COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

Nos. 99-2308 and 99-2309

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

WOODY HOWLAND,

PLAINTIFF-APPELLANT,

V.

BG PRODUCTS, INC.,

DEFENDANT-RESPONDENT,

CORNERSTONE DISTRIBUTING, INC.
AND JIM BRAUN,

DEFENDANTS.

ELI MENDEZ,

PLAINTIFF-APPELLANT,

E & B AUTOMOTIVE POWER BOOSTERS, INC.

PLAINTIFF,

V.

BG PRODUCTS, INC.,

DEFENDANT-RESPONDENT,

CORNERSTONE DISTRIBUTING, INC.
AND JIM BRAUN,

DEFENDANTS.

APPEAL from judgments of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Woody Howland and Eli Mendez appeal the grant of summary judgment to BG Products (BG) dismissing their unlawful termination claims brought under Chapter 135, Wisconsin's Fair Dealership Law (WFDL).[1] Howland and Mendez argue that the trial court improperly granted summary judgment because the material facts were disputed; Peter Bender was BG's agent when he originally hired Howland and Mendez; and, consequently, Howland and Mendez were BG's distributors. Further, Howland and Mendez claim the trial court erred when it found no implied contract between them and BG. We affirm.[2]

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] Earlier, this court granted Howland's and Mendez's motion seeking to consolidate their cases for appeal.

I. BACKGROUND.

¶2 The facts giving rise to this suit took place over the course of several years. In the late 1980's, Peter Bender became a BG distributor for part of Wisconsin and, later, he became the distributor for the entire state. BG manufactures motor oils and lubricants. After being terminated in 1994, Bender sued BG, alleging violations of the WFDL. The parties settled and, as part of their settlement, Bender and BG entered into two contracts reinstalling Bender as BG's statewide distributor. One contract covered the northern half of the state, and the other the southern half. Both agreements were essentially identical to the old agreement, with several additional provisions. The new provisions relevant to this controversy obligated Bender to employ "adequately trained and competent personnel or jobbers" pursuant to a manpower quota set by BG; to provide training for his "personnel or jobbers"; and to report to BG the employees' or jobbers' monthly production.

¶3 Howland began selling BG's products for Bender in 1992. Bender hired Mendez in 1994. After the settlement between Bender and BG, Mendez was responsible for selling BG's goods in the southern half of the state, and Howland responsible for the northern half. In early 1996, Howland, believing Bender's conduct toward his sales people had become "irrational," stopped buying from Bender and began purchasing BG's products from a distributor outside of Wisconsin. In response, BG wrote to Howland telling him to stop using BG's product names and logotypes, explaining that the company was obligated to take this action because "you are no longer associated with Mr. Peter Bender as an independent sales agent."

¶4 In 1996, Bender committed suicide, and his mother, as his heir, appointed Jim Braun, one of Bender's other jobbers, to carry on the business while the estate was being probated. After Bender's death, Howland sought to become the distributor of BG's products in the northern half of the state. However, in April of 1997, BG appointed Braun as its sole distributor in Wisconsin. Shortly thereafter, Braun terminated both Mendez and Howland.

¶5 Howland and Mendez then sued Braun, Braun's distributorship, Cornerstone Distributing Inc., and BG, claiming the WFDL was violated when they were terminated.[3] They asserted that BG was liable under the WFDL because when they were hired by Bender, Bender was acting as BG's agent and, as a result, they were BG's distributors. Alternatively, Mendez and Howland claimed that BG either breached an implied contract between them or that they were entitled to compensation under an unjust enrichment theory. BG brought a summary judgment motion requesting dismissal of the claims. It contended that Bender was not its agent, and that since BG never entered into any contract with either Howland or Mendez, it could not be sued under WFDL. Further, it argued that the facts give rise to neither an implied contract claim nor an unjust enrichment claim.

¶6 The trial court found that the relevant facts were undisputed and granted BG's motion. It held that Bender was not BG's agent, and that BG, having entered into no agreement with either Mendez or Howland, was not liable under the WFDL. The trial court also found no implied contract, noting that the

[3] The suit against Braun and Cornerstone is still pending.

necessary element of a "meeting of the minds" was not proved. Finally, the trial court also dismissed Howland's and Mendez's unjust enrichment claim.[4]

Standard of Review

¶7 "Summary judgment methodology is governed by [WIS. STAT. § 802.08], and has been described in many cases such as ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). Our review is *de novo* and independent of the trial court's decision." ***Bong v. Cerny***, 158 Wis. 2d 474, 478, 463 N.W.2d 359 (Ct. App. 1990).

A. *WFDL*

¶8 Chapter 135 of the Wisconsin Statutes was enacted to protect the interests of dealers whose economic livelihood could be imperiled by the dealership grantor. *See* ***Rossow Oil Co. v. Heiman***, 72 Wis. 2d 696, 702, 242 N.W.2d 176 (1976). WISCONSIN STAT. § 135.02(3) defines a dealership as:

> "Dealership" means a contract or agreement, either expressed or implied, whether oral or written, between 2 or more persons, by which a person is granted the right to sell or distribute goods or services, or use a trade name, trademark, service mark, logotype, advertising or other commercial symbol, in which there is a community of interest in the business of offering, selling or distributing goods or services at wholesale, retail, by lease, agreement or otherwise.

WISCONSIN STAT. § 135.06 authorizes an action against a "grantor" for wrongful termination of a dealership. Pursuant to § 135.02(5), a "grantor" is "a person who grants a dealership." Thus, to succeed on their wrongful termination claim,

[4] Howland and Mendez have not pursued this claim in their appeal.

Howland and Mendez must prove that either an express or implied contract or agreement existed "by which [they were] granted the right to sell or distribute." WIS. STAT. § 135.02(3). Thus, to fall within the protection of chapter 135, Howland and Mendez needed to establish that they had a dealership relationship with BG.

¶9 Howland and Mendez argue that the trial court erred in its determination that their relationship with BG did not fall within the WFDL. While conceding that BG never had any written contract with either of them, they submit that BG is liable for Braun's actions under the WFDL because Bender was BG's agent when they were hired; thus, they submit, they were BG's distributors, not Bender's, and Braun's termination of them was attributable to BG as the principal. Stated otherwise, they contend they were grantees, and BG was the grantor, and that when Bender contracted with them, he created a BG "dealership." As a consequence, they maintain that BG is liable for their unlawful termination. They contend this agency relationship established by Bender continued, even though Braun replaced Bender as the BG distributor. As support for their argument that Bender was BG's agent, they point to BG's contracts with Bender, arguing that these contracts gave BG such a high level of control over Bender's business that it transformed Bender into BG's agent. We disagree.

¶10 The dispositive issue here is whether Bender was BG's agent. However, we first dispose of Howland's and Mendez's argument that the trial court erred in determining that the material facts were undisputed. They insist that whether BG made Bender its agent is a question of fact for a jury to determine, citing ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). Although ordinarily the existence of a principal/agent relationship is a question of fact, here the answer lies entirely on contract interpretation, which is a

question of law. *See* ***Weimer v. Country Mut. Ins. Co.***, 216 Wis. 2d 705, 714, 575 N.W.2d 466 (1998).

¶11 Howland's and Mendez's support for their belief that Bender was actually BG's agent is based solely on the contracts between BG and Bender. They argue that the amount of control given to BG in the contract over Bender's business was so great that it transformed Bender into BG's agent, making BG responsible for Braun's later termination of them. Thus, a resolution of this question—whether Bender was BG's agent—only requires us to interpret the contracts between BG and Bender. Interpreting a contract is a question of law for the court. *See* ***id.*** As a result, the trial court correctly determined that this matter was appropriate for summary judgment treatment. There are no material factual disputes and the issue is one of law.

¶12 In addressing Howland's and Mendez's contention that Bender was BG's agent, we adopt the definition of agency found in WIS JI—CIVIL 4000:

> AGENCY: DEFINITION
>
> An agency is created as the result of the conduct of two parties.
>
> The party for whom action is to be taken is the principal. The party who is to act is the agent.
>
> An agency is based on an agreement between the parties which embodies three factual elements:
>
> (1) the conduct of the principal showing that the agent is to act for him or her;
>
> (2) the conduct of the agent showing that he or she accepts the undertaking;
>
> (3) the understanding of the parties that the principal is to control the undertaking.
>
> The conduct on the part of the principal must show that he or she is willing that the agent act for him or her and must indicate that the agent is to do so, subject to the principal's control. The conduct on the part of the agent

> must show that the agent acts or agrees to act on the principal's behalf, subject to principal's control.
>
> A principal-agent relationship may be created or exist between the parties as a result of their acts and conduct, even if they had no knowledge or intent that the relationship was, or is being, created.
>
> …

In analyzing this dispute, we are also mindful that "the mere authority to act for another does not, without more, establish agency as a matter of law. Agents and independent contractors both act on behalf of the principal. The critical distinction is the degree of control exercised by the principal." ***Envirologix Corp. v. City of Waukesha***, 192 Wis. 2d 277, 295, 531 N.W.2d 357 (Ct. App. 1995).

¶13 As noted, BG and Bender executed two contracts. One contract covers the northern half of the state, and the other covers the southern half. BG and Bender's contracts are identical, except for the description of the distributorship locations. Howland and Mendez rely on three contract provisions that they contend created the agency. The contracts, in pertinent part, provide:

> 4(f) …
>
> Bender shall employ, engage or otherwise contract with a sufficient number of adequately trained and competent personnel or jobbers to aid Bender in the sale or distribution of BG Products in Region II (such persons are hereinafter referred to as "Independents" or "Bender's Independents"). Whether or not Bender shall have employed, engaged or otherwise contracted with a sufficient number of Independents shall be determined by reference to the number of Bender's Independents and the manpower quota established by BG for Region II. The "manpower quota" means the minimum number of Bender's Independents from time to time established by BG for Region II. As a condition to the continued enjoyment of the authority granted herein, Bender agrees to meet the manpower quota. Bender shall exercise good faith in carrying out the terms of this Agreement.

> 5. Reporting Requirements. Bender agrees to submit to BG each month on or before the date specified by BG reports accurately and fully prepared and in form satisfactory to BG, detailing the BG Products sold by Bender, the person to whom BG Products were sold by Bender, the amount sold and the amounts received on such sales for all sales made on or before the end of the preceding month. Additionally, Bender agrees to furnish BG each month on or before a date specified by BG copies of invoices of any and all sales by Bender, showing the name, address of the purchaser, product sold and the price thereof for all invoices dated during the preceding month. All reports or statements furnished to BG shall be true and accurate and not misleading.
>
> 6. Additional Reporting Requirements. Bender shall furnish to BG each month on or before the date specified by BG a complete statement, on a form entitled "Monthly Top 20/Stars of Industry Report" which form is attached hereto or such other form prescribed by BG, stating the names and addresses of Bender's Independents, dollar volume of each Independent's sales of BG Products for the preceding month and for the year to date. Additionally, Bender shall submit to BG at this same time a report detailing the BG Products sold by Independents and the persons to whom BG Products were sold by Independents, together with copies of all invoices or billing statements in connection with such sales. Bender's obligation under this paragraph is limited to providing such information (or any part of it) as is in Bender's possession, custody or control, or would be in the exercise of reasonable diligence and good faith. Bender further agrees to provide BG, at BG's request, with a description of his efforts to obtain the information described in this paragraph.

Howland and Mendez contend that Bender was BG's agent because these contract provisions gave BG control over Bender's business. Specifically, they point to the contract provisions requiring Bender to hire and train independent sales persons/jobbers subject to a manpower quota set by BG, obligating Bender to train these persons and the reporting of Bender's "independents'" sales to BG as evidence of this control. BG disagrees. BG maintains that it was not given sufficient control over Bender's business so as to create an agency between the parties. BG further argues that ***Bong v. Cerny*** controls the outcome of this case.

We agree with BG. The contracts between Bender and BG did not make Bender BG's agent, and ***Bong*** is on point.

¶14 While we acknowledge that the parties' stated intent is not entirely dispositive of the agency issue, we find it important that the BG/Bender contract explicitly declared that it was not the intent of BG or Bender to create an agency relationship between the two. A contract provision reads: "12. Bender Not Agent. This Agreement does not in any way create the relationship of principal and agent between BG and Bender; and under no circumstances shall Bender be considered to be the agent of BG." Clearly then, it was never the intent of BG or Bender to make Bender BG's agent. Thus, this case turns on whether the parties' contract inadvertently made Bender BG's agent.

¶15 In ***Bong***, similar arguments were raised as those here. The Bongs were jobbers for the Neumans who were distributors for Technical Rubber Company (Tech Rubber). *See* ***Bong***, 158 Wis. 2d at 479. The distributorship was later sold to Larry Cerny, who terminated the Bongs. The Bongs sued both Cerny and Tech Rubber, claiming that the agreement between Tech Rubber and the Neumans made the Neumans agents of Tech Rubber, and when the Neumans hired the Bongs, they became Tech Rubber's distributors. *See* ***id.*** Like Howland and Mendez, the Bongs sued, believing they were unlawfully terminated under the WFDL. The Bongs also relied on several contract provisions between the Neumans and Tech Rubber to support their claim that the level of control given to Tech Rubber in Neumans' contract made the Neumans Tech Rubber's agent. *See* ***id.*** at 480. ***Bong*** held to the contrary:

> However, the express agreement between Tech Rubber and the Neumans does not grant a dealership to anyone. It merely authorizes further agreements, which may or may not occur, between the Neumans and unidentified third

> parties. The express agreement granted nothing to the Bongs.

Id. at 480 (footnote omitted). The same result must be reached here. Despite Howland's and Mendez's contention that, unlike the contract in ***Bong***, BG's contracts with Bender permitted BG to control the "details" of Bender's business, our review of the BG/Bender contracts leads us to conclude otherwise.

¶16 "It is well established that the most-important factor in determining whether a person is an agent is the extent of the control retained over the details of the work." ***Kablitz v. Hoeft***, 25 Wis. 2d 518, 521, 131 N.W.2d 346 (1964). Here, there is no showing that BG controlled the details of Bender's business. The fact that the contract between Bender and BG obligated Bender to "employ or otherwise contract with a sufficient number of adequately trained and competent personnel or jobbers to aid Bender in the sale or distribution of BG products" and to report their sales did not create the level of control needed to make Bender BG's agent. Under Bender's contract with BG, Bender was free to decide whether to hire sales representatives or to appoint jobbers. The contract only instructed Bender to hire sufficient employees to meet the objectives of the contract. The contract also mandated that Bender train whomever he hires, but the contract did not specify how Bender was to train his sales staff, nor require any specific training. It merely directed that Bender have a workforce that was adequately trained to sell BG products. Another provision obligated Bender to give monthly reports to BG, including the amount of sales generated by his employees/jobbers. This contract provision did not, however, require Bender to sell BG's products in any specific manner—it only required Bender to accurately report the sales that occurred. Thus, we conclude that BG did not retain control over the details of

Bender's work, and the level of control needed to find an agency relationship did not occur here.

B. *Implied Contract*

¶17 Howland and Mendez next contend that the trial court erred in finding that no implied contract existed between them and BG to distribute BG's products.

¶18 Howland and Mendez point to the following facts as support for an implied contract: (1) BG required Bender to hire and retain them as "independents"; (2) BG was aware of their sales of BG products because Bender was obligated to report their sales. By including this requirement in Bender's contract BG knew and approved of their activities done on BG's behalf; (3) Howland and Mendez were required to purchase BG products and equipment; (4) BG allowed them to use BG's trademarks and logos; (5) BG required that they be trained at BG approved schools, which they did at their own expense; and (6) during the period following Bender's death, Howland corresponded with BG which suggested BG was contracting separately with Howland. With respect to this claim, the trial court concluded that:

> I don't believe the facts demonstrate there was an implied contract either because under this theory there is the presupposition that there is a mutual agreement, a meeting of the minds, an intention to contract, and that is entirely lacking here, so clearly there is no contract implied in fact.

Our review of the record and the pertinent case law comports with the trial court's conclusion. The separate circumstances cited by Howland and Mendez to prove an implied contract fall far short of those required. Howland and Mendez insist that this is a question to be decided by a jury. However, in order to bring the

matter to a jury requires a minimum showing of facts that, if believed, would support a finding that an implied contract existed. *See* ***Transportation Ins. Co. v. Hunzinger Const. Co.***, 179 Wis. 2d 281, 289-91, 507 N.W.2d 136 (Ct. App. 1993). Here there is no such showing. None of the events demonstrates that BG had an intention of contracting with Howland and Mendez and, thus, there was no "meeting of the minds."

¶19 The definition of an agreement can be found in WIS JI—CIVIL 3010:

> For a contract to be binding, three things must concur: first, the offer; second, the acceptance; and third, the consideration.
>
> For the parties to come to an agreement, it is necessary that there be a meeting of the minds of the parties upon the essential terms and conditions of the subject about which they are agreeing; that is, they must be in accord upon the essential terms and conditions. There must be a mutual assent.
>
> The language used and the conduct of the parties must be such as to disclose sufficiently the fact that the minds of the parties have met, or have been in accord, on all the terms of the agreement, or, in other words, disclose the fact that there has been a mutual assent. One party cannot make an agreement; both parties must, by their words or actions, assent to the agreement.
>
> …

WIS JI—CIVIL 3024 specifically addresses the necessary elements of an implied contract:

> An agreement may be established by the conduct of the parties without any words being expressed in writing or orally, if from such conduct it can fairly be inferred that the parties mutually intended to agree on all the terms. This type of agreement is known as an implied contract. An implied contract may rest partially on words expressed in connection with conduct or solely upon conduct.
>
> …

We also look for guidance in a case that found an implied contract existed, ***Schaller v. Marine National Bank of Neenah***, 131 Wis. 2d 389, 388 N.W.2d 645 (Ct. App. 1986), where this court remarked that:

> The essence of a contract implied in fact is that it arises from an agreement circumstantially proved. It requires, like an express contract, the element of mutual meeting of minds and of intention to contract; it is established by proof of circumstances from which the intention is implied as a matter of fact. Such circumstances may include the conduct of the parties. But an implied contract must arise under circumstances which, "according to ordinary course of dealing and common understanding of men, show a mutual intention to contract."

Id. at 398 (citations and footnote omitted).

¶20 As noted, Bender's contract required him to hire either sales representatives or jobbers. The contract does not specify whom he was to employ. The fact that Howland's and Mendez's sales were reported to BG by Bender also does not imply that BG intended to contract with them. BG's knowledge of their existence does not create a contractual relationship. Further, Howland's and Mendez's decision to buy BG's products and equipment to further their employment relationship with Bender, and later, Braun, does not implicate BG either. They made purchases in order to continue doing business with Bender. The fact that Howland and Mendez were obligated to pay for their training to sell BG products or that they spent money on BG products and machinery also does not create a contract between Howland and Mendez and BG. In order to remain a part of Bender's sales force, Howland and Mendez had to have proper training and had certain expenditures. These happenings did not evince "a mutual intention to contract" with BG. Further, their use of BG's logos and trademarks was contingent on their remaining as one of Bender's independents. None of the

actions cited by Howland and Mendez suggests that BG had an intention to contract independently with Howland and Mendez.

¶21 Finally, Howland argues that correspondence with BG following Bender's death supports his position. In fact, this evidence supports the contrary conclusion. Certainly Howland knew from his correspondence with BG that he was not BG's distributor. After all, he sought to become a BG distributor and he was turned down. Also, all of BG's correspondence with him confirmed that he had no independent right to sell BG's goods, except through the state distributor. Consequently, we conclude that Howland and Mendez have failed to provide any circumstantial evidence that would permit a finding of an implied contract between BG and them.

¶22 In sum, the trial court correctly dismissed Howland's and Mendez's WFDL claim against BG. The facts were undisputed. There was no contract between BG and Howland or Mendez. The record reveals that BG and Bender never entered into any contracts which indicated an intent to create an agency relationship between them. Further, the contract language did not give sufficient control to BG over Bender's business to unintentionally create an agency relationship. As a result, we are satisfied that BG's relationship did not fall within the ambit of the WFDL law. Moreover, no implied contract existed between BG and Howland and Mendez because there was no "meeting of the minds."

By the Court.—Judgments affirmed.

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