COURT OF APPEALS
DECISION
DATED AND FILED

April 30, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1496 **Cir. Ct. No. 2012CV10**

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

CHILI IMPLEMENT COMPANY, INC.,

PLAINTIFF-RESPONDENT,

V.

CNH AMERICA, LLC,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Clark County: JON M. COUNSELL, Judge. *Affirmed*.

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. This case arises under Wisconsin's Fair Dealership Law, and involves a dispute between CNH America, a dealership grantor, and Chili Implement Company, a dealer. Chili sued CNH for multiple violations of

the Dealership Law, and a jury found that CNH terminated Chili's dealership without good cause. CNH appeals the resulting judgment. We affirm.

¶2 CNH argues that the circuit court should have granted its summary judgment motion in which CNH asserted that the statute of limitations barred Chili's cause of action. For support, CNH relies on ***Les Moise, Inc. v. Rossignol Ski Co.***, 122 Wis. 2d 51, 361 N.W.2d 653 (1985), as establishing that causes of action under the Wisconsin Fair Dealership Law accrue when a dealer receives a termination notice from the grantor. We conclude that CNH reads ***Les Moise*** too broadly, and that CNH fails to show that ***Les Moise*** controls here. Therefore, we reject CNH's argument that the circuit court should have granted summary judgment.

¶3 CNH also argues that the evidence was insufficient to support the jury's termination-without-good-cause finding. In addition, CNH argues that the verdict was tainted by erroneously admitted evidence in the form of a map purporting to show that CNH had a preconceived plan to terminate Chili. We reject these CNH arguments as well.

Background

¶4 CNH is an agricultural equipment manufacturer, and Chili is an agricultural equipment dealer. CNH and Chili had a grantor-dealer relationship and a corresponding dealership agreement.[1]

[1] The issue of whether a dealership relationship existed was disputed at trial, but the jury found that there was a dealership, and CNH does not dispute that finding on appeal.

¶5 CNH sent Chili a notice dated March 1, 2010, in which CNH stated that Chili was in default of the parties' agreement. The notice stated that Chili failed to achieve a satisfactory market share in selling CNH's products and that Chili failed to stock sufficient inventory conducive to achieving a satisfactory market share. The notice specified that, in order to avoid termination, Chili needed to meet two requirements within one year of the notice date: Chili needed "to meet or exceed 90% of the Wisconsin state market share," and Chili needed to stock sufficient inventory conducive to achieving that market share.

¶6 After determining that Chili failed to satisfactorily meet the requirements, CNH terminated Chili effective May 31, 2011, and Chili sued CNH on January 19, 2012. Among other claims, Chili alleged that CNH violated the Wisconsin Fair Dealership Law by terminating Chili without good cause.

¶7 A cause of action under the Wisconsin Fair Dealership Law "shall be commenced within one year after the cause of action accrues or be barred." WIS. STAT. § 893.93(3)(b).[2] CNH moved for summary judgment, arguing that Chili's cause of action was barred by the one-year statute of limitations because Chili's cause of action accrued when Chili received the March 2010 notice. The circuit court denied the motion, and Chili's action proceeded to trial.

¶8 The jury found that CNH terminated Chili without good cause. We reference additional facts as needed below.

[2] All references to the Wisconsin Statutes are to the 2013-14 version. We cite the current version for ease of reference; there have been no pertinent changes in the statutes during times relevant to this appeal.

Discussion

A. CNH's Summary Judgment Argument Based On The Statute Of Limitations

¶9 There is no dispute that a one-year statute of limitations applies. The dispute is over when Chili's cause of action accrued. If it accrued, as CNH contends, in March 2010 when Chili received the termination notice, then Chili's action, filed in January 2012, is time barred and CNH was entitled to summary judgment.

¶10 Narrowing our focus even more, CNH's specific accrual argument hinges on CNH's reading of ***Les Moise***. CNH reads ***Les Moise*** as establishing a simple blanket rule: a "cause of action" under the Wisconsin Fair Dealership Law accrues when a dealer receives a termination notice from the grantor. We disagree. As we further explain below, although ***Les Moise*** *does* address the situation in which a dealer's claims are based solely on a defective notice, a defect that can be determined by reference to the notice and the facts in existence at the time the notice is received, ***Les Moise*** *does not* dictate the result in other situations, such as the one here, where a dealer has at least one claim that is based on grantor acts or omissions subsequent to the termination notice.

¶11 In the rest of this section, we summarize ***Les Moise***, and then explain why we reject CNH's interpretation. Because CNH's only developed statute-of-limitations argument is based on CNH's incorrect interpretation of ***Les***

Moise, our rejection of that interpretation is sufficient for us to reject CNH's argument that CNH was entitled to summary judgment.[3]

¶12 The grantor in ***Les Moise*** provided the dealer with notice that the dealership would terminate on a specific future date, about four months hence. ***Les Moise***, 122 Wis. 2d at 54-55. Actual termination occurred on the specified date. *See* ***id.*** The dealer subsequently sued the grantor, within one year of the termination but more than one year after receiving the notice. ***Id.*** The dealer in ***Les Moise*** alleged two violations of the Wisconsin Fair Dealership Law, both based solely on a defective notice theory. The dealer alleged: "[T]he written notice of termination … was in violation of sec. 135.04 … for failing to meet the written notice requirements, and of sec. 135.03 … for termination without good cause." ***Id.*** at 56.

¶13 As here, the question in ***Les Moise*** was whether the statute of limitations barred the claims. *See* ***id.*** at 53. More specifically, the supreme court stated the issue as follows:

> Does a cause of action for termination of a dealership upon written notice not complying with the Wisconsin Fair Dealership Law (WFDL), Chapter 135, Stats., and without

[3] The circuit court's summary judgment decision was based on the court's conclusion that there was a material factual dispute relating to whether the March 2010 notice that CNH provided to Chili was a termination notice. The circuit court distinguished ***Les Moise, Inc. v. Rossignol Ski Co.***, 122 Wis. 2d 51, 361 N.W.2d 653 (1985), on that basis, concluding that ***Les Moise*** does not address what should happen when parties have a factual dispute as to the existence of a termination notice. We take a different approach and assume, in favor of CNH and as CNH argues, that the March 2010 notice was a termination notice. *See* ***Correa v. Farmers Ins. Exch.***, 2010 WI App 171, ¶4, 330 Wis. 2d 682, 794 N.W.2d 259 (we may affirm circuit court on alternative grounds). Still, we agree with the circuit court's ultimate conclusion and with Chili's argument that CNH fails to show that ***Les Moise*** is controlling. In sum, we assume without deciding that the March 2010 notice was a termination notice within the meaning of the Wisconsin Fair Dealership Law.

> good cause as required by such statute, accrue for purposes of starting the statute of limitations to run on the date the dealer receives the non-conforming written notice, or on the date termination, pursuant to that notice, actually occurs?

Id. Addressing this question, the ***Les Moise*** court relied on the "***Barry*** rule," which is based on ***Barry v. Minahan***, 127 Wis. 570, 107 N.W. 488 (1906). According to the ***Les Moise*** court, the ***Barry*** rule provides: "[A] cause of action generally accrues for statute of limitations purposes where there exists a claim capable of present enforcement, a suable party against whom it may be enforced, and a party who has a present right to enforce it." *See* ***Les Moise***, 122 Wis. 2d at 57 (quoted source and internal quotation marks omitted).

¶14 Applying the ***Barry*** rule to the facts, it was apparent in ***Les Moise*** that the dealer's cause of action accrued on the date the dealer received the notice. *See* ***Les Moise***, 122 Wis. 2d at 53, 63. On that date, according to the ***Les Moise*** court, the dealer's claims based on the defective notice were capable of present enforcement and the dealer had a right to enforce the claims. *See* ***id.*** at 58. Accordingly, the dealer's claims were time barred.

¶15 As indicated, CNH reads ***Les Moise*** broadly. According to CNH, ***Les Moise*** holds that all causes of action under the Wisconsin Fair Dealership Law accrue when a dealer receives a termination notice from the grantor. CNH bases this reading on statements in ***Les Moise*** that CNH strips of context. For example, CNH points to the ***Les Moise*** court's statement that "[w]hen the dealer receives a written termination notice, he may bring an action under sec. 135.03, if the grantor lacked good cause to terminate, or under sec. 135.04, if the written notice did not comply with that provision." *See* ***id.*** at 61. CNH apparently interprets this

language to mean that any termination-without-good-cause claim, as well as an inadequate-notice claim, always accrues upon receipt of a termination notice.

¶16 CNH might also have relied more broadly on the part of ***Les Moise*** where the court explained why it rejected our contrary decision in the same litigation. We quote the entire pertinent passage, then discuss the passage along with CNH's argument. The supreme court in ***Les Moise*** said:

> In this case, although [the dealer] did claim violations of both secs. 135.03 and 135.04, Stats., the parties did not make any distinction between these two types of claims. Such a distinction is not warranted where the grantor has terminated the dealer as of a future date and given the dealer written notice of that decision. When the dealer receives a written termination notice, he may bring an action under sec. 135.03, if the grantor lacked good cause to terminate, or under sec. 135.04, if the written notice did not comply with that provision.
>
> We disagree with the court of appeals' conclusion that the ***Barry*** rule should not apply to actions brought under the WFDL. First, the remedy provisions of the WFDL become available to dealers upon the grantor's violation of the statute with no need for a determination of actual injury. This legislative scheme is consistent with both commercial reality and the WFDL's policy to protect dealers in their relationships with grantors. Upon receipt of a written notice of termination which does not comply with the WFDL, the dealer has a cause of action which does not require him to wait until actual injury and yet allows him relief from the obvious commercial burden of doing business under a written termination notice. Even if actual injury could not be shown until the termination occurs, the WFDL gives the dealer the right to obtain injunctive relief to prevent termination.
>
> Second, the ***Hansen*** [discovery rule] case is distinguishable. This court in ***Hansen*** said that the ***Barry*** rule "equitably regulates the statute of limitations in the majority of cases." Even assuming that ***Hansen*** is a deviation from the ***Barry*** rule, in ***Hansen***, the limitation period had expired before the claimant knew or should have known about the injury. In this case, on the other hand, when [the dealer] received the written termination notice it was immediately informed of the intention of the

> grantor and it was immediately capable of determining whether the written notice and termination violated the WFDL. Once [the dealer] received the written notice which violated the WFDL, it could pursue remedies available under the WFDL or it could decide to allow the dealership to expire. In ***Hansen***, this court sought to avoid an application of the ***Barry*** rule which would effectively deprive the claimant of the statutory period in which to bring an action because the claimant did not know she had been injured. In the instant case, [the dealer] was given the benefit of the full statutory period because it had written notice of the violation and had a right, upon receipt of the non-conforming notice, to seek a remedy under the WFDL.

Id. at 61-62 (citations omitted).

¶17 We admit some difficulty in interpreting the language in the quoted paragraphs immediately above. As our summary of ***Les Moise*** shows, the court was addressing a situation in which a dealer's claims were based solely on a defective notice. That is, the defective notice in ***Les Moise*** obviously gave rise to a presently enforceable claim for inadequate notice, but also, perhaps less obviously, the defective notice was what gave rise to that dealer's particular termination-without-good-cause claim because that claim was based on the failure of the notice to provide reasons for termination. The discussion we quote seems to stray from the claims at issue in ***Les Moise*** and talk more generally about termination-without-good-cause claims, even if such claims are not similarly tied to the notice. Regardless, ***Les Moise*** cannot reasonably be read as holding that all Wisconsin Fair Dealership Law claims accrue when a termination notice is received.

¶18 First, ***Les Moise*** contains clear limiting language explaining that what matters is whether, upon receipt of a notice, the dealer was "immediately capable of determining" all of its claims so that the dealer had "the benefit of the full statutory time period." *See* ***id.*** at 62. The ***Les Moise*** court said that the dealer

there "was immediately informed of the intention of the grantor and [the dealer] *was immediately capable of determining* whether the written notice *and termination* violated the WFDL." ***Id.*** (emphasis added).

¶19 Second, there are obviously situations in which CNH's interpretation of ***Les Moise*** makes no sense. Suppose, for example, that a grantor notified a dealer that the dealer would be terminated in one year if the dealer did not comply with specified requirements. Suppose further that the notice was adequate, and that the grantor later terminated the dealership, but that the grantor lacked good cause for termination because the dealer, subsequent to the notice, "substantially complied" with the requirements imposed by the grantor. Under CNH's reading of ***Les Moise***, if such a dealer sued after the grantor followed through and wrongfully terminated the dealer, the dealer would have no remedy under the law that is designed, in part, to protect the dealer under those circumstances. *See* WIS. STAT. § 135.03 (requiring that termination be only upon good cause). Or, suppose the same facts except that the grantor lacked good cause to terminate because, subsequent to the notice, the grantor applied the requirements to the dealer in a way that was "discriminatory" when compared to the way the requirements are applied to other dealers. *See* WIS. STAT. § 135.02(4) (defining "good cause"). In these situations, the acts or omissions that are necessary to a cause of action arise *after* the termination notice is delivered. It makes no sense, under the rationale of ***Les Moise***, to say that in these situations the dealer's claim accrued—that is, that the dealer had a presently enforceable cause of action—as of the date the dealer received the termination notice.

¶20 In sum, we disagree with CNH that ***Les Moise*** establishes that all causes of action under the Wisconsin Fair Dealership Law accrue when a dealer receives a termination notice.

¶21 Having rejected CNH's interpretation of ***Les Moise***, the question remains how a lawsuit like Chili's should be treated. Chili's lawsuit falls somewhere in the middle between what occurred in ***Les Moise*** and our hypothetical examples; that is, Chili's lawsuit involved a claim based on inadequate notice that was capable of present enforcement when Chili received the notice, but Chili's lawsuit also involved a claim for termination-without-good-cause that depended on CNH's subsequent acts or omissions relating to good cause. How a lawsuit like this should be treated under ***Les Moise*** is not a question that CNH has briefed, at least not in any meaningful way, and the question is one that we would require full briefing to resolve. Accordingly, we end our discussion of the statute-of-limitations issue here. In sum, CNH fails to show that it was entitled to summary judgment because CNH fails to show that it had a winning statute of limitations argument based on ***Les Moise***.

B. Sufficiency Of The Evidence

¶22 CNH argues that the evidence was insufficient to support the jury's finding that CNH lacked good cause to terminate Chili. We disagree.

¶23 "Appellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it." ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659. "In applying this narrow standard of review, th[e] court considers the evidence in a light most favorable to the jury's determination." ***Id.***, ¶39. We "search the record for credible evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not." ***Id.*** "[I]f the evidence gives rise to more than one reasonable inference, we accept the particular inference reached by the jury." ***Id.***

Moreover, we uphold the verdict even if "'the contradictory evidence [is] stronger and more convincing.'" ***Id.*** (quoted source omitted).

¶24 Consistent with the good cause standard under WIS. STAT. § 135.02(4), the jury here was instructed:

> CNH America had good cause to terminate its dealership agreement with Chili Implement if Chili Implement did not substantially comply with an essential and a reasonable requirement imposed by CNH America.
>
> A requirement that discriminates against Chili Implement and does not apply to similar dealers either by its terms or in the way it is enforced is not an essential and a reasonable requirement.

Thus, we must sustain the jury's verdict if there is evidence to support a finding that the requirements CNH imposed on Chili were not "essential" and "reasonable." And, as the jury was told, a requirement is not essential and reasonable if the requirement discriminated against Chili as compared with other dealers "by [the requirement's] terms or in the way [the requirement was] enforced."

¶25 CNH's supporting insufficiency-of-the-evidence arguments miss the mark because CNH fails to apply all of these good cause standards to all of the evidence favoring Chili. Instead, CNH more narrowly asserts that there is undisputed evidence that Chili's performance was "poor" and "breached" the parties' dealership agreement. This argument, even if correct, does not mean that CNH had good cause to terminate Chili *as defined in the jury instruction*. For example, the argument does not address whether the evidence was sufficient to show discrimination against Chili, thus rendering a requirement not "essential" and "reasonable." Accordingly, we could stop our sufficiency-of-the-evidence

discussion here. Nonetheless, we will briefly summarize some of the evidence and reasonable inferences from the evidence that support the jury's finding.

¶26 CNH informed Chili that Chili was required "to meet or exceed 90% of the Wisconsin state market share" in eight product categories (the "market share" requirement) and to maintain sufficient inventory to meet the market share requirement. Evidence supported a finding that the market share requirement discriminated against a small dealer like Chili because the requirement was based on CNH's largest dealers, which on the whole received larger product discounts than smaller dealers like Chili received. Chili's expert testified and submitted a report supporting a finding that CNH's approach to discounts was inconsistent and arbitrary, and that CNH's approach unfairly disadvantaged small dealers like Chili. CNH does not point to any competing expert opinion.

¶27 Instead of making termination decisions uniformly based on whether dealers met the market share requirement, CNH allowed some dealerships to continue as long as the dealers showed "substantial" or "significant" "improvement," a subjective standard that was never explained to Chili. CNH terminated Chili for failing to show sufficient improvement, even though Chili performed as well as or better than at least one other non-terminated dealer on the CNH-imposed requirements.

¶28 We could summarize additional evidence supporting the jury's verdict, but we conclude that the above summary is sufficient, particularly given CNH's mostly-off-target insufficiency-of-the-evidence arguments.

C. Tainted Verdict: Admission Of Map Evidence

¶29 At trial, the circuit court received into evidence a document purporting to be a map depicting about 20 of CNH's Wisconsin dealers, which did not include Chili. Chili relied on the map at trial to suggest that CNH had a preconceived plan to terminate Chili, that is, a plan to terminate Chili even before sending Chili the termination notice or before giving Chili a chance to meet the notice requirements.

¶30 CNH argues that the circuit court erred in admitting the map because the map lacked adequate foundation, and CNH further argues that the map's admission tainted the verdict, necessitating a new trial. We will assume, without deciding, that the map was improperly admitted. Still, we disagree that a new trial is warranted.

¶31 Evidentiary error warrants reversal here only if there is a "'reasonable possibility that the error contributed to the outcome of the action.'" *See* ***Weborg v. Jenny***, 2012 WI 67, ¶68, 341 Wis. 2d 668, 816 N.W.2d 191 (quoted source omitted). "A reasonable possibility of a different outcome is a possibility sufficient to undermine confidence in the outcome." ***Id.*** (quoted source and internal quotation marks omitted).

¶32 In arguing that this standard was met, CNH attempts to make much of the fact that at trial Chili repeatedly referenced the map on multiple days.[4] However, these repeated references to the map must be viewed in context.

[4] CNH asserts that there were at least thirteen references to the map, apparently including instances in which Chili referred to CNH's long-range plans without making direct reference to the map. We question this way of counting references to the map, but we will assume for the (continued)

¶33 The trial lasted 10 days, Chili put on the testimony of approximately 20 witnesses, and the circuit court received well over 100 exhibits. Most of Chili's direct references to the map were comparatively brief, and most longer exchanges regarding the map focused as much on whether CNH witnesses had knowledge of the map as on what the map purportedly showed. Chili's references to the map played a minor role in Chili's lengthy closing arguments, which the record shows ran well over an hour.

¶34 Although the map was damaging, neither the map nor a plan to terminate Chili regardless of Chili's performance was central to the gist of Chili's claim that CNH terminated Chili without good cause by imposing requirements that were unreasonable and that were applied in a discriminatory fashion. Nor do we agree with CNH that the map was so likely to appeal to the jury's emotion or sympathies that it could have otherwise tainted the verdict. We are confident that the outcome would have been the same with or without the map.

Conclusion

¶35 For the reasons stated above, we affirm the judgment against CNH.

By the Court.—Judgment affirmed.

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

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sake of argument that each of the references CNH cites would have made the jurors think of the map.