the affirmative defense that Appellants lacked standing in their respective Answers to Plaintiffs' Petition for Damages. Second, both Respondents asserted, in their respective motions for summary judgment, that Appellants lacked standing. LF0042; LF0084. Third, Judge Moorhouse agreed with both Respondents' motions for summary judgment—albeit in a rather short opinion. LF0237; LF0238. Fourth, the Court of Appeals "upheld" Judge Moorhouse's dispositive decision in light of the fact that Appellants lacked standing. In light of the fact that Respondents repeatedly argued that Appellants lacked standing to advance this case in the first instance, it should come as no surprise to Appellants that the circuit court and the Court of Appeals agreed.

This Respondent suspects that the following sentence from the Court of Appeals' decision is the source of Appellants' concern: "This court treats the judgment as one for the grant of a motion to dismiss for lack of subject matter jurisdiction." (Slip opinion, p. 7). The Court of Appeals merely sought to clarify that despite the summary judgment motions plead by both Respondents, ultimately, Appellants' claims were rendered moot because they lack standing. Because Appellants lack standing, the Court of Appeals was correct that dismissal was appropriate.

Unlike *J.C.W.,* where the Court of Appeals determined the case without sufficient evidence to determine the application of the statute at issue, by contrast, here, the Court of Appeals analyzed the *merits* of the standing. Whereas a technicality, i.e. non-compliance with a statutory bond, purportedly divested subject matter jurisdiction from the circuit court in *J.C.W.,* here, there was no such contingency or technicality that played any role whatsoever in the analysis of subject matter jurisdiction. On the contrary, the Appellants simply lack standing to bring suit.

Appellants also cite *State ex rel. State of Missouri v. Parkinson,* 280 S.W.3d 70 (Mo. 2009) in their argument that the Court of Appeals incorrectly addressed the standing argument as a matter of subject matter jurisdiction. *Parkinson* discusses how technical non-compliance with a statutory requirement does not negate subject matter jurisdiction. In short, the State failed to follow the proper statutory procedure because a psychologist who prepared a report regarding an inmate was not licensed in the state of Missouri at the time he authored the report. *Id.* at 74. The trial court determined that it was deprived of jurisdiction to proceed because the licensing issue violated RSMo 632.483. *Id.* at 72. This Court held error in allowing a psychologist to issue a report before he received his Missouri license was just that, an error, explaining that the error did not divest the circuit court of subject matter jurisdiction. *Id.* at 75.

Unlike *Parkinson,* here, there was no perceived or real "error" that played any role in determining whether the circuit court possessed jurisdiction to consider the Appellants claims. On the contrary, the Appellants simply lack standing; therefore, the trial court

properly granted summary judgment, and the Court of Appeals decision upheld that determination. *Parkinson* has little or no bearing on this case.

Appellants next cite *McCracken v. Wal-Mart Stores East, L.P.*, No. SC900050, 2009 WL 3444894 (Mo. Oct. 27, 2009). In that case, Wal-Mart raised on the day of trial the statutory employer defense and asserted that the court thereby lacked subject matter jurisdiction. The trial court granted Wal-Mart's motion to dismiss, and the Court of Appeals affirmed the trial court's decision. This Court accepted transfer, and ultimately reversed and remanded finding:

> As this Court recently has had occasion to clarify in *J.C.W. v. Wyciskalla*, 275 S.W.3d 249, 254 (Mo. banc 2009) and *State ex rel. State of Missouri v. Parkinson*, 280 S.W.3d 70 (Mo. 2009), to the extent that some cases have held that a court has no jurisdiction to determine a matter over which it has subject matter and personal jurisdiction, those cases have confused the concept of a circuit court's jurisdiction—a matter determined under Missouri's constitution—with the separate issue of the circuit court's *statutory* or *common law* authority to grant relief in a particular case. (italics in original) *Id.* at 3.

This Court cautioned, however, that the mere existence of the circuit court's subject matter jurisdiction did not necessarily mean that Mr. McCracken "has an undefeatable right to have his claim determined in circuit court just because he chose to file it there in the first instance[.]" *Id.* On the contrary, this Court emphasized that whether McCracken was a statutory employee, whose remedy was limited to workers'

compensation benefits, was an issue that should be raised as an affirmative defense to the circuit court's *statutory authority to proceed*. *Id.*

In *McCracken*, this Court emphasized the need to raise affirmative defenses that may impact the court's ability to hear a case. In this case, Respondents both raised affirmative defenses stating that Appellants lacked standing to file suit, and filed dispositive motions reiterating Appellants' lack of standing. The circuit court granted summary judgment because Appellants lacked standing—not because Appellants were divested of jurisdiction based on a statute (or non-compliance with a statute). In other words, Judge Moorhouse (and the Court of Appeals) correctly determined that the Plaintiffs lacked standing.

Appellants also cite *State ex rel. Unnerstall v. Berkemeyer*, No. SC89982, 2009 WL 3833437 (Mo. Nov. 17, 2009). In that case, a widow filed a petition with the probate division of the circuit court one year after her husband's death, asserting her husband's assets were subject to probate as though he died without a will because his will was not presented within one year as required by Missouri statute. *Id.* Despite the fact the will was not presented within one year, the judge entered an order and judgment admitting the will to probate. *Id.* The widow petitioned for a writ of mandamus to require the probate judge to vacate orders and declare that her husband had died intestate.

While this Court ultimately agreed with Mrs. Unnerstall, it rejected her initial argument that the circuit court did not have subject matter jurisdiction to accept or reject the purported will to probate because more than one year had elapsed since her husband's death. *Id.* at 3. As in *J.C.W* and *McCracken*, this Court emphasized that the *Unnerstall*

circuit court possessed subject matter jurisdiction to admit or reject a will to probate. *Id.* That said, this Court also noted the issue of whether the probate division of the circuit court was correct in admitting the purported will under RSMo 473.050 was an entirely different matter. *Id.* Ultimately, this Court agreed with Mrs. Unerstall, but not because the circuit court lacked subject matter jurisdiction. *Unnerstall* does not assist Appellants.

Contrary to Appellants' assertions, Appellants' lack of standing is not enhanced by the existence or non-existence of subject matter jurisdiction by the circuit court. Stated differently, even if the Court of Appeals incorrectly ruled the circuit court lacked subject matter because the Appellants lacked standing, at the end of the day, the Appellants still lack standing—and summary judgment was appropriate.

None of the subject matter analysis in *J.C.W, Parkinson, McCracken,* or *Unnerstall* pertained to standing. Those cases involved issues questioning the circuit court's subject matter jurisdiction to hear and rule upon a controversy as a result of some failure to comply with a statute. Technical compliance with a statute is a far cry from whether a person seeking relief has standing in the first instance. Standing is a *jurisdictional matter antecedent* to the right to relief. *Farmer v. Kinder*, 89 S.W.2d 447, 451 (Mo. banc. 2002) (emphasis added). In fact, in *Kinder*, this Court clarified that "[b]efore we can address the merits of these claims, however, we must determine whether the treasurer has standing to make them." *Id. Kinder* remains good law in Missouri.

Here, although Judge Moorhouse's order granting summary judgment did not specifically state that Appellants' lacked standing, Appellants' lack of standing is sufficient for granting summary judgment. Regardless of whether it is couched as an

order granting summary judgment, or, an order properly dismissing the case, Judge Moorhouse's order disposed of Appellants' claims. Contrary to Appellants' assertions that the Court of Appeals erred by analyzing subject matter jurisdiction, under *Kinder*, the Court of Appeals had a "duty" to determine whether Appellants possessed standing before addressing the merits of the claim. *Id.* at 451.

In summary, this Court should affirm the Court of Appeals' decision because the Court of Appeals correctly determined Appellants lacked standing. Simply stated, none of the Appellants owned the T1055 at the requisite time to be an aggrieved party in the first instance. Appellants cannot circumvent that fact. With the vast amount of maneuvering and transferring of assets etc., the Western District of the Court of Appeals recognized Appellants' shell game and properly found each plaintiff is a unique entity. Just because John Uhlmann was the sole member of a company does not result in an "identity of interests between the two entities." (Slip opinion, p. 5).

Scrutiny of the facts bolsters the Court of Appeals' ruling that Appellants lacked standing. Great Plains refers this Court to Respondent Manufacturing's Substitute Brief in response to Renaissance and TEAM's arguments that they are proper parties with standing. Appellants strain mightily to cobble together a far-reaching and nebulous hypothesis as to how they supposedly owned the 1055. However, as the Court of Appeals (and trial court) correctly determined, Appellants' assertions are without merit because the evidence of ownership simply does not exist. Even Uhlmann himself did not know how Renaissance came to own the 1055 and did not produce any evidence or documentation reflecting that purported transaction. LF0291-LF0292. The non-

existence of said "ownership" evidence leaves no genuine issue of material fact, because Appellants simply lack standing to assert their claims.

Conspicuous by its absence, Appellants fail to cite a case establishing that a business entity has standing to file suit for a product that was neither purchased, nor owned, by it. Appellants do cite *State v. Pullis*, 579 S.W.2d 395 (Mo. App. S.D. 1979) to support the proposition that a bill of sale is not required to prove ownership. Importantly, however, *Pullis* involved a criminal defendant who stole another person's property. The standard for establishing ownership in a *criminal larceny* case is obviously a far cry from the type of proof of ownership needed to establish standing in a civil action—especially when the entity that purchased the 1055, (i.e., Crush) is not a party to that civil action. Indeed, in prosecutions for larceny, mere proof of possession is sufficient as to ownership. 579 S.W.2d. at 399. Appellants may arguably have standing to sue if the 1055 had been *stolen*; however, for the purpose of this civil case, Appellants' inability to establish ownership is fatal.

In *Midwestern Health Management v. Walker*, 208 S.W.3d 295 (Mo. App. W.D. 2006), the Court clarified that standing to sue exists when a party has an interest in the subject matter of the suit that gives it a right to recovery, *if validated*. However, in *Midwestern Health Management*, the Plaintiff failed to establish that it was the assignee of the unpaid medical accounts for the defendant's treatment. *Id.* at 298. In view of the lack of evidence to establish that Plaintiff was the assignee of the medical accounts, the Court held Plaintiff lacked standing. *Id.* at 299. Similarly, in this case, Appellants do not explain—nor produce any convincing evidence to show—how Appellants attained an

ownership interest of the 1055 to establish standing; accordingly, failing in this burden, there is no genuine issue of material fact and summary judgment is appropriate.

C. Great Plains' Implied Warranties

1. There is no valid, enforceable contract between Great Plains and Renaissance and/or TEAM

Appellants commingle arguments relating to their breach of contract and implied warranties claim—probably to deflect from the glaring absence of a contract with Great Plains. Essentially, Appellants assert that the implied warranty claims asserted by Renaissance and/or TEAM arise out of Great Plains' contract with Crush. (App. Subst. Brief at 35). A defendant who has contracted with another owes no duty to a plaintiff who is not a party to the contract. *Fleischer v. Hellmuth, Obata & Kassabaum, Inc.*, 870 S.W.2d 832, 834 (Mo. App. E.D. 1993). This general rule of privity is designed to protect contractual parties from exposure to unlimited liability and to prevent burdening the parties with obligations they have not voluntarily assumed. *Westerhold v. Carroll*, 419 S.W.2d 73, 77 (Mo. 1976). Great Plains dealt with, and, ultimately sold the 1055 to Crush. Great Plains had no interaction with Renaissance or TEAM; in fact, neither Appellant legally existed at the time of the sale. Therefore, Great Plains could not breach a contract with entities that did not exist and did not contract with for the sale of the 1055.

Great Plains had no contractual relationship whatsoever with either Appellant in this action; accordingly, Appellants are prohibited from asserting alleged breaches of

contract against Great Plains. Because the Appellants were not parties to the purchase of the 1055, and because no contractual relationship exists between Great Plains and Appellants, Appellants do not have any contractual rights in this matter, nor does Great Plains have any contractual obligations towards the Appellants.

The different roles parties play in a sales transaction, along with their associated rights and obligations, were discussed in *Moore Equip. Co. v. Halferty*, 980 S.W.2d 578 (Mo. App. 1998):

> Section 400.1-201(33) defines a "purchaser" as "a person who takes by purchase." Section 400.1-201(32) defines "purchase" as "includ[ing] taking by sale. . . or other voluntary transaction creating an interest in property." Section 400.2-106(1) tells us that "a 'sale' consists in the passing of title from the seller to the buyer for a price." Section 400.2-103(1)(a) defines a "buyer" as "a person who buys or contracts to buy goods." Section 400.1-201(11) defines a contract as "the total legal obligation which results from the parties' agreement as affected by this chapter and any other applicable rules of law." It follows that a "purchaser" is a person who is a party to a contract for sale and who agrees under the contract to buy certain goods.

Moore Equip. 980 S.W.2d at 583. Clearly, as the evidence presented in this case demonstrates, Appellants were neither purchasers nor buyers of the pertinent 1055. Because they lack the necessary involvement to assert they have rights under the sales contract, and because they lack the status necessary to assert Great Plains owes any

obligation(s) towards them, there are no genuine issues of material fact on Appellants' breach of contract cause of action. Summary judgment in favor of Great Plains was appropriate.

2. Implied Warranties were disclaimed by Great Plains

Appellants rely on RSMo 400.2-314(1) to assert that warranties for merchantability and fitness for a particular purpose were implied in the sale of the 1055 by Great Plains "absent an express disclaimer." (App. Subst. Brief at 36) Importantly, however, RSMo 400.2-314(1) states that the warranty that goods are merchantable is implied in the contract "unless excluded or modified (section 400.2-316)." RSMo 400.2-316(2) allows the exclusion of implied warranties of merchantability if the writing disclaiming said warranties is conspicuous. Here, the writing disclaiming any warranties for merchantability or fitness for a particular purpose was conspicuous in that it was in bold all-caps print on the Limited Warranty. LF0634. Accordingly, contrary to Appellants' assertions, under RSMo 400.2-316(2), Great Plains may, and did, disclaim the warranties of merchantability and fitness for a particular purpose via the conspicuous language on the Limited Warranty.

Additionally, under RSMo 400.2-316(3)(b), when the buyer has examined the goods or model as fully as desired, there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him. Here, as discussed below, Crush demonstrated and "tested" the 1055 for over two (2) months at the Phenix Quarry. LF0366; LF1018. Crush tested the 1055 on different locations

around the quarry, including the overburden rock, the spoils in the pit and the hard rock floor of the quarry and knew the 1055's capabilities and limitations. Watts testified that the 1055 performed well at various locations around the quarry, with the exception of the quarry floor, where the rock was extremely hard. LF0367; LF0404. Watts believed the 1055 did exactly what he wanted it to do. LF0410. Accordingly, in view of Crush's examination and observations of the 1055's capabilities, the buyer (Crush) fully understood what it purchased and a non-party to the purchase cannot now claim a breach of warranty under RSMo 400.2-316(3)(b).

Appellants cite *Morrow v. Caloric Appliance Corporation*, 372 S.W.2d 41, 55 (Mo. banc. 1963), *Ragland Mills Inc. v. General Motors Corp.*, 763 S.W.2d 357 (Mo. App. S.D. 1989) and *Groppel Co., Inc. v. U.S. Gypsum Co.*, 616 SW2d. 49 (Mo. App. E.D. 1981), to support their proposition that implied warranties are not limited to the original purchaser in privity with the seller, however, these cases pertain to an individual plaintiff's suit against the *manufacturer* of a product—not the seller. Indeed, in the chain of commerce, if a consumer alleges complaints with regard to a product, Missouri Courts have explained that a consumer need not have privity of contract with the manufacturer for implied warranties; however, this rationale does not apply to this case against Great Plains.

These cases cited by Appellants clarify that a remote consumer may sue a *manufacturer* for breach of warranty in the absence of contractual privity; however, they do not directly address standing for a party to assert a breach of warranty claim against the retailer—especially as in this case where the seller, i.e., Great Plains, had absolutely

no relationship with either Appellant. Nor do these cases address the situation where the original purchaser spent over two (2) months demonstrating the product to ensure it met their particular needs for their application. Crush, the purchaser, examined the 1055 and undertook those efforts it deemed necessary to ensure the 1055 would meet its needs. Appellants should not be allowed the ability to now assert additional claims for obligations for which Great Plains did not agree.

3. Great Plains did not breach an Implied Warranty of Merchantibility.

Assuming, for the purpose of argument, that Appellants have standing to assert a breach of implied warranty claim, Great Plains nevertheless did not breach any implied warranties because the 1055 was fit for its ordinary purpose. To establish a breach of implied warranty of merchantability, Appellants 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 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, and (5) as a direct result of such product being unfit for such purpose, plaintiff was damaged. MAI 25.08 [1980 New] (6th ed. 2002).

Because Appellants cannot satisfy several of these elements, there are no genuine issues of material fact to disturb summary judgment. Although Great Plains did sell the 1055 to Crush, the record overwhelmingly establishes that the 1055 was fit for the purpose which Crush intended, which was to quarry rock at the Phenix Quarry. In fact, Crush was started with the concept for making aggregate from the Phenix Quarry in Southern Missouri. LF0340. Crush's business plan included plans to "expand its current

opportunity with the Phenix rock quarry in Green County, Missouri, and to excavate and produce premium native Missourian limestone products." LF0448. Crush tested the 1055 at the Phenix Quarry for two (2) months before its representatives decided to purchase the 1055. LF0366; LF1018. A demonstration period is typically required with large equipment like the 1055 so the customer can determine if the machine is going to work for their needs. LF1019-LF1020. Watts testified that the 1055 did exactly what he wanted it to do. LF0410.

When Crush was formed, Gary Watts was not only a member, but was also Crush's Project Manager. LF0362; LF0448. Watts was instrumental in bringing the 1055 to the Phenix Quarry and oversaw its operation during the demonstration period. Watts recalls that the 1055 performed well at various locations around the quarry, with the exception of the quarry floor, where the rock was extremely hard. LF0367; LF0404. In other words, Crush's manager, Watts, observed and possessed an understanding of what the 1055 could do, as well as its limitations.

Ultimately, when it came time to purchase the 1055, Watts told the other members of Crush that he thought it was a good machine. LF0371. The represented intended purpose of the 1055 was to make aggregate; accordingly, Crush purchased the 1055 after testing it for several months. LF0362. Ultimately, even the sales invoice from Great Plains confirms the intended purpose of the 1055, as it states: "**Quarry Operation**, sales tax does not apply." (emphasis added). LF1021. No sales tax on the purchase price of $670,000.00 was charged because Crush had purchased the 1055 to quarry rock at the Phenix Quarry and as such, was exempt from sales tax. LF1021. Kevin Thomas,

President of TEAM, confirmed that a piece of equipment used in a quarry application would not be subject to sales tax; but, if it is used for a purpose other than a quarry there would be sales tax. LF0782. Crush's operations manager Watts voiced this same understanding when the 1055 was removed from the quarry and transported to the Kansas City area. LF0409-LF0410. Under Appellants' arguments, with their purported intentions to use the 1055 otherwise, Appellants could owe a substantial tax payment and penalty on the purchase of the 1055.

It is clear that when the 1055 was used for its intended purpose at the Phenix Quarry, it met, and exceeded expectations—as evident by Watts' testimony that it ran on the overburden pile probably 30 to 40 times a day grinding big rock down to small rock and was doing "a hell of a job." LF0347; LF0352. Indeed, after testing the 1055 for several months at the Phenix Quarry, Crush could have declined to purchase the 1055 if it did not believe that it was fit for its purpose to crush rock at the Phenix Quarry. Additionally, Great Plains would not have sold the 1055 "tax free" to Crush if Crush did not intend to keep the 1055 at the Phenix Quarry performing "Quarry Operations." Mark Sonnenberg understood from Watts that the 1055 would spend its life at the Phenix Quarry. LF0594. There is no disputed fact, and indeed, Crush's own Operations Manager determined after months of operating the 1055 for free, that the 1055 performed for which the purchase was intended. Appellants' argument that non-parties to the sale can now intercede and claim another intended purpose is beyond the scope of any implied warranties they may now attempt to assert existed. Because the 1055 was fit for its

purpose, Appellants cannot satisfy the elements of breach of implied warranty of merchantability and summary judgment was appropriate.

In their substitute brief, Appellants assert that a factual dispute exists regarding whether the purchaser of the 1055—who is not a party to this case—should have noted defects upon examination. (App. Subst. Brief at 39). This supplement to Appellants' Court of Appeals brief was in response to Great Plains' argument that there is no implied warranty when a buyer has had an opportunity to examine or sample the goods under RSMo 400.2-316(3)(b). Appellants selectively cite the tail end of that statute in their attempt to manufacture a factual dispute. The *complete* version of RSMo 400.2-316(3)(b) states:

> When the buyer before entering into a contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought <u>in the circumstances</u> to have revealed to him. (underscoring added).

Contrary to Appellants' assertions, there is no factual dispute because, as discussed in great detail above, non-party Crush *did fully* sample and examine the 1055 for approximately 60 days before purchasing the equipment. When this is coupled with the fact that Crush purchased the 1055 to quarry soft rock in the first instance—as evident by the sales invoice—there simply is no factual dispute. Because the 1055 was supposed to spend its life at the Phenix Quarry, the only "defect which an examination ought in the

circumstances" to have revealed to Crush was whether the 1055 functioned properly at that quarry. Because the 1055 performed at Phenix, Crush purchased it.

The statute anticipates that the pre-purchase "examiner" is examining the equipment for the examiner's intended use of that equipment—not a third-parties' use of the equipment for an unanticipated purpose years later. Under RSMo 400.2-316(3)(b), there is no implied warranty because Crush fully tested the 1055 and determined that it was appropriate for its intended purpose.

4. Great Plains did not breach an Implied Warranty of Fitness for a Particular Purpose

To the extent Appellants have standing to assert a breach of implied warranty claim against Great Plains, and without sounding redundant, the "particular purpose" that Crush purchased the 1055 for was to make aggregate at the Phenix Quarry. LF0340. The 1055 satisfied the particular purpose. Even one of the Appellants in this matter, John Uhlmann witnessed the 1055 in action at the Phenix Quarry and testified the 1055 was "creating rock. It was doing something extraordinary. It was performing…" LF0882.

Appellants rely on John Uhlmann's responses to interrogatories (LF1759) as evidence that Great Plains knew an intended purpose of the 1055 was to quarry very hard limestone rock. (App. Subst. Brief at 42). However, Uhlman's interrogatory answers—which were filed years after Crush purchased the 1055—are not relevant to the particular purpose for which Crush intended to purchase the 1055; moreover, those nebulous interrogatory answers contain no reference to any intention to quarry "very hard rock."

Clearly, prior to purchasing the 1055, Crush tested the 1055 for over two (2) months, for free, to determine if the machine would work for them in their operations. Its personnel knew from its demo that the 1055 worked well making aggregate from the overburden pile and the remnants left in the quarry, but did not work well on the hard rock floor. LF0367; LF0404. Watts fully understood before, and at the time of purchase, that the usefulness of the 1055 depended on the hardness or "psi" of the rock. LF0359. Watts knew Great Plains' personnel could not tell him what type of rock the 1055 could cut because "you don't know what kind of rock it can cut until you do it." LF0361. Watts knew Great Plains could not give Crush any production rates because "they couldn't, because you can't. It's impossible, until you just get out and start doing it." LF0361. Although Appellants (as opposed to the actual purchaser of the 1055), in hindsight, now express what they had "anticipated" the use of the 1055 to be, there is no circumventing the fact that (1) Crush purchased the 1055 after testing it for several months, because it satisfied the particular purpose that Crush wanted, and (2) Crush's representatives knew the limitations of the machine depended on the rock's hardness or "psi" and that until the 1055 was operated on a particular rock, no one would know whether it would cut it, and (3) despite Appellants' current position of the "anticipated" the use of the 1055 (i.e., road remediation work or work on very hard rock), Great Plains sold Crush the 1055 for "Quarry Operation" tax free because Crush represented its intended use of the machine at the Phenix Quarry. LF1021. No factual dispute exists because the 1055 was fit for its particular intended purpose as required by the original purchaser; accordingly, summary judgment was appropriate.

II. THE TRIAL COURT DID NOT ERR IN GRANTING MANUFACTURING'S SUMMARY JUDGMENT ON APPELLANTS' MISREPRESENTATION CLAIMS BECAUSE THE UNDISPUTED FACTS SHOW THAT MANUFACTURING IS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT PLAINTIFF UHLMANN HAS NO STANDING TO ASSERT SUCH CLAIMS, APPELLANTS CANNOT ESTABLISH ESSENTIAL ELEMENTS OF THE CLAIMS, AND THE ECONOMIC LOSS DOCTRINE BARS THE CLAIMS

Appellant acknowledges that its second point pertains only to Defendant Manufacturing, as it asserts: "The trial court erred in granting Manufacturing's motion for summary judgment on Appellants' claims for fraudulent and negligent misrepresentation because. . ." (App. Subst. Brief at 44). As Great Plains is not implicated in this Count, it will not respond to point II and will refer the Court to Manufacturing's response.

III. THE TRIAL COURT DID ERR IN GRANTING GREAT PLAINS' COSTS TO THE EXTENT RULE 57.03 PRECLUDES RECOVERY OF VIDEOGRAPHY EXPENSES

A. Standard of Review

The Court reviews the grant of costs *de novo. In re: J.P.*, 947 S.W.2d 442, 444 (Mo. App. W.D. 1997).

B. Argument

Great Plains acknowledges the Trial Court's granting of costs for videotape expenses is outside the scope of permissible costs and would suggest this Court should reverse any award for such costs and remand this matter for proper award of costs by deduction of the amount for video expenses.

CONCLUSION

WHEREFORE and based on the foregoing, Great Plains respectfully requests the court to affirm summary judgment for Great Plains, and to reverse and remand solely on the Appellants' motion to review the award of costs as it pertains to Manufacturing.

Respectfully submitted,

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CERTIFICATE OF WORD PROCESSING PROGRAM

The undersigned hereby certifies that the Brief was prepared on a computer, using Microsoft Word. A CD-ROM containing the full text of the Brief in Microsoft Word is provided herewith, and has been scanned for viruses and is believed to be virus-free.

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

The undersigned hereby certifies that this Brief herein is in compliance with Missouri Rule of Civil Procedure 84.06. According to the word count of the word processing system used to prepare the Brief, the Brief contains 7,207 words.

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The undersigned hereby certifies that two true and correct copies of the foregoing was mailed the 11th day of January, 2010, via first class U.S. mail, postage prepaid, along with a CD-ROM disc containing same in Word for Windows format, to the following:

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IN THE SUPREME COURT OF MISSOURI

RENAISSANCE LEASING, L.L.C. TEAM EXCAVATING LLC AND JOHN UHLMANN,	)	
Plaintiffs/Appellants,	)	
vs.	)	Supreme Court No. SC 90258
VERMEER MANUFACTURING COMPANY AND VERMEER GREAT PLAINS, INC.	)	
Defendants/Respondents.	)	

APPENDIX