COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal Nos. 03-2903
03-3438

Cir. Ct. No. 01CV000752

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

No. 03-2903

WESTERN WISCONSIN WATER, INC. D/B/A LA CROSSE PREMIUM WATER,

PLAINTIFF-APPELLANT,

V.

QUALITY BEVERAGES OF WISCONSIN, INC. D/B/A J.P. HERING COMPANY, CRYSTAL CANYON BOTTLED WATER, ACUITY, A MUTUAL INSURANCE COMPANY,

DEFENDANTS,

JEFFREY J. WELTER AND STEPHEN WELTER,

DEFENDANTS-RESPONDENTS,

CRYSTAL CANYON, INC. AND JONATHAN SWANSON,

DEFENDANTS-THIRD-PARTY PLAINTIFFS,

V.

JEFF SCHAITEL, MICHAEL BURNS AND BRIAN ELDER,

THIRD-PARTY DEFENDANTS.

No. 03-3438

WESTERN WISCONSIN WATER, INC. D/B/A LA CROSSE PREMIUM WATER,

PLAINTIFF-APPELLANT,

v.

QUALITY BEVERAGES OF WISCONSIN, INC. D/B/A J.P. HERING COMPANY, CRYSTAL CANYON BOTTLED WATER, ACUITY, A MUTUAL INSURANCE COMPANY, JEFFREY J. WELTER AND STEPHEN WELTER,

DEFENDANTS,

CRYSTAL CANYON, INC.,

DEFENDANT-THIRD-PARTY PLAINTIFF,

JONATHAN SWANSON,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT,

v.

JEFF SCHAITEL, MICHAEL BURNS AND BRIAN ELDER,

THIRD-PARTY DEFENDANTS.

APPEAL from judgments of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

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

¶1 DEININGER, P.J. Western Wisconsin Water, Inc., appeals two judgments that dismissed its claims against Jeffrey and Stephen Welter and Jonathon Swanson. A corporation controlled by the Welters (J.P. Hering Distributing Co., Inc.) sold the assets of a bottled water distributorship to a corporation controlled by Swanson (Crystal Canyon, Inc.). Western Wisconsin alleged that, in so doing and afterward, the Welters and Swanson committed several torts that caused Western Wisconsin to suffer damages. It contends that the circuit court erred in dismissing on summary judgment its claims against these individuals for tortious interference with a contract, fraudulent misrepresentation under WIS. STAT. § 100.18 (2003-04),[1] conspiracy to injure business under WIS. STAT. § 134.01 and trademark infringement.

¶2 We conclude that disputed issues of material fact preclude summary judgment in favor of Swanson as to whether he tortiously interfered with a contract between Western Wisconsin and J.P. Hering and as to whether Swanson was personally liable for trademark infringement. We reverse the judgment of dismissal in favor of Swanson, and with respect to these claims, we remand for further proceedings on them in the circuit court. As to the remainder of the claims

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

against Swanson and all claims against the Welters, we affirm the judgments of dismissal.

BACKGROUND

¶3 Western Wisconsin Water produces and sells bottled water. J.P. Hering distributed a Western Wisconsin product—LaCrosse Premium Water. J.P. Hering had acquired the "LaCrosse Premium Water 5-gallon retail business in LaCrosse and surrounding area," consisting of some "420 rental water accounts including coolers," from Western Wisconsin in 1997. The 1997 sale agreement provided that J.P. Hering would "use only LaCrosse Premium Water in said business" and that Western Wisconsin "reserves a 'First Right of Refusal' to re-acquire the business at original purchase price based on original number of accounts in event buyer, at any time, opts to sell or 'shut down' the same."

¶4 The principal owner of J.P. Hering, Edward Welter, died in April 2001. His son, Jeffrey Welter, was active in a part of the J.P. Hering business and was president of the corporation, and another son, Stephen Welter, became personal representative of Edward's estate. After their father's death, Jeffrey and Stephen Welter decided to sell the bottled water distribution business to Crystal Canyon, Inc., a competitor of Western Wisconsin. The record contains a sales agreement between J.P. Hering and Crystal Canyon, Inc., dated June 20, 2001, signed by Crystal Canyon's president, Jonathan Swanson, and another officer of Crystal Canyon, although the document bears no signatures from anyone on behalf of Hering. The agreement recites that J.P. Hering was selling its assets, including "water coolers installed at customer locations," "water accounts that own their own cooler" and several "vehicles" to Crystal Canyon.

¶5 The asset sale transaction closed on November 2, 2001. Following the closing, Crystal Canyon leased a J.P. Hering warehouse facility and took possession of J.P. Hering's trucks and inventory. In addition, many of J.P. Hering's former employees became Crystal Canyon employees. On November 8, 2001, counsel for Western Wisconsin wrote to Stephen Welter informing him of Western Wisconsin's right of first refusal and of J.P. Hering's apparent breach of contract in selling its assets to Crystal Canyon. Welter responded with a letter from his attorney asserting that he was unaware of the 1997 sale agreement until receiving the letter from Western Wisconsin's counsel. Welter further informed Western Wisconsin that J.P. Hering would be willing to honor the right of first refusal provision, but not as interpreted by Western Wisconsin with regard to price. Western Wisconsin apparently did not respond favorably to this offer.

¶6 After acquiring the retail distribution business, Crystal Canyon sent letters to the customers it had acquired from J.P. Hering. The letterhead displayed the names of both Crystal Canyon and J.P. Hering and the letters informed customers that Crystal Canyon and J.P. Hering had "merged." It also said that "[d]ue to several price increases and some quality issues in our current brand of water, we have decided to offer all of our customers 'Crystal Canyon Water.'" Customers were told that they would be transferred to Crystal Canyon products but that "[w]e will continue to distribute our current products for those customers who request not to be switched."

¶7 Western Wisconsin sued Crystal Canyon and J.P. Hering, and it later impleaded Swanson and the Welters. Crystal Canyon and J.P. Hering subsequently filed for bankruptcy relief in federal court and the instant state court action against the corporations was stayed. The bankruptcy court concluded that J.P. Hering had breached its contract with Western Wisconsin by not offering it

the opportunity to exercise its right of first refusal. The court awarded Western Wisconsin some $262,000 on its claim against J.P. Hering for lost profits, mitigation costs and other damages. In the state court action against the individual defendants, the circuit court granted Swanson's and the Welters' separate summary judgment motions. Western Wisconsin appeals the judgments dismissing its claims and awarding costs to these defendants.

ANALYSIS

¶8 We review the granting or denial of motions for summary judgment de novo, applying the same methodology and standards as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate where the pleadings and evidentiary submissions show no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* ***Maynard v. Port Publ'ns, Inc.***, 98 Wis. 2d 555, 558, 297 N.W.2d 500 (1980). This court will reverse a decision granting summary judgment if the trial court incorrectly decided legal issues or if material facts are in dispute. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). We, like the trial court, may not decide issues of fact but must determine only whether a material factual issue exists. ***Id***. Finally, if there is doubt as to whether a genuine issue of material fact exists, we will resolve those doubts against the party moving for summary judgment. ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980).

¶9 The ultimate burden of demonstrating that the record on summary judgment is sufficient to warrant a trial rests on the party that has the burden of proof on the issues that are addressed by the movant for summary judgment. ***Transportation Ins. Co. v. Hunzinger Const.***, 179 Wis. 2d 281, 290, 507 N.W.2d

136 (Ct. App. 1993). At times, a moving party may be able to demonstrate only that there are no facts in the record to support an element on which the opposing party has the burden of proof. ***Id***. If that is the case, the party opposing the motion may not simply rest on its allegations or denials in the pleadings. ***Moulas v. PBC Prods., Inc.***, 213 Wis. 2d 406, 410-11, 570 N.W.2d 739 (Ct. App. 1997). Instead, the non-moving party must point to specific items in the summary judgment record that demonstrate the presence of a genuine issue for trial. ***Id***. at 411.

¶10 Before addressing each of Western Wisconsin's claims against Swanson and the Welters that the trial court dismissed, we note that our review was made more difficult by the appellant's failure to structure its arguments in terms of the specific causes of action it pled and the items of proof going to each of the elements it needed to establish or place in dispute in order to survive summary judgment. For example, the appellant begins its brief with a lengthy statement of the case and underlying "facts," followed by a "summary of argument" and a discussion of our well-settled standard of review. Finally, on page thirty-five of its brief, the appellant begins discussing the merits of its appeal, but the discussion first lumps several causes of action together in an effort to persuade us that the record contains sufficient evidence for a jury to find that the three individual defendants "personally participated in tortious conduct."

¶11 There is no cause of action, however, for generalized "tortious conduct." What we must decide is whether each of Western Wisconsin's specific claims (tortious interference with contract, conspiracy to injure business, fraudulent misrepresentation, and trademark infringement) should survive against either or both Swanson and the Welters. It is not until the fifty-first page of its brief that Western Wisconsin begins addressing its separate claims in terms of

their elements and the items the parties submitted on summary judgment that relate to those elements. Even then, however, its germane arguments are interspersed with claims that the circuit court should not have considered certain, allegedly belated, arguments made by the movants in the trial court.

¶12 We do not include this criticism of the appellant's brief to embarrass its counsel but to point out the all too common failure on the part of appellants to properly structure their arguments when appealing summary judgment rulings. What both we and the circuit court must decide on summary judgment is whether there needs to be a trial to resolve factual disputes that are material to the specific causes of action properly pled by a plaintiff or to any legally cognizable defenses raised by a defendant. And, because our review is de novo, whether the circuit court properly considered certain arguments or submissions is irrelevant to our independent analysis. Although the presentation of a certain amount of introductory context may be necessary to our proper understanding of the arguments which follow, appellants should succinctly explain to us why we should or should not permit specific claims to survive summary judgment based on what the law requires claimants or defendants to prove and what the record demonstrates regarding the presence or absence of disputed facts material to those requirements.

¶13 We now turn to Western Wisconsin's specific claims against Swanson and the Welters.

Tortious Interference With Contract

¶14 Western Wisconsin alleges this claim against only Swanson. 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; (5) the defendant was not privileged to interfere. ***Dorr v. Sacred Heart Hosp.***, 228 Wis. 2d 425, 456-57, 597 N.W.2d 462 (Ct. App. 1999). Because Western Wisconsin would have the burden at trial of proving the first four elements, in order for the tortious interference claim to survive summary judgment, Western Wisconsin must point to evidentiary materials in the record that establish or place in dispute each of these elements. ***Transportation Ins. Co.***, 179 Wis. 2d at 291-92 ("[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)).

¶15 We conclude that the factual underpinning of the first two elements is not in dispute. Although there may have been some initial dispute between the parties as to whether the right of first refusal in the 1997 sales agreement between Western Wisconsin and J.P. Hering was valid, the bankruptcy court's decision to award Western Wisconsin breach-of-contract damages against J.P. Hering for failing to give Western Wisconsin the opportunity to re-acquire the distribution business establishes the existence of Western Wisconsin's contractual right to acquire the Hering assets. The record also demonstrates that Swanson was instrumental in arranging and effecting the transfer of J.P. Hering's bottled water business assets to Crystal Canyon, thereby permitting a reasonable inference that he interfered with Western Wisconsin's contract with J.P. Hering.

¶16 Whether the present record establishes or places in dispute the presence of the third element, that Swanson's interference with the Western Wisconsin-J.P. Hering contract was intentional, is a closer question. Swanson

asserts that he was not aware of the 1997 sales agreement between Western Wisconsin and J.P. Hering until after the closing on November 2, 2001. Western Wisconsin refutes this claim by way of an affidavit from an individual previously employed by J.P. Hering who became a Crystal Canyon and later a Western Wisconsin employee. In the affidavit, the employee avers that he met with Swanson on October 15, 2001, learned of Crystal Canyon's plan to purchase J.P. Hering and told Swanson that "there were contracts in play between Western Wisconsin and J.P. Hering and that [he] did not know the details ... but [knew] that [Western Wisconsin] had a first right to buy the business." The employee further states in the affidavit that, at the end of the conversation, Swanson told him not to mention the meeting to anyone.

¶17 Under summary judgment methodology, we must accept the employee's statements as true, and thus, unless a fact finder ultimately determines otherwise, Swanson knew prior to the closing on the sale that Western Wisconsin had a contractual "first right to buy" J.P. Hering's water distribution business. *See* ***Moulas***, 213 Wis. 2d at 410. Swanson contends that the employee's averment as to what the employee told him on October 15, even if true, is insufficient to show either that he knew and understood that a valid, contractual right of first refusal existed in favor of Western Wisconsin or that he formed the intention to interfere with that contractual right. We conclude, however, that it is for a fact finder to determine not only the extent of what Swanson knew prior to November 2 but also what his intentions were based on that knowledge. If November 2, 2001, is regarded as the date Crystal Canyon purchased J.P. Hering's assets in violation of Western Wisconsin's contractual rights, a fact finder could reasonably infer that, by failing to at least make further inquiries regarding Western Wisconsin's

contractual rights before going forward with the closing, Swanson's interference with those rights was intentional.

¶18 Swanson argues, however, that Crystal Canyon purchased J.P. Hering's business assets in June or July of 2001, when he signed the agreement on behalf of Crystal Canyon to do so. We note, however, that, at least on the record before us, no officer of J.P. Hering signed the sale agreement, and further, that the agreement called for a closing and Crystal Canyon's payment of the full purchase price by October 1, 2001, which undisputedly did not occur. We conclude that a fact finder could determine that a sale of J.P. Hering's business assets did not occur until November 2, 2001, and that Swanson knew of the Western Wisconsin contract at that time and intended to interfere with it.

¶19 The fourth element of tortious interference requires that "a causal connection exists between the interference and the damages." ***Dorr***, 228 Wis. 2d at 456. Although Western Wisconsin does not directly address this element, we have noted that the bankruptcy court awarded Western Wisconsin damages for lost profits and "mitigation expenses" stemming from J.P. Hering's breach of contract. In addition, Western Wisconsin's president testified at a temporary injunction hearing in this action as to the adverse impact the sale of J.P. Hering's business to Crystal Canyon had and would have on Western Wisconsin's business. The record does not indicate whether Western Wisconsin was made whole by any amounts it may have recovered as a result of the bankruptcy court's ruling. We conclude that the record permits a reasonable inference that Swanson's alleged interference with Western Wisconsin's contractual rights caused the company to suffer damages.

¶20 As to the fifth element, whether Swanson enjoyed a privilege to interfere with the Western Wisconsin-J.P. Hering contract, Swanson would bear

the burden of proving the existence of such a privilege. *See* ***Finch v. Southside Lincoln-Mercury, Inc.***, 2004 WI App 110, ¶38, 274 Wis. 2d 719, 635 N.W.2d 154. Swanson claims that, even if he did intentionally interfere with the contract, he was simply acting as a corporate officer in the best interest of Crystal Canyon and is therefore protected from liability. The privilege on which Swanson apparently seeks to rely, however, applies when a corporate officer causes or induces a breach of contract between *his own* company and another. *See* ***Lorenz v. Dreske***, 62 Wis. 2d 273, 286-87, 214 N.W.2d 753 (1974) (citation omitted). Swanson's alleged interference was with the Western Wisconsin-J.P. Hering contract, not with a contract to which his company, Crystal Canyon, was a party.

¶21 To the extent that Swanson claims a broader, free-ranging privilege on the part of officers of a corporation to interfere with contracts to which their corporations are not a party, on the theory that such interference with other parties' contracts furthers the interests of the officer's corporation, we reject the claim. We find no authority for such an extensive privilege to engage in otherwise tortious conduct so long as one is furthering the interests of one's corporate employer. We agree instead with Western Wisconsin that Swanson is personally liable for any tortious acts he may have committed, regardless of whether he was acting to further Crystal Canyon's interests. *See* ***Oxmans' Erwin Meat Co. v. Blacketer***, 86 Wis. 2d 683, 692, 273 N.W.2d 285 (1979) ("A corporate agent cannot shield himself from personal liability for a tort he personally commits or participates in by hiding behind the corporate entity; if he is shown to have been acting for the corporation, the corporation also may be liable, but the individual is not thereby relieved of his own responsibility.").

¶22 Finally, Swanson also relies on ***Cudd v. Crownhart***, 122 Wis. 2d 656, 364 N.W.2d 158 (Ct. App. 1985), which he claims stands for the proposition

that a party has a right to protect what he believes are his legal interests and cannot be liable for his actions if his belief is ultimately determined to be incorrect. Swanson points to the fact that the June 2001 J.P. Hering-Crystal Canyon sale agreement provided that Hering warranted against any "demands or claims that would mature or adversely effect (sic) the assets conveyed" and that Hering further agreed to indemnify Crystal Canyon against "all claims … with respect to the business assets conveyed." He asserts that, based on the warranty and indemnification provisions, he believed J.P. Hering had the right to sell its assets to Crystal Canyon, and he cannot, therefore, be liable for closing on the sale and operating the business, even though it later turned out that Western Wisconsin had a valid contractual claim to the Hering assets.

¶23 We reject this argument as well. First, as we have explained, what Swanson knew regarding Western Wisconsin's contractual right to acquire the J.P. Hering business assets and what he intended in light of that knowledge are matters of disputed fact and inference. The fact that J.P. Hering may have warranted good title to the assets and a right to convey them, and may also have agreed to indemnify Crystal Canyon against future claims regarding the assets conveyed, does not logically negate what Swanson knew or intended when he caused Crystal Canyon to go forward with the sale on November 2, 2001.

¶24 Second, Crystal Canyon arguably had no rights to the assets in question until on or after the November 2 closing. (Recall, the record does not reflect that a representative of J.P. Hering ever signed the June agreement, and the agreement called for a closing on or before October 1, which did not happen.) Put another way, until Crystal Canyon actually consummated the purchase, it had no legal interest in the Hering assets to protect. Although Western Wisconsin cites some of Swanson's alleged post-closing actions as supporting its other causes of

action, its tortious interference claim focuses on Swanson's role in Crystal Canyon's acquisition of the J.P. Hering assets. Swanson cannot claim a privilege for protecting Crystal Canyon's legal rights in assets before it acquired those rights.

¶25 We thus conclude that the trial court erred in dismissing Western Wisconsin's tortious interference with contract claim against Swanson.

Conspiracy to Injure Business Reputation Under WIS. STAT. § 134.01

¶26 WISCONSIN STAT. § 134.01 provides as follows:

> Any 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of willfully or maliciously injuring another in his or her reputation, trade, business or profession by any means whatever … shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding $500.

A plaintiff must prove four things in order to prevail in a civil action for damages alleging a violation of § 134.01: (1) the defendants acted together; (2) the defendants acted with a common purpose to injure the plaintiff's business; (3) the defendants acted maliciously in carrying out the common purpose; (4) the acts of the defendants financially injured the plaintiff. WIS JI—CIVIL 2820.

¶27 As to the requirement that the defendants acted "maliciously," the jury instructions explain that the defendants must be shown to have acted "with a malicious motive. For conduct to be malicious, it must be intended to cause harm for harm's sake. The harm must be an end in itself, and not merely a means toward some legitimate end." ***Id.***; ***Maleki v. Fine-Lando Clinic Chartered, S.C.***, 162 Wis. 2d 73, 87-88, 469 N.W.2d 629 (1991). Moreover, in order to prove a conspiracy, a plaintiff must demonstrate more than "suspicion or conjecture that

there was a conspiracy." ***Id***. at 84. If circumstantial evidence supports equal inferences of lawful action and unlawful action, then the claim of conspiracy is not proven and should not be submitted to the jury. ***Id***. at 85 (citation omitted).

¶28 As evidence of Swanson's and the Welters' malice toward Western Wisconsin points to the fact that they went ahead with the sale of J.P. Hering to Crystal Canyon despite being told by a J.P. Hering employee that Western Wisconsin had a contractual right of first refusal to re-acquire the business. Western Wisconsin also cites the defendants' alleged "desire for secrecy" and an alleged statement by "Crystal Canyon's owners" that they intended to bring Western Wisconsin "to its knees" as additional damning evidence from which a jury could reasonably infer malice. Finally, Western Wisconsin asserts that the defendants' failure to "cease and desist from the illegal conduct in which they were engaged," after receiving a letter from its counsel demanding that they do so, is additional evidence of the defendants' malice. We disagree that these facts, if found to be true, permit a reasonable inference that the defendants intended to harm Western Wisconsin's business "for the sake of the harm as an end in itself." *See* ***Maleki***, 162 Wis. 2d at 88.

¶29 At best, the evidence Western Wisconsin cites shows that the defendants pursued their mutually advantageous transaction knowing both that Western Wisconsin claimed a superior right to acquire the J.P. Hering assets and that Crystal Canyon would likely obtain a significant competitive advantage over Western Wisconsin in the LaCrosse bottled water market by acquiring those assets. Willful acts are not sufficient to show a violation of WIS. STAT. § 134.01 absent a showing of malicious motive. *See* ***id***. at 91 n.10. Moreover, a "purpose … to improve one's competitive advantage does not run afoul of conspiracy laws if there is not a malicious motive." ***Id***. at 87 n.9. Finally, "[t]here can be no

conspiracy if malice is not found in respect to both conspirators." ***Id***. at 86. Thus, even if Swanson was out to bring Western Wisconsin "to its knees," and that this alleged aim can be interpreted as something more than a desire to surpass a business competitor, there can be no recovery for a violation of WIS. STAT. § 134.01 unless a jury could find that the Welters, too, intended by their dealings with Swanson to harm Western Wisconsin "for harm's sake." Western Wisconsin has pointed to nothing in the record from which a jury could infer such a motive on the part of the Welters.

¶30 We conclude that the trial court did not err in dismissing Western Wisconsin's claim under WIS. STAT. § 134.01 against these three defendants.

Fraudulent Misrepresentation Under WIS. STAT. § 100.18

¶31 In order to recover on a claim of fraudulent misrepresentation under WIS. STAT. § 100.18, Western Wisconsin must show that the defendants: (1) made a statement to the public concerning the sale or distribution of bottled water; (2) the statement contained an assertion or representation that was false, deceptive or misleading; and (3) Western Wisconsin suffered pecuniary loss as a result of the false assertion. WIS JI—CIVIL 2418; *see* ***Tietsworth v. Harley-Davidson, Inc.***, 2003 WI App 75, ¶21, 261 Wis. 2d 755, 661 N.W.2d 450.[2] As to the first element, there is no dispute that Crystal Canyon sent a letter

[2] Many if not most claims under WIS. STAT. § 100.18 involve a plaintiff who was fraudulently induced to purchase a product from or enter into a contract with the defendant as a result of false or deceptive statements the defendant communicated to the public. It appears, however, that the statute also permits an action brought by a competitor of the defendant whose sales are adversely affected by false or misleading advertisements regarding the competitor or its product. *See* ***Tim Torres Enters., Inc. v. Linscott***, 142 Wis. 2d 56, 64-65, 416 N.W.2d 670 (Ct. App. 1987) (upholding jury verdict in favor of one seller of frozen custard against another who published untrue statements that caused the plaintiff seller to suffer pecuniary loss).

concerning the sale or distribution of bottled water to the customers it acquired from J.P. Hering, and that the letter bore the names of both Crystal Canyon and J.P. Hering. For present purposes, we accept without deciding that a fact finder might reasonably infer from the record that Swanson, and perhaps the Welters as well, were responsible for sending the letter and for its contents. We also accept on the same basis that one could reasonably infer from the record that Western Wisconsin suffered pecuniary loss on account of one or more statements in the letter regarding its product, LaCrosse Premium water.

¶32 Our disposition thus turns on the second element, whether a statement in the Crystal Canyon letter was false, deceptive or misleading. The portion of the letter to "valued customers" to which Western Wisconsin objects reads as follows: "Due to several price increases and some quality issues in our current brand of water, we have decided to offer all of our customers 'Crystal Canyon Water.'" Significantly, Western Wisconsin does *not* challenge the trial court's conclusion that the record establishes that "LaCrosse Premium Water had quality issues." Rather, Western Wisconsin contends that the statement is actionable because it cites quality issues as the reason Crystal Canyon decided to offer its own water to its new customers, when the real reasons were that it would not be able to obtain the Western Wisconsin product after its initial supply acquired from J.P. Hering ran out and because Crystal Canyon quite simply wanted to sell its own water to its new customers.

¶33 We conclude that the record on summary judgment does not establish or place in dispute whether the cited statement was false, deceptive or misleading. Silence or nondisclosure of facts is not sufficient to support a claim under WIS. STAT. § 100.18; an affirmative misrepresentation is required. ***Tietsworth***, 270 Wis. 2d 146, ¶40. The fact that Crystal Canyon may well have

had other, undisclosed reasons for urging its new customers to switch to its own brand of water is thus not actionable under WIS. STAT. § 100.18. Western Wisconsin's claim therefore rests solely on its being able to establish that the "quality issues" regarding its product, which it concedes existed, played no part in Crystal Canyon's decision to promote its own product to its new customers. We conclude that, even if this purported "fact" could be said to be a reasonable inference from the present record, instead of mere conjecture, a seller's statement of its reasons for conducting a particular sales promotion is not actionable under § 100.18 unless those reasons themselves contain false assertions of fact.

¶34 The supreme court concluded in ***State v. American TV & Appliance of Madison, Inc.***, 146 Wis. 2d 292, 430 N.W.2d 709 (1988), that the use of the words "clearance" and "closeout" "cannot form the basis of a claim under sec. 100.18(1)." ***Id***. at 302. Although this court had concluded that the seller's depiction of a sale as a "closeout sale" was false or deceptive because the seller had ordered merchandise specifically for the sale, the supreme court disagreed, concluding that the advertisement's suggestion that it had stock on hand that it wished to sell during the sale made irrelevant the timing of its acquisition of the merchandise. ***Id***. at 302-03. Similarly, we conclude here that, so long as it was true that LaCrosse Premium water had "quality issues," which Western Wisconsin has not disputed, how big a role, if any, that fact played in Crystal Canyon's

decision to encourage its customers to switch over to its own water is immaterial for purposes of the analysis under § 100.18.[3]

¶35 Under the heading in its brief asserting the defendants' generalized "tortious conduct," Western Wisconsin makes additional accusations against Swanson and the Welters that it claims find support in the record. Western Wisconsin may have intended to argue that some of these other alleged actions also support its fraudulent misrepresentation claim. For example, Western Wisconsin claims that Swanson, without authority to do so, allowed or authorized Crystal Canyon employees to pass themselves off as representatives of Western Wisconsin by wearing uniforms and driving trucks bearing the LaCrosse Premium Water logo. Western Wisconsin also claims that Swanson allowed or authorized Crystal Canyon to place misleading listings in local phone books, causing persons seeking to obtain "LaCrosse Premium Water" to reach Crystal Canyon instead of Western Wisconsin. Western Wisconsin also implicates the Welters in these actions, alleging that they acted as though they still owned J.P. Hering after November 2, 2001, and thus were in a position to prevent Swanson's "tortious conduct." Although some of these alleged activities may support a trademark infringement claim, which we discuss below, we conclude that they are not the type of affirmative misrepresentations of fact that are required to support a claim under WIS. STAT. § 100.18. *See* ***Tietsworth***, 270 Wis. 2d 146, ¶40.

[3] In its reply brief, Western Wisconsin argues for the first time that other parts of the "valued customer" letter were deceptive or misleading within the meaning of WIS. STAT. § 100.18. For example, they cite the joint Crystal Canyon-J.P. Hering letterhead, the reference to having "merged" and the offer to continue to distribute "our current products" as deceiving customers into believing that a true merger had occurred and that Crystal Canyon was authorized to "continue" to distribute LaCrosse Premium water, which, of course, it was not. We generally do not address arguments first raised in a reply brief and decline to do so here. *See* ***Swartout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981).

¶36 We conclude that the circuit court did not err in dismissing Western Wisconsin's claim under WIS. STAT. § 100.18 because Western Wisconsin has not established or placed in dispute that Swanson or the Welters made untrue statements to the public that are actionable under the statute.

Trademark Infringement

¶37 Western Wisconsin's complaint alleges a cause of action against all three defendants for "common law trademark infringement" based on Crystal Canyon's use of the "trademark 'LaCrosse Premium Water' on trucks, uniforms, and products" following the transfer of J.P. Hering's assets to Crystal Canyon. A difficulty with Western Wisconsin's argument on appeal, however, is that, instead of presenting the elements of this claim in its opening brief and citing the evidentiary submissions that support them, it attacks only Swanson's trial court argument invoking the "first sale" doctrine. We nonetheless conclude that, on the present record, Westerns Wisconsin's trademark infringement claim against Swanson survives summary judgment but its claim against the Welters does not.

¶38 We explained in ***Madison Reprographics v. Cook's Reprographics***, 203 Wis. 2d 226, 552 N.W.2d 440 (Ct. App. 1996), that in order to prevail on a cause of action for common law trademark infringement, a plaintiff "must show that a designation meets the definition of a trademark or trade name and that the defendant's use of a similar designation is likely to cause confusion." ***Id***. at 234. "A trade name is a word or other designation … that is used in a manner that identifies that business or enterprise and distinguishes it from the business or enterprise of others." ***Id***. at 234. Neither Swanson nor the Welters dispute that Western Wisconsin's "LaCrosse Premium Water" brand is a trademark or trade name, and our inquiry thus turns to whether the record shows or places in dispute

that Crystal Canyon's use of it caused its customers to be confused into believing that Crystal Canyon was an authorized distributor of LaCrosse Premium Water.

¶39 The factors involved in proving the likelihood of confusion are: (1) the distinctiveness or strength of plaintiff's trademark, (2) similarity of the defendant's designation to plaintiff's trademark, (3) similarity and proximity of the goods offered by plaintiff and defendant, (4) overlap of marketing channels, (5) degree of care likely to be exercised by consumers in selecting the product, (6) evidence of actual confusion, and (7) defendant's intent when selecting its designation. ***Id***. at 236-37. The record establishes that, following its acquisition of J.P. Hering's assets, Crystal Canyon used the LaCrosse Premium Water logo, without Western Wisconsin's authority, on driver uniforms and delivery trucks. Furthermore, affidavits from Western Wisconsin and Crystal Canyon customers aver that they were confused as to whether Crystal Canyon was an authorized distributor of LaCrosse Premium Water. There also appears to be no dispute as to the distinctiveness of the trade name, the similarity of the goods purveyed, the proximity to Western Wisconsin's market area or the overlap in marketing channels. Finally, the record indicates that Crystal Canyon employees told customers, and the "valued customer" letter implied, that Crystal Canyon would and could continue to distribute LaCrosse Premium Water. We are thus satisfied that the "use … likely to cause confusion" element is sufficiently established for purposes of surviving summary judgment.

¶40 As we have noted, however, Crystal Canyon is no longer a defendant in this action. The dispositive question thus becomes whether the record demonstrates or places in dispute whether Swanson or the Welters were individually culpable for Crystal Canyon's wrongful use of the LaCrosse Premium Water trade name. Swanson, citing FLETCHER'S CYCLOPEDIA OF THE LAW OF

PRIVATE CORPORATIONS (perm. ed., Supp. 2002), acknowledges that corporate officers can be held individually liable for acts of trademark infringement when a corporation's acts were "instigated and controlled by them," or if they "induced" the infringement. He claims, however, that the record is devoid of any evidence that he personally authorized the wrongful actions or that he knew (or should have known) that his own actions would induce trademark infringement. We agree with Western Wisconsin, however, that Swanson's admitted knowledge that Crystal Canyon's drivers and trucks were using the LaCrosse Premium Water logo, as well as his involvement in the preparation and distribution of the 'valued customer' letter, are sufficient to permit a reasonable inference that Swanson knew or should have known that his own actions and those of the employees he supervised would cause water customers to be confused regarding Crystal Canyon's status as a distributor of LaCrosse Premium water.

¶41 As for the "first sale doctrine" on which Swanson seeks to rely, the doctrine precludes liability for trademark infringement on the part of one who, although not an authorized seller, does nothing more than to resell a product under the producer's trademark. *See* ***Sebastian Int'l, Inc. v. Longs Drug Stores Corp.***, 53 F.3d 1073, 1074 (9th Cir. 1995). Swanson claims that, because Crystal Canyon simply resold LaCrosse Premium Water that it acquired from J.P. Hering, he cannot be found liable for infringing Western Wisconsin's trade name. If Crystal Canyon had done nothing more than resell the product it acquired in the asset purchase, we might accept Swanson's contention. We conclude, however, that the use of the LaCrosse Premium Water logo on its drivers' uniforms and trucks, the suggestion in the "valued customer" letter that it could continue to provide its "current product," and evidence that Crystal Canyon may have refilled some LaCrosse Premium Water bottles it acquired from J.P. Hering with its own water

go beyond the simple stocking and reselling of LaCrosse Premium Water. *See* ***id***. at 1076 (noting that conduct going beyond "merely stocking and reselling genuine trademarked products" (e.g., the use of a trademark in telephone directory listings and advertisements, or other use of it "in a manner likely to cause the public to believe the reseller was part of the producer's authorized sales force or one of its franchisees") may be "sufficient to support a cause of action for infringement").

¶42 As for the Welters, Western Wisconsin asserts that they may be found liable for Crystal Canyon's alleged trademark infringement because they acted as if they still owned J.P. Hering by offering to sell its assets to Western Wisconsin after the November 2, 2001 closing. Western Wisconsin points to nothing in the record, however, to indicate that the Welters' offer was anything other than an attempt, apparently with Crystal Canyon's consent, to resolve Western Wisconsin's breach of contract claim. That is, there is no evidence in the record that the Welters exercised any day-to-day control over the former J.P. Hering assets after Crystal Canyon took possession of them.

¶43 Western Wisconsin also cites the fact that J.P. Hering purchased a quantity of LaCrosse Premium Water just before the closing and transferred it to Crystal Canyon as proof, in Western Wisconsin's view, that the Welters knew that the product would be "improperly sold to customers of Crystal Canyon." We conclude, however, that the record establishes that the Welters played no role in Crystal Canyon's activities after the closing. They were simply in no position to direct, authorize or control how Crystal Canyon conducted its business. As we have noted, the mere sale by J.P. Hering of the trademarked water to Crystal Canyon, or by Crystal Canyon to its customers, standing alone, did not constitute trademark infringement, and we reject Western Wisconsin's contention that, on this record, the Welters could have or should have prevented Crystal Canyon from

using the LaCrosse Premium Water trade name in the manner it did after acquiring the J.P. Hering assets.

¶44 We thus conclude that the trial court erred in dismissing Western Wisconsin's trademark infringement claim against Swanson but did not err in dismissing the claim against the Welters.

CONCLUSION

¶45 For the reasons discussed above, we affirm the judgment entered in favor of the Welters, and we reverse the judgment in favor of Swanson. As to Swanson, we affirm the circuit court's dismissal of Western Wisconsin's fraudulent misrepresentation claim under WIS. STAT. § 100.18 and its claim for conspiracy to injure business under WIS. STAT. § 134.01. We remand to the circuit court for further proceedings on Western Wisconsin's claims against Swanson for tortious interference with contract and trademark infringement. The Welters are entitled to costs under WIS. STAT. RULE 809.25(1)(a)1, but we allow no costs to either Swanson or Western Wisconsin. *See* RULE 809.25(1)(a)5.

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

Not recommended for publication in the official reports.