

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**AUGUST 15, 1995**

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

**NOTICE**

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

**No. 95-0556-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

**WALTER F. TESCH and  
BETTY TESCH,**

**Plaintiffs-Respondents,**

**v.**

**BEST MOTORS, INC.,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Milwaukee County: LAURENCE C. GRAM, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Best Motors, Inc., appeals from a summary judgment in favor of Walter and Betty Tesch. The issues are: (1) whether Best Motors had a duty to disclose repairs made to a vehicle they sold to the Tesches; and, if they did, (2) whether the Tesches were entitled to rescission of the

contract. Pursuant to this court's order dated March 27, 1995, this case was submitted to the court on the expedited appeals calendar. See RULE 809.17, STATS. We conclude that Best Motors had a duty to disclose the repairs and that rescission is an appropriate remedy. We affirm.

The facts are not in dispute. The Tesches purchased a new 1991 Ford Mustang automobile from Best Motors on February 8, 1992. The retail price of the car, as listed on the automobile's sticker, was \$16,027. The Tesches purchased the car for \$14,000, including sales tax. Prior to the sale, the vehicle had been vandalized while on Best Motor's show lot. The culprits stole the tires, broke glass, and caused damage to the rocker panels. Best Motors repaired the damage, totalling \$4,031, but did not inform the Tesches about the damages prior to the purchase.

When the Tesches learned of the vandalism, they brought this action against Best Motors, arguing that Best had a duty to disclose the damages under WIS. ADM. CODE § TRANS 139.05(6) because the damages to the vehicle exceeded six percent of the manufacturer's suggested retail price. The trial court granted summary judgment in favor of the Tesches.

In reviewing an order for summary judgment, we follow the same methodology as the trial court. *Dobratz v. Thomson*, 161 Wis.2d 502, 513, 468 N.W.2d 654, 658 (1991). That methodology has been often stated and need not be repeated here. See *id.* at 513, 468 N.W.2d at 657-58. Summary judgment must be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

WIS. ADM. CODE § TRANS 139.05(6), provides:

DAMAGE DISCLOSURE. On any new vehicle or demonstrator or executive vehicle, any corrected damage exceeding 6% of the manufacturer's suggested retail price as measured by retail repair costs, and all uncorrected damage shall be disclosed in writing to the purchaser prior to delivery. Damage to glass, tires, or bumpers is excluded from the 6% rule when replaced by identical manufacturer's original equipment.

Best Motors contends that it did not have a duty to disclose the repairs made to the vehicle. Noting that "glass, tires, or bumpers" are excluded from the six percent disclosure rule when they are replaced by "identical manufacturer's original equipment," Best argues that the price of the tires should be excluded from the cost of the repairs it made to the vehicle, thus bringing the total repair cost to less than six percent of the suggested retail price. Acknowledging that it replaced the damaged tires with performance tires, rather than all season tires as listed on the vehicle sticker, Best contends that the tires were, in effect, identical to the original tires because the car comes equipped from the manufacturer with either of the two kinds of tires, regardless of what the automobile sticker indicates.

We agree with the trial court that Best Motors did not replace the damaged tires with "identical manufacturer's original equipment." The vehicle's sticker indicated that the car was equipped with all season performance tires when manufactured. Ford Motor Company records also indicate that the vehicle was manufactured with all season performance tires. According to a statement Walter Tesch made in a deposition, one of the reasons he bought the car was because of the all season tires. The performance tires, which were apparently of a lower quality than the all season performance tires, were not "identical manufacturer's original equipment." Therefore, Best Motors had an obligation to notify the Tesches of the corrected damages prior to the sale of the car because, when the cost of replacing the tires was included, the damages to the vehicle exceeded six percent of its suggested retail price.

Best Motors next argues that WIS. ADM. CODE § TRANS. 139.05(6) only requires disclosure of "corrected damage," while, in this case, the tires were completely removed, not damaged. Therefore, the cost of replacing the missing parts does not fall within the mandate of the six percent-disclosure rule. We reject this overly-technical reading of the rule. To accept Best Motor's interpretation would require differing results depending on whether, for example, automobile tires were punctured by vandals and, thus, "damaged," or whether the tires were completely removed. Common sense suggests that "damage" to a vehicle includes theft which results in removal of parts of the vehicle. This reading is in accord with the purpose of the rule—to protect consumers from unwittingly purchasing a vehicle which is no longer in the same condition as it was when it was manufactured.

Best Motors next argues that rescission was not the appropriate remedy because the breach of contract was "only ancillary or insubstantial." *See Appleton State Bank v. Lee*, 33 Wis.2d 690, 692, 148 N.W.2d 1, 2-3 (1967) (rescission is only appropriate where there is a substantial breach of contract). However, given that the cost of repairs (\$4,031) totalled approximately twenty-five percent of the list price of the automobile (\$16,027), we conclude that the breach was substantial and that rescission was an appropriate remedy.

*By the Court.*--Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.