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**IN THE IOWA SUPREME COURT**

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**SUPREME COURT NO. 15-0741**

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**JASON CANNON,**
Plaintiff-Appellant,

v.

**BODENSTEINER IMPLEMENT COMPANY**
**ECK & GLASS, INC. d/b/a EPG INSURANCE, INC.**
**and CNH AMERICA, LLC d/b/a CASE IH,**
Defendants-Appellees.

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**APPEAL FROM THE DISTRICT COURT FOR CLAYTON COUNTY**
**THE HONORABLE JOHN BAUERCAMPER**

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**FINAL BRIEF OF APPELLEE, CNH AMERICA, LLC d/b/a CASE IH**

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

**I. THE TRIAL COURT CORRECTLY HELD THAT, ABSENT PERSONAL INJURY OR PROPERTY DAMAGE BEYOND THE TRACTOR, THE ECONOMIC LOSS RULE PRECLUDES TORT CLAIMS SEEKING ECONOMIC LOSS ARISING FROM PRODUCT PERFORMANCE EXPECTATIONS.**

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## ROUTING STATEMENT

Appellee/Defendant, CNH America LLC, now known as CNH Industrial America LLC d/b/a Case IH (hereinafter "CNH"), disagrees with the Routing Statement of Appellant/Plaintiff, Jason Cannon (hereinafter "Cannon"). The pertinent issues presented for review in this case do not involve constitutional issues or issues of first impression and do not involve any other issues included in Iowa Rule of Appellate Procedure 6.1101(2)(a)-(f). Iowa R. App. P. 6.1101(2)(a)-(f) (2015). Further, the pending issues are appropriate for resolution based on the application of existing legal principles and appropriate for summary disposition under Iowa Rule of Appellate Procedure 6.1101(3)(a) and (b). Iowa R. App. P. 6.1101(3)(a) and (b) (2015). As such, CNH states that this case may be assigned to the Court of Appeals for decision in accordance with Iowa Rules of Appellate Procedure 6.1101(1) and 6.1101(3).

## STATEMENT OF THE CASE

CNH generally agrees with Cannon's Statement of the Case, but provides this brief statement to clarify the issues. Cannon commenced this action on April 22, 2013, advancing claims for damages allegedly resulting from his disappointed expectations regarding a used 2008 Case IH MX Magnum tractor that he purchased used from a John Deere dealership.

(Petition) (App. 22-25). Cannon first raised claims against CNH in a Second Amendment to the Amended and Substituted Petition that was filed on December 23, 2013. (2nd Amendment to Petition) (App. 54-62). At that time, Cannon advanced three claims against CNH seeking recovery under the theories of: product liability (tort) (Count VIII); negligent misrepresentation (tort) (Count IX); and breach of implied warranty (contract) (Count X). *Id.* CNH filed its Answer and asserted various affirmative defenses to Cannon's claims, including but not limited to: failure to state a claim; comparative fault; claims are barred by the economic loss doctrine; and statute of limitations. (CNH Answer to 2nd Amendment to Petition) (App. 63-70). Subsequent to CNH filing a Motion for Summary Judgment, Cannon voluntarily dismissed the negligent misrepresentation claim[1] and filed a motion seeking leave to amend to add two (2) additional claims based on: breach of express warranty (contract) (Count XI) and fraudulent concealment/fraudulent nondisclosure (tort) (Count XII). (Plf Mot. Amend filed 10/31/2014; CNH MSJ Filings 7/31/2014) (App. 71-73; 147-230). Prior to the trial court entering a ruling on Cannon's motion to amend, CNH filed a reply to Cannon's Resistance to CNH's Motion for Summary Judgment. (CNH MSJ Reply filed 11/18/2014) (Supp.App. 1015-

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[1] Cannon dismissed Count IX on November 3, 2014. *See* Docket.

1027). After Cannon's request to amend was granted by the trial court, Cannon filed his Recast Petition and CNH filed its Answer and again asserted various affirmative defenses to Cannon's claims, including but not limited to: failure to state a claim; comparative fault; claims are barred by the economic loss doctrine; and statute of limitations. (Recast Petition filed 1/23/2015; CNH Answer to Recast Petition filed 1/29/2015) (App. 83-102; 111-121). CNH filed a Supplemental Motion for Summary Judgment directed to the newly added claims. (CNH Supp. MSJ filed 1/23/2015) (App. 808-830). CNH also filed a Reply to Cannon's Resistance to CNH's Supplemental Motion for Summary Judgment. (CNH Reply to Resist. Supp. MSJ filed 3/11/2015) (App. 886-897).

On March 10, 2015, the trial court held a hearing on all pending motions. On March 30, 2015, the trial court granted summary judgment for CNH on all pending claims advanced by Cannon (hereinafter "**Ruling**"). (Ruling) (App. 136-144). Cannon timely served a Notice of Appeal on April 28, 2015. (Notice of Appeal) (App. 145-146).

## STATEMENT OF FACTS

On October 6, 2010, Cannon purchased a used 2008 Case IH MX Magnum tractor (Serial No. Z8RZ02496) from Defendant Bodensteiner Implement Company, a John Deere dealership. (Recast Petition at ¶¶ 5, 75)

(App. 84, 93). The tractor was manufactured by CNH on March 17, 2008. (CNH Answer to Recast Petition at ¶ 75) (App. 114). The tractor was first sold on April 21, 2008, by Scherrman Implement.[2] (Recast Petition ¶ 76; Ruling, p. 3) (App. 93; 138). At the time of the original sale, CNH issued a two-year limited warranty that provided protection to the original purchaser, titled "Warranty and Limitation of Liability" (hereinafter "CNH Warranty"). (CNH MSJ Ex. A) (App. 814-815). In addition, there was a "Commercial Equipment Purchased Protection Plan" (hereinafter the "PPP") agreement between EPG Insurance Co. (hereinafter "EPG") and the original purchaser or a subsequent transferee. (CNH MSJ Ex. B) (App. 816-820). The PPP provided extended protection for specifically identified parts. Id.

At the time he agreed to purchase the tractor, executed the purchase agreement and paid the purchase price, Cannon had not looked at and did not have any first hand knowledge regarding the tractor. (Ruling, pp. 3-4; Cannon Resist. Bodensteiner MSJ Ex. 13 - Cannon Depo. taken 8/20/2014, pp. 55:22—57:24) (App. 138-139; 577-578). When he agreed to purchase the tractor, Cannon had no knowledge regarding how the tractor had been maintained. (Cannon Resist. Bodensteiner MSJ Ex. 13 - Cannon Depo.

[2] Claims were first made against CNH over five years after the tractor was first sold. (2nd Amendment to Petition, pp. 3-8) (App. 56-61).

taken 8/20/2014, p. 55:22-25) (App. 577). Further, despite having the opportunity, Cannon did not inspect, test, drive or in any way examine the tractor prior to agreeing to purchase, executing the purchase agreement and paying the purchase price. (Ruling, pp. 3-4; Cannon Resist. Bodensteiner MSJ Ex. 13 - Cannon Depo. taken 8/20/2014, pp. 56:15—57:1; 86:16-23; 95:20-23) (App. 138-139; 577-578; 586; 588). A cursory inspection, however, would have uncovered existing service or maintenance issues that were present at the time of Cannon's purchase. (Cannon Resist. Bodensteiner MSJ Ex. 13 - Cannon Depo. taken 8/20/2014, p. 56:5-14) (App. 577) (noting that existing issues with turbo were apparent from a visual inspection).

Cannon contends that he experienced performance issues after purchasing the used tractor. (Recast Petition ¶¶ 5, 77) (App. 84, 93-94). He did not and still does not know if the prior owner's use or maintenance of the tractor caused or was related to these performance issues. (Cannon Resist. Bodensteiner MSJ Ex. 13 - Cannon Depo. taken 8/20/2014, pp. 56:1-4) (App. 577). Nevertheless, based on these alleged performance deficiencies, Cannon first made claims against CNH based on the theories of product defect (tort), negligent misrepresentation (tort), and breach of implied warranty (contract) on December 23, 2013. (2nd Amendment to Petition

¶¶ 72-98) (App. 57-61). Cannon subsequently received permission to advance claims for alleged breach of express warranty and fraudulent concealment/fraudulent nondisclosure. (Order 1/8/2015; Recast Petition) (App. 81-82; 83-102).

## ARGUMENT

### I. THE TRIAL COURT CORRECTLY HELD THAT, ABSENT PERSONAL INJURY OR PROPERTY DAMAGE BEYOND THE TRACTOR, THE ECONOMIC LOSS RULE PRECLUDES TORT CLAIMS SEEKING ECONOMIC LOSS ARISING FROM PRODUCT PERFORMANCE EXPECTATIONS.

#### A. Error Preservation.

CNH agrees that Cannon preserved his right to appeal this issue.

#### B. Scope and Standard of Review.

CNH agrees with Cannon's statement that the applicable standard of review is for correction of errors at law.

#### C. Argument.

##### 1. Interrelationship between Warranty and Product Liability Claims.

Iowa law has long recognized the interrelationship between warranty and product liability claims. Wright v. Brooke Group Ltd., 652 N.W.2d 159, 180 (Iowa 2002). In fact, the same conduct that raises potential liability under a warranty theory "mirrors conduct" that gives rise to a product defect

claim. Id. at 182. The Iowa Supreme Court, however, has held that courts should not submit duplicate claims for recovery to a jury. Id. at 169. Similarly, the United States District Court for the Northern District of Iowa, while applying Iowa law, recognized that it is inappropriate to submit a warranty claim along with a product defect claim arising from identical facts. Zeigler v. Fisher-Price, Inc., 302 F. Supp. 2d 999, 1008 (N.D. Iowa 2004) (finding that it was improper to submit parallel design defect and warranty claims to a jury in a product liability matter). Accordingly, courts must frequently determine whether a plaintiff's claim is properly considered under a warranty or tort theory.

Warranty claims apply in cases where a user's disappointed expectation interests respecting product performance are at issue and only economic losses or damage to the product is alleged as damages.

> [C]ontract law protects a purchaser's expectation interest that the product will be fit for its intended use, whereas products liability law concerns risk of injury to a person or the person's property through exposure to a dangerous product. It can be summarized like this: **"defects of suitability and quality are redressed through contract actions and safety hazards through tort actions."**

American Fire & Casualty Co. v. Ford Motor Co., 588 N.W.2d 437, 439 (Iowa 1999) (emphasis added). Accordingly, this Court must examine the

trial court's determination that under Iowa substantive law, Cannon's product defect claims are only properly considered under contract principles and tort claims are precluded. Determan v. Johnson, 613 N.W.2d 259, 262 (Iowa 2000).

> The line between tort and contract must be drawn by analyzing interrelated factors such as the **nature of the defect, the type of risk, and the manner in which the injury arose.** These factors bear directly on whether the **safety-insurance policy of tort law** or the **expectation-bargain protection policy of warranty law** is most applicable to a particular claim.

Determan, 613 N.W.2d at 262 (emphasis added) (quoting Nelson v. Todd's Ltd., 426 N.W.2d 120, 124-25 (Iowa 1988)).

Under American Fire, whether Cannon's claim should be permitted under a product defect or breach of warranty theory depends on whether the damages arose from a sudden and dangerous occurrence, which did not occur in this case, or, alternatively, as alleged in the Recast Petition, Cannon's disappointed expectations. Determan, 613 N.W.2d at 263; American Fire, 588 N.W.2d at 439. In addition, for a tort theory to apply, the alleged damage must extend beyond the product itself to include either damage to other property or personal injury. Determan, 613 N.W.2d at 262. The face of Cannon's myriad pleadings, however, demonstrates that the damages sought in this action are solely for economic loss resulting from the

alleged failure of the tractor to perform as expected and related expenses. (Amended and Substituted Petition; 1st Amendment to Petition; 2nd Amendment to Petition; Recast Petition; CNH MSJ Ex. G - Cannon's Answer to Interrogatory No. 8) (App. 26-46; 47-53; 54-62; 83-102; 208). Although Cannon claims to be seeking emotional distress damages, under the circumstances, the absence of any physical injury specifically precludes recovery of damages for emotional distress.[3]

**2. Operation of the Economic Loss Doctrine**

The economic loss rule prohibits tort claims where overlapping contract claims more appropriately address the injury alleged. Lincoln Sav. Bank v. Open Solutions, Inc., 956 F. Supp. 2d 1032, 1044 (N.D. Iowa 2013).

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[3] Iowa law recognizes a cause of action for negligent or unintentional infliction of emotional distress. Lawrence v. Grinde, 534 N.W.2d 414, 420 (Iowa 1995). Nevertheless, emotional distress damages may only be recovered, absent four narrowly circumscribed exceptions that are inapplicable in this case, when a claimant has sustained a physical injury. Lawrence, 534 N.W.2d at 420-21; Mills v. Guthrie County Rural Elec. Coop. Ass'n, 454 N.W.2d 846, 852 (Iowa 1990); Niblo v. Parr Mfg., Inc., 445 N.W.2d 351, 354 (Iowa 1989).

> It is the general rule in this state that, absent intentional conduct by defendant or some physical injury to the plaintiff, no recovery may be had for emotional distress.

Mills, 454 N.W.2d at 852.

> We have long adhered to the rule that in negligence cases no recovery is permitted for emotional distress for mental anguish, unless there is an accompanying physical injury.

Niblo, 445 N.W.2d at 354.

The doctrine applies when a plaintiff sustains only economic loss, which includes "any monetary loss, costs of repair or replacement, loss of employment, loss of business and employment opportunities, loss of good will, and diminution in value." Id. at 1045.

> As a general proposition, the economic loss rule bars recovery in negligence when the plaintiff has suffered only economic loss. In part, this rule is intended to prevent the "tortification of contract law."

St. Malachy Roman Catholic Congregation v. Ingram, 841 N.W.2d 338, 351 (Iowa 2013) (quoting Annett Holdings, Inc. v. Kum & Go, L.C., 801 N.W.2d 499, 503 (Iowa 2011)). Further, the doctrine is not limited to circumstances where the plaintiff and defendant have a contractual relationship or are in "direct contractual privity." Annett Holdings, 801 N.W.2d at 504.

> A purchaser seeking purely economic losses should not be permitted to complain, under tort principles, against anyone in the chain of distribution that the product bought was not better ….

Id. at 505.

Under Iowa law, Cannon cannot employ tort theories to recover for alleged performance issues that caused only economic loss. Where the loss relates to a consumer's "disappointed expectations due to deterioration, internal breakdown or non-accidental cause, the remedy lies in contract."

Determan, 613 N.W.2d at 262. This is so because "contract law protects a purchaser's expectation interest that the product received will be fit for its intended use." Id., at 262 (quoting Tomka v. Hoechst Celanese Corp., 528 N.W.2d 103, 107 (Iowa 1995)).

Pursuant to Iowa law, a claimant may only recover purely economic loss under a contractual theory and cannot advance a claim based on general tort law. Ethyl Corp. v. BP Performance Polymers, Inc., 33 F.3d 23, 25 (8th Cir. 1994); Gunderson v. ADM Investor Servs., Inc., 85 F. Supp. 2d 892, 922-23 (N.D. Iowa 2000); Annett Holdings, 801 N.W.2d at 502-03; Determan, 613 N.W.2d at 261-62; Richards v. Midland Brick Sales Co.., 551 N.W.2d 649, 650-51 (Iowa Ct. App. 1996). This principle is known as the economic loss rule. Consequential damages that do not result from a personal injury or property damage to property other than the product at issue, *i.e.,* Cannon's tractor, are considered economic losses and are not compensable via tort claims. Annett Holdings, 801 N.W.2d at 502. The economic loss rule is a long-standing, respected principle of Iowa law that's been applied for more than 100 years.

> For well over a century, it has been a settled feature of American and English tort law that in a variety of situations there is no recovery in negligence for pure economic loss, that

> is, for economic loss unrelated to injury to the person or the property of the plaintiff.

Id. at 503. In summary, when no personal injury or property damage occurs beyond the product at issue, the economic loss rule precludes tort recovery under Iowa law. Id. at 504.

#### 3. Application of the Economic Loss Rule to Cannon's Claims

When examining if the economic loss rule applies, courts must determine whether the expectation/bargain protection principles of warranty law or the safety/insurance policies of tort law more appropriately apply to the claim. Determan, 613 N.W.2d at 264. When making this determination, Iowa courts consider several factors, including the: nature of the alleged source of damages; type of risk at issue; manner in which the injury arose; and type of damages sought by the plaintiff. Annett Holdings, 801 N.W.2d at 506; Determan, 613 N.W.2d at 262-64.

> We agree that the line to be drawn is one between tort and contract rather than between physical harm and economic loss. . . . **When**, as here, the **loss relates to a consumer or user's disappointed expectations due to deterioration, internal breakdown or non-accidental cause, the remedy lies in contract**.
>
> Tort theory, on the other hand is generally appropriate when the harm is a sudden or dangerous occurrence, frequently involving

> some violence or collision with external objects, resulting from a genuine hazard in the nature of the product defect. . . .
>
> "The line between tort and contract must be drawn by analyzing interrelated factors such as the nature of the defect, the type of risk, and the manner in which the injury arose. These factors bear directly on whether the safety-insurance policy of tort law or the expectation-bargain protection policy of warranty law is most applicable to a particular claim.

Determan, 613 N.W.2d at 262 (emphasis added) (citation omitted). This distinction provided by the economic loss rule is based on the responsibilities undertaken by a manufacturer or seller and the expectations of the purchaser or user.

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held [liable] for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.

> Consequently, **losses in product liability cases are generally limited to physical harm to the plaintiff or physical harm to property of the plaintiff other than the product itself**. **Economic losses to the product itself are excluded**.

Richards, 551 N.W.2d at 651 (emphasis added) (citations omitted). "At a minimum" there must be personal injury or property damage that extends beyond the product itself to recover in tort. Determan, 613 N.W.2d at 262. In this case, Cannon solely seeks damages for alleged economic loss, absent personal injury or damage to other property. Accordingly, as applied in Iowa, the economic loss rule precludes tort recovery under the circumstances.

Cannon claims that application of the economic loss rule is unfair under the circumstances because he was not in privity of contract with CNH. Application of the economic loss rule, however, is in no way impacted by the existence or lack of contractual privity. The economic loss rule is equally applicable to claims by parties in contractual privity and strangers to written agreements that are not in privity. Annett Holdings, 801 N.W.2d at 504. The distinction provided by the economic loss rule is based on the type of claim and nature of the damages sought, rather than the positions of the parties.

### 4. Application of the Economic Loss Rule Does Not Implicate Constitutional Rights

Cannon also challenges the constitutionality of the economic loss rule, contending that application to non-privity buyers violates the due process clause of the Iowa state constitution. Not surprisingly, Cannon fails to cite a single authority, from any jurisdiction, finding that application of the economic loss rule is unconstitutional. Counsel for CNH, in responding to Cannon's argument found only a single case that addressed this issue. See Just in Case Business Lighthouse, LLC v. Murray, 2013 Colo. App. LEXIS 1140 at *40 (Colo. Ct. App. Jul. 18, 2013) (stating "[n]or does the economic loss rule implicate a constitutional right."). This is not surprising. Iowa law clearly establishes that, without an independent non-contractual basis, a breach of contract does not give rise to a tort or negligence action. Preferred Marketing Assoc. Co. v. Hawkeye Nat'l Life Ins. Co., 452 N.W.2d 389, 397 (Iowa 1990) (stating that breach of contract does not create basis for tort action absent violation of a non-contractual duty). Similar to determining that a breach of contract is not a tort, the economic loss doctrine is a determination that certain rights are better handled through contract-related actions, rather than tort claims, and does not foreclose Cannon's right to seek a remedy. Richards, 551 N.W.2d at 651.

> The economic loss doctrine "bars a party from recovering economic damages in tort unless accompanied by physical harm, either in the form of personal injury or secondary property damage." This is premised on a theory that:
>
>> **contract law and tort law each protect distinct interests**. Generally, **contract law** enforces the **expectancy interests** between contracting parties and provides **redress** for parties who fail to receive the **benefit of their bargain**. . . . **Tort law**, in contrast, seeks to protect the public from **harm to persons and property**.
>
> The economic loss doctrine, however, is not a "blanket disallowance of tort recovery for economic losses." Rather, recovery is barred when the claim alleges "only economic damages resulting from an alleged breach of contract."

Ares Funding, LLC v. MA Maricopa, LLC, 602 F. Supp. 2d 1144, 1148 (D. Ariz. 2009) (emphasis added) (citations omitted). Limiting economic loss claims to contract-related theories of recovery does not deprive Cannon of a property right, but instead defines the type of action he is entitled to bring, a standard function of the law. In this instance, Cannon had the right and opportunity to bring a breach of implied warranty claim against CNH. For whatever reason, despite filing suit against the other defendants, Cannon chose not to pursue a claim against CNH under that theory or any other until after the applicable limitations period expired. Limiting these types of claims to contract-based theories does not invoke constitutional protections as argued by Cannon.

Cannon's claims and the damages sought are based solely on the alleged failure of the tractor to perform as expected. These types of damage, resulting from the Cannon's disappointed expectations regarding product performance, reside solely in contract law and cannot be pursued via a tort theory under Iowa law. Determan, 613 N.W.2d at 262-63; Richards, 551 N.W.2d at 651. Consequently, as found by the trial court, CNH is entitled to summary judgment on Cannon's product defect tort claim.

## II. PLAINTIFF HAS NO LEGAL GROUNDS FOR AN EXPRESS WARRANTY CLAIM AGAINST CNH.

### A. Error Preservation.

CNH agrees that Cannon preserved his right to appeal this issue as presented to the trial court. Cannon, however, raised two new arguments in his Appellant's Brief (joint venture and agency) that were neither presented to nor considered by the trial court. Cannon did not preserve his right to appeal on those issues and they are not properly considered by this Court under the governing standard. Meier v. Senecaut, 641 N.W.2d 532, 537 (Iowa 2002)

### B. Scope and Standard of Review.

CNH agrees with Cannon's statement that the applicable standard of review is for correction of errors at law.

### C. Argument.

Iowa law permits both express and implied warranty claims founded on proper grounds. In this case, the trial court correctly held that the statute of limitations for any implied warranty claims expired eight (8) months before Cannon advanced any claims against CNH. (Ruling, p. 8) (App. 143). While Cannon did not appeal the ruling by the trial court on the statute of limitations, a brief discussion of implied warranty claims, the only potentially appropriate claim against CNH under the circumstances, is pertinent to the issues in this case that are on appeal.

Iowa law provides that an implied warranty claim, whether based on merchantability or fitness for a particular purpose, is subject to a five-year statute of limitations. See IOWA CODE § 614.1(4) (2013); Fell v. Kewanee Farm Equip. Co., 457 N.W.2d 911, 919 (Iowa 1990) (applying five-year statute of limitations to implied warranty actions in Iowa); City of Carlisle v. Fetzer, 381 N.W.2d 627, 628-29 (Iowa 1986) (same); Richards v. Midland Brick Sales Co., Inc., 551 N.W.2d 649, 652 (Iowa Ct. App. 1996) (same). Most importantly, the limitations period for an implied warranty claim commences when the product is first sold by the manufacturer. See IOWA CODE § 554.2725(2) (2013). Section 554.2725(2) of the Iowa Code states:

> A cause of action accrues when the breach occurs, regardless of the aggrieved parties' knowledge of the breach. **A breach of warranty occurs when tender of delivery is made**….

Id. (emphasis added); see also, Nationwide Agribusiness Ins. Co. v. SMA Elevator Constr., Inc., 816 F. Supp. 2d 631, 666 (N.D. Iowa 2011) (stating that statute of limitations for an implied warranty claim commences when goods are initially delivered).

There is no dispute that the tractor was originally sold on April 21, 2008. (Recast Petition, ¶ 76; Ruling p. 3) (App. 93; 138). Accordingly, the deadline to commence a breach of implied warranty claim under Iowa law, whether based on merchantability or fitness for a particular purpose, **expired on April 21, 2013**, five years after the tractor was originally sold. See IOWA CODE §§ 614.1(4) (establishing five-year statute of limitations for implied warranty claims); 554.2725(2) (stating that statute of limitations commences upon tender of delivery). It is immaterial that Cannon may have purchased the tractor after that time or failed to commence an action against CNH within that time. See Fell, 457 N.W.2d at 919 (affirming summary judgment for defendant on implied warranty claim for 1986 accident involving agricultural elevator because the elevator was first sold in 1969 and the implied warranty limitations period expired in 1974).

Cannon first raised claims against CNH in the Second Amendment to the Amended Petition, which was filed on December 23, 2013. Based on the original date of sale, the statute of limitations for an implied warranty claim against CNH expired April 21, 2013. Based on the expiration of this deadline, the trial court correctly granted summary judgment for CNH on Cannon's implied warranty claim. (Ruling, pp. 8-9) (App. 143-144).

Alternatively, while two documents potentially provide grounds for an express warranty claim, neither provides a legally cognizable basis for Cannon's claims against CNH in this action. First, CNH issued the CNH Warranty which was a two-year limited warranty that provided protection to the original purchaser. (CNH MSJ Ex. A) (App. 814-815). Second, there was the PPP agreement between EPG and the original purchaser and/or a subsequent transferee. (CNH MSJ Ex. B) (App. 816-820). Neither agreement provides a valid legal basis for Cannon's express warranty claim against CNH.

#### 1. The CNH Warranty Expired after Two Years and Protects Only the Original Retail Purchaser.

The terms of the UCC, which govern this transaction for the sale of a good, permit a manufacturer to limit its responsibilities for both express and implied warranty claims. Tomka v. Hoechst Celanese Corp., 528 N.W.2d

103, 108 (Iowa 1995); Sharp v. Tamko Roofing Prods., Inc., No. 02-0728, 2004 Iowa App. LEXIS 1250 *5-8 (Iowa Ct. App. Nov. 15, 2004). Valid warranty limitations or disclaimers apply to both the original purchaser and to subsequent or remote purchasers that are not in privity with the seller. Tomka, 528 N.W.2d at 108; Sharp, 2004 Iowa App. LEXIS at *7-8. In fact, subsequent purchasers are subject to the same warranty disclaimers or limitations as the original purchaser and do not obtain greater rights, regardless of whether they received a copy of the warranty. Id., at *8-9 (citing substantial authority finding that subsequent or non-privity purchasers are subject to all terms of the warranty issued at the time of sale, regardless of whether they received a copy of the warranty).

Two separate and independent grounds preclude Cannon from recovering under the CNH Warranty. First, the CNH Warranty, which became operative at the time of sale on April 21, 2008, expired on April 21, 2010, approximately six months prior to Cannon purchasing the tractor in October 2010. (CNH MSJ Ex. A, p. 1) (App. 814). Second, benefits under the CNH Warranty were specifically limited to the "initial retail purchaser." Id. Consequently, Cannon was not a party to and cannot benefit from that agreement. Because Cannon was not a party to the CNH Warranty and the

warranty expired prior to his purchase, there is no legal basis for Cannon's express warranty claim under the CNH Warranty.

There is an additional reason that Cannon cannot recover under the CNH Warranty. Pursuant to Iowa law, non-privity buyers cannot recover consequential economic loss under an express warranty theory. Tomka, 528 N.W.2d at 107. Cannon's alleged damages solely encompass consequential economic loss, *i.e.,* loss of business income. Under Iowa law, purchasers that are not in privity with the manufacturer or original seller cannot recover consequential economic loss damages under an express warranty theory. Id. at 108.

Because the terms of the CNH Warranty were limited to the original purchaser and expired prior to Cannon purchasing the tractor, Cannon has no basis for an express warranty claim under the CNH Warranty. Further, Iowa law precludes a non-privity buyer from recovering consequential economic loss under an express warranty theory. Accordingly, the trial court correctly held that CNH is entitled to summary judgment on the CNH Warranty for Cannon's express warranty claim. (Ruling, pp. 8-9) (App. 143-144).

### 2. CNH was Not a Party to and Cannot be Held Liable Under the Extended Warranty.

At the time the tractor was first sold, the PPP was obtained by the initial purchaser. (CNH MSJ Ex. B) (App. 816-820). By its express terms, the PPP is an agreement between EPG and the original buyer. Protection under the PPP, however, could be permissibly transferred to a subsequent purchaser, such as Cannon in this case. The express terms, however, demonstrate that CNH was not a party to or responsible for performance under the terms of the PPP.

> The **Plan is a contract between the Provider** [defined as EPG Insurance, Inc.] **and the Customer** [defined as the Purchaser of the Plan or an assignee] under which the **Provider agrees to protect** certain specified whole goods purchased by the Customer (the "Goods") according to the terms and conditions set out herein. THE **SCOPE AND EFFECTIVENESS OF THE PLAN IS HEREBY LIMITED EXCLUSIVELY TO THE TERMS AND CONDITIONS EXPRESSED HEREIN**, AND THE **CUSTOMER IS BOUND** BY THESE TERMS AND CONDITIONS.

(CNH MSJ Ex. B ¶ 2) (App. 817) (emphasis added). Because CNH was not a party to, did not issue and was not responsible for performance under this agreement, the PPP does not provide a basis for an express warranty claim against CNH.

Accordingly, because there is no legal basis for an express warranty claim against CNH under the CNH Warranty or the PPP, the trial court correctly held that CNH is entitled to summary judgment on Cannon's express warranty claims. (Ruling, pp. 8-9) (App. 143-144).

Cannon, however, attempts to shift the focus of his express warranty claim, alleging that he is entitled to relief because the purported warranties failed in their essential purpose. It is axiomatic, however, that to recover under a claim alleging that a warranty failed in its essential purpose, there must be or have been a basis for a valid warranty claim. Stated differently, there is no legally cognizable basis for a claim that a warranty failed of its essential purpose when no valid warranty rights ever existed. Under the circumstances, Cannon has no basis for a warranty claim against CNH under the CNH Warranty or the PPP issued by EPG. Because Cannon does not have a valid basis for a warranty claim against CNH, CNH is entitled to summary judgment on Cannon's express warranty count.

Finally, Cannon's contends for the first time in his appeal brief that CNH can be held liable for breach of warranty under the PPP based on a "joint venture" with EPG or, alternatively, because EPG was CNH's agent. Cannon waived these legally ineffectual arguments by failing to raise them with the trial court. Arguments raised for the first time on appeal, that were

not raised with or addressed by the trial court, are waived. Meier v. Senecaut, 641 N.W.2d 532, 537 (Iowa 2002) (noting that it is a "fundamental doctrine" of appellate review that arguments neither raised nor considered by the district court are waived on appeal); Cox v. Waudby, 433 N.W.2d 716, 718 (Iowa 1988) (stating that the Iowa Supreme Court will not consider arguments raised for the first time on appeal and not presented to the district court). Further, there is no record evidence supporting either contention.

Because Cannon has failed to demonstrate that CNH has potential liability under the CNH warranty or the PPP, the trial court's summary judgment ruling denying Cannon's express warranty claim should be affirmed.

## III. PLAINTIFF CANNOT DEMONSTRATE THE PRIMA FACIE ELEMENTS OF A FRAUDULENT CONCEALMENT/ FRAUDULENT NONDISCLOSURE CLAIM AGAINST CNH.

### A. Error Preservation.

CNH agrees that Cannon preserved his right to appeal this issue.

### B. Scope and Standard of Review.

CNH agrees with Cannon's statement that the applicable standard of review is for correction of errors at law.

## C. Argument.

After amending the operative pleadings multiple times, Cannon added a claim for alleged fraudulent concealment/fraudulent nondisclosure against CNH. (Recast Petition, pp. 17-18) (App. 99-100). Within that claim, Cannon vaguely and generally alleges that through the existence of the original two-year CNH Warranty and attempts to repair the tractor, CNH concealed the fact that the tractor was unusable and could not be repaired. In making this claim, Cannon does not and cannot advance any specific allegations regarding particular deceptive and intentional conduct by CNH, a *prima facie* requisite for this claim. In addition, by his own admission, Cannon was aware of this vaguely alleged fraudulent concealment in late 2011 or early 2012, more than a year prior to expiration of the deadline for implied warranty claims, which expired on April 21, 2013. (Recast Petition ¶ 117) (App. 100).

### 1. Cannon Cannot Establish the *Prima Facie* Elements for a Fraudulent Concealment/Nondisclosure Claim.

Fraudulent concealment/nondisclosure claims are premised on common law principles and provide a type of equitable estoppel that can, when applicable, be used to override a statute of limitations defense. Estate of Anderson v. Iowa Dermatology Clinic, PLC, 819 N.W.2d 408, 414 (Iowa

2012); Christy v. Miulli, 692 N.W.2d 694, 700 (Iowa 2005). This doctrine was intended to prevent a party from benefiting from a statute of limitations defense when that party's **fraud** "prevented" another from timely seeking relief within an applicable limitations period. Estate of Anderson, 819 N.W.2d at 414; Hook v. Lippolt, 755 N.W.2d 514, 525 (Iowa 2008); Christy, 692 N.W.2d at 700.

> The common law doctrine of fraudulent concealment . . . developed to "prevent a party from benefiting from 'the protection of a limitations statute when **by his own fraud he has prevented the other party from seeking redress *within the period of limitations*.'"** The doctrine is a form of equitable estoppel that estops a party from raising a statute of limitations defense in certain circumstances.

Estate of Anderson, 819 N.W.2d at 414 (emphasis added) (citations omitted).

Cannon's claim, however, fails to satisfy this preliminary requirement. Specifically, in the Recast Petition, Cannon alleged that "this fraudulent concealment and/or fraudulent non-disclosure became known to Cannon "in late 2011 and/or early 2012." (Recast Petition ¶ 117) (App. 100). The doctrine of fraudulent concealment only applies to protect a claimant when a defendant's "fraud" precludes the plaintiff from timely filing suit. Within the Recast Petition, however, Cannon clearly admits that

he knew of the alleged fraudulent concealment at least a year prior to expiration of the limitations period for an implied warranty claim. Further, Cannon actually filed suit on the day that limitations period expired, but did not include CNH as a party. The fraudulent concealment theory protects a plaintiff who was misled by another's fraud, but does not provide a second chance to add parties that Cannon was aware of but chose not to include as defendants when suit was timely filed. Hammen v. Iles, No. 12-1134, 2013 Iowa App. LEXIS 573, *10-11 (Iowa Ct. App. May 30, 2013) (holding that the doctrine of fraudulent concealment did not apply when plaintiff timely filed an action, but made mistakes in how the matter was filed). Consequently, because Cannon was aware of the "alleged" circumstances more than a year prior to expiration of the statute of limitations and chose not to include CNH as a defendant when initially filing suit, he cannot benefit from the fraudulent concealment doctrine.

Alternatively, Cannon argues that his fraudulent concealment/ nondisclosure claim is not advanced to ameliorate the expiration of the statute of limitations for the untimely filed breach of implied warranty claim, but instead as an independent tort basis for recovery against CNH. Regardless of the underlying intent for Cannon's theory, for tort recovery or relief from the statute of limitations, the operative *prima facie* elements that

must be satisfied are identical. Cannon is unable to satisfy the *prima facie* requisites for a fraudulent concealment/nondisclosure claim.

To successfully prosecute this claim, Cannon must demonstrate all of the following elements through a clear and convincing preponderance of the evidence: (1) CNH made a false representation or concealed material facts; (2) Cannon lacked knowledge of the true facts; (3) CNH intended for Cannon to act upon its false representations; and (4) Cannon relied on false representations to his prejudice. Estate of Anderson, 819 N.W.2d at 414-15; Hook, 755 N.W.2d at 524-25; Christy, 692 N.W.2d at 702. Cannon's proof or supporting evidence for this claim fails for each of the foregoing elements.

To satisfy the first element, Cannon must identify and demonstrate affirmative conduct by CNH that was intended to conceal his cause of action or the true circumstances surrounding the tractor. Estate of Anderson, 819 N.W.2d at 415; Christy, 692 N.W.2d at 702. The conduct at issue must be intentionally deceptive or fraudulent. Hook, 755 N.W.2d at 525. In fact, there must be specific evidence establishing that CNH acted with the "intent to mislead" Cannon. Id. (citing substantial authority requiring "affirmative misconduct"). Further, the alleged concealment must be separate from and after the alleged initial liability-producing conduct. Estate of Anderson, 819

N.W.2d at 415; Christy, 692 N.W.2d at 702. When the plaintiff cannot or does not particularly identify intentional conduct performed with the specific intent to mislead, plaintiff has failed to establish a *prima facie* requisite and the claim is subject to summary disposition. Estate of Anderson, 819 N.W.2d at 416; Hook, 755 N.W.2d at 525-27; Hallett Constr. Co. v. Meister, 713 N.W.2d 225, 231-32 (Iowa 2006). Cannon's failure to specifically identify any intentional conduct performed by CNH with the intent to mislead precludes application of the fraudulent concealment doctrine and entitles CNH to summary judgment.

Cannon cannot satisfy the second *prima facie* element based on the undisputed facts in this case. Specifically, Cannon did not have any contact with CNH prior to purchasing the tractor. (Cannon Resist. Bodensteiner MSJ Ex. 13 - Cannon Depo. taken 8/20/2014, p. 61:9-15) (App. 579). Accordingly, CNH's actions did not influence his purchase decision. Further, Cannon admits that he was aware of the acts that he characterized as fraudulent prior to expiration of the deadline for implied warranty claims. (Recast Petition ¶ 117) (App. 100). In summary, there is no evidence that any actions by CNH impacted Cannon's knowledge or lack of knowledge of the circumstances, the second *prima facie* element.

Even giving credence to the acts Cannon characterized as fraudulent, *i.e.*, existence of a warranty agreement and efforts to repair, which are insufficient under the fraud pleading standard, Cannon also cannot show that CNH intended for him to rely or act in a manner that caused injury. Because he did not have any contact with CNH prior to purchasing the tractor, there were no representations by CNH that influenced his purchase decision. (Cannon Resist. Bodensteiner MSJ Ex. 13 - Cannon Depo. taken 8/20/2014, p. 61:9-15) (App. 579). In addition, because he was "aware" of these alleged acts prior to expiration of the statute of limitations, neither CNH's representations nor conduct influenced his decision to forgo a claim based on breach of implied warranty until after the statute expired.

Finally, Cannon cannot satisfy the fourth element of the claim based on the undisputed facts of this case. This element requires that Cannon rely on any false representations to his prejudice. Under the circumstances, there are only two decisions that Cannon can claim were impacted by CNH's actions: the decision to purchase the tractor and the decision to seek relief for alleged performance issues. The evidence, however, clearly demonstrates that no actions or representations by CNH affected either of those decisions.

First, Cannon was seeking a Case tractor based on observing the positive experiences of several co-workers who owned Case tractors. (Cannon Resist. Bodensteiner MSJ Ex. 13 - Cannon Depo. taken 8/20/2014, pp. 57:2−58:15) (App. 578). He did not have any contacts with CNH personnel in making this decision or prior to purchasing the used tractor from a John Deere dealership. (Cannon Resist. Bodensteiner MSJ Ex. 13 - Cannon Depo. taken 8/20/2014, p. 61:9-15) (App. 579). In addition, the original CNH Warranty expired before he purchased the tractor. (CNH MSJ Ex. A) (App. 814-815). Consequently, there were no acts or decisions by CNH, implicit or explicit, that impacted Cannon's decision to purchase the tractor.

Second, after Cannon experienced problems with the tractor, he received assistance from CNH representatives during the repair process. He has not, however, identified any statements or actions by CNH representatives that kept him from taking action or seeking relief within the legally permitted time period. In fact, Cannon could not properly advance that allegation as the Recast Petition expressly admits that he had knowledge of the alleged misstatements by CNH in late 2011 or early 2012. (Recast Petition ¶ 117) (App. 100). Cannon subsequently filed suit in April, 2013, prior to expiration of the statute of limitations for implied warranty claims,

but chose not to include CNH as a defendant. (Petition) (App. 22-25). Because there is no evidence that Cannon relied on any allegedly false acts or representations by CNH to his detriment, he cannot satisfy any of the requisite elements for a fraudulent concealment/ nondisclosure claim. This failure of Cannon's evidence to satisfy the *prima facie* elements of a fraudulent concealment/nondisclosure claim requires that this Court affirm the trial court's grant of summary judgment to CNH.

**2. Cannon's Evidence Does Not Satisfy the Fraud Pleading Standard**

In addition to failing to establish any elements for a fraudulent concealment/nondisclosure claim, the failure of Cannon's fraud evidence entitles CNH to summary judgment on a separate and independent basis. Because this claim is premised on alleged fraud by CNH, Cannon must particularly demonstrate and identify any acts which constitute fraud. Estate of Anderson, 819 N.W.2d at 415; Postal Finance Co. v. Langton, 166 N.W.2d 806, 807 (Iowa 1969) (stating that it is insufficient to generally allege or advance legal conclusions of fraud and noting that a fraud claim should be dismissed if it does not set forth specific acts or facts that constitute fraud). Allegations of fraud involve "conduct, words or representations which partake in some material degree of artifice or

deception employed to deceive, cheat or circumvent another; it is some form of deception consciously employed for the purpose of misleading another." Postal Finance, 166 N.W.2d at 808.

When pleading fraud, whether premised on fraudulent concealment/ nondisclosure or other fraud grounds, the proponent **must** specifically allege and identify the purportedly fraudulent conduct. Estate of Anderson, 819 N.W.2d at 415; Postal Finance, 166 N.W.2d at 807. Longstanding Iowa law establishes this requirement.

> Fraud is **never presumed** and whenever it constitutes an element of a cause of action . . . the ultimate facts relied on to constitute the essential elements requisite to maintain an action for fraud must be pleaded in clear and positive terms.
>
> It is **not sufficient to allege fraud in general terms or in terms which amount to mere conclusions**.

In re Estate of Lorimor, 216 N.W.2d 349, 353 (Iowa 1974) (emphasis added) (citations omitted).

> A **mere charge of fraud in a pleading is not sufficient** as it is a legal conclusion, but the **facts upon which the fraud is based must be averred**." . . .
>
> It is **not sufficient to plead fraud in general terms**, and, if the pleading does not state the specific acts or facts relied upon as constituting fraud, a demurrer thereto will be sustained.

Postal Finance, 166 N.W.2d at 807 (emphasis added) (citations omitted). Accordingly, Iowa law indisputably requires that any alleged fraudulent statements or activities be specifically identified and pleaded within the petition.

> To call a thing a 'fraud,' without a statement of facts constituting fraud, is not an issuable allegation. Fraud, as used in this connection, has reference to conduct, words or representations which partake in some material degree of artifice or deception employed to deceive, cheat or circumvent another; it is **some form of deception consciously employed for the purpose of misleading another**.

Postal Finance, 166 N.W.2d at 808 (emphasis added) (quoting Plagmann v. City of Davenport, 165 N.W. 393, 394 (Iowa 1917)). Merely alleging or generally pleading fraud, as Cannon has in this case, specifically paragraphs 112-117 of the Recast Petition, is unquestionably insufficient under Iowa pleadings standards, ineffective to support a fraud claim and subjects this claim to summary disposition. See Recast Petition ¶¶ 112-117 (App. 99-100).

Cannon has advanced a broad, general allegation of fraud that is supported only by innuendo and surmise. In summary, Cannon's fraud claim is premised on the existence of an express warranty that was limited to the original purchaser and expired prior to his purchase of the tractor, the

existence of a service protection agreement with a separate and different entity, and efforts by CNH to assist with his tractor. Cannon had no contact with any CNH representatives prior to purchasing the tractor. (Cannon Resist. Bodensteiner MSJ Ex. 13 - Cannon Depo. taken 8/20/2014, p. 61:9-15) (App. 579). Further, there are no specific fraudulent acts alleged indicating that CNH or its representatives made any statements or performed any deceptive acts with the intent to deceive Cannon, only allegations that CNH attempted to repair Cannon's tractor. Absent pleading specific facts demonstrating that CNH **engaged in identifiable fraudulent conduct with the intent to deceive Cannon**, the trial court's grant of summary judgment on the fraudulent concealment/nondisclosure claim should be affirmed.

As demonstrated, by the operative facts and application of Iowa law, an implied warranty claim provided the proper basis, if any, for Cannon to seek recovery from CNH. Cannon, however, specifically admitted that the alleged fraudulent concealment and/or nondisclosure became "known" to him in late 2011 or early 2012. (Recast Petition ¶ 117) (App. 100). At that point, Cannon was within the applicable limitations period and had the opportunity to timely pursue implied warranty claims against CNH, the appropriate remedy under Iowa law. Ethyl Corp. v. BP Performance Polymers, Inc., 33 F.3d 23, 25 (8th Cir. 1994) (noting that tort claims are not

proper remedy to compensate alleged disappointed consumer expectations based on product performance which should be pursued under contract/warranty theory); Gunderson v. ADM Investor Servs., Inc., 84 F. Supp.2d 892, 922-23 (N.D. Iowa 2000) (same); Annett Holdings, Inc. v. Kum & Go, 801 N.W.2d 499 502-03 (Iowa 2011) (same); Determan, 613 N.W.2d at 261-62 (same). Based on the decision not to pursue CNH at that time Cannon filed his initial petition, Cannon now seeks to re-characterize CNH's conduct to create a different, legally and factually unsupported cause of action. However, as demonstrated by the undisputed facts in this case, Cannon cannot satisfy the *prima facie* elements of a fraudulent concealment/nondisclosure claim and also cannot satisfy the fraud "specificity" pleading requirement. Based on these deficiencies in his claim, the trial court's grant of summary judgment to CNH should be affirmed.

## CONCLUSION

Application of Iowa law to the pertinent, undisputed facts clearly demonstrates that the trial court correctly granted summary judgment to CNH. First, based on the underlying nature of Cannon's claims and types of damages sought, the economic loss rule as applied in Iowa law clearly provides that product defect claims premised on tort theories are precluded. Second, because the original CNH Warranty granted no rights to the Cannon

and expired prior to the time of purchase and CNH was not a party to the PPP agreement, Cannon has no basis for an express warranty claim against CNH. Absent any basis for an express warranty claim, there are no grounds for a claim that the warranty failed of its essential purpose. As an additional ground, Iowa law precludes a non-privity purchaser, such as Cannon, from recovering consequential damages under an express warranty theory. Finally, Cannon cannot establish any of the *prima facie* requisites for a fraudulent concealment/nondisclosure claim. Based on all the foregoing, the trial court's grant of summary judgment should be affirmed.

## REQUEST FOR ORAL ARGUMENT

Counsel for Appellee/Defendant, CNH America LLC, n/k/a CNH Industrial America LLC d/b/a Case IH, respectfully requests to be heard at oral argument upon the submission of this case.

Respectfully submitted,

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## CERTIFICATE OF COST

The undersigned hereby certifies that the cost of printing the foregoing Final Brief of Appellee, CNH America LLC, n/k/a CNH Industrial America LLC d/b/a Case IH, is $0.00.

s/ *Richard J. Kirschman*
Richard J. Kirschman

## CERTIFICATE OF FILING

The undersigned hereby certifies that the foregoing Final Brief of Appellee, CNH America LLC, n/k/a CNH Industrial America LLC d/b/a Case IH, was filed with the Iowa Supreme Court by electronically filing the same on November 30, 2015, pursuant to Iowa R. App. P. 6.902(2) (2013) and Iowa Ct. R. 16.1221(1).

s/ *Richard J. Kirschman*
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Final Brief of Appellee, CNH America LLC, n/k/a CNH Industrial America LLC d/b/a Case IH, was served upon the attorneys of record listed below by electronic filing and electronic delivery to the parties via the EDMS system on November 30, 2015, pursuant to Iowa R. App. P. 6.902(2) and Iowa Ct. R. 16.1221(2).

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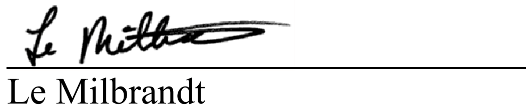
## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. 6.903(1)(*g*)(1) because this brief contains 7,851 words, excluding the parts of the brief exempted by Iowa R. App. 6.903(1)(g)(1) (table of contents, table of authorities, statement of the issues, and certificates).

2. This brief complies with the typeface requirements of Iowa R. App. 6.903(1)(*e*) and the type-style requirements of Iowa R. App. 6.903(1)(*f*) because this brief has been prepared in a proportionally spaced typeface using Word 2003 in Times New Roman 14 pt.



Le Milbrandt

November 30, 2015
Date