

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 3, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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.

No. 00-3092

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**MICHAEL S. JAKUBOWSKI AND MARTIN C.
JAKUBOWSKI,, INDIVIDUALLY AND D/B/A M & M
SHORECREST LIQUOR,**

PLAINTIFFS-APPELLANTS,

V.

**NEVAC, INC., D/B/A SHORECREST SHOPPING CENTER,
BRIAN R. RIORDAN, INC.,**

DEFENDANTS,

BADGER COMMERCIAL SALES, INC.,

DEFENDANT-RESPONDENT,

**SCHULTZ SAV O STORES, INC., D/B/A PIGGLY WIGGLY
GROCERY STORE, STRUCK BROTHERS, INC., D/B/A
MAYTAG JUST LIKE HOME LAUNDRY, SHORECREST
SHOPPING CENTER, LLC,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Racine County:
EMMANUEL VUVUNAS, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael S. Jakubowski and Martin C. Jakubowski appeal from the judgment entered in favor of Badger Commercial Sales, Inc. The Jakubowskis argue on appeal that Badger is not entitled to summary judgment both because there are disputed issues of fact and as a matter of law. We disagree, and affirm the judgment of the circuit court.

¶2 The Jakubowskis brought suit against Badger, among others, alleging claims against Badger for conversion and misappropriation, misappropriation of trade secrets, and breach of the duty of an agent. The Jakubowskis owned and operated a liquor store in a shopping center. They became interested in opening a laundromat in the same center, and contacted Badger, a seller of commercial laundry equipment. The Jakubowskis discussed with Badger the possibility of establishing the laundromat. Badger conducted demographic, feasibility and investment studies for the proposed laundromat and gave the documents to the Jakubowskis.

¶3 At some point, the main store in the shopping center, Piggly Wiggly, objected to the proposed laundromat. The lease the Jakubowskis had for the liquor store provided them the exclusive right to sell liquor in that center. The shopping center manager told the Jakubowskis that Piggly Wiggly would drop its objection to the laundromat if the Jakubowskis would allow Piggly Wiggly to have twenty feet of linear space in its store to sell hard liquor. The Jakubowskis refused and the negotiations for the laundromat stopped. Sometime subsequently, Badger

worked with a different customer to establish a laundromat at the same site. The Jakubowskis brought suit and Badger moved for summary judgment.

¶4 The Jakubowskis argue that Badger is not entitled to summary judgment. Our review of the circuit court's grant of summary judgment is de novo, and we use 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 is well known, and we need not repeat it here. 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. We conclude that there are no genuine issues of material fact and Badger is entitled to judgment as a matter of law.

¶5 The first issue is whether the Jakubowskis established that Badger acted as their agent, and that Badger breached the duties owed by an agent to its principal. Badger argues that an agency relationship never existed. The elements necessary to establish an agency relationship are: "(1) 'the express or implied manifestation of one party that the other shall act for him;' (2) 'who has retained the right to control the details of the work;' and (3) 'whether the party agreeing to perform the service is engaged in a distinct occupation or business apart from that of the person who engages the services.'" *Peabody Seating Co. v. Jim Cullen, Inc.*, 56 Wis. 2d 119, 123, 201 N.W.2d 546 (1972) (footnote omitted). We agree with Badger that the Jakubowskis have not established these elements.

¶6 Instead, the record establishes, as the circuit court found, that the parties had a business relationship. Badger was selling laundry equipment, the Jakubowskis were trying to start a laundromat. In order to make the sale, Badger was trying to help the buyer obtain a place to locate that equipment. As part of its

business enterprise, Badger offered demographic, investment and other types of services to help determine appropriate locations. Badger was simply accommodating the Jakubowskis to make it easier for them to purchase Badger's product. We cannot conclude that this conventional wholesaler/customer relationship developed into an agency relationship as a matter of law. The record does not support the Jakubowskis' argument that Badger was acting as their agent.

¶7 The Jakubowskis also brought claims against Badger for misappropriation and conversion. As part of the service it provided to the Jakubowskis, Badger had prepared demographic, feasibility and investment studies about the proposed site. The Jakubowskis claim that Badger converted these studies when it gave them to another customer who eventually opened the laundromat at the site. Conversion requires a showing of a wrongful taking, or, when there is no wrongful taking, a showing that the rightful owner made a demand for the return of the chattel which demand was refused. *Prod. Credit Ass'n of Madison v. Nowatzski*, 90 Wis. 2d 344, 353-54, 280 N.W.2d 118 (1979). In this case, the Jakubowskis have not established either that Badger wrongfully took the documents, or that they demanded that Badger return the documents to them and Badger refused. The Jakubowskis have not established their claim of conversion and Badger is entitled to judgment as a matter of law.

¶8 The Jakubowskis have also not established that Badger misappropriated the documents. In order to establish misappropriation, a party must show: "(1) time, labor and money expended in the creation of the thing misappropriated; (2) competition; and (3) commercial damage to the plaintiff." *Leske v. Leske*, 197 Wis. 2d 92, 100, 539 N.W.2d 719 (Ct. App. 1995). First, there was no evidence that Badger and the Jakubowskis were in competition with each other: Badger sold laundry equipment, the Jakubowskis ran a liquor store.

Moreover, as in *Leske*, the information here was so far removed from the actual completion of the project as to constitute only “a feeble step in a competitive war.” *Id.* at 101. We conclude that Badger is entitled to judgment as a matter of law on this claim as well.

¶9 The Jakubowskis also claim that Badger misappropriated a trade secret. We again conclude that Badger is entitled to judgment as a matter of law because we conclude that the documents at issue did not contain trade secrets. The Jakubowskis assert that Badger misappropriated trade secrets when it gave the studies it had prepared for the Jakubowskis to another customer. A trade secret is:

information, including a formula, pattern, compilation, program, device, method, technique or process to which all of the following apply:

1. The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

2. The information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.

WIS. STAT. § 134.90(1)(c) (1999-2000).

¶10 An indispensable feature of a trade secret is that “[t]he subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be his secret.” *Abbott Labs. v. Norse Chem. Corp.*, 33 Wis. 2d 445, 457, 147 N.W.2d 529 (1967) (quoting RESTATEMENT OF TORTS § 757 cmt. b). Further, “a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information.” *Id.*

¶11 These documents do not meet the definition of trade secrets for two reasons. First, the information itself was readily ascertainable from other, proper sources. Anyone who was interested could have obtained the same information either from Badger or from another source, simply by commissioning a study.¹ Secondly, the evidence does not show that the Jakubowskis kept the information a secret. The Jakubowskis assert that these documents were trade secrets because they kept the documents in the safe in their house. While this fact is undisputed, the evidence also established that the Jakubowskis disclosed the information to at least two other people. The Jakubowskis have not established that the documents were trade secrets and Badger is entitled to judgment as a matter of law.

¶12 For the reasons stated, the judgment of the circuit court is affirmed.

By the Court.—Judgment affirmed.

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

¹ The Jakubowskis assert that their idea to put a children's play area in the back of the store was a unique idea contained in the floor plan. The evidence, however, establishes that children's play areas were part of the Maytag "Just Like Home" concept, and were not unique to the Jakubowskis' plan. We cannot conclude that the location of the play area in the back of the store was so unique as to create a trade secret.

