

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 18, 2011

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. 2010AP2260

Cir. Ct. No. 2007CV102

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

WANDA OSOWSKI,

PLAINTIFF,

**GENE OSOWSKI, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF
WANDA OSOWSKI,**

PLAINTIFF-APPELLANT,

V.

DON HOWARD AND KRAUSE HOWARD & Co., S.C.,

DEFENDANTS-RESPONDENTS,

DELUXE SERVICES, INC.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Marathon County:
GREGORY B. HUBER, Judge. *Affirmed.*

Before Peterson, Neubauer, JJ., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Gene Osowski, as personal representative of the Estate of Wanda Osowski, appeals a summary judgment dismissing Wanda's professional negligence, misrepresentation, and conspiracy claims against her former accountant, Don Howard, and his firm, Krause Howard & Co., S.C. We conclude summary judgment was proper because Wanda's claims are barred by the six-year statute of repose for claims arising out of professional accounting services. *See* WIS. STAT. § 893.66(1).¹ We therefore affirm.

BACKGROUND

¶2 This case arises from a dispute between the former owners of Deluxe Disposal Service, a garbage collection business. Wanda Osowski and her husband, Gene Osowski, Sr., formed Deluxe Disposal in 1974 as a partnership with their son, Gene Osowski, Jr. Over the years, Wanda's sons Ronald, Allen, and Robert also acquired partnership interests in Deluxe Disposal. No written partnership agreement was ever drafted. Gene, Sr., managed the business, while Gene, Jr., Ronald, Allen, and Robert collected garbage and maintained the business's garbage trucks. Wanda worked in Deluxe Disposal's office.

¶3 In 1991, Gene, Sr., passed away, transferring his interest in the partnership to Wanda. From that time on, Wanda's sons managed Deluxe Disposal. They did not consult her about the business or seek her authority before making business decisions. A few years after Gene, Sr., died, Gene, Jr., and

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Robert sold their interests in the business to Wanda, Ronald, and Allen, who then became the only remaining partners. None of the Osowskis knew precisely what share of the partnership Wanda, Ronald, and Allen each owned, but, in general, they agreed Wanda owned the majority interest.

¶4 In late 1994, Ronald and Allen decided to incorporate Deluxe Disposal.² They made the decision after talking to “some guys that were hauling blacktop” who told them that incorporating Deluxe Disposal would make it eligible for certain tax benefits. According to Ronald, he and Allen alone made the decision to incorporate, without consulting anyone else.

¶5 Once the decision to incorporate was made, Ronald and Allen met with Howard, Deluxe Disposal’s accountant.³ Howard had prepared Deluxe Disposal’s tax returns since 1974 and had also prepared the Osowskis’ personal tax returns for a number of years. He had never acted as a business advisor or financial consultant for Deluxe Disposal, though, and Ronald and Allen did not consult him before deciding to incorporate. Howard could not remember what was discussed during the meeting with Ronald and Allen, but he testified that they “probably discussed electing S corp. status to minimize the tax bite.” He also testified that Deluxe Disposal’s articles of incorporation “possibly” could have been typed up in his office. However, Howard did not decide who the

² The incorporation was effective January 1, 1995.

³ There is a factual dispute as to whether Wanda was also present at the meeting with Howard. Both Ronald and Allen testified that Wanda was present at the meeting, and Howard testified he “believe[d]” Wanda was present. However, Wanda testified she never discussed Deluxe Disposal’s incorporation with Howard and did not even know about the incorporation until several years later.

shareholders of the new corporation would be or what percentages of the company they would own. That information was provided to him by Ronald and Allen.

¶6 In order to incorporate Deluxe Disposal, the partnership was dissolved and its assets were rolled into the new corporation. Ronald and Allen were the only shareholders in the new corporation, and Wanda ceased to have an ownership interest in the business. According to Ronald, he and Allen took over ownership of Deluxe Disposal because Wanda told them she wanted to retire. Ronald testified they agreed to pay Wanda \$420 per month plus health insurance in exchange for her ownership interest. However, Allen testified he was not aware that Wanda lost her ownership interest when Deluxe Disposal was incorporated. Wanda testified she never agreed to retire.

¶7 In fact, Wanda testified she did not even know that Deluxe Disposal had been incorporated until sometime after 1995. After she found out about the incorporation, she still believed she had an ownership interest in the business. She never asked anyone what bearing the incorporation had on her ownership of Deluxe Disposal. Specifically, she “never sat down with [Howard] and asked him any questions about how [Deluxe Disposal] was structured or how [her] shares were[.]” Beginning in 1998, Wanda’s personal tax returns no longer listed her as an owner of Deluxe Disposal. Deluxe Disposal’s tax returns from 1995 on listed Ronald and Allen as the only shareholders.

¶8 Wanda continued working in Deluxe Disposal’s office until about 2005, when she was locked out of the office and told she did not need to come to work anymore. Several months later, Deluxe Disposal’s assets were sold for \$4,100,000. Following the sale, Wanda only received \$29,000 from Ronald and Allen. Wanda alleges it was not until after the sale that she realized she no longer

had any ownership interest in Deluxe Disposal. She contends that, up until that point, she still considered herself to be the majority owner.

¶9 In January 2007, Wanda filed the lawsuit underlying this appeal. Wanda asserted claims for breach of fiduciary duty, theft, and misrepresentation against Ronald and Allen. She also asserted claims for misrepresentation, professional negligence, and conspiracy against Howard and Krause Howard. Wanda contended Howard breached a duty to her by failing to explain the effect incorporation would have on her ownership of Deluxe Disposal and by failing to tell her that she was not a shareholder in the new corporation. She also alleged Howard had “entered into a conspiracy with and aided and abetted [Ronald] and Allen for the purpose of willfully injuring the partnership and Wanda.” Wanda died in February 2009, and the personal representative of her estate was substituted as plaintiff.

¶10 Howard and Krause Howard moved for summary judgment, alleging Wanda had not raised a genuine issue of material fact with respect to her misrepresentation, professional negligence, and conspiracy claims. Additionally, Howard and Krause Howard argued that Wanda’s claims were time-barred by the six-year statute of repose for claims arising from “act[s] or omission[s] in the performance of professional accounting services.” *See* WIS. STAT. § 893.66(1).

¶11 The circuit court granted summary judgment dismissing Wanda’s claims against Howard and Krause Howard. The court first concluded Wanda had not presented sufficient evidence to create a jury question on her misrepresentation and conspiracy claims. Then, the court determined Wanda’s remaining claim, professional negligence, was barred by the statute of repose. Following the court’s

ruling, Wanda's claims against Ronald and Allen were settled. Wanda now appeals the summary judgment in favor of Howard and Krause Howard.

DISCUSSION

¶12 We review a grant of summary judgment independently, using the same methodology as the circuit court. *O'Kon v. Laude*, 2004 WI App 200, ¶9, 276 Wis. 2d 666, 688 N.W.2d 747. Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2). Here, we conclude Howard and Krause Howard are entitled to a judgment as a matter of law because WIS. STAT. § 893.66(1) bars Wanda's claims.

¶13 WISCONSIN STAT. § 893.66(1) provides that, subject to certain exceptions, "an action to recover damages, based on tort, contract or other legal theory, against any certified public accountant ... for an act or omission in the performance of professional accounting services shall be commenced within 6 years from the date of the act or omission or be barred." According to Wanda's accounting expert, Greg LaFreniere, Wanda's claims against Howard arose out of acts or omissions that occurred no later than the spring of 1996. Wanda did not file her lawsuit against Howard until January 2007—nearly eleven years later.

Consequently, unless an exception applies, the six-year time limitation in § 893.66(1) bars Wanda's claims.⁴

¶14 Wanda contends an exception does apply. She relies on WIS. STAT. § 893.66(4), which states that the six-year limitation “does not apply to any person who commits fraud or concealment in the performance of professional accounting services.” Wanda argues that, based on the undisputed facts, Howard committed both fraud and concealment while performing accounting services for Deluxe Disposal. We disagree.

I. Fraud

¶15 The elements of fraud are: (1) a false representation; (2) made with intent to defraud; and (3) justifiable reliance on the misrepresentation by the injured party. *Ritchie v. Clappier*, 109 Wis. 2d 399, 404, 326 N.W.2d 131 (Ct. App. 1982). Based on the undisputed facts, Wanda cannot establish these elements.

A. False representation

¶16 To establish fraud, Wanda must first show that Howard made a false representation. Wanda does not allege that Howard misrepresented any facts to her regarding Deluxe Disposal's incorporation. Instead, she argues Howard made

⁴ In the circuit court, Wanda argued her claims were not barred by WIS. STAT. § 893.66(1) because she did not discover Howard's unlawful conduct until 2005. However, the circuit court correctly held that the discovery rule does not apply to a statute of repose. *See Kohn v. Darlington Cmty. Schs.*, 2005 WI 99, ¶38, 283 Wis. 2d 1, 698 N.W.2d 794 (A statute of repose limits the time period within which an action may be brought based on date of the act or omission and may therefore bar an action before the injury is discovered or before the injury even occurs.). Wanda does not renew her discovery argument on appeal.

a misrepresentation by omission when he failed to disclose that the incorporation extinguished her ownership interest in Deluxe Disposal. However, a failure to disclose does not constitute misrepresentation unless the defendant had a duty to disclose. *Ollerman v. O'Rourke Co.*, 94 Wis. 2d 17, 26, 288 N.W.2d 95 (1980). We conclude Howard did not have any duty to tell Wanda about the incorporation's effect on her ownership of Deluxe Disposal.⁵

¶17 Wanda asserts that Howard had a duty to disclose based on his contractual duty of good faith and fair dealing. The duty of good faith and fair dealing is implied in every contract and is a guarantee by each party that he or she “will not intentionally and purposely do anything to prevent the other party from carrying out his or her part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.” *Tang v. C.A.R.S. Prot. Plus, Inc.*, 2007 WI App 134, ¶41, 301 Wis. 2d 752, 734 N.W.2d 169 (quoting *Metropolitan Ventures, LLC v. GEA Assocs.*, 2006 WI 71, ¶35, 291 Wis. 2d 393, 717 N.W.2d 58).

⁵ On appeal, Wanda also contends Howard “had a duty to her to account for her partnership interest for tax purposes[.]” She argues that, although Howard variously testified that Wanda gifted her partnership interest to Ronald and Allen or loaned her interest to the new corporation, Howard never prepared any tax documents reflecting a gift, loan or other transfer of Wanda's interest.

Even assuming that Howard had a duty to account for Wanda's partnership interest following the incorporation, we would nevertheless conclude that Wanda has not established that Howard committed fraud. As discussed below, the second element of the fraud exception is that the defendant acted with intent to defraud. *See infra*, Section I.B. Wanda has not presented any evidence that Howard intended to defraud her by failing to “account for her partnership interest for tax purposes.” The evidence permits an inference that Howard was negligent by failing to account for Wanda's partnership interest, but there is simply no evidence that Howard intended to defraud Wanda.

¶18 The only contracts involved in this case were Howard's agreements to prepare tax returns for Deluxe Disposal and for various members of the Osowski family. Wanda has not provided any legal authority for the proposition that Howard's duty of good faith and fair dealing under these contracts encompassed a duty to disclose the incorporation's effect on Wanda's ownership of Deluxe Disposal. Howard was merely a tax preparer and did not have a contractual agreement to function as a business advisor. Accordingly, Howard's duty of good faith and fair dealing under his contracts with Wanda and Deluxe Disposal did not include a duty to tell Wanda anything about the incorporation process.

¶19 Wanda next argues Howard had a duty to disclose because he was her agent and therefore owed her a fiduciary duty. However, agents only owe their principals a fiduciary duty "with respect to matters within the scope of their agency." *First Nat'l Bank v. Wernhart*, 204 Wis. 2d 361, 370, 555 N.W.2d 819 (Ct. App. 1996). Because Howard was not a business advisor for Wanda or Deluxe Disposal, the business ramifications of incorporating Deluxe Disposal were outside the scope of the agency relationship. The agency relationship therefore did not create a duty to disclose those ramifications.

¶20 Wanda relies on *Hatleberg v. Norwest Bank Wisconsin*, 2005 WI 109, 283 Wis. 2d 234, 700 N.W.2d 15, for the proposition that "the agent's other, non-fiduciary duties may support an independent claim for negligence for negligently providing information for the guidance of the principal." *Hatleberg* is not on point. There, the trustee of a trust learned that a trust document was defective. *Id.*, ¶9. The trustee nevertheless told the grantor to contribute to the trust and affirmatively stated there were no problems with the trust documents. *Id.*, ¶10. When the grantor died, the personal representative of her estate

discovered the trust’s defect and sued the trustee for negligence. *Id.*, ¶¶11-12. Our supreme court concluded the trustee “violated a duty arising in its capacity as a financial advisor to avoid providing false information” to the grantor. *Id.*, ¶18. The court determined that, by making affirmative misstatements to the grantor, the trustee breached “a duty to ensure *that the information it actually provided* to [the grantor] was correct.” *Id.*, ¶41 (emphasis added). The court specifically noted, “This is not a ‘duty to disclose’ case.” *Id.*, ¶36. Because *Hattleberg* did not implicate the duty to disclose, Wanda’s reliance on it is misplaced.⁶

¶21 Wanda also contends that three professional accounting standards imposed a duty to disclose on Howard. First, she cites an American Institute of Certified Professional Accountants (AICPA) standard entitled “Integrity and objectivity,” which states that “in the performance of any professional service, [an accountant] ... shall not knowingly misrepresent facts[.]” This standard does not address whether an accountant has a duty to disclose facts, and it does not say that the failure to disclose facts is tantamount to an affirmative misrepresentation. It therefore adds nothing to our analysis.

¶22 Second, Wanda cites an AICPA standard entitled “Conflicts of interest,” which states that a conflict of interest may occur if an accountant performs services for a client and has a relationship with another entity that could

⁶ Wanda’s reliance on *Citizens State Bank v. Timm, Schmidt & Co., S.C.*, 113 Wis. 2d 376, 335 N.W.2d 361 (1983), *Chevron Chemical Co. v. Deloitte & Touche*, 168 Wis. 2d 323, 483 N.W.2d 314 (Ct. App. 1992), and *Imark Industries, Inc. v. Arthur Young & Co.*, 141 Wis. 2d 114, 414 N.W.2d 57 (Ct. App. 1987), is similarly misplaced. Those cases address whether an accountant may be held liable to a non-client who relies on a negligently prepared audit report. See *Citizens State Bank*, 113 Wis. 2d at 377; *Chevron*, 168 Wis. 2d at 334; *Imark*, 141 Wis. 2d at 133-35. Wanda’s case does not implicate the scope of an accountant’s liability to a non-client.

be viewed by the client as impairing the accountant's objectivity. Wanda does not explain why, under this standard, Howard had a duty to tell Wanda that she no longer owned Deluxe Disposal.

¶23 Third, Wanda cites an AICPA standard entitled "Certain Procedural Aspects of Preparing Returns." This standard allows an accountant to rely on information furnished by a taxpayer when preparing a tax return, but states that an accountant may not ignore obvious errors. Wanda's claims against Howard are premised on his failure to disclose the effect of Deluxe Disposal's incorporation on Wanda's ownership interest, not on Howard's negligent preparation of a tax return. Accordingly, this standard is not relevant to the issue of whether Howard had a duty to disclose.⁷

¶24 Wanda has not established that Howard had any duty to tell her about the incorporation's effect on her ownership of Deluxe Disposal. Because Wanda cannot establish a duty to disclose, she cannot establish that Howard's omission amounted to a false representation. Consequently, Wanda cannot establish the first element of the fraud exception to WIS. STAT. § 893.66(1).

B. Intent to defraud

¶25 Furthermore, even if Wanda could establish that Howard made a false representation, she would not be able to establish the second element of the

⁷ Wanda also states that Howard is subject to the accounting standards in the Wisconsin Administrative Code and has violated several of those standards. However, she does not allege that any administrative code section creates a duty to disclose, nor does she explain how Howard violated any specific administrative code provision. Wanda's argument regarding the administrative code is undeveloped, and we decline to address it. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

fraud exception—that Howard acted with intent to defraud her. *See Ritchie*, 109 Wis. 2d at 404. Wanda has not produced any evidence that Howard intended to defraud her by failing to tell her she no longer owned Deluxe Disposal. Instead, the facts show that Howard’s failure to disclose Wanda’s loss of ownership was consistent with the limited scope of Howard and Wanda’s business relationship.

¶26 Howard prepared Wanda’s and Deluxe Disposal’s taxes. Wanda only saw Howard once or twice per year, typically when she ran into him by accident. Even when she went to Howard’s office to drop off and pick up papers, she never met with Howard in person. Wanda never discussed her taxes with Howard over the telephone. Howard never gave Wanda any advice about business or financial matters, and, after Wanda’s husband died, she never talked to Howard “about the company at all.” The only reasonable inference from these undisputed facts is that Wanda and Howard’s relationship was limited to tax preparation and, therefore, Howard had no reason to tell Wanda she was no longer an owner of Deluxe Disposal. The facts do not support an inference that Howard’s silence was motivated by an intent to defraud Wanda. Accordingly, Wanda cannot establish the second element of the fraud exception to WIS. STAT. § 893.66(1).

C. Justifiable reliance

¶27 Wanda also fails to establish the third element of the fraud exception—that her reliance on Howard’s silence was “justifiable.” *See Ritchie*, 109 Wis. 2d at 404. As a matter of law, negligent reliance is not justifiable. *Id.* A plaintiff cannot justifiably rely on a misrepresentation while ignoring contradictory information that he or she knew or could have discovered. *Id.* (citing *Jacobsen v. Whitely*, 138 Wis. 434, 437, 120 N.W. 285 (1909)). For instance, in *Ritchie*, the court held that the plaintiff’s reliance on the defendant’s

fraudulent misrepresentation about the contents of a document the plaintiff signed was not justifiable because the plaintiff's reasonable diligence would have uncovered the defendant's fraud. *Id.* at 400-01, 404-06. The plaintiff should have read the document carefully before signing it, rather than relying on the defendant's representation about its contents. *Id.* at 406.

¶28 We reached a similar result in *Malzewski v. Rapkin*, 2006 WI App 183, 296 Wis. 2d 98, 723 N.W.2d 156. There, the plaintiffs offered to purchase a home from the defendants, even though the real estate condition report indicated that the basement might experience some seepage during heavy rainstorms. *Id.*, ¶2. The plaintiffs did not have the home inspected, and after closing they learned that the foundation had been cracked for many years and would require significant repairs. *Id.*, ¶¶4-5. During the subsequent litigation, the defendants admitted they knew about the cracked foundation before selling the house. *Id.*, ¶7. However, we affirmed a summary judgment on the plaintiffs' fraud claim because we concluded their reliance on the defendants' misrepresentation was not justifiable. *Id.*, ¶18. The real estate condition report "disclosed, at the very least, potential defects in the basement," yet the buyers declined to have the house inspected. *Id.* We noted that individuals are required "to exercise proper vigilance and apply their attention to those particulars which may be supposed to be within the reach of their observation and judgment, and not close their eyes to the means of information accessible to them." *Id.* (quoting *Kanack v. Kremski*, 96 Wis. 2d 426, 432, 291 N.W.2d 864 (1980)).

¶29 Here, Wanda claims she believed she was an owner of Deluxe Disposal until 2005. However, although she believed she was the majority owner, Wanda never knew precisely how much of the business she owned. She testified she could not remember when she learned that Deluxe Disposal had been

incorporated, and, once she did learn about the incorporation, she made no effort to find out what effect it had on her ownership interest. As early as 1998, Wanda's personal tax returns did not state that she had any ownership interest in Deluxe Disposal. Moreover, during the entire time she believed she was a majority owner, Wanda never looked at Deluxe Disposal's tax returns. Beginning in 1995, those tax returns listed Ronald and Allen as the corporation's only shareholders.

¶30 We conclude Wanda did not take appropriate steps to understand her ownership interest in Deluxe Disposal. Had Wanda simply looked at her own or at Deluxe Disposal's tax returns, she would have at least suspected that she no longer had an ownership interest. Furthermore, after learning that the business had been incorporated, Wanda should have asked questions about the incorporation's effect on her ownership interest. Both before and after incorporation, Wanda never attempted to clarify how much of the business she actually owned. Wanda simply failed to make any effort to stay apprised of the status of her ownership interest in Deluxe Disposal. Wanda's reliance on Howard's silence was therefore unjustifiable. Accordingly, Wanda cannot establish the third element of the fraud exception to WIS. STAT. § 893.66(1).

II. Concealment

¶31 Wanda next argues that, even if she cannot establish that Howard committed fraud, the exception in WIS. STAT. § 893.66(4) still applies because Howard committed "concealment in the performance of professional accounting services." Wanda contends that, to establish concealment, a plaintiff need only show that the defendant had "actual knowledge of the thing concealed" and failed to disclose it. We disagree.

¶32 Accepting Wanda’s argument, the concealment exception would apply whenever a plaintiff alleged that an accountant failed to disclose something. Thus, the statute of repose would never bar any claim arising out of an accountant’s alleged omission. Under Wanda’s reasoning, with respect to claims arising from omissions, the exception would therefore become so broad as to swallow the rule. We are not persuaded that the language of the statute compels this result.

¶33 When we interpret a statute, we must give the statutory language its common, ordinary, and accepted meaning. *Town of Madison v. County of Dane*, 2008 WI 83, ¶17, 311 Wis. 2d 402, 752 N.W.2d 260. We may consult a recognized dictionary to determine the common, accepted meaning of a word. *Id.* The NEW OXFORD AMERICAN DICTIONARY 354 (2001), defines to “conceal” as to “keep from sight; hide” or to “keep (something) secret; prevent from being known or noticed.” Under this definition, we conclude concealment involves something more than the mere failure to disclose. Instead, concealment involves actively keeping something hidden or actively preventing it from becoming known.

¶34 Here, Wanda has not produced any evidence that Howard actively hid her loss of ownership interest from her. For instance, Wanda has not shown that Howard affirmatively lied to her about whether she continued to own Deluxe Disposal. Wanda also has not shown that Howard prevented her from seeing her own or Deluxe Disposal’s tax returns, both of which called her continuing ownership interest into question. The most Wanda can show is Howard’s “mere silence,” and, as one federal court has stated, “Concealment by mere silence is not enough.” See *Fiene v. V & J Foods, Inc.*, 962 F. Supp. 1172, 1183 (E.D. Wis.

1997) (citation omitted) (interpreting a similar “fraud or concealment” exception to the statute of limitations for ERISA claims).⁸ Accordingly, we conclude Wanda cannot establish that the concealment exception to WIS. STAT. § 893.66(1) applies. Because Wanda has not established either fraud or concealment, § 893.66(1) bars her claims against Howard and Krause Howard. The circuit court properly granted summary judgment.

By the Court.—Judgment affirmed.

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

⁸ See *First Wisconsin Nat’l Bank v. Nicolaou*, 113 Wis. 2d 524, 531-32, 335 N.W.2d 390 (1983) (when language in a federal statute is identical to the pertinent language in a state statute, federal cases interpreting the language are persuasive authority).

