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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT III

**04-05-2018**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

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APPEAL NO. 2017-AP-002527-LV

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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 CORP.,  
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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**PLAINTIFF-RESPONDENT, TISSUE TECHNOLOGY, LLC'S  
RESPONSE BRIEF**

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## **INTRODUCTION**

This lawsuit emanates from a breach of contract by which Defendant-Third-Party Plaintiff-Appellant, ST Paper, LLC (hereinafter, “ST Paper”) was to pay Plaintiff-Respondent, Tissue Technology LLC (hereinafter, “Tissue Technology”) a percentage of revenue generated from an output contract that was related to the prospective sale of the Oconto Falls Tissue mill to ST Paper under the “Amended and Restated Sales and Marketing Agreement” (hereinafter “Agreement”) entered into between the parties on September 20, 2006. (A-App. 4-18). Tissue Technology asks this Court to affirm the order entered by The Honorable Jay N. Conley on December 13, 2017 which rejected ST Paper’s claim that Tissue Technology did not have the standing to proceed with its lawsuit for breach of the Agreement. (A-App. 1-3).

## **ISSUES PRESENTED FOR REVIEW**

Did the Trial Court err in concluding that Tissue Technology was a real party in interest to enforce the Amended and Restated Sales and Marketing Agreement based on a license to do so from Nicolet National Bank?

Answer: No. The Trial Court did not err.

## **STANDARD OF REVIEW**

This Court granted ST Paper’s Petition for Leave to Appeal Non-Final Order, following competing summary judgment motions, because it determined that the appeal could materially advance the termination of the ligation, could

protect the petitioner from substantial or irreparable injury, and/or could clarify an issue of general importance in the administration of justice. Wis. Stat. §808.03(2). Now that the Petition has been granted, the Appellate Court reviews the grant or denial of summary judgment de novo and it applies the same standard as does the trial court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). It is well-established that a party is entitled to summary judgment if there are no disputed issues of fact and that party is entitled to judgment as a matter of law. Wis. Stat. §802.08(2). In evaluating whether a defendant – here, ST Paper – is entitled to summary judgment, the Appellate Court examines the defendant’s submissions to determine whether they establish a prima facie defense to the claim; if they do, the Court then determines whether the plaintiff’s submissions in response create a genuine issue of material fact that defeats the motion for summary judgment and entitles the plaintiff to a trial. *Preloznik v. Madison*, 113 Wis. 2d 112, 116, 334 N.W.2d 580 (Ct. App. 1983). Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence. Wis. Stat. §802.08(3).

#### **STATEMENT OF FACTS AND PROCEDURAL BACKGROUND**

The parties to this dispute are well-known to each other. There are three separate lawsuits among various related companies, one having been decided following a bench trial in the United States District Court for the Eastern District

of Wisconsin<sup>1</sup> as well as another suit pending in Oconto County Circuit Court. Including this suit, all of the referenced lawsuits generally emanate from transactions concerning the sale of the paper mill in Oconto Falls, Wisconsin from four (4) related companies principally owned by Ronald Van Den Heuvel to ST Paper, LLC, and Tak Investments, LLC, both controlled by Sharad Tak. Part and parcel of the agreements between the parties was the Amended and Restated Sales & Marketing Agreement which is the subject of this lawsuit and which was actually executed before the purchase of the paper mill was consummated. (A-App. 4-18). The Amended and Restated Sales & Marketing Agreement was meant to foster the transfer of ownership in the paper mill and grant ST Paper access to the sole substantial customer in advance of the closing on the balance of the assets of the mill. The Amended and Restated Sales & Marketing Agreement was executed on September 20, 2006 and the closing on the sale of the paper mill occurred on April 16, 2007.

The Amended and Restated Sales & Marketing Agreement is an “off take agreement” and which generally provided the Oconto Falls tissue mill would sell virtually all of its production to SCA Tissue North America, LLC, (hereinafter “SCA”) an international company with a substantial production facility in Neenah,

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<sup>1</sup> Hon. William Griesbach issued his post-trial decision on March 19, 2018 in the Federal District Court for the Eastern District of Wisconsin: *Tissue Technology LLC et al v. TAK Investments LLC*, Case No. 2014-CV-1203. An appeal is anticipated. The second lawsuit is in the initial stages now pending in Oconto County Circuit Court, *Oconto Falls Tissue Inc. vs ST Paper LLC*, Case No. 2017 CV 104.

Wisconsin. The Amended and Restated Sales & Marketing Agreement was to ensure continuity in the relationship between Tissue Technology, ST Paper and SCA and which would provide Tissue Technology a stream of future revenue.

On April 25, 2007 the Amended and Restated Sales & Marketing Agreement was assigned by Tissue Technology to Nicolet National Bank with the express permission of ST Paper and Sharad Tak in order to serve as collateral for various obligations Tissue Technology and its principal had to Nicolet Bank. (A-App. 19-22). On July 1, 2008, while Nicolet National Bank was holding the contract rights to the Amended and Restated Sales & Marketing Agreement, the plaintiff company, Tissue Technology, executed an agreement to allow defendant ST Paper to withhold payment of commissions from July 15, 2008 through December 1, 2008 to assist ST Paper with some additional financing. Though initially having paid the commissions to Tissue Technology, ST Paper never continued payment after Tissue Technology agreed to assist with the contemplated financing. Ultimately, on February 28, 2013, Nicolet National Bank assigned the Amended and Restated Sales & Marketing Agreement back to Tissue Technology, reserving certain rights. (A-App. 23-25).

This lawsuit was commenced on August 21, 2014. (A-App. 26-30). Tissue Technology filed a motion for summary judgment opposed by ST Paper and ST Paper sought summary judgment itself in response as allowed by Wis. Stat. §802.08(6).



The Trial Court issued a memorandum decision on December 5, 2017 denying both Tissue Technology's and ST Paper's cross motions for summary judgment. As to Tissue Technology, the Trial Court found a single material issue of fact. (A-App. 2-3). Among its findings, the Trial Court found that Nicolet National Bank had granted Tissue Technology a limited license to collect, at its own expense, the amounts due and owing by ST Paper to the assignor. (A-App. 2-3). In denying ST Paper's motion for summary judgment, the Trial Court reasoned that its analysis of the Agreement would result in an absurdity in that ST Paper would have to consent to be sued for its own breach of the Agreement if one follows ST Paper's logic. (A-App. 2-4).

### **ARGUMENT**

#### **I. THE TRIAL COURT CORRECTLY DENIED ST PAPER'S MOTION FOR SUMMARY JUDGMENT BECAUSE TISSUE TECHNOLOGY WAS A REAL PARTY IN INTEREST AND THEREFORE HAD STANDING TO SUE.**

In its Memorandum Decision, inter alia, the Trial Court denied ST Paper's motion for summary judgment, and succinctly stated: "Plaintiff [Tissue Technology] had every right to file this suit." (A-App. 2-3). Tissue Technology agrees. It is ST Paper's position that the Trial Court erred in concluding that the 2013 Agreement executed by Tissue Technology and Nicolet National Bank was sufficient to give Tissue Technology standing as the real party in interest – thereby granting it (Tissue Technology) license to sue on the Agreement. (ST Paper's Brief, p. 7).

**A. Tissue Technology had a License, or Permission, to Commence this Instant Lawsuit and is Therefore a Real Party in Interest.**

In its simplest form, “license” is permission, accorded by a competent authority, conferring the right to do some act which without such authorization would be illegal, a trespass or a tort. *Black’s Law Dictionary*, Eighth Ed., 2004. The 2013 Agreement, entitled Restated and Amended Assignment of Sales and Marketing Agreement and Pledge of Commercial Tort Claim (hereinafter “2013 Agreement”) is the document which granted the permission – or the license – to Tissue Technology to pursue this lawsuit. (A-App. 24). That 2013 Agreement provides in pertinent part:

Notwithstanding the Assignment herein, Nicolet grants to Assignor [Tissue Technology] a limited license to collect, as Assignor’s own expense, amounts due and owing by ST Paper to Assignor under the Marketing Agreement including, but not limited to, pursuing the Lawsuit described in paragraph 3, below *provided that* (a) Assignor shall obtain Nicolet’s prior written approval of any settlement agreed to by Assignor and ST Paper; and (b) Assignor uses the first proceeds from the Lawsuit to pay the Indebtedness, as provided in paragraph 4, below.

(A-App. 24). ST Paper asserts that “it is hornbook law that one who is not a real party in interest cannot maintain an action.” (ST Paper’s Brief, p. 7). Tissue Technology tends to agree with this statement. However, in this instant case, Tissue Technology *is* a real party in interest – as determined not only by the terms the 2013 Agreement, but also by the Trial Court. (A-App. 24 and 2-3, respectively).

Well over one century ago, the Wisconsin Supreme Court held that the rule that every action must be prosecuted in the name of the real party in interest ... is imperative, but is satisfied when it is shown that that party suing is the one who

has the right to control and receive the recovery. *Chase v. Dodge*, 111 Wis. 70 at 72, 86 N.W. 548 (1901). Citing a New York case with approval, the Court held that between the assignor and assignee, if the transfer is complete, so that the former is divested of all control and right to the cause of action, and the latter is entitled to control it and receive its fruits, the assignee is the real party in interest. *Id* at 72-73. Whether the assignment was with or without consideration, and notwithstanding the assignee may have taken it subject to all equities between the assignor and third parties it does not matter. *Id*. The Court stated:

Even if the court had submitted the question to the jury, and they had found that the transfer was only colorable as between the parties, yet that would constitute no defense on the ground that plaintiffs were not the real parties in interest. Such an inquiry might become material if the rights of creditors were involved, or upon the right of interposing some defense or counterclaim supposed to be cut off by the assignment. [\*Sheridan v. New York, supra\*](#). No such considerations were presented in this case, and the trial court was manifestly right in refusing to submit the matter to the jury.

*Id* at 73.

As illustrated, the Court must look to whether the assignment somehow infringes on the rights of ST Paper. That is, are ST Paper's contract rights somehow impaired by the assignment? Of course they are not impaired and there is no proof of such impairment in the record. Suffice to say, the objection to this assignment is nothing more than a device to attempt to weasel out of ST Paper's obligations. Tissue Technology is the assignee of Nicolet National Bank, even though the 2013 Agreement classifies it as the "assignor." (Tissue Technology was the *original* assignor to Nicolet National Bank and that original Agreement is still valid). The

2013 Agreement divests Nicolet National Bank of control, though reserves certain rights for Nicolet Bank within the cause of action. (A-App. 24). Moreover, the original assignment to Nicolet Bank was to collateralize other Tissue Technology related obligations. Tissue Technology was to initiate the lawsuit, as well as collect amounts due and owing by ST Paper. (A-App. 24). The “limited license” bestows a couple of conditions on those rights, like the right to approve settlement and the right to be first paid—consistent with its rights to the collateral – but effectively, Nicolet National Bank is divested of the ownership rights so as to render Tissue Technology the real party in interest.

By the terms of the 2013 Agreement, it is evident that Tissue Technology was the assignee for collection at a minimum. A grant for the purpose of collection has been the law in Wisconsin for more than 100 years. In *Hankwitz v. Barrett*, 143 Wis. 639, 128 N.W. 430 (1910), the Court stated:

The claim is made that the assignments to, and agreements with, the plaintiff, set out in the statement of facts, show that he is not the real party in interest and, therefore, has no right to maintain the action. It is evident from a mere inspection of the assignments and agreements that the plaintiff was at least an assignee for collection. As such he was entitled to maintain the action. *Wooliscroft v. Norton*, 15 Wis. 198; *Gates v. N. P. R. Co.* 64 Wis. 64, 24 N.W. 494. But the assignments are absolute in form and vest the entire apparent legal title in the assignee. This is a sufficient protection to the defendant. He cannot be subjected to a second action by the assignor or any one, and is in no position to question the effect or validity of collateral agreements to account for the proceeds to the assignor or to apply them as directed by him. Such collateral agreements do not render him any the less the real party in interest.

*Id* at 643. See also, *Ehrlich v. Frank Holton & Co.*, 228 Wis. 676, 280 N.W. 297, 281 N.W. 696 (1938); *Necedah Mfg. Corp. vs. Juneau County*, 206 Wis. 316, 237 N.W.277 (1932); *Oconto Chamber of Commerce v. Grandall*, 175 Wis. 447, 185 N.W. 544 (1921).

It is worth noting that as a general rule, Chapter 409 applies to any transaction that is intended to secure payment or performance of an obligation. Wis. Stat. §409.102(2); *Nat'l Operating, L.P. v. Mut. Life Ins. Co.*, 2001 WI 87, ¶35, 244 Wis. 2d 839, 857, 630 N.W.2d 116 (2001). Even though Chapter 409 specifically applies to assignments if they are intended to secure payment or performance of an obligation, the assignment at the subject of this lawsuit is not one to which Chapter 409 applies. *Id.*; Wis. Stat. §§409.102(1)(a) and 401.201(37).

ST Paper seems to believe, should this matter be allowed to proceed to trial, it would be subjected to a continuing threat from Nicolet National Bank for the same demands Tissue Technology now makes. (ST Paper's Brief, p. 10). This argument is misguided and is contrary to the clear language of the assignment back to Tissue Technology and to which Nicolet Bank is a signatory. By the very terms of the 2013 Agreement, Nicolet National Bank assigned its rights to collection and litigation to Tissue Technology and reserved its rights to approve settlement and to receive the first proceeds as would be commercially reasonable for a secured party. There is sufficient protection for ST Paper in that it cannot be subjected to a second action by Nicolet National Bank based on the terms of the limited license. *See Hankwitz* at 643.<sup>2</sup> In a subrogation context, once an insured

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<sup>2</sup> The fact is that if it is deemed Tissue Technology is not the real party in interest, Nicolet National Bank will file an action shortly thereafter.

has been fully compensated for his loss, any additional recovery by the insured would constitute unjust enrichment. *Muller v. Soc’y Ins.*, 2008 WI 50, ¶23, 309 Wis. 2d 410, 750 N.W.2d (2008). As Tissue Technology “steps into the shoes” of Nicolet National Bank, once Nicolet has been fully compensated, all additional recovery accrues to the benefit of the holder, to wit: Tissue Technology.

ST Paper defaulted under the terms of the Marketing Agreement by failing to make commission payments to Assignor, Tissue Technology. (A-App. 19-22 and A-App. 23). This is a cause of action which is still valid, and if a cause of action survives, it is assignable. *P.C. Monday Tea Co. v Milwaukee County Expressway Com.*, 24 Wis. 2d 107, 111, 128 N.W.2d 631 (1964). Actions for damages done to the property rights or interests of another, and for damages done to real or personal property, as well as other actions, also survive. *Id.* In this case, ST Paper’s failure to make commission payments damaged the interests of Tissue Technology.

Public policy concerns should also be considered. Modern day debt collection is premised on assignments of causes that permit others to prosecute in the name of creditors. If ST Paper’s position were adopted, these common assignments would be a thing of the past and roil the regular practice of creditors suing on bad debts by their assignees—whether they be collection agencies or firms that purchase debt.

**B. ST Paper's Arguments are Without Legal Authority and Should be Rejected.**

ST Paper focuses a portion of its brief arguing that the reassignment of the Sales and Marketing Agreement was invalid and therefore the contract is rendered unenforceable. (ST Paper's Brief, p. 11). As stated in its Trial Court brief, ST Paper fails to cite any law supporting its position. Wisconsin law is clear, if a party fails to cite the law in advancing an argument, the Court should disregard the argument. *State v. Pettit*, 171 Wis. 2d 627 at 646, 492 N.W.2d 633 (Ct. App. 1992).

As an initial matter, according to the Trial Court, no "reassignment" occurred. In the Trial Court's Memorandum Decision, it stated:

This contract is not a "reassignment" of the original Agreement and does not require the Defendant's [ST Paper] consent by its clear and unambiguous terms. The assignment of the Agreement remains with the Bank. Exhibit 3 [the contract] is important, however, as it, clearly states: "Notwithstanding the Assignment herein..."

(A-App. 2). Though Tissue Technology may disagree with this characterization, the result is the same. The Trial Court's decision provides that Nicolet National Bank granted a limited license to Tissue Technology, all while retaining the original assignment, which it was certainly permitted to do. The general principle of Wisconsin law is that a valid assignment of property rights can occur as long as the rights are "alienable", that is, they are assignable. *Attorney's Title Guar. Fund, Inc. v. Town Bank*, 2014 WI 63, ¶20, 355 Wis. 2d 229, 238, 850 N.W.2d 28 (2014). In order for a right to be alienable, it must not be precluded from transfer by way of statute or contract. Wis. Stat. §402.210(2) codifies that concept. There

is nothing in Wisconsin law, statutorily or by way of contract, that prohibits the transfer of the Sales and Marketing Agreement from Nicolet National Bank back to Tissue Technology, LLC—whether in piecemeal fashion or in its entirety. In fact, the contrary is true. ST Paper had not provided any document or authority purporting to prohibit the transfer – and it will not be able to do so. Wisconsin law permits the assignment. There is nothing contractually that prohibits it, or Sharad Tak would have insisted at the time the transfer took place to language to that effect.

With respect to ST Paper’s argument that the granting of a limited license required its consent, the Trial Court quashed the argument in finding that Defendant’s analysis of this issue would result in an absurdity: Defendant itself would have to consent to be sued for breach of the Agreement. Tissue Technology agrees with the Trial Court’s decision which ably demonstrates the absurdity of ST Paper’s argument. ST Paper refers to this occurrence as “reassignment” when it was clearly not a reassignment, as found by the Trial Court, by virtue of the clear and unambiguous terms of the 2013 Agreement. (A-App. 24).

**C. Nicolet National Bank, in No Uncertain Terms, Assigned Tissue Technology the Right to Collect Amounts Due and Owing by ST Paper as well as to Pursue Litigation Against ST Paper.**

ST Paper devotes a portion of its brief discussing contract law and how Tissue Technology’s licensing argument does not hold water, but again, makes no



citation to any law in support of its argument. (ST Paper's Brief, pp. 12-13). The Court should disregard this argument. *See State v. Pettit*, supra. Further, this Court must decline to embark on its own search of the record, unguided by references and citations to specific testimony to look for evidence in support of an argument. *Grothe v. Valley Coatings, Inc.*, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 411, 620 N.W.2d 463 (Ct. App. 2000). Absent specific citation, this Court should refuse to consider such an argument. *Id.*

The bottom-line is that the 2013 Agreement between Nicolet National Bank and Tissue Technology is clear and unambiguous in its terms, and Wisconsin law is well-settled with respect to contract interpretation. (A-App. 23-25). Where a party's claims rest on contract, the Court must apply the contract's language. *Brew City Redevelopment Grp., LLC v. Ferchill Grp.*, 2006 WI App 39, ¶3, 289 Wis. 2d 795, 802, 714 N.W.2d 582. A contract is ambiguous when its terms are reasonably or fairly susceptible to more than one construction, and whether a contract is ambiguous, is itself a question of law. *Borchardt v. Wilk*, 156 Wis. 2d 420 at 427, 456 N.W.2d 653 (Ct. App. 1990). Judicial interpretation of a contract seeks to determine and give effect to the intent of the contracting parties. *Wisconsin Label Corp. v. Northbrook Property & Cas. Ins. Co.*, 2000 WI 26, ¶23, 233 Wis. 2d 314, 607 N.W.2d 276.

The Trial Court has already interpreted the 2013 Agreement, granting at a minimum, Tissue Technology a limited license to collect, at Assignor's own expense, amounts due and owing by ST Paper under the Agreement including, but not limited to, pursuing the Lawsuit described in paragraph 3. (A-App. 2). The Trial Court interpreted the contract as not being a reassignment and not requiring ST Paper's consent. (A-App. 2). The Trial Court even used the words *clear and unambiguous terms*. (A-App. 2). Contract ambiguity is a question of law, and the Court has decided that question of law – the contract is unambiguous. This Court should follow suit.

### CONCLUSION

Tissue Technology holds a valid “reassignment” of the Amended and Restated Sales & Marketing Agreement—either in its entirety or as a license to collect. Substantial sums are owed by ST Paper and this appeal is nothing but a stall tactic in order to delay, or altogether avoid, having to live up to its contractual obligations. Under the terms of the Agreement, Tissue Technology has every right to sue for breach and, in the event of success, satisfy the debts owed to Nicolet National Bank and retain the balance of the proceeds. The Trial Court correctly found that Tissue Technology could enforce the Agreement based on a license to do so from Nicolet Bank. Accordingly, Tissue Technology respectfully requests that this Court affirm the decision of the Trial Court and remand this matter back to the Trial Court.

Dated this 5<sup>th</sup> day of April, 2018.

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font and consists of 3,760 words and 14 pages.

Dated this 5<sup>th</sup> day of April, 2018.

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WISCONSIN COURT OF APPEALS  
DISTRICT III

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Appeal from the Circuit Court of Oconto County  
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**PLAINTIFF-RESPONDENT, TISSUE TECHNOLOGY, LLC'S  
RESPONSE BRIEF**

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**CERTIFICATE OF SERVICE**

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I further certify that on the 5<sup>th</sup> day of April, 2018, a true and correct copy of the Plaintiff-Appellee, Tissue Technology, LLC's Response Brief, were mailed to:

Mr. Jonathon Smies  
Godfrey & Kahn, S.C.  
200 South Washington Street, Suite 100  
Green Bay, WI 54301

and hand-delivered to:

Clerk of Court of Appeals  
110 East Main Street, Suite 215  
Madison, WI 53701-1688

Dated this 5<sup>th</sup> day of April, 2018.

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*Attorneys for Plaintiff-Respondent Tissue  
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