COURT OF APPEALS
DECISION
DATED AND FILED

June 13, 2018

Sheila T. Reiff
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. 2016AP493 **Cir. Ct. No. 2013CV1149**

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

ANN CATTAU, THOMAS M. BECK, LINDA BECKWITH, ARDYTH BERGSTROM, VICKI CHRISTMAN, GAIL W. CISMOSKI, KATHLEEN A. CURTIS, JANICE DEMENTER, JOHN DOBBINS, ELSIE EVENSON, KRIS GRASLEY, GARY HAFFEMAN, KRISTINE HAFFEMAN, KATHY J. HAGER, GAIL HARRMANN, JOANN HARRELL, MARY LOUISE HILDEBRANDT, LEXANN HITCHCOCK, JO ANNE HOLDEN, KARLA M. HUSTON, SUSAN R. JOHNSON, MARY K. JONES, DOROTHI A. KARISNY, CHUCK KNOECK, LAWRENCE H. KREBS, DIANE D. KRUEGER, HELEN L. KURKA, JUDITH J. KURKA NAGEL, JAMES LANTZ, JANE E. LANTZ, THOMAS MARZAHL, MARY JOY MAYER, MARJORIE R. MURPHY, BRUCE C. NUFER, ANNA P. OLSON, SHARON O'REILLY, PATRICIA ORMSTON, MARK PEERENBOOM, SUE PETERSON, JAMES S. PIEPENBRINK, ANNA MAE PREM, JANE REIMER, MARY J. RESCH, CYNTHIA A. RIECK, DIANNE ROTH, LUCY RUMPF, SUSAN M. SCHUG, DAVID K. SEBORA, SUANN M. SENSO, KARLA SHEEHAN, SANDRA L. SMITH, ROBIN L. SNELL, MARY C. TIEMAN, TERESA D. WALOTKA, PATRICIA M. WASKAWIC, MINDY WEICHMANN, SUSAN WESTPHAL, VICKI WIPPICH, CHRISTINE WOLLERMAN, JAMES A. ZIPPLE AND LEVERN J. ZWIRCHITZ,

PLAINTIFFS-APPELLANTS,

JAMES SHIPMAN,

PLAINTIFF,

v.

NATIONAL INSURANCE SERVICES OF WISCONSIN, INC. AND MIDAMERICA ADMINISTRATIVE & RETIREMENT SOLUTIONS, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Winnebago County: JOHN A. JORGENSEN, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 HAGEDORN, J. This case is a smaller piece of a larger lawsuit by former teachers and administrators from the Neenah School District (Plaintiffs) who claim damages resulting from the federal tax noncompliance of a retirement plan. The Plaintiffs sued several entities, including most prominently the School District itself. The issue in this appeal concerns allegations against two entities—MidAmerica Administrative & Retirement Solutions, Inc. (MidAmerica) and National Insurance Services of Wisconsin, Inc. (NIS)—who, according to the complaint, assisted in the administration and delivery of the offending retirement plan. The Plaintiffs' claims against these two entities were for negligence, breach of fiduciary duty, and both negligent and strict responsibility misrepresentation. MidAmerica and NIS brought a motion to dismiss all claims on the pleadings, a motion the circuit court granted. The Plaintiffs appeal that decision along with the circuit court's refusal to grant leave to amend the complaint to remedy any pleading deficiencies. We affirm.

¶2 While sufficiently stating a claim is not a terribly high bar to reach, a litigant must do more than offer propositions of law and conclusory allegations.

The complaint must contain sufficient factual allegations that plausibly suggest a claim for relief on each claim against every defendant. We hold that the Plaintiffs failed to plead sufficient facts to support their assertion that MidAmerica and NIS were negligent, or to plead sufficient facts to establish the existence of a fiduciary relationship between the Plaintiffs and MidAmerica and NIS. We further hold that the Plaintiffs did not plead their misrepresentation claims with particularity as required by WIS. STAT. § 802.03 (2015-16).[1] Finally, we hold that the circuit court did not erroneously exercise its discretion by dismissing the Plaintiffs' claims with prejudice.

BACKGROUND

¶3 This is the second time this case has been before us. The earlier iteration involved the circuit court's conclusion that the Plaintiffs' claims were solely federal tax questions and were therefore all preempted. We reversed and held that the allegations did raise cognizable state law claims.[2] The question before us this time around is whether the Plaintiffs have sufficiently pled those claims. Because this comes on a motion to dismiss on the pleadings, all the facts for purposes of the motion are those pled in the complaint. And we take those facts as true when determining whether a claim has been sufficiently pled. *See* ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] ***Cattau v. National Ins. Servs. of Wis., Inc.***, 2015 WI App 40, ¶2, 362 Wis. 2d 524, 865 N.W.2d 215.

¶4 The Plaintiffs retired from the School District during the years 2006-11 and had, throughout their employment, entered into various collective bargaining agreements and contracts with the School District that established a retirement plan.

¶5 Among other things, the retirement plan promised ten years of payments following retirement. Section 403(b) of the Internal Revenue Code, however, allows this type of plan to have a maximum payout period of just sixty-six months. An Internal Revenue Service audit of the retirement plan in 2010 revealed this defect. Eventually, the School District and the IRS reached a settlement agreement; no other party (including the Plaintiffs) was part of the settlement. When the dust settled, due to various tax-related issues arising from the noncompliant payment schedule, the Plaintiffs were left holding a federal tax bill they had obviously not anticipated.[3] The Plaintiffs responded by filing suit against the School District and several other parties they allege contributed to their financial losses.[4]

¶6 The amended complaint is clear that the School District itself actually "administered" the retirement plan. Even more, the School District "had the unilateral ability to control how the Retirement Plan was funded, structured,

[3] The settlement agreement impacted several classes of 2008-10 retirees who were deemed to have constructively received the last four and one-half years of payments and required to pay federal and state taxes on that amount (an amount not yet received) plus interest. The 2011 retirees had the constructive income added to their taxes for the 2011 tax year. The School District agreed, however, to pay both the employee and employer share of FICA taxes.

[4] This lawsuit involves several other defendants, including the School District, who are not parties to this appeal. NIS filed a statement in this appeal pursuant to WIS. STAT. § 809.19(3)(a)3. indicating that it agreed with MidAmerica, was adequately represented by MidAmerica's brief, and would not be making a separate filing.

administered and paid," decisions that were "not addressed in any contract between Plaintiffs and the Defendants."[5]

¶7 The complaint describes MidAmerica's and NIS's business and role in this case as follows. MidAmerica and NIS are in the business of marketing, structuring, and administering IRS qualified plans for employees of public sector organizations. MidAmerica and NIS "held themselves out as being experts in the area of structuring retirement plans for municipalities and their employees" and the "plaintiffs relied upon [MidAmerica's and NIS's] expertise … to act in accordance with applicable provisions of the Internal Revenue Code and the rules and regulations promulgated thereunder … in structuring the Retirement Plan." The School District chose to pay benefits under the plan through MidAmerica and NIS; the complaint thus calls the problematic retirement plan the "MidAmerica Program."

¶8 The complaint asserts that the "defendants made representations and caused to be distributed to the plaintiffs documentation concerning the MidAmerica Program" that "described the benefits and options available to participants."[6] This information described, among other things, tax benefits that turned out to be faulty. These representations were relied on by plan participants who expected the promised benefits.

[5] This latter assertion appears in tension with the contracts attached to the complaint, which provided a ten-year payout for benefits. Thus, it appears that at least part of the structure was dictated by the contracts between the Plaintiffs and the School District. At any rate, resolving this potential contradiction has no bearing on our decision.

[6] It is unclear which "defendants" are being referred to or if this allegation is meant to apply to all defendants equally.

¶9 The complaint seems to place the fault for the compliance errors at the feet of the School District. In remedying the error, the complaint notes that the IRS called the School District "the responsible party; the party who created this situation." One allegation refers to the defendants collectively and generically, indicating that had "the defendants properly structured the MidAmerica Program (or not utilized the MidAmerica Program at all)," damages would not have occurred. And further, had "the MidAmerica Program been structured and administered as required," the various tax consequences would not have been incurred. Before listing its specific claims and related factual averments, the complaint characterizes MidAmerica's and NIS's actions as "akin to professional malpractice." The complaint also calls these acts of "failing to structure the Retirement Plan as mandated" a breach of fiduciary duty.

¶10 The complaint makes the following specific claims against MidAmerica and NIS: negligence, breach of fiduciary duty, negligent misrepresentation, and strict responsibility misrepresentation.

¶11 The common-law negligence claim alleges that MidAmerica and NIS "had a duty to exercise ordinary care as a similarly situated professional," and it "completely and utterly failed to exercise anything that even resembles … ordinary care," thereby causing damage to the Plaintiffs.

¶12 The breach of fiduciary duty claim is based on the allegation that that MidAmerica and NIS "held themselves out as experts in the area of structuring and administering plans," and "owed to the [P]laintiffs a fiduciary duty" to structure their retirement plan in accordance with I.R.C. § 403(b) (2012). The complaint alleges that the "Defendants knew or should have known" the plan was not compliant and "failed to cause" and "to establish the terms and

conditions" "such that the plan would be compliant," thus breaching their fiduciary duties of care.

¶13 Finally, the amended complaint sets out the negligent and strict responsibility misrepresentation claims in general terms: "employees" and "designated representatives" of both defendants made "representations of fact" that were untrue "on an on-going basis over a period of years." The Plaintiffs relied on these representations in planning for retirement and were damaged as a result. The strict responsibility misrepresentation claim is substantially similar and added the assertion that MidAmerica and NIS "had particular means of ascertaining" the truth and "ought to have known the truth or untruth of the statements" they were making.

¶14 MidAmerica moved to dismiss the complaint based on federal preemption. In response, the Plaintiffs filed the amended complaint that is the subject of this appeal. MidAmerica filed a second motion to dismiss (NIS joined the motion), this time adding failure to state a claim for relief as a ground for dismissal because the claims were "directed indiscriminately at the 'Defendants'" and relied on "unsupported, conclusory allegations." The second motion also maintained that the court should not grant any request to amend the complaint further because the Plaintiffs already had "months" to remedy any deficiencies in the complaint and failed to do so. After a hearing, the circuit court granted the motion based on federal preemption; the Plaintiffs appealed, and we reversed solely on the preemption claim. *See* ***Cattau v. National Ins. Servs. of Wis., Inc.***, 2015 WI App 40, ¶2, 362 Wis. 2d 524, 865 N.W.2d 215. We did not address MidAmerica's and NIS's claim that the complaint should be dismissed for failure to state a claim. ***Id.***, ¶12.

¶15 On remand, the circuit court dismissed all claims against MidAmerica and NIS for failure to state a claim. The circuit court concluded that the negligence claim failed to allege enough facts to state a claim for relief.[7] With respect to the misrepresentation claims, the court concluded that the complaint failed to "identify with specificity who said what to who" as required. Finally, the court concluded that the facts pled in the complaint failed to establish the existence of a fiduciary duty. After being asked whether the Plaintiffs would have an opportunity to replead their claims, the circuit court clarified that the Plaintiffs "had plenty of time to amend the complaint to address any concerns that were raised by the Defendant and fail[ed] to do so." Therefore, the claims were dismissed with prejudice. The Plaintiffs appeal, and we now affirm.

DISCUSSION

¶16 The Plaintiffs maintain their complaint alleges sufficient facts against MidAmerica and NIS to withstand a motion to dismiss.[8] Alternatively, the Plaintiffs claim the circuit court erred in dismissing the complaint with prejudice and without granting leave to amend to remedy any pleading deficiencies. Whether a complaint states a claim upon which relief can be based is a question of law we review de novo. ***Data Key***, 356 Wis. 2d 665, ¶17.

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[7] The court also concluded that the negligence claim should be dismissed pursuant to ***Mackenzie v. Miller Brewing Co.***, 2001 WI 23, 241 Wis. 2d 700, 623 N.W.2d 739. Because we agree the complaint failed to establish that MidAmerica and NIS owed a duty to the Plaintiffs, we need not address this conclusion.

[8] The amended complaint asserts a claim that the School District and another party violated 42 U.S.C. § 1983 (2012). The Plaintiffs now claim in conclusory fashion that they "stated an appropriate claim under 42 U.S.C. § 1983." However, they fail to develop any legal argument on that point. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not address undeveloped arguments). We further note that this claim was not raised against MidAmerica or NIS, so we fail to discern how it is relevant to the issues here.

¶17 WISCONSIN STAT. § 802.02(1) provides the statutory requirements for a complaint: "A pleading … shall contain … [a] short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief."

¶18 In ***Data Key***, the Wisconsin Supreme Court clarified the analytical framework for determining whether a complaint sufficiently states a claim upon which relief can be granted. Interpreting WIS. STAT. § 802.02(1), the court explained that the United States Supreme Court's interpretation of the statute's federal counterpart "is consistent with our precedent." *See* ***Data Key***, 356 Wis. 2d 665, ¶¶22, 31 (discussing ***Bell Atl. Corp. v. Twombly***, 550 U.S. 544 (2007) and its interpretation of FED. R. CIV. P. 8(a)(2)). The Wisconsin Supreme Court restated the proper analysis as follows. First, "we accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." ***Data Key***, 356 Wis. 2d 665, ¶19. We cannot "add facts in the process of construing a complaint"; we look only to the facts actually alleged. ***Id.***; *see also* ***Strid v. Converse***, 111 Wis. 2d 418, 422-23, 331 N.W.2d 350 (1983). Second, we "accurately distinguish pleaded facts from pleaded legal conclusions." ***Data Key***, 356 Wis. 2d 665, ¶19. "[L]egal conclusions stated in the complaint are not accepted as true, and they are insufficient to enable a complaint to withstand a motion to dismiss." ***Id.*** "In order to satisfy … § 802.02(1)(a), a complaint must plead facts, which if true, would entitle the plaintiff to relief" and "plausibly suggest a violation of applicable law." ***Data Key***, 356 Wis. 2d 665, ¶¶21, 29-31. This depends on the substantive law underlying each claim. ***Id.***, ¶31.

¶19 It is generally agreed that ***Twombly*** established a heightened pleading standard in federal motion practice, and some have observed that this

heightened standard has led to more cases being dismissed than before. *See* ***Data Key***, 356 Wis. 2d 665, ¶¶69-70 (Abrahamson, C.J., dissenting). ***Twombly*** was a move away from mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action." ***Twombly***, 550 U.S. at 555. The short and plain statement required by the federal rules, the Court explained, demands more than just the possibility of a claim. ***Id.*** at 557. The mere possibility of a claim could allow "a plaintiff with a largely groundless claim … to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." ***Id.*** at 557-58 (citation omitted). In other words, broad-based legal impleading where only a possible, but not plausible, factual basis is stated for claims against each defendant is not consistent with FED. R. CIV. P. 8(a)(2)—the federal analog to our own WIS. STAT. § 802.02(1). This same approach is now the law in Wisconsin.

¶20 Not all states have chosen to follow the United States Supreme Court's lead. *See* Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411 (2018). But Wisconsin has. And in adopting the plausibility standard, the Wisconsin Supreme Court joined the United States Supreme Court in rejecting the old adage that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," a statement taken from ***Conley v. Gibson***, 355 U.S. 41, 45-46 (1957), and reiterated in this state under ***Strid***, 111 Wis. 2d at 422. ***Data Key***, 356 Wis. 2d 665, ¶¶29, 31. Our supreme court explained that the oft-cited "'no set of facts' language"—invoked by the Plaintiffs in this case as well—"could be incorrectly read as saying that 'any statement revealing the theory of the claim will suffice unless factual impossibility may be shown from the face of the pleadings' when

more facts are required to sufficiently state a claim that can proceed." ***Id.*** (quoting ***Twombly***, 550 U.S. at 561). The correct standard now mandates that "Plaintiffs must allege facts that plausibly suggest they are entitled to relief." ***Data Key***, 356 Wis. 2d 665, ¶31.

¶21 Against this backdrop, none of the Plaintiffs' claims—for negligence, breach of fiduciary duty, or misrepresentation—meet the plausibility standard.[9]

Negligence

¶22 Plaintiffs bringing a common-law negligence claim must plead sufficient facts to establish all four elements.

> First, the plaintiff must establish "the existence of a duty of care on the part of the defendant…." Second, the plaintiff must establish that the defendant breached that duty of care. Third, the plaintiff must establish "a causal connection between the defendant's breach of the duty of care and the plaintiff's injury…." Fourth, the plaintiff must establish that he or she suffered an actual loss or damage that resulted from the breach.

Nichols v. Progressive N. Ins. Co., 2008 WI 20, ¶11, 308 Wis. 2d 17, 746 N.W.2d 220 (citations omitted). We conclude the Plaintiffs fail to establish the first element: a duty of care. "Whether a duty exists under the circumstances, and the scope of any such duty, are questions of law we decide de novo." ***Brenner v. Amerisure Mut. Ins., Co.***, 2017 WI 38, ¶12, 374 Wis. 2d 578, 893 N.W.2d 193.

[9] MidAmerica and NIS also offer alternative arguments that the dismissal may be affirmed because the "applicable tax law does not permit the tax treatment that Plaintiffs seek" and on grounds of public policy. Because we conclude that the complaint was properly dismissed for other reasons, we need not address these arguments.

¶23 "Wisconsin has adopted the minority view from ***Palsgraf v. Long Island Railroad Co.***, 248 N.Y. 339, 162 N.E. 99 (1928), which established that everyone owes a duty to the world at large." ***Hocking v. City of Dodgeville***, 2009 WI 70, ¶12, 318 Wis. 2d 681, 768 N.W.2d 552. However, this does not mean the first element of a negligence claim is already a given by the mere assertion of negligence. ***Brenner***, 374 Wis. 2d 578, ¶16. To the contrary, duty is still an important element that must be established by the plaintiff.[10] ***Id.*** And "the duty owed to the world is ... restricted to what is reasonable under the circumstances." ***Hocking***, 318 Wis. 2d 681, ¶12. "[T]he test of negligence is whether the conduct foreseeably creates an unreasonable risk to others." ***Hoida, Inc. v. M&I Midstate Bank***, 2006 WI 69, ¶22, 291 Wis. 2d 283, 717 N.W.2d 17 (quoting ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis. 2d 723, 732, 275 N.W.2d 660 (1979)). The nature of the duty to refrain from engaging in acts that could unreasonably injure others depends upon the unique circumstances of a given situation, including the

[10] Wisconsin cases have shifted a bit in their analysis of "duty." In ***Alvarado v. Sersch***, the supreme court stated that liability limitations on the basis of duty are not really the appropriate framing as some cases had said. ***Alvarado v. Sersch***, 2003 WI 55, ¶16 n.2, 262 Wis. 2d 74, 662 N.W.2d 350. Rather, because everyone has a duty to act with reasonable care, the real question is whether liability is limited on public policy grounds. ***Id.*** However, just a few years later in ***Hoida***, the supreme court seemed to reframe once again when it rejected a claim because no duty was established. ***Hoida, Inc. v. M&I Midstate Bank***, 2006 WI 69, ¶2, 291 Wis. 2d 283, 717 N.W.2d 17. The dissent in ***Hoida*** strenuously objected to this, wondering if this was a *sub silentio* overruling of these prior pronouncements. *See* ***id.***, ¶¶56-65.

This court has observed that the "element of duty has been problematic." ***Tesar v. Anderson***, 2010 WI App 116, ¶6, 329 Wis. 2d 240, 789 N.W.2d 351. Indeed it has. That said, it appears that ***Hoida***'s framing is the appropriate analysis—at least in the fact scenario here. *See* ***Brenner v. Amerisure Mut. Ins. Co.***, 2017 WI 38, ¶16, 374 Wis. 2d 578, 893 N.W.2d 193 (explaining that a negligence claim does not "arrive[] at court with the first element already proven as a matter of law"); *see also* ***Moss v. Trane U.S., Inc.***, 2016 WL 916435, unpublished slip op. at 3-4 (W.D. Wis. Mar. 10, 2016) (construing Wisconsin law). So that is what we shall apply.

nature of the relationship between the parties. ***Behrendt v. Gulf Underwriters Ins. Co.***, 2009 WI 71, ¶18, 318 Wis. 2d 622, 768 N.W.2d 568.

¶24 When contracts are in play, the nature of the contractual duties will help define what is foreseeable, and in turn, what kind of response is reasonable and consistent with the standard of ordinary care. *See* ***Hoida***, 291 Wis. 2d 283, ¶35. In ***Hoida***, a subcontractor on a building project sued a bank and title company following the alleged misappropriation of funds by the general contractor and owner of a property. ***Id.***, ¶1. Though the decision had many moving parts, the upshot for our purposes is that the bank's duty of ordinary care—what was reasonable under the circumstances—was "shaped" by "contractually assumed obligations and agreed upon limitations." ***Id.***, ¶38. The title company was also "obligated to perform only those tasks" outlined in the contract. ***Id.***, ¶39. These contractual duties shaped the contours of the duty of ordinary care. ***Id.***

¶25 Similarly, in ***Hatleberg v. Norwest Bank Wis.***, 2005 WI 109, ¶¶17-18, 283 Wis. 2d 234, 700 N.W.2d 15, we looked to the nature of the relationship (a trustee) and the nature of the duties in that relationship—including by reference to the instrument creating the trust. ***Id.***, ¶¶19-21. Based on this, we concluded in part that the trustee had no duty to ensure the trust worked to accomplish its intended purpose (tax avoidance), pointing specifically to the absence of any language in the trust instrument imposing this duty. ***Id.***, ¶¶24-25. On the other hand, we also concluded that because the trustee had a role as a financial advisor, the trustee's duty did extend to avoiding providing false information. ***Id.***, ¶42.

¶26 In ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, 277 Wis. 2d 21, 690 N.W.2d 1, the supreme court rejected the notion that because an architect

had superior knowledge and skill, he should have provided certain instructions on a building project. ***Id.***, ¶¶14, 18. "[S]uperior knowledge alone does not create liability." ***Id.***, ¶18 (citation omitted). The court grounded its duty analysis in the architect's contractual responsibilities. ***Id.***, ¶¶18-21.

¶27 These themes are replete in our case law.[11] This certainly does not mean that a retirement plan record keeper handling funds for retirees has no duty of care absent a contract. A common-law negligence claim could certainly exist independent of a contract, especially where that contract involves professional services. *See* ***Kerry Inc. v. Angus-Young Assocs., Inc.***, 2005 WI App 42, ¶9, 280 Wis. 2d 418, 694 N.W.2d 407. And professionals generally have a common-law duty to exercise the standard of professional care usual for those professions. ***Id.*** The question here is whether that duty has been spelled out in the complaint. With this background, the Plaintiffs' pleading deficiency becomes clearer.

¶28 The complaint's specific "negligence" averments are brief, reflecting only generic allegations that MidAmerica and NIS "completely and utterly failed to exercise anything that even resembles the ordinary care," and this negligence "was a substantial factor in causing the Plaintiff's financial injuries." These allegations are conclusory, merely parroting the legal standards. As ***Data Key*** made clear, we do not accept legal conclusions as true. The factual basis for the negligence claim, then, must come from the other broader factual claims.

[11] *See also* ***Vonasek v. Hirsch & Stevens, Inc.***, 65 Wis. 2d 1, 10-12, 221 N.W.2d 815 (1974) (holding that a general contractor's negligence claims against an architect following the collapse of a building went beyond what was contemplated by the owner-architect contract).

¶29 The complaint alleges that the School District, not MidAmerica or NIS, "had the unilateral ability to control how the Retirement Plan was funded, structured, administered and paid." As to MidAmerica's and NIS's actual duties and role, very little is spelled out. In fact, the complaint does not distinguish between the two defendants, and we are unable to discern which allegations apply to MidAmerica, which allegations apply to NIS, and which allegations are applicable to both defendants.

¶30 The complaint vaguely asserts that the School District "chose not to pay the Plaintiffs directly but, rather, to pay the [P]laintiffs their benefits … through" MidAmerica and NIS. It is unclear what this assertion has to do with the injury alleged here—that the plans were improperly *structured*. And again, the complaint says it was the School District that controlled how plan payments were made.

¶31 The complaint also contains allegations hinting at some sort of advisory role played by MidAmerica and NIS—a set of responsibilities the Plaintiffs emphasize on appeal. The complaint generally alleges that MidAmerica and NIS held themselves out as experts on retirement plans, and the Plaintiffs relied upon MidAmerica's and NIS's expertise "to act in accordance with applicable provisions of the Internal Revenue Code." In its briefing before us, the Plaintiffs take MidAmerica and NIS to task for failing to speak up as the resident experts, asserting that MidAmerica's and NIS's real sin was not "screaming at the top of their lungs 'guys, this is a huge risk, you should structure the plan some other way.'" But, again, nothing in the complaint suggests that MidAmerica or NIS had any responsibility for the decisions that caused the specific injury here, or that MidAmerica and NIS had an affirmative obligation to warn parties it had not contracted with about the tax consequences of their retirement plan. What seems

to be missing in the Plaintiffs' efforts to establish MidAmerica's and NIS's duty is clarity regarding the nature of their presumably contractual relationship with the School District, and consequently, the contours of their responsibilities.

¶32 Taking the allegations and reasonable inferences from those allegations at face value, the injury was caused by an I.R.C. § 403(b) (2012) retirement plan allowing benefits to be paid over a ten-year period in violation of the Internal Revenue Code. The complaint fails to tell us what MidAmerica's or NIS's responsibilities actually were. Nothing alleged allows us to conclude that MidAmerica or NIS had any say in the contracts between the Plaintiffs and the School District, or that the School District hired MidAmerica or NIS to provide advice on how to structure the problematic elements of the retirement plans, or that MidAmerica's and NIS's relationship with the School District authorized or required them to analyze the tax compliance of the problematic plan. And we reiterate that, according to the complaint, the only defendant we know of with the ability to determine how the plan was structured, administered, and paid was the School District. Without some idea what MidAmerica's and NIS's actual role was, we cannot identify what its common-law duty of ordinary care actually was.

¶33 The Plaintiffs seem to hang on to the idea that MidAmerica and NIS are experts, and thus automatically have some responsibilities associated with that.[12] But that cannot be the long and short of it. By way of analogy, suppose

[12] The Plaintiffs even insist that "this case is akin to an accountant malpractice suit" where "an accountant caused his client to incur unnecessary taxes, avoidable interest, and other damages because his advice fell below that applicable standard of care." This argument further illustrates the deficiencies in the complaint. We have no facts regarding the relationship between MidAmerica and NIS and the Plaintiffs. Certainly nothing that would indicate that the Plaintiffs are "clients" of MidAmerica and NIS. In fact, the Plaintiffs concede that no contractual relationship exists.

you take your car in to have repairs done after an accident. The shop then subcontracts to Jim's Autobody to do the body work and paint—Jim is a car "expert" you might say. Suppose also that your suspension was damaged in the accident—dangerously so—and that Jim obviously sees this and says nothing to you. Jim finishes the body work and returns the car to the shop, which in turn gives the car back to you. But the shop fails to fix the suspension or otherwise notify you of the problem. On your way back from the shop, you get injured in an accident that would not have occurred had your suspension been repaired. Is Jim responsible for the injury merely because he is a car expert and had some role in the repair (the body work)? It depends—on the scope of services Jim was contracted to do, the nature of Jim's expertise, and other possible factors. That is the logic of the supreme court's decision in ***Hoida***. Simply saying Jim is an "expert" and therefore should be held liable is not enough. A sufficiently pled complaint would have to show that Jim had a duty and ability to act, to speak up, and it would tell us what actions Jim did or did not take.

¶34 Here, the Plaintiffs have failed to fill in the gaps. We fail to see that just because MidAmerica and NIS are "experts" in retirement plans and were hired by the School District (not the Plaintiffs) to assist in administering the plans, they breached a duty—under the facts as pled—to ensure that the specific error in structure of the retirement plan was corrected. Although the complaint generally avers that the "defendants … failed to cause [the retirement plans] to be structured" properly, it never tells us what MidAmerica's or NIS's role was in this. The failure to distinguish between the roles of MidAmerica and NIS highlights the problem even more. To survive a motion to dismiss the negligence claim, the Plaintiffs must allege specific facts implicating each defendant in the failure to exercise ordinary care. In sum, the complaint leaves us guessing as to what

MidAmerica and NIS were supposed to do by virtue of their assistance to the School District. We cannot add facts to create a plausible claim that MidAmerica and NIS breached a common-law duty of ordinary care to the Plaintiffs. The negligence claim was rightly dismissed.

Breach of Fiduciary Duty

¶35 To show a breach of fiduciary duty, a plaintiff must plead facts that support three elements: "(1) the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached that duty; and (3) the breach of duty caused the plaintiff's damage." ***Berner Cheese Corp. v. Krug***, 2008 WI 95, ¶40, 312 Wis. 2d 251, 752 N.W.2d 800. Thus, the claim depends on the existence and nature of the fiduciary relationship. "A fiduciary relationship arises from a formal commitment to act for the benefit of another (for example, a trustee) or from special circumstances from which the law will assume an obligation to act for another's benefit." ***Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Boeck***, 127 Wis. 2d 127, 136, 377 N.W.2d 605 (1985). "The mere fact of reliance on representations … does not necessarily create a relationship of trust and confidence leading to a fiduciary duty." ***Id.***

¶36 The complaint's simple declaration in the claim section that a fiduciary relationship existed is a legal conclusion that we do not accept. As to the factual allegations, the Plaintiffs suggest that because the defendants "were handling the [Plaintiffs'] financial investments, there can be little question that

they owe a fiduciary duty to those whose money/investments they are handling."[13] In their briefing, the Plaintiffs attempt to paint a picture of MidAmerica and NIS as investment advisors to the Plaintiffs. The problem is that the allegations in the amended complaint do not support this characterization.

¶37 The Plaintiffs concede there is no contractual relationship between themselves and MidAmerica or NIS, nor do they point us to any "formal commitment" to act on the Plaintiffs' behalf. Thus, any fiduciary relationship must arise from special circumstances. And this we do not see alleged or described in the complaint. The Plaintiffs make much of the allegation that the School District retained MidAmerica and NIS to pay the Plaintiffs. But this fact does not amount to special circumstances. The key problem is that the amended complaint fails to specify MidAmerica's and NIS's relationship to the *Plaintiffs* and the role these defendants played in the alleged tax debacle.

¶38 The Plaintiffs cite ***Schweiger v. Loewi & Co.***, 65 Wis. 2d 56, 221 N.W.2d 882 (1974), in support of the proposition that handling investments creates a fiduciary duty. But the case does not help the Plaintiffs. There, the court stated that when a person obtains the services of an investment expert in order to handle his or her investments, the investment expert owes a fiduciary duty to that person. ***Id.*** at 64. But the fiduciary duty described in ***Schweiger*** was based on the *plaintiff* retaining the services of the defendant. ***Id.*** at 58. The complaint here

[13] The Plaintiffs draw our attention to the United States Supreme Court's decision in ***Tibble v. Edison International***, 135 S. Ct. 1823 (2015), claiming that the case "greatly expanded the fiduciary duties (and with it the exposure to liability) against those who negligently administer retirement plans for employees." Putting aside the fact that the decision was based on federal law, the decision addressed whether claims for breach of fiduciary duty under the Employee Retirement Income Security Act were timely, not whether a fiduciary duty existed. ***Id.*** at 1828-29. It is inapplicable here.

alleges that the School District, not the Plaintiffs, enlisted the help of MidAmerica and NIS to pay out the retirement benefits to the Plaintiffs. We have no facts that would allow us to conclude that the Plaintiffs enlisted MidAmerica and/or NIS as their agent to handle their investments.

¶39 The complaint's assertion that MidAmerica and NIS were in the business of marketing, structuring, and administering retirement plans and that the Plaintiffs relied upon MidAmerica's and NIS's expertise also does not amount to a fiduciary duty. Mere reliance is not enough; there must be "special circumstances from which the law will assume an obligation to act for another's benefit." ***Merrill Lynch***, 127 Wis. 2d at 136. Therefore, the complaint does not allege sufficient facts to support a plausible claim that a fiduciary relationship existed between MidAmerica and NIS and the Plaintiffs. And without that, the Plaintiffs have failed to state a claim for breach of fiduciary duty against MidAmerica and NIS.

Misrepresentation

¶40 The Plaintiffs bring both a negligent misrepresentation claim and one for strict responsibility misrepresentation. Unlike breach of fiduciary duty and negligence, misrepresentation is a species of fraud. *See* ***Whipp v. Iverson***, 43 Wis. 2d 166, 169, 168 N.W.2d 201 (1969) (observing that "[f]raud is a generic and an ambiguous term" and includes "misrepresentation which may be separated into the three familiar tort classifications of intent, negligence, and strict responsibility"). Whether a complaint states a claim for fraud is governed by WIS. STAT. § 802.03(2), which provides a heightened pleading standard: "the circumstances constituting fraud or mistake shall be stated with particularity."

The statute does, however, allow "[m]alice, intent, knowledge, and other condition of mind of a person" to be averred generally. ***Id.***

¶41 Particularity requires "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 (citation omitted). In other words, the "who, what, when, where and how" of the false statements must be pled. ***Id.*** (citation omitted). Reference to generic entities or the "defendants" or "plaintiffs" broadly does not suffice. *See* ***Schotz v. Indianapolis Life Ins. Co.***, No. 2011AP209, unpublished slip op. at ¶12 (WI App. Dec. 28, 2011).

¶42 The reason for this requirement is twofold. First, it serves the aims of notice to the defendant. ***Friends of Kenwood***, 239 Wis. 2d 78, ¶14. Second, this statutory requirement "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.*** (quoting ***McGinty v. Beranger Volkswagen, Inc.***, 633 F.2d 226, 228 n.2 (1st Cir. 1980)). As the Seventh Circuit has emphasized regarding the federal analog to WIS. STAT. § 802.03(2):

> [FED. R. CIV. PROC.] 9 requires heightened pleading standards because of the stigmatic injury that potentially results from allegations of fraud…. We have observed, moreover, that fraud is frequently charged irresponsibly by people who have suffered a loss and want to find someone to blame for it. If discovery is allowed to proceed, a defendant well may face a long period of time where it stands accused of fraud, placing what may be undue pressure on the defendant to settle the case in order to lift the cloud on its reputation. The requirement that fraud be pleaded with particularity compels the plaintiff to provide enough detail to enable the defendant to riposte swiftly and effectively if the claim is groundless. It also forces the

> plaintiff to conduct a careful pretrial investigation and thus operates as a screen against spurious fraud claims.

United States ex rel. Presser v. Acacia Mental Health Clinic, LLC, 836 F.3d 770, 776 (7th Cir. 2016) (citations omitted). This particularity requirement "is designed to discourage a 'sue first, ask questions later' philosophy." ***Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.***, 631 F.3d 436, 441 (7th Cir. 2011) (quoting ***Berman v. Richford Indus., Inc.***, 1978 WL 1104, at *5 (S.D.N.Y. July 28, 1978)).

¶43 In ***Friends of Kenwood***, this court considered whether general allegations that letters, mailings, phone calls, meetings, and other efforts from a public relations campaign over a period of five years were insufficiently particular. ***Friends of Kenwood***, 239 Wis. 2d 78, ¶¶15-16. We concluded the allegations were insufficient "because they fail to specify the particular individuals who made the representations, and fail to specify the details of where and when the misrepresentations were made, and who the misrepresentations were made to." ***Id.***, ¶16. Under this standard, the Plaintiffs' allegations against MidAmerica and NIS fall short.

¶44 The complaint vaguely avers that the "defendants" made representations "[p]eriodically and on an on-going basis over a period of years" concerning the tax benefits of the retirement plans. The complaint never identifies which defendants made what statements. It merely alleges that the "defendants" made representations through "employees" and "designated representatives." Nor are we given any hint as to what medium these representations took; the complaint avers that the "representations were both in writing and by word of mouth." Even assuming these generic allegations could be isolated to MidAmerica and NIS, it is not enough to allege that MidAmerica and NIS made misrepresentations at some

unspecified time through unspecified individuals.[14] The holding in ***Friends of Kenwood*** controls the outcome here; more is needed to state a misrepresentation claim. The circuit court correctly dismissed the Plaintiffs' claims against MidAmerica and NIS for negligent misrepresentation and strict responsibility misrepresentation.

Leave to Amend

¶45 Finally, the Plaintiffs challenge the circuit court's decision to deny leave to amend the complaint a second time. The Plaintiffs candidly admit they used their one amendment as of right when they filed the amended complaint in response to the original motions to dismiss. However, the Plaintiffs argue they should have been given the opportunity to amend their complaint a second time to specifically respond to MidAmerica's second motion to dismiss, which added failure to state a claim as grounds for dismissal. The Plaintiffs emphasize that "[t]he current state of the law favors adjudication on the merits, not on [procedural] gamesmanship." We affirm because the circuit court acted within its discretion when it denied the Plaintiffs leave to amend the complaint.

[14] We are mindful of the difficulty of obtaining evidence of the particulars of a misrepresentation claim. *See generally* ***Emery v. American Gen. Fin., Inc.***, 134 F.3d 1321, 1323 (7th Cir. 1998) ("We don't want to create a Catch-22 situation in which a complaint is dismissed because of the plaintiff's inability to obtain essential information without pretrial discovery (normally of the defendant, because the essential information is in his possession and he will not reveal it voluntarily) that she could not conduct before filing the complaint. But [FED. R. CIV. PROC.] 9(b) is relaxed upon a showing of such inability."). It is for good reason, though, that some measure of diligence and fact-finding is generally required prior to pursuing and pleading a misrepresentation claim. As the Seventh Circuit has stated, "The particularity requirement ensures that plaintiffs do their homework before filing suit and protects defendants from baseless suits that tarnish reputations. And the requirement dovetails with lawyers' ethical obligations to ensure they conduct a pre-complaint inquiry before signing off on their clients' contentions." ***Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.***, 631 F.3d 436, 439 (7th Cir. 2011).

¶46 WISCONSIN STAT. § 802.09(1) grants plaintiffs the right to amend pleadings "*once* as a matter of course … within 6 months" of the filing of the original complaint. ***Id.*** (emphasis added). If the complaint has already been amended once or the six-month window has closed, "a party may amend the pleading only by leave of court or by written consent of the adverse party." ***Id.***; *see also* ***Tietsworth v. Harley-Davidson, Inc.***, 2007 WI 97, ¶25, 303 Wis. 2d 94, 735 N.W.2d 418. Consistent with Wisconsin's "policy in favor of liberal amendment of pleadings," § 802.09(1) also instructs that "leave shall be freely given at any stage of the action when justice so requires." *See* ***Tietsworth***, 303 Wis. 2d 94, ¶25. However, the circuit court's decision whether to grant leave to amend the complaint is ultimately discretionary. ***Piaskoski & Assocs. v. Ricciardi***, 2004 WI App 152, ¶30, 275 Wis. 2d 650, 686 N.W.2d 675. We sustain a discretionary decision "if the circuit court has examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis. 2d 296, 306, 470 N.W.2d 873 (1991).

¶47 The Plaintiffs did not formally request leave to amend the complaint a second time, nor did they offer any specific amendments. In their brief in opposition to the motion to dismiss back in March 2014, the Plaintiffs suggested that they could amend the claims for misrepresentation if any deficiency was found. The Plaintiffs never filed a motion for leave to amend, nor did they identify any proposed amendments to the complaint; they consistently took the position that the complaint was sufficient. Even during the hearing, the Plaintiffs did not admit that the complaint had any deficiencies, propose any amendments, or specifically request leave to amend. The Plaintiffs merely indicated that they were willing to amend the complaint further if the court granted the motion to dismiss.

¶48 After the circuit court granted the motion to dismiss the claims against MidAmerica and NIS, Plaintiffs' counsel asked if they would have the right to replead. MidAmerica's counsel responded that the circuit court should dismiss the claims with prejudice and not allow any amendment:

> We request a dismissal with prejudice. This is the second complaint already. We've seen vague statements here and there today in argument and briefs that if more specificity was required, we promise we could provide it. We've seen no evidence of it, we haven't seen a draft, supplemental complaint in response to any of our motions to dismiss. I think the time has passed to allow for future amendment.

The court agreed and found that the Plaintiffs "had plenty of time to amend the complaint to address any concerns that were raised by the Defendant and fail[ed] to do so. So [the claims] will be dismissed with prejudice."[15]

¶49 The court's decision to deny amendment and dismiss with prejudice was reasonable and supportable. Although Wisconsin embraces a policy of liberal amendment, a reasonable court could certainly conclude under the circumstances that justice weighed in favor of MidAmerica and NIS. MidAmerica's and NIS's concerns with the conclusory allegations in the complaint dated back almost twenty-one months to the filing of MidAmerica's and NIS's joint motion to dismiss for failure to state a claim.[16] Given the passage of time, the absence of a

[15] We disagree with the Plaintiffs' suggestion that the court was operating under the misconception that the Plaintiffs "could have amended" the complaint after the second motion to dismiss. In context, it appears that the circuit court was noting (consistent with MidAmerica's argument) that the Plaintiffs had not actually offered any proposed amendments to remedy the complaint's deficiencies. Nothing gives us reason to believe that the circuit court mistakenly believed that the Plaintiffs were free to amend their complaint a second time outside the statutory six-month window and faulted the Plaintiffs for failing to do so.

[16] MidAmerica filed the motion on March 6, 2014, and the circuit court made its oral ruling on December 2, 2015.

direct request to amend the complaint, or any proposed amendments, it was reasonable for the circuit court to conclude that "justice" did not require that the Plaintiffs be granted an opportunity to amend the complaint again. *See* WIS. STAT. § 802.09(1).[17]

CONCLUSION

¶50 To a certain extent, Jackson Pollock-style pleading is necessary for plaintiffs with an incomplete understanding of the facts. Indeed, our statutes require only a "short and plain statement of the claim." WIS. STAT. § 802.02(1)(a). However, our liberal pleading laws cannot be so loose that every ounce of paint thrown must be allowed to stick to every defendant. This was the very concern raised by the Supreme Court in ***Twombly*** and reemphasized by our supreme court in ***Data Key***—namely, that "a largely groundless claim" could be allowed to proceed, thus taking up significant time and money. ***Twombly***, 550 U.S. at 558 (citation omitted). Circuit courts "must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." ***Id.*** (citation omitted). Waiting for discovery to ferret out inadequately pled claims is no solution either. ***Id.*** at 558-59.

[17] To the extent the Plaintiffs argue that dismissal should have been without prejudice even if the circuit court properly exercised its discretion by denying leave to amend the complaint, the argument is undeveloped. *See* ***Pettit***, 171 Wis. 2d at 646-47. The Plaintiffs do assert that the circuit court "disregarded clear binding precedent that dismissal should have been without prejudice." However, the only citation advanced by the Plaintiffs is to ***Adler v. D & H Industries, Inc.***, 2005 WI App 43, 279 Wis. 2d 472, 694 N.W.2d 480. In ***Adler*** we concluded that a circuit court erroneously exercised its discretion by dismissing a claim with prejudice because it relied upon a legal error. *See* ***id.***, ¶¶17, 22. We did not establish an absolute right to replead after a dismissal for failure to state a claim under WIS. STAT. § 802.06(2)6. Other Wisconsin cases affirm that dismissal with prejudice following a successful motion for failure to state a claim is permissible. *See* ***Wisconsin Ass'n of Nursing Homes, Inc. v. Journal Co.***, 92 Wis. 2d 709, 721-22, 285 N.W.2d 891 (Ct. App. 1979).

¶51 If true, the Plaintiffs have alleged real wrongs, but they have not "nudged their claims across the line from conceivable to plausible" with respect to MidAmerica and NIS. ***Id.*** at 570. We affirm the circuit court's decision dismissing all claims against MidAmerica and NIS with prejudice.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¶52 REILLY, P.J. (*dissenting*). The majority describes the Plaintiffs' amended complaint as a "Jackson Pollock" and that Wisconsin's "liberal pleading laws" are not so loose as to allow that "every ounce of paint thrown must be allowed to stick to every defendant." Majority, ¶50. While the majority views the Plaintiffs' claims as "conceivable," it concludes they are not "plausible" and will only waste time and money if allowed to proceed. ***Id.***, ¶¶50, 51. I respectfully dissent as the amended complaint clearly sets forth viable claims at this stage of the proceedings, and the fact that the majority subjectively does not appreciate the teachers' "Jackson Pollock" is not grounds to dismiss their action. *See* ***id.***

¶53 Our appellate review is to be objective, rather than subjective, and we must accept as true all factual allegations in the amended complaint. ***Kohlbeck v. Reliance Constr. Co.***, 2002 WI App 142, ¶9, 256 Wis. 2d 235, 647 N.W.2d 277 ("We accept as true all the factual allegations in the plaintiff's complaint and must make all reasonable inferences in favor of the plaintiff."). "We will affirm an order dismissing a complaint for failure to state a claim only if it appears to a certainty that no relief can be granted under any set of facts that the plaintiffs

could prove in support of their allegations."[1] ***Id.***; *see also* ***Strid v. Converse***, 111 Wis. 2d 418, 422, 331 N.W.2d 350 (1983); ***Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.***, 2016 WI App 56, ¶5, 370 Wis. 2d 644, 883 N.W.2d 154. Plaintiffs' amended complaint clearly alleges, in factual allegations, claims of misrepresentation and negligence against MidAmerica Administrative and Retirement Solution, Inc. and National Insurance Services of Wisconsin, Inc. (collectively, MidAmerica). The majority acknowledges that a financial advisor has a duty in Wisconsin to avoid "providing false information," Majority, ¶25, and yet the Plaintiffs' pleadings allege that MidAmerica did just that.

¶54 I will briefly recite the pertinent facts from the amended complaint that we must accept as true:

(1) MidAmerica is in the business of marketing, structuring, and administering qualified plans for employees of public sector organizations.

(2) Plaintiffs are retired employees who, as part of their collective bargaining agreements, entered into a retirement plan called the "MidAmerica Program" in which MidAmerica held itself out as an expert in structuring the MidAmerica Program and the Plaintiffs relied upon the expertise and advice of MidAmerica.

[1] I do not read ***Data Key Partners v. Permira Advisers LLC***, 2014 WI 86, 356 Wis. 2d 665, 849 N.W.2d 693, as broadly as the majority. *See* Majority, ¶20. ***Data Key*** did not overrule our precedent in ***Strid v. Converse***, 111 Wis. 2d 418, 422, 331 N.W.2d 350 (1983), which advanced the "any set of facts" language, instead calling ***Bell Atlantic Corporation v. Twombly***, 550 U.S. 544 (2007), "consistent with our precedent." ***Data Key***, 356 Wis. 2d 665, ¶30. While our supreme court suggested, based on ***Twombly***, the concern that the "any set of facts" language could be taken too far, my reading of the case suggests that the "any set of facts" language was clarified to make clear that the standard is "any set of sufficiently pled facts."

(3) MidAmerica made representations through its employees and designated representatives of options available to the Plaintiffs, including a ten-year plan that MidAmerica represented would free the Plaintiffs from FICA taxes on a tax-deferred basis. MidAmerica "specifically represented" that the MidAmerica Program was compliant with Section 403(b) of the Internal Revenue Code. Plaintiffs relied on the representations of MidAmerica.

(4) The Plaintiffs' property (their retirement benefits) were held by and paid out under the "MidAmerica Program" through MidAmerica. As holders of Plaintiffs' property, MidAmerica owed the Plaintiffs a fiduciary duty of care under the MidAmerica Program.

(5) The MidAmerica Program was, in fact, not compliant with Section 403(b) of the Internal Revenue Code and, as a result, the Plaintiffs sustained monetary damages.

¶55 Stated more succinctly, when MidAmerica filed its motion to dismiss rather than answering the amended complaint, it asked the court to accept that it offered itself out to the Plaintiffs as experts in retirement planning and made certain representations to the Plaintiffs that the MidAmerica Program was compliant with I.R.C. § 403(b) (2012) in order to induce the Plaintiffs to turn over their property to MidAmerica to manage and administer. MidAmerica admits that the Plaintiffs relied upon its representations in turning over their property to MidAmerica. MidAmerica admits that it misrepresented that the MidAmerica

Program was compliant with § 403(b) and that the Plaintiffs have suffered damages as a result of its misrepresentations.

¶56 At a minimum, MidAmerica was negligent in its representations to the Plaintiffs. At a minimum, MidAmerica, in holding the Plaintiffs' property for management and administration, had a fiduciary duty to the Plaintiffs. MidAmerica admits via its motion to dismiss rather than an answer that, at this stage of the proceedings, it failed in its duty as a financial advisor to avoid "providing false information." *See* Majority, ¶25. It cannot, therefore, be reasonably argued that "to a certainty" "no relief can be granted under any set of facts" when accepting all factual allegations in the Plaintiffs' amended complaint as true. I respectfully dissent and would reverse the circuit court's dismissal of Plaintiffs' amended complaint in toto.