

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 6, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

**Nos. 98-3086
98-3580**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

LIBORIO CIANCIOLO AND SERAFINA MARTELL,

PLAINTIFFS-APPELLANTS,

JOHN CIANCIOLO,

PLAINTIFF,

v.

ANTONINA CIANCIOLO,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Liborio Cianciolo and Serafina Martell appeal from the circuit court judgment granting summary judgment to their sister,

Antonina Cianciolo. They argue that the court erred in dismissing their action, which sought recovery of their respective shares of the estate of their mother, Serafina (Sally) Cianciolo.¹ We affirm.

I. BACKGROUND

¶2 In June 1995, Liborio, Serafina, and John filed a complaint alleging fraudulent inducement and breach of contract, and seeking the imposition of a constructive trust and punitive damages from their sister, Antonina, who allegedly had procured an estate planning document through which she became the sole beneficiary of the estate of their mother, Sally. The complaint alleged that shortly before their mother's death, Antonina contacted them and "asked them to assist her in procuring a[n] . . . estate planning document by which the property of [their mother] would pass . . . without the necessity of probate proceedings." They alleged that Antonina "personally ensure[d] that all property passing into her control as a result of said document would be divided equally among all of her siblings, . . . [because] it was the intention of [their mother] that all of her children share equally in her estate." They further alleged that Antonina procured Sally's signature on the estate planning documents when Sally lacked testamentary capacity due to the gravity of her illness. In addition, they alleged that Antonina's procurement of their mother's signature was obtained as a result of fraud, duress and undue influence. Consequently, they alleged that their mother's assets should be subject to a constructive trust, and that they should receive punitive damages.

¹ Liborio and Serafina's brother, John Cianciolo, was also a plaintiff in the case but is not a party to this appeal.

¶3 In April 1996, the circuit court granted Antonina’s motion to dismiss for lack of personal jurisdiction. On appeal, this court reversed the order, and on remand, the case was reassigned to Judge Patricia D. McMahon. Thereafter, the circuit court set October 31, 1997 as the cutoff date for discovery, and on that date, Antonina moved for summary judgment. On December 1, 1997, Liborio and Serafina filed their brief in opposition to Antonina’s motion for summary judgment, and on December 23, they moved to amend their complaint. The circuit court denied their motion to amend. The court then granted Antonina’s motion for summary judgment, concluding: (1) that the plaintiffs had failed to allege with specificity the facts surrounding the fraudulent inducement claim; (2) that a constructive trust was a remedy and not a cause of action; and (3) that the breach of contract claim was prohibited by WIS. STAT. § 879.59, the probate statute that prohibits unwritten compromises between claimants having an interest in an estate.

¶4 Liborio and Serafina then moved to amend their complaint and filed a motion for reconsideration to which they attached photocopies of their mother’s medical records, correspondence from Antonina to the attorney who drafted the trust, a copy of the trust, and copies of real estate conveyances. The circuit court denied the request for reconsideration and refused to consider the newly submitted materials, based on Milwaukee County Circuit Court Local Rule 367. Liborio and Serafina now appeal.²

² Liborio and Serafina do not challenge the circuit court’s decision with respect to the dismissal of their breach of contract claim because they concede “that the contract was an oral contract and, therefore, unenforceable by reason of WIS. STAT. § 879.59, as interpreted by [*Street v. Owens*], 53 Wis. 2d 202, 191 N.W.2d 856 (1971).”

II. ANALYSIS

¶5 In reviewing a grant of summary judgment, we employ the same methodology as the circuit court. *See Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We first examine the pleadings and affidavits to determine whether a claim for relief has been stated. *See id.* If a claim for relief has been stated, we then determine whether any material factual issue exists. *See id.* If no genuine material factual issue exists, and if the moving party is entitled to judgment as a matter of law, we will affirm the circuit court’s decision granting summary judgment. *See id.*

¶6 The purpose of summary judgment is to “avoid trials where there is nothing to try.” *Caulfield v. Caulfield*, 183 Wis. 2d 83, 91, 515 N.W.2d 278 (Ct. App. 1994) (citation omitted). Consequently, once the moving party makes a prima facie case, summary judgment will be granted unless the non-moving party presents evidence upon which a jury could reasonably find in favor of the non-moving party. *See Pomplun v. Rockwell Int’l Corp.*, 203 Wis. 2d 303, 306-07, 552 N.W.2d 632 (Ct. App. 1996). On appeal, we review the circuit court’s decision *de novo*. *See Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980).

¶7 Liborio and Serafina claim that the circuit court erred in dismissing their claim for a constructive trust. Liborio and Serafina maintain that the circuit court was mistaken in ruling that a constructive trust is a remedy, not a cause of action, and never looked at the allegations in the complaint, which, they maintain, were sufficient to support their action for a constructive trust. While we agree that the circuit court erroneously concluded that the plaintiffs’ request for a constructive trust failed to state a cause of action, we nevertheless conclude that

the plaintiffs' submissions attached to their brief in opposition to Antonina's motion for summary judgment were insufficient to support their constructive trust claim.

¶8 A constructive trust is a trust imposed by a court in equity to compel a person who unfairly holds a property interest to convey such interest to its rightful owner. *See Gorski v. Gorski*, 82 Wis. 2d 248, 254, 262 N.W.2d 120 (1978). A constructive trust will be imposed if a party has been unjustly enriched and the enrichment was achieved through wrongful conduct such as fraud, duress, mistake, or an abuse of a confidential relationship. *See Wilharms v. Wilharms*, 93 Wis. 2d 671, 678-79, 287 N.W.2d 779 (1980). In *Gorski*, the supreme court noted that to support a request for constructive trust, the complaint "must state facts sufficient to show (1) unjust enrichment and (2) abuse of a confidential relationship, or some other form of unconscionable conduct." *Gorski*, 82 Wis. 2d at 255.

¶9 In the instant case, the complaint, in relevant part, alleged:

That shortly before the death of [Sally], defendant contacted plaintiffs and asked them to assist her in procuring a grantor-type trust or other estate planning document by which the property of [their mother] would pass to the other family members without the necessity of probate proceedings.

That the defendant represented to plaintiffs that it was the intention of [Sally] that all of her children share equally in her estate.

That defendant further assured plaintiffs that regardless of the disposition of assets pursuant of the above referenced estate planning document, or the nominations in said document, that the defendant would personally ensure that all property passing into her control as a result of said document would be divided equally among all of her siblings.

That in reliance upon said assurances by the defendant, plaintiffs procured an estate-planning document of the type described and sent it to defendant.

That after the death of [Sally], defendant appropriated all property belonging to [Sally] and has refused to turn any of it over to plaintiffs, and has moreover advised plaintiffs through an attorney that all of the property belonging to [Sally] passed to her as sole beneficiary of the above referenced estate planning document.

FIRST CAUSE OF ACTION – FRAUDULENT INDUCEMENT

....

That defendant fraudulently induced the decedent, [Sally], to sign the above referenced estate planning document by representing to her that it would result in an even distribution of her assets among her children, while actually intending to appropriate the entire estate.

SECOND CAUSE OF ACTION – BREACH OF CONTRACT

....

That the refusal of defendant to divide the decedent's estate assets equally was a breach of an enforceable agreement between her and plaintiffs, in reliance on which plaintiffs had procured the requested estate planning document.

THIRD CAUSE OF ACTION – CONSTRUCTIVE TRUST

....

That defendant procured the signature of the decedent . . . on the estate planning documents at a time when [Sally] lacked testamentary capacity due to but not limited to the following: fraud, duress, undue influence, and mental incompetency secondary to her final illness, as a result of which the assets of the decedent, together with the proceeds thereof, are subject to a constructive trust under Wisconsin law.

FOURTH CAUSE OF ACTION- PUNITIVE DAMAGES

....

That the actions of defendant in fraudulently obtaining plaintiffs' assistance and her mother's signature with regard to the above were outrageous in reckless disregard of the plaintiff's [sic] rights, thereby justifying punitive damages.

WHEREFORE, plaintiffs demand judgment against the defendant for their respective beneficial shares of the assets of [Sally] together with the imposition of a constructive trust on all of the above property, punitive damages, attorney fees, and all other relief as may be deemed just and equitable by the court.

¶10 Under WIS. STAT. § 802.02(1) (1995-96)³, we conclude that the complaint, viewed in its entirety, sets forth allegations sufficient to support the action for a constructive trust. By alleging that: (1) Antonina received a benefit, her mother's property; (2) this property was supposed to be divided equally among the siblings; and (3) Antonina procured her mother's signature and retained the trust property by wrongful conduct, the complaint met the elements essential to an action for a constructive trust. In their response to Antonina's motion for summary judgment, however, Liborio and Serafina failed to submit any evidence to support their claim. Specifically, their submissions do not establish the third element for a constructive trust—that Antonina abused a confidential relationship, exercised undue influence over her mother, or misled her about the contents of the document.

³ WISCONSIN STAT. § 802.02(1) (1995-96), provides:

General rules of pleading. (1) CONTENTS OF PLEADINGS. A pleading or supplemental pleading that sets forth claim for relief, . . . shall contain all of the following:

- (a) A short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief.
- (b) A demand for judgment for the relief the pleader seeks.

¶11 To establish undue influence, one must show that the decedent was susceptible to undue influence, that the person alleged to have had undue influence had the opportunity to influence the decedent and had the disposition to do so, and that the person who exercised undue influence obtained the coveted result. *See Sensenbrenner v. Sensenbrenner*, 89 Wis. 2d 677, 686, 278 N.W.2d 887 (1979). Alternatively, one may also establish undue influence by showing the existence of a confidential relationship between the decedent and the favored beneficiary, and by showing suspicious circumstances surrounding the making of the estate-planning document.⁴ *See id.* Notably absent from Liborio and Serafina's submissions is evidence that Sally relied on Antonina's advice or that Antonina had control over their mother's estate-planning decisions. Without submissions to this effect, no support exists for the imposition of a constructive trust.

¶12 With regard to their complaint's allegation that Sally was incompetent, Liborio and Serafina also failed to submit any evidence in response to Antonina's motion for summary judgment to establish their mother's mental capacity at the time she signed the documents.⁵ Consequently, we conclude that

⁴ Although Liborio and Serafina might claim that they established suspicious circumstances through their submissions indicating that Antonina sought the drafting of new estate planning documents for Sally, Liborio, in the submitted portion of his deposition, admits that *he*, albeit at Antonina's suggestion, was the one who procured the documents by contacting an attorney and sending the documents to Antonina.

⁵ Indeed, in their motion for reconsideration, the plaintiffs attached numerous documents, including their mother's medical records, in an effort to support their cause of action. The circuit court refused to consider the newly submitted material, based on Milwaukee County Circuit Court Local Rule 367, which provides:

VI. MOTIONS

Any motion, brief, affidavit, or other supporting documents received and/or filed in an untimely fashion may be disregarded by the court and a decision may be based on the record as timely filed. The time periods set forth in these rules may be altered by leave of the court for good cause shown by the party requesting a special exception.

(continued)

the plaintiffs failed to present evidence, in opposition to Antonina's motion for summary judgment, that countered her motion or established a material factual issue.

¶13 Liborio and Serafina also contend that the circuit court erred in dismissing their fraudulent inducement claim. We disagree. WISCONSIN STAT. § 802.03(2) (1995-96) provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." The circuit court ruled that the complaint did not plead fraud with the specificity required by § 802.03(2). We agree.

¶14 WISCONSIN STAT. § 802.03(2) is identical to FED. R. CIV. P. 9(b), which "requires specification of the time, place, and content of an alleged false representation." *New England Data Servs., Inc. v. Becher*, 829 F.2d 286, 288 (1st Cir. 1987) (quoting *McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226, 228 (1st Cir. 1980)). One purpose of the particularity requirement is to put defendants on notice so that they may prepare meaningful responses to the claim. *Id.* at 289. The complaint in this case failed to do so.

Local Rule 364, another rule of the First Judicial District, governs summary judgment and dismissal motions. Specifically, it gives a respondent to a summary judgment motion fifteen days from "the service of the movant's motion" to serve and file "a brief, affidavits, or other supporting documents, or waive in writing the right to do so." If the respondent fails to file such documents within the fifteen-day period, "it shall be presumed that [the] respondent has waived the right to do so." *Id.*

As noted above, Liborio and Serafina did not file their motion to amend the pleadings with the attached submissions until December 23, 1997, well after the fifteen-day period pronounced in Local Rule 364. Consequently, the circuit court properly refused to consider the newly filed submission.

¶15 Specifically, the complaint fails to identify the substance of any statements made to the decedent, and whether or in what regard they were false. A complaint pleading negligent or intentional misrepresentation must allege that the defendant misrepresented a fact to the plaintiff or to a third person with specificity as to time, place and content. *See Render v. Markos*, 154 Wis. 2d 420, 428, 453 N.W.2d 202 (Ct. App. 1990). Nothing in the complaint specified the time, place or content of any alleged false representation by Antonina to the decedent; plaintiffs simply alleged in conclusory terms that Antonina made a false statement, and that their mother relied on it and signed the documents.⁶ As the circuit court noted in its written decision:

Allegations concerning fraud must be specific in order to focus discovery. Although the plaintiffs referred to certain paragraphs in their complaint supporting the fraudulent inducement claim, the requisite time, place and content specificity was not present. Plaintiffs cannot satisfy such a burden by contending that the essential elements are “somewhere in the complaint.”

Thus, the circuit court properly granted summary judgment on the fraudulent inducement claim.

¶16 Liborio and Serafina also contend that the circuit court erred in dismissing their fraudulent inducement claim without permitting them to amend the complaint. We disagree. The amendment of pleadings is governed by WIS. STAT. § 802.09(1) (1997-98), which provides, in relevant part:

⁶ The only specific representation pleaded is that Antonina assured her siblings that any assets “passing into her control would be divided equally among all of her siblings.” This representation is of no consequence, however, because it would have had no effect on Sally’s testamentary intent. Only a misrepresentation from Antonina that would have affected Sally’s understanding of the documents, or would have misled her to sign documents contrary to what Liborio and Serafina allege was her testamentary intent, would have been material to their fraudulent inducement theory.

A party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires.

“A trial court's decision to grant leave to amend a complaint is discretionary.” *Finley v. Culligan*, 201 Wis. 2d 611, 626, 548 N.W.2d 854 (Ct. App. 1996). We will not reverse a court's discretionary decision unless the record discloses that the court failed to exercise its discretion, that the facts do not support the trial court's decision, or that the court applied the wrong legal standard. *See id.* at 626-27.

¶17 In denying Liborio and Serafina's leave to amend, the circuit court noted:

With respect to the plaintiffs' motion to amend the pleadings, the significant issue is timing. Due to the appeal, the first scheduling conference was not held until June 9, 1997. However, at that scheduling conference, the parties indicated that they were prepared to proceed and dates were established. Yet the plaintiffs did not file their motion to amend until more than two months after the deadline for the filing of motions and the completion of discovery. Plaintiffs have not presented any reason why such a motion was not brought earlier. The fact that the trial court had not yet set a trial date is not significant as the scheduling order requires the parties to comply with the deadlines or risk the imposition of sanctions. Whether an amendment might have been granted at other stages during these proceedings is not relevant as that is not the factual scenario presented in the instant case.

The court also noted that because the time for discovery had ended, the plaintiffs' contention that the defendant incurred “no prejudice” was without merit. Accordingly, the court concluded that it was unfair to allow the pleadings to be amended. The circuit court's explication supports its discretionary determination.

By the Court.—Judgment affirmed.

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

