

IN THE SUPREME COURT OF IOWA

No. 15-0741

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

RESISTANCE TO APPLICATION FOR FURTHER REVIEW

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CERTIFICATE OF FILING

I, Judith O'Donohoe, hereby certify that I filed the Resistance to the Application for Further Review by Electronic document filing on the 17th day of April, 2017, addressed to the Clerk of the Supreme Court, Iowa Judicial Branch Building, 4th Floor, 1111 East Court Avenue, Des Moines, Iowa 50319.

____s/Judith O'Donohoe____
Judith M. O'Donohoe #AT0005849

CERTIFICATE OF SERVICE

I, Judith O'Donohoe, hereby certify that on the 17th day of April, 2017, I served the attached Supplemental Appendix by electronic document filing on counsel for the Appellees.

____s/Judith O'Donohoe____
Judith M. O'Donohoe #AT0005849

CERTIFICATE OF COST

I, Judith O'Donohoe, certify that the costs of producing the Resistance to Application for Further Review was \$ 3.10.

____s/Judith O'Donohoe____
Judith M. O'Donohoe #AT0005849

RESPONSE TO QUESTIONS PRESENTED FOR REVIEW

1. The Court of Appeals ruled that the Defendant, Bodensteiner, could not prove as a matter of law that its agents had not made an expressed warranty to Plaintiff, Jason Cannon. Consequently Bodensteiner is seeking review.

2. The first issue is not as framed by Bodensteiner whether there is a genuine issue of material fact concerning oral statements. This factual dispute is obvious. The conclusory second issue that the oral statements were not a basis of the bargain is also factually disputed. Cannon asserts that the oral statements were the bargain as the deal was made orally when he agreed trade for the tractor and pay an extra \$1,000 for transport the Monticello to the Clermont dealership prior to signing the paper presented by Bodensteiner's salesman Monroe.

3. Since the Supreme Court has the ability to review any issues raised on appeal, if it grants further review, Jason Cannon is asking that the Court review whether the Court of Appeals erred in upholding summary judgment on the causes of action for fraudulent misrepresentation, breach of implied warranties, breach of an implied covenant of good faith and fair dealing and rescission.

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**STATEMENT SUPPORTING RESISTANCE TO
APPLICATION FOR FURTHER REVIEW**

COMES NOW Cannon, and for his resistance to the application of
Bodensteiner for further review, states as follows:

1. Further review was requested by Bodensteiner because the issue is
purportedly one that presents a question which is fundamental, urgent and of
broad public importance requiring prompt or ultimate determination by the
Supreme Court per Rule 6.1101(2)(d).

2. The basis of the claim outlined in ¶1 is that the Court of Appeals
ruling violated Article I, §21 of the Iowa Constitution, which is raised for the
first time in this application. The Article states: "No bill of attainder, ex post
facto law or law impairing the obligation of contracts shall ever be passed".

3. The question addressed by the Court of Appeals was whether the
oral statements ascribed to salesman, Monroe, an agent of Bodensteiner, by

Cannon could be characterized as a matter of law as not creating an express warranty. Cannon contended that salesman, Monroe advised him that a Case 305 tractor, held a Bodensteiner's Monticello dealership was in good condition and fit for immediate use by him in the manure hauling business. Bodensteiner argued that, as a matter of law, an express warranty could not be created because of the terms of a pre-printed form utilized by Bodensteiner Implement Company, which applies only to John Deere equipment, not Case equipment, indicating: "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." A copy of this document is attached to this resistance and marked as Exhibit A.

4. This form was signed after the sale was agreed to and not specifically made a part of that bargain according to Cannon.

5. As noted by the Court of Appeals, UCC §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 where ever reasonable as consistent with each other; but . . . negation or limitation is inoperative to the extent that such construction is unreasonable."

6. Bodensteiner's also argued that salesman, Monroe's statements were "merely puffing" or opinion.

7. The Court of Appeals aptly observed that this conclusion could not be determined as a matter of law and required determination by a factfinder. Accordingly it found that there is a genuine issue of material fact.

8. Contrary to the representations made by Bodensteiner in his application for further review, the Court did not find that, as a matter of law, in all instances oral statements control over written disclaimers.

9. The chronology asserted by Cannon and supported by his materials are:

- 1) He asked his long-time Bodensteiner salesman, Roger Monroe, if there were any Case tractors available because he had been advised by the dealership's mechanic that he would need warranty repairs on his John Deere 8430 that would put his tractor out of service for the next three weeks(App540,636);
- 2) Bodensteiner implement, did an inspection of Cannon's tractor to be sure that it was fully cognizant of any defects that it might have(App588-9);
- 3) Salesman, Monroe, consulted the computer regarding tractors available at other Bodensteiner dealerships and

identified a Case 305 in Monticello. Cannon had requested a 285(App585);

4) Salesman Monroe, represented that the tractor had been inspected in the shop by the Monticello dealership and it was ready (App385-8). Monroe advised Cannon that he could have the tractor if he agreed to purchase it sight unseen, but not otherwise, as he did not want to incur the cost of \$1,000 transportation to Clermont(App485, 586);

5) On salesman Monroe's representation, Cannon agreed to the transaction which required a trade-in of his John Deere tractor for the Case plus payment of \$1,000(App586,613);

6) The tractor arrived at Clermont as Cannon was picking it up, salesman Monroe, presented him with a two-page printed form, which on its face applied only to John Deere products but in handwriting it indicated a Case tractor, Model 305 and the purchase price(App498-9);

7) Both parties signed the pre-printed form which Monroe characterized as a "purchase order" and Cannon left with the tractor driving a few miles home. He then hooked onto an empty manure tank to travel to the job site. He immediately

noticed that the tractor did not have enough pulling power. He examined the tractor and was able to observe that 12 turbo bolts had broken off then rusted at some time in the distant past. Cannon observed that if the tractor had been examined it would have been obvious (App567-569,586-588,609);

8) Still on 10/6, while driving the Case 305, 19th gear went out of the tractor and then the hydraulic pump exploded(App567-9);

9) Later that day or early the next morning, Cannon contacted Monroe asked him to provide a loaner for the tractor, Monroe refused returning Cannon to the Case warranty(App567-9);

10) Shortly after the explosion of the hydraulic pump, the transmission overheated and the brakes failed. A later review of the warranty repair record revealed that the previous owner Gansen Pumping, had some of these same problems and that a Case dealership in the Monticello area, Schermann's Implement, had concluded that the tractor had inherent mechanical problems(App572-3).

10. Cannon pled additional theories against Bodensteiner: 1) breach of implied warranties; 2) fraudulent misrepresentation; 3) breach of the

covenant of good faith and fair dealing; and 4) rescission(App83-91). In the event the Supreme Court grants further review, Cannon is requesting that these issues be reviewed for the following reasons:

1) A disclaimer of implied warranties delivered after a sale deal is made is ineffective, Limited Flying Club Inc v Wood, 632 F2d, 51(8th Cir (Iowa) 1980);

2) If the facts are interpreted in the light most favorable to Cannon, Bodensteiner salesman, Monroe clearly made a fraudulent misrepresentation when he indicated that the Case 305 tractor was inspected in Monticello and found to be fit and ready to go(App607). Bodensteiner is liable for the misinformation provided by Monticello re: the inspection, as Cannon would not have agreed to buy the tractor unseen if he had not had Monroe's assurances.

3) The claim of breach of implied covenant of good faith and fair dealing, as noted by the Court of Appeals generally operates upon any express condition of a contract, the occurrence of which is largely or exclusively within the control of one of the parties. The Court of Appeals erroneously concluded that such a duty did not arise because it did not analyze the question from the stand point that the contract was oral and completed before the preprinted form was signed. Since

there is evidence to support that sequence, the cause of action should have been remanded for trial.

4) Finally, the requested rescission remedy was discarded by the Court of Appeals as not having been argued on equitable and statutory grounds. However in his resistance to the MSJ(App502, ¶6), Canon argues both grounds. These are both discussed in the memorandum in support of the resistance under Issue IV(App523-4). The Court's ruling on the motions addresses rescission in one line stating that there is an adequate remedy at law without reference. If fraudulent representation is reinstated the trier of fact will have to determine if Cannon can prove it. If so he would be entitled to the remedy of rescission.

WHEREFORE, Cannon prays that the Court deny the application for further review and if it accepts the application that it accept review of all theories pled against Bodensteiner in this case.

TABLE OF AUTHORITIES

<u>C&J Fertilizer Inc v Allied Mutual Insurance Company</u> , 227 NW2d 169, <i>dicta</i> , 178 (IA1975)	22
<u>Fieldtech Avionics & Instruments Inc v Component Control</u> , 262 SW3d 813,829 (TX App 2008)	22
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<u>Reilley Construction Co Inc v Bachelder Inc</u> , 863 NW2d 302 (Table), (IA App2015, pg 4)	23
<u>Taterka v Ford Motor Company</u> , 271 NW2d 653,655-6 (WI 1978)	22
<u>Turner v Kunde</u> , 128 NW2d 196,198 (IA 1964)	22
<u>Williams v Mid-Iowa Equipment Inc</u> , 2015 WL12731737.....	25
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STATEMENT OF THE CASE

Cannon agrees with Bodensteiner's statement of the case.

STATEMENT OF FACTS

Throughout the case, Bodensteiner has treated facts about which there is a dispute as undisputed facts from its own viewpoint, overlooking that the facts must be viewed in the light most favorable to Cannon. In its initial MSJ, Bodensteiner presents the following "undisputed facts: 1)It does not do Case warranty work; 2)It received the 305 Case tractor on trade from its original owner covered by an extended Case warranty(App457); 3)The tractor was purchased pursuant to a written contract, citing the preprinted form at App498-499 but acknowledging it was signed after Cannon agreed to purchase the tractor(App437-40); 4)That the Mitchell brothers also

manure haulers, convinced Cannon to purchase the Case 305 tractor, not salesman, Monroe(App450). [The Mitchells were deposed and both of them have said that they have never driver a Case 305 tractor.] Salesman Monroe convinced Cannon to purchase the 305 instead of the 285 driven by the Mitchells which he requested(App562,585-6,616,622,625,630); 5)That Cannon was comfortable purchasing the tractor because of the Case warranty on it(App437-40). However, in a further submission, Bodensteiner cited to Cannon's deposition(App648), where he stated that he never discussed the Case warranty until after he made his purchase picking up the tractor(App563,588).

In an affidavit filed with his resistance to the summary judgment, Cannon again stated that he first talked to anyone about the Case warranty only after he had picked up the tractor and that he was relying on salesman, Monroe to find him a tractor that he could use immediately for manure hauling. He relied on his assurances that this particular tractor was fit for manure hauling, been checked over and was in good condition and ready to go(App631,637). He knew Monroe was not aware of the past problems with the tractor at that time but he thought the Monticello employees would have known then because they spoke to the Gansens on trade-in and had inspected it. An inspection would have revealed the broken turbo bolts and the short

drive of the tractor should have revealed that 19th gear was not working properly(App637).

In its original motion, Bodensteiner attempts to avoid liability from misrepresentation because he did not inspect the tractor. However as the entity sued its employees in Monticello are chargeable with misrepresentation that the tractor was fit and ready to go for manure hauling. Bodensteiner acknowledged that the tractor was plagued with mechanical problems and not fixable(App437-40).

In a reply to Cannon's resistance, Bodensteiner's added additional "undisputed facts": 1)Bodensteiner does John Deere warranty work but not Case warranty work; 2)Bodensteiner made no express warranty; 3)The preprinted form disclaimed any implied warranties; 4)The Case warranty was transferred with the tractor; 5)Bodensteiner did not commit fraud-misrepresentation or fail to exercise good faith and fair dealing; 6)The tractor was purchased pursuant to a written contract. These are conclusions disputed by Cannon.

Bodensteiner's statement of facts in its application contains a number of inaccuracies. It states that Cannon has farmed his whole life which is not in its citation(V2:902). It indicates that Cannon had extensive knowledge about tractors and owned five tractors in his lifetime. The citation indicates

that Cannon owned a skidloader, inherited a small White tractor and purchased two John Deere tractors with Monroe's assistance prior to obtaining the Case(AppV-2:906;App637-8,¶12&13). On page 10 if falsely claims the Mitchell brothers were familiar with the Case 305 tractor. On page 11 Bodensteiner indicates that Phil Kluesner, the Monticello dealership salesman told Monroe the tractor was traded in, the former owner was a manure pumping entity, it had a warranty, it was a good tractor, he had driven it briefly and did not observe any problems. However the referenced deposition testimony indicated Kluener described the tractor, stated he had inspected it and it "went through the test okay", and it was a good tractor. Monroe only assumed that he had driven it but it was not indicated. On page 12, Bodensteiner further indicates that Monroe provided Cannon with the information about the Case warranty extended protection plan prior to his purchase of the Case tractor which denied by Cannon(App648). At page 13, Bodensteiner repeats that a selling point for the tractor was the existence of the warranty, citing App926 where Cannon indicates that he has never seen the warranty terms and had found out about the warranty specifics through talking to Scott Busta at Windridge Implement, a Case dealer after he left Bodensteiner. A further assertion is that Cannon understood he could go to

Monticello to inspect the tractor before purchasing it. It ineffectively cites the trial court's ruling and App588:

Q: Had you wanted to test drive this tractor before you decided to purchase you knew you could have?

A: When I was talking to Roger [Monroe] on the phone when this whole trucking fee came up he wasn't going to pay to have the truck, go down and get it unless I wanted the tractor . . . so I said I want the tractor if it is a good running tractor, if it is going to work for me I want the tractor. He said it is fit, it is ready, it is ready, it is field ready.

Bodensteiner then states that the post-sale document signed is a purchase contract setting forth excerpts in print considerably larger than the original exhibit. The document does not state it is a purchased contract.

Bodensteinter states Cannon had the opportunity to read it prior to signing it, citing App575:

Q: Did you read it before you signed it?

A: Yes. Not the fine print. But over, yes.

Cannon, in his affidavit indicates: "I signed where I was told to sign, I did not believe the information about the warranties on the front of the form

applied to my purchase because it seems to apply only to John Deere products."(App278).

Bodensteiner states Cannon did not notice anything wrong until he put it under a "significant" load. The record indicates a problem occurred as soon as he hooked up an empty manure tank(App566). He called salesman Monroe right away and spoke to him and Monroe indicated that the fuel filters were possibly clogged(App568). Monroe then advised Cannon that he would have to contact a Case dealership for service under the warranty and that Bodensteiner would not give Cannon a loaner tractor(App568).

The facts taken in the light most favorable to Cannon are:

Cannon was an independent contractor for D & J Pumping tasked with hauling manure in tanks and spreading spreading it in fields(Vol I-App567,619). Before 2008, when Cannon obtained his John Deere 8430 from Bodensteiner Implement, he had heard of a Case tractor model, Magnum 305 from another dealer, Mark Baumler, but elected to go with the John Deere 8430 sold to him by Bodensteiner salesman, Monroe(Vol 1-App571). Bodensteiner has dealerships in several locations including Clermont (Monroe's location) and Monticello. Cannon had no specific information from his co-manure haulers, the Mitchells about the Case Magnum 305(Vol I-App622,630-631,637).

Cannon had a long-standing relationship with Monroe. All three of the large tractors that he purchased were purchased with Monroe's advice. He consulted Monroe: 1)when he made a private purchase of a John Deere tractor; 2)when he purchased the John Deere 8430 from Bodensteiners; and 3)in connection with the purchase of a Case from Bodensteiners(Vol I-App583-585,537). When Cannon called and spoke to Monroe about a Case tractor, he asked for a Case 285(Vol I-App585,621, 628,636). Monroe called Cannon back the next day and indicated he had a Case Magnum 305 available instead at Bodensteiner's dealership in Monticello(Vol I-App585,636); he stated the Case 305 was in the shop, had been gone through and was ready to go(Vol I-App586,637). Monroe advised Cannon that the previous owner had used it for manure hauling and he had no issues with the tractor(Vol I-App587).

Bodensteiner's mechanic at the Clermont dealership, Neil, said that the tractor was a good tractor and that Cannon would be happy with what he was getting including the horsepower(Vol I-556); Monroe advised Cannon that he knew of the Case Magnum 305 and it was a good tractor(Vol I-App546).

Monroe stated that he would not have the tractor trucked to Monticello from Clermont for Cannon unless he agreed to purchase it in

advance. The purchase price was to be \$139,000, \$1,000 cash and the balance in trade-in of his 8430 John Deere tractor, which needed a head gasket, and would be down for three weeks with the repair, under his J.D. warranty(Vol I-App545,586,588,613,615,637-638). The day of delivery of the tractor, 10/6/2010, Monroe told Cannon that the Case 305 Magnum tractor had been in the shop and everything tested out(Vol I-App586). Monroe also told Cannon that the tractor was ready to go for manure hauling. Cannon found out later that these statements were untrue(Vol I-545,558). Monroe claims he drove the Case 305 when it arrived at the dealership 10/6/10 before calling Cannon(Vol I-App592).

As a salesman, Monroe indicated that he had experience with tractors and their use for manure hauling and had sold tractors to other manure haulers(Vol I-App597-601,604-605). His responsibility, as a salesman, included an inspection of the tractor with the aid of a mechanic before taking it in on trade. He also routinely runs the tractor and asks the owner questions about how it has worked(Vol I-App600-601). Before reselling a tractor, the tractor is inspected by the dealership mechanic and serviced(Vol I-App601-604).

Monroe acknowledged that he has known Cannon for a long time through previous transactions and that Cannon asked him whether the Case

305 tractor was appropriate for manure hauling(Vol I-App605-606). Monroe spoke to the Monticello dealership salesman, Phil Kluesner, who took the Case 305 tractor in on trade from Gansen Pumping. Kluesner told him that it was a good tractor, it had been used satisfactorily for manure pumping, it passed inspection at the Monticello dealership, and had been driven satisfactorily(Vol I-App606-612). This information was passed onto Cannon by Monroe who acknowledged that he told Cannon the tractor was in good condition(Vol I-App592). Based on the information provided to Cannon and the fact that they did a thorough inspection of Cannon's John Deere tractor before they accepted it on trade, Cannon believed that the Case 305 would have been carefully inspected so he agreed to purchase it sight unseen(Vol I-App585).

Cannon's test drive of the tractor occurred after he picked it up from the Clermont dealership and had traded in his tractor and paid \$1,000. He drove it ten miles to his home(Vol I-App544,608-609). When Cannon picked up the tractor Monroe had him sign a form which referenced purchase of John Deere equipment only. The purchase form(App498-9), states that the purchaser had already accepted the tractor. It did not provide an option to refuse it. Cannon believed that he had to accept the tractor before it was trucked up to the Clermont dealership(Vol I-App586-588,609).

The information on the front of the purchase form appeared to be a disclaimer of warranties as it related to John Deere products but did not speak directly to the issue of the Case 305 tractor (App495-499). Cannon relied on Monroe's superior knowledge of tractors and their use in the manure hauling business to help him locate a tractor that would be satisfactory. This was known to Monroe who false made representations about the specific tractor, its appropriateness and adequacy(Vol I-App536,545,558, 637). The purchase form specifically references "Case Warranty", in handwriting and was signed by Monroe and Cannon on 10/6/10; it was not actually signed and accepted by the dealership until 10/11/2010(Vol I-App609-610).

On 10/6/2010, after Cannon drove the tractor home and hooked it up to an empty tank, and he noticed it did not have enough pulling power. He identified that the problem was with the turbo and immediately spoke to Monroe, who told him perhaps the filters were clogged and should be checked. Cannon then observed that 12 turbo bolts were broken and rusted, a condition that had existed for some time and should have been known to Bodensteiner if it had conducted an inspection(Vol I-App547,552, 568-569,578).

After hooking up when starting his work still on 10/6/2010, 19th gear went out of the tractor(Vol I-App552) followed by the hydraulic pump exploding(Vol I-App546,632,637). Cannon asked Monroe, within a day or two of taking delivery of the tractor, for a loaner while the Case 305 was being repaired under the Case warranty by Windridge. Monroe said that this was not possible(Vol I-App637-638). Shortly after 10/6/2010, the transmission overheated and the brakes failed. This had been a recurrent problem for the previous owner, Gansen Pumping(Vol I-App553, 578).

At first, Cannon believed that the tractor was fixable(Vol I-App543). After a series of repairs and re-occurrences, it was clear that the problem was not fixable(Vol I-App637-638). Monroe agreed that incidence of repairs of the brakes was excessive(Vol I-App611).

Cannon states either that no inspections was done by Bodensteiner or if done any obvious problems where covered up(Vol I-App574). After the repeated problems with the transmission overheating and the brakes failing, Cannon talked to Schermann's Implement, a case dealership's service manager about service provided to Gansen Pumping. He told Cannon that the first time the brakes failed he thought it was possible operator misuse, but when they went out again, he decided it was an inherent mechanical problem with the manufacture of the tractor(Vol I-App576-577,633).

After taking delivery from Windridge of the tractor following extensive repairs, the brakes failed almost immediately and the tractor had to be parked as Windridge had no idea of how to fix the problem(Vol I-App575). Since the tractor is unrepairable, Cannon wants to revoke acceptance of it and receive a refund of his original purchase price plus out of pocket expenses(Vol I-App637-638). There is no evidence anyone used or offered to purchase the tractor by Gansen Pumping from March 2010, after its trade-in until Cannon's purchase in October 2010(Vol I-App495-499,531-532).

**REPLY TO ARGUMENT UNDER ISSUE I RE: ALLEGED FAILURE
OF THE COURT OF APPEALS TO RECOGNIZE THE
SIGNIFICANCE OF THE DISCLAIMER OF EXPRESS
WARRANTIES DELIVERED TO CANNON AFTER HE HAD
ALREADY AGREED TO THE PURCHASE OF THE CASE
TRACTOR**

With indignation, Bodensteiner argues that the Court of Appeals did not adequately weigh the legal significance of the written disclaimer in its form delivered to Jason after he had orally agreed to the terms for purchase of the tractor. The Court of Appeals references the form in its decision, page 12: "2) Breach of Implied and Express Warranties" identified the issues: 1) whether the disclaimer was delivered post-sale; and 2) whether the disclaimer was conspicuous within the meaning of §554.1201(2)(j) but stated they gave rise to the factual disputes. It is well settled that a printed

document disclaiming warranties, which is delivered to a buyer after the deal has been made is ineffective. See C&J Fertilizer Inc v Allied Mutual Insurance Company, 227 NW2d 169, *dicta*, 178 (IA1975); Turner v Kunde, 128 NW2d 196,198 (IA 1964), (holding that a disclaimer of warranties on a shipping slip which accompanied delivery of goods after the terms of the sale had been determined was ineffective). For similar holdings see Taterka v Ford Motor Company, 271 NW2d 653,655-6 (WI 1978), Helena Chemical Co v Sun Refining and Marketing Co, 255 A.D.2d 869 (4th App Div NY, pg366-7) (NYApp 1998), Fieldtech Avionics & Instruments Inc v Component Control, 262 SW3d 813,829 (TX App 2008).

There is insufficient information in the record to hold as a matter of law that the deal was not made prior to the signature of the one-page Bodensteiner form which it is relying on as a disclaimer of all warranties. Salesman Monroe, characterizes it as a "purchase order"(App609). The form itself does not have a title except: "For John Deere Products (U.S. only)" (App498). Both Cannon and salesman Monroe indicated that Cannon had to agree to purchase the tractor on specific terms including the transportation costs before Bodensteiner would transport the tractor from Monticello to Clermont and that this transport of the tractor occurred before salesman Monroe presented any paperwork to Cannon(App547-548,565,608). Since

the issue is ordinarily one of fact to be determined by the factfinder and there is a clear dispute of fact as to whether the "purchase order" signed after the sales agreement would constitute an effective disclaimer of warranties it cannot be concluded on a MSJ, Limited Flying Club Inc v Wood, 632 F2d 51 (8th Cir (IA) 1980).

Bodensteiner also argued that the statements ascribed to salesman Monroe could give rise to an express warranty. This question was discussed in Nationwide Agribusiness Insurance Co v SMA Elevator Construction, Inc, 816 FSupp2d 631,677 (ND Iowa, 2011) in a detailed opinion by Federal District Court Judge Mark Bennett. In the context of deciding whether a defendant's description that a grain elevator would be built as "state of the art" or "turnkey" is sufficient to raise a question of fact regarding whether the statements were mere puffery or opinion. The statements made by Monroe and the mechanic Neil to Cannon, according to Cannon, are a lot more detailed and include information that the tractor has been checked and is ready to go, is a good tractor, will fit the purpose of being utilized in a manure hauling context, that it has been inspected and that there are no known problems with it. In Reilley Construction Co Inc v Bachelder Inc, 863 NW2d 302 (Table), (IA App2015, pg 4), the Court of Appeals held that a comment by a pond construction contractor that he could "do a pond" at a

staked location was sufficient to make an oral contract with the landowner for construction of a pond expressly warranted to hold water.

Summarizing, Bodensteiner's argument does not give fair credit to the Court of Appeals. It acknowledges that there is no proof as a matter of law that the disclaimer was incorporated as part of the contract and how it was to be construed since it was subsequently delivered. Further, it cites no case law that would support its assertion that the words utilized by salesman Monroe were mere puffery or opinion as a matter of law. Bodensteiner sidesteps both issues entirely in its argument. It assumes for the purposes of its argument that the disclaimer is effective against the warranty despite of the lack of simultaneity and argues without citation that there is a legal rule that oral sales agreements must always be construed with reference to subsequently delivered written statements regarding the product.

**REPLY TO ARGUMENT AS TO ISSUE II - WHETHER THE
COURT OF APPEAL INCORRECTLY HELD THERE WAS A
GENUINE ISSUE OF MATERIAL FACTS REGARDING
ORAL STATEMENTS WHICH BODENSTEINER CLAIMS
WERE NOT A "BASIS OF THE BARGAIN"**

The statement of the issue assumes a fact which was not proved as a matter of law, i.e. that salesman Monroe's oral statements to Cannon to induce him to purchase a tractor sight unseen were not a basis for the sales agreement. It raises a new argument not raised below, that statements

regarding the condition of the tractor could not be characterized as express warranties because the buyer, prior to purchase, did not inspect the product, citing the Federal court decision of Williams v Mid-Iowa Equipment Inc, 2015 WL12731737. This is a ruling on a motion for summary judgment authored by Ross A. Walters, U.S. Magistrate for the Southern District of Iowa. It does not hold that a statement that a tractor is "100% field ready" is negated by a failure to inspect. Instead, it points to a written contract for sale generated as a result of the auction which indicates that the tractor is sold "as is" with no specified guarantees. The court correctly held that if the statement "100% field ready" was to be made part of the contract it should have been referred to in the written contract in light of the "as is" language. In contrast, the document signed by Cannon and Monroe, was signed 10/6/2010 just before Cannon drove the Case tractor away, contains a statement that the dealership was not liable if there is a delay in delivering the product from the manufacturer. Below the title "For John Deere Products Only" this is in very small print and followed by another paragraph of small print which indicates that the item conveyed will have a clear title. This is followed by more print which is quite small that indicates that the John Deere warranty applicable to new John Deere products is printed on the back and that it should be read carefully and that rights and remedies

pertaining to the purchase are limited to the warranty set forth in the contract, followed by the comment that implied warranties of merchantability and fitness are not made and are excluded unless specifically provided in the John Deere warranty. The entire contract speaks only to relate only to sale of John Deere products and makes no representation which would contradict the quality statements made by Monroe to Cannon as to the Case tractor.

This part of the argument also misstates the record by indicating that the problems were not observable upon inspection. Cannon specifically stated that the problem with the turbo would have been viewable on inspection and that some of the other problems which occurred within hours of driving the tractor home, such as warning lights and the failure of 19th gear should also have been detectable if the tractor had been driven at all at the Monticello dealership. It then makes another factual argument that Cannon knew salesman Monroe had not inspected the tractor before it was trucked up to Clermont and therefore he should not have believed the warranties. A review of depositions clearly indicates that Monroe told Cannon he was getting information from the Monticello dealership regarding the tractor which included the representation that it was a good tractor, that it had been checked or tested or inspected and that it was ready to go.

The final argument is the polemic that Cannon could not possibly rely on statements by a John Deere dealership about a case product. There is no factual citation for this proposition other than that Cannon admitted that there was a Case warranty with extended warranty protection on the tractor. This observation contradicts the undisputed fact that Cannon was looking for a different tractor because his John Deere would be subject to repairs for 2-3 weeks during the peak manure hauling season. The J.D. tractor had a warranty and the work that was to be done on it was covered by the warranty so the fact that the Case tractor was covered by a warranty would not solve Cannon's problem which was that he needed a tractor suitable for manure hauling which was ready to go at that moment.

CONCLUSION

In conclusion, the Court of Appeals most likely should not have upheld summary judgment for Bodensteiners on the grounds of fraudulent misrepresentation, breach of implied warranties, breach of covenant of good faith and fair dealing and rescission. If the court accepts further review of this case, then Cannon is asking that it review these issues as well. Bodensteiner's application for further review attempts to dramatize the issue to constitutional proportions and then fails to cite either factual or legal support for its claim that the trial court could appropriately decide the

express warranty issue as a matter of law. The application for further review should be denied.

Certificate of Compliance

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because:

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____s/Judith O'Donohoe_____
Judith O'Donohoe

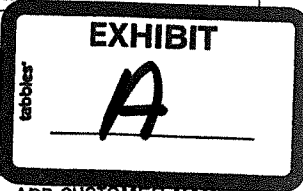
____April 17, 2017____
Date



For John Deere Products (U.S. Only)

15010354

CUSTOMER'S NAME - First Signer (First, Middle Initial, Last) <u>Jason Cannon</u>		DATE OF ORDER <u>10/6/10</u>	COMPANY UNIT <u>08</u>	DEALER ORDER NO.	DEALER ACCOUNT NO. <u>5838/6247</u>
SECOND LINE OF OWNER NAME		CASH SALE <input type="checkbox"/> LEASE <input type="checkbox"/> TIME SALE <input type="checkbox"/>	<input type="checkbox"/> SOC. SEC. <input type="checkbox"/> IRS NO. <input type="checkbox"/> EIN NO.		PURCHASER SALES TAX EXEMPT NO.
STREET OR RR <u>4246 P Ave</u>		SELLER'S NAME & ADDRESS BODENSTEINER IMPLEMENT COMPANY			
CITY <u>Elkader</u>		Elkader * Clermont			
COUNTY <u>Wayne</u>		Box 760, Elkader, IA 52043			
PURCHASER ACCT. <u>563-422-7642</u>		563-245-2470 * 563-423-5206			
STATE <u>IA</u>		ZIP CODE <u>52147</u>			
PHONE NUMBER <u>563-422-7642</u>					
CUSTOMER'S NAME - Second Signer		CUSTOMER IS:			
STREET OR RR		<input type="checkbox"/> Business <input type="checkbox"/> Accepted <input type="checkbox"/> Rejected			
CITY		<input type="checkbox"/> Individual <input type="checkbox"/> Accepted <input type="checkbox"/> Rejected			
COUNTY		<input type="checkbox"/> POWERGARD PROTECTION PLAN <input type="checkbox"/> Accepted <input type="checkbox"/> Rejected			
STATE		<input type="checkbox"/> POWERGARD MAINTENANCE PLAN <input type="checkbox"/> Accepted <input type="checkbox"/> Rejected			
ZIP CODE		<input type="checkbox"/> JOHN DEERE MAINTENANCE PLAN PLUS <input type="checkbox"/> Accepted <input type="checkbox"/> Rejected			
		ADD CUSTOMER NAME TO MAIL LIST			
		CP (Check only one box) AG			
		Residential Commercial Part-Time Farmer			
		<input type="checkbox"/> H <input type="checkbox"/> C <input type="checkbox"/> F <input checked="" type="checkbox"/> A			



I, the undersigned, hereby order from you the Product described below, to be delivered as shown below. This order is subject to your ability to obtain such product from the manufacturer and you shall be under no liability if delivery of the Product is delayed or prevented due to labor disturbances, transportation difficulties, or any reason beyond your control. The price shown below is subject to your receipt of the Product prior to any change in price by the manufacturer. It is also subject to any new or increased taxes imposed upon the sale of the Product after the date of this order.

NEW	USED	PRODUCT (Give Model, Size & Description)	(Hours of Use)	PRODUCT IDENTIFICATION NO.	DELIVERED CASH PRICE (Or Total Lease Payments)
		<u>28007</u>			
		<u>2008 Case IH 30.5 MFWD tractor</u>	<u>2573</u>	<u>Z8RZ02496</u>	<u>139,000.00</u>
		<u>w/ Duals + Wghts</u>			
		<u>18.4x50 w/ Duals, Suspended front axle</u>			
		<u>(Case Warranty)</u>			
offer to sell, transfer, and convey the following item(s) at or prior to the time of delivery of the above Product, to be applied against the cash price. Such item(s) shall be free and clear of all security agreements, liens, and encumbrances at the time of transfer to you. The following is a description and the price to be allowed for each item.					
DESCRIPTION OF TRADE-IN				1. TOTAL CASH PRICE	AMOUNT
<u>2007 John Deere 8430 MFWD tractor ILS</u>				<u>RW8430P018870</u>	<u>138,000.00</u>
<u>w/ Wghts + Duals</u>					
<u>paid Check No. 1039</u>					
CHASER TYPE (Check One)				2. TOTAL TRADE-IN ALLOWANCE	
Agriculture				3. BALANCE	
<input type="checkbox"/> 17 General Utility				4. SALES TAX	
<input type="checkbox"/> 13 Livestock / Feedlot / Dairy				5. SUB-TOTAL	
<input type="checkbox"/> 15 Row Crop / Small Grain				6. CASH WITH ORDER	
<input type="checkbox"/> 16 Specialty Crop				7. BALANCE DUE	<u>1000</u>
Rental & Lease Companies					
<input type="checkbox"/> 97 Deere Dealer					
<input type="checkbox"/> 96 Independent					
<input type="checkbox"/> 98 Undefined Govt. Use					
Utility Companies					
<input type="checkbox"/> 82 Gas / Water / Electric					
<input type="checkbox"/> 81 Telephone					
Other					
<input type="checkbox"/> 41 Building & Housing Construction					
<input type="checkbox"/> 71 Airports					
<input type="checkbox"/> 94 Golf Courses					
<input type="checkbox"/> 92 Highway Mowing					
<input type="checkbox"/> 95 Institutions (schools/churches/hosp.)					
<input type="checkbox"/> 93 Nursery / Landscape					
<input type="checkbox"/> 87 Parks & Cemeteries					
<input type="checkbox"/> 89 Residential					
<input type="checkbox"/> 84 Sanitary Landfill / Refuse					
<input type="checkbox"/> 74 Railroads					
<input type="checkbox"/> 49 Highways & Streets					
<input type="checkbox"/> 43 Sewer & Water					

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. The new product warranty is part of this contract. Please read it carefully. **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.**

ACKNOWLEDGEMENTS - I (We) promise to pay the balance due (line 7) shown above in cash, or to execute a Time Sale Agreement (Retail Installment Contract), or a Loan Agreement, for the purchase price of the Product, plus additional charges shown thereon or execute a Lease Agreement, on or before delivery of the Product ordered herein. Despite physical delivery of the Product, title shall remain in the seller until one of the foregoing is accomplished.

CUSTOMER'S SIGNATURE <u>Jason Cannon</u>	ACCEPTED BY <u>Clermont Imp Co</u> (Authorized Signature of Seller)
CUSTOMER'S SIGNATURE	DATE ACCEPTED SALESMAN <u>Roger Monroe</u>
DELIVERY ACKNOWLEDGEMENT <u>11/20/10</u>	WARRANTY BEGINS <u>11/20/10</u>
SIGNATURE: (DEALER) <u>App498</u>	

LIMITED WARRANTY FOR NEW JOHN DEERE COMMERCIAL & CONSUMER EQUIPMENT (U.S. Only)

GENERAL PROVISIONS - The warranties described below are provided by Deere & Company ("John Deere") to the original purchasers of new Agricultural and Commercial & Consumer Equipment from John Deere or authorized John Deere dealers. These warranties apply only to equipment intended for sale in the U.S. Under these warranties, John Deere will repair or replace, at its option, any covered part which is found to be defective in material or workmanship during the applicable warranty term. Warranty service must be performed by a dealer or service center located in the U.S. or Canada, and authorized by John Deere to sell and/or service the type of product involved, which will use only new or remanufactured parts or components furnished by John Deere. Warranty service will be performed without charge to the purchaser for parts or labor. The purchaser will be responsible, however, for any service call and/or transportation of product to and from the dealer's or service center's place of business, for any premium charged for overtime labor requested by the purchaser, and for any service and/or maintenance not directly related to any defect covered under the warranties below. Non-John Deere engines in self-propelled Forage Harvesters are warranted separately by their respective manufacturer. John Deere's Obligation shall not apply to Yanmar fuel injection pumps and nozzles during the original manufacturer's warranty period. When the pump manufacturer's warranty is less than the engine warranty, John Deere will provide warranty during the remainder of the original engine warranty period.

WHAT IS WARRANTED - All parts of any new John Deere product, except non-John Deere engines in self-propelled Forage Harvesters, tires, radios, and batteries (which are warranted under separate documents provided with each product), are warranted for the number of months or operating hours specified below.

I) AGRICULTURAL PRODUCTS	WARRANTY TERM
TRACTORS	24 Months - or 2,000 Hours, Whichever Comes First*
SCRAPERS	6 Months
OTHER PRODUCTS, Including Ag Management Solutions (AMS) Products	12 Months
Engines in Self-Propelled Equipment other than Tractors	24 Months - or 2,000 Hours, Whichever Comes First

*Warranty Term for all tractors used in Earthmoving applications (other than those specific models and configurations approved by John Deere as having a two year warranty in scraper service) is 90 days. Engine Items Covered months 13 through 24 - Engine block, cylinder head, rocker arm cover, timing gear cover, crankcase pan and all parts enclosed within these units. Also included are the fuel injection pump, turbocharger, water pump, torsion damper, manifolds, and engine oil cooler. All other engine related items are not covered in months 13 through 24.

Sweeps, Shovels, Plow Shares and Disk Blades - A replacement part will be furnished without charge if the following John Deere items break during the applicable warranty term, subject to these conditions:

SWEEPS & SHOVELS - When breakage occurs on items which do not show appreciable wear.

PLOW SHARES - When breakage occurs before the plow share reaches the following wear limits (labor not included - wear to be measured perpendicularly across the middle of the front bolt hole): INCH DIMENSION SHARES: 1/2 inch of wear (3/4 inches remaining); METRIC DIMENSION SHARES: 15mm of wear (100mm remaining).

DISK BLADES - When warrantable breaks occur as shown in the operator's manual on blades that have worn less than 10 percent of the original diameter (center breakage excluded).

I) LAWN & GARDEN EQUIPMENT	WARRANTY TERM
All Lawn & Garden Equipment and Attachments and Compact Series Gators (except for equipment listed in 2 below)	24 Months in Private Residential - Personal Use 12 Months in Any Other Application
100, L100, LA100 and G100 Series Tractors, Residential EZtrak Mowers and Attachments and Walk-Behind Mowers under 36"	24 Months in Private Residential - Personal Use 90 Days in Any Other Application

COMMERCIAL EQUIPMENT	WARRANTY TERM
Wide Area Mowers, Front Mower Traction Units (with diesel or 20 HP and above engines), Commercial Z-TRAK Mowers, Commercial Walk Behind Mowers (36" or larger), and 7-IRON Mower Decks	24 Months
Utility Tractors, Compact Utility Tractors	24 Months or 2000 Hours, Whichever Comes First
a) Powertrain on Compact Utility Tractors (components as per D below)	36 Months or 2000 Hours, Whichever Comes First
Gator Utility Vehicles (except Compact Series), Tractor Loader Backhoes (TLB), Other mower decks, implements, and attachments for Equipment listed in 3, 4, 5	12 Months or 1000 Hours, Whichever Comes First

UTILITY ALL TERRAIN VEHICLES	WARRANTY TERM
Utility All Terrain Vehicles (UATV) and attachments	6 Months

f) Each warranty term begins on the date of product delivery to the purchaser (except for certain agricultural tillage, planting, cultivating, and harvesting products which may have a delayed warranty start date, but only if established by John Deere and noted by the dealer on the purchase order).

WHEN APPLICABLE, A SEPARATE EMISSIONS WARRANTY STATEMENT WILL BE PROVIDED BY YOUR JOHN DEERE DEALER.

WHAT IS NOT WARRANTED - JOHN DEERE IS NOT RESPONSIBLE FOR THE FOLLOWING: (1) Used Products; (2) Frontier Equipment™ products. Warranty is the responsibility of the original manufacturer. The customer should contact a Frontier Equipment™ dealer for details; (3) Any product that has been altered or modified in ways not approved by John Deere, including, but not limited to, setting injection pump fuel delivery above John Deere specifications and modifying combine grain tanks; (4) Depreciation or damage caused by normal wear, lack of reasonable and proper maintenance, failure to follow the product's Operator Manual recommendations; (5) Normal maintenance parts and service including, but not limited to, oil, filters, coolants, and conditioners, timing parts, belts, brake and clutch linings; (6) UATV if used for racing or any other competitive activity.

INCLUDED IN COMPACT UTILITY TRACTOR POWERTRAIN WARRANTY - Engine: cylinder block, cylinder head, valve covers, oil pan, timing gear covers, wheel housing, and all parts contained therein (does not include fuel, electrical, cooling, intake or exhaust components). Powertrain: hydrostatic transmission, transmission case, differential and axle housings, clutch housings, MFWD front axle assembly, and all parts contained therein (does not include external bellows, dry clutch parts, or steering cylinders).

SECURING WARRANTY SERVICE - To secure warranty service, purchaser must (1) report the product defect to an authorized dealer and request repair within the applicable warranty term, (2) present evidence of the warranty start date, and (3) make the product available to the dealer or service center within a reasonable period of time.

NO IMPLIED WARRANTY OR OTHER REMEDY - AGRICULTURAL PRODUCTS - Where permitted by law, neither John Deere or any company affiliated with it makes any warranties, representations, or promises, express or implied as to the quality or performance, or freedom from defect of its agricultural products other than those set forth above, and NO IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS IS MADE. IN NO EVENT WILL THE DEALER, JOHN DEERE OR ANY COMPANY AFFILIATED WITH JOHN DEERE BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES. The only remedies available to a purchaser has in connection with the breach of performance of any warranty on John Deere agricultural products are those set forth above.

MITIGATION OF IMPLIED WARRANTIES OR OTHER REMEDIES - COMMERCIAL & CONSUMER EQUIPMENT - To the extent permitted by law, neither John Deere nor any company affiliated with it makes any warranties, representations, or promises, express or implied as to the quality, performance or freedom from defect of the Commercial & Consumer Equipment covered by this warranty. IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, TO THE EXTENT APPLICABLE, SHALL BE LIMITED IN DURATION TO THE APPLICABLE PERIOD OF WARRANTY SET FORTH ON THIS PAGE. THE PURCHASER'S ONLY REMEDIES IN CONNECTION WITH THE BREACH OR PERFORMANCE OF ANY WARRANTY ON JOHN DEERE COMMERCIAL & CONSUMER EQUIPMENT ARE THOSE SET FORTH ON THIS PAGE. IN NO EVENT WILL THE DEALER, JOHN DEERE OR ANY COMPANY AFFILIATED WITH JOHN DEERE BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES. (Note: Some states do not allow limitations on how long an implied warranty lasts or the exclusion or limitation of incidental or consequential damages so the above limitations and exclusions may not apply to you.) In the event the above warranty fails to correct purchaser's performance problems caused by defects in workmanship and/or materials, the purchaser's exclusive remedy shall be limited to payment by John Deere of actual damages in an amount not to exceed the amount paid for the product. This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

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. If further information is desired, contact your selling dealer or DEERE & COMPANY MOLINE, IL at 1-866-993-3373.