FILED
04-14-2023
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN, COURT OF APPEALS, DISTRICT III

Aaron Carmody,
Plaintiff-Co-Appellant,
vs.
Byline Bank and
Defendant-Third-Party
Plaintiff-Respondent
Dylan Esterling,
Defendant-Respondent,
vs.
Nicole Elizabeth Carmody,
Third-Party Defendant,
Appellant

Appellate Case No. 2022AP1660

ON APPEAL FROM THE CIRCUIT COURT FOR DOOR COUNTY,
CIRCUIT COUNTY COURT CASE NO.: 2018CV88
THE HONORABLE DAVID L. WEBER, PRESIDING

BRIEF OF DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT, BYLINE BANK AND DEFENDANT-RESPONDENT, DYLAN ESTERLING

JELLUM LAW, P.A.
Garth G. Gavenda, #1079588
Lindsay W. Cremona, #1115578
14985 60th Street North
Stillwater, MN 55082
Telephone: (651) 439-2951
Garth.Gavenda@JellumLaw.com
Lindsay.Cremona@JellumLaw.com
Attorneys for Byline Bank and
Dylan Esterling

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. Case Law – Wisconsin.

II. Case Law – Other Jurisdictions.

III. Statutes – Wisconsin.

IV. Other Authorities

STATEMENT OF THE ISSUES

I. WAS THE CIRCUIT COURT'S CONCLUSION THAT CARMODY SIGNED THE LOAN DOCUMENTS NOT CLEARLY ERRONEOUS NOR WAS IT CONTRARY TO THE GREAT WEIGHT AND CLEAR PREPONDERANCE OF THE EVIDENCE?

AUTHORITIES: *State v. Kienitz*, 227 Wis. 2d 423, 438 (Wis. 1999); *Schorer v. Schorer*, 177 Wis. 2d 387 (Wis. Ct. App. 1993); *Gehr v. City of Sheboygan*, 260 N.W.2d 30 (Wis. 1977); *Milbauer v. Transport Emps' Mutual Benefit Soc'y*, 203 N.W.2d 135 (Wis. 1973); *First Nat'l Bank v. Nennig*, 285 N.W.2d 614 (Wis. 1979).

DISPOSITION BY TRIAL COURT: The Circuit Court appropriately found that based on the voluminous evidence, Appellant, Aaron Carmody executed the Loan Documents at issue. *App. Appendix* 27-61.

II. DID THE CIRCUIT COURT CORRECTLY DETERMINE THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED AND THAT THE CARMODYS DID NOT SUSTAIN ANY DAMAGES ARISING FROM ESTERLING NOTARIZING THE CARMODYS' SIGNATURES?

AUTHORITIES: *Anic v. Board of Review of Town of Wilson*, 751 N.W.2d 870 (Wis. Ct. App. 2008); *Dietrich by Padway v. Wisconsin Patients Compensation Fund*, 485 N.W.2d 614 (Wis. Ct. App. 1992); *Milwaukee Journal v. Call*, 450 N.W.2d 515 (Wis. Ct. App. 1989); *Helland v. Kurtis A. Froedtert Mem. Lutheran Hosp.*, 601 N.W.2d 318 (Wis. Ct. App. 1999); *Governor of Wisconsin ex rel. Kadin v. Bristol*, 281 N.W. 686 (Wis. 1938); *Production Credit Ass'n of Madison v. Nowatzski*, 280 N.W.2d 118 (Wis. 1979); *Pleasure Time, Inc. v. Kuss*, 254 N.W.2d 463 (Wis. 1977); *De Sombre v. Bivkel*, 118 N.W.2d 868 (Wis. 1963).

DISPOSITION BY TRIAL COURT: The Circuit Court properly found that the Carmodys did not sustain any damages arising from Respondent, Dylan Esterling, notarizing Appellant's signatures. *App. Appendix* 27-61.

III. DID THE CIRCUIT COURT CORRECTLY DETERMINE THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED AND RESPONDENTS DID NOT MAKE MATERIAL MISREPRESENTATIONS TO CARMODY, WHICH CARMODY RELIED ON AND SUFFERED DAMAGES AS A RESULT WITH RESPECT TO THE BUSINESS VALUATION?

AUTHORITIES: *Milwaukee Journal v. Call*, 450 N.W.2d 515 (Wis. Ct. App. 1989); *Green v. Hahn*, 2004 WI App 214 (Wis. Ct. App. 2004); *Doe v. Archdiocese of Milwaukee*, 700 N.W.2d 180 (Wis. 2005); *Ramsden v. Farm Credit Service of North Cent. Wis. ACA*, 590 N.W.2d 1 (Wis. Ct. App. 1998); *Production Credit Ass'n v. Croft*, 423 N.W.2d 544 (Wis. Ct. App. 1988); *Kiefer v. Fred Howe Motors, Inc.*, 158 N.W.2d 288 (Wis. 1968); *Chicago & North Western Transportation Co. v. Thoreson Food Products, Inc*., 238 N.W.2d 69 (Wis. 1976); *Jacobsen v. Whitely*, 120 N.W. 285 (Wis. 1909); *Bostwick v. Mutual Life Ins. Co.*, 89 N.W. 538 (Wis. 1903); *Ritchie v. Clappier*, 326 N.W.2d 131 (Wis. Ct. App. 1982).

DISPOSITION BY TRIAL COURT: Appellant, Aaron Carmody, did not properly appeal the Circuit Court's Order Partially Granting Respondents' Motion for Summary Judgment and Appellant, Nicole Carmody did not assert claims relative to the Business Valuation. To the extent that Appellant, Aaron Carmody, did properly appeal the Circuit Court's Order Partially Granting Respondents' Motion for Summary Judgment, the Circuit Court found that Respondents did not make false representations or misrepresentations to Appellant, Aaron Carmody. *Resp. Appendix* 36-67; 122-135.

IV. DID THE CARMODYS PROPERLY APPEAL ANY ISSUES DETERMINED BY THE CIRCUIT COURT'S ORDER PARTIALLY GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT, PURSUANT TO WHICH THE CIRCUIT COURT PROPERLY DISMISSED THE CARMODYS PURPORTED CLAIMS UNDER WIS. STAT. § 100.18?

AUTHORITIES: *Milwaukee Journal v. Call*, 450 N.W.2d 515 (Wis. Ct. App. 1989); *Green v. Hahn*, 2004 WI App 214 (Wis. Ct. App. 2004); Wisconsin Statutes § 100.18; *K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 732 N.W.2d 792 (Wis. 2007); *Bonn v. Haubrich*, 366 N.W.2d 503 (Wis. 1985); *Tim Torres Enters., Inc. v. Linscott*, 416 N.W.2d 670 (Wis. Ct. App. 1987); *Kailin v. Armstrong*, 643 N.W.2d 132 (Wis. 2002); Wis JI–Civil 2418.

DISPOSITION BY TRIAL COURT: Appellants did not properly appeal the Circuit Court's Order Partially Granting Respondents' Motion for Summary

Judgment. To the extent that Appellants did properly appeal the Circuit Court's Order Partially Granting Respondents' Motion for Summary Judgment, the Circuit Court dismissed the claim under Wis. Stat. § 100.18, as a matter of law. *Resp. Appendix* 36-67; 68-80.

V. DID THE CIRCUIT COURT CORRECTLY DETERMINE THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED AND THAT RESPONDENTS DID NOT BREACH A CONTRACTUAL OBLIGATION OF GOOD FAITH AND FAIR DEALING OWED TO CARMODY[1], BECAUSE CARMODY'S CLAIMS WERE ENTIRELY BASED ON HIS ALLEGATION THAT NO CONTRACTS EXISTED?

AUTHORITIES: *Milwaukee Journal v. Call*, 450 N.W.2d 515 (Wis. Ct. App. 1989); *Super Valu Stores, Inc. v. D–Mart Food Stores, Inc*., 431 N.W.2d 721 (Wis. Ct. App. 1988); *Horicon Foods, Inc. v. Gehl Foods, LLC*, No. 15-C-0689, 2016 WL 4926189 (E.D. Wis. Sept. 15, 2016); *Marine Travelift, Inc. v. Marine Lift Sys., Inc.*, No. 10-C-1046, 2013 WL 6255689 (E.D. Wis. Dec. 4, 2013); *Dennehy v. Cousins Subs Sys., Inc.*, No. Civ. 02–1772, 2003 WL 1955168 (D. Minn. Apr. 21, 2003)

DISPOSITION BY TRIAL COURT: Appellant, Aaron Carmody, did not properly appeal the Circuit Court's Order Partially Granting Respondents' Motion for Summary Judgment. To the extent that Appellant, Aaron Carmody, did properly appeal the Circuit Court's Order Partially Granting Respondents' Motion for Summary Judgment, the Circuit Court dismissed the claim of the breach of good faith and fair dealing. *Resp. Appendix* 36-67.

[1] Nicole Carmody did not assert a counterclaim for breach of the contractual duty of good faith and fair dealing. R-78.

STATEMENT REGARDING PUBLICATION AND ORAL ARGUMENT

Publication is unnecessary as the issues presented relate solely to the application of existing law to the facts of the record. Oral argument is unnecessary because the issues can be set forth fully in the briefs.

STATEMENT OF THE CASE

Appellants, Aaron Carmody ("Carmody"), and Nicole Elizabeth Carmody ("Nicole Carmody") (collectively, "Carmodys"), appeal the Circuit Court's findings and conclusions of law made after a twelve-day bench trial[2]. The lawsuit initially hinged on Carmody's allegations that someone else affixed his signatures on Loan Documents, as later defined, associated with Carmody and his business partners obtaining a $2,255,000 loan ("SBA Loan"), from Respondent, Byline Bank ("Byline"), through the 7(a) Loan Program of the U.S. Small Business Administration ("SBA").

Carmody sought to be freed from his obligation to repay the SBA Loan, to release mortgages granted by the Carmodys, and for millions of dollars in damages. R-1; R-51. The Circuit Court ruled in favor of Byline and Dylan Esterling ("Esterling") (collectively, "Respondents"), concluding the mortgages and Loan Documents were enforceable and that Carmody was personally liable to Byline. R-718.

Factual History

During 2015, Carmody, and his friends, Adam Komoroski ("Komoroski"), and Nathan Price ("Price") sought to acquire a business together. Carmody, Komoroski, and Price (collectively, "Partners") became aware that a Colorado business, DAB Drilling, Inc. ("DAB"), was for sale, and they entered into a Letter-of Intent to acquire it for $3,500,000.00. R-167:12-13.

[2] Though Appellants fail to cite to the Circuit Court record, their Brief makes clear that they also seek review of the Circuit Court's decisions on cross-motions for Summary Judgment. R-544; R-545.

The Partners needed financing and in December 2015, they began communicating with Byline through Esterling, who was then a Vice President of Business Development. R-658:17.

From the outset, Byline made clear that the SBA Loan was to be secured by the business assets of DAB and mortgages against two real properties owned by the Carmodys (collectively, "Mortgages"), against properties they owned in Door County (collectively, "Carmody Properties"). R-640:4-9; R-658; R-663:13; R-664:2. Additionally, Byline made clear that all Partners would be personally obligated to repay the SBA Loan. *Id*.

On February 18, 2016, Byline issued a commitment letter ("Commitment Letter"), summarizing the terms and conditions for the expected SBA Loan, including the requirements for personal liability for each and that the Carmodys would grant the Mortgages against the Carmody Properties. R-640:4-9.

The signed Commitment Letter was returned to Byline, including Carmody's signature, along with checks for payment of the initial $5,000 deposit for fees Byline expected to incur. *Id*. 7. Nicole Carmody issued a check to Byline for $2,375.00. *Id*. 9.

In reliance thereon, Byline and its closing agents worked to obtain necessary documentation and information to ensure that the SBA Loan was properly structured and collateralized, pursuant to SBA and Byline underwriting requirements. R-375:8-9.

During this process, there were numerous e-mails to the Partners, including many sent to Carmody, i.e., R-661, R-664, R-666, R-668:18, 37, R-669:8, 18, 20, 21-22, 23, 25; R-671:1-2, 7-8; R-672; R-673, R-675:10, 13-18, 33, 41; R-677:3; R-679:1-2, 10-11, 12-13, 44-49; and R-680:21-22, 24-25, even though Carmody denied having any communication with Byline. R-749:10. Carmody also did directly respond, i.e., R-668:38, R-669:21-22,25; R-675:13-14; and R-675:41.

As stated in the Commitment Letter, and as required by SBA, Byline obtained appraisals of the Carmody Properties, which included interior access to the properties. R-640:6; R-611; R-612; R-613; R-614.

As required by SBA, Byline obtained a Business Valuation, which indicated the Fair Market Value of the valued assets of DAB was $5,005,085. R-301. Esterling did send an e-mail to Price and Komoroski (not Carmody) indicating that the Business Valuation "came back at just over $5 million" (R-408), but the Business Valuation was not shared with the Partners, who never requested to see it. R-768:7-9.

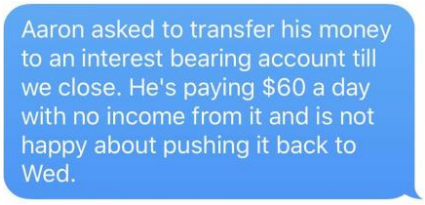
By July 2016, the Partners were putting pressure on Esterling to quickly close and fund the SBA Loan, as they were anxious to purchase DAB. On July 18, 2016, Price e-mailed Esterling indicating, "[i]f we wait till Thursday vs closing today, we will lose $190,000 in revenue. We lose $46,000 each day we put off the closing. We also lose a day in free insurance coverage each day we delay." R-679:7.

During this same time, Esterling, Byline, and its closing agent were in direct communication with Carmody and the Partners to obtain necessary documents and information and to coordinate obtaining signatures on the Loan Documents. On July 12, 2016, Esterling e-mailed the Partners, including Carmody, providing a reminder that "Aaron's wife will need to be at the closing because of the signatures on the mortgage." R-673:9.

On July 18, 2016, Carmody was asked for a copy of his driver's license, as it was needed for Power of Attorney documents that Carmody would be signing in conjunction with the pledging a security interest in DAB's vehicles. R-679:1-2 Carmody quicky responded to the e-mail. *Id*.

On July 19, 2016, Carmody and the Partners received an e-mail from the broker for the sellers of DAB (collectively, "Sellers"), providing an updated list of equipment and vehicles that the Partners would be acquiring with DAB. R-736.

Also on July 19, 2016, Esterling received a text from Komoroski, expressing Carmody's unhappiness about waiting to close on the SBA Loan:



R-608.

On July 20, 2016, Carmody acknowledged the need for him and Nicole Carmody to sign the Loan Documents stating:

> **From:** Aaron Carmody [mailto:aaron.carmody@gmail.com]
> **Sent:** Wednesday, July 20, 2016 1:56 PM
> **To:** Adam Komoroski <adamkomoroski@gmail.com>; Rissa L. Angeloni <rissa.angeloni@aj-law.com>
> **Cc:** Nathan Price <ceag8@yahoo.com>
> **Subject:** Re: Fwd: DAB - Closing
>
> Guys. We will screw this up if not on same page. I thought closing was set for Thursday. I wont be able to sign anything on friday. Nicole is only available to sign stuff today. And we only have about 2 hours to get that done. What is she needing to sign? I thought we were going down on thursday?

R-680:21-23. In response, Byline's closing agent told Carmody, "[s]ince Nicole is a limited guarantor on the loan, due to the mortgages, her documents cannot be sent out (yet)…" *Id.* 21. Carmody did not respond to question why Nicole Carmody would be signing mortgages.

On July 21, 2016, Komoroski directed an e-mail, on which Carmody was copied, expressing that Carmody was "pretty upset… as he's getting pretty impatient." *Id.* 29. Also on July 21, 2016, Price sent an e-mail, copying Carmody, seeking to close the SBA Loan as soon as possible. Price expressed that the Partners wanted to "try and push this thru… We would consider signatures on Saturday morning (July 23, 2016) if need be." *Id.* 30.

In anticipation of a closing, on July 21, 2016, Esterling e-mailed a draft of the closing statement to the Partners, including Carmody. *Id.* 24-25. The closing statement included charges for title fees/recording fees for each of the Mortgages. *Id.* 25.

To accommodate the Partners' desire to close on the SBA Loan as quickly as possible, Byline's attorneys prepared the package of Loan Documents[3], which was delivered to Esterling on the morning of Friday, July 22, 2016. R-743:187. The Loan Documents required most signatures to be notarized, which was not a common

[3] The "Loan Documents" include R-640:10 through R-647.

requirement. *Id*. 92. The notarization was required, because it would be a remote closing, as opposed to at the bank. *Id*.192-194.

Esterling was in communication that morning with Komoroski to coordinate delivery of the Loan Documents to the Partners for signing. *Id*. 194. The package included full and complete copies of the Loan Documents. *Id*. 195. Esterling drove to meet Komoroski at a gas station, approximately halfway between where they were respectively located, where Komoroski met Esterling, providing the package of Loan Documents to Komoroski. *Id*. 196.

Later, on July 22, 2016, Komoroski brought the package of Loan Documents to the Carmodys' Shiloh Property, where he met Nicole Carmody and Price to sign the Loan Documents. R-739:236-238. During that afternoon, Esterling received several text messages from Komoroski asking questions about the terms in the Loan Documents, i.e., Carmody's middle name was wrong on a document, whether a packaging fee could be waived, addresses were incorrect, and that the first payment was supposed to be 60 days after execution, not 30, as provided in the Note. *Id*.; R-608:36-40. Esterling tried to answer these questions and also spoke on the phone with Komoroski. *Id*. 202. Komoroski's questions made it evident the Partners were going through the Loan Documents and expressing questions to Esterling. R-743:198-200.

Price signed and left the Shiloh Property, but Komoroski and Nicole Carmody remained there with the Loan Documents. *Id*. Price testified that Komoroski was not texting or having phone calls with Esterling while Price was at the Shiloh Property. *Id*. 244-247.

The following morning, Komoroski texted Esterling about returning the signed Loan Documents. R-743:207; R-608:40. Esterling agreed to meet Komoroski at the Byline office in Kaukauna, as Komoroski on his way to DAB's office in Colorado. R-743:208-210; R-608:41-42. Komoroski returned the Loan Documents to Esterling. R-743:203. After Komoroski left, Esterling opened the package finding that all the wet-ink signatures were completed, including Carmody's, but the notary blocks were incomplete. R-743:210-218, 221-225.

Knowing that Komoroski was off to Colorado to take over DAB and having endured the pressure from the Partners to get the SBA Loan closed, in lieu of trying to get the Loan Documents re-executed before a notary, Esterling made the decision to affix his signature and notary stamp to the Loan Documents, though he did not witness the signatures. *Id*. 225-228. Esterline notarized the Loan Documents on Monday, July 25, 2016, and provided the original signed Loan Documents to Byline's closer for processing. *Id*. 228 230.

That morning, Esterling sent e-mail to the Partners, including Carmody, saying "[t]hanks for taking time to go through all of those documents. Everything looked good to me but I have sent everything to Rissa for her review." R-680:32. Carmody did not respond to Esterling and allege that he didn't receive any documents. R-743:244.

On July 27, 2016, Esterling sent a follow up e-mail to the Partners, including Carmody, stating, "I have signatures from Nate, Aaron, Johnny, and Brandon. Adam can you get me yours asap?" R-680:40; R-743:244-245. Carmody did not respond to Esterling and allege that he didn't sign any documents. R-743:245; R-737:72.

On July 28, 2016, the SBA Loan funded, and $2 million was distributed for the acquisition of DAB. R-743 p. 246. Additional funds were available to be used for working capital and $250,000 was disbursed to the Partners, as requested by Komoroski in an e-mail to Esterling, on which Carmody was copied. R-680:41; R-743:245-247. Carmody did not respond and enquire why the SBA Loan proceeds were being distributed without Byline obtaining his signature.

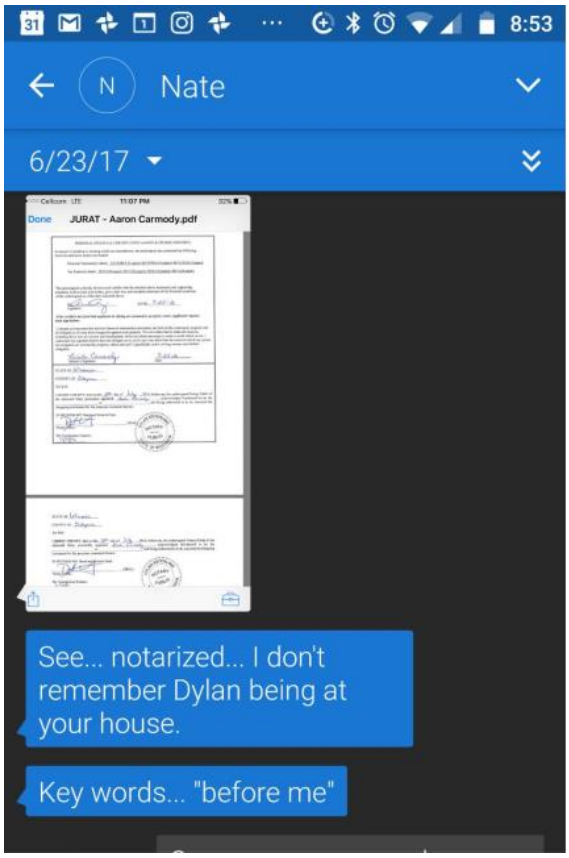
In June 2017, Carmody and Price contacted Byline regarding a dispute with the Sellers over equipment that was to be included in the acquisition. R-737:112; R-686. On June 21, 2017, Byline provided Carmody a copy of the Equipment Certification for the SBA Loan. R-686. The Equipment Certification included two signatures of "Aaron Carmody", personally and as the President of DAB. *Id*.

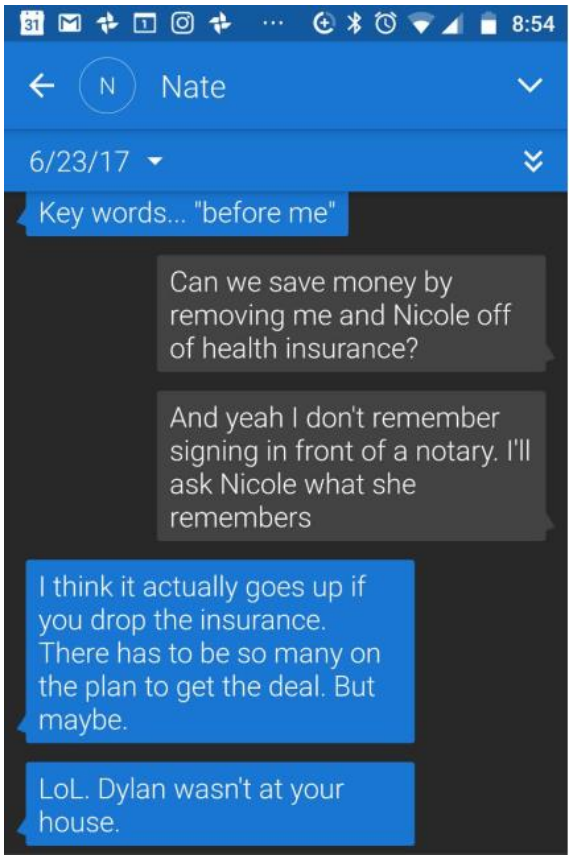
Carmody admittedly did not respond to Byline and allege that he did not sign the Equipment Certification (or any other Loan Documents). R-737:113-114.

Carmody did respond to Byline (R-687:1), but Carmody testified that he "made the conscious decision not to advise [Byline] of [his] accusation of fraud at this time." R-737:115-116.

Carmody and Price continued their communication with Byline in June and July 2017, as Byline attempted to assist the Partners regarding the equipment issue. R-737:118-122, 124-125; R-687, 689:1, 5-18, 28-35. Nowhere in these numerous e-mails did Carmody advise Byline of his allegation that he did not sign the Loan Documents. *Id.*

Concurrently, Price and Carmody were exchanging text messages about the Loan Documents:





R-619:3-4 (Carmody's texts are in gray on the right). Notably, Carmody never claims that his signatures were forged, but rather states "I don't remember signing in front of a notary. I'll ask Nicole what she remembers". *Id.* Similarly, Price's response focuses on Esterling and the notarization, not Carmody's signature. *Id.*

Carmody engaged in additional communication with Byline at this time, with respect to the Mortgages against the Carmody Properties. R-690:2. Carmody did not tell Byline that he did not sign the Mortgages; rather, Carmody asked to Byline about releasing one or both of the Mortgages, in exchange for a payment or pledge of additional collateral. *Id.* 2, 14. Carmody had myriad communications with Byline about his request throughout 2017. *Id.*15-25; R-691; R-692:4-5; R-694:1-15; R-695; R-700:1-16. Carmody did not advise Byline of the allegation that he did not sign the Loan Documents. *Id.*

In October, Byline approved a release of the Shiloh Property, in exchange for the collateral swap. R-697, 699. However, in November, DAB's monthly payment on the SBA Loan was not paid due to insufficient funds in DAB's account. R-700:17.

On December 11, 2017, Carmody directed a letter to Byline to "inquire of a set of events/facts that I don't quite understand." *Id.* 18-37. And that Carmody had been "made aware of a number of anomalies which suggest facts that run contrary to my recollection…" *Id.* 18. Carmody's letter states that he received copies of the Loan Documents on June 19, 2017, yet was making these allegations 6-months later, just after DAB failed to make its SBA Loan payment in November. *Id.* Finally, Carmody's letter asserted that he was "surprised to see that my signature had been added to these documents." *Id.* 19.

Even in this letter, Carmody is incredibly careful in the words he chose, when he easily could have stated that he didn't sign "Aaron Carmody" and his signature was forged. *Id.*18-20. Remarkably, Carmody needed to hire a "Forensic Document Examiner" to tell him that the signatures on the Loan Documents were not his. *Id.* 20.

Procedural History

In May 2018, Carmody commenced this lawsuit seeking to void his liability under the SBA Loan and pursuing millions of dollars in alleged damages. R-1. Carmody's Complaint asserted twenty causes of action against Respondents. *Id.* Respondents moved to dismiss ten of the claims, which motion was granted. R-16.

Carmody then filed an Amended Complaint. R-51; Resp. App.81-121. Nowhere in the 39-pages of the Amended Complaint is there a mention about the Business Valuation, let alone fraudulent misrepresentation relating to the Business Valuation. *Id*.

Byline engaged Janis S. Tweedy, a certified Forensic Document Examiner ("Tweedy"), to examine the Loan Documents and Carmody's known signatures. R-751:27-28. After reviewing the signatures of Carmody on the Loan Documents and those on endorsed checks containing known signatures, Tweedy opined that the person who endorsed "Aaron Carmody" on the checks was the same person who signed "Aaron Carmody" on the Loan Documents. R-705; R-707.

Byline then asserted a Third-Party Complaint against Nicole Carmody and a Counterclaim against Carmody, asserting that, if Carmody did not sign the Loan Documents, Nicole Carmody must have, given that the person who endorsed "Aaron Carmody" on the checks was the same person who signed "Aaron Carmody" on the Loan Documents. R-60; R-62.

In discovery, Carmody "quantified" his alleged damages in a spreadsheet, despite his failure to disclose facts and evidence and/or any expert opinions, asserting damages of $27,148,100.00! Resp. App. 150-151.

The parties each moved for Summary Judgment. Respondents sought to dismiss Appellants' claims on numerous bases, including that Appellants failed to present any admissible evidence to support their alleged damages. R-315:3-6; R-316:4-17. Nicole Carmody admitted that she suffered no damages, despite asserting Counterclaims against Byline. R-315:3-6.

Notably, in support of his motion for Summary Judgment, Carmody did not assert any claims relating to the Business Valuation, nor any alleged misrepresentations relating thereto. R-161.

Concurrent with Respondents' motions for Summary Judgment, Respondents moved to exclude Carmody's purported experts (R-251; R-252), including ten "experts" whose opinions were never disclosed. R-251. One "expert", Tyler Hinckley

("Hinckley"), engaged by Carmody to prepare a retrospective business valuation ("Hinckley Valuation"), was included in this motion to exclude. *Id.*

In opposition to Respondents' motion for Summary Judgment, Carmody shifted his legal theories from those in his Amended Complaint and asserted a new theory: that Carmody relied on the Business Valuation obtained by Byline, which Carmody never saw. R-398:64-67. Carmody also sought to rely on the Hinckley Valuation. *Id.* 72.

The Circuit Court denied Appellants' motions for Summary Judgment in their entirety. R-544; R-545. The Circuit Court partially granted Respondents' motions for Summary Judgment, concluding Appellants presented no admissible evidence of monetary damages under any cause of action. *Id.*; R-586, R-587; R-758. The Circuit Court further narrowed the issues for trial, determining that "Plaintiff's sole recourse pursuant to Counts 3, 4, 7, 8, 9, 10, 11, 13, and 14… be limited to a determination whether Plaintiff is liable to Byline, pursuant to the terms of the Loan Documents and/or at law…" R-545.

Importantly, the Circuit Court considered Carmody's belated allegations relating to the Business Valuation and Esterling's e-mail about it. *Id.* 14-16. The Circuit Court concluded that Respondents "did not make false representations or misrepresentations by silence in connection with the Business Valuation…" *Id.*15. The Circuit Court also concluded that Carmody "did not rely upon any representation or omission from Byline and/or Esterling with respect to the Business Valuation, the business assets acquired by Plaintiff as an owner of DAB, or his decision to purchase DAB." *Id.* The Circuit Court recognized that Carmody never saw the Business Valuation and there was no evidence that Carmody relied on it. *Id.*

The Circuit Court granted Byline's motion to exclude Carmody's "experts" whose opinions were never disclosed and who never prepared an expert report. R-535. This included the exclusion of Hinckley.

Respondents filed motions in limine seeking to exclude expected evidence and testimony. R-570; R-571. Respondents' Motion in Limine No. 1 sought to preclude

evidence, argument, or testimony relating to the Business Valuation. *Id*. p. 3. Respondents' Motion in Limine No. 5 sought to preclude evidence, argument, or testimony relating to the opinion of Hinckley, as well as the purported Hinckley Valuation. *Id*. pp. 5-6.

The Circuit Court conditionally granted all but one of Respondents' Motions in Limine, including Motion in Limine No. 1 and Motion in Limine No. 5. R-593. The Circuit Court's "conditional" grant of the Motions in Limine was subject only to Carmody's potential use for another purpose, i.e., challenging the credibility of witnesses, but not to prove Carmody's alleged reliance. R-745. Carmody's attorney agreed stating, "I'm not trying to prove reliance. We're trying to establish credibility." *Id*. 49.

A trial before the Circuit Court as fact finder commenced on October 12, 2021. After twelve-days of trial, the Circuit Court found that Carmody did affix his signatures on the Loan Documents, that the Loan Documents were enforceable against Appellants, and that Appellants' claims were legally unsustainable. R-718; R-786. The Amended Trial Order was then entered. R-718.

ARGUMENT

I. THE CIRCUIT COURT'S CONCLUSION THAT CARMODY SIGNED THE LOAN DOCUMENTS WAS NOT CLEARLY ERRONEOUS NOR WAS IT CONTRARY TO THE GREAT WEIGHT AND CLEAR PREPONDERANCE OF THE EVIDENCE.

A. The Circuit Court, acting as the trier of fact, is not bound by the opinion of an expert.

The primary basis for the Carmodys' appeal is their assertion that the Circuit Court should have ignored all the other evidence and relied on Carmody's expert. The first fallacy in the Carmodys' argument is that it was not clearly erroneous, nor contrary to the great weight and clear preponderance of the evidence, for the Circuit Court to disagree with some of the experts' opinions.

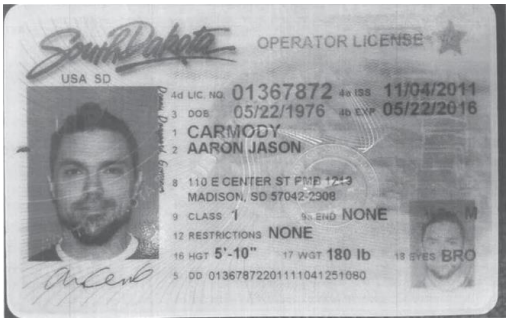
As a matter of law, a judge acting as "the trier of fact is not bound by the opinion of an expert." *State v. Kienitz*, 227 Wis. 2d 423, 438 (Wis. 1999). The Circuit

Court is "free to weigh the expert's testimony when it conflicted and decide which was more reliable; to accept or reject the testimony of any expert, including accepting only parts of an expert's testimony; and to consider all of the non-expert testimony…" *Id*. at 441; *see Schorer v. Schorer*, 177 Wis. 2d 387, 396-97 (Wis. Ct. App. 1993) ("The weight and credibility to be given to the opinions of [expert witnesses] is uniquely within the province of the fact finder.").

Appellants' reliance on *Cahill v. Cahill*, 131 N.W.2d 842 (Wis. 1965), claiming that the Circuit Court "is not at liberty to disregard the unimpeached, unequivocal and uncontradicted testimony of [experts]" is misplaced, because in *Cahill*, the Supreme Court made clear, that "[w]e are not prepared to state that the trier of the fact is absolutely bound by the uncontradicted testimony of an expert." *Id*. Notably, almost no other cases in Wisconsin rely on *Cahill* as support. Without regard to the exceptional volume of evidence the Circuit Court heard, much of which impugned Carmody's character and veracity, the Circuit Court, as the finder of fact, was not bound by the testimony of any expert.

B. The Circuit Court's conclusion was not actually contrary to the opinion of Respondents' expert.

Appellants conveniently ignore the testimony of Respondents' expert at trial. R-751. First, Tweedy testified that there was a "wide variation" in Carmody's known signatures. R-751:43. Tweedy focused on Carmody's driver's license, which she noted was "written a lot more carefully than a lot of the signatures that [she] saw." *Id*. 46; Item 28-15.



Carmody's signature on his driver's license shows a lift between his first and last name. *Id.*

Second, Tweedy reviewed 27 known signatures of Carmody and concluded that Carmody had "two different styles of signature within the 27 items… one… that's kind of a wild -- lot of variation, and then another one that was much more concise and repeatable and easier to was much more concise and repeatable and easier to look at." *Id*. 51.

Tweedy testified that it was highly probably that the person who signed the Loan Documents was a single writer because of common characteristics. *Id*. 56. The signatures were repeatable and fluently written without unnaturalness. *Id*.59.

Tweedy examined known signatures of Carmody, the vast majority of which were endorsed checks deposited in Appellants' bank account at North Shore Bank. Tweedy testified that the person who endorsed Carmody's name on the checks deposited into a joint account with North Shore Bank (*see* R-652 at NorthShoreBank52, 55, 61, 70, 73, 76, 79, 82, 88, 91, 94, 103, 65) is the same person who signed Carmody's name on the Loan Documents. *See* R-705.

Nicole Carmody testified that only Carmody and herself have access to the North Shore Bank account and only Carmody and herself endorsed the checks. R-740:245-246. Thus, only Carmody or Nicole Carmody could have signed "Aaron Carmody" on the Loan Documents.

Items 33 through 38 (R-707:9-56) were additional known signatures of Carmody. R-751:63-64. Tweedy examined checks, marked as Item 38 and Item 34-5 (R-707:57-58, 43-44), each endorsed by Carmody. R-751:65-67.

R-707:56 (Item 38).

R-707:44 (Item 34-5).

Tweedy concluded that it was highly probable that these endorsements were written by the same writer. *Id*. 65-66. Tweedy ultimately concluded that it was highly

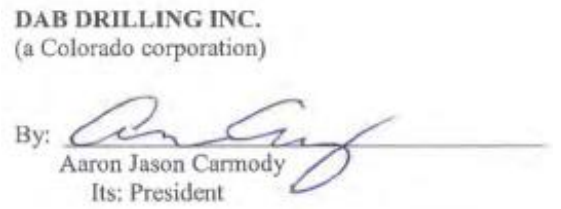
probably that the signer of these signature endorsements also signed the Loan Documents:

A. When I looked at the signatures that were in these items from the, what, 33 to 38, I found that there were Aaron Carmody checks endorsements in there and questioned checks endorsements in there. And when I looked at those endorsements that were in here, questioned endorsements, I found that they had the similar characteristics I'd seen in all the questioned signatures before. So I was of the feeling that they had all been written by one writer.

Q. And that is the same writer as the loan document? The questioned signatures?

A. Yes.

Id. p. 89, i.e.:



R-705 p. 127.

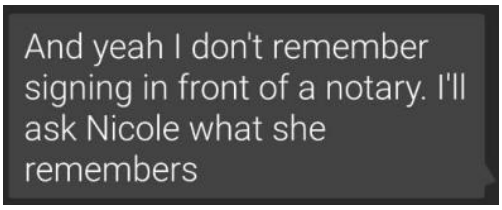
R-705 p. 52.

In sum, Tweedy's testimony and opinions do not contradict the conclusions of the Circuit Court, as Carmody's driver's license and other known signatures evidence a lift between the first and last name and share common characteristics found on the signatures of "Aaron Carmody" on the Loan Documents.

C. The Circuit Court relied on volumes of direct and indirect evidence to conclude that Carmody signed his name on the Loan Documents.

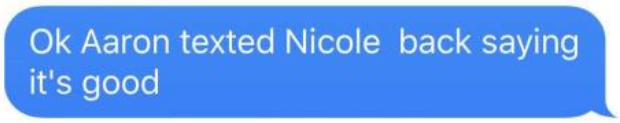
In the absence of a jury, the circuit court is the ultimate arbiter of both the credibility of the witnesses and the weight to be given to each witness' testimony. *Gehr v. City of Sheboygan*, 260 N.W.2d 30, 33 (Wis. 1977); *Milbauer v. Transport Emps' Mutual Benefit Soc'y*, 203 N.W.2d 135, 138 (Wis. 1973). When the trial court acts as the finder of fact, it is the ultimate arbiter of credibility of a witness when conflicting testimony is presented. *First Nat'l Bank v. Nennig*, 285 N.W.2d 614, 620 (1979). Moreover, when more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact. *Id.*

The Circuit Court, in its oral ruling, pointed to specific evidence relied upon to conclude that Carmody signed the Loan Documents. Importantly, the Circuit Court noted that Carmody admitted in a text message to Price that he signed the Loan Documents:



R-619:4. As the Circuit Court concluded, this is "direct evidence… namely, Mr. Carmody's own text in which he says he signed; he just did not sign in the presence of a notary." R-768:25.

While the Loan Documents were being signed on July 22, 2016, Komoroski texted Price stating:



R-280:53. This evidences that Carmody was fully aware of and participated in the efforts to sign the Loan Documents and the Circuit Court concluded that Carmody's mindset was, "there won't be a problem getting the signatures. Including his signature." R-768:20.

On July 25, 2016, after the Loan Documents were signed on July 22, 2016, Esterling directed an e-mail to Carmody, Price, and Komoroski:

From: Dylan Esterling
To: Adam Komoroski; Nate Price; Aaron Carmody
Subject: Clear to Close!!!
Date: Monday, July 25, 2016 9:46:49 AM

Guys,
Thanks for taking time to go through all of those documents. Everything looked good to me but I have sent everything to Rissa for her review.
We have a clear to close...which is excellent news!! Now all we are waiting are the documents being signed today by the sellers to make everything official and actually wire out the funds. According to Bob, this is happening later today. Possibly 2 pm MST? It will be a close call as to whether we get them in time to fund today or tomorrow. The wire cutoff is 3pm CST.
Thanks!
Dylan C. Esterling
V.P. - Business Development Officer
Ridgestone Bank
3051 Progress Way, Suite 115
Kaukauna, WI 54130
Direct: 920-221-6775
Mobile: 920-915-6652
Email: desterling@ridgestone.com
www.ridgestone.com

R-680:32. This e-mail was sent to Carmody, and he had every opportunity to respond and ask "What? I never signed any documents. What do you mean everything looks good?" R-768:21. Carmody failed to respond, showing he knew he signed the Loan Documents.

Additionally, two days before the Loan Documents were signed, Carmody participated in organizing the plan for himself and Nicole Carmody to sign. On July 20, 2016, Carmody acknowledged the need for him and Nicole Carmody to sign the Loan Documents:

From: Aaron Carmody [mailto:aaron.carmody@gmail.com]
Sent: Wednesday, July 20, 2016 1:56 PM
To: Adam Komoroski <adamkomoroski@gmail.com>; Rissa L. Angeloni <rissa.angeloni@aj-law.com>
Cc: Nathan Price <ceag8@yahoo.com>
Subject: Re: Fwd: DAB - Closing

Guys. We will screw this up if not on same page. I thought closing was set for Thursday. I wont be able to sign anything on friday. Nicole is only available to sign stuff today. And we only have about 2 hours to get that done. What is she needing to sign? I thought we were going down on thursday?

R-680:21-23. Given Carmody's direct communication with Byline's attorneys and his knowledge that he was needed to sign, it is implausible that Carmody did not know his signature was on the Loan Documents for almost a year. R-768:22.

The foregoing are merely some of the highlights that the Circuit Court referred to in the oral decision. The record is replete with additional evidence which further bolstered that conclusion. It cannot be said that the nits that Appellants attempt to pick

with snippets of testimony and evidence shows that the Circuit Court's decision was contrary to the great weight and clear preponderance of the evidence.

D. Nicole Carmody's testimony was particularly damming, as she denied signing "Aaron Carmody" on any of the Loan Documents, and she consistently testified that the signatures of "Aaron Carmody" looked like Carmody's authentic signature.

First, Nicole Carmody testified on direct examination that one week before the Loan Documents were to be signed, Carmody told her that she would need to be available to sign them. R-740:201-202. How could Carmody know and plan for Nicole Carmody to sign Loan Documents and believe that he did not need to do so?

Second, as she had throughout the litigation, Nicole Carmody repeatedly denied that she signed "Aaron Carmody" on the Loan Documents. *Id.*; R -741, generally. Nicole Carmody did admit that her signatures on the Loan Documents were authentic. *Id*.

Nicole Carmody testified at length about her very specific knowledge about Carmody's signature and the nuances that make it identifiable:

Q. Looking at this signature here on Bates label 53, does that look like your husband's signature?
A. It could be.
Q. Why?
A. Just looks sort of like it. But I don't know for sure if it is his. I didn't see him sign this check.
Q. But it's got the big A?
A. There are some similarities.
Q. What are those similarities?
A. Yeah, the big A.
Q. And there's a squiggle after that A?
A. Yeah.
Q. And it's got kind of loop at the bottom at the end?
A. Yeah.
Q. And it kind of swishes up?
A. Yeah.
Q. And all those are similarities of how Mr. Carmody signs his name?

R-740:252.

Nicole Carmody's testimony about Carmody's signature on the known signature documents echoed testimony of Janis Tweedy:

THE COURT: So let me ask you this -- I'm sorry, Miss Cremona.

When you say "sometimes" in answer to a question, are you suggesting that his signature takes various forms?

THE WITNESS: I mean, it has looked different.

THE COURT: In what -- so in what ways does it vary?

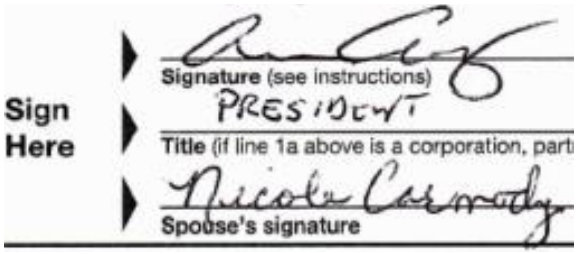
THE WITNESS: Well, sometimes it looks like two words; sometimes it's one. You know.

THE COURT: Any other way?

THE WITNESS: Sometimes it's just a -- an A and a line through it. You know, it depends, I guess.

Id. 270.

Nicole Carmody testified that certain signatures of Carmody, which he denied as authentic, appeared to be authentic, "Q: And then above it is a signature line with a signature that purports to be Mr. Carmody's. Does that look like his signature? A: Yes. Q: Why? A: The similarities. The A, the C, and the Y." R-741:38.



R-238. Nicole Carmody denied signing "Aaron Carmody" on this document, emphatically stating, "No, that's not possible. Because he didn't ask me." R-741:38-39.

Finally, Nicole Carmody was questioned about her and Carmody's signatures on the Loan Documents. One of the Loan Documents, a Personal Financial Certification (R-641:23), bore signatures of both Appellants. Nicole Carmody testified, admitting to signing the document and further testified that the signature of "Aaron Carmody" looked like her husband's signature:

because of the "identifying characteristics, the A, the C, and the swoop at the end." R-741:90. Nicole Carmody denied signing Carmody's signature on this document, because she "wasn't given permission to sign it." *Id*.91.

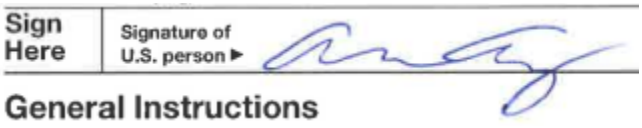
Nicole Carmody provided her analysis of each of the signatures of "Aaron Carmody" on the Loan Documents and her denials to signing them. R-741:120-121. Document after document, Nicole Carmody denied signing "Aaron Carmody" on the Loan Documents, because Carmody did not give her permission to sign on his behalf. R-741, generally. Nicole Carmody only had permission to sign her own name. R-741:127.

Time after time, Nicole Carmody testified that the signatures of "Aaron Carmody" could be the actual signatures of Carmody, because they looked how he signed his signature. R-741, generally. Specifically, Nicole Carmody testified:

> Q. And above that is a signature for Aaron Carmody; does that look like his signature?
>
> A. Yes.
>
> Q. And why?
>
> A. Just the similarities, the consistency; the A, the C, and the Y.
>
> Q. Mr. Carmody has indicated that he did not sign this document. Did you sign it?
>
> A. No.
>
> Q. How do you know?
>
> A. I don't recognize this document. And I wasn't given permission to sign something like this.
>
> Q. But Mr. Carmody did give you permission to sign documents that Mr. Komoroski and Mr. Price dropped -- came to your house with; correct?
>
> A. On July 22nd, yes.
>
> Q. And looking at this signature, this does have characteristics that reflect your rendition of Mr. Carmody's signature; correct?
>
> A. Not really.
>
> Q. Why not?
>
> A. It's just different.

Id. 137.

Again and again, Nicole Carmody testified that the signatures of "Aaron Carmody" looked like Carmody's signature. "Q: The signature purporting to be Mr. Carmody's, does that look like his signature? A: It does. Q: Why? A. Just the similarities, consistencies; the A and the C and the Y." *Id*. p. 139.



R-643. Nicole Carmody also testified that she did not sign it. R-741:140. This line of questioning continued on through the Loan Documents and Nicole Carmody consistently testified that the signatures on the Loan Documents looked like Carmody's signature, that she did not sign "Aaron Carmody" on the documents, and she knew she did not because she did not have his permission to do so. *Id.*141-148; 152-158.

With respect to the Note, Nicole Carmody testified that the signatures of "Aaron Carmody" appeared to be his signatures and that she did not sign it. "Q: Does this look like Mr. Carmody's signature? A: It appears it could be his signature. Q: Why? A. The similarities. Q: What are those similarities? A: The A, the C, and the Y…. A: I didn't sign this." *Id*. 175-176.

R-364.

Without further belaboring of the point, it is readily apparent through hundreds of pages of trial transcript that Nicole Carmody, with over 20 years of experience of seeing Carmody's signature, had very credible testimony. She testified time and again that many of the signatures on the Loan Documents appeared to be those of her husband.

Nicole Carmody's testimony was also consistent with Tweedy's testimony, identifying that Carmody has two types of signatures, one of which his very varied and a single stroke, and another which is more consistent and legible with a lift between his first and last name, with very consistent characteristics, the big A, the big C, and the swoop up ending on the Y. R-741:228-232.

Nicole Carmody easily could have testified that she did not know if the signatures of "Aaron Carmody" looked like his; but she did not. As the Circuit Court determined, her testimony that many of the signatures looked like his carried a great deal of weight. Given this volume of credible testimony, the decision was not contrary to the great weight and clear preponderance of the evidence and was not clearly erroneous.

E. The Circuit Court afforded the Carmodys every benefit of the doubt to prove their case at trial and Carmody's testimony was not credible.

Judge Weber stated, "I wanted to give Mr. Carmody every benefit of the doubt. I wanted to err on the side of allowing evidence in rather than keeping it out. R-768:5-6. Carmody simply abused his benefit of the doubt.

At trial, Carmody contradicted himself, contradicted the documents, and had incredibly selective memory. The story presented to the Court by Carmody was a classic case of the difficulty of trying to maintain a lie, as the story continually shifts. As the Circuit Court noted, "[Aaron Carmody] gave so much testimony largely because he would not answer questions in a straightforward way." R- 768:18.

Carmody testified that after he met with Esterling in person, Carmody had no further direct communication from Byline and that no one from Byline contacted him by e-mail:

> Q: Okay. And then after that meeting, when was the next -- when was the next communication in any form that you had directly with Byline Bank or any of its employees?
>
> Carmody: There -- there was emails that were forwarded to me from Nate. But I never received any direct communication from Byline. I

> never got, for instance, a phone call. No one wrote me specifically an email. Everything, I think, was forwarded from Nate or from Adam or something like that.

R-749:9-10.

> Carmody: I never specifically sent anything to Byline. Like, my person -- I never forwarded a document or a signed agreement or a contract, if that's what you're asking, to anyone at Byline. Or sorry, Ridgestone.

Id. 11.

Carmody's blatantly false testimony was easily refuted by numerous e-mails sent by Byline to Carmody, which Carmody was examined about, i.e., R-661; R-664; R-666; R-668:18, 37; R-669:8, 18, 20, 21-22, 23, 25; R-671:1-2, 7-8; R-672; R-673, R-675:10, 13-18, 33, 41; R-677:3; R-679:1-2, 10-11, 12-13, 44-49; R-680:21-22, 24-25.

Carmody also responded to e-mails from Byline, i.e., R-668:38; R-669;21-22, 25; R-675:13-14; R-675; 41. Carmody's testimony that he **never** had direct communication with Byline was false, evidenced by exhibits he was examined about.

Carmody also conveniently testified that, even though the Commitment Letter (R-640:4-9) bears the signature of "Aaron Carmody" and even though Nicole Carmody remitted a check to Byline for $2,375.00, Carmody **never** saw nor signed the Commitment Letter (R-749:68-69).

It is remarkable how Carmody's allegations in his Complaints vary dramatically from the issues the Carmodys raise on appeal. Carmody's facts, claims, and story constantly shifted, including into trial. As Judge Weber emphasized, "theories of liability continually shifted in the case. And even at the time of trial there were theories being advanced that I certainly hadn't heard of before." R-768:4. "It was just constantly moving." *Id*. 5.

Ultimately, the great weight of the evidence, including Carmody's convenient recollections, or lack thereof, and the overwhelming direct and indirect evidence led to the Circuit Court's decision that Carmody did, in fact, sign the Loan Documents.

Appellants cannot show that the Circuit Court's decision was contrary to the great weight and clear preponderance of the evidence.

II. THE CIRCUIT COURT CORRECTLY DETERMINED THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED AND THAT THE CARMODYS DID NOT SUSTAIN ANY DAMAGES ARISING FROM ESTERLING NOTARIZING THE CARMODYS' SIGNATURES.

A. The Carmodys fail to establish a record for the Court of Appeals to consider this issue on appeal.

In *Anic v. Board of Review of Town of Wilson*, 751 N.W.2d 870, 873, n.1 (Wis. Ct. App. 2008), the Court of Appeals warned appellants that the "court is not required to sift through the record for facts to support the [petitioner's] argument" and that it "is their responsibility to provide this court with proper references to the record." *Id*.

The court "is not a performing bear, required to dance to each and every tune played on an appeal" and is "not required to search for the proverbial needle in the haystack that the appellant asserts exists but has not cited to." *S.C. Johnson & Son, Inc. v. Morris*, 779 N.W.2d 19, 22, n.1 (Wis. Ct. App. 2009). When the scope of review is much broader, and the inquiry is whether evidence is present rather than absent, courts refuse to "speculate" about factual allegations that are inadequately supported. *Dietrich by Padway v. Wis. Patients Comp. Fund*, 485 N.W.2d 614, 617, n.1 (Wis. Ct. App. 1992).

The Carmodys fail to provide the Court of Appeals with citations to the record to evidence the alleged error on this issue. Notably, at Summary Judgment, the Circuit Court limited Carmody's claims under Wis. Stat. § 137.01[4] to a determination whether the Mortgages were enforceable and, potentially an award of attorneys' fees, upon a showing of actual malice by Esterling in notarizing the Mortgages. R-545:21-22. The Carmodys fails to even include the order partially granting Respondents' motion for Summary Judgment (R-545) in his appendix and provides no citation to the motions.

Additionally, the Carmodys presented no evidence of damages at trial, nor do

[4] Nicole Carmody did not assert a claim under Wis. Stat. § 137.01. Resp. App. pp. 122-135; R-78.

they cite to the trial transcript in relation to alleged damages. *See* App. Brief 31-33. At best, Carmody claims to have incurred attorneys' fees and costs for hiring an expert, but there is no evidence of the same. *Id*. 31.

The Court of Appeals should not be forced to find the needles that Carmody claims exist in this haystack. Carmody's appeal on this issue entirely fails.

B. The burden was on the Carmodys to set forth disputed facts, and they failed to do so, making Summary Judgment proper and on appeal the Carmodys have failed to identify any errors of law made by the Circuit Court.

Carmody apparently seeks reversal of the Circuit Court's Order partially granting Respondents' motion for Summary Judgment. Resp. App. 36-67; R-545. While the standard of review is *de novo* for summary judgment decisions, the decision of the lower court will not be disturbed simply because another judge might reach a different conclusion. The Court of Appeals "is an error-correcting, not a fact-finding, tribunal." *Milwaukee Journal v. Call*, 450 N.W.2d 515, 517 (Wis. Ct. App. 1989).

To defeat a properly supported summary judgment motion, a plaintiff must do more than just allege a factual dispute; he or she must present specific facts creating a genuine issue for trial. *Helland v. Kurtis A. Froedtert Mem. Lutheran Hosp*., 601 N.W.2d 318, 321 (Wis. Ct. App. 1999). "It is not enough to rely on unsubstantiated conclusory remark, speculation, or testimony which is not based on personal knowledge." *Id*.

C. Legal standard to establish violation of Wis. Stat. § 137.01.

Wisconsin Statutes § 137.01 provides, "[i]f any notary public shall be guilty of any misconduct or neglect of duty in office the notary public shall be liable to the party injured for all the damages thereby sustained". Irrespective of whether Esterling committed misconduct or neglect, Carmody's claim still fails because Carmody failed to show that he suffered any damages. Damages cannot be recovered from a notary public for negligence of the notary unless the damages were proximately caused by the notary's negligence. *Governor of Wis. ex rel. Kadin v. Bristol*, 281 N.W. 686, 688 (Wis. 1938).

D. Carmody failed to create a dispute of material fact as to whether he suffered any damages arising from the alleged notarial misconduct.

For Carmody to have viable claims, he needed to provide evidence that he suffered damages arising from the actions or inactions of Respondents. Carmody wholly failed to meet his burden.

As a prerequisite to recovery, a party must prove the amount of the damages sustained. The general rule is that damages must be proven with reasonable certainty. *Production Credit Ass'n of Madison v. Nowatzski*, 280 N.W.2d 118, 124 (Wis. 1979). Damages may not be awarded on speculation or conjecture. *Pleasure Time, Inc. v. Kuss*, 254 N.W.2d 463, 470 (Wis. 1977). Even in cases where it is difficult to prove precise dollar values, the burden still rests with the party seeking damages "to prove by credible evidence to a reasonable certainty that damages were suffered and to establish at least to a reasonable probability the amount of these damages". *Id.* "[S]ome type of damage is difficult of proof but the difficulty does not excuse the failure to put into evidence some reasonable basis of computation". *De Sombre v. Bivkel*, 118 N.W.2d 868, 873 (Wis. 1963).

Respondents presented significant evidence at Summary Judgment evidencing that Carmody failed to create a dispute of material fact, regarding his alleged damages. Respondents submitted the Affidavit of Garth G. Gavenda – Regarding Plaintiff, Aaron Carmody – Damages ("Damages Affidavit"). Resp. App. 136-164; R-314. The Damages Affidavit included citations to discovery responses and deposition testimony of Carmody, including Carmody's "Damages Worksheet", which baselessly itemized $27,148,100.00 in damages:

Damages Worksheet		Type
business loans		
byline loan	$2,250,000.00	actual
promissary notes to sellers	$700,000.00	actual
promissary notes to sellers	$800,000.00	actual
guaranteed consulting Contract for sellers	$1,480,000.00	actual
line of credit	$270,000.00	actual
Lost primary work opportunity	$193,600.00	
Euipment Financed		
drill 1	$320,000.00	consequential
drill 2	$200,000.00	consequential
trucks	$50,000.00	consequential
trucks	$34,500.00	consequential

Theft of Properties - equity in homes		
Vermont pl	$650,000.00	actual
Shiloh rd	$80,000.00	actual
Down Payment	$320,000.00	actual
Legal Expenses(estimate)	$100,000.00	actual
Lost Profits	$7,200,000.00	10 years at .48*1.5MM net revenue - consequential
Loss in business Value(5MM*.48%)	$2,400,000.00	5MM *.48 - consequential
Mental Anguish and stress	$100,000.00	consequential
Punative Damages	$10,000,000.00	Punative

Resp. App. 150-151; R-314:15-16.

Carmody's "Damages Worksheet" was "supported" by a rambling narrative in his discovery responses, where Carmody attempted to explain why, for example, he was entitled to be freed from the $2,225,000 SBA Loan, but also suffered $2,225,000 in damages. Resp. App. 146-149; R-314:11-14. Or why he was entitled to $7,200,000 in lost profits, to be earned over 10-years, which lost profits he intended to prove through his own testimony. Resp. App. 149; R-314:14.

The issue of damages was largely disposed of by the Circuit Court on Summary Judgment. Resp. App. 136-164; R-545. The Circuit Court properly concluded that:

1. Carmody failed to establish that he has suffered any monetary damages;

2. Carmody failed to introduce admissible evidence to support a claim for damages related to "business loans" including, but not limited to, the SBA Loan, any loan or contract;

3. Carmody failed to introduce admissible evidence to support a claim for damages related to alleged lost profits, lost primary work opportunity, and loss in business value;

4. Carmody failed to introduce admissible evidence to support a claim for damages related to alleged financing of four pieces of equipment, two drills and two trucks;

5. Carmody failed to introduce admissible evidence to support a claim for damages related to alleged equity in the Vermont Property and alleged equity in the Shiloh Property;

6. Carmody failed to introduce admissible evidence to support a claim for damages related to mental anguish and stress; and

7. Carmody failed to introduce admissible evidence to support a claim for punitive damages.

Resp. App. 44-47; R-545:9-12.

There simply are no errors for the Court of Appeals to correct. Carmody failed to present evidence of damages at any point in this case. Carmody continues that failure on appeal, as the record is bare.

E. Despite the determination that Carmody failed to show he suffered any damages, the Circuit Court still allowed Carmody to attempt to show damages at trial, which he entirely failed to do.

Despite granting Summary Judgment on this issue, the Circuit Court left open the opportunity for Appellants to prove alleged damages if at trial:

> "[Aaron Carmody] proves, by a preponderance of the evidence, that Byline and/or Esterling acted with malicious and fraudulent intent with respect to the signing of "Aaron Carmody" on the Loan Documents, the notarization of Plaintiff's signature on the Mortgages, and Byline's recording of the Mortgages, Plaintiff may pursue an award of reasonable attorneys' fees actually incurred by Plaintiff.

Resp. App. 65; R-545:30. As addressed above, nowhere in the Carmodys' brief is there citation to the record pointing to the presentation of alleged damages. This is because no such evidence was presented.

Carmody received exactly what he bargained for: the $2,255,000 SBA Loan, pursuant to which he was required to grant the Mortgages against the Carmody Properties. The statutory requirement that the Mortgages needed to be notarized does

not, in itself, create damages.

The Circuit Court concluded that Esterling violated Wis. Stat. § 137.01, with respect to Esterling notarizing the signatures without witnessing them. R-768:51. However, the Circuit Court properly concluded that Esterling did not act with malice, that Carmody executed the Mortgages, and that Carmody failed to present admissible evidence of any damages arising from the notarization. Resp. App. 57; R-718:22-23. This conclusion is not contrary to the great weight of the evidence nor is it clearly erroneous based on the evidence presented.

III. THE CIRCUIT COURT CORRECTLY DETERMINED THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED AND RESPONDENTS DID NOT MAKE MATERIAL MISREPRESENTATIONS TO CARMODY, WHICH CARMODY RELIED ON AND SUFFERED DAMAGES AS A RESULT WITH RESPECT TO THE BUSINESS VALUATION.

A. The burden was on Carmody[5] to set forth disputed facts; he failed to do so, making Summary Judgment proper and Carmody has failed to identify any errors of law made by the Circuit Court.

Carmody again seeks reversal of the Circuit Court's Order partially granting Respondents' motion for Summary Judgment. Resp. App. 36-67; R-545. The standard of review is *de novo* for summary judgment decisions, but the decision of the lower court will not be disturbed simply because another judge might reach a different conclusion. *Milwaukee Journal*, 450 N.W.2d at 517.

Carmody failed to carry his burden to present a material dispute of facts in response to Respondents' motion for Summary Judgment. Carmody similarly fails to carry his burden here, as he fails to present an error of law that warrants correction.

B. Carmody never asserted a claim for allegedly intentional misrepresentations by Respondents in his Complaint nor his Amended Complaint, in relation to the Business Valuation.

[5] Nicole Carmody did not assert a claim for Intentional Misrepresentation relating to the Business Valuation. Resp. App. pp. 122-135; R-78.

As the Circuit Court made clear, Carmody never pled a claim for alleged intentional misrepresentations by Respondents, in relation to the Business Valuation, in his Complaint nor his Amended Complaint. Resp. App. 81-121; R-51. Carmody admits as much in his brief, stating that, "[a]fter [d]iscovery had commenced, Carmody became aware of the valuation…". App. Brief p. 34.

Carmody never sought to amend his claims to include a claim for intentional misrepresentation regarding the Business Valuation. Carmody's Count for Intentional Misrepresentation focused on the signatures and notarization on the Loan Documents, the "manufacture" of the Loan Documents, allegedly circulating only signature pages, and Byline requiring/obtaining the Mortgages. Resp. App. 92-95;R-51:12-15.

For the first time, in opposition to Respondents' motion for Summary Judgment, Carmody shifted his legal theories and asserted a new theory: that Carmody relied on the Business Valuation, that Carmody never saw nor requested. R-398:64-67. In his opposition, Carmody sought to rely on the Hinckley Valuation, which lacked any foundation or reliability. *Id.* 72.

Appellate courts do not address an issue that is raised for the first time on appeal except in rare circumstances. *Green v. Hahn*, 2004 WI App 214, ¶ 21 (Wis. Ct. App. 2004). As Judge Weber noted in his Oral Decision, "the theories of liability continually shifted in this case. And even at the time of trial there were theories being advanced that I certainly hadn't heard of before." R-768:4. Given that Carmody never asserted a cause of action for intentional misrepresentation regarding the Business Valuation, the Court of Appeals should not take up the issue on appeal.

C. Hinckley, the "expert" Carmody attempts to rely upon, and the Hinckley Valuation were properly excluded by the Circuit Court.

In addition to Carmody failing to assert the claims that he pursues on appeal, the underlying basis for these purported claims was deemed inadmissible by the Circuit Court. Respondents moved to exclude Carmody's "experts" (R-251; R-252), including Hinckley, who Carmody engaged to prepare what purports to be a

retrospective business valuation. The Circuit Court granted Byline's motion to exclude Hinckley. *Id.*

Respondents also filed motions in limine, including Motion in Limine No. 5 to preclude evidence, argument, or testimony relating to the opinion of Hinckley, who was already excluded, as well as the Hinckley Valuation. *Id*. 5-6.

Hinckley did not testify at trial and the Hinckley Valuation was never introduced into evidence. Consideration of this issue on appeal is improper.

D. Legal standard to establish intentional misrepresentation.

Intentional misrepresentation is synonymous with fraud. *Doe v. Archdiocese of Milwaukee*, 700 N.W.2d 180, 187 n.4 (Wis. 2005). To state a claim for intentional misrepresentation, the following allegations must be made: (1) defendant made a factual representation; (2) which was untrue; (3) defendant either made the representation knowing it was untrue or made it recklessly without caring whether it was true or false; (4) defendant made the representation with intent to defraud and to induce another to act upon it; and (5) plaintiff believed the statement to be true and relied on it to his/her detriment. *Ramsden v. Farm Credit Service of North Cent. Wis. ACA*, 590 N.W.2d 1, 7 (Wis. Ct. App. 1998).

E. The factual representation, not made to Carmody, that the Business Valuation "came back at just over $5 million" was true.

Byline obtained the Business Valuation for purposes of underwriting the SBA Loan. Carmody had the obligation of conducting his own due diligence, as one must exercise reasonable diligence for one's own protection. *Production Credit Ass'n v. Croft*, 423 N.W.2d 544, 549 (Wis. Ct. App. 1988).

On June 24, 2016, Esterling e-mailed Price and Komoroski (but not Carmody), stating, "I don't have the full report yet but the business valuation came back at just over $5 million". R-408. There was no other communication about the Business Valuation. The Partners did not request it and Byline did not provide it to them.

Carmody's claim that Esterling's representation is false is plainly incorrect. The Business Valuation literally indicates a valuation "just over $5 million" as it the valuation of DAB was $5,005,085. R-301. Thus, Esterling did not misrepresent the Business Valuation's conclusion.

Judge Weber reaffirmed his decision on Esterling's truthful representation after trial, concluding that "Esterling did not misrepresent anything. He stated what the number said… even if that somehow was a misrepresentation, it was not justifiably relied on, just the brute number because that… tells you nothing." R-768:8-9. "Based on the evidence that I heard at the trial, they had all of the information by the time they closed this deal…the plaintiff or the buyers in this case had access to that information. So it is not a situation that if they had asked for it and received it, that they would have been misled by it." R- 768:9.

F. Even if Esterling made a factual representation to Carmody about the Business Valuation, Carmody's purported reliance on the Business Valuation was not reasonable nor justifiable.

The Circuit Court correctly concluded that Carmody could not be misled by the Business Valuation, which he did see and did not ever request. Judge Weber made this clear in his oral ruling, where he concluded that Carmody could have relied on the Business Valuation, but "neither Price nor Komoroski nor Carmody asked for it." R-768:7.

Carmody's purported reliance on the Business Valuation or Esterling's lone statement regarding the Business Valuation must be "justifiable" or "reasonable. *Kiefer v. Fred Howe Motors, Inc.*, 158 N.W.2d 288, 292–93 (Wis. 1968); *Chicago & North Western Transportation Co. v. Thoreson Food Products, Inc*., 238 N.W.2d 69, 75 (Wis. 1976). Negligent reliance is not justifiable:

> [C]ourts will refuse to act for the relief of one claiming to have been misled by another's statements who blindly acts in disregard of knowledge of their falsity or with such opportunity that by the exercise of ordinary observation, not necessarily by search, he would have known. He may not close his eyes to what is obviously discoverable by him…

Jacobsen v. Whitely, 120 N.W. 285, 286 (Wis. 1909) (citations omitted).

"[A] person cannot have the protection of the law where he fails to use reasonable care to protect himself". *Bostwick v. Mutual Life Ins. Co.*, 89 N.W. 538, 541 (Wis. 1903) ("An examination of the policies, even of a casual character, would have revealed all the material facts"). "The mere fact that one person relies upon false representations made by another to his injury does not constitute a cause of action against such other. There must be a further circumstance. Such person must be induced to rely upon the fraudulent representations, and that circumstance does not exist where such person would not be so induced but for his own heedlessness." *Id.*

As a matter of law, negligent reliance is not justifiable. *Ritchie v. Clappier*, 326 N.W.2d 131, 134 (Wis. Ct. App. 1982). For instance, in *Ritchie*, the court held that the plaintiff's reliance on the defendant's fraudulent misrepresentation about the contents of a document the plaintiff signed was not justifiable, because the plaintiff's reasonable diligence would have uncovered the defendant's fraud. *Id*. at 134-135.

It is undisputed that Carmody did not ask for nor receive a copy of the Business Valuation, despite claiming to know that it existed prior to the SBA Loan closing. Carmody's retrospective reliance is not reasonable. Attempts to rely on the Business Valuation is simply Carmody concocting a new theory, in the midst of his lawsuit about alleged forgeries.

As Judge Weber concluded, "you can't just rely on a number that's given to you… that is not a justifiable reliance… Without having the actual appraisal, you can't rely on it." R- 768:10.

G. Carmody attempts to shift responsibility when the Partners knew and agreed that the accounts receivable being acquired were reduced.

Carmody tries to manipulate facts to argue that the Business Valuation was inaccurate, and the wrong data was purportedly used to arrive to at the $5,005,085 valuation; this is a red herring.

Carmody and the Partners were responsible for negotiation of the terms for their acquisition of DAB, not Byline. The Partners had actual knowledge of the terms of their acquisition and even expressed their willingness to walk away from the deal if they were unhappy with the terms:

> Last, if this deal can't be done by July 1st, we feel this deal is too skinny and won't have enough to survive the winter, since we won't be in long enough to bank enough cash. In my opinion, from my due diligence reading about the industry and talking to others, I feel after June 1st is too late.

See R-668:23 (e-mail from Komoroski copying Carmody and Price).

In that same exhibit, e-mails on May 20-23, 2016, the Partners discussed a collateral shortfall with the broker representing the seller, looking for that shortfall to be made up:

You will notice that with the leased drills and various asset units that were sold off that there is a $597,000.00 collateral short fall. When you add the $53,000.00 of purchased equipment back, that number comes down to $544,000.00.

Total appraisal came in at $1,781,000.00 - collateral short fall of $544,000.00 = new collateral amount of $1,237,000.00

We can take care of the leased drills by having DAB Drilling pay the leases off and allow the bank take a first on them at the closing. The EXACT pay off amount will be allowed to be paid back, but it will have to be add to the 2 year stand by note. The Bank will not budge on this method.

With the drills paid off, there is still a $194,000.00 short fall that will need to be addressed. The short fall can be addressed with any of the following... cash,receivables,assets,and inventory(tooling etc.).

Id. Carmody's claims that he was in the dark about the business terms of the deal falls flat when the actual evidence is examined.

On July 19, 2016, the seller's broker e-mailed Carmody, Price, and Komoroski attaching as "Exhibit C" a 7-page list equipment that would be conveyed in the Partners:

From: "Robert Hedges" <rhedges@earthlink.net>
Date: July 19, 2016 at 12:01:56 PM CDT
To: "Nate Price" <ceag8@yahoo.com>, "Adam Komoroski" <adamkomoroski@gmail.com>, "Aaron Carmody" <aaron.carmody@gmail.com>
Cc: "Johnny Dabovich" <cjscon1@msn.com>
Subject: Exhibit C
Reply-To: "Robert Hedges" <rhedges@earthlink.net>

Gentlemen,

Here is Exhibit C with all the equipment and vehicles. Each of you will need to initial each page for closing.

R-736. In response to being provided with this 7-page list by the Partners, Esterling stated:

> It will really be up to you guys to make sure that the sellers are leaving all of the assets for you. There really isn't a perfect way to do it when it comes to equipment that we can't put specific liens on.

R-680:26.

Respondents did not owe Carmody a duty to hold his hand throughout a sophisticated commercial transaction, where Carmody plainly had access to at least as much information as Respondents. Carmody's feigned reliance on Respondents was not reasonable nor justified. Carmody attempts to shift the duty to protect himself to Respondents. Carmody's decision to not walk away from the transaction, having information that he now finds objectionable, is not reasonable nor justified.

If you believe Carmody's story, it is evident that he was intentionally negligent in disregarding information available to him. Respondents had no duty to protect Carmody from himself. The decision of the Circuit Court is not contrary to the great weight of the evidence nor is it clearly erroneous.

IV. THE CARMODYS FAIL TO PROPERLY APPEAL ANY ISSUES DETERMINED BY THE CIRCUIT COURT'S ORDER PARTIALLY GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT, PURSUANT TO WHICH THE CIRCUIT COURT DISMISSED THE CARMODYS PURPORTED CLAIMS UNDER WIS. STAT. § 100.18.

A. The burden was on the Carmodys to set forth disputed facts, and they failed to do so, making Summary Judgment proper and the Carmodys have failed to identify any errors of law made by the Circuit Court on appeal.

The Carmodys seek reversal of the Circuit Court's Order partially granting Respondents' motion for Summary Judgment, with respect to their claims under Wis. Stat. § 100.18. App. Appendix 36-80; R-544; R-545. The standard of review is *de novo* for summary judgment decisions, but the decision of the lower court will not be disturbed simply because another judge might reach a different conclusion. *Milwaukee Journal v. Call,* 450 N.W.2d at 517.

The Carmodys failed to carry their burden to present a material dispute of facts, in response to Respondents' motions for Summary Judgment. The Carmodys similarly fail to carry their burden to present an error that warrants correction.

B. Legal standard to establish a violation of Wis. Stat. § 100.18.

Wis. Stat. § 100.18 is the Wisconsin Deceptive Trade Practices Act ("DTPA"). To prevail on a claim under the DTPA, a plaintiff must prove: (1) that, with intent to induce an obligation, the defendant made a representation to "the public"; (2) that the representation was untrue, deceptive, or misleading; and (3) that the representation caused plaintiff a pecuniary loss. *K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.,* 732 N.W.2d 792, 798-99 (Wis. 2007). The intended purpose of Section 100.18(1) is to protect Wisconsin consumers from untrue, deceptive, or misleading representations made to promote the sale of a product. *Bonn v. Haubrich,* 366 N.W.2d 503, 505-06 (Wis. 1985).

Section (3) requires a causal connection between the untrue, deceptive, or misleading representation and the pecuniary loss. *Tim Torres Enters., Inc. v. Linscott*, 416 N.W.2d 670, 675 (Wis. Ct. App.1987). "Because the purpose of the DTPA includes protecting Wisconsin residents from untrue, deceptive, or misleading representation made to induce action . . . proving causation in the context of § 100.18(1) requires a showing of material inducement. *K & S Tool,* 2007 WI 70, ¶ 35, *citing* Wis JI–Civil 2418.

C. The Carmodys failed to satisfy the elements of Wis. Stat. § 100.18 due to their failure to show they suffered a pecuniary loss caused by any representations made by Respondents.

This issue is essentially a regurgitation of Issues II and III, relating to Esterling's lone true statement about the Business Valuation. To avoid repetition, Respondents incorporate by reference the arguments and references set forth in the foregoing sections of their brief, as though set forth fully herein. In short, the Carmodys failed to provide evidence of pecuniary loss.

D. The Carmodys also failed to satisfy the other elements of Wis. Stat. § 100.18 due to their failure to show Respondents made untrue, deceptive, or misleading statements, which induced action by the Carmodys.

1. Esterling's statement that the Business Valuation "came back at just over $5 million" was not untrue, deceptive, or misleading.

First, Esterling did not represent anything false to Carmody, let alone to Nicole Carmody; neither of the Carmodys were materially induced by Esterling's statement about the Business Valuation, which they never saw.

Again, Carmody claims that Esterling represented that DAB was worth over $5 million, in violation of Wis. Stat. § 100.18. It's entirely unclear how Nicole Carmody could have a claim, given that this representation was never made to her and, by her own admission, she knew nothing about the SBA Loan or Business Valuation prior to this lawsuit. Carmody, claims that the Business Valuation, which was never shared with him, "was a material factor in whether or not Carmody was to buy the DAB business". This is Carmody attempting to change his story and legal theory mid-lawsuit, which contradicts his prior legal theories and trial testimony, claiming that Carmody never communicated with anyone at Byline about the SBA Loan and was dumbfounded to learn about it after the fact. Resp. Brief pp. 32-33.

Esterling's representation that the Business Valuation "came back at just over $5 million" was not untrue, deceptive, or misleading. The Business Valuation plainly does set forth a valuation just over $5 million.

2. Neither Esterling's statement nor the actual Business Valuation, which the Carmodys did not see, induced action by the Carmodys.

The evidence clearly shows that the Business Valuation did not influence whether Carmody was interested in purchasing DAB. Carmody entered into a Letter of Intent to buy DAB for $3.5 million, long before Carmody met Esterling, and the Business Valuation was prepared. R-640:1-3; R-657:13; R-750:58-60.

Additionally, Carmody performed his own financial analysis of DAB and it was Carmody who made representations to Byline, based on his financial analysis of DAB's financials, which analysis Price provided to Byline to induce Byline to approve the SBA Loan. R-657:8-9; R-750:43-45.

Nowhere in Carmody's Complaint nor Amended Complaint was there any allegation that Carmody was misled, because he believed he was buying a business worth $5 million and, as he claims, it was not. Resp. App. 81-121; R-1; R-51.

It's utterly incredulous that Carmody attempts to claim on appeal that he was induced by the Commitment Letter, which was prepared by Byline based on financial data provided to Byline by the Partners. Carmody maintained through trial that he never signed, let alone saw the Commitment Letter. *See* App. Brief 41-42; R-640:4-8. Carmody's testimony at trial made clear that, once again, it was Carmody's position that he "was never given" the Commitment Letter:

Q. Okay. And yesterday you testified with this document, and if I recall your testimony you stated that this was never given to you, you did not ask to look at it, and you did not ask for it to be sent to you. Is that your recollection of your testimony yesterday?

A. That is an accurate representation of what I said.

Q. But my understanding of your trial testimony yesterday was that you never got it?

A. Before the commencement of this lawsuit I had not received it.

R-750:153-154. Despite what Carmody would have the Court believe, it's simply impossible to rely on and be induced by information in a document a person never saw.

The rampant misconstruction of evidence by Carmody is truly remarkable, as further evidenced by Carmody attempting to rely on a sippet of a document (App. Brief 42) that reflects Esterling's response to learning that the Partners' negotiations

with the sellers of DAB resulted in the Partners agreeing to significantly reduce the accounts receivable they would be receiving:

From: Nate Price [ceag8@yahoo.com]
Sent: Wednesday, February 17, 2016 4:00 PM
To: Dylan Esterling
Subject: Re: Update

Hello Dylan,

I'm thinking this will work. I will discuss this with Bob.

Regards,
Nate

Sent from my iPhone

On Feb 17, 2016, at 2:40 PM, Dylan Esterling <desterling@ridgestone.com> wrote:

> Nate,
>
> It looks like the A/R and A/P being reduced does impact the deal quite a bit. For example, if the A/R is reduced to $160K and the A/P is reduced to $100K....the seller financing that needs to be on standby jumps up to $675,000. Then the other $825,000 can be on payments.
>
> This is a fairly complex calculation, but this has to do with the calculation of cash left in the deal (A/R - A/P) + the down payment + the amount of seller financing on standby. That amount has to equal at least 25% of the total deal. By reducing the cash down significantly....we have to bump up something. And that has to be the seller financing. So if the A/R and A/P continue fluctuate it will continue to affect the amount of seller financing on standby. To be safe on all counts, the sellers need to agree to $700K on standby and $800K on payments.
>
> We can still proceed with the deal but the seller financing will have to be renegotiated. Let me know your thoughts. Thanks,
>
> Dylan C. Esterling
> V.P. - Business Development Officer
> Ridgestone Bank

R-406 (initial page omitted by Carmody). Notably, this e-mail was sent to Esterling one day before the Commitment Letter was dated. Price is not concerned about the diminution of accounts receivable the Partners were to receive. If the Partners were not concerned, why would Esterling or Byline be concerned for them?

Carmody failed to present evidence that Esterling or Byline made any representations to Carmody with respect to the Business Valuation, DAB's business equipment, the accounts receivable included in the deal, or otherwise relating to Carmody's acquisition of DAB, that were untrue, deceptive, or misleading. Carmody knew, or should have known, that the Partners agreed to a reduction of the accounts receivable, Price advised Byline of this change.

The Carmodys simply failed to present evidence that Respondents made any representation that was untrue, deceptive, or misleading or that the Carmodys suffered a pecuniary loss.

V. THE CIRCUIT COURT CORRECTLY DETERMINED THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED AND THAT RESPONDENTS DID NOT BREACH A CONTRACTUAL OBLIGATION OF GOOD FAITH AND FAIR DEALING OWED TO

CARMODY[6], BECAUSE CARMODY'S CLAIMS WERE ENTIRELY BASED ON HIS ALLEGATION THAT NO CONTRACTS EXISTED.

A. The burden was on Carmody to set forth disputed facts, and he failed to do so, making Summary Judgment proper and Carmody has failed to identify any errors of law made by the Circuit Court.

Carmody seeks reversal of the Circuit Court's Order partially granting Respondents' motion for Summary Judgment on this issue. App. Appendix 36-67; R-545. Carmody failed to carry his burden to present a material dispute of facts, in response to Respondents' motion for Summary Judgment. Here, Carmody fails to show that the Circuit Court made an error of law.

B. Legal standard to establish a breach of the contractual duty of good faith and fair dealing.

Wisconsin law recognizes that every contract implies good faith and fair dealing between the parties to it. *See Super Valu Stores, Inc. v. D–Mart Food Stores, Inc*., 431 N.W.2d 721 (Wis. Ct. App. 1988). In addition, where the contracting party complains of acts of the other party that are specifically authorized in their agreement, there is no breach of good faith and fair dealing. *Id.*

Further, a party can act in bad faith without injuring or destroying the other party's ability to receive the benefits of the contract. In such a circumstance, the plaintiff cannot succeed on a claim for breach of the duty of good faith. *See Horicon Foods, Inc. v. Gehl Foods, LLC*, No. 15-C-0689, 2016 WL 4926189, at *8 (E.D. Wis. Sept. 15, 2016).

C. Carmody's lawsuit was predicated on the assertion that no contracts existed; thus, this pretended claim fails as a matter of law.

Carmody makes little attempt to argue this matter on appeal, which alone should result in its denial. Contained in the short shrift that Carmody does pay to this issue, Carmody baselessly asserts that he's entitled to relitigate this issue as though he

[6] Nicole Carmody did not assert a counterclaim for breach of the contractual duty of good faith and fair dealing. Resp. App. 122-135;R-78.

accepted there were contracts all along. Notably, Carmody fails to identify what contracts he claims are at issue and what actions he claims as the basis for this claim.

On the forefront, a claim for the breach of implied **contractual** duty of good faith relies upon the fact that there is a contract between the parties. This directly contradicts Carmody's position throughout his lawsuit; asserting that there was no contract(s) between himself and Byline. In retrospect, Carmody cannot establish a viable claim for the breach of the contractual duty of good faith.

D. Even if Carmody had asserted a contractual based claim, he cannot show a breach of the duty of good faith, nor any damages.

Carmody asserted that Respondents acted in bad faith by Esterling notarizing the Loan Documents, without witnessing the parties signing. There has never been a dispute that Esterling did notarize the Loan Documents outside the presence of the signers; however, there is no evidence to suggest that the notarization was done in bad faith.

Further, any breach requires that Carmody show damages arising from the breach. Carmody failed to show that he incurred any damages. Rather, Carmody received precisely what he bargained for: a $2,225,000 loan. Because Carmody received what he bargained for, Carmody has no viable claim against Respondents for the breach of contractual good faith and fair dealing.

CONCLUSION

The decision of the Circuit Court should be affirmed. The Circuit Court properly weighted the exceptional volume of evidence, including the testimony of experts, and concluded that Carmody signed his name on the Loan Documents. The great weight of the evidence, including Carmody's convenient recollections, or lack thereof, and the overwhelming direct and indirect evidence led to the Circuit Court's decision, and Appellants simply cannot show that the decision was not clearly erroneous and contrary to the great weight and clear preponderance of the evidence.

Despite the Circuit Court giving the Carmodys every benefit of the doubt to prove their case, they failed to establish they suffered any damages. The Circuit

Court's decision should not be disturbed, as the decision is not clearly erroneous nor contrary to the great weight and clear preponderance of the evidence.

Lastly, the Carmodys' arguments as to claimed reliance on the Business Valuation, and the purported claims that arise from there, simply do not evidence entitlement to relief on appeal and instead are the ever-changing theories the Carmodys made to the Circuit Court. The record before the Circuit Court plainly supports its ruling and should be affirmed.

Respectfully submitted,

JELLUM LAW, P.A.

Dated: April 14, 2023.

Electronically signed by Garth G. Gavenda
Garth G. Gavenda, #1079588
Lindsay W. Cremona, #1115578
14985 60th Street North
Stillwater, MN 55082
Telephone: (651) 439-2951
Garth.Gavenda@JellumLaw.com
Lindsay.Cremona@JellumLaw.com
Attorneys for Respondents

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes § 809.19(8)(b), (bm) and (c) for a brief. The length of this brief is 10,982 words.

JELLUM LAW, P.A.

Dated: April 14, 2023.

Electronically signed by Garth G. Gavenda
Garth G. Gavenda, #1079588
Lindsay W. Cremona, #1115578
14985 60th Street North
Stillwater, MN 55082
Telephone: (651) 439-2951
Garth.Gavenda@JellumLaw.com
Lindsay.Cremona@JellumLaw.com
Attorneys for Respondents