

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 29, 2006**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2006AP287**

**Cir. Ct. No. 2004CV62**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**CYNTHIA COLLINS-HANSEN AND LOWELL HANSEN,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**BARTELT-FILO, INC. AND CINCINNATI INSURANCE COMPANY,**

**DEFENDANTS,**

**RICHARD G. BARTELT AND RICHARD L. FILO,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Ozaukee County:  
JOSEPH D. McCORMACK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 PER CURIAM. Cynthia Collins-Hansen and Lowell Hansen (the Hansens) appeal from a judgment dismissing their misrepresentation claims against Richard Bartelt and Richard Filo. We affirm the judgment granting summary judgment.

¶2 In December 1998, the Hansens entered into a contract with Bartelt-Filo, Inc. (BF) to repair improper construction by another contractor by tearing down and rebuilding the second story of the Hansen home. After the work was completed in December 1999, the Hansens experienced problems with leakage around certain light fixtures and drywall problems. In February 2001, BF removed drywall from the ceiling and replaced insulation and lights. The Hansens later discovered mold in their home. They vacated the home in February 2002.

¶3 The Hansens commenced this action alleging that BF breached the contract and that intentional and negligent misrepresentations were made about BF's expertise and ability to perform the construction work correctly. The Hansens alleged that Richard Bartelt and Richard Filo made such representations individually and on behalf of the corporation. BF moved for partial summary judgment to declare that the Hansens' only viable claim was one for personal injury to Cynthia allegedly caused by BF's negligence. The motion asked that claims against Bartelt and Filo individually be dismissed because they acted as employees of the corporation and were insulated from personal liability. The circuit court concluded that the alleged tort claims had no basis and that "the Hansens have made no showing whatsoever that would entitle them to attempt to personally hold Richard Bartelt or Richard Filo personally liable." The individual defendants were dismissed from the action and the Hansens appeal.

¶4 When reviewing summary judgment, we apply the standards set forth in WIS. STAT. § 802.08 (2003-04),<sup>1</sup> in the same manner as the circuit court. See *Williams v. State Farm Fire and Cas. Co.*, 180 Wis. 2d 221, 226, 509 N.W.2d 294 (Ct. App. 1993). The first step requires us to examine the pleadings to determine whether a claim for relief has been stated. *Crowbridge v. Village of Egg Harbor*, 179 Wis. 2d 565, 568, 508 N.W.2d 15 (Ct. App. 1993). If so, the inquiry shifts to whether any factual issues exist. *Id.* Summary judgment is proper if the affidavits and other proofs “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.” *Id.* at 568-69 (quoting § 802.08(2)).

¶5 At the outset we agree with the Hansens that even in the absence of any reason to “pierce the corporate veil,” Bartelt and Filo can be individually liable for their tortious conduct, if any.

An individual is personally responsible for his own tortious conduct. A corporate agent cannot shield himself from personal liability for a tort he personally commits or participates in by hiding behind the corporate entity; if he is shown to have been acting for the corporation, the corporation also may be liable, but the individual is not thereby relieved of his own responsibility.

*Oxmans’ Erwin Meat Co. v. Blacketer*, 86 Wis. 2d 683, 692, 273 N.W.2d 285 (1979).

¶6 The Hansens mark this legal proposition as the stopping point and contend that because they allege that Bartelt and Filo made misrepresentations, it was error to dismiss Bartelt and Filo from the action individually. Bartelt and Filo

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

argue that the Hansens failed to demonstrate that Bartelt and Filo individually committed a tortious act which renders them personally liable in this action. The circuit court did not directly address this question.<sup>2</sup> However, our review is de novo and we may consider the entire record in determining whether summary judgment was appropriate. See *Davenport v. Gillmore*, 146 Wis. 2d 498, 506 n.3, 431 N.W.2d 701 (Ct. App. 1988).

¶7 The Hansens' complaint alleges that Bartelt and Filo intentionally and negligently made untrue representations for the purpose of inducing the Hansens to enter into the construction contract and that the Hansens relied on those representations. The complaint states a cause of action for misrepresentation. See *Ramsden v. Farm Credit Servs. of N. Cent. Wis.*, 223 Wis. 2d 704, 718-19, 590 N.W.2d 1 (Ct. App. 1998) (to state a claim for intentional misrepresentation the complaint must allege that: "(1) the defendant made a factual representation; (2) which was untrue; (3) the defendant either made the representation knowing it was untrue or made it recklessly without caring whether it was true or false; (4) the defendant made the representation with intent to defraud and to induce another to act upon it; and (5) the plaintiff believed the statement to be true and relied on it to his/her detriment.").

¶8 Next, we consider whether there are any disputed facts about the representations made. The inferences to be drawn from the moving party's proofs should be viewed in the light most favorable to the party opposing the motion, and doubts as to the existence of a genuine issue of material fact should be resolved

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<sup>2</sup> There was no hearing on the motion for summary judgment. The decision was based on the parties' written submissions.

against the party moving for summary judgment. *Grams v. Boss*, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980).

¶19 We look to the deposition of Cynthia Hansen which was submitted with BF's motion for summary judgment. Cynthia testified that Bartelt and Filo came out to the house along with their lead carpenter and an electrician. Cynthia was asked to list each and every intentional false representation made by BF (and consequently Bartelt and Filo individually). She responded:<sup>3</sup>

Well I believe when they told us that they would fix our house that had collapsed and they would do it properly, was untrue.

They said they were the best and they would do the best job. They had all these awards and [were] number one in Wisconsin and all this, and they showed us all their awards and said they would do the best job, they were the best contractors.<sup>4</sup>

Well, again, when they came back and said they would fix—in 2001 and they said they would honor their warranty. Rick Filo came to the house, and he said the only way we can figure out what is making it leak is to take down your ceiling. He said we've talked about it all year, and that's the only way we can figure out what's happening.

I believe that's false.

Maybe for them that was the only way they could figure it out, yeah. Maybe that's true for them, but, however, what they said was they could fix it and take care of the problem, And that's what they didn't intend to do, I feel.

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<sup>3</sup> Questions have been deleted from the deposition excerpts.

<sup>4</sup> Moments later Cynthia acknowledged that it was not false that BF had received many awards.

They said they would take care of it and fix it so we could live in it and be happy in it, and they didn't intend to do that.

¶10 When asked about negligent misrepresentations that were made, Cynthia added the following:

One, that they said that they would repair and they would honor their warranty and fix our property so that it was livable. Two, that Rick Filo came to my property and said as a bonus for fixing this for you, we'll put in new lights for you.

And I believe they knew that was wrong. And then as them coming in and making it worse, dragging the insulation through the house, into the dumpster, and then dragging it back through the house, back to the upstairs, and telling me it wasn't wet, when it was sitting in the snow, and putting it into the roof while I watched them and took pictures.

And Rick Filo saying he would oversee the project, and then he was not available for the whole three weeks. Somehow he disappeared.

...overall them not doing what they said they would do. They broke things, they made the house look worse than it was. They said they would fix them, and they didn't.

I asked Rick Filo on the phone if he had checked the roof during this time when they came back to fix. And he started accusing me of being a problem and that they were professionals and that there was nothing wrong with the roof and how dare I accuse him of not having a good roof.

¶11 In opposition to the motion for summary judgment, the Hansens relied on Cynthia's deposition testimony in describing the alleged

misrepresentations. They referred generally to their “rightful tort claims” but offered nothing further.<sup>5</sup>

¶12 The Hansens cannot establish a claim that Bartelt and Filo made tortious misrepresentations. Puffery, an exaggeration made by a seller, the truth or falsity of which cannot be precisely determined, is not actionable as a misrepresentation of fact. *Loula v. Snap-On Tools Corp.*, 175 Wis. 2d 50, 54, 498 N.W.2d 866 (Ct. App. 1993). Bartelt and Filo’s representations that they were the best contractors and number one in the state are mere puffery. Such representations do not support a cause of action for misrepresentation. See *State v. American TV & Appliance of Madison, Inc.*, 146 Wis. 2d 292, 302, 430 N.W.2d 709 (1988) (“A general statement that one’s products are best is not actionable as a misrepresentation of fact.”).

¶13 Similarly, “an action for misrepresentation cannot be based on future events or facts not in existence when the representation was made, or on unfulfilled promises.” *Schurmann v. Neau*, 2001 WI App 4, ¶10, 240 Wis. 2d 719, 624 N.W.2d 157. The representations that BF’s construction would allow the Hansens to enjoy their home or that it would properly fix the problems constitute statements about future behavior. The Hansens present nothing more than unfulfilled promises.

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<sup>5</sup> In trying to avoid the contract, the Hansens cited Cynthia’s testimony that Rick Bartelt had informed her that the “Environmental Hazards” portion of the contract referred to asbestos related problems. The Hansens argued that by now claiming that the contract meant something different, the defendants should be held responsible for the misrepresentation intended to induce contract execution. That contention is confined to contract avoidance.

¶14 To the extent the claimed misrepresentations fall outside the realm of puffery or promises about future conduct, there is no showing that reliance on those representations induced the Hansens to enter into the contract. Other claimed misrepresentations came after the contract was executed. Summary judgment dismissing Bartelt and Filo individually from the action was proper.

*By the Court.*—Judgment affirmed.

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



