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**COURT OF APPEALS**

STATE OF WISCONSIN, COURT OF APPEALS, DISTRICT II

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MERRILEE ROJAS,

Plaintiff-Third-Party  
Defendant-Respondent,

v.

KARDO RASHA,

Defendant,

Appeal No. 2024AP002080

v.

MILWAUKEE COFFEE HOSPITALITY LLC,  
MILWAUKEE COFFEE HOSPITALITY  
OAK CREEK LLC, MCH MENOMONEE  
FALLS #2 RE LLC, MCH KENOSHA RE LLC,  
MCH STURTEVANT RE LLC, MILWAUKEE  
COFFEE HOSPITALITY KENOSHA LLC,  
KARDO 17 INC., DIVERSEY D.B.T., INC.,  
KARDO 21 INC., KARDO 22 INC.,  
MCH HALES CORNERS RE LLC,  
MCH OCONOMOWOC RE LLC AND  
KARDO 8 LLC,

Third-Party Plaintiffs-Appellants.

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ON APPEAL FROM THE CIRCUIT COURT FOR WAUKESHA COUNTY,  
CASE NO. 2023CV000758, THE HONORABLE MICHAEL O. BOHREN,  
PRESIDING

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**BRIEF OF THIRD-PARTY PLAINTIFFS-APPELLANTS**

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Third-Party Plaintiffs-Appellants Milwaukee Coffee Hospitality LLC, Milwaukee Coffee Hospitality Oak Creek LLC, MCH Menomonee Falls #2 RE LLC, MCH Kenosha RE LLC, MCH Sturtevant RE LLC, Milwaukee Coffee Hospitality Kenosha LLC, Kardo 17 Inc., Diversey D.B.T., Inc., Kardo 21 Inc., Kardo 22 Inc., MCH Hales Corners RE LLC, MCH Oconomowoc RE LLC and Kardo 8 LLC (collectively, “Appellants”) respectfully submit this brief on appeal from the September 16, 2024 Order of Judge Michael Bohren that dismissed the Appellant’s intervening complaint in Waukesha County Case 2023CV000758.

### **INTRODUCTION**

This appeal concerns a fraudulent scheme Plaintiff-Respondent Merrilee Rojas (“Rojas”) contrived to convince Defendant Kardo Rasha to refinance millions of dollars in loans held by his various businesses. At Rojas’s urging, Mr. Rasha agreed to do so, and put his trust in Rojas to facilitate those refinancing efforts. That trust soon proved misplaced.

Without Mr. Rasha’s knowledge, Rojas falsified Appellants’ refinance applications by altering the financial documentation Mr. Rasha provided to support them, including by inflating the businesses’ historic and projected revenues to make them appear more profitable than they actually were. When Rojas’s scheme was eventually discovered, Mr. Rasha was left to manage the fallout, incurring hundreds of thousands in damages as a result.

Despite this, in May of 2023, Rojas brought suit against Mr. Rasha in Waukesha County Circuit Court, claiming that she became a partner in Mr.

Rasha’s franchise businesses by “coordinat[ing] franchise financing with banks” and seeking a share of all assets of the alleged “partnership,” as well as additional damages. In August of 2023, Mr. Rasha, through Appellants and other related Illinois entities, filed his own claim for fraud against Rojas in the Circuit Court of Cook County Illinois, based on her fraudulent scheme to secure financing by altering Appellants’ financials. In response, Rojas moved to dismiss, and the Illinois Court granted the motion, finding that the Illinois Plaintiffs had failed to plead their fraudulent omission claim with sufficient particularity. Although the Illinois Court granted leave to amend in Illinois, the Illinois Plaintiffs informed the Court that they intended to refile their claims in Waukesha County. For that reason, the Illinois Court made clear in its dismissal order that the claims were dismissed without prejudice as to any refiling in Wisconsin.

Following the dismissal of the Illinois Action, the Appellants did precisely what the Illinois Plaintiffs said they were going to do—and precisely what the Illinois Court said they *could* do; they (along with the additional related Appellants) filed their claims against Rojas in the already-pending Waukesha County Action. Yet, rather than permit Appellants an opportunity to litigate those claims on the merits, *for the first time*, the Circuit Court denied Appellants their day in court, finding, incorrectly, that Appellants’ claims were barred by the doctrine of issue preclusion. The Circuit Court further found (again incorrectly) that Appellants’ claim for Intentional Misrepresentation was not pled with particularity and dismissed the claim for that reason too.

But as discussed further below, the Circuit Court was wrong on both counts, and its decision should be reversed.

### STATEMENT OF THE ISSUES

1. Are Appellants' claims for Intentional Misrepresentation and Strict Liability Misrepresentation barred by the doctrine of issue preclusion based on the prior Illinois lawsuit that was dismissed on procedural grounds, with leave to amend, and without prejudice as to any refiling in Wisconsin?

The Circuit Court answered "yes." This Court should reverse the Circuit Court's decision.

2. Did the Appellants intervening complaint plead their Intentional Misrepresentation claim with sufficient particularity as required by Wis. Stat. § 802.03(2)?

The circuit court answered "no." This Court should reverse the Circuit Court's decision.

**STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

Appellants do not believe oral argument is necessary in this case and do not request publication of this decision. This appeal calls for the application of well-settled law and the issues can be decided using controlling precedent, with no reason for questioning or qualifying that precedent. Accordingly, neither oral argument nor publication is necessary.

## STATEMENT OF THE CASE<sup>1</sup>

### *The Parties and Their Relationship*

The appeal arises from a dispute between Plaintiff-Respondent Merrilee Rojas (“Rojas”), Defendant Kardo Rasha (“Rasha”), and Appellants-Intervenors Milwaukee Coffee Hospitality LLC, Milwaukee Coffee Hospitality Oak Creek LLC, MCH Menomonee Falls #2 RE LLC, MCH Kenosha RE LLC, MCH Sturtevant RE LLC, Milwaukee Coffee Hospitality Kenosha LLC, Kardo 17 Inc., Diversey D.B.T., Inc., Kardo 21 Inc., Kardo 22 Inc., MCH Hales Corners RE LLC, MCH Oconomowoc RE LLC and Kardo 8 LLC (collectively, “Appellants”). Appellants are all companies owned by Mr. Rasha for purposes of operating various Dunkin Donuts and other franchise locations in and around Wisconsin. (R. 42:9.)

The Appellants trusted Plaintiff-Respondent Merrilee Rojas as an experienced franchise banker to refinance millions of dollars in loans in 2015 with her employer at the time, FirstMerit Bank. (R. 42:9.) When Rojas left FirstMerit Bank to work for First Midwest Bank in 2016, she convinced the Appellants to refinance their loans for the second time in two years by telling Mr. Rasha in person or over the phone that First Midwest Bank could offer loans with lower

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<sup>1</sup> The issue before this Court is whether the circuit court properly granted Rojas’s Motion to Dismiss Appellants’ Complaint in Intervention. When reviewing a motion to dismiss, this Court accepts the facts set forth in the Complaint as true. *See Northridge Co. v. W.R. Grace & Co.*, 162 Wis. 2d 918, 923, 471 N.W.2d 179 (1991). As such, the facts set forth in the Statement of Case relating to the underlying claims in are those facts set forth in the Appellants’ Complaint in Intervention.

interest rates and longer amortization schedules than the FirstMerit Loans. (R. 42:10.) Rojas did not disclose to Rasha or any other agent of any of the Intervenors that the only way the Original Borrowers would be able to obtain the promised better loan terms was if she falsified the Appellant's financial documents to inflate revenues and profits. (R. 42:6.)

Indeed, although Mr. Rasha provided to Rojas complete and accurate copies of the Appellants' then-existing financials, "instead of forwarding those documents to First Midwest Bank, Rojas intentionally and knowingly submitted materially different, fabricated documents, including false financial documents and projections, to ensure First Midwest Bank would approve and maintain" the loans. (R. 42:12.)

The Appellants did not know that Rojas was submitting fabricated documents to First Midwest Bank until November of 2021, when First Midwest Bank placed the First Midwest Loans in workout. (R. 42:12.) The First Midwest Borrowers "were forced to refinance their loans" and Milwaukee Coffee Hospitality Oak Creek LLC was forced to "obtain a new loan" in a less interest-friendly environment because Rojas repeatedly submitted fabricated documents to the bank documents and the bank had discovered Rojas's fraudulent scheme. (R. 42:13.) As a direct result of Rojas's misrepresentations, the Appellants suffered substantial monetary damages, including prepayment penalties, costs of refinancing, attorneys' fees, higher interest payments, among other damages.

**The Illinois Action**

On August 11, 2023, Appellants Diversey D.B.T., Inc., Kardo 8 LLC, Kardo 17 Inc., Kardo 21 Inc., and Kardo 22 Inc., in addition to six other entities (the “Illinois Plaintiffs”), filed a Complaint in the Circuit Court of Cook County, Illinois, alleging claims for fraud based on Rojas’s scheme to falsify their financials to secure more favorable financials. (R. 60:7-8.) On October 5, 2023, Rojas filed a Motion to Dismiss the Illinois Complaint. (R. 60:15.) The Illinois Court granted the motion and dismissed the Illinois Complaint “without prejudice” with leave to file an amended complaint. (R. 60:37.)

However, the Illinois Plaintiffs decided not to file an amended complaint in the Illinois Action, and instead decided to bring the claims in a pending action Rojas had previously filed in the Circuit Court of Waukesha County, the underlying action that gave rise to this appeal. (R. 67:19.) But because the Illinois Plaintiffs opted not to re-file their claims in Illinois, Rojas moved the Illinois Court to convert its dismissal of the Illinois Action to a dismissal “with prejudice.” (R. 67:19, 24-25.) In response, the Illinois Plaintiffs objected to Rojas’s request and advised the Illinois Court that they intended to refile the claims in Wisconsin. (R. 67:19.)

As a result, the Illinois Court rejected Rojas’s request to dismiss the Illinois Action with prejudice, and instead entered an order dismissing the Illinois claims “without prejudice as to any pending or potential future action in a jurisdiction other than the courts of the State of Illinois” but with prejudice as to any other

action in the courts of the State of Illinois. (R. 67:28.) In other words, although the Illinois Court initially gave the Illinois Plaintiffs an opportunity to replead their fraud claims in the Illinois Action and barred them from re-filing in Illinois after they declined to do so, the Illinois Court expressly reserved their right to re-file the claims in any other jurisdiction, including the State of Wisconsin.

### **The Circuit Court Proceedings**

Consistent with their representations to the Illinois Court, Appellants moved to intervene in the underlying Waukesha County case that had previously been filed by Rojas (the “Waukesha County Action”). (R. 87:5.) The Circuit Court granted Appellants leave to intervene in the Waukesha County Action and file their complaint against Rojas. (*Id.*) Appellants filed their intervening complaint against Rojas on February 22, 2024, asserting claims for intentional and strict liability misrepresentation. (R. 42:5-16.)

Appellants’ claims were based on the scheme Rojas had devised to secure loans by falsifying supporting financials to make Appellants appear more profitable than they actually were. The intervening complaint detailed the steps Rojas took to orchestrate her fraudulent scheme, the various misrepresentations she made in the process, and the substantial damages Appellants sustained as a result.

In response, Rojas moved to dismiss both claims on the grounds that (1) they were barred by claim or issue preclusion; (2) the intervening complaint failed to plead fraud with particularity, as required to support a claim for

intentional misrepresentation; and (3) the complaint contained insufficient facts to support a claim for strict liability misrepresentation. (R. 59:2.) In other words, although the Illinois Court dismissed the Illinois Claims without prejudice as to any re-filing in Wisconsin (or elsewhere outside the State of Illinois), *i.e.*, with the understanding that the claims could be re-filed outside Illinois, Rojas moved to dismiss those claims, once refiled, on the theory that Appellants were nonetheless barred from re-filing their claims in Wisconsin under the doctrine of Issue Preclusion.

### **The Circuit Court Decision**

On September 5, 2024, the Circuit Court held a hearing on Rojas's motion to dismiss. The Circuit Court granted Rojas's motion, finding, incorrectly, that "the merits of the claims were litigated and decided" in the Illinois Action, and further, that "application of the doctrine of issue preclusion . . . is not inconsistent with fundamental fairness." (R. 89:31.)

In its ruling, the Circuit Court explained that, in its view, the issues raised in the intervening complaint were "identical or similar to the issues that were raised in the Illinois proceeding" (R. 89:25), and that there was reasonable privity between the parties in Illinois and Wisconsin. The Circuit Court found that the Illinois Court's decision dismissing the Illinois Complaint without prejudice based on an alleged pleading deficiency was nonetheless a ruling on the merits of the fraud by omission claim the Illinois Plaintiffs had alleged. As a result, the Circuit Court held that Appellants were barred under the doctrine of issue preclusion from

bringing their new claims in Wisconsin, even though the Illinois Court expressly permitted them to do so.

The Circuit Court likewise went on to find that Appellants' Intentional Misrepresentation Claim was not pled with sufficient particularity and dismissed the claim on that ground as well. (R. 89:34.)

Although the Circuit Court ruled that Appellants' newly-asserted claim for Strict Liability Misrepresentation was properly pled and stated a viable claim, the Circuit Court ruled that claim was precluded as well, apparently on the theory that it revisited the same issues already decided in Illinois. (R. 89:35.)

Yet, as discussed more fully below, the Circuit Court's decision was flawed for a number of reasons. The Illinois Court did not rule on the merits of any claim and made no determinations that warranted preclusion. The Circuit Court erred by dismissing Appellants' claims on issue preclusion grounds. Appellants' claim for Intentional Misrepresentation was pled with sufficient particularity and also should not have been dismissed.

### **STANDARD OF REVIEW**

Whether the trial court correctly dismissed a complaint on grounds of issue preclusion presents a question of law which this court reviews without deference to the trial court. *Jensen v. Milwaukee Mut. Ins.*, 204 Wis. 2d 231, 236, 554 N.W.2d 232 (Ct. App. 1996). A motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint. *See Watts v. Watts*, 137 Wis. 2d 506, 512, 405 N.W.2d 303 (1987). Whether the complaint states a claim for relief

is a question of law that this Court reviews independently. *Friends of Kenwood v. Green*, 2000 WI App 217 ¶ 11, 239 Wis. 2d 78, 619 N.W.2d 271.

## ARGUMENT

### I. The Circuit Court Erred by Dismissing Appellants' Claims on Issue Preclusion Grounds.

It is well-established that the doctrine of issue preclusion was designed to foreclose parties from relitigating issues that have already been contested—and *decided*—in a previous action between the same parties or their privies. *See Masko v. City of Madison*, 2003 WI App 124, ¶ 4, 265 Wis. 2d 442, 665 N.W.2d 391. To apply issue preclusion, a court must decide: (1) whether the issue was actually litigated and decided in a prior proceeding by a valid judgment; (2) whether the determination was essential to the judgment; and (3) whether applying issue preclusion comports with principles of fairness. *Aldrich v. Labor & Indus. Review Comm'n*, 2012 WI 53, ¶¶ 97-98, 341 Wis. 2d 36, 814 N.W.2d 433.

In other words, a necessary “prerequisite for precluding issues from being ‘relitigated’” is that they were actually litigated in the first place. *Deminsky v. Arlington Plastics Mach.*, 2001 WI App 287, ¶ 39, 249 Wis. 2d 441, 638 N.W.2d 331. Here, no such issues were actually litigated, and the Circuit Court erred by finding otherwise. Indeed, the Illinois Court made no findings worthy of preclusive effect; it merely ruled at the earliest stage of litigation that the allegations raised by the Appellants in the Illinois Action were insufficient to support their claims under applicable law. But the Illinois Court *did not* find that no set of facts could support Appellants’ claims or otherwise rule on their merit. Instead, the Illinois Court dismissed the Illinois Plaintiffs’ claims *without*

*prejudice*, with the understanding—and expectation—that the Illinois Plaintiffs would refile their claims in Wisconsin. That dismissal was not a final adjudication on the merits. The doctrine of issue preclusion does not apply, and it would be fundamentally unfair to apply it here.

For these reasons, as discussed more fully below, the Circuit Court’s decision to dismiss Appellants’ claims for Intentional Misrepresentation and Strict Liability Misrepresentation should be overturned in its entirety.

**A. No Issues or Facts Were Actually Litigated in the Illinois Action.**

As a threshold matter, the doctrine of issue preclusion *only* forecloses relitigation of an issue that was actually litigated and decided in a previous proceeding. *See Molitor v. Advantage Cmty. Bank*, No. 2012AP487, 2012 WL 6049110 (Ct. App. Dec. 6, 2012) (unpublished) (“The requirement that the issue be ‘actually litigated’ is a threshold prerequisite for application of the doctrine.” (citation omitted)). No such issue was litigated here.

Rather, in the previous Illinois proceeding, the Illinois Court merely made a preliminary ruling at the outset of Appellants’ lawsuit that the allegations they pled were insufficient to support a claim and survive Rojas’s motion to dismiss. That is a far cry from litigating a claim on the merits, or even any facts or issues relevant to such a claim. In fact, the Illinois Court did just the opposite; it determined only that the facts, as pled in Illinois, were *not* appropriate for litigation, because, in the Illinois Court’s view, they fell short of Illinois pleading

standards. The Illinois Court did not expect that its preliminary ruling on Rojas's motion to dismiss would forever foreclose Appellants from asserting their claims. Instead, by dismissing the claims without prejudice, the Illinois Court actually invited Appellants to re-file their claims in Wisconsin. That is precisely what Appellants did when they filed their claims in the already-pending Waukesha Action.

Yet, once Appellants re-filed their claims in the Waukesha Action, the Circuit Court determined, at Rojas's urging, that because the claims were "identical or similar" to those raised in Illinois, and relied on similar allegations, the Waukesha Action must be viewed as an effort to revisit issues the Illinois Court already decided in Rojas's favor. This is wrong for a number of reasons. For one thing, nothing in the record supports the Circuit Court's determination that the Illinois Court already decided any "issues" presented by the subsequent Waukesha County Complaint. The Circuit Court did not explain, either at the motion hearing or in its decision granting Rojas's motion to dismiss, what specific issues had been decided in Illinois, much less explain why the Waukesha Action was an impermissible attempt to revisit those "already-decided" issues. Nor could it. The record before the Circuit Court (and in this appeal) does not clearly indicate what, if any determinations of law or fact were critical to the Illinois Court's decision to dismiss the Illinois Claims; rather, the Illinois Court's final order dismissing the claim merely reflects that the Illinois Plaintiffs asserted claim

against for “fraud by omission” was dismissed with prejudice as to refiling in Illinois and without prejudice as to refiling in jurisdictions outside Illinois.

Despite this, the Circuit Court surmised that, because the allegations in the Waukesha Complaint were similar to those in the Illinois Complaint, the Illinois Court *must have* resolved the same issues in its dismissal decision. Of course, the Circuit Court ignored that the Waukesha County Complaint asserted different claims than the one asserted by the Illinois Plaintiffs in the Illinois Action. The mere fact that the intentional misrepresentation and strict liability misrepresentation claims asserted in Waukesha County were (not surprisingly) premised on the same theory that Rojas orchestrated a scheme to falsify Appellants’ financials does not mean the issues presented were identical. They were not. The sole question before the Illinois Court was whether the Illinois Complaint stated a viable claim for fraudulent omission under Illinois law. The Illinois Court’s dismissal decision has no bearing on the questions presented in the Waukesha County Action, namely, whether Rojas is or could be liable for intentional misrepresentation or strict liability misrepresentation.

The Circuit Court’s decision to apply issue preclusion was therefore erroneous and should be reversed.

**B. The Illinois Case was not a Final Adjudication on the Merits**

Issue preclusion applies only where a previous action decided an issue or fact *and* the decided issue or fact was essential to a final, conclusive judgment.

*See N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995)

([I]ssue preclusion is the “effect of a *judgment* in foreclosing relitigation in a subsequent action of an issue of law or fact that has actually been litigated and decided in a prior action.” (emphasis added)).

Indeed, the doctrine has been summarized as follows:

When an issue of fact or law is actually litigated and determined by a *valid and final judgment*, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Restatement (Second) of Judgments § 27, Westlaw (database updated Oct. 2024) (emphasis added).

In other words, another prerequisite for the application of issue preclusion is a final judgment on the merits. *See, e.g., Town of Delafield v. Winkelman*, 2004 WI 17, ¶ 34, 269 Wis. 2d 109, 675, N.W.2d 470; *Michelle T. v. Crozier*, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993).

The Illinois Court’s order dismissing the Illinois Action without prejudice for allegedly failing to satisfy applicable pleading standards was *not* a final judgment or adjudication on the merits. That is because a “[d]ismissal without prejudice, by definition, permits the complainant to sue again on the same cause of action.” *In re Jason B.*, 176 Wis. 2d 400, 406, 500 N.W.2d 384 (Ct. App. 1993) (quoting Black’s Law Dictionary 469 (6th ed. 1990)); *see also Bishop v. Blue Cross & Blue Shield United of Wis.* 145 Wis. 2d 315, 318, 426 N.W.2d 114, (Ct. App. 1988) (“Dismissals granted without prejudice differ from those granted with

prejudice. In the former case, the defendant continues to be exposed to the risk of further litigation.”)

The court’s dismissal order in the Illinois Action reads, in relevant part, as follows:

For the reasons stated in open court and over Plaintiffs objection, this matter and the claims asserted herein by Plaintiffs in their original complaint against Defendant, Merrilee Rojas, are dismissed with prejudice as to this and any other action in the courts of the State of Illinois, but without prejudice as to any pending or potential future action in a jurisdiction other than the courts of the State of Illinois.

(R. 60:38.) Thus, the dismissal order is clear that it was *not* a final judgment on the merits intended to dispose of the entire dispute once and for all. Quite the contrary, the Illinois Court made clear that Appellants had every right to proceed with their claims outside the State of Illinois, which is precisely what they did here.

Despite this, in ruling on Rojas’s motion to dismiss, the Circuit Court concluded (incorrectly) that the Illinois Court’s dismissal order resolved the Illinois Plaintiffs’ fraudulent omission claim “on the merits.” (R. 89:29.) The Circuit Court recognized the tension between its belief that the merits of the Illinois claims “were litigated and decided” and the language of the Illinois order itself, which provided the Illinois Plaintiffs an opportunity to re-plead. The Circuit Court initially posed the question of “what impact. . .the ability to re-plead has on issue preclusion.” But relying on the Supreme Court’s decision in *Deminsky*, 2003 WI 15, ¶ 49, the Circuit Court answered that question itself, reasoning that the

Illinois Court's dismissal order "does not obviate and wipe out the issue of issue preclusion" such that Rojas could still assert the doctrine applies in this case. (R. 89:29.)

But the *Deminsky* decision does not stand for the sweeping proposition the Circuit Court cited it for. Indeed, *Deminsky* did not involve the doctrine of issue preclusion because the Supreme Court concluded, as did the Court of Appeals before it, that issue preclusion was not applicable to that case because the action was never "actually litigated." *Id.* The Supreme Court in *Deminsky* explained that "an issue is actually litigated when an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined." *Id.* (citing Restatement (Second) of Judgments § 27 (1982)). And although the *Deminsky* case did not involve a motion to dismiss, the Supreme Court mentioned in passing that Comment d to the Restatement "provides that an issue may be submitted and determined on a motion to dismiss, a motion for summary judgment, a motion for a directed verdict, or their equivalents, or a judgment entered on a verdict." *Id.* Based on that alone, the Circuit Court determined that the Illinois Court's dismissal order, although without prejudice, could nonetheless bar subsequent claims or allegations raised by Appellants.

The Circuit Court's reliance on *Deminsky* (and the Restatement) was misplaced, however. Indeed, although the Restatement recognizes that "an issue may be actually litigated and determined even though there has not been a trial," including on a motion to dismiss, the Restatement finds support for that

proposition primarily in cases where “an issue of law or of law application” has been determined at the pleading stage, *i.e.*, where a court’s decision on a motion to dismiss necessarily resolves the asserted claim as a matter of law. *See, e.g., Florasynth Lab'ys v. Goldberg*, 191 F.2d 877, 877 (7th Cir. 1951) (affirming dismissal of trademark infringement claims based on issue preclusion where prior infringement action was dismissed because infringement claims were unfounded as a matter of law).

Comment N to the Restatement clarifies that “if, however, a judgment of dismissal is wholly without prejudice, then it has no conclusive effect between the parties in a subsequent action on the same or a different claim.” *Restatement (Second) of Judgments § 27 (1982)*. This is consistent with the decision in *Knox v. Lichtenstein*, 654 F.2d 19 (8th Cir. 1981). In *Knox*, the trustee of two profit sharing trusts brought an action in the U.S. District Court for the Eastern District of Missouri against American National Bank for alleged violations of federal securities laws. *Id.* at 20. The Bank moved to dismissed the claims for failure to state a claim and for failure to allege fraud with particularity, and the District Court granted the motion. Five days after the dismissal in federal court, the trustees filed a new suit against the Bank in the Circuit Court of the City of St. Louis, alleging breach of fiduciary duties under Missouri law. In response, the Bank filed a motion “requesting the district court to permanently enjoin the plaintiff-trustees from continuing the state court suit or otherwise relitigating

matters barred by the prior dismissal of the federal action under the doctrine of res judicata.” *Id.* at 21.

The district court denied the motion because its earlier dismissal for failure to allege fraud with particularity “had been expressly declared to be without prejudice.” *Id.* As the district court explained, “a dismissal for a procedural defect, such as the failure to plead fraud with particularity, does not operate as adjudication on the merits” such that preclusion would be warranted. The bank appealed, arguing that state law claim for breach of fiduciary duty was effectively the same cause of action as the previously-dismissed federal securities claim, and therefore should be barred. The Eighth Circuit disagreed, explaining: “If the first suit was dismissed for defect of the pleadings, or parties, or a misconception of the form of proceeding, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered should not bar another suit.” *Id.* at 22 (citing *Costello v. United States*, 365 U.S. 265, 286 (1961)).

Like in *Knox*, the Illinois Complaint was dismissed on entirely procedural grounds, for an alleged defect of the pleadings. The Illinois Court’s decision did not go to the merits of the claims that were asserted, and therefore should not have barred any subsequent suit. There was no final adjudication on the merits, so the second threshold element required to support issue preclusion was not met. The Circuit Court’s decision should be overturned for this reason, as well.

**C. Issues of Fairness Weigh Against Application of Issue Preclusion**

As discussed above, the Circuit Court erred by disposing of Appellants' claims on issue preclusion grounds, because no issue was actually litigated and determined by a valid and final judgment in Illinois. But even if the Circuit Court had correctly ruled on those threshold issues, its application of issue preclusion still would have been inconsistent with fundamental fairness.

Before applying the doctrine, a court must consider whether “application of issue preclusion is consistent with fundamental fairness.” *See Michelle T.*, 173 Wis. 2d at 687. The Supreme Court of Wisconsin has identified the following, non-exhaustive list of factors as relevant to this fairness analysis: (1) could the party against whom preclusion is sought, as a matter of law, obtained review of the judgment; (2) is the question one of law that involves two distinct claims or intervening contextual shifts in the law; (3) do significant differences in the quality or extensiveness of proceedings between the two courts warrant relitigation of the issue; (4) have the burdens of persuasion shifted such that the party seeking preclusion had a lower burden of persuasion in the first trial than in the second; or (5) are matters of public policy and individual circumstances involved that would render the application of collateral estoppel to be fundamentally unfair. *Id.* at 688–89.

Yet, the Circuit Court paid lip service to the fairness analysis mandated by the Wisconsin Supreme Court, giving only cursory consideration to one of those five factors, namely, whether Appellants could have sought review of the Illinois Court's dismissal order. For this factor, the Circuit Court reasoned that it would

not be fundamentally unfair to preclude the Appellants from “relitigating” the common (albeit unidentified) issues that were already “decided” in Illinois, because the Illinois Plaintiffs could have appealed the Illinois decision but opted not to do so. The Circuit Court explained:

I’m satisfied that. . . the issue of application of the doctrine of issue preclusion does not – is not inconsistent with fundamental fairness. I’m satisfied that the parties in Illinois decided . . .not to seek appeal of the Illinois case, but actually it was using the Wisconsin process – the Wisconsin filing as a way to get another kick at the cat in essence to not appeal what happened in Illinois, but to try again.

(R. 89:31.)

Here again, however, the Circuit Court missed the mark. For one thing, there was nothing improper about Appellants “trying again” after the Illinois Court dismissed their claims. They had every right to try to bring their claims again; after all, that is what it means to dismiss a complaint without prejudice and with leave to replead. And, in fact, the Appellants had no other choice but to “try again.” Under well-established Illinois law, dismissals that are entered without prejudice are not final and appealable orders. *DeLuna v. Treister*, 708 N.E.2d 340, 343 (Ill. App. Ct. 1999) (finding that neither issue nor claim preclusion barred Plaintiff from re-raising argument that dispute was not arbitrable because previous action was dismissed without prejudice and therefore not appealable); *see also Paul H. Schwendener, Inc. v. Jupiter Elec. Co.*, 829 N.E.2d 818, 827 (Ill. App. Ct. 2005) (dismissing appeal because “[a]n order dismissing an action ‘without

prejudice' is not deemed final for purposes of appeal", and therefore court of appeals lacked jurisdiction).

Although the Circuit Court briefly mentioned the remaining fairness factors at the motion hearing, its "analysis" of those additional factors was wanting. Indeed, rather than offer any meaningful explanation of why, in the Circuit Court's view, those remaining factors supported application of issue preclusion under the circumstances presented here, the Circuit Court merely declared that it was "satisfied" that "the matters involve the same claims, the same issues, the same factual circumstances between the two sets of litigation," "there's not a significant difference in the quality or extensiveness of proceedings," "there hasn't been a shift in the burdens provided to each party," and that public policy does "not undermine the application of the estoppel principle on issue preclusion, and it does not make it an unfair application if this Court applies it." (R. 89:32.) The Circuit Court's decision to apply issue preclusion should be overturned for this reason alone. *See In re Estate of Rille ex rel. Rille*, 2007 WI 36, ¶ 39, 300 Wis. 2d 1, 728 N.W.2d 693 ("We will affirm a circuit court's exercise of discretion if the circuit court applies the proper standard of law and, using a demonstrated rational process, reaches a conclusion that a reasonable court could reach.")

More fundamentally, the Circuit Court simply got it wrong on these additional fairness factors. As explained previously, the Illinois Case and the Waukesha County Action, although premised on similar allegations, did not involve the same claims or the same issues. In addition, there were no substantive

proceedings in Illinois, because the Illinois Complaint was dismissed on the pleadings. The dismissal on procedural grounds in Illinois should not bar Appellants from fully litigating their claims, for the first time, in Waukesha County. Perhaps most importantly, the Circuit Court incorrectly ruled that it would not be unfair to apply issue preclusion in this context. Of course, the Circuit Court initially expressed some skepticism that it would be fair to apply issue preclusion under the circumstances presented here, asking at the motion hearing “is there a fundamental fairness issue if you have the right in Illinois to re-plead in Wisconsin, then Wisconsin says you’re barred because you litigated the case in Illinois?” Although the Court later answered its own question in the negative, it should not have done so. Its decision to apply issue preclusion to bar Appellants’ claims denied Appellants their day in court and effectively punished them for doing precisely what they told the Illinois Court they planned to do, and precisely what the Illinois Court permitted them to do.

For these reasons, the fairness factors weigh against application of issue preclusion. The Circuit Court’s decision should be reversed for this reason, too.

## **II. The Circuit Court Erred by Dismissing the Intentional Misrepresentation Claim for Failure to Plead with Particularity.**

The Circuit Court likewise erred by dismissing Appellants’ intentional misrepresentation claim for allegedly failing to plead fraud with particularity, as required under Wis. Stat. § 802.03(2). Appellants do not dispute—and have never disputed—that they were required to plead their claim for intentional

misrepresentation with particularity. However, Appellants satisfied this heightened pleading standard here. The Circuit Court’s contrary ruling ignored the well-pled allegations of Appellants’ intervening complaint, which sufficiently alleged the “time, place, and content” of the Rojas’s misrepresentations, as required to put Rojas on notice of the charges against her for purposes of formulating a response.

Pleading with “particularity” means that the plaintiff’s allegations must specify “the particular individuals who made the representations [and] the details of where and when the misrepresentations were made, and who the misrepresentations were made to.” *Doe v. Archdiocese of Milwaukee*, 2005 WI 123, ¶ 52, 284 Wis. 2d 307, 700 N.W.2d 180. In other words, the “who, what, when, where and how” of the fraud must be alleged. *Friends of Kenwood*, 2000 WI App 217, ¶ 14 (citation omitted).

Appellants alleged in their Intervening Complaint that Rojas devised a scheme to secure favorable loans by falsifying Appellants’ loan applications and supporting materials to portray their businesses as more profitable than they actually were. Appellants allege that in doing so, Rojas defrauded Mr. Rasha, Appellants, and the bank. In support of their claim for intentional misrepresentation, Appellants detailed the steps Rojas took to orchestrate and perpetrate her fraud, including the following specific facts.

- Rojas convinced Mr. Rasha to refinance Appellants' loans and agreed to submit the required refinance applications and supporting financial information to the bank. (R. 42:6.)
- Mr. Rasha provided Rojas all required materials in support of the refinance applications, including historical financial documentation that accurately reflected Appellants' actual financial status and historic profitability. (R. 42:11-12.)
- Without Mr. Rasha's knowledge, Rojas altered the materials Mr. Rasha had provided to inflate Appellants' historic and projected revenues and falsely portray the companies as more profitable than they were. (R. 42:12-14.)
- Rather than forward the actual, accurate applications and supporting financials Mr. Rasha had provided, and as Rojas represented to Mr. Rasha she would, Rojas submitted the fabricated documents to the banks in an effort to secure the loans. (R. 42:10-12.)
- Rojas did so by creating fake email addresses, office@thekardogroup.com and om@thekardogroup.com, from a domain that Rojas registered and controlled. Rojas used the fake email addresses to submit the falsified documents to the bank, making it appear, falsely, that they came directly from Mr. Rasha. (R. 42:12.)

- Mr. Rasha only discovered Rojas's scheme and the various misrepresentations she made in connection with it when he was notified by the bank that it had discovered discrepancies in the fabricated materials Rojas had submitted without Mr. Rasha's knowledge, apparently after Rojas mistakenly sent an email to an incorrect address. (R. 42:11-12.)
- As a result, Appellants were placed by the bank in workout and ultimately forced to refinance the loans, causing significant damages. (R. 42:13.)

These allegations clearly identify the circumstances constituting Rojas's fraud, as required under Wis. Stat. § 802.03(2), including the details of when, how, and to whom Rojas made misrepresentations. The facts pled by Appellants leave little doubt as to the factual basis for the fraud Rojas was alleged to have committed. Therefore, they are sufficient to put Rojas on notice of the basis for Appellants' claims and permit her to adequately prepare a response. Nonetheless, the Circuit Court found Appellants' intentional misrepresentation claim wanting and dismissed it for failure to plead fraud with particularity. This, too, was in error.

At the motion hearing, the Circuit Court explained its reasoning:

I interpret the statutory section 802.03(2) to require specifically to state what the false information was, including the financials not to generally

refer to it as false information that increases -- that allegedly falsely increases revenues.

\* \* \*

I read the statute to require more specific spelling out of what the documents were, and not just fabricated documents, what the documents were and what the exact nature of the false financial documents and projections were that were submitted. That's specificity that is not what the intervener's complaint contains.

(R. 89:33-34.)

In other words, the Circuit Court faulted Appellants for not identifying more specifically what documents Rojas had fabricated. Although pleading fraud with particularity means a plaintiff must plead enough facts to inform the defendant of the nature of the fraud they are alleged to have committed, it does not require a plaintiff to identify any and all granular details relating to the fraud, including by identifying specific documents. *See, e.g., United States ex rel. Prose v. Molina Healthcare of Illinois, Inc.*, 17 F.4th 732, 741 (7th Cir. 2021) (pleading fraud claims with particularity did not require plaintiff to identify specific documents or conversations; “The obligation to set out the ‘who, what, when, where, and how’ of the fraud does not require such granular detail.”); *see also, Byrd v. Landowski*, No. 2009AP2504, 2010 WL 2836392 at \*2 (Ct. App. July 21, 2010) (unpublished) (reversing dismissal of complaint that alleged home had a long history of “water problems” without explaining the known defect with the basement or foundation alleged to have caused the problems).

The allegations supporting Appellants' intentional misrepresentation claim identified the specific documents Rojas allegedly falsified, the steps she took to falsify them, and the reasons they were false. Appellants therefore provided enough detail to support their claim and put Rojas on notice of the nature of the alleged fraud. The claim was pled with the required particularity, and the Circuit Court erred by dismissing it.<sup>2</sup>

### CONCLUSION

The Circuit Court should not have granted Rojas's motion to dismiss Appellants' claims for Intentional Misrepresentation and Strict Liability Misrepresentation. Neither claim was premised on matters already litigated and decided in the previous Illinois Action that had been dismissed without prejudice. Issue preclusion does not apply, and the Circuit Court erred by ruling otherwise.

In addition, Appellants supported their claim for Intentional Misrepresentation with detailed allegations describing the time, place and content

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<sup>2</sup> Even if the Circuit Court properly found that Appellants' claim lacked sufficient particularity, the Circuit Court should have granted Appellants leave to amend the pleadings. Wis. Stat § 802.09(1) allows for an amendment of a party's pleading "once as a matter of course at any time within 6 months after the summons and complaint are filed... Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires." Wis. Stat. § 802.09(1). Beyond the alleged failure to more specifically identify documents Rojas fabricated, the Circuit Court did not find that any other aspect of Appellants' claim lacked the required specificity. If the Circuit Court truly deemed the failure to more specifically identify falsified documents as fatal to Appellants' claim it should have granted Appellants leave to amend and an opportunity to more clearly identify such documents.

of Rojas's various misrepresentations and fraudulent scheme. The claim was pled with the required particularity and should not have been dismissed.

For these reasons, Appellants respectfully request that this Court reverse the Circuit Court's decision in its entirety.

Dated this 30th day of December, 2024.

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**CERTIFICATION OF FORM AND LENGTH**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm) and (c) for a brief. The length of this brief is 6,704 words.

Dated this 30th day of December, 2024.

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