

WI Court of Appeals rules plaintiff can add new claims after remand

Authors: [David Ziemer](#)

Source: [Wisconsin Law Journal \(Milwaukee, WI\)](#), 12/21/2005.

Accession Number: L54148737WLJO

WI Court of Appeals rules plaintiff can add new claims after remand

Listen

American Accent ▼

Story Type: News

The **Wisconsin Court of Appeals** held on Dec. 13 that, where the Supreme **Court** dismissed a **plaintiff's** tort **claims** pursuant to the economic loss doctrine, the **plaintiff** must be allowed to amend his complaint to **add** contract **claims**.

On June 28, 2001, Steven C. Tietsworth filed a proposed nationwide class action against Harley-Davidson, Inc., alleging problems with the design, manufacture, and sale of a particular model of motorcycle.

Tietsworth's causes of action included: (1) a violation of sec. 100.18 (the "Deceptive Trade Practices Act" or "DTPA"); (2) negligence; (3) strict products liability; and (4) common-**law** fraudulent concealment. Tietsworth did not allege breach of contract or any warranty **claims**.

Harley-Davidson moved to dismiss the complaint on the basis that Tietsworth's **claims** were premature as they incurred no actual injury, either personal or economic. Harley-Davidson also argued that **plaintiffs'** tort **claims** were barred by the economic loss doctrine, and that the statutory fraud under sec. 100.18, and the common **law** fraudulent concealment **claims** should be dismissed for lack of particularity.

On Feb. 27, 2002, the trial **court** granted the motion to dismiss. Tietsworth appealed only the dismissal of its DTPA and the fraudulent concealment **claims**. The **court of appeals** reversed, and reinstated the

actions. *Tietsworth v. Harley-Davidson, Inc.*, 2003 **WI** App 75, 261 Wis. 2d 755, 661 N.W.2d 450.

The Supreme **Court** granted review, and reversed the **court of appeals**, holding that the economic loss doctrine bars the tort **claims**. The **court** wrote, "The **plaintiffs** may have contract remedies - breach of contract/warranty or rescission and restitution - but may not pursue a tort **claim** for misrepresentation premised on having purchased allegedly defective motorcycles."

Tietsworth v. Harley-Davidson, Inc., 2004 **WI** 32, par. 37, 270 Wis. 2d 146, 677 N.W.2d 233.

Other than reversing the **court of appeals**, however, the Supreme **Court** gave no further instructions on **remand**.

Upon remittitur to the circuit **court**, *Tietsworth* moved the trial **court** to reopen the matter pursuant to sec. 808.08(3), and for leave to amend the complaint pursuant to sec. 802.09, in order to pursue contract and warranty remedies.

Milwaukee County Circuit **Court** Judge Michael D. Guolee denied the motion, and dismissed the complaint, holding that a trial **court** may not allow amendment of pleadings **after** the Supreme **Court** has affirmed a judgment dismissing a case. *Tietsworth* appealed, and the **court of appeals** reversed in a decision by Judge Ted E. Wedemeyer, Jr.

The **court** first held that the trial **court** had authority under sec. 808.08(3) to grant the motion to reopen.

The statute provides that, when a remittitur is received in the trial **court**, a party may move for further proceedings within one year **after** receipt of the record.

The **court** found, "The mandate by the supreme **court** in this case simply 'reversed the decision of the **court of appeals**' and remanded the matter to the trial **court**. The Supreme **Court's** decision did not affirm a judgment of dismissal or direct that a judgment of dismissal be entered. The only trial **court** order, which this **court** reversed on **appeal**, was dismissal of the tort **claims**."

The **court** added, "This action involved a matter not specifically resolved by the Supreme **Court** and was not inconsistent with the mandate. The mandate left open the opportunity for the **plaintiffs** to pursue contract and warranty **claims**. The opinion itself suggested that this option was available as a remedy to the **plaintiffs**."

Harley-Davidson argued that, if the Supreme **Court** had intended to permit *Tietsworth* to have the opportunity to amend its complaint, it would have directed that the action be remanded for further proceedings. Rejecting the argument, the **court** noted that the Supreme **Court** cannot order a party to file an amended complaint.

The **court** distinguished *Sutter v. State*, 69 Wis.2d 709, 233 N.W.2d 391 (1975), in which the Supreme **Court** held that a party could not amend a complaint to include tort **claims after** losing on its contract **claims** in a previous trip to the Supreme **Court**. In *Sutter*, the case had previously been tried, while in *Tietsworth's* case, there had been no trial, but only motions and "seemingly unending appellate proceedings."

Thus, the **court** held that the trial **court** had authority to grant the motion to reopen, and should have.

The **court** further held, under sec. 802.09(1), the trial **court** should have granted the motion to amend the complaint. The statute provides that leave to amend a pleading "shall be freely given at any stage of the action when justice so requires."

The **court** reasoned, "At the time that *Tietsworth* filed the tort **claims**, the **law** was unclear as to whether those **claims** were viable under the dictates of the economic loss doctrine. The Supreme **Court** clarified the **law** in this area in its decision in that case. *Tietsworth*, 270 Wis. 2d 146, pars. 36, 37. The Supreme **Court** specifically stated that the economic loss doctrine would not bar *Tietsworth's* contract and warranty **claims** against Harley-Davidson. *Id.*"

For support, the **court** cited *Wussow v. Commercial Mechanisms, Inc.*, 97 Wis. 2d 136, 293 N.W.2d 897 (1980), in which the Supreme **Court** allowed amendment of a complaint to **add** a punitive damages **claim, after** the parties had settled the question of compensatory damages.

The **court** concluded, "There is no dispute that the amended complaint arises out of the same transaction or set of facts. There is no dispute that Harley-Davidson is well aware of the transactions at issue here and what *Tietsworth's* **claims** are. It has known since the date of the Supreme **Court's** decision in this case, March 26, 2004, that these **claims** exist and that the highest **court** in this state concluded that *Tietsworth* is entitled to pursue them."

Accordingly, the **court** reversed, and remanded with specific directions to allow *Tietsworth* to file an amended complaint asserting the contract and warranty **claims**.

(c) 2005 Dolan Media, all Rights Reserved.

Source: Wisconsin Law Journal (Milwaukee, WI), Dec 21, 2005

Item: L54148737WLJO

