

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 29, 2001

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. 01-1509-FT
STATE OF WISCONSIN**

Cir. Ct. No. 99-CV-312

**IN COURT OF APPEALS
DISTRICT IV**

MAYVILLE DIE & TOOL, INC.

PLAINTIFF-APPELLANT,

v.

WELLER MACHINERY COMPANY,

DEFENDANT-RESPONDENT,

FABRICATING & PRODUCTION MACHINERY, INC.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Dodge County:
JOHN R. STORCK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Mayville Die & Tool, Inc. appeals a summary judgment which dismissed its misrepresentation claims against Weller Machinery

Company.¹ The issues are: (1) whether the fraudulent advertising statute, WIS. STAT. § 100.18(1) (1999-2000),² applies to representations made between parties who have an ongoing business relationship and, if so, whether the economic loss doctrine precludes recovery under that statute, and (2) whether there are any material facts in dispute which would require trial on a common law negligent misrepresentation claim. Upon independently reviewing the pleadings and affidavits, *see State v. Dunn*, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997) (setting forth the standard methodology for our review of summary judgment determinations), we conclude that § 100.18(1) is inapplicable to the facts of this case, and that the record discloses no material dispute on the common law negligent representation claim.

¶2 We accept as true the facts most favorable to Mayville for the purposes of this appeal. Mayville asked one of its distributors, Weller, for assistance in locating a vertical boring mill. Weller contacted Fabricating & Production Machinery, Inc. (FPM), who located a used vertical boring mill in Romania. Weller forwarded FPM's specifications for the boring mill to Mayville. FPM represented that the machine in question had been manufactured in the 1980's, had hardly cut any chips, and was in excellent shape. Weller repeated some of FPM's representations to Mayville. Mayville agreed to buy the boring mill for \$86,000 plus delivery charges and sent FPM \$70,000 before receiving the machine. Upon the machine's arrival, Mayville discovered that it had several

¹ Mayville raised seven claims against Weller in its complaint, but only challenges the dismissal of two of those claims on appeal.

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

missing or damaged parts and appeared to have components which predated the 1980's. Mayville sued FPM and Weller under several breach of contract and misrepresentation theories, but withdrew some of its claims. The trial court ultimately dismissed Weller from the suit.

¶3 We first consider Mayville's attempted cause of action under WIS. STAT. § 100.18(1). That section provides in relevant part:

No ... corporation or ... employee thereof, with intent to sell ... any ... merchandise ... offered by such ... corporation or ... employee thereof, directly or indirectly, to the public for sale ... or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase ... of any ... merchandise ... shall make ... or place before the public, or cause, directly or indirectly, to be made ... or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such purchase ... of such ... merchandise ... which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

The term "public" is not limited to large audiences, and may be applied to statements made to an individual. *State v. Automatic Merchandisers of America, Inc.*, 64 Wis. 2d 659, 664, 221 N.W.2d 683 (1974). "The important factor is whether there is some particular relationship between the parties." *Id.* Here, Mayville and Weller had an ongoing business relationship which led Mayville to contact Weller for assistance in locating a vertical boring mill. We therefore conclude Mayville was not a member of the public within the meaning of the statute. In light of our decision that § 100.18 is inapplicable, we do not address

whether Mayville's cause of action under the statute would be precluded by the economic loss doctrine.

¶4 With regard to the common law negligence claim, we agree with the trial court's conclusion that the concession of Mayville's representative that Mayville knew Weller had no more information about the boring mill than Mayville had precludes recovery. That is, because Mayville understood that the allegedly false statements or assertions were not being made by Weller based upon any independent observation it made of the machine, but were merely being forwarded by it, Mayville cannot be said to have relied upon representations made by Weller.

By the Court.—Judgment affirmed.

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

