STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

APPEAL NO. 2020-AP-2013

VHC, INC.,

Plaintiff,

v.

TISSUE TECHNOLOGY, LLC,

Defendant-Third-Party Plaintiff-Appellant,

v.

NICOLET BANKSHARES, INC.,

Third-Party Defendant-Respondent.

Appeal from the Circuit Court of Brown County
The Honorable John P. Zakowski, Presiding,
Circuit Court Case No. 2019CV000903

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT'S BRIEF

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ISSUES PRESENTED FOR REVIEW

1. Did the Trial Court err when it ruled the Sales & Marketing Agreement provision that requires return of the Agreement to Tissue Technology, LLC upon payment of the debt is inoperative if the debt is paid by others?

Answer by the Trial Court: Ruled the debt was paid by others and therefore could be transferred to VHC despite the clear language of the assignment agreement.

2. Whether the Trial Court erred by dismissing the lawsuit where the first Trial court failed to permit Appellant Tissue Technology, LLC to amend its pleadings, after the Appellant learned of the transfer to VHC, Inc., which was never disclosed and never addressed by the first court.

The Trial Court ruled: No amendment allowed.

3. Whether the Trial Court improvidently granted summary judgment before discovery was permitted.

Trial Court: Granted Summary Judgment.

4. Whether the Trial Court improvidently granted the Respondent's Motion to Dismiss.

Trial Court: Granted the Motion to Dismiss.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Appellant believes oral argument may be necessary here in light of the convoluted factual situation. Publication of the Court's decision may be appropriate.

STATEMENT OF THE CASE

The parties to this lawsuit have a long and significant history of business dealings going back many years. Appellant Tissue Technology, LLC had worked with Respondent Nicolet Bank for many years (including its predecessor) while VHC, Inc., who initially started this lawsuit, is a family business, originally started by the Van Den Heuvel Family patriarch, Raymond Van Den Heuvel, continued by his sons, including the current owners of VHC, Inc. and Ronald Van Den Heuvel, who at one point owned Tissue Technology, LLC. The crux of this appeal stems from two separate Brown County lawsuits where the trial courts refused to even give the Appellant an opportunity to have its case heard on the merits AFTER the Appellant learned that Respondent Nicolet Bankshares had transferred its valuable Sales and Marketing Agreement (explained below) to VHS Inc. after VHS paid the debt owed by Appellant to Nicolet Bank and to which VHC., Inc was a guarantor despite crystal clear language in the transfer agreement that mandated the Sales and Marketing Agreement be returned to the Appellant upon payment of the debt. The debt was paid and the Agreement was transferred to VHC by Nicolet.

The Amended and Restated Sales & Marketing Agreement was meant to foster the transfer of ownership interest in the Oconto Falls paper mill to ST Paper while benefitting Tissue Technology LLC with a future stream of income. (R.6 pgs.1-11; A-App.005-015). The Amended and Restated Sales & Marketing Agreement was executed on September 20, 2006 and the closing on the sale of the paper mill and occurred on April 16, 2007.

The Amended and Restated Sales & Marketing Agreement (hereinafter referred to as the "Sales and Marketing Agreement") is an off-take agreement which generally provided that 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, Wisconsin. (R.44 pgs. 1-15; A-App.075-089). The Amended and Restated Sales & Marketing Agreement was to ensure continuity in the relationship between Tissue Technology, LLC, ST Paper and SCA which would then provide Tissue Technology a stream of future revenue and served as additional consideration in the transaction. (R.44 pgs. 1-15; A-App.075-089).

On April 25, 2007, the Amended and Restated Sales & Marketing Agreement was assigned by Tissue Technology, LLC to Nicolet National Bank with the express permission of ST Paper and Sharad Tak. (R.45 pgs. 1-4; A-App.090-093) On July 1, 2008, while Nicolet National Bank was holding the contract rights to the Amended and Restated Sales & Marketing Agreement, ST Paper, LLC and Tissue

Technology, LLC executed an agreement to allow 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, LLC, ST Paper never continued payment after Tissue Technology agreed to assist with the contemplated financing. Finally, on February 28, 2013, in what appeared to be exasperation, Nicolet National Bank assigned the Amended and Restated Sales and Marketing Agreement back to Tissue Technology reserving certain rights. (R.16 pgs. 1-7; A-App.068-074). Shortly after the assignment, while Nicolet Bankshares still held the agreement as collateral, Tissue Technology LLC commenced suit in Oconto County Circuit Court, Case No. 14CV156.

Following the commencement of that action and the commencement of discovery, the parties filed cross motions for summary judgment. The Oconto County Circuit Court ruled that Tissue Technology, LLC could proceed in its claims against ST Paper despite the challenge to the limited assignment. ST Paper then initiated an interlocutory appeal. The District III Court of Appeals reversed the Trial Court holding that Nicolet Bank had retained too many of the rights associated with the contract such that it was the real party in interest, not Tissue Technology, LLC. 2018 WI App 45, 383 Wis. 2d 603, 918 N.W.2d 128. (R.16 pgs. 1-7; A-App.068-074).

Following dismissal of that first action, Appellant Tissue Technology, LLC then commenced an action in Circuit Court for Brown County, when Nicolet Bank refused to sue under the Sales & Marketing Agreement as demanded by the Appellant. *Tissue Technology, LLC v. Nicolet Bankshares, Inc.*, Brown County Circuit Court Case No. 2019CV0273. The Complaint in that action was filed on February 27, 2019. On March 21, 2019, counsel for Nicolet Bank and VHC, Inc., disclosed at that time, and entirely unknown to Tissue Technology, LLC, that Nicolet Bank had transferred the Sales & Marketing Agreement to VHC, Inc. Counsel began formulating a discovery plan, but Nicolet Bank then filed its Motion to Dismiss on April 10, 2019. Tissue Technology, LLC responded and sought the Court's permission to amend its pleadings, requested on the record at the Motion hearing held on June 14, 2019. (R.64 pgs. 1-38 at pg. 11; A-App.033-067 at 043). The Trial Court, presided over by the Honorable Timothy Hinkfuss, did not even address the Appellant's request for an opportunity to amend its pleadings and dismissed the Complaint on July 8, 2019 announcing the result in a bench decision telephonically. (R.24 pgs. 1-13; A-App.018-030).

After that dismissal, Tissue Technology, LLC was then sued by VHC, Inc. in this Brown County action and had included information in its Complaint about which neither Tissue Technology, LLC, nor its counsel, had any information. Having been so informed, and the prior Court having never considered the transaction described in this suit, Tissue Technology, LLC then counterclaimed and filed a third-party complaint against Nicolet Bank.

The defense moved to dismiss the third-party complaint for failure to state a claim citing Wis. Stat. §802.06(2)(a)6. The third-party defendant also moved for summary judgment pursuant to Wis. Stat. §802.08. The trial court first heard oral argument on December 16, 2019. Later, the Court ordered another round of oral argument and thereafter rendered the written decision from which this appeal is taken, granting both summary judgment and the motion to dismiss—ignoring the pleas of the third-party plaintiff to permit its case to be heard and it did so by granting summary judgment despite not allowing the third-party plaintiff the opportunity to conduct any discovery and then also granted, apparently as an alternative, the Motion to Dismiss. (R.57 pgs. 1-12; A-App.094-104). The trial courts having heard these matters have occasioned a great injustice where the Appellant has never had an opportunity to be heard with respect to the transfer of the Sales and Marketing Agreement despite the clear language of the transfer that mandated the Sales and Marketing Agreement be returned to the Appellant after the debt to Nicolet Bank was paid. The assignment did not delineate that it would be transferred to anyone else upon payment of the debt—only the Appellant herein, Tissue Technology LLC.

The Trial Court's Opinion relied on three main factors in reaching its conclusions. (R.57 pgs. 1-12; A-App.094-104). First, the Court ruled in favor of the Respondent on the issue of claim preclusion is a three-part test. (R.57 pgs. 1-12; A-App.094-104). The third element of claim preclusion, that there be an identity of

causes, was not met as will be discussed below. Second, the Court suggested that the Appellant should have amended its complaint rather than seek the Court's indulgence in permitting the plaintiff to amend, despite having made such a request and having been ignored. (R.57 pgs. 1-12; A-App.094-104). Third, the Court focused on the fact that the Note for which the security was given was not paid by the Appellant but rather the guarantor, VHC. (R.57 pgs. 1-12; A-App.094-104). All of this despite the fact that many millions of dollars were owed to the Appellant under the Sales and Marketing Agreement which would have paid the debt. Of course, default was a risk undertaken by VHC when it agreed to guaranty the debt. Finally, the Trial Court relied on paragraph four (4) of the Third-Party Complaint though in derogation of paragraph five (5). (R.57 pgs. 1-12; A-App.094-104).

The Trial Court was wrong on each count as will be discussed below but without addressing whether granting the Respondent's motions was in derogation of concepts of fairness and justice and completely ignoring the deprivation of the Appellant's right to have its claim adjudicated.

LEGAL ARGUMENT

I. THE TRIAL COURT INEXPLICABLY GRANTED SUMMARY JUDGMENT BEFORE THE APPELLANT COULD TAKE ANY DISCOVERY CONTRARY TO WELL ESTABLISHED WISCONSIN LAW.

Justice demands that Appellant Tissue Technology have the opportunity to discover what happened to its collateral, worth more than $20 million, which was apparently given to VHC, Inc. by Nicolet Bank. Wis. Stats. §802.08(4) provides that

the Court may refuse a Motion for Summary Judgment where the party cannot adequately respond to that Motion. The statute reads as follows:

> 802.08(4) When Affidavits Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the motion for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

As detailed above, Tissue Technology has not even had an opportunity see the transfer documents to ascertain the nature and extent of the agreement between VHC and Nicolet Bank. Perhaps ST Paper engineered the transfer and VHC was paid by ST Paper—we do not know. What were the terms? What was the agreement between the parties? This record is devoid of that information because the Appellant was never afforded an opportunity to discover the facts. In *Fortier v. Flambeau Plastics Company*, 164 Wis.2d 639, 476 N.W.2d 593 (Ct. App. 1990), a complex products liability case, the Fourth District Court of Appeals cited favorably to *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), which addressed the federal counterpart to our summary judgment statute, Federal Rule of Civil Procedure 56. Citing *Celotex*, the court stated as follows:

> In *Celotex*, the plaintiff claimed that her husband's death resulted from exposure to asbestos manufactured or distributed by the defendants. The defendants moved for summary judgment dismissing the complaint, on grounds that in answer to their interrogatories, the plaintiff failed to identify any witness who could testify to her husband's exposure to the defendants' asbestos products. The *Celotex* court held that the federal summary judgment rule "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case,

> and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. The moving party is entitled to summary judgment as to an essential element as to which that party bears the burden of proof.

Id. at 323.

The *Fortier* Court adopted the well-established federal requirement that summary judgment should not be granted unless an adequate time for discovery is allowed. Likewise, in *Kinnick v. Schierl, Inc.*, 197 Wis.2d 855, 541 N.W.2d 803 (Ct. App. 1995) Hon. Robert Sundby, in his dissent, further elucidated on this rule. Citing federal authorities throughout, Judge Sundby, consistent with Wis. Stats. §802.08(4), opined as follows:

> There is nothing in the rules of civil procedure which prevents a party from moving for summary judgment before discovery is completed. However, a court may not, without erroneously exercising its discretion, grant summary judgment when an opposing party shows by affidavit that he or she cannot at that time present by affidavit facts essential to justify his or her opposition.
>
> Subsection (4) [of §802.08] protects a party opposing a summary judgment motion who for valid reasons cannot by affidavit or other authorized means present facts essential to justify the party's opposition to the motion.
>
> A party who seeks the protection of Subsection (4) must state by affidavit the reasons why the party is unable to present the necessary opposing material … The affidavit need not contain evidentiary facts going to the merits of the case; it is merely a sworn statement explaining why these facts cannot yet be presented.
>
> "Rule 56 does not require that any discovery take place before summary judgment can be granted; if a party cannot adequately defend such a motion, Rule 56(f) is his remedy." Thus, that more time was scheduled for discovery does not, by itself, defeat summary judgment. The [plaintiffs] must satisfy Rule 56(F), a rule which "may not be invoked by the mere assertion that discovery is incomplete; the

> opposing party must demonstrate 'how the additional time will enable him to rebut the movant's allegations of no genuine issue of material fact.'" "The nonmovant's 'casual reference to the existence of ongoing discovery falls far short of showing how the desired time would enable it to meet its burden in opposing summary judgment.'" (Quoted sources omitted); see also *Burns v. Gadsden State Community College*, 908 F.2d 1512, 1519-20 (11th Cir. 1990) (district court should have delayed its decision on the merits of defendant's motion for summary judgment until responses to interrogatories had been filed); *Dunkin' Donuts of America, Inc. v. Metallurgical Exoproducts Corp.*, 840 [***20] F.2d 917, 919 (Fed. Cir. 1988) (summary judgment is inappropriate unless a tribunal permits the parties adequate time for discovery); *Klingele v. Eikenberry*, 849 F.2d 409, 412 (9th Cir. 1988) (summary judgment is disfavored where relevant evidence remains to be discovered); *First Chicago Int'l v. United Exchange Co.*, 267 U.S. App. D.C. 27, 836 F.2d 1375, 1381 (D.C. Cir. 1988) (plaintiff must have "a full opportunity to conduct discovery.").

In the case at bar, Respondent Nicolet Bankshares, Inc. only submits that it had the right to transfer the Sales and Marketing Agreement because VHC, Inc. had somehow purchased the debt. As will be stated below, the Assignment does not permit transfer to anyone but Tissue Technology, LLC once the debt was paid. Nevertheless, as it relates to this argument, the affidavit of Brad Hutjens was filed in support and cannot be countered since Mr. Hutjens' deposition hasn't been taken, nor has the Appellant ever received a copy of the documents showing the manner by which the transfer took place. Neither has Tissue Technology, LLC been afforded the opportunity to investigate whether that transfer was otherwise permitted. Tissue Technology, LLC is hamstrung from discovering anything about this transaction other than having known that it occurred, having reviewed the Assignment and having learned from counsel for Nicolet Bankshares, Inc. that a

transfer took place. It is Tissue Technology, LLC's position that the transfer was made contrary to the terms of the contract but it cannot even evaluate whether the transfer was permitted. This is precisely the circumstance that warrants a fair opportunity for discovery. Yet, the Trial Court granted summary judgment in derogation of the aforementioned authorities that require a reasonable course of discovery be undertaken so as to permit the party opposing the summary judgment motion to learn the facts.

II. THE ASSIGNMENT OF THE SALES AND MARKETING AGREEMENT SPECIFICALLY PROHIBITS ITS TRANSFER UPON PAYMENT OF THE DEBT TO ANYONE OTHER THAN TISSUE TECHNOLOGY, LLC

The Sales and Marketing Agreement secured a note owed by Appellant Tissue Technology LLC to Respondent Nicolet Bank. It would appear, though the Appellant cannot be certain because it has been denied the opportunity to conduct discovery, that Nicolet Bank has been paid by VHC and in exchange, the Note that was secured by the Sales and Marketing Agreement was assigned to VHC. The Note may well be negotiable, but the Sales and Marketing Agreement is not. The Assignment of the Sales and Marketing Agreement between Tissue Technology, LLC and Nicolet Bank is explicit. It states:

> ARTICLE V
> REASSIGNMENT
>
> Upon payment in full of the Note and the Indebtedness defined in the Commercial Security Agreement, the interests of Assignee in the

> Sales and Marketing Agreement herein assigned shall be released to Assignor and this agreement shall be terminated.

(R.45 pgs. 1-4; A-App.090-093).

Tissue Technology, LLC has no idea whether and to what extent the Note held by Nicolet Bank has been paid. What sum did VHC pay to Nicolet Bank in order to obtain that Note? Was it a cash payment or were there other considerations involved that would have effectively permitted or prohibited the transfer of the collateral; to wit: the Sales and Marketing Agreement? We have no idea. The Appellant had intended to find out these matters in both of the Brown County actions but that discovery was interrupted by the filing of the Motion to Dismiss and the interplay of §802.06(1)(b). The Appellant has not conducted a deposition or any other discovery and has no idea either at that time up to now what this transaction involved. Yet, the Appellant was put into a pleading circumstance that it could not find out and could not allege the circumstances of the transaction. The only thing known is that the transfer occurred by the representations of counsel in the first Brown County suit and the issuance of the Complaint in this lawsuit—in both cases, without the bedrock opportunity of learning what happened. Appellant Tissue Technology, LLC is completely handcuffed and cannot respond adequately, even in this Court, because the terms of the Agreement are unknown. With the debt to Nicolet Bank paid, the Sales and Marketing Agreement must be returned to Tissue

Technology, LLC. Justice demands that the Trial Court be reversed so the Appellant can at least understand the nature and extent of the transaction from which Nicolet Bank wishes to be exonerated.

Nicolet Bankshares also alleges that it could do what it wished with the Note and collateral based upon non-payment. (R.20 pgs. 1-2; A-App.016-017). As stated above, the collateral, in this case, the Sales and Marketing Agreement, only submits that it was assigned to Nicolet Bank and was to be returned to Tissue Technology, LLC when the debt was paid. (R.20 pgs. 1-2; A-App.016-017). We do not know the circumstance of whether the debt was or was not paid nor the terms and conditions. (R.20 pgs. 1-2; A-App.016-017). Moreover, if it is deemed that the Note was satisfied vis-à-vis Nicolet Bank, it matters not who paid, it only matters that the debt was satisfied. The plain language of the Assignment says as much. (R.45 pgs. 1-4; A-App.090-093). One can assume that the debt was somehow satisfied whether with cash, or other considerations. Again, the Appellant does not know this and respectfully requests that it be allowed to discover the facts and circumstances.

III. COLLATERAL ESTOPPEL IS NOT APPROPRIATE AS A BASIS FOR DISMISSAL FOR FAILURE TO STATE A CLAIM

The Trial Court that the doctrines of res judicata and collateral estoppel bar the third party complaint. The issue concerning the transfer of Note and Sales and Marketing Agreement to VHC was never adjudicated in either of the Brown County

courts. Tissue Technology asked the Court in the first suit for an opportunity to amend the pleadings. The statement to the Court, on the record, by counsel for the Appellant:

> The fact of the matter is here that after the litigation was commenced we learned not only did the loan become paid off, but that the collateral was then transferred to a third-party, VHC, rather than us. And so, that's why we have asked for the opportunity to replead because we're going to add that to the complaint.

(R.64 pgs. 1-35 at 11; A-App.033-067 at 043).

The complaint in the first Brown County lawsuit did not include any allegations concerning this because the Appellant only learned about it after filing the previous Brown County suit. Neither collateral estoppel nor claim preclusion apply under this set of facts. The final judgment on the merits will operate as a bar to a subsequent lawsuit arising out of the same transaction, however, the transaction involved here was not the same. Claim preclusion provides that the factors to be considered are whether the facts in the prior litigation are related in time, space, origin or motivation to those then before the Court. In *Northern States v. Bugher*, 189 Wis.2d 541, 525 N.W.2d 723 (S. Ct. 1995), the Supreme Court modified the concepts of res judicata in favor of the concepts of claim preclusion and issue preclusion. The Court stated:

> In order for the earlier proceedings to act as a claim-preclusive bar in relation to the present suit, the following factors must be present: (1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction.

> *Id.* at 311, 334 N.W.2d at 885; *Pliska v. City of Stevens Point, Wisconsin*, 823 F.2d 1168, 1172 (7th Cir. 1987). Our task is to determine whether the facts in this case meet these three requirements.

Northern States v. Bugher, *supra,* 189 Wis.2d at 551, 525 N.W.2d at 728.

In the case at bar, the transaction involved concerns the transfer of the Note and the Sales and Marketing Agreement to VHC. That transaction was never mentioned in the prior complaint since the plaintiff did not even know about it until shortly before Nicolet Bank filed its Motion to Dismiss. Granted the parties are the same but there is no identity of cause since there was never an allegation or cause related to the transaction at the heart of this lawsuit. A cause of action refers to "…facts upon which one or more rights of action are based, rather than the rights themselves." *Val-Lo-Will Farms, Inc. v. Irv Azoff & Associates, Inc.,*71 Wis. 2d 642 at 644-645, 228 N.W.2d 738 at 739 (1976). In this case, the Trial Court erroneously relies on the legal causes not the facts in deciding the third factor elucidated in *Northern States v. Bugher, supra,* were met. The facts giving rise to the cause of action in this case were never alleged in any prior lawsuit solely because the facts were not known—and they still are not known.

Since it was not before the Court in the prior suit, necessarily there was not a final judgment on the merits. Tissue Technology, LLC to this day has no information about the transfer other than the oral representations and the allegations contained in the complaint VHC filed in this lawsuit. How can Tissue Technology even evaluate its rights vis-à-vis Nicolet Bank and VHC without having an opportunity to take discovery? The issues involved in this case are not the same.

The prior case was premised upon the fact that Nicolet Bank held the Sales and Marketing Agreement. Apparently it did not hold the Sales and Marketing Agreement as stated even though that was the premise of the suit. It was never disclosed to the Appellant even though, as is alleged in VHC's underlying complaint in this action, the Note was purchased and the Sales and Marketing Agreement was transferred on December 19, 2018 before the first Brown County lawsuit was even initiated and suit was filed on February 27, 2019. (R.1 pgs. 3-6; A-App.001-004). No one involved in the transaction, despite the history between the parties, bothered to inform the Appellant of this fact until the Appellant had filed its first suit in February of 2019 and even then it was not until March 21, 2019 that the Appellant was initially informed.

For claim preclusion to apply, a court must have the opportunity to evaluate the claim in the prior proceeding. That did not happen, and the claim was never adjudicated. Nicolet Bank's request to apply claim preclusion must be denied. Moreover, this Court should not give its imprimatur the surreptitious nature of this transaction, and the shady practice of the bank and VHC.

IV. PAYMENT OF THE DEBT TO NICOLET WAS NOT GROUNDS TO TRANSFER THE COLLATERAL TO VHC

The Trial Court also determined that Nicolet Bankshares could do what it wished with the Note and collateral based upon non-payment. (R.57 pgs. 1-12; A-App.094-104). This is clearly error as it is contrary to the precise words of the agreement between the Appellant and Respondent. As stated above, the collateral,

in this case the Sales and Marketing Agreement, only submits that it was assigned to Nicolet Bank and was to be returned to Tissue Technology, LLC when the debt was paid. (R.45 pgs. 1-4 at pg. 3; A-App.090-093). We do not know the circumstance of whether the debt was or was not paid nor the terms and conditions, though it is presumably paid. (R.20 pgs. 1-2; A-App.016-017). Moreover, if it is deemed that the Note was satisfied vis-à-vis Nicolet Bank, it matters not who paid, it only matters that the debt was satisfied. The plain language of the Assignment says as much. (R.45 pgs. 1-4 at 3; A-App.090-093).

Wisconsin law provides that contracts are to be enforced as long as those contracts were entered into by and between competent and intelligent parties. *Jezeski v. Jezeski*, 316 Wis.2d 178 at 184, 763 N.W.2d 176 (Ct. App. 2008). A Court can only refuse to enforce a contract where it has no doubt that it violates a statute, a rule of law or public policy. Id. at 185. The Courts are to protect each of the parties to a contract by ensuring the parties' promises will be performed. *Merten v. Nathan*, 108 Wis.2d 205 at 211, 321 N.W.2d 173 at 177 (S. Ct. 1982). One can assume that the debt was somehow satisfied whether with cash, or other considerations. Again, we do not know this and respectfully request that we be allowed to discover the facts and circumstances. In any event, the clear contract language provides only that if the debt was paid, the Sales and Marketing Agreement was to be returned to the Appellant.

V. DISMISSAL PREMISED ON THE RESPONDENT'S MOTION TO DISMISS IS CONTRARY TO WELL-ESTABLISHED WISCONSIN LAW

The Trial Court granted the Respondent's Motion to Dismiss even though Respondent Nicolet Bank made no legitimate argument in its Trial Court submissions regarding its alternative Motion to Dismiss. The Motion to Dismiss must be evaluated in terms of whether the Third-Party Complaint had sufficient facts to state a cause of action. Wis. Stat. §802.02(1) and (6) provides only that the "plaintiff" make a short and plain statement of the claim identifying the transaction or occurrence, or series of transactions that give rise to the claim. The Third-Party Complaint is to be considered as true, along with all reasonable inferences therefrom. *Scarapaci v. Milwaukee County*, 96 Wis.2.d 663 669, 292 N.W.2d 816 (S. Ct.1980). A complaint should not be dismissed for failure to state a claim unless it appears that under no circumstances can relief be granted. *Kranzush v. Badger State Mutual Cas. Co.*, 103 Wis.2d 56 at 82, 307 N.W.2d 256 (S. Ct. 1981). The pleadings are to be liberally construed so as to do substantial justice to the parties. *Scarpaci v. Milwaukee Co.*, *supra*. Wis. Stats. §802.02(6). In this state, the technical and formal concepts of common law form pleading have been abandoned in favor of a more functional, notice pleading. *Tews v. NHI, LLC*, 2010 WI 137, 330 Wis.2d 389, 793 N.W.2d 860. The notice pleading rule is intended to facilitate the orderly adjudication of disputes based upon the merits and should not become a "game of skill in which one misstep of counsel may be decisive of the outcome." *Korkow v.*

General Casualty Co. of Wis., 117 Wis.2d 187 at 193, 344 N.W.2d 108 (S. Ct.1984), *citing*, *Canadian Pac. Ltd. v. Omark-Prentice Hydraulics*, 86 Wis.2d 369 at 373, 272 N.W.2d 407 (Ct. App. 1978). The Appellant's claim, on the merits, has never been addressed.

Wis. Stats. §409.207 requires that the secured party use reasonable care in the custody and preservation of the collateral. *See also* Wis. Stats. §409.208. Wis. Stats. §409.207(2)(d)(3) allows only that the party having possession of the collateral act in the manner and to the extent agreed by the debtor. In this case, the Respondent Bank failed to act in accordance with its express agreement with the Appellant. In that regard, it has breached its duties, both in common law and as required under Chapter 409 of the Wisconsin Statutes. The Respondent included the Motion to Dismiss, though ingenious, on the part of the Respondent in order to handcuff the Appellant by the automatic discovery stay, it is hardly fair to Appellant Tissue Technology, LLC. In fact, because there have been no legitimate arguments in offered under §802.02(1) and (6) and §802.06(2), that part of the Trial Court's decision must be reversed.

CONCLUSION

Nicolet Bankshares, Inc. was precluded from transferring the Sales & Marketing Agreement to VHC, Inc. upon payment of the debt owed by the express terms of the agreement. Nothing in the parties' agreement provides that Nicolet Bankshares, Inc. could do anything else with the Sales & Marketing Agreement but return it to Tissue Technology, LLC.

The Trial Court granted summary judgment without ever permitting Tissue Technology, LLC an opportunity to discover anything about the facts and circumstances surrounding the transfer. That is because the simultaneous Motion to Dismiss precludes conduct of discovery until the Motion to Dismiss is resolved.

It is further evident the Appellant, Tissue Technology, LLC, has been denied its day in court by the tactics of counsel for Nicolet Bankshares, Inc. and the acquiescence of the Trial Court in those tactics. Most importantly, despite acting in good faith throughout and addressing all legal issues, justice requires that Tissue Technology, LLC be granted its day in court. It was denied an opportunity to amend its pleadings as requested. When it then reasonably started a new lawsuit to address those inequities, in a third-party fashion since it did not commence the initial lawsuit, the Court denies a relatively common procedural opportunity to file an amended complaint in the first action and then is now being denied the opportunity in this new action to be heard in any fashion regarding the surreptitious transfer of the Sales & Marketing Agreement to VHC, Inc. despite the plain language of the Agreement. Justice demands that the Trial Court be reversed so that Tissue Technology, LLC may have its day in court.

Dated this 13th day of January, 2021.

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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 5,195 words and 21 pages.

Dated this 13th day of January, 2021.

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ELECTRONIC CERTIFICATION

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated at Milwaukee, Wisconsin this 13th day of January, 2021.

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TISSUE TECHNOLOGY, LLC,

Defendant-Third-Party Plaintiff-Appellant,

v.

NICOLET BANKSHARES, INC.,

Third-Party Defendant-Respondent.

Appeal from the Circuit Court of Brown County
The Honorable John P. Zakowski, Presiding,
Circuit Court Case No. 2019CV000903

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2021, an electronic version of the Defendant-Third-Party Plaintiff-Appellant's Brief and the Brief Appendix, were served upon the following via the Electronic Case filing System:

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

I further certify that on the 13th day of January, 2021, a true and correct copy of the Defendant-Third-Party Plaintiff-Appellant's Brief and the Brief Appendix were sent via the United States Postal Service to:

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Dated at Milwaukee, Wisconsin this 13th day of January, 2021.

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