STATE OF WISCONSIN **CIRCUIT COURT** **VILAS COUNTY**

CONSERVE COMMUNITY LLC et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. 09 CV 54**
	)	
CONSERVE SCHOOL CORPORATION et al.,	)	**Hon. Neal A. Nielsen, III**
	)	
Defendants.	)	
	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

Defendants Conserve School Corporation, Conserve School Trust, C. Daniel Blythe, John F. Calhoun, Michael J. Sullivan, Ronald V. Kazmar, Michael X. Cronin, James Rinn, and Stefan Anderson state as follows in support of their Motion to Dismiss Conserve Community LLC's Complaint.

Introduction

Plaintiffs challenge the discretionary decision of a decedent's chosen trustees concerning the administration of his trust and seek a mandatory injunction to force the trustees to take a different course. Not only do they lack standing to do so, but they cannot show that the trust instrument requires the result they seek -- or prohibits the decision the trustees have made. Plaintiffs' alternative claims for fraud also fail.

Background

This case concerns the Conserve School, which is the product of a trust created by James R. Lowenstine known as the Conserve School Trust. Mr. Lowenstine appointed the directors of

Central Steel and Wire Company to be the individual trustees of the Trust (Trust Instrument, Art. VII, ¶ C)[1] and instructed them to

> use part or all of the net income of the Conserve School Trust to defray the costs incurred in the operation of a school called the "Conserve School." The Conserve School shall be nonsectarian. Any income not otherwise expended shall be added to the principal of the Conserve School Trust as the trustees from time to time shall decide.

(Trust Instrument, Art. VI, ¶ A) Mr. Lowenstine did not require the Trustees to create a particular type of school. Instead, he vested them with discretion, sketching out what they "may" (not "shall") do with the Trust assets:

> Part of the property passing to the Conserve School Trust will be Lowenwood [Mr. Lowenstine's 1200-acre property near Land O' Lakes]. As soon after my death as is reasonably possible, and from time to time thereafter, the trustees may also use net income and principal of the Conserve School Trust: (1) to remodel or enlarge the buildings and improvements located on Lowenwood in order to adapt them for use as student dormitories, faculty housing, classrooms, facilities for preparing and serving food to students and faculty, and for other purposes in connection with the establishment of the Conserve School; (2) to erect additional facilities for such purposes, if necessary; (3) to acquire additional land to enlarge or round out the grounds in order to provide additional lake frontage or areas for outdoor instruction, all as herein provided; (4) to properly maintain all such facilities and grounds as herein provided; (5) to acquire such equipment as the trustees deem reasonably necessary for operating the school; (6) to employ as superintendent of the Conserve School a conservative, nonsectarian, experienced professional with academic and business qualifications; (7) to employ suitable faculty; (8) to prescribe a school curriculum which must include instruction in reading, writing and arithmetic and shall comply as nearly as the trustees deem practicable with the requirements set by school officials of the State of Wisconsin and which also shall, to the extent the trustees deem practicable, include nature study (and in particular the study of the ecology of unspoiled forest and lake areas such as Lowenwood), instruction in outdoor sports including skiing, use of snow shoes, archery, ice skating, target practice, swimming,

[1] A copy of the trust instrument is attached to Plaintiffs' Complaint.

> fishing, boating, camping, sledding, methods of survival in unexplored areas, and other outdoor activities; (9) to maintain dogs and other pets at Conserve School so that students may be educated in the proper training, care and habits of animals; and (10) to open the school for the regular enrollment of students beginning with the seventh grade, and extending, in the discretion of the trustees, through high school.

(Id. ¶ B) Mr. Lowenstine required the Trustees to focus on long-term sustainability. Any use of Trust principal for the School was subject to the following restriction:

> In making any expenditures out of trust principal, economies must be practiced and the trustees must first determine that there is a reasonable expectation that the trust principal would not be depleted to the extent that its earnings, plus any federal, state or local government grants or assistance, or gifts, grants, bequests or donations from others (which the trustees are hereby authorized to solicit, accept and administer), would be insufficient to continue the operation of the Conserve School and the upkeep and maintenance of the lands and buildings as herein provided.

(Id. ¶ D)

Mr. Lowenstine permitted the trustees to operate the School "in corporate form" through a not-for-profit corporation, but required his trustees to control any such corporation:

> The governing instruments of the corporation shall provide that the trustees, in their capacity as trustees hereunder and acting pursuant to the provisions and intent of this instrument, shall have the controlling votes with respect to all aspects of the operation and administration of the corporation. The trustees are hereby prohibited from at any time relinquishing such control.

(Id. ¶ V 2)

The Conserve School is presently operated by Conserve School Corporation as a four-year boarding school for high school students. (Complaint ¶ 4) On January 30, 2009, it was announced that the School would transition from a four-year high school to a semester school program. (Id. ¶ 12)

Plaintiffs, who are parents of Conserve School students, filed suit asking this Court to (1) override the Trustees' decision and require the School to be a four-year college preparatory school indefinitely, (2) remove Mr. Lowenstine's hand-picked trustees and appoint new trustees, or (3) simply dissolve the Conserve School Corporation entirely and either create a substitute corporation from scratch or transfer all of the Conserve School Trust's assets to the Conserve Community LLC, a limited liability company recently formed by Plaintiffs. If these requests for relief are not granted, Plaintiffs assert alternative claims for intentional misrepresentation, negligent misrepresentation, and fraudulent inducement, as well as punitive damages. All of Plaintiffs' claims should be dismissed.[2]

I. Counts 1 And 2 Should Be Dismissed.

In Counts 1 and 2, Plaintiffs claim that they, as parents of Conserve School students, have a "protectible interest" in both "maintaining Conserve School consistent with plaintiff's [sic] interests," and in "preserving and using the assets of the non-profit Conserve School Trust consistent with the grantor's intent" (as they define it). (Complaint ¶¶ 20, 25) Arguing that these issues are "ripe for judicial determination," Plaintiffs then ask the Court to declare, among other things, that the "defendants' decision to cease operation of the four-year college preparatory school is neither in the best interest of the school nor consistent with its principles" (Complaint ¶ 22(c)); that "defendants violated their fiduciary duties to Conserve School by choosing not to consult with other stakeholders in Conserve School, including faculty, staff, students [and] parents" (id. ¶ 22(d)); and that "defendants violated their fiduciary duties to the Conserve School Trust by choosing not to consult with objective persons, who do not have a

[2] Plaintiffs' request for injunctive relief is discussed more fully in Defendants' Memorandum in Opposition to Plaintiffs' Motion for Emergency Temporary Injunctive Relief (filed this same date). There is no basis for such relief in this case.

conflict of interest, before deciding to stop contributing money" (id. ¶ 27(d)). Plaintiffs lack standing to bring these claims. In any event, their claims are based on the premise that the School must be a four-year college preparatory school, and the language of the trust instrument refutes that premise.

A. Plaintiffs Lack Standing To Sue The Corporation For Injunctive Relief.

As an initial matter, Plaintiffs lack standing to seek injunctive relief against the Corporation. Count 1 seeks an injunction on the basis that the Corporation's directors allegedly breached the fiduciary duties they owed *to the Corporation.* (Complaint ¶ 22) Those duties are not owed to Plaintiffs and cannot form the basis for any claim by Plaintiffs.

Count 1 is an attempt to bring a derivative claim on behalf of the Corporation. Section 181.0741 limits standing to bring a derivative proceeding to one or more members of the corporation having 5% or more voting power or by 50 members, whichever is less, if each of the members was a member of the corporation at the time of the complained-of act and fairly represents the interests of the corporation. Wis. Stat. § 181.0741. The members of Conserve School Corporation are the individual Trustees of the Conserve School Trust. Plaintiffs are not members of the Corporation, so they have no standing to bring this derivative claim.

B. Plaintiffs Lack Standing To Sue The Trust.

Similarly, Plaintiffs lack standing to sue the Trustees of the Trust for breach of their fiduciary duties. Count 2 alleges that the Trustees breached various fiduciary duties *owed to the Trust* and seeks to enforce the Trust (or at least Plaintiffs' interpretation of it). But as Plaintiffs acknowledge (see Complaint ¶ 27(h) and Brief in Support of Plaintiff's Motion for Emergency Temporary Injunctive Relief at 20), the Conserve School Trust is a charitable trust, and Plaintiffs

are not among the limited persons who can seek to enforce a charitable trust under Section 701.10:

> A proceeding to enforce a charitable trust may be brought by:
>
> (1) An established charitable entity named in the governing instrument to which income or principal must or may be paid under the terms of the trust;
>
> (2) The attorney general in the name of the state upon the attorney general's own information or, in the attorney general's discretion, upon complaint of any person;
>
> (3) Any settlor or group of settlors who contributed half or more of the principal; or
>
> (4) A cotrustee.

Wis. Stat. § 701.10(3)(a).

C. The Trust Does Not Require A "Four-Year College Preparatory School."

Plaintiffs' request for injunctive relief also fails because it is premised on the incorrect notion that the School can take only one form: a four-year college preparatory boarding school. Plaintiffs contend that it would be improper to operate any other kind of school or "to stop allocating money to the operation of the four-year college preparatory school" (Complaint ¶¶ 9, 27), and they seek a permanent injunction requiring that the School "continue to operate as a four-year college preparatory school." (Complaint ¶¶ 30, 33) The governing document does not support that relief. On the contrary, the trust instrument vests the trustees with the discretion to decide what form the School should take.

The trust instrument clearly distinguishes between mandatory acts required of the trustees and those left to their discretion. Mr. Lowenstine imposed very few requirements. For example, the trust instrument mandates that the School be nonsectarian, that it never be controlled by outside organizations that sponsor Conserve students, and that its grounds be properly

maintained to preserve their natural state. See, e.g., Trust Instrument, Art. VI, ¶ A ("The Conserve School *shall be* nonsectarian.") (emphasis added); id. ¶ F ("no such organization ... *shall be* given power to physically maintain the school or its grounds, to control the manner in which the school is operated") (emphasis added); id. ¶ L ("I *direct* that the school grounds be maintained so that their natural beauty and wildlife will not be harmed") (emphasis added).

Mr. Lowenstine did not set any requirements for the School's structure or operations, preferring instead to leave those decisions to the trustees. He did not require that the Conserve School be a four-year boarding school for high school students or even that it educate high school students at all. He did not require that the School be a boarding school, that it have any particular number of students, or that it occupy any buildings other than those that existed at his death. Mr. Lowenstine left all those decisions and more to his trusted friends and colleagues, using the permissive language "may." See Myers v. Pink, 191 N.E.2d 659, 664 (Ill. App. Ct. 1963) (stating "shall" and "may" "are not identical in meaning"; "shall" is directive and "may" is permissive).[3]

Plaintiffs have not identified any provision of the trust instrument that requires a four-year college preparatory high school, nor have they identified any provision that would be violated by the semester school model the Trustees have adopted. The Complaint cites Paragraphs B(10) and K of Article VI (Complaint ¶ 27(i)), but neither of those provisions supports Plaintiffs' position.

Paragraph B(10) provides that "the trustees *may* also use net income and principal of the Conserve School Trust: ... (10) to open the school for the regular enrollment of students

[3] Pursuant to Article IX, ¶ B of the trust instrumnt, Illinois substantive law governs the Trustees' conduct and the meaning of the trust instrument. (Trust Instrument, Art. IX, ¶ B) ("This instrument and all dispositions hereunder shall be governed by and interpreted in accordance with the laws of the State of Illinois."))

beginning with the seventh grade, and extending, *in the discretion of the trustees*, through high school." (Trust Instrument, Art. VI, ¶ B (emphasis added)) The language is permissive, not mandatory, and it specifically gives the trustees discretion as to whether the school should include high school students at all.

Paragraph K provides as follows:

> I further *request* that *if, after due consideration, the trustees deem it feasible*, students who are enrolled in public or other private schools *may* be permitted to enroll in the Conserve School to receive tutorial instruction after such students' regular school hours or on Saturdays and school holidays, and during summer vacations.

Id. ¶ K (emphasis added). Paragraph K does not require or prohibit anything. It is explicitly a request, not a directive. It gives the trustees the authority, in their discretion, to permit students from other schools to attend the Conserve School outside their regular school hours. It does not require the School to be a four-year high school (or any type of school), and it does not prohibit a semester school (or any other type of school).

The bottom line is that there is nothing fixed or inviolate about the current school structure. Indeed, a core principle of Mr. Lowenstine's plan was to invest his trustees with maximum flexibility. Enjoining the Trustees to maintain the current structure would rewrite Mr. Lowenstine's estate plan and improperly override his intent to place that decision in the hands of his trustees.

D. The Trust Instrument Defeats Plaintiffs' Conflict of Interest Claim.

Plaintiffs also base their request for declaratory judgment on an allegation that the Conserve School Directors and Trustees have a conflict of interest. Specifically, Plaintiffs allege that Defendants cannot be impartial due to their roles as Directors of the Conserve School

Corporation, trustees of the Conserve School Trust, and directors of Central Steel & Wire. (See Complaint, ¶¶ 22(b), 27(b)) Once again, the trust instrument's plain language defeats this claim.

Indeed, the trust instrument reveals that Mr. Lowenstine anticipated and endorsed these overlapping relationships. First, Mr. Lowenstine assumed that Central Steel shares would "represent substantially more than half in value of all of the assets of the Conserve School Trust." (Trust Instrument, Art. VIII, ¶ C) The Trust also specifies that "the trustees should be in control of CENTRAL STEEL and be intimately familiar with and skilled in the operation of CENTRAL STEEL's business." Id. To that end, Mr. Lowenstine provided that, "at least upon [his] death, a majority of the Individual Trustees w[ould] be individuals who then [we]re Central Steel Directors." Id.

Recognizing that a potential conflict might arise between Central Steel and the interests of the Trust, Article VIII, Section I of the Trust authorizes the trustees to consider primarily the best interests of Central Steel:

> In voting the shares of CENTRAL STEEL, I authorize the trustees to consider primarily the best interests of CENTRAL STEEL, since it is my belief that attention to the best interests of CENTRAL STEEL ultimately will best serve the interests of the beneficiaries of the trusts hereunder. I further authorize the trustees to take such actions as they deem appropriate with respect to matters involving CENTRAL STEEL in which a trustee, or all of the trustees, may be individually interested as a director or officer of CENTRAL STEEL notwithstanding that such action may be adverse to the best interests of the beneficiaries of any trust hereunder, provided such action is not in breach of their fiduciary duties in such other capacity or other capacities. Any action taken in those respects shall be binding and conclusive on the beneficiaries of the trusts hereunder as if no such relationship or conflict of interest existed, and the trustees shall be relieved, to the maximum extent permitted by law, of any liability for actions so taken.

(Trust Instrument, Art. VIII, ¶ I) Clearly, the mere fact that the Conserve School Trustees and Directors are also employed by Central Steel is not a basis for finding an impermissible conflict of interest, let alone a breach of fiduciary duty warranting a declaratory judgment, since Mr.

Lowenstine expressly waived such conflicts of interest. See, e.g., Dick v. Peoples Mid-Illinois Corp., 609 N.E.2d 997, 1002 (Ill. App. Ct. 1993) ("The creator of the trust can waive the rule of undivided loyalty by expressly conferring upon the trustee the power to act in a dual capacity, or he can waive the rule by implication where he knowingly places the trustee in a position which might conflict with the interest of the beneficiaries. Where a conflict of interest is approved or created by the testator, the fiduciary will not be held liable for his conduct unless the fiduciary has acted dishonestly or in bad faith, or has abused his discretion.").

Despite the trust's express waiver of any conflicts, Plaintiffs go one step further and claim that the trust provisions themselves, not merely the Trustees' conduct, violate prudent investor rules under state law.[4] (See Complaint ¶ 27(h) (citing Trust Instrument, Art. VIII, ¶¶ C, D, E, F, and I)) The Trust provisions Plaintiffs cite recommend not to sell Central Steel stock, appoint the Central Steel directors as trustees, and excuse any conflict between their duties to Central Steel and the Conserve School. Contrary to Plaintiffs' claim, these provisions are fully supported by the Illinois prudent investor rule insofar as it is relevant, just as they are by the common law. The applicable Illinois statute states that the provisions of the prudent investor rule "may be expanded, restricted, eliminated or otherwise altered by express provision of the trust instrument" and that "the trustee is not liable to a beneficiary for the trustee's reasonable and good faith reliance on those express provisions." 760 ILCS 5/5(b).[5] Therefore, Mr.

[4] Although Plaintiffs state generally that certain provisions of the trust instrument violate "state law" and "the public intent of a non-profit Trust," the only authority they specifically reference is the "Uniform Prudent Investors' Act."

[5] As noted above, Illinois law governs the interpretation of the trust instrument, but Wisconsin law on this point is no different. See Wis. Stat. 881.01(2)(b) ("The prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a will, trust, or court order. A fiduciary is not liable to a beneficiary to the extent that the fiduciary acted in reasonable reliance on the provisions of the will, trust, or court order.").

Lowenstine's directions concerning the Central Steel stock cannot violate the prudent investor rule.[6]

II. Counts 3 And 4 Should Be Dismissed.

Counts 3 and 4 for "injunctive relief" should be dismissed because they are not independent causes of action, but rather remedies inextricably linked to the declaratory judgments sought in Counts 1 and 2. See Dan B. Dobbs, THE LAW OF REMEDIES 163 (2d ed. 1993) ("An injunction is a remedy ... ."); Shanak v. City of Waupaca, 185 Wis. 2d 568, 599, 518 N.W.2d 310, 321 (Wis. Ct. App. 1994) (law must confer a legal right or create cause of action to provide basis for right to injunctive relief); Wussow v. Commercial Mechanisms, Inc., 97 Wis. 2d 136, 151, 293 N.W.2d 897, 905 (Wis. 1980) (treating cause of action as a prerequisite for to injunctive relief and punitive damages).

III. Counts 5-7 Should Be Dismissed.

A. Plaintiffs' Single Alleged Misrepresentation Cannot Support A Fraud Claim.

Plaintiffs' claims for intentional misrepresentation (Count 5), negligent misrepresentation (Count 6), and fraudulent inducement (Count 7) are all based on a single alleged misrepresentation: that "Defendants made representations orally and in writing that it was the intent of Conserve School to operate as a four year school." (Complaint ¶¶ 36, 45, 52) The Court need not reach the question whether there were any such representations and, if so, whether they were untrue at the time -- which Defendants strongly deny. This allegation, even if it were true, is insufficient to support any of Plaintiffs' fraud claims because all three of the

[6] Plaintiffs' final alleged basis for injunctive relief is that the Trustees did not consult "objective persons ... before deciding to stop contributing money" to the School. (Complaint ¶ 27(d)) There is no requirement in the trust instrument or at common law to do so. The trust instrument expressly grants the Trustees the discretion to create and administer the Conserve School.

causes of action they attempt to assert require a statement of *present existing fact.* See, e.g., Malzewski v. Rapkin, 2006 WI App 183, ¶ 20, 296 Wis. 2d 98, 113, 723 N.W.2d 156, 163 ("The elements of negligent misrepresentation are: (1) the defendant made a representation of fact; (2) the representation was untrue; (3) the defendant was negligent in making the representation; and (4) the plaintiff believed that the representation was true and relied on it."); Betty Andrews Revocable Trust v. Vrakas/Blum, S.C., No. 2007AP1414, 2008 WL 4810769, ¶ 18 & n.4 (Wis. Ct. App. Nov. 6, 2008) (noting that, in addition to the elements of claim for negligent misrepresentation, "[i]ntentional misrepresentation has two additional elements: that the defendant knew the representation of fact was untrue or was reckless in making the misrepresentation, and that the defendant intended to deceive the plaintiff to the plaintiff's pecuniary damage"); Douglas-Hanson Co., Inc. v. BF Goodrich Co., 229 Wis. 2d 132, 144 n. 2, 598 N.W.2d 262 (Wis. Ct. App. 1999) (noting that a claim of fraudulent inducement requires showing a statement of fact that is untrue, which is made with the intent to defraud and for the purpose of inducing the other party to act on it, and that the other party relied on the false statement to his or her detriment), aff'd, 2000 WI 22, 233 Wis. 2d 276, 607 N.W.2d 621 (Wis. 2000).

The single alleged statement on which Plaintiffs rely does not qualify. "'[P]romises or representations of things to be done in the future are not statements of fact.'" Wausau Med. Ctr., S.C. v. Asplund, 182 Wis. 2d 274, 291, 514 N.W.2d 34, 42 (Wis. Ct. App. 1994) (quoting U.S. Oil Co. v. Midwest Auto Care Servs., 150 Wis. 2d 80, 87, 440 N.W.2d 825, 827 (Wis. Ct. App. 1989)). "'Statements of fact must relate to present or preexisting facts, not something to occur in the future.'" Id. This has long been the rule in Wisconsin. See, e.g., Stuart v. Weisflog's Showroom Gallery, Inc., 2008 WI 22, ¶ 67, 308 Wis. 2d 103, 139, 746 N.W.2d 762, 780

("Representations that are promises of future performance are not actionable as misrepresentations, unless the person promising future performance had no intention of carrying out that promise at the time he made it.") (citing Consol. Papers, Inc. v. Dorr-Oliver, Inc., 153 Wis. 2d 589, 594, 451 N.W.2d 456 (Wis. Ct. App. 1989)); Hartwig v. Bitter, 29 Wis. 2d 653, 656, 139 N.W.2d 644, 646 (Wis. 1966) ("[T]he general rule [is] that, in actions for deceit, the fraudulent misrepresentations must relate to present or pre-existing events or facts and cannot be merely unfulfilled promises or statements of future events."); Friends of Kenwood v. Green, 2000 WI App 217, ¶ 13, 239 Wis. 2d 78, 87, 619 N.W.2d 271, 275 ("[A] prediction as to events to occur in the future is to be regarded as a statement of opinion only, on which the adverse party has no right to rely.") (citing Asplund, 182 Wis. 2d at 291, 514 N.W.2d at 42).

Although Plaintiffs also allege that "Defendants had a duty to disclose the fact that the school would likely not continue as a four year school" (Complaint ¶¶ 42, 50), there is not and there cannot be a duty to disclose the possibility of future events. See Bellon v. Ripon College, 2005 WI App 29, ¶ 10, 278 Wis. 2d 790, 797, 693 N.W.2d 330, 333. In Bellon, Ripon College notified plaintiff, an assistant professor of philosophy, that her position would be eliminated after she had turned down an offer of employment from another university. Id. at ¶ 3. Subsequently, Bellon filed suit for both intentional and negligent misrepresentation. Id. at ¶ 4. Bellon argued that Ripon had misrepresented the College's financial situation, which in turn had undermined her ability to make an informed choice. Id. at ¶ 7. As relevant, the court, observing that "Bellon [sought] to impose a duty on Ripon to supply predictions, not facts" reconfirmed that "predictions as to future economic events are not generally actionable misrepresentations." Id. at ¶ 10 (citing Loula v. Snap-On Tools Corp., 175 Wis. 2d 50, 54, 498 N.W.2d 866 (Wis. Ct. App. 1993)). Moreover, the court concluded that there is no duty to foresee future adverse changes:

"It would be illogical to hold that failure to predict the future constitutes misrepresentation. The record demonstrates that Bellon's teaching position, along with others, was eliminated due to unforeseen economic circumstances. Ripon had no duty to predict future economic realities." Id. Bellon is directly on point. Defendants had no duty to disclose information they did not have and did not know regarding the future direction of the Conserve School. Accordingly, Counts 5-7 should be dismissed.

B. Counts 5 and 7 Are Not Pled With Particularity.

Even if Plaintiffs had alleged a misstatement of present existing fact, their intentional misrepresentation and fraudulent inducement claims fail because Plaintiffs have not even attempted to plead fraud with the required particularity.

Under Wisconsin law, in "all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Wis Stat. § 802.03(2). The Wisconsin Supreme Court has "interpreted this statute to require that 'allegations of fraud must specify the particular individuals involved, where and when misrepresentations occurred, and to whom misrepresentations were made.'" John Doe 1 v. Archdiocese of Milwaukee, 2007 WI 95, ¶ 39, 303 Wis. 2d 34, 62, 734 N.W.2d 827, 840 (quoting Kaloti Enters., Inc. v. Kellogg Sales Co., 2005 WI 111, ¶ 21, 283 Wis. 2d 555, 699 N.W.2d 205). In other words, Plaintiffs must detail "the "who, what, when, where and how'" of any alleged fraud. See Friends of Kenwood v. Green, 2000 WI App 217, ¶ 14, 239 Wis. 2d 78, 87, 619 N.W.2d 271, 276 (citation omitted). "This detailed pleading [requirement] protects persons from casual allegations of serious wrongdoing and puts defendants on notice 'so that they may prepare meaningful responses to the claim.'" Putnam v. Time Warner Cable of Southeastern Wis., Ltd. P'ship, 2002 WI 108, ¶ 26, 255 Wis. 2d 447, 464, 649 N.W.2d 626, 635 (quoting Rendler v. Markos, 154 Wis. 2d 420, 428,

453 N.W.2d 202 (Wis. Ct. App. 1990)); see also Friends of Kenwood, 2000 WI App 217, ¶ 14, 239 Wis. 2d at 87, 619 N.W.2d at 276 (stating the particularity requirement "is 'designed to protect defendants whose reputation could be harmed by lightly made charges of wrongdoing'").

Plaintiffs' cursory pleadings fall far short of the required specificity. Plaintiffs do not identify a single instance in which a particular defendant made the alleged representation that "it was the intent of the Conserve School to operate as a four year school," nor do they identify any particular plaintiff who supposedly relied upon that communication, much less when or where the alleged statement was made. (See Complaint ¶ 36) That omission is fatal to Counts 5 and 7.

Friends of Kenwood is directly on point. In that case, members of a congregation alleged that the board fraudulently misrepresented that it would not abandon the original temple in favor of a new facility. Friends of Kenwood, 2000 WI App 217, ¶ 9. Unlike Plaintiffs here, the plaintiffs in Friends of Kenwood cited numerous letters and newspaper articles containing the alleged misrepresentations. Id. at ¶ 18. Despite those specific facts, the court in Friends of Kenwood dismissed the complaint because it lumped all of the congregation and board members together without identifying which board members were involved in which misrepresentations and which congregants relied on which representations. Id. at ¶ 20.

Plaintiffs' Complaint is even more lacking. It contains no identification of when or in what form any representation was made and who made it. Nor does it attribute any representation to any Conserve trustee or board member or any act of reliance by any plaintiff. Without this information, Defendants cannot reasonably respond to the Complaint. Accordingly, Counts 5 and 7 should be dismissed.

IV. Plaintiffs' Request for Punitive Damages Is Not An Independent Cause Of Action.

Finally, Plaintiffs' Count 8, which purports to assert a claim for "punitive damages," fails to state a claim because punitive damages are a remedy, not a separate cause of action. See, e.g.,

22 Am. Jur. 2d Damages § 251 ("The foundational requirement for punitive damages is that some legally protected interest has been invaded. Also, as a rule, there is no cause of action for punitive damages by itself; a punitive-damages claim is not a separate or independent cause of action. Rather, a punitive-damages award is an element of recovery, a type of relief, or an additional remedy."); Norwest Bank Wisconsin Eau Claire, N.A. v. Plourde, 185 Wis. 2d 377, 518 N.W.2d 265 (Wis. Ct. App. 1994) (party must establish a cause of action to be entitled to possible remedy of punitive damages). This is consistent with how Wisconsin courts construe actions seeking punitive damages. See, e.g., Tietsworth v. Harley-Davidson, Inc., 2007 WI 97, ¶ 66, 303 Wis. 2d 94, 130, 735 N.W.2d 418, 435 ("It appears then that [Plaintiff] deliberately chose a strategy to pursue tort claims for the opportunity to recover punitive damages."); Cieslewicz v. Mutual Serv. Cas. Ins. Co., 84 Wis. 2d 91, 97, 267 N.W.2d 595, 598 (Wis. 1978) ("It is the infliction of bodily injury which gives rise to the cause of action. Once the cause of action arises, punitive or multiple damages are awarded in connection with, or because of, the injuries incurred.") (citation omitted); see also Plourde, 185 Wis. 2d at 393, 518 N.W.2d at 270 ("[Plaintiff] has established a cause of action in tort. Depending upon the evidence, he may then be entitled to a punitive damages instruction.") (citations omitted). Therefore, Count 8, too, should be dismissed.