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WISCONSIN COURT OF APPEALS  
DISTRICT III

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 REPLY BRIEF**

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## **INTRODUCTION**

The trial court reached two conclusions of law to deny ST Paper, LLC (“ST Paper”) summary judgment. It was correct in one important respect: the Amended and Restated Sales and Marketing Agreement dated September 20, 2006 (the “Agreement”) remains assigned from Plaintiff-Appellee Tissue Technology, LLC (“Tissue Technology”) to Nicolet National Bank (“Nicolet”). The trial court erred, however, in concluding that Nicolet could license the right to Tissue Technology to enforce the same Agreement six years later through a Restated and Amended Assignment of Sales and Marketing Agreement and Pledge of Commercial Tort Claim (the “Restated Assignment”).

Wisconsin law does not permit this, especially without ST Paper’s consent. The Court should reverse the trial court and remand this matter with instructions that judgment be entered in ST Paper’s favor dismissing Tissue Technology’s claims.

## **ARGUMENT**

### **I. The Restated Assignment Itself Demonstrates that Tissue Technology is Not the Real Party in Interest.**

Tissue Technology stakes its position that it is the real party in interest upon the language of the 2013 Restated Assignment between it and Nicolet and on the trial court’s decision. (Appellee’s

Br. at 6.) Of course, the trial court's conclusion is not itself a basis to conclude that Tissue Technology is the real party in interest – that is the issue on appeal, which must be supported by record evidence sufficient to justify the same decision. And on that point, the only factual information upon which Tissue Technology could possibly rely is the Restated Assignment.

Yet, under any reading of the Restated Assignment itself, it is plain that Tissue Technology is not the real party in interest. For example, Tissue Technology is purportedly granted a “license” to collect amounts due to Tissue Technology, but only under specific conditions outlined in the Restated Assignment. (App. 24.) In particular, Tissue Technology must obtain Nicolet's “prior written approval of any settlement agreed to by” Tissue Technology and ST Paper, and Tissue Technology committed to use “the first proceeds from the lawsuit to pay [its] indebtedness” to Nicolet. (*Id.*)

Tissue Technology contends that the “real party in interest” rule “is satisfied when it is shown that the party suing is the one who has the right to control and receive the recovery.” (Appellee's Br. at 6-7.) True enough, and that is precisely what defeats Tissue Technology's argument. Under even the Restated Assignment, Nicolet receives the proceeds. Nicolet ultimately controls the

litigation. Tissue Technology cannot proceed without Nicolet's consent. Those fundamental tactical and strategic rights are reduced in Tissue Technology's brief to merely "a couple of conditions." (*Id.* at 8.) To the contrary, they are the heart of the contractual rights of any party to any agreement.

Nicolet has had the sole interest in the Agreement since Tissue Technology assigned it to Nicolet in 2007. (App. 19-22.) ST Paper consented to this assignment, as required by the Agreement. (App. 22.) Nicolet's contractual rights in the Agreement deprive Tissue Technology of the standing necessary to enforce the Agreement, as all control and right to the cause of action has not been divested from Nicolet. *See Chase v. Dodge*, 111 Wis. 70, 72, 86 N.W. 548 (1901) ("If, as between the assignor and assignee, 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....") (citation omitted).

It would infringe ST Paper's rights were Tissue Technology permitted to proceed with litigation under the Agreement, and ST Paper were later called to answer for the same claims by Nicolet in an attempt to enforce the Agreement. Yet the purported

assignment from Nicolet to Tissue Technology was anything but absolute in form. Nicolet retains the right to veto any potential settlement concerning the Agreement and otherwise to control the litigation. Even under Tissue Technology's construction, Nicolet obviously retains the primary interest in the Agreement and, therefore, Nicolet could also assert the same contractual rights.

The holder of contractual rights cannot "license" to a proxy the right to prosecute a lawsuit, whose benefits, if any, would still flow to the assignee. The Court should reverse the trial court's conclusion to the contrary.

## **II. The Purported Reassignment to Nicolet is Ineffective without ST Paper's Consent.**

While ST Paper consented to the assignment from Tissue Technology to Nicolet, it never consented to the 2013 Restated Assignment. Because the Agreement requires ST Paper's consent for any assignment, the absence of that consent invalidates the purported reassignment.

With the 2007 assignment of the Agreement by Tissue Technology, Nicolet obtained no greater, and no fewer, contractual rights and obligations than those held by Tissue Technology.

*Moutsopoulos v. American Mut. Ins. Co.*, 607 F.2d 1185, 1189 (7th Cir. 1979) ("Elementary contract law provides that upon a valid an

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)). Thus, Nicolet took the Agreement subject to all of its terms and conditions, including the provision that any assignment be with the consent of ST Paper. Indeed, Tissue Technology lost any interest in the Agreement with the assignment to Nicolet. See *Tullgren v. School Dist. No. 1*, 16 Wis. 2d 135, 142, 113 N.W.2d 540, 544 (1962) (assignor retains no interest in the subject matter of an assignment following an unqualified assignment).

An essential term of the Agreement was the provision that it could not be assigned absent ST Paper’s consent. An anti-assignment clause in a contract, such as the one in the Agreement, is enforceable under Wisconsin law. *J.G. Wentworth S.S.C. Ltd. Partnership v. Callahan*, 2002 WI App 183, ¶ 19, 256 Wis. 2d 807, 649 N.E.2d 694. It is undisputed that consent was never obtained for the Restated Assignment.

Tissue Technology contends that the requirement of consent to assignments would undermine modern debt collection practices. (Appellee’s Br. at 10.) But most consumer lending transactions do



not include a contractual provision requiring the debtor's consent for an assignment. Here, by contrast, the parties to the Agreement, Tissue Technology and ST Paper, specifically agreed that no assignment could occur without ST Paper's consent. "This Agreement may not be assigned by either party without the express prior written consent of the other." (App. 13.)

ST Paper did consent to an assignment of the Agreement from Tissue Technology to Nicolet, but never consented to any further assignment. (App. 19-22.) The terms and conditions of the Agreement still control and necessarily require consent for any assignment, whatever its label. Nicolet, as Tissue Technology's assignee since 2007, became the "party" bound by the same provision of the Agreement that required ST Paper's consent. Because ST Paper's consent was never obtained, the Restated Assignment is ineffective, leaving Nicolet, not Tissue Technology, as the real party in interest.

When ST Paper consented to the assignment to Nicolet, ST Paper knew full well that – in the event of a default or breach – Nicolet had the right to try to enforce the Agreement. By definition, ST Paper did not consent to Tissue Technology retaining or recovering that right, let alone for both Nicolet and Tissue

Technology to have that right. With the original assignment, Nicolet stepped into Tissue Technology's shoes and, as the successor "party," Nicolet was bound by the same provision in the Agreement requiring ST Paper's consent to assign. Nowhere in its brief does Tissue Technology even address the specific "reassignment" provision but, rather, indulges in word games, calling the conduct here a "license" – a term, not incidentally, nowhere mentioned in the Agreement. Had Tissue Technology wanted to give the bank the right to "license" a collection action based on the Agreement, it surely had the opportunity to do so.

Contrary to the suggestion of the trial court, this would not leave ST Paper immune from suit simply by withholding its consent. ST Paper was, and is, at risk of suit by the party with standing to bring claims under the Agreement. Since 2007 that party has been, and is today, Nicolet, not Tissue Technology.

Indeed, as Tissue Technology states, the "original Agreement is still valid." (Appellee's Br. at 7.) And that Agreement requires ST Paper's written consent to assignment – given once, to be sure, but not for subsequent assignment, serial assignment, or any other kind of assignment.

To conclude otherwise, as the trial court mistakenly did, writes the original consent requirement out of the original Agreement. Whether the 2013 document is called a “reassignment” or by its title, a “Restated and Amended Assignment...,” matters not. The Agreement required ST Paper’s consent for assignment. Nor does it matter that Tissue Technology uses the term “license” to try to disguise an assignment. The original contractual parties – ST Paper and Tissue Technology – required mutual consent to bind each other and that included the need for mutual consent to transfer any rights or obligations by any party.

### **CONCLUSION**

For all of the above reasons, the trial court’s decision denying ST Paper summary judgment should be reversed and the matter remanded to the trial court with instructions that judgment be entered in ST Paper’s favor dismissing Tissue Technology’s claims.

Dated this 18<sup>th</sup> day of April, 2018.

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

I hereby certify that this brief conforms to the rule contained in s. 809.19(8)(b) for a brief 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 1,540 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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## **CERTIFICATE OF SERVICE**

I certify that I filed the Reply Brief of Defendant-Third Party Plaintiff-Appellant in the above-captioned appeal with the Clerk of the Wisconsin Court of Appeals and served a copy on counsel of record this 18<sup>th</sup> day of April, 2018 by first class mail.

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