COURT OF APPEALS
DECISION
DATED AND FILED

June 5, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3437 **Cir. Ct. No. 99-CV-2453**

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

RANDAL J. HELLENBRAND,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

IRWIN A. GOODMAN, ROBERT D. GOODMAN, IRWIN A. AND ROBERT D. GOODMAN, INC., F/K/A GOODMAN'S JEWELERS, INC. AND JOHN E. HAYES,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS,

GOODMAN'S JEWELERS, INC. F/K/A HHR, INC. AND ROBERT W. PRICER,

DEFENDANTS-RESPONDENTS.

APPEAL and CROSS-APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Vergeront, P.J., Deininger and Lundsten, JJ.

¶1 DEININGER, J. These appeals arise from a lawsuit brought by Randal Hellenbrand, a former employee of Goodman's Jewelers, Inc., against the former owners of the business, Irwin and Robert Goodman; its present owner, John Hayes; and Robert Pricer, a UW-Madison business professor. Hellenbrand pleaded five separate theories under which he hoped to recover against one or more of the defendants for his failure to acquire an ownership interest in the jewelry business: (1) breach of contract; (2) breach of fiduciary duty; (3) tortious interference with contract; (4) conspiracy; and (5) promissory estoppel.

¶2 The defendants moved for summary judgment and the circuit court dismissed some but not all of Hellenbrand's claims. Hellenbrand appeals the court's order insofar as it dismisses several of his claims, and the Goodmans and Hayes cross-appeal the court's denial of their motions to dismiss the remainder. Because we conclude that the Goodmans, Hayes and Pricer were entitled to dismissal of all of Hellenbrand's claims on summary judgment, we affirm the trial court's order in part and reverse it in part.

BACKGROUND

¶3 For some sixty years or more, Robert and Irwin Goodman owned and operated Goodman's Jewelers in Madison. Randal Hellenbrand worked at the store, initially part-time while a student and later full-time as the store's sales manager.

¶4 Hellenbrand claims that during this time, the Goodmans told him on several occasions that he was one of several employees whom they wanted to "take over" the business upon their retirement. Hellenbrand claims that in reliance

on these statements, he performed tasks "above and beyond" his job as sales manager, such as helping the Goodmans rent and maintain the apartments located above the store, repairing the store's jewelry cases and carpeting, and paying with personal funds for tables in the store's name at entertainment events. As the Goodmans approached retirement, three employees expressed interest in jointly pursuing the acquisition of the business: Hellenbrand; John Hayes, a long-time employee of the business and then its general manager; and a third employee who is not a party to this lawsuit.

¶5 To assist with the sale of their business, the Goodmans enlisted the help of Robert Pricer, a business professor at the University of Wisconsin-Madison. Pricer's responsibilities at the university include participating in a university-funded outreach program that provides business advice to various local businesses. Pricer accepts no compensation for the services he provides through this program, instead providing them "as part and parcel of [his] duties at the University of Wisconsin-Madison." Under the auspices of this program, Pricer agreed to assist the Goodmans and the employee group with the sale of Goodman's Jewelers, Inc., making clear to all parties that he would act as a neutral advisor and would accept no compensation for his services.

¶6 Pricer facilitated talks between the Goodmans and Hayes, whom the three-employee group had selected to negotiate on its behalf. Some months after Pricer began assisting with the negotiations, the Goodmans presented Pricer with a Rolex watch valued at between $4,000 and $5,000 as a gift in recognition of his efforts. Pricer initially declined the gift, but later accepted it. Pricer continued to assist with the parties' discussions after he received the watch.

¶7 Despite Pricer's efforts, the parties were unable to reach agreement on a number of issues: the size of Hellenbrand's ownership share in the business, the manner in which profits and losses would be distributed, and the procedure by which significant business decisions would be made. Notwithstanding these unresolved issues, the Goodmans and the employee group scheduled a closing date for the sale. As the closing date approached, the employees agreed to form a corporation (HHR, Inc.) to purchase the assets of the business. Toward that end, the parties retained an attorney to file articles of incorporation for HHR, Inc.

¶8 The day before the scheduled closing, however, the Goodmans informed Pricer and Hayes that they would not go through with the planned sale due to what they perceived as the employee group's unnecessarily difficult negotiating positions over the previous several months. In particular, the Goodmans were concerned with the amount of ownership and decision-making authority that Hellenbrand, through Hayes, had requested. The Goodmans further explained that they had decided to sell the business to an outside party. Hayes attempted to persuade the Goodmans to continue negotiations to no avail. Hayes then telephoned Hellenbrand to inform him of the Goodmans' decision to abort the sale.

¶9 A few days after the cancelled closing date, Pricer met with the Goodmans and suggested that they sell the business to Hayes alone, an outcome that Pricer believed was what the Goodmans had "always intended." With this result in mind, the Goodmans agreed to postpone attempts to sell the business to an outside party and to resume talks with Hayes. Pricer instructed Hayes that he should "immediately" tell Hellenbrand that he was negotiating with the Goodmans to acquire the business on his own. Hayes did not do so, testifying at deposition

that he felt "that the Goodmans' decision not to sell to the [employee] group meant … that if I tried to involve" the group, the sale "wouldn't happen."

¶10 As negotiations between the Goodmans and Hayes progressed, Hellenbrand, who was unaware of these negotiations, asked Hayes for a status update on the sale of the business. Hayes responded that he was "trying to save the deal" between the Goodmans and the employee group by "trying to save the store from being sold" to an outside party. When Hellenbrand offered to help, Hayes informed him that "there isn't anything you can do." At no time during his negotiations with the Goodmans did Hayes inform Hellenbrand that he was attempting to individually purchase the business.

¶11 Hayes and the Goodmans ultimately agreed on the terms for Hayes' purchase of the business. Hayes then instructed the attorney who drafted the articles of incorporation for HHR, Inc. to prepare documents: (1) issuing all of the corporation's stock to Hayes; (2) appointing Hayes to fill the corporation's various officer positions; (3) effecting the corporation's purchase of the assets of Goodman's Jewelers, Inc.; and (4) approving a name change from HHR, Inc. to Goodman's Jewelers, Inc.[1]

[1] The former Goodman's Jewelers, Inc., owned by the Goodmans, changed its name to Irwin A. and Robert D. Goodman, Inc. This corporation owns and leases the real estate on which the jewelry store sits. The corporate entities are also named as defendants, but Hellenbrand makes no specific allegations against the corporations in his complaint. His only explanation of their inclusion in this lawsuit is a statement in his brief that the activities of Hayes and the Goodmans "are indistinguishable from the actions of" their corporations and "all actions alleged in the complaint" against Hayes and the Goodmans are therefore "simultaneous actions" against the corporations. We will assume, in the absence of argument to the contrary, that our disposition of the claims against Hayes and the Goodmans as individuals determines the fate of any claims against their corporations. Accordingly, we do not separately discuss Hellenbrand's claims against the defendant corporations.

¶12 Shortly after the sale, Hayes informed Hellenbrand of his purchase of the business by showing him a letter that he received from Pricer. In the letter, Pricer congratulates Hayes on his purchase and warns that "[b]ecause it was not possible to purchase the business with [Hellenbrand] and [the third employee], you are left in a difficult position as they expected to be part of the purchase team." Pricer also states that the other members of the employee group "need to realize that a sale was only possible to you exclusively."

¶13 According to Hellenbrand's deposition testimony, Hayes told him in subsequent conversations that he "had no choice" but to solely acquire the business "[b]ecause he thought the Goodmans were going to sell it to someone else." Hellenbrand also testified at deposition that the Goodmans informed him that the sale to Hayes was "how it was always supposed to be," which Hellenbrand understood to mean that "it was [Hayes] who was always supposed to get the store." Hellenbrand's employment with Goodman's Jewelers, Inc. soon ended, and he filed suit against Hayes, the Goodmans, Pricer, and the corporate entities involved in the sale (see footnote 1).

¶14 Hellenbrand's complaint included claims for breach of contract, breach of fiduciary duty, tortious interference with contract, conspiracy, promissory estoppel, and punitive damages. On defense motions for summary judgment, the trial court dismissed all claims against Pricer. The court also dismissed the breach of fiduciary duty claim against Hayes, as well as the tortious interference, conspiracy, and punitive damages claims against Hayes and the Goodmans. The court denied summary judgment, however, on the breach of contract and promissory estoppel claims against Hayes and the Goodmans. The

parties appeal those portions of the court's order adverse to them.[2] Additional facts will be presented in the analysis which follows.

ANALYSIS

¶15 We review a trial court's grant or denial of summary judgment de novo, owing no deference to the trial court's decision. ***Waters v. United States Fid. & Guar. Co.,*** 124 Wis. 2d 275, 278, 369 N.W.2d 755 (Ct. App. 1985). "[S]ummary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995); WIS. STAT. § 802.08(2) (2001-02).[3] In our review, we, like the trial court, are prohibited from deciding issues of fact; our inquiry is limited to a determination of whether a factual issue exists. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993).

I.

¶16 We first address Hellenbrand's tortious interference, conspiracy, and punitive damages claims against Pricer. Pricer argues that these claims must be dismissed because Hellenbrand failed to comply with the notice of claim provisions of WIS. STAT. § 893.82. We agree.

---

[2] All of Hellenbrand's claims against Pricer were dismissed, and the order was thus final as to these claims. *See* WIS. STAT. § 808.03(1). We granted Hellenbrand and the remaining defendants leave to appeal and cross-appeal the court's non-final dispositions regarding the remaining claims. *See* § 808.03(2).

[3] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶17 WISCONSIN STAT. § 893.82(3) provides that a state officer, employee, or agent may be sued for an act "growing out of or committed in the course of the discharge of the officer's, employee's or agent's duties" only if the plaintiff serves the state attorney general with a notice of claim within 120 days of the event causing the damage giving rise to the lawsuit. The notice of claim must contain a description of the time, date, location, and circumstances surrounding the incident, as well as the names of the persons involved. ***Id***. Failure to timely serve a notice of claim is "fatal to the action." ***Ibrahim v. Samore***, 118 Wis. 2d 720, 726, 348 N.W.2d 554 (1984); *see also* section 893.82(3) ("[N]o … action … may be brought" unless notice is timely served.).

¶18 The parties do not dispute that, when performing duties as a university professor, Pricer is a state employee to whom the notice of claim requirement applies. The parties also do not dispute that Hellenbrand served his notice of claim outside of the 120-day period allowed by WIS. STAT. § 893.82. Hellenbrand served notice on the state attorney general over a year after Pricer allegedly injured Hellenbrand by facilitating Hayes' independent purchase of Goodman's Jewelers, Inc.

¶19 Hellenbrand argues, however, that Pricer's acceptance of the Rolex watch from the Goodmans converted his activities into those of a "private consultant," thereby eliminating any "need to comply with the notice of [claim] statute." We disagree. The record indicates that from the start of his involvement with the sale, Pricer made clear to the parties that he was working on behalf of the university and that he would not accept any compensation for his efforts. He then spent approximately 370 hours assisting with the sale and an additional 150 hours helping Hellenbrand transition to another jewelry store after it became apparent that he was not going to remain with Goodman's Jewelers. Except for the gift of

the watch, Pricer received no compensation for these efforts other than his salary as a state employee.

¶20 Although the watch was not a trifle, its value in no way approaches the value of the substantial services Pricer rendered under the auspices of the university's business outreach program. More importantly, its receipt was neither bargained for nor anticipated when Pricer agreed to assist the parties. Accordingly, we conclude the gift did not serve to remove his activities from the scope of his duties as a state employee and render Pricer a "private consultant" as Hellenbrand asserts. Whether Pricer failed to comply with any state or university regulations specifying how such gifts are to be reported or disposed of is an entirely separate issue which has no bearing on our conclusion. Hellenbrand's failure to timely serve a notice of claim under WIS. STAT. § 893.82 bars his claims against Pricer.

II.

¶21 We next consider Hellenbrand's breach of fiduciary duty claim against Hayes. "In order to show that an individual breached a fiduciary duty, the first element which must be established is that … a fiduciary duty is owed." ***Modern Materials, Inc. v. Advanced Tooling Specialists, Inc.***, 206 Wis. 2d 435, 443, 557 N.W.2d 835 (Ct. App. 1996). Generally, there are two types of relationships that give rise to a fiduciary duty: "(1) those specifically created by contract or a formal legal relationship such as principal and agent, attorney and client, trust and trustee, guardian and ward, and (2) those implied in law due to the factual situation surrounding the transactions and relationships of the parties to each other and to the questioned transactions." ***Production Credit Ass'n v. Croft***, 143 Wis. 2d 746, 752, 423 N.W.2d 544 (Ct. App. 1988).

¶22 Hellenbrand argues that he had both types of fiduciary relationships with Hayes: a formal fiduciary relationship arising from their alleged status as officers of HHR, Inc., and an informal fiduciary relationship arising from Hayes' position as the "negotiator" for the employee group. We conclude that neither asserted fiduciary relationship existed.

¶23 Hellenbrand was never a shareholder of HHR, Inc., to whom its officers and directors owed a fiduciary duty. *See* ***Jorgensen v. Water Works, Inc.***, 218 Wis. 2d 761, 778, 582 N.W.2d 98 (Ct. App. 1998) ("[D]irectors and officers of a corporation owe a fiduciary duty to individual shareholders as well as to the corporation."). Hellenbrand claims to have been an officer of the corporation, however, and asserts that that status placed him in a fiduciary relationship with other officers of HHR, Inc. Even if we were to assume that corporate officers owe fiduciary duties to each other as individuals, a question we do not decide, the record does not establish (or place in dispute) that Hellenbrand was ever an officer of HHR, Inc.

¶24 WISCONSIN STAT. § 180.0205 sets forth two ways by which a corporation may appoint its initial corporate officers. First, if the corporation's articles of incorporation name initial directors, the directors must appoint the officers. *See* § 180.0205(1). Second, if the articles of incorporation do not name initial directors, the incorporator(s) must appoint the officers themselves or elect directors who will do so. *See* § 180.0205(2)(a). The articles of incorporation for HHR, Inc. were of the second variety—they did not name initial directors. Thus, the appointment of officers awaited action by the incorporator; here, the attorney who drafted the articles of incorporation for HHR, Inc.

¶25 On the date that HHR, Inc. purchased the assets of Goodman's Jewelers, Inc., the incorporator signed resolutions appointing Hayes to fill all officer positions within the corporation. *See* WIS. STAT. § 180.0205(2)(b) (appointment of officers may be by unanimous written consent of the incorporator(s)). Quite simply, the incorporator never appointed Hellenbrand as an officer so he never became one. Thus, any claim based on an assertion of a fiduciary duty owing to Hellenbrand as an officer of HHR, Inc., fails for a lack of factual support in the record.[4]

¶26 We also conclude that Hayes did not assume a fiduciary duty to Hellenbrand when Hayes acted as the negotiator for the would-be purchasers. A court will imply a fiduciary relationship only when "there exists an inequality, dependence, weakness of age, of mental strength, business intelligence, knowledge of facts involved, or other conditions giving to one an advantage over the other." ***Production Credit Ass'n***, 143 Wis. 2d at 755-56. No evidence of these or similar factors exists here. To the contrary, Hellenbrand's case is premised in part on his assertion that he possessed sufficient business acumen to be entrusted with (and, indeed, was "owed") a substantial ownership interest in Goodman's Jewelers, Inc. There is nothing in the record to suggest that Hellenbrand was under any disability that would have precluded him from negotiating directly with the Goodmans on his own behalf.

[4] Hellenbrand contends he was appointed an officer of HHR, Inc. shortly before the scheduled closing date when Hayes signed and filed with the Department of Revenue an Application for a Sellers Permit and Employer Registration that listed Hellenbrand as a vice-president of the corporation. Although this document may be evidence that at that point Hayes expected or intended that Hellenbrand would become an officer of HHR, Inc., the tax form itself could not serve to appoint Hellenbrand an officer. WISCONSIN STAT. § 180.0205 sets forth the methods by which corporate officers are appointed, and the filing of applications for seller's permits and employer registration certificates is not among them.

¶27 As we consider below, Hayes may have broken an agreement or a promise, or committed some other actionable wrong, during his dealings with Hellenbrand and the Goodmans, but we find nothing in this record to support an implied fiduciary relationship between Hayes and Hellenbrand. Because Hellenbrand has failed to demonstrate the presence of a factual dispute concerning the existence of a fiduciary relationship with Hayes, either formal or informal, his breach of fiduciary relationship claim cannot survive summary judgment.

III.

¶28 We next turn our attention to Hellenbrand's tortious interference and breach of contract claims against Hayes and the Goodmans. We address these claims together because of the linkage between certain elements of these two theories of recovery Hellenbrand advances.

A.

¶29 The elements of tortious interference with a contract are: (1) the plaintiff had a contract or prospective contractual relationship with a third party; (2) the defendant interfered with the relationship; (3) the interference was intentional; (4) a causal connection exists between the interference and the damages; and (5) the defendant was not privileged to interfere. *See* ***Dorr v. Sacred Heart Hosp.***, 228 Wis. 2d 425, 456-57, 597 N.W.2d 462 (Ct. App. 1999). Because Hellenbrand would have the burden at trial to prove the first four elements, *see* WIS. JI—CIVIL 2780, he must establish in the summary judgment record that there is, at a minimum, a factual dispute with respect to the existence of each element in order for his tortious interference claim to survive summary judgment. *See* ***Transportation Ins. Co., Inc. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 291-92, 507 N.W.2d 136 (Ct. App. 1993) ("[O]nce sufficient time for

discovery has passed, it is the burden of the party asserting a claim on which it bears the burden of proof at trial 'to make a showing sufficient to establish the existence of an element essential to that party's case.'" (citation omitted)).

¶30 Hellenbrand's tortious interference claim against Hayes fails in this regard on the very first element: the existence of a contract.[5] Hellenbrand alleges that he had an existing "contract with the Goodmans to become part-owner of the business" and that Hayes interfered with that contract. To survive summary judgment, therefore, Hellenbrand must point to facts in the record, which, even though disputed, would tend to establish that he had a contractual right to require the Goodmans to sell him an ownership share in the business. *See* ***Sampson Investments v. Jondex Corp.***, 176 Wis. 2d 55, 73, 499 N.W.2d 177 (1993) ("The inability to show any right which was interfered with is fatal to [a] tortious interference claim.").

¶31 The submissions on summary judgment, however, contain no such facts. To the contrary, there is only one reasonable inference on the present record, and that is that Hellenbrand and the Goodmans did not have a "meeting of the minds" regarding the essential terms of a contract for Hellenbrand to acquire part-ownership of the business. Without mutual assent to essential terms, Hellenbrand had no contract with the Goodmans with which Hayes could interfere. *See* ***Garvey v. Buhler***, 146 Wis. 2d 281, 289, 430 N.W.2d 616 (Ct. App. 1988) ("Both implied and express contracts require the element of mutual meeting of the minds and of intention to contract."); *see also* ***Novelly Oil Co. v. Mathy***

[5] Hellenbrand does not assert that he had a "prospective contractual relationship" with the Goodmans. Accordingly, we analyze the record only in terms of whether it would support a claim that a contract existed between him and the Goodmans.

Constr. Co., 147 Wis. 2d 613, 623, 433 N.W.2d 628 (Ct. App. 1988) (For a binding contract to exist, the parties must agree on the contract's essential terms).

¶32 Robert Goodman testified at deposition that he and his brother "always had it in mind" to sell the business solely to Hayes and that any statements he made to Hellenbrand regarding his future with the business were intended to convey that he wanted him to continue as an employee, not to become an owner. Hellenbrand testified to the contrary, asserting that he thought he and the Goodmans had an "understanding" that they were "working towards … a takeover of the business" that would include Hellenbrand as an owner. Hellenbrand acknowledged, however, that in the year prior to the sale of the business, significant details of this "takeover," such as the financing of the purchase and the division of ownership, "hadn't been worked out."

¶33 Hellenbrand also described the status of the negotiations with the Goodmans in the months leading up to the scheduled closing date as follows:

> Q. …Was it your understanding that the actual terms of the deal would have to be negotiated between you and the Goodmans?
>
> A. Yes.
>
> Q. Was it also … a possibility that you and the Goodmans would not be able to negotiate a deal; [was] that a possibility?
>
> A. Anything is a possibility.

Finally, Hellenbrand conceded at deposition that he did not know what the terms of the "final deal" were at any time prior to the scheduled closing date.

¶34 A contract is only enforceable if its terms are "'so definite'" that the "'promises and performances to be rendered by each party are reasonably

certain.'" *See* ***Goebel v. National Exchangors, Inc.***, 88 Wis. 2d 596, 615, 277 N.W.2d 755 (1979) (citations omitted). Hellenbrand has failed to demonstrate the presence of a factual dispute concerning the existence of a contract with the Goodmans that even approaches this standard. The record indicates that, at best, Hellenbrand had an "understanding" with the Goodmans that, at some unstated time, he would have an opportunity to acquire an undefined percentage of the business for an unspecified price. "[A]s a matter of law a negotiation looking toward a definitive contract leaves the parties unbound until the closing." ***Skycom Corp. v. Telstar Corp.***, 813 F.2d 810, 815 (7th Cir. 1987) (applying Wisconsin law). Accordingly, Hellenbrand's tortious interference claim against Hayes fails for want of a contract, as does any claim against the Goodmans for breach of contract.

B.

¶35 We turn next to Hellenbrand's tortious interference claim against the Goodmans. Here, Hellenbrand claims that the Goodmans' decision not to sell to the employee group interfered with a contract he had with Hayes and the other member of the three-employee group, who had all agreed "to cooperate" in the purchase of the business. Regardless whether such a "contract to cooperate" in fact existed, we conclude that the Goodmans' decision not to sell to the group cannot, as a matter of law, constitute tortious interference. A person may not be sued in tort for refusing to do business with another. *See* RESTATEMENT (SECOND) OF TORTS § 766 cmt. b (1977) ("Deliberately and at his pleasure, one may ordinarily refuse to deal with another, and the conduct is not regarded as improper,

subjecting the actor to liability…. There is no general duty to do business with all who offer their services, wares or patronage ….").[6]

¶36 Accordingly, the Goodmans were free to refuse to sell to the employee group, even if a result of that decision was to thwart a contract between members of the group. Were we to hold otherwise, no seller who is aware of a "cooperation" agreement between potential buyers could sell to a different buyer without risking a tortious interference claim. The Goodmans had a right to select a buyer according to their own view of their best interests, and the scope of tortious interference liability cannot be expanded so as to encumber this right.[7]

C.

¶37 The circuit court concluded that Hellenbrand's breach of contract claims against Hayes and the Goodmans should survive summary judgment

[6] Hellenbrand claims that "Section 766 of the Restatement has not been adopted by Wisconsin courts." We note, however, that we have previously said that "Wisconsin has long adhered to the basic interference-with-contract rule of RESTATEMENT (SECOND) OF TORTS § 766 (1979)…." ***Magnum Radio, Inc. v. Brieske***, 217 Wis. 2d 130, 136, 577 N.W.2d 377 (Ct. App. 1998). Moreover, Wisconsin courts often consult the Restatements for guidance on aspects of the common law not explicitly addressed in our case law, and we see no reason why we may not do so here.

[7] We are of course mindful that the right to refuse "to do business" with another may be circumscribed by statute, such as, for example, state and federal laws prohibiting discrimination in public accommodations and employment. Hellenbrand makes no claim that the Goodmans violated any such statute.

We note further that Hellenbrand also asserts that Hayes tortiously interfered with his contract with Anchor Bank for a loan to acquire Goodman's Jewelers, Inc. Even if this were so, however, we fail to see what damages could result from Hellenbrand's inability to close on a loan whose only purpose was to finance the purchase of a business interest that he was unable to acquire for other reasons. *See* ***Dorr v. Sacred Heart Hosp.***, 228 Wis. 2d 425, 456, 597 N.W.2d 462 (Ct. App. 1999) (Tortious interference requires proof of a causal connection between the interference and the plaintiff's damages).

because of "materially disputed facts and inferences" which the court did not identify. As we have noted, however, Hellenbrand's breach of contract claim against the Goodmans cannot survive summary judgment because Hellenbrand had no contract with the Goodmans to purchase a share of their business. (See ¶¶30-34.)

¶38 Hellenbrand's breach of contract claim against Hayes fares no better. Hellenbrand argues that, by purchasing Goodman's Jewelers, Inc. independently, Hayes breached two separate contracts. The first was a purported agreement by Hayes to negotiate on his and Hellenbrand's behalf for their mutual acquisition of the business. As we discuss below, however, at the time of this alleged agreement, the essential details of the parties' co-ownership arrangement had not been agreed upon. An "agreement to agree at a future time" is too vague to create an enforceable contract because the minds of the parties have not met on essential terms, and such an agreement "'amounts to nothing.'" *See* ***Dunlop v. Laitsch***, 16 Wis. 2d 36, 42, 113 N.W.2d 551 (1962) (citations omitted). We conclude here that Hayes' "agreement to negotiate" for Hellenbrand is similarly unenforceable.

¶39 The purported contract with Hayes that Hellenbrand seeks to enforce is, at best, vague regarding its essential details. The agreement, according to Hellenbrand, was that Hayes "would negotiate with the Goodmans, on behalf of the group, for the best possible deal." It may be, as Hayes maintains, that the "best possible deal" he could get from the Goodmans was the one that he did—one that included only him and not Hellenbrand as a purchaser. But what if Hayes had gotten an agreement from the Goodmans that did include Hellenbrand, but at a lesser percentage of ownership than Hellenbrand desired, or one that called for a higher price or more onerous lease terms than Hellenbrand considered "the best possible"? There is no indication in the record that Hellenbrand was bound to go

forward with whatever "deal" Hayes was able to arrange with the Goodmans. Given that Hellenbrand could presumably have walked away from the transaction if its final terms were not to his liking, we fail to see how Hayes can be liable in contract for, in essence, procuring an agreement from the Goodmans which Hellenbrand found unacceptable.

¶40 We conclude that, absent a meeting of the minds between Hellenbrand and Hayes as to their respective shares of the business being acquired, or as to acceptable terms for the acquisition itself, any agreement that Hayes "would negotiate with the Goodmans … for the best possible deal" is simply too indefinite to be an enforceable contract. Hellenbrand asserts, however, that despite these loose ends, Hayes plainly breached their "contract" when he "began to pursue the acquisition of the Goodmans[']s business for himself," which at some point Hayes undisputedly did, without informing Hellenbrand until after Hayes' sole acquisition of the business was a fait accompli. We discuss below whether Hayes' undisclosed change in his negotiating goal constituted the breaking of a promise to Hellenbrand, but, just as it did not constitute a breached fiduciary duty, that action by Hayes did not constitute the breach of an enforceable contract.[8]

¶41 The second contract Hellenbrand alleges Hayes breached was an agreement between them regarding the essential terms under which HHR, Inc. would operate. Specifically, Hellenbrand claims that by acquiring sole ownership

[8] Hellenbrand did not include a misrepresentation claim in his complaint. Accordingly, we do not address whether Hayes had "a duty to speak" when his efforts shifted from a joint enterprise to sole acquisition of the business, or whether his statement to Hellenbrand that he was "trying to save" the employee group's potential deal with the Goodmans (when in fact he was negotiating for sole ownership of the business) might be actionable under a tort theory.

of HHR, Inc., Hellenbrand breached the parties' agreement concerning how ownership of the new corporation would be divided, how profits and losses would be distributed, and how management decisions would be made. As record support for his argument, Hayes cites to his affidavit, in which he avers:

> [I]n October or November 1998, John Hayes and I entered into an Equity Agreement. In that agreement, Hayes and I agreed that my liability would be limited to the same percentage as my ownership.
>
> Upon reaching this equity agreement, I agreed to accept the percentage ownership that Hayes wanted. I understood that this was the same percentage that the Goodmans wanted in order for the group to purchase the jewelry business. Hayes and I shook on this agreement.

¶42 Hellenbrand's affidavit, however, is inconsistent with his deposition testimony and other items in the record. For example, Hellenbrand conceded at deposition that the "equity agreement" with Hayes was a "potential agreement" that he expected "would be … worked out" at the closing. He also testified as follows:

> Q. In terms of your group, did you and John Hayes and the group ever reach an agreement on how the profits were going to be split up?
>
> A. I don't know if we had made – we had discussions, but I don't know if we'd agreed on anything, no.
>
> ….
>
> Q. … Was there an agreement on how losses would be allocated?
>
> A. I don't recall at this time, you know.
>
> Q. Do you have any recollection if there was any agreement on how major decisions were going to be made in the new corporation?
>
> A. There was still discussion going on with that.

Additionally, the attorney who prepared and filed organizational documents on behalf of HHR, Inc., acknowledged at deposition that the ownership structure of HHR, Inc. was "never agreed upon" and that he never prepared "any sort of an equity agreement." Finally, a different attorney who represented Hellenbrand individually at the time testified that he did not believe there was any agreement between the parties concerning such issues as ownership amounts or management structure.

¶43 We conclude that the record is devoid of evidence that would place in dispute the fact that the parties' minds had *not* met regarding the essential terms of a contract under which HHR, Inc. would operate. To the contrary, the record, save for Hellenbrand's affidavit, establishes that the parties never came to agreement on essential terms. The affidavit alone is insufficient to undermine this reality because Hellenbrand offers no explanation for the discrepancies between his affidavit and his deposition testimony. *See* ***Yahnke v. Carson***, 2000 WI 74, ¶21, 236 Wis. 2d 257, 613 N.W.2d 102 (An affidavit that directly contradicts prior deposition testimony is insufficient to create a genuine issue of fact precluding summary judgment unless the contradiction is adequately explained.).

IV.

¶44 The circuit court also denied Hayes and the Goodmans summary judgment on Hellenbrand's promissory estoppel claims against them, again citing unspecified factual disputes. Although, as we have discussed, no enforceable contracts existed between Hellenbrand and either the Goodmans or Hayes, the lack of an enforceable contract does not preclude a possible recovery for promissory estoppel. *See* ***Silberman v. Roethe,*** 64 Wis. 2d 131, 146, 218 N.W.2d 723 (1974) (noting that "the promise sought to be made the basis of an action in promissory

estoppel need not be so definite that it would be sufficient as the basis for a contract action"); ***Skycom Corp.***, 813 F.2d at 817 ("Even when a contract fails to become effective as a whole, particular terms may bind under the doctrine of promissory estoppel." (applying Wisconsin law)).

A.

¶45 The elements of promissory estoppel are: (1) the promisor must make a promise which he should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee; (2) the promise must induce such action or forbearance; and (3) injustice can only be avoided by enforcement of the promise. ***Kramer v. Alpine Valley Resort***, 108 Wis. 2d 417, 422, 321 N.W.2d 293 (1982). With respect to the Goodmans, Hellenbrand claims they promised him an opportunity to acquire a share of the business upon their retirement, which they should reasonably have expected would induce him to (1) perform duties over and above those generally associated with his position, and (2) forego other employment opportunities, both of which Hellenbrand contends he did.

¶46 The first two elements of promissory estoppel "present issues of fact which ordinarily will be resolved by a jury, the third requirement, that the remedy can only be invoked where necessary to avoid injustice, is one that involves a policy decision by the court." ***Hoffman v. Red Owl Stores, Inc.***, 26 Wis. 2d 683, 698, 133 N.W.2d 267 (1965). The circuit court did not specifically address the third element, but we see no reason why we are precluded from doing so in our de novo consideration of the Goodmans' summary judgment motion. *See* ***Silberman,*** 64 Wis. 2d at 143 (Where a trial court has not addressed it, a

reviewing court "must make [its] own independent determination of [the] policy question" presented by the "injustice" requirement.).[9]

¶47 The supreme court in ***Hoffman*** expressly adopted "the doctrine of promissory estoppel, as stated in sec. 90 of the RESTATEMENT, 1 CONTRACTS." ***Hoffman***, 26 Wis. 2d at 696. A comment to the current edition of the Restatement sets forth a number of factors a court should consider when weighing the injustice or not of enforcing a promise under the third element. These include "the reasonableness of the promisee's reliance, … its definite and substantial character in relation to the remedy sought, [and] the formality with which the promise is made." RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b (1979). The supreme court declined to enforce the promise in ***Silberman*** in part because "in a case like the present one it is very speculative that the plaintiff has actually suffered from his action in reliance," and also because "[t]he promises or 'assurances' which the plaintiff claims to have relied upon here were rather informal." ***Silberman***, 64 Wis. 2d at 144, 146. Hellenbrand's promissory estoppel claim against the Goodmans suffers from these same infirmities.

¶48 With respect to the purported promise itself, Hellenbrand tells us in his brief that it "was that the Goodmans were going to leave their business to key employees," and that "he was one of those key employees." Absent from

[9] We recognize that in ***Silberman v. Roethe,*** 64 Wis. 2d 131, 218 N.W.2d 723 (1974), the promissory estoppel claim was tried to a jury, while this case involves our review of a record on summary judgment. Nonetheless, it is an extensive record containing lengthy excerpts from numerous depositions of the parties and other witnesses, as well as a great number of exhibits. As we discuss, considering this extensive record in the light most favorable to Hellenbrand, and giving him the benefit of all reasonable inferences, he is not entitled to enforcement of the Goodmans' alleged promise because we conclude it was not a promise which the failure of a court to enforce would result in injustice.

Hellenbrand's argument, and more importantly, from the record, is any indication that the Goodmans promised Hellenbrand any specific ownership share in the business upon their retirement, let alone any material terms for his acquisition of such an interest. Given Hellenbrand's acknowledgement in his depositions that Hayes was to be the "primary" owner, and that the composition of the new ownership "team" would have to be acceptable to both Hayes and the Goodmans, it is difficult to see how this or any court could enforce the purported promise Hellenbrand claims to have relied on. That is, given the vagueness and informality of the promise, how could enforcement of it "avoid injustice" to Hellenbrand without creating "injustices" to Hayes and the Goodmans by awarding Hellenbrand an interest or rights in the business exceeding what either its former owners or the new owner contemplated?[10]

¶49 Hellenbrand's principal asserted "cost" for relying on the Goodman's alleged promise to sell him a portion of their business was that he went "above and beyond" what was required of him as a sales manager for no additional compensation. In particular, Hellenbrand claims that he helped manage the Goodmans' apartments above their store, repaired the store's carpeting and jewelry cases, and paid for tables at entertainment events in the store's name. The record establishes, however, that Hellenbrand's efforts (some of which arguably come within the job responsibilities of a sales manager) did not go unrewarded. Hellenbrand testified at deposition that the Goodmans gave him bonuses for "[g]oing the extra mile" and conceded that the Goodmans had compensated him

[10] Among the relief Hellenbrand requests in his amended complaint are an order granting him "control of Goodman's Jewelers," and the creation of "a constructive trust for his interest in the business … together with appropriate shareholder agreements, buy-sell agreements, and such other corporate documents as will protect his interest in the business."

fairly. Moreover, Hellenbrand admitted at deposition that, even if the Goodmans had never made a "commitment to [him] regarding future ownership," he would have worked extra hours at the store had he been asked to do so.[11]

¶50 Finally, we note that Hellenbrand asserts in his brief that he "stayed at the Goodmans' jewelry store long after he otherwise would have left for other employment had he not believed that he was going to be one of the purchasers." He provides no record citation for this assertion, however, let alone any details regarding foregone employment opportunities during the period in question. We are not required to sift through the record for facts to support Hellenbrand's contentions, it being his responsibility to provide this court with proper references to the record. *See* ***State v. Ross***, 2003 WI App 27, ¶28 n.5, 260 Wis. 2d 291, 659 N.W.2d 122; WIS. STAT. § 809.19(1)(e).

¶51 We conclude that the specific remedies Hellenbrand seeks (see footnote 10) are vastly out of proportion to his purported "extra" efforts while in the Goodman's employ. *See* ***Silberman***, 64 Wis. 2d at 146 (Courts should examine the "'definite and substantial character'" of the reliance "'in relation to the remedy sought.'" (quoting RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b (1979)). In addition to specific demands for control of the business and a constructive trust, Hellenbrand alternatively requests more general relief in the

[11]Hellenbrand claims in his brief that in reliance on the Goodmans' promise, he went "without his 1998 annual bonus." At deposition, however, Hellenbrand testified that he received a bonus for 1998 from Hayes, who had purchased the business by the time this bonus was distributed. Hellenbrand acknowledged that he believed Hayes "had done his best in terms of rewarding [him] for the hard work and extra effort that [he] put in over the prior year."

We note also that Hellenbrand included in his initial complaint a claim for violation of federal wage and hours laws due to the Goodman's allegedly "willful failure and refusal to pay overtime." Hellenbrand abandoned this claim in his amended complaint.

form of "damages" or "enforcement of the defendants' promises." As we have discussed, however, Hellenbrand's proffered "reliance damages" are indefinite and insubstantial, given his acknowledged receipt of fair compensation and bonuses for his efforts as an employee. Moreover, specific "enforcement" of the Goodmans' purported promise would be impossible given its lack of specificity. Accordingly, we conclude that Hellenbrand's promissory estoppel claim against the Goodmans cannot survive summary judgment. Even if he were able to convince a fact finder of the existence of the first two elements of the claim, he cannot prevail on the third.

B.

¶52 We next address Hellenbrand's promissory estoppel claim against Hayes. The alleged promise here is that Hayes would negotiate with the Goodmans on behalf of both Hayes and Hellenbrand. In reliance on that promise, Hellenbrand asserts that he refrained from dealing directly with the Goodmans, and that Hayes breached the promise when he abandoned the joint acquisition and pursued a purchase solely by him, without disclosing to Hellenbrand that he was no longer acting on Hellenbrand's behalf. We conclude that the record establishes there are factual disputes regarding these assertions, and that a fact finder might reasonably determine that the first two elements of promissory estoppel are present: Hayes should reasonably have expected Hellenbrand to refrain from direct dealings with the Goodmans in reliance on Hayes's promise to negotiate for both of them, and Hellenbrand did so forbear.

¶53 We again conclude, however, that Hellenbrand's promissory estoppel claim fails on the third element. Although none of the elements of promissory estoppel expressly require that the broken promise be a cause of harm

to the plaintiff, such a requirement is plainly a part of the "avoidance of injustice" inquiry encompassed by the third element. The supreme court, citing Corbin, has explained:

> [I]n some cases "the action in reliance may be of a kind that can hardly be measured […]." The situation in the present case is similar to the situation Corbin described. Here the plaintiff claims to have reduced a debt owed to him in reliance on the promise of the defendant. If he had refused to do so and the purchase of the company had not occurred, would he have collected his claim? Or if he had refused to reduce the debt and the purchase occurred anyway, the plaintiff would be in worse financial condition with a larger unpaid claim. The plaintiff-respondent argues in his brief that these factors should not be considered because the handling of the company … makes the question of what might have happened … forever unanswerable. However, this begs the question. *The issue is really that in a case like the present one it is very speculative that the plaintiff has actually suffered from his action in reliance.*

Silberman, 64 Wis. 2d at 144 (emphasis added).

¶54 We conclude that the same causation problem which contributed to the failure of Silberman's promissory estoppel claim also dooms Hellenbrand's claim. There is simply no showing in this record that if Hayes had not "promised to negotiate" on Hellenbrand's behalf, or if he had timely informed Hellenbrand that he was abandoning pursuit of a joint acquisition in favor of acquiring sole ownership, Hellenbrand could have done anything to prevent the ultimate outcome. As we have noted several times, the Goodmans plainly and consistently viewed Hayes as the key player in their business succession planning, and there is no hint in the record that if Hellenbrand had approached the Goodmans directly to press his claim for a share of the business that he would have met with any

success.[12] In fact, it appears that Hellenbrand's efforts to obtain a significant share of the business and to dictate terms of the purchase may have contributed to the Goodmans' decision to abandon any acquisition plan that involved anyone other than Hayes.[13]

¶55 In short, Hellenbrand points to nothing in the extensive record before us from which we might conclude that a breach by Hayes of a promise to negotiate on Hellenbrand's behalf was the cause, or even a cause, of Hellenbrand's failure to obtain a share of the business. Accordingly, there is neither an injustice to be avoided "only by enforcement of the promise," nor any quantifiable damages stemming from the promise or its breach.

---

[12] Robert Goodman testified in deposition that "[Hellenbrand] is a good man, but to my feeling, he's not ownership material," and that "I indicated to [Hayes] … *You're the man we want to deal with. You're the owner.*" Goodman also said that "I had absolutely no problem with [Hellenbrand]…. But it's just after 63 years I felt we could turn the business over to somebody that I wanted, and it wasn't [Hellenbrand], it was [Hayes]." Professor Pricer said this in his deposition: "I believe the Goodmans intended to sell the business to John Hayes from day one that I met with them and that [Hayes] could bring along whomever he wanted to, but I don't think they would have—this is my opinion. I don't think that we would have ever reached agreement…. [T]he member of the buying team that was most adamant about terms was [Hellenbrand], and I think that had [Hellenbrand] been face to face with the Goodmans, I think that probability for successful agreement would have dropped to zero."

[13] Robert Goodman testified that he told Pricer, and possibly Hayes, that he was not willing to proceed with the transaction if Hellenbrand had an equal share of the business with Hayes; that he was not "comfortable with [Hellenbrand]'s attitude" regarding a side agreement the Goodmans had proposed; and that "I felt that almost immediately, personally I just felt that [Hellenbrand] was striving to become something we really didn't want him to become." Pricer characterized the Goodmans' decision to terminate negotiations for a "team" purchase as follows: "[They said] [w]e're not comfortable with the way this sale is turning out. This isn't the way we wanted it to be. We wanted to sell this business to [Hayes] and … we feel uncomfortable that all of these terms are continually being questioned." Pricer testified that, after the Goodmans announced their intention to terminate the negotiations with the employees and sell to an outsider, he suggested to the Goodmans that they sell only to Hayes, a proposal the Goodman's quickly accepted and the transaction closed within a week.

V.

¶56 Finally, we briefly address Hellenbrand's conspiracy and punitive damages claims.[14] Both claims are dependent on the survival of one or more of Hellenbrand's other causes of action. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 481, 339 N.W.2d 333 (Ct. App. 1983) ("A conspiracy is not, itself, a tort. It is the tort, and each tort, not the conspiracy, that is actionable.") (citation omitted); ***Weiss v. United Fire & Cas. Co***., 197 Wis. 2d 365, 393, 541 N.W.2d 753 (1995) (explaining that punitive damages may not be awarded absent an award of actual damages). Because we conclude that none of Hellenbrand's substantive claims survive summary judgment, Hellenbrand's conspiracy and punitive damages claims fail as well.

CONCLUSION

¶57 Randal Hellenbrand was understandably disappointed when, after literally years of discussions and negotiations among himself, Hayes, the Goodmans and other employees of the business, he did not become an owner of the jewelry store. For the reasons discussed above, however, Hellenbrand has been unable to establish that any material facts are in dispute which, if found in his favor, would entitle him to a legal remedy against any of the parties he has named as defendants in this suit. Accordingly, we affirm the appealed order insofar as it dismisses certain of Hellenbrand's claims, and we reverse those portions of it which allowed contract and promissory estoppel claims to proceed against Hayes

[14] Although Hellenbrand pled punitive damages as a separate cause of action in his amended complaint, a claim for punitive damages is in the nature of a remedy, not a separate cause of action. ***Becker v. Automatic Garage Door Co.***, 156 Wis. 2d 409, 415, 456 N.W.2d 888 (Ct. App. 1990).

and the Goodmans. On remand, judgment should be entered in favor of all defendants, dismissing Hellenbrand's amended complaint in its entirety.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.