

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 27, 2002

Cornelia G. Clark
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. 01-0371
STATE OF WISCONSIN**

Cir. Ct. No. 99-CV-245-B2

**IN COURT OF APPEALS
DISTRICT II**

PETERSEN SUPPLY, LLC,

PLAINTIFF-APPELLANT,

TECSERVICES, INC.,

PLAINTIFF,

v.

WISCONSIN GAS COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Ozaukee County:
THOMAS R. WOLFGRAM, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Petersen Supply, LLC appeals from a summary judgment dismissing its Wisconsin Fair Dealership Law (WFDL) claim against

Wisconsin Gas Company. Because we agree with the circuit court that there were no material facts indicating that Petersen was a dealer of Wisconsin Gas under the WFDL, we affirm.

¶2 We review decisions on summary judgment by applying the same methodology as the circuit court. *M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 496-97.

¶3 Wisconsin Gas purchases water heating and water conditioning equipment and leases such equipment to its commercial customers. From 1991 to 1998, Petersen, a Wyoming corporation, supplied such equipment to Wisconsin Gas and provided leasing services to Wisconsin Gas. Petersen delivered and serviced the leased equipment using an unincorporated form of TecServices as a labor pool.

¶4 In 1994, after its incorporation under Wisconsin law, TecServices entered into a written agreement with Wisconsin Gas to provide leasing services in the transactions involving Petersen and Wisconsin Gas. Petersen was not a party to these agreements. Before entering into this contractual relationship, TecServices hired Al Dombrowski, a recently retired long-term employee of Wisconsin Gas who had been involved in Wisconsin Gas's commercial equipment lease transactions. In 1997, upon the expiration of the 1994 agreement, TecServices and Wisconsin Gas entered into a one-year consulting agreement. Under all of the agreements, Wisconsin Gas retained the right to approve the leasing and credit arrangements.

¶5 In 1998, Dombrowski and others left TecServices to join a competing company. Thereafter, Wisconsin Gas terminated its relationship with Petersen and TecServices. TecServices and Petersen brought WFDL claims against Wisconsin Gas claiming that they were dealerships and entitled to the protections of WIS. STAT. ch. 135 (1999-2000).¹

¶6 The circuit court dismissed Petersen's WFDL claim on summary judgment because there were no disputed material facts and a dealership did not exist as a matter of law.² Wisconsin Gas gave Petersen a purchase order for equipment. Petersen delivered and labeled the equipment as Wisconsin Gas leased equipment.³ The court noted that Petersen and TecServices were separate legal entities and that all written contracts were between TecServices and Wisconsin Gas. The court concluded that there were no factual issues as to whether Wisconsin Gas granted Petersen a right to sell or distribute goods or services or use a commercial symbol and that there was no community of interest between them.

¶7 "To constitute a 'dealership,' all three of the following elements must exist: (1) a contract or agreement; (2) which grants the right to sell or distribute goods or services, or which grants the right to use a trade name, logo, advertising or other commercial symbol; and (3) a community of interest in the

¹ All references to the Wisconsin Statutes are to the 1999-2000 version.

² The circuit court denied summary judgment on the WFDL claim brought by TecServices against Wisconsin Gas because there were material factual issues under the WFDL relating to the nature of their relationship.

³ Wisconsin Gas was not Petersen's only customer. Petersen sold equipment to other customers.

business of offering, selling or distributing goods or services.” *Bakke Chiropractic Clinic, S.C. v. Physicians Plus Ins. Corp.*, 215 Wis. 2d 605, 613, 573 N.W.2d 542 (Ct. App. 1997).

¶8 It is undisputed that Wisconsin Gas had a distinct contractual relationship with TecServices and that TecServices was a separate corporate entity from Petersen. Therefore, we reject Petersen’s arguments that it and TecServices were not separate entities and that the details of Wisconsin Gas’s relationship with TecServices should inure to Petersen’s benefit on the question of whether Petersen was a dealer for Wisconsin Gas under the WFDL.

¶9 We turn to the second dealership element: use of a commercial symbol or the right to sell or distribute goods or services. Wisconsin Gas logos were used primarily by Dombrowski in his capacity as a TecServices leasing consultant. In his correspondence and on his business cards, Dombrowski represented himself as an employee of Wisconsin Gas. These facts do not inure to the benefit of Petersen because TecServices was a separate corporate entity. Petersen’s use of Wisconsin Gas’s commercial symbols was limited to affixing a Wisconsin Gas sticker to the equipment it delivered to identify the equipment as leased from Wisconsin Gas. All other uses of Wisconsin Gas’s commercial symbols involved TecServices and its employees.⁴ This undisputed fact is insufficient to establish the use of a commercial symbol.

¶10 On the question of the right to sell or distribute goods or services, Petersen’s role was to sell equipment to Wisconsin Gas and to service that

⁴ In so noting, we do not mean to suggest that TecServices is a Wisconsin Gas dealer under the WFDL. That remains to be determined in the circuit court.

equipment.⁵ Petersen did not distribute Wisconsin Gas products or services, and Wisconsin Gas did not grant Petersen the right to sell or distribute its goods or services.

¶11 *Bakke* is instructive here. In *Bakke*, a health maintenance organization (HMO) terminated its contract with several chiropractors who were providing chiropractic care to HMO members. *Id.* at 610. The chiropractors claimed that they were dealers under the WFDL. *Id.* at 612. On the question of whether the chiropractors were selling the HMO's goods or services, the court of appeals held that the chiropractors were selling their own services, not those of the HMO. *Id.* at 617-18. The court deemed the relationship to be one where the HMO purchased the chiropractors' professional services. *Id.* at 618. The HMO provides and sells health insurance coverage and does not produce chiropractic services. *Id.* at 619. Therefore, the chiropractors' provider agreements with the HMO did not grant the chiropractors a right to distribute or sell the HMO's services. *Id.* at 620.

¶12 Much as the chiropractors in *Bakke* were not hired to distribute the HMO's insurance plans, *see id.* at 619, Petersen was not hired to distribute Wisconsin Gas products. Rather, Petersen provided Wisconsin Gas with equipment which the latter distributed under its own name.

⁵ Petersen makes much of a document entitled "Distributor Participation Terms and Conditions" it executed with Wisconsin Gas in February 1996. This agreement imposed certain requirements on Petersen as a distributor of equipment to Wisconsin Gas. Petersen's argument that this document is evidence of a dealership overlooks the essence of the relationship between the two entities: Petersen sold its equipment to Wisconsin Gas and Wisconsin Gas distributed that equipment under its own name to its customers. This was not a grant by Wisconsin Gas of the right to sell Wisconsin Gas's goods or services.

¶13 Because we conclude that Petersen has not established that Wisconsin Gas granted it the right to sell or distribute goods or services or the right to use a commercial symbol, we need not address the community of interest element.⁶ *Id.* at 624.

By the Court.—Judgment affirmed.

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

⁶ Petersen contends that Wisconsin Gas required it to maintain a parts inventory in the metropolitan Milwaukee area. Petersen contends that this inventory is indicative of its dealership. We have already held that the second element, use of a commercial symbol or right to sell or distribute, is absent. The maintenance of a parts inventory is not sufficient to establish a dealership when another necessary element is absent.

