

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 30, 2007**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

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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. 2006AP1181-CR**

**Cir. Ct. No. 2004CF867**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-APPELLANT,**

**V.**

**THOMAS J. BOOR,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order 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 CANE, C.J. The State of Wisconsin appeals an order dismissing an Information charging Thomas Boor with four felony counts of theft by false

representation under WIS. STAT. § 943.20(1)(d).<sup>1</sup> The State alleged Boor 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 produced at the preliminary hearing was sufficient to support bind over on the four felony counts. We agree and therefore reverse the circuit court's order and remand with directions to reinstate the four felony charges against Boor.

### **BACKGROUND**

¶2 This case arises from the alleged manipulation of milk weight and milk quality tests by Boor, 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 Boor on July 13, 2004, with information that Mullins Cheese had discovered water in the milk delivered from Boor. According to Millhausen, Boor signed a statement admitting he had been adding water to his milk. Millhausen also confronted Boor with information that Boor was switching milk samples to falsely report his milk quality to Mullins Cheese, resulting in higher payments to Boor. Millhausen stated Boor admitted that milk haulers had "helped him out with high cell counts," and acknowledged the current

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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.

driver Searer had been switching milk samples, especially during the state testing periods.

¶3 On October 29, 2004, the State charged Boor with four class G felonies of theft of more than \$10,000 by false representation, contrary to WIS. STAT. § 943.20(1)(d). Two of the felony charges related to the milk hauler's switching of milk samples to fix high cell counts. The other two felony charges related to Boor's adding of water to the milk. On October 11, 2005, at the close of the preliminary hearing, the court bound over Boor for trial. On November 3, 2005, the State filed an Information alleging four violations of § 943.20(1)(d). Boor moved to dismiss the Information for lack of probable cause at the preliminary hearing. Boor 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) conflicted with WIS. STAT. § 98.15(1), a specific statutory prohibition against manipulating the tests of the value of milk or cream. 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 Boor added water and may be involved as a conspirator in the manipulation of the milk samples to defraud Mullins Cheese, that is only a misdemeanor under WIS. STAT. § 98.26(1).

## DISCUSSION

¶15 The State argues the circuit court erred by concluding 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. Boor asserts the circuit court’s ruling had nothing to do with prosecutorial discretion. Instead, Boor argues the court’s decision was a statutory interpretation that his conduct was not a false representation under § 943.20(1)(d). He does not dispute that if his alleged misconduct of falsely representing the quantity and quality of milk he delivered to Mullins Cheese constitutes false representation under § 943.20(1)(d), the State 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).

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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 Boor’s alleged crime a class G felony based on an estimated loss of \$26,000.

<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, of 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 used for determining the value of milk or cream. No person shall make any false record or report of the results of any such test.”

*I. Representation Under WIS. STAT. § 943.20(1)(d)*

¶6 The first issue is whether the evidence that Boor added water to the milk tank and permitted the route driver to mix or switch milk samples was sufficient to constitute a false representation. Boor argues the evidence was insufficient because he made no verbal or written statement of fact to Mullins Cheese or its agents. Whether Boor’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 Boor argues the act prohibited by WIS. STAT. § 943.20(1)(d) is a false statement of fact. 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 Boor argues the statute must be strictly read and under a strict reading, an act or conduct cannot constitute a “representation.”

¶8 Contrary to Boor’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, Boor's alleged acts of adding water to milk before delivering the milk to Mullins Cheese constitute "false representations" under WIS. STAT. § 943.20(1)(d).

¶9 Next, turning to Boor's knowledge of the milk sample tampering, the State argues Boor's conduct was also a false representation when he permitted the milk hauler to alter the milk samples. We agree. Here, Boor's failure to correct the false impression that he was supplying a better quality of milk constituted a representation.

¶10 WISCONSIN STAT. § 943.20(1)(d) prohibits a type of fraud, which is addressed by both criminal and civil tort law. *See State v. Timblin*, 2002 WI App 304, ¶31, 259 Wis. 2d 299, 657 N.W.2d 89. While there are no common law crimes, this court has consulted civil tort law as an aid to interpreting the criminal fraud statutes. *Id.*, ¶31 n.5; *see also State v. Mueller*, 201 Wis. 2d 121, 138-39, 549 N.W.2d 455 (Ct. App. 1996). In *Kaloti Enters., Inc. v. Kellogg Sales Co.*, 2005 WI 111, 283 Wis. 2d 555, 699 N.W.2d 205, our supreme court laid out the circumstances where a failure to disclose can constitute a representation. The court concluded:

a party to a business transaction has a duty to disclose a fact where: (1) the fact is material to the transaction; (2) the party with knowledge of that fact knows that the other party is about to enter into the transaction under a mistake as to the fact; (3) the fact is peculiarly and exclusively within the knowledge of one party, and the mistaken party could not reasonably be expected to discover it; and (4) on account of the objective circumstances, the mistaken party would reasonably expect disclosure of the fact.

*Id.*, ¶20. If a duty to disclose exists, the failure to disclose is a representation. *See Id.*, ¶13 (When there is a duty to disclose a fact, the law has treated the failure to disclose that fact "as equivalent to a representation of the nonexistence of the

fact.”); *see also Ollerman v. O’Rourke Co.*, 94 Wis. 2d 17, 26, 288 N.W.2d 95 (1980).

¶11 Therefore, we have to determine whether the State produced sufficient evidence to establish that Boor had a duty to disclose the tampering. To resolve this issue, we turn to *Kaloti*’s elements. First, the fact that the milk hauler was tampering with the milk samples was material to the transaction because it affected the price that Mullins Cheese would pay Boor for the milk. Second, Boor knew Mullins Cheese would enter into the transaction under a misconception as to the milk’s quality because he knew the state sample, upon which the price of his milk was based, was altered. Third, the milk hauler surreptitiously altered samples given to both the State and Mullins Cheese, so Mullins Cheese could not reasonably have been expected to discover the tampering. Fourth, Mullins Cheese would reasonably expect disclosure of the tampering because it affected the price it would pay for Boor’s milk and the quality of its cheese. Under these facts, the State produced sufficient evidence to establish that Boor had a duty to disclose the tampering and by being silent made a representation.

¶12 Additionally, the RESTATEMENT (SECOND) OF TORTS § 529 (1977), provides that a fraudulent misrepresentation includes “[a] representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter ....” Both parties argue the representation at issue is the quality of the milk, which the milk hauler altered with Boor’s knowledge. However, Boor also made a representation as to the ownership of the milk to Mullins Cheese, which entitled him to payment based on the milk’s quality. Boor admitted he knew his milk quality was being altered by the milk hauler. This knowledge makes his representation to Mullins

Cheese regarding his milk materially misleading because he failed to disclose the milk quality tampering, which raised the price of the milk.

## *II. Sufficiency of the Evidence*

¶13 In determining whether the evidence was sufficient to bind Boor 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.*

¶14 The circuit court initially found probable cause to bind over Boor on felony charges. However, in dismissing the complaint, the court concluded, “although there is sufficient probable cause that Boor added water and may be involved as a conspirator in the manipulation of the milk samples to defraud Mullins Cheese, that is only a misdemeanor under Wis. Stat. § 98.26(1).”<sup>5</sup> We agree with the court’s first ruling that the evidence adduced at the preliminary hearing was sufficient to bind over Boor 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.

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<sup>5</sup> On appeal, Boor does not address the court’s holding that the State is restricted to charging him only under the misdemeanor statute. Instead, he argues only that his conduct did not constitute a false representation.



¶15 First, according to Millhausen, Boor signed a statement, admitting that he added water to his milk. Boor also admitted to Millhausen that the milk haulers had helped him out with high cell counts and acknowledged the current milk hauler had been switching milk samples. Because the price of milk is based in part on its quality, if the quality was misrepresented, Boor was overpaid for his milk. Don Mullins estimated the amount of money lost by Mullins Cheese based on Boor's misrepresentations was \$26,000. This evidence produced at the preliminary hearing supports probable cause that Boor wrongfully obtained "title to property" from Mullins in the form of monetary overpayments. Title to property under WIS. STAT. § 943.20(1)(d) includes money. *State v. O'Neil*, 141 Wis. 2d 535, 416 N.W.2d 77 (Ct. App. 1987).

¶16 Second, as noted above, the evidence presented at the preliminary hearing established probable cause that Boor made a false representation. Given that he added water to his milk and he knew of the milk sample tampering, there is also probable cause that the false representation was made with the intent to deceive and defraud.

¶17 Third, at the preliminary hearing Don Mullins provided records detailing the overpayments Mullins Cheese made to Boor because it believed the quality was higher. Boor appears to argue his milk's water content was consistently high, and therefore, it was not a false representation and should have been apparent to Mullins Cheese. However, whether Mullins Cheese was actually deceived by the adding of water or sample switching is a matter for trial and does not prevent a finding of probable cause where the alleged victim presents evidence that it was deceived. Thus, this evidence was sufficient to establish probable cause that Mullins Cheese was deceived and defrauded by Boor.

## CONCLUSION

¶18 Boor’s adding water to his milk and having knowledge of the milk sample tampering without disclosing it constitute representations 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 Boor’s alleged acts constitute “false representations” to Mullins Cheese and support a finding of probable cause that Boor committed a felony.

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

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