

No. A10-1854

STATE OF MINNESOTA
IN SUPREME COURT

Hardin County Savings Bank, Walworth State Bank,
Eitzen State Bank, Northern National Bank,
Kindred State Bank and First National Bank,

Plaintiffs/Appellants,

vs.

James H. Bedard, Inc.

Defendant/Respondent.

RESPONDENT'S BRIEF

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STATEMENT OF LEGAL ISSUES

Whether the District Court erred in dismissing the Bondholders' claim of negligent misrepresentation against Bedard for failing to plead the circumstances constituting fraud with particularity as required by Rule 9.02 of the Minnesota Rules of Civil Procedure.

The issue was raised in the Bondholders' Memorandum of Law in Opposition to Defendants' Motion to Dismiss (3/1/11 APP. 101; 10/25/11 APP. 145), and their Request to the Court for Reconsideration of its April 28, 2009 Order. 3/1/11 APP. 149-50; 10/25/11 APP. 41-42.

The District Court dismissed the Bondholders' claim of negligent misrepresentation against Bedard for failing to plead the circumstances constituting fraud with particularity and later denied the Bondholders' request for reconsideration. 10/25/11 APP. 33, 44-45.

The issue was properly preserved for appeal by the Bondholders' Opposition to Defendants' Motion to Dismiss. 3/1/11 APP. 101-33; 10/25/11 APP. 145-77. The Bondholders timely sought further review of the Court of Appeals' decision. ADD. 14-19.

Minnesota Rules of Civil Procedure 9.02

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United States ex rel. Costner v. United States, 317 F.3d 883 (8th Cir. 2003)

STATEMENT OF THE CASE

On November 26, 2008, Bedard filed a motion to dismiss all claims asserted against it in Appellants' First Amended Complaint, including the negligent misrepresentation claim at issue on this appeal. The Honorable David J. Ten Eyck granted Bedard's motion on April 28, 2009 and dismissed Bedard from the case. In his decision, Judge Ten Eyck ruled the Appellants (hereinafter "Bondholders") failed to plead their negligent misrepresentation claim against Bedard with particularity as required under Rule 9.02 of the Minnesota Rules of Civil Procedure.

After this decision, in a letter addressed to Judge Ten Eyck on May 13, 2009, the Bondholders sought leave to file a motion for reconsideration or, in the alternative, leave to file a second amended complaint. On May 21, 2009, Judge Ten Eyck denied both requests. Following entry of a final judgment on the remaining claims on October 14, 2011, the Bondholders appealed.

On September 26, 2011, the Court of Appeals affirmed the District Court's ruling, finding that the Bondholders' First Amended Complaint (hereinafter "Complaint") fails to meet the heightened pleading standard of Rule 9.02 of the Minnesota Rules of Civil Procedure.

STATEMENT OF FACTS

I. THE PROJECT

In late 2001, a developer sought to develop approximately forty acres of real estate in Brainerd, Minnesota into single family homes. 3/1/11 APP. 73, ¶¶ 14-15; 10/25/11 APP. 117, ¶¶ 14-15. The City of Brainerd established a tax increment financing (TIF) district for the developer in 2002 for 20 single family homes. 3/1/11 APP. 73, ¶ 18; 10/25/11 APP. 117, ¶ 18. On August 25, 2003, the City approved a resolution authorizing the issuance of General Obligation Improvement Bonds, which included \$1,085,000 for improvements for the Brainerd Oaks Project (“Project”). Id. at ¶ 20.

The Housing and Redevelopment Authority of the City of Brainerd (“HRA”) later assumed the Project from the developer and planned to issue taxable revenue bonds (“Bonds”) to acquire and improve the real estate. 3/1/11 APP. 74, ¶ 21; 10/25/11 APP. 118, ¶ 21. In preparation for the issuance of the Bonds, the HRA hired Dougherty & Company, LLC (“Dougherty”) as an underwriter for the bond issuance. Id. at ¶ 25. The Project consisted of 96 residential lots and included the construction of two model homes. Id. at ¶ 22.

A. Bedard’s Appraisal and Feasibility Study

Dougherty and the HRA retained James Bedard, principal of Bedard, Inc. (“Bedard”), to prepare an appraisal (“Appraisal”) of the residential and commercial lots to be developed, and of two model homes to be built in connection with the Project; the Appraisal was made as of October 27, 2003.

3/1/11 APP. 76, ¶¶ 29, 30 & 32; 10/25/11 APP. 120, ¶¶ 29, 30 & 32. The Bondholders allege the Appraisal was “based on flawed absorption and discount rates and opined the real estate (including 2 model homes, 94 residential lots and 2 commercial lots) was worth \$4,127,670, which overstated the value of the collateral by, at least \$1 million.” Id. at ¶ 32.

Bedard also prepared a feasibility study (“Feasibility Study”) on the Project. 3/1/11 APP. 77, ¶ 40; 10/25/11 APP. 121, ¶ 40. The Feasibility Study concluded it was achievable to sell all the lots in the development within a seven year period. Id. at ¶ 41. The Bondholders allege the Feasibility Study was flawed because it “restated the erroneous lot value from [sic] the Appraisal and relied upon those flawed values and failed to properly take into account the special assessment cost on the price of a lot to reach a seven-year absorption rate.” Id. at ¶ 42.

B. The Offering Memorandum

The Offering Memorandum stated the total appraised “value of the Project was \$4,127,670, including 94 residential lots, 2 model homes and 2 commercial lots.” 3/1/11 APP. 78, ¶ 46; 10/25/11 APP. 122, ¶ 46. The Bondholders allege the Offering Memorandum failed to disclose a cost of \$11,262 for a special assessment that would be levied against each of the 96 residential lots. 3/1/11 APP. 79, ¶ 48; 10/25/11 APP. 123, ¶ 48. The Bondholders allege the “Project was not economically viable when the bonds were issued because the buyers of the lot

would, in the aggregate, have to repay \$3.3 million in bonds along with \$1,085,000 in special assessments.” Id. at ¶ 51.

C. Bondholders’ Purchase of Bonds and the Mortgage

On November 1, 2003, an Indenture of Trust was entered into between U.S. Bank National Association as a Trustee (“Trustee”) and the Bondholders. 3/1/11 APP. 80, ¶ 56; 10/15/11 APP. 124, ¶ 56. That same day, the HRA and the Trustee entered into a Mortgage (“Mortgage”) on behalf of the Bondholders. Id. at ¶ 59. The Bondholders claim the Mortgage led them to believe the HRA would pay accrued taxes and special assessments on the Project until the lots were sold to buyers. Id. at ¶ 58. The Bondholders purchased all \$3,300,000 of the Bonds issued by the HRA. 3/1/11 APP. 81, ¶¶ 60-61; 10/25/11 APP. 125, ¶¶ 60-61. The Bonds were set to mature on December 1, 2006. 3/1/11 APP. 82, ¶ 68; 10/25/11 APP. 126, ¶ 68.

D. The Project

In 2004, two model homes were built for the Project and no lots were sold. 3/1/11 APP. 81, ¶ 64; 10/25/11 APP. 125, ¶ 64. In 2005, one model home and one lot were sold. Id. at ¶ 65. One lot sale occurred in 2006. 3/1/11 APP. 82, ¶ 69; 10/25/11 APP. 126, ¶ 69.

The Bondholders allege they made a “call” on the Bonds on December 11, 2006. Id. at ¶ 70. On February 20, 2007, the City approved the expansion of the TIF district within the Project. Id. at ¶ 72. On March 19, 2007, the City authorized the issuance and sale of \$4,925,000 of General Obligation Bonds (“GO Bonds”),

which were intended to be used to repay \$2.74 million the HRA owed to the Bondholders, however, the City did not issue the GO Bonds at that time because a public hearing was required to be held before the City could issue the GO Bonds. Id. at ¶¶ 73-74. The public hearing was set for April 16, 2007. Id. at ¶ 74.

E. The Ludenia Appraisal

On April 12, 2007, a new appraisal of the Project was prepared for the City by William R. Ludenia (the “Ludenia Appraisal”). Id. at ¶ 75. The Ludenia Appraisal opined that the value as of April 12, 2007 (over three years after the Bedard Appraisal) of the 83 remaining lots (after taking into account the two sold lots, model home and other lots the Authority purchased), was \$530,000. 3/1/11 APP. 83, ¶ 76; 10/25/11 APP. 127, ¶ 76. The Ludenia Appraisal stated “as of April 12, 2007, the unpaid balance for prior assessments was \$551,729 and for 2007 was \$128,996.41” and that each lot was encumbered with delinquent special assessments of \$7,500 along with current taxes and special assessments of \$14,638. 3/1/11 APP. 83, ¶¶ 77-78; 10/25/11 APP. 127, ¶¶ 77-78. The Bondholders allege the difference in value between the Bedard Appraisal and the Ludenia Appraisal was due to “Bedard’s failure to properly account for the impact on the ability to sell lots based on the special assessments and taxes.” Id. at ¶ 79.

F. Default on Bonds

After the April 16, 2007 public hearing, the City rejected the issuance of the GO Bonds. Id. at ¶¶ 80-82. On November 16, 2007, the HRA provided notice of

default on the Bonds to the Trustee and Dougherty. 3/1/11 APP. 84, ¶ 84; 10/25/11 APP. 128, ¶ 84.

II. IOWA FEDERAL COURT ACTION

On April 18, 2008, the Bondholders filed suit in United States District Court for the Northern District of Iowa against the Defendants, asserting claims for federal securities fraud and sixteen state law claims. On September 18, 2008, the Federal District Court granted the Defendants' motion to dismiss the federal securities fraud claims with prejudice, finding that the Bondholders failed to state a claim for federal securities fraud.

III. THE BONDHOLDERS' COMPLAINT AND FIRST AMENDED COMPLAINT

Following dismissal of the federal securities fraud claims in Iowa, the Bondholders filed this action in Minnesota state court on October 29, 2008. On January 12, 2009, the Bondholders filed their First Amended Complaint and Jury Demand, which became the operative complaint without leave of the court under Rule 15.01 of the Minnesota Rules of Civil Procedure. The First Amended Complaint added to Paragraph 26 by providing specific examples of statements made by Dougherty employees that the Bondholders allege led them to believe "the City would not allow HRA to default on the Bonds because it would harm the City's ability to issue bonds in the future." 3/1/11 APP. 74, ¶ 26; 10/25/11 APP. 119, ¶ 26. The First Amended Complaint also revised two other paragraphs under

Count VI-Fraud Dougherty. 3/1/11 APP. 93, ¶¶ 148-49; 10/25/11 APP. 137, ¶¶ 148-49.

IV. MOTION TO DISMISS

Bedard challenged the Iowa statutory securities fraud and negligent misrepresentation claims for lack of pleading with particularity. Despite the Bondholders' amendment, Bedard still argued the First Amended Complaint fell far short of the heightened pleading standard mandated by Rule 9.02 because the negligent misrepresentation claim was "vague." The Honorable David Ten Eyck dismissed the negligent misrepresentation claim against Bedard holding that the Complaint "only vaguely alleges that Bedard negligently supplied false information to [the Bondholders] and fails to allege any specific details regarding the alleged negligent misrepresentation." 3/1/11 ADD. 19.

V. THE BONDHOLDERS' REQUEST FOR RECONSIDERATION OR, IN THE ALTERNATIVE, LEAVE TO AMEND THEIR FIRST AMENDED COMPLAINT AND THE COURT'S DENIAL

In a letter to Judge Ten Eyck on May 13, 2009, the Bondholders requested the district court reconsider its ruling and, in the alternative, requested leave to amend the negligent misrepresentation count. The district court denied the Bondholders' motion to reconsider because the Bondholders failed to show "compelling circumstances." *Id.* at 29. The district court explained that the Bondholders "merely offered generic recitations of negligent misrepresentation in the Complaint and their Complaint fails to plead all the requisite elements of

negligent misrepresentation.” Id. The district court similarly denied the Bondholders’ request for leave to amend their First Amended Complaint.

VI. COURT OF APPEALS’ DECISION

The Court of Appeals affirmed the district court’s ruling for two separate and well-reasoned grounds. First, the Court of Appeals held that the Bondholders could not “simply regurgitate 176 elements of a complex complaint against multiple defendants in one catch-all provision” to meet the heightened pleading requirements. 10/25/11 ADD. 7. Second, the Court of Appeals held that even if all the other allegations in the First Amended Complaint were considered, the Bondholders still failed to plead with particularity because the First Amended Complaint contains no indication of what was actually negligently misrepresented by Bedard. Id.

ARGUMENT

I. THE COURT OF APPEALS AND DISTRICT COURT CORRECTLY DETERMINED THE BONDHOLDERS HAVE FAILED TO PLEAD THEIR NEGLIGENT MISREPRESENTATION CLAIM WITH SUFFICIENT PARTICULARITY IN ACCORDANCE WITH THE RULES OF CIVIL PROCEDURE

The sufficiency of pleading in a complaint is a question of law that is reviewed de novo. Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 553 (Minn. 2003). This Court “must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party.” Id.

Rule 9.02 of the Minnesota Rules of Civil Procedure requires that all “averments of fraud or mistake” be “stated with particularity.” Minn. R. Civ. P. 9.02. A negligent misrepresentation claim constitutes fraud under Minnesota law. General Ins. Co. of America v. Ledowsky, 252 N.W.2d 255 (Minn. 1977). Particularity is therefore also required for claims of negligent misrepresentation. Juster Steel v. Carlson Cos., 366 N.W.2d 616, 618-19 (Minn. Ct. App. 1985). And, all elements of the claim must be pled with particularity. Seafirst Commercial Corp. v. Speakman, 384 N.W.2d 895, 899 (Minn. Ct. App. 1986). Minnesota courts have looked to Federal courts’ interpretation of the Federal pleading rules for further guidance, because Rules 8.05(a) and 9.02 are virtually identical to Rules 8(d)(i) and 9(b) of the Federal Rules. DLH, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn. 1997).

Negligent misrepresentation occurs when a person, in the course of his profession during a transaction he has a financial interest in:

1. Supplies false information to another person to guide them in that person’s own business transactions, and
2. Fails to use reasonable care or competence in obtaining that information or communicating it, and
3. The other person relied on the information, and
4. The other person was justified in relying on the information, and
5. The other person was financially harmed by relying on the information.

CIVJIG 57.20; Bonhiver v. Graff, 248 N.W.2d 291 (Minn. 1976).

Here, the district court and the Court of Appeals have correctly held that the Bondholders' Complaint fails to adequately plead with particularity the elements of a prima facie cause of action for negligent misrepresentation.

A. The Bondholders' Adoption of the Preceding 176 Paragraphs Fails the Heightened Pleading Requirements Because Bedard Is Not Able To Respond Specifically and Quickly To the Allegations

The Bondholders argue the entire Complaint contains simple, concise and direct allegations of Bedard's negligent misrepresentation. The Bondholders admit the allegations contained in the count against Bedard (paragraphs 178 to 185) contain few factual specifics of the claim of negligent misrepresentation. Appellants' Brief, p. 24. Rather than plead the negligent misrepresentation claim with particularity, the Bondholders instead argued the heightened pleading requirement was satisfied by considering the other allegations asserted against the other two defendants that were scattered throughout the 185 paragraphs of the Complaint. As Judge Ten Eyck so aptly noted, this type of drafting results in the parties having to engage in "piecemeal hunting of incorporated allegations in the Complaint." 3/1/11 ADD. 29. And, as the Court of Appeals reasoned in affirming the district court's decision, simply referring Bedard to 176 paragraphs in a complex complaint against multiple defendants undermines the purpose of requiring a fraud claim to be pleaded with particularity so that a defendant can respond specifically and quickly to the potentially damaging allegations. 10/25/11 ADD. 7; see also United States ex rel. Costner v. United States, 317 F.3d 883, 888

(8th Cir. 2003) (pleading requirements “intended to enable the defendant to respond specifically and quickly to the potentially damaging allegations”).

The Bondholders cite to several cases for their position that their Complaint contains a sufficient level of particularity to survive a challenge to the claim of negligent misrepresentation. Appellants’ Brief, p. 25. The most important thing about each of the cases cited by the Bondholders is that the defendants in each case were at least provided a specific example of what was misrepresented. Here, while the Bondholders allege the Appraisal overstated the value, there is absolutely no detail provided about why the value assessed by Bedard was erroneous. Unlike in the cases cited by the Bondholders, Bedard is unable to determine from the Complaint what it is he misrepresented.

B. It Was Unnecessary for the Court of Appeals to Explicitly Apply The Who, What, When, Where and How Test Because Bondholders’ Complaint Fails to Identify What Was Negligently Misrepresented by Bedard

The Bondholders argue the Court of Appeals erred by failing to apply the “who, what, when, where and how” test in reaching its decision. Appellants’ Brief, pp. 18-19. The Bondholders claim that had the test been applied, the Complaint would have provided the necessary information for the negligent misrepresentation claim against Bedard. Specifically, the Bondholders maintain the following information is provided in the Complaint to adequately plead their negligent misrepresentation claim: who-Bedard; what-Appraisal and Feasibility Study; where-Brainerd Oaks Project, Brainerd, Minnesota; and how-erroneous

Appraisal misrepresented collateral value along with a flawed and contradictory Feasibility Study. Id. at 19. Despite this contention, Bedard is still unable to ascertain how the Appraisal and Feasibility Study were in any way erroneous.

The Bondholders' Complaint most importantly fails to identify what Bedard negligently misrepresented. The Bondholders allege the Appraisal, as it pertained to the residential land with the infrastructure improvements, overvalued the lots, but this allegation is nothing more than a conclusory allegation that is unsupported by the true nature of the Appraisal and Feasibility Study.

As Bondholders specifically indicated in their Complaint, "The Bedard Appraisal took 'into account the improvements such as streets, utilities, sidewalks, plantings in addition to the existing approvals, bonding and tax increment financing.'" 3/1/11 APP. 76, ¶ 34; 10/25/11 APP. 120, ¶ 34. However, despite the fact that the Bondholders allege the Appraisal valued each lot at \$43,386 (Id. at ¶ 33), the Bondholders proceed to allege that "a buyer would have to pay \$43,386 for the lot plus the \$11,302 special assessment which meant the true cost of the lot was \$54,688." 3/1/11 APP. 72, ¶ 37; 10/25/11 APP. 121, ¶ 37. There is no allegation in the Bondholders' Complaint that Bedard was somehow responsible (or if so how) for setting the prices that were ultimately marketed to potential buyers. In other words, there is no allegation in the Bondholders' Complaint that would provide an explanation for how Bedard is somehow

responsible for the failure of the lots to sell at a price that can be found nowhere in the Appraisal (\$54,688).

The Private Offering Memorandum discussed the value of the Project as collateral and explicitly stated the “values were determined by taking into account the partially completed improvements that are being constructed by the City, including streets, curbs, gutters, sidewalks and public utilities on the property as well as other improvements to be made by the Issuer.” 3/1/11 APP. 277; 10/25/11 APP. 319.

The Bedard Appraisal and Feasibility Study, included as Exhibits to the Bondholders’ Complaint, clearly show there was no misrepresentation on the part of Bedard. In fact, Bedard was quite clear in explaining that his values already included the improvements the Bondholders assume the buyers were to be charged in addition to Bedard’s values (i.e., double charged), a fact that the Bondholders readily acknowledge in their Complaint. 3/1/11 APP. 76, ¶ 36; 10/25/11 APP. 120, ¶ 36.

The letter accompanying Bedard’s Appraisal explicitly stated the value included consideration of the site and common area improvements. 3/1/11 APP. 161; 10/25/11 APP. 203.

In the Site Description of the Appraisal of the residential lots, Bedard explained, “subdivision plans called for the placement of a total infrastructure package including streets, sidewalks, water, sewer, curb, and gutter.” 3/1/11 APP. 177; 10/25/11 APP. 219. In assessing the value of the lots, Bedard specifically

stated, “the \$36,500.00 also takes into account the improvements such as streets, utilities, sidewalks, and plantings, in addition to the existing approvals, bonding, and tax increment financing.” 3/1/11 APP. 189; 10/25/11 APP. 231. Bedard then adjusted the \$36,500 value to account for the individual improvements to the property which impacted each lot by \$4,252 (3/1/11 APP. 190 & 194; 10/25/11 APP. 232 & 236) and the common improvements to the property which impacted each lot by \$2,634 (3/1/11 APP. 190 & 195; 10/25/11 APP. 232 & 237). Bedard included a breakdown of these individual and common improvements so those relying on the Appraisal could clearly understand the improvements he was including in his value. 3/1/11 APP. 194-95; 10/25/11 APP. 236-37.

Most importantly, Bedard identified the \$11,262.11 per lot impact for the sewer, water, storm, and road improvements he considered when he determined the lot values. After taking into consideration all of the individual and common improvements, Bedard reached an adjusted site value of \$43,386 per lot¹. 3/1/11 APP. 190; 10/25/11 APP. 232.

Finally, Bedard determined the actual estimated value of the residential portion of the Project to be \$3,282,670.00, not including the two model home lots. Bedard specifically noted, “the value is based upon the assumption that the subdivision will be completed in a professional manner according to the plans and specifications provided the appraiser.” 3/1/11 APP. 191; 10/25/11 APP. 233.

¹ Notably, Bedard’s Appraisal never assigns a value of \$54,688 to the lots, the value the Bondholders allege Bedard’s Appraisal forced them to market the property for.

Yet again, Bedard reminded the recipients of the Appraisal that the \$3,282,670.00 value is “subject to completion of the subdivision improvements in a professional manner according to the plans and specifications provided by appraiser.” 3/1/11 APP. 200; 10/25/11 APP. 242. Finally, on October 29, 2003, in the letter accompanying the completed appraisal reports, Bedard wrote again, “the residential value does include the physical improvements needed to develop the subdivision such as the streets, sewers, and water utilities.” 3/1/11 APP. 271; 10/25/11 APP. 313. Given these statements, it was quite obvious the values determined by Bedard assumed a completed subdivision, not just vacant lots with no improvements.

Bedard’s Appraisal contains no instructions or opinions on how to market the Project, who should pay for the improvements, or whether he believes the \$11,262 (already included in his value) should be charged again to any potential buyer in addition to his final estimated value of \$43,386. Just as importantly, the Bondholders’ Complaint contains absolutely no statement that would indicate Bedard was in any way responsible for setting the prices of the lots that were marketed to potential buyers, or responsible for any marketing decisions at all related to the Project.

The Bondholders have alleged nothing in their Complaint that at the time of the Appraisal the land was not worth \$4,127,670, when one does take into account the improvements of \$1,085,000. Instead, the Bondholders simply rely on the conclusory statement that the value of the real estate was overstated by at

least \$1 million. 3/1/11 APP. 94, ¶ 160; 10/25/11 APP. 138, ¶ 160. As the Court of Appeals correctly recognized, the Bondholders have done nothing more than allege that they disagree with the value stated in Bedard's Appraisal. Mere disagreement with the value does not satisfy the heightened pleading requirements of a negligent misrepresentation claim.

With regard to the Feasibility Study completed by Bedard, the Bondholders' Complaint also fails to plead any misrepresentation. The Bondholders allege the "Feasibility Study's time period for lot sales was a virtual impossibility due to the cost to acquire a lot and pay the related real estate taxes and special assessments." 3/1/11 APP. 94-95, ¶ 161; 10/25/11 APP. 138-39, ¶ 161. Again, an analysis of the actual Feasibility Study demonstrates Bedard was quite clear in explaining his opinions. Bedard was not contemplating just bare lots, but an actual completed subdivision with completed homes. Bedard opined that the "subdivision would sell out in a length of time no longer than seven years, which means an average of 14 **home** [sic] per year in this 96 lot subdivision." 3/1/11 APP. 272; 10/25/11 APP. 314 (emphasis added). The Bondholders' Complaint completely misstates Bedard's Feasibility Study by claiming that Bedard contemplated lot sales when in fact he expressly only considered home sales. Bedard's appraisal of the model homes also reflects the fact that Bedard contemplated the pricing and marketing of the properties as completed homes.

The only other attack the Bondholders make against the Feasibility Study was that it "restated the erroneous lot value form [sic] the Appraisal and relied

upon those flawed values to properly take into account the special assessment cost on the price of a lot to reach a seven-year absorption rate.” 3/1/11 APP. 77, ¶ 42; 10/25/11 APP. 121, ¶ 42. As explained above, Bedard did specifically consider the cost of improvements in determining his estimated value of the lots, and the Bondholders have failed to allege anything that would suggest the lots were not worth \$43,386 each when the improvements were included.

The Bondholders once again attempt to introduce evidence in this appeal that was not before the district court in a further effort to support their claim for negligent misrepresentation. Notwithstanding that such evidence is not properly before this Court, Bedard will address the same here.² First, they claim discovery has revealed a prior appraisal completed by Bedard that supports the merits of their claim. An analysis of this new evidence reveals only that Bedard expressly did not include the improvements in the prior appraisal and was later instructed to include the improvements. In the prior appraisal, dated May 30, 2003, Bedard gave an estimated market value of \$1,297,000 and expressly stated his value “does not give consideration to any physical site improvements such as streets, sewers, or gutter, etc.” 3/1/11 APP. 381-82. Considering the City of Brainerd did not approve the resolution authorizing the \$1,085,000 in improvements until August 25, 2003, it is no surprise that the May 30, 2003 appraisal did not include the improvements.

² Bodah, 663 N.W.2d at 553 (court must “consider only the facts alleged in the complaint...”).

In the May 30, 2003 appraisal, Bedard did deduct the estimated cost of the improvements from his original lot value of \$36,500 (same as his October Appraisal) to come up with a bare lot value of \$16,800. Id. at 410-11. The Bondholders are correct in pointing out that Bond Counsel found this value to be low and questioned whether the appraiser [Bedard] included the street, sewer, water, etc. improvements. Id. at 373. There is no significance attached to the May 30, 2003 appraisal for purposes of this appeal. Bedard was simply asked after the August 25, 2003 resolution authorized the improvements, to determine the lot values with the improvements included. Bedard responded to this request by preparing the Appraisal that is the subject of this appeal.

What is significant for purposes of this appeal is that the Bondholders have failed to plead Bedard was in any way responsible for requiring that prospective buyers purchase the lots for \$43,386 value opined by Bedard, plus the value of the improvements that were already included in the \$43,386 value. The Bondholders have also not pled the properties were in fact priced and marketed in such a fashion, only a presumption the prospective buyers would have to do so. 3/1/11 APP. 77, ¶ 37; 10/25/11 APP. 121, ¶ 37. Regardless, even if the properties were in fact priced and marketed as such, there is no allegation Bedard had any control over such.

The Bondholders also attempt to introduce an appraisal by their “valuation expert” to support their claim of negligent misrepresentation. In a letter dated May 10, 2010, the Bonholders’ expert, Alan Leirness, sets forth nine comments

regarding the Project and Bedard's Appraisal. 3/1/11 APP. 472-73. Lierness' expert opinion is of no consequence, however, with respect to the Rule 9.02 sufficiency of the Complaint filed on October 29, 2008 and amended on January 12, 2009. The Bondholders were just as capable of obtaining this expert at the time of filing their Complaint and should not now be tendering this expert in hindsight to supplement a complaint insufficient under Rule 9.02. Contrary to the Bondholders' assertion, substantial justice will not be served by considering this additional evidence because the Court must only consider whether the facts alleged in their Complaint (and not additional evidence) set forth a legally sufficient claim for relief. Bodah, 663 N.W.2d at 553.

Judge Ten Eyck correctly ruled that the Bondholders failed "to allege any specific details regarding the negligent misrepresentations." 3/1/11 ADD. 19; 10/25/11 APP. 33. The Court of Appeals echoed the district court's conclusion, finding that "[n]owhere in the complaint do appellants expressly outline what information respondent negligently misrepresented." 10/25/11 ADD. 7. There is simply nothing in the Complaint and its Exhibits that shows with particularity Bedard's Appraisal and Feasibility Study "supplies false information" or misrepresents anything.

The Bondholders argue that none of the policy concerns regarding abuse pleading practices were present in this case and go on to argue that "no undue harm to Bedard's reputation occurred from being sued for an appraisal and feasibility study which overstated real estate value by over \$1 million and led to

the bonds becoming worthless.” Appellants’ Brief, p. 27. It is difficult to understand how the Bondholders reached this conclusion that no undue harm resulted. Certainly an appraiser’s reputation is impacted when one claims he is in the practice of overstating real estate by a staggering amount of money. The policy concerns regarding abusive pleading practices are absolutely present in this case when the practices of Bedard are being cited by the Bondholders as the reason over \$3 million worth of bonds became worthless.

The Bondholders’ claim that Bedard misrepresented the values of the properties in question is premised upon a misplaced connection between his work product (the Appraisal and Feasibility Study) and the ultimate pricing and marketing of the lots over which Bedard had no control and for which Bedard cannot be held responsible.

C. There Was No Justifiable Reliance on Any Information Provided by Bedard that Caused Any Financial Harm to the Bondholders

Even assuming Bedard was able to somehow determine what misrepresentation he allegedly made, the Bondholders still fail to adequately plead there was a justifiable reliance on the misrepresentation that caused financial harm to them. Bonhiver, 248 N.W.2d at 299. The Bondholders’ Complaint merely alleged that due to Bedard’s alleged overvaluation, “the price of \$54,688 for each lot was too high and resulted in virtually none of the lots being sold, despite a strong real estate market in 2004 and 2005.” 3/1/11 APP. 75, ¶ 38; 10/25/11 APP. 121, ¶ 38.

The false premise underlying the Bondholders' claim against Bedard is that Bedard was somehow responsible for determining the cost of the lots to prospective buyers and the further factually unsupported assumption the properties were indeed marketed as vacant lots rather than completed homes. There is no explanation how Bedard's \$43,386 value required the properties to be sold as vacant lots, let alone for \$54,688. If for some reason Bedard were to have been asked to step out of his role as an appraiser and assume the role of marketing the property, and if in such fictitious role he then led the Bondholders to believe he was going to market the properties as vacant lots and sell the lots for \$43,386, but instead intended to market them for \$43,386, plus an additional \$11,302, resulting in a failure of the lots to sell, then the Bondholders would have an argument that Bedard both made a misrepresentation and the misrepresentation caused the loss. No such allegations exist in the Bondholders' Complaint, and not surprisingly, because nothing of the sort occurred. Bedard's Appraisal and Feasibility Study simply stated Bedard's opinions as to the value of the lots with the improvements and the completed subdivision's sell-out time and nothing more.

The Appraisal and Feasibility Study caused no loss to the Bondholders. Any loss caused to the Bondholders was caused not by anything Bedard did, but rather by a myriad of other activities and circumstances which occurred well after Bedard prepared his Appraisal and Feasibility Study and in which he is not alleged in the Complaint to have had any involvement whatsoever. Further, even

if one were to assume, inconsistent with Bedard's clear advisements of what his Appraisal and Feasibility Study contemplated, that the properties were to be sold as vacant lots, there is nothing in the Complaint to allege the lots were event marketed for such a sale, that any such marketing efforts failed, or that any such marketing efforts failed due to Bedard's alleged overvaluation of the lots. On the contrary, there is no allegation the \$43,386 value Bedard contemplated for the lots produced no sales, as opposed to the conclusory allegation the \$54,688 value assumed by the Bondholders produced no sales. 3/1/11 APP. 79, ¶¶ 49-50; 10/25/11 APP. 123, ¶¶ 49-50. In short, nothing in Bedard's Appraisal and Feasibility Study, indeed nothing he did, caused any loss to the Bondholders.

CONCLUSION

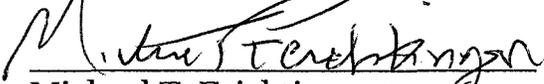
For all of these reasons, no actionable claim for negligent misrepresentation was pled against Bedard, let alone pled with particularity. The ruling by the Court of Appeals affirming the district court's dismissal of the negligent misrepresentation claim against Bedard should be affirmed.

Respectfully submitted,

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 5,483 words. This brief was prepared using Microsoft Word 2010.

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