STATE OF MICHIGAN

COURT OF APPEALS

I-FUSION TECHNOLOGY, INC., Plaintiff-Appellee, v TRW AUTOMOTIVE U.S., L.L.C., Defendant, and TRW SAFETY SYSTEMS, INC. and TRW VEHICLE SAFETY SYSTEMS, INC., Defendants-Appellants.	UNPUBLISHED December 18, 2012 No. 306466 Macomb Circuit Court LC No. 2009-001292-CZ

Before: STEPHENS, P.J., and OWENS and MURRAY, JJ.

PER CURIAM.

Defendants, TRW Safety Systems, Inc. and TRW Vehicle Safety Systems, Inc. (collectively, "TRW")[1], appeal by leave granted[2] an order denying TRW's motion for summary disposition regarding plaintiff, I-Fusion Technology, Inc.'s (I-Fusion) claim for fraudulent misrepresentation and request for exemplary damages. We reverse and remand for entry of summary disposition in favor of TRW regarding I-Fusion's fraudulent misrepresentation claim and request for exemplary damages, and for further proceedings consistent with this opinion.[3]

[1] Defendant, TRW Automotive U.S., L.L.C., was dismissed by stipulation of the parties and is not involved in this appeal.

[2] *I-Fusion Technology, Inc v TRW Auto US, LLC*, unpublished order of the Court of Appeals, entered May 29, 2012 (Docket No. 306466).

[3] I-Fusion's brief on appeal challenges this Court's jurisdiction, arguing that TRW's brief on appeal raises issues outside the scope of the appeal. Even if true, this does not divest this Court

TRW argues that the trial court erred in denying its motion for summary disposition pursuant to MCR 2.116(C)(10) regarding I-Fusion's fraudulent misrepresentation claim. We agree.

Appellate courts review "the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id*. at 120 (citations omitted).]

This Court has explained:

> Common-law fraud or fraudulent misrepresentation entails a defendant making a false representation of material fact with the intention that the plaintiff would rely on it, the defendant either knowing at the time that the representation was false or making it with reckless disregard for its accuracy, and the plaintiff actually relying on the representation and suffering damage as a result. Silent fraud is essentially the same except that it is based on a defendant suppressing a material fact that he or she was legally obligated to disclose, rather than making an affirmative misrepresentation. Such a duty may arise by law or by equity; an example of the latter is a buyer making a direct inquiry or expressing a particularized concern. A misleadingly incomplete response to an inquiry can constitute silent fraud. [*Alfieri v Bertorelli*, 295 Mich App 189, 193-194; 813 NW2d 772 (2012) (citations omitted).]

In addition, "to establish a claim of fraudulent misrepresentation, the plaintiff must have reasonably relied on the false representation. There can be no fraud where a person has the means to determine that a representation is not true." *Cummins v Robinson Twp*, 283 Mich App 677, 696; 770 NW2d 421 (2009) (citations omitted). "Thus, alleged misrepresentations regarding the terms of written documents that are available to the plaintiff cannot support the element of reasonable reliance." *Id*. at 698 (citations omitted). Also, a valid integration clause renders unreasonable as a matter of law a party's reliance on representations that are not included

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of jurisdiction. In any event, TRW's brief on appeal raises the same issues presented in its application for leave to appeal and in its second motion or summary disposition below, and thus does not exceed the scope of this appeal. Moreover, after filing its brief on appeal, I-Fusion asserted the same jurisdictional challenge in a motion to dismiss, which this Court denied. *I-Fusion Technology, Inc v TRW Auto US, LLC*, unpublished order of the Court of Appeals, entered September 12, 2012 (Docket No. 306466). Accordingly, I-Fusion's jurisdictional challenge is meritless.

in the contract. *Hamade v Sunoco, Inc (R & M)*, 271 Mich App 145, 171; 721 NW2d 233 (2006); *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 504; 579 NW2d 411 (1998).

In general, "an action for fraud must be predicated upon a false statement relating to a past or existing fact; promises regarding the future are contractual and will not support a claim of fraud." *Cummins*, 283 Mich App at 696 (citations omitted). "However, an unfulfilled promise to perform in the future is actionable when there is evidence that it was made with a present undisclosed intent not to perform." *Foreman v Foreman*, 266 Mich App 132, 143; 701 NW2d 167 (2005) (citations omitted). "A fraudulent misrepresentation may be based on a promise made in bad faith without the intention of performance. Thus, a claim of fraud lies where although no proof of the promisor's intent exists, the facts of the case compel the inference that the promise was but a device to perpetrate a fraud." *Id*. at 147 (quotations, brackets, and citations omitted).

Fraud in the inducement or procurement of a contract may be grounds for money damages or for retroactively avoiding contractual obligations. *Titan Ins Co v Hyten*, 491 Mich 547, 557-558; 817 NW2d 562 (2012). However, misrepresentations relating to the performance of a contract do not give rise to an independent cause of action in tort. *Huron Tool & Engineering Co v Precision Consulting Servs, Inc*, 209 Mich App 365, 373; 532 NW2d 541 (1995). Fraud must be extraneous to the contract in order to cause harm distinct from that caused by the breach of contract. *Id.* (citations omitted). The plaintiff must establish a "violation of a legal duty separate and distinct from the contractual obligation." *Rinaldo's Constr Corp v Mich Bell Tel Co*, 454 Mich 65, 84; 559 NW2d 647 (1997). No cognizable cause of action in tort exists when the plaintiff fails to "allege violation of an independent legal duty distinct from the duties arising out of the contractual relationship." *Id*. at 85.

In *Rinaldo's Constr Corp*, 454 Mich at 85, the defendant agreed to provide the plaintiff services under a contract but failed to fully perform according to the terms of its promise. Our Supreme Court held that the plaintiff had failed to allege violation of an independent legal duty distinct from the duties arising out of the contract. *Id*. Regardless of how the plaintiff labeled its claim, the plaintiff was "basically complaining of inadequate service and equipment. Thus, under the principles outlined above, there is no cognizable cause of action in tort." *Id*. (quotations, ellipses, and citation omitted).

Here, I-Fusion has failed to establish that TRW owed or violated an independent legal duty separate and distinct from its contractual obligations. I-Fusion's amended complaint alleged that from December 2006 through April 2008, TRW issued 11 purchase orders to I-Fusion. Although I-Fusion denied that it accepted the last two purchase orders dated April 30, 2008, I-Fusion's breach of contract count alleged that the parties' agreement was "represented by a series of Purchase Orders." I-Fusion also listed the purchase orders in a spreadsheet attached to its amended complaint. Neither the amended complaint nor the spreadsheet identified I-Fusion's earlier price quotation as the contract. "[A] party is bound by its pleadings." *Angott v Chubb Group of Ins Cos*, 270 Mich App 465, 470; 717 NW2d 341 (2006). See also *Soo Line R Co v St Louis Southwestern R Co*, 125 F3d 481, 483 (CA 7, 1997) ("A plaintiff can plead himself out of court by alleging facts which show that he has no claim, even though he was not required to allege those facts.") (quotations and citations omitted). Thus, I-Fusion's assertion, both at the

summary disposition stage and on appeal, that the purchase orders did not reflect the parties' agreement, and that I-Fusion's price quotation instead constituted the contract, is barred by I-Fusion's own admission to the contrary.

The purchase orders that constituted the parties' agreement contained the following language:

> THIS PURCHASE ORDER IS SUBJECT TO THE TRW AUTOMOTIVE TERMS AND CONDITIONS OF PURCHASE, AS REVISED OR AMENDED FROM TIME TO TIME (THE "TERMS AND CONDITIONS"). The Terms and Conditions, which are incorporated into this Purchase Order by reference, are located at https://vin.livmi.trw.com (the "VIN Website"), and Supplier acknowledges receipt, review and acceptance of the Terms and Conditions. Commencement of any work, services or delivery of goods under this Purchase Order shall constitute Supplier's acceptance of the Terms and Conditions.

TRW's terms and conditions included an integration clause, stating:

> BUYER AND SELLER AGREE THAT, NOTWITHSTANDING THE PRIOR OR SUBSEQUENT USE BY SELLER OF ANY ORDER FORM, INVOICE OR OTHER DOCUMENT CONTAINING PRINTED TERMS OR CONDITIONS, THEY ARE CONTRACTING SOLELY ON THE BASIS OF THIS ORDER, WHICH CONTAINS THE ENTIRE UNDERSTANDING OF THE PARTIES AND IS INTENDED AS A FINAL EXPRESSION OF THEIR AGREEMENT AND A COMPLETE STATEMENT OF THE TERMS THEREOF, AND MAY NOT BE AMENDED, MODIFIED OR OTHERWISE SUPPLEMENTED UNLESS SUCH AMENDMENTS, MODIFICATIONS OR SUPPLEMENTS ARE IN WRITING AND SIGNED BY BUYER'S AUTHORIZED REPRESENTATIVE. A PROVISION CONTAINED IN ANY ORDER FORM, INVOICE OR OTHER DOCUMENT USED BY SELLER (WHETHER PRIOR OR SUBSEQUENT TO THE DATE OF THIS ORDER) WHICH IS INCONSISTENT WITH THIS SUBPARAGRAPH WILL HAVE NO FORCE OR EFFECT AND WILL NOT BE BINDING ON THE BUYER UNLESS SUCH PROVISION IS CONTAINED IN AN ORDER FORM, INVOICE OR OTHER DOCUMENT DATED SUBSEQUENT TO THE DATE HEREOF AND IS SPECIFICALLY INITIALED BY BUYER'S AUTHORIZED REPRESENTATIVE.

In addition, the terms and conditions included a provision addressing additional costs arising from changes to drawings, designs, and specifications:

> Changes: Buyer may at any time by a written order but without notice to sureties change drawings, designs, specifications, materials, packing, time and place of delivery or method of transportation. If any such change increases or decreases the cost or time required for Seller's performance hereunder, an equitable adjustment will be made and this Order will be modified in writing

> accordingly. Any claim by Seller for any adjustment hereunder must be made within ten (10) working days of the date Seller is first notified of the change. . . .

I-Fusion argues that its fraud claim is separate and distinct from its breach of contract claim because the fraud claim seeks payment for goods and services provided outside the scope of the parties' contract. Specifically, I-Fusion asserts that TRW must pay for its requested changes to the parts it was producing for TRW, called bezels, and the tooling used to make the bezels, and that those changes were not set forth in a contract. However, the terms and conditions incorporated into the purchase order contracts expressly state that TRW may by written order change drawings, designs, and specifications, and that I-Fusion may then claim an equitable adjustment within 10 days if its costs increase as a result of the changes. Thus, the allegations underlying the fraud claim are not extraneous to the breach of contract claim, as the purchase order terms and conditions provide for recovery of costs arising from TRW's changes in designs and specifications.[4] Because I-Fusion has failed to identify a duty owed by TRW separate and distinct from its contractual obligations, no cognizable action in tort exists. *Rinaldo's Constr Corp*, 454 Mich at 84-85. I-Fusion's remedy, if any, lies in its contract-based claims, which are not before us in this appeal.[5]

I-Fusion has failed to demonstrate a genuine issue of material fact regarding the elements of fraud. I-Fusion has not presented evidence that TRW made a false representation. I-Fusion argues that TRW promised I-Fusion that TRW would issue additional purchase orders and resolve the parties' outstanding commercial issues, i.e., pay I-Fusion for its work in accommodating TRW's requested changes, in an effort to persuade I-Fusion to continue developing the tooling and producing parts. In particular, TRW employee Frank Gentile indicated in a March 6, 2008, email to I-Fusion vice-president Rick Roberts that Gentile would

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[4] I-Fusion asserts that TRW itself did not comply with the terms and conditions by putting its requested changes in writing in a new purchase order, and that TRW told I-Fusion that it would not accept an equitable adjustment. TRW's reply brief on appeal disputes I-Fusion's argument, noting that it had issued purchase orders covering certain tooling changes, a part print drawing listing a change to testing specifications, and various drawings regarding changes to the bezel finish that were governed by the purchase orders. In any event, I-Fusion's allegations on this point, if true, would fall within a breach of contract claim, as they suggest that TRW may not have complied with the terms and conditions. Accordingly, I-Fusion's argument fails to establish that TRW owed a duty separate and distinct from its contractual obligations.

[5] I-Fusion asserts that TRW impeded I-Fusion from accessing the terms and conditions by leading I-Fusion to believe it needed a personal identification number (PIN) to view the terms and conditions. However, the purchase orders expressly stated that the terms and conditions were available on TRW's website and provided the Internet address. I-Fusion does not indicate or present evidence that it attempted to access the terms and conditions on the website and was unable to do so. Instead, I-Fusion merely presents an email in which it requested from TRW "a user ID for VIN/PTS" and indicated it had made three such requests previously. This email fails to establish that TRW misled I-Fusion or impeded I-Fusion from viewing the terms and conditions on TRW's website.

meet with Roberts "to find an amicable resolution to the open commercial items." Similarly, in a March 3, 2008, email to Roberts, Gentile indicated that he and Roberts "will need to meet and find a solution to the open commercial items next week. . . ." Also, Roberts testified that Gentile said they would find an "amicable resolution" and that "[h]e was going to take care of all of our costs." These statements do not relate to a past or existing fact, but rather constitute promises regarding the future. *Cummins*, 283 Mich App at 696. Moreover, no evidence exists that TRW made such promises with a present undisclosed intent not to perform, and there are no facts that compel the conclusion that the promises were but a device to perpetrate a fraud. *Foreman*, 266 Mich App at 143, 147.

I-Fusion argues that TRW made these assurances fraudulently to induce I-Fusion to continue work on developing the tooling and producing bezels, while intending never to pay I-Fusion. This argument, however, is based on speculation, and "[t]o be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences . . . , not mere speculation." *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994) (citations omitted). Gentile testified that if I-Fusion had met its contractual obligations, TRW would have honored the purchase orders and paid I-Fusion. The record contains no contrary evidence establishing that TRW would have withheld payment if I-Fusion had met its contractual obligations. Of course, to the extent that disputes exist regarding whether I-Fusion met its contractual obligations to produce conforming bezels, those are contractual matters to be resolved in the context of I-Fusion's contract-based claims, which are not at issue in this appeal. And, as discussed, to the extent that I-Fusion seeks payment for increased costs arising from changes to design and specifications, such claims are governed by the terms and conditions incorporated into the purchase order contracts, and are thus properly considered in the context of a breach of contract claim.

But even if I-Fusion could show that TRW made a false material representation, I-Fusion could not establish that it reasonably relied on the false representation. As discussed, a valid integration clause renders unreasonable as a matter of law a party's reliance on representations that are not included in the contract. *Hamade*, 271 Mich App at 171; *UAW-GM Human Resources Ctr*, 228 Mich App at 504. TRW's purchase orders incorporated the terms and conditions set forth on TRW's website, which included an integration clause. Hence, I-Fusion could not reasonably have relied on any purported representations that were not included in the parties' agreement and were not made in a writing initialed by TRW's authorized representative.

I-Fusion further contends that TRW committed silent fraud by failing to disclose its relationship with a competing supplier of bezels, Northern Engraving Corporation (Northern Engraving), including that TRW had assigned production of bezels to Northern Engraving. However, I-Fusion has failed to establish that TRW had a legal or equitable duty to disclose this relationship. *Alfieri*, 295 Mich App at 193. I-Fusion cites *Ainscough v O'Shaughnessey*, 346 Mich 307; 78 NW2d 209 (1956), for the proposition that "[w]hen the circumstances surrounding a particular transaction are such as to require the giving of information, a deliberate and intentional failure to do so may properly be regarded as fraudulent in character." *Id*. at 316. I-Fusion also cites *Nowicki v Podgorski*, 359 Mich 18, 32; 101 NW2d 371 (1960), in which our Supreme Court stated that "one who remains silent when fair dealing requires him to speak may be guilty of fraudulent concealment." Here, no basis exists to conclude that fair dealing or the circumstances surrounding the parties' transaction required TRW to disclose its relationship with Northern Engraving. The record evidence does not contradict the plausible explanation that, as

TRW asserts, Northern Engraving was engaged to mitigate TRW's potential damages and to protect TRW's customer, Ford Motor Company (Ford), from a delay in the impending production launch of Ford's F-150 model line, in the event that I-Fusion failed to timely produce conforming bezels. More importantly, TRW's contractual obligations to I-Fusion were entirely unaffected by TRW's agreement with Northern Engraving. If I-Fusion satisfied its contractual requirements, TRW was obligated under the purchase order contracts to pay I-Fusion, regardless of whatever agreements TRW had with Northern Engraving. Thus, I-Fusion has not shown that fair dealing or the circumstances of the transaction required disclosure.[6]

Next, I-Fusion argues that TRW committed fraud in the inducement by promising to pay I-Fusion as an inducement to enter the two April 30, 2008, purchase orders. As discussed, however, there is no evidence that TRW made a false representation regarding a past or existing fact or promised to perform in the future with the present undisclosed intent not to perform. *Alfieri*, 295 Mich App at 193; *Foreman*, 266 Mich App at 143. Thus, I-Fusion has failed to demonstrate a material factual dispute regarding fraud in the inducement. Again, whether TRW's ultimate failure to pay I-Fusion constituted a breach of the parties' agreements is properly resolved in the context of I-Fusion's contract-based claims, which are not before this Court.

Finally, because I-Fusion has failed to establish a genuine issue of material fact regarding its fraud claim, it is not entitled to exemplary damages. "In cases involving breach of a commercial contract, exemplary damages are not recoverable, with the only exception being where there is 'proof of tortious conduct existing independent of the breach.'" *Tempo, Inc v Rapid Electric Sales & Serv, Inc*, 132 Mich App 93, 106; 347 NW2d 728 (1984), quoting *Kewin v Mass Mut Life Ins Co*, 409 Mich 401, 420-421; 295 NW2d 50 (1980). For the reasons discussed, TRW is entitled to summary disposition regarding I-Fusion's fraud claim. Because I-Fusion's remaining claims are contractual in nature rather than tort-based, I-Fusion may not recover exemplary damages.

[6] In connection with its silent fraud claim, I-Fusion also contends that TRW attempted to prevent I-Fusion from satisfying certain tests required of the bezels under the April 30, 2008, purchase order contracts, by denying I-Fusion access to Ford's design studio. As TRW's reply brief observes, however, I-Fusion relies in part on documents that were not before the trial court. Regardless, TRW correctly notes that any effort to hinder I-Fusion's performance of its contractual obligations would constitute a breach of contract and thus fall within I-Fusion's breach of contract claim. See *Adams v Edward M Burke Homes, Inc*, 14 Mich App 578, 590; 166 NW2d 34 (1968) (Levin, J., concurring) ("'In any kind of contract, if the right of one party to compensation is conditional upon the rendition of some service or other performance by him or on his behalf, it is nearly always a breach of contract for the other party to act so as to prevent or to hinder and delay or to make more expensive the performance of the condition.'") (quoting 3 Corbin on Contracts, § 571, p 349). Thus, I-Fusion's allegations, if true, fail to establish that TRW violated a duty separate and distinct from its contractual obligations.

Reversed and remanded for entry of summary disposition in favor of TRW regarding I-Fusion's fraudulent misrepresentation claim and request for exemplary damages, and for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Donald S. Owens
/s/ Christopher M. Murray