

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 5, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP2536

Cir. Ct. No. 2001CV406

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CECILIA SHAW AND ELTON SHAW D/B/A SHAW'S WRECKING YARD,

PLAINTIFFS-RESPONDENTS,

V.

AMERICAN STATE EQUIPMENT CO., INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County:
JAMES M. MASON, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. American State Equipment Co., Inc., appeals a judgment awarding money damages to Cecilia and Elton Shaw on their intentional misrepresentation claim. The court found that American's representative lied to induce the Shaws into a commercial transaction. The issue is whether the

economic loss doctrine precludes the Shaws' recovery in tort. We conclude that it does bar recovery and, therefore, reverse and remand for dismissal of the Shaws' complaint.

¶2 The Shaws operate a recycling business. In 1996, they bought a piece of used machinery from American for \$101,500. After using the machine for five years, the Shaws commenced this action, alleging that American's agent, John Oberthaler, intentionally misrepresented the number of hours the machine had been in use before the Shaws purchased it. They sought money damages and rescission of the purchase contract. After a trial to the bench, the circuit court denied rescission, but awarded the Shaws \$60,000 in damages.

¶3 The economic loss doctrine bars recovery in tort when a party sustains a purely economic loss due to a defect in the subject matter of a contract. *Bay Breeze Condo. Ass'n v. Norco Windows, Inc.*, 2002 WI App 205, ¶9, 257 Wis. 2d 511, 651 N.W.2d 738. For claims of misrepresentation in the inducement, a narrow exception exists if the fraud was extraneous to, as opposed to interwoven with, the contract. *Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶42, 283 Wis. 2d 555, 699 N.W.2d 205. Stated differently, the exception exists only if "the fraud concerns matters whose risk and responsibility did not relate to the quality or the characteristics of the goods for which the parties contracted or otherwise involved performance of the contract." *Id.* Whether the economic loss doctrine bars a claim under a set of facts is subject to independent review. *Linden v. Cascade Stone Co.*, 2005 WI 113, ¶5, 283 Wis. 2d 606, 699 N.W.2d 189.

¶4 The economic loss doctrine sometimes seemingly produces harsh results. This case, where the circuit court found that the seller made a substantial misrepresentation of the number of hours the machine had been in use, appears to

be one of those cases. Regardless, we are bound to follow well-settled law on the topic.

¶5 We conclude that the economic loss doctrine bars recovery on the Shaws' claim. The circuit court found that Oberthaler's material misrepresentation was his assertion that the machine had 7000 hours of prior use. This was a misrepresentation because American's records showed the machine had more than 50,000 hours of use. Pertinent here, the misrepresentation related directly to the "quality or the characteristics of the goods for which the parties contracted or otherwise involved performance of the contract." See *Kaloti Enters.*, 283 Wis. 2d 555, ¶42. In briefing on appeal, the Shaws do not contend otherwise.

¶6 On appeal, the Shaws argue instead that the essential misrepresentation was Oberthaler's false assertion that American did not have service records showing the true hours of use. That misrepresentation, they assert, was extraneous to the contract and, therefore, actionable. However, that argument is being made for the first time on appeal.

¶7 A complaint stating a claim for fraudulent misrepresentation must state the circumstances of the fraud with particularity. WIS. STAT. § 802.03(2) (2005-06).¹ In their complaints, the Shaws did not allege that Oberthaler misrepresented the service records. The complaints alleged only facts relating to misrepresentation of the hours of use. That is the only theory of liability the Shaws pursued at trial. Although there was evidence at trial relating to the service

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

records, it is on appeal for the first time that the Shaws argue that a misrepresentation relating to the service records is a factual basis for their misrepresentation claim. We may not affirm the circuit court's judgment based on a claim that was not tried before that court.

¶8 American argues that rescission is unavailable to the Shaws as a remedy. We need not address that issue, however, because our holding bars recovery on the intentional misrepresentation claim by means of any remedy, including rescission. On remand, the circuit court shall enter judgment dismissing the Shaws' complaint.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

