[Cite as *Raze Internatl., Inc. v. Southeastern Equip. Co., Inc.*, 2016-Ohio-5700.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

RAZE INTERNATIONAL, INC.,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 14 JE 0015
V.	)	
	)	OPINION
SOUTHEASTERN EQUIPMENT CO., ET AL.,	)	
	)	
	)	
DEFENDANTS-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Court of Common Pleas of Jefferson County, Ohio Case No. 10CV557
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiff-Appellee	Attorney Gerald P. Duff 320 Howard Street Bridgeport, Ohio 43912
For Defendants-Appellant	Attorney Kevin P. Murphy Attorney Matthew G. Vansuch 108 Main Ave., Suite 500 Warren, Ohio 44481 Attorney C. Keith Plummer 139 W. Eighth St., P.O. Box 640 Cambridge, Ohio 43725-0640
JUDGES: Hon. Gene Donofrio Hon. Cheryl L. Waite Hon. Mary DeGenaro	
	Dated: September 2, 2016

[Cite as *Raze Internatl., Inc. v. Southeastern Equip. Co., Inc.*, 2016-Ohio-5700.]
Donofrio, P.J.

{¶1} Defendant-appellant Southeastern Equipment Company, Inc. appeals a $655,000.00 jury verdict in favor of plaintiff-appellee Raze International Inc. on its claims for conversion, fraud, breach of contract, and punitive damages.

{¶2} This case concerns a used 2005 Kobelco SK330 excavator that Southeastern sold to Raze in 2008. Southeastern, which is in the business of selling and renting heavy equipment through multiple offices, purchased the machine in 2005 from Kobelco for $193,055. (Plaintiff's Exhibit 3.) Southeastern placed the machine in its rental fleet. While in Southeastern's rental fleet, the machine experienced hydraulic problems, with the service history evidencing that the hydraulic pump had to be rebuilt in 2007.

{¶3} Raze is in the demolition business, taking down residential and commercial structures. Most of its work is accomplished utilizing an excavator with either a bucket or grapple attachment. The company had three smaller excavators, one of which was a 200 series that it had previously purchased from Southeastern. After experiencing a successful year in 2007, Tom Brown, then co-owner and vice president of Raze, considered upgrading their equipment with the addition of a larger excavator. He spoke with Rob Bartsch, a sales person for Southeastern at its office in Brilliant, Ohio with whom he had dealt when Raze had previously purchased a smaller excavator, and Brandon Unklesbay, the manager of Southeastern's Brilliant office. Both Bartsch and Unklesbay were familiar with the type of business Raze was engaged in and were aware that Brown was looking for a piece of equipment which would be the anchor of Raze's business. Negotiations proceeded for approximately one and a half to two months in the beginning of 2008.

{¶4} Bartsch and Unklesbay recommended the used 2005 Kobelco SK330 excavator from Southeastern's rental fleet to Brown. According to Brown, Bartsch and Unklesbay told him that he would be "buying the cream of their crop" and that he would be "getting the best machine that [he] could possibly get within their fleet because they [were] the ones that serviced the machine." (Tr. 152.) They told him that he was "getting the best deal possible" and "one hell of a deal." (Tr. 153.) As for

the condition of the machine, they characterized it is "like new in perfect condition" and in excellent shape. (Tr. 153.) They added that the machine, like any machine from Southeastern's rental fleet, had never been sold to anyone else, that they "backed the machine up" and "stood by their machine." (Tr. 154.) They told him that if he had problems with the machine, "they stood by it," "they backed it," and "[t]hey would pay for it." (Tr. 154-155.) In reliance on these representations, Brown continued with the sales process.

{¶5} At the time, the machine was being rented by a company named Katko Limited which was using it at a Consol Energy coal yard in Marshall County, West Virginia. (Tr. 235, 320.) Brown visually inspected the excavator at that site. (Tr. 235-236.) John Bettem, the owner of Katko, testified that for the short period of time his company had rented the excavator, they discovered that it did not work properly, operated poorly, and it was sent back to Southeastern. (Tr. 321-323.) When the machine was returned to Southeastern from Katko on February 4, 2008, it had 2005.8 hours on it. (Tr. 148, 268-269; Plaintiff Exhibit 5; Defense Exhibits H.) While Southeastern had the excavator at its Brilliant yard, Brown took another opportunity to look at the machine, but did not operate it. (Tr. 238.)

{¶6} Meanwhile, at some point Southeastern prepared a sales order for the excavator reflecting a purchase price of $185,000. (Tr. 244; Defense Exhibit A.) The order was dated January 31, 2008 (although Brown contended at trial that it was backdated). (Tr. 243.) The $185,000 purchase price included a coupler and a bucket. (Tr. 245.) The order also reflected a $40,000 allowance or trade-in of a used 1998 Komatsu excavator by Raze. (Tr. 245.)

{¶7} The warranty section of the sales order contained three different options, the first of which stated, "THIS UNIT IS SOLD WITHOUT WARRANTY 'AS IS' CONDITION. INITIAL _____." The option contains an "X" in the box directly to the left of it, but does not contain the required initials on the signature space directly to the right of it. At trial, Brown stated that the "X" in the box was not there when he signed the sales order. He maintained that he refused to initial the as-

is provision (Tr. 247, 249, 307.) The sales order also contains a handwritten condition precedent stating, “Per Customer Approval” which bears Robert Bartsch’s signature.

{¶8} Brown indicated that he signed the sales order for two reasons. The first was to get the machine from the site where it had been rented back to Southeastern so that they could do their due diligence and get the machine ready for the sale to him. (Tr. 177, 249) The second was so that Bartsch could get his commission started.

{¶9} Southeastern also prepared a buyer’s guide, which also contained an “AS IS – NO WARRANTY” provision. (Defendant Exhibit B.) The provision bears the initials “TB” and what appears to be a signature of “Tom Brown.” Tom Brown testified that he did not initial or sign that document and had never seen the document until it was produced at his deposition following the commencement of this litigation. (Tr. 251, 308.) At trial, Robert Bartsch corroborated Brown’s testimony in this regard, stating that it was not Tom Brown’s signature, that Brown would not sign it, and that since Brandon Unklesbay was the only person who would have retained possession of that document he believes Unkelsbay forged Brown’s initials and signature upon it. (Tr. 603.)

{¶10} Thereafter, Southeastern sent Raze an invoice reflecting a total due of $157,950.00 ($185,000.00 indicating the purchase price of the excavator less $40,000.00 for the used excavator Raze was trading in plus $12,950.00 for taxes). (Plaintiff Exhibit 1, Defendant Exhibit C.) In a letter dated February 7, 2008, Tom Brown informed Southeastern that the purchase of the excavator was not to be invoiced until approval had been given by Raze. (Defendant Exhibit D.)

{¶11} Approximately a month later, Unkelsbay informed Brown that Southeastern was not going to hold the machine for Raze any longer and that if Raze wanted it, Raze was going to have to buy it. (Tr. 264-265.) On March 10, 2008, Brown, on behalf of Raze, and Unkelsbay, on behalf of Southeastern, signed a document setting forth the payment terms for the purchase of the excavator. (Plaintiff

Exhibit 9, Defendant Exhibit E.) It stated, "Southeastern Equipment will accept a partial payment of $80,000.00 and allow no more than 30-days to have the remainder of the balance paid in full. If at the end of the 30-day period, the machine is not paid in full, the customer forfeits his down payment, and Southeastern will assume possession and ownership of the machine (YC07-U1080). That same day, Raze wrote a check to Southeastern for the $80,000.00 (Plaintiff Exhibit 6, Defendant Exhibit F.)

{¶12} Thus, Brown had to finance the balance due to Southeastern of $77,950.00 or risk forfeiting $120,000 ($40,000 trade-in plus $80,000 cash deposit). (Tr. 192-193.) Local banks were unwilling to finance used or like-new machines which had any hours on them. After receiving a flier from Global Advantage, LTD. d.b.a. Global Finance Group in the mail advertising financing, Brown contacted Global about financing the remainder of the purchase price. Global sent an "EQUIPMENT CONDITION REPORT" to Southeastern inquiring about the condition of the excavator. (Plaintiff's Exhibit 4.) On the report, Unklesbay stated that reconditioning had been done on the unit, that it had 2000 hours, and that it was in "very good condition." Raze then essentially leased the excavator from Global and Global paid Southeastern the balance owed.

{¶13} Although documents in the case reflect slightly conflicting dates, the excavator was delivered to Raze at its job site at Franciscan University in Steubenville, Ohio, sometime in either the third or fourth week of March 2008. From the first day the excavator was delivered to Raze's site, the machine never worked properly and it was evident that there was something wrong with the hydraulics, causing it to operate at only 50% of its potential power.

{¶14} The first person to operate right after it was delivered to Raze at its Steubenville site was Brian McLeod. He found it to be "real slow, real sluggish." (Tr. 351). He estimated that the hydraulics were operating at only 50%. Problems with the excavator continued to be ongoing, as often as once or twice a week. (Tr. 358.) Due to the excavator's poor and unreliable performance, Raze's workers on a

demolition site did not feel safe around the machine, sometimes leading to arguments over who was going to have to operate it. (Tr. 354, 363.)

{¶15} Louis Aulenbacher, who was president of Raze at the time and was the field supervisor, was there at the site shortly after the excavator was delivered. After he got in it and began operating it he immediately noticed that it was weak, indicating something was wrong with the hydraulics. (Tr. 432.) He called Brown and told him to get in contact with Southeastern to inform them that something was wrong with the machine.

{¶16} Brown contacted Southeastern about the problems they were having with the excavator and they sent up a mechanic from their Brilliant office a day or two after it had been delivered. (Tr. 168.) Each time Brown got complaints from the operators (sometimes daily) of the excavator concerning its performance, Brown contacted Southeastern. Southeastern made numerous attempts to fix it, but the complaints and problems with the excavator persisted. On three occasions where Southeastern attempted to repair the excavator, it generated invoices for the repairs: (1) $830.77 on April 16, 2008; (2) $524.48 on December 10, 2008; and (3) $671.83 on December 19, 2008). (Plaintiff Exhibit 30, 31, 32; Defense Exhibit L, M, N.) In each of those instances, Southeastern billed the charges internally and did not bill Raze for those repairs. (Tr. 818.)

{¶17} In July or August of 2009, the hydraulic pump on the excavator completely malfunctioned necessitating Southeastern to take it to its Dublin, Ohio shop for extensive repairs. (Tr. 299, 823). In an invoice generated by Southeastern on August 10, 2009, it billed Raze for the repairs totaling $23,995.38. (Plaintiff Exhibit 33; Defense Exhibit O.) Southeastern did not return the excavator to Raze and instead released it to the financing company, AEL, which repossessed and auctioned off the excavator.

{¶18} Raze sued Southeastern in Jefferson County Common Pleas Court for: (1) fraudulent misrepresentation and/or concealment; (2) breach of contract; and (3) wrongful taking and selling of the excavator. It also sued Global Finance Group,

Global Vantage, Ltd. and AEL Financial, LLC, for contract reformation/rescission and misrepresentation. The trial court separated Raze's claims against Global and AEL and those claims are not the subject of this appeal.

{¶19} Following a jury trial, the jury awarded Raze $185,000.00 for its fraud claim, $200,000.00 for its breach of contract claim, $70,000.00 for its conversion claim, $200,000.00 in punitive damages, and attorney fees. This appeal followed.

{¶20} Southeastern presents six assignments of error. It has chosen to address its first three assignments of error collectively and present a consolidated argument thereunder. They state, respectively:

> The trial court erred in not granting a directed verdict to Southeastern on Raze's fraudulent inducement and breach of contract claims.
>
> The trial court erred in not granting a judgment notwithstanding the verdict to Southeastern on Raze's fraudulent inducement and breach of contract claims.
>
> The trial court erred in not granting a new trial to Southeastern on Raze's fraudulent inducement and breach of contract claims.

{¶21} As an initial matter, it should be noted that Southeastern did not preserve the directed verdict assignment of error for appeal. Southeastern requested a directed verdict at the close of Raze's case. (Tr. 764-776.) The record, however, is devoid of any indication that Southeastern renewed this motion at the close of its case in chief. A directed verdict motion raised after the presentation of the plaintiff's case in chief must be renewed at the conclusion of all the evidence to preserve the error for appeal. *Chemical Bank of New York v. Neman*, 52 Ohio St.3d 204, 556 N.E.2d 490 (1990); *Helmich v. Republic-Franklin Ins. Co.*, 39 Ohio St.3d 71, 529 N.E.2d 464 (1988), paragraph one of the syllabus. Failure to renew at the close of all the evidence waives any error in the earlier denial of that dispositive motion. *Nwabara v. Willacy*, 135 Ohio App.3d 120, 135, 733 N.E.2d 267 (8th Dist.1999),

citing *Helmich,* 39 Ohio St.3d 71, 529 N.E.2d 464. Southeastern's motion was not renewed. Therefore, the directed verdict argument is not properly before this court. Thus, Southeastern's first assignment of error is without merit.

JNOV & New Trial Standards of Review

{¶22} Appellate courts review decisions to grant or deny a motion for JNOV under a de novo standard of review. *Environmental Network Corp. v. Goodman Weiss Miller, LLP,* 119 Ohio St.3d 209, 2008-Ohio-3833, 893 N.E.2d 173, ¶ 22.

{¶23} A motion for JNOV under Civ.R. 50(B) tests the legal sufficiency of the evidence. *Eastley v. Volkman,* 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517 at ¶ 25 (a motion for JNOV presents a question of law); *Posin v. A.B.C. Motor Court Hotel, Inc.,* 45 Ohio St.2d 271, 275, 344 N.E.2d 334 (1976) (motions for JNOV employ the same standard as motions for directed verdict). Thus, when a verdict has been returned for the plaintiff, the trial court, in determining whether to sustain a motion for judgment notwithstanding the verdict, must decide whether the defendant is entitled to judgment as a matter of law when the evidence is construed most strongly in favor of the plaintiff. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.,* 81 Ohio St.3d 677, 679, 693 N.E.2d 271 (1998), citing Civ.R. 50(A)(4). In determining whether to grant or deny a Civ.R. 50(B) motion, the trial court should not weigh the evidence or evaluate the credibility of the witnesses. *Malone v. Courtyard by Marriott,* 74 Ohio St.3d 440, 445, 659 N.E.2d 1242 (1996).

{¶24} Pursuant to Civ.R. 59(A)(6), a new trial may be granted on the grounds that the judgment is not sustained by the weight of the evidence. A new trial may also be granted in the sound discretion of the court for good cause shown. Civ.R. 59(A). A trial court's decision to overrule a motion for a new trial is reviewed for abuse of discretion. *Mannion v. Sandel*, 91 Ohio St.3d 318, 321, 744 N.E.2d 759 (2001). We defer to the trial court who witnessed the testimony first-hand. *Id.* Thus, in reviewing the trial court's denial of a motion for a new trial based upon a factual question, we construe the evidence in a light most favorable to the trial court's action rather than to the original jury's verdict. *Jenkins v. Krieger*, 67 Ohio St.2d 314, 320,

423 N.E.2d 856 (1981); *Rohde v. Farmer*, 23 Ohio St.2d 82, 94, 262 N.E.2d 685 (1970).

As-Is Clause

{¶25} Southeastern steadfastly asserts that the sale was an as-is sale. In support, it relies principally on the sales order and the buyer's guide. It also relies on subsequent correspondence between itself and Raze which it argues constituted confirmation of the terms explicitly set forth in the sales order and the buyer's guide. The sales order contains a warranty section setting forth three different boxes which could be checked depending on the type of warranty agreed to. The first option states, "THIS UNIT IS SOLD WITHOUT WARRANTY 'AS IS' CONDITION. INITIAL _____." This option contains an "X" in the box next to it, but does not contain an initial signature after it. The buyer's guide likewise contains a warranty section which also has a box marked for "AS IS – NO WARRANTY." On the buyer's guide, this box is initialed and also bears what Southeastern purports to be Tom Brown's signature.

{¶26} "Most sales of goods, including used goods, involve either express or implied warranties. *Buskirk v. Harrell* (June 28, 2000), 4th Dist. No. 99CA31. For instance, a seller generally warrants that a good is merchantable and fit for a particular use when it sells that good unless it conspicuously excludes those implied warranties in writing. R.C. 1302.29(B). All implied warranties are excluded by expressions like 'as is' unless the circumstances indicate otherwise. R.C. 1302.29(C)(1). The phrase 'as is' describes the quality of the goods sold and in ordinary commercial usage it means that the buyer takes the entire risk as to the quality of the goods sold. *Ins. Co. of N. Am. v. Automatic Sprinkler Corp. of Am.* (1981), 67 Ohio St.2d 91, 94, 423 N.E.2d 151; *Schneider v.. Miller* (1991), 73 Ohio App.3d 335, 339, 597 N.E.2d 175." *Perkins v. Land Rover of Akron*, 7th Dist. No. 03 MA 33, 2003-Ohio-6722, ¶ 16.

{¶27} In this instance, although the box for the as-is option was checked on the sales order, it was not initialed. Tom Brown acknowledged signing the sales

order, but insisted that he did not check the box for the as-is warranty provision nor did he initial it. As for the buyer's guide which also included an as-is provision, Brown contended that he never saw that document and that it was not his signature or initial on it. Robert Bartsch corroborated his testimony in that regard. In Southeastern's appellate brief, it repeatedly stresses that Tom Brown did not take affirmative steps to disavow the as-is clause or to repudiate it. However, Southeastern fails to cite any statutory or case law authority for such a proposition. Given how the sales order document was constructed, it should be enough that Brown refused to initial the as-is provision.

Parol Evidence

{¶28} Southeastern argues that voluminous evidence was presented which contradicted the parties' written agreement, in violation of the parol evidence rule.

{¶29} In general, the parol evidence rule provides that a writing intended to be the final embodiment of the parties' agreement (known as "the integration") cannot be supplemented, varied, or contradicted by extrinsic evidence of prior or contemporaneous agreements, either oral or written. *Galmish v. Cicchini,* 90 Ohio St.3d 22, 27, 734 N.E.2d 782 (2000). The doctrine protects the integrity of a subsequent written contract, which is of a higher nature than earlier statements, negotiations, or oral agreements. *Id.* Thus, where the parties make promises during negotiations, these promises are said to be integrated into the final signed writing, and where said writing is unambiguous, parol evidence cannot be admitted to prove the prior promises. *East Liverpool v. Buckeye Water Dist.,* 7th Dist. No. 08CO19, 2010-Ohio-3170, ¶ 41.

{¶30} R.C. 1302.29, which governs the exclusion or modification of warranties, also provides that "[w]ords 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 section 1302.05 of the Revised Code on parol or extrinsic evidence, negation or limitation is inoperative to the extent that such construction is

unreasonable." R.C. 1302.29(A). R.C. 1302.05 provides that "[t]erms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement * * *."

{¶31} Southeastern suggests that even presence of fraud cannot overcome the parol evidence rule. For example, it maintains that even when a plaintiff asserts that it was fraudulently induced into purchasing a vehicle by certain representations that were disclaimed on the retail order, the parol evidence rule still applies, citing to *Olah v. Ganley Chevrolet, Inc.*, 191 Ohio App. 3d 456, 2010-Ohio-5485, 946 N.E.2d 771, ¶ 15 (8th Dist.). In *Olah*, the Eighth District observed, "Indeed, the parol-evidence rule may not be avoided when the inducement to sign the writing was a promise that directly contradicts an integrated written agreement." *Id*., citing *Galmish v. Cicchini*, 90 Ohio St.3d 22, 29-30, 734 N.E.2d 782 (2000).

{¶32} Southeastern's reliance on *Olah* is misplaced. In this instance, the representations that Tom Brown claims were made to him by Southeastern's agent were not disclaimed on the retail order. Southeastern repeatedly points to the as-is provision of the sales contract. However, as indicated, the as-is provision was not assented to by Tom Brown. The contract itself reflects that in order for the as-is provision to be in effect, the box next to the left of it had to be checked and that the buyer had to initial on the line provided to the right of the provision. Here, the box was checked, but there are no initials next the provision. Tom Brown testified that when he signed the sales order, the as-is box was not checked and, as is apparent from the face of the document, he did not initial that provision either.

{¶33} Furthermore, there are exceptions to the parol evidence bar. For instance, extrinsic evidence can be used to show fraud in inducing a contract as long as the parol evidence does not directly contradict the terms of the signed writing. *Galmish,* 90 Ohio St.3d at 29, 734 N.E.2d 782. "[A]n oral agreement cannot be enforced in preference to a signed writing which pertains to exactly the same subject

matter, yet has different terms." *Id.,* citing *Marion Prod. Credit Assn. v. Cochran,* 40 Ohio St.3d 265, 533 N.E.2d 325 (1988). Attempts to prove contradictory assertions are exactly what the parol evidence bar was designed to exclude. *Id.,* citing Shanker, Judicial Misuses of the Word Fraud to Defeat the Parol Evidence Rule and the Statute of Frauds (With Some Cheers and Jeers for the Ohio Supreme Court), 23 Akron L.Rev. 1, 7 (1989).

{¶34} If the parol evidence used to show fraud in the inducement is independent of the written instrument or does not directly contradict the signed writing, then it is admissible. *Id .* at 29–30, 533 N.E.2d 325. And, an integration clause does not vitiate this exception. *Id.* at 28, 533 N.E.2d 325 ("an integration clause makes the final written agreement no more integrated than does the act of embodying the complete terms into the writing."). "It has been said that if the courts were to hold, in an action on a written contract, that parol evidence should not be received as to false representations of fact made by the plaintiff, which induced the defendant to execute the contract, they would in effect hold that the maxim that fraud vitiates every transaction is no longer the rule; and such a principle would in a short time break down every barrier which the law has erected against fraudulent dealing." *Id*. at 28.

{¶35} Here, the sales contract was comprised primarily of the sales order. It clearly indicated that sale was conditioned on the customer's (i.e., Raze's) approval. As for the warranty, none of the three options were completed. The legal effect of that was that the sales contract stood silent on the issue of a warranty. Consequently, Brown's assertion that Bartsch and Unklesbay represented to him that Southeastern would stand by the machine does not contradict the written agreement in any way.

R.C. 1302.29(C)(2): Duty to Inspect

{¶36} Southeastern argues that even if the sales contract did not have the effect of disclaiming an implied warranty, such a warranty was precluded by Raze's alleged failure to inspect and conduct its own due diligence regarding the excavator.

In response, Raze argues that because of the misrepresentations made by the Southeastern's sales person and manager, it was absolved of any responsibility to investigate potential problems with the machine.

{¶37} The only authority Southeastern cites to in support of its argument that Raze had a duty to inspect the excavator is R.C. 1302.29(C)(2). R.C. 1302.29(C)(2) provides that "when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him * * *."

{¶38} Southeastern's reliance on this provision is misplaced. The Official Comment to R.C. 1302.29(C)(2) explains:

> In order to bring the transaction within the scope of "refused to examine" in paragraph (b) [(C)(2)], it is not sufficient that the goods are available for inspection. There must in addition be a demand by the seller that the buyer examine the goods fully. The seller by the demand puts the buyer on notice that he is assuming the risk of defects which the examination ought to reveal. The language "refused to examine" in this paragraph is intended to make clear the necessity for such demand.

{¶39} In this case, there was no evidence presented that Southeastern demanded that Raze examine the excavator fully. Consequently, Raze had no duty to examine the excavator fully under R.C. 1302.29(C)(2).

Justifiable Reliance

{¶40} Southeastern argues that Raze's claim that it was fraudulently induced into entering the sales contract fails because its reliance on Southeastern's representations about the excavator was not justifiable. In response, Raze contends that any duty it had to examine the excavator was absolved by Southeastern's misrepresentations concerning the condition of the excavator.

{¶41} Southeastern cites this Court's decision in *Scassa v. Dye*, 7th Dist. No. 02CA0779, 2003-Ohio-3480, where it stated that a seller cannot be held liable for misrepresentations to a buyer unless they were "justified in relying thereon in the exercise of common prudence and diligence." *Id*. at ¶ 44. Southeastern also argues that Raze's reliance on Bartsch's statements was not reasonable, citing this Court's observation in *Scassa* that "[w]hile purchasers are normally entitled to rely on the reasonable representations of sellers, 'a party dealing on equal terms with another is not justified in relying on representations where the means of knowledge are readily within his reach." Id. at ¶ 45 , quoting *J.A. Industries, Inc. v. All Am. Plastics, Inc.*, 133 Ohio App.3d 76, 84, 726 N.E.2d 1066 (3d Dist.1999), quoting 37 Corpus Juris Secundum, Fraud, Section 44(a), 229 (1997).

{¶42} However, Southeastern's reliance on *Scassa* is misplaced, especially when viewed in context. The Court's observations concerned a situation where the seller's general commendations about an item for sale were considered as mere "puffing." The Court went on to explain, "And where the representation consists of general commendations or mere expressions of opinion, hope, expectation, and the like, and where it relates to matters which from their nature, situation, or time, can not be supposed to be within the knowledge or under the power of the party making the statement, the party to whom it is made is not justified in relying upon it and assuming it to be true; he is bound to make inquiry and examination for himself so as to ascertain the truth." *Id*.

{¶43} Here, Bartsch's and Unklesbay's statements to Brown went beyond mere puffing. Their statements concerned the state of functionality and usability of the excavator by Raze. At trial, it was brought out that in his deposition testimony, when Unklesbay was asked, "Did you indicate to Mr. Brown that the equipment was fully functional and usable by the Plaintiff Raze?" He responded, "Yes." Additionally, Bartsch and Unklesbay told Brown that the machine was in excellent shape and like-new. Even Southeastern acknowledges that their representation that Southeastern would "stand by" the machine went beyond mere puffing.

{¶44} Additionally, it cannot be said that Southeastern and Raze were necessarily dealing on equal terms with one another. Contrary to Southeastern's characterization, Southeastern and Raze were not merchants on equal footing. While Brown had some familiarity with heavy equipment given the demolition business he was engaged in, he had never purchased an excavator of this size before. Also, as indicated, Raze was in the demolition business and was not a retailer of heavy equipment. In other words, Raze was not a merchant on equal footing with Southeastern. Moreover, given Southeastern's withholding of the service history on the excavator, in particular the repairs required to the hydraulics system, it cannot be said that Southeastern and Raze were on equal footing.

{¶45} Accordingly, Southeastern's second and third assignments of error are without merit.

{¶46} Southeastern's fourth assignment of error states:

> The trial court erred in not granting summary judgment, a directed verdict, judgment notwithstanding the verdict, or new [trial] to Southeastern on Raze's conversion action.

{¶47} In July or August of 2009, the hydraulic pump on the excavator completely malfunctioned necessitating Southeastern to take it to its Dublin, Ohio shop for extensive repairs. (Tr. 299, 823). In an invoice generated by Southeastern on August 10, 2009, it billed Raze for the repairs totaling $23,995.38. (Plaintiff Exhibit 33; Defense Exhibit O.) Raze refused to pay for the repairs, so Southeastern kept the excavator under lockdown on its lot. Once the financing company, AEL, satisfied Southeastern's lien, Southeastern released it to AEL in July 2011. The excavator was sold at auction for $66,000.00. (Plaintiff Exhibit 37, 39, 40.)

{¶48} The jury awarded compensatory damages in the sum of $70,000 to Raze against Southeastern for the wrongful taking and selling of the excavator. On appeal, Southeastern argues that it was entitled to retain the excavator because it had a bailee-for-hire lien. It also argues that while it was legally retaining the

excavator for payment, it was required to turn it over to AEL, the financing company, as it was entitled to immediate possession.

{¶49} "A wrongful taking of the property of another is a conversion." 18 Ohio Jurisprudence 3d, Conversion and Replevin, Section 12. Conversion is the wrongful exercise of dominion over property to the exclusion of the property owner or withholding property from the owner's possession under a claim inconsistent with the owner's rights. *Joyce v. Gen. Motors Corp.,* 49 Ohio St.3d 93, 96, 551 N.E.2d 172 (1990). The elements of a conversion action are: (1) the plaintiff had ownership or right of possession of the property at the time of conversion; (2) the defendant's conversion of plaintiff's property by a wrongful act or disposition; and (3) resulting damages. *Dice v. White Family Cos., Inc.,* 173 Ohio App.3d 472, 878 N.E.2d 1105, 2007-Ohio-5755, ¶ 17 (2d Dist.).

{¶50} R.C. 1333.41 addresses a lien of bailees for hire. R.C. 1333.41(A) provides in pertinent part that "a bailee for hire who performs services or provides materials with respect to any personal property, has a lien on the personal property to secure the reasonable value of the services he performs and the materials he provides." Southeastern contends that, pursuant to this provision, it had a valid lien on the excavator when Raze refused to pay for the August 2009 repairs totaling $23,995.38. Southeastern also argues that Raze never demanded the excavator's return as required by law, citing this court's decision in *Winland v. Winland*, 7th Dist. No. 04 BE 20, 2005-Ohio-1339.

{¶51} In this instance, there was sufficient evidence to support Raze's claim for conversion. First, Raze had a right of possession of the excavator. It purchased the excavator from Southeastern. The fact that the machine was ultimately financed through a leasing arrangement with AEL Financial, LLC is inconsequential to its claim for conversion. As lessee, Raze clearly had the right of possession.

{¶52} Second, Southeastern's conversion of the excavator was wrongful. Southeastern represented to Raze that they "backed the machine up" and "stood by their machine." (Tr. 154.) They told him that if he had problems with the machine,

"they stood by it," "they backed it," and "[t]hey would pay for it." (Tr. 154-155.) Additionally, on the three previous occasions Southeastern had attempted to repair the excavator, Southeastern billed the charges internally and did not bill Raze for those repairs. (Plaintiff Exhibit 30, 31, 32; Defense Exhibit L, M, N; Tr. 818.) Thus, there was evidence from which the jury could infer that Raze had the reasonable expectation that Southeastern would return the excavator to it after Southeastern took it to its Dublin, Ohio shop for repairs and that Raze would not be responsible for paying for those repairs.

{¶53} Third, Raze suffered damages as a result of the conversion. For the period of time that Southeastern kept the excavator under lockdown on its lot following the repairs, Raze was deprived of the use of it forcing it to rent other equipment in its place.

{¶54} Concerning Southeastern's bailee-for-hire lien argument, it is correct in that the law contemplates the owner of the property demanding it back. R.C. 1333.41(A) also provides that "[i]f the owner or legal possessor of the personal property, within thirty days after he has received notice that the bailee for hire has completed performing his services or providing materials, does not claim the personal property or commence litigation to claim the property, * * * then the bailee for hire may enforce the lien pursuant to the procedure in this section."

{¶55} Here, however, there was evidence from which the jury could have inferred Raze demanded the excavator back. Tom Brown testified that he called Southeastern repeatedly, sometimes daily. (Tr. 161.) After about the third time Southeastern had attempted to fix the machine, Brown had asked Brandon Unkelsbay for Southeastern's maintenance records on the excavator. He indicated that Southeastern never provided the records, and testified that "[a]fter the third or fourth time they worked on it, Brandon [Unklesbay] wouldn't return my calls and we became the ass of the jokes every day at the place where they worked." (Tr. 162.)

{¶56} Even assuming for the sake of argument that Southeastern had not properly demanded the excavator's return, Southeastern itself also did not comply

with R.C. 1333.41's requirements for the establishment of a lien. To enforce the lien created by R.C. 1333.41, the bailee for hire is required to send a detailed notice of the purported lien to the owner or legal possessor of the property by certified mail. In this case, there was no indication that Southeastern sent the statutorily required notice to Raze.

{¶57} Southeastern released the excavator to AEL in April 2011 after AEL satisfied Southeastern's purported lien by remitting a check to it for $25,000.00. (Plaintiff Exhibits 34, 35.) As another defense to Raze's conversion claim, Southeastern argues that it lawfully released the excavator to AEL since Raze had disclaimed its ownership rights to the excavator and in favor of AEL as part of the financing arrangement.

{¶58} Southeastern's arguments in this respect miss a couple of key points and rest on assumptions not necessarily borne out of the evidence presented at trial. First, it is undisputed that Southeastern kept the excavator "locked down" on its lot in Dublin, Ohio, from between August 2009 and when it released it to AEL in April 2011; a period of approximately 20 months. Even if Raze was only considered a lessee of the excavator, a lessee has the right of possession and use of goods under a lease. R.C. 1310.01(A)(14). Therefore, at least for the period of 20 months that Southeastern kept the excavator on its lot, the jury could have viewed that period of time as a period of time of Southeastern's unlawful conversion of the excavator.

{¶59} Accordingly, Southeastern's fourth assignment of error is without merit.

{¶60} Southeastern's fifth assignment of error states:

> The trial court erred in not granting Southeastern's motion for a new trial because the jury's award of compensatory damages for Raze's fraudulent inducement breach of contract claims was excessive, in error, not sustained by the weight of the evidence, and contrary to law.

{¶61} The jury awarded Raze $185,000.00 for its fraudulent inducement/misrepresentation claim and $200,000.00 for its breach of contract claim. The thrust of Southeastern's arguments under this assignment of error is that the damages that the jury awarded to Raze on its claims for fraudulent inducement and breach of contract were duplicative and speculative. Upon review, we conclude that the jury's award of damages in this case were neither duplicative not speculative.

{¶62} Generally, when a contract action exists against a defendant, the plaintiff cannot maintain a tort claim based upon the same underlying actions as the breach of contract claim unless the defendant also breached a duty owed independent of the contract. *Lucarell v. Nationwide*, 7th Dist. No. 13 MA 133, 2015-Ohio-5286, ¶ 87. However, a tort claim based upon the same actions as those upon which a breach of contract claim is based will exist independently of the contract action if the breaching party also breaches a duty owed separately from that created by the contract. *Id*. In other words, the tort claim must be based on a duty that would be owed even if no contract existed. *Id*.

{¶63} In this case, Raze's fraudulent inducement/misrepresentation claim (tort claim) existed independently from its breach of contract claim. Raze presented evidence demonstrating that it had made payments on the excavator totaling $234,819.48. (Plaintiff Exhibit 14.) Although Southeastern sold the excavator to Raze for $185,000.00, Robert Bartsch testified that it was really only worth approximately $50,000.00 to $60,000.00 taking into consideration its condition. (Tr. 543.) Kurt Neumann, Raze's mechanical expert, also testified that the value of the excavator when it was sold would be substantially reduced by its condition. (Tr. 512.) The excavator was ultimately sold at auction for only $66,000. (Plaintiff Exhibits 27, 29, & 40.) Southeastern never introduced any contrary evidence of its value. Given the evidence presented by Raze of its payments totaling $234,819.48 on a defective excavator valued at only $50,000 to $60,000, the jury's award of $185,000 award on Raze's fraudulent inducement/misrepresentation claim alone was supported by the evidence.

{¶64} Turning to breach of contract damages, under Ohio law, "[a] claimant seeking to recover for breach of contract must show damage as a result of the breach. Damages are not awarded for a mere breach of contract; the amount of damages awarded must correspond to injuries resulting from the breach." *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.,* 115 Ohio App.3d 137, 684 N.E.2d 1261, 1266 (9th Dist.1996) (internal citations omitted). Moreover, the damages awarded "should place the injured party in as good a position as it would have been in but for the breach." *Id.*

{¶65} "An award of damages must be shown with a reasonable degree of certainty and in some manner other than mere speculation, conjecture, or surmise." *Elias v. Gammel,* 8th Dist. No. 83365, 2004-Ohio-3464, at ¶ 25. Damages are not speculative when they can be "computed to a fair degree of probability." *Allied Erecting & Dismantling Co., Inc. v. Youngstown*, 151 Ohio App.3d 16, 2002-Ohio-5179, 783 N.E.2d 523, ¶ 65 (7th Dist.). However, if the appellant "establishes a right to damages, that right will not be denied because the damages cannot be calculated with mathematical certainty." *Id.* at ¶ 64, 783 N.E.2d 523, quoting *Hollobaugh v. D & V Trucking*, 7th Dist. No. 99 CA 303, 2001 WL 537058 (May 8, 2001).

{¶66} The jury's $200,000 damage award for breach of contract was not duplicative or speculative. In fact, Raze presented evidence going to two different components of damages that it suffered as result of Southeastern's breach, either of which standing alone more than supports that jury's award of $200,000 relative to this claim.

{¶67} The first component of breach-of-contract damages for which Raze presented evidence concerned its lost profits. It has been held that "[t]he remedies available for breach of contract * * * include both actual and consequential damages, such as lost future profits." *Telxon Corp. v. Smart Media of Delaware, Inc.,* 9th Dist. No. 22098, 2005-Ohio-4931, 2005 WL 2292800, ¶ 103, citing *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.,* 115 Ohio App.3d 137, 144, 684 N.E.2d 1261 (9th Dist.1996). In support of its claim of lost profits, Raze introduced financial data and

testimony. The financial data consisted of Raze's financial statements from 2007, 2008, and 2009, prepared by Abraham & Company PLLC, Certified Public Accountants. (Plaintiff Exhibit 50.) The testimony concerning Raze's lost profits came from Tom Brown, its current president and owner.

{¶68} In 2007, Raze had a net income of $116,443.76. In 2008, Raze's net income plummeted to $29,904.35. Brown attributed that loss of $86,539.41 directly to the defective excavator sold to Raze by Southeastern in March 2008. (Tr. 218.) The financial statements reflected that, in 2009, Raze's net income plummeted yet again, that time to *negative* $269,945.13. Again, Brown attributed this loss directly to the defective excavator sold to Raze by Southeastern. (Tr. 218.) Taken together, the financial statements entered into evidence by Raze reflect that it suffered lost profits of at least $472,928.30 had Raze remained as profitable in 2008 and 2009 as it did in 2007. (Plaintiff Exhibit 50.)

{¶69} The second component of breach-of-contract damages that Raze presented evidence on was loss loss-of-use damages. Like lost profits, loss-of-use can be another part of consequential damages. *R & H Trucking, Inc. v. Occidental Fire & Cas. Co. of North Carolina*, 2 Ohio App.3d 269, 272, 441 N.E.2d 816 (10th Dist.1981). When the non-breaching party rents a substitute piece of equipment like Raze did in this case, that party can seek to recoup those expenses as loss-of-use damages. *See MCI Communication Servs. v. Barrett Paving Materials, Inc.*, 1st Dist. No. C-100806, 2012-Ohio-1700. In this instance, Raze introduced documentary evidence reflecting payments for rentals to do the work intended for the excavator it had purchased from Southeastern totaling $323,571.34. (Plaintiff Exhibit 42.)

{¶70} In sum, the jury's award of damages was not excessive or contrary to law. The jury's award of damages was overwhelmingly sustained by the weight of the evidence. The jury's award of $185,000 for fraudulent inducement/misrepresentation was supported by evidence that Raze had made payments totaling $234,819.48 on a defective excavator valued at only $50,000 to $60,000. The jury's award of $200,000 for breach of contract was supported by

evidence that Raze suffered lost profits of at least $472,928.30 and loss-of-use damages in the form of replacement rental costs of $323,571.34. Notably, the fraudulent inducement/misrepresentation damages award ($185,000), the breach-of-contract damages award ($200,000), and the conversion damages award ($70,000) combined ($455,000) did not even exceed Raze's lost profits alone ($472,928.30).

{¶71} Accordingly, Southeastern's fifth assignment of error is without merit.

{¶72} Southeastern's sixth assignment of error states:

> The trial court erred in not granting a judgment notwithstanding the verdict or a new trial with respect to Raze's claim for punitive damages and attorney fees.

{¶73} Under this assignment of error, Southeastern essentially argues that there was not sufficient evidence of malice to support an award of punitive damages. Noting that the sale of the excavator was a commercial transaction, Southeastern argues that there was no evidence that the excavator was defective when it was sold or that Raze had engaged in due diligence with its purchase. These arguments were addressed in detail under Southeastern's first, second, and third assignments and found to be without merit.

{¶74} "Fraudulent or negligent misrepresentations and fraudulent inducements are all valid tort claims. Fraud can lead to both compensatory damages *and punitive damages*." (Emphasis added; Citations omitted.) *Curran v. Vincent*, 175 Ohio App.3d 146, 2007-Ohio-3680, 885 N.E.2d 964, ¶ 20 (1st Dist.). A jury may award punitive damages only upon a finding of actual malice. *Calmes v. Goodyear Tire & Rubber Co.,* 61 Ohio St.3d 470, 473, 575 N.E.2d 416 (1991). There are two different types of malice. "Actual malice" has been defined as "'(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, *or* (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. (Emphasis sic.)'" *Id*., quoting *Preston v. Murty,* 32 Ohio St.3d 334, 512 N.E.2d 1174 (1987), syllabus.

{¶75} As for the first type of malice, in this case Raze presented evidence that Southeastern acted with ill will through its sales manager Brandon Unklesbay. Southeastern's sales person Robert Bartsch who, along with Unklesbay, took part in the sale of the excavator to Raze testified at length about the ill will Unklesbay harbored against Tom Brown's father which carried over to his treatment of Tom Brown himself. Bartsch testified that there was bad blood between Unklesbay and Tom Brown's father which stemmed from a dispute over a service bill. (Tr. 563.) He referred to Brown's father as a "Pumpkinhead." (Tr. 563.)

{¶76} Unklesbay's ill will towards Brown's father carried over to Brown when it became apparent that the excavator was beyond repair and perhaps a replacement should have been considered:

> Q Okay. What did he indicate he was going to do to Tom?
>
> A Treat him like he did his father.
>
> Q What were you going to say?
>
> A Treat him like his F'ing father. I -- I -- that was just -- there was a lot -- a lot was said in that office.
>
> Q Did Mr. Unklesbay have a grudge against Tom from your observation?
>
> A I would say so, yes.
>
> Q Did he say anything else when you went to him about swapping this -- getting Mr. Brown a different piece of equipment?
>
> A Did he say -- after the second day after the swap?
>
> Q Yes.
>
> A No. It never went any further than that. I gave up.
>
> Q But did he make any comments to you as to who you worked for?
>
> A Yes. I was told I worked for Southeastern because I was told by Mr. Unklesbay that he shouldn't have bought a machine that

blew off the back of the truck. Whether it did or not, I don't know but I had to live with that for a long time.

Q Brandon said that Tom shouldn't have bought this --

A Yes.

Q -- because it fell off a truck?

A Yeah but I don't know if he was making it up to mess with me or what. I don't know.

(Tr. 565-566.)

{¶77} There was also evidence of the second type of actual malice presented in this case – a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. Southeastern, through its sales manager Brandon Unklesbay, intentionally sold a defective excavator to Raze knowing the type of work it would be used for by Raze and representing the machine as being in excellent condition. Raze's employees who operated the excavator testified at length about the dangers posed by the machine's faulty hydraulics. Brian McLeod, a former employee who operated heavy equipment for Raze and was the first one to operate the excavator Raze purchased from Southeastern, explained that the hydraulics of the excavator would not operate at full power or malfunction causing the boom to slip three to six inches while he was trying to load trucks with demolition debris. (Tr. 364.) His testimony illustrated how Southeastern's actions created a great probability of causing substantial harm:

[W]ith loading steel, you would grab six, eight, ten I-beams at a time, pick them up and put them in a semi-truck. If you get them up this high, if that boom is not working right, someone is in danger, especially the driver, the driver of that truck. I mean, at any times to say it doesn't work, that beam could slide out. You drop any -- you could drop the beam, drop the boom, anything could happen.

(Tr. 358-359.)

{¶78} Another Raze employee, Matthew Kinter, corroborated McLeod's testimony when he testified that the boom would slip creating a dangerous situation and resulting in compromised safety. (Tr. 402, 409.) Tom Brown, then co-owner and vice president of Raze, also testified:

> Q Did you rely on their representations?
>
> A I relied on their representations to put the job in a situation where I put people's lives at risk.
>
> Q Were they aware that you would be relying on that?
>
> A Yes, they were.
>
> Q Okay. And how do you say that people jobs -- lives could be put at risk?
>
> A You have -- you have people -- excuse me. Excuse me.
>
> * * *
>
> Q And why did you indicate that lives could be at stake?
>
> A Well, when you're when you're loading and unloading, when you're tearing a building down, you always have people around you and there's always a chance if everything is not working right that somebody can get killed. When you're loading trucks there's always somebody there. When you're tearing a building down, that you rely on the equipment that you're on and they knew that.
>
> Q Who's "they"?
>
> A Brandon and Rob, Southeastern Equipment.

(Tr. 155-157.)

{¶79} In sum, Southeastern displayed a conscious disregard for the rights and safety of other persons that resulted in a great probability of causing substantial harm by knowingly selling to Raze a defective machine and mispresenting its operability.

{¶80} Additionally, Southeastern intentionally deceived Raze into purchasing a defective machine which resulted in Raze suffering a multi-faceted financial injury

as detailed under Southeastern's fifth assignment of error. This was also a conscious disregard for the rights of Raze with great probability to cause harm to their business, which it did.

{¶81} Accordingly, Southeastern's sixth assignment of error is without merit.

{¶82} The judgment of the trial court is affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.