

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 11, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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 Nos. 01-1833, 01-2258

Cir. Ct. Nos. 98-CV-1312, 99-CV-919

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DIGICORP, INC., A WISCONSIN CORPORATION,

PLAINTIFF,

THE CINCINNATI INSURANCE COMPANY,

INTERVENING-PLAINTIFF,

v.

AMERITECH CORPORATION,

**DEFENDANT-THIRD-
PARTY PLAINTIFF-RESPONDENT-CROSS-APPELLANT,**

DANN KRINSKY,

DEFENDANT,

v.

BACHER COMMUNICATIONS, INC.,

**THIRD-PARTY DEFENDANT-
APPELLANT-CROSS-RESPONDENT.**

APPEAL and CROSS-APPEALS from judgments of the circuit court for Brown County: WILLIAM C. GRIESBACH, Judge. *Affirmed in part; reversed in part.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. This is an appeal and cross-appeals from judgments entered on a jury verdict. The jury awarded damages to Digicorp, Inc., for Ameritech Corporation's breach of contract and intentional misrepresentation, to Bacher Communications, Inc., for Ameritech's intentional misrepresentation, and to Ameritech for Digicorp's breach of contract.¹ All three parties appeal and cross-appeal various aspects of the judgments.

¶2 Ameritech argues that: (1) the economic loss doctrine bars both Digicorp and Bacher's claims; (2) there is insufficient evidence to support Digicorp and Bacher's intentional misrepresentations claims; (3) Bacher has never identified the misrepresentation, who made it, who received it and when it was made; (4) Ameritech did not breach its contract with Digicorp by violating the duty of good faith and fair dealing; (5) Digicorp is entitled to not more than one month's lost profits; (6) Bacher's damages must be reduced as a matter of law; and (7) Digicorp is not entitled to punitive damages. We reject these arguments and affirm the judgments entered in favor of Digicorp and Bacher.

¶3 Digicorp argues that a damage award for Ameritech's breach of contract claim against Digicorp is improper because those damages were caused

¹ We have consolidated case Nos. 01-1833 and 01-2258 for purposes of this appeal.

by Ameritech's tortious intentional misrepresentation. We agree and reverse the damages awarded to Ameritech.

¶4 Bacher argues that: (1) the trial court erroneously exercised its discretion by denying Bacher's request to submit punitive damages to the jury; and (2) the trial court erred by not awarding Bacher attorney fees. We disagree and affirm the judgment entered in favor of Bacher.

BACKGROUND

THE PARTIES

¶5 Ameritech is a telecommunications company providing, among other things, calling services and calling plans. Ameritech sells a calling plan known as Valu-Link² through both its internal sales staff and a network of authorized distributors.³ Authorized distributors are various independent companies that contract with Ameritech to sell its products. Ameritech does not pay the employees of the authorized distributorships a salary, but instead pays a sales commission to the distributorship itself when an Ameritech product is sold.

¶6 In Wisconsin, Ameritech established two managers, who were Ameritech employees, serving as liaisons between Ameritech and its authorized

² Under the Valu-Link plan, small businesses would pay lower per-minute charges for local long distance in exchange for guaranteed minimum usage. If, at the end of the contract, the customer did not use the minimum number of minutes required by the contract, the customer would be billed the difference between what it actually used and the amount to which it had agreed.

³ Ameritech had a multi-level sales operation in place to sell its products to its business customers depending on the size of the business. In-house Ameritech employees handled sales to Ameritech's largest customers.

distributors. The managers answered product questions, assisted with form preparation and accompanied authorized distributor salespeople on customer visits. A manager's salary was, in part, dependent on the sales of the authorized distributors. Ameritech's two managers in Wisconsin were Ray Taylor, who covered metropolitan Milwaukee, and Diane McPhee, who covered the rest of the state.

¶7 In 1996, Digicorp was an Ameritech authorized distributor. Based in Milwaukee, Digicorp sold a number of Ameritech products and services. However, it had not made a concerted effort to sell the Valu-Link product until approached by Bacher.

¶8 Bacher is also in the telecommunications industry, but is not an Ameritech authorized distributor. Bacher had applied for authorized distributor status with Ameritech, but never achieved it. Because Bacher was not an authorized distributor, it could not receive commissions on sales of Ameritech products. In order to receive commissions, it was necessary for Bacher to enter into a sub-agency agreement with an existing authorized distributor and essentially sell Ameritech's products under the authorized distributor's agreement with Ameritech.

KRINSKY AND NCS

¶9 Northeast Communications (NCS) was an Ameritech authorized distributor. Dann Krinsky was manager of the network sales department of NCS in Green Bay. Krinsky supervised thirty to forty employees selling Valu-Link. Employees stated that the atmosphere at NCS was very stressful due to the pressure to exceed a certain level of Valu-Link sales. As a result of the pressure to make sales, NCS employees resorted to "cutting and pasting" signatures from old

contracts and placing them on new contracts. NCS employees also forged customer signatures on contracts. Employees testified that Krinsky was aware of these activities. NCS shut down its Valu-Link operation in March of 1996 due to changes in the commission structure. The termination of this operation resulted in layoffs of the employees who worked in that division, including Krinsky.

THE INITIAL COMPLAINTS

¶10 Ameritech utilizes a customer service department call the “Assured Response Center” to accept Valu-Link contracts, enter information into its computer system and file customer complaints, including claims of fraud. In 1995, Carol Linder served as a manager in the Assured Response Center.

¶11 The Assured Response Center received customer complaints concerning “oversells”⁴ and forged contracts as early as the summer of 1995. At that time, Linder informed Taylor about these activities and gave him copies of these “suspicious contracts,” including contracts submitted by Krinsky. However, nothing was done and Krinsky continued to work at NCS until March of 1996.

KRINSKY, BACHER, AND DIGICORP

¶12 After Krinsky’s termination from NCS, he met with Tim Bacher, president of Bacher Communications, to discuss the possibility of expanding Bacher’s operations to include selling Valu-Link. During the course of that

⁴ Overselling is the practice of enrolling a customer in a calling plan that requires the customer to utilize volume well beyond what it had historically used. If a customer was enrolled in the Valu-Link calling plan at a level its average usage would not justify, the customer would be charged for the difference between the guaranteed usage under the plan and the actual minutes used. In these cases, a customer is said to have been “oversold.” Overselling is legal.

meeting, Krinsky told Bacher that while at NCS he was responsible for a substantial increase in Ameritech network sales. After subsequent internal discussions, Bacher agreed to develop a network sales division to sell Valu-Link. Bacher hired Krinsky on March 25, 1996.⁵

¶13 At approximately the same time Bacher hired Krinsky, but before Krinsky actually started working, Bacher had a meeting with McPhee, one of Ameritech's distributor managers. Bacher thought that hiring someone of Krinsky's experience and background "would put us in much better light of getting a distributorship from Ameritech, and we wanted to pursue that with Ms. McPhee" During the meeting, Bacher asked McPhee why NCS, an Ameritech authorized distributor, was shutting down its Valu-Link department. McPhee stated that it was due to a restructuring of the commissions and that shutting down did not make business sense. At no time did McPhee say anything negative about Krinsky. The meeting proved unsuccessful and Bacher was denied authorized distributor status.

¶14 On March 28, 1996, Tim Bacher, Krinsky, and Stewart Clark, president of Digicorp, met to discuss whether Bacher could sell Valu-Link under the auspices of Digicorp's distributor agreement with Ameritech. The parties agreed in principal to a sub-agency agreement. Within a short time after the meeting, Krinsky began selling Valu-Link contracts on behalf of Bacher.⁶

⁵ Bacher had no knowledge about Krinsky's fraudulent activities while employed at NCS.

⁶ While employed at Bacher, Krinsky continued to submit forged contracts. Evidence at trial showed that Krinsky submitted as many as 400 forged contracts while employed at NCS and Bacher.

Digicorp and Bacher later reduced their agreement to writing in a contract dated April 1, 1996.⁷

AMERITECH'S MISREPRESENTATION

¶15 After the Digicorp-Bacher meeting, Clark contacted Taylor to notify him of the arrangement with Bacher and to make sure they were proceeding within established guidelines.⁸ According to Clark, Taylor told him the prerequisites. Clark also stated that sometime in April he asked Taylor if he knew anything about Krinsky. Taylor responded that he had no knowledge of Krinsky, because Krinsky did not previously work in Taylor's territory while at NCS. Taylor stated that he would check whether information about Krinsky existed and get back to Clark. When Taylor did not follow up as promised, Clark again contacted Taylor and inquired about Krinsky's prior experience. Taylor again stated that he did not have information regarding Krinsky and he would have to check with another distributor manager and get back to Clark. Taylor never provided Clark with any information regarding Krinsky.

¶16 On April 30, 1996, Taylor sent Clark a letter outlining the conditions for use of "1099 employees."⁹ According to Clark, the letter was a summation of the details he had discussed with Taylor earlier in the month. The April 30 letter stated that authorized distributors like Digicorp could use sales people employed

⁷ Although the Digicorp and Bacher agreement is dated April 1, 1996, it is undisputed that it was signed on August 8, 1996, after Ameritech informed Clark of Krinsky's forgery.

⁸ The testimony is unclear whether Krinsky started selling contracts before Clark notified Taylor.

⁹ A "1099 employee" is essentially an independent contractor who must report their income on federal tax forms 1099.

by a third party to sell Ameritech's services. However, the letter stated that Ameritech required those sales people to be 1099 employees of the authorized distributor and to represent themselves as employees of the authorized distributor when selling Ameritech's services. Ameritech also required that 1099 employees be "approved and certified" by Ameritech. Finally, the letter states that Ameritech would hold the authorized distributor accountable for the actions of its 1099 employees.

¶17 The following day, Clark faxed a list of employees' names to Taylor for Ameritech's approval and certification. Krinsky's name was on this list. On May 23, 1996, Bacher, Clark, Taylor and Krinsky met to discuss the arrangement. At the meeting, Taylor did not indicate whether he had any information about Krinsky.

¶18 On June 1, 1996, Digicorp and Ameritech signed a Non-Exclusive Authorized Distributor Agreement. The agreement contained a provision that outlined the circumstances under which the agreement could be terminated. Under the contract, Ameritech could terminate the agreement without notice in the event of submission of any sales agreement that was found to contain forged customer signatures. This provision had not been in previous contracts between Ameritech and Digicorp.

AMERITECH INVESTIGATION

¶19 At approximately the same time Krinsky started selling Valu-Link with Bacher, the Assured Response Center again received complaints from customers regarding fraudulent contracts. Linder's initial impression was that the customers were simply attempting to rescind contracts so as to utilize the services of a competitor. On July 17, 1996, Linder became aware of a Valu-Link contract

in which the customer's verified signature did not appear to match the signature on the contract. In a separate situation, another Valu-Link customer claimed that it had been enrolled in the Valu-Link calling plan without having signed a contract. Linder followed up and determined that the customer had not signed the contract. She also determined that Krinsky submitted both of these contracts.

¶20 On July 19, 1996, Linder contacted Taylor to report the fraudulent contracts. Afterward, Taylor contacted Marlis Higgins, acting manager of the Assured Response Center. According to Higgins, Taylor asked her not to talk about the Krinsky fraud and asked her to tell her boss to "sweep it under the carpet." Higgins stated that it was her belief that Taylor did not want the Krinsky fraud to go to corporate security.

¶21 However, Linder had already contacted Ron Anderson of Ameritech's corporate security. A meeting was scheduled for July 22, 1996, with Linder, Anderson, and Taylor. Before the meeting, Higgins contacted Anderson and told him of Taylor's desire to sweep the situation under the carpet.

¶22 Anderson testified that at the July 22 meeting, Taylor asked Anderson that the Krinsky fraud not be turned over to law enforcement because it would give Ameritech a bad image. Taylor also told Anderson that Krinsky's sales did not seem to be abnormal and produced documentation to that effect. Anderson later determined through his own analysis that Krinsky's sales were among the highest of the forty-eight people selling Valu-Link.

¶23 Anderson contacted Tim Schettler, Taylor's boss, regarding Krinsky's suspected fraud and advised him that Ameritech was possibly seeking criminal prosecution. Schettler requested that corporate security not contact law enforcement due to the possibility of bad publicity.

¶24 On July 22, 1996, Taylor called Clark and informed him of Krinsky's fraudulent contracts. Clark attempted to immediately contact Tim Bacher and inform him of the fraud but was unable to do so until August 5 because Bacher was away. Once Bacher was informed of the fraudulent contracts, he examined contracts in Krinsky's office and discovered forgeries.¹⁰ Bacher contacted the Brown County Sheriff's Department and reported the forgeries.

¶25 The case was assigned to detective Donald Stewart. Stewart testified that in the course of his investigation, Linder told him that Taylor had knowledge of Krinsky's prior fraudulent activities and Linder was "incensed" that Taylor did nothing to correct it.¹¹ Krinsky was eventually charged with and convicted of forging contracts.

PROCEDURAL HISTORY

¶26 On October 8, 1996, as a result of Krinsky's forgeries, Ameritech exercised its rights under the June 1, 1996, contract with Digicorp and terminated Digicorp's status as an Ameritech authorized distributor. As a result of the distributorship termination, Digicorp commenced a lawsuit against Bacher to recover damages based on Bacher's hiring and supervision of Krinsky.

¶27 After reviewing Ameritech's internal investigation documents produced during discovery, Digicorp determined that Ameritech was aware of Krinsky's forgeries while he was employed by NCS. Digicorp dismissed its

¹⁰ Krinsky's last day with Bacher was July 26, 1996. His stated reason for leaving Bacher was that he was offered a better position with a different company.

¹¹ At trial Linder disputed that she ever told Stewart that she brought Krinsky's fraud to Taylor's attention in 1995.

lawsuit against Bacher on the basis that it was Ameritech, not Bacher, who was liable to Digicorp.

¶28 Digicorp then filed an action against Ameritech alleging breach of contract, intentional misrepresentation, strict liability misrepresentation, negligent misrepresentation and negligence. Digicorp also claimed it was entitled to punitive damages.

¶29 Ameritech counterclaimed, alleging breach of contract, indemnification, intentional misrepresentation, strict liability misrepresentation, negligent misrepresentation, negligent hiring, training and supervision, and unjust enrichment. Ameritech also filed a third-party complaint against Bacher alleging the same claims asserted against Digicorp in its counterclaim, with the exception of indemnification.

¶30 Bacher filed a counterclaim against Ameritech alleging strict liability misrepresentation, negligent misrepresentation, wrongful litigation, negligent hiring and supervision, breach of contract and secret rebates. It did not seek punitive damages.

¶31 After discovery, Ameritech and Bacher both moved for summary judgment. Both parties argued that all the pending tort claims were barred by the economic loss doctrine. The trial court dismissed Digicorp's claims of negligence and Bacher's claim for negligent supervision against Ameritech. However, the court withheld ruling on the economic loss doctrine arguments and allowed the remaining claims to go to trial.

¶32 On the sixth day of an eight-day trial, Bacher moved to amend its pleadings to conform to the evidence to include a claim for intentional

misrepresentation. The trial court granted Bacher's motion. However, the court denied Bacher's motion to amend the complaint to include punitive damages.

¶33 The case was submitted to the jury.¹² The jury answered all liability questions as to all parties in the affirmative and awarded damages.¹³ Digicorp was awarded \$13,080 for Ameritech's breach of contract, \$254,926.83 for Ameritech's intentional misrepresentation, and \$139,051 in punitive damages. Bacher was awarded \$100,000 for Ameritech's misrepresentation. Ameritech was awarded \$46,573.30 for Digicorp's breach of contract and \$5,000 for Bacher's negligent

¹² Due to the complex factual nature of the case and the fact that the alleged misrepresentation consisted of Taylor's failure to disclose information where he had a duty to do so, the trial court crafted a jury instruction based on the Restatement of Torts, § 533 and *Hennig v. Ahearn*, 230 Wis. 2d 149, 601 N.W.2d 14 (Ct. App. 1999). That instruction provided that it was necessary for Bacher to prove that:

Ameritech made a representation of fact either to Bacher directly or to Digicorp, and Ameritech intended or had reason to expect that the substance of the representation would be communicated to Bacher. Representations of fact do not have to be in writing or by word of mouth, but may be by acts or conduct on the part of Ameritech or even by silence if there is a duty to speak. If there is a duty to disclose a fact, failure to disclose that fact is treated in the law as the equivalent to a representation of the nonexistence of the fact. A duty to disclose a fact may arise when the information is asked for or where the circumstances would call for a response in order that the parties may be on equal footing or where there is a relationship of trust or confidence between the parties.

A party to a business transaction has a duty to disclose facts basic to the transaction. If he knows that the other is about to enter into it under a mistake as to that, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

¹³ The jury found that Ameritech did not make a representation of fact directly to Bacher concerning Krinsky's prior history in selling Valu-Link. However, the jury found that Ameritech intended or expected that the representation made to Digicorp would be communicated to Bacher.

hiring, training, and supervision of Krinsky. However, the \$5,000 was negated by contributory negligence. The jury found Bacher 20% negligent and Ameritech 80% negligent.

¶34 All parties filed motions after verdict. The trial court denied the motions and affirmed the jury's verdict, but did correct one item. On the verdict, the jury awarded damages to Digicorp for its breach of contract claim against Ameritech. However, a supplemental verdict given to the jury indicated that the jury had not deducted the amount of damages for breach of contract from the award of damages for the intentional misrepresentation claim. As a result, the court found that Digicorp's breach of contract damages had been awarded twice. Accordingly, the court eliminated damages to Digicorp for its breach of contract claim. This appeal followed.

DISCUSSION

I. AMERITECH'S APPEAL

¶35 Ameritech argues that: (1) the economic loss doctrine bars both Digicorp and Bacher's claims; (2) there is insufficient evidence to support Digicorp and Bacher's intentional misrepresentations claims; (3) Bacher has never identified the misrepresentation, who made it, who received it and when it was made; (4) Ameritech did not breach its contract with Digicorp by violating the duty of good faith and fair dealing; (5) Digicorp is entitled to not more than one month's lost profits; (6) Bacher's damages must be reduced as a matter of law; and (7) Digicorp is not entitled to punitive damages.

A. Economic Loss Doctrine

¶36 Ameritech argues that the economic loss doctrine bars both Digicorp and Bacher's claims because they both specifically assumed responsibility for Krinsky's actions in the April 1, 1996, contract between Digicorp and Bacher and the June 1, 1996, contract between Ameritech and Digicorp. Ameritech claims it had no responsibility for the behavior of Digicorp's "1099 employees."

¶37 The economic loss doctrine is a judicially created doctrine under which a purchaser of a product cannot recover from a manufacturer on a tort theory for damages that are solely economic. *Mose v. Tedco Equities—Potter Rd. Ltd. P'ship*, 228 Wis. 2d 848, 853, 598 N.W.2d 594 (Ct. App. 1999). "The economic loss doctrine exists to protect the expectations of parties to commercial transactions and allows parties the freedom to allocate any incidental risks." *City of West Allis v. WECO*, 2001 WI App 226, ¶16, 248 Wis. 2d 10, 635 N.W.2d 873. Wisconsin law requires transacting parties to pursue only their contractual remedies when asserting an economic loss claim, thus preserving the distinction between contract and tort law. *Daanen & Janssen, Inc. v. Cedarapids, Inc.*, 216 Wis. 2d 395, 403, 573 N.W.2d 842 (1998).

¶38 The policies underlying the economic loss doctrine are: (1) to protect the parties' freedom to allocate economic risk by contract; (2) to encourage the party best situated to assess the risk of economic loss—the purchaser—to assume, allocate, or insure against that risk; and (3) to maintain the fundamental distinction between tort law and contract law. *Douglas-Hanson Co. v. BF Goodrich Co.*, 229 Wis. 2d 132, 149 n.3, 598 N.W.2d 262 (Ct. App. 1999). The application of the economic loss doctrine is a matter of law, which we review

independently of the trial court. *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 225 Wis. 2d 305, 314, 592 N.W.2d 201 (1999).

¶39 Here, Digicorp initially pled claims for negligence, strict liability and intentional misrepresentation. The trial court found that the economic loss doctrine barred claims for negligent misrepresentation and strict liability. The court then allowed the intentional misrepresentation claim to proceed to trial. In sustaining the jury’s verdict, the court stated:

Fraud and deceit, it seems to me is the very antithesis of the purposes underlying that doctrine. One who acts fraudulently prevents the parties from freely allocating risk by deceiving the other party about the nature of the risk that is being allocated or even creating the risk after the contract is entered into; it’s inimical to the very kind of good faith bargaining that should take place between contracting parties ... and that the Economic Loss Doctrine is intended to further and protects.

¶40 The trial court’s decision is consistent with our holding in *Douglas-Hanson*. There, we stated the economic loss doctrine does not preclude a plaintiff’s claim for intentional misrepresentation when the misrepresentation fraudulently induces the plaintiff to enter into a contract. *Douglas-Hanson*, 229 Wis. 2d at 137-38. There are valid policy reasons why a party engaging in fraud should not be able to avail itself of the protections of the economic loss doctrine. Wisconsin has long recognized that parties need a background of truth and fair dealing in their commercial relationships. *Id.* at 144. Applying the economic loss doctrine to pre-contract negotiations would frustrate this longstanding principle. “[C]ontract negotiations that begin with the assumption that the other party is lying will hardly encourage free and open bargaining.” *Budgetel Inns v. Micros Systems*, 8 F.Supp.2d 1137, 1148 (E.D. Wis. 1998). Claims of fraud in the inducement of a contract should be treated differently because “the parties to the

contract appear to negotiate freely, but, in fact one party's ability to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent conduct." *Douglas-Hanson*, 229 Wis. 2d at 144-45.

¶41 Ameritech had information about Krinsky's past fraudulent activities that Digicorp did not have. The jury was entitled to find that Digicorp asked about the information and Ameritech lied about it. Digicorp, relying on Taylor's representations, subsequently signed a contract that gave Ameritech the right to terminate Digicorp's distributorship if Krinsky submitted a forged sales contract. Had Ameritech truthfully disclosed what it knew about Krinsky, Digicorp could have sought to protect itself by allocating risk in the contract. Digicorp was unable to properly and fairly assess the risks of the contract as a result of Ameritech's pre-contractual misrepresentations. According to *Douglas-Hanson*, under those circumstances, the party perpetrating the fraud cannot hide behind contractual remedies. *Id.* at 148-49.

¶42 Ameritech argues that Digicorp had the opportunity to allocate risk contractually. However, the opportunity to allocate risk, which is the central premise behind the economic loss doctrine, presumes that contracting parties are on a level playing field. As the trial court stated:

But I think, when you're talking about intentional fraud, the conduct falls outside of what any reasonable commercial party bargained for, and I think it would be contrary to public policy to insulate parties from the consequences of fraudulent conduct by applying a doctrine that would preclude the defrauded party from seeking tort damages. I see nothing in the contract that suggests that the parties intended to bargain away anyone's liability for fraud. If that was the intent, I think a contract has to say that more clearly. It seems to me that extending the Economic Loss Doctrine to bar claims for fraud would be as I said, contrary to the policy of encouraging honest and integrity in the commercial world.

¶43 Ameritech argues that the jury did not find that there was fraud in the inducement of the contract, the legal theory excepted from the economic loss doctrine in *Douglas-Hanson*, 229 Wis. 2d at 147. Ameritech claims that Bacher had hired Krinsky, and Digicorp and Bacher had contracted prior to the fraud taking place. However, this argument focuses on the wrong contract. The contract in question is not the contract that Digicorp and Bacher reached. Rather it is the June 1, 1996, contract between Digicorp and Ameritech. The fraud occurred before that contract was in effect.

¶44 The trial court instructed the jury that “in order to establish a claim of intentional misrepresentation, Digicorp must prove” five elements. One of those elements required a finding that “Ameritech made the representation with intent to deceive and induce Digicorp to act upon it to Digicorp’s pecuniary damage.” We presume that the jury followed the instructions it received from the trial court. *State v. Truax*, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989).

¶45 In addition, during the course of deliberations, the jury specifically asked the trial court whether it must find an intent to deceive and an intent to induce Digicorp to act. The court instructed the jury that it must find both. The jury then returned a finding against Ameritech on Digicorp’s intentional misrepresentation claim. From the jury’s question, it is reasonable to conclude that it considered the inducement issue and ultimately determined that Taylor intended to induce Digicorp to act on the misrepresentation.

¶46 Further, Ameritech does not explain how the economic loss doctrine applies specifically to Bacher’s claim because there is no contract between Ameritech and Bacher. Because there was no contract, the economic loss doctrine

does not apply. Therefore, we affirm the trial court's conclusion that Digicorp and Bacher's claims are not barred by the economic loss doctrine.

B. Intentional Misrepresentation

¶47 Ameritech argues that there is insufficient evidence to support Digicorp's and Bacher's intentional misrepresentation claims. Ameritech contends that: (1) there is no evidence in the record from which the jury could conclude that Taylor's representation of Krinsky to Clark was untrue and that he knew it to be untrue; (2) there is no evidence from which the jury could conclude that Taylor intended to deceive Clark about Krinsky's past history at NCS; (3) Digicorp could not have relied on Taylor's misrepresentation because Digicorp and Bacher already had an agreement in place well before Clark asked whether Taylor knew anything about Krinsky; and (4) there is no evidence in the record from which the jury could conclude that Bacher justifiably relied upon Taylor's misrepresentations.

¶48 Appellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it. *Meurer v. ITT Gen. Controls*, 90 Wis. 2d 438, 450, 280 N.W.2d 156 (1979). Moreover, if there is any credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding, we will not overturn that finding. *Morden v. Cont'l AG*, 2000 WI 51, ¶ 38, 235 Wis. 2d 325, 611 N.W.2d 659. In applying this narrow standard of review, we consider the evidence in a light most favorable to the jury's determination. *Meurer*, 90 Wis. 2d at 450.

¶49 The standard of review in this case is even more stringent because the circuit court approved the jury's verdict. We afford special deference to a jury determination in those situations in which the trial court approves the jury's findings. *Kuklinski v. Rodriguez*, 203 Wis. 2d 324, 331, 552 N.W.2d 869 (Ct. App. 1996). We will not overturn the jury's verdict unless “there is such a complete failure of proof that the verdict must be based on speculation.” *Coryell v. Conn*, 88 Wis. 2d 310, 315, 276 N.W.2d 723 (1979).

¶50 A party seeking to recover for intentional misrepresentation must establish five basic elements: (1) the representation must be of a fact and made by the defendant; (2) the representation of fact must be untrue; (3) the plaintiff must believe such representation to be true and rely thereon to his or her detriment; (4) either know the representation is untrue or recklessly make the representation without caring whether it is true or false; and (5) make the representation with the intent to deceive and to induce the plaintiff to act upon it to the plaintiff's pecuniary damage. WIS JI—CIVIL 2401.

1. Taylor's Misrepresentation

¶51 Ameritech argues that there is no evidence in the record from which the jury could conclude that Taylor's representation to Clark about Krinsky was untrue and that Taylor knew it to be untrue. Ameritech asserts that the only information Taylor had of Krinsky's prior dealings at NCS was that Krinsky had previously “oversold” contracts to customers, not that he submitted “fraudulent” contracts.

¶52 However, during detective Stewart's investigation into Krinsky's fraudulent activities, Stewart interviewed Linder. Stewart testified that during the interview, Linder told Stewart that she had notified Taylor of the “fraud”

perpetrated by Krinsky in the summer of 1995. This was approximately nine months before Taylor told Clark that he had no knowledge of Krinsky. According to Stewart, Linder was “incensed” that Ameritech had ignored the information she conveyed to Taylor. From this evidence, the jury could have concluded that Taylor had knowledge of Krinsky’s fraudulent activities and intentionally refused to reveal this information to Digicorp.

¶53 Further, there was evidence at trial that Taylor attempted to cover up Krinsky’s conduct after it came to light. In a conversation with Anderson, Taylor urged Anderson not to turn the matter over to the police. Schettler, Taylor’s boss, also repeated the request not to involve the law. The jury could reasonably infer that Taylor’s attempts to keep information from law enforcement was motivated by Taylor’s fear that his prior knowledge of Krinsky’s fraud would be exposed.

¶54 There was also testimony that Taylor attempted to thwart Ameritech’s internal investigation. The source of this testimony was Higgins. Higgins stated that Taylor told her to request that her boss “sweep it under the carpet.” The jury could reasonably infer that Taylor feared this internal investigation would uncover his prior knowledge of Krinsky’s fraud.

¶55 Therefore, after a thorough review of the record, we conclude that the record contains sufficient evidence for the jury to conclude that Taylor’s representation to Clark was untrue and that Taylor knew it to be untrue.

2. Intent to Deceive

¶56 Ameritech argues that there is no evidence from which the jury could conclude that Taylor intended to deceive Clark about Krinsky’s past history at NCS. Ameritech contends that deceiving Digicorp would not benefit Ameritech

or Taylor and that it makes no sense that Taylor would wish to deceive Digicorp about Krinsky's past.

¶57 However, Clark asked Taylor if he knew anything about Krinsky. Taylor stated that he did not and would have to check. Digicorp reasoned that one possible motivation for Taylor's false representation was that if Taylor had told the truth, Taylor would be implicating himself because he had failed to take action in 1995 and allowed Krinsky's fraud to continue.

¶58 According to Digicorp, money may have been another motivation. While Krinsky was employed at NCS, another Ameritech authorized distributor, Krinsky's sales volume placed him second in the state among all sales people. A component of Taylor's pay was tied to the performance of authorized distributors and its salespeople. Taylor had a personal financial motive for allowing the fraud to continue. Taylor also could have been motivated by a belief that Krinsky's actions were ultimately benefiting Ameritech. Locking customers into contracts would have allowed Ameritech to retain the customers and keep the market share. As the trial court noted:

I agree that, in hindsight, it certainly looks like the whole scheme was foolish, and Ameritech is not wrong to argue that it makes no sense. Criminal conduct often makes no sense in hindsight, or even in the big picture. But that doesn't mean a jury could not conclude that there was fraudulent conduct here, at least I find the evidence sufficient to support those inferences.

¶59 Based upon the evidence at trial, the jury could reasonably have concluded that Taylor made fraudulent misrepresentations to Digicorp that induced Digicorp to enter into the June 1, 1996, contract.

3. Digicorp's Reliance

¶60 Ameritech argues that Digicorp could not have relied on Taylor's misrepresentation because Digicorp and Bacher already had an agreement in place well before Clark asked whether Taylor knew anything about Krinsky. Therefore, Ameritech concludes that it was Digicorp's responsibility to determine Krinsky's background.

¶61 However, the discussions between Clark and Taylor occurred sometime after the March 28, 1996, meeting between Bacher and Digicorp and before the April 30, 1996, letter.¹⁴ The contract entered into between Digicorp and Ameritech was dated June 1, 1996. This contract contained a provision that Ameritech could terminate Digicorp's authorized distributorship if a forged customer sales contract was submitted. Although there had been previous contracts between Digicorp and Ameritech, the evidence was that the previous contracts did not contain this provision.

¶62 The jury could reasonably infer that Digicorp relied on Taylor's fraudulent representation in its decision to enter into the June 1, 1996, contract—a contract that for the first time allowed Ameritech to terminate Digicorp's authorized distributorship upon the submission of a forged customer sales contract.

¹⁴ We note that all the parties' briefs mischaracterize to a degree the chronological events found in the record.

4. Bacher's Reliance

¶63 Ameritech argues that there is no evidence in the record from which the jury could conclude that Bacher justifiably relied upon Taylor's misrepresentations. Ameritech contends that Clark's conversation with Taylor about Krinsky took place weeks after Krinsky started selling Valu-Link for Bacher.

¶64 In contrast, Bacher argues that it was clear to all the parties how Bacher would be selling Valu-Link and that had Bacher known any of the information that Taylor had on Krinsky, it would have not gone forward selling Valu-Link with Krinsky.

¶65 The trial court agreed with Bacher:

But it does seem to me that the evidence was such that Taylor knew of Krinsky's employment by Bacher at an early point But, in any event, at critical times it was known, it was known that Bacher would rely upon the approval. Obviously, the arrangement could not be completed and the—and Bacher would not be able to sell [Valu-Link] through Krinsky had he not been approved as an Ameritech salesperson.

¶66 Clark testified that he had a very active dialogue with Taylor even before Bacher approached him with the idea of selling Valu-Link. Clark stated that he had been at his current position at Digicorp since February and was eager to get off on the right foot. Clark stated that sometime after the meeting with Bacher on March 28, 1996, Clark contacted Taylor to discuss Bacher's proposal. Clark stated that he wanted to make sure Digicorp followed the proper procedures. The discussions that followed included Ameritech's requirement that Krinsky become Digicorp's 1099 employee. Those discussions culminated in the April 30, 1996, letter. Sometime during the discussions, Clark asked Taylor if he had any

knowledge of Krinsky. Taylor said that he did not and would have to check. At some point, Clark asked Taylor about Krinsky again. He never received an answer.

¶67 Although Clark's testimony is vague as to time and date, the evidence supports the jury's finding that Clark informed Taylor of Bacher's plan after the March 28, 1996, meeting and before Krinsky started selling Valu-Link. It is reasonable to infer that all the parties knew of the arrangement between Ameritech, Digicorp, and Bacher shortly after the March 28, 1996, meeting and that Krinsky would not be able to sell Valu-Link unless approved by Ameritech. It is also reasonable to infer that Bacher relied on Ameritech's misrepresentations and would not have sold Valu-Link with Krinsky had Ameritech informed Digicorp of Krinsky's prior fraudulent activity NCS.

C. Bacher's Amended Pleadings

¶68 Ameritech argues that Bacher has never identified the misrepresentation it made, who made it, who received it, when it was made, and the action it induced on the part of the recipient and that failure to do so is fatal to Bacher's claim of intentional misrepresentation. Therefore, Ameritech contends that it was an erroneous exercise of discretion for the trial court to allow Bacher to amend its pleadings.

¶69 WISCONSIN STAT. § 802.09(2) provides the trial court with the authority to amend the pleadings to conform to the evidence at trial. The decision to grant leave to amend a complaint is within the court's decision. *Carl v. Spickler Enterps., Ltd.*, 165 Wis. 2d 611, 622, 478 N.W.2d 48 (Ct. App. 1991). A discretionary decision can only be reversed where the trial court erroneously

exercised its discretion. *John v. John*, 153 Wis. 2d 343, 365, 450 N.W.2d 795 (Ct. App. 1989).

¶70 In *State v. Peterson*, 104 Wis. 2d 616, 631, 312 N.W.2d 784 (1981), our supreme court held that where a party impliedly consents to the trial of a particular matter the trial court must amend the pleadings. The court further held that implied consent exists where a party fails to object to the introduction of evidence on the unpleaded issue and where the party not objecting is aware that the evidence goes to the unpleaded issue. *Id.* at 630.

¶71 After Bacher moved to amend its pleadings to conform to the evidence, the trial court held that Bacher could amend the pleadings because Ameritech's fraud was the issue being tried:

I am satisfied that although fraud was not particularly plead ... that that is the issue that is being tried here, both by Digicorp and by Bacher. ...

I think that in that respect, the only thing missing from ... Bacher's last complaint is the general averments of malice and intent to deceive, and I think that the complaint can be amended at this point to allow those allegations to be made

Because the trial court found that Ameritech impliedly consented to the trial of the fraud issue with respect to Bacher, we conclude it was not an erroneous exercise of discretion to amend the pleadings to conform to the evidence.

D. Bad Faith

¶72 Ameritech argues that it did not breach the June 1, 1996 contract with Digicorp by violating the duty of good faith and fair dealing. Ameritech contends that the evidence presented at trial is insufficient to sustain Digicorp's breach of contract claim because: (1) Krinsky was in fact "approved and

certified”; (2) the “approved and certified” language was not intended for Digicorp’s benefit; and (3) a bad faith failure to “approve and certify” Krinsky could not have caused Digicorp damage.

¶73 We conclude that Ameritech’s argument is moot. “An issue is moot when its resolution will have no practical effect on the underlying controversy.” *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425. “[A] moot question is one which circumstances have rendered purely academic. Generally, moot issues will not be considered by an appellate court.” *Id.*

¶74 On the verdict, the jury awarded damages to Digicorp for its breach of contract claim. The jury also awarded damages to Digicorp for its intentional misrepresentation claim, but failed to deduct the amount awarded for the breach of contract. At motions after verdict, the trial court found that the effect of the jury verdict was to award Digicorp’s breach of contract damages twice. Accordingly, the trial court eliminated damages to Digicorp for its breach of contract claim. Therefore, Ameritech’s claim of error in the breach of contract verdict is moot because, ultimately, no damages were awarded for the breach.

E. Lost Profits

¶75 Ameritech argues that Digicorp is entitled to no more than one month’s lost profits. According to Ameritech, the June 1, 1996, contract was terminable by either party for any reason upon thirty days’ written notice to the other party.

¶76 Digicorp’s claim for damages consisting of the loss of the Ameritech authorized distributorship and the accompanying lost profits rested upon Scott

Wildman's testimony. Wildman was Digicorp's expert witness who testified with respect to the amount of damages Digicorp sustained as a result of the loss of the authorized distributorship. That testimony calculated damages for nine years, consisting of lost profits and increased expenses resulting from the termination of the distributorship.

¶77 The June 1, 1996, contract was induced by Taylor's misrepresentations. Previous contracts between Ameritech and Digicorp did not include a termination clause. Without that provision, it was reasonable to infer that Digicorp would have continued as an authorized distributor. However, Digicorp's distributorship was terminated because of Krinsky's forgery. Because Digicorp's tort claim was based on tort and not contract, Wildman's testimony was a sufficient basis for the jury to measure damages.

F. Bacher's Damage Award

¶78 Ameritech argues that Bacher's \$100,000 damage award must be reduced as a matter of law. Ameritech contends the jury awarded damages in strict accordance with the testimony of Timothy Mueller, Bacher's expert. At trial, Mueller estimated Bacher's damages to be \$99,644. Mueller divided the total amount into the following categories: (1) Payments made to or on behalf of Krinsky: \$13,600; (2) commissions due to Bacher employees on valid Valu-Link contracts: \$17,000; (3) legal fees: \$55,044; (4) time expended on litigation matters: \$4,000; and (5) damage to Bacher's business reputation: \$10,000. Ameritech further contends that: (1) there is no basis for requiring Ameritech to reimburse Bacher for payments made to or on behalf of Krinsky; (2) Bacher must look to Digicorp for repayment of payments made to or on behalf of Krinsky; and

(3) Muehler erroneously included time spent on the instant litigation when calculating the time expended by the Bachers.

¶79 Initially, we note that Ameritech does not cite any legal authority to support its argument. We also note that Ameritech did not object to the form of the verdict question. The special verdict was not separated into components. Rather the jury was simply asked one question: “What sum of money will fairly and reasonably compensate Bacher Communications for the damages it sustained as a result of Ameritech’s misrepresentation?”

¶80 Under WIS. STAT. § 805.13(3) objections to jury verdict questions or instructions are waived unless they are made at conference before the case is given to the jury. We have no power to consider waived errors regarding verdict questions or instructions. *State v. Schumacher*, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988).

¶81 Further, Ameritech’s argument is based on the assumption that the jury awarded damages in strict accordance with Muehler’s testimony. However, the jury was instructed that it was not bound by expert testimony and that Bacher’s loss of business reputation could not be determined with mathematical precision. Muehler estimated that Bacher’s loss of business reputation was \$10,000, but he also stated that was a conservative estimate. The jury could have awarded more than \$10,000 in damages for loss of business reputation. We have no way of determining what, if anything, the jury awarded for the damage categories disputed by Ameritech. Therefore, we conclude that Bacher is entitled to the \$100,00 damage award.

G. Punitive Damages

¶82 Ameritech argues that Digicorp was not entitled to punitive damages. Ameritech contends that there is insufficient evidence to warrant punitive damages.

¶83 It is well established that the trial court determines whether the evidence establishes a proper case for the allowance of punitive damages and whether to submit the issue to the jury. *Bank of Sun Prairie v. Esser*, 155 Wis. 2d 724, 735, 456 N.W.2d 585 (1990). The determination whether punitive damages are available is a question of law that we review independently of the trial court. *Loehrke v. Wanta Bldrs., Inc.*, 151 Wis. 2d 695, 701, 445 N.W.2d 717 (Ct. App. 1989).

¶84 Punitive damage factors include the “grievousness of defendant’s act, the outrageousness of his conduct and the ‘degree of malicious intention.’” *Lundin v. Shimanski*, 124 Wis. 2d 175, 196, 368 N.W.2d 676 (1985) (citation omitted). Punitive damages serve the dual purpose of punishment and deterrence. *Smith v. Golde*, 224 Wis. 2d 518, 532, 592 N.W.2d 287 (Ct. App. 1999). “It is self-evident that the greater the number of abusive incidents, the greater the need for deterrence and, correspondingly, an award calculated to achieve that purpose.” *Id.*

¶85 There is sufficient evidence to support the submission of punitive damages to the jury. Taylor not only lied to Clark about not having any knowledge of Krinsky, he attempted to cover up Ameritech’s internal

investigation once it came to light in July 1996. The jury could properly consider whether Taylor's acts were grievous, outrageous, and done with malicious intent.

II. DIGICORP'S APPEAL

¶86 The jury found that Digicorp, through Krinsky's actions in submitting fraudulent contracts, breached the June 1, 1996, contract with Ameritech. The jury awarded Ameritech \$46,573.30 in damages. Digicorp argues that Ameritech's award of damages was improper because the damages were caused by Ameritech's tortious intentional misrepresentation. We agree and reverse Ameritech's award of damages.

¶87 Ameritech argues that its fraud did not relieve Digicorp of its responsibility to supervise Krinsky. It relies on the contract provision which allows Ameritech to recoup damages for the submission of fraudulent contracts.

¶88 In Wisconsin, under certain circumstances, provisions in some contracts cannot be given legal effect because the provisions are against public policy. In *Anderson v. Tri-State Home Improve. Co.*, 268 Wis. 455, 457, 67 N.W.2d 853 (1955), a customer brought suit against a siding company for fraudulently inducing the customer to enter into a contract for siding. The contract stated that the siding company "prohibits the making of any promises, or representation, unless it is inserted in writing in this agreement before signing" *Id.* at 459. In concluding that the contract provision was not a bar to the plaintiff's claim our supreme court stated:

As a matter of principle it is necessary to weigh the advantages of certainty in contractual relations against the harm and injustice that result from fraud. In obedience to the demands of a larger public policy the law long ago abandoned the position that a contract must be held sacred regardless of the fraud of one of the parties in procuring it.

Id. at 460 (citation omitted).

¶89 Here, the jury found that Taylor had knowledge of Krinsky's past history when employed by NCS. When asked by Clark, Taylor said he did not have knowledge about Krinsky. The jury also found that Clark relied on the representation made by Taylor and was induced to act. Had Taylor been truthful, Clark would not have used Krinsky to sell Valu-Link. Had Krinsky not sold Valu-Link, Digicorp would not have breached the June 1, 1996, contract with Ameritech.

¶90 While it is true that the contract provision allowing Ameritech to recover damages for the submission of fraudulent contracts is not strictly an exculpatory agreement, under these facts it has the same effect. By allowing Ameritech to set off breach of contract damages, Ameritech profits from a contract that was induced by its own fraud. Moreover, the jury found that Ameritech's conduct in inducing Digicorp was extreme enough to justify punitive damages. Allowing Ameritech to set off the breach of contract damages is the same as allowing it to profit from its own wrongdoing.

¶91 We conclude that enforcement of the contract provision allowing Ameritech to recoup damages for the submission of fraudulent contracts violates public policy under these circumstances. See *Anderson*, 268 Wis. at 460. Therefore, we reverse the portion of the judgment awarding Ameritech damages for its breach of contract claim against Digicorp.

III. BACHER'S APPEAL

¶92 Bacher argues that: (1) the trial court erroneously exercised its discretion by denying Bacher's request to submit punitive damages to the jury; and

(2) the trial court erred by not allowing Bacher's actual attorney fees in the present action. We disagree.

A. Punitive Damages

¶93 Bacher claims that the trial court erroneously exercised its discretion by denying Bacher's motion to amend the pleadings because Ameritech impliedly consented to the issue of punitive damages and would not have been prejudiced by the amendment.¹⁵

¶94 "A trial court's decision to grant leave to amend a complaint is discretionary." *Finley v. Culligan*, 201 Wis. 2d 611, 626, 548 N.W.2d 854 (Ct. App. 1996). We will not reverse a court's discretionary decision unless the record discloses that the court failed to exercise its discretion, that the facts do not support the trial court's decision, or that the court applied the wrong legal standard. *Id.* at 626-27. The court "in exercising its discretion must balance the interests of the party benefiting by the amendment and those of the party objecting to the amendment." *Peterson*, 104 Wis. 2d at 634.

¶95 The record shows that six days into the eight-day trial, Bacher moved to amend its pleadings to include claims for intentional misrepresentation and for punitive damages. The trial court allowed Bacher to add the intentional

¹⁵ Additionally, Bacher argues that that the trial court erred by denying Bacher's request to submit punitive damages to the jury because it was not necessary to amend the pleadings to include a claim for punitive damages. However, Bacher makes this argument for the first time on appeal. As a matter of judicial policy, we decline to consider legal arguments that are posed for the first time on appeal and which were not raised in the trial court. *Dept. of Tax. v. Scherffius*, 62 Wis. 2d 687, 696-97, 215 N.W.2d 547 (1974).

misrepresentation claim, but denied its motion to add punitive damages on the basis that it would prejudice Ameritech:

I think the claim for punitive damages vastly increases the potential liability of Ameritech. I think had Ameritech realized there was a claim for potential—for punitive damages from Bacher as well as from Digicorp, they very well may have gone about the efforts in defending and discovery

....

I'm satisfied that to allow the punitive damage claim to come in at this point would prejudice Ameritech. It is late notice, I don't think it's fair to a party to quietly lay in the weeds and then, at the last minute, raise a claim for punitive damages after the other party has evaluated the case at one level and suddenly finds itself confronted with another form of damage.

¶96 Relying on *Peterson*, Bacher concludes that the trial court's findings focused on the substantive harm that Ameritech would be facing by allowing punitive damages to go to the jury, rather than Ameritech's opportunity to defend against the amended charge. In *Peterson*, the defendant argued that he was prejudiced as a result of the trial court's amendment to a forfeiture traffic charge because he was assessed four points against his driver's license instead of three. The defendant claimed that had he recognized this possibility he would have entered a guilty plea to the original charge. *Id.* 635. The court noted that the defendant applied an incorrect meaning of prejudice, focusing on substantive harm, rather than the deprivation of his opportunity to defend against the amended charge. *Id.* Whether the defendant would have pled guilty to the original charge did not affect whether he was given an adequate opportunity to defend against the amended charge. *Id.*

¶97 Here, Bacher misstates the trial court's ruling. The record shows that the court found that Ameritech would be prejudiced because it did not have an adequate opportunity to defend against a punitive damages claim from Bacher. This is not the type of substantive harm criticized in *Peterson*.

¶98 Bacher moved to amend the pleadings on the sixth day of trial. This amendment came after Bacher had already pled twice before. In addition, Bacher represented to the trial court that claims for punitive damages had been intentionally omitted from prior pleadings.

¶99 It is fundamentally unfair for Bacher to have a perceived posture and then to change that posture so late in the game. Ameritech's tactical and strategic decisions no doubt were based upon the amount of liability to which it was exposed. Ameritech was unable to perform discovery or to effectively cross-examine witnesses on the issue. Ameritech did not have the opportunity to present exculpatory evidence regarding the punitive damages claim because Ameritech did not know Bacher was seeking punitive damages. Had it known, Ameritech may have concentrated its discovery on malice directed at Bacher as opposed to only Digicorp. As a result, Ameritech was deprived of the opportunity to defend against those damages. Therefore, we conclude that the trial court properly exercised its discretion by denying Bacher's request to submit punitive damages to the jury.

B. Attorney Fees

¶100 Bacher argues that the trial court erred by not awarding its attorney fees in the present action. Among the economic losses claimed by Bacher are the legal fees it expended during the course of litigation. Those fees fall into two separate categories.

¶101 The first category of fees consists of those Bacher incurred in defending itself when Digicorp originally sued Bacher. The second category consists of fees Bacher incurred both defending and prosecuting litigation against Ameritech in the present action. The trial court allowed the jury to consider evidence of the first category of fees and excluded the second category. Bacher now argues that it can recover attorney fees incurred in the prosecution and defense of the present case.

¶102 Wisconsin adheres to the American Rule where the prevailing litigant generally may not recover attorney fees and expenses of litigation as damages or costs. *Gorton v. Hostak, Henzl & Bichler, S.C.*, 217 Wis. 2d 493, 510-11, 577 N.W.2d 617 (1998). Under the rule, actual attorney fees are only recoverable if authorized by statute or contract, or when the fees are incurred by a plaintiff who is subjected to third-party litigation on account of a defendant's wrongful act. *Id.*

¶103 Bacher relies on *Meas v. Young*, 142 Wis. 2d 95, 417 N.W.2d 55 (Ct. App. 1987). In that case, an elderly couple, the Cechvalas, entered into a listing contract with realtors to sell their farm. The realtors arranged for the sale of the farm to the Meases. *Id.* at 99-100. After the sale, it became apparent that the property contained less acreage than was warranted on the deed. *Id.* The Meases sued the realtors for monetary damages and rescission. *Id.* at 100. The realtors impleaded the Cechvalas for indemnification and contribution. *Id.* The Cechvalas counterclaimed, seeking dismissal of the realtors' third-party complaint, as well as actual attorney fees. *Id.* Following trial, the court ruled in favor of the Cechvalas. *Id.* The court found that the realtors' breach of numerous duties resulted in the Cechvalas wrongfully being brought into the litigation and awarded attorney fees. *Id.* at 101.

¶104 On appeal, we concluded that the realtors “were in reality third parties whose misconduct caused the subsequent litigation” and affirmed the trial court. *Id.* at 104. However, we explicitly limited our holding to the “exceptional circumstances of this case” lest the equitable exception swallow the rule. *Id.* at 106. Further, we only allowed attorney fees in the “prior” litigation and expressly limited recovery:

Of course, [the Cechvalas] can be allowed only those attorney fees incurred in protecting their interests caused by the failures of the realtors. ... To illustrate, the attorney fees that the Cechvalas incurred defending their interests in what we might treat as the "prior" Meas litigation are recoverable. However, [*Weinhagen v. Hayes*, 179 Wis. 62, 190 N.W. 1002 (1922)] disallows the recovery of attorney fees expended in the "separate" proceeding against the realtors to actually recover those fees incurred in the "prior" litigation.

Id. at 106-07.

¶105 Here, the only “prior” litigation in this matter was when Digicorp initially sued Bacher. Evidence of those fees was submitted to the jury and, presumably, included in the award. In the present case, Bacher defended itself against Ameritech’s claim and prosecuted its own claim against Ameritech. There was no third party and no “prior litigation.” To allow Bacher to recover attorney fees for the present case would be contrary to the American Rule. Therefore, we conclude that Bacher was not entitled to attorney fees.

By the Court.—Judgment affirmed in part; reversed in part.

Not recommended for publication in the official reports.

