

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**October 4, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2004AP1530**

**Cir. Ct. No. 2001CV440**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STRATFORD STATE BANK,**

**PLAINTIFF-COUNTER-DEFENDANT-RESPONDENT,**

**v.**

**GREEN GLASS USA, LLC,**

**DEFENDANT-CROSS-DEFENDANT,**

**v.**

**MARATHON COUNTY,**

**DEFENDANT-COUNTER-PLAINTIFF-CROSS-PLAINTIFF-APPELLANT,**

**MCDEVCO,**

**DEFENDANT.**

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APPEAL from a judgment of the circuit court for Marathon County:  
RAYMOND F. THUMS, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Marathon County appeals a summary judgment dismissing its counterclaim against Stratford State Bank. The County argues the trial court incorrectly ruled it lacked standing to assert its counterclaim. We conclude the court actually granted summary judgment on the basis that the County failed to prove its damages and, for the reasons herein, we affirm.

### **Background**

¶2 Green Glass USA, LLC, was a start-up company that had loan accounts through Stratford State Bank. Green Glass's loan accounts with the Bank eventually totaled over \$900,000.

¶3 In 2000, Green Glass applied for a "community development block grant." While these grants function as a loan to the applicant, the money originates with the federal government and the program is administered by the Department of Housing and Urban Development. *See* 24 C.F.R. § 570.489 (2005). HUD allocates funds directly to some larger municipalities, but otherwise gives money to the states to administer for the benefit of smaller areas. Upon a state's approval of a grant application, the state grants the funds to the local unit of government, which in turn loans the money to the applicant. When the applicant repays the loan, it repays the local government, which is allowed to keep the funds and use them for future loans in the community. Marathon County administers the grant program through McDevco, the Marathon County Development Corporation.

¶4 In this case, Green Glass applied for the grant through the State Department of Commerce. The Department tentatively approved a grant of up to

\$300,000 for Green Glass to purchase equipment, issuing its commitment letter on August 3, 2000.<sup>1</sup> In addition to stipulating the grant was to be used for equipment, the letter also conditioned the grant on there being “no material adverse change” in the project. Meanwhile, the Bank advanced a \$300,000 “bridge loan” to Green Glass, expecting to be repaid with the grant proceeds. Green Glass purchased two pieces of large equipment.

¶5 In August 2000, shortly after the Department issued its commitment letter to Green Glass, Bank president Allie Knoll appeared with McDevco employee Roger Luce at a meeting of the Marathon County Industrial Development Agency. The County contends Knoll “endorsed” Green Glass and recommended the County extend credit to the company through both a non-grant-related loan and the grant program.

¶6 In September 2000, the County approved the grant application. Throughout this time period, however, Green Glass allegedly experienced certain financial problems including repeated overdrafts, loan delinquencies, and cash flow issues. The County claims it did not know about these problems and disbursed the grant proceeds in February 2001. The funds were evidently used to repay the Bank, not to buy any additional equipment. Shortly after receiving the grant money, Green Glass closed and defaulted on all its loans and the grant.

¶7 The Bank commenced this action against Green Glass, McDevco, the County, and the State. The State was eventually dismissed by stipulation. The Bank sought a money judgment against Green Glass, along with a declaration of

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<sup>1</sup> Although it works as a loan to Green Glass, we will refer to this \$300,000 transaction as a grant throughout this opinion.

superior lien rights to Green Glass's assets. The Bank named McDevco and the County because it was seeking priority for its liens.

¶8 The County cross-claimed against Green Glass, seeking a money judgment. It also counterclaimed against the Bank, alleging misrepresentation, misrepresentation with strict responsibility, unjust enrichment, conversion and breach of contract. The County's basic theory was that the Bank, through Knoll, continuously endorsed or vouched for Green Glass while never mentioning its overdrafts and delinquent accounts at the Bank, insisting these were "material adverse changes" that should have been disclosed.<sup>2</sup> The County also asserted in its countercomplaint that the Bank violated rules regarding grant disbursement procedures. Later, in trial briefs, the County suggested it might not have approved the loan had it known the true risk Green Glass posed. As relief, the County demanded \$300,000 damages, punitive damages, costs, and "other relief" including subordination of the Bank's lien rights.

¶9 The Bank moved for summary judgment on the County's counterclaim. The court granted the Bank's motion on the theory that the County had no damages. In order for the County to keep the \$300,000 grant proceeds, the court said, it had to first loan the money, and then be repaid. Thus, if the County was asserting that it would not have made the loan to Green Glass, its damages would be zero, because the Department of Commerce would never have released the \$300,000 to the County. The court did, however, give the County a priority lien interest in the two pieces of large equipment that had been listed in the grant

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<sup>2</sup> Both parties spend considerable time disputing the essential facts of the misrepresentation. We have declined to include the lengthy details because this case ultimately does not hinge on whether the Bank engaged in misrepresentation.

documentation as collateral. The County appeals the judgment dismissing its counterclaim.

### **Discussion**

¶10 We review summary judgments de novo using the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). The methodology is well established and need not be repeated here. *See, e.g., Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. Before we address the merits of the County’s appeal, however, we have two initial issues that must be addressed: a \$100,000 loan and the basis of the court’s summary judgment ruling.

### **The \$100,000 Loan**

¶11 On appeal, the County asserts it is seeking over \$400,000 in damages, representing the principle on the grant, principle on a \$100,000 loan, and interest. The County contends the trial court ignored this loan in its judgment. The Bank points out that nothing regarding the \$100,000 loan was in the pleadings. The County responds that its request for “other relief” the court deemed proper is sufficient under Wisconsin’s notice pleading rules to bring the matter before the court. We disagree with the County.

¶12 We are, indeed, a notice pleading state. WIS. STAT. § 802.02 (2003-04). Under notice pleading, one need only give the opposing party fair notice of what the claim is and the grounds upon which it is based. *Hertlein v. Huchthausen*, 133 Wis. 2d 67, 72, 393 N.W.2d 299 (Ct. App. 1986). The County failed to give such notice regarding the \$100,000 loan. Rather, the County stated the grounds on which it seeks recovery—the Bank’s misrepresentation—but it

may not rely on “notice pleading” and assume the Bank will therefore appreciate all claims related to and based on a theory of misrepresentation.

¶13 The \$100,000 loan was separate from the grant petition. It was approved separately and prior to the grant, and the money was not loaned directly to Green Glass but to the Village of Stratford. The Village is not a party to this action. Moreover, at one of the hearings, the County informed the court that the Village was repaying the loan itself because it had guaranteed the loan. Under these circumstances, the Bank cannot be held to have notice of a claim against it relative to the \$100,000 loan. We therefore conclude the trial court did not ignore the \$100,000 loan claim. Rather, it was never before the trial court. It is also not before this court.

### **The Basis for Summary Judgment**

¶14 The County asserts the court incorrectly dismissed its counterclaim on the basis of standing. At the February 4, 2003 hearing, the court did question whether the County was the proper party because the grant money did not originate in County coffers. The court mused whether the State or even the federal government were more appropriate parties to seek the money’s recovery. The County argued the State had assigned its interest to the County and the paperwork for the grant appears to allow the County to stand in for the State in court.

¶15 More to the point, however, is that the court did not grant the Bank’s summary judgment motion on February 4. At a hearing in March 2003, the court granted the Bank’s motion, stating:

I’m going to grant the summary judgment to Stratford State Bank, again, on the theory Marathon County has not lost anything. ... You see, here it seems that making the county whole would mean restoring it to the situation it would

have been in had there been no misrepresentation. If that means there would have been no loan, then the county has sustained no damages.

Thus, it is evident that the court granted judgment not on standing but rather on the theory that the County has failed to prove damages, and we review the judgment accordingly.

### **Summary Judgment on the Misrepresentation Claim**

¶16 On appeal, the County essentially argues that the Bank’s misrepresentation about Green Glass—through the Bank’s failure to volunteer information about Green Glass’s fiscal responsibility—caused the County to underwrite a bad loan that it would not have authorized had it been given a full and accurate picture of Green Glass’s financial health. There are five elements to intentional misrepresentation:

(1) the defendant made a factual representation; (2) which was untrue; (3) the defendant either made the representation knowing it was untrue or made it recklessly without caring whether it was true or false; (4) the defendant made the representation with intent to defraud and to induce another to act upon it; and (5) the plaintiff believed the statement to be true and relied on it to his/her detriment.

*Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶12, 699 N.W.2d 205 (citations omitted). The trial court ruled, in essence, that the County failed to prove the fifth element. We agree.

¶17 The County repeatedly points to all the “facts” it believes demonstrate the Bank’s misrepresentations about Green Glass’s financial health. Misrepresentation, contrary to the Bank’s assertion, can include failure to disclose material information, not only making untrue statements. *See id.*, ¶13. However, the County never points to any admissible evidence that, but for the Bank’s

misrepresentation, it would not have loaned Green Glass the money. That is, it fails to demonstrate any reliance on the alleged misrepresentations. Indeed, the only time the County asserts that it would not have loaned the money if it had been “properly” informed is through counsel’s arguments in a trial court brief. Counsel’s arguments, however, are not evidence. WIS JI—CIVIL 110 (1991). There is no evidence submitted from anyone in the County with decision-making authority over loans that, had the Bank mentioned Green Glass’s problems, the County would have changed its mind about the grant.

¶18 Moreover, we agree with the trial court that the County has failed to show damages, and this applies to all theories in the County’s complaint, not just the misrepresentation. Neither party has explained to us the true mechanics of the community development block grant procedure. Thus, we rely on the trial court’s exposition of the process, especially since neither party has taken issue with the trial court’s explanation. As the trial court understood it, and as we understand it, once the money reaches the municipality for distribution to an applicant, the municipality must loan the money or return it to the Department of Commerce.

¶19 The County argues it retains the right to deny the grant application, which may be true, but the County has failed to show it is then entitled to keep the proceeds. Indeed, the agreement between the Department, the County, and Green Glass states: “If the Department determines that the Municipality has used CDBG-ED [grant] funds for purposes other than the activities specifically authorized in the Agreement, the Municipality shall repay such funds to the Department within thirty (30) calendar days after such determination, together with” interest, attorney fees, and costs. The only authorized activity in the agreement is that the County shall lend up to \$300,000 “to the borrower.” Only one borrower—Green Glass—is specified.



¶20 Thus, to the extent the County implicitly asserts that it would not have approved the grant had the Bank properly represented Green Glass's financial status, the County fails to show damages.<sup>3</sup> The only way the County gets to keep the funds is if the Department approves the grant, the County disburses the grant and the applicant repays the grant. That is, had the County withheld the loan, it would have had to return the funds to the State because the County would be in violation of the agreement. The County is not without some compensation—it did receive priority liens on two pieces of equipment specified as collateral. It also received a \$6,000 administrative fee for disbursing and collecting the loan. But because the County fails to show reliance on the Bank's purported misrepresentations, and because it fails to show damages in any event, summary judgment was proper on the counterclaim.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.

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<sup>3</sup> In fact, the only hint of damages is made in the trial court and not on appeal. In the trial court, the County argued that there is a lifetime cap on the amount of grant funds a municipality can receive. Even so, under that rule, a damage award would be speculative because it appears that no one could identify what the cap amount was or how close the County was to the cap.

