

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 6, 2009

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. 2008AP2009

Cir. Ct. No. 2006CV3226

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**WISCONSIN DAIRYLAND FUDGE CO. D/B/A SWISS MAID FUDGE AND
WISCONSIN DAIRYLAND FUDGE,**

PLAINTIFF-RESPONDENT,

v.

TRANSFORM, INC.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
RICHARD G. NIESS, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Transform, Inc., appeals an order awarding Wisconsin Dairyland Fudge Co. rescission of its contract with Transform for the purchase of office equipment. The issues are: (1) whether the trial court properly

determined that the contract was primarily one for goods, rather than services, and (2) if for goods, whether the trial court properly awarded Dairyland the remedy of rescission. We affirm.

¶2 Transform sold Dairyland a Toshiba “point of sale system,” which consists of computerized cash registers that also store business and employee records. The purchase price included approximately \$7,100 for the hardware and \$2,500 for programming, training, and implementation.

¶3 The system malfunctioned from the beginning, with the principal failure being its periodic inability to process credit card transactions. After several months the problems remained unresolved, despite Transform’s numerous efforts to repair the system, and Dairyland returned the hardware and demanded a full refund. Dairyland commenced this litigation when the parties were unable to resolve the refund dispute.

¶4 After a bench trial, the trial court held that the contract between the parties was for a mix of goods and services, but primarily for goods. The court found that the product was an “undisputed lemon,” that the defects in it were not incidental but substantially impaired the value of the system to Dairyland, and that Dairyland timely rescinded the contract after repairs proved futile. Consequently, the court determined that Dairyland was entitled to full rescission.

¶5 Transform first contends that the trial court should have construed the contract as one primarily for its service, rather than for goods.¹ Where, as

¹ The distinction matters because, in Transform’s view, Dairyland failed to meet the conditions for rescission of a service contract.

here, the parties enter into a contract for a mix of goods and services, courts determine the primary purpose of the contract by examining whether the predominant purpose is provision of service, with goods incidentally involved, or vice versa. See *Micro-Managers, Inc. v. Gregory*, 147 Wis. 2d 500, 507, 434 N.W.2d 97 (Ct. App. 1988). Whether a contract is primarily one for goods or for services is a question of law subject to independent review. *Ins. Co. of N. Am. v. Cease Elec. Inc.*, 2004 WI 139, ¶14, 276 Wis. 2d 361, 688 N.W.2d 462. On our independent review, we agree with the trial court that the contract was primarily for goods. The parties described it as the sale of a cash register system, and Transform's reimbursement for services involved in installation and training was small in proportion to the cost of the hardware. Although Transform contends that the true value of its labor far exceeded the billed price, a large portion of that labor was unanticipated when the parties entered into the contract because it was expended trying to repair the unforeseen defects. Consequently, no matter how much time was involved, Transform's repair efforts remained incidental to the purpose of the contract, which was providing Dairyland with a new cash register and account keeping hardware.

¶6 Transform next contends that the court erred by awarding the equitable remedy of rescission after determining that the contract was primarily for goods, because contracts primarily for goods are subject to the Uniform Commercial Code (UCC). See *Linden v. Cascade Stone Company, Inc.*, 2005 WI 113, ¶9, 283 Wis. 2d 606, 699 N.W.2d 189. However, if it was error to apply an equitable remedy to a UCC-governed contract, any such error was harmless.

Under UCC provision WIS. STAT. § 402.608 (2007-08)² rescission is available to the buyer of goods whose nonconformity substantially impairs their value to the buyer, the nonconformity is not “seasonally” cured, the buyer had no reason or ability to discover the nonconformity before purchase, and the buyer revokes acceptance within a reasonable time after discovery. The trial court made the findings of fact necessary to rescind under this provision, and Transform fails to show that any of those findings are clearly erroneous. *See* WIS. STAT. § 805.17(2). Although not identified as a rescission under the UCC, the court’s decision was its equivalent.

By the Court.—Order affirmed.

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

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

