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WISCONSIN COURT OF APPEALS  
DISTRICT III

**03-16-2018**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

Appeal No. 2017-AP-2527-PT

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TISSUE TECHNOLOGY, LLC,

Plaintiff-Respondent

v.

ST PAPER, LLC,

Defendant-Third Party Plaintiff-Appellant

v.

OCONTO FALLS TISSUE, INC., PARTNERS CONCEPTS  
DEVELOPMENT, INC. and TISSUE PRODUCTS TECHNOLOGY  
CORPORATION,

Third-Party Defendants

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Appeal from the Circuit Court of Oconto County, the Honorable Jay  
N. Conley Presiding,  
Circuit Court Case No. 14-CV-156

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**DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT  
ST PAPER, LLC'S BRIEF**

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## TABLE OF CONTENTS

STATEMENT OF THE ISSUE .....	1
STANDARD OF REVIEW .....	1
STATEMENT OF THE CASE/STATEMENT OF FACTS .....	2
Factual Background .....	2
Procedural Background .....	4
ARGUMENT .....	6
THE TRIAL COURT ERRED IN FAILING TO GRANT SUMMARY JUDGMENT BASED ON TISSUE TECHNOLOGY'S LACK OF STANDING.....	6
CONCLUSION .....	13
RULE 809.19(8)(d) CERTIFICATION.....	15
CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12) ...	16

## TABLE OF AUTHORITIES

### **Cases**

<i>Abramowski v. Wm. Kilps Sons Realty, Inc.</i> , 80 Wis. 2d 468, 259 N.W.2d 306 (1977).....	9
<i>Chenequa Land Conservancy, Inc. v. Village of Hartland</i> , 2004 WI App 144, 275 Wis. 2d 533, 685 N.W.2d 573.....	1
<i>Kornitz v. Commonwealth Land Title Ins. Co.</i> , 81 Wis. 2d 322, 260 N.W.2d 680 (1978).....	7
<i>Marshfield Clinic v. Doege</i> , 269 Wis. 519, 69 N.W.2d 558 (1955) .....	7
<i>Mortgage Assocs., Inc. v. Monona Shores, Inc.</i> , 47 Wis. 2d 171, 177 N.W.2d 340 (1970).....	8
<i>Moutsopoulos v. American Mut. Ins. Co.</i> , 607 F.2d 1185, (7th Cir. 1979) .....	7
<i>Town of Baraboo v. Village of W. Baraboo</i> , 2005 WI App 96, 283 Wis. 2d 479, 699 N.W.2d 610.....	1
<i>Tullgren v. Sch. Dist. of Whitefish Bay</i> , 16 Wis. 2d 135, 113 N.W.2d 540 (1962).....	8

### **Statutes**

Wis. Stat. § 134.93(1)(b) .....	4
Wis. Stat. § 802.06(6) .....	5
Wis. Stat. § 802.08(2) (2015-16).....	2
Wis Stat. § 809.19(1)(d), (e), and (f) .....	15
Wis. Stat. § 809.19(8)(b) .....	15
Wis. Stat. § 809.19(8)(d) .....	15
Wis. Stat. § 809.19(12) .....	16

### **Other Authorities**

<i>Restatement (Second) of Contracts</i> § 317 cmt. a (1) (Am. Law Inst. 1981) .....	7
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This is a fast-track interlocutory appeal from an order denying the Defendant summary judgment on a single question of law, unencumbered by factual disputes or complex issues and arguments, involving the Plaintiff's attempt to enforce a sales contract it assigned as collateral to a non-party bank.

### **STATEMENT OF THE ISSUE**

Did the trial court err, as a matter of law, by declining to enter judgment for Defendant-Third Party Plaintiff-Appellant ST Paper, LLC ("ST Paper") on undisputed facts demonstrating that Plaintiff-Respondent Tissue Technology, LLC ("Tissue Technology") is not the real party in interest, without any contractual enforcement authority, given the trial court's simultaneous finding that the agreement had been assigned to a non-party?

### **STANDARD OF REVIEW**

This Court reviews a grant or denial of summary judgment *de novo*, using the same methodology and standards of the trial court. *Town of Baraboo v. Village of W. Baraboo*, 2005 WI App 96, ¶ 5, 283 Wis. 2d 479, 699 N.W.2d 610 (citation omitted); *see also* *Chenequa Land Conservancy, Inc. v. Village of Hartland*, 2004 WI App 144, ¶ 12, 275 Wis. 2d 533, 685 N.W.2d 573 (standing presents a question of law for *de novo* review). Summary judgment

is warranted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Wis. Stat. § 802.08(2) (2015-16).

### **STATEMENT OF THE CASE/STATEMENT OF FACTS**

Tissue Technology and ST Paper entered into an Amended and Restated Sales and Marketing Agreement dated September 20, 2006 (the “Agreement”). (App. 4-18.) The Agreement provided that ST Paper would pay Tissue Technology a commission for sales of ST Paper’s paper products. Having assigned the Agreement to a bank, which still holds it, the Plaintiff still seeks to enforce its terms.

### **Factual Background**

The Agreement stated that the obligations of the Agreement could not be assigned by Tissue Technology absent the consent of ST Paper. “This Agreement may not be assigned by either [party] without the express prior written consent of the other....” (Agreement § 13; App. 13). Further, any assignee is bound by all of the rights and obligations of the Agreement (including the obligation to obtain ST Paper’s consent to any assignment). “The terms of this agreement shall be binding upon and inure to the

benefit of the parties hereto and their successors and assigns.”

(*Id.*, § 14, App. 14.)

On April 25, 2007, Tissue Technology assigned the Agreement to Nicolet National Bank (“Nicolet Bank”). (App. 19-22.) Tissue Technology conveyed to the bank “all of its right, title and interest in and to the [Agreement] together with any and all Commissions due thereunder...” (*Id.*) The Assignment explicitly and without reservation included “the right to take any and all such actions necessary, either in the name of the assignor or assignee, for breach of payment with respect to any fees due” pursuant to the Agreement. (*Id.*)

Article V of the Assignment, tellingly entitled “Reassignment,” states: “Upon payment in full of the Note and the Indebtedness [to Nicolet]...the interests of Assignee in the Sales and Marketing Agreement herein assignment shall be released to Assignor [Tissue Technology] and this agreement shall be terminated.” (*Id.*, App. 21.)

Nearly six years later, on February 28, 2013, Tissue Technology and Nicolet Bank executed a “Restated and Amended Assignment of Sales and Marketing Agreement and Pledge of Commercial Tort Claim” (the “Restated Assignment”), purporting to

“reassign” from Nicolet Bank to Tissue Technology some of the rights under the Agreement. (App. 23-25.) The Restated Assignment recognized the original assignment by Tissue Technology to Nicolet Bank of the Agreement, but it did not stop there.

The Restated Assignment purported to include a grant by Nicolet Bank to Tissue Technology of “a limited license to collect, at [Tissue Technology’s] own expense, amounts due and owing by ST Paper....” (*Id.*) While ST Paper had consented years before to the initial assignment of the Agreement to Nicolet Bank, as required by the Agreement, no consent was obtained from ST Paper by either Nicolet Bank or Tissue Technology for the purported reassignment. No one even bothered to ask.

### **Procedural Background**

On August 21, 2014, Tissue Technology filed suit against ST Paper, asserting claims for breach of the Agreement and for a violation of the Wisconsin Sales Representative Act, Wis. Stat. § 134.93(1)(b), a claim also based upon the Agreement. (App. 26-30.) ST Paper answered the Complaint and asserted its defenses, which included the affirmative defense that Tissue Technology had assigned its rights to Nicolet Bank and, absent ST Paper’s consent,

was without standing to enforce the Agreement or the statute. In short, Tissue Technology was not the real party in interest. (App. 31-36)

Tissue Technology filed a motion for summary judgment to collect commissions under the Agreement. (App. 37-38.) The total sought on summary judgment for these claimed unpaid commissions was \$51.9 million, a remarkable amount anywhere, and an extraordinary amount to be sought on the basis of a few affidavits with little discovery. In response, ST Paper opposed the motion and requested that the trial court, pursuant to Wis. Stat. § 802.06(6), grant summary judgment in ST Paper's favor. (App. 39-53.) ST Paper's request for summary judgment rested on the undisputed fact that the Agreement had long ago been assigned to, and remained with, Nicolet Bank. Thus, Tissue Technology was without standing to enforce the Agreement.

By a Memorandum Decision on December 5, 2017, the trial court denied Tissue Technology's motion for summary judgment for commissions as well as ST Paper's request that the court enter judgment in its favor. The trial court found factual disputes that prevented judgment for Tissue Technology. (App. 2-3.)

With respect to ST Paper’s competing summary judgment motion, the trial court properly held that the Agreement had been assigned to Nicolet Bank, which continues to hold it. “The assignment of the Agreement remains with the Bank.” (*Id.*) Nevertheless, the trial court found that the purported reassignment of the Agreement was sufficient to provide Tissue Technology with standing because the document purported to “license” Tissue Technology to enforce the Agreement.

On December 13, 2017, the trial court entered an order denying summary judgment to both parties for the reasons stated in the Memorandum Decision. (App. 1.) On January 17, 2018, this Court granted ST Paper’s petition for leave to appeal the trial court’s denial of summary judgment to ST Paper. The appeal is appropriate for expedited treatment and limited briefing because the single issue is narrowly and succinctly defined.

### **ARGUMENT**

#### **THE TRIAL COURT ERRED IN FAILING TO GRANT SUMMARY JUDGMENT BASED ON TISSUE TECHNOLOGY’S LACK OF STANDING**

The trial court correctly found that Tissue Technology had assigned the Agreement and that the Agreement remained assigned to Nicolet Bank. This is the inescapable conclusion of the record

before the trial court. The trial court erred, however, in concluding that the separate document executed in 2013 by Tissue Technology and Nicolet Bank, purporting to grant a license to Tissue Technology to sue on the Agreement, was sufficient to give Tissue Technology standing as the real party in interest. It was not sufficient nor, absent ST Paper's consent, could it have been.

It is hornbook law that one who is not the real party in interest cannot maintain an action. "A defense that the plaintiff is not the real party in interest is, in general, an absolute bar to the action." *Marshfield Clinic v. Doege*, 269 Wis. 519, 523, 69 N.W.2d 558 (1955) (citation omitted). It is also black letter law that a valid assignment of an existing right extinguishes the right in the assignor. *See Restatement (Second) of Contracts* § 317 cmt. a (1) (Am. Law Inst. 1981) ("A has a right to \$100 against B. A assigns his right to C. A's right is thereby extinguished, and C acquires a right against B to receive \$100."); *see also Moutsopoulos v. American Mut. Ins. Co.*, 607 F.2d 1185, 1189 (7th Cir. 1979) ("Elementary contract law provides that upon a valid and unqualified assignment, the assignee stands in the shoes of the assignor and assumes the same rights, title and interest possessed by the assignor..." (citing *Kornitz v. Commonwealth Land Title Ins.*

Co., 81 Wis. 2d 322, 327, 260 N.W.2d 680 (1978)); *see also Tullgren v. Sch. Dist. of Whitefish Bay*, 16 Wis. 2d 135, 142, 113 N.W.2d 540 (1962) (noting that a valid and unqualified assignment transfers to the assignee all the rights of the assignor, leaving no interest in the assignor).

The real party in interest is “one who has a right to control and receive the fruits of the litigation.” *Mortgage Assocs., Inc. v. Monona Shores, Inc.*, 47 Wis. 2d 171, 179, 177 N.W.2d 340 (1970) (citations omitted). “[A] fundamental test is whether the prosecution of the action will save the defendant from further harassment for the same demand, will cut the defendant off from any just defense, offset, or counterclaim against the demand, and whether the discharge of the judgment in behalf of the party suing will fully protect the defendant.” *Id.* (citation omitted).

Here, the trial court’s twin findings – that Tissue Technology assigned the Agreement to Nicolet Bank and that Nicolet Bank remained the assignee – cannot be squared with its conclusion that Tissue Technology was “licensed” by Nicolet Bank to enforce the Agreement against ST Paper. With the Assignment, Tissue Technology was no longer a party to the Agreement. This means that it cannot enforce the Agreement: “a contract cannot be

enforced by a person not party to it.” *Abramowski v. Wm. Kilps Sons Realty, Inc.*, 80 Wis. 2d 468, 472, 259 N.W.2d 306 (1977) (citations omitted).

The only exception to this rule is a contract specifically made for the benefit of a third party in which case a third-party beneficiary may enforce the contract. *Id.* at 472 n.3. But the third-party beneficiary exception can have no applicability here. Tissue Technology was never a third party to the Agreement but, rather, one of the original contracting parties.

The Assignment explicitly included “the right to take any and all such actions necessary, either in the name of the assignor or assignee, for breach of payment with respect to any fees due” pursuant to the Agreement. (App. 20.) Article V of the Assignment, entitled “Reassignment,” states: “Upon payment in full of the Note and the Indebtedness [to Nicolet]...the interests of Assignee in the Sales and Marketing Agreement herein assigned shall be released to Assignor and this [assignment] agreement shall be terminated.” (*Id.*, App. 21.)

The plain language of the Assignment leaves little, if any, room for doubt: Tissue Technology lacks standing. The assignee, Nicolet Bank, acquired the right – the sole right – to bring an action

for any sales commissions legitimately due on behalf of either itself or Tissue Technology. To that, and only that, ST Paper consented.

Further, the parties actually did contemplate “Reassignment” but not the “Reassignment” conjured up by Tissue Technology. The Agreement contemplated reassignment, to be sure, but only on “payment in full of the Note....” The provision for “Reassignment” on one set of facts and only one set of facts, “payment in full,” precludes reassignment on any other set of facts – with or without the consent of ST Paper. Moreover, the “license” is not only impermissible but gratuitous because Nicolet Bank always has had – and still has – the right to try to enforce the Agreement, though it has never chosen to do so. Not 11 years ago and not now.

To allow this matter to proceed to trial – with Nicolet Bank as the non-party to which the Agreement has been assigned – would necessarily subject ST Paper to the continuing threat from Nicolet Bank for the same demands Tissue Technology makes in its Complaint. Tissue Technology lacks standing to enforce the Agreement. Only Nicolet Bank has the right to seek collection from ST Paper. ST Paper is aware of no Wisconsin authority countenancing the practice of “licensing” the right to sue under a

contract assignment that conveyed all of the assignor's rights, including the exclusive right to sue.

Then, there is the matter of consent. The Defendant began its trial court brief in response to Tissue Technology's summary judgment motion with the affirmative defense of standing now at the core of this petition for interlocutory review. (ST Paper, LLC's Mem. of Law in Opp'n to Pl.'s Mot. for Summ. J. at 1-2; App. 39-40.) Tissue Technology's reply: "there is no writing that requires the approval of ST Paper for reassignment of the contract." (Pl. and Third-Party Defs.' Reply Br. at 10; App. 63.)

Tissue Technology itself emphasized the fact that the original assignment *required* the Defendant's consent and that the Defendant gave that consent. Precisely – no more and no less. The Plaintiff-Respondent has misplaced the contractual burden, turning it upside down.

There is no consensual writing that permits reassignment under any condition save one – "full payment" – and no writing that permits reassignment without consent. Tissue Technology's case citations in the trial court all involved the rights and duties of the obligor and obligee as they affect each other, not the rights of the party whose consent was surely required for the non-party

assignment, but which now finds itself with a different agreement altogether without its prior knowledge, let alone its consent under the false flag of “reassignment.”

The parties, ST Paper and Tissue Technology, entered into a contract that provided for the payment of commissions and, among other things, permitted Tissue Technology to assign the agreement but only with ST Paper’s consent. It defies logic to now maintain that a contract requiring mutual consent for “assignment” can somehow be modified unilaterally—through “reassignment”—without one party’s consent. When it executed the Agreement, ST Paper accepted the possibility that Tissue Technology might request permission to assign the Agreement. ST Paper gave that permission. But it did not give permission for a reassignment that, without consent, altered its own rights under the Agreement.

The ramifications of the plaintiff’s “licensing” argument are staggering. Mutual consent is the essence of contract law. Two parties reach an agreement, put it in writing to avoid misunderstanding, and sign it to signify both their consent and the sanctity of the agreement.

The agreement contains specific provisions that anticipate the very circumstances at work here: assignment and reassignment.

But assignment requires consent, and reassignment can occur only on a single specific condition—payment in full to the bank, which releases the collateral and automatically permits the return of the agreement’s rights to Tissue Technology. By its very definition, payment in full to the bank does not require ST Paper’s consent because the bank would no longer have a claim on the collateral. Having specified but one condition for reassignment, the Agreement permits no other and surely not without consent.

Here, the trial court’s decision and Tissue Technology’s argument eviscerate mutual consent. The parties agree, anticipating the precise conditions that occur here—assignment followed by reassignment. But one party now can change the terms unilaterally? Agreement and assignment with consent become reassignment without consent? That is not a contract, and it is not contract law.

### **CONCLUSION**

While the trial court correctly found that the Agreement was assigned to Nicolet Bank, it erred in concluding that Tissue Technology could enforce the Agreement based on a license to do so from Nicolet Bank. Accordingly, the Court should reverse the trial

court and direct that summary judgment be entered against Tissue Technology dismissing its claims against ST Paper.

Dated this 15<sup>th</sup> day of March, 2018.

GODFREY & KAHN, S.C.

By: s/ Jonathan T. Smies

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**RULE 809.19(8)(D) CERTIFICATION**

I hereby certify that this brief and accompanying appendix conform to the rule contained in s. 809.19(8)(b) for a brief and appendix produced with a proportional serif font. The length of those portions of this brief referred to in s. 809.19(1)(d), (e), and (f) is 2,333 words.

By: s/ Jonathan T. Smies  
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**CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

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

A copy of this Certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

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