COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 2010

A. John Voelker
Acting 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. 2009AP1195

Cir. Ct. No. 2008CV547

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

NINA STAPEL,

PLAINTIFF-APPELLANT,

V.

ALBERDINA STAPEL AND RUDOLPH STAPEL,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sheboygan County: GARY LANGHOFF, Judge. *Affirmed*.

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Nina Stapel has appealed from a judgment dismissing her amended complaint against the respondents, Alberdina Stapel and her son, Rudolph Stapel. In awarding judgment, the trial court granted motions for summary judgment filed by Alberdina and Rudolph, and denied a motion for

summary judgment filed by Nina. We conclude that the trial court properly granted summary judgment to Alberdina and Rudolph and affirm the judgment.

¶2 When reviewing a grant of summary judgment, we apply the same methodology as the trial court and decide de novo whether summary judgment was appropriate. ***Turner v. Taylor***, 2003 WI App 256, ¶7, 268 Wis. 2d 628, 673 N.W.2d 716. We first examine the pleadings to determine whether a claim for relief has been stated and whether a genuine issue of material fact is presented. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶21, 241 Wis. 2d 804, 623 N.W.2d 751. If the pleadings state a claim and demonstrate that material factual issues exist, our inquiry shifts to the moving party's affidavits or other proof to determine whether a prima facie case for summary judgment has been presented. ***Id.***, ¶22. If the moving party has made a prima facie case, the affidavits or other proof of the opposing party must be examined to determine whether there exist disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to trial. ***Id.***

¶3 Merely alleging a factual dispute will not defeat an otherwise properly supported motion for summary judgment. ***Helland v. Kurtis A. Froedtert Memorial Lutheran Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). The party that opposes a summary judgment motion must set forth specific evidentiary facts showing that a genuine issue exists for trial. *See* ***id.*** "It is not enough to rely upon unsubstantiated conclusory remarks, speculation, or testimony which is not based upon personal knowledge." ***Id.*** If a determination of law will conclude the case, summary judgment should be granted. ***Northwest Eng'g Credit Union v. Jahn***, 120 Wis. 2d 185, 187, 353 N.W.2d 67 (Ct. App. 1984).

¶4 In her amended complaint, Nina alleged that in 1980, she and Rudolph were married, employed, and living in Montana. Nina alleged that they were contacted by Rudolph's parents, Alberdina and Lukas, who requested that they return to Wisconsin to operate the family farm. Nina alleged that Lukas and Alberdina promised that if they did so, Rudolph and Nina would have the option of buying the farm in the future. Nina alleged that in reliance upon this promise, she and Rudolph terminated their employment and returned to Wisconsin where they commenced operating the farm in January 1981. Nina also alleged that in 1981, Lukas and Alberdina executed an option (the 1981 option) which gave her and Rudolph the option to purchase the farm on or before December 31, 1988 for $213,700.

¶5 Nina alleged that from 1980 to 1996, when Lukas died, Lukas and Alberdina represented to Nina and Rudolph that they would have the right to buy the farm in the future, and that Alberdina made similar representations from 1996 to 2006. Nina alleged that in reliance on the representations that they would have the right to buy the farm in the future, she and Rudolph made substantial improvements to the farm property in 1981 and thereafter, and Lukas and Alberdina knew of these improvements and recognized them as consideration for the right to buy the farm. Nina further alleged that in 1986 and before the expiration of the 1981 option, Lukas and Alberdina executed an option (the 1986 option), which gave her and Rudolph the right to purchase the real estate belonging to Lukas and Alberdina in the town of Mosel for $125,000. She further alleged that in 1989, Lukas and Alberdina executed an Option Right of First Refusal (the 1989 option), which granted Nina and Rudolph the right to purchase the farm property described in Schedule A of the 1989 option for $180,000.

¶6 Nina alleged that she and Rudolph commenced divorce proceedings in 2005. She alleged that during these proceedings, Rudolph, through his attorney, advised Alberdina that the 1986 option was unenforceable. Nina alleged that Rudolph also advised Alberdina that under the terms of the 1989 option, she could cancel that option. Nina alleged that Alberdina signed a cancellation of the 1989 option on March 16, 2006. She alleged that Alberdina would not have attempted to cancel the 1989 option if Rudolph had not induced her to do so. Nina also alleged that after this cancellation, she served Alberdina with a notice of intent to execute the 1986 option.

¶7 Based upon these factual allegations, Nina made three claims involving Alberdina: (1) requesting declaratory judgment that the 1986 and/or 1989 options were valid and enforceable; (2) alleging that Alberdina should be equitably estopped from refusing to honor the 1986 and/or 1989 options based upon principles of promissory estoppel; and (3) alleging that Alberdina would be unjustly enriched if Nina's right to purchase the property was not recognized.

¶8 Claims four through nine of Nina's amended complaint alleged claims against Rudolph. She claimed tortious interference with contract or prospective contract, alleging that Rudolph interfered with the 1986 option by advising Alberdina through his attorney that it was unenforceable, and interfered with the 1989 option by inducing Alberdina to execute a cancellation of it. Nina also alleged that Rudolph breached a duty of good faith and fair dealing owed by him to her. She alleged that Rudolph was liable for intentional, negligent, and strict liability misrepresentations to her. She also alleged that Rudolph engaged in "Constructive fraud/Breach of a fiduciary duty" by his conduct, and that he was liable for punitive damages.

¶9 Applying the standards for appellate review of a trial court decision on motions for summary judgment, we conclude that the trial court properly dismissed all of Nina's claims.[1] We address her claims seriatim.[2]

¶10 Nina's claim for declaratory judgment that the 1986 and/or 1989 options were valid and enforceable was properly dismissed. Initially, we note that on appeal, Nina does not dispute that the 1981 option expired on December 31, 1988, and that the 1989 option was cancelled by Alberdina pursuant to its express language providing that the option shall be open until cancelled in writing by the seller. On appeal, she argues that the trial court erred in determining that the 1986 option was unenforceable under the statute of frauds, WIS. STAT. § 706.02 (2007-08).[3]

¶11 An option to purchase real estate that does not conform to the statute of frauds is void. ***Wadsworth v. Moe***, 53 Wis. 2d 620, 623, 193 N.W.2d 645 (1972). To comply with the statute of frauds, the contract must be reasonably definite as to the property conveyed. ***Id.***; WIS. STAT. § 706.02(1)(b). When an

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[1] After the trial court granted summary judgment dismissing her amended complaint, Nina moved to vacate the order and judgment and for reconsideration. She contends that standards of review applicable to motions for relief from judgment are therefore applicable to this appeal. We disagree. Nina's motion to vacate judgment and reconsider the order granting summary judgment was premised on an argument that the trial court erred in granting summary judgment. Since we review a trial court's order granting summary judgment de novo, the only standard of review we need concern ourselves with is the standard of review for an order granting summary judgment.

[2] Because we decide de novo whether summary judgment dismissing Nina's amended complaint was warranted, we may rely on grounds different than those relied upon by the trial court. This is consistent with the well-established rule that this court will affirm the trial court even if it reached the right result for the wrong reason. ***State v. Amrine***, 157 Wis.2d 778, 783, 460 N.W.2d 826 (Ct. App. 1990).

[3] All references to the Wisconsin statutes are to the 2007-08 version except as otherwise noted.

individual owns more than one parcel of land in the same locality, the description in the document must be sufficiently definite so that a person might know to a reasonable certainty to which parcel or parcels the document relates. ***Wadsworth***, 53 Wis. 2d at 624. Pursuant to § 706.02(2), a conveyance may satisfy the requirement that it identify the land involved: (a) by specific reference to extrinsic writings in existence when the conveyance is executed; (b) by physical annexation of several writings to one another, with the mutual consent of the parties; or (c) by several writings that show expressly on their faces that they refer to the same transaction, and which the parties have mutually acknowledged by conduct or agreement as evidences of the transaction.

¶12 The 1986 option does not satisfy these requirements. The 1986 option states that it gives Nina and Rudolph the exclusive option to purchase the real estate of Lukas and Alberdina "situated in the Town of Mosel, Sheboygan County, Wisconsin, and particularly described in Schedule A attached hereto and incorporated herein by reference thereto." While a document captioned Schedule A is attached to the option, it is blank and contains no real estate description.

¶13 Nina contends that the option is saved because when she received it from Lukas in 1986, she also received a handwritten document signed by Lukas and Alberdina and captioned "Esstate (sic) Planning." That document states:

Real Esstate (sic) of Lukas and Alberdina Stapel

124 acres With Buildings

35 " of Land Formerly Sandra Knorner's

35 " of Land on Corner of Y & A Without Buildings

¶14 This notation in the "Esstate (sic) Planning" document does not clearly identify the land to which it refers. Most importantly, Nina's argument fails because nothing in the 1986 option refers to this document or indicates that it is incorporating this document. By its express language, the 1986 option states that it is incorporating the real estate description contained in Schedule A, which is blank. Determining that the document captioned "Esstate (sic) Planning" constituted the description of the real estate referred to in the 1986 option would therefore be inconsistent with the express language of the option.

¶15 While Nina attested that she received the document captioned "Esstate (sic) Planning" from Lukas with the 1986 option, this is insufficient to demonstrate physical annexation under WIS. STAT. § 706.02(2)(b) because nothing indicates that all of the parties mutually consented to inclusion of the "Esstate (sic) Planning" document in the option. Moreover, the "Esstate (sic) Planning" document contains additional terms that are inconsistent with the terms of the 1986 option.[4] It therefore cannot be deemed to be incorporated therein or to identify the land to which the 1986 option was intended to apply.

¶16 Nina also argues that the legal description attached to the 1989 option as Schedule A, which set forth legal descriptions for three parcels, identified the land involved in the 1986 option for purposes of satisfying the statute of frauds. This argument is patently unreasonable. The legal description incorporated in an option executed in 1989 cannot be deemed to have been

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[4] On its face, the 1986 option permitted the purchasers to exercise the option by paying or tendering the full amount of the purchase price or by written notice of intention to exercise the option, with "completion of repurchase" within 100 days thereafter. The "Esstate (sic) Planning" document referred to settlement within one year after both Lukas and Alberdina passed away.

incorporated in an option executed three years earlier, absent satisfaction of one of the methods of incorporation specified in WIS. STAT. § 706.02(2).[5]

¶17 The 1986 option is also void on other grounds. WISCONSIN STAT. § 706.02(1)(e) requires that a conveyance must be "signed by or on behalf of all parties, if a lease or contract to convey." The option was signed by Lukas and Alberdina, but not by Nina and Rudolph, even though their names are typed in with signature lines above them.[6] Moreover, even if Nina is correct in contending that generally only the grantors are required to sign an option under WIS. STAT. § 706.02(1)(d) and (e), the 1986 option relied on by Nina indicated that signatures of Nina and Rudolph were required on the page marked "SCHEDULE B – VALUATION," under the heading "Fair Market Valuation Agreed Upon."

¶18 An option to purchase also requires consideration separate from the consideration for the sale. ***McLellan v. Charly***, 2008 WI App 126, ¶2, 313 Wis. 2d 623, 758 N.W.2d 94, *review denied*, 2008 WI 124, 314 Wis. 2d 281, 758 N.W.2d 925. While the statute of frauds may not require that this consideration be recited in the option, ***id.***, ¶23 n.3, consideration is required. In this case, the 1986 option on its face stated that it was being given "[f]or the consideration contained herein." However, despite this provision, the consideration is not described or specified in the option. The statute of frauds requirement that the written option

[5] In rejecting this argument, we also note that the "Esstate (sic) Planning" document refers to parcels totaling 194 acres, while Schedule A attached to the 1989 option refers to three parcels totaling 199 acres. Nina's contention that the property referred to in Schedule A of the 1989 option is identical to the property referred to in the "Esstate (sic) Planning" document is therefore suspect.

[6] In addition, the date of execution of the 1986 option is not completely filled out, and a notarization section is blank.

identify the interest conveyed, "and any material term, condition, reservation, exception or contingency upon which the interest is to arise, continue or be extinguished" is therefore unfulfilled.[7] *See* WIS. STAT. § 706.02(1)(c).

¶19 Nina argues that even if the 1986 option is void under WIS. STAT. § 706.02, it is enforceable under WIS. STAT. § 706.04. Section 706.04 provides that a transaction that does not satisfy one or more of the requirements of § 706.02 may be enforceable in whole or in part under doctrines of equity, provided all of the elements of the transaction are satisfactorily proved and, in addition, the deficiency may be supplied by reformation in equity, the party against whom enforcement is sought would be unjustly enriched if enforcement was denied, or the party against whom enforcement is sought is equitably estopped from asserting the deficiency.

¶20 For the reasons already discussed, Nina is not entitled to relief under WIS. STAT. § 706.04 because the elements of the 1986 option, including the property to which the option applied, are not clearly and satisfactorily proved. Based on the summary judgment record, Nina's claims of promissory estoppel and unjust enrichment were also properly dismissed.

¶21 In her amended complaint, Nina alleged that when Lukas and Alberdina contacted her and Rudolph in Montana, they promised that if Nina and Rudolph would operate the farm in Wisconsin, they would have an option to buy it

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[7] We note that the deficiencies in the 1986 option are consistent with the affidavit of Attorney David Van De Water, the former attorney for Lukas and Alberdina, who attested that he prepared a draft of an option in 1986 pursuant to instructions from Lukas, but it was never completed or executed in his office. Attorney Van De Water further attested that when Lukas came to his office in 1989 to have option documents drafted, Lukas indicated that he did not believe any prior option was in effect.

in the future. Nina alleged that in reliance on this promise, she and Rudolph commenced operating the farm. She also alleged that from 1980 through his death in 1996, Lukas and Alberdina represented to Rudolph and Nina that they would have the right to buy the farm in the future. She alleged that Alberdina made the same representation from 1996 until 2006.

¶22 To prevail on a claim of promissory estoppel, a claimant must prove: (1) that the promise was one that the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee; (2) that the promise induced such action or forbearance; and (3) that injustice can be avoided only by enforcement of the promise. ***McLellan***, 313 Wis. 2d 623, ¶50. Based on the alleged representations, Nina contends that Alberdina is equitably estopped from refusing to honor the 1986 and/or the 1989 option.

¶23 Nina's claim fails for multiple reasons. While Lukas and Alberdina may have induced Nina and Rudolph to return to Wisconsin to operate the farm in 1980, they fulfilled their promise by providing Nina and Rudolph with the 1981 option, with a clear expiration date of December 31, 1988. Nina and Rudolph failed to exercise the 1981 option, and thus elected not to take advantage of the promise made to them in 1980.

¶24 To the extent Nina alleges that Lukas and Alberdina made similar promises after 1988, no basis exists to conclude that Nina reasonably relied on such promises. Rudolph attested that he was unaware of either the 1986 option or the 1989 option until he was informed of their existence during the divorce proceedings in 2006. Nina similarly attested that she was unaware of the 1989

option until the divorce proceedings in 2006. Nina could not reasonably rely on an option of which she was unaware.

¶25 Unlike Rudolph, Nina attested that she knew of the 1986 option. She attested that Lukas gave her and Rudolph a copy of it in 1986. However, as discussed above, the 1986 option was incomplete and void under the statute of frauds. Nina could not reasonably rely upon it, particularly since it provided that the purchase price would be the fair market value of the property at the end of each calendar year, and that the parties would re-determine the value each year, with the re-determined value to be endorsed on the attached Schedule B. The option further provided that the previously stipulated value would control if the parties failed to make a re-determination of value for a particular year, and listed an initial fair market value of $125,000. Nina could not reasonably rely upon the 1986 option and pursue its enforcement when the value of the property was never updated on the form and, as conceded in her amended complaint, the value of the farm exceeded $780,000 in 2006. It would be inequitable to require Alberdina to sell the farm for $125,000 as provided in the 1986 option, or for $180,000 as set forth in the 1989 option, when its value was more than $780,000.

¶26 For all of these reasons, the trial court properly dismissed Nina's promissory estoppel claim. It also properly dismissed her claim for unjust enrichment.

¶27 The essential elements of unjust enrichment are: (1) a benefit conferred upon the defendant by the plaintiff; (2) knowledge or appreciation of the benefit by the defendant; and (3) acceptance and retention of the benefit by the defendant under such circumstances that it would be inequitable for the defendant to retain it without paying the value of it. WIS JI—CIVIL 3028 (2010). An action

for recovery based on unjust enrichment does not arise out of an agreement. ***Watts v. Watts***, 137 Wis. 2d 506, 530, 405 N.W.2d 303 (1987). Instead, it is grounded on the moral principle that one who has received a benefit has a duty to make restitution if retaining the benefit would be unjust. ***Id.***

¶28 Recovery based on unjust enrichment is sometimes referred to as a quasi-contract. ***Id.*** As a claim based on quasi-contract, a claim for unjust enrichment is subject to the six-year statute of limitations set forth in WIS. STAT. § 893.43. *See* ***Boldt v. State***, 101 Wis. 2d 566, 578, 305 N.W.2d 133 (1981) (discussing WIS. STAT. § 893.19(3) (1977), which is now § 893.43).

¶29 In support of her unjust enrichment claim, Nina alleged that she and Rudolph expended approximately $300,000 making improvements to the property, and that Alberdina knew of such improvements and benefited from them. However, the list of improvements included by Nina in the summary judgment record establishes that most were made before 2002. Her cause of action to recover for improvements accrued when the improvements were made. This action was commenced on May 15, 2008. Any claim for recovery of the cost of improvements made before May 15, 2002, is therefore time-barred by WIS. STAT. § 893.43.

¶30 Nina's claim that she is entitled to recover based on unjust enrichment for improvements made after May 15, 2002, also fails. It is undisputed that after buying livestock and farm equipment from Lukas and Alberdina, Nina and Rudolph operated a farm business on Lukas and Alberdina's land for more

than two decades.[8] As such, Nina and Rudolph benefited from the improvements made by them. In light of the benefit to them, no basis exists to conclude that failing to require Alberdina to reimburse them would be inequitable. Nina's claim for unjust enrichment therefore was properly dismissed.

¶31 We conclude that Nina's claims against Rudolph were also properly dismissed on summary judgment. Nina's claim that Rudolph breached his duty of good faith and fair dealing, and her claim that he breached a fiduciary duty to her, are barred by the statute of limitations. Pursuant to WIS. STAT. § 893.57, an action to recover damages for libel, slander, assault, battery, invasion of privacy, false imprisonment "or other intentional tort to the person" is barred unless it is commenced within two years after the cause of action accrues. Tort claims accrue on the date the injury is discovered or with reasonable diligence should be discovered, whichever occurs first. ***Stroh Die Casting Co. v. Monsanto Co.***, 177 Wis. 2d 91, 101, 502 N.W.2d 132 (Ct. App. 1993).

¶32 The record establishes that Nina knew of her alleged injury from Rudolph's conduct in regard to Alberdina and the options at the time of depositions in the divorce case on April 28, 2006. As already noted, this action was commenced more than two years later, on May 15, 2008. Her claims of bad faith and breach of fiduciary duty were therefore untimely. *See* ***Zastrow v. Journal Communications, Inc.***, 2006 WI 72, ¶38, 291 Wis. 2d 426, 718 N.W.2d 51 (breach of fiduciary duty is an intentional tort); ***Professional Office Buildings,***

[8] The summary judgment record contains a factual dispute as to whether they lived rent-free on the property.

Inc. v. Royal Indemnity Co., 145 Wis. 2d 573, 587, 427 N.W.2d 427 (Ct. App. 1988) (a bad faith cause of action is an intentional tort).

¶33 Nina's claim of tortious interference with contract or prospective contract was also untimely. As noted above, Nina alleged that Rudolph interfered with the 1986 option by advising Alberdina through his attorney that it was unenforceable, and interfered with the 1989 option by inducing Alberdina to execute a cancellation of it. The elements of a claim for tortious interference with a contract are: (1) the plaintiff had a current or prospective contractual relationship with a third party; (2) the defendant interfered with that relationship; (3) the interference was intentional; (4) a causal connection exists between the defendant's interference and the plaintiff's damages; and (5) the defendant was not justified or privileged to interfere. ***Wolnak v. Cardiovascular & Thoracic Surgeons of Central Wis, S.C.***, 2005 WI App 217, ¶14, 287 Wis. 2d 560, 706 N.W.2d 667. To recover for interference with a contract, it is essential that the defendant acted intentionally. ***Cudd v. Crownhart***, 122 Wis. 2d 656, 660, 364 N.W.2d 158 (Ct. App. 1985).

¶34 Because Nina's claim of tortious interference with contract or prospective contract was an intentional tort to the person, it had to be commenced

within two years of April 28, 2006.[9] Because she did not file her complaint until May 15, 2008, this claim is barred and was properly dismissed as a matter of law.[10]

¶35 Nina's remaining claims against Rudolph were intentional misrepresentation, negligent and strict liability misrepresentation, and constructive fraud.[11] Intentional, negligent and strict liability misrepresentation have at least

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[9] Nina cites ***Segall v. Hurwitz***, 114 Wis. 2d 471, 339 N.W.2d 333 (Ct. App. 1983), for the proposition that the statute of limitations for a claim of tortious interference with contract is six years under WIS. STAT. § 893.53, the successor statute to WIS. STAT. § 893.19(5)(1977). Section 893.53 provides that an action to recover damages for an injury to the rights of another, not arising on contract, shall be commenced within 6 years after the cause of action accrues, except where a different period is expressly prescribed. In ***Segall***, 114 Wis. 2d at 487, the court concluded that § 893.19(5)(1977), the predecessor to § 893.53, applied because no specific statute applied to a claim of tortious interference with contract. However, at that time, WIS. STAT. § 893.21(2)(1977), the predecessor to WIS. STAT. § 893.57, prescribed a two-year statute of limitations for an action to recover damages for "libel, slander, assault, battery, invasion of privacy or false imprisonment." Subsequently, the legislature renumbered and amended this statute as § 893.57, adding "or other intentional tort to the person" to its provisions. Under the current language of § 893.57, Nina's claim of tortious interference with contract or prospective contract is barred.

[10] We acknowledge that, despite raising the issue in the trial court, on appeal Rudolph has not raised the statute of limitations as a basis for upholding the trial court's dismissal of the claim of tortious interference with contract or prospective contract. However, as previously stated, this court must decide de novo whether summary judgment was warranted. Dismissal of Nina's claim of tortious interference with contract, like the claims of bad faith and breach of fiduciary duty, was warranted under WIS. STAT. § 893.57.

[11] Nina's claim of "constructive fraud" was alleged in her amended complaint as her eighth claim, "Constructive fraud/Breach of a fiduciary duty." All of the allegations within this claim deal with breach of fiduciary duty. As noted above, Nina's claim of breach of fiduciary duty is time-barred under WIS. STAT. § 893.57.

We could uphold the trial court's dismissal of Nina's eighth claim based on WIS. STAT. § 893.57 alone. However, we note that an action based on fraud is subject to a six-year statute of limitations. WIS. STAT. § 893.93(1)(b). "The elements of fraud are a false representation made with intent to defraud and justifiable reliance by an injured party on the misrepresentation." ***Segall***, 114 Wis. 2d at 487. Fraud is a generic term encompassing misrepresentation. ***Whipp v. Iverson***, 43 Wis. 2d 166, 169, 168 N.W.2d 201 (1969). In ***Stroh Die Casting Co. v. Monsanto Co.***, 177 Wis. 2d 91, 116-17, 502 N.W.2d 132 (Ct. App. 1993), the court applied the six-year statute of limitations for fraud to a claim of intentional misrepresentation. We therefore address Nina's "constructive fraud" claim with her misrepresentation claims.

three elements in common: (1) the representation must be of fact and made by the defendant; (2) the representation of fact must be untrue; and (3) the plaintiff must believe such a representation and rely on it to his or her damage. ***Ollerman v. O'Rourke Co.***, 94 Wis. 2d 17, 24-25, 288 N.W.2d 95 (1980) (citation omitted). The general rule is that silence is not a misrepresentation unless the defendant has a duty to disclose a fact. ***Id.*** at 26. If there is a duty to disclose a fact, a defendant's failure to disclose that fact is treated as equivalent to a representation of the non-existence of the fact. ***Id.***

¶36 In her amended complaint, Nina alleged that Rudolph interfered with her rights under the options by advising Alberdina that the 1986 option was unenforceable and by inducing her to cancel the 1989 option. In her three misrepresentation claims, Nina alleged that Rudolph had a duty to disclose that he was interfering with Nina's property rights. She alleged that by failing to disclose his actions, Rudolph made a factual representation that he was not interfering with her property rights.

¶37 These allegations are insufficient as a matter of law to state a claim for intentional, negligent, or strict liability misrepresentation. The fact that Nina considered the 1986 option to be a valid and enforceable option did not render Rudolph's failure to tell her that he disagreed with her a misrepresentation of any kind. Similarly, Rudolph made no misrepresentation to Nina when, through his attorney, he told Alberdina that he did not believe the 1986 option was valid and enforceable, or pointed out to Alberdina that the 1989 option contained a provision that permitted Alberdina to cancel it. The trial court therefore properly granted summary judgment dismissing all of Nina's claims against Rudolph, including the claim for punitive damages.

By the Court.— Judgment affirmed.

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