

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 14, 1997

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

NOTICE

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

No. 96-3381

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CITY OF RICHLAND CENTER,

PLAINTIFF-APPELLANT,

V.

M&I BANK SOUTHWEST,

**DEFENDANT-
THIRD PARTY PLAINTIFF,**

ST. PAUL FIRE & CASUALTY INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

RICHLAND VALLEY PRODUCTS, INC.,

DEFENDANT,

CHARLES B. SCHLOTZHAUER,

THIRD PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Richland County:
KENT C. HOUCK, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

DYKMAN, P.J. The City of Richland Center appeals from a judgment dismissing its claim against St. Paul Fire & Casualty Insurance Co. for failure to state a claim upon which relief may be granted. Richland Center argues that its complaint properly alleges a cause of action against St. Paul for conversion. We conclude that Richland Center has not alleged facts that would constitute a claim for conversion against St. Paul. Accordingly, we affirm.

BACKGROUND¹

Richland Valley Products, Inc. (RVP) is a manufacturer of ice cream bars and other ice cream and frozen water novelties. In 1992, RVP shut down its entire manufacturing operation in order to eliminate clogging in its refrigeration system. RVP filed a claim with St. Paul Fire & Casualty Insurance Co. under its business interruption policy. After St. Paul denied the claim, RVP initiated a lawsuit against St. Paul for breach of contract and bad faith denial of its claim.

While RVP's action against St. Paul was pending, RVP, which was already indebted to the City of Richland Center (City) and Valley Bank, asked the City, Valley Bank and others to lend it additional working capital for its business operations. RVP obtained an additional \$350,000 from Valley Bank and an

¹ Because this appeal is from a motion to dismiss for failure to state a claim, we take the relevant facts from the complaint.

additional \$300,000 from the City,² subject to the terms of a loan agreement dated February 1, 1993. Included in the loan agreement was the following paragraph:

6. In the event that Richland Valley Products, Inc. settles a pending claim against St. Paul Insurance Co. prior to retiring this debt to the City, Richland Valley will pay the first \$100,000 of such settlement proceeds to Valley Bank to secure a release of a guarantee of indebtedness made by Richland Valley employees, and thereafter the settlement proceeds will be applied to the above described indebtedness to the City until all principal and interest have been repaid.

The circuit court awarded RVP a judgment in the amount of \$9,098,545.65 against St. Paul on its insurance claim, and St. Paul appealed. Prior to disposition of the appeal, RVP filed a garnishment action against St. Paul and various garnishee defendants in order to collect sums to be applied to the judgment. St. Paul and RVP negotiated an agreement in which RVP agreed to dismiss the garnishment action and refrain from further collection action and St. Paul agreed to pay RVP \$2.2 million, \$408,036.73 of which was to be transferred to Good Humor, another secured creditor of RVP. The parties agreed that if RVP prevailed on appeal, the \$2.2 million would be credited toward the judgment. If St. Paul prevailed on appeal, RVP was to return the \$2.2 million on demand. Of the proceeds that remained after the payment to Good Humor, RVP paid \$567,401.73 to Valley Bank and certain sums to other creditors, but nothing to the City. RVP's judgment against St. Paul was subsequently reversed on appeal. *See Richland Valley Products, Inc. v. St. Paul Fire & Cas. Co.*, 201 Wis.2d 161, 548 N.W.2d 127 (Ct. App. 1996).

² \$200,000 was obtained directly from the City and \$100,000 from Richland Center Electric Utility.

The City commenced an action against St. Paul, RVP and M&I Bank Southwest, the successor to Valley Bank by way of merger. Relevant to this appeal, the City alleged that St. Paul was liable for conversion for paying the \$2.2 million directly to RVP because, by virtue of paragraph six of the February 1, 1993 loan agreement, the City held a security interest in the funds.

St. Paul filed a motion to dismiss for failure to state a claim upon which relief could be granted. The circuit court determined that the \$2.2 million St. Paul paid RVP constituted a loan, not settlement proceeds, and therefore was not subject to paragraph six of the loan agreement. Accordingly, the court dismissed St. Paul from the suit. The City appeals.

DISCUSSION

In *Hermann v. Town of Delavan*, 208 Wis.2d 216, 220-21, 560 N.W.2d 280, 281-82 (Ct. App. 1996), we set forth the standard for reviewing a motion to dismiss for failure to state a claim:

In determining whether a complaint should be dismissed for failure to state a cause of action upon which relief may be granted, the facts pled are taken as admitted. The purpose of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the complaint. Whether a complaint properly pleads a cause of action is a question of law which we decide without deference to the circuit court. Since pleadings are to be liberally construed, a claim will be dismissed only if it is “quite clear that under no conditions can the plaintiff recover.”

(Citations omitted.)

Conversion is the wrongful exercise of control or dominion over another’s goods. *Production Credit Ass'n v. Equity Coop Livestock Sales Ass'n*, 82 Wis.2d 5, 10, 261 N.W.2d 127, 129 (1978). Conversion “may be committed in

a variety of ways, the most common being an unauthorized transfer of the goods to one who is not entitled to them.” *Id.* The plaintiff in a conversion suit “must allege and prove either that it was in possession of the chattel at the time of the conversion or that it was entitled to immediate possession.” *Id.*

The circuit court dismissed the City’s claim against St. Paul because it construed the payment from St. Paul to RVP as a loan, not a settlement, and therefore concluded that the payment was outside of the scope of paragraph six of the loan agreement. We do not need to reach the issue of whether the payment was a “loan” or “settlement,” however, because we dispose of the appeal on other grounds. We may “may affirm a lower court’s decision on different grounds than those relied upon by the lower court.” *Koestler v. Pollard*, 162 Wis.2d 797, 809 n.8, 471 N.W.2d 7, 12 (1991). We conclude that the City did not have a right to immediate possession to the proceeds at the time of the alleged conversion, and therefore the City has failed to properly state a claim.³

Paragraph six of the loan agreement provides that if RVP settles its pending claim against St. Paul, “[RVP] will pay the first \$100,000 of such settlement proceeds to Valley Bank ..., and thereafter the settlement proceeds will be applied to the ... indebtedness to the City until all principal and interest have been repaid.” This agreement does not provide that St. Paul will pay Valley Bank \$100,000 and then pay the City’s indebtedness. It provides that *RVP will pay* Valley Bank, and then the indebtedness of the City will be paid. It is clear from the agreement that the City would not be paid until St. Paul had transferred the

³ In addition to arguing that the City did not have a right to immediate possession, St. Paul raises several other arguments. Because we dispose of the appeal on the City’s lack of a right to immediate possession, we will not address the other arguments. See *Sweet v. Berge*, 113 Wis.2d 61, 67, 334 N.W.2d 559, 562 (Ct. App. 1983).

funds to RVP and RVP had paid the first \$100,000 to Valley Bank. The City did not have an immediate right to settlement proceeds at the time of the alleged conversion, but instead only had a right to settlement proceeds after they were transferred to RVP.⁴ Because any right that the City had to the proceeds arose *after* the alleged conversion, we conclude that the City has not properly alleged a cause of action against St. Paul. Accordingly, we affirm the trial court's judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

⁴ We have not determined whether the payment was a “settlement” or “loan” for purposes of paragraph six of the loan agreement.

