COURT OF APPEALS
DECISION
DATED AND FILED

December 28, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP209 **Cir. Ct. No. 2010CV8704**

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

LARRY SCHOTZ, MARION SCHOTZ, LS MARKETING, LLC, LS RESEARCHING INC. PROFIT SHARING PLAN, LS MARKETING DEFINED BENEFIT PENSION PLAN AND WILLIAM STEINKE,

PLAINTIFFS-APPELLANTS,

V.

INDIANAPOLIS LIFE INSURANCE CO., TIMOTHY NETTESHEIM, REINHART BOERNER & VAN DUREN, SC, JOEL NETTESHEIM AND SUBY VON HADEN & ASSOCIATES,

DEFENDANTS-RESPONDENTS,

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

INTERVENOR.

APPEAL from an order of the circuit court for Milwaukee County: MAXINE A. WHITE, Judge. *Affirmed*.

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Larry and Marion Schotz, LS Marketing, LLC, LS Researching Inc. Profit Sharing Plan, LS Marketing Defined Benefit Pension Plan and William Steinke (collectively, "plaintiffs") appeal the circuit court's order dismissing their First Amended Complaint against Indianapolis Life Insurance Co., Timothy Nettesheim, Reinhart Boerner and Van Duren, SC, Joel Nettesheim, Suby Von Haden and Associates, and Philadelphia Indemnity Insurance Company (collectively, "defendants"). The First Amended Complaint alleged that the defendants negligently misrepresented the tax benefits and risks of certain defined benefit plans. The plaintiffs argue that the circuit court erred when it granted the defendants' motions to dismiss the First Amended Complaint for failing to plead the negligent misrepresentation claims with particularity, in accordance with WIS. STAT. § 802.03(2) (2009-10).[1] The plaintiffs also argue that the circuit court erroneously exercised its discretion when it refused to grant the plaintiffs leave to again amend the complaint. Because we conclude that the heightened pleading specificity requirements of § 802.03(2) apply to the plaintiffs' First Amended Complaint and that the specificity requirements were not met, we affirm the circuit court. We also conclude that the circuit court reasonably exercised its discretion in denying the plaintiffs' oral motion to again amend their complaint.

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

BACKGROUND

¶2 This appeal stems from an underlying action alleging claims related to the marketing and sale of life insurance policies sold to the plaintiffs. According to the First Amended Complaint,[2] the plaintiffs purchased policies from Indianapolis Life to fund defined benefit pension plans created pursuant to I.R.C. § 412(i) (2001).[3] The First Amended Complaint alleges that the § 412(i) plans, in particular the "Pendulum Plan" that the plaintiffs purchased, were actually tax shelters that the defendants knew, or should have known, would ultimately be deemed illegal by the Internal Revenue Service (IRS). The plaintiffs allege that they were introduced to Indianapolis Life agents by their attorney, Timothy Nettesheim, an employee of Reinhart Boerner and Van Duren, S.C., and by their accountant, Joel Nettesheim, an employee of Suby Von Haden and Associates. The plaintiffs allege that they invested in the Pendulum Plan at the recommendation and encouragement of the Nettesheims, leading the plaintiffs to pay $1 million in premiums between 2001 and 2006.

¶3 According to the First Amended Complaint, in the early 2000s, the IRS began to scrutinize certain I.R.C. § 412(i) plans, warning that the plans were being funded in a way that contradicted the Internal Revenue Code. Such concerns were explicitly discussed by United States Treasury and IRS officials at the American Society of Pension Actuaries' Annual Conference in October 2002.

[2] Because this case comes to us following the circuit court's order granting the defendants' motions to dismiss, we assume the facts in the complaint are true for purposes of this appeal. *See* ***Walberg v. St. Francis Home, Inc.***, 2005 WI 64, ¶6, 281 Wis. 2d 99, 697 N.W.2d 36.

[3] Internal Revenue Code § 412(i) (2001) has been changed to I.R.C. § 412(e)(3) (2008).

The plaintiffs allege that the defendants were aware of the IRS scrutiny around this time.

¶4 The First Amended Complaint further alleges that in February 2004, the IRS issued a press release, two revenue rulings, and proposed regulations indicating that the I.R.C. § 412(i) plans and policies marketed by the defendants appeared to constitute illegal and abusive tax shelters. The IRS finalized regulations the following year, indicating that the issuance of life insurance policies greatly in excess of the permissible death benefit under a § 412(i) plan is a transaction constituting an abusive tax shelter. Congress enacted I.R.C. § 6707A (2008), imposing strict penalties for tax payers failing to file the requisite forms regarding participation in such plans. The IRS also began nationwide audits of participants in certain § 412(i) plans, including the plaintiffs. The First Amended Complaint alleges that the plaintiffs incurred substantial audit-related fees and tax liabilities.

¶5 The plaintiffs sued the defendants alleging civil conspiracy, common law fraud, negligent misrepresentation, unjust enrichment and punitive damages. After all of the defendants separately filed motions to dismiss, the plaintiffs filed the First Amended Complaint solely alleging negligent misrepresentation. The circuit court and the parties treated the motions to dismiss as applicable to the First Amended Complaint. The circuit court granted the defendants' motions in a written decision, stating that the plaintiffs failed to plead their negligent misrepresentation claim in accordance with the particularity requirement of WIS. STAT. § 802.03(2). Specifically, the circuit court found that negligent misrepresentation, as an averment of fraud, is subject to heightened pleading requirements requiring the complaint to set forth the "who, what, when, where, and how" of the claim. This appeal follows.

DISCUSSION

A. Standard of Review.

¶6 Whether a complaint states a claim upon which relief can be granted presents a question of law, which we review *de novo*. *See* ***Weber v. City of Cedarburg***, 129 Wis. 2d 57, 64, 384 N.W.2d 333 (1986). Because the plaintiffs' action comes before us on appeal from a motion to dismiss for failure to state a claim, only the allegations made in the First Amended Complaint are relevant to our decision. *See* ***id.*** Our standard of review is well-settled:

> A motion to dismiss a complaint for failure to state a claim upon which relief can be granted tests the legal sufficiency of the complaint. All facts pleaded and reasonable inferences that may be drawn from such facts are accepted as true, but only for purposes of testing the complaint's legal sufficiency. Nevertheless, legal inferences and unreasonable inferences need not be accepted as true. A complaint should not be dismissed as legally insufficient unless it appears certain that a plaintiff cannot recover under any circumstances.

Acevedo v. City of Kenosha, 2011 WI App 10, ¶7, 331 Wis. 2d 218, 793 N.W.2d 500 (citation omitted).

B. The plaintiffs did not plead their negligent misrepresentation claim with particularity.

¶7 The plaintiffs contend that the heightened pleading requirements of WIS. STAT. § 802.03(2) do not apply to claims sounding in negligence, but rather,

are meant for claims based in fraud.[4] They alternatively contend that if the heightened pleading requirements do apply to negligent misrepresentation claims, their First Amended Complaint meets the requirements. We disagree.

¶8 WISCONSIN STAT. § 802.03(2) requires heightened pleading specificity for claims based on fraud or mistake. The statute provides:

> FRAUD, MISTAKE AND CONDITION OF MIND. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

The plaintiffs' claim here is for negligent misrepresentation. Wisconsin law is clear that negligent misrepresentation is a species of fraud.[5] *See* ***Whipp v. Iverson***, 43 Wis. 2d 166, 169, 168 N.W.2d 201 (1969) ("Fraud is a generic and an ambiguous term. It embranches misrepresentation which may be separated into the three familiar tort classifications of intent, negligence, and strict responsibility."); *see also* ***Bellon v. Ripon Coll.***, 2005 WI App 29, ¶6, 278 Wis. 2d 790, 693 N.W.2d 330 ("A species of fraud, misrepresentation may take one of three familiar tort classifications: intentional, negligent, and strict responsibility."). Section 802.03(2) includes the additional category of "mistake,"

[4] The plaintiffs also argue that the circuit court erred in pointing to the structure of the Wisconsin Civil Jury Instructions regarding negligent misrepresentation to show "that negligent misrepresentation should not be confused with ordinary negligence" because jury instructions are not binding upon courts. Although the plaintiffs are correct that jury instructions are not binding, we conclude that the circuit court reasonably relied upon well-established Wisconsin law and the persuasive authority of the structure of the jury instructions to reach its findings. *See* ***Nommensen v. American Cont'l Ins. Co.***, 2001 WI 112, ¶47, 246 Wis. 2d 132, 629 N.W.2d 301 ("While the decisions of the civil instructions committee are not binding upon [a] court, we generally find the committee's work insightful and persuasive.").

[5] The Dissent comments that a negligent misrepresentation claim is not a claim of fraud, but rather is one of "mistake" under WIS. STAT. § 802.03(2), thereby agreeing that the statute applies here to require pleadings to be stated with sufficient particularity. *See* Dissent, ¶25.

which may overlap with the common law concept of negligent misrepresentation. Whether litigation based on negligent representation is analyzed as a species of fraud or as the result of mistake, we measure the pleadings by the standards of § 802.03(2).

¶9 We have held that the "particularity" requirement of WIS. STAT. § 802.03(2), like the particularity requirement of FED. R. CIV. P. 9(b), requires a plaintiff to plead the "specification of the time, place and content of an alleged false misrepresentation." ***Friends of Kenwood v. Green***, 2000 WI App 217, ¶14, 239 Wis. 2d 78, 619 N.W.2d 271. Thus, "[p]articularity" refers to the "'who, what, when, where and how.'" ***Id.*** (citation omitted). The adoption of this standard is "'designed to protect defendants whose reputation could be harmed by lightly made charges of wrongdoing involving moral turpitude, to minimize 'strike suits,' and to discourage the filing of suits in the hope of turning up relevant information during discovery.'" ***Id.*** (citation and one set of quotation marks omitted).

¶10 As we explained in ***Malzewski v. Rapkin***, 2006 WI App 183, 296 Wis. 2d 98, 723 N.W.2d 156, "[t]he elements of negligent misrepresentation are: (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant was negligent in making the representation; and (4) the plaintiff believed that the representation was true and relied on it." ***Id.***, ¶20. "A complaint pleading negligent or intentional misrepresentation must allege that the defendant misrepresented a fact to the plaintiff or to a third person with intent that it would be communicated to or influence the plaintiff." ***Rendler v. Markos***, 154 Wis. 2d 420, 429, 453 N.W.2d 202 (Ct. App. 1990). Although the statute allows for knowledge to be averred generally, "proof of intent or knowledge of falsity is not

required in … negligent misrepresentation claims." ***Stuart v. Weisflog's Showroom Gallery, Inc.***, 2008 WI 86, ¶34, 311 Wis. 2d 492, 753 N.W.2d 448.

¶11 Based on the standards stated above, we conclude that the circuit court did not err when it found that the plaintiffs did not plead the "who, what, when, where, and how" of their negligent misrepresentation claim against the defendants.

¶12 First, the First Amended Complaint does not identify "who"—on behalf of *which* corporate and/or individual defendant—was involved in any specific misrepresentation. The First Amended Complaint:

- Does not specify who of the Nettesheim defendants introduced which of the unspecified plaintiffs to which of the unidentified "agents" of Indianapolis Life.
- Alleges that Indianapolis Life employed the services of licensed insurance agents throughout the country, but identifies none specifically with this case.
- Fails to name any representative of any corporate defendant claimed to be involved in any specific misrepresentation.
- Refers generically to all six plaintiffs—three entities and three individuals—simply as "Plaintiffs," without identification of the agents or individuals who acted on behalf of the three corporate entities.
- Fails to specify who among the six different plaintiffs were present during any misrepresentations.

References to Indianapolis Life, the defendants and the plaintiffs as generic entities do not satisfy the statutory particularity requirements. "The allegations are too general because they fail to specify the particular individuals who made the

representations … and who the misrepresentations were made to." *See* ***Friends of Kenwood***, 239 Wis. 2d 78, ¶16.

¶13 The Dissent asserts that "[t]his case is … wholly different than ***Friends of Kenwood***" because here the defendants had enough "information to defend." *See* Dissent, ¶27. A closer reading of ***Friends of Kenwood*** establishes the unmistakable parallels between these cases, leading us to the same conclusion here as in ***Friends of Kenwood—***the pleading is too general.

¶14 In ***Friends of Kenwood***, the plaintiffs brought action against four defendants in an attempt to block the sale of a Temple, alleging that they were deceived into accepting a new construction project because of assurances that the Temple would not be abandoned. *See* ***id.***, 239 Wis. 2d 78, ¶9. The defendants were a corporation, the corporation's board of trustees, and two individuals. *See* ***id.***, ¶¶3, 9. The corporation was "an incorporated religious society existing under the laws of the State of Wisconsin[,]" and was comprised of 1300 member families. ***Id.***, ¶3. The corporation was "governed by a twenty-one-person Board of elected volunteer members."[6] ***Id.*** Like an insurance company, the corporate entity in ***Friends of Kenwood*** could only act through its agents. *See* ***id.*** The court described the "essence of [the plaintiffs'] claim for misrepresentation" as alleging "that between 1993 and October 19, 1997, unnamed trustees and officials affiliated with the advancement of the [construction] project, represented to the membership of the Congregation that the opening of the new facility 'would not

[6] We are hard-pressed to imagine that a 1300-member family congregation is as large as an insurance company which, according to the First Amended Complaint, was actively marketing tax shelter programs on a nationwide basis. Where allegations were insufficiently specific in ***Friends of Kenwood v. Green***, 2000 WI App 217, 239 Wis. 2d 78, 619 N.W.2d 271, as to a congregation of that size, less specific allegations about Indianapolis Life and the Nettesheims' respective employers are also inadequate.

result in the replacement of the Kenwood Temple.'" ***Id.***, ¶15. These representations were alleged to have occurred by letters, informational mailings, telephone calls, meetings with members individually and in small groups, at congregational services, and with "[a] massive public relations campaign." ***Id.***

¶15 The court in ***Friends of Kenwood*** held that such allegations failed to satisfy the particularity requirements of WIS. STAT. § 802.03(2) because "they fail[ed] to specify the particular individuals who made the representations, and fail[ed] to specify the details of where and when the misrepresentations were made, and who the misrepresentations were made to." ***Friends of Kenwood***, 239 Wis. 2d 78, ¶16. In addition, other than the two named individual defendants, no other board members who participated in the various activities were specified. *See* ***id.*** The lack of specificity as to individual actions in the First Amended Complaint before us is at least equal to, and arguably even less informative than, the vagueness of the pleadings in ***Friends of Kenwood***. As the Congregation and Board of Trustees in ***Friends of Kenwood*** could not fairly be required to guess which trustee said what to whom, so too is it unfair to require an insurance company to make the same determination between its nationwide network of agents and the individual plaintiffs and those who acted on behalf of the corporate plaintiffs.

¶16 Second, the First Amended Complaint fails to sufficiently allege "what" anyone actually said, or what specific documents with false statements were given to any identified person. After more than 100 paragraphs involving explanations of the Pendulum Plan, allegations of general knowledge, allegations

of general conduct and various asserted legal conclusions,[7] the First Amended Complaint:

> - Alleges that the unspecified defendants misrepresented the tax consequences of the Pendulum Plan, but does not identify specific statements or specific documents upon which that allegation is based.
>
> - Alleges that unspecified persons on behalf of Indianapolis Life made unspecified "intentional and knowing misrepresentations."
>
> - Alleges no facts describing individual transactions by specific people with specific plaintiffs.
>
> - Does not attribute a specific misrepresentation, either in the form of words, documents or actions, to a specific individual defendant or a specific representative of a corporate defendant.
>
> - Does not identify which specific misrepresentations were made to whom among the plaintiffs or specifically, when and where each representation was made.

Rather, the First Amended Complaint simply states:

> The Defendants made or caused to be made the following false representations, not to the exclusion of others, to Plaintiffs in the course of the Defendants' business or in a transaction in which they had a pecuniary interest:
>
> > (a) That the life insurance policies were appropriate for use in funding a qualified 412(i) plan;
> >
> > (b) That these policies provided a permissible death benefit under the 412(i) plan;

[7] Much of the First Amended Complaint reads more like a public relations statement than a complaint. For example, paragraph 54 states: "For literally decades, it has been a fundamental requirement of federal law that a tax-qualified retirement plan must be intended to be permanent, not a temporary program. This requirement is designed to guard against tax abuse." Paragraph 75 states: "Indianapolis … was blinded by the lucrative prospect of reaping enormous premiums and commissions from the sale of their specially designed insurance policies."

> (c) That the premiums to be paid on these policies qualified as a deduction for federal income tax purposes; and
>
> (d) That the 412(i) plan, including the insurance policies that would be used to fund it, complied with all federal tax laws and regulations.

¶17 The First Amended Complaint also does not identify who made the decision to purchase the insurance. Nor does it specify which misrepresentations were relied upon by which specific plaintiff—individual or corporate—in making that decision. In negligent misrepresentation cases, a misrepresentation victim will likely have firsthand knowledge of these particularities and should not have difficulty providing those details in a complaint. Such particularities are required by WIS. STAT. § 802.03(2) in order to "protect[] persons from casual allegations of serious wrongdoing and [to] put[] defendants on notice 'so that they may prepare meaningful responses to the claim.'" ***Doe 67C v. Archdiocese of Milwaukee***, 2005 WI 123, ¶52, 284 Wis. 2d 307, 700 N.W.2d 180 (citations and one set of quotation marks omitted).

¶18 Third, contrary to the requirements of ***Friends of Kenwood***, the First Amended Complaint failed to "specify the details of where and when the misrepresentations were made." *See* ***id.***, 239 Wis. 2d 78, ¶16. The First Amended Complaint simply states that "[b]etween the years 2001 and 2006, Plaintiffs paid well in excess of $1 million in premiums to Indianapolis [Life]." The First Amended Complaint does not allege:

- Facts as to *when* any specific misrepresentation was made.
- Facts as to *where* any specific misrepresentation was made.
- When the plaintiffs ultimately decided to invest in the Pendulum Plan.

- Where (and how many) meetings took place between the plaintiffs and defendants.

The First Amended Complaint alleges that two of the individual plaintiffs are residents of Florida, the remaining individual and the three corporate entities are residents of Wisconsin, and Indianapolis Life employs a nationwide network of licensed insurance agents. Therefore, the need for specificity in the allegations identifying who said what to whom, when, and where, as required by WIS. STAT. § 802.03(2) and ***Friends of Kenwood***, is compelling. Without these details, we cannot conclude that the plaintiffs met the requirements of § 802.03(2).

¶19 The Dissent argues that because corporations are "persons" for *some* purposes, they "necessarily act through agents and are responsible for their agents' torts." *See* Dissent, ¶26. While it is true that corporations are a creation of the law, without flesh or blood, and can only act through people or entities doing things on their behalf, it does not follow that a corporation is always responsible for the torts of those who do something on its behalf. Basic agency law holds that "the mere authority to act for another does not, without more, establish agency as a matter of law. Agents and independent contractors both act on behalf of the principal. The critical distinction is the degree of control exercised by the principal." ***Envirologix Corp. v. City of Waukesha***, 192 Wis. 2d 277, 295, 531 N.W.2d 357 (Ct. App. 1995). The First Amended Complaint does not allege facts which establish the elements of agency between any identified corporate entity and any of the unidentified individuals alleged to have acted on its behalf. The pleadings here simply allege in a conclusory fashion that unidentified individuals were "agents" of unspecified corporate defendants. There is no identification of any individual alleged to be an "agent," nor are there allegations relating to the control exercised by the principle. We are left by the First Amended Complaint to

speculate about whether these unidentified "agents" are what the law considers employees or independent contractors. Allegations which permit no more than speculation about the facts are inadequate to satisfy the specificity requirements of WIS. STAT. § 802.03(2).

¶20 The Dissent considers the identification of the corporate entities by name and references to conduct by unidentified people described as "agents" to satisfy the requirements of WIS. STAT. § 802.03(2). By way of example, the Dissent conflates at least three paragraphs from the First Amended Complaint to paraphrase the allegations against Timothy Nettesheim as: "Timothy Nettesheim was the plaintiffs' lawyer and 'introduced the Indianapolis agents to Plaintiffs' and 'encouraged Plaintiffs' to buy the scheme's investments that the Indianapolis Life agents were selling." *See* Dissent, ¶27 (internal citations in Dissent omitted). This allegation does not identify *which* plaintiff Nettesheim represented, *who* Nettesheim introduced to his client(s) as an "agent" of Indianapolis Life, *where* or *when* such introductions occurred, and *what* was said or delivered by the "agent." Nor does the First Amended Complaint allege facts that establish agency between Indianapolis Life and any named person. Allegations against the other defendants suffer from the same failings. Based on the First Amended Complaint, all defendants, both individual and corporate, are left to speculate about *who* among their acquaintances, employees or independent contractors, may have said *what* to *whom* among the individual plaintiffs and representatives of the corporate plaintiffs. They are further left to speculate about *when* such representations may have occurred. In our judgment, such vague and conclusory allegations fall far below the specificity required by § 802.03(2).

¶21 Finally, the plaintiffs do not explain "why" the defendants' alleged statements of opinion as to the tax consequences of purchasing the Pendulum Plan

were false at the time they were made. The plaintiffs allege that Indianapolis Life (as an entity) was aware of the illegality of the Pendulum Plan in October 2002, although the IRS did not determine the plan to be illegal until 2004. The plaintiffs imply that they chose to invest in the plan prior to 2001, when they began paying premiums. However, nothing in the First Amended Complaint alleges that prior to 2001, either identified persons on behalf of Indianapolis Life, the Nettesheims, or the Nettesheims' respective employers, falsely represented the legality of the investment plan. There are no allegations of pre-2001 representations indicating why such statements or inducements made by the defendants were actually false at the time the plaintiffs began to invest in the plan.

C. The circuit court reasonably exercised its discretion in refusing to grant the plaintiffs leave to again amend their complaint.

¶22 "A circuit court's decision on whether to permit an amendment to a complaint … is within the discretion of the circuit court." ***Columbia Propane, L.P. v. Wisconsin Gas Co.***, 2003 WI 38, ¶13, 261 Wis. 2d 70, 661 N.W.2d 776. A circuit court properly exercises its discretion when it considers the relevant facts, applies the correct law, and articulates a reasonable basis for its decision. *See* ***Krebs v. Krebs***, 148 Wis. 2d 51, 55, 435 N.W.2d 240 (1989). Therefore, this court will affirm a discretionary decision by a circuit court as long as the court reasonably exercised its discretion. *See* ***State v. Davis***, 2001 WI 136, ¶28, 248 Wis. 2d 986, 637 N.W.2d 62. Refusal to allow an amendment would be an erroneous exercise of the court's discretion: "(1) when justice requires an amendment of the pleadings, or (2) '[w]hen it appears that an omission … is material, … and that such omission or failure is through mistake, inadvertence, surprise, or excusable neglect.'" ***Wiegel v. Sentry Indem. Co.***, 94 Wis. 2d 172, 184-85, 287 N.W.2d 796 (1980) (citation omitted; ellipses in ***Wiegel***).

¶23 Applying these standards, we conclude that the circuit court reasonably exercised its discretion. The plaintiffs orally requested the opportunity to again amend their complaint at the hearing on the defendants' motions to dismiss. The circuit court denied the request, finding that the plaintiffs amended their original complaint and still failed at meeting the heightened pleading requirements. The circuit court also found that the plaintiffs ignored the defendants' particularity argument until the hearing, at which point the plaintiffs admitted to the court that it was a tactical decision not to address the defendants' particularity argument. The circuit court found that the plaintiffs' proposed amendments would still be insufficient even if granted leave to amend their complaint because "[w]hen pressed by the Court at the motion hearing, Plaintiffs admittedly did not have the details necessary to meet the heightened particularity standard for negligent misrepresentation claims." The circuit court took all of these factors into consideration when making its decision. Therefore, the circuit court appropriately considered the relevant facts, applied the correct law, and articulated a reasonable basis for its decision.

CONCLUSION

¶24 For all the foregoing reasons, we affirm the circuit court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¶25 FINE, J. (*dissenting*). WISCONSIN STAT. RULE 802.03(2) requires, as the Majority recognizes, that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." I agree with the Majority that this heightened-pleading rule applies here but not because a negligent-misrepresentation claim is a claim of "fraud," which requires an *intent* to defraud, *see* ***Kaloti Enterprises, Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶12, 283 Wis. 2d 555, 569, 699 N.W.2d 205, 211 (A claim of "fraudulent misrepresentation" requires, *inter alia*, allegations that the "'defendant made the representation with intent to defraud.'") (quoted source omitted), but because it is a claim of "mistake," *see* ***Malzewski v. Rapkin***, 2006 WI App 183, ¶20, 296 Wis. 2d 98, 113, 723 N.W.2d 156, 163 (A claim of negligent misrepresentation merely requires, *inter alia*, that "the defendant was negligent in making the representation."). On our *de novo* review of the legal issue of whether the Amended Complaint satisfies RULE 802.03(2)'s heightened-pleading requirement, I would reverse. Accordingly, I respectfully dissent.

¶26 As the Majority notes, to pass muster under WIS. STAT. RULE 802.03(2), a complaint must specify the following averments of the claim: "who" did "what" "when," and "where and how" the complained-of things were done. *See* ***Friends of Kenwood v. Green***, 2000 WI App 217, ¶14, 239 Wis. 2d 78, 87, 619 N.W.2d 271, 276 (quotation marks and cited source omitted). In my view, the Amended Complaint, the allegations of which "and all the reasonable inferences that may be drawn from them" are presumed at this stage to be true, *see* ***id.***, 2000 WI App 217, ¶11, 239 Wis. 2d at 85, 619 N.W.2d at 275, easily clears these

hurdles, bearing in mind that corporations have long been treated by the law as persons for many things, *see* ***Citizens United v. Federal Election Comm'n***, ___ U.S. ___, 130 S. Ct. 876, 899 (2010); ***Kiley v. Chicago***, ***Minneapolis & St. Paul Railway Co.***, 138 Wis. 215, 218–220, 119 N.W. 309, 312 (1909); ***Huber v. Martin***, 127 Wis. 412, 433–435, 105 N.W. 1031, 1038 (1906), and that they necessarily act through agents and are responsible for their agents' torts.

¶27 The Amended Complaint asserts that the investment scheme the Majority details:

- Was actively promoted by Indianapolis Life Ins. Co. throughout the country, using their "licensed insurance agents"—Paragraphs 76–80 (contrary to the Majority's assertion in paragraph 19, this is clearly an allegation that the "licensed insurance agents" were acting *for* Indianapolis Life in connection with the alleged negligent misrepresentations);

- Indianapolis Life misrepresented the legality and viability of the investments to the plaintiffs—Paragraph 120;

- Timothy Nettesheim was the plaintiffs' lawyer and "introduced the Indianapolis agents to Plaintiffs" and "encouraged Plaintiffs" to buy the scheme's investments that the Indianapolis Life agents were selling—Paragraphs 121, 123–124 (contrary to the Majority's assertion in paragraph 20, this is sufficient because a fair reading is that Timothy Nettesheim said these things to *all* the plaintiffs);

- Joel Nettesheim was the plaintiffs' accountant and "introduced the Indianapolis agents to Plaintiffs" and "encouraged Plaintiffs" to buy

the scheme's investments that the Indianapolis Life agents were selling—Paragraphs 122, 123–124 (the Majority does not make the same assertion with respect to Joel Nettesheim as it does in connection with Timothy Nettesheim, even though the Amended Complaint's assertions are identical other than the name and function of the defendant alleged to have misled the plaintiffs);

- Both Joel and Timothy Nettesheim "knew or should have known" that the investments were neither lawful nor viable—Paragraph 125;

- Timothy Nettesheim worked for "Reinhart, Boerner, Van Duren [*sic*], SC[,] and his conduct which is complained of in this suit was undertaken in such capacity[,]" and Reinhart "approved and condoned" what he did—Paragraphs 128–129;[1]

- Joel Nettesheim worked for "Suby, Von Haden & Associates and his conduct which is complained of in this suit was undertaken in such capacity[,]" and Suby "approved and condoned" what he did—Paragraphs 131–132.

Thus:

- the "who" is Indianapolis Life and its "licensed agents" in connection with the scheme alleged in the Amended Complaint, and the Nettesheims and their respective employers;

- the "what" is luring the plaintiffs into a scheme that the defendants negligently represented would be lawful and viable;

[1] The name of the firm is Reinhart, Boerner Van Deuren S.C.

- the "when" is during the time the plaintiffs invested what they say was "well in excess of $1 million" "[b]etween the years 2001 and 2006" (contrary to the Majority's implicit holding, misrepresentations, especially in the complex arcana of financial schemes, can and often do extend for many years);

- the "where" is the meetings plaintiffs had with the Nettesheims and Indianapolis Life's "licensed agents" selling the investment scheme; and

- the "how" is through Indianapolis Life's marketing materials to which the complaint refers and describes in detail.

This case is therefore, as we show briefly below, wholly different than ***Friends of Kenwood***, and, unlike the situation in ***Friends of Kenwood***, *gave the defendants more than sufficient information to defend*. *See* ***Doe 67C v. Archdiocese of Milwaukee***, 2005 WI 123, ¶52, 284 Wis. 2d 307, 336, 700 N.W.2d 180, 194.

¶28 ***Friends of Kenwood*** concerned a congregation's move from one place to another, and alleged that unnamed members of the congregation's board of directors misled the congregants as to what would happen following the move. ***Friends of Kenwood***, 2000 WI App 217, ¶¶12, 15, 239 Wis. 2d at 85–86, 87–88, 619 N.W.2d at 275, 276. The allegations did not satisfy WIS. STAT. RULE 802.03(2) because the complaint did not "specify the particular individuals who made the representations, and fail[ed] to specify the details of where and when the misrepresentations were made, and who[m] the misrepresentations were made to." ***Friends of Kenwood***, 2000 WI App 217, ¶16, 239 Wis. 2d at 88, 619 N.W.2d at 276. As we have seen, the situation here is entirely different. Simply put, unlike the situation in ***Friends of Kenwood***, where you had a population of alleged

misrepresenters (unnamed trustees) in a larger population of both misrepresenters *and* non-misrepresenters (all of the trustees), ***ibid.***, here we have a named company *plus* those of its "licensed agents" selling the alleged fraudulent scheme; there is no ambiguity from the defendants' point of view as to who will be on the hook if a jury finds that the scheme was in fact fraudulent. Further and significantly, even under what I see as the Majority's misapplication of the court of appeals' decision in ***Friends of Kenwood***, the plaintiffs' Amended Complaint against the Nettesheims certainly passes muster under even the Majority's reading of ***Friends of Kenwood***. Therefore, at the very least, the case against them and their employers, should not be dismissed. Sadly, the plaintiffs' right to have their complaints heard in court is being cut off prematurely. Accordingly, I would reverse.