STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Aaron Carmody, Plaintiff-Co-Appellant,

v.

Byline Bank, Defendant-Third-Party Plaintiff-Respondent,

Dylan Esterling, Defendant-Respondent,

v. Nicole Elizabeth Carmody, Third-Party Defendant-Appellant

Appeal No. 2022-AP-001660

On Appeal from the Circuit Court for Door County
The Honorable David Weber, Presiding
Case No. 18-CV-88

REPLY BRIEF OF PETITIONER-APPELLANT

Aaron and Nicole Carmody

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Sturgeon Bay WI 54235

Self Represented Parties-Appellant

TABLE OF AUTHORITIES

CASES

Susan Hatleberg, Plaintiff v. Norwest Bank Wisconsin, n/k/a Wells Fargo Bank, 271 Wis. 2d 225.

Nischke v. Farmers & Merchants Bank & Trust, 187 Wis. 2d 96, 522 N.W.2d 542 (Ct. App. 1994).

STATUTES

WIS. STAT. § 100.18 FRAUDULENT REPRESENTATIONS

WIS. STAT. § 403.308 PROOF OF SIGNATURES AND STATUS AS HOLDER IN DUE COURSE.

WIS. STAT. § 403.406 NEGLIGENCE CONTRIBUTING TO FORGED SIGNATURE OR ALTERATION OF INSTRUMENT.

WIS. STAT. § 805.17 (2) TRIAL TO THE COURT - FINDINGS OF FACT SHALL NOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS

WIS. STAT. § 809.22 RULE (ORAL ARGUMENT)

WIS. STAT. § 891.25 PRESUMPTIONS AS TO SIGNATURES

WIS. STAT. § 706.06 AUTHENTICATION

WIS. STAT. § 137.01(8), NOTARIAL MISCONDUCT

REPLY

In Defendants reply brief, they state that

> "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."

It is somewhat confusing why the defendant tries to persuade the court that I didn't claim a forgery existed in my initial letter to the bank because I didn't use the word "forged", but rather "surprised to see that my signature had been added to these documents." for which I had to hire an expert in such matters. This typical distortion of my words is wrongly asserted to mean one thing and not the other. It is true that I have a somewhat sarcastic way of writing, but in my shoes I did not feel the need to so carefully massage my words to the defendant in my communications with them. I had done my diligence and presented the findings in a professional matter. It is surprising that the defendant does not use this way of speaking to imply I'm admitting it was my signature because I used the words "my signature." Normal people do not use such precautions and the defendants interpretation of my meanings and the way I write should not hold water with the court. The fact that I took time to

fully investigate and compile as much evidence as I did before going to the defendant only speaks to my interest in resolving the issue in as thorough a manner as I could.

Later the Defendants claim,

> "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."

However, as described in my appeal brief, I admitted that I signed lots of documents in connection with the purchase of the business but not necessarily the documents the bank now wishes to assign to my knowledge when it was admitted that they never even bothered to send a copy of the loan documents to myself at any point in time prior to this litigation. In fact the bank admits that they never even gave a copy executed or otherwise to Carmody. The Defense in its misdirection, attempts to persuade the court that Carmody had full knowledge of the contents of the loan documents when there was no evidence he ever had them.

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3                THE WITNESS:  I don't recall sending any
4     copies or any -- to any of the principals.
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R 742 p162

and

Q. (By Mr. Linnan) Why didn't you send any copies out to the borrowers within a couple of weeks of the execution of those documents?
A. Why I didn't? They weren't in my hands at that point. Again, I don't recall if I scanned them in

R 742 p163

There is absolutely no communication from myself or my wife tying the “loan documents” to our personal proximity at any point in time. There is however, plenty of evidence that there were purchase documents presented and signed by us.

It was established that Carmody signed lots of documents in relation to the purchase of the business, see R749:56, 59, 61, 94,112, 117,130. The court misstates the record that he claimed to not sign any documents. “I just cannot find it plausible that he would not have -- that he would have bought a business with two others without signing any documents.” - R768:20. This is contradicting the record on the matter, but it does provide a glimpse of what the judge was thinking;

“THE COURT: Did you read the documents before you signed them?

THE WITNESS: Um, the Grant Erickson documents or the -- I mean, I believe I did.

THE COURT: You've testified that at that point you were not aware that paperwork had been signed?

A. I was aware that some paperwork had been signed.

Q. When you say "some," what do you mean?

A. The stuff that I signed related to the selling of DAB Drilling between the buyers and the sellers. I was aware that those were documents that had been signed." R749:59.

Additionally per testimony of Carmody;

"I just remember that a security agreement was signed, and I remember signing at least one of them." R737:84.

"I remember selling two promissory notes, but maybe only one security agreement." R737:87. The record was not corrected in the above typo, but what it should have said was "I remember signing two promissory notes." I don't think the defense will object to that as I am not in the business of "selling" promissory notes.

"Q. (By Mr. Gavenda) And you've affirmed that you did sign seller notes?A. That 's correct." R737:82.

"Q. And you signed a personal guarantee for the line of credit with Central Bank & Trust; correct? A. I believe I did. Yes." R737:106.

Of course none of those documents Carmody was detailing in the above example had notarizations on them. The inference that the court made in determining that Aaron Carmody admitted signing specifically the loan and mortgage documents is not a reasonable one.

The defendants next try to tie a late payment to the bank as somehow coinciding with the letter that was sent to the bank asking for an explanation about the loan documents,

> "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."

However they misled the court as this was immediately rectified by the business's accounting team. Evidence of this is reflected in the fact that payments were continuing to be made for long after this. Dab Drilling Inc had plenty of money in its accounts and payments had been ongoing up until May 2018 when a deferral was sought by partners Price and Komoroski. R473, R474. This is par for the course for the defendant in this litigation, half truths and misdirection to create their own narrative.

Section 1 Reply

In Section 1.A. of the Defendants reply, they make the claim that a judge is not bound to an expert's opinion. they state the "exceptional volume of evidence" was such that it was the weight of the evidence. However in the singular matter of: Is this my signature or not, there was no evidence to the contrary that it was my signature that was made by an equivalent person. It must be an incredibly persuasive argument when both Defendant's and Plaintiff's Expert unanimously agree. The judge here and the Defense effectively assign zero weight to this evidence and entirely disregard it. It was however unimpeached, unequivocal and uncontradicted testimony that the

court is not at liberty to ignore. Cahill did not have such a situation where there was unanimous consent, If allowed to stand, there becomes no need for an expert at all as it can just be so flippantly dismissed. What other person called as witness could provide this sort of technical analysis? I described all of the reasons the court came to the conclusion that it did in my reply brief. It describes the courts reasoning and I have adequately shown how these conclusions were not based in reality, but rather woefully and unreasonably made. The court in Cahill It is either at liberty to disregard the unimpeached, unequivocal and uncontradicted testimony or it is not. If it is not true, why is it there at all? Defendants reliance on ""[w]e are not prepared to state that the trier of the fact is absolutely bound by the uncontradicted testimony of an expert." - Cahill v. Cahill, 131 N.W.2d 842 (Wis. 1965) does not address unanimous testimony by both parties. As I eluded to in my brief, just how many experts are needed for the court to assign a modicum of weight?

The defendant dishonestly describes the following in their reply,

> 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).

These 2 items were NOT known signatures and there is no evidence that they were. This is a fabrication.

Nicole Carmody admitted she signed my name for deposit checks into our bank account and admitted that that is the style that she uses to sign my name. see Original Brief.

Regardless, the Tweedy report procured by the defense had numerous styles of my known signature and made the analysis that the question signatures on the loan documents were not authentic. Thus the statement by the defense is provably false. We believe that it was Nicole Carmody who signed my name to the loan documents and indeed the only reasonable conclusion.

in Section 1C, the citation of Gehr v. City of Sheboygan, 260 N.W.2d 30, 33 (Wis. 1977); Both came to the same conclusion, regardless of which is picked and in 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). There was no equivalent conflicting testimony presented, thus it is of no benefit to the defense.

The Myriad of Complaints against Nicole Carmody and Ratification claims of the defendant only show that with all the evidence they had, they believed, and rightfully so, that it was Nicole Carmody who had signed my name. They admitted it to the court, they sought the appropriate claims. That, in combination with the judge's own comments midway through the 12 day trial, told us it was not the case we were fighting. When pinned down against an unwinnable ratification claim, with the current legal representation's own liability on the line (AJ- Law), this is the misdirection that they succeeded in.

Finally the defense tries to paint me as a liar in regards to providing conflicting testimony about the countless documents they somehow expected me to have perfect

recollection of, they also conflate communications concerning the purchase documents and the loan documents, which are 2 different things. I am to this day, not a sophisticated entity, not a lawyer and do not have the benefit of an entire department of lawyers and a back office keeping business records and communications straight from 5 years previous. In other words, the court should understand errors in recollection regarding thousands of pages of documents from years past.

The rest of Section 1 is adequately addressed in the initial reply brief so no further comment is needed.

Section II Reply

The Defence claims the court rightfully dismissed claims for any damages as nothing was proven or given to indicate damages. Logically, having an encumbrance on ones properties, expending legal costs and experts fees and deposition fees are all damages that were prematurely dismissed. Evidence for all of this was provided to the court, they simply ignored it. R 402, 428. R398 p28-29. It is an absolute lie on the part of the defense to suggest no evidence was presented. Schedules of legal fees, expert witness fees, equipment contracts and the like were all submitted, in detail. The very nature of the notary fraud in this case in no uncertain terms subjected Carmody to litigate with a 3rd party for which he should be held liable. The defendants even tried persuading the court that by accepting the notary's bond of $500, that the principal, Esterling was absolved from any liability. R457 p47- 48. Again another lie aimed at confusing the court with baseless conclusions.

THE COURT: Mr. Esterling, why didn't you send out an email to everybody telling them that at that time that that's exactly what you were going to do?

THE WITNESS: I mean, to be honest, I mean, I guess I -- you know, as I just testified, I knew what I was doing wasn't proper. So I guess I didn't want to throw up a flag and -- and say that I'm -- I'm doing this.

R 742 p 103

What is the point of a notary at all if there is no consequence for deliberate wrongdoing? Esterling should be held to account. Evidence was provided, the court wrongfully ignored it. In addition, it was argued that loss of a right to ones property is a damage, which was wholly ignored.

> “Monetary loss is not the only form of actual damage. One form of actual damage is injury to a legal interest or loss of a legal right. Injury to a legal interest or loss of a legal right often occurs without a contemporaneous monetary loss. However, we have held that injury to a legal interest or loss of a legal right constitutes actual damage before such an injury or loss produces monetary loss.” Hennekens v. Hoerl, 465 NW 2d 812 - Wis: Supreme Court 1991.

And Finally, here I sit with obvious damages in the form of a $3,000,000 (and counting) because a judgment exists. The courts actions and its judgments do not seem logical in this Regard.

Next we turn to Section IIIB: The defense again distorts the facts, asserting that I attempted to shift the theory of the case. Yes, facts were discovered after the 6 month limit to amend pleadings, however I never claimed subsequently that the Business valuation itself was the reason for the claim, but rather the representation of the

business valuations final number that was made to me via Esterling, of course being the source of the statement. In any case, Nicole Carmody's claim is not lacking in its pleadings. We admit we never received the business valuation but we did receive information from the bank that they knew could not be correct. We are jointly appealing the court's decision thus her pleadings are equally relevant.

See R 74 p 10-11.

> “e. That the collateral for the loan was properly valued and was not to be diminished, reduced, or encumbered.
>
> f. That as part of the collateral there were receivables which would become collateral for the loan.
>
> g. Misrepresented information, signatures, authentications and notarizations, in order to obtain Small Business Association Loan approval;
>
> h. That Nicole was not providing her residence and other properties as collateral for the loan;
>
> i. That documents were properly authenticated in compliance with Wis. Stats. §706.06.
>
> j. Other misrepresentations.”

Reply to IIIC:

The Hinkley report, by Greener Ventures, was excluded as the judge had prematurely dismissed any damages (see above). Regardless, Hinkley was a representative of the same firm that the defendants had initially contracted to perform the evaluation, using the same calculations with the *actual* numbers that were received with the business, not the errant data that bank had initially supplied and did not rectify. The fact that is was 3

million dollars less than the previous one is inconsequential. The only thing that should matter is that the Evaluation that the bank contracted had false information in it and they knew this.

Reply to IIIE

Perhaps the most egregious distortion by the defense was that the valuation was true and that it was not made to Aaron or Nicole Carmody. If the court were to believe this line of thought, any business can simply supply garbage information to contracted appraisers and have no liability for the matter at all. Providing a certified evaluation with knowingly false information is contrary to public policy and should be strongly condemned, it is no less a material misrepresentation. As far as who it was said to, Esterling had already selected Nate Price to be the representative of the group and expected Price to communicate to the rest of the business partners.

MR. LINNAN: I'll rephrase.

Q. (By Mr. Linnan) Are you saying that you assumed that one of these three guys -- Adam, Aaron, or Nate -- would have communicated this information to her?

MR. GAVENDA: Object to foundation. How does he even know that she exists or that she needs to sign this?

THE COURT: Well, and assuming that it's the portion that -- it's the guarantors up there since she's referenced in the document. And he wrote the document, or at least signed it; he would know who she is or have some belief. So overruled. You may answer.

THE WITNESS: I mean, I guess at the time I wouldn't have -- you know, I wouldn't have communicated anything with her. I would have made the assumption that they would have. But it wasn't

R742 p90

Q. (By Mr. Linnan) Why didn't you share that information with Aaron Carmody directly?

THE COURT: What information?

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Q. This email that we just -- June 24th email. Why wasn't that email sent to Aaron also?

A. I honestly don't know. I could have forgot. I could have maybe thought I had him in there and didn't. I don't know.

R742 p 183-184

A. Well, I don't know what -- at what point I got that. I mean, the first point of contact was Nate. And then obviously I was well aware there were two other individuals. So oftentimes on deals it's -- you know, if there's three or four people, someone naturally ends up being the point person.
Q. Okay.

R 742 p 168

As you can clearly see, The banks expectations were precisely that something said to one, would be received by all at all times in the transaction. The bank attempts to squirm out of the very practice that caused many of the issues on trial now but to make a ruling based on the fact that it was not uttered specifically to Aaron or Nicole is no relief.

Beyond this, the law is settled. We had every right to rely on any information being provided by the bank as the sophisticated party as detailed in our brief. Reliance on Ritchie v. Clappier is a mistake as the core of the case dealt with forcing one party to be the lawyer for the other, not the case here, we just expected accurate information to be presented at all times. Furthermore, the statement by the bank as to the value of the business never had to be made, but they made it none the less. Even if Byline Bank argues that no duty exists, Nischke instructs that liability may be imposed on one who, having no duty to act, gratuitously undertakes to act and does so negligently. Nischke v. Farmers & Merchants Bank & Trust, 187 Wis. 2d 96, 522 N.W.2d 542 (Ct. App. 1994).

Restatement (Second) of Torts § 552. See Citizens State Bank v. Timm, Schmidt & Co., 113 Wis. 2d 376, 385-86, 335 N.W.2d 361 (1983); Milwaukee Partners, 169 Wis. 2d at 362-63. That section provides in relevant part:

§ 552. Information Negligently Supplied for the Guidance of Others.

(3) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

In Susan Hatleberg, v Norwest Bank, it is again confirmed that Byline Bank had/ has a duty to avoid negligently providing information, Susan Hatleberg, Plaintiff v. Norwest Bank Wisconsin, n/k/a Wells Fargo Bank, 271 Wis. 2d 225. It is clearly negligent to provide Plaintiff with a valuation which is intended to be relied on without either providing the actual report or explaining the discrepancies with the numbers. Plaintiffs rely on the good faith of Byline Bank and its employees. Its foreseeable that they would rely on this valuation number.

Once a duty has been established, even if gratuitous, it must be done in good faith and without negligence. It was an intentional misrepresentation for Mr. Esterling to make no effort to update the file by notifying the borrowers of the discrepancy, to update the underwriting department of the material misrepresentation- especially given the fact that both relied on the valuation by Greener Equity. Mr. Esterling had seen the evaluation, had supplied the numbers, had passed along the information to the borrowers, and understood that each party had an expectation that the information was accurate- or at least free of material mis-statements.

Reply to IIIG

Again, it was established in this case the valuation number itself was a key determination about the business value. As detailed in the SOP, it should be used to determine if the value of the business justified the cost. It was known that there would be no 1.4 Million dollar accounts receivable upon the purchase price, However it was assumed that the missing AR would have been carried over to the valuation and no such changes were incorporated upon that knowledge by the party tasked to perform such updates.

> 5. Business Appraisal Requirements – Change of Ownership
>
> Determining the value of a business (not including real estate which is separately valued through a real estate appraisal) is the key component to the analysis of any loan application for a change of ownership. An accurate business appraisal is required because the change in ownership will result in new debt unrelated to business operations and potentially the creation of intangible assets. A business appraisal assists the buyer in making a determination that the seller's asking price is supported by an independent qualified source.

R411 p172.

Beyond the AR, it was proven at trial that there was missing equipment and justifiably we believed any valuation number that was presented after this was discovered would be corrected. It was not. The 5 million dollar valuation included 1.4 MM in AR and 1.5MM in assets as specified in our brief, which is not what was received.

Reply to IV

Defendant again tries to make similar arguments as in III so we also incorporate our previous thoughts on the matter as though fully set forth herein. Nicole also appeals this dismissal of counts relating to 100.18 in her counter complaint for the reasons stated by the court, namely that it was not a statement made to the public and it was not some form of advertising. As detailed in our brief, all people in Wisconsin are members of the

public and it can be made to many or just 1. Her complaint on its face was adequate to proceed with a cognizable claim as to 100.18. R 74 p 12

COUNT III – WIS.STAT. § 100.18

92. Nicole realleges as if fully set forth herein Paragraphs One (1) through Ninety-one (91).

93. That Wis. Stats. §100.18 provides for compensation to Nicole for pecuniary loss, costs and reasonable attorney's fees:

94. That the misrepresentations of Byline are and contain assertions, representations and/or statements of facts which are untrue, deceptive and/or misleading, and violating Wis. Stats. §137.01 (8), thereby entitling Nicole to damages consistent with Wis. Stats. §100.18.

As per the statement in the defendants brief, "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." It defies the imagination that any rational person could come to that conclusion. The English language is easy to understand, Of course its untrue, deceptive, or misleading to make such claims knowing the numbers could not be correct. Ultimately, with all the evidence, trials and motions the judge explains in open court that:

> "I am convinced -- when I think of this case, too, I am persuaded that Aaron Carmody and his partners did think they were getting a business worth about $5 million for the purchase price of 3.5 million." -The Court - R768:44.

It cannot be more simple than that as to the court's opinion on the matter. Clearly there was a reliance, it was made to the public, and it was misleading as to the information provided to the Carmodys. I have nothing further to say except for the reasons stated in court, that I was not a member of the public nor was it some kind of advertising were, as defined in my brief, blatantly incorrect. We should have been

able to litigate this fact and were prevented in doing so by limiting our evidence and dismissing the claim.

Reply as to IV

We let our arguments in our initial brief stand on their own.

Conclusion

In regards to the outcome of the case, in the hand, you have a large commercial bank who admittingly did not follow standard commercial reasonableness. If the court of appeals should allow the current ruling, it essentially means that there is no consequence to the bank for such behavior. This is more or less an assent by the courts to do as they please with no ill effect. Passing off bad business appraisals that they knew were bad as legitimate, falsely notarizing federal documents with zero consequences. They should be precluded from asserting any of the signatures are legitimate due to the flagrant actions that they were involved in. They knew it was wrong or should have known and they cannot now, in good conscience, defend against it without consequence, as a bank, or as a notary.

Dated this 31st day of May, 2023.

Aaron and Nicole Carmody

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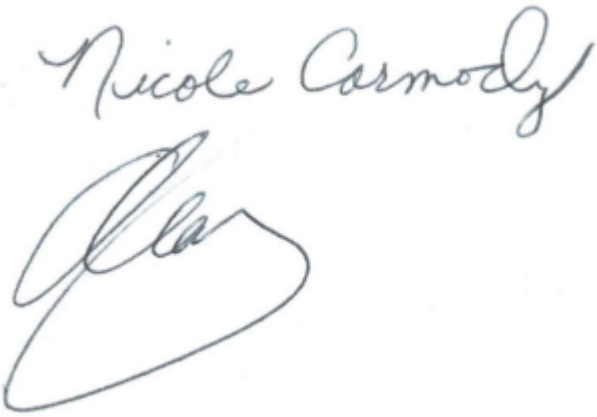

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