COURT OF APPEALS
DECISION
DATED AND FILED

December 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP2208 **Cir. Ct. No. 2015CV10**

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

JBCB, LLC,

PLAINTIFF-APPELLANT,

V.

MCKENNA BERRY COMPANY, LLC,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Jackson County: ANNA L. BECKER, Judge. *Affirmed in part, reversed in part, and cause remanded for further proceedings*.

Before Lundsten, P.J., Sherman and Fitzpatrick, JJ.

¶1 FITZPATRICK, J. In 2008, JBCB, LLC purchased real estate from McKenna Berry Company, LLC. Seven years later, JBCB sued McKenna alleging that: (1) McKenna breached an agreement by failing to transfer to JBCB rights in

a flowage easement at the time of the real estate purchase; (2) under theories of unjust enrichment or implied contract, McKenna owes JBCB monetary compensation for sand JBCB owned which was removed and used by McKenna; and (3) a Warranty Deed conveyed by McKenna was defective because the person who signed the Warranty Deed from McKenna to JBCB signed in his personal capacity only and not on behalf of McKenna.

¶2 The circuit court granted summary judgment to McKenna on the first and second claims, the flowage easement and sand disputes, and dismissed those claims. The circuit court did not resolve the third claim, JBCB's claim of a defective deed. Nonetheless, the circuit court's order also dismissed that claim. JBCB appeals and asserts there are genuine issues of material fact which preclude summary judgment on the flowage easement and sand claims. We disagree and affirm the decision of the circuit court on those claims. As to the validity of the Warranty Deed, McKenna joins JBCB in asking that we decide the issue, even though the circuit court did not. We decline to do so, reverse the circuit court's dismissal of that claim, and remand to the circuit court for further proceedings.

BACKGROUND

¶3 The following facts are undisputed. McKenna is the owner of a cranberry marsh in Jackson County. To conduct its cranberry operations, McKenna acquired, by virtue of a flowage easement, the right to erect dams,

dikes, and ditches to flood, and draw water from, adjoining property owned by Jackson County.[1]

¶4 McKenna sold eighty-two acres of land to JBCB in 2008. The purchased real estate is contiguous to McKenna's cranberry marsh. The Warranty Deed from McKenna to JBCB stated explicitly that McKenna retains the flowage easement.

¶5 The deed from McKenna to JBCB was signed by David Hoffman, an agent of one of the members of McKenna. However, the deed did not state that David Hoffman signed as an agent of McKenna.

¶6 Also in 2008, after the sale, McKenna used sand from the property JBCB purchased from McKenna to repair a dam. The sand was taken by McKenna with JBCB's permission, and JBCB did not demand monetary compensation from McKenna for the sand until initiating this lawsuit.

¶7 JBCB requested declaratory relief and reformation of the Warranty Deed because of the failure to transfer rights in the flowage easement and the failure of David Hoffman to execute the deed on behalf of McKenna. JBCB also requested monetary compensation for its sand removed and used by McKenna. McKenna moved for summary judgment, and the circuit court granted McKenna's motion concerning the flowage easement and sand disputes. In summary judgment arguments before the circuit court, neither party mentioned the claim

[1] A flowage easement grants one party the legal right to flow water on and off adjoining lands owned by another party. Flowage rights can be very important to cranberry cultivation. ***Borek Cranberry Marsh, Inc. v. Jackson Cty.***, 2010 WI 95, ¶3 n.4, 328 Wis. 2d 613, 785 N.W.2d 615.

about the signature on the Warranty Deed. Nonetheless, the circuit court dismissed all claims. JBCB appeals.

¶8 We will mention other undisputed facts relevant to particular arguments in the Discussion section.

DISCUSSION

¶9 Summary judgment shall be granted when there are no genuine disputes of material fact and the moving party is entitled to judgment at a matter of law. WIS. STAT. § 802.08(2) (2015-2016)[2]. We review de novo a grant of summary judgment, employing the same methodology as the circuit court. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503.

¶10 We first examine the moving party's submissions to determine whether those constitute a prima facie case for summary judgment. ***Gross v. Woodman's Food Market, Inc.***, 2002 WI App 295, ¶30, 259 Wis. 2d 181, 655 N.W.2d 718. A moving party defendant states a prima facie case for summary judgment by showing a defense that would defeat the claim. ***Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). If the movant has done so, we then examine the opposing party's submissions to determine if there are material facts in dispute which entitle the opposing party to a trial. ***Gross***, 259 Wis. 2d 181, ¶30.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶11 We view summary judgment materials in the light most favorable to the non-moving party. ***Affeldt v. Green Lake Cty.***, 2011 WI 56, ¶59, 335 Wis. 2d 104, 803 N.W.2d 56. But, "the 'mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.'" ***Baxter v. DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991)(quoting ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247-48, 106 S. Ct. 2505 (1986)).

I. The Flowage Easement

¶12 JBCB asserts that, orally, McKenna agreed to transfer to JBCB rights under McKenna's flowage easement with Jackson County but failed to do so. In its Amended Complaint, as relief, JBCB requested reformation of the Warranty Deed and declaratory relief and maintained that: (1) McKenna failed to inform JBCB the deed was not consistent with the parties' written Offer to Purchase and its two amendments; and (2) McKenna's failure to disclose that fact, when McKenna's "silence … was misleading," caused JBCB's mistake of accepting the terms of the Warranty Deed.[3] The circuit court granted McKenna's motion for summary judgment regarding reformation of the Warranty Deed as it concerned the flowage easement. JBCB contends there are genuine disputed issues of material fact which preclude a grant of summary judgment. We disagree.

[3] As to the flowage easement, JBCB also alleged in its Amended Complaint "mutual mistake" in that both McKenna and JBCB had a mistaken view of the facts, and that McKenna "innocently" misrepresented facts to JBCB. Neither party contends on appeal there are any facts in the record about either mutual mistake or that McKenna innocently misrepresented facts. As a result, we consider those allegations abandoned and those claims will be ignored. ***A.O. Smith Corp. v. Allstate Ins. Cos.,*** 222 Wis. 2d 475, 491-92, 588 N.W.2d 285 (Ct. App. 1998).

¶13 We discuss, first, applicable authorities on reformation of a written instrument and misrepresentation. Next, we consider whether McKenna's submissions constitute a prima facie case for summary judgment. We then discuss whether JBCB's submissions show there are genuine disputes of material fact which require a trial.

A. Reformation and Misrepresentation.

¶14 Reformation of a written instrument is appropriate when the instrument fails to express the intent of the parties because of the mistake of one party coupled with fraud or inequitable conduct of the other. ***La Rosa v. Hess***, 258 Wis. 557, 559, 46 N.W.2d 7 (1951); ***Hennig v. Ahearn***, 230 Wis. 2d 149, 174, 601 N.W.2d 14 (Ct. App. 1999). Reformation of a written instrument need not be based on statements which constitute material misrepresentations. It may be a sufficient basis for contract reformation that one party is mistaken as to a material term of a contract and the other knows of the mistake but fails to point it out. ***Hennig***, 230 Wis. 2d at 175. However, reformation of an instrument cannot occur if the only ground shown is that one party misunderstood the legal effect of the writing. ***La Rosa***, 258 Wis. at 559.

¶15 To obtain reformation of a written instrument, a party's reliance on another's alleged fraudulent or inequitable conduct must be "justified." If a recipient knows that an assertion is false, or should have discovered its falsity by making a cursory examination of a written instrument, reliance is not justified and the party is not entitled to reformation. ***Hennig***, 230 Wis. 2d at 176-77. A party is expected to use their senses and not rely blindly on the maker's assertions. ***Id.*** at 177. Put another way, a party's fault in not knowing or discovering the facts is not justified if "it amounts to a failure to act in good faith and in accordance with

reasonable standards of fair dealing." ***Id.*** at 176 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 172).

¶16 The burden is on the party seeking reformation to prove the elements of that cause of action with clear and convincing evidence. ***La Rosa***, 258 Wis. at 559-60; ***Henning***, 230 Wis. 2d at 177.

¶17 JBCB has not stated a separate cause of action of material misrepresentation but has alleged, as part of its reformation claim, that the fraud or inequitable conduct of McKenna consisted of a failure to disclose facts to JBCB when McKenna had a duty to do so. Accordingly, we review applicable authorities in those areas.

¶18 Failure to disclose a fact constitutes a misrepresentation if a party has a duty to disclose that fact. It is treated as equivalent to a representation of the non-existence of the fact. ***Hennig***, 230 Wis. 2d at 165 (citing ***Ollerman v. O'Rourke Co., Inc.***, 94 Wis. 2d 17, 26, 288 N.W.2d 95 (1980)). The crucial element in determining whether a duty to disclose exists is whether the mistaken party would reasonably expect disclosure. ***Id.*** at 166. There is a reasonable expectation of disclosure when taking advantage of a party's ignorance is so shocking to the ethical sense of the community, and is so extreme and unfair, as to amount to a form of swindling in which the party is led by appearances into a bargain that is a trap of whose essence and substance he is unaware. ***Id.*** at 167-68 (citing RESTATEMENT (SECOND) OF TORTS § 551 cmt. m (1977)). Whether a party has a duty to disclose a fact is essentially a policy determination and, therefore, properly decided as a question of law. ***Id.*** at 167 (citing ***Ollerman***, 94 Wis. 2d at 27).

¶19 For a party to prevail on a claim of misrepresentation, it is necessary to show "justifiable reliance." ***Id.*** at 169; ***Bank of Sun Prairie v. Esser***, 155 Wis. 2d 724, 732, 456 N.W.2d 585 (1990). The "general rule in Wisconsin" is that the recipient of a fraudulent misrepresentation is not justified in relying on it once the falsity is actually known or is obvious to ordinary observation. ***Hennig***, 230 Wis. 2d at 170. If there are undisputed pertinent facts, then justifiable reliance may be decided as a matter of law. ***Id.*** (citing ***Williams v. Rank & Son Buick, Inc.***, 44 Wis. 2d 239, 246, 170 N.W.2d 807 (1969)).

¶20 While claims of material misrepresentation and reformation of a written instrument have separate elements, the analysis is similar in determining whether there was "justifiable reliance" on a material misrepresentation and whether reliance on another's representation was "justified" in the context of reformation. ***Id.*** at 176.

B. McKenna's Prima Facie Case for Summary Judgment.

¶21 We consider now the first step in summary judgment methodology in this context: whether McKenna's submissions constitute a prima facie case for summary judgment. ***Gross***, 259 Wis. 2d 181, ¶30. We conclude that McKenna's submissions constitute a prima facie case for summary judgment on each of the three elements of contract reformation: (1) there was no inequitable conduct by McKenna, and no duty to disclose, because the terms of the Warranty Deed were not contrary to the terms of the Offer, and its amendments, signed by the parties; (2) the actions, and testimony, of JBCB's representative show that JBCB was not mistaken as to the terms of the Warranty Deed; and (3) reliance of JBCB on alleged misrepresentations of McKenna was not justified because a review of the

terms of the flowage easement shows there can be no valid transfer of flowage rights from McKenna to JBCB.

1. No Inequitable Conduct by McKenna.

¶22 We take up, initially, whether McKenna has made a prima facie case that there was no inequitable conduct in its dealings with JBCB about the flowage easement. There is no dispute as to the following facts which inform that issue. In 2004, McKenna purchased real estate in Jackson County for the purpose of operating a cranberry marsh, and the flowage easement from Jackson County was included in that purchase.[4] In 2007, James Brush contacted James Hoffman of McKenna and inquired about the purchase of a portion of the McKenna property to build a cabin.[5] During initial negotiations which predate the written Offer, JBCB was made aware of the flowage easement owned by McKenna. JBCB was familiar, at that time, with how a cranberry marsh worked and knew McKenna needed to use water, store water, and control the ability to get water in order to operate its marsh.

¶23 In November 2007, JBCB gave to McKenna a written Vacant Land Offer to Purchase. JBCB offered to purchase about 60 acres from McKenna, and

[4] The parties do not contend that McKenna owned any flowage rights or flowage easements other than the grant from Jackson County.

[5] JBCB, LLC was formed by James and Cindy Brush, and they are the sole members of that entity. JBCB was the purchaser of the McKenna property. However, the Offer to Purchase and its two amendments we will discuss shortly were signed by James and Cindy Brush before JBCB was formed. The parties place no significance on any distinction between the Brushes and JBCB, so we will refer to the Brushes and the LLC as "JBCB," except where the facts or context require otherwise.

McKenna would retain about 320 acres for its cranberry marsh. There were other pertinent provisions in the Offer:

> 4. Parties agree: … (b) *that Seller, its heirs, assigns and successors shall retain the flowage rights to raise, lower and use water from the reservoir* … (d) that Buyers have no objection to Sellers operating a cranberry marsh on its adjacent land … . Items (a) – (d) shall be memorialized in a separate agreement of the parties to be signed at closing.

(Emphasis added.)

¶24 Acceptance of the Offer would occur, according to its terms, when the Buyer and the Seller signed an identical copy of the Offer, and the parties did so.

¶25 JBCB and McKenna amended the Offer the next month. The only relevant change was retention of an easement by McKenna for ingress and egress:

> 4. Seller shall retain an easement on the property to … maintain, improve and reconstruct a dike *for the purpose of exercising Seller's flowage rights to raise, lower and use water from the reservoir*.

(Emphasis added.)

¶26 In a second Amendment to the Offer signed in January 2008, the amount of land to be purchased increased by about twenty-two acres, and the purchase price increased.[6]

¶27 The Warranty Deed from McKenna to JBCB was dated February 15, 2008, and JBCB received the Deed that same day at the closing. As alluded to in

[6] For simplicity, we will now refer to the Offer and its two amendments as "the Offer" unless the facts or context require otherwise.

the Offer, a separate agreement recorded as part of the Warranty Deed stated in relevant part:

> The Grantor retains …:
>
> An easement for dike and road maintenance, to be retained by the McKenna Cranberry Company …
>
> …
>
> *Grantor, its heirs, successors and assigns, retains all riparian rights associated with the property together with a [sic] those rights contained in a certain Flowage Easement dated March 18, 1981 … as modified by Flowage Easement dated March 23, 1993.*
>
> *Grantor expressly excepts and reserves from this conveyance the right and privilege to cause, by the erecting of dams, dikes, ditches and other works, water to flow back on, over under or to be withdrawn from the above described lands*, together with the right of entry and egress for the purpose of constructing, repairing and maintaining the dams, dikes, ditches and other works, or any part thereof, which now exist or may hereafter be constructed.

(Emphasis added.)

¶28 In support of its reformation request, JBCB claimed in its Amended Complaint that McKenna engaged in inequitable conduct because the terms of the Warranty Deed were contrary to the terms of the Offer in that rights under the flowage easement were not transferred to JBCB, and McKenna failed to disclose that fact to JBCB. JBCB's Amended Complaint incorporated the Offer and requested that the terms of the Offer be enforced rather than the terms of the Warranty Deed ("the Warranty Deed failed to accurately express the terms of the binding contract formed by the accepted Offer to Purchase and the two Amendments between the parties"; "A dispute has arisen between the Plaintiff and the Defendant as to what rights and interests were to be conveyed by Defendant as seller to Plaintiff as purchaser pursuant to the contract entered into by the parties

formed by the accepted Offer to Purchase and the two Amendments"; "McKenna willfully … misrepresented the facts with regard to riparian rights by failing to disclose that riparian rights were not being transferred contrary to the binding contract created by the Offer to Purchase and the two Amendments entered into by the parties …"). Consistent with those allegations, the first request for relief in the Amended Complaint asked the circuit court to declare the Warranty Deed invalid and determine the rights of the parties "under the terms and provisions of the Offer to Purchase and the two Amendments entered into by the parties and establish the terms of a replacement Warranty Deed …"

¶29 What, in JBCB's view, did the Offer require? JBCB alleged in its Amended Complaint that, by purchasing 82 of McKenna's 400 acres, "all riparian rights" McKenna owned would be transferred to JBCB, including the flowage easement from Jackson County but, "subject only to McKenna retaining the right to raise, lower and use water from the reservoir."

¶30 We conclude that McKenna has made a prima facie case that the terms of the Warranty Deed are consistent with the terms of the Offer. The parties agree that the terms of the Warranty Deed call for McKenna to retain all rights under the flowage easement. As was shown, no terms in the Offer state that the flowage easement, or any flowage rights under that easement, will be transferred to JBCB by McKenna. The terms of the Offer agreed to by the parties demonstrate the opposite; that is, only McKenna will retain flowage rights. JBCB ignores this point, but we find it conclusive in the rejection of JBCB's argument.

¶31 The terms of the Warranty Deed were consistent with, and not contrary to, the terms of the Offer and, accordingly, McKenna had no duty to disclose any further information to JBCB about the terms of the Warranty Deed.

McKenna has made a prima facie case for summary judgment in regard to JBCB's allegation that McKenna engaged in inequitable conduct regarding the flowage easement.

2. JBCB Was Not Mistaken About the Warranty Deed.

¶32 Next, for JBCB to prevail on its reformation claim regarding the flowage easement, it must prove that it was mistaken as to the terms of the Warranty Deed when that Deed was accepted by JBCB. ***Hennig***, 230 Wis. 2d at 174. McKenna has submitted testimony from JBCB's representative who attended the closing that shows JBCB was not mistaken as to the terms of the Warranty Deed when JBCB accepted it on the day of the closing.

¶33 James Brush attended the closing on behalf of JBCB, and he testified at his deposition to the following:

- He read the Warranty Deed at the closing;
- The Warranty Deed represented the transaction JBCB negotiated "and wanted";
- The language in the Warranty Deed concerning McKenna retaining all rights in the flowage easement were terms to which JBCB agreed;
- The language in the Warranty Deed which states that McKenna excepts from the conveyance the right to flow water on the "above-described lands" was consistent with terms JBCB negotiated; and
- After reviewing the Warranty Deed, Brush, on behalf of JBCB, decided to pay the amount agreed to "in exchange for the rights under that document."

¶34 The Warranty Deed states that no flowage rights will be transferred to JBCB from McKenna. The testimony of James Brush just mentioned confirms that the terms in the Warranty Deed were those agreed to by the parties. That testimony, coupled with the terms of the Offer and the Warranty Deed already discussed, establishes for McKenna a prima facie case for summary judgment because JBCB was not mistaken as to the terms of the Warranty Deed at the time of the closing when it accepted that deed.

3. JBCB's Reliance Was Not Justified.

¶35 The third reason we conclude that McKenna has stated a prima facie case for summary judgment is that, because of the terms of the flowage easement instrument and the Warranty Deed, reliance by JBCB on any misrepresentation by McKenna was not justified.[7] ***Hennig***, 230 Wis. 2d at 176-77. As will be discussed, the terms of the flowage easement owned by McKenna preclude a transfer of flowage rights to JBCB, and consideration of whether the flowage easement was appurtenant only to the McKenna land confirms the point. If JBCB had reviewed the terms of the flowage easement at the closing or before, it would have concluded McKenna's flowage rights are tied to the operation of a cranberry marsh and cannot be transferred in whole or in part to JBCB. As a result, any reliance on any representation by McKenna about transfer of the flowage easement cannot be justified.

[7] We will assume for the moment in this part of our analysis, without deciding, that there was at least one misrepresentation to JBCB by McKenna about a transfer of the flowage easement.

a) The flowage easement is not transferrable to JBCB.

¶36 The following facts are undisputed and relevant to construction of the flowage easement owned by McKenna. JBCB purchased eighty-two acres of McKenna's real estate, while McKenna retained about 300 acres. As the parties agreed in the Offer, McKenna continues to operate a cranberry marsh on its property. In contrast, JBCB's eighty-two acres are used for a cabin and recreation, and JBCB does not contend it has any plans to operate a cranberry marsh.

¶37 The McKenna flowage easement instrument was recorded with the Jackson County Register of Deeds.[8] A recital in the flowage easement establishes that the easement is tied to McKenna's use of the dominant estate[9] as a cranberry marsh:

> The grantee desires to flow said lands with water by means of dams, dikes, ditches and other works *for the use and benefit of grantee's cranberry marsh. The county has agreed to furnish this easement for that purpose.*[10]

[8] Water flowage rights are an interest in land. ***Borek Cranberry Marsh, Inc. v. Jackson Cty.***, 2010 WI 95, ¶16, 328 Wis. 2d 613, 785 N.W.2d 615. An easement is a conveyance of an interest in land possessed by another. ***Id.***, ¶14. Our supreme court has held that a flowage right is an easement. ***Id.***, ¶32; ***Union Falls Power Co. v. Marinette Cty.***, 238 Wis. 134, 138, 298 N.W. 598 (1941).

[9] Land that benefits from an easement is called the "dominant estate." Land burdened by an easement is called the "servient estate." *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.1 (2000). We have relied on the RESTATEMENT (THIRD) OF PROP.: SERVITUDES in construing an easement. *See* ***Nature Conservancy of Wis., Inc. v. Altnau***, 2008 WI App 115, ¶¶14, 16, 313 Wis. 2d 382, 756 N.W.2d 641. Here, the dominant estate is held by McKenna and McKenna is referred to as "the Grantee" in the flowage easement. The servient estate is held by Jackson County and is referred to as "the Grantor" or "the county" in the flowage easement.

[10] McKenna's predecessor in interest also operated a cranberry marsh on the property.

(Emphasis added.) The flowage easement grants certain rights but also contains restrictions. The relevant provisions are:

> 1) Grantor does hereby transfer and convey to the Grantee an easement and right to cause, by the erecting of dams, dikes, ditches and other works, water to flow back on, over under or to be withdrawn from the above described lands … for the right of backing and flowage and in addition thereto, all riparian rights of any kind in the lands described above.
>
> …
>
> 7) The parties acknowledge that the Grantee may assign the rights hereunder to subsequent purchasers or leases of Grantees [sic] property.
>
> 8) *This agreement and all of the terms and conditions hereof are binding on the successors and assigns of the parties hereto.*

(Emphasis added.)

¶38 We now construe McKenna's flowage easement to determine whether it is transferable to JBCB. The proper construction of an easement is a question of law this court reviews de novo. ***Borek Cranberry Marsh, Inc. v. Jackson Cty.***, 2010 WI 95, ¶12, 328 Wis. 2d 613, 785 N.W.2d 615. The goal in construing a contract, including an easement, is to determine by the words of the instrument what the contracting parties intended. ***Nature Conservancy of Wis. v. Altnau***, 2008 WI App 115, ¶13, 313 Wis. 2d 382, 756 N.W.2d 641; ***Hunter v. McDonald***, 78 Wis. 2d 338, 342, 254 N.W.2d 282 (1977).

¶39 WISCONSIN STAT. § 706.10(3) plays "a role in the proper interpretation" of interests in land and conveyances of land. ***Borek Cranberry***

Marsh, 328 Wis. 2d 613, ¶16.[11] Accordingly, we consider the provisions of § 706.10(3) in determining whether McKenna's interest in its flowage easement is transferrable to JBCB.

¶40 When construing an instrument, courts presume that all conveyances are transferrable. ***Borek Cranberry Marsh***, 2009 WI App 129, ¶8, 321 Wis. 2d 437, 773 N.W.2d 522 (citing WIS. STAT. § 706.10(3)). Accordingly, we start with the presumption that the flowage easement was transferrable to JBCB. However, rights are not transferrable if the conveyance evinces a different intent "expressly or by necessary implication." ***Borek Cranberry Marsh***, 328 Wis. 2d 613, ¶23 (quoting § 706.10(3)).

¶41 We will assume, without deciding, that the terms of the flowage easement do not "expressly" state whether rights under the flowage easement are transferrable. So, the question is whether the non-transferability of McKenna's flowage rights are a "necessary implication" from the terms of that instrument. ***Id.***, ¶27. Our supreme court has held that the legislature's intent in using the term "necessary implication" in WIS. STAT. § 706.10(3) is closely tied to the concept of an express statement. "It is fair to say that a necessary implication is one that is so clear as to be express; it is a required implication. Said another way, where the terms of a conveyance contain a necessary implication, an interpretation otherwise would constitute a perverse misconstruction of the language." ***Id.***

[11] WISCONSIN STAT. § 706.10(3) reads in pertinent part: "In conveyances of lands … every conveyance shall pass all the estate or interest of the grantor unless a different intent shall appear expressly or by necessary implication in the terms of such conveyance."

¶42 We conclude that McKenna has overcome the statutory presumption of transferability of the flowage easement. The instrument states that the Grantee desires to flow lands with water "for the use and benefit of grantee's cranberry marsh." The intent of the Grantor – Jackson County – is then stated in the next sentence: "The county has agreed to furnish this easement *for that purpose*." (emphasis added). The terms of the flowage easement make manifest the County's intent to grant to another the right to flood Jackson County land, but only if it is done to benefit a cranberry marsh. By necessary implication, the terms of the flowage easement show a clear intent of non-transferability to JBCB because the flowage rights must be transferred to a grantee who operates a cranberry marsh. Any other reading of the easement would "constitute a perverse misconstruction" of the instrument's terms. ***Id.*** Therefore, since there is no contention that any flowage rights under the easement are to be used by JBCB for the purpose of operating a cranberry marsh, those rights are not transferrable to JBCB by McKenna.[12]

b) The flowage easement was appurtenant only to McKenna's land.

¶43 A separate method of analyzing the flowage easement confirms our conclusion that it is not transferrable to JBCB.

¶44 The Warranty Deed declared that the 82 acres were transferred by McKenna to JBCB "[t]ogether with all appurtenant rights, title and interests." We

[12] In ***Borek Cranberry Marsh, Inc. v. Jackson Cty.***, 2010 WI 95, 328 Wis. 2d 613, 785 N.W.2d 615, our supreme court held that conditioning water flowage rights on their "use for the purpose of cranberry culture" is an "express limitation" on transferability of those rights. ***Id.***, ¶32. While the terms of the easement construed in ***Borek*** may be slightly stronger than the terms in McKenna's easement in limiting use of flowage rights to cranberry marsh owners, any distinction does not diminish the clarity of the intent in the McKenna flowage easement.

now consider whether the flowage rights were "appurtenant" to the property JBCB purchased from McKenna. Our review of this issue is de novo. ***Borek Cranberry Marsh***, 328 Wis. 2d 613, ¶12.

¶45 A benefit is "appurtenant" if the right to enjoy that benefit is tied to the ownership of a particular parcel of land. A benefit is "in gross" if it is not appurtenant; that is, if the benefit may be held without regard to whether one owns any particular land. ***Nature Conservancy***, 313 Wis. 2d 382, ¶7, (citing RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 1.1 and 1.5 (2000)); ***Borek Cranberry Marsh***, 328 Wis. 2d 613, ¶14.

¶46 We have adopted the standards in RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 4.1 and 4.5 (2000) to determine whether an instrument creates an in gross or an appurtenant easement. *See* ***Nature Conservancy***, 313 Wis. 2d 382, ¶15. Under § 4.1, "A servitude [easement] should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." Section 4.5 notes that, in cases of doubt, a benefit should be construed to be appurtenant rather than in gross. ***Id.*** The language in the flowage easement and the nature of the flowage rights, the circumstances surrounding the creation of the flowage easement, and the purpose for which the flowage easement was created (to benefit a cranberry marsh) establish that the flowage easement was not appurtenant to the eighty-two acres transferred to JBCB by McKenna and, instead, is appurtenant only to the 300 acres of cranberry marsh retained by McKenna.

¶47 We consider, first, the terms of the flowage easement. As discussed, terms of the instrument show the intent of the grantor, Jackson County, was that

only those who operate a cranberry marsh may hold those flowage rights. The flowage easement is not, and cannot be, appurtenant to the land JBCB purchased for non-cranberry marsh purposes.

¶48 In addition, other terms of the flowage easement, and the nature of the rights granted in that instrument, establish that the easement is appurtenant only to McKenna's land and not to any land purchased by JBCB. It is important to recall that JBCB does not argue that all rights in the flowage easement should have been transferred to it. Instead, JBCB argues that it should have "co-ownership" of the flowage easement and McKenna will continue to have the right to move water on and off Jackson County's land in the same manner it has until this time. In other words, those continuing flowage rights owned by McKenna, even accepting JBCB's premise, will continue to be appurtenant to McKenna's remaining 300 acres. As a result, if JBCB obtains reformation of the Warranty Deed as it requests, Jackson County (the servient estate) will be burdened with not one dominant estate (McKenna) but also another dominant estate (JBCB). Or, in the terms used in the flowage easement, Jackson County will have two "Grantees" using its land for flowage rights.

¶49 But, with an easement, appurtenant rights owned by a dominant estate cannot be divided up as JBCB wants. The sale of a parcel of land to JBCB does not change the fact that the flowage easement is appurtenant only to the land owned by McKenna. The RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 5.6 cmt. a (2000) makes the point that appurtenant rights must stay with the benefitted property (here, the land McKenna continues to own) and cannot be in "co-ownership" with another land owner who buys a small part of the benefitted property. It states:

> As a general rule, appurtenant benefits are not intended to be severable and transferable separate from a transfer of the benefited property. Limiting use of an appurtenant easement or profit to holders of the dominant estate … limits the potential burden on the servient estate. It also imposes a limit on the numbers of people whose consent would be required for an effective modification or termination of an easement …. Permitting severance and separate transfer of the benefit would generally permit conversion of an appurtenant benefit into a benefit in gross, imposing a greater burden on the property.

See also RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.11 cmt. b (2000).

¶50 There are no terms in the flowage easement agreed to by Jackson County which lead to the conclusion that McKenna has the authority to burden Jackson County's land with yet another dominant estate by granting flowage rights to JBCB. Indeed, if JBCB's argument is accepted, McKenna could slice its land into small parcels and sell flowage rights to Jackson County's land to hundreds of purchasers, all of which would burden Jackson County's land with multiple flowage easements. That would convert McKenna's appurtenant easement to an in gross easement and would be inconsistent with the terms of the flowage easement agreed to by Jackson County.

¶51 Second, and for the reasons already noted, the circumstances surrounding the creation of the flowage easement instrument lead to the conclusion that the flowage rights granted by Jackson County are not appurtenant to JBCB's land.

¶52 Third, the purpose for which the flowage easement was created by Jackson County – to benefit a cranberry marsh – confirms that the flowage rights are appurtenant to the McKenna land and not transferred, or transferrable, to JBCB. McKenna, after the sale to JBCB of 82 acres, retained 300 acres of land

and continues to operate a cranberry marsh. The undisputed facts show this was not a transaction in which JBCB purchased land to operate a cranberry marsh.

¶53 McKenna has satisfied the standards set out in ***Nature Conservancy***, 313 Wis. 2d 382. So, we conclude the flowage easement rights are appurtenant to the land retained by McKenna and not appurtenant to land transferred to JBCB.

c) Constructive notice.

¶54 There is another important consideration that concerns the issue of justified reliance by JBCB on a misrepresentation of McKenna. JBCB is charged with the knowledge that the rights under the flowage easement cannot be transferred to it from McKenna because the recording of an instrument is constructive notice to subsequent purchasers of the terms of an instrument. *See* ***Duitman v. Liebelt***, 17 Wis. 2d 543, 548, 117 N.W.2d 672 (1962); ***Hoey Outdoor Advertising, Inc. v. Ricci***, 2002 WI App 231, ¶19, 256 Wis. 2d 347, 653 N.W.2d 763. Accordingly, because the flowage easement was recorded with the Jackson County Register of Deeds, and JBCB alleges it was purchasing rights under that easement, JBCB was charged at the time of the closing with constructive notice of the terms of the flowage easement even if it failed to consult the terms of that instrument before it purchased the real estate from McKenna.

d) Reliance was not justified.

¶55 To obtain reformation of a written instrument, a party's reliance on another's alleged inequitable conduct must be "justified." ***Hennig***, 230 Wis. 2d at 177. A lack of justification may be shown in various ways. Pertinent here, if a cursory examination of a written instrument should have revealed the falsity of a representation, reliance is not justified and the party is not entitled to reformation.

Id. at 176-77. In addition, a party's reliance is not justified if its actions amount to a "failure to act in good faith and in accordance with reasonable standards of fair dealing." ***Id.*** at 176 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 172).

¶56 The terms of the flowage easement show it is not transferrable to JBCB and is appurtenant only to the McKenna land. Whether or not JBCB looked at the flowage easement instrument before the closing, it was charged with that knowledge because of constructive notice of those provisions. The falsity of any representation about transferability of the flowage easement would have been discovered by a review of the instrument, and JBCB's failure to do so was not in accordance with reasonable standards of fair dealing. For the reasons discussed, we conclude that McKenna has made a prima facie case for summary judgment that JBCB's reliance on any misrepresentation of McKenna was not justified.

¶57 McKenna has made a prima facie case for summary judgment on the elements of JBCB's reformation claim: whether McKenna acted inequitably by not drafting the Warranty Deed consistent with the Offer; whether JBCB was mistaken because of McKenna's alleged inequitable conduct; and whether JBCB was justified in relying on McKenna's alleged inequitable conduct. Accordingly, McKenna has made a prima facie case that it is entitled to summary judgment on JBCB's request for reformation of the Warranty Deed regarding the flowage easement.

C. No Issues Require a Trial.

¶58 We consider next whether JBCB's submissions show there are material facts in dispute which entitle it to a trial. ***Gross***, 259 Wis. 2d 181, ¶30. JBCB advances several arguments in an attempt to create factual disputes, but we conclude there are no genuine disputes of material fact and, therefore, JBCB is not

entitled to a trial on its request for reformation of the Warranty Deed regarding the flowage easement.

1. Alleged Inequitable Conduct of McKenna.

¶59 The first element of JBCB's reformation claim requires admissible evidence of inequitable conduct by McKenna regarding transfer of the flowage easement. ***Hennig***, 230 Wis. 2d at 174. We conclude that JBCB has failed to show there are genuine disputes of material fact that require a trial regardless of whether the alleged inequitable conduct occurred before, during, or after the closing.

a) Amended Complaint.

¶60 We make an initial observation about the allegations in JBCB's Amended Complaint. As framed in its Amended Complaint, JBCB alleges that McKenna failed to draft the Warranty Deed consistent with the "binding contract" described in the written Offer signed by the parties and failed to disclose that flowage easement rights were not transferred to JBCB by the same Warranty Deed.

¶61 On appeal, JBCB never addresses its chosen contention in the Amended Complaint that McKenna engaged in inequitable conduct because the Warranty Deed failed to conform to the Offer. In fact, in briefing JBCB does not mention the terms of the Offer at all except to explain in a general sense that there was an Offer. With JBCB's failure to rely on the terms of the Offer as a basis to reform the Warranty Deed, we conclude that JBCB has abandoned any contention that the Warranty Deed should be reformed because of the terms of the Offer agreed to by the parties. ***Waukesha Cty. v. J.W.J.***, 2017 WI 57, ¶21 n.10, 375

Wis. 2d 542, 895 N.W.2d 783 (2017) (where an issue has not been briefed, it is considered conceded). [13]

¶62 With that abandonment by JBCB of the basis in its Amended Complaint for reformation of the Warranty Deed as to the flowage easement, we may conclude for that reason, alone, that JBCB's request for reformation of the Warranty Deed fails. However, we will construe JBCB's arguments liberally and consider contentions made in summary judgment about McKenna's alleged inequitable conduct.

b) Before the closing.

¶63 JBCB now argues that reformation of the Warranty Deed is required because of oral representations and actions by McKenna representatives that JBCB and McKenna would have "co-ownership" of the flowage easement with both allowed to flood, and take water from, the Jackson County land. Our initial focus is on the alleged misrepresentations and actions of McKenna (which are disputed by McKenna) that occurred before the closing.

¶64 We pause to note that the parole evidence rule prohibits the introduction of extrinsic evidence to contradict the express language of an unambiguous contract such as the Offer and the Warranty Deed. However, parole evidence is admissible to establish mutual mistake in a reformation action and claims of misrepresentation. ***Newmister v. Carmichael***, 29 Wis. 2d 573, 577, 139

[13] We will also not consider JBCB's undeveloped and briefly-mentioned argument that there was inequitable conduct by McKenna because McKenna's attorney drafted the Offer. JBCB suggests nothing that would lead to the conclusion that there was any confusion or mistake on behalf of JBCB because McKenna's attorney drafted those documents.

N.W.2d 572 (1966); ***Batt v. Sweeney***, 2002 WI App 119, ¶12, 254 Wis. 2d 721, 647 N.W.2d 868. So, we will consider such evidence.

¶65 JBCB alleges the following. James Brush agreed with a McKenna representative that McKenna would retain one hundred percent control over the reservoir and the water in it for its cranberry operation. However, JBCB understood that it would own the flowage easement after it purchased the 82 acres. More particularly, JBCB claims that James Hoffman of McKenna said in the fall of 2007 that McKenna wanted to retain rights under the easement to raise the water levels and do anything it wanted in that area, but the easement would be owned by JBCB. Brush testified as follows:

> Q. What specifically did he [James Hoffman] say?
>
> A. He said, there's an easement that goes with it that allows us to flood that area with water if we needed it. And I said, great. That's good for both of us.
>
> Q. Did he say that they would sell it to you with the 82 acres?
>
> A. Yes. It came with the purchase of the 82 acres.
>
> Q. Ok. Earlier, you said he informed you that there was an easement that allowed them to flood up. What did he say that led you to believe that he would be conveying that along with the 82 acres?
>
> A. He told me that it did; it would be my easement, but they wanted to retain the rights that were in the easement to raise the water levels and do anything they want within that area, which I was agreeable to.

¶66 Even if we assume Brush's testimony is correct, as we must under summary judgment methodology, the actions and statements of McKenna do not establish the need for a trial. The undisputed facts show that, by their actions,

JBCB and McKenna contemplated at least two writings before the transaction for purchase of the land was complete and those writings supersede prior negotiations.

¶67 The first writing produced by mutual agreement after the alleged misrepresentation by McKenna was the Offer signed by JBCB as the buyer and McKenna as the seller. The Offer states in relevant part: "The Buyer, offers to purchase the Property … on the following terms." "Seller accepts this offer … Seller agrees to convey the property on the terms and conditions as set forth herein and acknowledges receipt of a copy of this offer." The second, later written agreement contemplated by the parties was the Warranty Deed. The written Offer specifically calls for conveyance of the property by Warranty Deed which would, of course, be consistent with the terms of the written Offer. Also, a written instrument is required for the conveyance of an interest in land. ***Trimble v. Wisconsin Builders***, 72 Wis. 2d 435, 440, 241 N.W.2d 409 (1976); WIS. STAT. § 706.2.

¶68 The intent of the parties controls as to whether a writing or an oral statement will bind the parties. ***Skycom Corp. v. Telstar Corp.***, 813 F.2d 810, 814 (7th Cir. 1987)(citing ***Garrick Theater Co. v. Gimble Bros.***, 158 Wis. 649, 656, 149 N.W. 385 (1914); ***Milwaukee Med. Coll. v. Marquette Univ.***, 208 Wis. 168, 170-71, 242 N.W. 494 (1932); and ***Peninsular Carpets, Inc. v. Bradley Homes, Inc.***, 58 Wis. 2d 405, 415-16, 206 N.W.2d 408 (1973)). When parties to negotiations contemplate, as here, at least one future writing to memorialize their agreement, then the previous representations create no contract, and the parties are bound by the subsequent writing(s). ***Id.*** (citing ***Dunlop v. Laitssch***, 16 Wis. 2d 36, 42, 113 N.W.2d 551 (1962)). The undisputed facts show that the parties

contemplated the Offer and the Warranty Deed as the writings that would bind McKenna and JBCB rather than any oral negotiations.[14]

¶69 Neither the Offer nor the Warranty Deed contain terms which lead to the conclusion that the flowage easement rights owned by McKenna would be transferred to, or shared with, JBCB. If JBCB wanted those terms in the Offer so as to bind all parties, it was required to place those terms in the Offer. Because it did not do so, the oral representations of McKenna (assuming those ever happened) in the weeks before the Offer was signed cannot bind the parties. Consistent with JBCB's Amended Complaint that continually refers to the Offer as the "binding contract," any oral representations by McKenna prior to the Offer can not form a basis for reformation of the Warranty Deed.

c) At the closing.

¶70 The next area of allegedly inequitable conduct by McKenna regarding the flowage easement concerns events at the closing. James Brush testified that David Hoffman gave him a copy of the flowage easement at the closing but "[t]here was no discussion about the containment of the easement except that, here's the easement along with the deed." When asked if David Hoffman said anything or simply handed Brush the easement and the Deed, Brush answered: "Yes. Didn't say anything about the containment of the deed either. They're self-explanatory." The questioning of Brush continued:

> Q. I guess what I'm getting back to is, at the time of the closing, you don't recall David Hoffman telling you,

[14] Of note is that JBCB has never requested reformation of the Warranty Deed to conform to oral negotiations. Also, JBCB does not contend it failed to understand the terms of the Offer signed by the parties.

> verbally saying, anything about whether the - - whether the flowage easement was being conveyed or was not being conveyed; he simply handed you paper?
>
> A. That's right. Well, he said that, here is the easement. It goes with the deed. Here's your documents that you purchased, along with receipts of paying off the cost of the closing.

¶71 Even if we assume JBCB's allegations are true, those actions and statements of McKenna at the closing do not establish the need for a trial.

¶72 JBCB argues that there was no reason for the McKenna representative to hand a copy of the flowage easement instrument to JBCB's representative at the closing unless JBCB was receiving rights under the flowage easement. However, that conclusion proffered by JBCB does not follow from the facts relied on.

¶73 The activities at the closing did not occur in a vacuum. The Warranty Deed read by JBCB, and accepted by JBCB, at the closing can only be understood as giving no flowage rights to JBCB. The Offer signed by JBCB leads to the same deduction. In contrast, the simple act of handing an instrument to JBCB's representative cannot reasonably be construed as a representation by McKenna that flowage rights under that instrument will be shared with JBCB. We conclude that no alleged inequitable actions or statements of McKenna at the closing create a genuine issue of material fact which require a trial.[15]

[15] JBCB briefly contends that McKenna had an affirmative duty to disclose the terms of the Warranty Deed to JBCB because of a "last minute reversal" of McKenna's position. Here, there was no "reversal" because the Warranty Deed is consistent with the Offer, and it was not "last minute" because months before JBCB signed an Offer consistent with the terms of the Warranty Deed. For those reasons, McKenna had no duty to disclose the terms of the Warranty Deed regarding the flowage easement to JBCB at the time of the closing beyond allowing JBCB to read the Warranty Deed.

d) After the closing.

¶74 Next, JBCB relies on two events which occurred after the closing as bases for its claim of inequitable conduct by McKenna. First, after the closing, JBCB excavated on the land owned by Jackson County burdened by the flowage easement. Jackson County and the Army Corps of Engineers stopped JBCB from taking those actions and required restoration of the land. JBCB argues that this militates in its favor because McKenna did not complain about JBCB's actions. According to JBCB, this is proof that McKenna knew JBCB owned the flowage easement.[16] Second, JBCB contends that years after the closing there was a discussion with McKenna about who would make the yearly payment to the County required under the flowage easement. Brush testified at his deposition that James Hoffman insisted on making the payment himself but, during the discussion, Hoffman told Brush, "I know it's your easement."

¶75 ***City of Milwaukee v. Milwaukee Civic Devs., Inc.***, 71 Wis. 2d 647, 653, 239 N.W.2d 44 (1976) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 505) states as follows:

> While mutual mistake, or mistake by one party and fraud by another are recognized as bases for the relief of reformation of an instrument, the fraud or inequitable conduct entitling such relief must exist at the time of execution of the instrument, not in some subsequent and distinct transaction … It is the failure of the instrument to express 'at the time of the execution' the intent of one party and that same intent known by the other party who also knows the error in the instrument that justifies reformation.

[16] We note that there is little or nothing in the record to support the contention of JBCB that McKenna did nothing to stop the excavation.

So, even assuming those post-closing events occurred, and viewing the events in the light most favorable to JBCB, those are irrelevant because the alleged inequitable conduct occurred after the closing and acceptance of the Deed (in other words, after "the time of the execution"). Those events cannot be a basis for a claim of inequitable conduct by McKenna.

¶76 Therefore, regardless of timing, none of the alleged statements or actions of McKenna that JBCB relies on lead to the conclusion that a trial is required on the element of inequitable conduct by McKenna.

2. Mistake of JBCB.

¶77 The second element of JBCB's reformation claim is that it accepted the Warranty Deed because of mistake. JBCB contends there is a genuine issue of material fact which requires a trial on whether it was mistaken when it accepted the Warranty Deed. We disagree. As discussed, at his deposition James Brush in the clearest of terms disclaimed that there was any mistake. JBCB attempts to contradict those statements and "clarify" Brush's testimony by relying on an affidavit JBCB proffered to the circuit court months after the deposition. We conclude that affidavit does not create a genuine issue of material fact.

¶78 The Brush affidavit states in relevant part:

> 5. During my deposition, your Affiant was asked whether I read the Warranty Deed which was signed by McKenna Berry Company, LLC at the closing, to which your Affiant acknowledged that I had, and that it appeared, in my understanding, to represent the transaction which your Affiant had negotiated and wanted.
>
> 6. Your Affiant understood that Defendant McKenna Berry Company, LLC would be retaining riparian rights associated with a Flowage Easement dated March 18, 1981, as modified by a Flowage Easement dated March 23, 1993,

> and your Affiant acknowledged that fact during the deposition.
>
> 7. Your Affiant has consistently maintained throughout this litigation that McKenna Berry Company, LLC., through its authorized agents, negotiated and represented that Plaintiff JBCB, LLC would also be acquiring riparian rights, and the right to erect dams, dikes, ditches and other works to control water levels.
>
> 8. During your Affiant's deposition, I was also asked at page 24 starting with line 3 whether your Affiant understood that McKenna Berry Company, LLC was expressly excepting and reserving from the conveyance the right and privilege to cause by the erecting of dams, dikes and ditches and other works water to flow back on, over and under or to be withdrawn from the above-described land; that your Affiant did not understand this question and improperly answered it in the affirmative -- that I understood that those terms were consistent with what your Affiant had negotiated with McKenna Berry Company, LLC; that to the contrary, it was and always has been your Affiant's understanding that both the Plaintiff and the Defendant would have riparian rights and the ability to erect dams, dikes and ditches and other works to effect water flowage, and any answer that your Affiant gave during the deposition to the contrary was a simple mistake on your Affiant's behalf.

¶79 The ability to create issues by submitting affidavits in direct contradiction of deposition testimony "reduces the effectiveness of summary judgment as a tool for separating the genuine factual disputes from the ones that are not, and undermines summary judgment's purpose of avoiding unnecessary trials." ***Yahnke v. Carson***, 2000 WI 74, ¶11, 236 Wis. 2d 257, 613 N.W.2d 102. "The very object of summary judgment is to separate real and genuine issues from those that are formal or pretended, so that only the former may subject the moving party to the burden of trial." ***Id.***, ¶16 (quoting ***Radobenko v. Automated Equip. Corp.***, 520 F.2d 540, 544 (9th Cir. 1975)). Wisconsin has adapted the "sham affidavit" rule in response to the problem. The rule is based on the proposition that testimony at depositions, at which times witnesses speak for themselves and

are subject to the give and take of examination and the opportunity for cross-examination, is more trustworthy than testimony by affidavit because the affidavit is almost always prepared by attorneys. ***Id.***, ¶15. It is called the "sham" affidavit because it contradicts prior deposition testimony and is, therefore, disregarded, but not necessarily because it is a "sham" in that it is fraudulent. The rule recognizes that the contradictory affidavits are more likely to create a sham, rather than a genuine, issue of fact. ***Id.***, ¶16.

¶80 For purposes of evaluating motions for summary judgment, an affidavit from a witness that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of fact requiring a trial unless the contradiction is adequately explained. ***Id.***, ¶21. To determine whether the witness's explanation for the contradictory affidavit is "adequate," a court is to examine the following: (1) whether the deposition afforded the opportunity for direct and cross-examination of the witness; (2) whether the witness had access to pertinent evidence or information prior to or at the time of his or her deposition, or whether the affidavit was based upon newly discovered evidence not known or available at the time of the deposition; or (3) whether the earlier deposition testimony reflects confusion, lack of recollection or other legitimate lack of clarity that the affidavit justifiably attempts to explain. ***Id.*** As clarified in ***Yahnke***, it is the deposition testimony which must reveal confusion that would require clarification or explanation. It is not sufficient that the confusion is created by the subsequent, contradictory affidavit. This test of whether the explanation for the contradictory affidavit is adequate is not met when the deposition testimony was "unequivocal." ***Id.***, ¶22.

¶81 Of the three accepted reasons to consider a later, contradictory affidavit, JBCB relies only on the third; that is, that the earlier deposition

testimony reflects confusion, lack of recollection or other legitimate lack of clarity that the affidavit justifiably attempts to explain. We reject JBCB's contention after reviewing the Brush deposition transcript and his affidavit.

¶82 James Brush was asked clear, relevant questions at his deposition. He gave unequivocal answers. Pertinent portions of his testimony show, without a doubt, that James Brush was not mistaken about the transaction details at the time of his deposition. His understanding at the closing was the same as the intent of the parties evinced by the terms of the Warranty Deed.

¶83 The affidavit of Brush attempts to sew confusion where none exists in the testimony. It is the deposition testimony which must reveal confusion that would require clarification or explanation, not confusion that is created by the subsequent, contradictory affidavit. ***Id.***, ¶18.

¶84 We conclude that the affidavit of James Brush fails to create a genuine issue of material fact and is a "sham" affidavit. Therefore, we will not consider the Brush affidavit, and we conclude there is no genuine issue of material fact which requires a trial on the issue of mistake. [17]

3. JBCB's Reliance Was Not Justified.

¶85 As noted earlier, McKenna has made a prima facie case that any reliance of JBCB was not justified. A review of the terms of the flowage easement shows it cannot be transferred in whole or in part to JBCB because JBCB does not operate a cranberry marsh, and the easement is appurtenant only to property

[17] Even if we had considered the affidavit, we would conclude that any reliance was not justified.

owned by McKenna. In an attempt to create an issue of fact requiring a trial, JBCB only states that James Brush's "understanding" was that both McKenna and JBCB would have rights under the flowage easement. JBCB's argument misses the mark. The subjective beliefs of a member of JBCB do not rebut the prima facie case made by McKenna.

¶86 We will assume, as we must on summary judgment, that James Brush held those beliefs. However, as discussed earlier, those beliefs were not justified because a person with knowledge of the terms of the flowage easement would not reasonably hold those beliefs. Therefore, we conclude there are no genuine issues of material fact which require a trial on the issue of whether JBCB was justified in relying on any alleged misrepresentations of McKenna.

¶87 For those reasons, we conclude that JBCB has not shown that there are genuine issues of material fact which require a trial on the issue of reformation of the Warranty Deed. We also conclude that the circuit correctly granted summary judgment in favor of McKenna on reformation of the Warranty Deed regarding the flowage easement.

II. Sand Used By McKenna

¶88 Through causes of action of unjust enrichment and implied contract, JBCB seeks monetary compensation for sand owned by JBCB which McKenna used to repair a dam. The circuit court granted summary judgment to McKenna. JBCB argues there are genuine issues of material fact which preclude summary judgment. We disagree.

A. Facts.

¶89 The following facts are not in dispute. In April 2008, about two months after JBCB purchased the property from McKenna, a dam that McKenna maintained as part of its cranberry operations gave out. James Brush, of JBCB, verbally granted McKenna permission to use sand from JBCB's property to rebuild parts of the dam. In a letter dated July 3, 2008, Brush reiterated to McKenna that it could use sand from JBCB's property to repair the dam: "You also have my permission to use any of the dirt or sand on my property within or outside the lake to help rebuild the dam." The letter outlined that Brush wanted the dam rebuilt because of his own "project" which was contingent on the rebuilt dam. In fact, Brush pressed McKenna on when the work on the dam would be completed. McKenna rebuilt the dam using sand from JBCB's property.[18]

¶90 In the years between the dam's repair and this lawsuit, JBCB never requested payment for the sand from McKenna. In his deposition testimony, Brush admitted the following:

- He told McKenna to take all the sand it wanted.
- He did not discuss payment with any representative from McKenna.
- He never told McKenna that he expected to be paid for the material.

[18] JBCB alleges that McKenna used 90,000 cubic feet of sand and 100,000 cubic feet of fill from its property. McKenna admits that it used sand and fill from JBCB, but does not concede how much it used. The parties refer to what was used by McKenna interchangeably as "sand," "fill," or "sand fill." The parties do not attach any important distinction to the terms so, for convenience, we will refer to the materials as "sand" although we understand it was not entirely sand.

- There was nothing in the July 3, 2008, letter indicating that he expected payment for the material taken.

¶91 McKenna needed the dam for its cranberry operations, but JBCB also benefitted from the dam repair. Brushes (and, therefore, JBCB) wanted the McKenna dam repaired so that they could have access to a lake. They bought the property for recreational purposes and fishing, so having the dam to ensure the lake was there served the Brushes' recreational purpose. Once the sand was dug out and the dam fixed, the lake would be deeper, which was good for the fish and there would be more water in the reservoir which was desirable to JBCB.[19]

B. Analysis.[20]

1. Unjust Enrichment.

¶92 An action for unjust enrichment is based on the principle that one who has received a benefit has a duty to make restitution when retaining such benefit would be unjust. The theory of unjust enrichment has three elements: (1) a benefit is conferred upon the defendant by the plaintiff; (2) an appreciation or

[19] On May 28, 2014, Brush sent Hoffman another letter. This letter explicitly stated, "You can always dig sand out of lake as you need. No cost." JBCB asserts that the letter is inadmissible pursuant to WIS. STAT. § 904.08, which states that evidence of offering valuable consideration in attempting to compromise a claim which was disputed is inadmissible to prove liability for or invalidity of the claim or its amount. We need not decide that issue and we will ignore the May 28, 2014 letter. Even without considering the May 28, 2014 letter, the undisputed evidence demonstrates that there are no genuine issues of material fact regarding claims for implied contract and unjust enrichment.

[20] In light of the relative simplicity of the issues and the record on this claim regarding the sand, we believe an efficient process that is equitable to both parties is to consider the evidence and arguments together rather than analyzing, first, a prima facie case for summary judgment made by McKenna and, then, as a separate step determining if JBCB has shown there are issues of fact which require a trial.

knowledge by the defendant of that benefit; and (3) it is inequitable for the defendant to accept or retain that benefit without payment of the value. ***Puttkammer v. Minth***, 83 Wis. 2d 686, 689, 266 N.W.2d 361 (1978). It is not enough to show that a benefit was conferred and retained. The retention of the benefit must be inequitable. ***Id.*** at 690. In an action for unjust enrichment, no contract is implied. ***Ramsey v. Ellis***, 168 Wis. 2d 779, 785, 484 N.W.2d 331 (1992).[21]

¶93 Only the third element is in dispute, and we conclude that there is no genuine issue of material fact that requires a trial on that element. First, and as just discussed in detail, it is evident that the repaired dam benefited JBCB. Accordingly, it was not inequitable for McKenna to take the sand from JBCB's property without compensation. Rather, this was an exchange that benefited both parties.

¶94 Second, it is inequitable for JBCB to demand payment years after the use of the sand by McKenna. JBCB expressed no hint before McKenna took the sand that a future payment was expected. Only in that way could McKenna reasonably consider whether it wanted to use the JBCB sand at a certain price. After all, the sand could not be returned to JBCB once used by McKenna so equity required JBCB to give a contemporary indication that the sand could be taken but only upon payment. Without that indication, the undisputed facts show the equities lie in favor of only McKenna.

[21] We will assume, as the parties do, that there is no express contract. A claim of unjust enrichment cannot survive if the parties have entered into a contract. ***Continental Cas. v. Wisconsin Patients Comp. Fund***, 164 Wis. 2d 110, 118, 473 N.W.2d 584 (Ct. App. 1991).

¶95 For those reasons, we conclude there is no genuine issue of material fact, and McKenna is entitled to summary judgment on the unjust enrichment claim.

2. Quantum Meruit.

¶96 Unjust enrichment is a distinct cause of action from quantum meruit. ***Ramsey***, 168 Wis. 2d at 785. Under quantum meruit, recovery is based upon a contract implied by law to pay reasonable compensation for services or goods rendered. ***Id.*** In this context, to establish an implied contract, Wisconsin law requires JBCB to prove that: (1) McKenna requested the property (sand); and (2) JBCB expected reasonable compensation for it. *See* ***Id.*** at 784 (citation omitted).

¶97 We conclude that, given the undisputed facts presented, JBCB did not expect reasonable compensation from McKenna for the sand. First, when the dam broke, JBCB *permitted* McKenna to use its sand for the dam's repair. The July 2008 letter stated that McKenna had JBCB's "permission" to use JBCB's sand to rebuild the dam. JBCB's wholesale allowance that McKenna could use its sand without any terms or qualifications, and JBCB's use of the word "permission," cannot, under any view of the facts, lead to the conclusion that JBCB expected reasonable compensation for the sand. In fact, the only reasonable conclusion is just the opposite.

¶98 Second, JBCB has conceded that it did receive reasonable compensation for its use of the sand. As discussed, for various reasons JBCB very much wanted McKenna to rebuild the dam because the rebuilt dam also benefitted JBCB.

¶99 Third, since purchasing the property in 2008 JBCB never told a representative of McKenna that, if McKenna took sand from its property, it expected payment for the material. The lack of any request (or even a hint) for seven years that monetary compensation was expected by JBCB confirms the point. A "reasonable expectation of payment" cannot be based on waiting seven years to request payment after all indications were that no money was owed. The failure to request payment for years supports the view that JBCB had no reasonable expectation of payment from McKenna for the sand.

¶100 We conclude there is no genuine issue of material fact as to whether McKenna and JBCB had an implied contract. The undisputed facts demonstrate that there was no implied contract that JBCB expected monetary compensation from McKenna for the sand. As a result, summary judgment in favor of McKenna is also warranted on the claim of an implied contract.

III. Validity of the Warranty Deed

¶101 We now turn to the validity of the Warranty Deed. Specifically, JBCB alleges that the Warranty Deed is defective because it was not executed by a McKenna agent but, rather, by David Hoffman in his individual capacity. JBCB requested that the circuit court determine the rights of the parties because of this alleged irregularity. For its part, McKenna has denied the deed is defective. JBCB seeks reversal of the circuit court's dismissal of this claim, and both parties ask us to determine the substance of the dispute about the signature.

¶102 McKenna asserts that it sought summary judgment on "all claims," including this issue about the signature. But, there was no mention by McKenna in the circuit court about the signature dispute in its summary judgment arguments or submissions. JBCB similarly did not address this issue in its summary

judgment arguments or submissions. The circuit court never considered whether the Warranty Deed was defective but dismissed the entire Amended Complaint mistakenly believing, at the time, that all claims had been resolved.

¶103 JBCB moved for reconsideration regarding the alleged defective signature claim. Before the circuit court heard that motion, JBCB filed a notice of appeal. Ultimately, the circuit court sent a letter to counsel stating that it would "hold open" JBCB's motion for reconsideration on the signature dispute (and McKenna's motion for sanctions which is not a subject of this appeal) and "promptly set [those motions] for a hearing" after remittitur.

¶104 Under these circumstances, we conclude that the best course is to reverse the circuit court order dismissing the claim challenging the validity of the Warranty Deed because of the signature issue and remand for further proceedings. On remand, if McKenna desires summary judgment on this issue, it must so move the circuit court. We express no opinion as to whether any such motion would be timely or meritorious. We further note that our decision to reverse dismissal of this claim appears to render moot JBCB's motion for reconsideration, which we understand is still pending before the circuit court.

CONCLUSION

¶105 For those reasons, we affirm the grant of summary judgment to McKenna on the issues of the transfer of rights under the flowage easement and monetary compensation by McKenna for the sand owned by JBCB. We reverse the circuit court's dismissal of the claim relating to the validity of the signature on the Warranty Deed and remand for further proceedings on that claim. We observe, but do not hold, that the reconsideration motion pending in the circuit court appears to be moot.

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

Not recommended for publication in the official reports.