STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

VHC, INC.,

Plaintiff, **Appeal No.** 2020-AP-2013

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

RESPONDENT'S BRIEF

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Statement on Issues for Review

1. Did the Circuit Court err in granting summary judgment based on res judicata/claim preclusion because Tissue Technology failed to raise these pertinent issues in earlier litigation and in fact, had planned to amend its complaint to do so, but inexplicably did not.

The Circuit Court granted summary judgment.

2. Did the Circuit Court err in granting a motion to dismiss for failure to state a claim when Tissue Technology failed to plead that it had repaid the money it borrowed, which served as a prerequisite and condition precedent to the return of collateral it had assigned outright.

The Circuit Court granted the motion.

3. Did the Circuit Court abuse its discretion in deciding both these motions before allowing Tissue Technology to take discovery on the merits of the case, when Wis. Stat. § 802.06(1)(b) forbid discovery and Tissue Technology presented no good reason why discovery was necessary in order to address the preliminary issue of res judicata/claim preclusion.

The Circuit Court did not lift the statutory stay.

Statement on Oral Argument and Publication

The decision should be published because the Courts have not addressed, so far, the circumstances under which the discovery stay statutorily imposed when a motion to dismiss is pending should be lifted. The case also presents commercial issues modern courts have rarely addressed and, if the court reaches those

questions, publication will benefit judges, lawyers, lenders and borrowers.

While Tissue Technology requests oral argument because the factual background is complex, in fact, it is not. The Court need not address the merits of the claim because the Circuit Court's decision clearly explains why that issue should have been presented in earlier litigation. This Court benefits from clearly written and oral decisions from Judges Zakowski and Hinkfuss and its own decision in a prior appeal Tissue Technology advanced. The factual background is not so complex that briefing cannot explain it adequately.

Statement of the Case

A. Introduction

This appeal represents the third lawsuit Tissue Technology, LLC ("Tissue Technology") has advanced to recoup commissions ST Paper LLC ("ST Paper") supposedly owes it. Tissue Technology lost twice before, and now appeals its third loss, contending the Circuit Court improperly granted summary judgment and motions to dismiss against it. The Circuit Court granted those motions based on well-established principles of claim preclusion/res judicata and the impossibility that Tissue Technology could adequately plead a claim for breach of contract against Nicolet Bankshares ("Nicolet").

The third-party complaint asserts Nicolet breached a contract by transferring collateral supposedly belonging to Tissue Technology. (R.6:6; R. App. § 81). But that complaint, which failed to allege that Tissue Technology fulfilled the contract between the parties, thus lacks an essential component: Tissue Technology has not repaid the promissory note, a

prerequisite to the return of the Sales and Marketing Agreement between Tissue Technology and ST Paper, which serves as the note's collateral. (R.6:10; R. App. 85). Tissue Technology actually possesses no rights in the Sales and Marketing Agreement, according to a determination made months ago in another Court, when Judge Hinkfuss determined that the agreement belonged to Nicolet because Tissue Technology had assigned it outright. (R.24:3-6; R. App. 19-22). Proceedings there established that the claim Tissue Technology now asserts in this case was well known in that prior litigation, so this claim should have been—but was not—advanced there and is, therefore, barred by claim preclusion/res judicata. (R.22; R.12:11, 17; R.25:3, 5; R. App. 34). Finally, the note, which is a negotiable instrument has not been repaid under the assignment; it has been negotiated – transferred and assigned – from Nicolet to VHC, Inc., the company which guaranteed the debt and has been paying it all along. (R.20:2). To obtain the return of its collateral, Tissue Technology need only repay its loan, which VHC now owns.

B. The ST Paper Commissions and the Nicolet Loan

Tissue Technology's factual recitation is far more complex than necessary, even though the case involves three contracts and three lawsuits. Events began in September, 2006, when Tissue Technology and ST Paper amended and restated a Sales and Marketing Agreement. (R.10:11-19; R.9:1-4). According to the agreement, ST Paper bought the assets of Oconto Falls Tissue, Inc, Echo Fiber, Inc., and Recovering Aqua Resources, Inc. and had ambitions to manufacture tissue, gypsum, and linerboard at the facilities it acquired. (R.10:11). The agreement appointed Tissue Technology as ST Paper's representative to solicit off-

take agreements from customers buying ST Paper products. (R.10:12). The agreement defined an off-take agreement as a firm commitment to purchase ST Paper products in a specified amount pursuant to a customer order. (*Id.*) Once the products were shipped and paid for, Tissue Technology received commissions at varying rates the agreement specified. (R.10:15). Tissue Technology contends it has received over $20 million less in commissions than it earned. (R.6:5; R. App. 80).

The record contains little evidence describing any efforts Tissue Technology made to collect these commissions from ST Paper directly. Perhaps that is because, in April, 2007, Tissue Technology assigned the Sales and Marketing Agreement to Nicolet Bank as security for a $3.6 million note. (R.9:7; R. App. 13). The assignment was absolute, so Nicolet owned the agreement. The assignment established as much: "Assignor does hereby sell, assign, transfer and set over to Assignee, its successors and assigns, all of Assignor's right, title and interest of Assignor in and to the Sales and Marketing Agreement, including all amendments of, supplements to, renewals and extensions thereof at any time made together with any and all commissions due thereunder." (R.9:7-8; R. App. 13-14). The assignment added that it included "all rights and remedies of Assignor under the Sales and Marketing Agreement," and that Nicolet Bank "shall have the right, without further notification to Assignor, to exercise all rights of Assignor with respect to the Sales and Marketing Agreement herein assigned, including but not limited to the right to receive payment of the commissions regardless of any contrary provision in the Sales and Marketing Agreement." (R.9:8-9; R. App. 13-14).

The assignment thus transferred "all rights and remedies of Assignor under the Sales and Marketing Agreement, including but not limited to, the right to take any and all such actions as necessary, either in the name of Assignor or Assignee, for breach of payment with respect to any fees due thereunder." (R.9:8; R. App. 13). The agreement, however, imposed no responsibility on Nicolet to sue ST Paper or undertake any effort to collect commissions. (R.24:5-6; R. App.67-68). It merely provided Nicolet the choice to do so should Tissue Technology's debt go unpaid.

Because the Sales and Marketing Agreement served as collateral to secure a debt, it remained in full force until the note and any other indebtedness owing Nicolet Bank was paid in full. When that happened, the assignment called for the "reassignment" of the agreement: "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.9:9; R. App. 15). In 2007, ST Paper consented to the assignment, just as the Sales and Marketing Agreement required. (R.9:10, R. App. 16).

C. The Loan in Default But Not Arrears

The record also contains little information about Tissue Technology's loan payment history on its note to Nicolet, but without dispute Tissue Technology missed multiple note payments, which VHC had guaranteed. (R.20:2). According to Tissue Technology, VHC was the family business of the Vanden Heuvel family; Ron Vanden Heuvel previously owned Tissue Technology. (App. Br. p.2). Although Tissue Technology dishonored its note, VHC honored its guarantee. (R.20:2).

Consequently, the loan was never in arrears, even though Tissue Technology was in default, and, of course, with payments current Nicolet had no reason—or right—to resort to the Sales and Marketing Agreement for payment, since it had lost nothing. (R.20:2).

D. Lawsuit Number One

Apparently discontent with Nicolet's unwillingness to file suit against ST Paper to collect payments on a bank loan that were already being made, Tissue Technology persuaded Nicolet to permit it to do so. Consequently, the parties executed an amended assignment of the Sales and Marketing Agreement which licensed Tissue Technology to sue ST Paper in order to collect ST Paper's purported debt. (R.9:11-13). The document again reiterated that Tissue Technology "sells, assigns, transfers and sets over to Nicolet... all of the right, title and interest of Assignor in, to and under the marketing agreement... together with any and all commissions due thereunder", so ownership remained with Nicolet. (R.9:12).

But the agreement, which now acknowledged a total indebtedness of approximately $4.9 million, differed from the original assignment insofar as Nicolet granted Tissue Technology "a limited license to collect at Assignor's [Tissue Technology's] own expense amounts due and owing by ST Paper to Assignor under the Sales and Marketing Agreement…". (R.9:11-12). Tissue Technology, in addition, agreed to obtain Nicolet's written approval of any settlement with ST Paper, dedicated the first proceeds of the lawsuit to repaying all indebtedness to Nicolet, and pledged the proceeds of the litigation as further security for the debt. (*Id*.)

Armed with this license, Tissue Technology sued ST Paper, but the Court of Appeals granted an interlocutory appeal and reversed the trial court's refusal to dismiss the case. (R.9:14-20; R. App. 17-23). The Court of Appeals concluded that Tissue Technology had assigned the Sales and Marketing Agreement to Nicolet, the agreement required ST Paper's consent to an assignment, and that while ST Paper had consented to the original assignment, it did not consent to re-licensure to Tissue Technology. (Id. ¶¶ 8-9; R. App. 21). Consequently, the Court concluded that Nicolet, not Tissue Technology, still owned the agreement, was the real party in interest, and, therefore, only Nicolet was entitled to bring suit. (Id. ¶ 12; R. App. 22). Invoking the "well-settled law that a party's assignment of an existing right to another extinguishes that party's interest in the contract", the Court of Appeals concluded that Tissue Technology no longer possessed legal rights against ST Paper under the agreement. (Id. ¶ 8; R. App. 21). In sum, having assigned the contract to Nicolet, even as security, Tissue Technology had lost all legal interest in it.

E. Lawsuit Number Two

But none of that deterred Tissue Technology. That dismissal led to the second in the trilogy of Tissue Technology's lawsuits. It filed its next lawsuit in Brown County Circuit Court against Nicolet Bank and no one else. Assigned to Judge Hinkfuss, that suit charged that Nicolet had committed certain torts, breached a fiduciary duty, and violated the contract – the assignment of the Sales and Marketing Agreement – that existed between the litigants, all because Nicolet refused to file suit against ST Paper. (R.10:1-10). The complaint asserted that Nicolet had breached the

assignment by rejecting Tissue Technology's demand that Nicolet sue ST Paper in Nicolet's own name to collect commissions for Tissue Technology which claimed were overdue. (R.10:7 ¶ 13).

Three weeks after that filing Tissue Technology learned – from Nicolet's counsel in fact – that the note had been negotiated to VHC and, the collateral consequently transferred with it by operation of law. (R.12:11, 16-17). Contending that Nicolet's negotiation of the note in favor of VHC somehow added to the claims for breach it thought it possessed, Tissue Technology asked the Court's permission to amend its complaint, apparently oblivious to the fact that it possessed the right to do so without grace of the Court by virtue of statute.

Nicolet Bank soon moved to dismiss the complaint, a motion that Judge Hinkfuss granted. (R.24; R. App. 63-75). Judge Hinkfuss noted that undisputed facts showed that ST Paper and Tissue Technology had entered into an exclusive agency contract in September 2006, that Tissue Technology had assigned its interest in that agreement to Nicolet Bank to secure its indebtedness in April 2007, and Nicolet Bank unsuccessfully licensed the right to sue for commissions back to Tissue Technology, a maneuver which failed to confer rights upon Tissue Technology to sue ST Paper according to this Court of Appeals. (R.24:3-4; R. App. 65-66). While Nicolet Bank refused Tissue Technology's demand to sue ST Paper in its own name, neither the assignment nor the licensure imposed that obligation; therefore, Nicolet's motion to dismiss the complaint succeeded. (R.24:5; R. App. 67).

Of critical importance here, Judge Hinkfuss fully evaluated the assignment of the Sales and Marketing

Agreement and noted that it completely transferred Tissue Technology's rights under the agreement, since the agreement itself announced that Tissue Technology "sells" and "transfers" all it owned in the Sales and Marketing Agreement. (R.9:7; R. App. 13). The Assignment expressly grants Nicolet Bank "all" rights and remedies that Tissue Technology possessed under the agreement, including by implication the right to – or the right not to – sue ST Paper. (R.9:8; R. App. 14). Judge Hinkfuss' decision fully explains his conclusion that Nicolet owned the Agreement and nothing required Nicolet to sue ST Paper for Tissue Technology's benefit. The key portions of that decision read verbatim:

> I am finding that the assignment between Tissue Technology and Nicolet Bank dated April 25 reads as follows: "First of all, the assignee – I'm quoting this directly – shall have the right, without further notification to assignor, to exercise all rights of the assignor with respect to the Sales and Marketing Agreement hereby assigned, including but not limited to the right to receive payment of the commissions regardless of any contrary provision on the Sales and Marketing Agreement.
>
> The rights provided are not exclusive and shall not preclude the exercise of any other right or remedy that the assignee may have pursuant to any agreement between assignor and assignee pursuant to law or equity."
>
> Then it goes on to say the assign – I quote it directly: "Assignor does hereby sell, assign, transfer and set over to assignee, successors and assigns all the assignor's right, title and interest of the assignor in and to the Sales and Marketing Agreement, including all amendments of, and supplements to, renewals and extensions made together with any and all commissions due under."
>
> I am finding that this assignment imposes no duty upon the assignee [Nicolet] in this case. I think the part I've read, the assignment of collateral, I've emphasized, exercise all rights. "All" is the operative

> word. It doesn't mean some of the rights, it means all the rights.
>
> And maybe I'm missing something cause no one picked up on this, but to me, it's – it's – it's a huge factor in this case. The assignee has all the rights, including the right to sue, including the right not to sue.
>
> And then I've referred to this at our oral argument: Under the assignment the assignor sold – and the word "sell" is in the assignment. There is no – nothing in the agreement which holds that the assignee, that Nicolet Bank is in any way to pursue the commissions and return those to the – to the assignor in this case. I mean, this is sold. I don't know what business – not – the assignor has in something that they sold. It would be like someone selling me a car and making me have a determination what to do with the car. Is there has been no right reserved to the assignor, in this case, to Tissue Technology.
>
> The word "sell" is in the assignment. I didn't put it there. I don't interpret it. That – that the – the assignor somehow retains the rights to the commissions because the word "sell," they sold the commission to Nicolet Bank.

(R.24:4-6; R. App. 66-68). Thus, according to Judge Hinkfuss' ruling, Nicolet owned the ST Paper contract as a matter of law and consequently could exercise all ownership rights including by implication, the right to transfer the agreement to others like VHC. The Court entered its final order of dismissal on July 8, 2019, and the time to appeal expired long ago. (R.17). Even though it stridently criticizes Judge Hinkfuss' decision now, that unappealed judgment binds Tissue Technology for purposes of the case at bar.

F. Lawsuit Number Three

Rather than appeal the Circuit Court's decision and despite the fact that it had already been told twice that the Assignment constituted an absolute transfer of

all its rights to the Sales and Marketing Agreement, Tissue Technology sued again. Tissue Technology alleged that it knew nothing of this transfer to VHC before suit and suggested, consequently, that it was unable to amend its complaint to raise claims of breach. (R. 6:6; R. App. 81).

This time Tissue Technology raised its claims by filing a third-party complaint after VHC sued to enforce the note that it had acquired through Nicolet. Its pleading acknowledged the Sales and Marketing Agreement it entered into with ST Paper and conceded that it had assigned "its interest in the agreement" to Nicolet Bank. (R. 6:4; R. App. 79). Additional allegations characterized the assignment purely as collateral, something that it had unsuccessfully asserted before Judge Hinkfuss. (*Id*.) Tissue Technology noted that this Court of Appeals had determined that Tissue Technology lacked the right to sue ST Paper directly for commissions because that agreement belonged to Nicolet Bank. (R.6:5-6; R. App. 80-81). It conceded that its previous suit before Judge Hinkfuss was unsuccessful "inasmuch as the Court determined the assignment was absolute". (R.6:6; R. App. 80). Apparently believing that its decision not to amend the complaint pending before Judge Hinkfuss somehow gave it a second kick at the proverbial cat, Tissue Technology asserted that because the transfer of the Sales and Marketing Agreement to VHC "was not a part of the pleadings" there and that it "lacked knowledge of the transfer," there was no binding adjudication on the critical subject. (R.6:6; R. App. 80). Tissue Technology then inaccurately concluded that Nicolet Bank had breached the Assignment by transferring the security to VHC when the debt it owed was supposedly paid in full. (R.6:7; R. App. 81).

Tissue Technology blamed Judge Hinkfuss for its failure to raise the claim sooner on the theory that the Court never addressed the Complaint's amendment. (App. Br. p.5). Yet, having filed its lawsuit against Nicolet in Judge Hinkfuss' Court on February 27, 2019, and with no scheduling order in place in that case (R.15:1), Tissue Technology had a statutory right to amend its complaint for six months after its complaint was filed. *See* Wis. Stat. § 802.09(1). It did not do so, even in response to Nicolet's motion for dismissal and even after it professed a plan to amend it. In fact, Tissue Technology wrote in briefing that "the plaintiff will file a motion for leave to amend pleadings shortly after filing this brief. The Plaintiff learned on March 21, 2019, that the Defendant bank had deemed the underlying debt paid in full and then transferred the collateral in question to a third party, VHC Inc." (R.25:3). It advanced the same position in oral argument. According to counsel:

> The law says that you are to consider all of the facts as proven in the complaint and then see if there are any theories of liability and we've proffered two theories of liability here.
>
> 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.12:11; R. App. 34). Although Tissue Technology told a previous Court that this transfer was somehow actionable and that it would amend its complaint to allege the precise breach it alleges here, it never amended the pleading.

G. Judge Zakowski's Decision

Tissue Technology had no more success before Judge Zakowski than it had before Judge Hinkfuss or this Court. Judge Zakowski's decision determined that claim preclusion/res judicata barred the claim. (R.57:6-9; R. App. 6-9). The Court explained that the parties were identical, and that the circumstances underlying this lawsuit and Tissue Technology's previous suit were inter-related as well. (*Id*.) Both pleaded causes of action for breach of contract and both suits sought the same remedy—Tissue Technology asserted that breaching the assignment obliged Nicolet to compensate Tissue Technology for ST Paper's unpaid commissions. (*Id*.) Judge Zakowski ultimately concluded, a "common nucleus of operative facts existed" between the cases for each involved "the same agreement, the same assignment, the same commissions that ST Paper never paid, the same note, the same co-guarantor (VHC) and the same creditor-bank (Nicolet)". (R.57:8; R. App. 8). The Court found that three weeks into the litigation before Judge Hinkfuss, Tissue Technology learned that Nicolet Bank had transferred the note to VHC so no impediment existed to asserting both claims for breach in one lawsuit. (*Id*.)

Secondly, the Court concluded that Tissue Technology's complaint stated no right to sue Nicolet because it could not plead its own performance under the note or the Assignment. (R.57:10; R. App. 10). Implicit in the decision, the Court reasoned that in order to recoup the Sales and Marketing Agreement and collect these supposedly delinquent commissions, Tissue Technology need only do what it promised to do – repay its debt.

Argument

A. Standard of Review

Nicolet moved for summary judgment based on Wis. Stat. § 802.08 and the well-known principles that govern such a motion. They need not be repeated. *Grams v. Boss*, 97 Wis. 2d 332, 338 (1980), and the many cases that follow it set forth the classic procedure the Courts employ in evaluating those motions. Nicolet also moved, alternatively, to dismiss the third-party complaint for failure to state a claim under equally well-established principles, most recently articulated in *Data Key Partners v. Permira Advisers, LLC*, 2014 WI 85, ¶¶ 18-22, 356 Wis. 2d 665. Appellate Courts review these motions *de novo* as legal issues. *Yahnke v. Carson,* 2000 WI 74 ¶10, 236 Wis. 2d 257; *Tietsworth v. Harley-Davidson, Inc.*, 2004 WI 32 ¶11, 270 Wis. 2d 146. In contrast, they review the other decisions criticized here—declining to lift a statutory stay on discovery, amending pleadings and staying summary judgment proceedings pending discovery—for abuse of discretion. *Mathias v. St. Catherine's Hospital, Inc.*, 212 Wis. 2d 540, 554-5, 569 N.W. 2d 330 (1997); *Skyrise Construction Group v. Global Water Center II*, *LLC*, 2020 Wi. App 10 ¶44 (unpublished).

I. Discovery was Unnecessary to Address Res Judicata

A. Tissue Technology Never Adequately Explained its Need for Discovery

Tissue Technology criticizes Judge Zakowski for "inexplicably" granting Summary Judgment when Tissue Technology claimed inadequate opportunity to take discovery about the note's transfer to VHC. (App. Br. p.7). But early discovery was unnecessary, because

both motions could be addressed without it. After all, a motion to dismiss is exclusively based on pleadings, without evidence. The motion for summary judgment was based first on res judicata, so discovery became unnecessary, since res judicata depends on past litigation and applies when a claim was actually litigated, or could have been litigated in prior litigation. *Northern States Power Co. v. Burgher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723, 727 (1995). Thus, no reason existed to delay summary judgment proceedings for discovery because the key motion depended on what Tissue Technology did in past litigation, not on the specifics of Nicolet's transaction with VHC.

Tissue Technology has never explained (here or below) why discovery was necessary to address summary judgment based on res judicata. After all, the question of whether the breach should have been alleged in earlier litigation has little to do with whether Nicolet had a right to transfer the note. Quoting federal and state courts, Tissue Technology concedes:

> Rule 56 [of the Federal Rules of Civil Procedure] 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 non-movant'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.

(App. Br. pp.9-10). (internal quotations omitted; emphasis added). Tissue Technology's argument suffers from that precise deficiency. It merely asserted that

discovery was incomplete, and failed to demonstrate how any additional discovery rebutted the fact that res judicata barred this lawsuit.

B. Judge Hinkfuss Made No Mistake

Tissue Technology's proposed discovery into the merits was, in fact, pointless for this suit plainly should have been advanced in Judge Hinkfuss' court. Tissue Technology excuses this failure by blaming Judge Hinkfuss for ignoring its request to amend the complaint. That is a harsh and unfair criticism of Judge Hinkfuss since Tissue Technology filed no motion when Wis. Stats. § 802.01(2)(a) required one and Courts typically do not respond to litigants' casual requests for orders. Moreover, Tissue Technology hardly needed permission to amend its complaint in the first place, since "a party may amend the party's pleading once as a matter of course at any time within six months after the summons and complaint are filed or within the time set in a scheduling order under § 802.10." Wis. Stat. § 802.09(1). In other words, Tissue Technology needed no permission to raise the breach before Judge Hinkfuss; it could have amended its complaint at any time before the Court dismissed it. Blaming Judge Hinkfuss hardly entitles Tissue Technology to a second lawsuit for breach of the same contract.

C. Judge Zakowski Made No Mistake Either

Tissue Technology also criticizes Judge Zakowski for simply applying the law as written. Under Wis. Stats. § 802.06(1)(b) no discovery occurs upon the filing of a motion to dismiss. In pertinent part, the statute provides: "Upon the filing of a motion to dismiss..., all discovery… shall be stayed for a period of 180 days after

the filing of the motion or until the ruling of the Court on the motion, whichever is sooner, unless the Court finds good cause upon the motion of any party that particularized discovery is necessary." While Tissue Technology complained generally that discovery was stalled, and sought to compel responses to discovery that it had served, (R.30), it never presented a motion showing good cause or sought "particularized discovery". And, while criticizing Judge Zakowski for perpetrating a "great injustice" and "ignoring pleas to permit its case to be heard", (App. Br. p. 6), Tissue Technology overlooks that the Court conducted a lengthy hearing where the Court carefully considered the discovery stay. (R.61). (Nicolet Bank actually concurred there that Tissue Technology was entitled to discovery—but only if the Court intended to reach the merits and evaluate the note's negotiation.) (R.61:10-11). The Court expressed concern about the needless expenditure of time and funds, if the motion to dismiss must be granted based on pleadings alone or if the case must be dismissed for res judicata because Tissue Technology forfeited that claim when it failed to raise it in earlier litigation after threatening several times to do so. (R.61).

Ultimately, res judicata exists to protect litigants from ceaseless lawsuits when one suit addresses an entire controversy. Taking discovery and delaying the res judicata motion subjects Nicolet to the most expensive aspects of litigation and deprives it of the very protections that res judicata affords. The Circuit Court repeatedly asked Tissue Technology to address res judicata, and Tissue Technology repeatedly replied with doublespeak, asserting only that discovery, in its opinion, was critical, but never explaining why it was critical if res judicata applied. (R.61). This statute bypasses time consuming and expensive discovery when

the case should be resolved on much more simple and straightforward grounds. Judge Zakowski followed this legislative mandate. Certainly, Tissue Technology has not shown he abused his discretion in doing so.

II. Undisputed Facts Show that Nicolet Negotiated the Note and that VHC Now Owns it; Tissue Technology Never Repaid its Loan and Has No Right to Return of the Collateral.

Tissue Technology focuses on Nicolet's supposed breach of contract, though much of the argument is beside the point since Nicolet prevailed for other reasons. Nevertheless, no breach of contract occurred because Nicolet indisputably possessed a clear right to transfer the note—as a negotiable instrument—by negotiating it. The undisputed facts showed that: (1) Tissue Technology never repaid its debt; (2) Nicolet negotiated the note by transferring it to VHC, but the debt remained outstanding; (3) the note was not in arrears because the guarantor, VHC, had made the payments to keep it current; (4) Nicolet exchanged the note for VHC's payment at par value; (5) consequently, VHC—not Nicolet—owned the note, and the Sales and Marketing Agreement securing the note passed to VHC by operation of law. (R.20:1-2). See also, *Dow Family, LLC v. PHH Mortg. Corp.*, 354 Wis. 2d 796 ¶ 28-9, 848 N.W.2d 728 (2014).

That the note was negotiated and thus transferred, rather than debt repaid is therefore beyond debate. Article 3 of the Uniform Commercial Code describes negotiating a note as a "transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder." Wis. Stat. § 403.201. Tissue

Technology is, of course, the issuer, VHC the holder, and the transfer of the note from Nicolet to VHC therefore fits the classic definition of negotiation. Section 403.203(1), Stats., describes the rights that VHC acquired upon the transfer.

> An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument. Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument....

So, too, the transfer of a note animates the equitable assignment of the collateral which secures it. According to *Dow*, Article 9 of the Uniform Commercial Code embodies that rule. In particular, Wis. Stat. § 409.203(7), provides that "[t]he attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien." *Dow* noted that the comment to this section expressly provided that it "codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien." Id. ¶ 33, quoting U.C.C. s. 9-03, comment 9 (2000). In short, the transfer of the note to VHC also transferred the security that secured the note.

Despite all this, Tissue Technology claims that the assignment called for Nicolet to transfer the Sales and Marketing Agreement back to Tissue Technology upon repayment of the note, because Article 5 of the assignment provides "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 the agreement shall be terminated." (R.9:9). Tissue Technology thus confuses negotiating a note – transferring possession under Wis. Stat. § 403.201 in exchange for money – with paying a note – which cancels, discharges or otherwise satisfies the debt forever under Chapter 403. The problem, of course, is that the note was not paid; it was negotiated, and Tissue Technology did not repay the indebtedness at all, much less in full. As Tissue Technology acknowledges, Nicolet had an absolute right to negotiate the note and therefore transfer it to VHC. It should have acknowledged that when the note transferred to VHC, the collateral securing the note transferred as well as a matter of law. Yet Tissue Technology ignores *Dow* and this important legal principle altogether.

Furthermore, Tissue Technology has no practical reason to complain. Its position has not worsened. Tissue Technology still owes at least $3.6 million; it merely owes it to VHC, the company that now holds the note. Because Tissue Technology never satisfied its debt, it has no basis to claim that it recoups the collateral. Under the assignment, when Tissue Technology repays VHC, it will be entitled to the return of the collateral. Until then, however, the note, the Sales and Marketing Agreement and any commissions belong to VHC as a result of the note's negotiation.

Certainly, the assignment does not reward Tissue Technology for failing to pay its debt yet that is what it insists occur. By its account, it remains obliged on the note it executed, yet now separates that debt from the collateral that secures it. According to Tissue Technology, VHC might acquire the note but Tissue Technology retakes the collateral. The interpretation

seems counterintuitive, even absurd. There is nothing in the assignment that prohibits transferring the Sales and Marketing Agreement with the note and the assignment's terms hardly reward Tissue Technology for failing to pay its debt by transforming it from a secured to an unsecured obligation. Instead, under clear Wisconsin law, transferring a note automatically transfers the collateral that secures it.

III. Res Judicata Bars the Third-Party Complaint because Tissue Technology Should Have Brought These Claims in the Litigation Before Judge Hinkfuss.

A. Opportunity Existed to Bring this Claim Sooner

Granting summary judgment would have been appropriate because Tissue Technology has never repaid the $3.6 million it borrowed, so it has no right to retrieve the collateral. But a simpler reason existed to dismiss the action against Nicolet: much of this has been the subject of prior litigation, and Tissue Technology has no right to relitigate these issues. This is the third lawsuit Tissue Technology has filed on this subject. In the first, it learned from the Court of Appeals, that Nicolet, not Tissue Technology, owned the Sales and Marketing Agreement and the right to collect commissions. Only Nicolet, as the real party in interest, had the prerogative to bring a lawsuit. Consequently, the Court of Appeals ordered dismissal of Tissue Technology's claims against ST Paper because "assignment of an existing right to another extinguishes that party's interest in the contract." (R.9:18; R. App. 21).

In the second suit, Tissue Technology learned early that VHC had acquired exclusive rights in the Sales and Marketing Agreement. Within three (3)

weeks of filing suit it knew that VHC had acquired the note and the agreement from Nicolet. (R.25:3). Tissue Technology nevertheless contends that because the Court dismissed its complaint before it amended it, this lawsuit remains sound and claim preclusion/res judicata fails to apply. Several reasons, however, contradict that position.

First, Tissue Technology knew enough about the note's transfer to VHC to threaten this very suit, not once, but twice. At oral argument in May 2019 before Judge Hinkfuss, counsel announced an intention to amend the complaint to raise the precise allegations advanced here. (R.12:11, 17; R. App. 34, 40). Tissue Technology actually urged that the agreement's transfer constituted one reason to refrain from dismissing the complaint, since the transfer provided another basis to sue Nicolet. (*Id*.) In briefing, Tissue Technology made the same claim. (R.25:3, 5). On each occasion, it informed the Court that it had further grievances against Nicolet which it asserted should be addressed in the pending litigation. But it failed to formally raise them.

Tissue Technology implies that it needed the Circuit Court's permission in order to amend its complaint in that litigation, and that foreclosed litigating the issue before Judge Hinkfuss. Yet, as mentioned already, Tissue Technology never formally sought permission to amend the pleading, a perplexing decision in light of its repeated admonitions that it planned an amendment.

Nor did it need permission, as Wis. Stat. § 802.09(1) (quoted above) demonstrates. The deadline for voluntarily amending its complaint actually expired

after the Court's decision. Thus, Tissue Technology's excuse fails, for it needed no such permission.

B. Res Judicata Bars All Claims Which Could Be Theoretically Raised

Tissue Technology's announced plan to raise these issues in the suit before Judge Hinkfuss proves raising them now comes too late. The ancient doctrine of claim preclusion/res judicata foreclosed the third-party complaint here because the allegations it contained should have been made in the prior litigation. As the Supreme Court explained in *Kruckenberg v. Harvey*, 2005 WI 43, 279 Wis. 2d 520, ¶¶ 19-20, (2005):

> The doctrine of claim preclusion provides that a final judgment on the merits in one action bars parties from relitigating any claim that arises out of the same relevant facts, transactions, or occurrences. When the doctrine of claim preclusion is applied, a final judgment on the merits will ordinarily bar all matters which were litigated or which might have been litigated in the former proceedings.
>
> Claim preclusion thus provides an effective and useful means to establish and fix the rights of individuals, to relieve parties of the cost and vexation of multiple lawsuits, to conserve judicial resources, to prevent inconsistent decisions, and to encourage reliance on adjudication. The doctrine of claim preclusion recognizes that endless litigation leads to chaos; that certainty in legal relations must be maintained; that after a party has had his day in Court, justice, expediency and the preservation of the public tranquility requires that the matter be at an end.

[Footnotes and quotations omitted, emphasis added]

Wisconsin follows the Restatement (Second) of Judgments on claim preclusion/res judicata. That means that Courts make "the determination pragmatically, considering such factors as whether the facts are related in time, space, origin, or motivation."

Id. ¶ 25. Courts, thus, determine first, how related the facts are, and then "whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Id. at ¶ 25. Under this transactional approach, legal theories and remedies do not matter, and even evidence may differ between the claims. Id. ¶ 26. "The concept of a transaction"—whether a "common nucleus of operative facts" exists—guides the Court's inquiry. Id.

Here and, in its prior action, Tissue Technology sued Nicolet for breach of contract and sought the identical remedy—to force Nicolet to pay it for ST Paper's supposedly delinquent commissions. It contended that Nicolet had breached the assignment twice, first by failing to sue ST Paper for unpaid commissions and then by transferring the note to VHC. Yet Tissue Technology may not split its claims, alleging one breach in an initial suit and a second breach of the same agreement in a subsequent action. By Tissue Technology's logic, as long as there is no final judgment adjudicating a specific breach, it would be free to sue again. To the contrary, Wisconsin law required Tissue Technology to assert both breaches in a single lawsuit, since each involved the same assignment, creditor, debtor, note and guarantor and each stemmed from Tissue Technology's desire to obtain commissions ST Paper purportedly owed. No sound reason exists to permit Tissue Technology to file serial lawsuits, one to assert a failure to pursue collateral and, once that failed, a second to complain about the negotiation of the note.

C. Judge Zakowski Applied Claim Preclusion Not Issue Preclusion

Tissue Technology never challenges the true reason it lost, for it confuses res judicata and collateral estoppel when it complains that there was no actual adjudication of this precise breach. Collateral estoppel (or issue preclusion) "refers to the effect of a judgment in foreclosing re-litigation in a subsequent action of an issue of law or fact that his been actually litigated and decided in a prior action." *Northern States Power Co.*, 189 Wis. 2d at 550. Claim preclusion/res judicata, on the other hand, also requires an identity of the parties, an identity of the causes of action, and a final judgment on the merits so as to preclude relitigation "in all subsequent actions between the same parties [or their privies] as to all matters which were litigated" but also *"those which might have been litigated* in the former proceedings." Id. (Emphasis added).

While collateral estoppel covers the precise argument Tissue Technology raises – a Court must adjudicate an issue of law or fact in order to bind a litigant – the Circuit Court applied res judicata, a subject which Tissue Technology ignores. That doctrine applies to matters that might have been litigated and forbids invoking different contractual breaches in different lawsuits, when raising all breaches in a single suit is possible. Tissue Technology never explains how the Court misapplied res judicata.

D. Prior Decisions Established Nicolet's Right to Transfer the Note and Sales and Marketing Agreement

Moreover, there was an actual adjudication of Nicolet's ownership interest in the collateral and consequently the legal right to transfer it. Judge

Hinkfuss concluded, in a finding that Tissue Technology never appealed, that the assignment gave Nicolet "all the rights" Tissue Technology possessed in the Sales and Marketing Agreement. (R.24:5; R. App. 68). The Court noted that "'[a]ll' is the operative word. It doesn't mean some of the rights, it means all the rights." (*Id.*) The Court emphasized that the parties used the critical term "sell", a notion that was inconsistent with the idea that Tissue Technology somehow retained rights in the collateral. (*Id.*) The Court determined that, even on the later licensure, Nicolet "kept ownership of the asset. What they gave was a license and assignment to sue, they did not give the collateral back to Tissue Technology." (R.24:9; R. App. 71). Ultimately the Court concluded that "Nicolet Bank owned the collateral that was put up by Tissue Technology." (R.24:6; R. App. 68).

The Court of Appeals reached a similar conclusion in Tissue Technology's original suit against ST Paper, when the Court determined that Nicolet owned the Sales and Marketing Agreement "until such time as Tissue Technology repaid Nicolet's note", something that has not occurred. (R.9:18 ¶8; R. App. 21). Thus, on issues that were actually litigated and decided, Judge Hinkfuss and this Court separately determined that Nicolet owned the collateral. The notion that Nicolet's transfer of the note to VHC somehow forfeited the collateral is simply wrong, for the collateral follows the note as a matter of equity and both belonged to Nicolet. Consequently, the doctrine of issue preclusion also foreclosed the claims advanced here.

IV. Failing to Allege its Performance, Tissue Technology Failed to Include a Necessary Allegation and, Therefore, Stated No Claim.

Tissue Technology's third-party complaint contains no allegation that it has satisfied any obligations under the contract, much less repayment of its debt. The third-party complaint failed to state a claim upon which relief can be granted because a party itself in material breach of a contract may not sue to enforce it, *Management Computer Services v. Hawkins Ash,* 206 Wis. 2d 158, 183, 557 N.W. 2d 67 (1996), and this pleading failed to allege Tissue Technology's performance. The Supreme Court's decision in *Data Key*, 356 Wis. 2d 665, ¶¶ 19-31, makes clear that no complaint survives that motion unless it steps beyond speculation and possibilities and shows plausible facts that the plaintiff can prevail on. Here, Tissue Technology's recovery of collateral depends on it first fulfilling its contract and repaying its debt. Absent repayment, Tissue Technology has no right to recoup its collateral.

Repayment was thereafter a prerequisite to return of the collateral. Under Wis. Stat. § 802.03(3), pleading the breach of a contract which contains conditions precedent requires at least a general allegation of performance. That statute provides:

> In pleading the performance or occurrence of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance or occurrence, but it may be stated generally that the party duly performed all the conditions on his or her part or that the conditions have otherwise occurred or both.

Thus, Tissue Technology must at least generally plead that it had duly performed all conditions of the contract. But Tissue Technology can make no such averment,

because it would be false. Having omitted that critical allegation, Tissue Technology's third-party complaint failed to state a claim.

Despite this deficiency the Circuit Court searched the Third-Party complaint for an allegation that would somehow satisfy this requirement, even though Tissue Technology supplied no explanation itself. The Court construed the complaint to assert that "executing the assignment constituted Tissue Technology's performance in lieu of making payments on or otherwise complying with the terms of the note." (R.57:10; R. App. 10). The Court divined that allegation from a vague passage in the complaint to the effect that "the assignment was to cover the debt and that any funds received beyond the debt were to be paid to Tissue Technology." (*Id*.) The Court then compared the allegation to the assignment itself and found it contradictory. (R.57:10-11; R. App. 10-11).

Even now, Tissue Technology does not contend the Circuit Court read its complaint correctly or challenge the analysis. Instead, it merely contends the Court misjudged its complaint and repeats the well-known standards by which courts assess motions to dismiss without supplying an explanation as to why the Circuit Court erred.

The Circuit Court treated Tissue Technology's pleading more charitably than it deserved, for in proceedings below, Tissue Technology simply asserted Nicolet Bank made no "legitimate argument" requiring dismissal of the complaint. (R.42:10-11). It offered nothing more. It failed to address, much less refute, the key criticism that its complaint must allege compliance with its own contractual obligations, just as Wis. Stat. § 802.03(3) mandates. And, contending that an

argument is illegitimate hardly refutes it. The contention was too superficial for Courts to take seriously and epitomized the type of undeveloped, unexplained, unsupported argument that the Courts routinely deem concedes what it perfunctorily contests. *Charolais Breeding Ranches Ltd. V. FPC Securities Corp.*, 90 Wis. 2d 97, 108-9 (Ct. App. 1979).

Tissue Technology now claims something new by advancing a contention it offered nowhere in the five sentences it dedicated to this issue below. (R.42:10-11). It suggests that its complaint states claims under Wis. Stats. § 409.207(1) & (2)(d)(3). Those passages require secured parties to "use reasonable care in the custody and preservation of collateral" and to use collateral "in the manner and to the extent agreed by the debtor." Multiple problems exist with this new argument. First, and foremost, appellate Courts reject arguments never presented to the Circuit Court, since the alternative is to blindside Trial Courts with reversals based on theories originating outside the forum. *State v. Polashek*, 2002, WI 74 ¶25, 253 Wis. 2d 527. Second, nothing in the complaint alleges such claims, for the complaint mentions nothing about utilizing reasonable care, or suggests that the transfer to VHC somehow impaired or misused the collateral. The collateral still exists, and Tissue Technology only need pay its debt in order to retake possession. Third, Wis. Stats. § 409.207(2)(d)(3) only applies to collateral Nicolet "uses" or "operates", something that Tissue Technology does not – and cannot – allege occurred. The essence of Tissue Technology's grievance before Judge Hinkfuss was that Nicolet had not utilized the collateral to sue ST Paper. Finally, and, most significantly, the Court need not reach this issue at all. Since, the case was correctly dismissed on res

judicata grounds, whether the complaint states a claim hardly matters.

V. Tissue Technology Misreads the Decision

Without pinpoint citation to the record, Tissue Technology contends "the Trial Court also determined that Nicolet Bankshares could do what it wished with the note and collateral based on non-payment." (App. Br. p.16). In fact, the Trial Court made no such determination, if only because such a determination was unnecessary to its opinion. Judge Hinkfuss made that determination based upon the clear language in the assignment. As owner of the Sales and Marketing Agreement, Nicolet had all rights of ownership, Judge Hinkfuss appropriately concluded. Tissue Technology contends such a determination was "clearly error" and contrary to the agreement's terms (App. Br. p.16), but the time to disagree was on appeal of Judge Hinkfuss' order, not on appeal of Judge Zakowski's. In short, the time has long passed for Tissue Technology to take issue with Judge Hinkfuss' ruling, and consequently, the argument that the Court failed to protect Tissue Technology in violation of the clear terms of the agreement fails.

Conclusion

For these reasons, the Court should affirm the Judgment.

Dated this 12th day of February, 2021.

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Form and Length Certification (§ 809.19(8)(d))

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 8,065 words.

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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 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.

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