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WITTENBERG FORD-MERCURY, INC.,  
RODNEY ROSENOW,  
VICTORIA ROSENOW,  
ROSENOW FARMS, INC. and  
ROSENOW LAND COMPANY, LLC.

Plaintiffs-Appellants,      Appeal No. 2009AP002931

v.      Circuit Court Case No. 07-CV-471

ROGER ROSENOW, SR.,  
SUSAN ROSENOW,  
JAMES HARTLEBEN,  
RHONDA HARTLEBEN,  
BANNER BANK and  
PETER HITTNER,

Defendants-Respondents.

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**PLAINTIFFS-APPELLANTS' BRIEF**

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**On Appeal from a Final Judgment of  
Circuit Court for Shawano County,  
The Honorable James R. Habeck, Presiding  
(Trial Court Case No. 07-CV-471)**

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## **INTRODUCTION**

The Plaintiffs sued Banner Bank, their lender, Peter Hittner, their lawyer, James and Rhonda Hartleben, who sold them a Ford dealership, and Roger and Susan Rosenow, former business partners who assisted Hartleben in deceiving them. The allegations sound largely in tort and for statutory violations. After Roger and Susan Rosenow and Banner Bank moved to dismiss the Second Amended Complaint for failure to state a claim upon which relief could be granted, the Circuit Court dismissed claims against all Defendants, including the Hartlebens and Hittner, even though no other dismissal motions were pending before the Court. The Court reasoned that because the Plaintiffs knew as of the date of closing in 2000 that Ford Motor Company had not consented to the dealership's transfer, the statute of limitations had expired. The Circuit Court's ruling contradicts long-standing

principles limiting how courts construe complaints on dismissal motions like this one, so reversal is appropriate.

**STATEMENT OF ISSUES FOR REVIEW**

Did the Circuit Court err in dismissing a complaint under the statute of limitations based on the language of the complaint alone, when the complaint expressly alleged that the injury was neither suffered nor discovered until shortly before suit was filed?

The Circuit Court dismissed the complaint in its entirety against all Defendants.

**STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Neither oral argument nor publication are requested. This case presents a straight forward issue of applying well settled pleading principles to a motion to dismiss for failure to state a claim upon which relief can be granted. The Circuit

Court lost sight of those principles in dismissing the Second Amended Complaint.

### **STATEMENT OF FACTS**

This lawsuit stems from a business transaction gone bad. According to the Second Amended Complaint, the Plaintiffs were misguided by their lawyer and bank, and deceived by the sellers of a Ford-Mercury franchise located in Wittenberg, Wisconsin. The Circuit Court found that whether governed by a six year statute of limitations on some claims or a two year statute of limitations on others, the statute began to run on the date of closing in October 2000, and the Plaintiffs should have appreciated their injury at that time as a matter of law.

#### **I. CLAIMS AGAINST JAMES HARTLEBEN AND ROGER ROSENOW**

According to the Plaintiffs' Second Amended Complaint, October 24, 2000 saw the Hartlebens sell and

Rodney Rosenow and Wittenberg Ford-Mercury, Inc. purchase a Ford dealership. (R.35:1 ¶4; A.App. 38). After purchase, the Plaintiffs began operating the dealership, and committed considerable financial resources to the venture. (Id. ¶¶4, 48, 96).

The Complaint first alleged fraud against Hartleben stemming back to the original sale. (Id. ¶¶38-73). The Complaint charged that from January, 1999 through November 2, 2000, Hartleben falsely told the Rosenows that he would transfer ownership of the Ford-Mercury franchise, Wittenberg Ford-Mercury, Inc., to the Rosenows under the stock purchase agreement (attached to the Complaint as Exhibit F)(A.App. 74-82), that he had obtained Ford Motor Company's advance approval to sell stock to the Rosenows, that the stock purchase agreement transferred ownership to Rosenows of the Wittenberg Ford-Mercury franchise, and

that language in the stock purchase agreement to effect that the parties would cooperate in obtaining the consent and approval from Ford to the stock transfer was language that already had Ford's approval and the transaction was already authorized by Ford. (Id. ¶43). Hartleben added that Ford would formally transfer ownership once the Rosenows demonstrated their ability to successfully operate the franchise over time. (Id.).

In response the Plaintiffs paid Hartleben \$130,000, signed the stock purchase agreement and obtained loans with Banner Bank for over \$1 million. (Id. ¶¶48, 80). They paid Hartleben's indebtedness to business creditors and eventually awarded Hartleben 100 shares of preferred stock in December, 2003, based on another falsehood. (Id. ¶¶48-50). After the closing occurred in November, 2000, and on an "ongoing basis through August 1, 2008," Hartleben

continually and falsely informed Rosenow that he was “working with Ford to procure Rosenow’s recognition as the new franchise owner”. (Id. ¶49). Indeed, a December 11, 2003 letter from Rosenow to Hartleben states:

I am contacting you again in regards to getting the Ford franchise changed from your name to ours. ... We have been in here for the three years now that you said was necessary to satisfy Ford. Again, please contact Ford or whoever you have to get this underway.

(Id., Ex. J; A.App 95). Rosenow added that Banner Bank was insisting upon the transfer. Hartleben now falsely told Rosenow in response that in order to procure the transfer, shareholder status in Ford was essential and because Rosenow lacked that status, Hartleben needed to own stock in his corporation; thus the transfer of the 100 preferred shares followed. (Id.).

In addition to these allegations, the Second Amended Complaint alleges that Roger Rosenow collaborated with

Hartleben in deceiving the Plaintiffs, both by acting purposefully and as Hartleben's agent. (Id. ¶¶59-73).

Against the Hartlebens, the Complaint lastly alleges that the Hartlebens committed "negligent and wrongful conduct" in October and September, 2007, when they changed the locks on the dealership building and converted the Plaintiffs' property. (Id. ¶¶5-13). The Second Amended Complaint alleges that from June through September, 2007, the Hartlebens attempted to buy the Rosenows' interest in the business. (Id. ¶28). According to the pleading, Hartleben feigned interest, and, recognizing that he must otherwise compete with the Plaintiffs, induced them to liquidate the franchise's inventory because Hartleben had "no need for it post-acquisition". (Id.). The Second Amended Complaint adds that Hartleben then unfairly competed with the Plaintiffs by evicting them, starting a Ford dealership at the location

using the business name that the Plaintiffs had acquired, and falsely claiming that Wittenberg Ford was under “new ownership”. (Id. ¶¶14-49). Citing Wis. Stat. §100.18, Wisconsin’s fraudulent advertising statute, and multiple common law claims of unfair competition, the Second Amended Complaint demands an accounting, and seeks damages, and declaratory and injunctive relief. (Id. ¶¶19-26).

## **II. CLAIMS AGAINST PETER HITTNER**

Next, the Second Amended Complaint alleges legal malpractice against Peter Hittner, noting that Hittner represented the Plaintiffs in purchasing the business, beginning in January, 1999. (Id. ¶75). A bank officer at Banner Bank recommended Hittner for the acquisition. (Id. ¶100). The Complaint alleged that Hittner represented the Plaintiffs negligently from January, 1999 through August 1, 2008 by carelessly drafting the stock purchase agreement,

carelessly recommending Rosenow sign the agreement, carelessly failing to contact Ford Motor Company to obtain its acquiescence to the franchise transfer before closing the transaction, carelessly failing to examine the franchise agreement between Hartleben and Ford Motor so as to learn whether Ford Motor prohibited any transfer of the franchise ownership without its authorization, carelessly counseling the Plaintiffs to commit over \$1 million to acquire the franchise without obtaining the franchise or Ford's approval, carelessly failing to attempt to gain Ford Motor's approval after the closing, carelessly failing to address the lack of approval from Ford in 2003 after the Plaintiff reminded him that Rosenow had yet to be approved and carelessly drafting and backdating the preferred stock purchase agreement for Hartleben. (Id. ¶78). The Complaint makes similar claims against Hittner on Wittenberg Ford-Mercury Inc.'s behalf. (Id. ¶84). Ensuing

damages include the \$1 million investment to acquire the franchise, \$640,000 paid in interest on the Banner Bank loan, the loss of earnings which followed Ford Motor's termination of the franchise, and the potential loss of the Plaintiffs' farm and real estate in Banner Bank's foreclosure action. (Id. ¶¶80, 85).

In addition to common law negligence claims against Hittner, the Complaint also alleges several breaches of fiduciary duty claims against him. The Complaint cites several conflicts of interest, including the fact that Hittner served recently as attorney for Hartleben's corporation, the same company the Plaintiffs sought to acquire, during a foreclosure M&I Bank initiated, and that he failed to disclose that he regularly represented Banner Bank while representing the Rosenows in their acquisition of the franchise and in their borrowings from the Bank. (Id, ¶88, Ex. A; A.App. 58-67).

The Complaint alleges Hittner violated fiduciary duties by failing to alert the Rosenows to these conflicts, failing to obtain their written waiver of the conflict to the extent possible, failing to withdraw from representation in light of conflicting interests with his other clients, and directing the Rosenows to sign certain legal documents that solely benefited Banner Bank, Hartleben, and Roger Rosenow, at the closing, and an amendment to the stock purchase agreement signed two days later. (Id.). The amendment had no obvious purpose; it called for the Plaintiffs to acknowledge that they had been “in control of the corporation and know the financial conditions and liabilities of the corporation”, and restructured allocation of the purchase price attributed to the seller’s covenant not to compete from its original \$60,000 to \$30,000. (Id. ¶88, Ex. K; A.App. 100). According to the Complaint, neither change benefited the Plaintiffs. (Id.).

### **III. CLAIMS AGAINST BANNER BANK**

Lastly, against Banner Bank, the Second Amended Complaint alleges an ongoing business relationship with the Plaintiffs even prior to this transaction's arising in January, 1999. (Id. ¶53). The Complaint alleges that from January, 1999 through November, 2000, Banner Bank failed to contact Ford Motor Company to obtain approval of the transfer of the franchise ownership in contradiction of conventional banking practice. (Id. ¶95). The Bank also inappropriately required restructuring the Rosenows' pledged collateral into LLCs, thus drastically shortening the redemption period on foreclosure. (Id. ¶107(c)). The Complaint claimed that, acting in concert with Attorney Hittner as the Bank's agent, Banner Bank induced the Plaintiffs to pay in excess of \$1 million for the franchise, \$640,000 in interest on bank loans, threatened the real estate and personal property pledged in the

loans through foreclosure and ultimately led to the loss of profits for the franchise's termination. (Id. ¶96). Together with this, the Complaint alleges the bank also breached certain fiduciary duties including failing to disclose that Attorney Hittner was the bank's attorney on an ongoing basis and advising the Plaintiffs to utilize Attorney Hittner in the acquisition, failing to verify with Ford Motor Company the transfer of ownership, and "inexplicably" removing Roger Rosenow from personal guarantees on the loan, thus increasing the Plaintiffs' personal exposure on this debt. (Id. ¶100).

#### **IV. CLAIMS AGAINST ALL DEFENDANTS**

As for final legal theories, the Second Amended Complaint alleged a claim for civil conspiracy in exquisite detail, recounting how Hartleben and the others misled the Plaintiffs about the Ford Motor Company's willingness to

approve the transfer, the false statements made to induce the Plaintiffs to grant Hartleben 100 shares of preferred stock under false pretenses, Hartleben's efforts – with Banner Bank's approval – to purchase the franchise back for a minimal sum, the abrupt eviction of the Plaintiffs from the premises and Hartleben's taking over of the business. (Id. ¶¶106-107). The Complaint adds that the Bank's referral of the Plaintiffs to a lawyer with a long-standing attorney-client relationship with the Bank was improper and the Bank's decision to remove Roger and Susan Rosenow from personal guarantees leaving the entire obligation on the loans to the Plaintiffs, was equally inappropriate. (Id.). The Complaint adds that the bank endorsed the false representations that Hartleben and Roger Rosenow made, that the bank failed to follow "standard banking practice" in making the loan before the franchise was transferred and, finally, that the bank

insisted that the real estate and personal property be transferred into separate LLCs for no business reason when the transfer shortened the redemption period on foreclosure from a year to as little as two months under the law. (Id.). Finally, the Complaint alleged a violation of Wis. Stat. §134.01, which forecloses anyone from acting in concert to purposely injure another in a business, trade, or reputation.

Critically important, the Second Amended Complaint repeatedly alleges the Plaintiffs first discovered their injury upon Ford Motor's termination of the franchise on August 1, 2008. (Id. ¶¶55, 70, 90, 102).

Defendant Hittner answered the Second Amended Complaint but did not move to dismiss it. (R.36). Banner Bank moved to dismiss the Second Amended Complaint but did not answer it. (R.40). Defendants Roger and Susan Rosenow did not respond to the Second Amended Complaint

but relied on an earlier motion to dismiss it since the Second Amended Complaint closely resembled the First Amended Complaint. (R.41(a):21-22; A.App. 28-29). Defendant Hartleben also argued for dismissal briefly at the hearing. (Id.; A.App. 33).

At that hearing, on October 22, 2009, the Circuit Court addressed the pending motions to dismiss. The Court found that the central issue was whether the statute of limitations barred the claim, and more particularly when the discovery rule first applied. (Id.; A.App 34-6). The Court indicated that because the stock purchase agreement, executed October 24, 2000, read:

The corporation is the current franchisee of the Ford Motor Company franchise for the corporation's business.

All parties hereto agree to fully, timely and diligently cooperate and do all things reasonable and necessary to obtain the written consent and approval of said franchisor to the new ownership of the corporation by the Buyers while retaining the franchise by the corporation.

The terms of this paragraph shall survive closing.

(R.35, Ex. F; A.App. 81), the statute of limitations in tort began to run as of that date and consequently had expired before the lawsuit was filed on November 30, 2007. (R.1, 42(a); A.App 35-6). Without explanation, the Court added that dismissal of Count 11 was appropriate against Banner Bank because no duty existed, and Count 13 relating to civil conspiracy, and Count 14 under Wis. Stat. §134.01 should be dismissed because they were “insufficient” or “conclusory”. (Id.; A.App. 34). But the Court described those rulings as tangential and made plain that its ruling centered upon the statute of limitations. (Id.; A.App. 34, 36).

Because the Circuit Court inaccurately concluded that the statute of limitations began to run on the date of the closing, the dismissal order requires reversal.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

The Court reviews the legal sufficiency of a complaint as a question of law. Evans v. Cameron, 121 Wis.2d 421, 426, 360 N.W.2d 25 (1985). Review, consequently is *de novo*. Id.

A motion to dismiss for failure to state a claim is considered without regard to affidavits, evidence or testimony, for the motion tests the legal sufficiency of the complaint. Id. The motion is not a procedure for resolving contests about facts; the motion requires the court to liberally construe the complaint, ignore extraneous evidence, accept all well pleaded facts as true, and order dismissal only if the facts as pleaded reveal the plaintiff can never prevail and the defendant will win as a matter of law. Anderson v. Continental Ins. Co., 85 Wis.2d 675, 683, 271 N.W.2d 368

(1978). Not only must the court accept every factual allegation in the complaint as true, but it must construe the language of the complaint to favor the conclusion that a claim has been stated if such a conclusion is possible. Jenkins v. Sabourin, 104 Wis.2d 309, 311 N.W.2d 600 (1981) at 313.

The time periods controlling the statute of limitations here are well settled. They are: for professional negligence – six years, Auric v. Continental Casualty Co., 111 Wis.2d 508, 516-7 (1983); for breach of fiduciary duty – two years, Beloit Liquidating Trust v. Grade, 270 Wis.2d 356, 382 (2004); for fraud – six years, Wis. Stat. §893.93(1)(b); for fraudulent advertising – three years, Wis. Stat. §100.18(11)(b), and for conversion - two years, Wis. Stat. §893.57(1). Therefore the tort claims alleged against the Defendants, though varied, carry a statute of limitations of two through six years.

## **II. THE CIRCUIT COURT MISAPPLIED PLEADING STANDARDS AND THE DISCOVERY RULE.**

### **A. The Injury Occurred and Was Discovered When Ford Terminated the Franchise.**

The Circuit Court overlooked the basic principles which control this appeal. First, a cause of action typically accrues when the last event which would give rise to a judgment occurs. Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Construction Corp., 96 Wis.2d 314, 322-4 (1980). This means that almost universally, no cause of action accrues and no statute of limitations begins to run until an injury occurs, id., because before that no right of recovery exists. Second and third, the statute of limitations even then is extended for tort claims. Especially in professional settings where there often is a continuum of negligent conduct, the cause of action accrues and no claim is complete until the last date on which the last act of negligence occurs. Forbes v.

Stoeckl, 303 Wis.2d 425 ¶5, 735 N.W.2d 536 (Ct.App. 2007).

And, the well known discovery rule ensures that no cause of action in tort accrues until the victim knows of the injury or in the exercise of reasonable diligence should have discovered

it. Hansen v. A.H. Robbins, Inc., 113 Wis.2d 550, 559, 335

N.W.2d 578 (1983). The Hansen Court explained that:

Although theoretically a claim is capable of enforcement as soon as the injury occurs, as a practical matter, a claim cannot be enforced until the claimant discovers the injury and the accompanying right of action. In some cases, a claim will be time-barred before the harm is or could have been discovered, making it impossible for the injured party to seek redress. Under these circumstances, the statute of limitations works to punish victims who are blameless for the delay and to benefit wrongdoers by barring meritorious claims. In short, we conclude that the injustice of barring meritorious claims before the claimant knows of the injury outweighs the threat of stale or fraudulent action.

Id. at 559. From this, the Court decreed that:

In the interest of justice and fundamental fairness, we adopt the discovery rule for all tort actions other than those already governed by a legislatively created discovery rule. Such tort claims shall accrue on the date the injury is discovered or with reasonable diligence should be discovered, whichever occurs first. All cases

holding the tort claims accrue at the time of the negligent act or injury are hereby overruled.

Id. at 560.

The Circuit Court's decision runs afoul of several of these time-honored rules. For example, central to the Circuit Court's decision was the conclusion that the cause of action accrued October 24, 2000, when the parties entered into the Stock Purchase Agreement to buy the Ford-Mercury dealership. Banner Bank argued that position vigorously (R.41(a);A.App. 21), and the Circuit Court adopted the argument. The Court expressly indicated that under Paragraph 10 of the Stock Purchase Agreement, responsibility fell upon the Plaintiffs to obtain Ford Motor's consent. (Id.; A.App 33-36). But that ruling misses the point of the entire complaint. The Plaintiffs understood that Ford Motor's consent was necessary, but Hartleben and Roger Rosenow assured the Plaintiffs that that would merely be a formality.

(Id. ¶43). And the Plaintiffs pleaded that their lawyer, Peter Hittner, erred in permitting a closing with this key element unresolved. (Id. ¶84). They suggest they looked to Hittner, followed his advice and proceeded, borrowing \$1 million from Banner Bank and paying \$640,000 in interest over the next seven years. (Id. ¶¶84, 85).

Certainly nothing in the Complaint suggests that the Plaintiffs were injured at closing; indeed, their losses ensued after that date. The appropriate question is then whether a lawsuit could have proceeded on October 25, 2000, the day after closing, against these Defendants that would give rise to a judgment. The clear answer is negative. No injury had occurred because the Plaintiffs expected Ford Motor's consent to the transfer. Indeed, the Complaint alleges that Attorney Hittner and Banner Bank were expected but failed to

formalize Ford Motor's approval on that subject. (Id. ¶¶84, 107).

No better proof exists that the Plaintiffs did not know of the injury than the letter they wrote three years later. In December 2003, Rosenow writes to Hartleben seeking the transfer, noting that enough time had passed in Rosenow's operation of the franchise to convince Ford that he operated it capably. (Ex. 1; A.App. 95). A similar letter followed in March 2004. (Id.; A.App. 96). The only response appears to have been that Hittner prepared and the Rosenows conferred preferred stock upon Hartleben, who now claimed that Ford Motor required his participation in the venture. (Id. ¶44).

Banner Bank's situation is no better. The Complaint alleges that Banner Bank also assumed responsibility for ensuring the transfer occurred but failed to achieve it. (Id. ¶95). It alleges that Hittner's extensive business relationship

with Banner Bank essentially made him its agent. (Id. ¶96). It alleges that the Bank's urging that the Rosenows retain Hittner, when it knew of his extensive business relationships with Banner, helped create his conflict of interest and contributed to the eventual acts of malpractice. (Id. ¶¶100-103). It alleges that at Banner Bank's urging and insistence, the Rosenows transferred real estate and personal property into LLCs that secured Banner Bank's loan, and thus reduced the redemption period in any foreclosure action from one year to two months under applicable Wisconsin law. (Id. ¶107). Finally it charges that Banner Bank released Roger and Susan Rosenow from personal guarantees on the debt for no sound business reason and to the Plaintiffs' detriment. (Id. ¶98).

According to the Second Amended Complaint, many of these acts occurred long after the closing, and certainly

extend the statute of limitations long past the October 24, 2000 accrual date the Circuit Court employed. By the Circuit Court's reasoning, a six year statute of limitations expired in 2006, almost two years before Ford Motor ended the franchise.

So too, James Hartleben's conversion, subject to a two year statute of limitations under Wis. Stat. §893.51(1), occurred in September 2007 and the episode of unfair trade practice, where he usurped the Plaintiffs' business and trade name, occurred at that same time. The statute of limitations on those claims had not yet expired when the Circuit Court dismissed the case against Hartleben in its entirety with prejudice. Likewise, the Plaintiffs allege that Hartleben misled them regarding his intentions to repurchase the franchise, lied to them about the need to liquidate the inventory, and then when the Rosenows' company fell into

default under the lease (after liquidating the inventory at Hartleben's direction), they were summarily evicted from the premises after Hartleben surreptitiously changed the locks. This occurred by September 2007. (Id. ¶¶7, 15, 28-31).

Finally, Hartleben's misrepresentation to Rosenow that because he no longer owned stock in the corporation, Rosenow must issue him preferred stock in order to induce Ford Motor to transfer ownership was both false and occurred in December 2003, another example of fraud that occurred well after the statute of limitations accrual date the Circuit Court utilized. (¶¶48-9). Indeed, the case was dismissed before the statute of limitations on that claim expired too.

Ultimately, the Circuit Court misapplied the Hansen discovery rule. According to the Rosenows' Complaint, they did not discover much of this wrongdoing until – and suffered the actual injury on – August 1, 2008 when Ford Motor

refused to transfer the franchise and terminated it. (Id. ¶¶55, 70, 90, 102). Before that time, to the Rosenows' knowledge, Ford had been silent on the subject. Discovery will reveal what, if any, efforts the various Defendants made to transfer the franchise, but it was not until the Rosenows' lost their business that their claims here accrued. Because no tort claim accrues until the date of injury or its discovery, no claims accrued here until August 2008.

The Circuit Court also failed to construe the Complaint as broadly as the Supreme Court has directed. Rather than read the Complaint in favor of stating a claim under any possible circumstance, the Circuit Court read it narrowly to foreclose one. There is nothing in the Complaint that suggests the Rosenows had been injured as of the closing or that they should have recognized the injury then. A direct reading of the Complaint suggests otherwise. Since the

pleading alleges at least four times that the Plaintiffs incurred and discovered an injury on August 1, 2008 (*id.*), the Circuit Court was required to accept this allegation as gospel truth on this motion to dismiss. This oversight alone requires reversal.

**B. The Circuit Court Misapplied Pleading Rules.**

Without significant explanation, the Court also rejected Count 13 relating to conspiracy and Count 14 under Wis. Stat. §134.01 as conclusory and insufficiently pled. (R.41(c); A.App. 34).

But the Circuit Court's ruling subjects the Plaintiffs to far more rigorous pleading standards than Wisconsin law requires. Based on the Federal Rules of Civil Procedure, Wis. Stat. §802.02(1) merely requires the complaint 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.

There can be no doubt that this 113 paragraph complaint, with its 43 pages of exhibits, clearly informs the Defendants what they have been accused of. It is not necessary to replead each key fact in reciting a cause of action. Indeed, it is not necessary to recite causes of action at all. As the Seventh Circuit cogently explained:

Complaints initiate the litigation but need not cover everything necessary for the plaintiff to win; factual details and legal arguments come later. A complaint suffices if any facts consistent with its allegations and showing entitlement to prevail could be established by affidavit or testimony at a trial.

Doe v. Smith, 429 F.3d 706, 708 (7<sup>th</sup> Cir. 2005). The Circuit Court seemingly believed that reciting the elements of a specific cause of action, despite listing dozens of key factual details before it, inadequately pled the claim. But pleading causes of action is a throwback to code pleading days and while it clearly informs the adversary of the legal theory

behind the case, it is completely unnecessary in modern practice. As the Seventh Circuit noted in Doe:

A pleading need not allege facts corresponding to each element of a statute. It is enough to state a claim for relief – and Federal Rule of Civil Procedure 8 [Wis. Stat. §802.02(1)(a)] departs from the old code pleading practice by enabling plaintiffs to dispense with the need to identify, and plead specifically to, each ingredient of a sound legal theory. Plaintiffs need not plead facts; they need not plead law; they plead claims for relief. Usually they need do no more than narrate a grievance simply and directly, so that the defendant knows what he has been accused of.

Id at 708.

Certainly the Defendants here cannot claim they do not know what they have been accused of. While the Circuit Court indicated that the allegations were insufficient or conclusory, no one articulated what was missing from these claims for civil conspiracy and under Wis. Stat. §134.01.

Thus, Doe's admonition that:

any district judge (for that matter, any defendant) tempted to write 'this complaint is deficient because it does not contain' should stop and think: what rule of law *requires* a complaint to contain that allegation. Rule

9(b) [Wis. Stat. §802.03] has a short list of things that plaintiffs must plead with particularity.

Id. (emphasis in original). The Defendants here do not contend that the Second Amended Complaint fails to recite any matters requiring special pleading under 802.03, Stats., the state law corollary to Fed. R. Civ. P. §9(b).

In summary, the Circuit Court's dismissal of Counts 13 and 14 imposed a far greater pleading burden on the Plaintiffs than Wisconsin law requires. The plaintiffs need not plead facts, they need not plead law, they must plead claims for relief and only then in a fashion that informs the defendants what they have been accused of. Counts 13 and 14, certainly read together with the many allegations that precede them, clearly and directly inform the Defendants of the key accusations.

Finally, the Circuit Court dismissed Count 11 with the simple explanation that no such duty existed for the Bank.

(Id.). Banner Bank had argued that because the Plaintiffs had assumed the responsibility in the Stock Purchase Agreement, no similar duty devolved to the Bank.

Neither the Bank nor the Circuit Court cited any legal authority for the notion that no duty existed, so it is difficult to address the argument precisely. Notwithstanding, common sense dictates that sometimes more than one person holds a duty. There is nothing in Wisconsin law that forecloses Banner Bank's responsibility to ensure that the franchise transferred just because the Stock Purchase Agreement required that the parties to it to "cooperate" to obtain Ford's written consent. Indeed, the Complaint alleges that "standards of care required of banking institutions in the same or similar circumstances" required Banner Bank's participation in that endeavor. (Id. ¶94). And it is clear that after closing, Banner Bank was plainly involved in the effort.

According to Exhibit J, Rodney Rosenow's December 11, 2003 letter to James Hartleben, "Banner Bank is insisting" that the Ford franchise change from Hartleben's name to Rosenow's. (Id.; A.App. 95). Though the Complaint alleges banking practice standards required Banner Bank's efforts, Wisconsin law acknowledges that even the voluntary assumption of a duty the law otherwise fails to impose nonetheless imposes liability, if negligently performed. Gritzner v. Michael R., 235 Wis.2d 781 ¶56 (2000); American Mutual Liability Ins. Co. v. St. Paul Fire & Marine Ins. Co., 48 Wis.2d 305, 313 (1970). Here, whether standard banking practices imposed responsibility, or Banner Bank assumed it, it is liable for its negligent failure to obtain Ford's consent to the franchise's transfer.

**CONCLUSION**

For the foregoing reasons, Plaintiffs-Appellants respectfully requests that the Court reverse the judgment granted below.

Respectfully submitted this \_\_\_\_ day of April, 2010.

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**CERTIFICATION**

I hereby certify that this Brief conforms to the rules contained in §§808.10 and 809.62 for a brief produced with a proportional serif font. The length of this Brief is 4,906 words.

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**CERTIFICATE OF COMPLIANCE WITH RULE**  
**809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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