COURT OF APPEALS
DECISION
DATED AND FILED

June 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-1848

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

CUSHMAN ENTERPRISES, INC. D/B/A SCOTT IMPLEMENT COMPANY, AND STEVEN BROGLEY AND TAMMY BROGLEY,

PLAINTIFFS-APPELLANTS,

V.

NEW HOLLAND OF NORTH AMERICA, INC., AND TERRY FIX,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Eich, C.J., Dykman, P.J., and Deininger, J.

DEININGER, J. Plaintiffs, who own and operate a farm equipment dealership, appeal a judgment which dismisses their misrepresentation and Wisconsin Fair Dealership Law (WFDL) claims against New Holland of North America, Inc., and one of its employees. Plaintiffs claim the trial court erred when it granted New Holland's summary judgment motion on the morning of trial. We conclude that there are disputed issues of material fact which preclude the granting of summary judgment on either the misrepresentation claims or the WFDL claim. Accordingly, we remand for a trial on all claims.

BACKGROUND

In this appeal, we review the trial court's decisions on motions for summary judgment. We are thus limited to a consideration of the pleadings and evidentiary facts that were properly before the trial court at the time it decided the motions. ***Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.***, 146 Wis.2d 568, 573, 431 N.W.2d 721, 724 (Ct. App. 1988). Plaintiffs' amended complaint alleges that, in 1991, Steven and Tammy Brogley purchased all of the outstanding stock of Cushman Enterprises, Inc., which in turn was the entity that owned and operated Scott Implement Company, located in Platteville. We will refer to the plaintiffs collectively as Brogleys, except where it is necessary to separately identify either of the individual plaintiffs or their corporation.

At the time Brogleys purchased Cushman, the corporation was an authorized dealer of New Holland farm implements. New Holland implements are manufactured and distributed by New Holland of North America, Inc. (FNH), which also manufactures and distributes Ford tractors. Prior to closing their purchase of the Platteville dealership, Brogleys inquired of FNH's territory manager, Terry Fix, whether it would be possible for them to acquire a Ford

franchise from FNH. Fix allegedly told Brogleys that FNH could not legally give them a Ford contract because there was a Ford tractor dealership just five miles away in Cuba City. This dealership, known as Grant Equipment, was a Ford tractor dealer only, and it was not authorized to sell New Holland implements.

Brogleys allege that since they were told, untruthfully, that FNH was prevented by Wisconsin law from granting them a Ford dealership, the statement also implied that Grant Equipment would not be able to acquire a competing New Holland franchise from FNH. Relying on this representation, Brogleys consummated their purchase of the Platteville New Holland dealership.

About four years later, in 1995, an implement dealer located in Bloomington purchased the New Holland contract belonging to a dealer in Potosi, and the Potosi dealer went out of the implement business. FNH then awarded a New Holland franchise to Grant Equipment in Cuba City. Two months after Grant Equipment became a New Holland implement dealer, Brogleys commenced this action. In addition to claims of intentional, negligent and strict responsibility misrepresentation, Brogleys allege that FNH violated the WFDL. Specifically, their claim is that FNH failed to notify Brogleys of a "substantial change in competitive circumstances" as required by § 135.04, STATS.[1]

[1] Section 135.04, STATS., provides, in relevant part, as follows:

> Except as provided in this section, a grantor shall provide a dealer at least 90 days' prior written notice of termination, cancellation, nonrenewal or substantial change in competitive circumstances. The notice shall state all the reasons for termination, cancellation, nonrenewal or substantial change in competitive circumstances and shall provide that the dealer has 60 days in which to rectify any claimed deficiency. If the deficiency is rectified within 60 days the notice shall be void.

FNH's answer to the amended complaint admits that it is a "grantor" and Cushman is a "dealer" within the meaning of the WFDL.[2] FNH also admits that it awarded Grant Equipment a New Holland contract in May of 1995, and that it did not give a ninety-day notice of that action to Brogleys. FNH denies, however, that it violated the WFDL or caused Brogleys or Cushman to suffer any damages, and it denies the material allegations of the misrepresentation claims.

Brogleys filed a motion for partial summary judgment, seeking a judgment that FNH violated the WFDL when it failed to give the notice required under § 135.04, STATS. In support of this motion, Steven Brogley executed an affidavit which included the following averments:

> 5. The appointment of Grant Equipment as a New Holland dealer was a substantial change in Scott Implement's competitive circumstances, in that it reduced Scott Implement's potential sales of New Holland farm equipment by about half, and required Scott Implement to reduce its profit margin on the sale of New Holland farm equipment to slightly above cost. This has had and will continue to have a devastating effect on Scott Implement's profitability and has significantly reduced Scott Implement's chances of economic survival.

In response, FNH submitted discovery excerpts showing that the net result of the 1995 transactions was that Cushman's nearest direct competitor for sales of New Holland implements had moved from Potosi, twelve miles from Platteville, to Cuba City, some five miles away. FNH argued that this seven mile difference did "not create a substantial change in the competitive circumstances of the Cushman dealership."

[2] *See* § 135.02(2) and (5), STATS.

FNH also moved for summary judgment, requesting the court to dismiss all of Brogleys' claims. With respect to the WFDL claim, FNH pointed to this court's decision in ***Jungbluth v. Hometown, Inc.***, 192 Wis.2d 450, 531 N.W.2d 412 (Ct. App. 1995), *rev'd,* 201 Wis.2d 320, 548 N.W.2d 519 (1996), where we held that an action permitted by the terms of a dealership agreement could not constitute a substantial change in competitive circumstances so as to trigger the notice requirement of § 135.04, STATS. FNH argued that nothing in its dealership agreement with Cushman prevented it from awarding a New Holland contract to Grant Equipment, and that the supreme court's subsequent reversal of our holding should not be applied retroactively to FNH's actions and omissions in 1995.

In support of its motion to dismiss the misrepresentation claims, FNH asserted that neither it nor its agent, Terry Fix, had misrepresented any past or existing facts. It submitted excerpts from Steven Brogley's deposition where he acknowledged the following:

> Q Did [FNH] say specifically Grant would just have Ford or is that what you surmised from the conversation?
>
> A I guess that's what I surmised. Since I couldn't have Ford, I surmised that they wouldn't have New Holland.
>
> ….
>
> Q Did anyone from [FNH] prior to your purchasing Cushman Enterprises tell you that Grant Equipment would not be selling New Holland equipment?
>
> A Not that I can recall that they said that.
>
> ….
>
> Q Did anyone from [FNH] tell you prior to your executing [the dealership agreement with FNH] that Grant Equipment would never have a New Holland contract?
>
> A No, they never stated that way.

On November 16, 1996, four days before the scheduled start of a jury trial on Brogleys' claims, the trial court granted Brogleys' motion for partial summary judgment on the WFDL claim, leaving only damages to be tried on that claim. The court also denied FNH's summary judgment motion "in total," concluding that the misrepresentation claims involved "factual issues which must be determined by a jury."

FNH immediately moved for reconsideration of the partial summary judgment in favor of Brogleys, arguing that there were "issues of material fact regarding whether there was a 'substantial change in competitive circumstances' due to [FNH]'s decision to provide Grant Equipment a New Holland equipment dealership." FNH also noted that, in granting partial summary judgment to Brogleys on the WFDL claim, the court had relied heavily on Steven's affidavit regarding Cushman's potential loss of New Holland implement sales and the reduced profits that Steven had stated would result from competition with Grant Equipment. FNH asserted that Brogleys had abandoned any claim of damages from lost New Holland equipment sales, citing excerpts from a recently conducted deposition of Brogleys' expert. The expert testified in the deposition that Brogleys were not seeking damages from lost sales of New Holland equipment, rather, they were claiming that their damages stemmed from lost Ford tractor sales.

FNH argued in the trial court that this change in Brogleys' theory of damages eliminated any basis for their claim that a substantial change in competitive circumstances had occurred on account of the establishment of a New Holland dealership within five miles of their business. FNH also filed a motion in limine to exclude any evidence regarding lost Ford tractor sales, claiming that Brogleys should be judicially estopped from presenting this evidence because of

the recent shift in Brogleys' theory of damages. In support of this motion, FNH filed an excerpt from Steven's deposition in which he denies any claim for damages based on lost Ford tractor sales,[3] as well as Brogleys' response to an interrogatory which reads: "Plaintiffs do not seek damages for lost sales caused by not being a Ford tractor dealer."

Brogleys' counsel explained to the court that the change in their theory of damages came about as follows: during discovery, Brogleys learned that FNH witnesses would testify that FNH would not have permitted Brogleys to purchase the Potosi New Holland contract in lieu of the two-step deal which resulted in Grant Equipment obtaining a New Holland dealership. Thus, even if Brogleys had been given the statutory ninety-day notice of the intended action, they would have been unable to prevent a New Holland dealership from being established in Cuba City. Brogleys then considered what else they might have done to offset the impact of the new competitor if they had received timely notice of the intended action. They concluded that they could have resurrected a proposal from two years earlier, which had involved their purchase of the Potosi dealership. Had they done that, Brogleys would have obtained a contract to sell Ford tractors, and that then is the measure of what they claim to have lost by not

[3] "Q Are you claiming damages in this lawsuit as a result of not having a Ford tractor dealership agreement? A No."

having had timely notice of FNH's intended award of a New Holland dealership to Grant Equipment.[4]

The trial court took up FNH's motions for reconsideration and in limine on the morning the trial was to begin, November 20, 1996. A jury had been selected and was awaiting opening statements. Although counsel for both parties stated their opposition, the trial court continued the trial for six months in order to allow FNH to respond to the change in Brogleys' theory of damages. The court did not, however, rule on FNH's motion for reconsideration of the partial summary judgment in favor of Brogleys on the WFDL claim.

On the morning of the rescheduled trial date, May 12, 1997, a jury was again selected and seated. The court then met with counsel outside the jury's presence to hear a motion in limine from FNH, unrelated to the present issues. During argument on that motion, FNH's counsel made "a formal motion to renew

[4] The Brogleys' theory of damages for lost Ford tractor sales is not spelled out in the evidentiary materials that were before the court when it made its final summary judgment ruling on May 12, 1997. Their counsel explained during argument and in an offer of proof, however, that in 1993, the New Holland dealer in Potosi, some twelve miles from Platteville, wanted to sell his business. Discussions between Brogleys, FNH, the Potosi dealer and Grant Equipment resulted in a proposal that would accomplish the following: Brogleys would purchase the Potosi dealership, move their entire operation to Potosi, and be awarded a Ford tractor franchise, thus becoming a "full-line" dealer based in Potosi. Grant Equipment would contribute $100,000 to Brogleys in order to offset the costs of the purchase and the moving of their business. Grant Equipment would then receive a New Holland franchise from FNH and become a "full-line" dealer in Cuba City.

Brogleys declined this offer in 1993 because they were still in debt from their initial purchase; they feared losing most of their customer base, which was largely south of Platteville; and, in general, they did not feel it was a good business move. Additionally, Brogleys' claim that they continued to rely on their understanding, based on FNH's alleged misrepresentation, that Grant could not become a New Holland dealer, and thus a nearby direct competitor of theirs, while their dealership remained in Platteville. Brogleys asserted that they would be able to prove at trial that, given notice of the intended award of a New Holland contract to Grant Equipment in 1995, they would have been able to resurrect and consummate the transaction which had been proposed two years earlier.

my motion for you to reconsider your grant of summary judgment in this case because of what counsel has done to this court. He changed theories as he admitted." That request was apparently directed only to the court's prior decision to grant Brogleys' summary judgment on the liability portion of their WFDL claim. Later, however, FNH's counsel broadened his motion, arguing "[t]he case should be dismissed for his conduct," referring to Brogleys' counsel, and finally, FNH's counsel moved "for summary judgment and dismissal of this complaint in this case."

After additional argument from both counsel, the court granted FNH's motion for summary judgment dismissing all of Brogleys' claims. The court explained the principal basis for its decision as follows: "[t]he theory in this case that's being propounded is that the plaintiffs are attempting to collect damages for a dealership that never came into existence." Following the judge's ruling, Brogleys' counsel made a lengthy offer of proof, reciting for the record those matters he contended Brogleys would be able to prove at trial. The jury was then dismissed, and the court subsequently entered judgment dismissing Brogleys' amended complaint "on its merits, with prejudice." Brogleys appeal the judgment of dismissal.

ANALYSIS

Brogleys first claim the trial court erred in granting FNH's "oral motion for summary judgment" on the morning of the rescheduled trial. FNH responds by characterizing its motions that morning, and the court's order, as being for the reconsideration and reversal of the court's decision of November 16, 1996, on the parties' motions for summary judgment. We agree with Brogleys that it would have been improper for the court to entertain and grant a new motion

for summary judgment on May 12, 1997, because the procedures required by § 802.08, STATS., were not followed at that time. *See* ***Village of Fontana-on-Geneva Lake v. Hoag,*** 57 Wis.2d 209, 214, 203 N.W.2d 680, 682 (1973). We accept, however, the characterization of the court's actions that day as granting FNH's reconsideration request, and then granting FNH's earlier motion for summary judgment dismissing all four of Brogleys' claims.

Brogleys next argue that the trial court's reconsideration of its earlier rulings on the morning of trial was an erroneous exercise of its discretion. While we can understand the consternation and frustration of the parties and their counsel in having prepared twice for a jury trial that almost (but never quite) began, we choose to consider first the legal issues raised by the summary judgment motions, rather than the trial court's unfortunate timing. The main question raised in this appeal is whether the trial court correctly dismissed Brogleys' claims, not if it did so at an appropriate time.

We will therefore review the submissions of the parties on their motions for summary judgment to determine whether the trial court erred in granting summary judgment to FNH on May 12, 1997.

a. Standard of Review

On review of an order for summary judgment, an appellate court owes no deference to the trial court. ***Waters v. United States Fidelity & Guar. Co.,*** 124 Wis.2d 275, 278, 369 N.W.2d 755, 757 (Ct. App. 1985). We note that a trial court's decision granting summary judgment will be reversed if it incorrectly decided legal issues or if material facts were in dispute. ***Coopman v. State Farm Fire and Cas. Co***., 179 Wis.2d 548, 555, 508 N.W.2d 610, 612 (Ct. App. 1993). We review a motion for summary judgment using the same methodology as the

trial court. ***M&I First Nat'l Bank v. Episcopal Homes Management, Inc***., 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995); § 802.08(2), STATS. That methodology is well known, and we will not repeat it here except to note the following principles:

> On summary judgment the moving party has the burden to establish the absence of a genuine, that is, disputed, issue as to any material fact. On summary judgment the court does not decide the issue of fact; it decides whether there is a genuine issue of fact. A summary judgment should not be granted unless the moving party demonstrates a right to a judgment with such clarity as to leave no room for controversy; some courts have said that summary judgment must be denied unless the moving party demonstrates his entitlement to it beyond a reasonable doubt. Doubts as to the existence of a genuine issue of material fact should be resolved against the party moving for summary judgment.
>
> The papers filed by the moving party are carefully scrutinized. The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion. If the movant's papers before the court fail to establish clearly that there is no genuine issue as to any material fact, the motion will be denied. If the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance, it is improper to grant summary judgment.

Grams v. Boss, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 477 (1980).

b. Misrepresentation Claims

To prove an intentional misrepresentation, Brogleys must establish the following: "(1) a false representation of fact; (2) made with intent to defraud and for the purpose of inducing another to act upon it; and (3) upon which another did in fact rely and was induced to act, resulting in injury or damage." ***D'Huyvetter v. A.O. Smith Harvestore Products,*** 164 Wis.2d 306, 320, 475 N.W.2d 587, 592 (Ct. App. 1991). The Brogleys' negligent and strict responsibility misrepresentation claims require them to "show that the defendant

made a representation of fact, that the representation was untrue, and that the plaintiff believed the representation and relied upon it to his or her detriment." ***Consolidated Papers, Inc., v. Dorr-Oliver, Inc.***, 153 Wis.2d 589, 593, 451 N.W.2d 456, 459 (Ct. App. 1989).

FNH claims there is no factual dispute that Brogleys cannot establish an element that is common to all three types of misrepresentation claims—a false representation of fact. According to FNH, even if its agent told Brogleys that Wisconsin law precludes FNH from granting them a Ford tractor franchise because of the proximity of their business to Grant Equipment, the statement is not actionable because it is an opinion on the law and not a statement of past or existing fact. *See* ***id.*** at 594, 451 N.W.2d at 459. We conclude, however, that the statement is actionable because, although it includes the word "law," the statement is actually one of fact: that there is either a statute or case law in Wisconsin that prohibits a grantor from establishing competing dealers in close proximity to one another. *See* RESTATEMENT (SECOND) OF TORTS § 545, 97-100 (1977); *also see* ***Nelson v. Taff***, 175 Wis.2d 178, 182-85, 499 N.W.2d 685, 687-88 (Ct. App. 1993).

FNH also argues, however, that the misrepresentation claims must fail as a matter of law because it is undisputed that its agent never told Brogleys that Wisconsin law precludes FNH from awarding Grant Equipment a New Holland contract. The deposition excerpts submitted on summary judgment show that Brogleys "surmised" the parallel result from what they were allegedly told regarding the impossibility of their receiving a Ford contract while Grant Equipment remained a Ford dealer. We agree with Brogleys that FNH cannot avoid liability for the reasonable inferences or implications which may flow from

a false representation by its agent. *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 525, 57 cmt. e (1977):

> To be actionable, a misrepresentation of fact must be one of a fact that is of importance in determining the recipient's course of action at the time the representation is made. Thus a statement that a horse has recently and consistently trotted a mile in less than two minutes may justifiably be taken as an implied assertion of the capacity of the horse to repeat the performance at the time the statement is made.

The trial court originally concluded that Brogleys' misrepresentation claims involved disputed issues of material fact, and we agree with that conclusion. Whether Terry Fix made false representations to the Brogleys, and whether the Brogleys then acted, to their detriment, in justifiable reliance on those representations, are factual questions for a jury to decide. The trial court erred when it reversed its original ruling and dismissed Brogleys' misrepresentation claims.[5]

c. Wisconsin Fair Dealership Law Claim

Section 135.04, STATS., requires a grantor, such as FNH, to "provide a dealer at least 90 days' prior written notice of … [a] substantial change in competitive circumstances." The trial court originally concluded, largely on the basis of Steven Brogley's uncontroverted averments, that the award of a New Holland contract to Grant Equipment would significantly reduce Cushman's potential sales of New Holland implements, and its profit margins, and that FNH

[5] In their amended complaint, Brogleys allege only that they had "suffered substantial damage" as a result of FNH's misrepresentations, without specifying a theory of damages. Brogleys asserted in their offer of proof on May 12, 1997, that they would show at trial that, if they had known Grant Equipment could become a New Holland dealer, they would have paid $40,000 less for the Cushman dealership, and that the sellers would have accepted the lower price. Thus, they claim that their misrepresentation claims should survive even if we were to rule that Brogleys may not proceed with a claim of damages for lost Ford tractor sales.

had thus violated § 135.04 as a matter of law. FNH argued in the trial court that whether changes in the New Holland dealership network which placed Brogleys' nearest New Holland competitor within five miles, instead of twelve miles, constituted a "substantial change in competitive circumstances," was a factual matter for the jury to decide. We agree, and conclude that the trial court erred both when it granted Brogleys' motion for partial summary judgment on the WFDL claim and when it reversed itself and dismissed the claim entirely.[6]

In its brief on appeal, FNH offers four reasons why we should affirm the dismissal of Brogleys' WFDL claim: (1) as a matter of law, there was no "substantial change in competitive circumstances"; (2) Brogleys lacked a viable damages theory; (3) the holding in ***Jungbluth v. Hometown, Inc.***, 201 Wis.2d 320, 548 N.W.2d 519 (1996), should be applied only prospectively; and (4) judicial estoppel.

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[6] We note that Brogleys argue on appeal that the trial court never reversed its earlier partial summary judgment declaring FNH to have violated the WFDL, and that the court's action on May 12, 1997, constituted only a summary judgment in favor of FNH on the issue of damages for that violation. We disagree with this characterization of the trial court's actions. Following the court's May 12 rulings, Brogleys' counsel drafted and submitted a judgment providing that "plaintiffs' amended complaint is dismissed on its merits, with prejudice." In a letter which followed the submission of the proposed judgment counsel informed the court:

> I drafted the proposed judgment based on my understanding that it was your intention to dismiss all claims in the action, including the misrepresentation claims, and the claim for the actual costs of the action (including reasonable actual attorney fees) arising from your partial summary judgment that defendant violated sec. 135.04, Stats. If that was not your intention, please schedule a hearing for the determination of costs to be awarded to plaintiffs pursuant to sec. 135.06, and a conference on when a jury trial of the misrepresentation claims should occur.

The trial court entered the submitted judgment on May 14, 1997, without scheduling any further proceedings. We conclude, therefore, that the trial court intended to and did reverse its prior partial summary judgment in favor of Brogleys, and granted complete relief to FNH by dismissing all claims against it.

FNH's first argument is based on an admission by Brogleys' counsel that Cushman's sales of New Holland implements increased in the years following Grant Equipment's entry into the New Holland line, which, according to FNH, negates any possibility that Brogleys can show that there had been a substantial change in competitive circumstances. Counsel's actual statement in response to a question from the court during the May 12, 1997 argument on FNH's motions was as follows: "They [Cushman's sales of New Holland equipment] did increase and they increased by half of what they would have increased had not the competitor been down the road." This statement does not negate, and in fact is consistent with, Steve Brogley's averment that Grant's entry as a competitor "reduced Scott Implement's potential sales of New Holland farm equipment by about half."

The parties have not referred us to a comprehensive definition of the term "substantial change in competitive circumstances." The supreme court in ***Jungbluth*** concluded that the circuit court, after a bench trial, had properly found that a grantor's seven-month remodeling project at a service station, which "inhibit[ed] [the dealer's] ability to operate his dealership on a daily basis" was included within the statutory term. ***Jungbluth***, 201 Wis.2d at 335, 548 N.W.2d at 525. In ***Van v. Mobil Oil Corp.***, 515 F. Supp. 487 (E.D. Wis. 1981), a dealer's claim survived a defense motion for summary judgment when the Federal District Court deemed a change in credit terms which required a dealer to pay cash for deliveries of gasoline, to be a substantial change in competitive circumstances in that it affected the dealer's "ability to stay in business." ***Id.*** at 491. And, the United States Court of Appeals, Seventh Circuit, has commented that the term in the WFDL "may … protect dealers against new competition that has substantially adverse although not lethal effects," noting further that:

> [t]he [WFDL] is primarily designed to benefit existing dealers … and what most dealers fear more than anything

> else is that the franchisor will increase the amount of intrabrand competition by placing new outlets … too close to the existing outlets for comfort.

Remus v. Amoco Oil Co., 794 F.2d 1238, 1241 (7th Cir. 1986).

Steven stated in his affidavit that, in order to compete with Grant Equipment, Scott Implement had been required "to reduce its profit margin on the sale of New Holland farm equipment to slightly above cost. This has had and will continue to have a devastating effect on Scott Implement's profitability and has significantly reduced Scott Implement's chances of economic survival." The last statement is perhaps more opinion than evidentiary fact, but FNH submitted no materials which refuted Steven's statements regarding the loss of potential New Holland equipment sales and the reduction of profit margins. FNH did, however, establish in the summary judgment record that the award of a New Holland contract to Grant Equipment did not increase the overall number of New Holland dealers in Grant County, but only resulted in a rearrangement of dealers which placed Cushman seven miles closer to its nearest direct competitor.

Thus, while each party submitted certain uncontroverted facts, the inferences which may be drawn from those facts are very much in dispute. In short, the record on summary judgment was insufficient to establish that the undisputed facts, and the reasonable inferences from those facts, entitled either party to judgment as a matter of law. We, therefore, adopt FNH's assertion in its trial court brief that "[o]nly a jury can decide if this 7 mile difference was a [substantial] change in the [Brogleys'] competitive circumstances."[7]

[7] On May 12, 1997, FNH's counsel, in arguing for reconsideration of the partial summary judgment on the WFDL claim, also told the court:

(continued)

FNH next argues that, even if Brogleys were to succeed in establishing that the award of a New Holland contract to Grant Equipment substantially changed their competitive circumstances, they could not claim damages for lost Ford tractor sales as a result because Brogleys had no dealership contract with FNH for the sale of Ford tractors. The trial court seems to have adopted this view when it dismissed all of Brogleys' claims on May 12, 1997. We reject the argument, however, inasmuch as the damages a dealer may recover for a grantor's violations of the WFDL are not limited by the statute to losses stemming from lost sales of the grantor's products.

Under § 135.06, STATS., a dealer may recover "for damages sustained by the dealer as a consequence of the grantor's violation," together with the dealer's actual costs, including "reasonable actual attorney fees." The supreme court noted in ***Jungbluth*** that "the statutory notice requirement provided in § 135.04 is designed to afford the dealership the opportunity to react and protect itself from the potentially devastating affects [sic] of an overreaching grantor." ***Jungbluth,*** 201 Wis.2d at 331, 548 N.W.2d at 523-24. The court also quoted with approval the following language from ***St. Joseph Equip. v. Massey-Ferguson, Inc.***, 546 F. Supp 1245, 1249 (W.D. Wis. 1982):

> Even in cases such as this one, where there are no deficiencies for a dealer to cure, it furthers the Act's policy of fairness in business relations to require the grantor to provide the dealer with notice of an impending change in his business circumstance. For even if the dealer is without

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> The issue of a change in competitive circumstances, that's what you have to give notice of, that was not addressed in your decision. That is a question of fact, of whether or not there was a change in competitive circumstances, that the jury must decide; in other words, moving New Holland from a position 12 miles away to a position 5 ½ miles away constitutes a change in competitive circumstances. That's a fact question for the jury, not a question of law….

> power to rectify the problem and forestall future changes in his business operations, fairness would provide him with a reasonable opportunity to arrange for the orderly accomplishment of whatever changes are to be wrought including, if necessary, the investigation of new dealership opportunities.

Jungbluth, 201 Wis.2d at 332, 548 N.W.2d at 524. We conclude, therefore, that a dealer in Brogleys' position is not limited to claiming damages based on lost sales of the grantor's product, but may seek to recover for other losses sustained on account of the grantor's failure to give notice of a substantial change in competitive circumstances, including a lost opportunity to acquire another product line.

FNH argued in the trial court that Brogleys' claim for damages based on lost sales of Ford tractors was highly speculative, but it does not renew that argument on appeal. We acknowledge that Brogleys face a formidable task in establishing that a two-year-old, multi-party transaction[8] could have been resurrected and consummated, especially since it appears that the Potosi dealer had since agreed to a different disposition of its New Holland contract. In addition to showing that the 1993 deal could have been put back together, Brogleys would have to show that this "missed opportunity" was causally related to either FNH's alleged misrepresentation or to its failure to notify them of the impending Grant Equipment New Holland dealership. But, these are matters of proof, and we do not decide issues of fact on summary judgment. The question before us is whether Brogleys are precluded by law on the present record from attempting to prove they were damaged by FNH's acts or omissions, and we conclude they are not.

[8] *See* n.4, above.

We next consider whether Brogleys' WFDL claim must fail, as FNH argues, because the supreme court's 1996 holding in ***Jungbluth*** should not be applied to FNH's failure in 1995 to give advance notice to Brogleys of the impending Grant Equipment New Holland contract. This court held in 1995 that no notice under § 135.04, STATS., was required for any action by a grantor that was permitted under its agreement with a dealer. ***Jungbluth***, 192 Wis.2d 450, 531 N.W.2d 412 (Ct. App. 1995). There is no dispute that FNH's contract with Cushman did not preclude it from awarding Grant Equipment a New Holland franchise, and thus, FNH argues, it did not violate the WFDL in 1995 as the statute was then interpreted. Nothing in the supreme court's ***Jungbluth*** decision, however, limits its holding to future applications. Only that court, and not this one, may adopt such a limitation. ***Jacque v. Steenberg Homes, Inc.***, 209 Wis.2d 605, 624, 563 N.W.2d 154, 158 (1997) (prospective application of a judicial holding is question of policy to be determined by the supreme court).

Finally, we address FNH's claim that Brogleys should be judicially estopped from proceeding with their WFDL claim because, after they had obtained a partial summary judgment from the trial court on this claim, they sought to take a position inconsistent with the one upon which they obtained the favorable summary judgment ruling. That is, according to FNH, Brogleys obtained partial summary judgment based on their claim that the newly awarded Grant Equipment New Holland contract adversely impacted Cushman's sales of New Holland

implements, but at trial, the plaintiffs were seeking to recover damages on a completely different theory, lost Ford tractor sales.[9]

Judicial estoppel "is intended 'to protect against a litigant playing fast and loose with the courts by asserting inconsistent positions.'" ***State v. Petty***, 201 Wis.2d 337, 347, 548 N.W.2d 817, 820 (1996) (quoted source and internal quotation marks omitted). The doctrine requires a showing that a party has "asserted irreconcilably inconsistent positions" and that the party has "intentionally manipulated the judicial system." ***Id.*** at 353, 548 N.W.2d at 823. We conclude that neither has occurred here. As we have discussed above, Brogleys did not abandon their claim that the Grant Equipment New Holland contract represented a substantial change in competitive circumstances because it adversely affected their potential future sales of and profits from New Holland equipment. Rather, based on information learned through discovery, Brogleys altered only their theory of how, and by how much, they were damaged by the failure to receive advance notice of the Grant Equipment contract.[10]

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[9] FNH also argues that judicial estoppel should be applied to Brogleys' misrepresentation claims, but it points to no favorable ruling on these claims in the trial court that was premised on a position that was later allegedly abandoned by Brogleys. The trial court's initial denial of FNH's motion for summary judgment on the misrepresentation claims was based on the court's conclusion that the elements of those claims were the subject of factual disputes. That conclusion is not undermined by Brogleys' purported intention to establish at trial that additional false representations were made by FNH. While FNH may seek evidentiary sanctions for what it considers to be a previously undisclosed basis for Brogleys' misrepresentation claims, there is no basis in the record for us to affirm the dismissal of the misrepresentation claims under the doctrine of judicial estoppel.

[10] We also note that our disposition takes from Brogleys any benefit they may have obtained in the trial court from the position FNH claims they intended to abandon at trial. We remand for trial, among others, the issue of whether FNH's award of the New Holland contract to Grant Equipment constituted a substantial change in Cushman's competitive circumstances. Thus, the judicial system has not been manipulated into conferring any benefit on Brogleys as a result of the position they took when seeking partial summary judgment on their WFDL claim.

CONCLUSION

We conclude that the trial court erred when it dismissed Brogleys' amended complaint. We therefore need not address whether the court erroneously exercised its discretion in reconsidering FNH's summary judgment motions on the morning of trial. We also conclude that Brogleys are not entitled to partial summary judgment on their WFDL claim, and order that the case be remanded for trial of all issues. To the extent that the judgment appealed from vacates the trial court's earlier partial summary judgment in favor of Brogleys, it is affirmed. In all other respects, the judgment is reversed.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.