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**02-13-2025**  
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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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**REPLY BRIEF OF THIRD-PARTY PLAINTIFFS-APPELLANTS**

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## ARGUMENT

In a continuing effort to deny Appellants their day in court and evade responsibility for her own fraudulent conduct, Respondent insists yet again, that the doctrine of issue preclusion bars Appellants from asserting their misrepresentation claims against Respondent because the Illinois Court previously dismissed a different claim based on similar allegations. That is not the law. As discussed further below, even if the Illinois claim was “actually litigated” on Respondent’s motion to dismiss in Illinois, issue preclusion still would not apply, because the issues presented in Illinois were not identical to the issues before the court in the Wisconsin Action.

The Circuit Court decision to dismiss Appellants’ Intentional Misrepresentation and Strict Liability Misrepresentation claims on issue preclusion grounds was erroneous and should be reversed. The same is true of the Circuit Court’s dismissal of Appellants’ Intentional Misrepresentation claim for failure to plead with particularity.

The Circuit Court’s decision should be overturned.

### **I. Prior Adjudication of Similar Issues Is Insufficient to Trigger Issue Preclusion**

As explained in Appellants’ opening brief, the Circuit Court wrongly dismissed Appellants’ claims on issue preclusion grounds, because the Illinois claim that preceded this action was not actually litigated and decided. (App. Br. at 18-20.) In response, Respondent claims that the Supreme Court recognized in

*Deminsky v. Arlington Plastics Mach.*, 2001 WI App 287, 249 Wis. 2d 441, 638 N.W.2d 33, that an issue may be actually litigated and decided on a motion to dismiss. (Resp. Br. at 16, 21-22.) Regardless of the state of dicta in Wisconsin Supreme Court opinions,<sup>1</sup> *Deminsky* is not controlling. Whether an issue may be actually litigated in the context of a motion to dismiss is irrelevant. The critical question is whether any issues litigated in the Illinois Action are the same as the issues presented in Wisconsin. They are not.

Like the Circuit Court before it, Respondent would apply issue preclusion when allegations raised in related litigation are “identical *or similar*.” (A-App. 50) (emphasis added) (Resp. Br. at 13) (describing the allegations as “practically identical”). Both the Wisconsin Supreme Court and the United States Supreme Court disagree. Issue preclusion “applies ‘where the matter raised in the second suit is *identical in all respects* with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged.’” *State ex rel. Flowers v. Dep’t of Health & Soc. Servs.*, 81 Wis. 2d 376, 387, 260 N.W.2d 727

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<sup>1</sup> Members of the Wisconsin Supreme Court have recently revisited this issue and explained that notwithstanding prior comments to the contrary, not all reasoning in the Court’s opinions is binding upon lower courts. See *Wisconsin Just. Initiative, Inc. v. Wisconsin Elections Comm’n*, 2023 WI 38, ¶¶ 140-141, 407 Wis. 2d 87, 990 N.W.2d 122 (J. Hagedorn concurring) (collecting cases and explaining: “Is every jot and tittle, stray statement, or tangential footnote binding legal precedent that must be followed faithfully? The answer to this question almost always and everywhere is no. While debate continues over where to draw the line in principle and from case to case, the general rule remains that the holding of a case—that is, *the legal rationale underlying and necessary to a decision—constitutes precedent. Other discussion, including discussion of legal matters, is nonbinding dicta.*) (emphasis added).

(1978) (quoting *C. I. R. v. Sunnen*, 333 U.S. 591, 599, 600, 68 S.Ct. 715, 92 L.Ed. 898 (1948)) (emphasis added).

It was Respondent's burden to show that any issue decided in Illinois was identical in all respects to the issue before the Circuit Court. *See Masko v. City of Madison*, 2003 WI App 124, ¶ 4, 265 Wis. 2d 442, 665 N.W.2d 391 ("The party seeking to use issue preclusion bears the burden of demonstrating that the doctrine should be applied."). She did not carry that burden. The record reflects that the Illinois Court dismissed the Illinois Complaint "for the reasons stated in open court," (R-App at 26), but nothing in the record demonstrates what those reasons were. Instead, Respondent (and the Circuit Court) simply assumed that the unidentified pleading deficiencies that allegedly supported dismissal in Illinois must have been dispositive of the different claims asserted in Wisconsin, because the claims were "similar." But that is not the appropriate standard for application of issue preclusion.

The critical question for purposes of issue preclusion was not whether the allegations in the intervening complaint were similar to the allegations in Illinois; it was the sufficiency of those allegations. And the sufficiency of allegations can only be tested against the substantive elements of the claims they support. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 31, 356 Wis. 2d 665, 849 N.W.2d 693 ("the sufficiency of a complaint depends on substantive law that underlies the claim made because it is the substantive law that drives what facts must be pled").

Thus, before the Circuit Court could apply issue preclusion to bar Appellants' claims in the Wisconsin Action, it had to determine that the substantive law underlying those claims was identical in all respects to that underlying the claim at issue in the Illinois Action. The Circuit Court did not do so. Had the Circuit Court compared the substantive law underlying the claims, it would have concluded that the issue of in Illinois could not be the same as the issue in Wisconsin.

The elements of the claims are not identical in all respects. The Illinois Action involved a claim of fraud by omission. (*See* A-App. at 8.) The Illinois pattern civil jury instruction for Fraudulent Concealment requires a plaintiff to show (1) that the defendant concealed facts, (2) that the facts were material, (3) that the plaintiff acted to deceive the defendant and to induce the plaintiff to act, (4) that the plaintiff did act in reliance on the facts known to him, and (5) that plaintiff sustained damages as a result. *See* Illinois Pattern Jury Instructions, Civil, No. 800.08. Further, the instruction is to be given only where the court first determines as a matter of law that the defendant owed a duty to the plaintiff to disclose the facts concealed. *See id.* While those elements are similar to the elements underlying Intentional Misrepresentation and Strict Liability Misrepresentation claims under Wisconsin law, they are not identical in all respects. For example, Intentional Misrepresentation does not require proof of materiality beyond reliance and Strict Liability Misrepresentation does not require a legal finding of a duty between the plaintiff and defendant and instead treats that

issue as one of fact based upon whether the defendant had an economic interest in the transaction. *See* WIS JI-Civil 2401, 2402. Because the substantive law underlying the claims in the Wisconsin Action is different than that underlying the claims asserted in Illinois, the Illinois decision has no bearing on the issue that was before the Circuit Court—the sufficiency of the allegations in Wisconsin.

Respondent claims that issue preclusion applies even when subsequent litigation involves different claims. While that is technically accurate, none of the cases Respondent cites for this proposition address the issue in this case—whether a decision on the sufficiency of one claim can bar subsequent litigation of the sufficiency of different claims. Instead, the cited cases address the impact of the same issue on different claims. In *Masko*, the common issue was whether the plaintiff caused an accident; in one proceeding she lost a contest to a traffic citation and in another that same issue precluded her claim for damages resulting from the accident. *See* 2003 WI App 124, ¶ 8, 265 Wis. 2d 442, 665 N.W.2d 391 (“In the municipal court, the issue was whether Masko had attempted an improper lane change and caused the accident. In this action, determining whether the City is liable for Masko's damages also depends upon whether Masko or the bus driver caused the accident. The issue in both actions is the same.”) Similarly, in *Dane County v. Dane County Union Local 65, AFSCME, AFL-CIO*, the claimant brought two different grievances in separate arbitrations but the issue to which the court applied issue preclusion was the same—whether he had the right to return to work without providing certain documentation to his employer. *See* 210 Wis. 2d

267, 280–81, 565 N.W.2d 540 (Ct. App. 1997) (describing the overlapping issue).

These cases do not support the application of issue preclusion to this case.

Although the cases involved different claims (like this case), the issues underlying those claims were the same (unlike this case).

Respondent's contrary argument is premised on the theory that because, in her view, all fraud claims must satisfy a heightened pleading standard, any decision relating to the sufficiency of one theory of liability must apply to all other theories or causes of action. (Resp. Br. at 24-25.) This argument conflates pleading standards with substantive elements underlying distinct claims. It should be disregarded.

For these reasons, and those explained in Appellants' opening brief, issue preclusion does not apply here, and the Circuit Court erred by dismissing Appellants' claims on those grounds.

## **II. The Circuit Court Wrongly Dismissed Intervenors' Intentional Misrepresentation Claim for Lack of Particularity.**

Appellants' Complaint contained detailed allegations regarding Ms. Rojas's fraudulent scheme to refinance Appellants' loans by falsifying their loan applications and supporting materials, as well as the various steps Rojas took to orchestrate her scheme. (A-App. 17-22.) These allegations concerning Ms. Rojas's fraud were pled with particularity, and the Circuit Court erred by ruling otherwise.

Respondent disagrees, claiming in its brief that Appellants failed to plead the details of their claim with sufficient specificity, either by omitting certain allegations deemed critical (at least to Respondent) to Appellants' Intentional Misrepresentation claim, or, by "[misconstruing] what is alleged in the Complaint." (Resp. Br. at 34.) Respondent is wrong on all counts.

Respondent claims, for instance, that Appellants' Complaint fell "woefully short" of the required particularity because "[t]he time and means of Ms. Rojas' alleged fraudulent conduct. . . are completely unspecified." (Resp. Br. at 35.) Respondent likewise claims that Appellants' Complaint failed to identify "who at First Midwest informed Mr. Rasha of the false information allegedly submitted to the bank and "lacks even a modicum of detail" regarding how Ms. Rojas falsified the financial documents she submitted with Appellants' loan applications, or "how these alleged falsifications were material to the loans." Respondents are once again wrong and even a cursory review of Appellants' Complaint shows why.

Appellants' Intentional Misrepresentation claim was based on allegations that, when submitting loan applications on behalf of Appellants in 2016, Rojas took historical financial documentation provided to her by Mr. Rasha, altered it to inflate Appellants' historic and projected revenues and falsely portray the companies as more profitable than they were. Then, without Mr. Rasha's knowledge, Rojas sent the falsified documents from email addresses purportedly

belonging to Mr. Rasha<sup>2</sup> to her own First Midwest email address, to make it appear as though the altered documents had come directly from Mr. Rasha. (Appellant Br. at 30-32.) In other words, the Court needs to look no further than these allegations already cited by Appellants to find the “time and means” of Ms. Rojas’s fraudulent conduct, despite Respondents’ claim that they are “completely unspecified” or not supported by “even a modicum of detail.” (Resp. Br. at 35.) Appellants further alleged in their complaint that once the bank discovered the fraudulent information, Mr. Rasha was first notified by Robert Kelly, the director of Business Banking at First Midwest Bank (*i.e.*, “who at First Midwest informed Mr. Rasha of the false information”), before the bank (again through Mr. Kelly) cancelled the loans and notified Mr. Rasha that he would need to refinance with another bank. (A-App.18-20.) If there was any doubt that falsifying information required to support a loan application would have been material to the loans, these allegations about how the bank reacted to the fraud once discovered should clear up any confusion.

Indeed, despite these detailed allegations, Respondent claims that she was left to guess as to the nature of the misconduct she’s alleged to have committed.

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<sup>2</sup> Respondent accuses Appellants of “mischaracterizing the record in this case” by stating Ms. Rojas used “fake email addresses” to perpetrate her scheme (Resp. Br., at 34). This is false. Appellants alleged in Paragraph 43 of their Complaint that, unbeknownst to Mr. Rasha, Rojas used certain email addresses she registered and controlled to send the documents she falsified to her own bank email address. She did so to make it appear those documents had come directly from Mr. Rasha, even though they did not. Describing these emails as “fake” is hardly a mischaracterization of the record.

(Resp. Br. at 35-36.) In support of this argument, Respondent points to previous decisions of the Court of Appeals, in *Friends of Kenwood v. Green*, 2000 WI App 217 ¶ 15, 239 Wis. 2d 78, 619 N.W.2d 271, *Cattau v. Nat'l Ins. Servs. of Wisconsin, Inc.*, No. 2016AP493, 2018 WL 2997574 (Ct. App. June 13, 2018) (unpublished), and *Schotz v. Indianapolis Life Ins. Co.*, No. 2011AP209, 2011 WL 6785302 (Ct. App. December 28, 2011) (unpublished).<sup>3</sup> (Resp. Br. at 34.) The allegations in those cases bear little resemblance to the allegations asserted here. In *Friends of Kenwood*, for example, the Court of Appeals affirmed the dismissal of an Intentional Misrepresentation claim brought against multiple defendants. In just three paragraphs of allegations the plaintiffs asserted that various “unnamed trustees and officials” made misrepresentations “between 1993 and October 19, 1997,” without identifying which of the various defendants allegedly made the misrepresentations, or even which of the numerous plaintiffs supposedly relied on them. *Friends of Kenwood*, 2000 WI App 217 ¶ 15. Similarly, in *Cattau*, more than 60 individual plaintiffs brought claims against two entities, alleging that the defendants “[p]eriodically and on an on-going basis of a period of years” made misrepresentations concerning the tax benefits of retirement plans without identifying the “employees” or “designated representatives” who supposedly made the representations, or even hinting “as to what medium these representations took.” *Cattau*, 2018 WL 2997574 at \*10. Finally, in *Schotz*, the plaintiffs alleged

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<sup>3</sup> Copies of the Court of Appeals’ unpublished decisions in *Cattau* and *Schotz* were included in Respondent’s Appendix. See R-App. 028 and R-App. 041.

that they were induced to purchase certain defined benefit pension plans based on misrepresentations by various named defendants concerning the tax benefits of such plans. *Schotz*, 2011 WL 6785302 at \*1. The claim was dismissed, however, because the complaint failed to identify which of the multiple named defendants made the alleged misrepresentations, what they said, or which of the six plaintiffs allegedly heard and relied upon the misrepresentations. *Id.* at 2. In other words, in all of those cases, the plaintiffs lumped multiple defendants together and accused them all of fraud, without informing each defendant of the nature of their alleged participation in the fraud.

That is a far cry from the allegations that were asserted against Ms. Rojas here. Despite what she would have the Court believe, the misconduct Ms. Rojas is alleged to have committed is not a mystery. Appellants' complaint specified the details of her fraudulent scheme, including the time, place, and nature of her misrepresentations, and gave her more than fair notice of the basis for the claims asserted against her. Appellants' Intentional Misrepresentation claim was pled with particularity and should not have been dismissed.

### **III. Intervenors' Strict Liability Misrepresentation Claim Should Not Have Been Dismissed Either.**

The Circuit Court likewise erred by dismissing Intervenors' claim for Strict Liability Misrepresentation based on issue preclusion. As explained previously, the doctrine of issue preclusion is inapplicable here; the fraudulent omission claim asserted in Illinois was not actually litigated, and any "issues" that may have been

decided in Illinois were not the same as the issues presented in Wisconsin. The Circuit Court's decision to dismiss Appellants' Strict Liability Misrepresentation claim on issue preclusion grounds should be overturned.

Indeed, were it not for the Circuit Court's erroneous application of issue preclusion, Appellants' Strict Liability Misrepresentation claim would have survived dismissal. After all, the Circuit Court found (correctly) that Appellants' claim for Strict Liability Misrepresentation was properly pled. (A-App. 60.) Yet, Respondent tries to sidestep that portion of the Circuit Court's decision by arguing, *for the first time*, that the Circuit Court applied an incorrect standard when judging the adequacy of that claim. (Resp. Br. at 36.) Respondent contends that Appellants' Strict Liability Misrepresentation claim was subject to the same heightened pleading standard as their Intentional Misrepresentation claim—and that the Court erred by finding it was adequately pled. (Resp. Br. at 36.) This argument should be rejected for several reasons.

First, Respondent has never before argued that Appellants' Strict Liability Misrepresentation claim was subject to a heightened pleading standard. In fact, at every stage of the proceedings before the Circuit Court, Respondent took the opposite position, conceding that Appellants' Strict Liability Misrepresentation claim *was not* subject to the same heightened pleading standard. For example, while Respondent argued in her opening brief in support of her motion that Appellants' Intentional Misrepresentation claim failed to plead fraud with particularity, she moved to dismiss the Strict Liability claim for allegedly failing

to satisfy “Wisconsin’s notice pleading standard” in accordance with Wis. Stat. § 802.02(1)(a). (R. 49:16-17.) Respondent repeated those same arguments on reply (R. 68:9.) And Counsel for Respondent made them again at the motion hearing before the Circuit Court (A-App. 32-33.) (arguing dismissal of the Intentional Misrepresentation claim was warranted because “the heightened pleading standard under 802.03(2) is not met here” and Strict Liability Misrepresentation should be dismissed for “violation of sections 802.02(1) and 802.04(2)”). Counsel repeated those arguments even after Appellants’ then-counsel argued that “for Strict Liability Misrepresentation, that’s notice pleading under Wisconsin law.” (A-App. 40.)—and when specifically asked by the Circuit Court “how do you respond to the allegations that the pleading is sufficient for Strict Liability Misrepresentation?” (A-App. 47.) (responding: “I harping back, Your Honor, to the violations of 802.02(1) and 802.04(2)”)

In other words, Respondent had multiple opportunities to argue that Appellants’ Strict Liability claim should be subject to a heightened pleading standard. She not only failed to make that argument, but took the opposite position, agreeing with Appellants—and the Circuit Court—that the Strict Liability Misrepresentation claim need only meet Wisconsin’s notice pleading standards. Having failed to raise this argument before the Circuit Court, Respondent cannot do so in this appeal. Arguments raised for the first time on appeal are waived. *See Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶ 11, 261 Wis.2d 769, 661 N.W.2d 476 (“A fundamental appellate precept is that we ‘will

not. . . blindsided trial courts with reversals based on theories which did not originate in their forum.’ . . . Trial courts need not divine issues on a party’s behalf. It is therefore unfair and certainly illogical to expect trial courts to discern and resolve every ‘argument’ that could have been but was not raised in resolving an issue.”) (internal citations omitted)

Even if Respondent had properly raised this new argument before the Circuit Court and preserved the issue for appeal (she did not), it would still fail, for the reasons discussed above. Just as Appellants’ claim for Intentional Misrepresentation was supported with adequate facts pled with particularity, the claim for Strict Liability was too<sup>4</sup>. The Circuit Court correctly found that the Strict Liability Misrepresentation claim was adequately pled.

## CONCLUSION

For these reasons, Appellants respectfully request that this Court reverse the Circuit Court’s dismissal of Appellants’ claims for Intentional Misrepresentation and Strict Liability Misrepresentation.

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<sup>4</sup> Even if Appellants’ claims were properly dismissed, Appellants should have been granted leave to amend. Respondent argues otherwise, claiming leave to replead was properly denied because of an “interest in the need for finality.” (Resp. Br. at 38.) But the Circuit Court did not consider this interest in finality, or any other relevant factors, when determining whether to grant Appellants leave to amend. Instead, the Circuit Court denied leave to amend based on its conclusion that Appellants’ claims were barred by issue preclusion, explaining: “I’m satisfied that there is not an ability to re-plead on issue preclusion.” (A-App. 60) But just as issue preclusion was not an appropriate basis for dismissal of Appellants’ claims in the first place, it cannot support denial of leave to amend.

Dated this 13th day of February, 2025.

Electronically signed by Thomas M. Burnett

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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 2,985 words.

Dated this 13th day of February, 2025.

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