

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 11, 2008

David R. Schanker
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. 2008AP554

Cir. Ct. No. 2005CV88

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DENNIS CHRISTENSEN, M.D., D/B/A MADISON ABORTION CLINIC,

PLAINTIFF-APPELLANT,

v.

TDS METROCOM LLC,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
WILLIAM E. HANRAHAN, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 LUNDSTEN J. Dennis Christensen, d/b/a Madison Abortion Clinic, appeals the circuit court's order dismissing his statutory and common law misrepresentation claims against TDS Metrocom. According to Christensen, TDS misrepresented the amount of time it would take for TDS to switch over

Christensen's telephone service when Christensen moved his clinic. Christensen argues that the circuit court erred by granting summary judgment to TDS on his WIS. STAT. § 100.18(1) claim.¹ He also argues that the circuit court erred when it directed a judgment against him at trial on his common law claims. We reject Christensen's arguments and affirm the circuit court's order.

Background

¶2 In preparation for moving his clinic to a new location, Christensen had discussions with a TDS representative, Bill Peterson, about switching Christensen's six telephone service lines to TDS from another carrier. Peterson represented to Christensen that Christensen's telephone service would not be interrupted for more than one day and that the switch to TDS would take thirty minutes per line. Christensen's business depended heavily on operational telephone service, and Peterson's representations were a significant factor in Christensen's decision to change his telephone service to TDS.

¶3 On the day of the switchover, things did not go as Peterson said they would. Instead, the switchover took considerably longer. According to Christensen, it was not until approximately two to three weeks after the clinic's move that all of the phone lines began working properly, and it took even longer for his toll-free number to function.²

¹ All further references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² We recognize that TDS disputes some of the details as to when certain phone lines became available to Christensen or when certain aspects of the switchover were complete. Any such dispute is immaterial for purposes of our decision. There is no dispute that the switchover took considerably longer than TDS represented it would.

¶4 Christensen sued TDS, alleging misrepresentation under WIS. STAT. § 100.18. He also alleged common law claims for negligent misrepresentation, strict responsibility misrepresentation, and ordinary negligence.

¶5 TDS moved for summary judgment on all of Christensen's claims. The circuit court granted the motion with respect to Christensen's WIS. STAT. § 100.18 claim, but denied it with respect to Christensen's common law claims.

¶6 As to Christensen's common law claims, the circuit court granted TDS's motion for directed judgment at trial, concluding that Christensen failed to offer sufficient evidence to support those claims. Accordingly, the circuit court dismissed Christensen's action. We reference additional facts as needed below.

Discussion

A. Summary Judgment On WIS. STAT. § 100.18(1) Claim

¶7 Christensen first challenges the grant of summary judgment to TDS with respect to his WIS. STAT. § 100.18(1) claim. We review the grant or denial of summary judgment *de novo*, applying the same standards as the circuit court. *Novell v. Migliaccio*, 2008 WI 44, ¶23, 309 Wis. 2d 132, 749 N.W.2d 544. We need not repeat all of those standards here. It is sufficient to say that a party is entitled to summary judgment when there are no disputed material issues of fact and that party is entitled to judgment as a matter of law. *See id.* In addition, this case involves the application of § 100.18(1) to undisputed facts. This also presents a question of law for our *de novo* review. *See id.*, ¶24.

¶8 WISCONSIN STAT. § 100.18(1) is sometimes referred to as the “false advertising” statute. *See, e.g., Malzewski v. Rapkin*, 2006 WI App 183, ¶23, 296 Wis. 2d 98, 723 N.W.2d 156; *Kailin v. Armstrong*, 2002 WI App 70, ¶37, 252

Wis. 2d 676, 643 N.W.2d 132. The statute prohibits sellers from making “any assertion, representation or statement of fact which is untrue, deceptive or misleading.” *See* § 100.18.³ “[T]he purpose of § 100.18 is to deter sellers from making false and misleading representations in order to protect the public.” *Novell*, 309 Wis. 2d 132, ¶30.

¶9 A claim for misrepresentation under WIS. STAT. § 100.18 has three elements: (1) the defendant made a representation to “the public” with the intent to induce an obligation; (2) the representation was untrue, deceptive, or misleading; and (3) the representation caused the plaintiff a pecuniary loss. *K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 2007 WI 70, ¶19, 301 Wis. 2d

³ WISCONSIN STAT. § 100.18(1) reads, in full, as follows:

No person, firm, corporation or association, or agent or employee thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, securities, employment, service, or anything offered by such person, firm, corporation or association, or agent or employee thereof, directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, 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, sale, hire, use or lease of such real estate, merchandise, securities, service or employment or to the terms or conditions thereof, which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

109, 732 N.W.2d 792; *see also* WIS JI—CIVIL 2418. Only the second element is at issue here. TDS does not dispute that Christensen’s summary judgment submissions were sufficient with respect to the other two elements.

¶10 The underlying question Christensen presents is a narrow one: Did the circuit court erroneously dismiss Christensen’s WIS. STAT. § 100.18(1) claim because, viewing the facts most favorably to Christensen, Peterson’s representation that the telephone switchover “would not” take more than one day was “untrue, deceptive or misleading” within the meaning of § 100.18(1) because the switchover ended up taking approximately two to three weeks? According to Christensen, the proof that Peterson’s statement was “untrue, deceptive or misleading” is the fact that the switchover actually took substantially longer than represented. Christensen argues that the substantial delay in switching over the phones “constitute[s] a concrete refutation” of Peterson’s representation.

¶11 Notably, Christensen does *not* argue that the representation was “untrue, deceptive or misleading” because Peterson made the representation while knowing that switchovers sometimes take longer than expected. Similarly, Christensen does not argue on appeal that a violation of WIS. STAT. § 100.18(1) occurred because of a failure by TDS to disclose information. Indeed, Christensen expressly disclaims that his § 100.18(1) action depends on any nondisclosure or omission by TDS. Whatever debate may have occurred on that topic before the circuit court, Christensen does not pursue the matter on appeal.⁴

⁴ Although a nondisclosure is not an “assertion, representation or statement of fact” under WIS. STAT. § 100.18(1) and, thus, is not actionable under the statute, *see Tietzworth v. Harley-Davidson, Inc.*, 2004 WI 32, ¶40, 270 Wis. 2d 146, 677 N.W.2d 233, a nondisclosure of facts, *combined with* an affirmative representation that is undermined by the non-disclosed facts, may result in liability under § 100.18(1). In such situations, the existence of the undisclosed facts

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¶12 The only question we therefore address is whether the circuit court erred in granting summary judgment to TDS on Christensen’s WIS. STAT. § 100.18(1) claim because the fact that the switchover ended up taking approximately two to three weeks makes Peterson’s representation that the switchover “would not” take more than one day “untrue, deceptive or misleading” within the meaning of § 100.18(1).

¶13 Addressing the narrow question presented is complicated by the fact that Christensen chooses to challenge the circuit court’s ruling by focusing on the court’s reliance on the “pre-existing fact” rule. The general pre-existing fact rule provides that “in actions for deceit, the fraudulent misrepresentations must relate to present or pre-existing events or facts and cannot be merely unfulfilled promises or statements of future events.” *Hartwig v. Bitter*, 29 Wis. 2d 653, 656, 139 N.W.2d 644 (1966); *see also Lundin v. Shimanski*, 124 Wis. 2d 175, 192, 368 N.W.2d 676 (1985). The rule includes exceptions. For example, statements of opinion, including predictions of future events, are actionable when the speaker “knows of facts incompatible with [the] opinion.” *See Lundin*, 124 Wis. 2d at 192; *see also Hartwig*, 29 Wis. 2d at 658. Another exception provides that the

may show that the affirmative representation is untrue, deceptive, or misleading. *See MADCAP I, LLC v. McNamee*, 2005 WI App 173, ¶¶28-29, 284 Wis. 2d 774, 702 N.W.2d 16 (distinguishing *Tietzworth* and explaining: “We do not agree with Warehouse Rack that MADCAP is asserting that Warehouse Rack’s failure to disclose constitutes the actionable misrepresentation. Rather, the evidence of the actual size and nature of Warehouse Rack’s business is evidence, according to MADCAP, that the website’s affirmative representations are false.”). Regardless, here Christensen makes no such argument, and we also note that there is no significant factual development in the summary judgment submissions addressing Peterson’s or TDS’s knowledge about the frequency, duration, or circumstances of prior delays. The only evidence we find on this topic is Peterson’s averments that it was “rare” for a customer’s phone service to be down for more than one day and that switchovers are problem-free “probably 95 percent” of the time.

rule “does not apply where the promisor has a present intention not to perform.” *Hartwig*, 29 Wis. 2d at 658.

¶14 Although TDS defends the circuit court’s application of the pre-existing fact rule to WIS. STAT. § 100.18(1) claims, TDS’s underlying arguments do not hinge on whether that rule applies. Indeed, we conclude that, regardless whether the pre-existing fact rule applies in this context, Christensen’s argument fails.⁵

¶15 Accordingly, we return to Christensen’s narrow argument. Christensen relies on the following undisputed facts: 1) Peterson represented to Christensen that Christensen’s telephone service would not be down for more than one day and that the switchover would take only thirty minutes per line, 2) Peterson told Christensen that, if the switchover was initiated at 3:00 p.m. on the scheduled day, Christensen “should” have phone service by the end of the day, and 3) TDS failed to perform the switchover in a time frame even approximating the one that Peterson represented. These facts, Christensen argues, show that TDS

⁵ We agree with Christensen that TDS has not identified a single published Wisconsin case in which the pre-existing fact rule has been applied, either expressly or implicitly, to a WIS. STAT. § 100.18(1) claim. We also agree with Christensen that *Dorr v. Sacred Heart Hospital*, 228 Wis. 2d 425, 597 N.W.2d 462 (Ct. App. 1999), can be read as being inconsistent with the application of the pre-existing fact rule to § 100.18. In *Dorr*, the representation at issue was essentially a broken promise. A hospital promised not to seek certain payments from subscribers, but then later did so, and we concluded that a jury could find that the representation was “deceptive, misleading or untrue.” *Id.* at 445-46. We do not rely on *Dorr* here for two reasons. First, Christensen relies on *Dorr* only as a part of his argument that the circuit court erroneously applied the common law pre-existing fact rule, and we do not rely on that rule. Second, we are unable to discern *Dorr*’s reasoning on this topic. On its face, *Dorr* says that there could be a violation of § 100.18(1) because the hospital later attempted to collect payments it represented it would not collect. *See id.* at 446. This does not provide an explanation as to *why* the statement was “deceptive, misleading or untrue” when made. It may be that the unspoken reasoning was that a jury could infer that the representation was made with a current intention not to abide by it. Regardless, we do not find helpful guidance in *Dorr*.

made an “untrue, deceptive or misleading” representation under WIS. STAT. § 100.18(1). He contends that Peterson’s representation goes beyond mere puffery⁶ and that the failure to perform as represented is, *per se*, a misrepresentation under the statute.

¶16 We find no support in either the statutory language or the purpose of the statute for such a broad interpretation. When it comes to a telephone switchover, any reasonable consumer understands that there is at least some possibility that the task will not occur in the time frame specified. Consequently, any reasonable consumer would understand that Peterson’s representations, standing alone, were statements about how switchovers would most likely occur, not an absolute guarantee.

¶17 The statute is directed at false advertising and other misrepresentations, not breach of contract or failure to perform. Christensen’s argument blurs the line between the two. It would not matter under Christensen’s interpretation if TDS had always, until now, completed switchovers in the time represented, nor would it matter if some unforeseeable circumstance caused the delay.

¶18 Christensen argues that, at the very least, Peterson’s representation was “deceptive or misleading” because it led Christensen to hold a wrong belief about the switchover time. But this adds nothing to the arguments we have already rejected. This is nothing more than a different way of saying that a

⁶ “Puffery” is defined as “the exaggerations reasonably to be expected of a seller as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined.” *Tietzworth*, 270 Wis. 2d 146, ¶41 (citations omitted).

prediction violates WIS. STAT. § 100.18(1) any time it turns out to be wrong because, in retrospect, the prediction was wrong and therefore misleading.

¶19 Accordingly, we conclude that Christensen’s argument that TDS made misrepresentations within the meaning of WIS. STAT. § 100.18(1) is based on an unreasonable reading of the statute. It follows that Christensen’s § 100.18(1) claim was properly dismissed on summary judgment because the facts, viewed most favorably to Christensen, do not support the claim.

¶20 Our decision should not, of course, be read to mean that WIS. STAT. § 100.18(1) permits TDS to represent switchover times to its customers regardless of TDS’s past experience in making timely switchovers. We again emphasize, however, that Christensen makes no argument that TDS’s past experience is a relevant consideration in his case. Here, we decide only that the fact that TDS did not perform as represented is not, by itself, enough.

B. Directed Judgment On Common Law Claims

¶21 Christensen also argues that the circuit court erred in directing judgment in favor of TDS on his common law claims.

¶22 Christensen tried his common law claims to the court. Christensen did not call Peterson or any other TDS employee to testify. At the close of Christensen’s case, TDS moved for judgment pursuant to WIS. STAT. § 805.17(1).⁷

⁷ WISCONSIN STAT. § 805.17(1) provides:

MOTION AT CLOSE OF PLAINTIFF’S EVIDENCE. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his or her evidence, the defendant, without waiving his or her right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground

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TDS argued that Christensen failed to put forth sufficient proof for the court to find for Christensen on any of his common law claims.

¶23 The circuit court agreed with TDS. The court concluded that Christensen presented no evidence as to the standards of care underlying his common law claims. Specifically, the court concluded that there was no evidence of what Peterson or TDS knew or reasonably should have known or disclosed regarding the likelihood that TDS would not perform the switchover in the time represented. Accordingly, the court granted TDS's motion for directed judgment.

¶24 Christensen takes issue with the circuit court's conclusion, arguing that this conclusion was inconsistent with the court's previous conclusion on summary judgment that a fact finder could infer that TDS and Peterson failed to meet the standard of care for Christensen's common law claims based on the fact that the switchover took considerably longer than TDS represented. The most pertinent portion of the circuit court's summary judgment decision is as follows:

[F]rom the extraordinary disjunct between the represented and actual times of interrupted service, a reasonable jury could infer that TDS ..., *if* complicating factors justified the mammoth delay, was negligent in not communicating those factors to Dr. Christensen or at least in so egregiously understating the switchover time.... *If* Peterson did not in fact possess sufficient knowledge to communicate down time with reasonable accuracy, he should not have made the representations or should have taken reasonable

that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff on that ground or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in sub. (2). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section operates as an adjudication upon the merits.

measures in “ascertaining the facts” before making them. A reasonable jury could conclude that TDS breached its duty of reasonable care in this regard.

(Emphasis added; citation omitted.)⁸

¶25 We reject Christensen’s argument for at least two reasons. First, we disagree with Christensen that this portion of the circuit court’s summary judgment decision constitutes a clear ruling that a fact finder could infer that TDS failed to meet the applicable standards of care based solely on the fact that the switchover took considerably longer than represented. Assuming Christensen viewed the court’s decision this way, Christensen should have sought clarification or confirmation on this point at another time before or during trial. The language used by the court does not suggest that Christensen was free to forgo submitting evidence on the question of what TDS or Peterson knew or reasonably should have known or disclosed.

¶26 Second, Christensen failed to raise this issue when the circuit court orally granted TDS’s motion for directed judgment. If, in Christensen’s view, the circuit court was at that time erroneously overruling its prior summary judgment decision, Christensen should have objected and brought this issue to the circuit court’s attention. Christensen did not object. Accordingly, we consider the issue waived. *See Apex Elecs. Corp. v. Gee*, 217 Wis. 2d 378, 384, 577 N.W.2d 23 (1998) (issues not raised in the circuit court need not be considered for the first time on appeal).

⁸ The quoted excerpt actually comes from Christensen’s summary judgment brief, portions of which the circuit court adopted as its reasoning.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

