COURT OF APPEALS
DECISION
DATED AND FILED

December 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2980 **Cir. Ct. No. 2007CV631**

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

AMERICAN CUSTOM SURFACING, LLC,

PLAINTIFF-COUNTER DEFENDANT-APPELLANT,

BRIAN MCDONALD, BY THE BANKRUPTCY ESTATE OF BRIAN MCDONALD, AND DARREN KARMAN, BY THE BANKRUPTCY ESTATE OF DARREN KARMAN,

PLAINTIFFS-APPELLANTS,

V.

MANITOWOC CRANES, INC., D/B/A MANITOWOC CRANE GROUP,

DEFENDANT-COUNTER CLAIMANT-RESPONDENT,

LOYD SANDIDGE,

DEFENDANT.

APPEAL from an order of the circuit court for Manitowoc County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed in part, reversed in part, and cause remanded.*

Before Vergeront, Higginbotham and Sherman, JJ.

¶1 VERGERONT, J. American Custom Surfacing, LLC ("American") and two of its members, Brian McDonald and Darren Karman, appeal an order of the circuit court dismissing on summary judgment their claims for negligent, intentional, and strict liability misrepresentation against Manitowoc Cranes, Inc. d/b/a Manitowoc Crane Group ("Crane"). On appeal American, McDonald, and Karman contend the circuit court erred in concluding that the undisputed facts show that certain elements of the misrepresentation claims were not established. McDonald and Karman also contend the circuit court erred in concluding that the undisputed facts show they did not suffer harm separate from the harm suffered by American.

¶2 We conclude issues of fact preclude summary judgment on whether certain representations fall within an exception to the "present fact" requirement for misrepresentation claims and preclude summary judgment on whether American justifiably relied on the representations. Accordingly, we reverse and remand American's claims for further proceedings. However, because we conclude the harm alleged by McDonald and Karman is a harm to American and not a harm to McDonald and Karman individually, we affirm summary judgment against McDonald and Karman on their individual claims.

BACKGROUND

¶3 Crane manufactures and sells cranes worldwide. At the time of the events giving rise to this action, American was a small commercial painting company organized as a limited liability company. Ninety percent of American was owned by Brian McDonald and Darren Karman.

¶4 In 2005 Crane decided to use outside vendors to meet increased production demands. Crane and American began discussing a business relationship whereby American would prepare, paint, and assemble crane booms and parts for Crane. According to American's submissions, in January 2006, American reached an oral agreement with Crane whereby Crane would provide American with 54,600 hours of painting per year over the next three to five years, with American to undertake a three-stage "ramping up" process during the first year to meet this demand.

¶5 The parties signed a Letter of Intent in February 2006. This document stated that it was valid for a period of one year. Crane agreed to provide American with at least 10,000 hours of work per year, and American agreed to provide a facility with a minimum of 22,000 square feet of production area, to be increased by an additional 50,000 square feet by March 1, 2007, in order to meet Crane's future growth.

¶6 According to American's submissions, Crane told American the Letter of Intent was not an agreement; it was meant only to support American's application for first-stage financing and it reflected only the first part of a larger oral agreement. In contrast, Crane's position is that there was no oral agreement; rather, the parties' obligations were completely defined by the Letter of Intent and a second agreement executed in January 2007 titled "Supply Agreement." Crane contends it complied with its obligations under these two agreements.

¶7 The Supply Agreement was executed in January 2007 and governed the parties' relationship until the relationship ended in August or September 2007. According to American's submissions, American entered into this agreement after

it became clear that Crane was unable to send American the amount of work it had promised.

¶8 After the relationship between the parties deteriorated, American, McDonald, and Karman sued Crane for breach of an oral contract and negligent, intentional, and strict liability misrepresentation, as well as other claims not relevant to this appeal. With respect to American's misrepresentation claims, the first amended complaint alleged that Crane falsely represented the amount of painting work it needed to outsource, and this misrepresentation induced American to sign the Letter of Intent. The complaint also alleged that Crane falsely represented, after the Letter of Intent was signed, that it had additional work for American to perform, and this misrepresentation induced American to expand its production capacity earlier than required by the Letter of Intent. McDonald's and Karman's misrepresentation claims were premised on allegations that they relied on Crane's false representations when they made personal expenditures to support American's growth.

¶9 Crane moved for summary judgment. The circuit court concluded as a matter of law that, after the Letter of Intent was signed, the Letter of Intent and then the Supply Agreement constituted the parties' contract and there was no oral contract. Evidently, American did not contend that Crane breached the terms of either of these agreements.[1]

[1] The court denied summary judgment on American's contract claim insofar as it covered work American did before the Letter of Intent was signed, and the parties subsequently stipulated to dismissal of this claim.

¶10 The circuit court granted summary judgment on the misrepresentation claims for two reasons. First, the court held that any representation that Crane would provide a certain amount of work over the next several years was a promise of future performance, not a representation of present fact, and therefore it could not be the basis of a claim for misrepresentation. Second, the court concluded that reliance on representations that were inconsistent with the terms of the Letter of Intent was not justifiable.

¶11 As for McDonald's and Karman's individual claims for misrepresentation, the court concluded that these are claims of the limited liability corporation.

¶12 American, McDonald, and Karman appeal the portion of the circuit court's order granting summary judgment in favor of Crane on their misrepresentation claims. They do not appeal the court's grant of summary judgment on American's contract claim.

DISCUSSION

¶13 American, McDonald, and Karman contend the circuit court erred when it granted summary judgment on their misrepresentation claims. They assert that the representations on which they relied were statements of present fact, and, to the extent the statements were of future events, issues of fact remain whether the representations fall within exceptions to the "present fact" requirement. They also contend the circuit court erroneously concluded there was no factual dispute regarding whether American, McDonald, and Karman justifiably relied on the representations. As to the individual claims, McDonald and Karman contend the court erred in dismissing these claims because they suffered harm separate from the harm suffered by American.

¶14 Crane responds that it "is legally irrelevant" whether the representations attributed to it were of present fact because, based on the undisputed facts, American's reliance on the representations was unjustified.[2]

¶15 We review a grant of summary judgment de novo, applying the same methodology as the trial 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 disputed issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2009-10).[3] In deciding whether there are factual disputes, the court is to consider whether more than one reasonable inference may be drawn from undisputed facts; if so, the competing reasonable inferences may constitute a genuine issue of material fact. ***H&R Block E. Enters., Inc. v. Swenson***, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421 (citation omitted). Whether an inference is reasonable and whether more than one reasonable inference may be drawn are questions of law, which we review de

[2] Crane also argues that American's misrepresentation claims were not pled "with particularity," and thus American failed to state a claim for relief. Crane made this argument to the circuit court in its motion to dismiss, and the circuit court rejected the argument. It is true that whether a complaint states a claim for relief is the first step in summary judgment methodology. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 339, 294 Wis. 2d 473 (1980). However, Crane does not develop an argument explaining the legal standard for analyzing a complaint in order to determine if it states a claim for relief, the particular relevant allegations in the amended complaint, and the elements of the claims. In addition, Crane mixes this argument with contentions that American's proofs and arguments on the misrepresentations are "vague" and "shifting." These latter contentions require analyses that are different from each other and different from a determination on the adequacy of the complaint; and the requisite analyses are lacking. Accordingly, we do not separately address the arguments made in Section VI-C of Crane's brief. *See* ***Hennig v. Ahearn***, 230 Wis. 2d 149, 173, 601 N.W.2d 14 (Ct. App. 1999) (citation omitted) (we may decline to review an inadequately briefed issue).

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

novo. *See* ***Pum v. Wisconsin Physicians Serv. Ins. Corp.***, 2007 WI App 10, ¶6, 298 Wis. 2d 497, 727 N.W.2d 346 (citations omitted).

¶16 In the following sections, we first address American's misrepresentation claims and conclude the circuit court erred in dismissing these claims with respect to representations made before the Letter of Intent was signed. We next address McDonald's and Karman's misrepresentation claims and conclude the circuit court correctly granted summary judgment on these claims.

I. American's Misrepresentation Claims

¶17 Wisconsin recognizes three categories of misrepresentation: intentional, negligent, and strict responsibility misrepresentation. ***Tietsworth v. Harley-Davidson, Inc.***, 2004 WI 32, ¶12, 270 Wis. 2d 146, 677 N.W.2d 233 (citation omitted). These three claims share the following elements: (1) the defendant made a representation of fact to the plaintiff; (2) the representation of fact was false; and (3) the plaintiff believed the representation and justifiably relied on it to his or her detriment or damage. In addition to these three elements, each of the three types of misrepresentation claims has other elements. ***Id.***, ¶13.[4]

[4] A claim for intentional misrepresentation requires that the defendant made the misrepresentation with knowledge that it was false or recklessly without caring whether it was true or false, and the defendant must have made the misrepresentation with intent to deceive and to induce the plaintiff to act on it to his detriment or damage. ***Tietsworth v. Harley-Davidson, Inc.***, 2004 WI 32, ¶13, 270 Wis. 2d 146, 677 N.W.2d 233. A claim for negligent misrepresentation requires that the defendant failed to exercise ordinary care in making a misrepresentation or in ascertaining the facts. ***Ollerman v. O'Rourke Co. Inc.***, 94 Wis. 2d 17, 25, 288 N.W.2d 95 (1980) (citing ***Whipp v. Iverson***, 43 Wis. 2d 166, 169-70, 168 N.W.2d 201 (1969)). This claim also requires a duty of care or voluntary assumption of a duty. ***Id.*** Finally, a claim for strict responsibility misrepresentation requires that the misrepresentation was "made on the defendant's personal knowledge or under circumstances in which he necessarily ought to have known the truth or untruth of the statement and the defendant must have an economic interest in the transaction." ***Id.***

¶18 According to American, Crane made representations to it both before and after the Letter of Intent was signed that were false and on which it justifiably relied to its detriment. We separately address these two categories of representations.

A. Misrepresentations before the Letter of Intent

1. False Representations of Present Fact

¶19 In this section we consider together the first two elements common to the misrepresentation claims: whether Crane made false representations of fact to American before the Letter of Intent was signed.

¶20 As a general rule, representations that form the basis of a misrepresentation claim must relate to present or pre-existing facts or events and cannot be merely unfulfilled promises or statements of future events. ***Hartwig v. Bitter***, 29 Wis. 2d 653, 656, 139 N.W.2d 644 (1966). However, this general rule is subject to certain exceptions. As relevant here, claims of misrepresentation based on statements of future events are permitted when the speaker knew of facts incompatible or inconsistent with the statement when he or she made it. ***Id.*** at 658. In essence, this exception addresses both the "representation of fact" element and the element of falseness.

¶21 In ***Hartwig*** the court applied this exception to a representation to the plaintiffs that real estate sales by them to certain "prospects" would "result in earning large sums of money." ***Id.*** at 655, 658-59. The court reached this conclusion because, although the statement related to future events, there were allegations that the defendant knew that "nine previous salesmen over a period of four years had grossed commissions not in excess of $752.50." ***Id.*** at 659.

¶22 American contends that the representations by Crane that induced it to enter into the Letter of Intent are either representations of pre-existing fact or fall within the exception for statements of future events made when the speaker knew of facts inconsistent with the statement. We do not address the pre-existing fact argument because we conclude there are factual disputes requiring a trial on the applicability of the exception for statements of future events made with knowledge of inconsistent facts.[5]

¶23 American's submissions show the following three representations were made to American on more than one occasion:

- At multiple meetings during November and December 2005 and January 2006, Lloyd Sandidge, the then-Superintendent of Test, Paint, Load and Assembly for Crane, represented to American that, based "on present and projected demand for outsourced painting work," Crane needed to outsource painting work at the rate of 54,600 hours per year, an average of 4,550 hours monthly, by the end of 2006.

- Throughout this same period, Sandidge represented that Crane would need to outsource 54,600 hours of painting work from the end of 2006 through 2008, and potentially through 2010.

[5] Another exception to the general rule of present or pre-existing facts or events is the situation in which the speaker has a present intention not to perform the promise when the promise is made. ***Hartwig v. Bitter***, 29 Wis. 2d 653, 658, 139 N.W.2d 644 (1966). American argues that there are factual disputes concerning this exception, too. However, we need not address this exception because we conclude there are factual disputes concerning the exception for statements of future events made with knowledge of inconsistent facts.

- Crane represented, through Sandidge's repeated statements during November and December 2005 and January 2006, that American could expect the rate of outsourced painting work to increase each year at the rate of thirty percent for the next three to five years.

¶24 American contends that, when Sandidge made these statements about Crane's future need to outsource painting work, Sandidge had knowledge of facts that were contrary to these statements. Specifically, American relies on Sandidge's deposition testimony that the only way he was kept informed of the potential hours that were needed for paint outsourcing was by consulting a capacity plan prepared by another Crane employee. The testimony was that the capacity plan was updated and distributed each week. The capacity plan in the record is dated December 26, 2005. A reasonable inference from the plan is that the painting work that needed to be outsourced during 2006 was significantly less than the 54,600 hours that, according to American's submissions, Sandidge represented. In addition, American also relies on an email sent by Sandidge to other Crane employees, dated January 10, 2006, stating that Crane needed to outsource only 7500 hours of work in 2006.

¶25 We conclude that, although the only capacity plan in the record is dated December 26, 2005, it is reasonable to infer that the capacity plans that were prepared for November and earlier in December were inconsistent with the representations that Sandidge made at meetings before December 26 and that Sandidge knew this. We also agree with American that, although the capacity plan and Sandidge's email address Crane's needs for 2006, there is a reasonable inference that these are inconsistent with the representations Sandidge made for the years after 2006 and that Sandidge knew this. Accordingly, we conclude that the submissions are sufficient to raise issues of fact whether Sandidge knew of

facts inconsistent with these representations: that Crane needed to outsource painting work at the rate of 54,600 hours per year by the end of 2006; that Crane anticipated a need to outsource 54,600 hours per year from 2006 to 2008, or potentially 2010; and that Crane anticipated increases in outsource painting work at the rate of thirty percent per year.

¶26 In summary, there are material issues of fact whether the representations we have identified come within the exception to the "present fact" requirement for statements of future events made with knowledge of inconsistent facts. Thus, there are disputed issues of fact on the first two elements that are common to all three misrepresentation claims.

2. Justifiable Reliance

¶27 The third element common to all three misrepresentation claims is that the plaintiff believed the representation and justifiably relied on it to his or her detriment or damage. ***Tietsworth***, 270 Wis. 2d 146, ¶13. Negligent reliance is not justifiable. *See* ***Bank of Sun Prairie v. Esser***, 155 Wis. 2d 724, 732, 456 N.W.2d 585 (1989) (citations omitted).

¶28 Crane makes two arguments in support of its contention that the undisputed facts show that American's reliance was not justified. First, Crane contends that American could not have justifiably relied on any representations because the alleged representations differ from the subsequently executed Letter of Intent. In the alternative, Crane contends that American's reliance was unjustified because Crane had previously rejected two proposals submitted by American whereby Crane would provide American with more hours of painting work than provided for in the Letter of Intent. For the following reasons, we reject both arguments.

¶29 In support of its first argument, Crane cites ***Amplicon, Inc. v. Marshfield Clinic***, 786 F. Supp. 2d 1469 (W.D. Wis. 1992), the case on which the circuit court relied in concluding there was no justifiable reliance. In ***Amplicon***, a lessor sued for breach of a lease agreement and the lessee raised fraud in the inducement as a defense. ***Id.*** at 1470. The lessee asserted that, prior to the signing of the lease agreement, the lessor told the lessee that no deposit or interim rent was required under the agreement. ***Id.*** at 1475. The lease agreement, however, plainly provided that the lessee would pay interim rent and a deposit. ***Id.*** at 1479. The lease also contained two merger clauses, which stated that the lease agreement was the complete agreement between the parties and no representation was binding unless made part of the lease by addendum. ***Id.*** at 1476. In light of the merger clauses in the lease and the fact the representations directly contradicted the written agreements, the ***Amplicon*** court held that reliance on the representations was not justified as a matter of law. ***Id.*** at 1478.

¶30 Although we are not bound by federal court cases on matters of Wisconsin law, we may consider them for their persuasive value. ***Kaloti Enters., Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶23, 283 Wis. 2d 555, 699 N.W.2d 205 (citation omitted). We do not find ***Amplicon***'s reasoning persuasive here for two reasons.

¶31 First, a significant fact underlying the federal court's reasoning is not present in this case. The Letter of Intent does not contain a merger clause, as did the contract in ***Amplicon***.

¶32 Second, and more fundamentally, ***Amplicon*** does not discuss Wisconsin law and appears to apply a rule of law that is inconsistent with Wisconsin law. Under Wisconsin law the existence of a contract does not, as a

matter of law, require the conclusion that a party cannot justifiably rely on representations made before a contract is entered into that are inconsistent with the terms of the contract. In ***Bank of Sun Prairie***, 155 Wis. 2d at 727-29, the signatory of a personal guarantee defended against enforcement and filed a counterclaim alleging that she had been fraudulently induced to sign the guarantee. The supreme court rejected the bank's argument that the claim of misrepresentation was barred as a matter of law because the guarantor admitted she had not read the entire guarantee and the alleged misrepresentations were inconsistent with the terms of the guarantee. ***Id.*** at 732-34. Instead, the court stated, all circumstances must be considered and, in the case before it, the issue of justifiable reliance on the representations was an issue for the jury. ***Id.*** at 734; *see also* ***Caulfield v. Caulfield***, 183 Wis. 2d 83, 92-94, 515 N.W.2d 278 (Ct. App. 1994) (relying on ***Bank of Sun Prairie*** in concluding that there were material factual disputes whether the signer of a note reasonably relied on representations that were inconsistent with the note); ***Hennig v. Ahearn***, 230 Wis. 2d 149, 170-72, 601 N.W.2d 14 (Ct. App. 1999) (relying on ***Bank of Sun Prairie*** in concluding that there were material factual disputes whether a party claiming misrepresentation reasonably relied on the silence of the other party to a contract who failed to disclose a change to the final draft).[6]

¶33 Thus, to the extent ***Amplicon*** adheres to a rule that, as a matter of law, there can be no justifiable reliance on representations that are made before a party enters into a contract and are inconsistent with the terms of the contract, that

[6] After briefing was complete, American brought to our attention an unpublished opinion, ***Johnson Bank v. Tiziani***, No. 2010AP3121, unpublished slip op. (WI App Oct. 13, 2011), which relies on ***Bank of Sun Prairie***. Crane filed a response. We conclude it is unnecessary to discuss ***Johnson Bank***.

rule is inconsistent with Wisconsin law. The proper inquiry under Wisconsin law is whether all the surrounding circumstances here create a factual dispute on the reasonableness of American's reliance on the misrepresentations that, according to its submissions, induced it to sign the Letter of Intent. *See* ***Hennig***, 230 Wis. 2d at 171 (citation omitted).[7]

¶34 Crane's second argument is that, even if we consider all the surrounding circumstances, the undisputed facts show that American's reliance on the representations was not justified. It is undisputed that, before the Letter of Intent was signed, American submitted two proposals to Crane whereby American offered to provide Crane with an amount of painting hours in excess of those identified in the Letter of Intent and Crane rejected both proposals. American's submissions show that Crane rejected the proposals because it was uncertain about the scheduling of some of the initial painting work. American's submissions also show that Sandidge told American that, despite the fact Crane rejected the initial proposals, Crane was still agreeing to reach the full 54,600-hour level of work by the end of the first year. Crane contends that the only reasonable inference from its rejection of these two initial proposals is that American knew or should have known that Crane would not have agreed to a ramping-up process that would

[7] As part of its argument that ***Amplicon, Inc. v. Marshfield Clinic***, 786 F. Supp. 2d 1469 (W.D. Wis. 1992), sets forth the correct law, Crane argues that the parol evidence rule bars the consideration of evidence extrinsic to the Letter of Intent and the Supply Agreement. The court in ***Amplicon*** ruled that the parol evidence rule barred consideration of the alleged misrepresentations to alter the terms of the contract; and it described the defendant's assertion of fraudulent inducement to achieve this same result as an "attempt[] to circumvent the parol evidence rule," an attempt the court rejected. ***Id.*** at 1476-78. However, the parol evidence rule is a substantive rule of contract law. ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶36, 330 Wis. 2d 340, 793 N.W.2d 476 (citations omitted). American's misrepresentation claims sound in tort. Accordingly, they are governed by tort law, not contract law, and the parol evidence rule is inapplicable.

increase the number of hours Crane would provide to American up to the amount of hours Crane had initially rejected.

¶35 We conclude that the inference Crane asks us to draw is not the only reasonable inference. It is also reasonable to infer from American's submissions that, although Crane did not agree initially to provide a greater amount of hours because it was concerned with the scheduling of the work, American reasonably believed that Crane would provide those hours by the end of the year after the scheduling issues were resolved.

¶36 We also observe that other evidence supports justifiable reliance by American on Crane's representations. For example, there is evidence that Sandidge told McDonald and Karman that the Letter of Intent was meant only to support American's application for first-stage financing; it was not meant to reflect the parties' entire agreement. If a jury accepted this evidence as true, it could conclude that American had a justifiable basis for relying on representations of future available work that were greater than those in the Letter of Intent.

3. *Conclusion*

¶37 In summary, with respect to representations made before the Letter of Intent, we conclude there are disputed issues of fact on each of the three elements common to all three of the misrepresentation claims. As we have already noted, the three types of misrepresentation claims—intentional, negligent, and strict responsibility misrepresentation—have elements in addition to the three we have discussed. *See* ***supra***, ¶17 n.4. However, the circuit court did not address those additional elements, and on appeal the parties do not develop arguments related to those elements. Accordingly, we reverse the grant of summary judgment on American's three misrepresentation claims without addressing the

additional and distinct elements of each claim. *See* ***Hennig***, 230 Wis. 2d at 173 (noting that on appeal we generally do not address issues that have not been specifically raised in the briefs and we may decline to review an inadequately briefed issue).[8]

B. Misrepresentations after the Letter of Intent

¶38 In addition to American's claim that it was induced by Crane's misrepresentations to enter into the Letter of Intent, American contends that, within six weeks after the Letter of Intent was signed, Crane made additional misrepresentations that induced American to expand its painting capacity sooner than the Letter of Intent required and that American did so to its detriment. We assume without deciding that American's submissions provide factual support for these assertions. We nonetheless conclude for the following reasons that American is not entitled to a reversal of summary judgment for misrepresentation claims based on these representations.

¶39 Crane's representations to American that it wanted to change the terms of the Letter of Intent and have American begin its expansion early and American's agreement to do so appear to be properly characterized as a modification of the Letter of Intent. In the context of this characterization, American is arguing that Crane's misrepresentations induced it to agree to a modification of the Letter of Intent. However, the circuit court concluded there were only two valid contracts: the Letter of Intent and the Supply Agreement (the

[8] We also observe that Crane may be arguing that it is not liable for any misrepresentation claims made by Sandidge. However, this argument is not developed and we therefore do not address it.

latter governing the parties' relationship at a later stage), and American did not appeal from that ruling. Thus, any argument that Crane's misrepresentations after the signing of the Letter of Intent induced American to agree to modify the Letter of Intent is inconsistent with the circuit court's ruling. American does not develop an argument explaining why it may present an argument on appeal that is inconsistent with a circuit court ruling it did not appeal.

¶40 It may be that American means to argue that it may recover on a misrepresentation claim based on representations made while a contract is in effect when the representations induced it to perform more work than the contract required, and that it may do so without regard to whether there was a modification of the contract. If this is American's argument, it provides no authority and no developed reasoning to support this legal proposition.

¶41 In the absence of a developed argument, we conclude that the misrepresentation claims based on representations made after the signing of the Letter of Intent were properly dismissed.

II. McDonald's and Karman's Individual Claims

¶42 The circuit court dismissed McDonald's and Karman's individual misrepresentation claims on the ground that the losses McDonald and Karman asserted were actually losses of the limited liability company and therefore McDonald or Karman could not bring the claims as individuals.

¶43 McDonald and Karman contend they both suffered individual losses shortly after the Letter of Intent was signed, when Sandidge and other Crane employees directed American to begin the second and third ramp-up stages. McDonald and Karman aver that, in response to the ramp-up orders, they resorted

to charging over $100,000 on credit cards in order to fund the accelerated ramp-up.

¶44 We agree with the circuit court that, based on the undisputed facts, McDonald and Karman did not suffer individual losses and, therefore, dismissal of their individual claims was proper.

¶45 The parties agree that WIS. STAT. § 183.0305 is applicable. This statute provides that "[a] member of a limited liability company is not a proper party to a proceeding by or against a limited liability company, solely by reason of being a member of the limited liability company[.]"[9] The misrepresentations asserted by McDonald and Karman are statements made by Crane to McDonald and Karman, as representatives of American, to induce American to increase its capacity to perform painting work. McDonald and Karman, as members of the LLC, chose to contribute to the LLC by making purchases with personal credit cards in order to support American's expansion. Any damages incurred after American's expansion due to Crane's alleged failure to provide American with the promised amount of work are damages suffered by American.

¶46 McDonald and Karman do not provide citations to any case law holding that members of an LLC can maintain individual misrepresentation claims on the basis of harm suffered by the members when the members chose to assume personal liability for expenditures used to expand the LLC's business. The only authority McDonald and Karman cite is ***Industrial Electronics Corp. of Wisconsin v. iPower Distribution Group Inc.***, 215 F.3d 677, 680-81 (7th Cir.

[9] The statute identifies exceptions to this general rule, but they are inapplicable here. *See* WIS. STAT. § 183.0305(1) & (2).

2000), which stands for the proposition that individuals fraudulently induced to invest in an LLC by a third party's misrepresentations about its interaction with that LLC can recover individually in tort. However, a claim of fraudulent inducement to make an initial investment in a company is significantly different than a claim that individuals who are already members of the LLC and own ninety percent of it were induced to make personal expenditures to expand the LLC.

¶47 Based on the argument and authority presented, we conclude McDonald's and Karman's claims of misrepresentation are based solely on their being members of American. Therefore, they cannot bring these claims as individuals.

¶48 Karman makes an additional argument in support of his contention that he suffered individual losses. He contends that the "representations made by Sandidge in late 2005 were a substantial part of the reason [he] decided to buy into [American] to begin with." Evidently, this is an effort to bring his individual claim within the reasoning of ***Industrial Electronics Corp.***

¶49 In support of this argument, Karman cites to his deposition in which he avers that "Defendant Loyd Sandidge met with Brian McDonald and me at [American]'s Clipper Drive facility in mid- to late-November 2005 to propose contracting with [American] to fill [Crane]'s unmet painting needs. Because I was only a prospective investor in [American] at this time, I wanted to hear directly from [Crane]'s representative whether a sufficient amount of work would be coming from [Crane] to warrant a substantial investment in [American]."

¶50 Assuming without deciding that Karman adequately pled this claim in the first amended complaint, we conclude that no reasonable jury could find, based on the above testimony, that Karman relied on Sandidge's representations when

Karman purchased his initial interest in American. The most this testimony shows is that, as a potential investor in American, Karman was interested in the amount of business Crane might potentially provide American.

CONCLUSION

¶51 We reverse the circuit court's dismissal on summary judgment of American's misrepresentation claims based on Crane's representations made prior to the signing of the Letter of Intent and remand to the circuit court for further proceedings. However, we affirm the circuit court's dismissal of American's misrepresentation claims based on Crane's representations made after the signing of the Letter of Intent. We also affirm the dismissal on summary judgment of Karman's and McDonald's individual misrepresentation claims.

By the Court.—Order affirmed in part, reversed in part, and cause remanded.

Not recommended for publication in the official reports.