

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 20, 2026

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

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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. 2025AP1399

Cir. Ct. No. 2024CV258

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DESTINI N. HANSEN AND TYLER J. HANSEN,

PLAINTIFFS-APPELLANTS,

V.

REGINA M. KRAMER,

DEFENDANT-RESPONDENT,

MELISSA TREPANIER,

DEFENDANT.

APPEAL from an order of the circuit court for Brown County:
TIMOTHY A. HINKFUSS, Judge. *Affirmed in part, reversed in part and cause
remanded for further proceedings.*

Before Stark, P.J., Hruz, and Gill, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. This case arises from Destini and Tyler Hansen’s purchase of a house from Regina Kramer. The Hansens filed this lawsuit against Kramer after discovering damage to the property caused by cat urine.¹ They alleged causes of action under theories of breach of contract; common law intentional misrepresentation; misrepresentation pursuant to WIS. STAT. § 895.446 (2023-24)² and WIS. STAT. § 943.20(1)(d) (theft by fraud); and misrepresentation pursuant to WIS. STAT. § 100.18 (false advertising).

¶2 The Hansens’ breach of contract claim was based on Kramer’s alleged false representation in an accepted offer to purchase that she had “no notice or knowledge” of defects affecting the property other than those noted in a real estate condition report (RECR). See WIS. STAT. § 709.03. The Hansens’ common law misrepresentation and theft by fraud claims were based on Kramer’s alleged false representation in the RECR that she was not aware of any defects affecting the property; her claimed failure to disclose material facts to the Hansens, as required by *Ollerman v. O’Rourke Co.*, 94 Wis.2d 17, 42, 288 N.W.2d 95 (1980); and her claimed concealment of cat urine by having the carpet professionally cleaned and opening the windows and doors prior to showing the

¹ The Hansens also sued Melissa Trepanier, Kramer’s real estate agent. Because this appeal concerns only those causes of action against Kramer, we limit our discussion of the procedural posture of this action to facts pertaining to those claims against Kramer. We note, however, that after the circuit court granted Kramer’s motion for summary judgment and dismissed her from the lawsuit, the court granted the Hansens’ motion to stay proceedings against Trepanier until the resolution of this appeal.

² All references to the Wisconsin Statutes are to the 2023-24 version.

property to the Hansens. Finally, the Hansens’ false advertising claim was based on Kramer’s alleged false representation in the RECR and her concealment of cat urine.

¶3 The circuit court granted summary judgment to Kramer on all of the Hansens’ claims after concluding that the cat urine and cat urine odor present in the house did not constitute a “defect” under WIS. STAT. § 709.03, that the Hansens failed to put forth sufficient evidence demonstrating that Kramer had knowledge of the cat urine and cat urine odor, and that the Hansens waived their right to file any claims against Kramer because they waived an inspection contingency in their offer to purchase and they discovered the presence of a cat urine odor prior to closing.

¶4 We conclude that the Hansens did not waive any of their claims. We further conclude that summary judgment is inappropriate on the Hansens’ common law misrepresentation and theft by fraud claims premised on Kramer’s alleged failure to disclose a material fact—the presence of cat urine and cat urine odor—to the Hansens. Likewise, we conclude that genuine issues of material fact exist as to the Hansens’ common law misrepresentation, theft by fraud, and false advertising claims premised on Kramer’s alleged concealment of the cat urine or cat urine odor from the Hansens. Therefore, on those claims, we reverse and remand for further proceedings consistent with this opinion.

¶5 We affirm the circuit court’s decision granting summary judgment to Kramer on the Hansens’ remaining claims as they relate to WIS. STAT. § 709.03 because the Hansens failed to provide sufficient evidence to raise a genuine issue of material fact on the question of whether the cat urine and cat urine odor constituted a “defect” requiring disclosure by Kramer. See *id.* Accordingly, we

affirm the court's order with respect to the Hansens' breach of contract claim, common law misrepresentation, theft by fraud, and false advertising claims premised on § 709.03.

BACKGROUND

¶6 The Hansens filed the present action against Kramer following their purchase of Kramer's house in August 2023. According to the amended complaint, Kramer represented to the Hansens in an RECR that she was not aware of any defects or conditions affecting the property, including any animal infestations, any defects caused by animal infestations, or any hazardous substances on the property. Kramer also stated, in an accepted offer to purchase the house, that she had no notice or knowledge of conditions affecting the property other than those identified in the RECR. The Hansens alleged that, following the closing, they "discovered severe damage to the property and its components caused by cat urine," requiring "remediation of, among other things, the property's carpeting, flooring, subfloors, walls, base trim, vents, and ductwork."

¶7 As noted above, the Hansens alleged four categories of claims against Kramer. Kramer moved for summary judgment. The evidence submitted at the summary judgment stage, viewed in the light most favorable to the Hansens, demonstrates the following. See *State Bank of La Crosse v. Elsen*, 128 Wis. 2d 508, 512, 383 N.W.2d 916 (Ct. App. 1986).

¶8 Kramer purchased the house in 2010, later hired Trepanier as her realtor, and listed the house for \$649,900 on August 17, 2023. Kramer owned several dogs and owned and fostered numerous cats throughout her time residing at the house, and she "occasionally" witnessed some of the animals urinating on the carpets during this period. Furthermore, Kramer observed an area in the

basement “where one of the cats had sprayed” on a plastered wall and the base trim. Kramer was also aware that one of the cats, on more than one occasion, sprayed the wall in a bathroom where at least one litter box was kept. When the animals would urinate on the carpet, Kramer would “try to clean it up” with a “carpet cleaning solution.” In addition to cleaning the carpets herself, Kramer had the carpets professionally cleaned twice a year, on average. Kramer “expected” that the carpet padding would get wet from the urine, but she was unable to clean the padding “without pulling up the carpeting itself.” Kramer claimed that her guests never mentioned or complained about an odor of cat urine in the house, and Kramer could recall smelling cat urine only when a litter box needed to be cleaned out.

¶9 In 2021, Kramer had the carpet replaced in her house, and in 2022, she had pet-resistant padding installed underneath some of the carpeting. Kramer stated that she had the pet-resistant padding installed because she had “multiple pets” and was aware that they would, from time to time, urinate or vomit on the carpet.

¶10 Trepanier stated that when she first visited the house for a pre-listing walk-through, she did not detect an odor of cat urine in the house. However, a potential buyer’s agent reported to Trepanier that the buyer was “[s]omewhat” interested in purchasing the house but that “allergies to animals means full flooring replacement and possible subfloor as odor was in whole home especially office.” Another potential buyer’s agent stated that the buyer “struggled with the smell of cat/pet urine” in the house.³ In an affidavit, Kramer averred that she “was

³ Kramer contends that these showings occurred on August 18, 2023. However, the listing activity report states that the showings occurred on August 19, 2023.

unaware of any concerns regarding urine or the smell of urine from any other individuals who viewed the property prior to closing on the property sale to” the Hansens.

¶11 On August 18, 2023, the Hansens viewed the house for the first time, and, before they entered, Kramer informed them that cats were present at the property. Destini testified that neither she nor Tyler had any concerns about the smell of the house during their first visit, and Tyler stated that he did not observe any issues with the carpeting or the flooring in the house.⁴

¶12 On August 19, 2023, Kramer provided the signed RECR to the Hansens. In the RECR, Kramer represented that, “to the best of [her] knowledge,” she was unaware of any “defect caused by unsafe concentrations of, or unsafe conditions relating to,” “potentially hazardous or toxic substances on the property”; unaware of “defects caused by animal ... infestations”; and unaware of “other defects affecting the property.”

¶13 That same day, the Hansens submitted a signed offer to purchase the house for \$650,000. The Hansens stated in an attached addendum to the offer to purchase that they were waiving home inspection and testing contingencies. In waiving the inspection contingency, the Hansens expressly acknowledged in the addendum that “there may be benefits of a home inspection.” The addendum further stated that the Hansens were “encouraged to include inspection and testing contingencies ... with respect to” hazardous substances “and to consult with the appropriate experts if such conditions(s)” were material to the Hansens.

⁴ Because the Hansens share a surname, we refer to them individually using their first names where appropriate.

¶14 On August 20, 2023, Kramer accepted and signed the Hansens' offer to purchase. The accepted offer to purchase included a provision stating that, as of August 20, 2023, Kramer had "no notice or knowledge of Conditions Affecting the Property or Transaction ... other than those identified in" the RECR. The accepted offer to purchase further stated that the parties would close the transaction on or before October 2, 2023.

¶15 On September 1, 2023, the Hansens visited the house a second time. Kramer's cats were again present, and the Hansens did not voice concern regarding pet or other odors in the house. On September 30, 2023, the Hansens visited the house a third time. During this visit, Destini noticed a strong smell of cleaning products throughout the house, and the Hansens inquired about a stain on the carpet in a "traffic area." Kramer advised the Hansens that a carpet cleaning company, H.J. Martin, was at the house on September 29, 2023, and that H.J. Martin was "unsuccessful" in improving the area because the carpet issue "was based on wear." During each of the Hansens' three visits to the house, the windows and patio door were open.

¶16 An employee of H.J. Martin averred that he cleaned the carpets in the house in June 2020, May 2021, and March 2022, and on July 28, 2023, and September 29, 2023, and that he would use a "heavy-duty pet deodorizer with a strong citrus or lemon scent" and "a commercial[-]grade ultra[-]concentrated cleaning solution." The employee stated that on each occasion he cleaned the carpets, there was "a strong odor of cat urine throughout the house." In addition, the employee stated that "[d]uring each cleaning, typically every room in the house would have some areas of vomit, feces, or discolored carpet from fresh or dried cat urine." He further opined that he had been cleaning carpets for over five years, that the "problems with cat urine odors and stains that [he] encountered at

the Kramer home were the worst [he had] ever seen,” and that the carpet cleaning process he performed would only “temporarily hide or conceal the odor.”

¶17 Kramer explained that she had the carpets cleaned twice in two months in 2023 because she “had people in and out of [the] house” with boxes and furniture and she “wanted to make sure that [the house] was clean.” Kramer also stated that she had a health condition at the time she was moving, which limited her ability to clean the house by herself. According to Kramer, her decision to have the carpets cleaned twice in two months in 2023 had nothing to do with “the presence of cat urine.” Kramer stated that she had “no knowledge nor did [she] request the use of commercial-grade product on the carpeting in the Property due to pet urination.”

¶18 On October 1, 2023, the Hansens visited the house a fourth time to perform a pre-closing walk-through. Tyler testified that he smelled cat urine when he entered the house through the garage and that this visit was the first time that he had noticed the smell in the house. Tyler further testified that as he continued to go through the house, the smell “kind of dissipated and went away. You know, it didn’t go away, but it wasn’t as strong as it was right there.” In addition, Tyler testified that he and his father, who was the Hansens’ realtor, thought they could “come up with a solution to fix” the odor and did not view it as “a big issue.” Similar to Tyler, Destini stated that there was “a very immense” “cat odor” when they walked through the door connecting the house to the garage, but that the smell “dissipated throughout the house.” Destini testified that she and Tyler discussed the smell following their fourth visit to the house. During their conversation, the Hansens “talked about how [they] didn’t smell anything” in their previous visits and how they felt that they “could clean it and ... it didn’t seem like it was going to be significant.”

¶19 The Hansens requested a pre-closing meeting to discuss the cat urine odor with Kramer. At that meeting, held on October 2, 2023,⁵ Destini testified that Kramer informed the Hansens that “she was very surprised to hear” about the odor and that “the cat litter box was in the bathroom that was by the garage entryway.” Destini also stated that Kramer apprised them of the fact that “one of her cats did like to mark its territory behind the toilet in that bathroom and that could be where the smell was coming from.” In addition, Destini testified that during the pre-closing meeting, Kramer and Trepanier offered to have Trepanier’s husband “paint the bathroom with KILZ” and to provide the Hansens with an “ozone machine to try to help with the cat smell.” According to Destini, the Hansens accepted these offers. After the pre-closing meeting, the Hansens’ realtor informed them that they could still back out of the closing.

¶20 Later that same day, after the pre-closing meeting, the Hansens moved forward with the closing and purchased the house. Destini testified that while she was concerned about her child’s safety with respect to the cat urine odor, she wanted to proceed with the closing because she trusted Kramer. Destini further averred that, when purchasing the house, the Hansens relied upon Kramer’s explanation of the cat urine being contained to the bathroom area. Kramer did not inform the Hansens, at any point prior to the closing, that she observed the cats urinating on the carpets in the house throughout her 13 years living at the residence.

⁵ Earlier in the day on October 2, 2023, Trepanier accompanied the Hansens’ realtor to the house after the realtor informed her that “there was an odor of pet, cat, something, by the back hallway” of the house. Trepanier testified that she entered the house through the garage and that the house “smelled like it had the entire time, like a pet.” Trepanier stated that she did not smell cat urine.

¶21 Following the purchase, the Hansens “noticed urine odors and urine stains throughout the property.” Destini stated that she asked Kramer to “bring H.J. Martin back to the property to remediate the damage,” but H.J. Martin informed Destini that “removing the carpet and the padding was the only way to get rid of the urine odor.” The Hansens hired H.J. Martin to conduct a black light inspection of stains found on and underneath the carpet. The inspector concluded that the stains were from cat urine.

¶22 Thereafter, the Hansens “removed the carpeting and padding and had the ductwork cleaned and the walls cleaned and painted with KILZ so that [they] could move into the property in early November” 2023. Destini testified that the Hansens did not complete “any work ... to the concrete sub-floor” underneath the carpet. Kramer said that she “was not aware of cat urine in the carpeting prior to the carpeting being torn out by the Hansens after the closing of the Property.”

¶23 The Hansens’ pediatrician opined in a letter to them that “an environment contaminated with residual pet urine clearly presents several very significant health risks to the inhabitants, especially to a young infant.” Likewise, the Brown County Health Department warned the Hansens that the “presence of urine in the property could be hazardous to” their child’s health. Neither the pediatrician’s letter nor the health department’s statement was presented as sworn statements.

¶24 In an oral ruling, the circuit court granted Kramer’s motion for summary judgment on all claims asserted in the amended complaint. The court concluded that the presence of pet urine is not a “defect” for purposes of a residential real estate transaction and, consequently, does not need to be disclosed

in an RECR under WIS. STAT. § 709.03. Interpreting § 709.03, the court stated that if

the presence of pet urine or odor in the home were intended by the legislature to constitute a defect, that surely given that is so common for people to own pets, the boilerplate [RECR] described in [§] 709.03, would include questions asking whether the owner had pets and whether the pets ever urinated in the home. However, there is no statute, regulation, or law of any kind in Wisconsin that requires disclosure of this information.

The court further stated that the Hansens’ pediatrician did not discuss the hazards of cat urine as it related to the property in this case or to the amount of cat urine that would be necessary to constitute a hazard, and the court concluded that “pet urine is not a hazardous substance.” In addition, the court concluded that even if pet urine could constitute a defect, Kramer did not have “notice or knowledge of” the defect.

¶25 Furthermore, the circuit court concluded that, pursuant to the accepted offer to purchase, the Hansens had the opportunity to “delay[] the closing” after the fourth visit if they had concerns about the cat urine, but they chose to proceed to closing after having waived inspection and testing

contingencies. The court entered a written order consistent with its oral ruling. The Hansens now appeal.⁶

DISCUSSION

¶26 We review a circuit court’s summary judgment decision de novo, applying the same methodology as the circuit court. **Hocking v. City of Dodgeville**, 2009 WI 70, ¶7, 318 Wis. 2d 681, 768 N.W.2d 552. Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”⁷ WIS. STAT. § 802.08(2). In order to survive summary judgment, the party with the burden of proof on an element in the case

⁶ We pause to note that the Hansens’ and Kramer’s appellate counsel each violate the Rules of Appellate Procedure. First, both parties’ appellate briefs do not comply with WIS. STAT. RULE 809.19(8)(bm), which requires a brief to “have page numbers centered in the bottom margin using Arabic numerals with sequential numbering starting at ‘1’ on the cover.” Our supreme court has explained that this pagination requirement “will match the page number to the page header applied by the eFiling system, avoiding the confusion of having two different page numbers.” S. CT. ORDER 20-07, 2021 WI 37, 397 Wis. 2d xiii (eff. July 1, 2021). Second, Kramer’s response brief frequently fails to include proper page numbers when citing the record. As the Hansens note in their reply brief, references to the appendix are not to the record. See RULE 809.19(1)(d)-(e); **Ripp Distrib. Co. v. Ruby Distrib. LLC**, 2024 WI App 24, ¶16 n.7, 411 Wis. 2d 630, 5 N.W.3d 930. We admonish counsel that we expect parties to follow our Rules of Appellate Procedure.

⁷ Kramer incorrectly states that our review of the circuit court’s summary judgment decision includes an assessment of the court’s findings of fact under the clearly erroneous standard of review. “Summary judgment procedure prohibits a court, trial or appellate, from deciding an issue of fact.” **State Bank of La Crosse v. Elsen**, 128 Wis. 2d 508, 511, 383 N.W.2d 916 (Ct. App. 1986). “The court determines only whether a factual issue exists, resolving doubts in that regard against the party moving for summary judgment, because that party has the burden of establishing the absence of a factual issue.” *Id.* at 512 (citation omitted). “The court also views the facts in the light most favorable to the party opposing the motion. If a dispute concerning the material facts exists or the material presented is subject to conflicting factual interpretations or inferences, summary judgment must be denied.” *Id.* (citation omitted).

must establish that there is at least a genuine issue of fact on that element by submitting evidentiary material setting forth specific facts pertinent to that element. *Malzewski v. Rapkin*, 2006 WI App 183, ¶12, 296 Wis. 2d 98, 723 N.W.2d 156. “A factual issue is ‘genuine’ if the evidence is such that a reasonable jury could return a verdict in favor of the non-moving party.” *Midwest Neurosciences Assocs., LLC v. Great Lakes Neurosurgical Assocs., LLC*, 2018 WI 112, ¶80, 384 Wis. 2d 669, 920 N.W.2d 767.

I. Waiver

¶27 We first address Kramer’s argument that pursuant to *Lambert v. Hein*, 218 Wis. 2d 712, 582 N.W.2d 84 (Ct. App. 1998), the Hansens waived all of their claims because they proceeded with the purchase after waiving the inspection and testing contingencies and after discovering the cat urine odor during the pre-closing walk-through. The Hansens respond that had they backed out of the purchase after the pre-closing meeting, they “could have faced a lawsuit ... for specific performance.”

¶28 In *Lambert*, the seller of a house noted in the RECR that one of the basement’s walls had a water stain from a broken downspout. *See id.* at 717-18. After viewing the house and receiving the RECR, the buyers accepted the seller’s counteroffer to purchase. *Id.* at 718. Thereafter, the buyers viewed the house a second time and “became concerned about possible cracks and water problems in the basement walls.” *Id.* Each party obtained an expert to inspect the basement, and both experts agreed that the problem was more serious than a disconnected downspout. *Id.* The experts disagreed, however, as to the best method for remediating the problem. *Id.*

¶29 The buyers then sent a letter to the seller stating that they were willing to proceed with the transaction but “with a full reservation of all rights in requiring the sellers to have the real estate placed into the condition as was covenanted in” the RECR. *Id.* at 718-19. Following the seller’s declaration that the buyer’s offer was “null and void,” and that she would return their earnest money, the buyers “reconfirmed their desire to move forward with the transaction.” *Id.* at 719. While the sale was pending, the buyers filed a lawsuit alleging, in relevant part, breach of warranty and misrepresentation. *Id.* Approximately one month later, the parties closed on the transaction. *Id.*

¶30 At a bench trial, the circuit court ruled in favor of the seller, concluding that any damages suffered by the buyers were solely the result of their own actions because they proceeded with the transaction “when they were not legally, practically or monetarily required to do so and when they had full knowledge of the defective condition of the basement.” *Id.* at 720. The court further concluded that the buyers waived any defects. *Id.*

¶31 On appeal, we rejected the buyers’ argument that their post-contract, pre-closing discovery of the defect did not require them to either rescind the transaction or waive the defects. *Id.* at 726, 730. We concluded that the contract provided the buyers the opportunity, after their offer to purchase, to discover actual or potential defects in the property so that they could “make an informed choice whether to proceed with the transaction, whether to seek amendments to the terms of the contract, or whether to abort the contract.” *Id.* at 729. Accordingly, we concluded that the buyers waived their breach of warranty claim by choosing to close the transaction while knowing of the defect. *See id.* at 730.

¶32 As to the buyers’ misrepresentation claims, we agreed with the circuit court’s conclusion that “once the inspection was made and the defect discovered, the [buyers] were negligent in further relying upon the representations made in the seller’s condition report.” *Id.* at 731. We concluded that the buyers had “obligations to act prudently once they had discovered the true nature of the defect” because “the inspection and disapproval provisions of this contract envisioned possible future developments which could alter the parties’ rights and responsibilities under the agreement.” *Id.* at 731-32. In other words, the buyers went ahead with the purchase despite knowing of the defect that they contended breached the seller’s contractual warranty and despite the contract permitting them not to close on the property after discovering the defect.

¶33 In *Malzewski*, buyers offered to purchase a house from the sellers contingent on an inspection and a final walk-through. *Malzewski*, 296 Wis. 2d 98, ¶¶2-3. Like in this case, the offer to purchase included a provision stating that the sellers represented to the buyers that as of the date of the acceptance, the sellers had no notice or knowledge of conditions affecting the property other than those identified in the RECR. See *id.*, ¶2. The RECR stated that the sellers were “aware of defects in the basement or foundation (including cracks, seepage and bulges).” *Id.* The sellers explained in the RECR that “[d]uring very heavy rainstorms, there might be a little seepage in the walls/floors. The seller has regraded to correct this when it has happened.” *Id.* (alteration in original). Furthermore, like in this case, an addendum to the offer to purchase referenced the inspection contingency and recommended that the home be formally inspected. See *id.*, ¶3. After conducting the final walk-through and not noticing any defects, the buyers “waived their right to have the home inspected” and purchased the house. *Id.*, ¶4.

¶34 Months after the purchase, “paint on the basement walls peeled away and some pre-existing cracks in the basement walls opened.” *Id.*, ¶5. The buyers hired an engineer to evaluate the walls’ condition, and the engineer estimated that the walls had been “cracked for many years, were failing and would have to be fixed.” *Id.* A contractor estimated that the cost to repair the basement walls would be in excess of \$25,000. *Id.*

¶35 The buyers sued the sellers for failing to disclose the cracks in the basement walls under the following theories: breach of contract and breach of warranty; intentional, strict responsibility, and negligent misrepresentation; theft by fraud; and false advertising. *Id.*, ¶6. In discovery, the sellers admitted that when they owned the house, the basement walls had 12-foot-long cracks, which they filled in 10 to 20 times using masonry cement. *Id.*, ¶7. The sellers further admitted that they painted the walls approximately five times and also “touched them up after they had filled” the cracks with cement. *Id.* According to the sellers, “they never had anyone look at the house’s basement or foundation to get a repair estimate.” *Id.* The circuit court granted the sellers’ motion for summary judgment. *Id.*, ¶10.

¶36 Interpreting *Lambert*, this court stated that “a buyer aware of the ‘true nature’ of defects, or who has the right to discover the ‘true nature’ of defects *that are disclosed*, cannot later complain when he or she goes ahead with the purchase” “(1) despite knowing about the defects, or (2) after giving up a right under the contract to discover their ‘true nature.’” *Malzewski*, 296 Wis. 2d 98, ¶15 (quoting *Lambert*, 218 Wis. 2d at 731). This court concluded that each of the buyers’ claims, aside from the false advertising claim, required the buyers to show that they “reasonably relied” on the sellers’ RECR “and its alleged failure to disclose the true nature of the problems with the basement.” *Id.*, ¶¶12, 24. We

held that the buyers could not demonstrate that they reasonably relied on the RECR because they waived their right to an inspection despite the fact that the RECR “disclosed, at the very least, potential defects in the basement.” See *id.*, ¶¶16, 18-20, 22.

¶37 As to the false advertising claim, we stated that while reasonable reliance is not an element of such a claim, it may be considered by a jury in determining whether “the purchaser in fact relied” on the seller’s representation. *Id.*, ¶24 (citation omitted). We held that summary judgment was inappropriate on that claim because the sellers admitted that they knew that the basement walls had cracks and that they painted over the cracks. *Id.*, ¶¶24-25. We concluded that “[a] reasonable jury could find that those cracks and the attempted efforts at remediation should have been disclosed, and that failure to do so violated WIS. STAT. § 100.18 even though the [buyers] waived their right to have the property inspected.” *Id.*, ¶25.

¶38 In the present case, the summary judgment record reasonably demonstrates that Kramer did not disclose the cat urine or cat urine odor to the Hansens in the RECR or in any other manner. This fact stands in stark contrast to the sellers in *Malzewski* and *Lambert*, who disclosed that there were issues with the houses in the RECR, thus putting the buyers on notice that there were at least potential defects or issues with the homes. Therefore, while the Hansens did waive an inspection in their offer to purchase, a jury could reasonably find that the cat urine and cat urine odor were not disclosed in the RECR, or in any other manner by Kramer, and the Hansens were not aware of their “true nature.” A jury could reasonably find that the Hansens were not put on notice of the cat urine and cat urine odor to the extent that they could have knowingly given up their right to discover their true nature. When viewing the record in the light most favorable to

the Hansens, a jury could reasonably find that by the time the Hansens discovered the presence of the cat urine odor, on the day before the scheduled closing, Kramer had already accepted their offer to purchase. Moreover, a jury could reasonably find that the Hansens also reasonably relied on Kramer's statements at the pre-closing meeting that the cat urine odor was limited to the bathroom near the garage entryway and would be taken care of by cleaning and painting.

¶39 Significantly, and to the Hansens' point that they could have been liable for specific performance, Kramer fails to explain where in the offer to purchase it states that the Hansens could have, following their discovery of the cat urine odor, rescinded the transaction. In *Lambert*, as we have explained, the contract itself provided that the buyers did not have to close on the property, despite the fact that their offer to purchase was accepted, once they discovered the true nature of the defect.

¶40 Upon our independent review of the offer to purchase in this case, we see nothing that provided the Hansens such a right. The offer to purchase stated that the Hansens had the "right to walk through the Property to determine that there has been no significant change in the condition of the Property," but the offer did not provide whether the Hansens could, for example, back out of the contract, request an inspection or other testing, or investigate the cat urine odor in some other fashion prior to closing. As the record demonstrates, in the light most favorable to the Hansens, Kramer did not disclose the cat urine and cat urine odor, the Hansens did not discover the cat urine odor until after their offer to purchase was accepted, and the contract did not provide a basis for them to rescind due to the cat urine odor or to further investigate the potential issue. Therefore, we conclude that the Hansens did not waive their claims against Kramer as a matter of law.

II. Defect

¶41 We now turn to the Hansens’ four causes of action as they relate to the allegation that Kramer made false representations in the RECR and the accepted offer to purchase that she was not aware of any defects affecting the property.⁸ We conclude that the Hansens failed to provide sufficient evidence demonstrating that the cat urine and cat urine odor constituted a defect that Kramer was required to disclose in the RECR or the offer to purchase.

¶42 WISCONSIN STAT. § 709.02(1) requires that a seller of residential real estate furnish a completed RECR under WIS. STAT. § 709.03 to a prospective buyer. An RECR “is a standard report required under Wisconsin law that obliges the sellers of a home to attest to any known defects in the property.” *Novell v. Migliaccio*, 2008 WI 44, ¶7, 309 Wis. 2d 132, 749 N.W.2d 544. A “defect” is a “condition that would have a significant adverse effect on the value of the property; that would significantly impair the health or safety of future occupants of the property; or that if not repaired, removed, or replaced would significantly shorten or adversely affect the expected normal life of the premises.” Sec. 709.03.

¶43 WISCONSIN STAT. § 709.03 lists questions that must be included in an RECR that address a seller’s awareness of defects pertaining to a house for sale. However, the statute cautions that the “lists of defects following each question ... are examples only and are not the only defects that may properly be

⁸ The four causes of action, as they relate to Kramer’s alleged false representations both in the RECR and the contract, required proof of, among other elements, the existence of a defect in the house that Kramer failed to disclose. See WIS JI—CIVIL 3053 (breach of contract); WIS JI—CIVIL 2401 (common law intentional misrepresentation); WIS JI—CIVIL 2419 (theft by fraud); and WIS JI—CIVIL 2418A (false advertising).

disclosed in response to each respective question.” *Id.*; see also *Novell*, 309 Wis. 2d 132, ¶8. Among the listed disclosures, a seller must address whether he or she is “aware of current or previous ... defects caused by animal ... infestations” and whether he or she is “aware of a defect caused by unsafe concentrations of, or unsafe conditions relating to, ... potentially hazardous or toxic substances on the property.” Sec. 709.03.

¶44 The accepted offer to purchase included a provision stating that Kramer had “no notice or knowledge of Conditions Affecting the Property or Transaction ... other than those identified in” the RECR. The accepted offer to purchase further stated that “‘Conditions Affecting the Property or Transaction’ are defined to include,” in pertinent part, “Defects caused by unsafe concentrations of, or unsafe conditions on the Property relating to ... potentially hazardous or toxic substances” and “Other Defects affecting the Property.” Moreover, the accepted offer to purchase included the same definition for “defect” as in WIS. STAT. § 709.03.

¶45 The Hansens argue that “cat urine qualifies as” a defect because it is “a potentially hazardous or toxic substance” that “would significantly impair the health or safety of future occupants of the property.” The Hansens further argue that cat urine and cat urine odor are defects because they “would have a significant adverse effect on the value of the property.”

¶46 We conclude that the Hansens failed to provide sufficient evidence to raise a genuine issue of material fact on the question of whether the cat urine and cat urine odor constituted defects, such that Kramer was required to disclose

them in the RECR or the accepted offer to purchase.⁹ In other words, the Hansens failed to put forth sufficient evidence upon which a jury could have concluded that the cat urine and cat urine odor constituted a defect and, therefore, that Kramer breached the contract and misrepresented the conditions of the house to the Hansens by failing to disclose the defect. *See Malzewski*, 296 Wis. 2d 98, ¶12.

¶47 The Hansens presented no evidence raising a genuine issue of material fact regarding whether the cat urine and cat urine odor *in the house they purchased* would significantly impair their own health or safety.¹⁰ Even if we assume without deciding that the pediatrician’s letter was admissible evidence, it makes no reference to whether the specific conditions at the property would significantly impair the Hansens’ health and safety or whether the conditions at the home constituted an “environment contaminated with residual pet urine.” Likewise, even if we assume without deciding that the Brown County Health Department’s opinion was admissible, the department did not offer an opinion as to the dangerousness of the particular conditions present in the house. In addition, the black light testing merely showed the presence of cat urine—there is no

⁹ Although Kramer contends that the stains underneath the carpet “could stem from non-urine sources like spills,” the H.J. Martin inspector concluded, after conducting a black light test, that the stains were from cat urine. Therefore, for purposes of summary judgment, we accept the Hansens’ claim that the stains were caused by cat urine.

¹⁰ Even if we were to accept the Hansens’ proposed definitions of “hazardous” and “toxic” substances from WIS. STAT. § 100.37(1)(c)1. and (1)(k), both WIS. STAT. § 709.03 and the contract (which defined “defect” in the same manner) required the Hansens to present sufficient evidence that the cat urine and cat urine odor were defects that Kramer was required to disclose. Stated differently, it is not enough to conclude that cat urine is a hazardous or toxic substance. Rather, the Hansens were required to present sufficient evidence for a jury to reasonably determine that the cat urine and cat urine odor were “condition[s] that would have a significant adverse effect on the value of the property; that would significantly impair the health or safety of future occupants of the property; or that if not repaired, removed, or replaced would significantly shorten or adversely affect the expected normal life of the premises.” Sec. 709.03.

evidence in the record demonstrating the severity of the conditions relating to the urine so as to enable a jury to reasonably find that the conditions would significantly impair the Hansens' health or safety.

¶48 As to the Hansens' argument that the cat urine and cat urine odor constituted defects because they "would have a significant adverse effect on the value of the property," they point to the fact that Kramer acknowledged in her deposition that "cat urine on carpeting or strong cat odors could affect a buyer's decision to purchase her property or the price to offer for her property." Again, however, the Hansens failed to present sufficient evidence showing that the cat urine and cat urine odor were so significant that they would negatively affect the value of the house to the extent that they constituted a defect and required Kramer's disclosure. There is no evidence in the record suggesting what financial or other impact the cat urine and cat urine odor present at the house would have on the house's property value, much less whether the presence of cat urine and the cat urine odor would have had a *significant* adverse effect on the house's value. Indeed, the concrete sub-floor was not damaged, and the Hansens cite no evidence from the record demonstrating the costs associated with any required remediation, such as to allow a jury to compare that cost to the price the Hansens paid for the house.

¶49 Absent evidence addressing the specific conditions in the house and how those conditions would significantly impair the Hansens' health or safety or have a significant adverse effect on the property's value, the presence of cat urine and cat urine odor alone was insufficient to demonstrate that Kramer was aware of defects affecting the property and therefore made false representations both in the RECR and the accepted offer to purchase.

III. Material fact

¶50 Despite the foregoing, we conclude that the Hansens’ remaining claims were improperly dismissed at the summary judgment stage. We begin with the Hansens’ intentional misrepresentation and theft by fraud claims based on Kramer’s alleged failure to disclose a material fact to the Hansens. Citing **Ollerman**, the Hansens contend that “Wisconsin courts have long held that sellers of residential real estate have a common law duty to disclose material facts to buyers” and that the presence of cat urine and cat urine odor was a “material fact.”¹¹ In response, Kramer argues that the presence of cat urine and cat urine odor is not a material fact because no Wisconsin court has “extended disclosure mandates to pet urine or odors.”

¶51 Our supreme court stated in **Ollerman** that a “vendor of a residential lot has a duty to a ... purchaser to disclose facts which are known to the vendor, which are material to the transaction, and which are not readily discernible to the purchaser.” **Ollerman**, 94 Wis. 2d at 42. Pertinent here, a “fact is material if a reasonable purchaser would attach importance to its existence or nonexistence in determining the choice of action in the transaction in question.” *Id.*

¶52 Here, a jury could reasonably find that the presence of cat urine and cat urine odor was a material fact. In particular, on their fourth and final visit to the house prior to closing the transaction, both Tyler and Destini noticed the cat urine odor, and they discussed the odor following the visit. Based on their

¹¹ The Hansens argue that a seller’s duty to disclose material facts to a buyer applies to intentional misrepresentation claims and theft by fraud claims. Kramer does not dispute the Hansens’ legal assertion, and we accept it as true for purposes of this opinion.

discovery of the cat urine odor, the Hansens requested a meeting with Kramer, during which Kramer told them that the cat urine odor was limited to the bathroom by the garage. The Hansens accepted Kramer's explanation, and a jury could determine that such acceptance was reasonable. In addition, Destini stated that she was concerned about the cat urine odor and its potential effect on her child's safety and that the Hansens "were not interested in purchasing a property that was contaminated by ... urine," and a jury could reasonably find that a reasonable purchaser would likewise attach importance to the cat urine odor. The reasonableness of the Hansens' concerns is supported by the fact that two other potential buyers visited the house and sent messages to Trepanier stating that they were not interested in purchasing the house due to allergy issues and the cat urine odor.

¶53 In addition, a jury could reasonably find that Kramer had knowledge of the extent of the cat urine and cat urine odor beyond the bathroom. Kramer stated that she was aware that, on at least two occasions, "the cats" sprayed in the house. Kramer further admitted to "occasionally" witnessing her pets urinating on the carpet during her 13 years living at the residence. A jury could reasonably infer from this admission that Kramer witnessed her cats urinating on the new carpet after it was replaced in 2021. Furthermore, Kramer "expected" that the carpet padding would get wet from the urine, but she was unable to clean the padding "without pulling up the carpeting itself." A jury could also reasonably infer from Kramer's replacement of the carpet in 2021, and the installation of pet-resistant padding underneath some of the carpeting in 2022, that she was aware of the cat urine and cat urine odor problem when she sold the house.

¶54 A jury could further reasonably infer that Kramer knew the extent of the cat urine and cat urine odor problem for two reasons. First, the two other

potential buyers detected an odor on prior visits and commented on the odor to Trepanier. While only one of the buyers’ agents specifically referenced “the smell of cat/pet urine,” and while Kramer states that she had no knowledge of these comments, the odor was apparently bad enough during these visits that these buyers did not want to purchase the house. A jury could reasonably infer that if these buyers detected the odor, Kramer also detected the odor.¹²

¶55 Second, Kramer had the carpets professionally cleaned in July 2023 and September 2023. A jury could reasonably infer that Kramer had the carpets professionally cleaned twice in two months because she was trying to sell her house and did not want buyers detecting the cat urine odor. Indeed, the H.J. Martin employee who cleaned the carpets stated that “[d]uring each cleaning, typically every room in the house would have some areas of vomit, feces, or discolored carpet from fresh or dried cat urine” and that he used a commercial-grade, ultra-concentrated cleaning solution. The employee further stated that he had been cleaning carpets for over five years, that the “problems with cat urine odors and stains that [he] encountered at the Kramer home were the worst [he had] ever seen,” and that the carpet cleaning process he performed would only “temporarily hide or conceal the odor.” A jury could also reasonably

¹² Kramer is correct that the Hansens claim that they did not detect an odor on August 18, 2023, when they conducted their first walk-through of the house. According to Kramer, the Hansens should have discovered the cat urine odor that day if the other buyers noticed it during their walk-throughs. However, as we noted earlier, the listing activity report states that those two walk-throughs occurred on August 19, 2023, while the Hansens’ first walk-through occurred on August 18, 2023. Regardless, even if the showings occurred on the same day, Kramer’s assertion is one for the jury to consider, not for this court to rely upon in summary judgment proceedings, and could be relevant as to whether the Hansens’ reasonably relied on Kramer’s representations. See *Malzewski v. Rapkin*, 2006 WI App 183, ¶¶18, 22, 296 Wis. 2d 98, 723 N.W.2d 156 (stating that a buyer’s claims based on a seller’s alleged intentional misrepresentation and theft by fraud “require[] that the buyer’s reliance be justifiable” (citation omitted)).

find that the cat urine and cat urine odor were not readily discernible to the Hansens given Kramer's cleaning of the carpets and opening of the doors and windows prior to their visits, despite the presence of the cats during the visits.

¶56 Therefore, on this summary judgment record, and viewing the evidence in a light most favorable to Hansens, a jury could reasonably find that a reasonable purchaser would consider the cat urine and cat urine odor to be a material fact that Kramer failed to disclose, either intentionally or otherwise. *See* WIS JI—CIVIL 2401; WIS JI—CIVIL 2419. Because Kramer does not dispute the remaining elements of the intentional misrepresentation and theft by fraud claims as they pertain to this allegation, we do not address them further.

IV. Concealment

¶57 We now address the Hansens' intentional misrepresentation, theft by fraud, and false advertising claims based on the Hansens' claims that Kramer concealed the cat urine odors specifically by having the carpet professionally cleaned twice within two months—once shortly before the house was listed for sale and once after the house was listed for sale—and by opening the windows and patio door prior to showing the property to the Hansens.

¶58 In response to these claims, Kramer merely contends that she did not have knowledge of the cat urine and cat urine odor. We have already concluded that a jury could reasonably find that Kramer had knowledge of the cat urine and cat urine odor, thereby creating a material question of fact for a jury, and we do not address these claims further. We do note, however, that a false advertising claim does not include a knowledge element. *Malzewski*, 296 Wis. 2d 98, ¶23; WIS JI—CIVIL 2418A. That said, a reasonable jury could find that the presence of cat urine and the cat urine odor, and Kramer's alleged attempts at concealing

them, “should have been disclosed, and that failure to do so violated WIS. STAT. § 100.18 even though the [Hansens] waived their right to have the property inspected.” See *Malzewski*, 296 Wis. 2d 98, ¶25.

V. Spoliation

¶59 Finally, Kramer contends that because the Hansens destroyed the carpet in the house after the purchase, the doctrine of spoliation required granting Kramer’s motion for summary judgment. However, Kramer cites no authority permitting a circuit court to grant summary judgment against a party on spoliation grounds. Therefore, we do not address this argument. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (stating that we will not consider arguments unsupported by reference to legal authority). We further note that the circuit court did not dismiss the Hansens’ claims at the summary judgment stage as a sanction for spoliation, and we see nothing before us that would permit us to affirm the court’s decision on that ground. See *Garfoot v. Fireman’s Fund Ins.*, 228 Wis. 2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999) (“A trial court’s decision whether to impose sanctions for the destruction or spoliation of evidence, and what sanction to impose, is committed to the trial court’s discretion.” (footnote omitted)).

¶60 In summary, we conclude that genuine issues of material fact exist as to the Hansens’ common law misrepresentation and theft by fraud claims premised on Kramer’s alleged failure to disclose material facts to the Hansens. We further conclude that genuine issues of material fact exist as to the Hansens’ common law misrepresentation, theft by fraud, and false advertising claims premised on Kramer’s alleged concealment of the cat urine or cat urine odor from the Hansens. Therefore, on those claims, we reverse and remand for further

proceedings consistent with this opinion. We affirm the circuit court’s decision granting summary judgment to Kramer on the Hansens’ remaining claims. In particular, we affirm the court’s order with respect to the Hansens’ breach of contract, common law misrepresentation, theft by fraud, and false advertising claims premised on Kramer’s failure to disclose a “defect” to the Hansens.

By the Court.—Order affirmed in part, reversed in part and cause remanded for further proceedings.

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

