IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 15-0741
CLAYTON COUNTY NO. LACV009564

JASON CANNON,
APPELLANT,

vs.

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

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR CLAYTON COUNTY
THE HONORABLE JOHN BAUERCAMPER, JUDGE

APPELLEE'S FINAL BRIEF

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ROUTING STATEMENT

Appellee Bodensteiner Implement Company ("Bodensteiner") disputes Appellant Jason Cannon's ("Cannon") position that this case should be retained by the Supreme Court because it presents a substantial constitutional question and a question of first impression. The issues presented for review in this case more closely fit the criteria for transfer set forth in Iowa Rule of Appellate Procedure 6.1101(3)(a), cases presenting the application of existing legal principles. As such, this case should be assigned to the Court of Appeals for decision in accordance with Iowa Rules of Appellate Procedure 6.1101(3).

STATEMENT OF THE CASE

This is an appeal from the Clayton County District Court's Order ("District Court") granting summary judgment in favor of Bodensteiner on Cannon's claims for fraudulent misrepresentation, breach of express and implied warranties, breach of an implied covenant of good faith and fair dealing and equitable rescission. On April 22, 2013 Cannon filed his original Petition in this case. After several parties and claims were added, Cannon filed a Recast of Claims in Plaintiff's Petition Per Order of January 8, 2015 ("Recast Petition") on January 22, 2015. (App. V1 83-102)

On November 3, 2014 Bodensteiner filed a Motion for Summary Judgment seeking the dismissal of all of Cannon's claims against Bodensteiner. (App. V1 437-444) Bodensteiner also filed a Brief in Support of Motion for Summary Judgment, a Statement of Undisputed Material Facts in Support of Motion for Summary Judgment, an Affidavit of Roger Monroe in support of Motion for Summary Judgment and an Affidavit of Arenz in support of Motion for Summary Judgment on November 3, 2014. (App. V1 445-456, 457-459, 460-494, 495-499)

On January 23, 2015 Cannon filed a Resistance to Bodensteiner's Motion for Summary Judgment, a Statement of Disputed and Undisputed Facts in Resistance to Bodensteiner's Motion for Summary Judgment, Memorandum in Support of Resistance to Bodensteiner's Motion for

Summary Judgment and an Appendix Resisting Bodensteiner's Motion for Summary Judgment. (App. V1 500-504, 505-511, 512-526, 527-638)

On January 28, 2015 Cannon filed a Conditional Application for Continuance of Motion for Summary Judgment and an Affidavit of Judith O'Donohoe in Support of Conditional Application for Continuance claiming Bodensteiner's Motion for Summary Judgment was premature because all discovery had not been completed in the case. (App. V1 103-110, 132-135)

On February 26, 2015 Bodensteiner filed a Reply to Cannon's Resistance to Bodensteiner's Motion for Summary Judgment ("Reply to Resistance") and a Reply to Cannon's Memorandum in Support of Resistance to Bodensteiner's Motion for Summary Judgment ("Reply to Memorandum"). (App. V1 639-648, 649-654) On March 10, 2015, the District Court held a hearing on Bodensteiner's Motion for Summary Judgment. (App. V2 965-1014) On March 30, 2015, the District Court entered an Order granting Bodensteiner's Motion for Summary Judgment and dismissing all four of Cannon's claims against Bodensteiner. (App. V1 136-144) Cannon filed a Notice of Appeal on May 1, 2015. (App. V1 145-146)

STATEMENT OF THE FACTS

Bodensteiner is a John Deere dealership that is authorized to sell new and used John Deere agricultural equipment. (App. V1 495) Bodensteiner has branches in Monticello and Clermont, plus others in Iowa that are not relevant here. Case IH ("Case") is a competitor of John Deere that also specializes in the manufacturing of agricultural equipment. Bodensteiner is not an authorized Case dealer, does not sell new Case products and is not authorized to perform Case warranty work. (App. V1 495) Occasionally, Bodensteiner will accept "on trade" a used tractor from a competing manufacturer such as Case. In the fall of 2010, Bodensteiner's Monticello branch obtained a Case 305 tractor on trade from the tractor's original purchaser. (App. V1 495)

Cannon is a resident of Hawkeye, Iowa. (App. V2 902, 5:12-15) He grew up on a farm and has farmed his whole life. (App. V2 902, 6:1-2, 12:4-9) Cannon has extensive knowledge about tractors and has owned five tractors in his lifetime and has driven many more. (App. V2 906, 24:17-25) Cannon has worked in the custom manure pumping business for the last fourteen years. (App. V2 918, 69:20-22) As an independent contractor, Cannon provides his own tractor to pull a manure tank. (App. V2 918, 69:23-25) There is a very short window of time when manure can be applied to the farm fields each year. (App. V1 567, 14:1-9) During those timeframes,

Cannon and other manure haulers work as much as ten to twenty hours per day seven days a week. (App. V1 567, 13:14-18)

In 2010 and the years immediately preceding, Cannon worked with brothers Brent Mitchell and Bruce Mitchell during the manure hauling season. (App. V2 908, 32:1-9) Brent Mitchell and Bruce Mitchell owned one or more large Case tractors and were familiar with the Case 305 tractor, the tractor at issue in this lawsuit. (App. V2 908, 32:10-16) Cannon was impressed with the Case tractors used by the Mitchell brothers during the manure hauling season. (App. V1 137) Cannon sought and obtained advice from Brent Mitchell and Bruce Mitchell about purchasing a used Case 305 tractor. (App. V2 910, 37:7-18) The Mitchell brothers told Cannon that Case 305 tractors are phenomenal tractors and people who have 305s love them. (App. V2 910, 38:12-19) Cannon trusted the advice of Brent Mitchell and Bruce Mitchell and relied upon their advice in deciding to purchase the used Case 305 tractor. (App. V2 910, 37:19-25, 38:1-25, 39:1-17)

In 2008, Cannon purchased a used John Deere 8430 tractor ("John Deere tractor") from Bodensteiner's Clermont branch. (App. V1 505) Just as the manure hauling season began in October of 2010, Cannon began having problems with his John Deere tractor. (App. V2 909, 33:5-9) Cannon learned from Bodensteiner's Service Department that his John Deere tractor would

be down for repairs for an extended period of time. (App. V2 909, 33:9-16) Cannon could not afford to be without a tractor during the manure hauling season. (App. V2 909, 33:10-12) Cannon was interested in trading his John Deere tractor back to Bodensteiner in return for another tractor so he could work during the busy manure hauling season. (App. V2 909, 33:16-19)

Cannon contacted Roger Monroe, a salesman at Bodensteiner's Clermont branch, and told him he was thinking of trading in his John Deere tractor and asked Monroe if Bodensteiner had a "red" tractor[1] available for purchase. (App. V2 953, 44:15-25) Monroe told Cannon that he would have to call him back because he needed to search the inventory on the computer and see what tractors Bodensteiner had available. (App. V2 954, 46:2-8) After obtaining basic information from the computer regarding the Case 305 tractor available at the Monticello branch, Monroe called Phil Kluesner ("Kluesner"), the salesman in Monticello that received the Case 305 tractor in on trade from the original purchaser. (App. V2 954, 46: 24-25, 47: 1-25)

Kluesner told Monroe that they just got the Case 305 tractor in, that it had a Purchase Protection Plan on it from Case, that the former owner was Gansen Pumping of Zwingle ("Gansen"), and that to the best of his knowledge, it was a good tractor. (App. V2 954, 48:6-18; App. V2 955,

[1] Red tractor means a Case IH tractor.

50:3-10) Kluesner had driven the Case 305 tractor around the lot at the Monticello branch and did not observe any problems. (App. V2 955, 50:1-10) Kluesner and Monroe did not discuss the repair history of the Case 305 tractor. (App. V2 959, 66:15-21)

Monroe knew that Gansen, the former owner of the tractor, was also involved in the manure disposal business. (App. V2 955, 50:11-23) At the time the Case 305 tractor was purchased by Gansen, it included a manufacturer's warranty and an additional product called a "Purchase Protection Plan" ("PPP") issued by EPG[2] Insurance, Inc. (App. V1 138) The PPP became effective on November 18, 2008 and expired on April 21, 2013. (App. V1 138)

Monroe relayed the information he received from Kluesner to Cannon. (App. V2 955, 51:8-11) Cannon understood that Monroe had not seen or inspected the Case 305 tractor himself. (App. V2 913, 50:13-15) Cannon asked Monroe the details of the PPP, but Monroe was not sure of the details and suggested that Cannon contact a Case dealer. (App. V1 573, 40:1-7) Cannon then contacted Windridge Implements, LLC ("Windridge") for information on the PPP. (App. V1 573, 40:8-24) Windridge is a Case

[2] Although EPG Insurance, Inc. provided the PPP, the form, nature and extent of the protection plan was dictated by Case.

dealer that is authorized to sell new and used Case equipment and to perform Case warranty work. Windridge informed Cannon that the PPP on the 305 Case tractor would transfer effectively to him. (App. V1 573, 40:1-23) Monroe told Cannon that there would be no warranty given by Bodensteiner. (App. V1 496)

Cannon also spoke with Neil Hammersland ("Neil"), a mechanic at Bodensteiner, about the Case 305 tractor. Neil told Cannon that the Case 305 tractor was a good tractor and that he would be happy with the horsepower. (App. V2 921, 81:2-7) Cannon understood that Neil had not actually seen the Case 305 tractor that Cannon was purchasing and that Neil was talking generically about the make and model of the tractor. (App. V2 921, 81:8-19)

Monroe informed Cannon that if he was interested in purchasing the Case 305 tractor, it would cost him $1,000 to have it trucked up from Monticello to Clermont. (App. V2 956, 54:17-23) Cannon knew that he could go to Monticello to inspect and test drive the tractor before purchasing it, but he was in a hurry to get a different tractor. (App. V1 138; App. V1 588, 95:13-23) Cannon told Monroe to have the Case 305 tractor hauled to Clermont first thing in the morning. (App. V2 912, 46:7-11) When the Case 305 tractor arrived at Bodensteiner in Clermont, Monroe drove the Case 305

tractor around for a block and a half and did not observe any problems. (App. V2 956, 55:7-20)

On October 6, 2010, Cannon drove his John Deere tractor to Bodensteiner's Clermont branch to exchange it in trade for the Case 305 tractor. (App. V1 565, 5:17-25) When Cannon arrived at Bodensteiner's, he traded in his John Deere tractor, signed a Purchase Agreement for the used Case 305 tractor and gave Monroe a check for $1,000. (App. V2 902, 6:12-23) Cannon had the opportunity to read the Purchase Agreement prior to signing it. (App. V1 575, 45:12-17) The Purchase Agreement stated in part,

> "**IMPORTANT WARRANTY NOTICE**. The John Deere warranty applicable to new John Deere product(s) is printed on the back side of this document. There is no warranty on used products…**YOUR RIGHTS AND REMEDIES PERTAINING TO THIS PURCHASE ARE LIMITED AS SET FORTH IN THE WARRANTY AND THIS CONTRACT. IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS ARE NOT MADE AND ARE EXCLUDED UNLESS SPECIFICALLY PROVIDED IN THE JOHN DEERE WARRANTY.**
> …
> **NO DEALER WARRANTY** – THE SELLING DEALER MAKES NO WARRANTY OF ITS OWN AND THE DEALER HAS NO AUTHORITY TO MAKE ANY REPRESENTATION OR PROMISE ON BEHALF OF JOHN DEERE, OR TO MODIFY THE TERMS OR LIMITATIONS OF THIS WARRANTY IN ANY WAY." (App. V1 498-499)

All express and implied warranties, including the warranty of merchantability and the warranty of fitness for a particular purpose were

disclaimed in the Purchase Agreement. (App. V1 495-496) Cannon had not seen, inspected or driven the Case 305 tractor prior to purchasing it. (App. V2 912, 46:12-25)When the Case 305 tractor arrived in Clermont, Cannon drove the Case 305 tractor for the first time back to his house. (App. V2 908, 29:6-12) Cannon did not observe any problems with the Case 305 tractor on his ride home. (App. V2 914, 55:2-5)

After Cannon purchased the Case 305 tractor, it had several mechanical breakdowns. (App. V1 566, 11:8-25) Cannon has not sought to have Bodensteiner repair the Case 305 tractor since he purchased it. (App. V1 568, 20:19-21) Despite having Windridge mechanics, the Windridge service manager, a Case field representative and a Case technical support person inspect and work on the Case 305 tractor, Cannon has been unable to find any person who can identify what is wrong with it. (App. V1 574, 43:16-25, 44:1-15) Cannon has decided that the Case 305 tractor is a lemon and there is no point in obtaining further repairs. (App. V1 139) On April 22, 2013, Cannon filed suit in this case.

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED BODENSTEINER'S MOTION FOR SUMMARY JUDGMENT ON CANNON'S FRAUDULENT MISREPRESENTATION CLAIM.

Standard of Review

Appellate review of a district court's decision on summary judgment is for correction of errors at law. *Hagen v. Texaco Refining & Marketing, Inc*., 526 N.W.2d 531, 534 (Iowa 1995). The appellate court will determine whether a genuine issue of material fact existed and whether the district court correctly applied the law. *Farm & City Ins. Co. v. Anderson*, 509 N.W.2d 487, 489 (Iowa 1993).

Preservation of Error

Bodensteiner agrees that Cannon has preserved error on the fraudulent misrepresentation claim. However, error was not preserved on the fraudulent nondisclosure claim as Cannon failed to raise the fraudulent nondisclosure claim in his pleadings or amend his pleadings to include the claim. (App. V1 83-102) Even if Cannon properly pled a fraudulent nondisclosure claim, Cannon still failed to preserve error as the District Court did not rule on Cannon's purported fraudulent nondisclosure claim in its Order. (App. V1 136-144) After the issuance of the District Court's Order, Cannon did not file the necessary motion under Iowa Rule of Civil Procedure 1.904(2) to preserve error. An Iowa Rule of Civil Procedure 1.904 motion is "essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication." *State Farm Mut. Auto. Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206 (Iowa 1984).

Argument

In order to recover for fraudulent misrepresentation the plaintiff must prove the following propositions by a preponderance of clear, satisfactory and convincing evidence: (1) The defendant made a representation to plaintiff; (2) the representation was false; (3) the representation was material; (4) the defendant knew the representation was false; (5) the defendant intended to deceive plaintiff; (6) the plaintiff acted in reliance on the truth of the representation and was justified in relying on the representation; (7) the representation was a cause of the plaintiff's damage; (8) the amount of damage. If the plaintiff has failed to prove any of these propositions, the plaintiff cannot recover damages. *Beeck v. Kapalis*, 302 N.W.2d 90 (Iowa 1981); *Restatement (Second) of Torts* § 525 (1977); *Thompson v. Kaczinski*, 774 N.W. 2d 829, 836-39 (Iowa 2009).

In Cannon's claim for fraudulent misrepresentation against Bodensteiner, he alleges that a salesman for Bodensteiner, Monroe, and a mechanic for Bodensteiner, Neil, falsely represented the condition of the Case 305 tractor to him. (Appellant's Final Brief p. 28) In granting Bodensteiner's Motion for Summary Judgment, the District Court found that "[t]here is no substantial evidence in the materials provided that

[Bodensteiner's] employees had any knowledge of any defects" in the tractor. (App. V1 141)

Cannon failed to submit sufficient evidence that any representations made by Bodensteiner were false or that Bodensteiner knew them to be false when made. As noted previously, as part of his prima facie case of fraudulent misrepresentation, Cannon was required to establish by clear and convincing evidence that Monroe, Neil or any agent of Bodensteiner intended to deceive him. *Lloyd v. Drake U.,* 686 N.W.2d 225, 233 (Iowa 2004). The intent element involves intent that a misrepresentation shall be made to a particular person, convey a certain meaning, be believed, and be acted upon in a certain way. *See Hall v. Wright*, 261 Iowa 758, 773, 156 N.W.2d 661, 670 (1968). An intent to deceive may be shown by evidence that the defendant had actual knowledge of the falsity of the representation or he made a representation with reckless disregard of whether it was true or false. *Rosen v. Board of Med. Exam'rs*, 539 N.W.2d 345, 500 (Iowa 1995).

In Cannon's deposition, he stated under oath that he does not believe that Monroe knew there was something wrong with the Case 305 tractor when it was sold to Cannon. (App. V2 913, 51:5-10) Cannon also stated that he believed Monroe was acting in good faith in dealing with him and that he does not think Monroe was trying to fool him into buying a bad tractor.

(App. V1 572, 36:9-16) Cannon also conceded that he agrees with Neil's general representations regarding the Case 305 tractor and that Neil did not deceive him by making those representations. (App. V2 921, 81:20-25, 82:1-2) Moreover, Cannon testified that he does not know if anyone at Bodensteiner knew there was something wrong with the Case 305 tractor when it was sold to him. (App. V1 576, 51:11-14)

Cannon's statements under oath that he does not believe Monroe knew there was something wrong with the Case 305 tractor before it was sold to him completely undercuts Cannon's ability to prove that Monroe knew his statements to Cannon were false and that he was trying to deceive Cannon. (App. V2 913, 51:5-10) Likewise, Cannon's statements regarding Neil's representations equally undermine the scienter element of his claim. Summary judgment is appropriate if the opposing party "has adduced no evidence whatsoever of the requisite intent to defraud." *Pinnacle Pizza Co., Inc. v. Little Caesar Enterprises, Inc*., 598 F.3d 970, 981 (8th Cir. 2010) (quoting *Demerath Land Co. v. Sparr*, 48 F.3d 353, 355 (8th Cir.1995)).

Moreover, it is not enough for Cannon to assert that he does not know if anyone at Bodensteiner knew there was something wrong with the Case 305 tractor when it was sold to him. (App. V2 913, 51:11-14) A party resisting a motion for summary judgment must set forth specific facts

showing that there is a genuine issue for trial. Iowa R. Civ P. 1.981(5). Furthermore, the party opposing the motion for summary judgment "is not entitled to rely on the hope of the subsequent magical appearance at trial of genuine issues of material fact." *Prior v. Rathjen*, 199 N.W.2d 327, 331 (Iowa 1972).

Cannon has suggested in his Final Brief that Bodensteiner's employees should have made further inquiry into the condition of the tractor. (Appellant's Final Brief p. 29) This argument fails under Iowa law. A false statement innocently but mistakenly made will not establish intent to defraud unless the statement was recklessly asserted. *Magnusson Agency v. Pub. Entity Nat. Co.-Midwest*, 560 N.W.2d 20, 28 (Iowa 1997). The fact that the speaker could have been more careful by making further inquiry is insufficient to prove that he or she acted in reckless disregard of the truth. *Id.* at 29.

Cannon also has the burden of proving that he actually relied to his detriment on Bodensteiner's representations, and that any such reliance was "justifiable." *See Midwest Home Distributor, Inc. v. Domco Indus*., 585 N.W.2d 735, 743 (Iowa 1998) ("[J]ustifiable reliance is an essential element of fraudulent misrepresentation."). The reliance does not necessarily need to conform to the standard of a reasonably prudent person, "but depends on the

qualities and characteristics of the particular plaintiff and the specific surrounding circumstances." *Lockard v. Carlson*, 287 N.W.2d 871, 878 (Iowa 1980). The element of justifiable reliance element is to be viewed in light of plaintiffs own information and intelligence. *Dier v. Peters*, 815 N.W.2d 1, 7 (Iowa 2012) (citing *Lockard*, 287 N.W.2d at 878).

The Iowa Supreme Court has stated that the persons to whom the allegedly fraudulent misrepresentation is made is " 'required to use his senses, and cannot recover if he blindly relies on a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation.' " *Lockard*, 287 N.W.2d at 878 (quoting *Restatement (Second) of Torts* § 541 cmt. a, at 89). The standard requires plaintiffs to utilize their abilities to observe the obvious, and the entire context of the transaction is considered to determine if the justifiable-reliance element has been met. *Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726, 737 (Iowa 2009) "Where a plaintiff has equal information of certain knowledge as the defendant, he has no right to rely upon defendant's statements." *Andrew v. Baird*, 221 Iowa 83, 93, 265 N.W. 170, 175 (1936).

Cannon did not justifiably rely on any of Monroe's or Neil's alleged misrepresentations. Cannon grew up on a farm and has been farming his whole life. (App. V2 902, 6:1-2) Cannon has extensive knowledge about

tractors, has owned five tractors in his lifetime and has driven many more. (App. V2 906, 24:23-25; App. V2 907, 25:1-3) As a person with life-long knowledge of farming and farm machinery, Cannon was required to use his abilities and experience when purchasing a used tractor. *Spreitzer*, 779 N.W.2d at 737.

Cannon did not use his abilities and experience when purchasing the 305 Case tractor. Cannon knew that Monroe and Neil, at the time they made the representations to him, had never seen the Case 305 tractor before. (App. V2 912, 45:1-8; App. V2 913, 50:13-15; App. V2 921, 81:2-25, 82:1-2) Moreover, Cannon had the opportunity to inspect and test drive the Case 305 tractor himself before purchasing it, but he decided to purchase the used tractor without examining it or test driving it first. (App. V2 912, 46:12-25, 47:1-2; App. V1 588, 95:1-23) Cannon was also in a hurry to purchase the tractor. (App. V2 909, 35:18-24) Because Cannon failed to make a reasonable examination of the used tractor before purchasing it, and because he knew that neither Monroe nor Neil had seen the tractor before, Cannon did not justifiably rely on their representations regarding the tractor.

The evidence illustrates that Cannon did rely on the favorable experiences and opinions of his friends and co-workers, Brent and Bruce Mitchell, in selecting a used Case tractor to purchase. Cannon stated that the

reason he decided to get a similar tractor as Brent and Bruce Mitchell was because he saw that they had no problems with their Case tractor. (App. V2 908, 32:17-25) Cannon stated that he relied on the Mitchells for guidance and knowledge regarding Case tractors. (App. V2 910, 38:1-11) Cannon also thought he would get the "straight scoop" from an actual Case tractor owner as opposed to a tractor salesman. (App. V2 913, 49:8-14) Likewise, Cannon also conceded in his deposition that it was the PPP that actually induced him to purchase the Case 305 tractor. (App. V2 937, 146:2-5)

Particularly in light of Cannon's admissions that neither Monroe nor Neil intended to deceive him, Cannon's failure to make even a cursory examination of the tractor before purchasing it and Cannon's actual reliance on the PPP and opinions of the Mitchell brothers, Cannon failed to generate a genuine issue of material fact with respect to his fraudulent misrepresentation claim. The District Court properly determined that Cannon's fraudulent misrepresentation claim must fail as a matter of law.

Cannon also argues that the District Court erred in granting summary judgment on his purported claim for fraudulent nondisclosure. (Appellant's Final Brief p. 30) While the elements of fraudulent nondisclosure are similar to fraudulent misrepresentation, a claim of fraudulent nondisclosure is restricted to those cases where there is a special relationship between the

parties. *Sain v. Cedar Rapids Community School Dist*., 626 N.W.2d 115, 128 (Iowa 2001). There is no specific test for determining whether such special circumstances existed, but the duty can arise "from a relation of trust, a relation of confidence, inequality of condition and knowledge, or other circumstances as show by a particular fact situation." *Irons v. Community State Bank*, 461 N.W.2d 849, 854 (Iowa Ct. App. 1990). Fraudulent nondisclosure may occur "when one with superior knowledge dealing with inexperienced persons who rely on him or her, purposely suppresses the truth respecting a material fact involved in the transaction." *Kunkel Water & Elec., Inc. v. City of Prescott*, 347 N.W.2d 648, 653 (Iowa 1984).

Notably absent from Cannon's Recast Petition is a claim for fraudulent nondisclosure. (App. V1 83-91) Cannon's assertions in his Recast Petition do not establish even the basic elements of a fraudulent nondisclosure claim. (App. V1 83-102) Cannon failed to allege in his Recast Petition that special circumstances exist which give rise to a duty to communicate some concealed fact. *Kunkel*, 347 N.W.2d at 653. Based on Cannon's omissions in his Recast Petition, the District Court was correct in granting summary judgment to Bodensteiner.

In any event, Cannon's fraudulent nondisclosure claim also fails on its merits. Cannon is not an inexperienced person when it comes to tractors.

Cannon has extensive knowledge about tractors and has owned five tractors in his lifetime and has driven many more. (App. V2 906, 24:17-25) In Cannon's deposition, he stated under oath that he does not think that Monroe knew there was something wrong with the Case 305 tractor when it was sold to Cannon. (App. V2 913, 51:5-10) Cannon also stated that he believed Monroe was acting in good faith in dealing with him and that he does not think Monroe was trying to fool him into buying a bad tractor. (App. V1 572, 36:9-16) Moreover, Cannon admitted that he does not know if anyone at Bodensteiner knew there was something wrong with the Case 305 tractor when it was sold to him. (App. V2 913, 51:11-14) For the same reasons as the fraudulent misrepresentation claim, the District Court properly granted summary judgment to Bodensteiner.

II. THE DISTRICT COURT PROPERLY GRANTED BODENSTEINER'S MOTION FOR SUMMARY JUDGMENT ON CANNON'S BREACH OF EXPRESS AND IMPLIED WARRANTY CLAIMS.

Standard of Review

Appellate review of a district court's decision on summary judgment is for correction of errors at law. *Hagen*, 526 N.W.2d at 534.

Preservation of Error

Cannon argues for the first time on appeal that the disclaimer of express and implied warranties in the Purchase Agreement is ineffective because it was provided to him after the agreement had been made with Bodensteiner. *See* Iowa Code § 554.2207. (Appellant's Final Brief p. 32, 34) It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the District Court before they can be decided on appeal. *Metz v. Amoco Oil Co*., 581 N.W.2d 597, 600 (Iowa 1998); *see also Garwick v. Iowa Dep't of Transp*., 611 N.W.2d 286, 288 (Iowa 2000) (" 'Issues not raised before the district court ... cannot be raised for the first time on appeal.' ") (quoting *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997))). If the District Court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal. *Benavides v. J.C. Penney Life Ins. Co*., 539 N.W.2d 352, 356 (Iowa 1995).

Cannon has not preserved error on the issue of whether the disclaimer was ineffective because the agreement with Bodensteiner was reached before the disclaimer of warranties was provided to him. Cannon did not raise this issue in his Resistance to Bodensteiner's Motion for Summary Judgment, in his Statement of Disputed and Undisputed Facts in Resistance to Bodensteiner's Motion for Summary Judgment or in his Memorandum in

Support of Resistance to Bodensteiner's Motion for Summary Judgment. (App. V1 500-504, 505-511, 512-526). Cannon also did not raise the issue at the hearing on March 10, 2015. (App. V2 974-984) Consequently, the District Court did not address or decide this issue in its March 30, 2015 Order. (App. V1 141-142) Finally, Cannon did not file the necessary motion under Iowa Rule of Civil Procedure 1.904(2) to preserve error following the Order granting Bodensteiner's Motion to for Summary Judgment.

Argument

Cannon argues in his Final Brief that the District Court erred in granting summary judgment on his claims of breach of express warranty, breach of implied warranty of merchantability and breach of implied warranty of fitness for a particular purpose.

A. Cannon's Breach of Express Warranty Claim Fails as a Matter of Law.

With regard to the breach of express warranty claim, the District Court found in granting Bodensteiner's Motion for Summary Judgment that "[t]he written contract between these parties disclaimed any express warranties other than the extended warranty or PPP, and there is no dispute that Cannon got the benefit of the PPP." (App. V1 141)

Express warranties for the sale of goods are governed by the Uniform Commercial Code in section 554.2313 of the Iowa Code. *See* Iowa Code § 554.2313. This provision requires "an affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain." Iowa Code § 554.2313(1). However, an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty. Iowa Code § 554.2313(2). For a plaintiff to prove a breach of an express warranty based on sales representations, there must be a finding the sale would not have been made but for the representations. *Dailey v. Holiday Distrib. Corp*., 260 Iowa 859, 869, 151 N.W.2d 477, 484 (1967).

Cannon contends that Monroe's statement to him regarding the Case 305 tractor constitutes an express warranty. (Appellant's Final Brief p. 31) The undisputed facts show that Monroe represented to Cannon that Bodensteiner just got the Case 305 tractor in, that it had a PPP on it, that the former owner was Gansen, and to the best of Monroe's knowledge, it was a good tractor. (App. V2 954, 48:6-18; App. V2 955, 50:3-10) Cannon knew that Monroe, at the time he made the representations to him, had never seen that Case 305 tractor. (App. V2 912, 45:1-8; App. V2 913, 50:13-15; App. V2 921, 81:2-25, 82:1-2) To the extent that Cannon misinterpreted Monroe's

statement to be specific to the Case 305 tractor that Cannon was purchasing, Monroe's statement is the type of praise that Iowa Code § 554.2313(2) declares does not create a warranty. Such a vague statement from someone Cannon knew had never seen that specific tractor cannot form the basis of the bargain. *See, e.g., Wendt v Beardmore Suburban Chevrolet Inc.*, 219 Neb. 775, 782, 366 N.W.2d 424, 429 (1985) (statement by seller that as far as he knew automobile had not been involved in collision was not affirmation that automobile had not in fact been involved in collision).

Contrary to Cannon's statement in his Appellate Brief that there is no specific provision regarding disclaimers of express warranties, Iowa Code § 554.2316(1) provides that,

> "Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (section 554.2202) negation or limitation is inoperative to the extent that such construction is unreasonable." Iowa Code § 554.2316(1) (Appellant's Final Brief p. 32).

The statute denies effect to disclaimer language when it would be inconsistent with the language of express warranty. However, a party must comply with the parol evidence rule when attempting to establish any inconsistency. Iowa Code § 554.2316(1).

Cannon signed a Purchase Agreement for the used Case 305 tractor on October 6, 2010. (App. V1 565, 6:12-23) The Purchase Agreement stated in part,

> "**IMPORTANT WARRANTY NOTICE**. The John Deere warranty applicable to new John Deere product(s) is printed on the back side of this document. There is no warranty on used products…**YOUR RIGHTS AND REMEDIES PERTAINING TO THIS PURCHASE ARE LIMITED AS SET FORTH IN THE WARRANTY AND THIS CONTRACT. IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS ARE NOT MADE AND ARE EXCLUDED UNLESS SPECIFICALLY PROVIDED IN THE JOHN DEERE WARRANTY.**
> …
> **NO DEALER WARRANTY** – THE SELLING DEALER MAKES NO WARRANTY OF ITS OWN AND THE DEALER HAS NO AUTHORITY TO MAKE ANY REPRESENTATION OR PROMISE ON BEHALF OF JOHN DEERE, OR TO MODIFY THE TERMS OR LIMITATIONS OF THIS WARRANTY IN ANY WAY." (App. V1 498-499)

The language "There is no warranty on used products…", "NO DEALER WARRANTY" and "THE SELLING DEALER MAKES NO WARRANTY OF ITS OWN AND THE DEALER HAS NO AUTHORITY TO MAKE ANY REPRESENTATION OR PROMISE ON BEHALF OF JOHN DEERE…" is sufficient to disclaim any express warranties on behalf of Bodensteiner. (App. V1 498-499)

Assuming that Monroe's representation to Cannon constitutes an express warranty, such representation is consistent with the disclaimer of

express warranties in the Purchase Agreement. (App. V2 954, 48:6-18; App. V2 955, 50:3-10) The disclaimer that there is no John Deere warranty on used products is consistent with Monroe's representation to Cannon that the Case 305 tractor came with a PPP provided by Case. (App. V2 954, 48:6-18; App. V2 955, 50:3-10) It is also consistent with Monroe's statement that that there would be no warranty given by Bodensteiner. (App. V1 496) Moreover, Monroe's representation that, to his knowledge, the Case 305 tractor was a good tractor is such a vague statement from someone who had never seen the tractor that it cannot reasonably constitute an express warranty. *See Wendt v Beardmore Suburban Chevrolet Inc*, 219 Neb. 775, 782, 366 N.W.2d 424, 429 (1985).

Because the District Court correctly concluded that the Purchase Agreement effectively disclaimed all express warranties, the District Court's dismissal of Cannon's express warranty claim must be affirmed.

B. Cannon's Breach of Implied Warranties Claim Fails as a Matter of Law.

Cannon also claims that Bodensteiner breached the implied warranty of merchantability and the implied warranty of fitness for a particular purpose. Section 554.2314 of the Iowa Code provides: "Unless excluded or modified…a warranty that the goods shall be merchantable is implied in a

contract for their sale if the seller is a merchant with respect to goods of that kind." This implied warranty of merchantability applies unless excluded or modified pursuant to Section 554.2316 of the Iowa Code. In order to exclude or modify an implied warranty of merchantability, the language used must mention merchantability, and if the exclusion is in writing, the writing must be conspicuous. Iowa Code § 554.2316(2).

An implied warranty of fitness for a particular purpose only exists if the seller (1) at the time of the contract has a reason to know of a legally significant "particular purpose" for the goods, (2) at the time of contract has a reason to know that the buyer is relying on the seller's skills or judgment to select or furnish suitable goods, and (3) the buyer in fact relies on the seller's skill or judgment to furnish suitable goods. Iowa Code §554.2315; *Van Wyk v. Norden Laboratories, Inc*., 345 N.W.2d 81, 84 (Iowa 1984). Section 554.2316(2) of the Iowa Code permits disclaimer of implied warranties of fitness if the disclaimer is both in writing and conspicuous. *All-Iowa Contracting Co. v. Linear Dynamics, Inc.,* 296 F. Supp. 2d 969, 980 (N.D. Iowa 2003). The District Court found in granting Bodensteiner's Motion for Summary Judgment that the Purchase Agreement "also effectively disclaimed any implied warranties of fitness for a particular purpose and merchantability." (App. V1 141)

Iowa Courts have held that a disclaimer in capital letters and bold font is conspicuous. *All-Iowa Contracting Co.*, 296 F. Supp. 2d at 980 (upholding disclaimer). If a disclaimer is conspicuous, it is effective so long as the buyer receives the disclaimer and has a reasonable opportunity to read it. *Bruce v. ICI Americas, Inc*., 933 F. Supp. 781, 791 (S.D. Iowa 1996) (quoting *Adams v. American Cyanamid Co*., 1 Neb.App. 337, 498 N.W.2d 577, 587 (1992)).

Page one of the Purchase Agreement stated the following with regard to the implied warranty of merchantability and the implied warranty of fitness for a particular purpose,

> "**IMPORTANT WARRANTY NOTICE**. The John Deere warranty applicable to new John Deere product(s) is printed on the back side of this document. There is no warranty on used products…**YOUR RIGHTS AND REMEDIES PERTAINING TO THIS PURCHASE ARE LIMITED AS SET FORTH IN THE WARRANTY AND THIS CONTRACT. IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS ARE NOT MADE AND ARE EXCLUDED UNLESS SPECIFICALLY PROVIDED IN THE JOHN DEERE WARRANTY…"** (App. V1 498-499)

The disclaimer in the Purchase Agreement is in writing and patently mentions the word merchantability. (App. V1 498-499) The portion of the disclaimer which excludes claims for implied warranties is preceded by a heading which states "IMPORTANT WARRANTY NOTICE" in bold capital letters. (App. V1 498) Likewise, the disclaimer language excluding

both the implied warranty of merchantability and fitness for a particular purpose is in bold, capital letters and is located an inch above where Cannon signed the Purchase Agreement. (App. V1 498) Cannon admitted that he had the opportunity to read the Purchase Agreement prior to signing it. (App. V1 575, 45:12-17)

Despite the obvious conspicuousness of the disclaimer, Cannon argues that since the District Court did not make a specific finding regarding the conspicuousness of the disclaimer in its Order, the decision must be reversed and remanded to the District Court. (Appellant's Final Brief p. 34) Assuming *arguendo* that a specific finding of conspicuousness is required, Cannon failed to preserve this error on appeal. When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal. *Benavides*, 539 N.W.2d at 356. In order for Cannon to preserve his right to address the conspicuousness of the disclaimer on appeal, he needed to file a motion to enlarge under Rule 1.904 of the Iowa Rules of Civil Procedure requesting a finding on that issue from the District Court. *Id*. Cannon did not file such a motion.

Because there is no genuine issue of material fact that the Purchase Agreement effectively disclaimed any implied warranty of merchantability

or any implied warranty of fitness for a particular purpose, the District Court's ruling granting summary judgment to Bodensteiner on Cannon's breach of implied warranties claim must be affirmed.

III. THE DISTRICT COURT PROPERLY GRANTED BODENSTEINER'S MOTION FOR SUMMARY JUDGMENT ON CANNON'S BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING CLAIM.

Standard of Review

Appellate review of a district court's decision on summary judgment is for correction of errors at law. *Hagen*, 526 N.W.2d at 534.

Preservation of Error

Bodensteiner agrees that Cannon has preserved error.

Argument

A. The Implied Covenant of Good Faith and Fair Dealing

It is well established in Iowa that "[e]very contract contains an implied covenant of good faith and fair dealing." [3] *Balins Properties, Inc. v.*

[3] Appellant's Final Brief, p. 34, states that the covenant of good faith and fair dealing is imposed as a duty in contracts under the UCC §§ 554.1304, 554.2103. It is unclear whether the thrust of Cannon's argument is a violation of UCC duties of good faith or the common law implied duty of good faith and fair dealing. To the extent that this is unclear, Bodensteiner considers the argument to be that the common law duty was violated. While the UCC does prescribe a duty of good faith, UCC duties of good faith are distinct from the common law covenant of good faith and fair dealing. *See*,

First Nat'l Bank of West Union, No. 05-0794, 2006 WL 2871975 at *1 (Iowa Ct. App. 2006) (citing *Harvey v. Care Initiatives, Inc.*, 634 N.W.2d 681, 684 (Iowa 2001)). "The underlying principle is that there is an implied covenant that neither party will do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Alta Vista Properties, LLC v. Mauer Vision Center, P.C.*, 855 N.W.2d 722, 730 (Iowa 2014). Iowa has "adopted the definition of good faith employed by the Restatement (Second) of Contracts, which states that good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Restatement (Second) of Contracts* § 205, cmt. c, at 100 (1981) (internal quotations omitted). The Restatement references the "duty of good faith and fair dealing," but Iowa Courts have not treated "fair dealing" as an independent or separate duty; rather, they are one and the same. *Balins*, WL 2871975 at *3.

This implied covenant "prevents one party from using technical compliance with a contract as a shield from liability when that party is acting for a purpose contrary to that for which the contract is made." *Mid-America*

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e.g., *Alta Vista Properties, LLC v. Mauer Vision Center, P.C.*, 855 N.W.2d 722, 730 (Iowa 2014).

Real Estate Company v. Iowa Realty, 406 F.3d 969, 974 (8th Cir. 2005). Essentially, the "terms of the contract must create a 'justified expectation' that a party will act or refrain from acting in a certain way, while acting in compliance with the contract, before the implied covenant can be breached." *Clasing v. Hormel Corp.*, 993 F.Supp.2d 960, 981 (N.D. Iowa 2014).

Further, the implied covenant "operates upon an express condition of a contract, the occurrence of which is largely or exclusively within the control of one of the parties." *Clasing*, 993 F.Supp.2d at 980 (citing *Williston on Contracts* § 38.15, at 435). This means that an alleged "violation of the implied covenant of good faith and fair dealing **must have a contract term to which it can be attached.**" *Bagelmann v. First Nat'l Bank*, 823 N.W.2d 18, 34 (Iowa 2012) (Emphasis added). It is "universally recognized [that] the scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and the express terms of the contract." *Mid-America Real Estate Company v. Iowa Realty Co.*, 406 F.3d 969, 974 (8th Cir. 2005). In other words "a claim of breach of the implied covenant is doomed if it lacks support in the text of the contract." *Clasing*, 993 F.Supp.2d at 981. Allowing this theory to replace the contractual agreement that was formed and "create new substantive obligations would harm the

institution of contract, with all the advantages private negotiations and agreement brings." *Mid-America*, 406 F.3d at 975.

B. Bodensteiner Did Nothing to Destroy or Injure Cannon's Rights Under the Contract and Did Not Act Contrary to the Purposes for Which the Contract Was Made.

As discussed above, to be in breach of the implied covenant, a party must do something that destroys or injures the rights of the other party to receive the fruits of the contract. *Alta Vista Properties, LLC v. Mauer Vision Center, P.C.*, 855 N.W.2d 722, 730 (Iowa 2014). Here, it is clear that Bodensteiner did nothing to impair the rights of Cannon to receive the benefit (i.e., the Case 305 tractor with a Case PPP) of the Agreement that was formed. Bodensteiner took no actions that interfered with any of Cannon's justified expectations.

Cannon dealt with Bodensteiner through Monroe, who Cannon has known for some time. Throughout the entire process of negotiating the purchase of the Case 305 tractor, Cannon was fully aware of the fact that Monroe had not even seen the 305 tractor. (App. V2 913, 50:13-15) ("Q: But you also knew that Roger Monroe had not seen the Case 305 himself? A: Yes."). Cannon does not allege that Monroe knew something was wrong with the tractor before he sold it to Cannon. (App. V2 913, 51:5-14) ("Q: . . .

do you think Roger Monroe knew there was something wrong with that Case 305 when it was sold to you? A: No.").

The only other person who Cannon had contact with at Bodensteiner prior to his purchase of the tractor was an employee named Neil, whom Cannon talked to only generically about the make and model of the tractor, as Neil had never seen this particular tractor either. (App. V2 921, 81:8-19) Monroe never inspected the tractor more than to the degree of driving it around the lot for a short period of time. (App. V2 956, 55:7-20) Nor has there been an assertion by Cannon that he was told the tractor was inspected by Bodensteiner, or that Bodensteiner would personally warrant the performance of the tractor. Further, Cannon declined to have the tractor inspected or to test it himself prior to purchasing it. (App. V2 912, 46:12-25, 47:1-23) It is not clear in this case that even a detailed inspection of the tractor would have revealed the problem with the tractor. To this date, Windridge, the local Case dealership, has still failed to identify any specific explanation for the tractor's problems after repeated attempts. (App. V1 574, 43:16-25, 44:1-15)

Under the clear terms of the Purchase Agreement, Bodensteiner gave no warranties as to the performance or condition of the tractor, and specifically disclaimed the warranties of merchantability and fitness for a

particular purpose. (App. V1 498-499) Monroe also told Cannon that there would be no warranty given by Bodensteiner. (App. V1 496) The only statement that Bodensteiner made that could reasonably be construed to assure the performance by the tractor was its statement that the tractor carried a PPP (Case extended warranty). (App. V2 955, 51:15-23) When Cannon asked Monroe about the PPP, Monroe stated that he had no knowledge of the specifics of the Case extended warranty and directed Cannon to speak with an authorized Case dealership, which Cannon did. (App. V1 573, 40:1-7)

Accordingly, because the Purchase Agreement contained no implied warranties of performance, and because neither Monroe nor anyone at Bodensteiner made any specific statements regarding the condition of the tractor, and because Cannon knew Monroe and Neil had not even seen the tractor, Cannon could not have had a "justified expectation" that Bodensteiner was warranting the condition of the tractor. *Clasing v. Hormel Corp.*, 993 F.Supp.2d 960, 981 (N.D. Iowa 2014). Such a creation of a justified expectation in the aggrieved party is a requirement in Iowa before a breach of this implied warranty can be alleged. *Id*. *See also* Restatement (Second) of Contracts § 205, cmt. c, at 100 (1981).

Further, Bodensteiner did nothing to prevent Cannon from receiving the fruits of the contract. The contract did not make any warranties, nor were any express warranties given by any Bodensteiner employees. The fruits of the contract here were that Bodensteiner would deliver to Cannon a Case 305 tractor that, to the best of their knowledge, was fully operational, and that the tractor would carry a Case extended warranty (the PPP). Those obligations were fulfilled in good faith by Bodensteiner.

C. The Agreement Contained No Terms Requiring Bodensteiner to Inspect or Warrant the Condition of the Tractor, to Which An Implied Covenant Could Attach.

When alleging a breach of an implied covenant of good faith and fair dealing, the universal rule is that the scope of the conduct prohibited by the covenant of good faith is circumscribed by the purposes and the express terms of the contract. *Mid-America Real Estate Company v. Iowa Realty Co.*, 406 F.3d 969, 974 (8th Cir. 2005); *see also Clasing v. Hormel Corp.*, 993 F.Supp.2d 960, 980 (N.D. Iowa 2014) (citing *Williston on Contracts* § 38.15, at 435). Accordingly, when alleging a violation of this implied covenant, there "**must [be] a contract term to which it can be attached**." *Bagelmann v. First Nat'l Bank*, 823 N.W.2d 18, 34 (Iowa 2012) (Emphasis added).

Cannon's failure to allege a contractual term under the Purchase Agreement upon which the implied covenant of good faith and fair dealing could have attached is lethal, and the claim is "doomed." (*See* Appellant's Final Brief p. 35) This case is similar to *Mid-America*, where the court concluded that the Appellant's claim for an implied covenant was "doomed by a lack of support in the text of the contract." 406 F.3d 969, 974-75. The instant case is also analogous to *Alta Vista Properties*, where the court declined to find a breach of the implied duty where the mortgage documents contained no promise that the mortgagee would provide notification or otherwise guarantee the property's flood hazard status, because such a claim for a breach "lack[ed] a contract term to which it can be attached." 855 N.W.2d at 731.

D. Summary Judgment was Appropriate

The District Court did not err in granting summary judgment in favor of Bodensteiner. There are no genuine issues of material fact and the law was correctly applied. *Red Giant Oil v. Lawlor*, 528 N.W.2d 524, 528 (Iowa 1995). Cannon has provided no evidence in support of any assertion that his justified expectations of the contract were not met, or that there was any contractual term to which the implied covenant could attach. Cannon points

to nothing in the pleadings, depositions, affidavits, or exhibits to indicate that there were any material disputed issues of fact.

IV. THE DISTRICT COURT PROPERLY GRANTED BODENSTEINER'S MOTION FOR SUMMARY JUDGMENT ON CANNON'S EQUITABLE RESCISSION CLAIM.

Standard of Review

Appellate review of a district court's decision on summary judgment is for correction of errors at law. *Hagen*, 526 N.W.2d at 534.

Preservation of Error

Bodensteiner agrees that Cannon has preserved error.

Argument

Rescission is an equitable remedy, and is "considered to be extraordinary relief." *Clark v. McDaniel*, 546 N.W.2d 590, 595 (Iowa 1996). Consequently, such relief is "not available as a matter of right but only when it is necessary to obtain equity." *Id.* Three requirements must be met before rescission will be granted: (1) the injured party must not be in default; (2) the breach must be substantial and go to the heart of the contract; and (3) remedies at law must be inadequate. Here, remedies at law, namely damages, are clearly adequate as the District Court found. (App. V1 142) Cannon's arguments should not be considered because Cannon does not

claim in his Appellate Brief that legal remedies would be inadequate. (Appellant's Final Brief p. 36-37)

Cannon first asserts that equitable rescission is appropriate when there has been a fraudulent nondisclosure. (Appellant's Final Brief p. 35) However, equitable rescission is not appropriate under those grounds as Cannon failed to preserve the error on the issue of fraudulent nondisclosure. *See* Section I. Next, Cannon states that equitable rescission is appropriate when there is proof of fraudulent misrepresentation. (Appellant's Final Brief p. 35-36) Again, this theory was not successful at the trial level and the facts, even when taken in the light most favorable to Cannon, clearly do not provide support for a fraudulent misrepresentation claim. *See* Section I.

Cannon also argues that revocation is appropriate where goods turn out to be non-conforming in a way that substantially impairs their value which would have been difficult to discover before acceptance or if the non-conformity was hidden by seller assurances. (Appellant's Final Brief p. 36) This argument is disingenuous, as Cannon made no effort to inspect the goods at any point in time prior to acceptance. (App. V2 954, 46:12-25) He cannot now claim that such non-conformity of the goods would have been difficult to discover after not making any attempt to inspect the goods. Under Iowa Code § 554.2608, in order to revoke, the buyer's acceptance

must have been "reasonably induced" by the difficulty of discovery or by the seller's assurances. Neither of those requirements is met here.

Cannon cites *Campbell v. AG Finder Iowa Nebraska*, where the Iowa Court of Appeals found that the party attempting to revoke was not induced into accepting the goods by the difficulty of discovering the defects in the goods because an inspection of the goods could have discovered the defects. *Campbell v. AG Finder Iowa Nebraska*, 683 N.W.2d 126 (Iowa Ct. App. 2004). Similarly, here, there is no support in the record that Cannon's acceptance was induced by the difficulty of discovering any defects or by Bodensteiner's statements. In addition, under Iowa Code § 554.2608(2), revocation must occur within a reasonable time after the buyer discovers the grounds for it. We are well beyond any reasonable timeframe for revoking goods based on non-conformity.

Cannon also argues that rescission is appropriate if a disclaimer of warranties is found to be unconscionable based on factors of assent, unfair surprise, notice, and disparity of bargaining power and unfairness of result. (Appellant's Final Brief p. 36) This theory is inappropriate as Cannon voluntarily sought out and did business with Monroe and Bodensteiner. Cannon does not point to any evidence in the record that would tend to show

any of the above factors, and relies instead on a blanket assertion without support.

Cannon is hard-pressed to say he was at the mercy of the Bodensteiner dealer when so many other tractor dealerships and retailers exist in Iowa and where he specifically chose the salesman and dealership of his choice. This is not an instance where Cannon had no other alternatives than to choose Bodensteiner and acquiesce to their terms of sale. Further, Cannon is not a naïve consumer in regards to this transaction, but rather a sophisticated purchaser as his career is operating such tractors. (App. V2 906, 24:17-25)

Cannon next states that revocation is appropriate if the Case warranty for repair is found to fail of its essential purpose under Iowa Code § 554.2719. Cannon's reliance on §554.2719 and on *Midwest Hatchery* is misguided. First, § 554.2719 is simply inapplicable in regards to the Case warranty, as Bodensteiner is not a party to the Case warranty. Bodensteiner did not promise anything to Cannon regarding the Case warranty, except that Case had sold such a warranty for the tractor. (App. V1 573, 40:1-7) Accordingly, whether or not the Case warranty failed of its essential purpose, which it did not, is irrelevant with regard to Bodensteiner. Second, with regard to the essential purpose of a remedy, a "remedy's essential purpose is to give to a buyer what the seller promised him." *Hartzell v.*

Justus Co., 693 F.2d 770, 774 (8th Cir. 1982). Such a theory does not apply here as the Purchase Agreement did not promise anything to Cannon in the form of a remedy. (App. V1 498-499) To the extent that the Purchase Agreement was a limitation of remedies in that it provided that Cannon's only recourse would be through the Case extended warranty (PPP), Bodensteiner provided exactly what it promised to provide to Cannon; a Case tractor that was under Case extended warranty.

Cannon fails to show that a genuine issue of material fact exists in regards to his equitable rescission claim. First, Cannon ignores the requirement that there be a showing that legal damages would be inadequate. Failure to establish this requirement is fatal to his claim. Further, Cannon's theories for equitable rescission are unsupported by any evidence in the record, and are no more than vague conclusory assertions. The District Court's Order granting Bodensteiner's Motion for Summary Judgment on Cannon's equitable rescission claim must be affirmed.

CONCLUSION

For all the reasons stated herein, the District Court's Order granting Bodensteiner's Motion for Summary Judgment was appropriate and must be affirmed.

REQUEST FOR NON-ORAL SUBMISSION

Bodensteiner requests that this case be submitted with non-oral argument.

BODENSTEINER IMPLEMENT COMPANY,
Appellee/Defendant

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PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on November 25, 2015, I, the undersigned party or person acting in their behalf, did serve Appellee's Final Brief on counsel for all parties to this action using the Iowa Judicial Branch EDMS system, which will send notification of such filing to the following:

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I further certify that on November 25, 2015 I filed Appellee's Final Brief with the Clerk of the Iowa Supreme Court using the Iowa Judicial Branch EDMS system.

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