NO. 97-0877

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

WESTBY-COON VALLEY STATE BANK, A WISCONSIN BANKING CORPORATION,

PLAINTIFF RESPONDENT,

V.

HIRAM LUND A/K/A HIRAM R. LUND AND SALLY LUND,

DEFENDANTS-APPELLANTS,

LYNN LUCKASSON A/K/A LYNN S. LUCKASSON, NANCY LUCKASSON, ERNIE PETERSON A/K/A ERNIE J. PETERSON, VICKI PETERSON A/K/A VICKI L. PETERSON, AND CASHTON FARM SUPPLY, LTD., A WISCONSIN CORPORATION,

DEFENDANTS.

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PLEASE TAKE NOTICE that the attached pages 5 through 22 are to be substituted for pages 5 through 22 in the above-captioned opinion which was released on March 19, 1998.

Dated this 17th day of April, 1998.

the court denied the motion insofar as it related to attorney fees and collection costs and partially granted the motion as it related to the credit for interest on "the Lunds' deposit accounts which were frozen and set to one side as of February 23, 1995." The court ordered that interest on those accounts be credited against the judgment against the Lunds for a prescribed time period at prescribed rates.[1] An amended order granting summary judgment, amended findings of fact and conclusions of law, and an amended judgment was entered reflecting the court's decision on the motion for reconsideration. The Lunds' appeal this amended order and judgment.

JURISDICTION

As a threshold matter, we address our jurisdiction over this appeal. An appeal as of right may be taken only from a final order or judgment, that is, an order or a judgment that disposes of the entire matter in litigation as to one or more parties. ***Westport Sand & Gravel Co., Inc. v. Holdmann***, 159 Wis.2d 613, 615, 464 N.W.2d 676, 677 (Ct. App. 1990). A judgment or an order dismissing a complaint is not final if a counterclaim remains pending. ***Id.*** Because it was unclear from the parties' appellate briefs if there was a dispute over whether the trial court had dismissed the Lunds' counterclaims, we issued an order directing the parties to address this issue. We conclude that the order on the motion for reconsideration and the amended judgment entered pursuant to that did *sub silentio* dispose of the counterclaims. We reach that conclusion for the following reasons.

[1] The court's order on the motion for reconsideration also dealt with other issues raised in the motion but not pertinent to this appeal.

The affidavit accompanying the motion for reconsideration and a letter to the court from the Lunds' counsel filed about that time brings the counterclaims to the trial court's attention. Since the record does not contain a complete transcript of the hearing on the motion, we do not know what counsel argued to the court at the hearing on the motion or the basis for the court's decision. However, the court's written order on the motion refers to the Lunds' deposit accounts that were frozen and set to one side as of February 23, 1995. The court was informed, by the Lunds' counsel's affidavit accompanying the motion, that these accounts included those that the Lunds claimed really belonged solely to their children, even though the Lunds were named as joint owners. Therefore, when the court determined that the interest on all these accounts should be credited against the judgment entered against the Lunds, the court was implicitly deciding that the Lunds had an ownership interest in all these accounts such that the interest earned on these accounts should properly be credited against their obligations to the Bank. Since the amended judgment entered pursuant to that order implicitly dismisses the Lunds' counterclaims, their appeal from that judgment is properly before us, and we address the merits of the appeal.

SBA LOAN GUARANTY

The trial court determined that the language of both the SBA loan guaranty and the $100,000 guaranty (the limited guaranty) was plain, and that the Bank was entitled to recover under both as a matter of law. The Lunds agree that

there are no facts in dispute,[2] but they contend that various actions of the Bank preclude it from recovering under either guaranty.

We use the same summary judgment methodology as does the trial court, and we review its decision de novo. ***Grosskopf Oil, Inc. v. Winter***, 156 Wis.2d 575, 581, 457 N.W.2d 514, 517 (Ct. App. 1990). If the moving party has stated a claim for relief in the pleadings, the inquiry shifts to whether any factual issues exist. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there is no genuine issue of material fact. *See* ***Baxter v. DNR***, 165 Wis.2d 298, 312, 477 N.W.2d 648, 654 (Ct. App. 1991). A factual issue is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. ***Id.*** If no such issue exists and the moving party is entitled to judgment as a matter of law, we must grant summary judgment. Section 802.08(2), STATS.; ***Fortier v. Flambeau Plastics Co.***, 164 Wis.2d 639, 651-52, 476 N.W.2d 593, 597-98 (Ct. App. 1991).

We first address the arguments that concern only the SBA loan guaranty. The Lunds argue that the guaranty was conditioned upon the SBA loan being secured by first liens on all real estate and personal property owned by the company, and the Bank did not meet that condition because it took and permitted others to take higher priority liens on that collateral. They rely primarily upon Hiram Lund's affidavit. Hiram avers that, although he does not specifically

[2] As will be clear later in the opinion, in certain instances the logical import of the Lunds' particular argument seems to be that there are disputed issues of fact entitling them to trial, rather than that they are entitled to judgment as a matter of law. We address that position where appropriate.

recollect the conversations, he remembers that he was told many times in conversations with the company's chief operating officer and the Bank's loan officers that he would have no real exposure under the SBA loan guaranty because the loan would have a first priority security interest in all real estate and personal property held by the company. He does not have a specific memory of reviewing the various notes, mortgages and security instruments when he signed the guaranty, but he is confident he did so, and if any were inconsistent with what he had been told and believed about the first priority of the SBA loan, he would not have signed the guaranty. Contrary to what he had been led to believe, he avers, the SBA granted the loan taking a secondary position subordinate to the liens identified in the loan agreement. The Bank responds that it has the right to recover under the plain language of the guaranty.

The SBA loan guaranty Hiram signed states that the "Undersigned hereby unconditionally guarantees …. payment when due … with respect to the note.…" There is no condition in the guaranty relating to the priority of the loan, or any similar condition to Hiram's obligation. The guaranty expressly gives the Bank broad powers "in its uncontrolled discretion and without notice to the undersigned" with respect to the liabilities and any collateral, (except to increase the principal amount of the note) subject to the terms of any agreement between the company or any other party and the Bank. The guaranty also expressly provides that "the obligations of the [guarantor] … shall not be released, discharged or in any way affected, nor shall the [guarantor] have any rights or recourse against the [Bank] by reason of any action the [Bank] may take or omit to take under [those] powers." Finally, the guaranty provides that the obligations of the guarantor and the rights of the Bank in the collateral are not in any way affected by, and the guarantor has no rights against the Bank:

> [B]y reason of the fact that any of the collateral may be subject to equities or defenses or claims in favor of others … nor by reason of the fact that the value of any of the collateral, or the financial condition of the [company] or of any obligor under or guarantor of the collateral, may not have been correctly estimated or may have changed or may hereafter change….

We interpret a guaranty by applying the principles applicable to the interpretation of contracts in general. *See* ***Bank of Sun Prairie v. Opstein***, 86 Wis.2d 669, 676, 273 N.W.2d 279, 282 (1979). If the terms of a contract are plain and unambiguous, it is our duty to construe it according to its plain meaning even though one of the parties may have construed it differently. ***Waukesha Concrete Products Co. v. Capitol Indem. Corp.***, 127 Wis.2d 332, 339, 379 N.W.2d 333, 336 (Ct. App. 1985). Whether a contract is ambiguous in the first instance is a question of law, which we decide independently of the trial court. ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis.2d 315, 322, 417 N.W.2d 914, 916 (Ct. App. 1987).

We conclude, as did the trial court, that the language of the SBA loan guaranty plainly and unambiguously does not condition Hiram's obligation upon the first priority of the SBA loan. His understandings and conversations do not, as a matter of law, alter the plain language of the guaranty he signed. ***Bank of Sun Prairie***, on which the Lunds rely, does not indicate otherwise. The guaranty in that case contained a provision that the lender "agrees to assign first mortgage of household goods to Guarantor." Based on that language, the trial court determined that the guaranty was conditioned on that assignment and the supreme court affirmed. ***Bank of Sun Prairie***, 86 Wis.2d at 676, 273 N.W.2d at 282. There is no language in the guaranty Hiram signed that could be interpreted as conditioning his obligation on the first priority of the SBA loan.

We reach the same conclusion with respect to the Lunds' contention that the Bank had an obligation to disclose to Hiram that it secured new loans, and permitted another Bank to secure a loan to the company, by taking higher priority liens on the collateral that secured the SBA loan. The plain language of the guaranty allows the Bank to take such actions with respect to the collateral, and there is nothing in the case law brought to our attention that prohibits such actions by a lender under the terms of a guaranty such as the one signed by Hiram.

The Lunds also contend that, after Hiram revoked the guaranty on February 14, 1995, the Bank impermissibly continued to loan money to the company, securing each new loan by the Bank's original mortgage and security agreement, which pre-existed the SBA mortgages and security agreements, thereby acquiring a higher priority lien than the SBA loan. The Lunds do not direct us to any language in the guaranty that limits the Bank in this way, and the provisions we have cited above indicate that the Bank is not limited in this way.[3]

EQUITABLE DOCTRINES

As to both the SBA loan guaranty and the limited guaranty, the Lunds make several arguments against recovery on the basis of doctrines which they describe as intended to achieve equity and justice. First, they argue that although the language of the guaranties may be that of a standard absolute guaranty, as opposed to conditional guaranties, the condition that the Bank apply the collateral to the loan is necessarily implied in the guaranties. This is so, they

[3] The Lunds also argue that the Bank had an obligation to disclose higher priority liens to Hiram. Although they cite language from cases on the duty to disclose, they do not relate the facts and legal principles of those cases to the record in this case. We decline to consider this undeveloped argument. *See* ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987) (reviewing court will not consider undeveloped arguments).

contend, because the Bank reserves for itself the rights under both guaranties to collect on the underlying debts until all the company's obligations are paid, leaving the Lunds without the ability, even after paying fully on the guaranties, to collect against the company or the collateral. We reject this argument as having no support in the case law.

The only case the Lunds cite as authority for this position is ***Bank of Sun Prairie***. The difference between an absolute guaranty and a conditional guaranty is clearly spelled out in that case. Under a guaranty of payment, as distinguished from a guaranty of collection, a creditor is not under any legal obligation to first enforce collection from the maker or any other guarantor or to first resort to securities given by the principal debtor. ***Bank of Sun Prairie***, 86 Wis.2d at 677-78, 273 N.W.2d at 282-83. Guaranties of payment are absolute, and it is no defense for a guarantor of payment that the creditor, through negligence or lack of due diligence, lost or dissipated the collateral furnished by the debtor. ***Id.***

Bank of Sun Prairie does not support the Lunds' argument that conditions to collect may be implied in a guaranty that, by its plain language, is an absolute guarantee of payment. In fact, their position would erase the very distinction between the two types of guaranties that the court recognized in that case. As we have indicated, the court in ***Bank of Sun Prairie*** upheld the trial court's determination that the guaranty was conditioned upon the assignment of the security interest to the guarantor, not because of any implied condition, but because the guaranty expressly stated that the Bank agreed to do that. ***Bank of Sun Prairie***, 86 Wis.2d at 678, 273 N.W.2d at 283.

The Lunds also contend that if the Bank's obligation to reasonably protect and preserve the company's assets is not implied in the guaranties, they are contracts of adhesions and therefore unenforceable. The Lunds cite general case law on contracts of adhesions, but none that applies these general principles in a context similar to this. As we have stated before, when a guarantor signs an absolute guaranty of payment, it is not a defense that the creditor negligently or through lack of due diligence loses or dissipates the collateral. ***Bank of Sun Prairie*** at 86 Wis.2d at 677-78, 273 N.W.2d at 282-83. The Lunds' theory effectively erases this central characteristic of an absolute guaranty of payment, and we reject it.

Next, the Lunds contend that the Bank breached the covenant of good faith implied in all contracts. Wisconsin law recognizes that every contract implies good faith and fair dealing between the parties to it. ***Foseid v. State Bank of Cross Plains***, 197 Wis.2d 772, 796, 541 N.W.2d 203, 213 (Ct. App. 1995). The concept of good faith here:

> [E]xcludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness.…
>
> Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: Bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance. [citing RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a & d].

Id.

Our supreme court has found a breach of the covenant of good faith where the actions of one party, while not breaching any specific term of the written contract, "stripped nearly all the flesh from the bones" of the contract, "accomplishing exactly what the agreement of the parties sought to prevent…." ***Estate of Chayka***, 47 Wis.2d 102, 107, 176 N.W.2d 561, 564 (1970). However, we have also held that where a contracting party complains of acts of the other party which are specifically authorized by the agreement, there is no breach of the covenant of good faith. ***Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.***, 146 Wis.2d 568, 577, 431 N.W.2d 721, 726 (Ct. App. 1988).

The Lunds point to the affidavit of Timothy Masters, who has banking experience in the area of commercial loans and who reviewed various depositions and exhibits in this case. He opined that after learning of the loss of the company's inventory, the Bank did not act in a reasonable and prudent manner to dispose of the collateral in a reasonable commercial time. He further stated that the Bank did not properly manage the loan with the result that the guarantors have suffered or will suffer increased losses. The trial court determined that, while there was evidence that the Bank had not acted prudently, and perhaps had acted negligently, there was no evidence of bad faith.

Because we are reviewing a summary judgment granted in favor of the Bank, we draw all reasonable inferences from the evidence in favor of the non-moving party. *See* ***Grams v. Boss***, 97 Wis.2d 332, 339, 294 N.W.2d 473, 477 (1980). The question presented is whether this affidavit either entitles the Lunds to judgment as a matter of law, as the Lunds claim, or alternatively, presents a disputed issue of material fact preventing summary judgment in favor of the Bank. We conclude that, taking Masters' affidavit as true for purposes of this motion and drawing all reasonable inferences in the Lunds' favor, the trial court correctly

granted summary judgment to the Bank on the Lunds' claim of a breach of the implied covenant of good faith.

Masters' affidavit is evidence of the Bank's negligence, but not of the Bank's bad faith. The Lunds' argument blurs the distinction between the two. The agreements they signed with the Bank were guaranties of loans to a company in which Hiram was an officer, director, stockholder and employee. The guaranties state that they are an inducement for the Bank to make those loans. Hiram signed five of the six notes as an officer of the company. The company received the benefit of the loans. The terms of the guaranties make clear that the Bank has the power to make decisions about the collateral, including extending more loans against it. Evidence that the Bank exercised these powers negligently and in a way that was not in the Lunds' financial interests as guarantors is not evidence of the type of willful evasion of the purpose of the guaranties required for a breach of the implied covenant of good faith.

The Lunds argue that the Bank is equitably estopped from recovering under the SBA guaranty because they reasonably relied on the Bank's assurances that they had little risk of exposure because the company's assets would be secured by first liens. Equitable estoppel requires that one party's action or nonaction induces reasonable reliance by another party to the other party's detriment. ***St. Paul Ramsey Med. Ctr. v. DHSS***, 186 Wis.2d 37, 47, 519 N.W.2d 681, 685 (Ct. App. 1994). This equitable estoppel argument is a restatement of the Lunds' argument that the SBA loan guaranty is invalid because Hiram was told he would have no exposure. Just as we have held that the plain language of the guaranty Hiram signed governs the Bank's obligations with respect to the collateral, so, too, we conclude that in view of the plain language of the

agreement, Hiram has not presented a triable issue of fact with respect to equitable estoppel.

Finally, the Lunds argue that the trial court incorrectly decided that the doctrine of marshaling of assets does not apply. Under that equitable doctrine, where a creditor has a lien or an interest in two funds or properties in the hands of the same debtor, and another creditor has a lien or interest in only one of those two, the former creditor may be required to first satisfy its debt from the fund the latter creditor has no interest in. *See* ***Production Credit Ass'n v. Jacobson***, 131 Wis.2d 550, 388 N.W.2d 655 (Ct. App. 1986). The Lunds' application of this doctrine to require the Bank to first satisfy the indebtedness from the company's assets before recovering under the guaranty is unsupported by case law and effectively rewrites the plain terms of the guaranty. The trial court correctly decided this doctrine did not apply.

COSTS OF COLLECTION UNDER LIMITED GUARANTY

The trial court awarded the Bank its actual and reasonable attorney fees, including the costs and disbursements of this action, in the amount of $49,428.86 as of December 10, 1996. The court also reserved the right for the Bank to recover its costs of collection, including reasonable attorney fees and disbursements, incurred subsequent to that date through collection. The $49,428.86 included attorney fees incurred in collecting the company's underlying debts as well as those incurred in collecting on the guaranties. The trial court reasoned that the guaranties "if not specifically, at least imply that the costs of collection are part of the obligation of the guarantor in the event that it becomes necessary to pursue collection against the guarantor."

The Lunds do not dispute that the SBA loan guaranty includes the costs of collecting the underlying SBA loan as part of Hiram's obligations as a guarantor. They contend, however, that the limited guaranty limits their liability to $100,000 plus the costs of collecting from them on the guaranty. Therefore, the Lunds argue, the Bank is not entitled to recover from them the costs of collecting from the company on five of the notes. The Bank responds that the language of the limited guaranty unambiguously provides for recovering $100,000 plus the cost of collecting from the company on the notes; but it provides no analysis of specific language to explain this construction.

Under the limited guaranty, the Lunds' guarantee the payment of and promise to pay when due:

> [A]ll loans, drafts, overdrafts, checks, notes and all other debts, obligation and liabilities … including interest and charges and … to the extent not prohibited by law, all costs, expenses and fees at any time paid or incurred in endeavoring to collect all or part of any of the above, or to realized upon this Guaranty, or any collateral securing any of the above ("costs of collection") (all called the "Obligations").

The limited guaranty also contains this language: "LIMITATIONS. The amount of liability under this Guaranty is limited to $100,000 plus interest plus costs of collection." Apparently in the Bank's view, because "costs of collection" is defined in the body of the guaranty to include the costs of collecting on the underlying loans, that is plainly what the phrase means in the limitation clause. The Lunds point out that if the "costs of collection" has the same meaning in both places, then the Bank may recover double for those costs—once because they are part of "Obligations," which are limited by $100,000 and once again because they are added to the $100,000 in the limitation clause.

We conclude the guaranty language on this point is ambiguous and requires construction.[4] The problem in interpreting the language arises because "costs of collection," which expressly includes the costs of collecting on the guaranty as well as the costs of collecting on the underlying notes, are included in the definition of "Obligations." It is, however, unclear whether the $100,000 limitation on liability, to which "costs of collection" are added, also includes them. If it does, then, as the Lunds point out, there would be double recovery of the items defined as "costs of collection." We agree with the Lunds that this is not a reasonable construction of the contract language. However, we do not understand the Bank to contend that the contract does allow for double recovery of the items defined as "costs of collection." We understand the Bank's argument to be that the $100,000 limitation applies to all aspects of the items defined as "Obligations" except those included in the definition of "costs of collection," and those items are added to the $100,000.

We disagree that this meaning is "plain," as the Bank contends, because it requires reading language into the contract to avoid a double recovery. While this may not be an unreasonable construction, it is certainly not an obvious one based on the contract language.

The Lunds' interpretation is also not free of the need to read language into the contract. As we understand their argument, they would read the $100,000 to include the costs of collecting on the underlying notes but to exclude the costs of collecting on the guaranty, even though the latter is expressly included

[4] The Lunds argue that if the contract language is ambiguous, there is an issue of fact for the trial court and summary judgment should be denied for that reason. However, they do not identify the issue of fact, and we are aware of no testimony or evidence that would bear on how to interpret the pertinent language in the guaranty in this case.

in definition of "costs of collection," which are expressly included in "Obligations." The Lunds then read the same term, "costs of collection," in the limitation clause to have a different meaning—costs of collection on the guaranty but not on the underlying notes. Their interpretation requires that the same term have different meanings in different contexts and that the explicit definition does not apply in every context. We observe, however, that this same adjustment is required to make sense of other portions of the guaranty: "Obligations" is used in other sections of the guaranty where it cannot reasonably be read to include the costs of collection on the guaranty, even though those costs are included in the definition of "Obligations."

Ambiguity in contracts is generally construed against the drafter, for the reason that the drafter could have chosen the obvious terms that would have clearly established the contract right the drafter seeks. ***Huntzinger Const. Co. v. Granite Resources***, 196 Wis.2d 327, 339, 340, 538 N.W.2d 804, 809 (Ct. App. 1995). This principle applies to guaranties. *See* ***Bank of Sun Prairie***, 86 Wis.2d at 676, 273 N.W.2d at 282. Applying this principle here, we conclude that the correct interpretation of the guaranty is that the $100,000 limitation applies to everything defined in the guaranty as "Obligations" except costs, expenses and fees incurred in collecting on the guaranty, and that the Lunds' liability under the guaranty is limited to $100,000 plus the costs, expenses and fees incurred in recovering the $100,000 under this guaranty. Thus, if the amount of the underlying debt is less than $100,000, the cost of collecting that debt from the company may be added to the Lunds' liability until the combined total is $100,000. However, if the amount of the underlying debt exceeds $100,000, the

Lunds are not obligated for any of the costs of collecting that debt from the company.[5]

On remand, the trial court needs to determine what amount in costs (including reasonable attorney fees) the Bank is entitled to under the SBA loan guaranty, which includes the costs of collection on the underlying SBA loan as well as on that guaranty (as defined in that guaranty). Concerning the limited guaranty, the trial court needs to determine: (1) the liability of the Lunds up to the $100,000 limitation consistent with this opinion, and (2) the costs of realizing on this guaranty (including reasonable attorney fees).[6]

DEPOSIT ACCOUNTS

After the Lunds revoked their guaranties, the Bank "placed a hold" on a number of deposit accounts, six of which were in the name of one of their children and in the name of either Hiram or Sally or both. The Lunds contend in their main appellate brief that summary judgment should be entered in their favor on their counterclaim, releasing these accounts because Hiram's affidavit avers that the money in these accounts belong totally to the children. The Bank responds that the affidavit of a bank officer shows that it is undisputed that the accounts were joint accounts, including the name of either Hiram or Sally or both,

[5] We are unable to discern how the trial court determined the amount of the Lunds' liability under the limited guaranty. It appears that the $47,403.54 awarded against Sally Lund, and $47,403.54 of the $179,799.48 awarded against Hiram, arose from their liability under the limited guaranty. (We assume this amount does not include the cost of collecting the underlying debt or the cost of collecting under the guaranty, since those amounts were awarded separately as part of the award of attorney fees.) The total is $94,807.08, which is less than the $100,000 limit. We do not know whether the underlying debt was in excess of $100,000 but offsets brought this portion of the Lunds' liability below $100,000, or whether $94,807.08 represents the total of the underlying debt on the notes guaranteed by the limited guaranty.

[6] The Lunds have raised some objections to the court's procedure for deciding the amount of attorney fees, but since we are remanding, it is unnecessary to address those.

and therefore set-off was proper both at common law and under the guaranties. The Bank also argues that it is the children, not the Lunds, who must assert the claim that the funds in the account belong to them.[7] The Lunds' reply does not explain on what basis they may assert their children's ownership rights in the accounts. Their reply seems to indicate that there should be further proceedings on the question of the children's accounts, perhaps suggesting that there are disputed issues of material fact that entitle them to a trial.

As we indicated before in our discussion on jurisdiction, we have determined that, on the Lunds' motion for reconsideration, the trial court implicitly granted summary judgment on this counterclaim, dismissing it. We, however, do not have the portions of the hearing transcript in which the attorneys or the court might have addressed this issue. Nevertheless, because our review on a motion for summary judgment is de novo, we apply the summary judgment analysis independent of the trial court. We conclude that the trial court correctly dismissed the Lunds' counterclaim concerning their children's accounts because the counterclaim fails to state a claim on which they are entitled to relief, the first step in summary judgment analysis. *See* ***Green Spring Farms***, 136 Wis.2d at 315, 401 N.W.2d at 820.

This counterclaim asserts that the Lunds' only interest in their children's account is as custodians; that the Bank's refusal to release funds in those accounts constitutes "a wrongful interference with their custodial responsibilities;" and that this was done willfully in order to illegally harass and intimidate the Lunds into paying the Cashton Farm Supply's debts. The Lunds,

[7] The Bank asserted this as a defense to this counterclaim—that the children were the proper parties for this claim, not the Lunds.

however, have provided us with no case law supporting a claim for wrongful interference with their custodial responsibilities. Both their appellate briefs on the issue of these accounts are directed to their assertion that they have no ownership interest, but they fail to provide a legal basis for their entitlement to relief. Even in reply to the Bank's assertion with cited authority that the claim belongs to their children, the Lunds do not present any legal authority for their position that they are entitled to relief on this issue.

The Bank, on the other hand, cites as authority ***Commercial Discount Corp. v. Milwaukee Western Bank***, 61 Wis. 671, 687, 214 N.W.2d 33, 41 (1974), which states that when a third party claims that the money deposited with the Bank belongs to that party, not to the depositor, it is the Bank's duty only to refrain from releasing the money to the depositor for a reasonable time, to permit the third party to proceed on its claim; it is the duty of the third party to promptly institute the necessary legal proceedings to stop the release to the depositor. In reply, the Lunds refer to another aspect of the decision in ***Commercial Discount***, 61 Wis.2d at 687, 214 N.W.2d at 41, which, in their view, favors their position that set-off was wrong. However, the Lunds do not challenge the Bank's assertion that the children, not they, are the proper parties to contest the set-off, if the accounts are truly owned only by the children.

When a proposition is asserted in a responsive brief, and not disputed in a reply brief, we may take it as a concession. *See* ***Schlieper v. DNR***, 188 Wis.2d 318, 322, 525 N.W.2d 99, 101 (Ct. App. 1994). And, we do not ourselves develop arguments that are inadequately developed by the parties. *See* ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987). We conclude that the Lunds' counterclaim does not state a claim on which they are entitled to relief for the Bank's hold on the accounts which the Lunds claim

belong solely to their children. We therefore conclude that dismissal of this counterclaim on summary judgment was proper.

In summary, we conclude that the trial court properly granted summary judgment in favor of the Bank dismissing the Lunds' counterclaim regarding their children's accounts. We also conclude that the trial court correctly granted summary judgment in favor of the Bank on their claim under the SBA loan guaranty and that the Bank is entitled to recover the costs of collecting on the underlying SBA loan as well as the costs of collecting on that guaranty. The court also correctly determined that the Bank was entitled to recover up to the $100,000 limitation, plus the costs of collecting from the Lunds on the limited guaranty; however, the court incorrectly decided that the Bank was entitled to recover the costs of collecting the underlying debts without regard to the $100,000 limitation. On remand, the trial court will determine the costs of collection, including reasonable attorney fees, consistent with this opinion.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.