

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 26, 1996

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

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No. 95-1039

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

FLOOD MOBILE HOMES, INC.,

Plaintiff-Respondent,

v.

LIBERTY HOMES, INC.,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

PER CURIAM. Liberty Homes, Inc. appeals from a judgment holding that its relationship with Flood Mobile Homes, Inc. was a dealership under the Wisconsin Fair Dealership Law (WFDL), ch. 135, STATS., and that Flood lost profits totaling \$211,750 when Liberty terminated the dealership. While we affirm the trial court in these respects, we reverse the court's award of actual and reasonable attorney's fees to Flood because the court did not give Liberty a hearing on its objection to the attorney's fees.

Liberty challenges the sufficiency of the evidence regarding a Flood-Liberty dealership under WFDL and argues that termination of the Liberty-Flood relationship did not have a significant adverse economic impact upon Flood. We disagree with both arguments.

The elements of a dealership under WFDL are: (1) an agreement between two or more persons; (2) by which one has granted certain rights to the other; and (3) in which a community of interest exists in the business of offering, selling or distributing goods or services at wholesale or retail. *Guderjohn v. Loewen-America, Inc.*, 179 Wis.2d 201, 204, 507 N.W.2d 115, 117 (Ct. App. 1993).¹

Liberty claims that there was insufficient evidence of a community of interest in this case. In order for there to be a community of interest, there must be: (1) a continuing financial interest and (2) "interdependence" or "shared goals and a cooperative effort more significant than that in the typical vendor-vendee relationship." *Id.* at 205, 507 N.W.2d at 117. Whether the parties have a continuing financial interest in their business relationship and whether the relationship is interdependent requires consideration of ten "facets" of the relationship as evidenced by the actual dealing of the parties and their agreement. *Id.* at 205-06, 507 N.W.2d at 117-18. Those facets were set forth in *Ziegler Co. v. Rexnord, Inc.*, 139 Wis.2d 593, 605-06, 407 N.W.2d 873, 879-80 (1987).

The trier of fact is responsible for determining the weight of the evidence and the credibility of the witnesses, and we will not overturn those findings unless they are clearly erroneous. *Micro-Managers, Inc. v. Gregory*, 147 Wis.2d 500, 512, 434 N.W.2d 97, 102 (Ct. App. 1988). Here, the trial court was the trier of fact. If more than one reasonable inference can be drawn from

¹ A "dealer" is a person who is the grantee of a dealership in this state. Section 135.02(2), STATS. "Community of interest" is "a continuing financial interest between the grantor and grantee in either the operation of the dealership business or the marketing of such goods or services." Section 135.02(1). "Dealership" is an oral or written agreement, either express or implied, by which a person is granted the right to sell goods or use a trade name or other commercial symbol, in which there is a community of interest in the business of offering the goods. Section 135.02(3).

the evidence, we must accept the inference drawn by the trial court. *Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979).

The trial court made the following findings of fact. Flood Mobile Homes, which sells, transports and services new and used mobile homes, was founded in 1951 and operated as a sole proprietorship until January 1975. Through the years, it sold several Liberty mobile home products, including Peerless mobile homes. Mark Flood, the founder's son, purchased the business in 1975 after his father died. Flood continued to sell Liberty homes. In May 1992, Liberty began delaying deliveries of homes to Flood and in January 1993 terminated its business relationship with Flood. Flood brought this WFDL action in March 1993.

Testifying at trial regarding Liberty's termination of Flood, Robert Anderson, Liberty's district sales manager,² and Mark Flood acknowledged that Flood had been a dealer for Liberty in Peerless mobile homes for the past twenty-eight years. Flood testified that it was important that he be able to continue selling Peerless homes because Liberty was dominant in the entry level mobile home market and a seller of mobile homes needed to have high-end homes and low-end homes (such as Peerless) to display and sell. Anderson testified that in February 1975, he promised Mark Flood that Flood would be Liberty's exclusive dealer within a radius of thirty to thirty-five miles from the City of Fond du Lac. Anderson stated that he had authority to procure dealers in his sales area and that he was required to assist them. The trial court found that there were corresponding benefits to Liberty in being associated with Flood because Flood had been a dominant name in mobile home sales and Liberty was in the process of establishing sales centers for its products rather than letting any seller offer Liberty mobile homes. Anderson understood that Mark Flood was concerned that Flood be the exclusive dealer for Liberty's products within his area.

The trial court considered the following facets of the Liberty-Flood relationship in reaching its conclusion that a community of interest existed. Liberty provides financial packages to assist in sales and purchases by dealers

² Robert Anderson worked with Flood Mobile Homes until he retired in September 1991.

and buyers, and if a Liberty dealer sells a certain volume, the dealer receives a bonus consistent with that sales volume. Liberty provided brochures and advice on sales and marketing and any other subject necessary to promote Liberty homes. Flood met with Anderson once every four to five weeks to discuss display and sale of Liberty products. Anderson met with Flood's sales staff on these occasions to provide sales information. Flood's sales staff was experienced in selling Liberty homes and staff expertise was a high priority given the numerous models and options available to a consumer. Flood testified that he placed Liberty-specific advertising and was able to document his expense in this regard and that Liberty homes represented a substantial portion of his sales in the six years preceding Liberty's termination of their relationship. Anderson frequently indicated to Flood that he should have an average of five to eight mobile homes in inventory at all times to facilitate Liberty sales, and that he was expected to have a trained staff who could service the homes and a parts and accessories inventory. Flood stated that he stocked his sales lot based upon his discussions with Anderson. The court found that Flood handled warranty work for Liberty and that for major repairs authorization from Liberty was required.

The trial court found that Flood had an exclusive right to display Liberty models within its sales area and concluded that the Flood-Liberty relationship was interdependent because Liberty and Flood shared goals and engaged in cooperative efforts in order to sell Liberty homes. The court further concluded that there was a significant economic relationship between Liberty and Flood over a significant period of time.

On appeal, Liberty argues that certain other aspects of the Flood-Liberty relationship do not suggest a community of interest. A court assessing the existence of a community of interest must consider a wide variety of facets of the business relationship, individually and in combination. *Ziegler*, 139 Wis.2d at 605-06, 407 N.W.2d at 879-80. Liberty argues that Flood did not pay a franchise fee, did not have the exclusive right to sell and distribute Liberty products in the Fond du Lac market, was not required to make any capital expenditures in order to sell Liberty products, was not subject to a sales quota, was not prohibited from displaying and selling competitors' products, and was not required to maintain a parts and accessories inventory, pay for advertising material it received from Liberty, spend a specific amount in advertising Liberty products, provide Liberty with any financial information or absorb the costs of Liberty warranty work.

Liberty does not contend that the trial court's findings of fact are clearly erroneous. Rather, it suggests that other evidence in the record supported other findings and therefore a different legal conclusion. As we have stated, the trial court was charged with evaluating the credibility of the witnesses, weighing the evidence and drawing reasonable inferences. It did so here, and its findings are not clearly erroneous based upon the evidence presented at trial. We conclude that its findings are legally sufficient to meet the standard for a community of interest and therefore a dealership under ch. 135, STATS.

Liberty argues that even if Flood was a dealer, termination of the dealership did not have a significant adverse economic effect on Flood. We disagree. The trial court found that Liberty and Flood had "a significant economic relationship that existed between [them] over a significant period of time." Implicit in this finding is a finding that termination of the relationship would have a significant economic effect. Liberty argues that Flood's sales revenue increased subsequent to the termination of the relationship. However, this argument ignores what Flood's revenues and profits would have been had it been able to continue selling Liberty homes.

Liberty contests the trial court's damages award of \$211,750 in lost profits. In calculating damages, the trial court relied upon various exhibits indicating the number of Liberty units Flood sold in fiscal years 1987 through 1991 and a short period in 1992, the average percentage of Liberty sales to gross Flood sales during that time, profit and loss summaries, and the lost profits suffered by Flood. The court found that Flood's exhibits were reasonable and warranted an award of lost profits in the amount of \$211,750.

Lost profits is an appropriate measure of damages resulting from a grantor's violation of WFDL if they are based on adequate data and proven to a reasonable certainty. *Bush v. National Sch. Studios, Inc.*, 131 Wis.2d 435, 444, 389 N.W.2d 49, 53 (Ct. App. 1986). Liberty complains that Flood's Exhibit 22 demonstrating lost profits is defective because it claims Flood lost fourteen Liberty sales in 1992 due to the termination. Liberty argues that the termination did not occur until January 1993. However, the trial court found that Liberty started changing its relationship with Flood in May 1992 by delaying inventory deliveries. Therefore, it was reasonable for the trial court to look to the 1992 lost sales in determining Flood's total lost profits resulting from the termination

which officially occurred in January 1993. The trial court's analysis of damages was not speculative, was based on the record and properly employed a lost profits approach.

Finally, Liberty challenges the trial court's award of attorney's fees to Flood in the amount of \$22,537.50. Pursuant to § 135.06, STATS., a grantor who violates WFDL can be held liable for the actual costs of the dealer's action, including reasonable actual attorney's fees. Flood's request for attorney's fees was supported by the affidavit of its counsel, Richard J. Carlson.

The appendix to Liberty's brief includes the trial court's March 21, 1995, letter to the attorneys rejecting Liberty's objection to Flood's attorney's fees. While this letter does not appear in the record on appeal, neither party disputes that it was sent. Accordingly, we will consider it. Liberty's objection to Flood's request for attorney's fees is also not included in the record on appeal. However, we assume that such objection was made because the trial court referred to it in its March 21 letter. Finally, the record on appeal does not substantiate that Liberty requested a hearing on the reasonableness of Flood's attorney's fees. However, Flood's respondent's brief does not contest that Liberty requested such a hearing. Therefore, we will take this point as conceded as well. Assuming the foregoing facts, we conclude that the trial court erred in awarding Flood its attorney's fees without holding a hearing on Liberty's objection to their reasonableness.

In assessing a request for attorney's fees, a trial court should consider numerous factors set out in *Siegel v. Leer, Inc.*, 156 Wis.2d 621, 631, 457 N.W.2d 533, 537 (Ct. App. 1990). Here, the trial court's two-line letter does not indicate that it considered these factors and does not provide this court with a sufficient record for reviewing the decision to award attorney's fees. Accordingly, we reverse and remand for further proceedings on the question of an award of actual and reasonable attorney's fees to Flood.³

³ We do not comment on whether the fees awarded by the trial court were actual and reasonable fees. We reverse only because the issue was not fully developed in the trial court.

No costs on appeal to either party.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

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