

APPENDIX

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Nos. 2012AP2377 & 2015AP870
Supreme Court of Wisconsin

Debra K. SANDS,

Plaintiff-Appellant-Petitioner,

v.

John R. MENARD, Jr., Menard Thoroughbreds,
Inc., Webster Hart as Trustee of the John R.
Menard, Jr. 2002 Trust and Related Trusts,
Angela L. Bowe as Trustee of the John R.
Menard, Jr. 2002 Trust and Related Trusts and
Alphons Pitterle as Trustee of the John R.
Menard, Jr. 2002 Trust and Related Trusts,

Defendants-Respondents,

Midwest Manufacturing Co., Wood Ecology Inc.,
Countertops Inc., Team Menard Inc., Menard
Engine Group, Menard Competition Technologies
LTD, MC Technologies Inc., Menard Engineering-
LTD, UltraMotive LTD and Merchant Capital LLC,

Defendants,

Menard, Inc.,

Defendant-Respondent-Cross
Petitioner.

Debra K. Sands,

Plaintiff-Appellant-Cross-Respondent-
Petitioner,

v.

John R. Menard, Jr. and Menard Thoroughbreds, Inc.,

Defendants-Respondents-Cross-Apellants,

Webster Hart as Trustee of the John R. Menard, Jr. 2002 Trust and Related Trusts, Angela L. Bowe as Trustee of the John R. Menard, Jr. 2002 Trust and Related Trusts, Alphons Pitterle as Trustee of the John R. Menard, Jr. 2002 Trust and Related Trusts, Midwest Manufacturing Co., Wood Ecology Inc., Countertops Inc., Team Menard Inc., Menard Engine Group, Menard Competition Technologies LTD, MC Technologies Inc., Menard Engineering LTD, UltraMotive LTD and Merchant Capital LLC,

Defendants,

Menard, Inc.,

Defendant-Respondent-Cross-Appellant-Cross
Petitioner.

PATIENCE DRAKE ROGGENSACK, C.J.

¶1 We review a decision of the court of appeals, affirming the circuit court's¹ grant of summary judgment dismissing Debra Sands' claims and Menard, Inc.'s counterclaim. Debra Sands and John Menard, Jr., were involved in a romantic relationship from late 1997 to April 2006.² Sands alleges that from 1998

¹ The Honorable Paul J. Lenz of Eau Claire County, presided.

² Debra Sands appeals from a judgment of the court of appeals, affirming the circuit court's grant of summary judgment dismissing Sands' claims against John Menard, Jr. ("Menard"),

until 2006 she cohabitated with Menard and they engaged in a “joint enterprise” to work together and grow Menard’s businesses for their mutual benefit. Menard and his affiliated entities argue that by failing to comply with Supreme Court Rule 20:1.8(a), which regulates business transactions between lawyers and their clients, Sands is precluded from seeking an ownership interest in any of Menard’s various business ventures.

¶2 We review four issues. First, we consider whether Sands has pleaded facts sufficient to establish what she styled as an unjust enrichment claim under *Watts v. Watts*, 137 Wis. 2d 506, 405 N.W.2d 303 (1987), thereby necessitating a remand to the circuit court for a full hearing on the merits. Second, we consider whether the court of appeals properly concluded that SCR 20:1.8(a) may be raised as a defense to an unjust enrichment claim. Third, we consider whether the court of appeals properly granted summary judgment to Sands on Menard, Inc.’s counterclaim for breach of fiduciary duty. And fourth, we consider whether the court of appeals properly granted summary judgment to the Menard Trustees.

¶3 As to the claim she has characterized as a *Watts* unjust enrichment claim, we conclude that Sands has failed to allege facts which, if true, would support her legal conclusion that she and Menard had a joint enterprise that included accumulation of assets in which both she and Menard expected to share equally. On the second issue, for the reasons explained below, we

Menard, Inc., and Menard Thoroughbreds, Inc. (“collectively, the Menard Defendants”) and against the trustees of the John R. Menard, Jr. 2002 Trust and related trusts (“the Trustees”). The Menard Defendants appeal from an order affirming summary judgment to Sands on Menard, Inc.’s counterclaim for breach of fiduciary duty.

conclude that SCR 20:1.8(a) may guide courts in determining required standards of care generally; however, it may not be used as an absolute defense to a civil claim involving an attorney.³ And finally, we also conclude that the court of appeals properly granted summary judgment to Sands on Menard, Inc.'s counterclaim for breach of fiduciary duty, and to the Trustees on their motion for summary judgment dismissing Sands' claim.

¶4 Accordingly, we affirm the court of appeals.

I. BACKGROUND

¶5 Menard is the founder, president, and CEO of Menard, Inc., a privately held chain of home improvement stores that began in Eau Claire, Wisconsin. In November 1997, nearly 40 years after starting his business, Menard began dating Sands, a lawyer licensed to practice in the state of Minnesota, who at the time was directing several business ventures with her sister in St. Paul. Sands claims that she moved in with Menard in the summer of 1998, and they became engaged later that year. Menard admits that he and Sands were engaged, but denies that they ever lived together.

¶6 During their relationship, Sands alleges she made a number of business and personal contributions to both Menard and his companies, including Menard, Inc. and Menard Thoroughbreds, Inc. Although the parties agree that Sands made certain contributions, they do not agree as to the nature of those contributions, when they began, or who was the recipient at

³ We do not consider whether Menard or the Menard Defendants waived, ratified, or may be estopped to assert Sands' alleged non-compliance with SCR 20:1.8(a).

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any given time. Sands describes her contributions to Menard and his companies as follows:

She was Menard's life partner, social companion, and manager and hostess of his households. Sands protected Menard from unwanted approaches by serving as a "gate-keeper." She supervised his health care and medical needs; managed the remodeling of three residences; and advised on the acquisition of airplanes and their design and décor. She provided ideas for new products and product lines for the Menard, Inc., stores, such as garden centers; and scouted and proposed new store locations, store layouts, and product displays. She represented Menard, Inc., as a product buyer. She reviewed and suggested changes and additions to Menard, Inc., marketing plans. She assisted with government and public relations. She participated in the redesign of store signs and logos. She helped find new business and investment opportunities. She assisted in the management of the Team Menard auto racing venture and newly-acquired businesses, including two engine design companies in England, a thoroughbred racing business, and a \$400 million private equity fund. She made her joint enterprise with Menard her focus, which occupied her every moment.

¶7 Sands claims that Menard repeatedly promised her that in return for these contributions, he would give her an ownership interest in his various business ventures. Menard denies ever making such promises, and states only that Sands provided certain legal services beginning in approximately 1997.

¶8 The parties also disagree as to whether Sands

performed legal work for Menard or the Menard Defendants prior to the beginning of their romantic relationship. Sands contends that there was never any attorney-client relationship with the Menard Defendants prior to 1998. Conversely, the Menard Defendants assert that Sands began providing legal services in October 1997, before she and Menard began dating.

¶9 As evidence, the Menard Defendants submitted a May 28, 1998, invoice from Prima Group, a company owned by Sands and her sister, in the amount of \$49,635.84. The invoice referenced a “client matter,” listed as “Wisconsin Dept. of Natural Resources v. Menard, Inc.” The invoice further indicated it was for “Governmental relations & Legal services rendered Oct. 15, 1997 – May 15, 1998.” Sands claims that the invoice was prepared at Menard’s request, in response to his offer to pay off Sands’ remaining student loans of \$49,635.84. Sands claims that Menard told her to send the invoice to Menard, Inc., so that the payment would be tax deductible as a business expense. Menard, however, claims this invoice related to legal services that Sands provided in connection with a Wisconsin DNR investigation into Menard, Inc.’s disposal of wood ash.⁴

¶10 Although the parties disagree as to the nature of the legal services provided prior to 2003, both concede that beginning in 2003 Sands began to provide significant legal services to Menard, Inc.⁵ Sands

⁴ A similarly questionable transaction involving race car driver Robby Gordon began in September 1998. The record reflects that Menard, Inc. paid Sands \$3,000 on September 21, 1999, for her work on the Gordon transaction. Sands concedes that she performed some work as Menard’s business advisor—not lawyer—but states that the payment was actually a reimbursement for wedding planning expenses. *Sands v. Menard*, 2016 WI App 76, ¶¶9-10, 372 Wis. 2d 126, 887 N.W.2d 94.

⁵ The parties disagree as to whether Sands ever provided

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billed at an hourly rate of \$145, and Menard, Inc. paid Sands a total of \$152,105 for seven invoices.

¶11 In early 2004, Sands assisted in the creation of a private equity fund (“the Fund”). Steve Hilbert, a businessman with money management experience and a long-time friend of Menard’s, began to meet with Menard to discuss the Fund. According to Sands, Menard asked her to review documentation used to create the Fund. Menard, Inc., however, asserts that from at least January 2005 through October 2005, Menard, Inc. had retained Sands as its outside legal counsel to represent it in the Fund transaction.

¶12 Menard alleges that Sands was responsible for negotiating the terms of the transaction with Hilbert, in addition to reviewing and editing the Fund transaction documents. Sands states that she was never asked and never did create invoices for her work for Menard, in part because she believed her efforts were part of her and Menard’s “joint enterprise.” It was not until her relationship with Menard ended in 2006 that Menard instructed her to provide itemized invoices for all legal services for which she had not been paid, dating back to 2003. Sands then submitted 190 separate invoices for work performed between February 2003 and April 2006, representing 7,487.10 hours of legal work at \$145 per hour, for a total fee of \$1,085,629.50.

¶13 Sands met with Menard and Pete Liupakka, Menard, Inc.’s CFO, to discuss the invoices in October 2006. Liupakka believed that the number of hours reflected on the invoices was excessive. Nevertheless, Menard, Inc. offered to pay Sands \$961,518 – the amount claimed in the invoices minus payments that Menard, Inc. believed Sands had already received.

legal services to Menard personally. According to Sands, Menard himself was never a client.

However, Menard, Inc. made receipt of this payment conditioned on Sands signing a one-page “release of all claims” that included a waiver of any “quasi-marital claims.” Sands refused to sign, prompting Menard, Inc. to offer an additional \$100,000. Sands again refused, and Menard, Inc. rescinded its offer to pay any portion of the fees reflected in the invoices.

¶14 On November 3, 2008, Sands filed suit against Menard, the Menard Defendants, and eleven other parties owned or controlled by Menard. She asserted claims for Unjust Enrichment, Implied Contract, Promissory Estoppel, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, Fraudulent Misrepresentation, Conversion, and Breach of Fiduciary Relationship. On November 19, 2009, Sands filed an amended complaint, re-alleging her claims of unjust enrichment against Menard, asserting breach of contract and promissory estoppel claims against Menard, and claims for unjust enrichment against Menard, Inc., Menard Thoroughbreds, Inc., and MH Private Equity Fund LLC (“MH Equity”). A second amended complaint was filed on May 10, 2011, adding the Trustees as defendants.

¶15 Shortly after Sands filed her second amended complaint, the Menard Defendants discovered evidence that Sands had a side agreement with Hilbert, prompting accusations that Sands had been attempting to obtain an ownership interest or employment with MH Equity while she was representing them in the Fund transaction. Therefore, on May 25, 2011, the Menard Defendants asserted a counterclaim for breach of fiduciary duty under SCR 20:1.8(a).

¶16 On April 12, 2012, the Menard Defendants moved for summary judgment to dismiss all of Sands’ claims by which she sought a portion of Menard’s “net worth or assets, ownership interests in the Menard

companies, or any part of the increase in value of the Menard Companies.” The Menard Defendants argued that SCR 20:1.8(a) barred Sands from recovering any portion of Menard’s assets or an ownership interest in his companies because she had failed to comply with SCR 20:1.8(a), which regulates business transactions between attorneys and their clients.

¶17 The Trustees also moved for summary judgment, arguing that Sands’ theory of unjust enrichment failed as a matter of law because: (1) even if Sands benefitted Menard or Menard, Inc., her claim would therefore be against the Menard Defendants, not the Trustees; (2) she did not allege facts, which if true, would show any benefit conferred to the Trustees; and (3) she failed to allege facts showing “unjust circumstances.”

¶18 Following an oral ruling on October 12, 2012, the circuit court entered summary judgment on October 22, 2012. The court acknowledged that Sands had violated SCR 20:1.8(a),⁶ but declined to adopt a bright-line rule that SCR 20:1.8(a) prohibits an attorney from bringing what Sands has styled as a *Watts* unjust enrichment claim regarding past contributions. Rather, the court recognized an implicit exception to SCR 20:1.8(a), such that it does not bar an attorney from bringing an equitable claim for contributions provided in a romantic relationship if: (1) the romantic relationship predates the attorney-client relationship; and (2) “the legal services rendered are merely ancillary or incidental to the larger joint enterprise of

⁶ The court found that: (1) Sands is a lawyer and was a lawyer at all relevant times; (2) Sands performed legal services for Menard and the Menard Defendants; and (3) Sands did not obtain a written agreement to acquire any portion of the Menard Defendants’ assets.

the parties.”⁷

¶19 As to the first requirement, the court focused on whether Sands’ May 28, 1998, invoice for “Governmental relations & Legal services” established that her attorney-client relationship began before her romantic relationship with Menard.⁸ Even accepting as true Sands’ claim that the invoice was a fraudulent document submitted at Menard’s request, the court stated that it would deny relief in equity due to Sands’ admitted fraud regarding the invoice, which showed that she was *in pari delicto*⁹ with Menard and, thus, the court would “leave matters where they stand.”¹⁰

¶20 Looking to the second element of the exception, the court found that no reasonable jury could find that Sands’ legal services were “merely ancillary or incidental.” Therefore, because neither exception to its test applied, the court concluded that Sands’ violation of SCR 20:1.8(a) barred her claims against the Menard Defendants. The court then held that because Sands could not recover against Menard, she could not recover against the Trustees. The circuit court then granted summary judgment to the Trustees. Sands’ claim against the Menard Defendants for

⁷ During this hearing Judge Lenz focused on the legal services as opposed to Sands’ general contributions because the proposed defense, namely, that SCR 20:1.8(a) barred Sands’ claim, applies to attorney-client relationships and their attendant legal services.

⁸ See *Security Pac. Nat’l Bank v. Ginkowski*, 140 Wis. 2d 332, 339, 410 N.W.2d 589, 593 (Ct. App. 1987) (Stating that for the concept of the clean hands doctrine to be applied, “it must be shown that the alleged conduct constituting ‘unclean hands’ caused the harm from which the plaintiff now seeks relief.”).

⁹ Latin for “in equal fault.” *Black’s Law Dictionary* 911 (10th ed. 2014).

¹⁰ The circuit court did not address the waiver, ratification, or estoppel arguments.

compensation for services rendered remained.

¶21 Sands appealed from the order regarding the Trustees and petitioned for leave to appeal from the order regarding the Menard Defendants. The court of appeals denied Sands' motion, but stayed her appeal of the order regarding the Trustees pending the disposition of her remaining claims in circuit court. *Sands v. Menard*, 2016 WI App 76, ¶21, 372 Wis. 2d 126, 887 N.W.2d 94.

¶22 After the circuit court granted partial summary judgment, Sands claimed that she was entitled to compensation for her non-legal services. In support, she submitted extensive documentation of the various "non-legal" services she had provided, and for which she alleged she was entitled to receive compensation. The Menard Defendants moved to strike, pointing to Sands' previous affidavit in which she stated that she never expected to be compensated for personal and family services. The court granted the motion.

¶23 Refusing to concede that her only remaining claim was for compensation for legal services "at a rate of \$145 per hour," Sands next asserted that she was entitled to the *quantum meruit* value of her legal services, which she claimed was between \$355 and \$640 per hour. Again, the Menard Defendants moved to strike, arguing that Sands could not recover on a quasi-contract theory when she had an express contract with Menard to be paid \$145 per hour for her legal services. The court agreed, explaining that "even if [\$145 per hour] was dictated by the client, Mr. Menard, this was clearly the agreed rate." The circuit court distinguished unjust enrichment claims from *quantum meruit*, stating that while a plaintiff asserting a *Watts* unjust enrichment claim seeks to recover a fair portion of the increase in the couple's net worth, a *quantum meruit* claim seeks to recover

the fair value of services performed based on a contract implied by law. The dismissal of Sands' *quantum meruit* claim therefore did not affect her unjust enrichment claim. The circuit court also stated that Sands' *quantum meruit* claims were barred because of her failure to comply with SCR 20:1.8(a).

¶24 Sands moved for summary judgment on Menard, Inc.'s counterclaim for breach of fiduciary duty. The circuit court granted the motion, concluding that the counterclaim was barred by the applicable statute of limitations and that a reasonable person in Menard's situation would have further investigated his suspicions of Sands' disloyalty at an earlier date.

¶25 On April 24, 2015, Sands filed a notice of appeal from the circuit court's final order, and Menard, Inc. cross-appealed from the order dismissing its counterclaim for breach of fiduciary duty.

¶26 Proceedings at the court of appeals involved the consolidation of the direct appeal from the 2012 judgment disposing of all claims between Sands and the Trustees, and a direct appeal from the 2015 final judgment disposing of all claims between Sands, Menard, and the Menard Defendants. The court of appeals affirmed the circuit court, but on different grounds.

¶27 Sands filed a petition for review on October 19, 2016, which was followed by a petition for cross-review filed by the Menard Defendants on November 18, 2016. We granted review, and now affirm.

II. DISCUSSION

A. Standard of Review

¶28 We review a grant or denial of summary judgment independently, applying the same standards as employed by the circuit court, while benefitting from

the discussions of the court of appeals and the circuit court. *Dufour v. Progressive Classic Ins. Co.*, 2016 WI 59, ¶12, 370 Wis. 2d 313, 881 N.W.2d 678; *Preisler v. General Cas. Ins. Co.*, 2014 WI 135, ¶16, 360 Wis. 2d 129, 857 N.W.2d 136. Summary judgment is appropriate in cases where there is no genuine issue of material fact and the moving party has established his or her right to judgment as a matter of law. Wis. Stat. § 802.08(2);¹¹ *Wadzinski v. Auto-Owners Ins. Co.*, 2012 WI 75, ¶10, 342 Wis. 2d 311, 818 N.W.2d 819. We review summary judgment submissions in the light most favorable to the nonmoving party. *Id.*

B. Unjust Enrichment Claim

¶29 Sands asserts she has a claim against Menard for unjust enrichment. She relies on her interpretation of *Watts*, where we concluded that public policy does not preclude unmarried, former cohabitants from raising “claims based upon unjust enrichment following the termination of their relationships where one of the parties attempts to retain an unreasonable amount of the property acquired through the efforts of both.” *Watts*, 137 Wis. 2d 506 at 532-33, 405 N.W.2d 303.¹²

¹¹ All subsequent references to the Wisconsin Statutes are to the 2009-10 version unless otherwise indicated.

¹² Plaintiff, Sue Ann Watts, asserted five legal theories to support her claim: (1) Sue Ann and James, and their children, constituted a “family,” thus entitling Sue Ann to bring an action for property division under Wis. Stat. § 767.02(1)(h) (1985-86), and to have the court divide their property pursuant to Wis. Stat. § 767.255 (1985-86); (2) James’s words and conduct estopped him from asserting the lack of a legal marriage as a defense under Wis. Stat. § 767.255; (3) Sue Ann and James had a contract, either express or implied in fact, to share equally the property accumulated during their relationship; (4) unjust enrichment; and (5) partition. The *Watts* court dismissed claims one and two, holding that divorce statutes were exclusively for those persons

¶30 The Watts court relied on the usual legal standard for unjust enrichment:

[A] claim for unjust enrichment does not arise out of an agreement entered into by the parties. Rather, an action for recovery based upon unjust enrichment is grounded on the moral principle that one who has received a benefit has a duty to make restitution where retaining such a benefit would be unjust.

Id. at 530, 405 N.W.2d 303. Unjust enrichment requires proof of three elements: (1) a benefit conferred on the defendant by the plaintiff; (2) appreciation or knowledge by the defendant of the benefit; and (3) acceptance or retention of the benefit by the defendant under circumstances making it inequitable to do so. *Id.* at 531, 405 N.W.2d 303. In order to plead an unjust enrichment claim, the party seeking judicial relief must allege facts that, if true, would be sufficient to satisfy a court that the above elements are present. In *Watts*, we concluded that they were. *Id.* at 533, 405 N.W.2d 303.

¶31 *Watts* held that neither public policy nor the abolition of common-law marriage prohibited an unmarried cohabitant from asserting a contractual or quasi-contractual claim against another cohabitant.¹³ Sue Ann Watts sued James Watts over their respec-

who were legally married, but concluded that all other legal remedies were available. *Watts v. Watts*, 137 Wis. 2d 506, 511-12, 405 N.W.2d 303 (1987). We focus our analysis on the decision's holding as to unjust enrichment.

¹³ Common law marriage was abolished in Wisconsin by statute in 1917. *Meyer v. Meyer*, 2000 WI 132, ¶63 n.1, 239 Wis. 2d 731, 620 N.W.2d 382 (Sykes, J., dissenting) (citing § 21, ch. 218, Laws of 1917). *Watts* did not preclude the remedy of unjust enrichment for parties—unmarried cohabitants—who may otherwise have been precluded from seeking judicial relief.

tive interests in property accumulated during their 12-year cohabitation. *Id.* at 510, 405 N.W.2d 303. Sue Ann assumed James' last name as her own, and together the couple raised two children, who also shared the Watts name. They filed joint income tax returns and maintained joint bank accounts. Sue Ann and James purchased real and personal property together; Sue Ann co-signed for the loans James obtained. *Watts*, 137 Wis. 2d at 513-14, 405 N.W.2d 303.

¶32 During this period Sue Ann managed the home front so that James could build Watts Landscaping. She was a homemaker who cared for their children. She cleaned, cooked, laundered, shopped, ran errands, and maintained the grounds surrounding the parties' home. *Id.* at 513, 405 N.W.2d 303. She contributed personal property that she owned at the beginning of the relationship, served as hostess for James at both social and business-related events, and for a time worked 20-25 hours per week at James' office, performing duties as a receptionist, typist and assistant bookkeeper. *Id.* at 513-14, 405 N.W.2d 303.

¶33 Sue Ann alleged that because of her personal and business contributions, the business and personal wealth of the couple increased. *Id.* at 514, 405 N.W.2d 303. Following the termination of their relationship, however, James refused to compensate Sue Ann for these contributions despite his indications that she would share equally in the increased wealth. *Id.*

¶34 In holding that Sue Ann had stated a claim for relief, we focused our analysis on principles of equity and fairness. *Id.* at 532-33, 405 N.W.2d 303. Specifically, we concluded that regardless of the nature of the relationship, the court should enforce contract, quasi-contract, and property rights where "one party keeps all or most of the assets accumulated during the relationship, while the other party, no more or less

‘guilty,’ is deprived of property which he or she has helped to accumulate.” *Id.* at 526, 405 N.W.2d 303.

¶35 In concluding that Sue Ann had stated a claim, we determined it would be unjust and inequitable to allow James to retain the entire benefit of their joint enterprise. As to the three elements of unjust enrichment, we concluded: (1) Sue Ann contributed property and services to the relationship; (2) the couple’s assets increased as a result of these contributions; and (3) James’ retaining all of the assets was inequitable. *Watts*, 137 Wis. 2d at 533, 405 N.W.2d 303.

¶36 Subsequent to our decision in *Watts*, unjust enrichment claims in the context of unmarried cohabitants have appeared before Wisconsin courts on an infrequent basis.¹⁴ Nevertheless, case law does provide some guidance on the scope of unjust enrichment claims and, in particular, the types of facts that must be pled in order to survive summary judgment.

¶37 In *Waage v. Borer*, 188 Wis. 2d 324, 525 N.W.2d 96 (Ct. App. 1994), the court of appeals held that proof of the elements of unjust enrichment must be demonstrated by showing: (1) an accumulation of assets; (2) acquired through the efforts of the claimant and the other party; and (3) retained by the other party in an unreasonable amount. *Id.* at 329-30, 525 N.W.2d 96. At trial, Borer claimed money for her housekeeping efforts after Waage reneged on an alleged promise to marry her. The court concluded that despite her cooking, cleaning, and childcare services, Borer failed to allege facts sufficient to meet the *Watts* unjust enrichment standard. Specifically, the court held that only certain benefits will constitute “assets” or “property”

¹⁴ Indeed, of the 171 cases citing to *Watts*, only a handful discuss Sue Ann’s unjust enrichment claim, and fewer are published or authored decisions.

for the purposes of unjust enrichment. “*Watts* does not recognize recompense for housekeeping or other services unless the services are linked to an accumulation of wealth or assets during the relationship.” *Id.* at 330, 525 N.W.2d 96. In alleging only that Waage retained a benefit from Borer’s uncompensated housekeeping efforts made in contemplation of marriage, the court concluded that Borer had not met the unjust enrichment standard. Furthermore, the court explained that there is no cause of action for breaching an alleged promise to marry.

¶38 In *Ward v. Jahnke*, 220 Wis. 2d 539, 583 N.W.2d 656 (Ct. App. 1998), the court of appeals re-emphasized that in order for a plaintiff to successfully demonstrate unjust enrichment he or she must present proof that the assets or property acquired during cohabitation were acquired as a result of a mutual undertaking or joint effort. *Id.* at 552. 583 N.W.2d 656. Sandra Ward and Dennis Jahnke had shared an apartment for nearly four years, during which time Ward paid rent and all other household expenses so that Jahnke could save money for a down payment on a house. Jahnke eventually purchased a home, making the \$11,000 down payment and all mortgage and tax payments on the property. For the next nine years, Ward lived in the home rent-free, although she did pay utilities and purchased groceries. All finances were kept separate. Upon their separation, Ward claimed that Jahnke was unjustly enriched because he was able to accumulate a down payment while she paid for nearly all of their household expenses. *Id.* at 544, 583 N.W.2d 656. She also argued that because she moved into Jahnke’s house and continued to pay certain expenses, the house itself was an asset accumulated through their joint efforts and retained by Jahnke in an unreasonable amount. *Id.*

¶39 Applying the elements of unjust enrichment to the facts, the court of appeals affirmed the circuit court’s conclusion that Jahnke was unjustly enriched by Ward’s efforts during the period of cohabitation in which she paid rent and all other household expenses. *Id.* at 550, 583 N.W.2d 656. “We agree that under these facts, Ward’s assumption of the cost of the couple’s living expenses was a benefit conferred on Jahnke which resulted in an accumulation of the asset – the [\$11,000] down payment.” *Id.* However, the court reversed the circuit court’s conclusion that Jahnke had been unjustly enriched following the purchase of the home.¹⁵ “Not only does Ward’s claim lack a single *Watts* factor, her testimony as to their financial arrangements shows only that she and Jahnke were cohabitants who divided their household expenses in such a way that it made it easy to maintain separate finances and avoid commingling their individual resources.” *Id.* at 550-51, 583 N.W.3d 656.

¶40 In so holding, the appeals court stated that it does not read the list of factors outlined in *Watts* as a checklist, but rather as “requiring a plaintiff to put forth facts which indicate a shared enterprise and some form of proof that the assets or property in dispute were ‘acquired *through the efforts of both*.’” *Id.* at 547-48, 583 N.W.3d 656 (quoting *Watts*, 137 Wis. 2d at 533, 405 N.W.2d 303) (emphasis in original).¹⁶ It is only after a party can demonstrate the existence of

¹⁵ At the circuit court, Ward had received a jury award of \$45,000, or one-half of the equity in the house. *Ward v. Jahnke*, 220 Wis. 2d 539, 544, 583 N.W.2d 656 (Ct. App. 1998).

¹⁶ See, e.g., *Watts*, 137 Wis. 2d at 533 n.21, 405 N.W.2d 303 (listing four out-of-state decisions in which a cohabitant’s unjust enrichment claim was founded on specific facts that showed a mutual undertaking or joint effort); *Ward*, 220 Wis. 2d at 548 n.3, 583 N.W.2d 656 (describing in further detail the footnote found in *Watts*).

a joint enterprise that the court may award equitable relief. See *Ulrich v. Zemke*, 2002 WI App 246, ¶12, 258 Wis. 2d 180, 654 N.W.2d 458.

The proper legal standard requires the court to . . . analyze the character of the parties' relationship by inquiring whether the relationship was a joint enterprise which encompassed the accumulation of assets. A court makes this determination by considering the total circumstances of the parties' relationship, specifically whether the parties' contributed property and services to the relationship producing an increase in wealth.

Id., ¶12.¹⁷

¶41 Properly understood, *Watts* stands for a very simple proposition: Wisconsin's public policy favoring marriage does not prohibit unmarried formerly cohabitating couples from asserting unjust enrichment claims against one another. *Watts*, 137 Wis. 2d at 532, 405 N.W.2d 303. In such cases, the focus is on the benefit received by one party from the other party which would be inequitable to retain. *Boldt v. State*, 101 Wis. 2d 566, 573, 305 N.W.2d 133 (1981). Therefore, the proper focus is on property accumulated, not on the type of personal relationship that existed between the parties. Stated otherwise, a claim for unjust enrichment may lie when two people work together to acquire property "through the efforts of both," regardless of their personal relationship. *Watts*, 137 Wis. 2d at 533, 405 N.W.2d 303.

¹⁷ In *Ulrich v. Zemke*, 2002 WI App 246, 258 Wis. 2d 180, 654 N.W.2d 458, the court concluded that where a couple maintained a house together, raised four children, shared living expenses, and continually acquired real and personal property, they had acted as a joint enterprise.

¶42 That James and Sue Ann Watts were romantic cohabitants is not central to the merits of Sue Ann's unjust enrichment claim. For example, if James, instead, had a joint enterprise to accumulate wealth with his sister, mom or next door neighbor who provided necessary child care, domestic services and part-time office help, an unjust enrichment claim by that person would require the same proof as *Watts* required of Sue Ann. *Watts* simply provided that cohabitation between unmarried romantic partners is not a bar to an otherwise valid claim of unjust enrichment. It did not provide that the romantic relationship created the claim for relief. *Watts*, 137 Wis. 2d at 532-33, 405 N.W.2d 303.

2. Sands' pleadings

¶43 To plead facts sufficient to support an unjust enrichment claim, Sands must demonstrate: (1) a benefit conferred on Menard by Sands; (2) appreciation or knowledge by Menard of the benefit;¹⁸ and (3) acceptance or retention of assets arising from the benefit by Menard under circumstances making it inequitable for him to retain all of those assets. Stated otherwise, Sands' unjust enrichment claim must demonstrate that, viewed in their entirety, the contributions she made to a joint enterprise in which she and Menard were mutually engaged resulted in an accumulation of wealth that Menard unfairly retained. *Ward*, 220 Wis. 2d at 552, 583 N.W.2d 656 (explaining the importance of a mutual undertaking or joint effort).

¶44 Based on her allegations in the pleadings, which we accept as true for purposes of summary judgment, Sands made a variety of contributions to

¹⁸ For purposes of our discussion it is undisputed that Menard was aware of Sands' contributions. We therefore focus our analysis on the first and third prongs.

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Menard, both professionally and personally. Professionally, she offered business and legal advice, political consultation services, marketing and research expertise. She was directly involved in decisions regarding Menards' Indycar and NASCAR racing sponsorships, and she advised Menard on numerous corporate matters. In their personal relationship,¹⁹ Sands supervised Menard's health care and medical needs, planned and prepared meals, and assisted with gardening and other household tasks. Sands advised about refurbishment and redecoration of three personal residences, acted as hostess of Menards' households, and provided both personal and family advice. Sands contends that as a result of these and other contributions she is entitled to judgment in an amount equal to the fair and reasonable share of the property, wealth, and increased net worth acquired by Menard during their cohabitation. We disagree.

¶45 First, *Watts* and the cases that followed make clear that unjust enrichment by a former cohabitant is founded on the premise of a mutual undertaking or joint enterprise which results in an accumulation of assets in which the parties expected to share equally but which are unfairly retained by one party. In *Watts*, we emphasized that as a direct result of Sue Ann's efforts, James' business grew and the parties' assets increased.

¶46 In *Ward*, the court distinguished between the couple's initial, forty-four month cohabitation, during

¹⁹ We again clarify that unjust enrichment claims do not require an intimate relationship; the emphasis is on the property acquired. However, to the extent that Sands claims these personal contributions allowed Menard to focus his attention on his companies, they are relevant to her unjust enrichment claim, namely, whether any assets were acquired "through the efforts of both." See *Ward*, 220 Wis. 2d at 549, 583 N.W.2d 656.

which time they lived in Ward's apartment where the \$11,000 down payment was accumulated, and the latter period during which they lived in the house purchased by Jahnke. The court affirmed the circuit court's finding that Ward's assumption of most household expenses during the initial forty-four months was "predicated on a mutual undertaking to accumulate a down payment on a house." *Ward*, 220 Wis. 2d at 550, 583 N.W.2d 656. "The length of time this arrangement persisted, with undisputed testimony that Ward assumed nearly all of the couple's living expenses, coupled with the fact that Jahnke then made a substantial down payment on a house lends credibility to Ward's claim that this was a shared undertaking." *Id.*

¶47 However, the court concluded that Ward had failed to satisfy the unjust enrichment standard for the period following the purchase of the home. First, Jahnke had paid all closing costs associated with the house, and all mortgage and tax payments thereafter. Second, although Ward did the cooking, cleaning, and laundry, as well as paid for groceries and utilities while living in the house, these contributions were offset by the fact that she did not pay rent, and that Jahnke took care of all maintenance work. Finally, the evidence did not support the assertion of a joint enterprise after the house had been purchased. Each maintained separate bank accounts and had individual insurance policies. Each purchased, paid for, and maintained his or her own vehicle. They never held joint savings or checking accounts, purchased items together, took on any joint debt, or loaned each other money. *Ward*, 220 Wis. 2d at 543, 583 N.W.2d 656. Given these facts, the court concluded, "Ward cannot claim that her assumption of the costs of the utilities and groceries in a shared living arrangement, while living rent free, entitles her to share in the equity of a

house titled in another's name. Evidence of a mutual undertaking is completely lacking." *Id.* at 552, 583 N.W.2d 656. Comparing the facts and outcomes in *Watts* and *Ward* with the facts alleged by Sands, we conclude that Sands' and Menard's relationship more closely resembles that of Ward and Jahnke after the purchase of Jahnke's home.

¶48 First, at the time Sands and Menard met, Menard, Inc. had been a business for almost forty years, and Menard was already a multi-millionaire. Sands, meanwhile, was a graduate of law school operating at least three separate businesses with her sister in St. Paul, Minnesota. Therefore, while Menard's net worth was undoubtedly higher than Sands', both parties had sufficient financial means and business acumen. We therefore reject any comparison of Sands' contributions to those of Sue Ann Watts, who helped James Watts begin and grow his landscaping business, or to those of Sandra Ward, whose contributions allowed Dennis Jahnke to save \$11,000 for the down payment on a house. In each of those cases, the parties had very little, and it was only through their joint efforts that their assets or property increased. Sands, however, did not support Menard as he built his empire; he already had it when they met.

¶49 Second, we note the inherent differences between how Sue Ann and James Watts conducted themselves, and how Sands and Menard conducted themselves during their respective relationships. Sands has not alleged that during their relationship she and Menard commingled finances, filed joint tax returns, or made joint purchases of real and/or personal property. Sands did not obligate herself to any business or personal debt Menard incurred. Given these undisputed facts, we conclude that Sands and Menard were not engaged in a "joint enterprise" as

required under *Watts*.²⁰

¶50 Although we conclude that there was no “joint enterprise,” we nonetheless turn to *Watts*’ three-part unjust enrichment analysis to evaluate the underlying merits of Sands’ unjust enrichment claim. Under the first prong, Sands must allege sufficient facts which, if true, would prove that her contributions were material to increasing Menard’s wealth. Here, despite the litany of contributions she made, *see, e.g. supra* ¶6, we cannot conclude that Sands’ contributions were “material” given Menard’s wealth and the success of his company when the parties met. In particular, although Sands has listed a series of business transactions in which she “participated” or “assisted,” she has alleged no facts from which we could conclude that her contributions caused an increase in Menard’s assets or property.

¶51 We are similarly disinclined to conclude that Sands has pled sufficient facts which, if true, would demonstrate that Menard’s acceptance or retention of her contributions would be inequitable under the circumstances. In particular, Sands must demonstrate that the benefits she conferred to Menard are not offset by the benefits she derived from him. First, the record indicates that Sands enjoyed an expansive lifestyle as the companion of a wealthy man.²¹ Sec-

²⁰ Once again, the precise nature of the underlying relationship is not the linchpin of our analysis. However, we do consider the circumstances of the relationship relevant in helping us determine whether the elements of unjust enrichment have been met, particularly the second element under the *Waage* test, *Waage v. Borer*, 188 Wis. 2d 324, 329-30, 525 N.W.2d 96 (Ct. App. 1994) (requiring “(1) an accumulation of assets; (2) acquired through the efforts of the claimant and the other party and (3) retained by the other party in an unreasonable amount.”).

²¹ For example, the record reflects that Sands and Menard took multiple boating and skiing trips, vacations to St. Martin,

ond, unlike the plaintiffs in *Watts* or *Ward*, Sands did receive compensation for some of her services. Over the course of their eight-year relationship, Sands was paid \$49,635.84 for the balance of her student loans,²² \$3,000 to compensate her for “wedding expenses,” and \$152,105 for various legal services.

¶52 Sands argues, however, that because Menard “repeatedly” promised her that she would obtain a certain ownership interest in Menard, Inc., and because she made contributions “fully and faithfully and in reliance on the promises and representations of Menard,” it would be inequitable to deny her an ownership interest in his property. Given that a specific agreement is unnecessary under *Watts*, Sands’ allegations that she was promised a certain ownership interest are not persuasive. In short, we conclude that Sands has failed to allege facts which, if true, would support her legal conclusion that she and Menard had a shared enterprise that included accumulation of assets in which both she and Menard expected to share equally.²³

C. Rules of Professional Conduct

¶53 In light of our conclusion that Sands has failed to allege facts which, if true, would support what

London, and Italy, and that Menard gifted Sands with a Ford Mustang for Christmas in 2005. They went to horse races, NASCAR events, and fashion shows, and met prominent political figures at that time.

²² As referenced above, it is disputed whether this payment was for her student loans or for legal services in regard to the DNR matter.

²³ We do not suggest that a former cohabitant may never plead facts sufficient to establish a “material benefit” unjustly obtained by a wealthy partner. We simply hold that in this case, Sands did not plead facts sufficient to meet the criteria for unjust enrichment set forth in *Watts*.

she has styled as a *Watts* unjust enrichment claim, analyzing whether her claim also is barred by SCR 20:1.8(a) may not seem necessary. Nonetheless, because the question of whether a Supreme Court Rule can be used as an absolute defense against an attorney in a civil action is an important issue, we address it here. For the reasons stated below, we conclude: (1) the court of appeals erred in holding SCR 20:1.8(a) created an absolute bar to Sands' unjust enrichment claim; and (2) although SCR ch. 20 may not be used as an absolute defense to a civil claim where an attorney is a party, SCR 20:1.8(a) may guide courts in determining whether those standards of care that generally are required of lawyers have been met.

1. General principles

¶54 Supreme Court Rule ch. 20 sets forth the regulations governing professional conduct of attorneys licensed to practice law in the State of Wisconsin. Attorneys not admitted to the State Bar of Wisconsin may be subject to the disciplinary action in Wisconsin “if the lawyer provides or offers any legal services in the state.” SCR 20:8.5(a). We have the exclusive authority to define the “practice of law.” See *Seitzinger v. Cmty. Health Network*, 2004 WI 28, ¶39, 270 Wis. 2d 1, 676 N.W.2d 426. We have previously concluded that deciding whether one engaged in the “practice of law” is determined on a case-by-case basis. *State ex rel. Junior Ass’n of Milwaukee Bar v. Rice*, 236 Wis. 38, 53, 294 N.W. 550, 556 (1940).

¶55 At all times relevant to the current litigation, attorneys licensed outside of Wisconsin who were acting as in-house counsel in this state were not “practicing law” for the purposes of bar admission. See *Mostkoff v. Bd. of Bar Exam’rs*, 2005 WI 33, ¶19, 279 Wis. 2d 249, 693 N.W.2d 748 (concluding Michigan

attorney's legal services as corporate counsel were not the "practice of law" for purposes of admission to the State Bar of Wisconsin). Therefore, because at that time an attorney who was not licensed to practice in Wisconsin, but who was nonetheless serving as in-house counsel for a Wisconsin corporation, was not eligible for bar admission based solely on in-house counsel services, he also was not subject to regulation by the State Bar of Wisconsin.

¶56 As to all attorneys practicing law in this state, we have previously ruled that "[v]iolations of the Code of Professional Conduct are determined only by means of disciplinary action." *Foley-Ciccantelli v. Bishop's Grove Condo.*, 2011 WI 36, ¶2, 333 Wis. 2d 402, 797 N.W.2d 789. Indeed, as stated in preamble [20]²⁴ to the Rules in effect during Sands' alleged cohabitation:

Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's

²⁴ The preamble was amended in 2007 to add the following concluding sentence: "Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of breach of the applicable standard of conduct."

self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule.

¶57 The court of appeals has also endorsed the use of the Rules of Professional Conduct as guidelines or principles in civil litigation. *Gustafson v. Physicians Ins. Co.*, 223 Wis. 2d 164, 176-78, 588 N.W.2d 363 (Ct. App. 1998). In *Gustafson*, the plaintiffs' attorney in a medical malpractice case also agreed to represent the interests of the plaintiffs' subrogated health insurer in exchange for one-third of the health insurer's recovery. *Id.* at 168, 588 N.W.2d 363. After a jury rendered a verdict in favor of the defendants, the plaintiffs' attorney reached a settlement agreement with the defendants whereby the plaintiffs waived their right to appeal the judgment in exchange for the defendants' agreement not to seek taxable costs against them. *Id.* at 169, 588 N.W.2d 363. However, the plaintiffs' attorney never consulted with the subrogated insurer about the settlement and it expressly left the defendants the option of taxing costs against the subrogated insurer, which they did. *Id.* The subrogated insurer appealed on the basis that the judgment was unfair because of the attorney's misconduct, whereupon the settlement was voided. *Id.*

¶58 In determining whether the judgment for taxable costs should be reversed due to the attorney's conduct, the court of appeals considered several of the Rules of Professional Conduct as guidelines or principles. For example, SCR 20:1.16 was considered to determine whether the plaintiffs' attorney properly withdrew from representing the subrogated insurer; SCR 20:1.2 was considered to determine whether the attorney should have informed the subrogated insurer

of the proposed settlement; and SCR 20:1.7 was reviewed to determine whether the attorney had an impermissible conflict of interest when he negotiated the settlement. *Id.* at 176-78, 588 N.W.2d 363. Taxable costs were reversed because the attorney failed to adequately protect his client. *Id.* at 182, 588 N.W.2d 363.

2. SCR 20:1.8(a) general principles

¶59 Supreme Court Rule 20:1.8(a) applies to financial conflicts of interest that may arise when an attorney “enter[s] into a business transaction with a client or knowingly acquire[s] an ownership, possessory, security or other pecuniary interest adverse to a client.” SCR 20:1.8(a). During the relevant time period, SCR 20:1.8(a) provided:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to the client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
- (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) the client consents in writing thereto.

¶60 Supreme Court Rule 20:1.8(a) is grounded in the concern that “[a] lawyer’s legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client.”

See Model Rules of Prof'l Conduct r. 1.8 cmt. (Am. Bar Ass'n 2015). The rule applies to all attorney-client relationships, and includes transactions in which an attorney seeks an ownership interest in the client's business as compensation for his or her legal services. See *id.* The existence of an attorney-client relationship "depends upon the intent of the parties and is a question of fact." *In re Disciplinary Proceedings Against Kostich*, 2010 WI 136, ¶16, 330 Wis. 2d 378, 793 N.W.2d 494.

3. SCR 20:1.8(a) and Sands

¶61 Both the circuit court and the court of appeals applied SCR 20:1.8(a) to Sands' *Watts* unjust enrichment claim. The circuit court formulated a two-part exception to Menard's proposed bright-line rule, namely, that SCR 20:1.8(a) is an absolute defense unless two conditions are met: (1) the attorney and client had a romantic relationship that predated their attorney-client relationship; and (2) the legal services rendered by the attorney were "merely ancillary or incidental" to the larger joint enterprise. The court of appeals went one step further, holding that a violation of SCR 20:1.8(a) is an absolute bar to recovery. *Sands*, 372 Wis. 2d 126, ¶38, 887 N.W.2d 94. As to both dispositions, we disagree, and conclude that while Supreme Court Rules may guide courts in determining required standards of care generally, they may not be employed as an absolute defense in a civil action involving an attorney.

¶62 As Sands has repeatedly pointed out, the preamble to the Supreme Court Rules clearly demonstrates that alleged violations are to be determined in disciplinary proceedings, not civil litigation. "The Preamble demonstrates that the purpose of the rules is not to provide remedies outside the realm of profes-

sional discipline.” *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶173, 797 N.W.2d 789 (Roggensack, J., concurring). *See also Nauga, Inc. v. Westel Milwaukee Co., Inc.*, 216 Wis. 2d 306, 318 n.5, 576 N.W.2d 573, (Ct. App. 1998) (“Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are not designed to be a basis for civil liability.”).

¶63 The Menard Defendants argue that they have not invoked SCR 20:1.8(a) as a basis for civil liability, to obtain disciplinary sanctions, or as a procedural weapon. Instead, they look to the language of the amended preamble “because it establishes the standards of conduct with which Sands needed to comply if she wanted to enforce such an arrangement.” Similar to Sands, the Menard Defendants ground their argument in the language of *Foley-Ciccantelli*. However, while Sands focuses on the language cited above, the Menard Defendants focus on ¶86, which reads, in part:

The resolution of the issue of disqualification in the present case is thus guided by our prior case law and the precepts of the Supreme Court Rules of Professional Conduct for Attorneys regarding an attorney’s duties to former clients. Appellate courts have often cited the Rules of Professional Conduct for guidance in non-disciplinary cases, including disqualification cases.

Foley-Ciccantelli, 333 Wis. 2d 402, ¶86, 797 N.W.2d 789.

¶64 The arguments of the Menard Defendants are not persuasive. *Foley-Ciccantelli* arose from a disqualification motion, not from a claim that the lawyer’s conduct violated SCR ch. 20. *Id.*, ¶91.

¶65 Accordingly, we conclude that SCR ch. 20 does

not apply here for at least two reasons. First, Supreme Court Rules that regulate the ethical practice of law in Wisconsin cannot be used as an absolute defense in a civil action in which an attorney is a party. In that regard, we clarify *Foley-Ciccantelli* to so hold. Second, Sands' provision of legal services was not the practice of law, as we defined the practice of law in *Mostkoff*; therefore, she was not entitled to membership in the State Bar of Wisconsin during the times relevant to her *Watts* claim. Accordingly, she was not subject to SCR 20:1.8(a).

D. Menard, Inc.'s Counterclaim

¶66 The court of appeals concluded that the accrual date for Menard, Inc.'s counterclaim for breach of fiduciary duty was September 1, 2005, the date of closing for the Fund transaction. As we consider the court of appeals' conclusion, we note that the question presented is whether on September 1, 2005, Menard, as the president and CEO of Menard, Inc., knew or should have known that Sands' loyalty was questionable. *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 560, 335 N.W.2d 578 (1983) (concluding that a claim accrues "on the date the injury is discovered or with reasonable diligence should be discovered, whichever occurs first."). To answer that question, we consider Menard's personal characteristics.

¶67 Menard was a skilled businessman who had been involved in countless business transactions in his individual capacity and as the CEO of Menard, Inc. On September 1, 2005, he had enough information to be required to investigate further. As he said in regard to the closing of the transaction that created the Fund, "it was very difficult to tell whose side [she] was on, was she on [Hilbert's] side or my side." He also said that he then believed that Sands was lying

to him. Although the degree of certainty of suspicion is variable, here, Menard was not a novice. He was in charge of a multi-billion dollar corporation. He also had outside advisors by his side. His suspicion triggered the obligation to investigate further, and he had plenty of assistance to do so. *See Goff v. Seldera*, 202 Wis. 2d 600, 611, 550 N.W.2d 144 (Ct. App. 1996) (citing *Awve v. Physicians Ins. Co.*, 181 Wis. 2d 815, 825, 512 N.W.2d 216 (Ct. App. 1994)). Yet, he did nothing until after Sands sued him.

¶68 Even with the tolling rule of *Donaldson v. West Bend Mut. Ins. Co.*, 2009 WI App 134, ¶¶23-24, 321 Wis. 2d 244, 773 N.W.2d 470, which makes the effective filing date November 3, 2008, Menard, Inc.’s counterclaim was well outside the applicable statute of limitations.²⁵

E. Claim Regarding Trustees

¶69 Sands also appeals the court of appeals’ dismissal of her claim against the Trustees, in which the court of appeals affirmed the circuit court’s grant of summary judgment to the Trustees based on its earlier ruling granting partial summary judgment to the Menard Defendants. The court stated, “since there is no avenue to recover against the Menard principal, there cannot be recovery against the [Trustees].”

¶70 Before us, Sands’ brief-in-chief asserted only what she styled as a *Watts* unjust enrichment claim, and in her combined response brief regarding the Menard Defendants and Trustees, Sands stated, “This Appeal is Solely a *Watts v. Watts* Unjust Enrichment Claim.”

²⁵ We concur with the conclusion of the court of appeals on this matter, and largely adopt their factual narration as our own. *Sands*, 372 Wis. 2d 126, ¶¶53-59, 887 N.W.2d 94.

¶71 *Watts*, as we have discussed above in some detail, does not preclude an unmarried cohabitant from bringing an unjust enrichment claim on equitable grounds when the cohabitants engaged in a joint enterprise to work together to accumulate wealth and one cohabitant has retained the accumulated wealth in an unjust amount. *Watts* provides no support for an unjust enrichment claim made by a third party because unjust enrichment claims are premised on two people working towards a joint accumulation of property in which they both expect to share equally.

¶72 However, we understand Sands' claim against the Trustees to be made under the theory that they are the repositories of significant property that once belonged to Menard. Therefore, if Sands were to prevail on what she has styled as a *Watts* unjust enrichment claim against Menard, she would need to reach the Trustees to garner a share of Menard's property that they hold. We offer no opinion on her theory of recovery from the Trustees because she has not prevailed on her unjust enrichment claim against Menard. Accordingly, she can have no interest in any property that the Trustees hold. Therefore, Sands' claim against the Trustees was properly dismissed.

III. CONCLUSION

¶73 There were four issues argued before this court on appeal. First, we considered whether Sands has pled facts sufficient to show unjust enrichment. We conclude that she has not. Sands has failed to demonstrate facts which, if true, would support her legal conclusion that she and Menard had a joint enterprise that included accumulation of assets in which both she and Menard expected to share equally.

¶74 Second, we considered whether the court of appeals properly concluded that SCR 20:1.8(a) may

be raised as an absolute defense to what Sands has styled as a *Watts* unjust enrichment claim arising from a long-term romantic relationship. We conclude that SCR 20:1.8(a) may guide courts in determining required standards of care generally; however, it may not be employed as an absolute defense to a civil claim involving an attorney.

¶75 And finally, we also conclude that the court of appeals properly granted summary judgment to Sands on Menard, Inc.'s counterclaim for breach of fiduciary duty, and to the Trustees on their motion for summary judgment dismissing Sands' claim.

By the Court.—The decision of the court of appeals is affirmed.

SHIRLEY S. ABRAHAMSON, J. (concurring in part and dissenting in part).

¶76 Unlike the majority, I conclude that Debra Sands pleaded sufficient facts to establish an unjust enrichment claim under *Watts v. Watts*, 137 Wis. 2d 506, 405 N.W.2d 303 (1987), against John R. Menard, Jr.¹ I would remand Sands' unjust enrichment claim against Menard to the circuit court for trial. Accordingly, I dissent from the majority's contrary conclusion.

I.

¶77 I begin by setting forth the applicable standard of review, which is muddled by the majority. The

¹ I agree with the following conclusions of the majority: (1) SCR 20:1.8(a) may guide courts in determining required standards of care for attorneys generally, but may not be used as an absolute bar in a civil claim involving an attorney; (2) the court of appeals properly granted summary judgment to Sands on Menard, Inc.'s counterclaim for breach of fiduciary duty; and (3) the court of appeals properly granted summary judgment to the Menard Trustees. Majority op., ¶3.

supreme court reviews a grant of summary judgment independently, applying the same standards as employed by the circuit court. *Dufour v. Progressive Classic Ins. Co.*, 2016 WI 59, ¶12, 370 Wis. 2d 313, 881 N.W.2d 678. “There is a standard methodology which a trial court follows when faced with a motion for summary judgment.” *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314, 401 N.W.2d 816 (1987).

¶78 “The first step of that methodology requires the court to examine the pleadings to determine whether a claim for relief has been stated.” *Green Spring Farms*, 136 Wis. 2d at 315, 401 N.W.2d 816; *see also Moya v. Aurora Healthcare, Inc.*, 2017 WI 45, ¶15, 375 Wis. 2d 38, 894 N.W.2d 405. This step tests the “legal sufficiency of the complaint.” *Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶11, 283 Wis. 2d 555, 699 N.W.2d 205. All facts alleged in the complaint, as well as all reasonable inferences from those facts, are accepted as true, and the complaint is given a liberal construction. *Ollerman v. O’Rourke Co.*, 94 Wis. 2d 17, 24, 288 N.W.2d 95 (1980).

¶79 “If a claim for relief has been stated, the inquiry then shifts to whether any factual issues exist.” *Green Spring Farms*, 136 Wis. 2d at 315, 401 N.W.2d 816. Summary judgment is only appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Wis. Stat. § 802.08.² The evidence is viewed in the light most favorable to the non-moving party, and all reasonable inferences are drawn in favor of the non-moving party. *Burbank Grease Servs., LLC v. Sokolowski*, 2006 WI 103, ¶40,

² All subsequent references to the Wisconsin Statutes are to the 2009-10 version unless otherwise indicated.

294 Wis. 2d 274, 717 N.W.2d 781. It is not the job of the court on summary judgment to “decide issues of credibility, weigh the evidence, or choose between differing but reasonable inferences from the undisputed facts.” *Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 665, 476 N.W.2d 593 (Ct. App. 1991).

II

¶80 I conclude that the facts alleged in Sands’ complaint, taken as true (as we must), adequately state a claim for unjust enrichment against Menard.³

¶81 An unjust enrichment claim has three elements: “(1) a benefit conferred on the defendant by the plaintiff, (2) appreciation or knowledge by the defendant of the benefit, and (3) acceptance or retention of the benefit by the defendant under circumstances making it inequitable for the defendant to retain the benefit.” *Watts*, 137 Wis. 2d at 531, 405 N.W. 303.

¶82 *Watts* did not change the elements of unjust enrichment. Nor did it create a sub-category of unjust enrichment claim. It merely recognized that unmarried cohabitants may state a claim for unjust enrichment where one party retains an unreasonable amount of property acquired through the efforts of both. As the *Watts* court explained:

Many courts have held, and we now so hold, that unmarried cohabitants may raise claims based upon unjust enrichment following the termination of their relationships where one of the parties attempts to retain an unreasonable amount of the property acquired through the efforts of both.

In this case, the plaintiff alleges that she

³ The operative complaint in the instant case is Sands’ Second Amended Complaint.

contributed both property and services to the parties' relationship. She claims that because of these contributions the parties' assets increased, but that she was never compensated for her contributions. She further alleges that the defendant, knowing that the plaintiff expected to share in the property accumulated, "accepted the services rendered to him by the plaintiff" and that it would be unfair under the circumstances to allow him to retain everything while she receives nothing.

Watts, 137 Wis. 2d at 532-33, 405 N.W.2d 303.

¶83 Additionally, nothing in *Watts* limits an unjust enrichment claim to two persons. A claim for unjust enrichment may involve more than two persons so long as all those involved worked towards the joint accumulation of property or wealth in which they all expected to share. Any contrary suggestion by the majority is unsupported. See majority op., ¶71.

¶84 In *Watts*, the plaintiff alleged that during her relationship with the defendant, she contributed both property and services to the parties' relationship with the expectation that she would enjoy equally with the defendant the wealth accumulated through their joint efforts. *Watts*, 137 Wis. 2d at 513-14, 405 N.W.2d 303. The plaintiff alleged:

During their relationship, the plaintiff contributed childcare and homemaking services, including cleaning, cooking, laundering, shopping, running errands, and maintaining the grounds surrounding the parties' home. Additionally, the plaintiff contributed personal property to the relationship which she owned at the beginning of the relationship or acquired through gifts or purchases during

the relationship. She served as hostess for the defendant for social and business-related events. The amended complaint further asserts that periodically, between 1969 and 1975, the plaintiff cooked and cleaned for the defendant and his employees while his business, a landscaping service, was building and landscaping a golf course. From 1973 to 1976, the plaintiff worked 20-25 hours per week at the defendant's office, performing duties as a receptionist, typist, and assistant bookkeeper. From 1976 to 1981, the plaintiff worked 40-60 hours per week at a business she started with the defendant's sister-in-law, then continued and managed the business herself after the dissolution of that partnership.

Watts, 137 Wis. 2d at 513-14, 405 N.W.2d 303.

¶85 The *Watts* court held that the plaintiff stated a claim for unjust enrichment against her former co-habitant:

In this case, the plaintiff alleges that she contributed both property and services to the parties' relationship. She claims that because of these contributions the parties' assets increased, but that she was never compensated for her contributions. She further alleges that the defendant, knowing that the plaintiff expected to share in the property accumulated, "accepted the services rendered to him by the plaintiff" and that it would be unfair under the circumstances to allow him to retain everything while she receives nothing. We conclude that the facts alleged are sufficient to state a claim

for recovery based upon unjust enrichment.
Watts, 137 Wis. 2d at 533, 405 N.W.2d 303.

¶86 In the instant case, Sands pleaded extensive facts spanning approximately eight pages of her complaint supporting her unjust enrichment claim against Menard. Sands alleges in her complaint as follows:

[D]uring the eight-year period of Sands's cohabitation and engagement with Menard, the substantial and continuing efforts of Sands resulted directly in the acquisition of valuable property, wealth, and substantial increase in the net worth of Menard, who now attempts to retain not merely an unreasonable amount of property, wealth, and increased net worth acquired through the efforts of Sands, but all of the property, wealth, and increased net worth acquired through the efforts of Sands.

Appendix to Brief of Plaintiff-Appellant-Petitioner Debra K. Sands, Volume I, at A061.

¶87 Sands summarized her contributions as follows:

Sands relied on Menard's promises, representations, and conduct, and devoted over eight years to working with and helping him in his business and personal matters. Sands contributed to their enterprise in numerous ways. She was Menard's life partner, social companion, and manager and hostess of his households. Sands protected Menard from unwanted approaches by serving as a "gate-keeper." She supervised his health care and medical needs; managed the remodeling of three residences; and advised on the acquisition of airplanes and their design and décor. She provided ideas for new products

and product lines for the Menard, Inc., stores, such as garden centers; and scouted and proposed new store locations, store layouts, and product displays. She represented Menard, Inc., as a product buyer. She reviewed and suggested changes and additions to Menard, Inc., marketing plans. She assisted with government and public relations. She participated in the redesign of store signs and logos. She helped find new business and investment opportunities. She assisted in the management of the Team Menard auto racing venture and newly-acquired businesses, including two engine design companies in England, a thoroughbred racing business, and a \$400 million private equity fund. She made her joint enterprise with Menard her focus, which occupied her every moment.

Brief of Plaintiff-Appellant-Petitioner, Debra K. Sands 14-15.

¶88 Construing Sands' complaint liberally and taking all factual allegations as true (as the court must), I conclude that Sands alleged facts sufficient to state a claim for unjust enrichment.

¶89 The majority concludes that Sands failed to adequately plead unjust enrichment by relying on in-apposite cases and drawing distinctions that were not essential to the court's holding in *Watts* vis-à-vis the plaintiff's unjust enrichment claim.

¶90 The majority relies on *Waage v. Borer*, 188 Wis. 2d 324, 525 N.W.2d 96 (Ct. App. 1994), and *Ward v. Jahnke*, 220 Wis. 2d 539, 583 N.W.2d 656 (Ct. App. 1998), asserting that these cases shed light on "the types of facts that must be pled in order to survive summary judgment." Majority op., ¶36. They do not.

These cases do not support the majority's position.

¶91 In *Waage*, the court of appeals held that under the particular facts of that case, the complainant could not recover on her unjust enrichment claim because “*Watts* does not recognize recompense for housekeeping or other services unless the services are linked to an accumulation of wealth or assets during the relationship.” *Waage*, 188 Wis. 2d at 330, 525 N.W.2d 96.

¶92 Importantly, the *Waage* court did not conclude that the complainant had failed to adequately plead unjust enrichment. Rather, the unjust enrichment claim proceeded to trial, and the court of appeals held that the complainant did not present sufficient evidence of any assets accumulated during the relationship as a result of joint efforts: “[Plaintiff] arguably alleged but did not set forth any evidence to satisfy [the elements of her unjust enrichment claim]. . . . [Plaintiff] presented absolutely no evidence of assets accumulated during their relationship.” *Waage*, 188 Wis. 2d at 330, 525 N.W.2d 96. Simply stated, *Waage* has nothing to say about pleading requirements.

¶93 The *Ward* case also did not analyze the sufficiency of the complaint. In *Ward*, the question presented was the sufficiency of the evidence produced at trial.

¶94 In *Ward*, the complainant recovered at trial her fair share of the down payment on the couple's house, but the court of appeals held that the defendant had not been unjustly enriched following the purchase of the home. *Ward*, 220 Wis. 2d at 544-50, 583 N.W.2d 656. In so holding, the court of appeals pointed out that the plaintiff's own trial testimony established that after the couple moved into the home, the couple split household expenses as evenly as possible, so that a reasonable finder of fact could not find that the

defendant had been unjustly enriched. *See Ward*, 220 Wis. 2d at 550-53, 583 N.W.2d 656.

¶95 In addition to relying on inapposite cases, the majority misunderstands what facts were relevant to the court’s holding in *Watts* vis-à-vis the plaintiff’s unjust enrichment claim. The majority magnifies differences in Sands’ and Menard’s personal relationship and in the personal relationship of the parties at the center of *Watts*.⁴ For example, the majority points out that unlike in *Watts*, in which the plaintiff helped the defendant begin and grow his landscaping business, Menard was already a multi-millionaire and had been a successful businessman for almost 40 years when Sands and Menard met. Majority op., ¶48.

¶96 This reasoning suggests that the court would not have allowed the unjust enrichment claim in *Watts* to proceed if the defendant’s business had already been established and profitable at the time the parties cohabitated, as opposed to being built from scratch by the efforts of both. *Watts* does not support this suggestion. The fact that Menard was already successful does not preclude Sands’ unjust enrichment claim if Menard’s assets became more valuable as a result of the parties’ joint efforts.

¶97 The majority also highlights that “Sands has not alleged that during their relationship she and

⁴ The majority appears to acknowledge that the joint accumulation of property and wealth, not the nature of the relationship, is the focus of the unjust enrichment claim, *see* majority op., ¶¶33-34, 41-42, 44 n.19, 49 n.20, but nonetheless, the majority places great emphasis on these relationship differences, *see* majority op., ¶¶31, 48-49. The majority disclaims any reliance on a “checklist” of similarities with the specific facts of *Watts*, majority op., ¶40, but that is exactly what the majority does. What should readers rely upon for future cases: what the majority opinion *says* or what the majority opinion *does*?

Menard commingled finances, filed joint tax returns, or made joint purchases of real and/or personal property . Sands did not obligate herself to any business or personal debt Menard incurred.” Majority op., ¶49. These facts are not dispositive of unjust enrichment.

¶98 In *Watts*, we detailed certain aspects of the parties’ relationship, but those facts were not necessary to our holding on the unjust enrichment issue. We explained:

Early in 1969, the parties began living together in a “marriage-like” relationship, holding themselves out to the public as husband and wife. The plaintiff assumed the defendant’s surname as her own. Subsequently, she gave birth to two children who were also given the defendant’s surname. The parties filed joint income tax returns and maintained joint bank accounts asserting that they were husband and wife. The defendant insured the plaintiff as his wife on his medical insurance policy. He also took out a life insurance policy on her as his wife, naming himself as the beneficiary. The parties purchased real and personal property as husband and wife. The plaintiff executed documents and obligated herself on promissory notes to lending institutions as the defendant’s wife.

Watts, 137 Wis. 2d at 513, 405 N.W.2d 303.

¶99 None of these facts reappears in the analysis of the plaintiff’s unjust enrichment claim. *See Watts*, 137 Wis. 2d at 530-533, 405 N.W.2d 303. Rather, they were relevant to the plaintiff’s claim that the plaintiff, the defendant, and their children constituted a “family,” thus entitling her to bring an action for property division under Wisconsin’s marriage dissolution stat-

ute. *Watts*, 137 Wis. 2d at 514-15, 405 N.W.2d 303.⁵

III

¶100 This matter is here on summary judgment. Although the majority opinion is confusing, it purports to dismiss Sands' unjust enrichment claim as inadequately pleaded. It nonetheless impermissibly ventures outside the pleadings to weigh the evidence, reaching the conclusion that Sands would not prevail on the merits of her unjust enrichment claim.⁶

⁵ In support, the plaintiff relied upon a Washington court of appeals case with similar facts, *Warden v. Warden*, 36 Wash. App. 693, 676 P.2d 1037 (1984). The Washington court of appeals applied its marriage dissolution statute to divide property acquired by unmarried cohabitants in what was tantamount to a marital family except for a legal marriage. We recognized that "*Warden* is remarkably similar on its facts to the instant case. The parties in *Warden* had lived together for 11 years, had two children, held themselves out as husband and wife, acquired property together, and filed joint tax returns." *Watts*, 137 Wis. 2d at 516, 405 N.W.2d 303. Thus, the plaintiff in *Watts* pleaded similar facts not to support her unjust enrichment claim, but because she was also arguing that her relationship with the defendant should be considered a "family" under Wisconsin's marriage dissolution statute.

⁶ The majority concludes:

[D]espite the litany of contributions she made, we cannot conclude that Sands' contributions were "material" given Menard's wealth and the success of his company when the parties met. In particular, although Sands has listed a series of business transactions in which she "participated" or "assisted," she has alleged no facts from which we could conclude that her contributions caused an increase in Menard's assets or property.

We are similarly disinclined to conclude that Sands has pled sufficient facts which, if true, would demonstrate that Menard's acceptance or retention of her contributions would be inequitable under the circumstances. In particular, Sands must demonstrate that the benefits she conferred to Menard are not offset by the benefits

¶101 In contrast, I conclude that Sands pleaded sufficient facts to state a claim for unjust enrichment against Menard. After reviewing the summary judgment record, viewing all the evidence in the light most favorable to Sands, and drawing all reasonable inferences in her favor (as I must), I would hold that genuine issues of material fact preclude summary judgment. I would remand Sands’ unjust enrichment claim to the circuit court for trial.

¶102 For the reasons set forth, I write separately.

¶103 I am authorized to state that Justice ANN WALSH BRADLEY joins this separate writing.

she derived from him. First, the record indicates that Sands enjoyed an expansive lifestyle as the companion of a wealthy man. Second, unlike the plaintiffs in *Watts* or *Ward*, Sands did receive compensation for some of her services. Over the course of their eight-year relationship, Sands was paid \$49,635.84 for the balance of her student loans, \$3,000 to compensate her for “wedding expenses,” and \$152,105 for various legal services.

Majority op., ¶50-51 (footnotes omitted). The majority noted specific examples of luxuries enjoyed by Sands as Menard’s companion including “multiple boating and skiing trips, vacations to St. Martin, London, and Italy, and . . . a Ford Mustang for Christmas in 2005. They went to horse races, NASCAR events, and fashion shows, and met prominent political figures at that time.” Majority op., ¶51 n.21.

Clearly, the majority reaches beyond the pleadings and has substituted itself as the finder of fact in order to resolve genuine issues of material fact in favor of Menard. At this stage, it is not the court’s task to “decide issues of credibility, weigh the evidence, or choose between differing but reasonable inferences from the undisputed facts.” *Fortier*, 164 Wis. 2d at 665, 476 N.W.2d 593.

2012AP2377 & 2015AP870
Court of Appeals of Wisconsin

Debra K. SANDS,
Plaintiff-Appellant,

v.

John R. MENARD, Jr., Menard, Inc., Menard Thoroughbreds, Inc., Webster Hart as Trustee of the John R. Menard, Jr. 2002 Trust and Related Trusts, Angela L. Bowe as Trustee of the John R. Menard, Jr. 2002 Trust and Related Trusts and Alphons Pitterle as Trustee of the John R. Menard, Jr. 2002 Trust and Related Trusts,

Defendants-Respondents,

Midwest Manufacturing Co., Wood Ecology Inc., Countertops Inc., Team Menard Inc., Menard Engine Group, Menard Competition Technologies LTD, MC Technologies Inc., Menard Engineering LTD, Ultra-motive LTD And Merchant Capital LLC,

Defendants.

Debra K. Sands,
Plaintiff-Appellant-Cross-Respondent,

v.

John R. Menard, Jr., Menard, Inc., and
Menard Thoroughbreds, Inc.,

Defendants-Respondents-Cross-Appellants,

Webster Hart as Trustee of the John R. Menard, Jr.

2002 Trust and Related Trusts, Angela L. Bowe as Trustee of the John R. Menard, Jr. 2002 Trust and Related Trusts, Alphons Pitterle as Trustee of the John R. Menard, Jr. 2002 Trust and Related Trusts, Midwest Manufacturing Co., Wood Ecology Inc., Countertops Inc., Team Menard Inc., Menard Engine Group, Menard Competition Technologies Ltd, MC Technologies Inc., Menard Engineering LTD, Ultramotive LTD And Merchant Capital LLC, Defendants.

STARK, P.J.

¶1 This case involves, in part, the extent to which an attorney can assert a claim under *Watts v. Watts*, 137 Wis. 2d 506, 405 N.W.2d 303 (1987), arising out of legal services allegedly provided to a cohabiting partner and his businesses. Debra Sands appeals orders dismissing her claims against John Menard, Jr., Menard, Inc., and Menard Thoroughbreds, Inc., (“the Menard Defendants”)¹ and against the trustees of the John R. Menard, Jr. 2002 Trust and related trusts (“the Trustees”). Sands claims she cohabitated with Menard from 1998 until 2006, and during that time she performed work for Menard and his companies that increased their value and for which she was not fully compensated. Sands further claims Menard repeatedly represented to her during their relationship that he would give her ownership interests in his companies as compensation for her services, but he has since failed to do so.

¹ We refer to John Menard, Jr., Menard, Inc., and Menard Thoroughbreds, Inc., collectively, as “the Menard Defendants.” We refer to John Menard, Jr., individually, as “Menard” and to Menard, Inc., individually, as “Menard, Inc.”

¶2 For the reasons explained below, we conclude the circuit court properly granted summary judgment dismissing Sands' claims against the Menard Defendants and the Trustees. We also conclude the court properly granted summary judgment to Sands on Menard, Inc.'s counterclaim for breach of fiduciary duty. We therefore affirm.

BACKGROUND

¶3 Menard is the founder of Menards, a highly successful, privately held chain of home improvement stores, and is president and chief executive officer (CEO) of Menard, Inc. In November 1997, nearly forty years after starting his business, Menard began dating Sands. Sands had graduated from William Mitchell College of Law in 1993 and was licensed to practice law in Minnesota.

¶4 Sands contends she moved into Menard's home in August 1998, and they became engaged in December 1998. She claims they lived together until their relationship ended in April 2006. Menard concedes he and Sands were engaged; however, he denies they ever lived together.

¶5 It is undisputed that, during Sands' relationship with Menard, she performed work on behalf of Menard and his companies. Sands asserts:

Among the many contributions Sands made, in addition to being Menard's life's partner, social companion, and manager and hostess of his households, were acting as a "gate-keeper" to screen Menard from unwanted approaches; supervising his health care and medical needs; managing the remodeling of three residences; advising on the acquisition of airplanes and their design and

décor; finding and suggesting ideas for new products and product lines for the Menard stores, such as garden centers; scouting and proposing new store locations; proposing redesign of store layout and product displays; representing Menard, Inc., as a product buyer; reviewing and suggesting changes and additions to Menard, Inc., marketing plans; assisting with government and public relations; participating in the redesign of store signs and logo; helping find new business and investment opportunities; and assisting in the management of newly-acquired businesses, including two engine design companies in England, a thoroughbred racing business, and a \$400 million private equity fund.

Sands contends Menard repeatedly promised to compensate her for her services by giving her “an ownership interest in the various Menard business ventures for which she provided assistance.” Menard denies making any such promises.

¶6 Sands contends she did not perform any legal work for Menard until 2003, over five years after their relationship began. Conversely, the Menard Defendants assert that Sands began providing legal services for Menard in October 1997, about one month before she and Menard began dating. Specifically, the Menard Defendants claim Sands was retained to provide legal services in connection with an investigation by the Wisconsin Department of Natural Resources (DNR) regarding Menard’s disposal of wood ash.

¶7 The record reflects that, on or about May 28, 1998, the Prima Group, a company owned by Sands and her sister, sent Menard, Inc., an invoice for a “Client Matter” entitled “*Wisconsin Dept. of Natural*

Resources v. Menard, Inc.” The invoice stated it was for “Governmental relations & Legal services rendered Oct. 15, 1997–May 15, 1998.” The total amount of the invoice was \$49,635.84, which was comprised of a \$35,000 retainer, \$35.84 in “Disbursements,” and \$14,600 for “Gov’t Relations & Legal Services.” Menard, Inc., paid this invoice in full on May 29, 1998, and recorded the payment in its financial records as a legal expense.

¶8 Sands disputes that the May 29, 1998 payment was compensation for legal services. Instead, Sands contends that, in May 1998, Menard offered to give her money so that she could pay off an outstanding student loan in the amount of \$49,635.84. According to Sands, Menard directed her to bill Menard, Inc., for the exact amount of the loan and to state the invoice was for government relations and legal services. Sands contends this was done so that the payment would be tax deductible by Menard, Inc., as a business expense.

¶9 In addition to the DNR/wood ash matter, the Menard Defendants contend Sands provided legal services to both Menard and Menard, Inc., beginning in September 1998 in a transaction involving race car driver Robby Gordon. Gordon’s affidavit supports the Menard Defendants’ claim. In addition, the record reflects that Menard, Inc., paid Sands \$3,000 on September 21, 1999, and the Menard Defendants contend that payment was for her work on the Gordon transaction.

¶10 Sands concedes she performed “a small amount of work . . . in assisting with negotiation” of the Gordon transaction. However, she asserts her role in the transaction was “as [Menard’s] business advisor, and not as his lawyer.” Sands further claims she was never paid for her work on the Gordon transaction, and

the \$3,000 payment she received from Menard, Inc., was actually a reimbursement for wedding planning expenses.

¶11 The parties do agree, however, that by the year 2003 Sands had begun doing legal work for Menard and Menard, Inc. From May 2003 to June 2004, Sands sent Menard, Inc., seven invoices for a total of 1,049 hours of “legal services” provided between April 9, 2003 and June 7, 2004.² Sands billed at an hourly rate of \$145, which she testified at deposition was “suggested, demanded, . . . approved” and “agreed” upon by Menard. Menard, Inc., paid Sands a total of \$152,105 for the legal work reflected in the seven invoices.

¶12 Sands continued providing legal services for Menard and Menard, Inc., until her relationship with Menard ended in 2006. At that point, Menard instructed Sands to submit a bill for all legal services for which she had not been paid dating back to 2003. Sands then submitted 190 separate invoices to Menard, Inc., for work performed between February 2003 and April 2006. According to those invoices, Sands performed 7,487.10 hours of legal work during that time period, which, at a rate of \$145 per hour, amounted to \$1,085,629.50 in legal fees.

¶13 Sands met with Menard and Peter Liupakka, Menard, Inc.’s chief financial officer (CFO), in October 2006. During the meeting, Liupakka advised

² Beginning in May 2003, all of the invoices Sands sent to Menard, Inc., bore the following header:

Debra K. Sands, Esq.
Attorney-at-Law

Each invoice also included the following description: “Professional fees in respect of legal services in acting on your behalf.” None of the invoices dated May 2003 or later referred to the Prima Group.

Sands he believed the number of hours reflected in her invoices was excessive. Menard, Inc., nevertheless offered to pay Sands \$961,518—the amount claimed in the invoices, less payments Menard, Inc., believed Sands had already received. However, payment of that amount was conditioned on Sands signing a one-page “Release of All Claims,” which expressly included a waiver of any “quasi-marital claims.” Sands refused to sign the release. According to Sands, Menard then “said that he would add an additional \$100,000 to the total of these invoices and [Liupakka] would go prepare the check as [she] sat there if [she] would sign the [r]elease.” Sands again refused to sign. Because of Sands’ refusal, Menard, Inc., declined to pay her any portion of the fees reflected in the 190 invoices she had submitted.

¶14 On November 3, 2008, Sands filed the instant lawsuit against the Menard Defendants and various other parties. Two weeks later, Sands filed an amended complaint dropping all of the additional defendants except MH Private Equity Fund, LLC. A second amended complaint was filed on May 10, 2011, adding the Trustees as defendants. Among other things, the second amended complaint alleged that, in 2002, unbeknownst to Sands, Menard had transferred the vast majority of his non-voting stock in Menard, Inc., to the John R. Menard, Jr. 2002 Trust.

¶15 Sands’ second amended complaint asserted claims for unjust enrichment, breach of contract, and promissory estoppel against Menard. As damages for those claims, Sands sought “a fair and reasonable share of the property, wealth, and increased net worth acquired by Menard through [Sands’] efforts” during their relationship, or damages equal to the fair value of the ownership interest Menard had allegedly promised her. The second amended complaint also

asserted unjust enrichment claims against the other Menard Defendants and the Trustees, claiming in each case that Sands was entitled to “judgment in an amount equal to the fair and reasonable value of the substantial . . . benefits” she had provided. In response to Sands’ second amended complaint, Menard, Inc., asserted a counterclaim against Sands for breach of fiduciary duty.³

¶16 In April 2012, the Menard Defendants moved for partial summary judgment, seeking dismissal of “all of [Sands’] claims by which she [sought] a portion of [Menard’s] net worth or assets, ownership interests in the Menard companies, or any part of the increase in value of the Menard companies.” (Some capitalization omitted.) The Menard Defendants argued, among other things, that Sands was barred from recovering a portion of Menard’s assets or an ownership interest in his companies because she had failed to comply with the requirements of SCR 20:1.8(a) (hereinafter, Rule 1.8(a)), which regulates business transactions between attorneys and clients.⁴ The Trustees also moved for summary judgment. They contended Sands’ unjust enrichment claim against them failed as a matter of law because: (1) Sands did not allege she had provided any services to the Trustees; (2) Sands could not

³ The Menard Defendants also asserted various other counterclaims against Sands. However, they have since abandoned those additional counterclaims, and, as a result, we need not discuss them further.

⁴ All references to SCR 20:1.8(a) are to the 1997 version, which was in effect when Sands and Menard began their relationship and when, according to the Menard Defendants, Sands first performed legal work for Menard. The rule remained unchanged until 2007, after Sands’ relationship with Menard ended. *Compare* SCR 20:1.8(a) (1997), *and* SCR 20:1.8(a) (2006), *with* SCR 20:1.8(a) (2007); *see also* SUP. CT. ORDER 04-07, 293 Wis. 2d xv, xv-xvii, lx (eff. July 1, 2007).

establish the value of her alleged contributions; and (3) the Trustees did not retain any benefit provided by Sands under inequitable circumstances.

¶17 Following a hearing, the circuit court granted both summary judgment motions. With respect to the Menard Defendants' motion, the court declined to adopt a bright-line rule that an attorney's claims against his or her client stemming from a business transaction with the client are necessarily barred if the attorney violated Rule 1.8(a). Instead, the court held that Rule 1.8(a) does not bar the attorney's claim if: (1) the attorney and client had a romantic relationship that predated their attorney-client relationship; and (2) the legal services rendered by the attorney were "merely ancillary or incidental" to the parties' larger joint enterprise.

¶18 Applying the first prong of this test, the circuit court focused on whether the May 28, 1998 invoice from the Prima Group to Menard, Inc., for "legal services" rendered between October 15, 1997, and May 15, 1998, established that Sands' attorney-client relationship with Menard preceded their romantic relationship. The court noted that, for purposes of summary judgment, it was required to accept as true Sands' claim—which the court referred to as "quite a tale"—that the invoice was

a fraudulent document she submitted to Menard, Inc., so that a personal gift from John R. Menard, Jr., to Debra Sands to pay her student loans could be run through his company and, with the magic of fraud, transforms a taxable event under the gift tax to a tax deductible event as a business expense, albeit a tax shifting event to Sands as income.

Even accepting Sands' claim regarding the invoice as

true, however, the court stated it would deny Sands relief in equity because her admitted fraud regarding the invoice was evidence of unclean hands and showed she was *in pari delicto*⁵ with Menard. The court therefore refused to “ignor[e]” the invoice, which, according to the court, showed that Sands had an attorney-client relationship with Menard before their romantic relationship began.

¶19 Applying the second prong of the test stated above, the circuit court noted the record contained “invoices . . . approaching one million dollars covering eight years’ period, which is, on average, . . . over a hundred thousand dollars a year.” The court stated that amount of legal services was “certainly not . . . ancillary, much less incidental.” Because the court concluded neither prong of the test it had formulated was met, it ruled Sands’ violation of Rule 1.8(a) barred her claims against the Menard Defendants for an ownership interest in Menard’s businesses or for a portion of the increase in their value.

¶20 The circuit court then held that, “since there [was] no avenue to recover against the Menard principal,” Sands could not recover from the Trustees. Accordingly, the court granted the Trustees’ motion for summary judgment. The court stated that, following these rulings, Sands’ only remaining claim was her claim “against [the Menard Defendants] for compensation for services rendered.”

¶21 The circuit court subsequently entered written orders granting summary judgment to the Trustees and partial summary judgment to the Menard Defen-

⁵ *In pari delicto* is a Latin phrase meaning “in equal fault.” BLACK’S LAW DICTIONARY 911 (10th ed. 2014). The *in pari delicto* doctrine refers to “[t]he principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing.” *Id.*

dants. Sands appealed as of right from the order regarding the Trustees and petitioned for leave to appeal from the order regarding the Menard Defendants. On December 27, 2012, we denied Sands' motion for leave to appeal the order regarding the Menard Defendants; however, we stayed Sands' appeal of the order regarding the Trustees pending the disposition of her remaining claims in the circuit court.

¶22 Thereafter, in the circuit court, Sands submitted a thirty-seven page list of "nonlegal" services for which she alleged she was entitled to be compensated. Among other things, Sands sought compensation for selecting and purchasing furniture for Menard's residences, planning and preparing meals, managing and coordinating Menard's medical care, assisting with gardening and lawn mowing, providing "personal . . . and family advice," and advising Menard regarding various aspects of his businesses. The Menard Defendants moved to strike Sands' claim for nonlegal services on several grounds, including that Sands had previously averred in an affidavit that she never expected to be compensated for her nonlegal services. The circuit court granted the Menard Defendants' motion to strike, finding Sands had previously admitted she had no expectation of compensation for her nonlegal services. Sands does not challenge that ruling on appeal.

¶23 After the circuit court struck Sands' claim for nonlegal services, the Menard Defendants sought an admission from Sands that her only remaining claim was "for the legal services that she rendered to the Menard Defendants at \$145 per hour." However, Sands refused to admit that fact, instead asserting, apparently for the first time, that she was entitled

to the *quantum meruit*⁶ value of her legal services, which she claimed was between \$355 and \$640 per hour. After multiplying those hourly rates by 6,779.25 hours—the number of hours for which Sands claimed she had not yet been paid—Sands asserted she was entitled to damages of between \$2,406,633.75 and \$4,338,720.

¶24 The Menard Defendants moved to strike Sands’ *quantum meruit* claim, arguing she could not recover on a quasi-contract theory when she had an express contract with Menard to be paid \$145 per hour for her legal services. The circuit court agreed with the Menard Defendants and granted their motion to strike the *quantum meruit* claim, explaining:

All the invoices in this case generated by [Sands] show the rate of \$145 per hour. Even if this sum was dictated by the client, Mr. Menard, this was clearly the agreed rate. [Sands] claims that Mr. Menard repudiated the contract and thus the contract amount when he refused to pay the amount without there being the signature of a general release. Refusal to pay when the services have been fully performed is not a repudiation of the contract, it is rather a breach of the contract.

Sands does not challenge this ruling on appeal.

¶25 In the meantime, Sands moved for summary judgment on Menard Inc.’s counterclaim for breach of fiduciary duty. The circuit court ultimately granted that motion, concluding the counterclaim was barred

⁶ Latin for “as much as he has deserved,” *quantum meruit* refers to “[t]he reasonable value of services; damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship.” BLACK’S LAW DICTIONARY, *supra*, at 1437.

by the applicable statute of limitations.

¶26 Thus, the only remaining claim before the circuit court was Sands' claim that Menard had breached an express contract to pay her \$145 per hour for legal services. On March 27, 2015, Sands moved the circuit court to dismiss that claim with prejudice and enter a final judgment so that she could pursue an appeal of the court's previous order granting the Menard Defendants partial summary judgment. The court granted Sands' motion, and a final order was entered on April 8, 2015, disposing of the entire matter in litigation with respect to all the parties.

¶27 On April 24, 2015, Sands filed a notice of appeal from the circuit court's April 8, 2015 final order. Menard, Inc., cross-appealed from the order dismissing its counterclaim for breach of fiduciary duty. Sands moved to consolidate her appeal from the April 8 order with her previous appeal from the order granting summary judgment to the Trustees. We granted that motion on June 15, 2015. Additional facts are included in the discussion section as necessary.

DISCUSSION

¶28 We review a grant of summary judgment independently, using the same methodology as the circuit court. *Hardy v. Hoefflerle*, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).⁷ The burden is on the party seeking summary judgment to demonstrate "the absence of any genuine factual disputes and entitlement to judgment as a matter of law under the legal standards applicable to the claim."

⁷ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Steven V. v. Kelley H., 2004 WI 47, ¶35, 271 Wis. 2d 1, 678 N.W.2d 856. We review summary judgment materials in the light most favorable to the nonmoving party. *Thomas v. Mallett*, 2005 WI 129, ¶4, 285 Wis. 2d 236, 701 N.W.2d 523.

I. Sands' appeal

A. Sands' claims against the Menard Defendants

¶29 In her second amended complaint, Sands asserted claims for unjust enrichment against all three of the Menard Defendants. In addition, she asserted breach of contract and promissory estoppel claims against Menard only. The Menard Defendants contend the circuit court properly granted summary judgment on all of these claims, to the extent they were premised on legal services Sands provided during her relationship with Menard, because the undisputed facts show that Sands violated Rule 1.8(a), which governs business transactions between attorneys and clients. The Menard Defendants contend Sands' violation of Rule 1.8(a) is a complete bar to any claim that Sands is entitled to an ownership interest in Menard's businesses based on legal services she provided.

¶30 During the time period relevant to this case, Rule 1.8(a) provided:

A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to the client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

- (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) the client consents in writing thereto.

These requirements are necessary because “[a] lawyer’s legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client.” *Model Rules Of Prof’l Conduct* r. 1.8 cmt. (AM. BAR ASS’N 2015). This includes transactions, like the one Sands alleges here, in which an attorney seeks an ownership interest in the client’s business as compensation for legal services. *See id.* (“[Rule 1.8(a)] does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client’s business or other nonmonetary property as payment of all or part of a fee.”).

¶31 Sands argues Rule 1.8(a) does not apply to her because she did not have an attorney-client relationship with Menard at the time he agreed to give her an ownership interest in his businesses as compensation for her services. Sands contends she did not begin performing legal work for any of the Menard Defendants until 2003. Although the Menard Defendants claim Sands acted as Menard’s attorney in 1997 and 1998 in conjunction with the DNR/wood ash matter and the Robby Gordon transaction, Sands contends there are disputed issues of material fact regarding whether she provided legal services in those matters.

¶32 The Menard Defendants argue Sands judicially admitted, in her second amended complaint, that she provided legal services to Menard throughout their

entire relationship.⁸ Regardless of whether Sands judicially admitted to providing legal services to Menard throughout their relationship, we conclude Rule 1.8(a) applies to the conduct at issue in this case. In the second amended complaint, Sands clearly alleged that she provided nonlegal services to the Menard Defendants prior to 2003. However, the circuit court concluded Sands could not recover for any nonlegal services because she conceded she never expected to be compensated for them. Sands does not challenge that ruling on appeal. Thus, Sands is barred from seeking compensation for nonlegal services provided at any time during her relationship with Menard. To the extent Sands seeks compensation for legal services, whenever provided, based upon the alleged representation by Menard that he would give Sands an ownership interest in his businesses in exchange for her services, whenever that representation was alleged to have been made, Sands had an attorney-client relationship with Menard and was subject to the requirements of Rule 1.8(a). Consequently, any arrangement for Sands to acquire an interest in Menard's businesses in exchange for her legal services required her to comply with Rule 1.8(a)'s requirements.

¶33 Having concluded that Sands was required to comply with Rule 1.8(a) in order to receive an ownership interest in Menard's businesses in exchange for her legal services, we note it is undisputed that Sands violated the rule. Sands affirmatively alleges that she entered into an agreement to provide legal services to

⁸ Judicial admissions are "formal statements in stipulations or pleadings which are created in the course of proceedings in an action." TED M. WARSHAFSKY & FRANK T. CRIVELLO II, 11 WIS. PRACTICE SERIES: TRIAL HANDBOOK FOR WIS. LAWYERS § 18:02 (3d ed. 2005). A judicial admission is "conclusive on the party making it" and "forecloses the admitter from contradicting the admission." *Id.*

Menard in exchange for an interest in his businesses, and she does not dispute that she failed to provide the disclosures required by Rule 1.8(a) and to obtain Menard's written consent to the transaction. Nevertheless, Sands argues her violation of Rule 1.8(a) does not bar her claims against the Menard Defendants because violations of the Rules of Professional Conduct can only be considered in attorney disciplinary proceedings.

¶34 In support of this assertion, Sands cites the preamble to the Rules of Professional Conduct, which states, in relevant part:

Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty.

SCR ch. 20, Preamble: A Lawyer's Responsibilities, Scope (1997).

¶35 Sands also cites *Foley-Ciccantelli v. Bishop's*

Grove Condominium Association, 2011 WI 36, 333 Wis. 2d 402, 797 N.W.2d 789, which addressed the proper standard for deciding a motion to disqualify an opposing party's attorney based on a conflict of interest. *Id.*, ¶¶20, 26, 81. In resolving that question, our supreme court stated:

The circuit court concluded that the plaintiffs' law firm did not engage in any unethical conduct of any kind. The instant case is not a determination of unethical conduct. *Violations of the Code of Professional Conduct are determined only by means of disciplinary action.* This is a disqualification proceeding, not a disciplinary proceeding.

Id., ¶2 (emphasis added).

¶36 Finally, Sands cites three additional cases for the proposition that violations of the Rules of Professional Conduct do not provide a basis for civil liability or create a presumption that a legal duty has been breached. See *Industrial Roofing Servs. v. Marquardt*, 2007 WI 19, ¶68 n.14, 299 Wis. 2d 81, 726 N.W.2d 898; *Williams v. Rexworks, Inc.*, 2004 WI App 228, ¶20, 277 Wis. 2d 495, 691 N.W.2d 897; *Nauga, Inc. v. Westel Milwaukee Co.*, 216 Wis. 2d 306, 318 n.5, 576 N.W.2d 573 (Ct. App. 1998).

¶37 Contrary to Sands' assertion, the preamble to the Rules of Professional Conduct and the cases cited above do not establish that the Rules of Professional Conduct can never be considered outside the attorney disciplinary context. In fact, the preamble was amended in 2007 to add the following concluding sentence to the paragraph quoted above: "Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of breach of the applicable standard of conduct." SUP.

CT. ORDER 04-07, 293 Wis. 2d xv, xxii (eff. July 1, 2007). Furthermore, although the *Foley-Ciccantelli* court initially stated violations of the Rules of Professional Conduct could be determined only by means of disciplinary action, *see Foley-Ciccantelli*, 333 Wis. 2d 402, ¶2, 797 N.W.2d 789, the court went on to hold that the Rules can be considered in determining whether an attorney should be disqualified because the Rules “provide principles for an attorney’s duties to former and current clients.” *Id.*, ¶91. The court explained that Wisconsin courts “have often cited the Rules of Professional Conduct for guidance in non-disciplinary cases, including disqualification cases.” *Id.*, ¶86.

¶38 With these principles in mind, we conclude Sands’ undisputed violation of Rule 1.8(a) barred her equitable claims against the Menard Defendants—that is, her unjust enrichment claims against all three Menard Defendants and her promissory estoppel claim against Menard.⁹ It is axiomatic that a party seeking to recover in equity must come to court with clean hands. *See Zinda v. Krause*, 191 Wis. 2d 154, 174, 528 N.W.2d 55 (Ct. App. 1995).

Equity imperatively demands of suitors in its courts fair dealing and righteous conduct with reference to the matters concerning which they seek relief. He who has acted in bad faith, resorted to trickery and deception, or been guilty of fraud, injustice, or unfairness, will appeal in vain to a court of con-

⁹ As noted above, the circuit court concluded Rule 1.8(a) barred Sands’ claims if: (1) her attorney-client relationship with Menard predated their romantic relationship; and (2) the legal services she provided were “merely ancillary or incidental” to the parties’ larger joint enterprise. The court did not, however, cite any legal authority in support of this two-factor test. We therefore decline to adopt it.

science, even though in his wrongdoing he may have kept himself strictly “within the law.” Misconduct which will bar relief in a court of equity need not necessarily be of such nature as to be punishable as a crime or to constitute the basis of legal action. Under this maxim, any wilful act in regard to the matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean.

David Adler & Sons Co. v. Maglio, 200 Wis. 153, 160, 228 N.W. 123 (1929) (quoting *Weegham v. Killefer*, 215 F. 168, 171 (W.D. Mich. 1914)).

¶39 Here, Rule 1.8(a) sets forth a standard of conduct with which an attorney must comply when entering into a business transaction with his or her client. If, as Sands alleges, she entered into a business transaction with Menard by which she agreed to perform legal services for him in exchange for an interest in his businesses, Sands was required to comply with Rule 1.8(a). It is undisputed that Sands failed to comply with the rule. By doing so, Sands committed a willful act that would be “condemned and pronounced wrongful by honest and fair-minded men.” See *David Adler & Sons*, 200 Wis. at 160, 228 N.W. 123. As such, Sands’ hands are unclean, and her violation of Rule 1.8(a) therefore bars her from recovering on her equitable claims.

¶40 Sands raises several arguments in attempt to save her equitable claims. First, she argues Menard waived his right to raise her violation of Rule 1.8(a) as a defense by ratifying their agreement after the violation occurred. Sands cites three cases in support

of this proposition.¹⁰ See *DiLuglio v. Providence Auto Body, Inc.*, 755 A.2d 757 (R.I. 2000); *Milo Fields Trust v. Britz*, 378 N.J.Super. 137, 874 A.2d 1130 (Ct. App. Div. 2005); *Murdock v. Nalbandian*, Nos. 218-2008-CV-1062, 218-2009-EQ-0031, 2010 WL 8484210 (N.H. Super. Ct. Oct. 26, 2010).

¶41 Assuming without deciding that Menard performed acts sufficient to constitute ratification,¹¹ we nevertheless reject Sands’ ratification argument. None of the foreign cases Sands cites involved a client attempting to use an attorney’s violation of Rule 1.8(a) as a defense to the client’s equitable claims against the attorney. Because none of those cases involved equitable claims, but rather contract claims, they did not address whether an attorney’s violation of Rule 1.8(a) rendered the attorney’s hands unclean and therefore prevented the attorney from pursuing equitable claims against the client. Here, in contrast, we have concluded Sands’ hands are unclean due to her Rule 1.8(a) violation, and she is therefore precluded from recovering on her equitable claims. Sands cites no authority for the proposition that Menard’s alleged ratification of the underlying transaction was sufficient to show the safeguards required when an attorney enters into an arrangement with a client to obtain an interest in the client’s businesses were met. Absent such a showing, Menards’ alleged ratification cannot cleanse Sands’ unclean hands, thus permitting her to recover in equity.

¹⁰ Sands also cites a fourth case. See *Twachtman v. Hastings*, No. CV 9557307S, 1997 WL 433878 (Conn. Super. Ct. July 23, 1997). However, Twachtman does not discuss waiver or ratification.

¹¹ Sands contends Menard ratified his promise to give her a share of his businesses by “repeat[ing]” that promise throughout their relationship; she does not contend that any such agreement was ever reduced to writing.

¶42 Sands also argues Rule 1.8(a) does not apply to an unjust enrichment claim brought under *Watts*. In *Watts*, the plaintiff (Sue Ann) and defendant (James) lived together for twelve years, during which time they had two children together and held themselves out to the public as husband and wife. *Watts*, 137 Wis. 2d at 513, 405 N.W.2d 303. Sue Ann contributed childcare and homemaking services to the relationship, as well as personal property. *Id.* She also worked at James' business and at a separate business she started with his sister-in-law. *Id.* at 514. After the parties' romantic relationship ended, James "refused to share equally with [Sue Ann] the wealth accumulated through their joint efforts or to compensate her in any way for her contributions to the relationship." *Id.* Sue Ann therefore sued James, asserting several grounds for relief.

¶43 On appeal, our supreme court rejected Sue Ann's argument that she was entitled to a division of property under the statutes governing the disposition of property at divorce. *Id.* at 519-20, 405 N.W.2d 303. The court also rejected Sue Ann's claim that James was estopped from asserting their lack of a legal marriage as a defense against Sue Ann's claim for property division under the divorce statutes. *Id.* at 520-21, 405 N.W.2d 303. However, the court concluded the circuit court had improperly dismissed Sue Ann's remaining claims for breach of an express or implied contract, unjust enrichment, and partition. *Id.* at 528-29, 533, 537, 405 N.W.2d 303. With respect to the unjust enrichment claim, the court rejected James' argument that it should "leave the parties to an illicit relationship such as the one in this case essentially as they are found, providing no relief at all to either party." *Id.* at 532, 405 N.W.2d 303. Instead, the court held that "unmarried cohabitants may raise claims based

upon unjust enrichment following the termination of their relationships where one of the parties attempts to retain an unreasonable amount of the property acquired through the efforts of both.” *Id.* at 532-33, 405 N.W.2d 303.

¶44 Sands argues *Watts* affirms her right to bring an unjust enrichment claim against Menard.¹² However, unlike Sands, the plaintiff in *Watts* was not an attorney and was therefore not subject to the requirements of Rule 1.8(a). There is no exception to Rule 1.8(a) for attorneys who cohabit with their clients, and we decline Sands’ invitation to read *Watts* as establishing such an exception. Sands’ own pleadings allege that she entered into an arrangement with Menard, her client, by which she provided legal services in exchange for a promise that Menard would give her a share of his businesses. This situation falls squarely within the parameters of Rule 1.8(a), and Sands was therefore required to comply with the rule’s requirements.

¶45 Sands next asserts the ownership interests she sought to acquire were not “adverse” to her client. *See* SCR 20:1.8(a) (“A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest *adverse* to a client unless . . .” (emphasis added)). However, Sands’ own pleadings belie this assertion. According to Sands’ second amended complaint, she provided legal services to both Menard

¹² Sands frequently refers to her unjust enrichment claim as a “*Watts* claim.” However, *Watts v. Watts*, 137 Wis. 2d 506, 405 N.W.2d 303 (1987), did not create a new cause of action for unmarried cohabitants. It merely recognized that such parties are not barred from asserting existing legal or equitable claims by virtue of their cohabitation. *See, e.g., id.* at 532, 405 N.W.2d 303.

and his businesses “in reliance on the promises and representations of Menard ... to compensate her with an ownership interest for her contributions to the increase in the net worth of Menard and his various business interests.” If Sands succeeded in gaining either an ownership interest in Menard’s businesses or the economic equivalent in damages, that result would clearly be adverse to Menard because Sands’ gain would be Menard’s loss.

¶46 Finally, Sands claims that barring her unjust enrichment claim in this case would mean that no lawyer could ever bring an unjust enrichment claim under *Watts* against a former cohabitant. However, that is not the case. We merely hold that an attorney cannot bring an unjust enrichment claim under *Watts* to recover an ownership interest in a former cohabitant’s business (or equivalent damages) as compensation for legal services, unless the attorney complied with Rule 1.8(a). Our holding in this case does not address other circumstances in which an attorney might attempt to bring an unjust enrichment claim under *Watts*—for instance, a circumstance in which the attorney provided only nonlegal services to a joint enterprise with a cohabitant, or a circumstance in which the attorney contributed to a joint enterprise the salary he or she earned while working at a law firm on unrelated matters.

¶47 Having concluded that Sands’ violation of Rule 1.8(a) bars her equitable claims against the Menard Defendants, we turn to Sands’ claim that Menard breached a contract with her by failing to give her an ownership interest in his companies as compensation for her legal services. Assuming without deciding that Sands’ failure to comply with Rule 1.8(a) does not bar her breach of contract claim, or that Menard waived his right to assert the rule violation as a defense by

ratifying the parties' transaction, we nevertheless conclude the claim was properly dismissed because it was insufficiently pled.

¶48 “A contract must be definite and certain as to its basic terms and requirements to be enforceable.” *Metropolitan Ventures, LLC v. GEA Assocs.*, 2006 WI 71, ¶ 22, 291 Wis. 2d 393, 717 N.W.2d 58, *opinion clarified on denial of reconsideration*, 2007 WI 23, 299 Wis. 2d 174, 727 N.W.2d 502. “Indefiniteness means that an essential term of the agreement is so vague or indefinite that that agreement is not ‘definite as to the parties’ basic commitments and obligations,’ thus preventing the formation of a contract.” *Ehlinger v. Hauser*, 2008 WI App 123, ¶28, 313 Wis. 2d 718, 758 N.W.2d 476 (quoting *Management Comput. Servs. Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 178, 557 N.W.2d 67 (1996)). Indefiniteness is not synonymous with ambiguity. *Id.* “[W]hereas ambiguity in itself does not render a contract unenforceable, indefiniteness does.” *Id.*

¶49 Here, Sands’ second amended complaint simply alleges that Menard

repeatedly promised, agreed, and represented to Sands that, in consideration for Sands’s assistance, advice, and efforts on behalf of Menard and his various business interests and entities, Menard would compensate Sands with an ownership interest for her contributions to the acquisition of property, wealth, and the increase in his net worth and the net worth of his various business[es].

The complaint does not identify the amount or value of the ownership interest Menard agreed to give Sands, or even in which entity or entities he agreed to give her an ownership interest. It therefore fails to

identify with specificity the consideration Menard allegedly promised Sands in exchange for her services. Without this essential term, Sands has failed to allege a valid and enforceable contract. Accordingly, her breach of contract claim against Menard was properly dismissed. See *Trinity Ev. Luth. Church & Sch.-Freistadt v. Tower Ins. Co.*, 2003 WI 46, ¶32, 261 Wis. 2d 333, 661 N.W.2d 789 (“[T]he first step in the summary judgment review analysis is to determine whether the pleadings set forth a claim of relief.”).

B. Sands’ claim against the Trustees

¶50 Sands also appeals the circuit court’s order dismissing her unjust enrichment claim against the Trustees. Sands’ second amended complaint alleged that Sands, through her work for Menard and his businesses, “conferred substantial benefits” on the Trustees “in their representative capacity” as trustees of the John R. Menard, Jr. 2002 Trust; that the Trustees were aware of the substantial benefits; and that the Trustees “accepted and retained the substantial benefits ... under circumstances making it inequitable to retain those benefits without payment of their value.” Sands therefore alleged she was entitled to “judgment in an amount equal to the fair and reasonable value of the substantial benefits” she provided.

¶51 The circuit court granted the Trustees summary judgment based on its earlier ruling granting partial summary judgment to the Menard Defendants. The court reasoned, “[S]ince there is no avenue to recover against the Menard principal, there cannot be recovery against the [Trustees].” On appeal, Sands does not challenge the court’s conclusion that, if her claims against the Menard Defendants were properly dismissed, dismissal of her claim against the Trustees was also required. In fact, in her brief-in-chief, Sands’ entire argument regarding the order granting sum-

mary judgment to the Trustees is as follows:

The [c]ircuit [c]ourt entered summary judgment for the Trustees solely because it granted summary judgment for the Menard Defendants. Because the Menard Order must be reversed, then so must the Trustee Order granting summary judgment for the Trustees.

In her reply brief, Sands similarly fails to dispute the circuit court's conclusion that dismissal of her claims against the Menard Defendants necessitated dismissal of her claim against the Trustees.

¶52 Failure to address the grounds on which the circuit court ruled constitutes a concession of the ruling's validity. *Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994); *see also Industrial Risk Insurers v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (“[W]e will not abandon our neutrality to develop arguments” for the parties.). Here, we have already concluded the circuit court properly dismissed Sands' claims against the Menard Defendants, and Sands does not challenge the circuit court's ruling that dismissal of her claims against the Menard Defendants was fatal to her claim against the Trustees. We therefore affirm the order dismissing Sands' unjust enrichment claim against the Trustees.

II. Menard, Inc.'s cross-appeal

¶53 In a cross-appeal, Menard, Inc., argues the circuit court erred by granting Sands summary judgment on its counterclaim for breach of fiduciary duty. Specifically, Menard, Inc., contends Sands breached her fiduciary duties while representing Menard, Inc., in a transaction involving the formation of MH Private Equity Fund, LLC (the Fund).

A. Factual background

¶54 It is undisputed that Sands acted as outside legal counsel for Menard, Inc., from at least January 2005 until October 2005 in connection with the Fund's formation. As part of the transaction, Menard, Inc., created a wholly-owned subsidiary known as Merchant Capital, LLC, which ultimately invested more than \$300 million in the Fund. The Fund was managed by MH Equity Managing Member, LLC (MH Equity), a company owned by Stephen Hilbert and his wife. As Menard, Inc.'s attorney, Sands negotiated the terms of the Fund transaction with Stephen Hilbert, who was a personal friend of Menard. She also reviewed, edited, and drafted the necessary legal documents. Sands later billed Menard, Inc., for 753.75 hours of legal services in connection with the Fund transaction. At Sands' hourly rate of \$145, this amounted to \$109,239.75 in legal fees.

¶55 Menard, Inc., asserts Sands breached her fiduciary duties in three primary ways with respect to the Fund transaction. First, Menard, Inc., asserts that, during her negotiations with Hilbert, Sands attempted to obtain a twenty-percent ownership interest in the entity created to manage the Fund. The record shows that, on March 11, 2005, Sands received an email from Hilbert attaching draft documents regarding the Fund's formation, including a "Subscription Agreement" through which Sands would purchase 30,000 shares in TH Investment, LLC, a Hilbert-owned entity that was a forerunner of MH Equity. Another document in the record, a draft of the "Summary of Selected Terms and Conditions" for the Fund, showed Sands as having a twenty-percent interest in MH Equity.¹³

¹³ Sands never actually obtained an ownership interest in MH Equity. Hilbert testified at deposition that he refused to provide Sands an ownership interest in MH Equity because doing so

¶56 Menard, Inc., also contends Sands breached her fiduciary duties by “bec[oming] an advocate for the Fund transaction and disclos[ing] confidential information to Hilbert to ensure the transaction would close.” It is undisputed that a meeting was scheduled for September 1, 2005, to negotiate the final terms of the Fund transaction. The day before the meeting, Sands sent Hilbert an email that stated, in relevant part:

Bob brought up the issue of board approval today. Obviously, John [Menard] should have approval for this undertaking, but as you and I know, board approval for him is a minor formality. Since he is 90% Maj SH (and the others are his kids) it is really a moot point. He is THE decision maker and it wouldn’t be the first deal that was approved post-signing. So, if he uses that as a stall – I would push him a bit, at least try to get the signature – maybe date it out a week in order for him to “document” approval.

Despite our concerns over funding – I think we should be very careful not to raise this issue with him. Let’s see if we can get everything in place first. It isn’t something he has thought about and I’d rather he didn’t think too much about it. It’s best if he “feels” that this is a “Menard” deal and obligation—which he does.

I would play to the idea that the financial strength of the Fund and its backing by Menards gives it a tremendous advantage

would have been a “conflict [due to her representation of] John [Menard].” Sands contends she did not receive an ownership interest primarily because she was not an “accredited investor,” but also because she did not want to be “in a position where it could be construed as any kind of conflict of interest.”

in the market and the ability to attract the best deals. He'll like that and it's true and it will make him want to make sure the Fund is strong. He's proud of his financial strength and he wants only to be associated with "winners". The only thing he probably hates more than actually losing money is for others to know he has made a bad investment and is losing money . . .

¶57 The parties met the next day as scheduled. During the meeting, accountant Joseph Stienessen and Menard, Inc.'s CFO, Peter Liupakka, counseled against going forward with the transaction. Sands then began advocating strongly in favor of the transaction and, according to Menard, Inc., falsely informed Menard he was legally obligated to proceed. In response, Menard asked Sands, "[W]hose side are you on?" and queried whether he "should get different counsel to represent him." Despite his misgivings, Menard went forward with the Fund transaction. Sands later asserted that she was "responsible for saving the deal."

¶58 Finally, Menard, Inc., asserts Sands breached her fiduciary duties by accepting certain payments from Hilbert without disclosing them to Menard, Inc. Menard, Inc., notes that, on October 6, 2005, approximately one month after the transaction closed, Sands received a check for \$15,000 from the "Stephen C. Hilbert Trust." At her deposition, Sands described that payment as a "bonus." The record also shows that, after the Fund transaction closed, Sands was named general counsel of the Fund. From September 2005 until February 2007, she received \$180,000 for her work as general counsel.

¶59 As discussed above, after Sands filed the instant lawsuit, Menard, Inc., filed a counterclaim

against her for breach of fiduciary duty on January 15, 2009. Sands later moved for summary judgment on the counterclaim, asserting it was barred by the two-year statute of limitations in WIS. STAT. § 893.57 (2007-08).¹⁴ The circuit court agreed and granted Sands summary judgment on the counterclaim. Menard, Inc., cross-appeals from that order.¹⁵

B. Analysis

¶60 On appeal, it is undisputed that Menard, Inc.'s counterclaim for breach of fiduciary duty was subject to the two-year statute of limitations in WIS. STAT. § 893.57. It is also undisputed that, under WIS. STAT. § 893.14, the filing of Sands' complaint on November 3, 2008, tolled the statute of limitations on the counterclaim.¹⁶ The operative issue is therefore whether Menard, Inc.'s counterclaim accrued prior to

¹⁴ At all times relevant to this case, WIS. STAT. § 893.57 set forth a two-year statute of limitations for intentional tort claims. See § 893.57 (2007-08); see also *Zastrow v. Journal Commc'ns, Inc.*, 2006 WI 72, ¶¶35-40, 291 Wis. 2d 426, 718 N.W.2d 51 (breach of fiduciary duty is an intentional tort). The statute was subsequently amended to provide a three-year limitations period. See 2009 Wis. Act 120, § 1. The three-year limitations period "first applie[d] to injuries occurring on" the act's effective date—February 26, 2010. See *id.*, § 2; see also WIS. STAT. § 991.11 (unless otherwise specified, the effective date of an act is the day after publication). It is undisputed that any breach of Sands' fiduciary duties with respect to the Fund transaction occurred before February 26, 2010; accordingly, the two-year statute of limitations in § 893.57 (2007-08), applies. As a result, all further references to § 893.57 in this opinion are to the 2007-08 version.

¹⁵ During the circuit court proceedings, Menard, Inc., was granted leave to amend its breach of fiduciary duty counterclaim to add Merchant Capital as a counterclaim plaintiff. However, Merchant Capital did not file a notice of appeal from the order granting Sands summary judgment on the counterclaim, and we therefore do not discuss it further.

¹⁶ WISCONSIN STAT. § 893.14 provides, in relevant part:

November 3, 2006. If it did, the claim is barred by the two-year statute of limitations in § 893.57, and the circuit court properly granted Sands summary judgment.

¶61 “It is well settled that a cause of action accrues when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it.” *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 302, 315, 533 N.W.2d 780 (1995). Sands argues that, with respect to Menard, Inc.’s counterclaim, these elements were fully satisfied as of September 1, 2005, the date on which the Fund transaction was finalized. Menard, Inc., does not dispute Sands’ contention that these elements were satisfied as of September 1, 2005. Instead, Menard, Inc., argues its counterclaim was nevertheless timely pursuant to the discovery rule.

¶62 Our supreme court adopted the discovery rule in *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 560, 335 N.W.2d 578 (1983), for “all tort actions other than those already governed by a legislatively created discovery rule.” The rule provides that such tort claims “shall accrue on the date the injury is discovered or with reasonable diligence should be discovered, whichever occurs first.” *Id.* The discovery rule, as adopted

Unless otherwise specifically prescribed by law, the period within which a cause of action may be used as a defense or counterclaim is computed from the time of the accrual of the cause of action until the time that the plaintiff commences the action in which the defense or counterclaim is made.

We have previously explained that this language tolls a statute of limitations applicable to a defendant’s counterclaim beginning on the date the plaintiff files his or her complaint. See *Donaldson v. West Bend Mut. Ins. Co.*, 2009 WI App 134, ¶¶12, 24, 321 Wis. 2d 244, 773 N.W.2d 470.

in *Hansen*, balances “the threat of stale or fraudulent actions against the injustice of barring meritorious claims before the claimant knows of the injury.” *Dakin v. Marciniak*, 2005 WI App 67, ¶14, 280 Wis. 2d 491, 695 N.W.2d 867.

¶63 Sands contends the undisputed facts show that Menard, Inc., had enough information as of September 1, 2005, that it should have, with reasonable diligence, discovered Sands’ alleged breach of her fiduciary duties.¹⁷ Reasonable diligence “means such diligence as the great majority of persons would use in the same or similar circumstances.” *Auwe v. Physicians Ins. Co.*, 181 Wis. 2d 815, 823, 512 N.W.2d 216 (Ct. App. 1994). “Plaintiffs may not close their eyes to means of information reasonably accessible to them and must in good faith apply their attention to those particulars which may be inferred to be within their reach.” *Spitler v. Dean*, 148 Wis. 2d 630, 638, 436 N.W.2d 308 (1989). “[I]n an appropriate case, an initial suspicion may trigger the discovery or the obligation to exercise reasonable diligence to discover the injury.” *Goff v. Seldera*, 202 Wis. 2d 600, 611, 550 N.W.2d 144 (Ct. App. 1996). “When the material facts are undisputed and only one inference can reasonably be drawn, whether a plaintiff exercise[d] reasonable diligence in the discovery of an injury is a question of law.” *Dakin*, 280 Wis. 2d 491, ¶14.

¶64 We agree with Sands that, as of September 1, 2005, Menard, Inc., had enough information that it should have, with reasonable diligence, discovered the

¹⁷ Sands also suggests, in a footnote, that the discovery rule may not apply to a claim for breach of fiduciary duty. However, Sands fails to develop an argument in support of this assertion, and we therefore decline to address it. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments).

alleged breach of Sands' fiduciary duties. Menard, the president and CEO of Menard, Inc., conceded at deposition that he had formed a belief as early as 2004 that Sands and Hilbert were "increasingly close, and it was very difficult to tell whose side [Sands] was on, was she on [Hilbert's] side or my side." Menard further testified he believed at that time that Sands was lying to him, and he did not think she was protecting his interests.

¶65 With respect to the Fund transaction, Menard testified that, by the time the September 1, 2005 meeting occurred, he suspected that Sands, her sister, and Hilbert were conspiring against him. During that meeting, Menard openly questioned Sands' loyalty to him, asking her, "[W]hose side are you on?" and querying whether he "should get different counsel to represent him." Menard conceded in his deposition testimony that he discussed his concerns about Sands' loyalty with both Stienessen and Liupakka before finalizing the Fund transaction.

¶66 The only reasonable conclusion that can be drawn from these undisputed facts is that, as of September 1, 2005, Menard, Inc. had suspicions about Sands' loyalty that would have been significant enough to prompt a reasonable person in Menard, Inc.'s position to investigate further. Menard, Inc., however, chose not to do so. By doing nothing in the face of these suspicions, Menard, Inc., failed to exercise reasonable diligence to discover the alleged breach of Sands' fiduciary duties. *C.f. id.*, ¶18 ("Speculation after the fact about why an investigation might have failed does not alter the fact that [plaintiff] never attempted any investigation . . . [Plaintiff] simply did nothing that might have produced more information and we conclude that, in this case, doing nothing was not an exercise of reasonable diligence.").

¶67 Menard, Inc., argues its mere suspicions regarding Sands were insufficient to trigger its obligation to exercise reasonable diligence. However, as noted above, an initial suspicion may in some cases be enough to trigger a plaintiff's duty to investigate. *Goff*, 202 Wis. 2d at 611, 550 N.W.2d 144. For instance, in *KDC Foods, Inc. v. Gray, Plant, Mooty, Mooty & Bennett, P.A.*, 763 F.3d 743 (7th Cir. 2014), KDC Foods asserted fraud and conspiracy claims against its former law firm. *Id.* at 748. The district court concluded those claims were barred by the six-year statute of limitations in WIS. STAT. § 893.93(1)(b), and the Seventh Circuit affirmed that ruling on appeal. *KDC Foods*, 763 F.3d at 749, 754. In so doing, the Seventh Circuit rejected KDC Foods' argument that its claims were timely under the discovery rule. The court noted that, under Wisconsin law,

“Discovery occurs when the plaintiff has information that would constitute the basis for an objective belief as to his or her injury and its cause.” As soon as the defrauded party has “sufficient knowledge to make a reasonable person aware of the need for diligent investigation,” the clock begins to run.

KDC Foods, 763 F.3d at 750 (citations omitted).

¶68 The Seventh Circuit further observed that the degree of certainty required to trigger a plaintiff's duty to investigate “is variable, depending on the particular facts and circumstances of the plaintiff,” and that “with corporate players, a different quantum of expertise and knowledge is in play.” *Id.* at 751. Consequently, “ignorance is a less compelling excuse for corporate enterprises in the context of the discovery rule.” *Id.* Observing that both of the parties in *KDC Foods* were “experienced corporate players,” the court concluded:

Accordingly, we do not find that the circumstances justified a more forgiving application of the discovery rule to KDC. KDC did not require “a greater degree of certainty” than “initial suspicion” to trigger discovery of its alleged injury, and it certainly was not required to be convinced that actual fraud had occurred, as *KDC* argues in its briefs.

Id.

¶69 Similarly, in this case, Menard, Inc., is an experienced corporate player. As of September 1, 2005, Menard—its president and CEO—suspected Sands was acting in a way that violated her fiduciary duties. Menard raised concerns about Sands with Liupakka and Stienessen, both of whom advised against going forward with the Fund transaction. As in *KDC Foods*, these “initial suspicions” were sufficient to trigger Menard, Inc.’s duty to exercise reasonable diligence to investigate Sands’ conduct. *See id.*

¶70 Menard, Inc., correctly notes that Sands, as its attorney and fiduciary, had an obligation to disclose any conflicts of interest pertaining to the Fund transaction. Menard, Inc., therefore argues it was not obligated to exercise reasonable diligence to investigate and discover any breach of Sands’ fiduciary duties. Citing cases from Mississippi and Texas, Menard, Inc., asserts that, “because of the high level of trust that a client must necessarily place in his [or her] attorney, some courts have categorically refused to bar a client’s claim against an attorney on statute-of-limitations grounds.”

¶71 We do not find the foreign cases cited by Menard, Inc., persuasive. Instead, we conclude the existence of a fiduciary relationship, rather than excusing a client entirely from its obligation to investigate, is merely

one factor to be considered in determining whether the client exercised reasonable diligence to discover a claim against its attorney. Under the circumstances of this case, although a fiduciary relationship existed between Sands and Menard, Inc., other undisputed facts show that Menard, Inc., was a sophisticated corporate actor and that its president and CEO harbored suspicions about Sands' conduct for approximately one year before the Fund transaction closed. Those facts gave rise to a duty to investigate, regardless of the fiduciary relationship between Sands and Menard, Inc.

¶72 Finally, Menard, Inc., argues it cannot be expected to have discovered Sands' breach of fiduciary duty in September 2005 because it "was not able to confirm and complete its investigation . . . until after it obtained discovery in this case." Again, we reject Menard, Inc.'s argument, based on the Seventh Circuit's reasoning in *KDC Foods*. There, relying on an 1884 case, KDC Foods had argued it did not have any reason to suspect its former law firm had committed misconduct until it deposed attorneys from that firm in related litigation. *KDC Foods*, 763 F.3d at 752 (citing *O'Dell v. Burnham*, 61 Wis. 562, 21 N.W. 635 (1884)). According to KDC Foods, only after those depositions were conducted did it have "objective evidence" of the attorneys' "specific role in the fraud." *Id.* In rejecting this argument, the Seventh Circuit explained:

O'Dell does not stand for the proposition that a plaintiff must have more knowledge than that which would prompt a reasonable person to inquire further into the alleged fraud. The Wisconsin courts—in over a hundred years of interpreting *O'Dell* and the discovery rule—have been clear that "actual and complete knowledge of the fraud on the part of the plaintiff is not necessary in

order to set the limitation period running.” It is well-understood that Wisconsin courts impute knowledge to a party when it “finds out enough to cause a reasonable [party] to make sufficient inquiries to discover a fraud.”

Id. at 752-53 (internal citations omitted).

¶73 Here, although Menard, Inc., may not have had full knowledge of Sands’ alleged misconduct on September 1, 2005, it certainly had enough information at that time to prompt a reasonable person—or, more to the point, a reasonable corporation—to inquire further. As a result, Menard, Inc.’s counterclaim against Sands for breach of fiduciary duty accrued on September 1, 2005. Because the counterclaim accrued before November 3, 2006, it is barred by the two-year statute of limitations in WIS. STAT. § 893.57. *See supra*, ¶60. Consequently, the circuit court properly granted Sands summary judgment on the counterclaim.¹⁸

Orders affirmed.

¹⁸ On appeal, Sands also argues Menard, Inc., lacked standing to bring the counterclaim because any injury caused by the alleged breach of Sands’ fiduciary duties was sustained by Merchant Capital, rather than Menard, Inc. Because we conclude the circuit court properly dismissed Menard, Inc.’s counterclaim on statute of limitations grounds, we need not address Sands’ argument regarding standing. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (appellate court need not address every issue raised by the parties when one issue is dispositive).

App. 85a

[Filed: September 4, 2013]

STATE OF WISCONSIN
CIRCUIT COURT EAU CLAIRE COUNTY
BRANCH V

Case No.: 08-CV-990

DEBRA K. SANDS,

Plaintiff,

v.

MENARD, INC., et al,

Defendants.

ORDER GRANTING THE MENARD DEFENDANTS'
MOTION TO STRIKE ALL OF PLAINTIFF'S CLAIMS
FOR NON-LEGAL SERVICES AND DENYING THE
MENARD DEFENDANTS' MOTION TO STRIKE
CERTAIN OF PLAINTIFF'S CLAIMS FOR LEGAL
SERVICES

The above-entitled action came before the Honorable Paul J. Lenz on August 12, 2013, on the Menard Defendants' Motion to Strike all of Plaintiff's Claim for Non-Legal Services and Certain of Plaintiff's Claims for Legal Services. Appearances were as noted on the Record. Based upon the Record and proceedings herein,

IT IS HEREBY ORDERED:

That the Menard Defendants' Motion to Strike all for Plaintiff's Claim for Non-Legal Services is granted for the reasons stated on the Record; and

That the Menard Defendants' Motion to Strike Certain of Plaintiff's Claims for Legal Services is denied for the reasons stated on the Record.

Dated this 3 day of Sept, 2013.

BY THE COURT:

/s/

Honorable Paul J. Lenz
Circuit Court Judge
Eau Claire County, Wisconsin

STATE OF WISCONSIN:
CIRCUIT COURT EAU CLAIRE COUNTY
BRANCH 5

ORAL RULING

Case No. 08-CV-990

DEBRA K. SANDS,
Plaintiff,

-vs-

JOHN R. MENARD, JR.; MENARD,
INC.; MENARD THOROUGHBREDS, INC.;
MH PRIVATE EQUITY FUND, LLC;
WEBSTER HART, AS TRUSTEE OF THE
JOHN R. MENARD, JR., 2002 TRUST
AND RELATED TRUSTS; ANGELA L. BOWE,
AS TRUSTEE OF THE JOHN R. MENARD, JR.,
2002 TRUST AND RELATED TRUSTS; AND
ALPHONS PITTERLE, AS TRUSTEE OF THE
JOHN R. MENARD, JR., 2002 TRUST AND
RELATED TRUSTS,
Defendants.

MENARD, INC.,
Counter-Plaintiff,

-vs-

DEBRA K. SANDS,
Counter-Defendant.

The above-entitled matter coming on to be heard before the Honorable Paul J. Lenz, judge of the above-named court, on the 12th day of August, 2013, commencing at approximately 1:30 p.m., in the courthouse in the City of Eau Claire, County of Eau Claire, State of Wisconsin.

APPEARANCES:

DANIEL R. SHULMAN and JULIE L. BOEHMKE, of the firm of Gray, Plant, Mooty, Mooty & Bennett, 500 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402, appeared via telephone representing the Plaintiff.

BRIAN P. NORTON and MICHAEL D. FREEBORN, of the firm of Freeborn & Peters, LLP, 311 South Wacker Drive, Suite 3000, Chicago, Illinois 60606, appeared representing the Defendants.

STEPHANIE L. FINN, of the firm of Herrick & Hart, S.C., 116 West Grand Avenue, Eau Claire, Wisconsin 54703, appeared representing the Defendants.

JAMES ANDERSON, Attorney at Law, 5101 Menard Drive, Eau Claire, Wisconsin 54703, appeared representing Menard, Inc.

THE COURT: All right. This is 08-CV-990. This one's misnumbered. The appearances today, please.

MR. SHULMAN: Your Honor, good afternoon. For the plaintiff, by phone, Dan Shulman and Julie Boehmke.

MR. NORTON: Good afternoon, Your Honor. Brian Norton and Michael Freeborn from Freeborn & Peters, Stephanie Finn from Herrick & Hart, James Anderson from Menard, and John Menard is here as well.

THE COURT: All right. This is the time set

for an oral ruling. Once in a while, you come across a quote that kind of goes to the point on things; and this is one from someone that the folks, when they were starting the revolution in this country, quoted a lot. His name was Charles de Montesquieu said: "There is no crueller tyranny than that which is perpetuated under the shield of law and in the name of justice." I just kind of like that.

We need to remember here that the lawyer regulation rules as the court has interpreted them in Wisconsin are a shield, not a sword. The Menards defendants bring motions to strike/summary judgment type motions on the following areas: a motion to strike all nonlegal services claims; second, a motion to strike Sands' claims for legal services after March of 2005.

The nonlegal services. As to the nonlegal services claims, Menards defendants assert that at all relevant times Sands was John Menard, Jr.'s attorney and she did not set forth an agreement in writing as required by SCR 20:1.8(a) as to the business related services and that the personal services were given gratuitously with no expectation of compensation, being further barred by the two-year statute of limitations.

As to the nonlegal services claims, Sands asserts that although there was not compliance with SCR 20:1.8(a), she is nevertheless able to recover on a quantum meruit grounds because, one, John Menard, Jr., is a sophisticated businessman, not merely a love-struck, vulnerable victim, so that the provisions of SCR 20:1.8(a) create no bar to recovery and that the defendant requested the services and Sands expected reasonable compensation for her services. Further, Sands asserts that the six-year rather than the two-year statute of limitations applies or that since this is an action in equity only, it should be determined under the doctrine of laches.

There is a motion to strike legal services after March 2005. The Menards defendants assert that the legal services rendered after March 2005 should be barred because Sands breached her fiduciary duty to the Menards defendants in the formation of the MH Private Equity Fund, LLC, promoting her interests over his, or the interests of the fund manager, Stephen Hilbert, over his, as demonstrated by an undisclosed \$15,000 payoff for closing the deal favorable to him, him being Mr. Hilbert. Further, serving as the general counsel for the MH Private Equity Fund, LLC, and receiving \$10,000 per month for a total of \$180,000 was either a conflict of interest for which there was no signed waiver or a business transaction with a client and accordingly barred. Sands asserts there was no breach of fiduciary duty or not so serious as to deny relief under quantum meruit.

The special master recommends that both motions to strike should be granted, indicating, regarding the nonlegal services, that at all relevant times there existed an attorney-client relationship between Sands and Menard such that every business related service plaintiff had with a client was prohibited by SCR 20:1.8(a) unless set forth clearly in writing and consented to in writing by the client, Mr. Menard. The plaintiff cannot recover on any of these business related services under any theory whatsoever, end of quote. And I quote, all remaining claims for services involve truly personal services; and she expected no compensation for them and that they are outside the two-year statute of limitations.

This is a hearing de novo without deference to the special master's decision. However, the court has considered the arguments of the parties and the rationale and recommendations of the special master in this portion of the motions, and it is the order of the

court that the Menards defendants' motion to strike as to the nonlegal services is granted.

There are two categories of services: business related and personal services. The plaintiff had no expectation of compensation for either the business related services or the personal services. In an affidavit in the arbitration of the claim of Dawn Sands' employment dispute, Debra Sands swore, quote, During discussions with John on matters for which I had no professional responsibility, John Menard often sought, and I provided, my personal opinions, business advice, and general input. It was my clear understanding and belief that John was not, at such times, seeking my professional legal counsel but rather the personal, trusted advice of his significant other. Emphasis is added to the next sentence. Such understanding is further evidenced by the fact that I never invoiced him or the company for such discussions.

To counter this now, Sands claims that the joint venture understanding as the parties had in the Watts portion of the claim shows that Sands expected compensation. The court disagrees with this proposition. The expectations in the Watts unjust enrichment claim is very different from the expectation in a quantum meruit claim. Quantum meruit meaning "as much as he deserves." In a Watts unjust enrichment claim, it is the expectation that the parties to the joint venture will share in the fruits of their venture, not that a party will be compensated for the value of the efforts placed into that venture. *Ramsey v. Ellis*, 168 Wis.2d 779, 484 N.W.2d 331, 333 (1992) cited by *Lindquist Ford, Inc. v. Middleton Motors, Inc.*, 557 F.3d 469, 476 (7th Cir. 2009). Quote, Quantum meruit is a distinct cause of action from an action for unjust enrichment, with distinct elements and distinct measure of damages, end quote. The expectation element under

the unjust enrichment claim under *Watts* is found in the element, quote, under circumstances such that it would be inequitable to retain the benefit, end quote, because the defendant knew the plaintiff expected to share the fruits of the joint venture. *Watts v. Watts*, 137 Wis.2d 506, 533 (1987).

Under the quantum meruit, the expectation is different. The element requires that, quote, the plaintiff expected reasonable compensation for the services. *Lindquist Ford* at 478 citing *Ramsey* at 484 N.W.2d at 333. There is no genuine issue of fact. *Sands* did not expect compensation as services for nonlegal services. Therefore, as a matter of law, she cannot meet her burden of proof under a quantum meruit theory. Thus, under whatever title you want to call it, motion to strike or summary judgment is granted dismissing that portion of the claim.

Further, additional grounds exist. The court agrees with the conclusions of the special master. Any reviewing court should review those conclusions. At all relevant times, there existed an attorney-client relationship between *Sands* and *Menard*. It is undisputed that there is no written agreement and consent for Attorney *Sands* to be compensated for nonlegal services, as required by SCR 20:1.8(a). There is a bright line that there is no recovery regardless of theory when an explicit agreement is barred by that agreement being unenforceable as contrary to public policy. *Abbott v. Marker*, 295 Wis.2d 636 (2006). Declarations of the Wisconsin Supreme Court as found in the Supreme Court Rules regulating the conduct of attorneys is the public policy of the State of Wisconsin. The judicial branch of government is a coequal branch of government with the legislative and executive branches. Sometimes the authority is exclusive to the court. Frequently, however, the authority over

an area is shared. Regulation of attorney conduct is shared by the three branches. The legislature and executive can legislate -- regulate attorney conduct through statutes. Likewise, the Wisconsin Supreme Court has the inherent authority to regulate attorney conduct as found in the Supreme Court Rules. The plaintiff urges the court to adopt the reason -- reasoning of *DiLuglio v. Providence Auto Body*, 755 A.2d 757 (R.I. 2000), which was found persuasive in *Milo Fields Trust v. Britz*, 874 A.2d 1130, New Jersey Superior Court, Appellate Division 2005, that as a, quote, knowledgeable and experienced businessman, end quote, because sophisticated clients -- quote, sophisticated clients who bargain with their lawyers from positions of substantial parity are less susceptible to overreaching, citing *Cohen v. Radio-Elects. Officers Union*, 679 A.2d 1188 (N.J. 1996). Sands combines this with the proposition as found in *Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007) that the rules of professional conduct, quote, does not imply that an antagonistic in a collateral proceeding or transaction has standing to seek enforcement of the rule, end quote. They base this as found in the preamble of the rules. That's 877 N.E.2d at 182 to 183. The preamble states, quote, The violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. They are not designed to be a basis for civil liability, but reference to these rules as -- as evidence of an applicable standard of care is not prohibited. Examination of the Wisconsin Supreme Court Rules on the regulation of attorney conduct provides identical language. Thus, the plaintiff may be on a stronger ground than previously recognized. However, there is a difference between finding an affirmative cause of action, civil liability, and use of the rule as a defense.

There is a difference between a sword and a shield. A sword as an offensive weapon would be using the rules to create civil liability. I agree with the plaintiff that a violation of the Supreme Court Rules by a lawyer does not in and of itself provide a basis for civil liability. Thus, a client cannot recover damages simply because a lawyer violated the rule. I saw the cases to the contrary, but a client must also be damaged due to the violation of the rule. Even though *Trotter v. Nelson*, 684 N.E.2d 1150, 1153 (Ind. 1997) provided persuasive authority in *Abbott v. Marker* to create the shield, and that the language in *Trotter*, which, quote, the rules at issue are explicit declarations of public policy and akin to contravening a statute, agreements in violation of these rules are unenforceable, and that this was specifically overruled in *Liggett*. However -- and I might add, however, this is not Rhode Island and this is not New Jersey and this is not Indiana. This is Wisconsin, which must find its own way on the issue. It may very well be that the Court of Appeals or the Wisconsin Supreme Court follow the reasoning of New Jersey, Rhode Island, and the most recent manifestation by the Indiana Supreme Court. This court is a trial court and is bound by the current case law of this state. *Abbott* has not been overruled, nor do I find it persuasive that the basis of the *Abbott* decision was founded in violation of a specific statute rather than a Supreme Court Rule. *Abbott*, at 168, provides, quote, we choose not to enforce an agreement through unjust enrichment when the party cannot enforce the agreement because it is illegal. Though perhaps not illegal, the agreement would be contrary to public policy. Finally, as previously noted, quantum meruit has different elements than unjust enrichment in that quantum meruit involves an expectation of compensation rather than an agreement, expressed or implied, or the expectation of the fruits of the joint venture,

receiving the benefit thereof knowing that the expectation exists, there should not be an expectation of compensation by an attorney for services provided in violation of this rule.

As to the personal services, I find that viewing uncontroverted facts and the controverted facts most favorable to the plaintiff that Sands, as the fiancée of Mr. Menard and a member of his household, not brought in as a servant but rather as his consort, that these services were provided gratuitously. Really, cases from the 1800s, 1930s, '40s, '50s, and '60s and even into the 1970s are not that much help. In those days, to put it bluntly, it was not, quote, living together; it was, quote, shacking up. It is critical here that Sands was not hired as a housekeeper, as in the case *In re Estate of Steffes*, 95 Wis.2d 490 (1980). There is nothing to indicate Sands expected compensation for doing those things that people cohabitating (sic) do for each other.

Although perhaps not necessary, finally, on those -- on these issues, the court finds that it is the two-year statute of limitations which applies. Although it was not specifically addressed in *Steffes*, the trial court had limited the compensation for two years rather than six. Here, the last date of the labor or services which could have been provided was the spring of 2006, and this action was filed in November of 2008. Thus, these claims are outside the statute of limitations, because what is being sought is not the, quote, end product or fruit of the service, as it would be in a *Watts* claim, but rather the claim for compensation is that which is labor rather than the end product. In *re the Estate of Javornik*, 35 Wis.2d 741 (1967). For the reasons stated, Menards defendants are granted summary judgment dismissing Sands' claims for nonlegal services.

Motion to strike or summary judgment as to legal services after March 2005 is denied. It is the opinion and recommendation of the special master, quote, that this entire series of events in the formation of MH Private Equity, LLC, should be found to be a business transaction with a client, a prohibited transaction under SCR 20:1.8(a). On this basis alone, the motion to strike the plaintiff's claim for attorney related fees related to the formation of the MH Equity Fund, LLC, should be granted. This was the opinion of the special master. This may be the case, and there are reasonable suspicions that this may be true; however, based upon the record before the court, there is an insufficient basis to do so as a matter of law. It is indeed true and uncontroverted that in one draft of the MH Equity Fund, LLC, formation documents that Ms. Sands was to receive a 20-percent interest as an owner of the fund, which as it was ultimately formed of \$400 million would have resulted in Ms. Sands, in one instance, obtaining \$80 million of Mr. Menard's money. She did not, however, in the final documents, obtain any outright ownership interest in the fund. Therefore, I cannot find as a matter of fact or law that the formation or continuation of the MH Equity Fund, LLC, was a business transaction with a client as opposed to a business transaction for a client. Mr. Menard has many business interests. It is not apparent on its face that Ms. Sands was in a conflict circumstance to provide legal services to Mr. Menard, to his corporation Menards, Inc., and as general counsel for his wholly owned private equity fund. A lawyer can represent a person and that person's corporation without it being a conflict in cases where it would not require a written waiver. In some small businesses, which of course Mr. Menard and Menards, Inc., are not, but in those cases may have one attorney for a multitude of interests. Perhaps there was a conflict of

interest. The court can certainly understand why Mr. Menard would be less than happy with how the MH Equity Fund, LLC, business turned out. In retrospect, when this was formed, a billionaire is convinced that a mere millionaire is in a better position to manage his money than he is. This, only a few months after that savvy millionaire had a judgment against him for \$62 million from his former company and just a short time after his Le Chateau Renaissance \$26 million mansion was turned over to his former company, and the fact that his consort and attorney received from the millionaire a small token or a gift of personal appreciation for, quote, closing the deal. Then the fund loses vast sums of money. At the same time, the fund manager is living the highlife. Ouch. Nobody likes getting snookered. I can imagine almost anybody in those shoes would be none too happy.

However, there are questions of fact that are unresolved. Was Ms. Sands' compensation as general counsel for MH Equity a disclosed, knowing, and voluntary arrangement to basically be counsel for another of Mr. Menard's companies, or was it a sham way for Ms. Sands to obtain a business transaction with a client? What was the nature of the \$15,000 payment from Mr. Hilbert from his personal funds to Ms. Sands? It was reported in the news recently that Oprah Winfrey wanted to purchase a \$37,000 handbag. While I believe there is no handbag worth \$37 million (sic), for Ms. Winfrey, who is reported to make \$77 million last year, that would be like the average person spending \$3.50 on a handbag. It may not be that expensive at all to her. Just to digress, simply because somebody can afford to buy a \$37 million (sic) handbag, that just means they're rich; that doesn't mean they're smart. Likewise, to me, a \$15,000 gift seems like a big deal. Perhaps to persons with the re-

sources of Mr. Hilbert or Mr. Menard, it would be like a person of ordinary means buying somebody a drink. Was the \$15,000 payment disclosed to Mr. Menard? Was the \$15,000 payment some sort of kickback for negotiating a deal favorable to Mr. Hilbert? We know there was a payment. However, we -- there is not before the court sufficient information for there to be a factual finding as to the nature of the payment.

Further, there are practical considerations, and while they do not form the basis for the determination by the court are nevertheless there. Will the determination at this point resolve this issue? No. Menard's counterclaims regarding the formation and result of the MH Equity Fund, LLC, are so intertwined with the relief sought here that there is not economy to the parties nor to the court to do so. There will need to be a factual finding regarding Ms. Sands' role in the formation of the MH Equity Fund, LLC. There will be little, if any, savings in the discovery process regarding the remaining claims. The discovery regarding Menard's counterclaim will go at least in part to this issue. Thus, nothing will be saved either in the discovery process or at trial by granting this portion of Menard's judgment -- Menard's motion.

Indeed, there are other practical considerations which could run contrary to economy for the parties and for the administration of justice. The determination of this issue is a question of law reviewable *de novo* on appeal. Because the conduct of Ms. Sands will need to be resolved at trial regardless, then the determination at this point may by that time be a moot issue. If, on the other hand, a reviewing court should disagree with the court at this stage if the court were to grant the motion, then there would have been a trial on fundamentally the same questions which may have to be retried because the court concluded at this

point that Ms. Sands violated her fiduciary duty. My concern here is the use of the lawyer regulation rules as a shield at this stage could have the effect of being a sword at the next stage, which is not the intent of the lawyer regulation statutes. Therefore, at this time, that motion is denied.

The only issues which remain for discovery, then, are Menard's counterclaims and Ms. Sands' claims for legal services, including those involving the core of the counterclaim, the formation and result of the formation of the MH Equity Fund, LLC, and thereafter. In retrospect, perhaps the parties, in dealing with the MH Equity Fund, should have waited for Mr. Hart's signature.

That concludes the ruling. Thank you.

(The proceedings came to a close at approximately 2:03 p.m.)

STATE OF WISCONSIN)
) ss.
COUNTY OF EAU CLAIRE)

I, Becky J. Thomas, Official Circuit Court Reporter for Eau Claire County, State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of the proceedings in the foregoing matter, held on the 12th day of August, 2013, as contained in my Stenograph shorthand notes, and all matters pertaining thereto, to the best of my ability

Dated: August 15, 2013.

Becky J. Thomas, RMR, CRR

[FILED: October 22, 2012]

STATE OF WISCONSIN
CIRCUIT COURT EAU CLAIRE COUNTY
BRANCH V

Case No. 08-CV-990

DEBRA K. SANDS,
Plaintiff,

v.

JOHN R. MENARD, JR.; MENARD, INC.;
MENARD THOROUGHBREDS, INC.; MH PRI-
VATE EQUITY FUND, LLC; WEBSTER A. HART,
AS TRUSTEE OF THE JOHN R. MENARD, JR.
2002 TRUST AND RELATED TRUSTS; ANGELA A.
BOWE, AS TRUSTEE OF THE JOHN R. MENARD,
JR. 2002 TRUST AND RELATED TRUSTS; AND AL-
PHONS PITTLERLE, AS TRUSTEE OF THE JOHN
R. MENARD, JR. 2002 TRUST AND RELATED
TRUSTS,

Defendants.

MENARD, INC.,
Counter-Plaintiff,

v.

DEBRA K. SANDS,
Counter-Defendant.

ORDER GRANTING MENARD DEFENDANTS'
MOTION FOR PARTIAL SUMMARY JUDGMENT
DISMISSING ALL OF PLAINTIFF'S CLAIMS BY
WHICH SHE SOUGHT A PORTION OF JOHN
MENARD'S NET WORTH OR ASSETS, OWNER-
SHIP INTERESTS IN THE MENARD COMPANIES,
OR ANY PART OF THE INCREASE IN VALUE OF
THE MENARD COMPANIES

The above-entitled action came before the Honorable Paul J. Lenz on October 12, 2012, on John R. Menard, Jr., Menard, Inc., and Menard Thoroughbreds, Inc. (the Menard Defendants) Motion for Partial Summary Judgment. Appearances were as noted on the record.

Based upon the record and proceedings herein

IT IS HEREBY ORDERED:

That the Menard Defendants' Motion for Partial Summary Judgment to Dismiss All of Plaintiff's Claims by Which She Seeks a Portion of John Menard's Net Worth or Assets, Ownership Interests in the Menard Companies, or Any Part of the Increase in Value of the Menard Companies is granted for the reasons stated on the record.

Dated this 19 day of October, 2012.

BY THE COURT:

s/Paul J. Lenz
Circuit Court Judge Br 5
Honorable Paul J. Lenz
Circuit Court Judge
Eau Claire County, Wisconsin

App. 102a

STATE OF WISCONSIN
CIRCUIT COURT EAU CLAIRE COUNTY
BRANCH 5

ORAL RULING
Case No. 08-CV-990

DEBRA K. SANDS,
Plaintiff,

-vs-

JOHN R. MENARD, JR.; MENARD, INC.;
MENARD THOROUGHBREDS, INC.; WEBSTER
HART, AS TRUSTEE OF THE JOHN R. MENARD,
JR., 2002 TRUST AND RELATED TRUSTS; AN-
GELA L. BOWE, AS TRUSTEE OF THE JOHN
R. MENARD, JR., 2002 TRUST AND RELATED
TRUSTS; AND ALPHONS PITTERLE, AS TRUST-
EE OF THE JOHN R. MENARD, JR., 2002 TRUST
AND RELATED TRUSTS,
Defendants.

MENARD, INC.,
Counter-Plaintiff,

-vs-

DEBRA K. SANDS,
Counter-Defendant.

The above-entitled matter coming on to be heard
before the Honorable Paul J. Lenz, judge of the above-

named court, on the 12th day of October, 2012, commencing at approximately 9:30 a.m., in the courthouse in the City of Eau Claire, County of Eau Claire, State of Wisconsin.

APPEARANCES:

JOHN P. RICHIE, of the firm of Richie, Wickstrom & Wachs, LLP, 101 Putnam Street, P.O. Box 390, Eau Claire, Wisconsin 54702, appeared representing the Plaintiff.

DANIEL R. SHULMAN, JULIE L. BOEHMKE, and JEREMY JOHNSON, of the firm of Gray Plant Mooty Mooty & Bennett, P.A., 500 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402, appeared representing the Plaintiff.

STEPHANIE L. FINN, of the firm of Herrick & Hart, S.C., 116 West Grand Avenue, P.O. Box 167, Eau Claire, Wisconsin 54702-0167, appeared representing the Defendants.

MICHAEL D. FREEBORN and BRIAN P. NORTON, of the firm of Freeborn & Peters, LLP, 311 South Wacker Drive, Suite 3000, Chicago, Illinois 60606, appeared representing the Defendants.

TODD A. WIND, of the firm of Fredrikson & Byron, P.A., 200 South Sixth Street, Suite 4000, Minneapolis, Minnesota 55402-1425, appeared representing the Trustees of the John R. Menard, Jr., 2002 Trust.

THOMAS J. GRAHAM, JR., of the firm of Weld, Riley, Prenn & Ricci, S.C., P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appeared representing the Trustees of the John R. Menard, Jr., 2002 Trust.

JAMES ANDERSON, Attorney at Law, 4777 Menard Drive, Eau Claire, Wisconsin 54703, ap-

peared representing Menard, Inc.

THE COURT: All right. This is Sands versus Menards -- boy, that's loud -- Case Number 08-CV-990. The appearances today, please.

MR. SHULMAN: Good morning, Your Honor. For the plaintiff, Dan Shulman, Jeremy Johnson, Julie Boehmke, John Richie.

MR. FREEBORN: Good morning, Your Honor. For the Menard defendants, Michael Freeborn and my partner Brian Norton; our cocounsel, Stephanie Finn; and in-house counsel, Mr. James Anderson. And I believe Mr. John Menard will be joining us shortly.

MR. WIND: Good morning, Your Honor. On behalf of the trustee defendants, Todd Wind, and with me, Tom Graham as well, and Webster Hart on behalf of the trust.

THE COURT: All right. First, the -- I want to thank you for the excellent job that all of the lawyers have done in this case. The materials are of the highest quality, and the clients should be satisfied with the job that their lawyers have done.

First, if I have the parties right -- that's always a good place to start -- the plaintiff is Debra K. Sands, hereafter in the decision will be Sands. The defendants are in two groups. Group one includes John R. Menard, Jr.; Menard, Inc.; Menard Thoroughbreds, Inc.; and MH Private Equity Fund, LLC, although I think they have been taken care of in this case, hereafter Menards. Group two includes Webster Hart, Angela Bowe, and Alphons Pitterle in their fiduciary capacity as trustees of the John R. Menard, Jr., 2002 Trust and related trusts, hereafter Menard Trust.

First, Menards moves for partial summary judgment to dismiss all of Sands' claims, regardless of

legal theory, by which she seeks a portion of John R. Menard, Jr.'s net worth or assets, ownership interest in Menards, or any part of the increase in value of Menards. Menards does not seek summary judgment concerning Sands' claim for compensation for services rendered.

Second, Menard Trust moves for summary judgment to dismiss all Sands' claims against Menard Trust.

It's the order of the court that both motions are granted.

First, the standard of review. Determination of summary judgment is a question of law reviewable de novo on appeal, without deference to the trial court. A portion of this decision will involve the exercise of discretion by the trial court, which will be upheld provided the trial court examines the relevant facts of record, applied the correct legal standard, and reached a conclusion that a reasonable judge could reach, and will not overturn a discretionary decision simply because the reviewing court would reach a different conclusion. *Security Pac. National Bank v. Ginkowski*, 140 Wis.2d 332, 339 (Ct. App. 1987).

Imagine before you on this bench is a tower of cards placed together as it happened. On a motion to dismiss for failure to state a claim, no wind is permitted. If the tower of cards will stand, then the motion to dismiss is denied. At trial, the tower of cards must withstand whatever wind the defendant can provide. At the summary judgment stage, the tower of cards must be capable of withstanding a gentle breeze of examination after some discovery has been completed. In this tower of cards, near the bottom is a card that just doesn't fit. It's not part of the same deck. There's something just not quite right about the card.

However, in order to keep the tower of cards upright, the court is asked to remove this unusual card but told that the card was a cheatin' card made by both folks building the tower. One of those folks say, I just happen to have the true card in my back pocket. We ask you to replace the cheatin' card with the true card from the original deck, because if you do not, the tower of cards will fail with the slightest breeze. However, you will be tainted by touching the cheatin' card. This the court will not do. The cheatin' card in the tower of cards is the May 15, 1998, invoice to Menard, Inc.

Menards contends that Sands is barred from any recovery on claims seeking a portion of the accumulation of Menard's assets because, one, Sands is a lawyer and was a lawyer at all relevant times; two, Sands performed legal services for Menards; and, three, Sands did not obtain a written agreement to obtain a portion of the assets required by Wisconsin Supreme Court Rule 20:1.8(a). The undisputed facts are that Sands was a lawyer at all relevant times, Sands performed legal services for Menards, and Sands did not obtain a written agreement contemplated by Wisconsin Supreme Court Rule 20:1.8(a). Menards contends that this is the end of the story because Wisconsin Supreme Court Rule 20:1.8(a) is a bright line rule with no possible exception. The special master/referee's recommendation adopts this proposition, and it is persuasive. If a reviewing court seeks to adopt a bright line/no exception rule, then the recommendation of the special master/referee provides a sound basis to do so.

There are a number of reasons which would support a bright line rule. First, a bright line rule is easy to administer because there are no gray areas. Second, the Supreme Court could have adopted an exception similar to the exception it provided in the

rule against sexual relations between lawyer and client, except when the sexual relations predate the lawyer-client relationship. No such exception is provided here, which it is urged, indicates that none should exist. Finally, we are dealing with a Supreme Court rule. The law is whatever a majority of the Supreme Court says the law is. It is unlikely that the Supreme Court will find an exception to their own rule.

However, this court has already rejected twice a bright line, without any provision for exception rule. There should be an exception when the following is true. The romantic relationship-joint enterprise relationship predates the lawyer-client relationship and the legal services rendered are merely ancillary or incidental to the larger joint enterprise of the parties. This remains the opinion of the court. If there is no potential for there to be an exception to this bright line rule, then you can ignore the rest of this opinion because it's really just an esoteric exercise.

Summary judgment is a drastic remedy and not meant to be a substitute for trial. However, summary judgment is an appropriate remedy when examination of the combination of uncontroverted facts and controverted facts, in the light most favorable to the nonmoving party, the claim is either sufficient or insufficient, as a matter of law, such as the case here.

Here I find in the exercise of discretion in an equitable action under the clean hands doctrine that the lawyer-client relationship predates the romantic-joint enterprise relationship. Further, I find that no reasonable jury could find that the legal services rendered were merely ancillary or incidental to the joint enterprise relationship.

There are very good reasons for there to be an exception to the bright line rule. Assume that a ro-

mantic relationship is formed. The parties cohabit the same home, commingle funds, and venture together to improve the business of one of the parties for many years, and the business grows, at least in part, to the efforts of this joint enterprise. Then on a dark and stormy night, the nonlawyer party needs a deed drafted before the regular lawyer could be called in. The lawyer party does not get an agreement concerning their financial relationship in writing and takes the ten minutes needed to draft the deed. Under the bright line rule, this insignificant legal service provides a ticking time bomb as an absolute shield for the many years of labor. I think not.

Here, the only way Sands can establish that the romantic-joint enterprise existed prior to the lawyer-client relationship is for the court to ignore an admitted fraud on the government to which this court is a part, in the form of a fraudulent invoice for legal services which clearly establishes that the lawyer-client relationship predates the joint enterprise relationship.

On May 15, 1998, Sands provided an invoice to Menards, Inc., which lists legal services starting October 15, 1997. It is uncontroverted that the romantic relationship and then joint enterprise began after this date, sometime beginning in November-December 1997. Sands now claims that this invoice is a fraudulent document she submitted to Menard, Inc., so that a personal gift from John R. Menard, Jr., to Debra Sands to pay her student loans could be run through his company and, with the magic of fraud, transforms a taxable event under the gift tax to a tax deductible event as a business expense, albeit a tax shifting event to Sands as income.

Wow, this is quite a tale, but I'm taking it as true. Sands would have this court believe that some-

one who is worth as much as Mr. Menard would stoop so slow as to intentionally defraud the people of the United States. How could this be true? While a jury could easily find that this would border on the absurd, the court for the purposes of summary judgment only accepts it as true. In short, Sands requests of this court to perpetrate a fraud on the people of the United States in the form of their government to do equity by providing an exception to this bright line. This the court will not do. Perhaps a reviewing court will do so, but this court will not.

Being primarily an esoteric exercise, the law in this area begins with Zoroaster who, in the Gathas, maintains that the human condition is a mental struggle between truth and lie. Under the equity of Zoroaster, to obtain justice, one must have clean hands and a pure heart, not to swear deceitfully to that which is false, and to act blamelessly. Those thousands of years ago, that was a pretty high standard. To be pure of heart is difficult and nearly impossible to ascertain. To act blamelessly in all things is rarely achieved. Thus, over the millennium there remains in the law, however, the concept of clean hands, because dirty hands are easy to spot and false swearing is not to be condoned because the court is to be a quest or a search for the truth.

Even assuming the facts most favorable to Sands, the court would deny relief to her in equity, as an exercise of discretion, because Sands does not come to this court with clean hands, and I find that she is *in pari delicto* with Mr. Menard; and, thus, this court will not dirty its hands and leave the matters where they stand.

I find it amazing, really, that Sands has the audacity to ask this court to do equity by ignoring the invoice she submitted representing herself to be

a lawyer prior to the joint enterprise being formed because the invoice is a fraud, claimed to be made at the behest of John Menard and done in concert with him. You should have known better. You're a lawyer. It's been 30 years since I've been doing this, and maybe for -- I see it with some of the young lawyers, but to be a lawyer, to me, when I started this, meant something. It meant something about honor, integrity, and zeal in representation of a client. A lawyer is held to a higher standard.

For the concept of clean hands to be applied, "It must be shown that the conduct constituting unclean hands caused the harm which the plaintiff now seeks relief... It must clearly appear that the things the plaintiff seeks relief are the fruits of its own wrongful or unlawful course of conduct." Again, *Security Pac. National Bank v. Ginkowski*, 140 Wis.2d 332, 339 (Ct. App. 1987).

Sands seeks relief from the rule prohibiting lawyers from obtaining a client's assets without a written agreement by adopting as true that the invoice is fraudulent. In short, the harm she seeks relief from is the bar under Supreme Court Rule 20:1.8(a) by ignoring the fraud which she is a coconspirator to certainly potentially criminal activity with John Menard, being blatant tax fraud. Doesn't that just creep you out? It creeps me out.

It could be argued that since John Menard, Jr., was a part of the conspiracy to commit fraud on the people of the United States and of this state that he should not benefit from the clean hands doctrine since his hands are dirty also. I find that the parties are in *pari delicto*, and thus the court will leave the matter where it is found. The court will not aid a party whose claim is based upon an illegal act. *Evans v. Cameron*, 121 Wis.2d 421, 427 (1985).

Further, the court will address the second prong of the two-prong exception; that is, the services were merely ancillary or incidental to the larger joint enterprise. Wait a minute. There have been invoices submitted approaching one million dollars covering eight years' period, which is, on average, would be over a hundred thousand dollars a year. While we're not talking riches here, we're certainly not talking ancillary, much less incidental.

Therefore, neither of the conditions precedent for there being an exception to the Supreme Court rule are present here. Therefore, the bar stands.

Sands claims that the Supreme Court rule cannot provide a basis for private liability. This is true. However, the Supreme Court rule provides a shield. Illegal conduct shall not provide a basis for a claim.

Finally, with regard to Menards and Sands, Sands claims that regardless of the court's ruling on any equity claims, other claims remain. This is wrong. The equitable claims are the leading edge. When the legal claims fail, then the equitable rules survive. When the claim in equity does not survive, neither will the other claims.

Regarding the Menard Trust, I don't want to give the Menard Trust short shrift here, but -- regarding all of your efforts that you put into this matter; however, since there is no avenue to recover against the Menard principal, there cannot be recovery against the Menard Trust. Therefore -- and there is no action against the trustees. Thus, the action against the trust is also nonexistent, and the motion is granted.

Accordingly, there remains only the claim of Sands against Menards for compensation for services rendered.

In this matter, to the successful party goes the

responsibility of drafting an order. Menards and the Menards Trust will draft a decision consistent with this order. Be brief. Something like this: The motion is granted for the reasons stated on the record. This is a final decision for purposes of appeal. It doesn't have to be long.

Thank you.

(The proceedings came to a close at approximately 9:50 a.m.)

* * * * *

STATE OF WISCONSIN)
) ss.
COUNTY OF EAU CLAIRE)

I, Becky J. Thomas, Official Circuit Court Reporter for Eau Claire County, State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of the proceedings in the foregoing matter, held on the 12th day of October, 2012, as contained in my Stenograph shorthand notes, and all matters pertaining thereto, to the best of my ability.

Dated: October 15, 2012.

Becky J. Thomas, RMR, CRR¶

App. 113a

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The court has entered the following order:

District: 3 Circuit Court
Case No. 2008CV990
Appeal Nos. 2012AP2377/2015AP870
Debra K. Sands v. John R. Menard, Jr.

The court having considered the motion for reconsideration filed in the above matter, IT IS ORDERED that the motion for reconsideration is denied with \$50 costs.

Abrahamson, C. J. and Bradley, A.W., J. dissent (opinion attached).

Sheila T. Reiff
Clerk of Supreme Court

¶1 SHIRLEY S. ABRAHAMSON, J. (dissenting).
The court seldom grants reconsideration whether in the sense of rehearing a case or changing a decision. Supreme Court Internal Operating Procedure III. J. A change of decision on reconsideration will, however, ensue when the court has overlooked controlling legal precedent. Supreme Court Internal Operating Procedure III. J.

¶2 In the instant case the court has overlooked controlling legal precedent and a party's constitutional right to procedural due process.

¶3 The court has sua sponte wrongfully dismissed a lawsuit, depriving a party of due process, namely the opportunity to be heard in support of its claim.

¶4 Ruling sua sponte on issues not briefed by the parties is becoming a recurring bad habit of this court.

¶5 I dissent.

¶2 I am authorized to state that Justice ANN WALSH BRADLEY joins this dissenting opinion.