

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 28, 2011

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. 2010AP2998

Cir. Ct. No. 2010SC553

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

PETER A. BORCHARDT,

PLAINTIFF-APPELLANT,

V.

RAYMOND D. GORE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Marathon County:
GREGORY B. HUBER, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ Peter Borchardt appeals a small claims judgment, dismissing his intentional misrepresentation claim as barred by the economic loss

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

doctrine. He asserts the circuit court erred because the economic loss doctrine does not preclude his claim. He also argues, for the first time on appeal, he is entitled to recover for misrepresentation under WIS. STAT. § 100.18. We conclude Borchardt's claim is barred by the economic loss doctrine.

¶2 Raymond Gore filed a motion, contending Borchardt's appeal is frivolous and seeking costs and attorney fees. We conclude Borchardt's appeal is not frivolous as contemplated by WIS. STAT. RULE 809.25(3). We affirm.

BACKGROUND

¶3 Gore, who restores and rebuilds heavy equipment as a hobby, purchased a nonworking bulldozer. Gore disassembled the machine, purchased and installed various parts, and made it operational. Shortly thereafter, the bulldozer stopped working. Gore "[u]ry-rigged" a solution, making the bulldozer operational again. Gore testified he had no further problems with the bulldozer after the second fix. Three months later, Gore decided to sell it.

¶4 Borchardt, interested in purchasing the bulldozer, went to look at the machine. Borchardt testified that Gore explained the bulldozer used to be nonoperational but he had repaired it by installing new parts. Gore showed Borchardt the parts he had removed and receipts for the new, installed equipment. Borchardt testified Gore told him once he installed the new parts, he did not have further problems with the machine. Borchardt explained he was unaware the bulldozer broke down after Gore installed the new parts. After test driving the bulldozer, Borchardt decided to purchase it. He purchased the bulldozer "in as-is condition."

¶5 Borchardt testified that within six or eight hours after operating the bulldozer, it broke down. Borchardt took the bulldozer to a mechanic, Fritz Hilfiker, who testified Gore’s second modification was only a short-term patch, not a repair. The total cost of repairs to fix the bulldozer exceeded \$5,000.

¶6 Borchardt brought a small claims action against Gore, alleging intentional misrepresentation. He sought reimbursement for the parts and labor associated with fixing the bulldozer. The circuit court concluded that, although Borchardt successfully proved his intentional misrepresentation claim, the claim was nevertheless barred by the economic loss doctrine.

DISCUSSION

¶7 On appeal, Borchardt argues that the economic loss doctrine does not bar his intentional misrepresentation claim. He also asserts he can recover for misrepresentation under WIS. STAT. § 100.18. Gore argues Borchardt’s appeal is frivolous and moves for costs and attorney fees.

I. Economic loss doctrine

¶8 The economic loss doctrine is a judicially created rule that “preclude[es] contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship.” *Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶27, 283 Wis. 2d 555, 699 N.W.2d 205 (quotations omitted). “Economic loss” is defined as “damages resulting from inadequate value because the product is inferior and does not work for the general purposes for which it was manufactured and sold.” *Id.*, ¶29. The economic loss doctrine is designed “(1) to maintain the fundamental distinction between tort law and contract law; (2) to protect commercial parties’ freedom to allocate economic

risk by contract; and (3) to encourage the party best situated to assess the risk of economic loss, the commercial purchaser, to assume, allocate, or insure against that risk.” *Id.*, ¶28 (citations omitted); *see also State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 225 Wis. 2d 305, 311, 592 N.W.2d 201 (1999) (holding the economic loss doctrine applies to consumer transactions).

¶9 In *Kaloti*, 283 Wis. 2d 555, ¶42, our supreme court adopted a narrow exception to the economic loss doctrine for a claim of intentional misrepresentation. The court held that an intentional misrepresentation claim is not barred by the economic loss doctrine if “the fraud is extraneous to, rather than interwoven with, the contract. ... Or stated another way, 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.*

¶10 In *Kaloti*, when contracting for the purchase of products, Kellogg failed to inform Kaloti that it was going to begin selling directly to Kaloti’s customers, which would result in Kaloti’s inability to sell the products. *Id.*, ¶45. The court concluded the fraud was extraneous to the contract because it did not go to Kellogg’s ability to perform under the contract, or go to quality or characteristics of the products Kellogg sold. *Id.* The court held Kaloti’s intentional misrepresentation claim was not barred by the economic loss doctrine. *Id.*, ¶52.

¶11 Borchardt contends that the economic loss doctrine does not bar recovery for his intentional misrepresentation claim because the fraud in this case is extraneous to the contract. Borchardt analogizes this situation to the facts in *Kaloti*. He argues that similar to *Kaloti*, the fraud is extraneous to the contract

because “[the fraud] does not concern ... Gore’s performance of the contract ... and it does not regard the quality or character of the bulldozer.” He asserts that Gore’s “misrepresentations [about the repair history] ... concerned a matter [whose] risk was never contemplated to be a part of the contract to purchase the bulldozer.”

¶12 We disagree. Unlike the situation in *Kaloti*, the alleged fraud goes to the quality and characteristics of the product sold—specifically, the bulldozer’s functional ability. Borchardt contractually agreed to purchase the bulldozer “in as is condition.” We conclude the fraud is interwoven with the contract and the economic loss doctrine bars Borchardt’s intentional misrepresentation claim.

¶13 In the alternative, Borchardt argues we should forgo the *Kaloti* majority’s adoption of the narrow exception to the economic loss doctrine and instead adopt the rule proffered by Chief Justice Shirley Abrahamson in her concurrence to the *Kaloti* majority opinion. However, we must apply the narrow exception because we are bound by the majority opinion of our supreme court. *See Dane Cnty. Hosp. & Home v. LIRC*, 125 Wis. 2d 308, 320 n.4, 371 N.W.2d 815 (Ct. App. 1985); *see also Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

II. WISCONSIN STAT. § 100.18

¶14 Borchardt also argues, for the first time on appeal, he is entitled to recover for misrepresentation under WIS. STAT. § 100.18. We do not address Borchardt’s § 100.18 misrepresentation claim because it was not raised in the trial court. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980) (“[I]ssues not raised or considered in the trial court will not be considered for the first time on appeal.”), *superseded on other grounds by* WIS. STAT. § 895.52.

III. Frivolous appeal

¶15 Gore argues Borchardt’s appeal is frivolous and moves for costs and attorney fees. In order to grant Gore costs and attorney fees, we must conclude, as a matter of law, the entire appeal frivolous. See *Baumeister v. Automated Prods., Inc.*, 2004 WI 148, ¶26, 277 Wis. 2d 21, 690 N.W.2d 1. To be frivolous, the appeal must have been filed in bad faith or have no support in law or equity or good faith argument for a change in the law. WIS. STAT. RULE 809.25(3).

¶16 In support of his motion, Gore argues that Borchardt’s appeal represents a “consistent pattern of ... litigation” that is “an act of financial harassment.” He also asserts “the only substantive argument raised in [Borchardt’s] brief ... is the concept that the repair history for the ... bulldozer is somehow separate from the quality and condition of the bulldozer.”

¶17 We conclude Borchardt’s appeal is not frivolous. The “pattern” of litigation Gore references is a trial in front of the court commissioner, an independent review before the circuit court, and this appeal. Nothing in Borchardt’s exercise of his right to review signifies any bad faith. Further, although we did not adopt Borchardt’s reasoning, he presented arguments based in law and equity about why the economic loss doctrine should not bar his claim.² Additionally, he has presented a good faith argument for a change in the law, preserving that issue for review by our supreme court. Accordingly, we deny Gore’s motion for fees and costs.

² Gore’s motion for sanctions for a “frivolous appeal” is inconsistent with his request that we publish the opinion because “the Economic Loss Doctrine, and the narrow exception to the doctrine, are not fully understood by some litigants” and our opinion could “add additional clarity to the role and function of the Economic Loss Doctrine.”

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)4.

