

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 9, 2009**

David R. Schanker  
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. 2008AP352**

**Cir. Ct. No. 2005CV44**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**JACKSON COUNTY,**

**PLAINTIFF-RESPONDENT-CROSS-APPELLANT,**

**V.**

**FIRST NATIONAL BANK IN VIROQUA,**

**DEFENDANT-APPELLANT-CROSS-RESPONDENT.**

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APPEAL and CROSS-APPEAL from a judgment of the circuit court for Jackson County: GERALD W. LAABS, Judge. *Reversed and cause remanded with directions.*

Before Higginbotham, P.J., Lundsten and Bridge, JJ.

¶1 PER CURIAM. First National Bank in Viroqua (the Bank) appeals a money judgment entered in favor of Jackson County. The County cross-appeals the judgment. The court entered judgment for \$4395, plus costs, on one of the

County's seven claims against the Bank, and dismissed the other six. The Bank contends that the circuit court should have dismissed the County's complaint in its entirety. The County contends that it was entitled to damages on all seven of its claims. We agree with the Bank that the court should have dismissed all of the claims, and therefore reverse and remand for an order dismissing the County's complaint.

¶2 In a series of seven contracts, James Hershey agreed to pay the County for the right to cut timber on County land. Each contract included the estimated total compensation Hershey would owe the County for logging in the designated area, and required Hershey, in advance of logging, to deposit 10% of that estimated total by cash, a performance bond, or a letter of credit. The contracts provided that Hershey "agrees that upon breach of any terms or conditions of this contract, as determined by the [County], such cash or bond shall be forfeited to the [County] as liquidated damages."

¶3 On each of Hershey's seven contracts, the Bank issued a letter of credit providing that "[a]ll checks written to Jackson County Forestry for the deposit amount will be honored by [the Bank] up to the amount of deposits." Each letter also provided that the Bank would pay the County up to the credit limit stated in the letter, which in each case was the deposit amount for the particular contract, if Hershey did not make payments on the contracts when due, provided the Bank "receives written documentation from [the County] stating the deposits have not been made."

¶4 The County terminated all seven contracts with Hershey in August 2004. At the time, Hershey had done no logging on four of the contracts, and had partially performed on three. In a series of letters to the Bank, the County

demanded full payment up to the credit limit on each of the letters of credit. The demand letters stated that Hershey had failed to comply with the contracts or had failed to pay for timber that he cut and removed. None of the County's demand letters provided any further details or explanation.

¶5 When the Bank refused payment on the letters of credit, the County commenced this action, seeking as damages the credit limits stated in the seven letters of credit issued on Hershey's contracts. The court granted partial summary judgment to the Bank dismissing the claims on the four contracts Hershey never commenced performing. The court ordered trial as to the Bank's liability on the remaining three contracts upon concluding that the evidence on summary judgment failed to establish the amount of Hershey's payment defaults on those contracts. After the bench trial, the court dismissed the claims on two of the three remaining contracts because there was no proof that Hershey owed the County any money on them. The court found the Bank liable as to the one remaining contract (contract 1986), where Hershey's payment defaults totaled several thousand dollars. Consequently, the County received judgment for the \$4395 credit limit provided in the letter for contract 1986.

¶6 The circuit court erred when it granted judgment against the Bank, even though Hershey defaulted on his contract 1986 payments. Although the parties differ as to the applicable statutes, both agree that under provisions of the Uniform Commercial Code in effect at the time of the transactions here, the County had a duty to comply with the terms of the Bank's letter of credit to receive payment on it. One of those terms required that the County give the Bank written documentation of Hershey's payment defaults. The County's series of demand letters gave conclusory notice that Hershey had defaulted on his contracts, but none of the demand letters contained any specific information on the defaults

for contract 1986, or any other contract for that matter. There was not, for example, any written documentation as to the amounts of any payment defaults, the dates when the defaults occurred, or how the unpaid amounts were computed. One of the letters inaccurately stated that Hershey had failed to make payments on all seven contracts. The County noted in its final demand letter that the amounts of Hershey's payment defaults were irrelevant because the County was demanding liquidated damages from the Bank. By giving conclusory and/or inaccurate notice, the County did not minimally comply with the requirement to provide written documentation of payment defaults, under any reasonable interpretation of that requirement. In effect, the County asked the Bank to take the County's claims on faith. Only at trial did the County produce a record of Hershey's nonpayments on contract 1986, with amounts and dates. There was no evidence that the County ever presented that record or anything similar to the Bank before the letter of credit expired. Consequently, the circumstances never arose upon which the Bank incurred liability under the contract 1986 letter of credit.

¶7 The circuit court properly dismissed the County's claims on the other six contracts. The Bank incurred no liability on the remaining letters of credit for the same reason that it had no liability under contract 1986: the County failed to produce the necessary documentation of Hershey's nonpayment.

¶8 Additionally, even if the County had provided adequate documentation, it had no basis to claim damages from the Bank in the absence of actual financial loss. The County argues that actual loss is irrelevant because it based its claims against the Bank on the liquidated damage clauses in Hershey's contracts, under the theory that the Bank assumed Hershey's obligations and liabilities when it issued the letters of credit, up to the credit limit stated in the letters. However, after giving Hershey the option of paying his deposit by cash,

bond, or letter of credit, the contracts provided that, upon breach of a contract, only “such cash or bond shall be forfeited to the [County] as liquidated damages.” The interpretation of a contract is a question of law that we review *de novo*. *Kasten v. Doral Dental USA, LLC*, 2007 WI 76, ¶19, 301 Wis. 2d 598, 733 N.W.2d 300. “When the terms of a contract are plain and unambiguous, we will construe the contract as it stands.” *Tang v. C.A.R.S. Protection Plus, Inc.*, 2007 WI App 134, ¶29, 301 Wis. 2d 752, 734 N.W.2d 169 (quoting *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶14, 257 Wis. 2d 421, 651 N.W.2d 345). Here, the contracts between the County and Hershey plainly excluded the letters of credit as sources of liquidated damages. Only if Hershey had paid his deposits by cash or bond was the County entitled to them.

¶9 For the foregoing reasons, we reverse and remand for an order dismissing the County’s complaint.

*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. (2007-08).

