**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 24, 2010**

**A. John Voelker**
**Acting 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. 2010AP574** **Cir. Ct. No. 2008CV4143**

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

---

**BRENTWOOD CONDO, LLC,**

**PLAINTIFF-RESPONDENT-CROSS-APPELLANT,**

**V.**

**NELSON C. WALSTEAD,**

**DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT-CROSS-RESPONDENT,**

**V.**

**GORDON R. BECKER,**

**THIRD-PARTY DEFENDANT-RESPONDENT-CROSS-APPELLANT,**

**AMERICAN FAMILY INSURANCE,**

**INTERVENOR.**

---

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Vergeront, P.J., Higginbotham and Blanchard, JJ.

¶1 VERGERONT, P.J. Nelson Walstead purchased rental property from Brentwood Condo, LLC, with a loan secured in part by a mortgage on Walstead's personal residence. When Walstead failed to comply with certain terms of the mortgage and note, Brentwood initiated this foreclosure action. Walstead asserted affirmative defenses and filed a counterclaim against Brentwood and third-party claims against Gordon Becker, who had been involved in work on the property. The circuit court granted summary judgment in favor of Brentwood on the foreclosure and the counterclaim and in favor of Becker on the third-party claims. Walstead appeals. For the reasons we explain below, we affirm the circuit court's grant of summary judgment in favor of Brentwood and Becker. On their cross-appeal, we affirm the circuit court's denial of their motion for attorney fees.

## BACKGROUND

¶2 The following facts are undisputed. In July 2006 Nicole Evans, Walstead's stepdaughter, became interested in purchasing rental property owned and managed by Brentwood. Becker, the contractor who had supervised the repair and remodeling work on the property, gave Evans a tour of the property. After this tour, Becker agreed to act as Evans' agent in drafting an offer to purchase. Evans executed a document acknowledging that Becker was the agent for Brentwood, that he was the father of Laura Morris, who owned the property through Brentwood, and that she, Evans, understood and agreed that Becker had a "duo-agency in this transaction." Evans signed the offer to purchase drafted by

Becker but was unable to obtain adequate financing. In order to close on the property, she involved Walstead in the transaction. Walstead did not personally view the property, instead receiving information about the property from Evans.

¶3 Walstead signed an offer to purchase the property in August 2006. This purchase was partially financed by a loan from Brentwood, secured in part by a second mortgage on Walstead's personal residence. This mortgage requires Walstead to pay all taxes when due and to obtain Brentwood's written permission prior to transferring an ownership interest in the property. Without Brentwood's written permission, Walstead transferred ownership of the property to 2413 Brentwood LLC (2413 LLC), a company he formed. He and Evans were the only members. Walstead also failed to pay the 2007 real estate taxes when due. In July 2008, Brentwood notified Walstead that these actions constituted defaults under the mortgage and note, and, as a result of these defaults, the entire amount of the note was immediately due and payable.

¶4 Shortly after sending the notice of default, Brentwood commenced this action seeking foreclosure and sale of Walstead's residence. In his responsive pleading, Walstead asserted an affirmative defense of estoppel, based on the allegation that the Brentwood members were aware at the time of closing of his intention to transfer title to an LLC that would include Evans. He also asserted an affirmative defense of unclean hands. In addition, he filed a counterclaim of misrepresentation against Brentwood and third-party claims of misrepresentation and breach of fiduciary duty against Becker. The unclean hands defense, like the misrepresentation claims against Brentwood and Becker, were founded on allegations of misrepresentation with respect to seepage and flooding damage in the basement. Based on his defenses and claims, Walstead demanded dismissal of the foreclosure action and rescission of the purchase contract.

¶5 Brentwood and Becker filed a motion for judgment on the pleadings, requesting that the court grant a judgment of foreclosure to Brentwood and dismiss Walstead's counterclaim and third-party claims. On Walstead's motion, the court converted that motion to a motion for summary judgment and all parties filed affidavits. Walstead also moved to amend his responsive pleading, and the circuit court granted this motion. Walstead's amended pleading added more allegations regarding the alleged misrepresentation but was otherwise the same.

¶6 The circuit court granted summary judgment in favor of Brentwood on the foreclosure and the counterclaim and granted summary judgment in favor of Becker on the third-party claims.

¶7 Walstead filed a motion for reconsideration and attached additional affidavits. In their response to this motion, Brentwood and Becker moved for attorney fees and other expenses as a sanction pursuant to WIS. STAT. § 802.05(3) (2007-08),[1] alleging violations of § 802.05(2)(b) and (c). The circuit court denied Walstead's motion for reconsideration and denied the motion for attorney fees.

¶8 Walstead appeals the order and judgment from the circuit court's original decision and the order denying his motion for reconsideration. Brentwood and Becker cross-appeal the court's denial of their motion for sanctions.

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

## DISCUSSION

### *Appeal*

¶9 On appeal Walstead challenges both the denial of his motion for reconsideration and the grant of summary judgment ordering foreclosure and dismissing his counterclaim and third-party claims. With respect to the motion for reconsideration, he contends the circuit court erred because it refused to consider the new affidavits he submitted with that motion and refused to consider his argument that Becker violated his duties under WIS. ADMIN. CODE § RL 24.07(2). With respect to the summary judgment motion, he contends there are disputed issues of fact regarding his defenses to the foreclosure and his claims against Brentwood and Becker.

I. Motion for Reconsideration

¶10 In opposition to the converted summary judgment motion, Walstead submitted an affidavit from Evans. In his motion for reconsideration, he submitted a second affidavit from Evans, his own affidavit, and affidavits from two former residents of the property and a licensed professional engineer. These addressed the condition of the basement. The circuit court declined to consider the new affidavits because they did not contain newly discovered evidence and could have been submitted before the court issued its decision on summary judgment.

¶11 To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact. ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853 (citation omitted). "[A] motion for reconsideration is not a vehicle for making new arguments or

submitting new evidentiary materials after the court has decided a motion for summary judgment." ***Lynch v. Crossroads Counseling Ctr., Inc.***, 2004 WI App 114, ¶23, 275 Wis. 2d 171, 684 N.W.2d 141. "A party may not use a motion for reconsideration to introduce new evidence that could have been introduced at the original summary judgment phase." ***Koepsell's***, 275 Wis. 2d 397, ¶46.

¶12 We review a circuit court's decision on a motion for reconsideration under the erroneous exercise of discretion standard. ***Koepsell's***, 275 Wis. 2d 397, ¶6. A circuit court properly exercises its discretion if it examines the relevant facts, applies the correct legal standard, and employs a demonstrated rational process to reach a reasonable conclusion. *See* ***Borreson v. Yunto***, 2006 WI App 63, ¶6, 292 Wis. 2d 231, 713 N.W.2d 656.

¶13 Walstead concedes on appeal that the additional affidavits he submitted with his motion for reconsideration do not contain newly discovered evidence. He contends they were submitted to buttress Evans' first affidavit, which the court had considered insufficient to entitle Walstead to a trial. This argument is inadequate to show that the court erroneously exercised its discretion in not considering the new affidavits. Accordingly, in addressing Walstead's challenges to the summary judgment, we consider only Evans' first affidavit.

¶14 For the first time in his motion for reconsideration Walstead argued that Becker breached his duty as a realtor to disclose material adverse facts as required by WIS. ADMIN. CODE § RL 42.07(2). The court did not address this issue and Walstead claims this was error. Walstead does not explain why the circuit court erroneously exercised its discretion in declining to consider this new argument. He provides no explanation why he could not have raised this issue before the court ruled on the summary judgment motion. We conclude the circuit

court properly exercised its discretion in declining to consider this new argument, and we do not discuss it further.

II. Summary Judgment

A. Legal Standard

¶15 We review de novo the grant of summary judgment, employing the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶16 We first examine the complaint to determine whether a claim for relief has been stated. ***Hoida, Inc. v. M&I Midstate Bank***, 2006 WI 69, ¶16, 291 Wis. 2d 283, 717 N.W.2d 17. If it does and if the answer is sufficient to join issue, we examine the moving party's affidavits and other submissions to determine if they make a prima facie case for summary judgment. ***Id.*** If the moving party is a defendant, the prima facie showing is a showing of a defense that would defeat the claim. *See* ***Preloznik v. City of Madison,*** 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). Once the moving party has made a prima facie case, the nonmoving party may not rest upon the pleadings, but must, by affidavits or other statutory means, set forth specific facts showing that there is a genuine issue of material fact. WIS. STAT. § 802.08(3).

¶17 In deciding if there is a genuine issue of material fact, we view the evidence most favorably to the nonmoving party and draw all reasonable inferences in favor of that party. ***Metropolitan Ventures, LLC v. GEA Assoc.***, 2006 WI 71, ¶20, 291 Wis. 2d 393, 717 N.W.2d 58. Competing reasonable

inferences from undisputed facts may create genuine issues of fact. ***Hennekens v. Hoerl***, 160 Wis. 2d 144, 162, 465 N.W.2d 812 (1991). Whether an inference is reasonable and whether there is more than one reasonable inference are questions of law. ***Id.***

B. Estoppel: Affirmative Defense

¶18 Brentwood's submissions establish a prima facie case for a violation of the following provision in the mortgage:

> [Walstead] shall not transfer, sell or convey any legal or equitable interest in the Property … without the prior written consent of [Brentwood]…. The entire indebtedness under the Obligation secured by this Mortgage shall become due and payable in full at the option of [Brentwood] without notice, which notice is hereby waived, upon any transfer, sale or conveyance made in violation of this paragraph. A violation of the provisions of this paragraph will be considered a default under the terms of this Mortgage and the Obligation it secures.

Evans' affidavit acknowledges that Walstead did transfer the property to 2413 LLC, of which she is a member. Walstead does not contend this was not a violation of the mortgage provision. Instead, he argues that Evans' affidavit entitles him to a trial on his affirmative defense of estoppel.

¶19 Evans' affidavit avers that, before the closing, she advised Laura Morris, the manager of Brentwood, and Michael Morris, a member, that she and Walstead intended that she would receive an ownership in the property from Walstead. She also avers that the Morrises did not object but proceeded with the closing. Walstead contends Brentwood is therefore equitably estopped from relying on the unauthorized transfer of ownership as a basis for default.

¶20 The affidavits of both Laura Morris and Michael Morris deny that either Walstead or Evans informed them that Walstead intended to transfer any ownership interest to Evans and deny that either had requested permission to do so. Both aver that, had they been so informed, they would have objected because of Evans' reportedly poor financial situation.

¶21 The circuit court, applying the elements of promissory estoppel, concluded that Walstead did not properly plead an affirmative defense of promissory estoppel because he did not allege a promise to approve the transfer. The circuit court also concluded that Walstead did not explain any exception to the general rule that estoppel is not available when the parties have entered into a contract that describes their rights and responsibilities. *See* ***Kramer v. Alpine Valley Resort, Inc.***, 108 Wis. 2d 417, 423-24, 321 N.W.2d 293 (1982) (A contract that embodies all of the essential terms of an agreement between the parties is "a complete defense to the cause of action based on promissory estoppel or a defense of estoppel.") (quoting ***Goff v. Massachusetts Protective Ass'n***, 46 Wis. 2d 712, 717, 176 N.W.2d 576 (1970)). Walstead contends that he did not intend to assert a defense of promissory estoppel, but rather, a defense of equitable estoppel.

¶22 We will assume that the estoppel defense Walstead intended to assert was the defense of equitable estoppel and that his pleading met any requirement for the pleading of an affirmative defense in the context of summary judgment methodology.[2] We agree with Walstead that, in order to prevail on a

[2] The estoppel affirmative defense alleged as follows:

(continued)

defense of equitable estoppel, a promise is not required. Rather, the party asserting the defense must prove action or non-action by the party against whom it is asserted that induces reasonable reliance by the party asserting estoppel to this party's detriment. ***Kamps v. Wisconsin DOR***, 2003 WI App 106, ¶20, 264 Wis. 2d 794, 663 N.W.2d 306.

¶23 However, the cases on which the circuit court relied present a problem for Walstead even if his defense is equitable estoppel, not promissory estoppel. In ***Goff*** the court referred to a contract as being "a complete bar" not only to a claim of promissory estoppel but also to "a defense of estoppel." ***Goff***, 46 Wis. 2d at 717. In ***Goff*** the court rejected the argument that a party to a contract could not rely on the other party's breach of contract because of "acquiescence." ***Id.*** ***Kramer***, although a promissory estoppel case, includes the "defense of estoppel" in its statement on the effect of a contract embodying all the essential terms. ***Kramer***, 108 Wis. 2d at 425. We also observe that the parol-

---

> [Walstead] affirmatively alleges that the members of the [Brentwood] limited liability company were aware of the intention of [Walstead] to transfer the title of the property to include ownership by Nicole Evans at the time of closing, that this transfer was to be in the form of a limited liability company, that said transfer did occur, caused no risk to [Brentwood], that [Brentwood] did not object and is now estopped from raising said transfer as a default.

The circuit court's analysis of the estoppel defense focused as a first step on the adequacy of this pleading to assert the elements of the defense. Apparently the court was analogizing an affirmative defense to a claim for relief in a complaint, counterclaim or third-party claim. *See* ***Hoida, Inc. v. M&I Midstate Bank***, 2006 WI 69, ¶16, 291 Wis. 2d 283, 717 N.W.2d 17 (under summary judgment methodology, we first examine the complaint to determine whether a claim for relief has been stated). We do not decide whether analyzing the adequacy of the pleading of an affirmative defense is the first step when a defendant, in opposition to summary judgment, submits factual materials in order to make a prima facie showing of that defense. Neither party addresses this issue.

evidence rule prohibits, in the absence of an ambiguity, the use of prior or contemporaneous negotiations to vary the terms of a written instrument complete on its face. ***O'Connor Oil Corp. v. Warber***, 30 Wis. 2d 638, 642, 141 N.W.2d 881 (1966). Walstead's legal theory is that a pre-contract failure to object to the other party's stated intention to perform an act precludes enforcing a contract term agreed to by the parties expressly prohibiting that act. Walstead provides no authority or developed argument in support of this legal theory.

¶24 In the absence of any authority or argument to support Walstead's legal theory, we conclude that he has not made a prima facie showing on his affirmative defense of equitable estoppel and therefore is not entitled to a trial on this defense. Rather, based on the undisputed facts, Brentwood is entitled to judgment as a matter of law on the foreclosure because of the violation of the no-transfer provision. However, even if Walstead were entitled to a trial on the equitable estopped defense, it is directed only to the violation of the no-transfer provision. There is a second violation—failure to pay taxes. As we explain in the next section, the undisputed facts show a violation of the tax provision.

C. Misrepresentation: Affirmative Defense, Counterclaim and Third-Party Claims

¶25 Brentwood's submissions make a prima facie case that Walstead did not pay taxes as required by the mortgage. Evans' affidavit does not dispute this. As we understand Walstead's position, he contends that his affirmative defense of unclean hands prevents Brentwood from foreclosing for this violation. As noted above, this affirmative defense is, in substance, the same as the misrepresentation

counterclaim against Brentwood and the misrepresentation claim against Becker. We therefore consider them together.[3]

¶26 The amended pleading alleges that Becker acted as an agent both for Evans and Brentwood and made false representations to Evans that the basement foundation was sound, that he was aware of no defect in the structure of the property, and that there was no history of basement seepage or flooding. The pleading further alleges that these representations were made to induce Evans to purchase the property, that Brentwood and Becker knew they were false, that Evans relied on these false representations and repeated them to Walstead in recruiting him to assist her in purchasing the property, and that he relied on them in deciding to purchase the property. Evans' affidavit essentially tracks these

[3] With respect to the affirmative defense of unclean hands, the alleged connection between the misrepresentations of the condition of the property and Walstead's default is that, as a result of alleged damage from seepage and flooding, he received lower rent and this caused him to be unable to pay the property taxes. We assume without deciding that this is a viable legal theory on which to defend against the foreclosure action.

The summary judgment methodology operates differently on Walstead's affirmative defense based on misrepresentation than it does on the misrepresentation counterclaim and third-party claim. Given that Brentwood's submissions make a prima facie case for violations of the mortgage and Evans' affidavit does not dispute that, to avoid summary judgment Walstead must make a prima facie case on the affirmative defense. However with respect to the misrepresentation claims, if the pleading states a claim for relief (which Brentwood and Becker contest), then Brentwood and Becker, the defendants on these claims, must make a prima facie showing of a defense. *See* ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). If they do so, then in order to avoid summary judgment against him, Walstead must submit factual materials that create factual disputes on those claims. *See* WIS. STAT. § 802.08(3). In this case, the inadequacy of Evans' affidavit leads both to a failure to show a prima facie affirmative defense and a failure to create a material factual dispute on Walstead's claims, assuming the pleading states a claim for relief. Therefore, to simplify the discussion, we combine the analysis of the misrepresentation affirmative defense and the misrepresentation claims.

allegations and adds that she intended that Walstead would rely on these representations in passing them on to him.[4]

¶27 As we understand Walstead's brief, the legal basis for his misrepresentation defense and claims are common law intentional misrepresentation and fraudulent representations under WIS. STAT. § 100.18(1). We agree with the circuit court that Evans' affidavit is inadequate to entitle Walstead to a trial under either theory.

¶28 Intentional misrepresentation has three elements: (1) a false representation of fact; (2) made with the intent to defraud and for the purpose of inducing another to act on it; and (3) such person relies on the representation to his or her detriment. ***Lundin v. Shimanski***, 124 Wis. 2d 175, 184, 368 N.W.2d 676 (1985). A party claiming intentional misrepresentation must allege that the defendant misrepresented a fact to the claimant or to a third person with the intent that it would be communicated to or influence the claimant. *See* ***Friends of Kenwood v. Green***, 2000 WI App 217, ¶13, 239 Wis. 2d 78, 619 N.W.2d 271; ***Rendler v. Markos***, 154 Wis. 2d 420, 429, 453 N.W.2d 202 (Ct. App. 1990).

[4] This affidavit is the only affidavit Walstead filed in opposition to summary judgment before the court ruled on that motion. We reject Walstead's argument that we should consider in addition allegations in his amended pleadings. Specifically, he argues that the circuit court erroneously failed to treat the unanswered allegations in his amended pleading as admitted by Brentwood and Becker. There is no merit to this contention. Under WIS. STAT. § 802.09(1), "[a] party shall plead in response to an amended pleading … unless: (a) the court otherwise orders; or (b) no responsive pleading is required or permitted under s. 802.01(1)." During the September 2, 2009, scheduling conference, the circuit court granted Brentwood's motion to allow its motion for judgment on the pleadings and/or motion for summary judgment to stand as the answer to Walstead's amended answer. Indeed, the court minutes indicate this was "stipulated by Attorney Myers [Walstead's counsel]."

¶29 There is no allegation that Becker made any representation to Walstead. Evans' affidavit does not aver that Becker did, and Becker's affidavit denies that he did. Walstead advances two theories in support of his position that Becker (and Brentwood, as the principal) is liable to him for any misrepresentations to Evans.

¶30 First, Walstead contends that Evans was his agent in the transaction and Becker knew or had reason to know of this agency relationship.[5] An agency relationship exists only "if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act." ***State v. Timblin***, 2002 WI App 304, ¶27, 259 Wis. 2d 299, 657 N.W.2d 89 (quoting RESTATEMENT (SECOND) OF AGENCY § 15 (1957)).

¶31 Even if we assume for purposes of argument that the pleading is sufficient to allege that Evans was Walstead's agent and Becker knew this when he made the alleged misrepresentations, Evans' affidavit does not aver any facts from which one can reasonably infer Becker's knowledge. Becker's affidavit denies that he had any knowledge that any third party, including Walstead, was involved with Evans in the purchase of the property. Walstead argues that, because Evans avers that she "prepared personal financial information" for Becker's use, Becker should have known that she could not afford the property, and thus must either have a partner or be an agent for a third party. We conclude it is not reasonable to infer from Becker's receipt of Evans' personal financial

[5] Walstead also contends that he acted as Evans' agent when he purchased the property. In support of this claim, Walstead points to Evans' averment that she induced him to purchase the property on her behalf after she was unable to obtain adequate financing. The only reasonable inference from this statement is that, if Walstead was Evans' agent, the agency relationship began *after* the alleged misrepresentations were made.

information that he knew she was acting as Walstead's agent when Becker made the alleged misrepresentations to Evans.

¶32 Another deficiency is that the pleading does not allege that, in purchasing the property, Walstead relied on the alleged misrepresentations. Even if we overlook this pleading deficiency, there is no factual submission showing his reliance. Walstead cites to Evans' affidavit, which states that she passed on the representations to Walstead and "intended and understood" that Walstead would rely on them. Her intent and understanding that Walstead would rely on them is not admissible at trial to show that Walstead did rely on them. *See* WIS. STAT. § 802.08(3) (Affidavits submitted in support of and in opposition to summary judgment "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence.").

¶33 Walstead's second theory for Brentwood's and Becker's liability to him is that they are liable to Evans for the alleged misrepresentation and Evans transferred her causes of action to Walstead. The pleading alleges and Evans' affidavit avers that Evans "transferred on [her] own behalf and as a member of 2413 Brentwood LLC all interest and causes of action with regard to the property back to Nelson Walstead." This legal theory is not well developed, either factually or legally. However, even if it is a viable legal theory and Evans' affidavit is sufficient to show that she relied on the representations to her detriment despite the fact that she did not purchase the property, her affidavit is not sufficient to make a prima facie case that the representations were false and made with the intent to induce her to purchase the property.

¶34 Evans' affidavit avers that Becker had concealed rooms and otherwise covered over evidence of mold and repeated, longstanding water

incursion in the basement. However, she provides no foundation for her personal knowledge either that these problems existed before the purchase of the property or that Becker knew of them. We agree with the circuit court that, without this foundation, these statements in her affidavit are not admissible in evidence. *See* WIS. STAT. § 906.02 (A non-expert witness may not testify to a matter unless evidence is introduced to support a finding that the witness has personal knowledge of the matter.).

¶35 For the same reason, Evans' affidavit is inadequate to create a factual dispute in response to Becker's affidavit. Becker's affidavit avers that he supervised the remodeling work, that it was completed by professional contractors according to the building code, that the root cellar was closed off to make the basement more attractive and energy efficient and easier to clean and was not done to conceal it, and that the remodeling was done within the existing basement foundation with no modification of the foundation. He also avers that, in doing this remodeling, he saw no evidence of any foundation defects, past or present water incursion, basement seepage or mold, and he is not aware that any remodeling or other improvements to the property conceal any such thing. The statements in Evans' affidavit that do not meet the requirements of WIS. STAT. § 802.08(3) are inadequate to create a factual dispute on the existence of the water condition in the basement before Walstead purchased the property and Becker's knowledge of it.

¶36 We reject Walstead's contention that, in assessing Evans' and Becker's affidavits, the circuit court made impermissible credibility determinations. The circuit court did not make credibility determinations but properly evaluated both affidavits in light of the requirements of WIS. STAT.

§ 802.08(3) that they be "made on personal knowledge and … set forth such evidentiary facts as would be admissible in evidence."

¶37 Walstead's reference to another affidavit of Evans submitted in the context of his motion to disqualify counsel does not cure the problems with the one she submitted in opposition to summary judgment. The other affidavit avers: "I became aware of the defects in the property." Even if it were proper to consider an affidavit filed on another motion and not brought to the attention of the circuit court and the other party in the context of the summary judgment motion, this averment does not cure the deficiency in her summary judgment affidavit. Evans' awareness of the defects in the property does not show first hand knowledge of their origin or of Becker's knowledge of them before the sale.[6]

¶38 We next address WIS. STAT. § 100.18 as a basis for the misrepresentation defense and claims. A claim under this statute has three elements: "(1) the defendant made a representation to the public with the intent to induce an obligation; (2) the representation was 'untrue, deceptive or misleading'; and (3) the representation materially induced (caused) a pecuniary loss to the plaintiff." ***Goudy v. Yamaha Motor Corp.***, 2010 WI App 55, ¶23, 324 Wis. 2d 441, 782 N.W.2d 114.[7]

[6] Walstead also argues that paragraph 24 of Evans' summary judgment affidavit "adopts and incorporates as her sworn statement the allegations of the Amended [Answer]," particularly paragraphs 20-26. This paragraph avers that she "spent many hours … cleaning up and repairing the flooding damages as described in the Answer and Cross-Complaint in this matter." While the referenced paragraphs in the pleading provide somewhat more detail on the alleged water damage, they do not allege any facts that show a basis for Evans' first-hand knowledge of the origin of the damage or of Becker's knowledge of them before the sale.

[7] WISCONSIN STAT. § 100.18 provides:

(continued)

¶39 Walstead asserts that Becker's construction work allegedly concealing the rooms in the basement is a representation that the basement did not contain mold or past water damage, and that Becker made this representation to the "purchasing public, including Walstead." It is true, as Walstead contends, that acts can be representations under WIS. STAT. § 100.18(1). *See* ***Novell v. Migliaccio***, 2010 WI App 67, ¶11, 325 Wis. 2d 230, 783 N.W.2d 897 (concluding that a reasonable jury could find that painting over evidence of a leaky basement was a "representation" that the basement did not leak). Walstead contends that the concealed rooms should be considered a representation "to all who view the basement while considering purchase."

¶40 However, there is no allegation that Walstead viewed the basement prior to purchasing the property and no affidavit to that effect. Walstead does not present a developed argument explaining why he has a cause of action under WIS. STAT. § 100.18(1) for an act-as-representation that he did not observe.[8]

¶41 We conclude Walstead has not made a prima facie showing on his unclean hands/misrepresentation defense and has not shown disputed factual issues on the misrepresentation counterclaim and third-party claim. Therefore,

---

> No person … with intent to sell … real estate … shall make … [a] statement or representation of any kind to the public relating to such … sale … of such real estate … or to the terms or conditions thereof, which … statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

[8] "The public" to whom the representation is made under WIS. STAT. § 100.18 may consist of a single person. *See* ***State v. Automatic Merchandisers of Am., Inc.***, 64 Wis. 2d 659, 664, 221 N.W.2d 683 (1974); ***Bonn v. Haubrich***, 123 Wis. 2d 168, 173 n.4, 366 N.W.2d 503 (Ct. App. 1985). However, we are aware of no case, and Walstead has cited none, in which the representation—whether by word or act—was not made to the person who is asserting the claim or to the public of which that person was a member.

Brentwood is entitled to judgment as a matter of law on the foreclosure based on the tax violation, and it is entitled to dismissal of the counterclaim. Similarly, Becker is entitled to dismissal of the third-party misrepresentation claim.

D. Breach of Fiduciary Duty: Third-Party Claim

¶42 Walstead's pleading alleges that "[i]n drafting the Offer to Purchase and amendments to the Offer to Purchase between Laura B. Morris and Nicole Evans, Third-Party Defendant Gordon R. Becker served as agent for the buyer and in that agency breached his fiduciary duty to Third-Party Plaintiff Walstead and 2413 Brentwood, LLC." We agree with the circuit court that this does not state a claim for relief by Walstead against Becker.

¶43 "A claim for a breach of fiduciary duty exists if: '(1) the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached that duty; and (3) the breach of duty caused the plaintiff's damage.'" ***Yates v. Holt-Smith***, 2009 WI App 79, ¶20, 319 Wis. 2d 756, 768 N.W.2d 213 (quoting ***Berner Cheese Corp. v. Krug***, 2008 WI 95, ¶40, 312 Wis. 2d 251, 752 N.W.2d 800).

¶44 There is no allegation in Walstead's amended pleading of any relationship between him and Becker. Walstead argues that the agency relationship between Evans, as agent, and Walstead, as principal, makes Becker's breach of fiduciary duty to Evans a breach as to Walstead. This is not a developed argument with legal authority and we decline to address it further.

¶45 To the extent that Walstead advances any theory of breach of fiduciary duty based on Becker's alleged misrepresentations, our analysis in paragraphs 34 to 37 explains why such a theory would not prevent summary judgment in Becker's favor.

### *Cross-Appeal*

¶46 Brentwood and Becker moved for attorney fees under WIS. STAT. § 802.05(3) in response to Walstead's motion for reconsideration. They argued that the reconsideration was filed without reasonable basis in law or fact, in violation of WIS. STAT. § 802.05(2)(b) and (c). The circuit court denied their motion, concluding that, while Walstead asserted "a rather strained reading of the facts and law," sanctions were not appropriate. On appeal, Brentwood contends that the circuit court's decision denying Walstead's motion for reconsideration shows that this motion was without any reasonable basis in law or fact, and thus the circuit court erred in denying attorney fees. We disagree and affirm.

¶47 Whether to impose sanctions is within a circuit court's discretion. ***Industrial Roofing Servs., Inc. v. Marquardt***, 2007 WI 19, ¶41, 299 Wis. 2d 81, 726 N.W.2d 898. We uphold discretionary decisions if the circuit court examined the relevant facts, applied the proper legal standard, and used a demonstrated rational process to reach a reasonable conclusion. ***Id.*** (citation omitted). We generally look for reasons to sustain the circuit court's discretionary decisions. ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968).

¶48 The circuit court here explained its ruling, applied the correct legal standard, and its reasoning has a basis in the record. The fact that the court properly exercised its discretion in not allowing Walstead to add to the record or to his legal arguments does not mean that it was an erroneous exercise of discretion to deny the motion for attorney fees.

## CONCLUSION

¶49 We conclude the circuit court properly granted summary judgment to Brentwood on the foreclosure and properly dismissed on summary judgment Walstead's counterclaim and third-party claims. We also conclude the circuit court properly denied Walstead's motion for reconsideration and properly denied Brentwood's and Becker's request for attorney fees on the motion for reconsideration. Accordingly, we affirm on the appeal and the cross-appeal.

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.