

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 8, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1338

Cir. Ct. No. 2011CV4117

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DR. MICHAEL B. SHAPIRO,

PLAINTIFF-APPELLANT,

V.

**RICK VANDEN HEUVEL CPA, S.C., RICK VANDEN HEUVEL,
DAN W. MCGOWN, SWEENEY & SWEENEY, S.C.,
PATRICK S. SWEENEY AND CORY A. BUYE,**

DEFENDANTS-RESPONDENTS,

WISCONSIN LAWYERS MUTUAL INSURANCE COMPANY,

INTERVENOR.

APPEAL from orders of the circuit court for Dane County:
JOHN W. MARKSON, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 BLANCHARD, P.J. Michael Shapiro appeals the circuit court's orders on summary judgment dismissing all of his claims against two accountants, two attorneys, and their respective firms. Shapiro contends that the court erred when the court dismissed the complaint as to all defendants. However, Shapiro fails to address in his principal brief one of the grounds relied on by the court, namely, that the complaint does not describe the circumstances constituting alleged fraud by the defendants with particularity, as required by WIS. STAT. § 802.03(2) (2011-12).¹ This failure is fatal to Shapiro's appeal. Accordingly, we affirm the circuit court on this ground. We further observe that if we were to reach the merits on this ground, we would likely conclude that the complaint does not meet the heightened pleading specificity requirements of § 802.03(2), based on the short argument on this topic presented in Shapiro's reply brief.

BACKGROUND

¶2 The complaint alleges that accountants Rick Vanden Heuvel and Dan McGown and their accounting firm, and attorneys Patrick Sweeney and Cory Buye and their law firm, fraudulently induced Shapiro to make or maintain investments in companies controlled by Christian Peterson at times when the defendants were providing professional services to Peterson and his companies. That is, while Shapiro makes no direct claims against Peterson, he alleges that the

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

defendants defrauded him in connection with Shapiro's investments in Peterson-controlled business entities.

¶3 The complaint alleges that, beginning in May 2001, Shapiro made a series of investments in Peterson-controlled entities, including the following:

- \$300,000 to acquire a 30 percent interest in "Good Family Food," which owned a restaurant, Pancake Café in Middleton; Good Family Food was owned 10 percent by Sweeney, 50 percent by Peterson, and 10 percent by Peterson's father.
- \$1.25 million to acquire a 25 percent interest in Maverick, Inc., a company that allegedly bought and sold scrap foam material for resale to carpet pad makers (with Peterson owning the remaining 75 percent).

The complaint further alleges that Shapiro lost all or most of the money that he had invested, when, for example, Maverick defaulted on loans and was dissolved.

¶4 As it stood at the time of the circuit court's challenged summary judgment decision, the complaint alleged the following causes of action against each defendant: common law fraud; conversion; misrepresentation-intentional deceit; civil conspiracy; and violations of WIS. STAT. § 895.446 (action for property damage or loss caused by crime, based on alleged violations of WIS. STAT. § 943.20 (theft)).²

² The circuit court made an earlier, separate summary judgment decision in January 2013, dismissing defendant Wisconsin Lawyers Mutual Insurance Company, and in that decision implicitly dismissed Shapiro's claim alleging negligent misrepresentation. Shapiro does not appeal that decision. In addition, Shapiro abandoned in the circuit court his original claim that the defendants violated WIS. STAT. § 100.18.

¶5 In two summary paragraphs, the complaint characterizes the allegations as follows:

10. At all times relevant, Defendants knew or had reason to know that Peterson had ... serious addiction[s] to alcohol and gambling; and that unless [the defendants] enabled and facilitated Peterson's gross mismanagement and self-dealing related to the entities owned in part and controlled by him, Peterson would no longer engage [the defendants] to provide professional services to him and to those business entities, in exchange for which professional services defendants received compensation substantially in excess of the value thereof.

11. At all times relevant, Defendants knew or had reason to know that in order for them to continue to benefit financially from the gross mismanagement and self-dealing related to Peterson's control of the business entities that [Peterson] owned in part and controlled, it was necessary for Dr. Shapiro to continue to invest substantial amounts into those business entities and to provide his personal guarantees to lenders that extended millions of dollars of credit thereto.

¶6 The circuit court granted summary judgment on multiple grounds, including that Shapiro failed to allege fraud with specificity in his complaint. On this issue, the court explained that it was "unable to discern" "any specific misrepresentations that are asserted, or intentional affirmative representations that were asserted," and that the court was "at a loss to find any actionable specific representations other than the so-called failures to disclose" and "opinion[s] as to what may happen in the future." The court further explained that it could not discern any allegation "that either group of defendants [accountants or attorneys] were in any way covering up or not disclosing things that they knew about, and that Dr. Shapiro didn't or, with reasonable diligence, couldn't have easily found out." Shapiro appeals the court's grant of summary judgment.

DISCUSSION

¶7 We review a grant of summary judgment de novo. *Summers v. Touchpoint Health Plan, Inc.*, 2008 WI 45, ¶15, 309 Wis. 2d 78, 749 N.W.2d 182.

¶8 Before turning to what we conclude is a fatal flaw in Shapiro’s argument on appeal, we provide a brief background on summary judgment methodology as pertinent to this case. As explained above, one basis for the circuit court’s grant of summary judgment was that Shapiro failed to state a claim for relief in his complaint. This is part of the first step of summary judgment methodology. See *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 317, 401 N.W.2d 816 (1987) (“[O]ur first task is to determine whether plaintiffs have stated a claim for relief.”). “In testing the sufficiency of a complaint, we take all facts pleaded by plaintiffs and all inferences which can reasonably be derived from those facts as true. Pleadings are to be liberally construed, with a view toward substantial justice to the parties. [WIS. STAT. §] 802.02(6).” *Id.*

¶9 In determining whether Shapiro’s complaint states a claim for relief, “special rules apply” because the complaint sounds in fraud. See *Friends of Kenwood v. Green*, 2000 WI App 217, ¶14, 239 Wis. 2d 78, 619 N.W.2d 271. Where a party attempts to state a cause of action for fraud, “the circumstances constituting fraud ... shall be stated with particularity.” WIS. STAT. § 802.03(2). “Particularity means the ‘who, what, when, where and how,’” and the pleading party must specify “the time, place, and content of an alleged ... misrepresentation.” *Friends of Kenwood*, 239 Wis. 2d 78, ¶14 (quoted sources omitted).

¶10 The rationale for this significantly higher pleading standard, exceeding the more relaxed requirements of ordinary notice pleading, is that the higher standard gives defendants opportunities for meaningful responses, and discourages the filing of reputation-harming but meritless allegations. *Id.* “By requiring the plaintiff to allege the who, what, where, and when of the alleged fraud, the rule requires the plaintiff to conduct a precomplaint investigation in sufficient depth to assure that the charge of fraud is responsible and supported, rather than defamatory and extortionate.” *Ackerman v. Northwestern Mut. Life Ins. Co.*, 172 F.3d 467, 469-71 (7th Cir. 1999) (concluding that a complaint was inadequate because it alleged “in general terms that the defendants inspired, encouraged, and condoned” a misleading sales pitch, but failed to associate a particular defendant with a particular set of misleading statements and failed to specify the contents of the statements).³

¶11 With that background, we now address what we conclude is a fatal defect in Shapiro’s briefing on appeal. The defect is that Shapiro fails to address, in his principal brief on appeal, the circuit court’s clearly expressed conclusion that fraud is not alleged with specificity in the complaint. We reject Shapiro’s appeal due to his failure to address this dispositive issue. *See Riley v. Town of Hamilton*, 153 Wis. 2d 582, 588, 451 N.W.2d 454 (Ct. App. 1989) (“We have

³ The terms of WIS. STAT. § 802.03(2) are identical to those in FED. R. CIV. P. 9(b), and we may draw on federal precedent interpreting Rule 9(b) when we apply § 802.03(2). *See, e.g., Rendler v. Markos*, 154 Wis. 2d 420, 428, 453 N.W.2d 202 (Ct. App. 1990) (citing federal case law interpreting Rule 9(b) in the course of interpreting § 802.03(2)); *see also Data Key Partners v. Permira Advisers LLC.*, 2014 WI 86, ¶22 & n.10, 356 Wis. 2d 665, 849 N.W.2d 693 (referring to U.S. Supreme Court interpretation of FED. R. CIV. P. 8(a) in connection with the interpretation of a subsection of WIS. STAT. § 802.02).

often held that we will not consider propositions which are not specifically argued and are unsupported by citations to legal authority.”).

¶12 It is unclear to us why Shapiro does not address the specificity issue in his principal brief.⁴ Shapiro repeatedly, but each time vaguely, characterizes aspects of the circuit court’s statements in its decision as being mere “dicta,” perhaps including statements by the court addressing the specificity issue. Whatever Shapiro means by using the term “dicta,” it would not be a reasonable position that the court did not clearly articulate, as one basis for its decision, a lack of specificity in alleging fraud in the complaint. The court’s discussion on this topic included, but was not limited to, the following, with our emphasis on wording that unmistakably signaled the court’s focus on a lack of specificity in alleging fraud in the complaint:

With respect to the fraud claims *as they have been variously pled* versus the attorneys and the accountants, I have been unable to discern in reviewing this any *specific misrepresentations* that are asserted, or intentional affirmative representations that were asserted, by either of the attorney or accounting defendants that are asserted by Dr. Shapiro. Rather, *the claims made* that fall generically under the fraud caption are based upon a failure to disclose.

And the law is very clear in Wisconsin that there is no duty that arises unless the facts that were not disclosed were, as the case law says, “peculiarly and exclusively within the knowledge of one party,[”] and the mistaken

⁴ If Shapiro believes that section II of his principal brief adequately addresses the lack of specificity issue, he is mistaken. This section of his brief is entirely devoted to arguments explicitly based on reasonable inferences that Shapiro argues could be drawn from the facts alleged in the summary judgment materials submitted by the parties after the complaint was filed, not on the allegations made in the complaint. To the extent that there may be legal arguments embedded in this discussion that could form a part of a properly developed specificity argument, Shapiro does not frame them as such, and we decline to attempt to construct such an argument on Shapiro’s behalf now.

party (here Dr. Shapiro) could not reasonably be expected to discover it....

....

There *is not any allegation* that I could discern in reviewing all of this *that either group of defendants were in any way covering up or not disclosing things* that they knew about, and that Dr. Shapiro didn't or, with reasonable diligence, couldn't have easily found out. In fact, I think it is very important to recognize *paragraphs 104 to 105 of the complaint* specifically allege that [Maverick's general] ledger showed these expenses that were being taken out of, were being made from Maverick that *formed the basis for Dr. Shapiro's complaint* here with respect to the misappropriations, and using Maverick effectively as Mr. Peterson's own ATM—all of that appeared on the ledger.

....

There's an additional fact that is *fundamental to a pleading of fraud*, which is that ... *fraud be alleged with specificity. And in reviewing the 70-page brief and the 100-plus [paragraph] complaint*, I again find myself at a loss to find any *actionable specific representations* other than the so-called failures to disclose. *So those are not in the case.*

The court unmistakably applied the requirement of specificity to the contents of the complaint, at a hearing convened for the purpose of resolving motions for summary judgment. As for the “dicta” concept, we find nothing in the record, and Shapiro does not point to anything, suggesting that the circuit court stated or implied that the parties should disregard this expressed conclusion, or that the court did not intend it as one basis for its summary judgment decision.

¶13 As discussed further below in connection with our observations that it appears that Shapiro would likely lose the lack of specificity issue on the merits, Shapiro does, very briefly, address the lack of specificity issue in his reply brief. However, putting aside the underdeveloped nature of the argument, it comes too late. Arguments raised for the first time in a reply brief need not be considered.

See *Roy v. St. Lukes Med. Ctr.*, 2007 WI App 218, ¶30 n.6, 305 Wis. 2d 658, 741 N.W.2d 256. To do otherwise would “thwart[] the purpose of a brief-in-chief, which is to raise the issues on appeal, and the purpose of a reply brief, which is to reply to arguments made in a respondent’s brief.” *Verex Assurance, Inc. v. AABREC, Inc.*, 148 Wis. 2d 730, 734 n.1, 436 N.W.2d 876 (Ct. App. 1989). The defendants have not had a chance to respond to a fully developed argument, and we have not had a chance to see how the defendants might respond to such an argument, nor to see how Shapiro might reply to those responses.

¶14 We now briefly explain why we think it likely that, if we were to address the lack of specificity issue on the merits, the result would be the same. It appears to us that, at best, the complaint generally describes a context in which various defendants at various times might have had a motive to mislead or provide false information to Shapiro, a potential opportunity to do so, or perhaps both, but that the complaint falls short of alleging what it was that Shapiro was specifically told, or specifically not told, by any defendant during any specified time period that could constitute a fraudulent misrepresentation.⁵ However, we will limit further comment to the very short attempt by Shapiro in his reply brief to address this issue. That is, although we suspect that a properly developed argument by Shapiro would fare no better, we limit the following observations to the specific argument that Shapiro advances in his reply brief.

⁵ In referring to what Shapiro was allegedly *not* told, we do not mean to suggest a position regarding the significant arguments between the two sides on appeal about whether omissions or failures to disclose information by the defendants, as opposed to alleged affirmative misrepresentations, could be actionable. It appears to us likely that, even assuming that Shapiro is correct that omissions could be actionable, the complaint fails to allege with particularity misrepresentations, in any form, by any defendant.

¶15 We first observe that Shapiro does not argue that any of the causes of action in the complaint that were dismissed on summary judgment do not rest on allegations of fraud. The attorney defendants argue on appeal that all claims against them fail because the claims “can only be based on allegations of fraud” and that the circumstances constituting alleged fraud are not alleged with particularity, and Shapiro’s reply on this point does not object to the concept that all of the claims rest on allegations of fraud. Indeed, in his reply brief argument on this topic, Shapiro appears to accept the premise that failure to allege fraud with particularity in the complaint would result in failure to state any claim.

¶16 Moreover, Shapiro’s claims alleging conversion, civil conspiracy, and violations of WIS. STAT. §§ 895.446 and 943.20 (theft) each appear to rest on the same grounds that he alleges in support of his claims of common law fraud and misrepresentation-intentional deceit, namely, allegations that the various defendants knowingly supplied him with false and misleading information.⁶ Therefore the complaint must “state with particularity the circumstances constituting fraud” regarding each count alleged. *See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.*, 631 F.3d 436, 441, 446-47 (7th Cir. 2011) (rejecting “proposed end run around the complaint’s particularity problems” because allegations sounded in fraud, meaning that the allegations were “premiered upon a course of fraudulent conduct” (quoted source omitted)).

⁶ For example, in count six, alleging a violation of WIS. STAT. § 895.446, Shapiro states, “The acts of fraud described above constituted intentional conduct that is prohibited under WIS. STAT. § 943.20.” If any of the counts in the complaint do not depend on allegations of fraudulent conduct, Shapiro fails to develop an argument to this effect, which he would need to do in order to establish that the circuit court’s decision should be reversed as to those particular counts.

¶17 In his reply brief, Shapiro identifies and very briefly alludes to nine paragraphs in the complaint, constituting three alleged episodes, that he asserts provide specific allegations of misrepresentations by the attorney defendants. He fails to identify any paragraphs of the complaint that he asserts provide specific allegations of fraud as to the accountant defendants.⁷

¶18 The first set of allegations in the complaint regarding either attorney defendant now cited by Shapiro involves Shapiro's May 2001 investment of \$300,000 to acquire 30 percent of Good Family Food, doing business as Pancake Café in Middleton. The allegations in the complaint are that: (1) Shapiro made this investment; (2) Attorney Sweeney then owned 10 percent of Good Family Food; (3) Sweeney performed legal work to establish Good Family Food; (4) neither Peterson nor Sweeney disclosed to Shapiro "the fact that Sweeney paid nothing to acquire his 10% ownership interest therein"; (5) neither Peterson nor Sweeney disclosed to Shapiro "the fact that Peterson owned the real estate and building from which that restaurant operated."

¶19 These paragraphs of the complaint do not allege with specificity a fraudulent representation or omission, and Shapiro does not develop any argument on this point. Missing here is any allegation that might support a reasonable inference that: any lawyer had an obligation to disclose how Sweeney acquired his ownership interest in the business or the ownership status of the property; Sweeney misrepresented, through any statement or omission, the value of his 10

⁷ Regarding the defendant professional firms to which the individual defendant accountants and attorneys belonged, Shapiro does not argue that there is any basis for liability for the firms if the court did not err in granting summary judgment to the defendants individually.

percent share or the ownership status of the restaurant property; there was a nexus between legal work Sweeney performed in this connection and any misrepresentation that anyone made to Shapiro; Shapiro made a contemporaneous inquiry on these topics that was met with intentional evasion or falsehood by any defendant, including Sweeney.

¶20 The second set of allegations in the complaint cited by Shapiro state in their entirety:

44. In the fall of 2006, Peterson and Sweeney attempted to persuade Dr. Shapiro to invest in a hotel business called Nesbitt Grove Hospitality, LLC (“Nesbitt Grove”).

45. On numerous occasions, at meetings with Peterson and Sweeney, Dr. Shapiro clearly stated that he would not invest in Nesbitt Grove or loan any funds thereto.

....

63. In March 2007, without the knowledge of Dr. Shapiro, the sum of \$500,000.00 was withdrawn from the Maverick⁸ business account and transferred to Sweeney & Sweeney’s client trust account.

64. Without the knowledge of Dr. Shapiro, Sweeney then caused \$400,000.00 thereof to be paid from his law firm’s client trust account to purchase a 50% interest in the Nesbitt Grove hospitality business in the name of a third party, despite Dr. Shapiro’s repeated refusals (in Sweeney’s presence) to invest in that hospitality business.

⁸ While not cited as part of Shapiro’s current reply brief argument, the complaint separately alleges, as noted above, that Shapiro invested \$1.25 million to obtain a partial interest in Maverick, a scrap foam broker. The complaint alleges that Peterson, Vanden Heuvel, and McGowan “strongly encouraged” this investment in Maverick.

¶21 Here again, Shapiro fails to provide sufficient specifics that would permit a reasonable inference of fraud. Shapiro does not, in his reply brief, develop an argument that paragraphs 44, 45, 63, and 64 of the complaint contain specific allegations showing a fraudulent representation or omission by anyone. Shapiro fails to point to an allegation in the complaint that Shapiro was misled during the course of any particular communication with Sweeney or any other defendant regarding Nesbitt Grove. Simply put, so far as we can tell, the facts are too spare. And, we will not attempt to construct a developed legal argument from Shapiro's unexplained citation to these paragraphs of the complaint.

¶22 Shapiro's third citation to the complaint is a paragraph that states in its entirety:

67. Throughout 2007, when the Peterson-controlled businesses owned in part by Dr. Shapiro, including Maverick, experienced serious financial hardship, Buye and Sweeney strongly encouraged Dr. Shapiro to continue investing with Peterson by making statements such as: "keep aligned with Chris" and to "stay with Chris."

¶23 The allegation that Sweeney and Buye, on various days in 2007, using unknown modes of communication, in unknown places, each made statements to the effect of, "keep aligned with Chris" or "stay with Chris," is not a specific allegation of fraud. It is true that the reasonable inference from the complaint as a whole is that these alleged statements were not merely general statements of support for Peterson as a person, but were intended to encourage Shapiro to make or maintain investments in entities Peterson allegedly controlled. However, these general statements of support for investment in Peterson-controlled entities are not representations of any fact regarding a specific investment or set of investments stated with the particularity required under WIS. STAT. § 802.03(2).

CONCLUSION

¶24 Because Shapiro fails to address in his principal brief one ground on which the circuit court dismissed the complaint in its entirety, we affirm the court's orders dismissing the complaint as to each defendant.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

