

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 23, 2007**

A. John Voelker  
Acting 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. 2006AP1178-CR**

**Cir. Ct. No. 2004CF860**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**KENNETH F. TESCH,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Marathon County:  
VINCENT K. HOWARD, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. The State of Wisconsin appeals a judgment dismissing an Information which charged Kenneth Tesch with two felony counts

of theft by false representation under WIS. STAT. § 943.20(1)(d).<sup>1</sup> The State alleged Tesch misrepresented the quality and quantity of milk he sold to Mullins Cheese Inc. The State argues the circuit court erred by concluding the prosecutor could only proceed under WIS. STAT. §§ 98.26(1)(c) or (e), because that statute more narrowly describes the alleged misconduct. The State also asserts the evidence adduced at the preliminary hearing was sufficient to support bind over on the two felony counts. We agree and therefore reverse the circuit court's judgment and remand with directions to reinstate the two felony charges against Tesch.

## BACKGROUND

¶2 This case arises from the alleged manipulation of milk weight and milk quality tests by Tesch, a dairy producer, to defraud Mullins Cheese.<sup>2</sup> Mullins Cheese suspected that water was added to the milk being shipped to its plant. Detective William Millhausen confronted Tesch on June 21, 2004, with information that Mullins Cheese had discovered water in the milk delivered from Tesch. According to Millhausen, Tesch signed a statement, admitting that every other day, beginning in December 2003 or January 2004, he added "about five to six inches of water to the bottom of [the small milk] tank to aid in the cooling of the milk." Millhausen estimated this would amount to 300 to 500 pounds of water out of total tank capacity of 2,900 to 2,950 pounds. Millhausen stated Tesch admitted that on June 21, 2004, the tank contained possibly as much as one-third

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

<sup>2</sup> Milk producers are paid based on the weight and quality of the milk delivered. The milk samples are sent to a state laboratory where the quality of the milk is determined. The purchaser of the milk, in this case Mullins Cheese, must pay the milk producer an amount based on a per unit of weight price set by the federal government.

water. Millhausen also spoke to the route driver, David Searer, who indicated that Tesch had once asked him to mix or switch milk samples to increase the somatic cell count in his milk.

¶3 The State filed a complaint against Tesch on October 29, 2004, for six counts of false representation contrary to WIS. STAT. § 943.20(1)(d). On November 2, 2005, at the close of the preliminary hearing, the court bound over Tesch for trial. On November 29, 2005, the State filed an Information alleging two violations of § 943.20(1)(d). Tesch moved to dismiss the Information for lack of probable cause at the preliminary hearing. Tesch challenged proof of the “false representation” element of the charges.

¶4 On March 31, 2006, the court dismissed the Information concluding the State could only proceed with charges under WIS. STAT. §§ 98.26(1)(c) or (e). The court reasoned WIS. STAT. § 943.20(1)(d), a general statutory prohibition against theft by fraud, and WIS. STAT. § 98.15(1), a specific statutory prohibition against manipulating the tests of the value of milk or cream, were in conflict. The court concluded:

Neither the district attorney nor this court can impose a felony when the legislature has determined that the conduct at issue is either a forfeiture or a misdemeanor. Because this case involves the fraudulent representation as to the weight of milk and/or manipulating the tests used to determine its quality, *Wis. Stat. § 98.26(1)* is the applicable criminal statute. Therefore, although there is sufficient probable cause that Tesch added water and sought the manipulation of the milk samples to defraud Mullins Cheese, that is only a misdemeanor under *Wis. Stat. § 98.26(1)*.

## DISCUSSION

¶5 The State argues the circuit court erred by concluding that the prosecutor could not proceed under WIS. STAT. § 943.20(1)(d)<sup>3</sup> and could only proceed under WIS. STAT. §§ 98.26(1)(c) or (e),<sup>4</sup> because that statute more narrowly described the alleged misconduct. Tesch does not refute this argument. Therefore, Tesch concedes that if his alleged misconduct of falsely representing the quantity and quality of milk he delivered to Mullins Cheese constitutes “false representations” under § 943.20(1)(d), the prosecutor may bring charges under that statute. *See State v. Peterson*, 222 Wis. 2d 449, 459, 588 N.W.2d 84 (Ct. App. 1998) (unrefuted arguments are deemed admitted).

¶6 The next issue is whether the evidence that Tesch added water to the milk tank and prompted the route driver to mix or switch milk samples was

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<sup>3</sup> WISCONSIN STAT. § 943.20(1)(d) reads as follows:

Whoever does any of the following may be penalized as provided in sub. (3):

....

(d) Obtains title to property of another person by intentionally deceiving the person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made. “False representation” includes a promise made with intent not to perform it if it is a part of a false and fraudulent scheme.

WISCONSIN STAT. § 943.20(3)(c) makes Tesch’s alleged crime a class G felony based on Millhausen’s report estimating a total loss of \$225,000.

<sup>4</sup> WISCONSIN STAT. § 98.26(1)(c) prohibits representing “in any manner a false quantity or price in connection with the purchase or sale, or any advertising thereof, or any commodity, thing or service.” WISCONSIN STAT. § 98.26(1)(e) makes a violation of WIS. STAT. § 98.15(1) a misdemeanor. Section 98.15(1) states “[n]o person shall manipulate, underread or overread or make any false determination by the Babcock test or any other test for determining the value of milk or cream. No person shall make any false record or report of the results of any such test.”

sufficient to support a bind over on felony counts of theft by false representation. Tesch argues the evidence was insufficient to support bind over because the statute prohibits making a false statement of fact and he made no verbal or written statement of fact to the victim or its agents. Whether Tesch's conduct constitutes a "false representation" under WIS. STAT. § 943.20(1)(d) presents an issue of statutory interpretation. The interpretation of a statute to a given set of facts is a question of law for our independent review. *World Wide Prosthetic Supply, Inc. v. Mikulsky*, 2002 WI 26, ¶8, 251 Wis. 2d 45, 640 N.W.2d 764.

¶7 Tesch argues the State incorrectly relies on common law principles to support its contention that acts and conduct may constitute a false representation. However, we previously recognized that "[b]oth the pre-1955 law and the current law are intended to prohibit fraudulent transactions." *State v. Meado*, 163 Wis. 2d 789, 797, 472 N.W.2d 567 (Ct. App. 1991). The common law in Wisconsin recognized that "[a]cts or conduct may constitute false pretenses," not just words. *Stecher v. State*, 168 Wis. 183, 186, 169 N.W. 287 (1918). Yet, Tesch argues the statute must be strictly read and under a strict reading, an act or conduct cannot constitute a "representation."

¶8 Contrary to Tesch's implicit contention, the rule of strict construction of a penal statute "does not mean that only the narrowest possible construction must be adopted in disregard of the statute's purpose." *State v. Johnson*, 2005 WI App 202, ¶20, 287 Wis. 2d 313, 704 N.W.2d 318 (citation omitted). Rather, "[a] statute should be construed to give effect to its leading idea and should be brought into harmony with its purposes." *Id.* It is consistent with the purpose of prohibiting fraudulent transactions to hold that a representation could include an act or conduct. Thus, Tesch's alleged acts of participating with a milk hauler in switching milk samples and adding water to milk before delivering

the milk to Mullins Cheese constitute “false representations” under WIS. STAT. § 943.20(1)(d).

¶9 In determining whether the evidence was sufficient to bind Tesch over on felony charges, we “will search the record for any substantial ground based on competent evidence to support the court’s bindover decision.” *State v. Koch*, 175 Wis. 2d 684, 704, 499 N.W.2d 152 (1993). “Probable cause at a preliminary hearing is satisfied when there exists a believable or plausible account of the defendant’s commission of a felony.” *Id.*

¶10 The circuit court initially found probable cause to bind over Tesch on felony charges. However, in dismissing the complaint, the court concluded, “although there is sufficient probable cause that Tesch added water and sought the manipulation of the milk samples to defraud Mullins Cheese, that is only a misdemeanor under *Wis. Stat. § 98.26(1)*.” We agree with the court’s first ruling that the evidence adduced at the preliminary hearing was sufficient to bind over Tesch on felony charges under WIS. STAT. § 943.20(1)(d). Section 943.20(1)(d) penalizes a person who (1) obtains title to property of another person (2) by intentionally deceiving the person with a false representation which is known to be false, made with the intent to deceive, and (3) which does defraud the person to whom it was made.

¶11 Title to property under both the common law and WIS. STAT. § 943.20(1)(d) includes money. *State v. O’Neil*, 141 Wis. 2d 535, 416 N.W.2d 77 (Ct. App. 1987). According to Millhausen, Tesch signed a statement, admitting that every other day, beginning in December 2003 or January 2004, he added “about five to six inches of water to the bottom of [the small milk] tank to aid in the cooling of the milk.” Millhausen estimated this would amount to 300 to 500

pounds of water out of total tank capacity of 2,900 to 2,950 pounds. Millhausen said Tesch admitted that on June 21, 2004, the tank contained possibly as much as one-third water. Millhausen also spoke to the route driver, David Searer, who indicated that Tesch had once asked him to mix or switch milk samples to increase the somatic cell count in the milk. Evidence also showed there was no water present in the milk samples sent to the state lab prior to May 2004. However, when Don Mullins, an owner of Mullins Cheese, began testing the milk himself in May, he found water in the milk.<sup>5</sup> Because the price of milk is based in part on its quality, if the quality was misrepresented, Tesch was overpaid for his milk. Millhausen estimated the amount of money lost by Mullins Cheese based on Tesch's misrepresentations was \$225,000. This evidence adduced at the preliminary hearing supports probable cause that Tesch wrongfully obtained "title to property" from Mullins in the form of monetary overpayments.

¶12 The evidence at the preliminary hearing also established probable cause that Tesch made a false representation with the intent to deceive and defraud Mullins Cheese. The evidence indicated Tesch had once asked a route driver to mix or switch milk samples to increase the somatic cell count in his milk. Evidence also showed that despite Tesch's admission that he added water to the milk, water did not show up in the samples sent to the state lab.

¶13 In addition, the evidence at the preliminary hearing shows that Mullins Cheese was deceived and defrauded. Mullins explained that he was paying Tesch fourteen to twenty dollars per hundred weight of milk based on

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<sup>5</sup> Together with the evidence that Tesch asked the route driver to switch samples and Tesch admitted to adding water to the milk beginning in December of 2003 or January of 2004, this evidence supports an inference that the milk samples were switched at Tesch's request.

Tesch's classification as a Grade A farm operation. Mullins also provided information regarding the amount Tesch had been overpaid in reliance on the falsified samples. This evidence was sufficient to establish probable cause that Mullins Cheese was deceived and defrauded by Tesch.

### CONCLUSION

¶14 Tesch concedes the circuit court erred as a matter of law in holding WIS. STAT. § 98.15(1) precludes prosecution under WIS. STAT. § 943.20(1)(d). Additionally, there was sufficient evidence presented at the preliminary hearing to conclude there was probable cause to believe Tesch's alleged acts constitute "false representations" to Mullins Cheese.

*By the Court.*—Judgment reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.



