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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
Sawyer County Case No. 22-CV-53

CRS PROPERTIES, LLC,
Plaintiff-Respondent,

v.

WILLIAM J. MOSSUTO &
LISA MOSSUTO,
Defendants-Appellants,

SAWYER COUNTY, Appeal No. 24-AP-1738
Defendant,

v.

CARL CHRISTENSEN,
CR CONTRACTING, LLC
& CAROL L. CHRISTENSEN,
Third-Party Defendants-Respondents.

ON APPEAL OF AN ORDER ON SUMMARY
JUDGMENT ENTERED AUGUST 29, 2024, THE
HONORABLE MONICA M. ISHAM PRESIDING

OPENING BRIEF AND APPENDIX

Lein Law Offices, LLP
Matthew Curtiss Lein
State Bar #1084028
Post Office Box 761
Hayward, WI 54843
(715) 634-4273

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ISSUES PRESENTED

- I. Whether the Circuit Court erroneously failed to address CRS Properties' misapplication of payments, which constituted a breach of the land contract and invoked the continuing violation doctrine.
- II. Whether the Circuit Court improperly resolved genuine issues of material fact in favor of CRS Properties, contrary to Wisconsin's summary judgment standards.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Mossutos welcome oral argument to clarify any questions this Court may have. Publication is not warranted since this case can be decided on existing precedent.

STATEMENT OF THE CASE AND FACTS

On June 28, 2013, a Land Contract was recorded through which William J. Mossuto agreed to purchase certain Property from CRS Properties for a total of \$65,000 at a 6% annual interest rate. (R. at 5:7-11 (the “Original Land Contract”).) Carl Christensen signed the Original Land Contract on behalf of CRS Properties and as a member of same. (R. at 5:10.) The only other member of CRS Properties is Carl’s wife, Carol Christensen. (R. at 120:9.)

As to collection and application of monthly payments, the Original Land Contract stated the Mossutos would pay:

Equal monthly payments of \$635.00 which represents principal and interest *plus an additional \$65.00 which represents property taxes and insurance*, for a total \$700.00 per month[.]

(R. at 5:7, *emphasis added*.)

Despite requiring the Mossutos to make a monthly payment of “\$65.00 *which represents property taxes and insurance*,” CRS Properties did not obtain insurance covering the structure built on the property – the Mossutos’ homestead. (R. at 5:4, 7.) So, when the home was destroyed in a 2014 fire, there was no active insurance policy to cover the loss. (R. at 5:4.)

To allow the Mossutos to rebuild their home, the parties recorded an Amendment to Land Contract to finance an additional sum of \$55,000.00. (R. at 5:12-13 (the “Amended Land Contract”).) The Amended Land Contract, which was recorded on February 4, 2015, indicated, “the total principal balance due under the terms of the land contract is \$120,000,” and raised the interest rate to 6.25% annually. (R. at 5:12.) The Amended Land Contract further required the Mossutos to pay for insurance and taxes as follows: **“Purchaser shall make an additional monthly payment of \$50.00 per month which shall be used for the payment of homeowner’s insurance and real estate taxes for a total of \$850.00 per month.”** (R. at 5:13, *emphasis added*.)

Despite the terms of the Original and Amended Land Contracts, CRS Properties continuously misapplied the Mossutos’ payments, misapplying \$650.00 related to the original land contract, and \$3,250.00 related to the amended land contract for taxes and insurance from the Mossutos. (R. at 123:5.) Due to the misapplication of the funds, the Mossutos were harmed in an amount of at least \$166,099.72 – the total of misapplied payments on the first and second land contract (\$3,900.00), the additional loan (\$57,450.00), additional interest paid (\$25,883.83), and future additional interest (\$78,865.89). (R. at 118:6; *citing* R. at 123:5-8.)

On May 26, 2022, CRS filed the underlying action for strict foreclosure of the premises and based on their allegation that the Mossutos failed to make certain payments due under the Amended Land Contract. (R. at 5.) Through their answer, the Mossutos alleged counterclaims against CRS Properties for intentional misrepresentation, strict responsibility misrepresentation, negligent misrepresentation, property loss through fraudulent misrepresentation, civil theft, slander of title, violation of WOCCA Wis.

Stat. § 946.87, declaratory judgment, and unjust enrichment. (R. at 37:11-21.) The Mossutos further alleged third-party claims against CR Contracting, LLC, Carl Christensen and Carol Christensen for breach of contract and civil theft. (R. 37:21-24.)

The Mossutos retained expert Bernard Jay Patterson, CFE, to review the relevant account and payments. (See, e.g., R at 123.) Through his calculations reproduced in the following portions of his affidavit, Mr. Patterson confirmed the amount of misapplied funds on the Mossutos' account:

ORIGINAL LAND CONTRACT:	
17. During the time period of the original Land Contract, Mossuto paid CRS a total of \$7,000.00 in principal, interest, taxes and insurance payments. These payments were intended to be applied as follows:	
To Principal & Interest:	\$6,350.00
To Taxes & Insurance:	\$650.00
TOTAL:	\$7,000.00
18. CRS applied these funds as follows:	
To Principal & Interest:	\$7,000.00
To Taxes & Insurance:	\$-0-
TOTAL:	\$7,000.00
19. According to my examination of CRS' payment ledger, CRS applied all of the payments (\$7,000.00) to principal and interest. Zero was applied or allocated to pay taxes and insurance.	
20. Even though CRS collected funds paid by Mossuto for insurance on the home, I did not find any payments made for insurance coverage. CRS asserts, "CRS believes it had insurance in place, but is not able to find any records at this time and will continue to search for the records." (See Interrogatory No. 9c response)	
21. Even though CRS collected funds paid by Mossuto for taxes on the property, CRS did not pay the property taxes on the property during the term of the original Land Contract. (See 9e Interrogatory No. 9 response)	

22. The table below shows the misapplied payments that were paid for insurance and taxes but were applied to other items of the loan:

Date	Misapplied Amount
09-30-13	\$65.00
10-12-13	\$65.00
12-07-13	\$65.00
02-01-14	\$65.00
03-01-14	\$65.00
04-09-14	\$65.00
05-14-14	\$32.50
06-09-14	\$65.00
07-07-14	\$32.50
08-04-14	\$32.50
09-04-14	\$32.50
10-08-14	\$32.50
11-01-14	\$32.50
TOTAL	\$650.00

AMENDED LAND CONTRACT:

23. According to my analysis, Mossuto paid \$55,830.00 to CRS on the Amended Land Contract between 04/01/2015 and 07/01/2021.

24. CRS applied all of the \$55,830.00 to principal and interest. None of these payments were allocated to pay taxes and insurance.

25. The table below shows the misapplied payments that were paid by Mossuto for insurance and taxes on the Amended Land Contract but were applied to other items of the loan:²

Year	Misapplied Amount:
2015	\$200.00
2016	\$550.00
2017	\$550.00
2018	\$600.00
2019	\$400.00
2020	\$700.00
2021	\$250.00
TOTAL:	\$3,250.00

(R. at 123:4-5)

In her deposition as a corporate representative of CRS Properties, Carol Christensen conceded the truth of the factual assertions underlying Mr. Patterson’s affidavit:

Deponent	Agree/Disagree	Paragraph of Bernard Jay Patterson Expert Report (R. 57)	R. 121
Corp. Rep. CRS - Carol Christensen	Agreed	18	p. 27, l. 4-10
Corp. Rep. CRS - Carol Christensen	Agreed	19	p. 27, l. 11-21
Corp. Rep. CRS - Carol Christensen	Agreed	20	p. 27, l. 22-25 and p. 28, l. 1-4
Corp. Rep. CRS - Carol Christensen	Agreed	21	p. 28, l. 5-10
Corp. Rep. CRS - Carol Christensen	Agreed	22	p. 36, l. 3-9
Corp. Rep. CRS - Carol Christensen	Agreed	23	p. 36, l. 10-19
Corp. Rep. CRS - Carol Christensen	Agreed	24	p. 36, l. 20-24
Corp. Rep. CRS - Carol Christensen	Agreed	25	p. 37, l. 25 and p. 38, l. 1-7

(R. at 121; R. at 57.)

Using the above concessions, Mr. Patterson concluded that if CRS Properties, LLC had applied the funds as required by the terms of the first land contract, and the taxes and insurance had been paid, the balance of the original land contract would be \$31,425.55. (R. at 134:4, ¶20.) Additionally, Mr. Patterson concluded that, because CRS Properties failed to properly apply the Mossuto's payments under the terms of the original contract, the Mossutos incurred actual damages as follows:

Damages Summary with Setoff Applied			
Misapplied Payments	1st LC	\$650.00	R. 57 at ¶ 22
	2nd LC	\$3,250.00	R. 57 at ¶ 23
Additional Loan		\$57,450.00	R. 57 at ¶ 32
Additional Interest Paid		\$25,883.83	R. 57 at ¶ 33
Future Additional Interest		\$78,865.89	R. 57 at ¶ 34
Total Damages		\$166,099.72	
Less: Current Outstanding Loan Balance of Land Contract 1		\$31,425.55	R. 134-4 at ¶ 20
Net Damages		\$134,674.17	

Given the above, the net damages the Mossutos sustained under their claims is \$134,674.17¹.

Damages Summary with Setoff Applied			
Misapplied Payments	1st LC	\$650.00	R. 57 at ¶ 22
	2nd LC	\$3,250.00	R. 57 at ¶ 23
Additional Loan		\$57,450.00	R. 57 at ¶ 32
Additional Interest Paid		\$25,883.83	R. 57 at ¶ 33
Future Additional Interest		\$78,865.89	R. 57 at ¶ 34
Total Damages		\$166,099.72	
Less: Current Outstanding Loan Balance of Land Contract 1		\$31,425.55	R. 134-4 at ¶ 20
Net Damages		\$134,674.17	

As discussed *supra*, as a representative for CRS Properties, Carol Christensen conceded CRS Properties did not apply any part of the Mossutos' payments under the land contracts to interest and taxes – the facts underlying Mr. Patterson's analysis and calculations. (R. at 120:7.) In her personal capacity, Carol Christensen confirmed that, pursuant to the terms of the Original and Amended Land Contracts, \$65 and then \$50 of the Mossutos'

¹ This does not account for attorney fees and costs, nor potential punitive damages. Wis. Stat. § 895.446(3).

payments, respectively, was supposed to be applied towards taxes and insurance. (R. at 119:3, 5.) As to the original land contract, Christensen answered:

Q: And the 65 a month, 65.00, what was that supposed to be paid towards?

A: Towards taxes and insurance.

Q: Only?

A: Yes. . . .

Q: Why do you say that?

A: It says here. It's in the contract.

Q: Should the \$65 be applied to principal and interest?

A: Doesn't say so.

Q: So is your answer no?

A: No.

(R. at 119:3.) As to the amended land contract, Christensen answered:

Q: . . . Is that \$50 [additional payment on the Amended Land Contract] to be used for taxes and insurance only?

A: Yes.

Q: Is any of that amount meant to be used for principal and interest?

A: No.

(R. at 119:5.) In his deposition as a corporate representative for CRS Properties, Carl Christensen confirmed the Mossutos' additional payment of \$65 per month under the Original Land Contract was to pay the taxes and insurance on the property, but that it was not held in a separate account for this purpose. (R. at 121:4.) As an individual, Carl stated he agreed with everything he stated as a corporate representative of CRS Properties. (R. at 122:1.)

The parties filed cross motions for summary judgment. (R. at 118; R. at 128.) The circuit court held its first hearing on the summary judgment motions on October 23, 2023. (R. at 107.) As to whether the Mossutos were in default, the Mossutos argued that when the additional monthly payments of \$65 and then \$50 per month (which CRS collected for taxes and insurance per the plain language of the contracts) are applied to the principal balance of the loan (as they were never applied to taxes and insurance), ***the Mossutos were not in default.*** (R. at 107:26, l. 18 – p. 28, l. 7.) As the Mossutos argued:

There was enough . . . for 2015 through 2021, my clients made those payments . . . but instead of being applied to taxes and insurance like the money was designated for in the land contract, it was misapplied. It wasn't applied for taxes and insurance, and we can show exactly that.

(R. at 107:28, l. 1-7.) As to whether the statute of limitations barred the Mossutos' claims, the Mossutos argued the ongoing acceptance and misapplication of the Mossutos' payments is a continuing violation such that the statute of limitations did not begin to accrue until the last misapplied payment – which occurred in 2021. (R. at 107:29, l. 25 – p. 30, l. 8.) Regardless of whether a three- or six-year statute of limitations applies to the Mossutos' claims, they are timely as they were brought in 2022 – within one year of the last act. (R. at 107:30-31.)

The circuit court declined to enter summary judgment at the October hearing, finding there were “a lot of [genuine] issues [of material fact].” (R. at 107:39, l. 13-20 (the circuit court stated, “I got to like six [genuine issues of material fact] before I stopped numbering them.”)) These issues included “who is obligated to pay taxes and insurance,” “how were payments supposed

to be applied strictly,” and “how were payments supposed to be applied if the payor was in default on principal payments.” (R. at 107:39-42.)

In considering the Mossutos’ counter- and third-party claims, the circuit court explained it would not grant summary judgment on these claims because the contract was ambiguous as to the parties’ obligations thereunder. (R. at 107:40-44.) While the circuit court found CRS did not intend to misapply the Mossutos’ payments, it concluded CRS’s actions may still have been in violation of the land contracts. (R. at 107:44, l. 9-11.) As the circuit court opined:

I don’t think it was some goal of the plaintiff to lure the Mossutos into this contract only to misapply this money . . . It was just what happened because the Mossutos were not making full payments. ***Was it wrong, according to the contract? I – I’m not sure yet.*** But was it intentional? No.

(R. at 107:44, l. 3-11.)

The circuit court additionally found there was a genuine issue of material fact as to whether the statute of limitations had run. (R. at 107:46-47 (the circuit court stated:

[W]e also have the issues relating to the statute of limitations . . . And the continuous violation doctrine, those -- those go hand in hand. And still, I -- ***I do think that each begs the question of what would have happened had the Mossutos been making their full payments?***

. . . So if breach of contract occurs and then the six years begins and we have a question as to first when the breach occurs, but then also, is it a continued breach, and does the six years begin after the last breach of a continued breach?

(R. at 107:44 l. 18-24; p. 46, l. 22-25.) The Mossutos then submitted Mr. Patterson's affidavit in support of their request for summary judgment. (R. at 123.) Through his affidavit, Mr. Patterson stated that he reviewed the file and determined the Mossutos paid a total of \$7,000 during the time period of the original land contract, and \$55,830 during the time period of the amended land contract, for a total of \$62,830 over a period of eight years (September 30, 2013, to July 1, 2021). (R. at 123:4-5.) The Mossutos used this affidavit in support of their argument that they satisfied their obligations under the contracts and were not in default. The Mossutos additionally submitted a declaration from William Mossuto, in which he explained that he "indicated several times to Carol Christensen and/or Carl Christensen on separate occasions that per the land contracts . . . that CRS Properties, LLC was responsible for paying all taxes and home insurance premiums." (R. at 153:2.)

The circuit court held a second summary judgment hearing on August 16, 2024. (R. at 170.) As to whether the Mossutos were in default, the Court found:

The Court finds that there is no genuine issue of material fact as to the default by the Mossutos. They did not hold up their end of this land contract – either land contract.

(R. at 170:12, l. 10-13.) As to the Mossutos counter- and third-party claims, the circuit court found:

The defendant can also not meet their burden on the elements of any of their claims. The statute of limitations also bars those claims.

(R. at 170:12, l. 13-15.) The circuit court did not consider or resolve the issues of material fact it identified in the October hearing. (*See generally*, R. at 170.) The circuit court granted summary judgment in favor of plaintiffs, ordered strict foreclosure of the property, and dismissed all the Mossutos' counter- and third-party claims. (R. at 170:12, l. 15-22.) The Mossutos appeal. (R. at 164.)

ARGUMENT

I. The Circuit Court erroneously failed to address CRS Properties' misapplication of payments, which constituted a breach of the land contract and invoked the continuing violation doctrine

A. Preservation

The Mossutos consistently raised the issue of CRS Properties' misapplication of payments and its breach of the land contract in their counterclaims, summary judgment briefing, and oral arguments before the Circuit Court. (R. at 37:6-21; R. at 54:2-23; R. at 107:26-31; R. at 170:4-6.) Specifically, the Mossutos argued that CRS Properties failed to allocate payments for taxes and insurance as required under both the original and amended land contracts, causing significant financial harm. (*See, e.g.*, R. at 37:6-11; R. at 54:2-23; R. at 107:26-28; R. at 170:4-5.) The continuing violation doctrine was also presented as a basis for tolling the statute of limitations due to CRS Properties' ongoing breaches, including payments misapplied as recently as 2021. (*See, e.g.*, R. at 54:16-17; R. at 107:29-31; R. at 170:9-10.) These arguments

were squarely before the Circuit Court and are therefore preserved for appellate review. *State v. Caban*, 210 Wis.2d 597, 604-605, 563 N.W.2d 501, 505 (Wis. 1997) (explaining that issues raised and considered in the lower court are preserved for appeal).

B. Standard of Review

“The construction of a statute of limitations is a question of law which [this Court] review[s] without deference to the circuit court’s decision.” *Kolpin v. Pioneer Power & Light Co.*, 162 Wis.2d 1, 18, 469 N.W.2d 595, 601 (Wis. 1991). Whether the continuing violation doctrine applies to toll the statute of limitations is a question of law reviewed de novo. *Enz v. Duke Energy Renewable Servs., Inc.*, 407 Wis.2d 728, 755, n. 9, 2023 WI App 24, ¶ 39; 991 N.W.2d 423, 436 (Wis. App. 2023). Questions of statutory and contractual interpretation, such as the proper construction of the land contract provisions at issue here, are also reviewed de novo. *Kolpin*, 162 Wis. 2d at 18. Where, as here, there remains a factual dispute as to the date on which the statute of limitations began to run, this Court will reverse the order of summary judgment and remand the matter for further proceedings.

C. Argument

The Circuit Court erroneously concluded that the statute of limitations barred the Mossutos’ claims, failing to apply the continuing violation doctrine properly and overlooking CRS Properties’ ongoing misapplication of payments made under both the original and amended land contracts. The continuing violation doctrine applies to ongoing breaches, such as CRS Properties’ repeated misapplication of payments, with the statute of limitations beginning to run only after the last violation. This breach of the parties’

agreements resulted in significant financial harm to the Mossutos and invoked the continuing violation doctrine, which tolls the statute of limitations for claims stemming from ongoing contractual breaches. Payments misapplied as recently as 2021 demonstrate that the claims were timely filed in 2022. (R. at 64:6, ¶29.)

Additionally, the Circuit Court misinterpreted the contractual provisions and statutory framework governing the allocation of payments for taxes and insurance, incorrectly concluding that CRS Properties was not in breach of its obligations. This misapplication of the law resulted in an improper dismissal of the Mossutos' claims.

1. CRS Properties breached the land contracts by misapplying payments for taxes and insurance

Under the terms of both the original and amended land contracts, CRS Properties was required to apply the Mossutos' payments to specific purposes, including taxes and homeowner's insurance. The contracts explicitly state that the Mossutos' monthly payments included amounts designated for these expenses. (R. at 5:7, 13.) Despite these obligations, CRS Properties failed to ensure that the designated funds were properly allocated, resulting in lapses in insurance coverage and unpaid taxes.

Evidence from the record establishes CRS Properties' breach. Carol Christensen, a representative of CRS Properties, admitted in her deposition that the company failed to maintain proper insurance coverage for extended periods, including between 2016 and 2019, despite collecting payments designated for this purpose. (R. at 119:6; R. at 120:3-4.) Additionally, forensic accounting findings from the Patterson affidavit reveal discrepancies in CRS Properties'

financial records, indicating that payments intended for insurance and taxes were routinely diverted for other purposes. (R. at 149:3-4.) These findings were further substantiated by subpoenaed records from Northwood Insurance Services and North Star Mutual Insurance, which revealed gaps in coverage that directly contradicted CRS Properties' assertions that insurance was in place throughout the relevant period. (R. at 135:7-8; R. at 149:2-3.)

The misapplication of payments constitutes a clear breach of the land contract. CRS Properties collected funds under false pretenses and failed to fulfill its obligations, resulting in significant financial harm to the Mossutos, including the loss of their property due to a lack of insurance coverage.

2. The continuing violation doctrine applies to CRS Properties' ongoing breaches

The continuing violation doctrine tolls the statute of limitations in cases where a party's wrongful conduct occurs as part of an ongoing series of acts. *State v. Elverman*, 366 Wis. 2d 169, 196, 873 N.W.2d 528, 539-540 (Wis. 2015). CRS Properties' ongoing misapplication of payments constitutes a continuing violation, with each misapplied payment constituting a separate actionable breach.

The evidence demonstrates that CRS Properties' breaches extended through 2021. Payments collected from the Mossutos as late as August 2021 included amounts designated for taxes and insurance. (R. at 5:5, 7, 13.) These payments, however, were misapplied, perpetuating the harm caused by CRS Properties' misconduct. Moreover, the amended land contract required CRS Properties to apply payments in a manner consistent with the parties' agreement, yet evidence from depositions and financial records confirms that these obligations were ignored

throughout the contractual period. (R. at 5:12-13; R. at 135:9; R. at 120:3.)

Because CRS Properties' breaches were ongoing, the statute of limitations for the Mossutos' claims did not begin to run until the last misapplied payment in 2021. The Circuit Court's failure to apply the continuing violation doctrine led to its erroneous conclusion that the Mossutos' claims were time-barred.

3. The Circuit Court's dismissal of the Mossutos' claims was contrary to law

By granting summary judgment in favor of CRS Properties, the Circuit Court improperly resolved material issues of fact and disregarded established legal principles. Summary judgment is inappropriate where genuine disputes exist regarding the application of payments, contractual obligations, and the timeline of the alleged breaches. *Oddsens v. Henry*, 368 Wis.2d 318, 335-336, 878 N.W.2d 720, 728 (Wis. App. 2016). The Circuit Court also failed to address the applicability of the continuing violation doctrine, which should have tolled the statute of limitations and allowed the Mossutos' claims to proceed.

The Circuit Court further erred by dismissing the Mossutos' counterclaims for misrepresentation and civil theft without properly considering the evidence of CRS Properties' intent and misconduct. Under Wisconsin law, intentional misrepresentation requires proof that a party knowingly made false statements to induce reliance, causing harm. *Malzewski v. Rapkin*, 2006 WI App 183, ¶17, 296 Wis. 2d 98, 723 N.W.2d 156, 162. CRS Properties' act of repeatedly misrepresenting the use of funds satisfies this standard, and the Circuit Court's dismissal of these claims was unwarranted.

The financial harm caused by CRS Properties' breaches is well-documented in the record. The loss of the Mossutos' property due to a lack of insurance coverage is a direct result of CRS Properties' failure to obtain insurance and allocate payments as required. Furthermore, CRS Properties' collection of additional payments under false pretenses, including amounts designated for taxes and insurance, compounded the financial burden on the Mossutos. These harms underscore the need for a full adjudication of the Mossutos' claims, which the Circuit Court prematurely dismissed.

D. Remedy

The Mossutos respectfully request that this Court reverse the Circuit Court's order granting summary judgment in favor of CRS Properties and remand this case for further proceedings. Specifically, this Court should direct the Circuit Court to address CRS Properties' ongoing misapplication of payments and its breach of the land contract under the continuing violation doctrine, as well as the resulting financial harm to the Mossutos. Such a remand will allow for a proper adjudication of the Mossutos' claims, consistent with Wisconsin law and the evidence presented.

II. The Circuit Court improperly resolved genuine disputes of material fact in favor of CRS Properties, contrary to Wisconsin's summary judgment standards

A. Preservation

The Mossutos argued through written pleadings and oral argument that there are, at minimum, genuine issues of material fact which preclude summary judgment on the issue of whether the Mossutos were in default and whether their counter- and third-party claims may proceed. (R. at 132:3-16; R. at 107:26-33;

R. at 170:4-6, 9-10.) This preserved the issues for appellate review. *Caban*, 210 Wis.2d at 604-605 (explaining that an issue is preserved for appellate review where it was “first raised before the circuit court.”)

B. Standard of Review

This Court reviews summary judgments de novo, using the same methodology as the trial court. *Wright v. Hasley*, 86 Wis.2d 572, 579, 237 N.W.2d 319, 322-323 (Wis. 1979). So, this Court must determine whether a genuine issue exists as to any material fact and whether the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). Any doubt as to the existence of a genuine issue of material fact is to be resolved against the moving party. *Heck & Paetow Claim Service, Inc. v. Heck*, 93 Wis.2d 349, 356, 286 N.W.2d 831, 834 (Wis. 1980); *see also Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183, 189, 260 N.W.2d 241, 243 (Wis. 1977) (stating, “Summary judgment is a drastic remedy and should not be granted unless the material facts are not in dispute, no competing inferences can arise, and the law that resolves the issue is clear.”)

C. Argument

1. Disputed default status

Through the underlying complaint, CRS Properties makes a single claim for strict foreclosure of the property due to the Mossutos’ alleged default on the original and amended land contracts. (R. at 5:4-6.) Strict foreclosure is a long-standing common law equitable remedy in Wisconsin, under which a land contract vendor may “forgo[] his or her right to collect the amount remaining on the debt and instead recover[] the property.” *Steiner v. Wisconsin Am. Mut. Ins. Co.*, 281 Wis.2d 395, 407, 697 N.W.2d 452 (Wis.

2005). So, before a land contract vendor may proceed with strict foreclosure, the land contract vendee must default under the terms of the contract. *Republic Bank of Chicago v. Lichosyt*, 2007 WI App 150, ¶ 18, 303 Wis.2d 474, 736 N.W.2d 153, 159. Here, issues of fact as to whether the Mossutos are in default precludes summary judgment of strict foreclosure.

In granting CRS's request for summary judgment on this claim, the circuit court simply found, "[T]here is no genuine issue of material fact as to the default by the Mossutos. They did not hold up their end of this land contract – either land contract." (R. at 170:12, l. 10-13.) This holding was based on the circuit court's findings that (1) the Mossutos "have defaulted on the required payments in said Land Contract and such default has continued for more than thirty (30) days," and (2) "there is now due and unpaid on the Land Contracts as of August 16, 2024, the total sum of \$132,910.73, which consists of a principal balance of \$111,668.41, plus accrued interest in the amount of \$21,242.31, which continues to accrue interest at the rate of 6.5% for a per diem interest after the date of judgment of \$19.12 per day." (R. at 157:4.)

But the circuit court failed to address the issues of material fact it identified at the prior hearing, including:

- "Who is obligated to pay taxes and insurance?"
- "How were payments supposed to be applied strictly?"
- "How were payments supposed to be applied if the payor was in default on principal payments?"

(R. at 107:39-42.) The circuit court also failed to consider evidence set forth by the Mossutos which supports their arguments that (1) CRS was obligated

to pay taxes and insurance, (2) payments were supposed to be applied under the terms of each contract -- \$635 to principal and \$65 to taxes and insurance per month on the original land contract, and \$800 to principal and \$50 to taxes and insurance per month on the amended land contract. This evidence included the depositions of corporate representatives for CRS Properties, as well as individual members Carl and Carol Christensen. In each of these depositions, CRS properties and its members admitted it was always CRS's responsibility to satisfy taxes and insurance for the Property. Both Carl and Carol Christensen, in their depositions, admitted that funds were not properly allocated to taxes and insurance in accordance with the land contracts' terms. The circuit court also did not consider the Patterson affidavit, through which the Mossutos' expert determined that the Mossutos had satisfied their obligations under the land contracts and were not in default. All the above evidence shows that the Mossutos met their burden on each of their claims.

The circuit court's act of reaching this finding that the Mossutos were in default without acknowledging the genuine issues of material fact that the court itself already identified shows that the court did not consider the entirety of the facts in a light most favorable to the Mossutos. But when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" are construed in a light most favorable to the Mossutos, the facts above are enough to support a jury finding that they were not in default under either land contract. Wis. Stat. § 802.08(2); *Heck*, 93 Wis.2d at 356 (explaining that any doubt as to the existence of a genuine issue of material fact is to be resolved against the moving party); *Lecus*, 81 Wis.2d at 189 (explaining that summary judgment should not be granted "unless the material facts are not in dispute, no competing

inferences can arise, and the law that resolves the issue is clear.”)

The Mossutos deserve the opportunity to be heard on the factual basis of whether they are in default under either land contract. Therefore, and because genuine issues of material fact remain, the circuit court’s grant of summary judgment must be reversed. *Kreinz v. NDII Securities Corp.*, 138 Wis.2d 204, 209, 406 N.W.2d 164, 166 (Wis. App. 1987) (explaining that, where a genuine issue of material fact remains in dispute, this Court “must reverse the grant of summary judgment” and remand the matter for further proceedings.)

2. Misrepresentation and civil theft claims

Through their answer, the Mossutos alleged counterclaims against CRS Properties for intentional misrepresentation, strict responsibility misrepresentation, negligent misrepresentation, property loss through fraudulent misrepresentation, civil theft, slander of title, violation of WOCCA Wis. Stat. § 946.87, declaratory judgment, and unjust enrichment. (R. at 37:11-21.) The Mossutos further alleged third-party claims against CR Contracting, LLC, Carl Christensen and Carol Christensen for breach of contract and civil theft. (R. at 37:22-24.) These claims are all based on the Mossutos’ underlying claim that, despite representing it would apply \$65 and then \$50 per month to taxes and insurance on the property, CRS Properties did not.

In dismissing these claims, the Court found the Mossutos “[C]an also not meet their burden on the elements of any of their claims.” (R. at 170:12, l. 13-14.) The record does not indicate what findings, if any, this holding was based on, or which elements the court were finding deficient of factual support. The circuit

court failed to address the issues of material fact it identified at the prior hearing, including whether CRS's actions with respect to the Mossutos' payments were in violation of the amended land contracts. It also failed to consider the Mossutos' evidence in support of their argument that the payments were to be applied based on the plain language of the land contracts, but was not. The Circuit Court failed (nor did it attempt) to apply the facts to the elements of each of the Mossutos' claims.

To the extent the circuit court based its grant of summary judgment on its prior finding that CRS Properties did not act "intentionally" with respect to the misapplication of the Mossutos' payments, this was erroneous, as well. (R. at 107:44, l. 3-11.) In accepting the Mossutos' payments, CRS Properties became a bailee of the Mossutos' money. Therefore, there is prima facie intent for CRS Properties to convert funds to their own use and contrary to the terms of the land contract. Wis. Stat. § 943.20(1)(b). As this statute provides, an individual or entity may be liable for theft where:

(b) By virtue of his or her office, business or employment, or as trustee or bailee, having possession or custody of money or of a negotiable security, instrument, paper or other negotiable writing of another, intentionally uses, transfers, conceals, or retains possession of such money, security, instrument, paper or writing without the owner's consent, contrary to his or her authority, and with intent to convert to his or her own use or to the use of any other person except the owner. ***A refusal to deliver any money or a negotiable security, instrument, paper or other negotiable writing, which is in his or her possession or custody by***

virtue of his or her office, business or employment, or as trustee or bailee, upon demand of the person entitled to receive it, or as required by law, is prima facie evidence of an intent to convert to his or her own use within the meaning of this paragraph.

Wis. Stat. § 943.20(1)(b); *emphasis added*. The evidence in support of application of this statute includes William Mossuto's declaration that, although he advised CRS Properties that he was making extra payments which he would like to be applied to taxes and insurance (pursuant to the plain language of the contract), CRS Properties admittedly failed to do so.

The circuit court's act of reaching this finding without acknowledging the genuine issues of material fact that the court itself identified at a prior hearing shows that the court did not consider the entirety of the facts in a light most favorable to the Mossutos. When construed in a light most favorable to the Mossutos, the facts above are enough to support a jury finding in their favor on each of their counter- and third-party claims. The Mossutos deserved the opportunity to present the factual basis of these claims to a jury. For these reasons, a genuine issue of material fact remains and, therefore, the circuit court's grant of summary judgment must be reversed.

3. Under the six-year statute of limitations for counterclaims 1-3 and third-party claim 1, these claims are timely.

In its order, the Circuit Court failed to consider that the statute of limitations for counterclaims 1-3 (intentional misrepresentation, strict responsibility misrepresentation, and negligent misrepresentation), as well as third-party claim 1 (breach of contract) is six

years. (R. at 170:12, l. 14-15 (the circuit court simply found, “The statute of limitations also bars those claims.”)) *See, e.g.* Wis. Stat. §893.43(1) (stating “an action upon any contract . . . shall be commenced within 6 years”); *State v. Lis*, 2008 WI App 82, ¶ 7, 311 Wis. 2d 691, 696, 751 N.W.2d 891, 894; *CMFG Life Insurance Co. v. UBS Securities*, 30 F. Supp. 3d 822, 827 (W.D. Wis. 2014). Applying this statute of limitation period to the 6 years from the date of filing (May 26, 2022), the Mossutos are entitled to offset the balance owed under the terms of the original land contract (\$31,425.55) by the amount of damages.

4. Under the continuing violation theory, counterclaims 4 & 5 and third-party claim 2 are timely

In dismissing the Mossutos’ claims on summary judgment, the circuit court simply found, “I looked into the continuing violation theory. While it’s a theory that I’m glad that I have learned, it does not apply in this situation.” (R. at 170:12-13.) The record does not indicate what findings, if any, this holding was based on. This holding was erroneous because the continuing offense doctrine applies to the Mossutos’ counterclaims 4 & 5 (property loss through fraudulent misrepresentation & civil theft) and third-party claim 2 (civil theft).

“The continuing offense doctrine is well established, and has been applied to encompass a wide variety of criminal activity including embezzlement, conspiracy, repeated failure to file reports, failure to report for induction, theft by receiving . . . as well as others.” *John v. State*, 96 Wis.2d 183, 189, 291 N.W.2d 502, 505 (Wis. 1980) (internal citations omitted). In *State v. Elverman*, 366 Wis.2d 169, 195, 873 N.W.2d 528, 539 (Wis. App. 2015), this Court confirmed that theft “can be charged as a continuing offense pursuant to Wis.

Stat. § 971.36(4).” This statute provides, in relevant part:

(3)(a) In any case of theft involving more than one theft, all thefts may be prosecuted as a single crime if . . . The property belonged to the same owner and the thefts were committed pursuant to a single intent and design or in execution of a single deceptive scheme.

(4) In any case of theft involving more than one theft but prosecuted as a single crime, it is sufficient to allege generally a theft of property to a certain value committed between certain dates, without specifying any particulars. On the trial, evidence may be given of any such theft committed on or between the dates alleged; and it is sufficient to maintain the charge and is not a variance if it is proved that any property was stolen during such period[.]

Wis. Stat. § 971.36(3)(a) & (4). Reading these statutes together, the *Elverman* Court concluded that multiple acts of theft occurring over time may constitute a continuous offense that is not complete until the last act is completed. *Elverman*, 366 Wis.2d at 195-196. As applied to the facts in *Elverman*, this meant that checks written outside the statute of limitations were part of a continuing offense for which the statute of limitations did not begin to run until *Elverman* cashed the last check. *Id.* at 197-198.

The relevant claims here are property loss through fraudulent misrepresentation in violation of Wis. Stat. §§ 895.446 & 943.20 (count 4), civil theft in violation of Wis. Stat. §§ 895.446 & 943.01 (count 5), and civil theft (third-party count 2.) As to all of these counts, Wis.

Stat. § 895.446 provides, “Any person who suffers damage or loss by reason of intentional conduct . . . that is prohibited under s. 943.01 [or] 943.20 . . . has a cause of action against the person who caused the damage or loss.” Wis. Stat. § 943.20 (count 4), of course, is the criminal theft statute. So, there is no doubt that the continuing offense theory applies to count 4 because, as the *Elverman* court explained, the continuing offense theory applies to the theft statute. *Elverman*, 366 Wis.2d at 195-16. And Wis. Stat. § 895.446 allows a person who suffers loss based on an action prohibited under the theft statute to seek damages. The last misapplication was cashed in 2021, which is within the statute of limitations. (R. at 64:6, ¶29) There is no doubt that the continuing offense theory applies here. While the *Elverman* case does not apply explicitly to damage to property (Wis. Stat. § 943.01 (count 5)), the broad application of the continuing offense doctrine would allow a district court to apply it to this count, as well. *See, e.g. John*, 96 Wis.2d at 189 (containing a non-exhaustive listing of offenses to which the continuing offense doctrine have been applied, including embezzlement, conspiracy, repeated failure to file reports, failure to report for induction, theft by receiving, and the failure to make and keep records of controlled substances.) Because count 5 is based on a continuing act for which the last act was within the statute of limitations (2021), the continuing offense theory applies.

Given the foregoing, the circuit court erroneously found the continuing violation theory does not apply and that the statute of limitations has run on the Mossutos’ counter- and third-party claims. When this theory is applied, there is at minimum a factual issue as to when the statute of limitations began to run. The circuit court did not consider or resolve this issue. It simply found, without explanation, that the statute of limitations had run. The circuit court’s act of reaching this finding without acknowledging the genuine issues

of material fact that the court itself identified at a prior hearing shows that the court did not consider the entirety of the facts in a light most favorable to the Mossutos. When construed in a light most favorable to the Mossutos, the facts above are enough to support a reasonable finding that the continuing violation theory occurred such that the statute of limitations had not run.

D. Remedy

Where a genuine issue of material fact remains in dispute, this Court “must reverse the grant of summary judgment” and remand the matter for further proceedings.” *Kreinz*, 138 Wis.2d at 209. Therefore, and because genuine issues of material fact remain, the Mossutos respectfully request that this Court reverse the circuit court’s order granting summary judgment in favor of CRS and remand for further proceedings.

CONCLUSION

Given the foregoing, the Mossutos respectfully request that this Court reverse the circuit court’s order of summary judgment and remand the matter for further proceedings.

Respectfully submitted on this
5th day of December, 2024

*Electronically signed by Matthew
Curtiss Lein*

Lein Law Offices, LLP

Curtiss Lein

State Bar #01015280

Post Office Box 761

Hayward, WI 54843

(715) 634-4273

CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 6,200 words. Including the cover, tables, and certifications, the length 6,777 words.

*Electronically signed by Matthew
Curtiss Lein*

Lein Law Offices, LLP

Curtiss Lein

State Bar #01015280

Post Office Box 761

Hayward, WI 54843

(715) 634-4273