COURT OF APPEALS DECISION DATED AND FILED

May 13, 2015

Diane M. Fremgen
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. 2013AP1103

Cir. Ct. No. 1999CV1200

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

FOXWOOD ESTATES HOMEOWNER'S ASSOCIATION, INC.,

PLAINTIFF-RESPONDENT,

V.

FOXWOOD ESTATES, LLC,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: KATHRYN W. FOSTER, Judge. *Affirmed and cause remanded with directions*.

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Foxwood Estates, LLC (the Developer), appeals from a judgment ordering that it convey to Foxwood Estates Homeowners Association (the Association) a thirty-acre parcel of land immediately adjacent to the Foxwood Estates subdivision, and awarding to the Association $332,953.25 in

attorney fees and costs in the amount of $10,699.98. The Developer challenges (1) the jury's finding that it was in breach of contract, arguing that the trial court should have dismissed this claim under the statute of frauds or that there was insufficient evidence to support the jury's verdict, and (2) the trial court's exercise of discretion in ordering specific performance as a remedy for the breach. The Developer further contends that (3) the jury instruction concerning the Association's WIS. STAT. § 100.18 (2013-14)[1] claim was flawed, and (4) for various reasons, the Association's misrepresentation claims should be dismissed.[2] We reject the Developer's arguments and affirm.[3]

¶2 In 1995, the Developer purchased property, part of which it subdivided into thirty-eight single-family homesite lots now known as the Foxwood Estates subdivision. The remaining property included a thirty-acre undeveloped parcel immediately adjacent to the subdivision (Land in Dispute). In

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] The Developer argues that the Association's misrepresentation claims are barred by the economic loss doctrine and that the Association failed to establish all elements necessary for its intentional misrepresentation claim. Given the jury's finding that the Developer breached its contract to convey the Land in Dispute and the trial court's order for specific performance, the court did not need to reach the availability of equitable relief based on the Association's misrepresentation claims. Appellate courts should decide cases on the narrowest possible grounds, *see* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997), and where one sufficient ground in support of the judgment has been declared, we need not discuss any other, *see* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938). We will therefore not address the Developer's arguments concerning the Association's misrepresentation claims.

[3] The Developer also asserts as a discrete claim that the Association is "not entitled to relief based upon [its] estoppel or quiet title claims." The Developer states: "It was the position of the homeowners that an order of specific performance 'ends this case.'" The Association responds that after the trial court granted specific performance, it sought no further relief because "the effect of granting specific performance *was* to quiet title to the Association." Indeed, the court did not grant equitable relief beyond specific performance, and we need not further address this superfluous claim.

marketing and selling the lots, the Developer made specific representations as to the Land in Dispute, both orally and in the documents distributed. As far as documents, the Developer provided prospective buyers with topographic and setback maps detailing the numbered lots and labeling the Land in Dispute as either "Outlot 1" or as "Outlot 1 [and] Outlot 2." The setback map was attached to the Declarations of Restrictions and Covenants (the Declarations) which were given to prospective buyers and became part of an actual buyer's purchase contract.[4] The Declarations expressly stated that the Association, not the Developer, would own the outlots.[5]

¶3 The Developer also provided prospective buyers with a brochure that referred to the secluded, natural feel of the subdivision, stating: "Foxwood Estates is an exceptional community designed and reserved for individuals who desire a lifestyle amidst the grandeur of nature, and who will appreciate the preservation of this natural habitat." The brochure included an aerial view showing the subdivision, including the Land in Dispute, bordered in red.

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[4] Lines 93 and 94 of the purchase contracts explicitly made the Declarations part of the contract by reference.

[5] The Declarations contained a section 2.18 entitled Common Area which stated:

> The following shall constitute the common area of the subdivision:
>
> (a) All outlots, conservancy areas, storm water detention areas and other common area owned by the Association as and shown on the Plat …."

The platted setback map attached to the Declarations showed the Land in Dispute as included in the outlots.

¶4 In 1998, one of the homeowners learned from a newspaper article that the Land in Dispute had been approved for multi-family housing. Upon further investigation, members of the Association learned that the maps they were provided as part of their purchase contracts differed significantly from the plat recorded with the register of deeds. The final recorded plat no longer showed Outlots 1 and 2 as including the Land in Dispute. Instead, both outlots were confined to a narrow sliver of land that had previously been labeled "Open Area." The Land in Dispute was now designated as "Unplatted Land—Owned by Developer." No homeowner was ever given or shown a copy of this map.

¶5 In 1999, the Association[6] filed suit, alleging various causes of action including breach of contract, misrepresentation, estoppel, declaratory judgment to quiet title, and a violation of WIS. STAT. § 100.18. Essentially, the complaint alleged that the Developer represented both orally and in writing that the Association would have title to the Land in Dispute, that these representations were part of the purchase contracts, and that the Developer breached the contract by retaining title of the Land in Dispute.

¶6 Prior to trial, the court divided the case into three phases. Phase one was on liability and would be tried to a jury. Phase two would be a determination by the trial court as to the available remedies. Phase three, if necessary, would determine damages. The first phase was tried to a jury in 2001. The verdict was sealed after the parties reached a contingent settlement and remained sealed for over ten years as the parties attempted to consummate their agreement.

[6] Various individual homeowners initially filed suit, but later assigned their claims to the Association. In the end, eleven homeowners assigned their claims to the Association.

Ultimately, the parties were unable to effectuate the settlement agreement, and at the request of the Association, the verdict was unsealed and read into the record in June 2012.

¶7 The verdict contained nine substantive questions, and the jury was instructed to answer the questions separately as to each of the eleven homeowners. On each substantive question, the jury found in favor of the Association with regard to at least one homeowner. The jury unanimously found that the Developer was in breach of contract as to all eleven homeowners (verdict questions 8 and 9), and that the Developer violated WIS. STAT. § 100.18 as to ten of the homeowners (verdict question 1). Questions 2 through 7 pertained to the elements necessary for common law misrepresentation and equitable estoppel; on these questions, as to a majority of the homeowners, the jury found that the Developer made untrue representations of fact concerning the ownership or use of the Land in Dispute under circumstances in which they should have known the untruth of such representations and that the homeowners believed and relied on the untruthful representations. With respect to one homeowner, the jury found that the Developer had committed intentional misrepresentation.

¶8 At the phase two hearing on remedies, the trial court considered the Developer's post-verdict motions and the Association's motion for equitable relief. The trial court ruled that the statute of frauds was satisfied under the "Equitable Relief" provisions of WIS. STAT. § 706.04. It further ruled that the jury verdicts were supported by sufficient evidence and that, as a result, the Association was entitled to specific performance conveying the Land in Dispute. The trial court also determined that the Association was entitled to attorney fees under WIS. STAT. § 100.18.

The Association's breach of contract claim was properly submitted to the jury, and the jury's verdict was supported by the evidence.

¶9 The Developer argues that the trial court should have dismissed the Association's breach of contract claim under the statute of frauds, or, in the alternative, that there was insufficient evidence to support the jury's verdicts on the breach of contract claim. Under the statute of frauds, *see* WIS. STAT. § 706.02, in order to be valid and enforceable, a contract to convey land must meet several prerequisites, including that it is in writing and identifies the parties, land, and the interest conveyed. However, WIS. STAT. § 706.04 provides conditions "under which a trial court may use equitable doctrines to enforce a promise to convey real estate." ***Lenhardt v. Lenhardt***, 2000 WI App 201, ¶7, 238 Wis. 2d 535, 618 N.W.2d 218. A request for specific performance is an equitable remedy which rests in the discretion of the trial court. ***Id***. at ¶6.

¶10 We conclude that the trial court properly determined that the Association established a colorable breach of contract claim under both WIS. STAT. §§ 706.02 and 706.04, and properly submitted the breach claim to the jury. As to §706.02, the accepted offers to purchase were signed and in writing and provided that the Declarations were made a part of the contract by reference. The Declarations provided that the "outlots" were part of the "common area" owned by the Association "as … shown on the Plat."[7] Attached to the Declarations was a platted setback map identifying the Land in Dispute as part of the outlots. This

[7] The recorded Declarations were different from those provided to the buyers and contained a section 2.24 entitled "outlots" which expressly stated that outlots 1 and 2 would "be conveyed to each Lot Owner and shall constitute common area and be maintenanced by the Association." In the set of Declarations provided to each lot owner and made part of the contracts, sec. 2.24 was shown as "intentionally omitted."

constitutes a writing that sufficiently identifies the land by "describ[ing] the property to a reasonable certainty."[8] ***Prezioso v. Aerts***, 2014 WI App 126, ¶23, 358 Wis. 2d 714, 858 N.W.2d 386 (citation omitted) (though the statute of frauds obligates the parties to identify the land affected with some specificity, a legal description is not required).

¶11 Additionally, the trial court properly exercised its discretion in granting equitable relief for a breach of contract under WIS. STAT. § 706.04. Section 706.04 authorizes the enforcement of a transaction "which does not satisfy one or more of the requirements of s. 706.02 … in whole or in part under doctrines of equity," if the "elements of the transaction are clearly and satisfactorily proved" and, as relevant to this case, if "[t]he party against whom enforcement is sought is equitably estopped from asserting the deficiency." WIS. STAT. § 706.04(3). Section 706.04 provides that equitable estoppel is shown where the party claiming estoppel has, in good faith reliance on the transaction, changed position to that party's substantial detriment "under circumstances such that the detriment so incurred may not be effectively recovered otherwise than by enforcement of the transaction," and the detriment was "incurred with the prior knowing consent or approval of the party sought to be estopped." Sec. 706.04(3), (3)(b).

¶12 Here, the elements of the transaction were proven. There is no dispute that the parties agreed to the underlying transaction, the sale of lots that included conveyance of any outlots to the Association, or that the transaction included the Declarations and setback maps labeling the Land in Dispute as Outlot

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[8] "Reasonable certainty" permits inquiry into "the facts and circumstances surrounding the parties at the time," and, consequently, "parol evidence is generally admissible to establish identity." ***Prezioso v. Aerts***, 2014 WI App 126, ¶23, 358 Wis. 2d 714, 858 N.W.2d 386.

1 or as Outlots 1 and 2. Moreover, the evidence was overwhelming that the Developer not only represented that these maps showed the Land in Dispute as part of the outlots, but also represented orally that this was the case. The jury found that the Developer's representations concerning the Land in Dispute were untrue and that the Developer's agents, on its behalf, made the untrue representations "based on personal knowledge or under circumstances in which they necessarily ought to have known the … untruth of such representations." The evidence was equally overwhelming that these representations materially induced the homeowners' decisions to purchase their lots. As to all homeowners, the jury agreed that they believed the representations to be true and acted in justifiable reliance on the representations when purchasing their lots. The trial court properly used the trial facts and jury findings as a basis for ordering specific performance under WIS. STAT. § 706.04.

¶13 We also conclude that the jury's verdicts on questions 8 and 9 are supported by credible evidence and should not be disturbed.[9] *See* ***Roehl Transp., Inc. v. Liberty Mut. Ins. Co.***, 2010 WI 49, ¶118, 325 Wis. 2d 56, 784 N.W.2d 542. The special verdict form contained two questions addressing the Association's breach of contract claim. Question 8 asked:

> Did Foxwood Estates, LLC enter into contracts with the following individuals, in which Foxwood Estates, LLC agreed to convey undivided interest in the Foxwood Subdivision 'Outlots' to the Homeowners Association?

[9] As will be addressed, the trial court instructed the jury to answer "yes" on question 8.

Question 9 asked:

> Did Foxwood Estates, LLC breach its contract with the following individuals by not conveying the land in dispute in this litigation to the Homeowners Association?

¶14 As to question 8, the parties agreed there was no factual dispute. The purchase contracts undeniably promised to convey outlots to the purchasers; the question for the jury was whether the outlots were conveyed pursuant to the platted setback map attached to the provided Declarations and which contained the Land in Dispute, or pursuant to the final recorded plat in which the outlots were small slivers excluded from the Land in Dispute.

¶15 There was also ample evidence supporting the jury's verdict on question 9, that the Developer breached the contract by not conveying the Land in Dispute. The Developer provided prospective buyers with two detailed maps, both of which labeled the Land in Dispute as either "Outlot 1" or as "Outlot[s] 1 [and] 2." The setback map attached to the Declarations and thus, the purchase contracts, portrayed the Land in Dispute as an outlot. The Developer also provided a marketing brochure that contained an aerial view of the subdivision which included the Land in Dispute. There was an abundance of testimony at trial that the Developer told homeowners that the outlots were unbuildable, were reserved for ownership or use by the Association, and/or that the Land in Dispute would not otherwise be developed. A number of homeowners testified that they walked through the property with the Developer carrying a copy of the map showing the Land in Dispute to be part of the outlots. When different homeowners specifically asked about the Land in Dispute, the Developer provided various assurances such as: they would have "an ownership in the lot as a lot owner in the Association"; it was "the detention pond area for the subdivision and

it was unbuildable"; the land was "unbuildable and environmentally sensitive"; or that the subdivision would own the Land in Dispute and it would serve as a very large buffer for the subdivision. One homeowner testified that he saw language in the offer to purchase referring to a "final plat" and, as a consequence, asked for a copy of the final plat as a condition of closing. At closing, the homeowner was provided a large map showing the Land in Dispute to be part of the outlots with the handwritten words "Final Plat" at the top. A forensic document examiner testified at trial to a reasonable degree of certainty that the handwriting was the Developer's.

¶16 The Developer argues that the trial court committed reversible error by directing the jury to answer "yes" on question 8. During deliberations, the jury submitted a written question asking why the term "Outlots" in question 8 was in quotations. After conferring with counsel, the trial court determined that there was no dispute that the Developer contracted to convey outlots to the Association and instructed the jury to answer "yes" to question 8 for each homeowner. The trial court further instructed the jury as follows:

> Having done that, that means you do need to go on and answer question nine. However, having done that, this court is not indicating in any fashion how you should answer question nine, and I direct you then to devote your attention to question nine taking into account the arguments that I am sure you understand to be the positions of the parties, the instructions, and certainly last but not least the evidence that was presented regarding that.

The Developer agrees that "yes" was the correct answer factually but contends that given the jury's question, it may have been confused over which parcel of land the term "Outlots" referenced. The Developer argues that if the jury believed that "Outlots" was synonymous with "Land in Dispute," there is a reasonable

possibility that the jury concluded that the trial court was ruling as a matter of law that the parties entered into a contract to convey the Land in Dispute.

¶17 We conclude that the trial court did not err. "When an appellate court reviews the evidentiary basis for a circuit court's decision to grant a directed verdict, the verdict must stand unless the record reveals that the circuit court was clearly wrong." ***Anthony Gagliano & Co. v. Openfirst, LLC***, 2014 WI 65, ¶30, 355 Wis. 2d 258, 850 N.W.2d 845. Here the parties agreed that, on the evidence presented, the only correct answer to question 8 was "yes." In determining how to respond to the jury's question, the trial court considered that, on the evidence and arguments presented, it was clear that the contract conveyed outlots to the homeowners and that the contested issue was whether the Developer had a duty to convey the Land in Dispute under the contract. To obviate the danger that the jury would misconstrue the directed verdict as requiring a finding that the contract promised to convey the Land in Dispute and, thus, that the Developer breached the contract, the trial court instructed the jury that its answer on question 8 should in no way affect its decision on question 9. Jurors are presumed to follow the court's instructions. *See* ***State v. Searcy***, 2006 WI App 8, ¶59, 288 Wis. 2d 804, 709 N.W.2d 497. Given the context of the case, the trial court's reasoning, and its cautionary instruction, the court's direction to the jury to answer "yes" to question 8 was not clearly wrong.

Specific performance was a proper remedy for the breach of contract.

¶18 The Developer argues that even assuming the existence of a valid and enforceable contract and a breach of that contract, the trial court erroneously exercised its discretion in ordering the remedy of specific performance. On appeal, the Developer asserts that the trial court "failed to conduct any legal or

factual analysis as to whether specific performance is fair and reasonable under the facts of this case" and did not consider:

> that the jury's finding for breach of contract, if allowed to stand, represents a claim on behalf of a distinct minority of the lot owners; to-wit: the jury found a breach of contract with regard to 9 of the 38 lot owners each having a 1/38 interest, at best, in the land at issue.
>
> In fact, given the 11 year period between the time this case was tried and the Special Verdict unsealed, only 4 of the nine lot owners listed in Special Verdict Questions 8 and 9, still reside in the Foxwood Estates Subdivision.

¶19 The decision whether to grant or deny the equitable remedy of specific performance lies within the trial court's sound discretion. ***Anderson v. Onsager***, 155 Wis. 2d 504, 513, 455 N.W.2d 885 (1990). As stated in ***Anderson***:

> While, as in all discretionary acts of a court, reasonable persons may sometimes differ in the outcome, all that this court need find to sustain a discretionary act is that the trial court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.

Id. at 514 (citation omitted). "[U]nless in the course of a trial court's exercise of discretion there are revealed factual or legal considerations which would make specific performance of the contract unfair, unreasonable or impossible, specific performance of a contract to sell land should be ordered as a matter of course." ***Id***. at 512-13.

¶20 We conclude that the trial court properly exercised its discretion in ordering specific performance. The judge, who also presided at trial in 2001, reviewed the parties' briefs seeking and opposing specific performance, reviewed portions of the trial testimony, and considered the arguments of counsel. The court properly concluded that an order for specific performance does not require a

predicate finding that legal damages would be an inadequate remedy. *See* ***Ash Park, LLC v. Alexander & Bishop, Ltd.***, 2010 WI 44, ¶¶45-46, 324 Wis. 2d 703, 783 N.W.2d 294. Regardless, the trial court considered but rejected damages as a remedy:

> We could go into monetary damages, which is another alternative. We can get [the Association's retained expert] here, but then … as the defendant pointed out … people have moved, they don't own the property anymore. Do we do it in dollars from 2001 or today's dollars? The entanglements of that are substantial, I believe, and not necessarily geared to do exactly what was bargained for here. It is a quality of life issue in many respects and, yes, you can assign dollars and cents, and we do that all the time in extreme injury cases, malpractice cases, you name it, when that is the only option.
>
> This is not the only option. Specific performance is an option. …

The trial court also considered but rejected the Developer's argument that conveying the Land in Dispute would be impossible and, in fact, the Land in Dispute has since been conveyed to the Association.

¶21 Contrary to the Developer's assertions, the trial court did consider its equitable arguments in determining the propriety of specific performance. Concerning the passage of time owing to the parties' settlement efforts, the court recognized that the pursuit of an agreement "was done voluntarily, and it could have been stopped at any time because either party could have come back to the Court and said we don't want to pursue this." The court acknowledged that circumstances had changed and that some of the homeowners who assigned their claims to the Association had since moved out of the subdivision, but determined that in the context of this case, the intervening time was "neither here nor there." The court explained that "we know what hasn't changed in reality is the land" and

determined that "The fact that there are plaintiffs who may no longer reside there or not, simply doesn't drive this Court's decision in terms of what the appropriate remedy is." Along these lines, the trial court considered that a minority of the subdivision's homeowners were part of the lawsuit but determined that:

> [T]he evidence here supports in effect giving the plaintiffs albeit a representative number of the homeowners what they bargained for, what they thought they were going to get. This Court doesn't need to speculate what the other 29 homeowners thought, what they cared about, etc. The Homeowners Association, as representative of them, has chosen to pursue this. …

The trial court concluded:

> Specific performance seems to be the most equitable resolution of a case in which the jury may not have found fraud and deceit in every vein, but it certainly found that the individuals didn't get what they bargained for because of the errors, the mistakes made by the defendant. That is what the verdicts speaks in my mind loudly and clearly to, whether you have 3 or 4 or … 9. And whether or not some happened outside the statute of limitations or repose or not, they all offered I think what would otherwise be 904.04(2) testimony about the practices and the modus operandi of the collective defendants in terms of what it took to sell this particular real estate and what at that time was a competitive market.

¶22 Finally, we reject the Developer's argument that the Association lacked standing to pursue equitable relief. We agree with the analysis in the Association's brief determining that the cases cited by the Developer do not support this proposition. The Developer's reply brief neither responds to the Association's position nor restates this claim of error. The Developer fails to provide and we are not aware of any authority holding that the Association, as assignee, cannot pursue specific performance for breaches of the contracts held by its assignors.

The jury properly found that the Developer violated WIS. STAT. § 100.18.

¶23 The Developer argues that owing to the form of the special verdict questions, the jury did not find in favor of the Association on all elements of its fraudulent representations claim. To prevail on a WIS. STAT. § 100.18(1) claim, the plaintiff must prove that (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 109, 732 N.W.2d 792.

¶24 In this case, the jury answered "yes" to question 1 of the verdict form,[10] which asked:

> Did Foxwood Estates, LLC make any oral statement or distribute to any of the following individuals a brochure, handout, map or survey concerning the marketing of lots in Foxwood Estates subdivision which contained a representation or statement that was untrue, deceptive or misleading?

¶25 Before submitting the case for deliberations, the trial court specifically instructed the jury that this claim required that the Developer's representations were made with the intent to induce the purchase of lots in the subdivision:

> The representation or statement need not be made by the defendant with the knowledge as to its falsity or with the

[10] The jury answered "yes" with respect to ten of the eleven homeowners. On motions after the verdict, the Association agreed that four of these homeowners' claims were barred by subsequent developments in Wisconsin case law. *See* ***Kain v. Bluemound East Indus. Park, Inc.***, 2001 WI App 230, ¶19, 248 Wis. 2d 172, 635 N.W.2d 640 (holding that WIS. STAT. § 100.18 is a statute of repose).

> intent to defraud or deceive so long as the defendant made it or delivered it with the intent to sell lots in Foxwood Estates, or with an intent to induce the purchase of lots in Foxwood Estates.

The developer did not object to either the verdict question or the jury instruction at the instruction conference. On appeal, the Developer contends that due to the wording of the special verdict question, there were no jury findings concerning whether the Developer made a representation to the public "with the intent to induce an obligation" or if "the representation caused the plaintiff a pecuniary loss."

¶26 We conclude that, pursuant to WIS. STAT. § 805.13(3), the Developer's failure to object at the instruction and verdict conference "constitutes a waiver of any error in the proposed instructions or verdict." *See also* ***LaCombe v. Aurora Med. Group, Inc.***, 2004 WI App 119, ¶5, 274 Wis. 2d 771, 683 N.W.2d 532 (this court has "no power to review waived error of this sort").

¶27 We also decline the Developer's request to use our WIS. STAT. § 752.35 discretionary reversal authority to reverse the judgment and either dismiss this claim in the face of the jury's verdict or to remand "with appropriate instructions on the § 100.18 claim." Here, the Developer argues that the real controversy in issue was not fully tried because the jury did not make findings on two elements of the Association's claim (intent to induce and pecuniary loss) and in light of the jury's verdict on question 7, in which it determined that there was no "intent to deceive and induce" with regard to all but one of the homeowners.

¶28 "The form of the special verdict is within the sound discretion of the trial court and will not be interfered with if the material issues of fact are encompassed within the questions asked and appropriate instructions given."

Murray v. Holiday Rambler, Inc., 83 Wis. 2d 406, 425, 265 N.W.2d 513 (1978). With respect to the verdict in issue, the trial court instructed the jury that the Association had to prove that (1) the Developer made representations concerning the sale of lots in the Foxwood Estates subdivision; (2) the representations were untrue, deceptive or misleading; and (3) the Developer made the representations "with the intent to sell lots in Foxwood Estates, or with an intent to induce the purchase of lots in Foxwood Estates." Regardless of the fact that the verdict question did not contain the words "intent to induce," the trial court's instruction made it clear that the jurors should not answer "yes" unless they found that the representations were made with the requisite intent to sell or induce. The jury was thus instructed on all of the elements. Additionally, that the representations were made with the intent to sell is encompassed within the verdict's reference to "marketing of lots in Foxwood Estates subdivision." [11] Similarly, that the verdict did not ask the jury to find that the Developer's untrue, deceptive or misleading representations caused the Association pecuniary loss does not persuade us that the real controversy was not fully tried. It is clear that the Developer's failure to live up to its representations caused the Association to lose a thirty-acre parcel of land, which is indisputably a pecuniary loss. The jury's answer to question 5 found that all of the homeowners who assigned their claims to the Association "justifiably rel[ied] upon [the Developer's] representations in the purchase of their

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[11] On motions after verdict, the trial court concluded:

> I think it is superfluous to say that all of these documents were created for no other purpose than to sell property. There is no other result that can be garnered from the record in this case or just observing the documents themselves. They were prepared as an inducement for sale.

lots." The jury was neither asked nor required to quantify the pecuniary loss because the trial court granted equitable relief.

¶29 That the jury answered "no" to all but one homeowner's claim on question 7 does not change our decision. That question required the jury to find that the representations were made with the specific "intent to deceive" the homeowners, not an intent to induce the public to purchase real estate.[12] Similarly, it is immaterial that some of the Homeowners' claims were barred by the statute of repose. The individual claims were assigned to the Association and six of the ten claims for which the jury answered "yes" on question 1 were not time barred.

¶30 Finally, the Association asks that we remand this case to the trial court for an award of its appellate attorneys' fees pursuant to WIS. STAT. § 100.18(11)(b)2. A party who prevails on appeal in a misrepresentation case brought under § 100.18 is entitled to reasonable appellate attorney fees. ***Radford v. J.J.B. Enters., Ltd.***, 163 Wis. 2d 534, 551, 472 N.W.2d 790 (Ct. App. 1991). We therefore remand the matter to the trial court for a determination of reasonable appellate attorney fees.

[12] Indeed, the trial court specifically instructed the jury that the Developer need not have made the representation "with the intent to defraud or deceive."

By the Court.—Judgment affirmed and cause remanded with directions.

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