COURT OF APPEALS
DECISION
DATED AND FILED

July 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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No. 95-2415
95-3127

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

No. 95-2415

DAVID THURIN, MARY ANN THURIN AND DCMM, INC.,

PLAINTIFFS-APPELLANTS,

V.

A.O. SMITH HARVESTORE PRODUCTS, INC., ABC INSURANCE COMPANY, GRITZ HARVESTORE COMPANY,

DEFENDANTS,

MID-WISCONSIN HARVESTORE SYSTEMS, INC.,

DEFENDANT-RESPONDENT,

GHI INSURANCE COMPANY,

DEFENDANT,

HEARTLAND HARVESTORE SYSTEMS, INC., DAIRYLAND HARVESTORE, INC., BADGERLAND HARVESTORE SYSTEMS, INC., BADGERLAND/DAIRYLAND HARVESTORE SYSTEMS, INC., BITUMINOUS INSURANCE

COMPANIES, CNA INSURANCE COMPANIES, MINNESOTA MUTUAL FIRE & CASUALTY COMPANY,

DEFENDANTS-RESPONDENTS,

SPECIALITY LINES UNDERWRITERS, SCOTTSDALE INSURANCE COMPANY AND STU INSURANCE COMPANY,

DEFENDANTS,

SECURA INSURANCE COMPANY,

SUBROGATED-PARTY.

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PLAINTIFFS-APPELLANTS,

V.

A.O. SMITH HARVESTORE PRODUCTS, INC., ABC INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS,

GRITZ HARVESTORE COMPANY, MID-WISCONSIN HARVESTORE SYSTEMS, INC., GHI INSURANCE COMPANY, HEARTLAND HARVESTORE SYSTEMS, INC., DAIRYLAND HARVESTORE, INC., BADGERLAND HARVESTORE SYSTEMS, INC., BADGERLAND/DAIRYLAND HARVESTORE SYSTEMS, INC., BITUMINOUS INSURANCE COMPANIES, CNA INSURANCE COMPANIES, MINNESOTA MUTUAL FIRE & CASUALTY COMPANY, SPECIALITY LINES UNDERWRITERS, SCOTTSDALE INSURANCE COMPANY AND STU INSURANCE COMPANY,

DEFENDANTS,

SECURA INSURANCE COMPANY,

DEFENDANT-SUBROGATED PARTY-PARTY.

APPEAL from orders of the circuit court for Vernon County: MICHAEL J. MCALPINE, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Eich, C.J., Roggensack and Deininger, JJ.

DEININGER, J. Plaintiffs David and Mary Ann Thurin, and their farm corporation, DCMM, Inc., appeal several orders which successively dismissed all of their claims against the various defendants in this case. As one of the parties correctly notes in its brief, the case has a long and convoluted history which cannot be summarized in uncomplicated fashion. At bottom, however, the Thurins complain on this appeal that the trial court erred in its conclusions regarding the application of statutes of limitation, the discovery rule, and the ***Sunnyslope*** doctrine[1] to the facts of record, and thus in granting summary judgments of dismissal in favor of all defendants. We reject the Thurins' arguments and affirm the trial court orders, except for the dismissal of the Thurins' claims against two dealers for breach of repair contracts. With respect to that cause of action against those two defendants, we reverse.

[1] ***Sunnyslope Grading, Inc. v. Miller, Bradford and Risberg, Inc.***, 148 Wis.2d 910, 437 N.W.2d 213 (1989).

BACKGROUND

David and Mary Ann Thurin operate a dairy farm in Vernon County through a corporation known as DCMM, Inc. The Thurins own the real estate while the corporation owns the personal property, including dairy cattle, feed, and farm equipment. In 1979, the Thurins purchased a Slurrystore System Model 6223, which is the subject of this litigation. The Slurrystore is manufactured by A.O. Smith Harvestore Products, Inc. (AOSHPI) and was sold to the Thurins by Gritz Harvestore, Inc. (Gritz), an authorized dealer of AOSHPI.

A Slurrystore System is a farm animal waste storage and fertilizer application system used to store and convert cattle manure and urine to a liquid fertilizer. In order to function, the Slurrystore System requires at least four components: (1) a tank to store the manure; (2) a reception pit to gather the manure from the barn; (3) pump(s) to agitate and remove the manure from the reception pit to the tank and then remove the manure from the tank; and (4) a vehicle to move the manure from the tank to the field for application. The objective of the system is to maximize recovery of nutrients within the manure for use on the farm as a fertilizer, thereby benefiting soil characteristics and increasing crop yields while eliminating the need to purchase fertilizer.

According to the Thurins, a salesperson from Gritz contacted them about the Slurrystore in 1978 and held himself out to be an expert in farm management techniques. The Thurins also claim they relied on promotional

materials distributed to farmers by AOSHPI.[2] Prior to purchasing the system, David Thurin attended two Slurrystore seminars in 1978 that were sponsored by Gritz and AOSHPI. Thurin contends that while at these seminars he approached an AOSHPI employee, informed him that the Thurins were using straw and lime in their dairy barn and was told by the AOSHPI employee that this was "no problem" and that the system would be able to function properly. The Thurins' expert testified at a deposition that the system, as designed and built, was incapable of being properly agitated when straw and lime are used. Essentially, the Thurins assert that the representations made by the Gritz salesperson and by AOSHPI representatives at the seminar led them to believe that the Slurrystore System would save them money on their farming operation over time.

The Thurins experienced problems with their Slurrystore System soon after it was installed in 1979. The main problem with the Thurins' Slurrystore was that it failed to maintain the manure and urine in a uniform liquid form, thereby requiring other measures to remove the solid waste. Various AOSHPI dealers worked with the Thurins over the years to rectify the problem, but the numerous solutions suggested by the dealers, such as replacing pumps or changing farming operations in some fashion, failed to alleviate the substantial problems incurred with the Slurrystore. In 1989 the Thurins "gave up" on the system, filing this lawsuit in 1990.

[2] In the publication, "The Winning System," copyrighted and distributed by AOSHPI, Harvestore salesmen were referred to as "farm management consultants" who obtained their knowledge through intensive training sponsored by AOSHPI on a regular and ongoing basis. The Thurins also claim to have relied upon advertisements of AOSHPI describing Harvestore representatives as "specialists in design and installation of automated feeding and manure handling systems" that are "backed up by A.O. Smith Harvestore Products, Inc." The Thurins maintain that advertisements like this, along with statements from the Gritz salespersons, caused him to expect continuous expert advice on the use and maintenance of the system.

In addition to AOSHPI and Gritz, the Thurins named the following as defendants in this action: Mid-Wisconsin Harvestore Systems, Inc. (Mid-Wisconsin); Heartland Harvestore Systems, Inc. (Heartland); Dairyland Harvestore, Inc. (Dairyland); Badgerland Harvestore Systems, Inc. (Badgerland); and Badgerland/Dairyland Harvestore Systems, Inc. (Badgerland/Dairyland). Gritz sold the Thurins their Slurrystore in 1979 and provided goods and services to support it until its assets were acquired by Mid-Wisconsin on June 29, 1981. Mid-Wisconsin purchased another Harvestore dealer, Heart O'Wisconsin Harvestore, Inc. in 1983, changed its corporate name to Heartland Harvestore, Inc. (Heartland), and thereafter continued to provide goods and services to the Thurins until it ceased operation in 1985. In November 1985, AOSHPI awarded Dairyland the franchise for the Vernon County Harvestore territory in which the Thurins' farm was located. In February 1987, Badgerland, another existing Harvestore dealer, merged with Dairyland to become Badgerland/Dairyland, an entity which then continued in business until June 1990. Louis Neuville held ownership interests, as well as corporate offices, in Mid-Wisconsin, Heartland, Dairyland, and Badgerland/Dairyland.

Several insurance companies are also defendants. Minnesota Mutual Fire & Casualty Company provided liability coverage to Mid-Wisconsin for the period 1981-83 and to Dairyland and Badgerland for some period prior to their merger in 1987. CNA Insurance Companies also provided coverage to Mid-Wisconsin for some period of time, and to Heartland prior to April 1, 1984. Bituminous Insurance Companies insured Heartland from April 1 through November 1, 1984; Dairyland from December 1, 1984, through December 1, 1985; and Badgerland from February 1, 1985, through February 1, 1986.

In their amended complaint of January 8, 1992, the Thurins alleged the following ten causes of action:

> (1) AOSHPI and Gritz were negligent in the design, manufacture and distribution of the Slurrystore System.
>
> (2) AOSHPI and Gritz disseminated false and misleading advertising regarding the system in violation of § 100.18, STATS.
>
> (3) AOSHPI and Gritz breached implied warranties of merchantability and fitness for the purpose intended regarding the Slurrystore purchased by the Thurins.
>
> (4) The equipment was defective and unreasonably dangerous, conditions for which AOSHPI was strictly liable.
>
> (5) Gritz and AOSHPI intentionally misrepresented the system in ten specific ways; Mid-Wisconsin, Heartland, Dairyland, Badgerland, and Badgerland/Dairyland continued to intentionally misrepresent the system in the "same or similar" ways in conjunction with attempts to repair the system; and Dairyland, Badgerland, Badgerland/Dairyland, and AOSHPI intentionally misrepresented that the Thurins could use and store sawdust in their barn for use with the system, and these defendants "failed to state that sawdust is subject to spontaneous combustion."
>
> (6) With respect to the various misrepresentations described in (5), the defendants were strictly liable for misrepresenting the system.
>
> (7) The defendants negligently misrepresented the system as described in (5).
>
> (8) The dealers, individually and as agents for AOSHPI, negligently repaired and maintained the system from 1979 until October 1989.
>
> (9) AOSHPI and the dealers, "individually and collectively" breached the initial Slurrystore purchase contract and the subsequent repair contracts.
>
> (10) AOSHPI, Badgerland, and Badgerland/Dairyland negligently advised the Thurins regarding the use and storage of sawdust, and negligently failed to warn them of sawdust storage characteristics, which led to a barn fire.

The complaint requested compensatory and punitive damages "against the defendants, and each of them," together with interest, costs, disbursements and attorney fees.

In December 1991, Badgerland, Dairyland and Badgerland/Dairyland filed a motion for summary judgment. In February 1992, the trial court ruled that Badgerland/Dairyland was entitled to summary judgment on all claims, except for the claim for negligent advice concerning the use and storage of sawdust. In its decision granting summary judgment, the trial court referred only to Badgerland/Dairyland. As a result, Badgerland and Dairyland both filed a Motion for Clarification of Summary Judgment Decision asking whether the court had also intended to include them in its summary judgment decision. The motion was heard on March 3, 1992, and the trial court clarified that its February 1992, summary judgment decision was applicable to both Badgerland and Dairyland in addition to Badgerland/Dairyland. The trial court entered an order to this effect on March 31, 1992. The Thurins and these three dealership defendants settled the only remaining claim (regarding the barn fire) by way of a ***Pierringer*** release[3] dated March 27, 1992. The settlement of the fire claims, in conjunction with the summary judgment granted in favor of Badgerland/Dairyland, Badgerland and Dairyland, amounted to a final adjudication of all claims against those three dealers. They were not dismissed as parties, however, until July 17, 1995.

AOSHPI also moved for summary judgment, and on February 27, 1992, the trial court entered an order granting AOSHPI partial summary judgment.

[3] ***Pierringer v. Hoger***, 21 Wis.2d 182, 124 N.W.2d 106 (1963).

The court dismissed the Thurins' claims of negligent design and manufacture, breach of contract, breach of implied and express warranty, strict product liability, advertising fraud and negligent advice (fire claim). The trial court, however, left the three common law misrepresentation claims intact (causes of action (5), (6) and (7)) with respect to AOSHPI. Additionally, Minnesota Mutual and Bituminous were granted summary judgment on all claims in February and March 1992. The Thurins appealed the orders dismissing Bituminous and Minnesota Mutual, and on December 2, 1993, this court reversed and remanded after concluding that the procedural requirements for summary judgment had not been met with respect to the motions filed by the two insurers. *See* § 802.08(2), STATS. On remand, the Thurins requested and were granted substitution of the original trial judge.[4]

On March 3, 1992, the trial court also entered default judgments against Mid-Wisconsin and Heartland, who had been named in the original summons and complaint, but had not appeared in the action. In an order dated September 10, 1992, however, the trial court vacated the judgments and dismissed Mid-Wisconsin and Heartland as parties for lack of personal jurisdiction, concluding that the Thurins had failed to exercise reasonable diligence in attempting personal service and that service by publication was ineffective to obtain jurisdiction over Mid-Wisconsin and Heartland. The Thurins then served registered agents of Mid-Wisconsin and Heartland on September 15, 1992, with a copy of both the original and amended summons and complaint. In October, Mid-Wisconsin and Heartland again challenged the service of process on jurisdictional grounds. In response, the Thurins, without obtaining the consent of the other

[4] Judge Michael McAlpine was substituted for Judge Michael Rosborough.

parties or leave of the court, filed another amended summons and complaint on October 8, 1992, in an attempt to bring Mid-Wisconsin and Heartland back into the lawsuit.

In 1995, Mid-Wisconsin, Heartland, Bituminous, Minnesota Mutual, and CNA, all moved for summary judgment. The Thurins moved for reconsideration of the summary judgment granted to Dairyland and Badgerland/Dairyland, but not of the summary judgment granted to Badgerland. In support of this motion, the Thurins filed two affidavits from expert witnesses and a third affidavit. Badgerland, Dairyland, and Badgerland/Dairyland filed a motion to strike the affidavits of the two expert witnesses and a portion of the third affidavit, which referred to a 1979 Dealer Council memorandum. These three dealers also moved the trial court to enter an order dismissing them from the litigation because a summary judgment had previously been granted to them on all claims except the barn fire claim, which had thereafter been settled with a ***Pierringer*** release of the dealers.

On July 17, 1995, the trial court issued an order which: (1) granted the dealers' motion to strike the affidavits; (2) denied the Thurins' motion to reconsider the previous summary judgment decision; (3) granted Badgerland, Dairyland and Badgerland/Dairyland's motion to dismiss; (4) dismissed Mid-Wisconsin and Heartland as parties for lack of personal jurisdiction; and (5) granted the summary judgment motions of Minnesota Mutual, CNA and Bituminous on statute of limitations grounds. The Thurins appeal this order as to all defendants except Badgerland.

The only claims remaining after the July 1995 order were the three misrepresentation claims against AOSHPI, the only remaining defendant.

AOSHPI thereafter filed a motion to reconsider the trial court's February 27, 1992 decision which denied summary judgment on the three misrepresentation claims. The Thurins opposed this motion and also sought relief from the portion of the July 1995 order which granted the dealers' motion to strike the affidavits. Specifically, the Thurins requested that the stricken information be permitted in any trial which might take place between themselves and AOSHPI. The trial court, in an order entered on September 25, 1995, granted summary judgment to AOSHPI on the remaining claims against it, but stated that the stricken affidavits could be used in any subsequent trial on the Thurins' claims against AOSHPI, should the summary judgment be reversed on appeal. The Thurins also appeal this order, and we have consolidated the two appeals.

ANALYSIS

a. Preliminary Matters

The Thurins do not challenge in this appeal the trial court's dismissal of certain claims with respect to several of the defendants. They acquiesce in the summary judgment granted in favor of Badgerland and its dismissal from the litigation. By the same token, the Thurins make no arguments regarding the trial court's dismissal of Mid-Wisconsin and Heartland on jurisdictional grounds. Accordingly, we affirm the appealed orders insofar as they dismiss these three dealers from the litigation. We address below the dismissal of the remaining dealer defendants, Dairyland and Badgerland/Dairyland.

The insurance company defendants successfully argued in the trial court that they can only be found liable on the Thurins' claims alleging negligence against their dealer-insureds. The Thurins do not argue otherwise on this appeal. The Thurins settled with and released those dealers allegedly involved in the

negligent advice claim involving the barn fire, the Thurins' tenth cause of action. Thus, with respect to Minnesota Mutual, CNA and Bituminous, we address below only the Thurins' claims against the dealer defendants alleging negligent misrepresentation and negligent repairs, causes of action (7) and (8) in the Thurins' amended complaint. We affirm the dismissal of all other claims against the insurers.

Finally, we note that there are several impediments to a straightforward analysis of the issues raised in this appeal. The first is simply the number of claims and the number of parties involved in the litigation and in this appeal. Our analysis of the case is further complicated by the fact that two different circuit judges made a series of rulings, each of which addressed only certain claims as they relate to certain parties.[5] Finally, and perhaps most troubling to our analysis, is the Thurins' failure to articulate clearly in their opening brief in this appeal why the record supports reversal of the summary judgments granted in favor of the several defendants on each of the various causes of action alleged in the amended complaint. For example, nowhere in their appellants' brief do the Thurins argue that the trial court erred in dismissing the barn fire claim (tenth cause of action) against AOSHPI, yet in their reply brief they attempt to argue that "[t]his claim remains, because AOSHPI participated in giving negligent advice and, even if it did not, is vicariously liable for the conduct of its agent." We conclude that the Thurins have abandoned the issue of

[5] While the Thurins appeal only Judge McAlpine's orders of July 17 and September 25, 1995, these orders, in part, revisit certain actions taken by Judge Rosborough in 1992 prior to his substitution. Moreover, the Thurins' appeal of the final orders of July 17 and September 25, 1995, bring before this court "all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon." Section 809.10(4), STATS.

AOSHPI's liability for the barn fire.[6] *See* ***In re Bilsie***, 100 Wis.2d 342, 346 n.2, 302 N.W.2d 508, 512 (Ct. App. 1981) (appellant may not discuss an alleged error in a reply brief if appellant has failed to do so in its main brief); ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 (Ct. App. 1981) (issue raised but not briefed or argued is deemed abandoned). And, since the Thurins also do not argue that the dismissal of the barn fire claim against Dairyland and Badgerland/Dairyland was error, we do not further address the barn fire claim (tenth cause of action) in this opinion.

In a footnote in their appellants' brief, the Thurins describe the relationships between the dealer defendants, from Gritz to Badgerland/Dairyland, and assert that "[a]s a matter of law, successor liability attaches in these circumstances." But the Thurins provide no further discussion or citation of authority for their apparent assertion that each of the dealers that attempted repairs to the Slurrystore is somehow responsible not only for its own acts, but also for those of all the dealers which preceded it, ostensibly including Gritz and its pre-sale representations. We will not consider arguments unsupported by references to legal authority. ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980). Moreover, Dairyland and Badgerland/Dairyland discuss in their respondents' brief, with citations to authority, why they should not be liable for the acts of any other dealers involved in this litigation, and the Thurins offer no refutation in their reply brief. Thus, we accept the dealers' independence from one another, and affirm the dismissal of all causes of action against Dairyland and

[6] In his order of February 27, 1992, Judge Rosborough concluded, with respect to the barn fire claim (tenth cause of action), that the record on summary judgment yielded no "genuine issue of material fact" with respect to AOSHPI's liability for the use of the sawdust and the barn fire.

Badgerland/Dairyland except those involving misrepresentations and repairs allegedly made by these two entities, as set forth in causes of action (5), (6), (7), (8) and (9) of the amended complaint. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.,*** 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979).

b. Standard of Review of Summary Judgments

We review an order for summary judgment de novo, owing no deference to the trial court. ***Waters v. United States Fidelity & Guar. Co.,*** 124 Wis.2d 275, 278, 369 N.W.2d 755, 757 (Ct. App. 1985). In reviewing a motion for summary judgment we use the same methodology as the trial court which we will not repeat "except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***M&I First Nat'l Bank v. Episcopal Homes Management, Inc.,*** 195 Wis.2d 485, 496-97, 536 N.W.2d 175, 182 (Ct. App. 1995); § 802.08(2), STATS. We will reverse a decision granting summary judgment if the trial court incorrectly decided legal issues or if material facts were in dispute. ***Coopman v. State Farm Fire & Cas. Co.,*** 179 Wis.2d 548, 555, 508 N.W.2d 610, 612 (Ct. App. 1993). We are prohibited, however, from deciding issues of fact and must only decide whether a factual issue exists. ***Id***.

c. Dismissal of Claims against AOSHPI

Judge Rosborough dismissed all but the three misrepresentation claims against AOSHPI. He did so because, with respect to the claims alleging negligent design and manufacture (1), strict liability for defective product (4), breach of contract (9), implied warranty (3), and negligent repair (8), he concluded that the record on summary judgment established that "the tank is the only important component of the system supplied by AOSHPI and … there is no

genuine issue of material fact as to whether it was defective." He also concluded that the claims of negligent design and strict liability for defect were barred under the ***Sunnyslope*** doctrine, and that the advertising fraud claim was barred by the statute of limitations. AOSHPI argues that the Thurins have abandoned any claims of error with respect to these rulings since the Thurins do not address these claims in their opening brief. The Thurins reply that "the statute of limitations as it relates to the consumer fraud claim is a part of this appeal" and that they "have addressed the ***Sunnyslope*** decision."

We have already noted the general failure of the Thurins to clearly articulate in their appellants' brief precisely which claims with respect to which defendants they are seeking to resuscitate in this appeal. Since a major part of their opening brief is devoted to statute of limitations issues, we will give the Thurins the benefit of the doubt that they intended to raise as an issue in this appeal the dismissal of their false advertising claim against AOSHPI (2), as well as the later dismissal of their three misrepresentation claims against this defendant ((5), (6) and (7)). The Thurins also devote a portion of their opening brief to the ***Sunnyslope*** issue, but their assertions are that the doctrine does not apply to misrepresentation claims, nor in the absence of a sale of goods. Thus, the Thurins do not address the application of ***Sunnyslope*** to their claims against AOSHPI for negligent product design and manufacture and for strict liability for defect, nor do they address the primary basis for Judge Rosborough's summary judgment in favor of AOSHPI on the non-misrepresentation claims: his conclusion that there was no genuine factual dispute that the Slurrystore tank sold to the Thurins was not defectively designed, manufactured or repaired by AOSHPI, and thus that it complied with the sales contract and warranties thereunder.

We therefore affirm the orders for summary judgment granted in favor of AOSHPI insofar as they dismiss the following causes of action against it: (1), (3), (4), (8) and (9). We do so because we conclude that the Thurins have abandoned any claims of error with respect to the trial court rulings on these claims, ***Reiman***, 102 Wis.2d at 306 n.1, 306 N.W.2d at 294, and even if not abandoned, the Thurins have inadequately briefed the issues relating to the dismissal of these claims against AOSHPI. *See* ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992) (we may decline to review an issue that is not adequately briefed).

We thus have left to consider the three misrepresentation claims ((5), (6) and (7)), and the advertising fraud claim (2), all of which were dismissed in the trial court for the Thurins' failure to commence their action against AOSHPI within the statutes of limitations for these claims. The parties agree that the limitation period on the misrepresentation claims is six years, and on the advertising claim it is three years.[7] The Thurins' argument that the trial court erred in dismissing these claims on statute of limitations grounds is twofold: AOSHPI should be estopped from asserting statutes of limitations defenses

[7] The misrepresentation claims are torts for which the Thurins have alleged they suffered property damage but not personal injuries. Section 893.52, STATS., specifies a six-year limitation "after the cause of action accrues" for these claims. Section 893.93(1)(b), STATS., also provides for a six-year limitation for actions grounded in "fraud," and further specifies that "[t]he cause of action in such case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud."

Section 100.18, STATS., which prohibits false and misleading advertising, contains a three-year period commencing as of "the occurrence of the unlawful act or practice which is the subject of the action." Section 100.18(11)(b)3. Although the Thurins argue that their statutory false advertising claim also "accrues at the time a party discovers a cause of action," they are wrong. ***Skrupky v. Elbert,*** 189 Wis.2d 31, 53-55, 526 N.W.2d 264, 272-74 (Ct. App. 1994) (limitations period for false advertising claims commences with the transaction itself and not with the discovery that the advertisement was untruthful).

because of its "fraudulent and inequitable conduct," and even if not so estopped, the claims to which the "discovery rule" applies did not accrue until 1989 when the Thurins finally gave up on attempting to repair the Slurrystore and decided to sue AOSHPI and the other defendants.[8]

The trial court addressed the discovery issue in its decision and order,[9] but did not specifically comment on the estoppel argument, although the Thurins did raise it in their briefs to the trial court. We first address the discovery/accrual issue not only because we have the benefit of the trial court's analysis of this issue,[10] but also because the concept of "reasonable diligence" on the part of the Thurins, which is central to the discovery issue, is also a consideration in the analysis of their estoppel arguments.

1. Accrual of the Misrepresentation Claims

The Thurins filed this action on August 2, 1990, and thus, if their misrepresentation claims against AOSHPI accrued before August 2, 1984, they are time-barred. The Thurins claim that the discovery rule justifies their delay in filing suit and contend that the trial court erred by granting summary judgment

[8] The Thurins concede that the "discovery rule" would not save their contract- and warranty-based claims but argue that the rule applies to their misrepresentation and false advertising claims. We agree that the discovery rule applies to the misrepresentation claims, but only the estoppel argument can save the false advertising claim. *See* n.7, above.

[9] We refer to Judge McAlpine's decision and order of July 17, 1995. Although that order addressed the statute of limitations issue only in relation to summary judgment motions filed by the insurers of several of the dealer-defendants, Judge McAlpine adopted the rationale of that decision by reference when he granted summary judgment to AOSHPI on the misrepresentation claims in the order of September 25, 1995.

[10] Even though we review the grant of summary judgment de novo, we may benefit from the trial court's analysis of the issues presented. ***Heier's Trucking, Inc. v. Waupaca County***, 212 Wis.2d 593, 598, 569 N.W.2d 352, 354 (Ct. App. 1997).

because the date of their discovery that they had been the victims of various misrepresentations regarding the Slurrystore is a question of fact for the jury.

Statutes of limitations ensure the prompt litigation of claims while protecting defendants from fraudulent or stale claims brought after memories have faded. *See* ***Korkow v. General Cas. Co.,*** 117 Wis.2d 187, 198, 344 N.W.2d 108, 114 (1984). Our supreme court has stated that a cause of action accrues:

> [W]hen there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it. A party has a present right to enforce a claim when the plaintiff has suffered actual damage, defined as harm that has already occurred or is reasonably certain to occur in the future.

Pritzlaff v. Archdiocese of Milwaukee, 194 Wis.2d 302, 315, 533 N.W.2d 780, 785 (1995) (citations omitted). In some instances, the discovery rule allows for the tolling of an otherwise applicable statute of limitations. *See* ***Hansen v. A.H. Robins, Inc.,*** 113 Wis.2d 550, 560, 335 N.W.2d 578, 583 (1983). Wisconsin adopted the discovery rule "for all tort actions other than those already governed by a legislatively created discovery rule." ***Id***. Under the discovery rule, a cause of action does not accrue "until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only the fact of the injury but also that the injury was probably caused by the defendant's conduct or product." ***Borello v. United States Oil Co.,*** 130 Wis.2d 397, 411, 388 N.W.2d 140, 146 (1986). The reasonable diligence requirement means that the plaintiff is required to exercise "such diligence as the great majority of persons would use in the same or similar circumstances" to discover their injuries. ***Spitler v. Dean,*** 148 Wis.2d 630, 638, 436 N.W.2d 308, 311 (1989). The requirement means that "[p]laintiffs may not close their eyes to means of information reasonably accessible to them

and must in good faith apply their attention to those particulars which may be inferred to be within their reach." ***Id***.

The Thurins allege that AOSHPI and Gritz made ten separate representations regarding the Slurrystore's characteristics and capabilities prior to their purchase.[11] The issue then is whether the Thurins discovered, or in the exercise of reasonable diligence should have discovered, that the pre-sale representations were false prior to August 2, 1984. Or, put another way, did the Thurins prior to August 2, 1984, possess information that, if appropriately investigated, would have led them to discover that these representations were false. The trial court answered this question in the affirmative, concluding:

> [The Thurins] continually were possessed with essential facts that had they diligently investigated could have allowed them to discover any negligent misrepresentation prior to August 2, 1984. The crucial or essential fact is that from installation on the farm in 1979 to August 1, 1984, a period of more than five (5) years, the Slurrystore never functioned as represented despite [the Thurins'] unsuccessful efforts, individually and through the dealer defendants.

[11] The ten allegedly false representations are: (1) that the Thurins would not ever need to use fertilizer after the Slurrystore was installed; (2) that no starter fertilizer would be necessary; (3) that the Thurins could apply 2,000 gallons of slurry per acre and get good corn; (4) that they could spread slurry on their growing alfalfa crop; (5) that by using certain items associated with the Slurrystore, the Thurins could obtain up to 96% usage of available fertilizer; (6) that the Thurins would obtain $70 fertilizer value from each cow and would realize better profits through fertilizer savings; (7) that the Slurrystore System would pay for itself in four to five years; (8) that it was appropriate and reasonable to use the Slurrystore in conjunction with straw bedding and lime; (9) that the Slurrystore would be maintenance-free and labor-saving; and (10) that the Slurrystore was a virtual "fertilizer factory."

The Thurins also allege the same ten representations were made by the other dealer defendants "continuously" up until October 1989. We discuss the misrepresentation claims as they apply to the only remaining dealer defendants, Dairyland and Badgerland/Dairyland, in a subsequent section of this opinion.

The trial court's conclusion was largely based on excerpts from David Thurin's deposition which reflected Thurin's knowledge that the Slurrystore "never" worked as intended:

> Q. And again the, as I understand when we had this discussion earlier, what the problem was there, is that you simply weren't able to inject the material into the ground in order to preserve it and then by spreading it on top you would lose the nutrient value of the liquid manure, is that basically it?
>
> A. I believe fair -- false. Now that's not all of it. Also false and misleading is the fact that the slurry would not work. It would not work the way they had told me it would work. It did not eliminate my need to buy fertilizer or, or purchase material. I think this is the part that was misleading and, and the fact of all the problems I've had with it.
>
> Q. Okay.
>
> A. I understand that as virtually buying something and that they would work for years.
>
> Q. All right. And in terms of the use, the need to use additional fertilizer, I mean, you knew within a year or two, any way, that you were still having to purchase additional fertilizer, right?
>
> A. Yes.
>
> Q. And the same thing with regard to the way the Slurrystore itself was working. I mean, you knew very quickly that in terms of it's [sic] mechanical operation it was not operating the way you had expected it to based on the representations that were made to you?
>
> A. That is correct.

The Thurins argue, however, that like the plaintiffs in ***Hines v. A.O. Smith Harvestore Prods., Inc.,*** 880 F.2d 995 (8th Cir. 1989), they should be relieved from a summary judgment granted to AOSHPI on a statute of limitations defense. The ***Hines*** court concluded that, given the plaintiffs' claim that AOSHPI and its agents had "lulled them into believing that the silos, while not presently performing as represented or warranted, could in fact be made to operate and

perform as promised," the question of when the plaintiffs knew or should have known that their silos were not performing as represented was a question of fact for the jury to decide. ***Id***. at 998. Additionally, the Thurins rely on ***Horn v. A.O. Smith Corp.,*** 50 F.3d 1365 (7th Cir. 1995), where certain farmers who had repeatedly confronted their Harvestore dealers when problems arose with their silos, and were consistently told that they were either chopping or storing their haylage improperly, obtained reversals of summary judgments grounded on statutes of limitations, while other farmers who had not complained to their dealers were denied relief:

> An ordinarily diligent farmer could interpret the dealer's comments to mean that once the haylage was chopped and stored correctly and the cows became accustomed to their feed, the dealer's projections would be met.

Id. at 1373.

The Thurins also point to our recent decision in ***Williams v. Kaerek Builders, Inc.,*** 212 Wis.2d 150, 568 N.W.2d 313 (Ct. App. 1997) for support of their assertion that the discovery issue in the present case should be put to a jury. In ***Kaerek Builders, Inc.,*** the plaintiff homebuyers claimed that a builder was negligent in constructing the basement of their home. The buyers noticed water seepage problems soon after construction and spent several years working with the builder to fix the problem. *See* ***id***. at 153-54, 568 N.W.2d at 314-15. After several years, the buyers finally contacted a waterproofing company to inspect their basement and learned that the builder had improperly constructed the basement. *See* ***id***. at 154, 568 N.W.2d at 315. The builder argued that the plaintiff's negligent construction action was time-barred, and the issue was when the plaintiff should have discovered the problem under the discovery rule. We agreed with the trial court's focus on "when the [plaintiffs] 'should have discovered' the cause of

their wet basement" but reversed the trial court's grant of summary judgment, concluding that the question was "a matter of *fact for the jury*." ***Id***. at 158-59, 568 N.W.2d at 316-17.

We acknowledged in ***Kaerek Builders, Inc.,*** that "in some cases this type of 'fact' could be appropriately resolved on summary judgment," but that the trial court had not done so because it "never pointed to a specific time during these six years when the [plaintiff homebuyers] should have come to the realization that they needed a second opinion." ***Id***. at 159, 568 N.W.2d at 317. The trial court had merely determined that the buyers should have known of the builder's culpability earlier than they did, largely because "the record [did] not conclusively reveal" when the plaintiffs should have discovered the cause of their basement water problems. ***Id***. Here, however, both the trial court's decision and the record on summary judgment clearly indicate that the Thurins knew or should have known that their Slurrystore was not performing as it had been allegedly represented to them within, at most, a year or two after its installation on their farm.[12]

We conclude that the Thurins were in much the same position as the plaintiff in ***Miles v. A.O. Smith Harvestore Prod., Inc.,*** 992 F.2d 813 (8th Cir. 1993), where the federal court of appeals affirmed a summary judgment in favor

[12] As we have noted above, the trial court, based on its review of the summary judgment submissions, concluded that "from installation on the farm in 1979 to August 1, 1984, a period of more than five (5) years, the Slurrystore never functioned as represented despite [the Thurins'] unsuccessful efforts, individually and through the dealer defendants," and that, therefore, the Thurins knew or should have known that the pre-sale representations were false during that time period. In fact, the record shows that there is no dispute that within "a year or two" of its installation in 1979, the Thurins were aware that the Slurrystore did not live up to the pre-sale representations. David Thurin testified in depositions that "I guess it starts from day one when the slurry wouldn't work the way they represented it"; that he knew "within a year or two" that he was "still having to purchase additional fertilizer"; and that he "knew very quickly that in terms of it's [sic] mechanical operation it was not operating the way [he] had expected it to based on the representations that were made."

of AOSHPI on a farmer's fraud claims against it because the applicable statute of limitations had expired. The court found no dispute of material fact, and concluded that the limitations period began to run when the appellant knew, from the time she put the Harvestore silos into service, that they did not operate as represented. ***Id.*** at 817. The court acknowledged that affirmative acts of concealment may toll a statute of limitations until the fraud is discovered or should have been discovered with reasonable diligence, but concluded:

> [H]arvestore took no steps to conceal the facts giving rise to appellant's cause of action. It would have been impossible for Harvestore to have done so--the evidence was in appellant's yard, in daily use for the feeding of her animals. Appellant by the exercise of reasonable diligence should have realized that Harvestore had misrepresented the qualities of the silos.

Id. at 816. The Thurins, like the plaintiff in ***Miles***, had immediate and obvious information that the product they purchased from AOSHPI was not meeting their expectations based on the seller's pre-sale representations. In contrast, the plaintiffs in ***Hines*** (moldy and spoiled feed) and ***Horn*** (decreased milk production) had only secondary and indirect indications that the Harvestore silos they had purchased were not living up to the sellers' representations.

Because the record on summary judgment shows that the Thurins knew or should have known from "day one," or at least within "a year or two," that their Slurrystore did not work as it had allegedly been represented to them, we conclude that the trial court did not err in its application of the discovery rule when it granted summary judgment to AOSHPI on the misrepresentation claims. *See* ***Stroh Die Casting Co. v. Monsanto Co.***, 177 Wis.2d 91, 103-04, 502 N.W.2d 132, 136-37 (Ct. App. 1993). Likewise, absent an estoppel, the three-year statute of limitations on the Thurins' claim against AOSHPI under § 100.18, STATS., expired several years before they commenced this action. We next consider

whether the Thurins may avail themselves of the doctrine of equitable estoppel in order to avoid summary judgment on these claims.

2. Equitable Estoppel of the Statute of Limitations Defense

The general rule is that a party asserting estoppel must plead estoppel when it has the opportunity, unless the facts constituting estoppel appear in the complaint. *See* ***Beane v. City of Sturgeon Bay,*** 112 Wis.2d 609, 622, 334 N.W.2d 235, 241 (1983). Several of the respondents argue that the Thurins' amended complaint fails to plead fraud with specificity in violation of § 802.03(2), STATS.[13] The Thurins reply that allegations of fraud and the elements of estoppel are contained in their allegations of intentional, negligent and strict liability misrepresentation against the various defendants. We conclude that the Thurins' amended complaint, although not specifically employing the words "fraud" or "estoppel," is sufficient in that it alleges specific acts of misrepresentation and reliance thereon by the Thurins. The purpose of the pleading requirement is to put defendants on sufficient notice to afford them an opportunity to prepare a meaningful response to a claim of fraud or estoppel. *See* ***Rendler v. Markos,*** 154 Wis.2d 420, 428, 453 N.W.2d 202, 205 (Ct. App. 1990). The amended complaint places AOSHPI and the remaining defendants on notice that they must defend against the Thurins' claims that they intentionally and actively misrepresented various matters relating to the operation and maintenance of the Slurrystore, and hence, we will consider the pleading sufficient to support an estoppel argument based on those allegations.

[13] Section 802.03(2) provides, in part: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

The test of whether a party should be estopped from asserting a statute of limitations is "'whether the conduct and representations of [the defendant] were so unfair and misleading as to outbalance the public's interest in setting a limitation on bringing actions.'" ***Hester v. Williams,*** 117 Wis.2d 634, 645, 345 N.W.2d 426, 431 (1984) (quoted source omitted). In ***State ex. rel. Susedik v. Knutson,*** 52 Wis.2d 593, 596-97, 191 N.W.2d 23, 25-26 (1971), the court set out six rules applicable to determining whether a defendant should be estopped from asserting a statute of limitations defense:

> (1) The doctrine of estoppel in pais may be applied to preclude a defendant who had been guilty of fraudulent or inequitable conduct from asserting the statute of limitations.
>
> ….
>
> (2) The aggrieved party must have relied upon the representations or the acts of the defendant, and as a result of such reliance failed to commence action within the statutory period.
>
> ….
>
> (3) The acts, promises or representations must have occurred before the expiration of the limitation period.
>
> ….
>
> (4) After the inducement for delay has ceased to operate the aggrieved party may not unreasonably delay.
>
> ….
>
> (5) Affirmative conduct of defendant may be equivalent to a representation upon which the plaintiff may to her disadvantage rely.
>
> ….
>
> (6) Actual fraud, in a technical sense, is not required to find estoppel in pais.

(Footnotes omitted.) The Thurins claim that they relied, to their detriment, on AOSHPI's false advertisements, and on the various dealers' subsequent false

assurances that a particular repair or change in farm management practices would cause the system to function as advertised, and thus AOSHPI should be estopped from asserting the statute of limitations regarding any claims against it.

The Thurins rely on ***Johnson v. Johnson,*** 179 Wis.2d 574, 508 N.W.2d 19 (Ct. App. 1993) for the proposition that inequitable conduct by a party asserting the statute of limitations, even if the conduct falls short of fraud, will suffice to bar a statute of limitations defense. The Thurins contend that AOSHPI's conduct and misrepresentations, along with those of its agent dealers outweigh the public's need for a time limit on actions. We concluded in ***Williams v. Kaerek Builders, Inc.,*** 212 Wis.2d 150, 162, 568 N.W.2d 313, 318 (Ct. App. 1997), that "the decision of whether to apply this equitable remedy was primarily *a matter for the circuit court.*" The Thurins argue that the trial court failed "to articulate the law and facts applicable to an exercise of discretion" on the estoppel issue because equitable estoppel was never addressed in the decisions of either of the circuit judges. The Thurins claim, therefore, that we must reverse on this issue, citing ***Hartung v. Hartung,*** 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981). We disagree.

We have acknowledged above that the trial court did not address the Thurins' possible avoidance by estoppel of the statutes of limitations defenses asserted by several of the defendants. We also confirm what we said in ***Kaerek Builders, Inc.***, that a decision to grant the Thurins equitable relief from the statutes of limitation is primarily a matter for the application of a trial court's discretion. Had the trial court addressed the issue, we would review its decision on the issue with an appropriately deferential standard of review. *See* ***Kaerek Builders, Inc.***, 212 Wis.2d at 162, 568 N.W.2d at 318. The case is before us on summary judgment, however, not following a trial. We are as able as the trial

court to review the summary judgment submissions to determine whether facts are present which would entitle the Thurins to avoid the statutes of limitations on equitable grounds, or at least to put the issue in dispute. After conducting such a review, we conclude that there is no basis for the Thurins to estop AOSHPI from asserting the statute of limitations on the record before us.

For the purpose of analyzing this issue, we will accept as true the following:

(1) The representations made to the Thurins by AOSHPI and Gritz, at the time of the purchase and sale of the Slurrystore, were false.

(2) All of the representations made by the dealer defendants following the sale with respect to the efficacy of their proposed repairs and recommendations in solving the problems the Thurins experienced with the Slurrystore were false, and all are attributable to AOSHPI for the limited purpose of determining whether AOSHPI may be estopped from asserting a statute of limitations defense regarding its pre-sale representations and advertisements.

(3) AOSHPI and the various dealer defendants knew, or should have known, that all of the representations made before and after the sale were false.

(4) The statute of limitations on the Thurins' advertising fraud claim against AOSHPI expired in 1982, three years after their purchase of the Slurrystore.

(5) The Thurins' claims against AOSHPI for misrepresentations prior to the sale of the Slurrystore expired no later than 1987, six years after the

Thurins knew, or should have known, that the pre-sale representations were false. (See our discussion of the discovery issue, above.)

(6) The Thurins relied on the false representations and assurances of AOSHPI and its "dealer-agents" between 1979 and 1988 that the recommended repairs and/or changes in management practices would allow the Slurrystore to live up to AOSHPI's pre-sale representations.

(7) The Thurins delayed commencing suit against AOSHPI until after the fall of 1989, when they finally "gave up" on the dealers' attempts to make the Slurrystore perform in accordance with AOSHPI's pre-sale representations. (Suit was commenced on August 2, 1990.)

To the extent that the Thurins have established in the record on summary judgment that there is evidence to support each of the foregoing propositions, they have established many, if not most, of the elements necessary to avoid a summary judgment against them on the estoppel issue. *See* ***Hester v. Williams***, 117 Wis.2d 634, 644-45, 345 N.W.2d 426, 431 (1984). In order to obtain equitable relief from a statute of limitations, however, the Thurins must show more than just reliance on the words or acts of AOSHPI and its agents in their election to forbear a lawsuit; they must show that their reliance was reasonable. ***Id.*** at 645, 345 N.W.2d at 431. The record is devoid of facts which would permit us to conclude that the Thurins' delay of some ten years in commencing suit was reasonable.

As we have noted above, the record on summary judgment establishes that the Thurins knew or should have known that AOSHPI's pre-sale representations and advertising materials were false within the first year or two after their Slurrystore purchase. It may well have been reasonable for the Thurins

to allow AOSHPI and the dealers to make one, or even several, timely attempts to rectify the deficiencies in the product that they purchased. Given the seasonal nature of farming activities, it may even have been reasonable for them to let one or two crop seasons go by before finally "giving up" on a product that was represented to them as a money- and labor-saving tool in their farming operations. We conclude, however, that it was unreasonable for the Thurins to continue to rely on dealer assurances of a cure for the obvious shortcomings of the Slurrystore for the better part of ten years.

In ***Kaerek Builders, Inc.***, 212 Wis.2d at 162, 568 N.W.2d at 318, we affirmed the trial court's conclusion that "the [plaintiff homebuyers] could not have reasonably relied on the Builder's representations that it was going to fix this problem, and therefore [they] had no legitimate reason for waiting to bring this claim." Similarly, we conclude here that the Thurins' reliance was not reasonable, and that they "should not have given [AOSHPI and the dealers] so many chances and should have started this action much sooner." ***Id***. at 163, 568 N.W.2d at 318. Under the circumstances before us, we conclude that the public policy in favor of extinguishing stale claims outweighs the desirability of requiring AOSHPI to answer for its alleged misrepresentations. Were we to rule otherwise, we would undermine incentives for plaintiffs to be "reasonably diligent" in exercising their rights, and instead, would encourage unreasonable delays in the commencement of lawsuits against those who commit civil wrongs. *Cf.* ***Klehr v. A.O. Smith Corp.***, 117 S. Ct. 1984, 1993 (1997) (holding that, in certain contexts, a plaintiff must demonstrate "due diligence" in order to obtain estoppel or equitable tolling of limitations period, since civil actions seek not only to compensate victims but to encourage them to diligently investigate and uncover unlawful activity).

We therefore affirm the dismissal of the remaining claims against AOSHPI, as set forth in causes of action (2), (5), (6) and (7) of the amended complaint.

d. Claims against Dairyland and Badgerland/Dairyland

We have affirmed above the dismissal of all claims against Dairyland and Badgerland/Dairyland (in this section, "the dealers," unless otherwise noted), except the following: intentional, strict responsibility and negligent misrepresentation in conjunction with attempts to repair the Slurrystore (5), (6) and (7); negligent repairs (8); and breach of repair contracts (9). These claims were dismissed by Judge Rosborough in his order of February 27, 1992, after he concluded that the dealers' only involvement was their efforts to repair the Thurins' Slurrystore; that the dealers could not therefore be held responsible for sale-related misrepresentations; and that the attempted repairs, although perhaps "unsuccessful," were not negligent.

The Thurins first argue that the summary judgment order of February 27, 1992, on its face, applied only to Badgerland/Dairyland, and that the court's subsequent order of March 3, 1992, which confirmed that the claims against Dairyland were also dismissed, constituted a new, separate and procedurally defective summary judgment in favor of Dairyland. The dealers respond that the court was either "shorthanding" three dealerships into one in the February 27th order, or that it was mistaken in referring to only Badgerland/Dairyland, because their motion for summary judgment expressly states that it was made on behalf of three dealers, the two presently under discussion plus Badgerland. Thus, the dealers assert that the March 3rd order was merely a clarification of the court's prior order. We agree. The dealers filed a

motion after the entry of the February 27th order entitled "Motion for Clarification of Summary Judgment Decision," and the following colloquy occurred at the March 3, 1992 hearing:

> THE COURT: Dairyland in effect is out of the trial, everybody agrees on that; right?
>
> [THE THURINS' COUNSEL]: That's correct. As I understand your order, the only thing we had left was the fire claim against Badgerland/Dairyland.

Since the Thurins acquiesced in the dealers' and the trial court's interpretation of the February 27th order, we will not now permit them to take a contrary position regarding the application of the February 27th order to their claims against Dairyland. *See* ***State v. Gove***, 148 Wis.2d 936, 938, 437 N.W.2d 218, 218 (1989) (concluding that a party who actively contributes to trial court action cannot claim the action was error on appeal).

On the merits of the dismissal of these claims against the dealers, the Thurins argue that the trial court overlooked the fact that they were claiming the dealers made misrepresentations regarding the efficacy of their proposed repairs in resolving the Slurrystore's performance problems: "If misrepresentations had not been made at the time the repairs were made, [the Thurins] would not have paid money to the dealers for the repairs." We have commented on several occasions above regarding the confusion created in the briefing of this appeal by the Thurins' failure to clearly articulate the basis for their challenges to the dismissal of various claims against the several defendants. It appears that similar confusion may have occurred during proceedings in the trial court. Be that as it may, we agree that the amended complaint can be read to support the Thurins' present assertions regarding the nature of their claims against the dealers, and that there is

sufficient evidentiary support in the record for their breach of contract claim against the dealers to survive summary judgment.[14]

Neither of the dealers performed any repairs on the Thurins' Slurrystore prior to August 2, 1984, so a statute of limitations defense is not available to the dealers regarding their actions in regard to their unsuccessful repair attempts.[15] The Thurins' articulation of their claim against the dealers, described in the preceding paragraph, makes it clear, however, that, at bottom, their complaint against the dealers is that they paid the dealers to provide equipment and to do repairs on their Slurrystore, none of which proved effective in causing the Slurrystore to perform as represented.[16] We conclude, therefore, that the Thurins' tort claims against the dealers were properly dismissed on summary judgment. Economic losses stemming from a commercial transaction are limited to contract remedies and are not recoverable under tort theories of negligence or strict liability. ***Sunnyslope Grading, Inc. v. Bradford & Risberg, Inc.,*** 148 Wis.2d 910, 437 N.W.2d 213 (1987). Economic loss is "damages resulting from

[14] The dealers moved to strike from the appellate record certain affidavits which the Thurins filed in support of their July 1995 motion to have Judge McAlpine reconsider the summary judgment previously granted to the dealers by Judge Rosborough in 1992. Judge McAlpine did not consider the affidavits when he denied the reconsideration motion, but later ruled that they could be admitted in any trial of the Thurins' claims against AOSHPI. We leave it to the trial court on remand to decide the status of the disputed affidavits and to what use they may hereafter be put. We have not relied upon those affidavits in deciding this appeal.

[15] We have noted above that Thurins' tort claims enjoy a six-year statute of limitations, and the same is true of their contract claim. *See* § 893.43, STATS.

[16] The record indicates that the dealers sold the Thurins a "three phase Flygt chopper pump" in August, 1986; a "pipe and valve" in October, 1986; a "Flygt pump and mast" in March, 1988; as well as supplying other parts, labor and recommendations during the years 1986 through 1988. The dealers apparently also installed a "center agitation system" for the Slurrystore in the fall of 1988, for which the Thurins had not yet paid as of February 24, 1992, the date of the hearing in the trial court on the dealers' motion for summary judgment.

inadequate value because the product 'is inferior and does not work for the general purposes for which it was manufactured and sold' … [and] includes both direct economic loss and consequential economic loss." ***Daanen & Janssen, Inc. v. Cedarapids, Inc.***, 216 Wis.2d 394, 399-400, 573 N.W.2d 842, 845 (1998) (quoted source omitted).

Thus, we affirm the dismissal of the Thurins' causes of action against the dealers for intentional, strict liability and negligent misrepresentations ((5), (6) and (7)), as well as their claim for negligent repairs (8). The Thurins argue that the ***Sunnyslope*** doctrine should not apply to the dealers because they were engaged in the provision of services to which the sale of pumps and various other products were only incidental. We disagree. In ***Micro-Managers, Inc. v. Gregory***, 147 Wis.2d 500, 507, 434 N.W.2d 97, 100 (Ct. App. 1988), we adopted the predominant factor test for distinguishing U.C.C.-governed sales contracts from service contracts, to which the U.C.C. does not apply:

> "The test for inclusion or exclusion [within the U.C.C.] is not whether [contracts] are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g. contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g. installation of a water heater in a bathroom)."

(Quoted sources omitted, alterations in original.)

We conclude that the predominant purpose of the transactions at issue in this case was the sale of the Slurrystore and related equipment. The gravamen of the Thurins' complaint against all of the defendants in this action is that the Thurins did not get what they paid for when they purchased a Slurrystore System in 1979, nor when they paid the dealers to install additional components and attempt repairs in the years thereafter. Their claimed damages are economic

loss,[17] and the backdrop for their claims against all of the defendants is a commercial transaction, the purchase of a Slurrystore. *See* ***D'Huyvetter v. A.O. Smith Harvestore Prods.,*** 164 Wis.2d 306, 326-29, 475 N.W.2d 587, 594-95, (Ct. App. 1991). The provision of repair services by the dealers was incidental to the purchase and sale of the Slurrystore and related equipment, and does not alter the overall commercial character of the transactions in question. We believe that we would reach a strange result if we were to conclude that the Thurins are limited to contract remedies for the recovery of their economic loss from the manufacturer and seller of the Slurrystore, but that they may pursue the dealers on both contract and tort theories to recover their costs in purchasing accessory equipment and repairs for the allegedly malperforming product.

The Thurins also argue that ***Sunnyslope*** does not apply to misrepresentation claims of any kind. Again, we disagree. We acknowledge that our holding in ***D'Huyvetter v. A.O. Smith Harvestore Prods.,*** 164 Wis.2d 306, 325-26, 475 N.W.2d 587, 594 (Ct. App. 1991), applied the ***Sunnyslope*** doctrine to strict liability and negligence claims per se, not to strict liability misrepresentation and negligent misrepresentation claims. We are, of course, also aware that in the

[17] The Thurins' amended complaint, except with respect to the negligent advice/barn fire claim, alleges no damage to persons or other property. Rather, the pleadings and other summary judgment submissions indicate that the Thurins claim damages for the amounts they paid for the Slurrystore and for the unsuccessful efforts to make it work as represented, together with consequential losses they sustained in their farming operations, such as the expense of manually removing manure from the Slurrystore tank, extra spreading, interest, etc. The Thurins argue on appeal that there is also evidence to support claims for injury to an alfalfa crop and health risks to their cattle stemming from the malperforming Slurrystore. We agree with the dealers, however, that, even if there is admissible evidence to support crop and cattle damage claims, those items would still constitute "economic loss" on the present facts. *See* ***D'Huyvetter v. A.O. Smith Harvestore Prods.,*** 164 Wis.2d 306, 327-28, 475 N.W.2d 587, 595 (Ct. App. 1991) (damage to feed and animals, allegedly caused by defective Harvestore silo purchased for farming operations, stem from failure of product to perform as expected and do not constitute injury to "other property").

same decision we set aside a directed verdict in favor of AOSHPI on a negligent misrepresentation claim; upheld a jury verdict finding AOSHPI guilty of intentional misrepresentation; and concluded that the trial court erred in submitting a verdict which did not allow the jury to reach a claim of strict responsibility for misrepresentation against a dealer. ***D'Huyvetter,*** 164 Wis.2d at 320-37, 475 N.W.2d at 592-598. We did not, however, hold in ***D'Huyvetter*** that ***Sunnyslope*** may not be applied to misrepresentation claims—the opinion is silent on this issue. It appears that the issue may be a matter of first impression in Wisconsin.

The United States Court of Appeals, Seventh Circuit, in analyzing the economic loss doctrine as it has developed in Wisconsin, has concluded that "Wisconsin would not permit [a tort cause of action for economic injury] when the parties have a contractual relationship and the injury is based on that relationship." ***Midwest Knitting Mills, Inc. v. United States***, 950 F.2d 1295, 1300-01 (7th Cir. 1991). Consistent with that reading of our state's case law, the Seventh Circuit has affirmed the dismissal of claims for negligent and strict responsibility misrepresentation made by one party to a marketing agreement against another party to the agreement, concluding that a Wisconsin court would do likewise. *See* ***Badger Pharmacal, Inc. v. Colgate-Palmolive Co.***, 1 F.3d 621, 628 (7th Cir. 1993). And, in ***Cooper Power Sys., Inc. v. Union Carbide Chems. & Plastics Co.***, 123 F.3d 675, 682 (7th Cir. 1997), the court adopted the ***Badger Pharmacal*** rationale in determining that intentional misrepresentations which "ultimately concern the quality of the product sold" are also barred under ***Sunnyslope***. The ***Cooper*** court specifically noted that this court's holding in ***D'Huyvetter*** is not to the contrary, and that: "'commercial disputes ought to be resolved according to

the principles of commercial law rather than according to tort principles.'"[18] ***Cooper Power Sys., Inc.,*** 123 F.3d at 682 (quoted source omitted); *see also* 682 n.5.

We find the Seventh Circuit's analysis persuasive, and accordingly, we affirm the dismissal of the Thurins' causes of action (5), (6), (7) and (8) against the dealers.

The only claim against the dealers which we have not yet addressed is the Thurins' ninth cause of action, alleging that the dealers "breached … repair contracts with the plaintiffs by failing to provide plaintiffs with the properly functioning Harvestore Slurrystore system and allied equipment and machinery."[19] Judge Rosborough's decision and order of February 27, 1992, which dismissed all claims against the dealers except the tenth cause of action relating to the barn fire, does not separately discuss the Thurins' breach of contract claim against the dealers. Unfortunately, the parties' discussion of the issue in this appeal is also scant. In their opening brief, the Thurins cite the alleged misrepresentations made by the dealers "at the time each of the repairs was made," which they claim induced them, on each occasion, to pay money for additional products and

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[18] We recognize that some federal courts have identified a type of fraud claim to which the ***Sunnyslope*** doctrine may not apply. *See* ***Raytheon v. McGraw-Edison Co., Inc.***, 979 F. Supp. 858, 870-73 (E.D. Wis. 1997). The alleged misrepresentations in this case, however, would not qualify for the "fraud in the inducement" exception to the economic loss doctrine because they go to "'the quality or character of the goods sold.'" ***Id.*** at 871 (quoted source omitted). The misrepresentations alleged by the Thurins are described in n.11, above.

[19] The Thurins conceded in the trial court that "Badgerland/Dairyland … is not liable for any breach of contract claim arising out of the *original* sales transaction by Gritz Harvestore in 1978. Hence, breach of contract relating to the original sales transaction *only* as against Badgerland/Dairyland or any of the other subsequent dealerships, is appropriately dismissed."

services. The Thurins do not, however, discuss the terms or conditions of any written or oral repair contracts they may have entered into with the dealers.

The dealers' entire treatment of the breach of contract claim consists of the following:

> Finally, if Thurin[s'] eighth and ninth causes of action, regarding negligent repair and breach of repair contracts, would have any validity, it would be limited only to the period of the dealership defendants' periods of corporate independence and only to damages incurred as a result of any ***proven*** deficient repairs. The trial court specifically found that ineffective repair does not necessarily constitute negligent repair and that Thurin had provided no evidence upon which to base a finding of negligent repair. Thurin does not challenge the trial court's finding on appeal.

In reply, the Thurins only assert once more that the dealers' repairs were indeed negligent.

We agree with the dealers and the trial court that ineffective repairs are not necessarily negligent repairs. Ineffective repairs may well constitute a breach of contract, however, depending, of course, on what the agreement between the parties was. We have concluded above that the dispute between the Thurins and these two dealers involves economic loss arising from a commercial relationship. On that basis, we have affirmed the dismissal of the Thurins' claims for negligent repairs and misrepresentations so that this dispute may be resolved, properly, under theories and remedies provided by the law of contracts. Our disposition on the breach of contract claim will permit that to occur. We cannot conclude on the record and arguments before us that there are no factual matters in dispute regarding the Thurins' claim for breach of repair contracts against the dealers. Thus, this claim against these defendants should not have been dismissed:

> A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such

> clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt.… If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it would be improper to grant summary judgment.

Grams v. Boss, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 477 (1980).

We have repeatedly noted above the analytical confusion in the briefs and record stemming from the multiple and overlapping claims and defendants involved in this case. On remand, there will remain only one issue and two defendants. We trust that the parties will be able to focus the trial court's attention on the facts and law relevant to whether the dealers breached any contracts of repair they may have entered into with the Thurins between 1985 and 1988, and if so, what damages the Thurins suffered as a result.

e. The Insurance Companies

As we have discussed above, the only claims remaining to be addressed against Minnesota Mutual, CNA and Bituminous are those for negligent misrepresentation and negligent repairs, causes of action (7) and (8) in the Thurins' amended complaint. We have also concluded above that, on the present facts, these claims are barred under the ***Sunnyslope*** doctrine. Accordingly, we affirm the summary judgment dismissing all claims against the three insurance company defendants.

The basis of the trial court's ruling limiting the insurers to liability for the negligent actions of the dismissed dealer defendants, a ruling which the Thurins do not challenge, was the "direct action" statute, § 632.24, STATS.[20] Our

[20] Section 632.24, STATS., provides as follows:

(continued)

disposition of this appeal permits a contract claim to go forward against two dealers, Dairyland and Badgerland/Dairyland. The trial court found Bituminous may have provided some type of insurance coverage to Dairyland during the period December 1, 1984, through December 1, 1985. The Thurins' amended complaint alleges that the other insurance company defendants also provided coverage to Dairyland during relevant time periods.

We doubt that any insurance coverage provided to Dairyland or to Badgerland/Dairyland extends to the contract claim which survives on remand. Nonetheless, and although we affirm the summary judgments granted in favor of the insurance company defendants, we direct that any of the remaining parties may move the trial court, within a reasonable time following remittitur and upon a showing that an insurer may be liable for damages on the Thurins' breach of contract claim against either Dairyland or Badgerland/Dairyland, for reconsideration of the dismissal of that claim with respect to any insurer.

CONCLUSION

For the reasons discussed above, we affirm the appealed orders in all respects except that the order granting summary judgment of dismissal to Dairyland and Badgerland/Dairyland on the ninth cause of action of the amended complaint, breach of repair contracts, is reversed. The case is remanded to the trial court for further proceedings consistent with this opinion.

> Any bond or policy of insurance covering liability to others for negligence makes the insurer liable, up to the amounts stated in the bond or policy, to the persons entitled to recover against the insured for the death of any person or for injury to persons or property, irrespective of whether the liability is presently established or is contingent and to become fixed or certain by final judgment against the insured.

By the Court.—Orders affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.