

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 3, 2004

Cornelia G. Clark
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. 03-2257
STATE OF WISCONSIN**

Cir. Ct. No. 01CV003356

**IN COURT OF APPEALS
DISTRICT I**

JOE VALENTI,

PLAINTIFF,

STEVE LAMPONE AND CONRAD HENRY,

PLAINTIFFS-APPELLANTS,

v.

HEWLETT-PACKARD COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Steve Lampone and Conrad Henry (collectively, the consumers) appeal a summary judgment decision dismissing their class action

lawsuit against Hewlett-Packard Company. The case revolves around allegations that, after years of selling its low-end inkjet printers with full ink cartridges, Hewlett-Packard began selling the printers with “economy” ink cartridges that were only half filled. The consumers maintain they have set forth materials sufficient to warrant trial on claims of deceptive trade practices and breach of implied warranty, based on assertions that they had expected to receive full ink cartridges with their printers and that they had to buy replacement cartridges sooner than they otherwise would have had to do. Upon reviewing the summary judgment materials *de novo*, employing the standard methodology which need not be repeated here, *see Frost v. Whitbeck*, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325 (citations omitted), we affirm the decision of the trial court.

Deceptive Trade Practice

¶2 The Wisconsin Deceptive Trade Practices Act provides a private cause of action for any “advertisement, announcement, statement or representation” containing “any assertion, representation or statement of fact which is untrue, deceptive or misleading” and which causes pecuniary loss. *See* WIS. STAT. § 100.18(1) and (11)(b)2 (2001-02);¹ *Tim Torres Enters., Inc. v. Linscott*, 142 Wis. 2d 56, 70, 416 N.W.2d 670 (Ct. App. 1987). Hewlett Packard argues that the consumers have failed to establish causation for a claim under this statute because neither of them alleged to have seen a “cartridges included” statement on the printer box or in any other materials before purchasing the printers. The consumers concede that they did not see or rely upon any “cartridges

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

included” statements, but claim that reliance on such statements was not required because the deception at issue here was “by omission.” The statute, however, applies to affirmative statements, not omissions. We agree with the trial court that the consumers’ failure to see or rely on any particular statements regarding the cartridges prior to making their purchase was fatal to their claim under WIS. STAT. § 100.18. That is, even assuming that the “cartridges included” statements on the printer boxes could be deemed misleading, the statements could not have caused the consumers any losses if they did not see them.

Implied Warranty

¶3 Under WIS. STAT. § 402.314(3), an implied warranty “may arise from course of dealing or usage of trade.” Here, the consumers alleged that Hewlett Packard breached an implied warranty to provide full ink cartridges with their inkjet printers. They did not, however, present any materials to rebut Hewlett Packard’s affidavit describing the wide range of ink volume contained in ink cartridges throughout the industry or commonly provided with low-end inkjet printers. Indeed, the consumers themselves admitted that they had no specific expectations as to the quantity of ink the included cartridges would contain, and one of them had previously purchased a Canon printer that included a cartridge containing 50% less ink. The trial court properly found that the consumers’ bare allegation that there was an industry standard, without any materials to support that assertion, was insufficient to create a material issue for trial.

By the Court.—Judgment affirmed.

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

