COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP912 **Cir. Ct. No. 2001CV3032**

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

PATRICK LAMBO,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

KATHLEEN D'ACQUISTO IRREVOCABLE TRUST AND ANTHONY D'ACQUISTO, AS AN INDIVIDUAL AND TRUSTEE OF THE KATHLEEN D'ACQUISTO IRREVOCABLE TRUST,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed*.

Before Brown, C.J., Anderson, P.J., and Nettesheim, J.

¶1 PER CURIAM. Patrick Lambo has appealed from a judgment dismissing various claims brought by him against the Kathleen D'Acquisto

Irrevocable Trust (the Trust) and Anthony D'Acquisto, as an individual and trustee of the Trust. The Trust and D'Acquisto have cross-appealed from the portion of the judgment awarding Lambo damages on his claim of unjust enrichment. We affirm the judgment in its entirety.

¶2 This action arises from the purchase and development of two non-contiguous lots that were located in the town of Pewaukee and sold by Waukesha County. Lambo learned that the lots were going to be sold in 1992, and subsequently submitted a bid to purchase them. However, his initial attempts to obtain financing for the purchase failed. On May 17, 1994, after the Waukesha County Board had accepted his bid but before closing, Lambo contacted D'Acquisto and persuaded him to provide the funds. On July 13, 1994, the Trust purchased the lots, paying the entire $107,850 purchase price. The properties were titled in the name of the Trust, which was listed as the grantee on the title transfer papers. Lambo signed the closing documents as the agent for the Trust.

¶3 In the years following the purchase, the Trust paid all fees, expenses and taxes related to the properties. Lambo expended personal effort to develop the properties, including working to get the property annexed to the city of Waukesha and to provide utilities, attempting to obtain a zoning change, and attempting to locate buyers for the properties.

¶4 In January 2000, D'Acquisto sent a letter to Lambo's counsel denying Lambo's claim that a partnership existed between them. In December 2001, Lambo commenced this action against the Trust and D'Acquisto, alleging six claims and seeking either a fifty percent partnership interest in the properties or compensation for his services in improving the properties. The trial court granted summary judgment dismissing his claims for an interest in the properties based on

a partnership agreement, partnership by promissory estoppel, promissory estoppel, and fraud.[1] At trial, it granted the defendants' motion for a directed verdict dismissing Lambo's claim for quantum meruit. It allowed his claim for unjust enrichment to go to the jury and, on motions after verdict, upheld the jury's award of $30,000 for unjust enrichment.

¶5 Lambo raises numerous issues in his appeal, which we address seriatim. His first challenges are to the trial court's summary judgment rulings.

¶6 When reviewing a grant of summary judgment, we apply the same methodology as the trial court and decide de novo whether summary judgment was appropriate. ***Coopman v. State Farm Fire & Cas. Co***., 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). Summary judgment is warranted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (2005-06).[2] Any reasonable doubt as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment. ***Heck & Paetow Claim Serv., Inc. v. Heck***, 93 Wis. 2d 349, 356, 286 N.W.2d 831 (1979).

¶7 Lambo's first argument is that the trial court erred in granting summary judgment dismissing his claim that a partnership existed. He contends that he and D'Acquisto verbally agreed to become 50/50 partners, sharing equally

[1] The original summary judgment rulings were made by the Honorable Donald Hassin. Subsequent rulings were made by the Honorable Robert G. Mawdsley.

[2] All references to the Wisconsin Statutes are to the 2005-06 version.

in the profits and losses related to the properties. He contends that pursuant to their agreement, D'Acquisto agreed to be the financial partner providing the funds for the purchase and development of the lots, while he agreed to provide the labor for development. He contends that their actions and conduct compel a conclusion that they had a partnership agreement.

¶8 The trial court dismissed Lambo's claim to a partnership interest after concluding that it was barred by the statute of frauds. It also concluded that, even viewing the facts most favorably to Lambo, the record did not support a finding that he and D'Acquisto had a meeting of minds and entered into a contract. Because we agree that the summary judgment record fails to establish that a partnership agreement existed or give rise to a material issue of fact for trial, we find it unnecessary to address the statute of frauds issue.

¶9 A partnership is an association of two or more persons to carry on as co-owners a business for profit. WIS. STAT. § 178.03(1). "A partnership agreement, whether expressed or implied, may be in writing or proven by circumstantial evidence demonstrating that the conduct of the parties was of such a nature as to clearly express the mutual intent of the parties to enter into a contractual relationship." ***Heck***, 93 Wis. 2d at 359. To have a partnership, there must be a meeting of minds of the parties. ***Id.*** The intention of one party alone cannot create a partnership. ***Id.***

¶10 The burden of proving that a partnership agreement exists is on the party asserting its existence. ***Id.*** The four elements required to create a partnership under WIS. STAT. ch. 178 are: (1) the contracting parties must intend to form a bona fide partnership and accept the legal requirements and duties necessary to such a relationship; (2) there must exist a community of interest in the

capital employed by the partnership; (3) each partner must have an equal voice in the management of the partnership operation; and (4) the profits and losses of the corporation must be shared and distributed. ***Heck***, 93 Wis. 2d at 359-60. "The ultimate and controlling test as to the existence of a partnership is the parties' *intention* of carrying on a definite business as co-owners. Such intention may be determined from the terms of the parties' agreement or from their conduct under the circumstances of the case." ***Id.*** at 360.

¶11 Lambo contends that the parties' conduct reflected their intent to create a partnership. He relies on evidence that D'Acquisto represented to third parties that they were partners and permitted others, including Lambo, to represent that they were partners. Lambo also relies on evidence that he had the approval of D'Acquisto to enter into contracts with companies and businesses to perform work in conjunction with developing the properties and that he had D'Acquisto's approval to sign legal documents, including counteroffers for the sale of the lots, as an owner of the properties. He contends that the properties were titled in the name of the Trust merely to avoid problems arising from judgments and liens against himself and D'Acquisto.

¶12 While the record supports Lambo's allegations regarding the parties' representations, the real issue is not how D'Acquisto chose to represent their relationship to others, but what understanding was reached between them. The evidence relied on by Lambo does not establish or permit the inference that Lambo and D'Acquisto intended to form a bona fide partnership and to accept the legal requirements and duties attendant to such a relationship. At best, as noted by the trial court, the evidence demonstrated an effort by the parties to come to an agreement, which never came to fruition.

¶13 In reaching this conclusion, we note that Lambo submitted six proposed written partnership agreements for D'Acquisto's signature between 1994 and 1996, and D'Acquisto refused to sign any of them. Although each of the proposed agreements purported to establish 50/50 ownership of the properties and a sharing of profits and losses on a 50/50 basis, the details of those provisions were never clarified. In addition, each proposed agreement contained additional provisions which varied from draft to draft. Some contained provisions entitling Lambo to have his alleged one-half interest in the property retitled to whomever he named; some gave Lambo a right of first refusal and option to purchase D'Acquisto's interest in the properties at half the purchase price plus an unspecified amount of interest; and one conferred a right to borrow against the properties for personal use. In addition, some of the proposed agreements provided that Lambo was obligated to pay interest at an unspecified rate if the properties were not sold or developed within two years and he still had not paid half of the purchase price. Others contained no such provisions.

¶14 Despite D'Acquisto's failure to sign any of the proposed partnership agreements, on January 18, 2000, Lambo again wrote a letter alleging that they were partners. In it, he purported to refresh D'Acquisto's memory as to the terms of their agreement. However, he set forth different terms than had been contained in the prior proposed agreements, contending that he and D'Acquisto were 50/50 partners as to the ownership of the land and profits and losses, but that D'Acquisto had agreed to loan the purchase money to Lambo at the time the properties were acquired and that the loan would be interest free for the first one or two years, with 8% interest thereafter. Lambo also alleged that he and D'Acquisto had agreed that Lambo would pay back the $107,850 plus other fees, expenses and taxes "out of my 50% profit when the land was sold or develop (sic)."

¶15 When a dispute over material terms manifests a party's lack of intent to contract, no contract results. ***Novelly Oil Co. v. Mathy Constr. Co.***, 147 Wis. 2d 613, 617, 433 N.W.2d 628 (Ct. App. 1988). Vagueness or indefiniteness as to essential terms of an agreement prevents the creation of an enforceable contract, because a contract must be definite as to the parties' basic commitments and obligations. ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 178, 557 N.W.2d 67 (1996).

¶16 The only reasonable inference that can be drawn from this record is that Lambo and D'Acquisto never reached an agreement as to the terms of a partnership and that their conduct never clearly expressed their mutual intent to enter into a partnership and to accept the requirements and duties of such a relationship. Their initial purported agreement was vague and nebulous. By indicating only that the parties would be 50/50 partners sharing equally in the profits and losses, with D'Acquisto providing funding and Lambo providing labor, no meeting of minds was demonstrated. Such an agreement could not be implemented because the essential meaning of these provisions was unclear.[3] The subsequent submission and rejection of the various proposals, coupled with the variation espoused by Lambo in January 2000, establish that no meeting of minds as to the nature and terms of a partnership agreement ever occurred.

¶17 In reaching this conclusion, we reject Lambo's argument that the parties entered into an oral agreement in 1994 and operated under it for six years.

[3] While Lambo alleges that the agreement meant that the Trust would pay all expenses and taxes in addition to the purchase price, and profits would be divided after the properties were sold, this was only one possible construction of the language. Because essential terms were not clarified, there was no way to determine that either party had fully performed or not performed under the agreement.

Based upon this argument, Lambo asserts that the proposed written agreements submitted by him to D'Acquisto were simply proposed modifications of the existing partnership agreement. However, as already discussed, parties must agree on the essential terms of a contract in order to enter into a contract. Submitting the various proposed written contracts to D'Acquisto could not have constituted an attempted modification of the terms of the partnership agreement when no partnership agreement was yet in existence.

¶18 We also reject Lambo's argument that he entered into an oral agreement with D'Acquisto that was made definite by the parties' conduct over the six years of their relationship. Rather than demonstrating that they agreed on the meaning of the alleged partnership, the conduct of the parties reveals that they never agreed on definite terms for their relationship. The trial court therefore properly granted summary judgment dismissing Lambo's claim that he and D'Acquisto were partners, entitling him to a 50% interest in the properties.

¶19 Lambo also claimed that he was entitled to a partnership interest in the properties based upon partnership by estoppel and promissory estoppel. He contends that D'Acquisto represented to him and to third-parties that they were partners, and that he reasonably relied on that representation and will be prejudiced if the representation is now denied.

¶20 Partnership by estoppel exists to protect third persons who rely to their detriment upon a representation that a person is a partner when, in fact, that person is not a partner. *See* ***Wisconsin Tel. Co. v. Lehmann***, 274 Wis. 331, 334, 80 N.W.2d 267 (1957). Lambo attempts to avoid this limitation by contending that he is relying not on partnership by estoppel as codified in WIS. STAT. § 178.13, but rather on common law promissory estoppel and statements made by

D'Acquisto to him personally, representing that they were partners. However, regardless of whether Lambo denominates his claim as one for common law promissory estoppel or partnership by estoppel, what he seeks is a determination that he has a partnership interest in the properties. As between Lambo and D'Acquisto, a partnership and partnership interest in the properties can exist only if they contracted to create a partnership. *See* ***Geo. Bert. Cropper, Inc. v. Wisterco Investments, Inc.***, 399 A.2d 585, 595-96 (Md. 1979). As is clear from the discussion above, they did not.

¶21 Lambo's fraud claim fails for similar reasons. As an alternative to his claim that a partnership was entered into by the parties, Lambo contends that D'Acquisto fraudulently misrepresented to him that a partnership existed even though he never intended to enter a partnership. Lambo contends that the measure of damages for fraud is the benefit of the bargain, citing ***Betterman v. Fleming Cos.***, 2004 WI App 44, ¶30, 271 Wis. 2d 193, 677 N.W.2d 673. He appears to contend that the "benefit of the bargain" in this case is either a partnership interest in the properties or damages in the amount of one-half of the increase in value of the properties.

¶22 The defect in Lambo's argument is that D'Acquisto did not fraudulently induce him to enter a partnership agreement. As already discussed, no contract or partnership agreement was ever entered into by the parties. While benefit-of-the-bargain damages are appropriate when a misrepresentation induces a victim to consummate a bargain, such damages are not appropriate in the absence of an actual, binding agreement. ***Roboserve, Inc. v. Kato Kagaku Co.***, 78 F.3d 266, 274 (7th Cir. 1996). "Damages for common law fraud are not intended to restore what one never had." ***Id.*** Because Lambo did not enter a partnership

contract, his fraud claim and demand for benefit-of-the-bargain damages was properly dismissed.[4]

¶23 Lambo's next argument is that the trial court erred by granting a directed verdict dismissing his quantum meruit claim. A motion challenging the sufficiency of the evidence to support a verdict may not be granted unless, considering all credible evidence and the reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to support a finding in favor of that party. ***Richards v. Mendivil***, 200 Wis. 2d 665, 670, 548 N.W.2d 85 (Ct. App. 1996). This standard applies to motions to change the jury's verdict answer and motions for a directed verdict. *See* ***id.*** It is the standard to be applied by the trial court and by this court on appeal. ***Id.***

¶24 The measure of damages for one seeking the reasonable value of services under a claim for quantum meruit is the rate of pay for such work in the community at the time the work was performed. ***Barnes v. Lozoff***, 20 Wis. 2d 644, 652, 123 N.W.2d 543 (1963); *see also* WIS JI—CIVIL 1812 (2006)(describing the reasonable value of services as the customary rate of pay for the work in the community at the time the work was performed).

[4] In his brief-in-chief, Lambo contends that the trial court erred by not allowing the fraud claim to go before the jury with the instruction that a plaintiff is entitled to benefit-of-the-bargain damages. In his reply brief, he alleges that "D'Acquisto agrees that Lambo could bring a fraud claim and recover out-of-pocket expenses, thereby admitting that Lambo's fraud claim should not have been dismissed." Appellate issues raised for the first time in a reply brief need not be addressed by this court. ***Estate of Bilsie***, 100 Wis. 2d 342, 346 n. 2, 302 N.W.2d 508 (Ct. App. 1981). Consequently, to the extent Lambo is claiming that his fraud claim should not have been dismissed because he was entitled to seek out-of-pocket expenses, rather than benefit-of-the-bargain damages as alleged in his brief-in-chief, we decline to address his argument.

¶25 Although he claimed he was performing development services for the properties between 1994 and 2001, Lambo did not offer testimony at trial as to the rate of pay for developers in the community during this time period. Similarly, no written evidence was introduced specifying a rate of pay for individuals performing the types of functions Lambo was performing.[5] Although damages under quantum meruit may be measured by a percentage of the project, evidence must be presented indicating that this is the customary rate of pay for such work in the community at the time it was preformed. *See* ***Barnes***, 20 Wis. 2d at 652. While Lambo testified as to what he believed his services were worth, this was not the equivalent of presenting evidence as to the customary rate of pay for such work in the community at the time it was performed.[6] The trial court therefore properly granted a directed verdict dismissing the claim.

¶26 Lambo's next argument is that the trial court erroneously exercised its discretion by excluding evidence at trial as to the partnership agreement between the parties. He contends that it was relevant to his unjust enrichment and quantum meruit claims because it showed that the parties valued his services or the benefit conferred by his services at 50% of the profits from the properties.

¶27 Relevant evidence is evidence having any tendency to make the existence of any fact which is of consequence to the determination of the action

[5] Lambo relies upon ***Watts v. Watts***, 152 Wis. 2d 370, 448 N.W.2d 292 (Ct. App. 1989), in challenging the trial court's dismissal of this claim. However, ***Watts*** dealt with unjust enrichment, not quantum meruit. *See* ***id.*** at 382.

[6] Lambo cites three pages of the testimony of John Bergman, a real estate developer, for the proposition that if he had worked with Lambo to develop this property the two of them would have been partners. Nothing in the cited portion of Bergman's testimony provides a basis for valuing Lambo's services under the standards applicable to quantum meruit.

more probable or less probable than it would be without the evidence. WIS. STAT. § 904.01. We review a trial court's decision admitting or excluding evidence under an erroneous exercise of discretion standard. ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. The trial court has broad discretion, and our review is highly deferential. ***Id.***, ¶¶28-29. We will not find an erroneous exercise of discretion if any reasonable basis exists for the trial court's decision. ***State v. Lindh***, 161 Wis. 2d 324, 361 n.14, 468 N.W.2d 168 (1991).

¶28 The trial court's decision to exclude evidence related to a partnership agreement was clearly reasonable. As discussed above, Lambo's claim for a partnership interest was properly dismissed on summary judgment because no basis existed to conclude that a partnership agreement was entered into by the parties. Because Lambo's claim as to the existence of a partnership agreement was properly dismissed, he could not rely on the existence of such an agreement to establish damages for unjust enrichment or quantum meruit.

¶29 Lambo also contends that the trial court erroneously denied his request to submit rebuttal testimony from witnesses Thomas Gale and Joseph Balistreri to impeach the testimony and credibility of D'Acquisto. We need not reach the merits of this issue. As already noted, the only claims that went to trial and remained pending when Lambo offered the testimony of Gale and Balistreri were the unjust enrichment and quantum meruit claims. The quantum meruit claim was subsequently dismissed on directed verdict for lack of proof as to the reasonable value of Lambo's services. Lambo prevailed on the unjust enrichment claim.

¶30 Lambo's argument in support of admitting rebuttal testimony by Gale and Balistreri provides no basis for concluding that their testimony was

relevant to the value of Lambo's services or provided a basis for a larger damages award for unjust enrichment. Because the alleged error in the admission of the testimony therefore did not affect Lambo's substantial rights, his argument regarding the trial court's exclusion of this testimony provides no basis for relief on appeal. *See* WIS. STAT. § 805.18(2).

¶31 Lambo's final argument on appeal is that the trial court erroneously exercised its discretion by denying his motion to enlarge the time for discovery. The decision whether to modify a scheduling order lies within the trial court's discretion. ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis. 2d 296, 305, 470 N.W.2d 873 (1991). When, as here, a motion to extend the time for discovery is made after the expiration of the time specified in the scheduling order, it may not be granted unless the court finds that the failure to act was the result of excusable neglect. *See* WIS. STAT. § 801.15(2)(a). Excusable neglect is neglect that might have been the act of a reasonably prudent person under the same circumstances, and is not synonymous with neglect, carelessness or inattentiveness. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 468, 326 N.W.2d 727 (1982).

¶32 A scheduling order was entered in this case on April 8, 2002, requiring that Lambo provide the names of all witnesses and provide all expert reports by June 30, 2002. The final discovery deadline was November 2, 2002. Two days after that deadline, D'Acquisto and the Trust moved for partial summary judgment dismissing Lambo's claims alleging a partnership interest based on a partnership agreement, estoppel, and fraud. The trial court granted the motion for partial summary judgment on February 25, 2003, and clarified its ruling on May 16, 2003. On that date, it also granted Lambo permission to amend his complaint, which he did on June 5, 2003.

¶33 On June 30, 2003, Lambo filed a notice of appeal from the order granting partial summary judgment. That appeal was dismissed by this court on September 29, 2003, in an order that found the appeal to be frivolous. *See* ***Lambo v. Kathleen D'Acquisto Irrevocable Trust***, No. 2003AP1742, slip op. at 6 (Wis. Ct. App. Sept. 29, 2003). On December 11, 2003, more than one month after remittitur, Lambo moved to enlarge the time for discovery.

¶34 Lambo contends that his failure to comply with the original discovery order and his delay in filing a motion for an extension of time for discovery were excusable because he did not realize until the May 16, 2003 hearing that the trial court was unlikely to allow him to rely on evidence of a 50/50 partnership for any purpose. Lambo contends that prior to that date, based on his reading of ***Watts*** he believed that he would be able to rely on evidence of a partnership to support his quantum meruit and unjust enrichment claims. He contends that it was not until May 2003 that he realized he would need an expert to testify regarding the value of a developer's services and the increase in value of the property resulting from such services. He contends that he acted promptly to rectify the situation after remittitur by this court.

¶35 Lambo's argument provides no basis to conclude that the trial court erroneously exercised its discretion by denying relief. Lambo's motion was filed almost a year and a half after the deadline for identifying witnesses, and more than a year after the final discovery deadline. His quantum meruit and unjust enrichment claims were raised in his original complaint, and the standards for recovery under such claims were known. Lambo made a decision to attempt to rely on evidence of a 50/50 partnership rather than identifying witnesses to establish his right to damages under those claims. Even when he knew that he would be unable to do so, he failed to immediately seek an enlargement of the

discovery deadline, and instead commenced a frivolous appeal shortly before the scheduled trial date. Even after remittitur, he waited more than a month to file his motion for an extension. Under these circumstances, the trial court acted reasonably in denying his motion on the ground that he had failed to show excusable neglect for the delay.

¶36 While we deny Lambo relief on appeal, we also reject the arguments raised in the cross-appeal. In their cross-appeal, D'Acquisto and the Trust contend that the trial court erred in denying their motion for a directed verdict dismissing Lambo's unjust enrichment claim. They also contend that the trial court erred in denying their motion after verdict to change the jury's damages award from $30,000 to zero. In addition, they contend that Lambo's unjust enrichment claim was barred by the statute of limitations.

¶37 The argument concerning the statute of limitations is clearly without merit. Although the timeliness of the commencement of an action at law is governed by statutes of limitation, in the absence of a controlling statute, the timeliness of an unjust enrichment claim is governed by laches. ***Suburban Motors of Grafton, Inc. v. Forester***¸ 134 Wis. 2d 183, 187, 396 N.W.2d 351 (Ct. App. 1986); *see also* ***Schwittay v. Sheboygan Falls Mut. Ins. Co.***, 2001 WI App 140, ¶11, 246 Wis. 2d 385, 390-91, 630 N.W.2d 772. A claim is barred by laches if there is an unreasonable delay, if the person had knowledge of the events and acquiesced, and if the person asserting laches is prejudiced by the delay. *See* ***Yocherer v. Farmers Ins. Exch.***, 2002 WI 41, ¶23, 252 Wis. 2d 114, 643 N.W.2d 457.

¶38 No basis exists to conclude that laches bars Lambo's unjust enrichment claim. The record indicates that Lambo worked to develop the

properties from 1994 until D'Acquisto informed Lambo that he denied the existence of a partnership in 2000. Lambo acted within a reasonable time when he commenced this action in December 2001.

¶39 The remaining arguments raised in the cross-appeal also fail. To recover on a claim for unjust enrichment, three elements must be proven: (1) a benefit conferred upon the defendant by the plaintiff, (2) an appreciation or knowledge by the defendant of the benefit, and (3) the acceptance or retention by the defendant of the benefit under circumstances that makes its retention inequitable. ***Tri-State Mech., Inc. v. Northland Coll.***, 2004 WI App 100, ¶14, 273 Wis. 2d 471, 681 N.W.2d 302. Recovery is based upon the moral principle that one who has received a benefit has a duty to make restitution when to retain such benefit would be unjust. *See* ***Management Computer Servs.,Inc.***, 206 Wis. 2d at 188. Because unjust enrichment is based upon equitable principles, the damages are measured by the benefit conferred upon the defendant, not by the plaintiff's loss. ***Id.***

¶40 D'Acquisto and the Trust contend in their cross-appeal that the record is devoid of evidence linking Lambo's alleged services to any measurable benefit to them from those services. They contend that the trial court therefore should have granted them a directed verdict, or granted their motion to reduce the damages award to zero.

¶41 As previously noted, a trial court may grant a party's motion for a directed verdict only if, viewing all credible evidence and the reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to support a finding in favor of that party. *See* ***Richards***, 200 Wis. 2d at 670. This same standard applies to a motion

to change the jury's award of damages for unjust enrichment. ***Management Computer Servs., Inc.***, 206 Wis. 2d at 187. Moreover, while damages must be proven with reasonable certainty, this does not mean that a plaintiff must prove damages with mathematical precision. ***Id.*** at 189. Evidence of damages is sufficient if it enables the jury to make a fair and reasonable approximation. ***Id.***

¶42 Viewing the evidence in the light most favorable to Lambo, we conclude that it supports a determination that his efforts to develop the properties increased their value and conferred a benefit on D'Acquisto and the Trust. Because the jury could reasonably determine that his efforts increased the value of the properties by $30,000, we conclude that the trial court properly denied the motions for a directed verdict and to reduce the damages award.

¶43 In making this determination, we recognize that the Trust paid the purchase price for the properties and paid all expenses and taxes related to them. In addition, we recognize the defendants' argument that market forces play a role in increasing the value of property, particularly in an area like Waukesha County. However, despite these factors, evidence remained that permitted the jury to conclude that Lambo's efforts increased the value of the properties by $30,000.

¶44 The record indicates that Lambo filed a petition to annex the properties to the city of Waukesha and, when his petition was denied, hired Jahnke & Jahnke Associates, an engineering firm, to provide services necessary for annexation. The record indicates that he attended numerous plan commission and common council meetings in connection with annexation, which ultimately occurred. Testimony by John Jahnke, a consultant, land surveyor and engineer, indicated that annexation increased the value of the properties.

¶45 Evidence also indicated that Lambo attempted to have the properties rezoned for commercial use and that, while they remained zoned T-1 for temporary zoning, his efforts constituted a step in an effort to obtain approval from the city for commercial rezoning. In addition, evidence indicated that Lambo worked with city officials, counsel, and other professionals, including Jahnke & Jahnke, to obtain utilities for the properties, and assisted in obtaining both water and sewer connections for the properties. Witnesses, including a developer and an attorney, testified that such utilities increase the value of property. In addition, testimony indicated that the value of a neighboring parcel of property increased after annexation and the provision of utilities.

¶46 This evidence regarding Lambo's efforts permitted a finding that Lambo provided services that helped increase the value of the properties. Moreover, while none of the offers to purchase solicited by him led to a completed sale of either parcel, evidence as to the amounts of the offers, combined with the increases in value of the properties as reflected in the real estate tax assessments for 1994 through 2001, permitted the jury to reasonably find that the services performed by Lambo increased the value of the properties by $30,000.[7] No basis therefore exists to conclude that the trial court erred in denying the motions for a directed verdict or to change the jury's answer as to damages.

[7] D'Acquisto and the Trust contend in a footnote that the tax assessments were not competent evidence reflecting the value of the properties at any relevant time, and did not establish that the properties were enriched as a result of Lambo's activities. We reject this argument, and conclude that the tax assessments were relevant to show that the properties significantly increased in value over the course of the relationship between Lambo and D'Acquisto. Based upon the evidence regarding Lambo's contributions to the development of the properties, and the testimony that annexation and utilities increase the value of property, the jury was entitled to conclude that $30,000 of the increase was attributable to Lambo.

¶47 Because Lambo has not prevailed on his appeal, and D'Acquisto and the Trust have not prevailed on their cross-appeal, costs are denied to all parties.

By the Court.—Judgment affirmed.

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