

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 12, 2001

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. 00-2518
STATE OF WISCONSIN**

Cir. Ct. No. 99-CV-2429

**IN COURT OF APPEALS
DISTRICT II**

EDISON LIQUOR CORPORATION,

PLAINTIFF-APPELLANT,

v.

**UNITED DISTILLERS & VINTNERS NORTH AMERICA,
INC. AND CAPITOL HUSTING COMPANY, INC.,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County:
J. MAC DAVIS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Edison Liquor Corporation appeals from an order granting summary judgment and dismissing its Wisconsin Fair Dealership Law (WFDL) claims against United Distillers & Vintners North America, Inc. (UDV) and its tortious interference with contract claim against Capitol Husting Company,

Inc. (Capitol). Because we agree with the circuit court that there were no genuine issues of material fact precluding summary judgment, we affirm.

¶2 Edison is a multi-line distributor of wine and spirits in southeastern Wisconsin. In 1990, Edison purchased the assets of United Wine and Spirits Co., another Wisconsin wholesaler. As part of that purchase, Edison obtained distribution rights for Heublein products which were valued at \$474,499. Among the Heublein products Edison gained in the transaction were Almaden and Inglenook wines. UDV was the supplier of Almaden and Inglenook wines. In 1994, UDV sold the Almaden and Inglenook brands to another wine supplier, Canandaigua. Thereafter, Edison obtained these brands from Canandaigua. A written Distributor Sales Agreement governed Edison's relationship with UDV.

¶3 In 1999, UDV terminated its Distributor Sales Agreement with Edison and thereafter entered into a distribution agreement with Capitol, another southeastern Wisconsin wine and liquor wholesaler. Edison brought a declaratory judgment action against UDV seeking a determination that the Wisconsin Fair Dealership Law applied to Edison's relationship with UDV. Edison also claimed that Capitol tortiously interfered with its distribution agreement with UDV. The circuit court dismissed both claims on summary judgment.

¶4 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). 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. The moving party bears the burden of demonstrating the absence of a genuine issue as to any material fact with such clarity as to leave no room for controversy. *Grams v. Boss*,

97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). A request for summary judgment is not defeated by the mere presence of conflicting facts. In order to defeat summary judgment, the conflict must be determinative of the question, *Dahlke v. Dahlke*, 25 Wis. 2d 559, 568A, 131 N.W.2d 362, 122 N.W.2d 584 (1964) (per curiam on motion for rehearing), and must be material to the question of law presented, *De Bonville v. Travelers Insurance Co.*, 7 Wis. 2d 255, 260, 96 N.W.2d 509 (1959).

¶5 Under the WFDL, a dealership exists if there is a contract by which a person is granted the right to sell or distribute goods or services or use a commercial symbol “in which there is a community of interest in the business of offering, selling or distributing goods or services.” WIS. STAT. § 135.02(3)(a) (1999-2000).¹ A 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.” Sec. 135.02(1). A community of interest “must indicate some significant economic relationship between the parties.” *Ziegler Co. v. Rexnord, Inc.*, 139 Wis. 2d 593, 601, 407 N.W.2d 873 (1987) (quoted source omitted). The guideposts that mark a community of interest are: (1) continuing financial interest and (2) interdependence, i.e., “the degree to which the dealer and grantor cooperate, coordinate their activities and share common goals in their business relationship.” *Id.* at 604-05. These guideposts “require a person to demonstrate a stake in the relationship large enough to make the grantor’s power to terminate, cancel or not renew a threat to the economic health of the person ... [such that the end of the] business relationship would have a

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

significant economic impact on the alleged dealer.” *Id.* at 605. The court must consider “a wide variety of facets” of the business relationship, including:

[H]ow long the parties have dealt with each other; the extent and nature of the obligations imposed on the parties in the contract or agreement between them; what percentage of time or revenue the alleged dealer devotes to the alleged grantor’s products or services; what percentage of the gross proceeds or profits of the alleged dealer derives from the alleged grantor’s products or services; the extent and nature of the alleged grantor’s grant of territory to the alleged dealer; the extent and nature of the alleged dealer’s uses of the alleged grantor’s proprietary marks (such as trademarks or logos); the extent and nature of the alleged dealer’s financial investment in inventory, facilities, and good will of the alleged dealership; the personnel which the alleged dealer devotes to the alleged dealership; how much the alleged dealer spends on advertising or promotional expenditures for the alleged grantor’s products or services; the extent and nature of any supplementary services provided by the alleged dealer to consumers of the alleged grantor’s products or services. Each of the facets may relate to one or both of the guideposts and we do not intend this list to be all inclusive.

Id. at 606.

¶6 On summary judgment, the court must examine these facets in light of the continuing financial interest and interdependence guideposts to determine whether there is a material factual dispute as to whether Edison and UDV shared a community of interest. *See id.* at 606-07.

¶7 The circuit court concluded that there were no genuine issues of material fact on the question of whether Edison and UDV had a community of interest. Sales of UDV’s products amounted to between 3% and 4% of Edison’s revenue and profits, and the circuit court held that this low percentage did not demonstrate a community of interest in conjunction with other facets of the Edison-UDV relationship. The court concluded that UDV’s relationship with

Edison was not meaningfully different from the relationship between any other vendor and vendee. The court noted that Edison sold products which were price and quality competitors of UDV's products, which was typical of a vendor-vendee relationship in which a vendee sells competing product lines. Additionally, Edison's marketing efforts did not highlight that it obtained its products from UDV.

¶8 On the question of interdependence, the circuit court held that UDV's termination of Edison's distribution agreement did not threaten Edison's economic health. The court noted that Edison contemporaneously marketed competitive products and promptly acquired dozens of new brands after the UDV termination. Edison did not reduce its work force or warehouse space in the aftermath of the UDV termination. Edison's success in overcoming the negative impact of UDV's termination established that Edison did not suffer a significant economic impact. Granting all reasonable inferences to Edison, the court found that Edison did not meet its burden to demonstrate interdependence because Edison used its warehouse for all products it distributed, without differentiation for UDV products, and did not incur substantial warehouse expense to distribute UDV's products. The court concluded that Edison engaged in ordinary sales promotion efforts for UDV's products. The court concluded that Edison did not establish a community of interest as required under the WFDL.

¶9 On appeal, Edison argues that its financial investment relating to its distributor agreement with UDV and the parties' cooperative activities presented genuine material factual issues as to whether Edison and UDV shared a community of interest.

¶10 Edison argues that it originally invested \$474,499 for the right to distribute products from UDV. However, this investment was principally for the Almaden and Inglenook brands, which UDV sold to another supplier with whom Edison established and continues to have a distributorship relationship. Therefore, the \$474,499 investment continues to provide a benefit to Edison and is unaffected by the termination of its UDV distributorship.

¶11 Edison also argues that it invested approximately \$500,000 in upgrades and equipment to handle UDV's brands. However, if Almaden and Inglenook were the principal brands for which Edison made this investment and because Edison continues to sell these brands through a different distributor, we fail to see the harm to Edison in ending a relationship with UDV which did not include these brands after 1994, five years before UDV terminated Edison's distributor agreement. We similarly reject Edison's claim that its warehouse needs and costs were interdependent with UDV. Edison renewed its warehouse lease in March 2000 after the UDV termination. Additionally, Edison's vice-president conceded that \$125,000 in warehouse improvements were used proportionally for all of the products obtained from Edison's suppliers.

¶12 Edison argues that it had multiple duties under its Distributor Sales Agreement. However, the summary judgment record reveals that these are the normal obligations of distributors in the liquor supply business. We fail to see that UDV and Edison coordinated their efforts or that Edison expended employee or other resources specifically for UDV in an amount out of proportion to UDV's business with Edison.

¶13 Sales volume is a relevant consideration when evaluating continuing financial interest. *Id.* at 607. From fiscal 1995 through fiscal 1999, UDV's business made up between 2.0% and 2.7% of Edison's annual gross sales.²

¶14 None of Edison's employees were dedicated to the UDV business. The Distributor Sales Agreement provided that while Edison had the right to sell goods bearing trademarks owned by UDV, the exclusive right to those trademarks remained with UDV. The trademarks only identified UDV brands, not UDV itself. UDV did not appear on any of Edison's signage, corporate forms or documents. Edison provided on-premises marketing materials for UDV's brands as it did for the other brands it distributes. Edison also sold products which competed with UDV's brands. Edison distributed products from almost seventy suppliers, including UDV. Edison's vice-president of sales opined that the percentage of time spent by Edison's sales, warehouse, delivery and office staff was probably about the same as the percentage of Edison's total sales attributable to UDV.

¶15 The WFDL is designed to protect a distributor with a significant financial stake and interdependence with the grantor. Even allowing for some factual disputes which are not determinative and considering all of the arguments raised on appeal,³ no reasonable person could conclude that Edison established

² Edison concedes that UDV's lines accounted for 3.8% of its net sales and 4.1% of its gross profits in fiscal year 1999. These conflicting facts do not change the analysis or preclude summary judgment because the factual conflict is not determinative of the community of interest question.

³ Any argument not expressly addressed is deemed rejected. *See State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

continuing financial interest and interdependence based on this summary judgment record. We affirm the circuit court's grant of summary judgment dismissing Edison's WFDL claim against UDV.⁴

¶16 We turn to Edison's tortious interference with contract claim against Capitol. The elements of tortious interference are: "(1) the plaintiff had a contract or prospective contractual relationship with a third party; (2) the defendant interfered with the relationship; (3) the interference was intentional; (4) a causal connection exists between the interference and the damages; and (5) the defendant was not justified or privileged to interfere. To have the requisite intent, the defendant must act with a purpose to interfere with the contract." *Dorr v. Sacred Heart Hosp.*, 228 Wis. 2d 425, 456-57, 597 N.W.2d 462 (1999) (citation omitted).

¶17 On summary judgment, the circuit court focused on whether there were material facts in dispute relating to allegedly intentional acts by Capitol to disrupt Edison's relationship with UDV. The court concluded that there was no evidence that Capitol interfered with Edison's contractual relationship with UDV. Rather, UDV made the decision to terminate Edison for reasons unrelated to the availability of Capitol to distribute UDV's lines, even though Capitol strongly promoted its availability to UDV before UDV terminated Edison. The court concluded that UDV terminated Edison because of differences regarding Edison's political activity relating to the relationship with distributors like UDV, and that UDV decided to terminate Edison before it made any commitment to Capitol. The court characterized Capitol's expression of interest in a distributor relationship

⁴ Because we agree that summary judgment was appropriate as to Edison's WFDL claim against UDV, we do not address Edison's WFDL claim against Capitol.

with UDV and Capitol's acquisition of UDV's business after Edison's termination as "good clean competition, not tortious interference."

¶18 Edison claims that the summary judgment record permits reasonable inferences that Capitol interfered with its relationship with UDV and therefore summary judgment was inappropriate. Edison's appellate arguments are largely premised on its contention that its relationship with UDV was subject to the WFDL. We have already held that the relationship was not subject to the WFDL.

¶19 The summary judgment record shows that UDV decided to terminate Edison before awarding the distributorship to Capitol. UDV wanted to consolidate its lines with a single distributor, and Capitol was already a distributor for other lines. Edison and UDV had areas of dispute and what could be characterized as an acrimonious history and, according to a UDV representative, the relationship had "soured beyond repair." The record indicates that Capitol's conduct had no bearing on UDV's decision to terminate its distributorship with Edison.

¶20 Edison argues that inferences from Capitol's agreement to indemnify UDV for legal expenses and damages arising from Edison's challenge to its termination present material factual issues on the tortious interference claim. Edison contends that the indemnity agreement was a condition precedent to its termination and the appointment of Capitol as UDV's distributor. The summary judgment record indicates that it was UDV's practice to require an indemnification agreement whenever it changed distributors. In light of this undisputed fact, the existence of an indemnification agreement and UDV's strategic decision to consolidate distributors did not create a factual issue sufficient to preclude summary judgment on the tortious interference claim.

By the Court.—Order affirmed.

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

