IN THE
SUPREME COURT OF MISSOURI

No. SC90258

RENAISSANCE LEASING LLC, et al.,

Plaintiffs-Appellants,

v.

VERMEER MANUFACTURING COMPANY and VERMEER GREAT PLAINS, INC.

Defendants-Respondents.

SUBSTITUTE BRIEF OF RESPONDENT

VERMEER MANUFACTURING COMPANY

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A. Nature of the Case/Procedural History

This case involves a large piece of heavy equipment called a T1055 Terrain Leveler ("T1055"), which was manufactured by Respondent Vermeer Manufacturing Company ("Manufacturing"), sold by Respondent Vermeer Great Plains, Inc. ("Great Plains"), and purchased by a company called Crush Tech, LLC ("Crush"). Crush is not a party to this case.

This is the second lawsuit that Appellants have brought against Respondents. In 2005, Appellants John Uhlmann ("Uhlmann"),[1] Renaissance Leasing, LLC ("Renaissance"), and TEAM Excavating, LLC ("TEAM") filed suit against Manufacturing and Great Plains in federal district court, asserting claims under the Lanham Act and state law relating to the purchase of the T1055. LF0832-0844. As here, Crush was not a party to that federal action. In May, 2006, the federal district court granted Manufacturing and Great Plains' respective motions to dismiss that action. LF0845-0858.

In August, 2006, Uhlmann, Renaissance, and TEAM filed this case in Jackson County Circuit Court, again asserting claims against Manufacturing and Great Plains relating to the purchase of the T1055. LF0008-0021. Uhlmann's claims against Manufacturing were premised on theories of fraud and negligent misrepresentation.

[1] As Appellants have explained, Mr. Uhlmann is now deceased and Patricia Werthen Uhlmann has been substituted for him.

LF0016-0017. The claims against Manufacturing by Renaissance and TEAM were also premised on theories of fraud and negligent misrepresentation, as well as on breach of express warranty. LF001-0019.

On September 25, 2007, having granted the separate motions for summary judgment by Manufacturing and Great Plains in orders dated June 29, 2007, and September 5, 2007, respectively, the trial court entered the final judgment against Appellants from which this appeal is taken, and it also awarded costs to Manufacturing and Great Plains. LF0239. On September 28, 2007, Appellants filed a motion for review of Manufacturing's bill of costs, challenging the inclusion of videography fees. LF2209-2211. In response, Manufacturing conceded that such costs were not recoverable. LF2255. On December 10, 2007, the trial court denied Appellants' motion for review and awarded Manufacturing its costs, including the videography fees. LF2303.

B. Standing

The purchaser of the subject piece of heavy machinery, the T1055, was Crush, a limited liability company formed in April, 2002, by Jeff Hall. LF0413-0414. According to Crush's Operating Agreement, its members were Sylvester Holmes, Gary Watts, Terry Watts, Jeffrey Hall, and Ben Childress. LF0440. Uhlmann was not an original member of Crush. The Crush Operating Agreement specified that "No new members will be admitted, or additional Units issued, without the unanimous approval of the Members." LF0425; LF0402; LF0263. The business plan of Crush was "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, "[t]he Phenix Rock Quarry located in Greene County, Missouri, … is an extremely unique piece of property." LF0448; LF0260.

In July or August of 2002, Crush learned of a piece of new technology, the Vermeer T1055 Terrain Leveler. LF0503-0504; LF0265. Gary Watts, Crush's project manager, heard about Vermeer's terrain levelers from a Great Plains representative in southern Missouri. LF0357-0358. Watts understood that the terrain leveler was new technology. LF0402. Representatives of Great Plains told Watts that the Vermeer terrain levelers' ability to break up rock depended on the "psi" hardness of the rock. LF0358.

Crush arranged for a demonstration of the T1055 at the Phenix quarry. LF0542. The demonstration period lasted approximately two months. LF0403; LF0275. During the demonstration period, Crush tested the machine in several locations at the Phenix quarry. LF036-0367. Gary Watts thought the T1055 performed well in several of the locations where it was tested. LF1476. During that demonstration period, however, Watts found that the T1055 "didn't do real good" on the quarry floor because the rock was really hard there; he determined that the T1055 did not do quite the job that Crush needed in the harder rock. LF1468-1469. There was a hill area at the Phenix quarry where old left-over rock from previous mining activities was piled up; the hill was approximately 400 x 800 feet and 40 feet high. LF0368; LF0369. Watts thought the T1055 performed very well on the scrap rock in the hill. LF0347. Watts told Mark Sonnenberg, a representative of Great Plains, that the T1055 would live all of its life in the Phenix quarry. LF0594.

Crush decided to purchase a T1055 instead of the larger T1255 because the T1255 was more expensive. LF0403. Manufacturing was unable to provide Crush with estimated production capabilities for the T1055; it only had such information available for the T1255. LF0625; LF0308. Gary Watts discussed with Jeff Hall and the other principals of Crush that the T1055 was not going to be able to do all of the things that the T1255 could do. LF0403.

Crush purchased the T1055 from Great Plains on September 30, 2002; the Sales Order to "Crush Technology dba Phenix Rock" shows Jeff Hall's name. LF0629. Hall was the president of Crush at that time. LF0255. The purchase price of the T1055 was $670,000, which included a written limited manufacturer's warranty for the machine. LF0629. The warranty documentation was signed by Crush executive vice president William Venable. LF0633.

In Appellants' first lawsuit against Respondents, in federal court, Uhlmann alleged that he was an investor in Crush. LF0832; LF0836. In this case, Uhlmann alleged not only that he was an investor in Crush, but that he also made loans to Crush. LF0008. Uhlmann's financial stake in Crush resulted from The Uhlmann Company's consideration of a Crush request seeking financing for its business. LF0525; LF0254; LF0260. Crush was, by design, a purchaser of new technology to be used in the rock industry. LF0504. The proposed equity investment in Crush exceeded The Uhlmann Company's risk tolerance, so it made loans to Crush instead. LF0525. Appellant Uhlmann both personally guaranteed the loans that The Uhlmann Company made to Crush and personally invested in Crush. LF0525; LF0257-0258.

Uhlmann heard about the new technology of Vermeer's terrain levelers from Jeff Hall of Crush. LF0265. Hall told Uhlmann about the machine and what it could do. LF0275. During the demonstration period, before Crush purchased the T1055 machine, Uhlmann saw the T1055 working at the Phenix quarry. LF0276. When Uhlmann saw the T1055 during the demonstration period, it was working on "scrap rock" and was "doing something that was extraordinary." LF0276.

No one stood in the way of Uhlmann satisfying himself as to the operation of the T1055 before Crush purchased the machine. LF0323. According to Uhlmann, it was his decision for Crush to purchase the T1055, and that decision was based on the recommendation of Crush's president, Jeff Hall. LF0273. Uhlmann obtained written promotional materials about the T1055 after Crush had purchased the machine; Uhlmann did not review any such materials prior to purchase. LF0270.

After purchasing the T1055, Crush initially continued to use it at the Phenix quarry where they had tested it during the demonstration period. LF0641. According to Crush's project manager, Gary Watts, after Crush purchased the machine it ran "great." LF0372. By the end of October, 2002, Uhlmann and Crush confirmed that the T1055 worked well on the overburden rock at the Phenix quarry, but could not produce well in the straight quarry application on solid rock. LF0624; LF0308.

In January, 2003, Crush moved the machine from the Phenix quarry to a location at 40 Highway & 291 Highway in Independence, Missouri. LF0642. According to Crush's project manager, Gary Watts, when the T1055 was at the 40 Highway location it "was just doing a Hell of a job" when the operator struck a buried steel beam and "all

Hell broke loose." LF0373-0374. When the machine hit the buried steel beam, many of the teeth on its grinding attachment flew off and many others came loose. LF0373-0374. Even after hitting that steel beam, the machine continued to perform terrain leveling to the satisfaction of Gary Watts. LF0373-0374. While the machine was at the 40 Highway location, the operator also ran it into a solid rock wall and broke two bolts on one side. LF0375-0376.

By mid-July, 2003, Crush had "operated the new 1055 long enough to trust that it would hold up on a job and had developed tentative production numbers for this new technology." LF027; LF0308. LF0375-0376. And although Crush continued to operate the T1055 at the 40 Highway location, Crush never attempted to use the T1055 as a terrain leveler at a separate 350 Highway location. LF0316; LF0794.

In December, 2002, Uhlmann had his attorneys prepare an Amended and Restated Operating Agreement of Crush Tech, LLC. That document indicates that Uhlmann, as Trustee of the John Uhlmann Revocable Trust, became a member in and 92.5% owner of Crush. LF0682; LF0262; LF0292. That document was back-dated to June, 2002, so that Uhlmann could claim personal tax losses for the amounts that were previously loaned to Crush. LF0262-0263. Uhlmann does not recall if there was ever a meeting of the original members of Crush to approve admitting him or the John Uhlmann Revocable Trust as a new member of Crush. LF0292. Gary Watts, one of the original members of Crush, denies ever signing the Amended and Restated Operating Agreement of Crush Tech, LLC. LF0382-0383. Watts testified that the signature that appears above his name on the Amended and Restated Operating Agreement of Crush Tech, LLC is a

forgery. LF0382-0383; LF0722. He also testified that the signature of Terry Watts, another member of Crush, is forged on that document. LF0382-0383; LF0722.

In January, 2003, Uhlmann fired Hall from Crush. LF0274. About a month after the firing of Hall, Terry and Gary Watts left Crush because Uhlmann told them "that they were out." LF0305. Uhlmann drove Gary Watts, Terry Watts, and Jeff Hall from the company, and Crush's name was then changed to Mo-Kan Rock and Gravel Company. LF0296. According to Uhlmann, Mo-Kan Rock and Gravel Company was then dissolved. LF0296; LF0727-0728. Gary Watts never signed the document entitled "Written Consent of the Members of Mo-Kan Rock Company," which purports to dissolve the company formerly called Crush by agreement of its members. LF0385; LF0731. Then, late in 2003, Uhlmann formed a new limited liability company called TEAM; he owned 100 percent of the new company. LF0296.

Uhlmann claims that Renaissance now owns the T1055. LF0293; LF0299. LF0746-0754; LF0297-0298. Yet Uhlmann does not know how Renaissance came to be the owner of the machine, and cannot point to any document evidencing a sale or other transaction. LF0291-0292. There is no documentation of any transaction by which Renaissance acquired the T1055. Neither Crush's executive vice president, who handled finance and other matters for Crush, nor anyone else has knowledge of any payment from Renaissance to Crush for the T1055. LF0508-0509. Yet Crush signed a master lease agreement dated January 1, 2003, by which it purported to lease from Renaissance the T1055 that Crush itself had just purchased a few months earlier. LF0733-0745; LF0295.

On June 3, 2004, TEAM also executed a master lease agreement by which it purported to lease the T1055 from Renaissance. And even though Appellants claim that Renaissance owns the T1055, TEAM carried the T1055 as an asset on its balance sheet, and used that balance sheet for the purpose of obtaining bank financing. LF0758; LF0314. On TEAM's balance sheet dated December 31, 2005, TEAM listed the value of the T1055 -- which had been purchased by Crush for $670,000 in the fall of 2002 -- as $574,285.72. LF0758.

C. Alleged Misrepresentations by Manufacturing

Appellants alleged that in an oral communication to Uhlmann made prior to Crush's purchase of the T1055, Manufacturing misrepresented "that the T1055 would perform terrain leveling." LF0550. Appellants also alleged that, after Crush purchased the T1055, Manufacturing misrepresented, in an oral communication to Uhlmann, that "the T1055 could be fixed so that it could perform terrain leveling as represented prior to sale, and as represented in advertising available at the time." LF0550.

D. Express Warranty by Manufacturing

Appellants alleged that Manufacturing breached the express warranty that Crush obtained for the T1055. The warranty, which was included as part of Crush's purchase of the T1055 (the "Limited Warranty"), provided, in pertinent part, that the parties agreed to be bound by it, and that:

> 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.

The warranties contained herein shall NOT APPLY TO:

(1) Any defect which was caused … by … collision or other accident.

(9) In no event shall Vermeer's liability exceed the purchase price of the product.

(10) Vermeer shall not be liable to any person under any circumstances for any incidental or consequential damages (including but not limited to, loss of profits, out of service time) occurring for any reason at any time.

* * *

<u>EXCLUSIONS OF WARRANTIES</u>: EXCEPT FOR THE WARRANTIES EXPRESSLY AND SPECIFICALLY MADE HEREIN, VERMEER MAKES NO OTHER WARRANTIES, AND ANY POSSIBLE LIABILITY OF VERMEER 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.

> **VERMEER RESERVES THE RIGHT TO MODIFY, ALTER AND IMPROVE ANY PRODUCT WITHOUT INCURRING ANY OBLIGATION TO REPLACE ANY PRODUCT PREVIOUSLY SOLD WITH SUCH MODIFICATION. NO PERSON IS AUTHORIZED TO GIVE ANY OTHER WARRANTY, OR TO ASSUME ANY ADDITIONAL OBLIGATION ON VERMEER'S BEHALF.**

LF0633-0634; LF0502; LF0503.

The first page of the Limited Warranty shows that it is a warranty for new equipment. LF0633. The first line of the Limited Warranty document states: "To validate warranty coverage, this form must be completely filled out, signed and returned at the time of delivery." LF0633 (underscoring in original). The Limited Warranty is by its terms given by Manufacturing to the retail purchaser. LF0634.

RESPONSE TO POINTS RELIED ON

I. RESPONSE TO APPELLANTS' POINT I: THE TRIAL COURT DID NOT ERR IN GRANTING MANUFACTURING SUMMARY JUDGMENT ON APPELLANTS' BREACH OF WARRANTY CLAIMS BECAUSE UNDISPUTED MATERIAL FACTS SHOW THAT MANUFACTURING IS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT RENAISSANCE AND TEAM HAVE NO STANDING TO ASSERT SUCH

CLAIMS AND THERE WAS NO BREACH OF WARRANTY BY MANUFACTURING IN ANY EVENT

Stefl v. Medtronic, Inc., 916 S.W.2d 879 (Mo. Ct. App. 1996)

Carpenter v. Chrysler Corp., 853 S.W.2d 346 (Mo. Ct. App. 1993)

II. RESPONSE TO APPELLANTS' POINT II: THE TRIAL COURT DID NOT ERR IN GRANTING MANUFACTURING SUMMARY JUDGMENT ON APPELLANTS' MISREPRESENTATION CLAIMS BECAUSE UNDISPUTED MATERIAL FACTS SHOW THAT MANUFACTURING IS ENTITLED TO JUDGMENT AS A MATTER OF LAW IN THAT THEY DO NOT HAVE STANDING TO ASSERT SUCH CLAIMS, CANNOT ESTABLISH ESSENTIAL ELEMENTS OF SUCH CLAIMS, AND THE ECONOMIC LOSS DOCTRINE BARS THE CLAIMS

Warren v. Mercantile Bank of St. Louis, N.A., 11 S.W.3d 621 (Mo. Ct. App. 1999)

Jones v. Rennie, 690 S.W.2d 164 (Mo. Ct. App. 1985)

Self v. Equilon Enters., LLC, No. 4:00CV1903, 2005 U.S. Dist. LEXIS 17288 (E.D. Mo. Mar. 30, 2005)

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

A. Introduction

This case revolves around a piece of heavy machinery known as a T1055, which was manufactured by Respondent Manufacturing, sold by Respondent Great Plains, and purchased by a company that is not a party to this case. Appellants asserted numerous claims against Manufacturing relating to the purchase and performance of that piece of machinery; however, none of Appellants purchased the machinery or ever owned it.

The trial court did not provide its reasoning in granting Manufacturing summary judgment on all of Appellants' claims, but that judgment was correct. Undisputed material facts show both that none of Appellants have standing to assert their claims and that they cannot prove essential elements of those claims in any event.

Although Appellants strive to give the impression (through extensive recitations of evidentiary facts) that there are genuine issues of material fact that preclude summary judgment, the undisputed material facts show that summary judgment for Manufacturing was proper. Renaissance and TEAM's claims of breach of warranty against Manufacturing fail because neither has standing to assert such claims. Manufacturing's express warranty was made to Crush, the retail purchaser of the T1055, and the undisputed material facts do not support the valid assertion of claims under that express warranty by either Renaissance or TEAM. Moreover, even if Renaissance or TEAM could somehow show that they were in a position to assert the warranty rights of Crush, Manufacturing did not breach the terms of its warranty.

Likewise, Uhlmann's claims of fraud and negligent misrepresentation against Manufacturing fail because he lacks standing to assert them. Uhlmann was perhaps an investor in, or a sort of creditor of, Crush, but in no event does he have individual claims against Manufacturing based on any alleged misrepresentations. Even if one assumes for purposes of argument that claims of fraud and negligent misrepresentation could be maintained on the representations that Appellants alleged Manufacturing made to Uhlmann, any relevant dealings that Manufacturing had with Uhlmann were in his capacity as some sort of a representative for a business entity, not with Uhlmann individually. Thus, any such claims would be held by a business entity, not Uhlmann individually.

Furthermore, the undisputed material facts also show that the claims of fraud and negligent misrepresentation asserted against Manufacturing by the business entity Appellants, Renaissance and TEAM, similarly fail. Even if they had standing to assert such claims, neither Renaissance nor TEAM (or for that matter Uhlmann) can establish either that the claimed misrepresentations by Manufacturing were false or that they reasonably relied upon those misrepresentations, both essential elements of such claims. Moreover, even if any Appellant could otherwise prove a misrepresentation claim, those claims seek to recover purely economic damages, and therefore are barred by the economic loss doctrine.[2/]

[2/] Appellants also challenge the trial court's award of costs to Manufacturing, pointing out that the award included expenses incurred for videography.

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR MANUFACTURING ON RENAISSANCE AND TEAM'S BREACH OF WARRANTY CLAIMS BECAUSE NEITHER HAD STANDING TO ASSERT SUCH A CLAIM, NOR CAN THEY ESTABLISH SUCH A CLAIM IN ANY EVENT – RESPONDING TO APPELLANTS' POINT I

A. Standard of Review

A trial court's summary judgment is reviewed *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 Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376-78 (Mo. banc 1993); *Am. 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. "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) (citations omitted). "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. Ct. 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

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Manufacturing agrees. The court should reverse just the trial court's order awarding costs and remand with directions to deduct the videography expenses.

reasons for the decision. *See Robinson v. Health Midwest Dev. Group*, 58 S.W.3d 519, 523 (Mo. banc 2001) (decision granting summary judgment was correct even though based on different reasoning).

B. Neither Renaissance nor Team have standing to assert claims based on an alleged breach of Manufacturing's express warranty to Crush

Neither Renaissance nor TEAM can demonstrate an ownership interest in the T1055; therefore, they have no standing to assert claims for breach of the warranty that accompanied its purchase by Crush. Although Uhlmann claimed that Renaissance owns the T1055, and TEAM and Renaissance entered into a lease agreement under which TEAM purported to lease the T1055 from Renaissance, there is no explanation of how Renaissance came to be the owner of the machine. There is nothing in the record evidencing a transaction by which Crush transferred ownership of the T1055 to Renaissance.

Moreover, Crush, under the purported direction of Uhlmann, never had the authority to transfer ownership of the T1055. Crush's Operating Agreement stated that the admission of new members required the unanimous approval of all members. Although Appellants produced a purported Amended and Restated Operating Agreement showing Uhlmann as a member, that agreement was not signed by members Gary Watts or Terry Watts. Their signatures appear on the document, but Gary Watts testified that they did not sign it. Importantly, there is no evidence of, and Uhlmann cannot recall, a meeting of the original members of Crush in which they discussed his admission. Furthermore, when Crush, under a new name, later was dissolved at the direction of

Uhlmann, at least some of its members did not agree to the dissolution or the distribution of the company's assets.

The Court of Appeals agreed that neither Renaissance nor TEAM had standing. *Slip op.* at 8-9. In language that was unfortunate in light of the recent opinion in *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009), the Court of Appeals characterized the standing issue -- as had many other Missouri appellate decisions -- as a matter of subject matter jurisdiction. This now faulty framing of the issue notwithstanding, the Court of Appeals was correct on the standing issue and, contrary to Appellants' contention, neither acted as a fact-finder nor applied an erroneous legal standard. The trial court did have subject matter jurisdiction, but the plaintiffs before it did not have standing.

Because neither Renaissance nor TEAM can prove ownership of the T1055 -- and thus do not have standing -- and Crush (through Uhlmann) did not have the authority to transfer the T1055, Renaissance and TEAM's warranty claims must fail. Claims for breach of warranty require, at a minimum, the purchase of an article or product. *Missouri Approved Jury Instructions* §§ 25.07, 25.08 (6th ed. 2002). *See Stefl v. Medtronic, Inc.*, 916 S.W.2d 879, 882-83 (Mo. Ct. App. 1996) (plaintiff must prove its purchase of a product to make a claim for breach of express warranty). If any party ever had a claim for breach of warranty against Manufacturing, it was Crush. And there is no evidence that Crush's assets, including the T1055 and any claims that it might have had, have ever been properly transferred to any of the Appellants. Renaissance and TEAM

therefore cannot demonstrate standing to assert claims for breach of warranty against Manufacturing.

Renaissance and TEAM nonetheless claim that they have standing to assert claims against Manufacturing for breach of the express warranty that Crush obtained when it purchased the T1055. Their position is inconsistent: they assert that the record shows that a reasonable jury could conclude that Renaissance or TEAM own the T1055. Appellants claim there is a factual dispute as to whether any breach of warranty claims that arose before the phantom transfer of the T1055 from Crush to Renaissance (a) went to Renaissance, with that undocumented transfer, or (b) remained with Crush -- apparently apart from the machine itself -- and were then later transferred to Uhlmann upon dissolution of Crush (who later somehow transferred them to TEAM, which purported to lease the T1055 from Renaissance).

These supposed factual disputes simply do not exist. The relevant inquiry starts and ends with the fact that there is nothing in the record that documents a transaction by which Crush transferred ownership of the T1055. Indeed, Uhlmann acknowledged that there is nothing that shows how Renaissance came to own the T1055 and that he did not know how Renaissance came to own it. Appellants blithely downplay this, claiming that it is unremarkable that there is no bill of sale or other document evidencing the transfer of ownership from Crush to Renaissance and pointing out that there is no bill of sale for Crush's original purchase by of the T1055. Of course, while there might not be a document labeled a "bill of sale" for Crush's purchase of the T1055, that transaction is reflected in a Sales Order and Limited Warranty Registration. By

contrast, there is *no* document that shows a transaction by which Crush transfers the T1055 to Renaissance, or to any other buyer.

Given that there is no documentation of any transfer of the T1055 by Crush, Appellants turn hopefully to oral testimony. But their legal basis for doing so is suspect. The dictum they cite from *Smith v. Spradling*, 532 S.W.2d 202, 205 (Mo. 1976), is an excerpt from a law review article and does not apply here. Similarly, *State v. Pulis*, 579 S.W.2d 395, 399 (Mo. Ct. App. 1979), is a criminal case, holding that "[i]n prosecutions for larceny, proof of possession is sufficient as to ownership," which is certainly not the issue here. Finally, this case does not even remotely resemble *Galemore v. Mid-West Nat'l Fire and Casualty Insurance Co.*, 443 S.W.2d 194, 198 (Mo. Ct. App. 1969), which simply addresses the issue of when title passes in the context of an accident involving a newly purchased car that occurred before the car's certificate of title had been issued. On the basis of this scant legal authority, Appellants highlight Uhlmann's testimony that ownership of the T1055 was transferred from Crush to Renaissance in December, 2002 (although he testified that he does not know how), and that Renaissance has owned it since. Appellants then cite testimony from Venable, the former executive vice president of Crush, who also could not recall a document by which Crush transferred ownership of the T1055 to Renaissance, but who referred to a list of assets that was part of a lease between Renaissance and Crush.

Left to point to that lease at the end of a chain of vague testimony as a substitute for documentation of a transaction transferring ownership of the T1055, Appellants assert that because Crush leased the T1055 from Renaissance under the lease,

Crush must have transferred ownership to Renaissance. But this circular reasoning does not explain how the T1055 got to Renaissance in the first place. While the schedule to the lease showing the equipment that Renaissance was leasing to Crush does in fact include "Vermeer," there is still no answer to the question of how Renaissance came to have an interest in the T1055 sufficient to allow it to lease it. Did Crush simply give it to Renaissance? There is no evidence of that, or of any other transaction by which Crush transferred ownership of the T1055. Neither TEAM nor Renaissance can prove an ownership interest in the T1055; therefore, they cannot assert breach of the warranty that Crush obtained as part of its purchase of the T1055.

C. Neither Renaissance nor Team can prove the essential elements of a claim for breach of warranty against Manufacturing

In order to make a case of breach of express warranty, a party must plead and prove:

1) a sale of the goods;
2) a representation to the buyer that the goods were of certain kind or quality;
3) that the seller's representation induced the purchase of, or was a material factor in the decision to, purchase the goods;
4) nonconformity of the goods to the representations made;
5) buyer's notice to seller, within a reasonable time of discovery of the goods' nonconformity, of such failure to conform; and
6) damages to the buyer.

Carpenter v. Chrysler Corp., 853 S.W.2d 346, 357 (Mo. Ct. App. 1993). *See Stefl*, 916 S.W.2d at 882-83. Even if they had standing to assert this claim, neither Renaissance nor Team can prove all of these elements.

Crush purchased the T1055 from Great Plains with the Limited Warranty from Manufacturing. Manufacturing does not have a warranty agreement with Renaissance or TEAM, and there are no facts that show how either of them obtained any interest in the T1055 or any possible warranty rights. The Limited Warranty is for new equipment, and refers throughout to the recipient of the warranty as the "retail purchaser." The first line of the Limited Warranty document states: "To validate warranty coverage, this form must be completely filled out, signed and returned at the time of delivery." The Limited Warranty was given to Crush, the retail purchaser of the T1055. And, again, there is no documentation of a transaction by which Crush transferred the T1055 and the accompanying warranty to anyone.

Even if they could somehow establish ownership, neither Renaissance nor TEAM can prove damages from any alleged breach of this warranty in any event. Although TEAM and Renaissance pled damages arising from the alleged breach of warranty in the conjunctive, their damages cannot be the same. TEAM's claimed damages would result from the alleged failure of its business. On the other hand, the only damages that Renaissance, a leasing company, could have suffered would have resulted from a loss in the rental value of the T1055. Renaissance has alleged no such damages, and moreover there is no evidence that TEAM gave any consideration to Renaissance (or anyone) for its use of the T1055. Thus, even if Renaissance or TEAM could somehow

prove that they had a legitimate ownership interest in the T1055, neither has any damages arising from any alleged breach of the Limited Warranty. Further, the Limited Warranty expressly excludes consequential damages, and limits any relief to repair and/or replacement.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR MANUFACTURING ON THE MISREPRESENTATION CLAIMS BY UHLMANN, RENAISSANCE, AND TEAM BECAUSE THEY EITHER DO NOT HAVE STANDING OR CANNOT ESTABLISH ESSENTIAL ELEMENTS OF SUCH CLAIMS – RESPONDING TO APPELLANTS' POINT II

A. Standard of Review

A trial court's summary judgment is reviewed *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*, 854 S.W.2d at 376-78; *Hargrave*, 34 S.W.3d at 92. 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. "An order of summary judgment will not be set aside on review if supportable on any theory." *Zafft*, 676 S.W.2d at 243-44 (citations omitted). "If the trial court's grant of summary judgment can be sustained on any theory as a matter of law, we cannot reverse." *Moran*, 41 S.W.3d at 537 (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,* 58 S.W.3d at 523 (decision granting summary judgment was correct even though based on different reasoning).

B. Uhlmann lacks standing to bring any claim of misrepresentation

Uhlmann's claims against Manufacturing are based on fraud and negligent misrepresentation. But Uhlmann never dealt with Manufacturing as an individual. Uhlmann *as Uhlmann* never dealt with Manufacturing, and thus has no misrepresentation claims.

This question of capacity is critical. The only dealings that Uhlmann ever had with Manufacturing were in his capacity as perhaps an investor in, creditor of, or purported owner of Crush, or perhaps in one of the other entities he formed. Thus, even if there were misrepresentation claims to be asserted against Manufacturing on the basis of representations to Uhlmann, such claims would belong to a business entity that actually dealt with Manufacturing, not to Uhlmann.

Because Uhlmann's status as investor, owner, or creditor is less than clear, analysis of this issue is complicated. It is plain, however, that *Empire Bank v. Walnut Products, Inc.*, 752 S.W.2d 404 (Mo. Ct. App. 1988), does not support Appellants' position. In reviewing the dismissal of fraud counterclaims against a bank by a motion to dismiss, the *Empire Bank* court held that the fraud claims of a creditor and a guarantor based on misrepresentations that induced them to extend credit could go forward. But unlike Uhlmann, the counterclaimants in *Empire Bank* alleged they heard the misrepresentations directly and that they led to the extension of credit. Appellant Uhlmann's testimony here was that he was told by his (or, more precisely, The Uhlmann

Company's) debtor, Crush, of the alleged misrepresentations about the capabilities of the T1055**.** Any possible representations by Manufacturing to Uhlmann were made to him in his capacity as some sort of representative of a business; they cannot form the basis of a claim by Uhlmann in his individual capacity. *See Warren v. Mercantile Bank of St. Louis, N.A.*, 11 S.W.3d 621, 623 (Mo. Ct. App. 1999) (citations omitted) (individuals who relied to promise to company to justify their investment in company as part of its restructuring did not have standing). *See also Jones v. Rennie*, 690 S.W.2d 164, 166 (Mo. Ct. App. 1985) (all of defendant's dealings with plaintiff were in his capacity as president and 100% shareholder of his company, therefore plaintiff lacked standing to sue in his individual capacity).

Given the capacity in which Uhlmann dealt with Manufacturing, any damages arising out of the alleged misrepresentations were sustained by Crush. *See Warren*, 11 S.W.3d at 623. The only cognizable injury that Uhlmann could have sustained as a result of any alleged misrepresentation would have arisen solely out of his investment in, or loan to, Crush. Even if Uhlmann invested in reliance on representations that Manufacturing made to Crush, that does not give him standing to assert a misrepresentation claim in his individual capacity. *See id.* at 622-23 (finding no individual standing even though plaintiffs invested personal capital in reliance on defendant's promise because defendant's representations were made to plaintiffs in their capacity as corporate representatives); *see also Around the World Importing, Inc. v. Mercantile Trust Co., N.A.*, 795 S.W.2d 85, 91 (Mo. Ct. App. 1990) (finding no standing

despite the fact that plaintiffs had been required to sign personal guarantees for the company on whose behalf they received the representations).

Appellants have attempted to blur the capacity in which Uhlmann provided or facilitated financing for Crush, apparently hoping somehow to establish Uhlmann's right to assert claims on his own behalf. In their initial federal lawsuit against Manufacturing and Great Plains, Appellants described Uhlmann as an investor. In their petition in this case, they portrayed him as an investor and as a creditor. Whatever his relationship to Crush at the relevant time -- investor or creditor or something else -- Uhlmann has no standing to assert misrepresentation claims against Manufacturing. The question is in what capacity Uhlmann dealt with Manufacturing, and there are no facts that show that that was as an individual acting in his own behalf. Uhlmann did not purchase the T1055, Crush did, and Manufacturing made no representations to Uhlmann outside of his role as a representative of some sort. *See Davis v. Carmichael*, 755 S.W.2d 679, 681-82 (Mo. Ct. App. 1988) (plaintiff has no standing to sue as an individual for an alleged fraudulent misrepresentation to the corporation of which he is an officer or shareholder).

C. Appellants cannot establish essential elements of a claim of fraudulent misrepresentation

Appellants assert two misrepresentations, but the essential elements of a fraudulent misrepresentation claim against Manufacturing cannot be found on the undisputed material facts. First, they contend that, before Crush purchased the T1055, Manufacturing falsely represented to Uhlmann "that the T1055 would perform terrain

leveling." Second, Appellants assert that, after Crush had purchased the machine, Manufacturing falsely represented to Uhlmann that the machine "could be repaired or fixed so that it could perform terrain leveling as represented prior to sale, and as represented in the advertising."

To prevail on a claim of fraudulent misrepresentation, a party must plead and prove: "(1) a false, material representation; (2) the speaker's knowledge of its falsity or his ignorance of its truth; (3) the speaker's intent that it should be acted upon by the hearer in the manner reasonably contemplated; (4) the hearer's ignorance of its falsity; (5) the hearer's reliance on its truth; (6) the hearer's right to rely thereon; and (7) the hearer's consequent and proximately caused injury." *Ziglin v. Players MH, L.P.*, 36 S.W.3d 786, 791 (Mo. Ct. App. 2001). Nonperformance, without more, does not establish knowledge or intent. *Bank of Kirksville v. Small*, 742 S.W.2d 127, 132 (Mo. 1987) (citations omitted). Appellants cannot prove these elements for either alleged fraudulent misrepresentation by Manufacturing.

Appellants simply cannot prove that the representations in question were false. The T1055 performed well in the terrain leveling applications for which it was purchased by Crush. Uhlmann testified that when he saw the machine working on the "scrap rock" at the Phenix quarry where Crush chose to test the T1055, he thought it was "doing something extraordinary." Crush's project manager, Gary Watts, was also impressed with the terrain leveling capabilities of the machine. While there may be a factual dispute as to the cause and extent of various claimed problems with the machine

that developed later, there is no genuine dispute that the T1055 did in fact perform terrain leveling on the hill of "scrap rock" at the Phenix quarry.

Additionally, Appellants never attempted to use the machine as a terrain leveler at the 350 Highway location at which they claim it failed. Because they never attempted to use the machine to level terrain at that location, there can be no genuine issue of material fact as to whether the T1055 would function as a terrain leveler in the conditions present at that location. This negates any falsity of the alleged misrepresentations. Appellants could not show that the T1055 would not function as a terrain leveler, or that it could not be repaired or fixed in order to function as a terrain leveler. It did in fact function as a terrain leveler, at least to the satisfaction of the purchaser's project manager.

Appellants also cannot establish that they acted in reliance on any representation in a manner reasonably contemplated. Uhlmann testified that he made the decision for Crush to purchase the T1055, and that he did so on the basis of the recommendation by Jeff Hall, Crush's president. Thus it was Hall, not Manufacturing, who represented the capabilities and qualities of the machine to Uhlmann, and there are no facts suggesting that Hall was misled.

Furthermore, it was not until after Crush had purchased the T1055 that Uhlmann obtained written promotional materials that he claimed also constituted misrepresentations. Again, Crush decided to purchase the machine after a nearly two-month demonstration period in which it had the opportunity to satisfy itself of the capabilities and qualities of the T1055. Crush's project manager knew that the machine

did not do quite the job that Crush needed on the harder rock of the quarry. But the undisputed material facts show that Crush did its own evaluation of the machine during the demonstration period, and that -- on the recommendation of Crush's president -- Uhlmann then decided to have Crush buy the machine.

A party who undertakes his own investigation is not allowed to rely on the misrepresentations of another. *Brown v. Bennett*, 136 S.W.3d 552, 556 (Mo. Ct. App. 2004) (*citing Wasson v. Shubert*, 964 S.W.2d 520, 527 (Mo. Ct. App. 1998)). Appellants note that there are three exceptions to the rule in *Brown* -- relating to partial inspections, the lack of equal footing, and specific and distinct representations -- and claim that all three apply.

Appellants are incorrect. Crush did not rely upon representations by Manufacturing in deciding to purchase the machine; Crush (and therefore Uhlmann) relied upon what it learned from the nearly two-month period during which it evaluated the machine at the Phenix quarry. To the extent that Appellants claim that the representations to Uhlmann somehow blunt the effect of the pre-purchase inspection by Crush, Uhlmann testified that he did not receive the brochures in question until after Crush had purchased the T1055. By then The Uhlmann Company had already loaned Crush the money to purchase the machine. Uhlmann relied upon Crush's president, Jeff Hall, in making his decision to have Crush buy the T1055, and Hall and the other owners of Crush relied upon their own investigation. Appellants therefore cannot properly claim that the two-month inspection was partial; that they somehow lacked equal footing in learning about the T1055's performance; or that Manufacturing made some specific and

distinct representation to Uhlmann that rendered Crush's pre-purchase inspection inoperable.

D. Appellants also cannot establish essential elements of a claim of negligent misrepresentation

The trial court also properly granted Manufacturing summary judgment on Appellants' negligent misrepresentation, as opposed to fraudulent misrepresentation, claims. To establish negligent misrepresentation a party must prove: (1) the speaker supplied information in the course of his business because of some pecuniary interest; (2) due to the speaker's failure to exercise reasonable care or competence in obtaining or communicating this information, the information was false; (3) the speaker intentionally provided information for the guidance of a limited group of persons in a particular business transaction; (4) the listener justifiably relied on the information; and (5) as a result of the listener's reliance on the statement, the listener suffered pecuniary loss. *M&H Enters. v. Tri-State Delta Chems., Inc*., 35 S.W.3d 899, 904 (Mo. Ct. App. 2001). The undisputed material facts show that Appellants cannot prove three of these elements.

First, as discussed above in connection with Appellants' fraud claims, the alleged misrepresentations were not false. There is no evidence that the representations were false because of some failure by Manufacturing to exercise due care. The undisputed material facts do not support the notion that Manufacturing acted without reasonable care in obtaining or conveying information about the T1055.

Second, the same problems that plagued the justifiable reliance element of Appellants' fraud claim loom large here: there is no evidence of reliance in any manner

reasonably contemplated. The reliance that Appellants claim is that they attempted to develop a business around representations that Manufacturing allegedly made regarding the T1055. Of course, Manufacturing could not have foreseen that Appellants would launch a new business premised on the production capabilities of the T1055, a machine for which Appellants admit such capabilities were not yet known.

Third, Appellants also cannot establish that the information was supplied for their guidance in a particular transaction. The only business transaction that transpired between Manufacturing and any other party with respect to the T1055 was the initial sale of the machine. Appellants have attempted to base their claims on alleged representations by Manufacturing that (a) were made after that purchase, and (b) had nothing to do with any business transaction involving Manufacturing. A claim of negligent misrepresentation, however, depends upon the provision of a misrepresentation within the context of a particular business transaction. *See Reding v. Goldman Sachs & Co.*, 382 F. Supp. 2d 1112, 1120 (E.D. Mo. 2005) (plaintiffs must be clients of defendant to demonstrate that the alleged misrepresentation was made for the purpose of guiding plaintiffs in a particular business transaction). At the time Appellants claim that Manufacturing made misrepresentations to them, Manufacturing's only business transaction, the sale of the T1055 to its distributor, Great Plains, had been completed. None of the alleged negligent misrepresentations by Manufacturing could have been intended to guide Appellants in any business transaction.

E. Appellants' misrepresentation claims are in any event barred by the economic loss doctrine

Appellants' misrepresentation claims relate to the design and performance of the T1055 -- that it is somehow defective, or not what it was represented to be -- and that they suffered economic loss as a result. But even if Appellants could otherwise establish such claims, they would be barred by the economic loss doctrine.

The economic loss doctrine prohibits recovery in tort for economic losses that are contractual in nature and is broadest in its application to commercial, as opposed to consumer, transactions. *See, e.g., Marvin Lumber & Cedar Co. v. PPG Indus., Inc*., 223 F.3d 873, 882-86 (8th Cir. 2000) (applying Minnesota law) (economic loss doctrine barred commercial purchaser's tort claims, including fraud and misrepresentation, against seller of allegedly defective wood preservative). In *Crowder v. Vandendeale*, 564 S.W.2d 879 (Mo. banc 1978), the court found that a later purchaser of a house could not sue the builder to recover for damage to the house caused by latent structural defects. The *Crowder* court stated that tort liability is only appropriate in cases in which recovery is sought for "personal injury, including death, or property damage either to property other than the property sold or to the property sold where it was rendered useless by some violent occurrence." *Id.* at 881.

The economic loss doctrine has since been applied in numerous Missouri cases to preclude tort recovery in cases in which economic loss recovery is sought, requiring the claimants to pursue contractual theories of recovery. *E.g., Sharp Bros. Contracting Co. v. Am. Hoist & Derrick Co*., 703 S.W.2d 901, 903 (Mo. banc 1986) (no

strict liability claim when only damage is to the product sold); *Rockport Pharmacy, Inc. v. Digital Simplistics, Inc.*, 53 F.3d 195, 198 (8th Cir. 1995) (applying Missouri law) ("Missouri prohibits a cause of action in tort where the losses are purely economic"); *R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 828-29 (8th Cir. 1983) (applying Missouri law) (if no personal injury or damage to other property, limited to UCC remedies).

Self v. Equilon Enters., LLC, No. 4:00CV1903, 2005 U.S. Dist. LEXIS 17288 (E.D. Mo. Mar. 30, 2005), a diversity case applying Missouri law, is instructive. Plaintiffs were operators of gas stations who purchased gasoline from defendants pursuant to written agreements that required defendants to provide plaintiffs with equal pricing. Plaintiffs complained that, among other things, defendants never intended to charge them the same prices and charged different prices. More specifically, plaintiffs claimed that defendants did not abide by representations made by their agents, sold gasoline for less to stations that defendants controlled, and otherwise conducted themselves in a way that caused plaintiffs to suffer substantial losses. Plaintiffs sought to recover not only for breach of contract but for, among other things, misrepresentation and fraud.

On defendants' motion to dismiss, which urged dismissal of the tort claims on the basis of the economic loss doctrine, the *Self* court reviewed the history and development of Missouri's economic loss doctrine, noting that Missouri state courts had not applied the doctrine beyond the context of product liability. Finding that Missouri had not yet addressed the precise question, the court stated that it believed that the

Missouri Supreme Court would find that, in a commercial transaction between merchants, "a fraud claim to recover economic losses must be independent of the contract or such claim would be precluded by the economic loss doctrine." *Id.* at *40. The economic loss doctrine bars tort claims when the substance of such claims is for recovery of losses "arising out of the parties[']contractual relationships." *Id.* at *40. Applying that rule, the court dismissed the misrepresentation and fraud claims because they sought to recover in tort for losses that were contractual in nature. *Id.* at *40-41. *See Dubinsky v. Mermart*, LLC, No. 4:08CV1806, 2009 U.S. Dist. LEXIS 31992 (E.D. Mo. Apr. 15, 2009) (economic loss doctrine bars fraudulent misrepresentation claim alleging that misrepresentation induced transaction).

In this case, TEAM and Renaissance alleged "damages including lost business and business opportunities, and lost profits and expenses" stemming from Crush's purchase of the T1055. LF0020. Uhlmann has alleged damages for "lost monies loaned and the lost value of his business…." LF0020. Appellants' damages are plainly economic; they do not allege injury to any person or to any property other than T1055 itself. Appellants are therefore attempting to recover in tort for losses stemming from a commercial contract in which the risks were allocated. *See Sharp Bros.*, 703 S.W.2d at 903 ("[W]hen commercial parties of equal bargaining power enter into a contract which either expressly allocates the risk or by omission is allocated under the terms of the Uniform Commercial Code, …[e]ither the contract or the U.C.C. governs the allocation of risk."). Appellants' misrepresentation claims are barred by the economic loss doctrine.

Appellants urge a fraud exception to the economic loss doctrine to stave off the doctrine's effect on their claims, but Appellants' position cannot be found in Missouri law. As a result, Appellants cite only to a legal encyclopedia and the *Restatement (Second) of Torts* for the proposition, after which they mistakenly cite and quote from a case that does not address the issue. Appellants' position that the economic loss doctrine does not bar its tort claims here cannot be sustained. This case, which involves an attempt to recover economic damages relating to a sales transaction involving sophisticated commercial parties, is no place for the creation of a fraud exception to Missouri's economic loss doctrine.[3/]

[3/] Some jurisdictions have carved out such an exception. *See, e.g., Huron Tool & Eng'g Co. v. Precision Consulting Servs., Inc.*, 532 N.W. 2d 541 (Mich. Ct. App. 1995) (representations relating to the performance of the contract do not fit within exception to the economic loss doctrine; tort claim for fraud in the inducement only viable if plaintiff "tricked" into contracting such that its assent to the contract is invalid). The best reasoned of those decisions limit the exception to cases of fraudulent inducement, which -- especially given Crush's extended evaluation of the T1055 prior to its purchase -- Appellants cannot prove here.

III. THE TRIAL COURT'S ORDER DENYING APPELLANTS' MOTION TO REVIEW THE AWARD OF COSTS SHOULD BE REVERSED AND REMANDED WITH DIRECTIONS TO DEDUCT VIDEOGRAPHY EXPENSES AWARDED – RESPONDING TO APPELLANTS' POINT III

A. Standard of review

A grant of costs is reviewed *de novo*. *In re J.P.*, 947 S.W.2d 442, 444 (Mo. Ct. App. 1997).

B. The trial court erred by awarding Manufacturing the expenses of videography as costs

As Manufacturing indicated below, it incorrectly included $10,022.20 in videography expenses in its motion for costs; those expenses should not have been taxed. LF2255. The court should therefore reverse and remand just on the denial of Appellants' motion to review the award of costs, with directions to the trial court to deduct the videography expenses from the awarded costs.

CONCLUSION

For the foregoing reasons, Manufacturing urges the Court to affirm summary judgment for Manufacturing, and to reverse and remand solely on the denial of Appellants' motion to review the award of costs to Manufacturing, with directions to the trial court to deduct videography expenses from the awarded costs.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the above and foregoing Substitute Brief of Respondent Vermeer Manufacturing Company were served by first class mail, postage prepaid, this 12th day of January, 2010, to:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b)

I certify that this brief complies with Rule 84.06(b). This brief contains 9,474 words, as counted by Microsoft Word. An electronic copy on CD of this brief in Microsoft Word format is being filed and served along with the paper copies. That disk has been scanned for viruses and is virus-free.

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