COURT OF APPEALS
DECISION
DATED AND RELEASED

June 15, 1995

No. 94-2096

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

DAVID GOLPER CO., INC., a Wisconsin corporation, d/b/a SUNRISE AGRI-SERVICE,

Plaintiff-Appellant,

v.

CARGILL, INCORPORATED, and LAVERNE ROSMAN,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Jefferson County: ARNOLD SCHUMANN, Judge. *Affirmed*.

Before Gartzke, P.J., Sundby and Vergeront, JJ.

VERGERONT, J. David Golper Co., Inc. ("Golper Inc.") appeals from a summary judgment dismissing all of its claims against Cargill, Incorporated ("Cargill") and one of Golper Inc.'s former employees, LaVerne Rosman. Golper Inc.'s action arose out of Cargill's termination of an alleged dealership agreement with Golper Inc. to sell livestock feeds and Rosman's

departure from Golper Inc.'s employ to work for Cargill. In its complaint, Golper Inc. alleged: (1) Cargill terminated Golper Inc.'s dealership without notice and good cause in violation of the Wisconsin Fair Dealership Law, ch. 135, STATS.; (2) Cargill and Rosman engaged in unfair competition against Golper Inc.; (3) Cargill breached its duty of good faith under tort and contract law; (4) Rosman breached his duty of loyalty to Golper Inc.; and (5) Cargill and Rosman intentionally interfered with Golper Inc.'s prospective contractual relations. We conclude that summary judgment was properly awarded to defendants on each claim and, accordingly, affirm.

BACKGROUND

The relevant facts are undisputed. Golper Inc. is engaged in the sale of livestock feeds, seeds, fertilizer and chemicals through its Sunrise Agri-Service division.[1] Cargill is engaged in the business of, among other things, manufacturing and distributing livestock feeds and related products through its Nutrena Feeds division.

In approximately 1973, David Golper Co. entered into an oral agreement with Cargill to sell Nutrena livestock feeds to farmers in the Watertown area. Nutrena is a brand of livestock feeds manufactured and distributed by Cargill under its Nutrena Feeds division. At that time, David Golper Co. was not incorporated and was owned by Sam and Fannie Golper. In October 1974, the Golpers incorporated their business under the name of David Golper Co., Inc. In early 1975, Albert and Darlene Grunewald purchased all of the shares of Golper Inc. from the Golpers.

Under the agreement to sell Nutrena livestock feeds, Golper Inc. was not granted an exclusive territory and was permitted to sell other brands of feeds. Cargill did not require any minimum purchases or minimum inventory, and did not impose performance standards. The agreement did not prohibit Cargill from selling Nutrena feeds to other businesses for resale in the Watertown area or from selling Nutrena feeds directly to consumers. Golper

[1] At all relevant times, Golper Inc. was composed of three divisions: (1) Sunrise Farms--engaged in the wholesale distribution of cheese, butter and eggs; (2) Sunrise Pools & Spas--engaged in retail sales and service of pools and spas; and (3) Sunrise Agri-Service.

Inc. was authorized to use, and in fact did use, Nutrena's name and trademarks on its signs and vehicles and in its advertising and promotions. Cargill at times provided Golper Inc. with advertising and promotions identifying Golper Inc.'s Sunrise Agri-Service division with Nutrena.

In January 1985, Golper Inc. hired LaVerne Rosman to work as the outside route salesman for its Sunrise Agri-Service division. As outside route salesman, Rosman's duties included visiting farm customers and prospective customers to obtain orders for Golper Inc.'s products, principally Nutrena feeds. Rosman was paid on a salary plus commission basis and the Nutrena line was the principal focus of Rosman's sales activities. During the time Rosman was employed by Golper Inc., Nutrena was the only major feed line carried by Golper Inc., and Rosman made the vast majority of Golper Inc.'s livestock feed sales.

Rosman was referred to Golper Inc. by Cargill's territory sales manager, Peter Brandt. Upon Rosman's hiring, Brandt assisted Golper Inc. in training Rosman and, for several years, Cargill assisted Golper Inc. in paying Rosman's wages.[2] Throughout his employment with Golper Inc., Brandt visited Golper Inc.'s Sunrise Agri-Service division on a weekly basis and generally spent one half-day on each visit working with Rosman and other Golper Inc. employees on promoting Nutrena products. Usually, Brandt would accompany Rosman in the field on sales calls. Rosman also attended training programs offered by Nutrena and was responsible for ordering Nutrena products from Cargill.

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[2] The dissent refers to a written agreement between Nutrena and Albert Grunewald, dated February 7, 1985, concerning a "Nutrena Dealer Fieldman Program" in which Cargill agrees to assist Golper Inc. in the hiring of Rosman as a full-time outside route salesman. Although the agreement is attached as an exhibit to the affidavit of Golper Inc.'s counsel, Attorney Gary Antoniewicz, neither party refers to it in their briefs. With respect to the agreement, the affidavit is not "made on personal knowledge and [does not] set forth such evidentiary facts as would be admissible in evidence" as required by § 802.08(3), STATS. In his deposition, Randall Overbaugh, Cargill's district general manager for its Nutrena Feeds division, could not identify the document and stated that the fieldman program is "something that hasn't been around for a while." The agreement also provides that it may be terminated by either party for any reason by thirty days' written notice. Golper Inc. did not provide any evidence regarding the time period during which the agreement was in existence.

While employed with Golper Inc., Rosman was required to maintain a list of his customers and their addresses, a list of his customers' feed needs, as well as a customer route itinerary. Some of this information was stored in a three-ring binder. Rosman also used a current list of prices at which Golper Inc. sold livestock feeds.

As of August 1, 1992, Golper Inc. maintained a warehouse for storage of bagged Nutrena feeds; maintained and owned a 1974 feed truck for the delivery of bag and bulk feeds; maintained and owned a 1987 van for use by its route salesman; and owned a mineral mixer for mixing certain feeds for its customers. Golper Inc.'s Sunrise Agri-Service division also employed a general manager, a route salesman, and a truck driver principally for its feed business, along with part-time office and administrative staff.

In late July 1992, Rosman quit his job with Golper Inc. and almost immediately went to work for Cargill as a "technical sales representative" to sell Nutrena feeds directly to farmers in the Watertown area. There was no agreement between Rosman and Golper Inc. which prevented Rosman from competing with Golper Inc. after he terminated his employment there. After leaving, Rosman sent a letter to farmers in the Watertown area addressed to "Valued customers and prospects." The letter stated that as of August 1, 1992, he had accepted a position with Cargill's Nutrena Feeds division and that he would continue to service his customers with Nutrena feeds. Golper Inc.'s sales of livestock feeds dropped by over seventy-five percent for the first month after Rosman's termination. Golper Inc. essentially discontinued its feed, seed and fertilizer business shortly after Rosman's departure.

Our review of a grant of summary judgment is *de novo*. ***Reel Enterprises v. City of La Crosse***, 146 Wis.2d 662, 667, 431 N.W.2d 743, 746 (Ct. App. 1988). We apply the same standard as the trial court and we follow the methodology set forth in ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987).

WISCONSIN FAIR DEALERSHIP LAW

Golper Inc. alleges that Cargill terminated its dealership without notice and good cause in violation of the Wisconsin Fair Dealership Law (WFDL). As a threshold matter, Cargill contends that the WFDL does not apply because the alleged dealership agreement between the parties was entered into prior to the effective date of the law. We disagree.

When the WFDL was originally enacted, it applied only to dealership agreements entered into after April 5, 1974, the effective date of the act. However, by an amendment in 1977, the legislature repealed the section governing applicability of the law to those agreements entered into after the effective date of the act. The legislature replaced this section with § 135.025(2)(d), STATS., which provides that the WFDL governs "all dealerships, including any renewals or amendments, to the full extent consistent with the constitutions of this state and the United States." By this amendment, the legislature seemed to invite courts to extend coverage under the WFDL to agreements entered into prior to April 5, 1974. ***Kealey Pharmacy & Home Care Servs. Inc. v. Walgreen Co.***, 539 F. Supp. 1357, 1362 (W.D. Wis. 1982), *aff'd*, 761 F.2d 345 (7th Cir. 1985).

However, in ***Wipperfurth v. U-Haul Co.***, 101 Wis.2d 586, 304 N.W.2d 767 (1981), the supreme court held that the application of the WFDL to agreements that predated the effective date of the law would be an unconstitutional impairment of the obligation of contract, in violation of article I, section 10 of the United States Constitution.

Sam and Fannie Golper entered into an oral agreement with Cargill to sell Nutrena feeds in approximately 1973. Under ***Wipperfurth***, that agreement would not be covered by the WFDL because it predated the effective date of the law. However, the Golpers incorporated their business in October 1974, several months after the effective date of the WFDL. Golper Inc. concedes that there was no express, written agreement between the parties upon incorporation of the business. But the WFDL does not require an express, written agreement; it permits an oral, implied agreement. Section 135.02(3), STATS. For an implied contract to exist, there must be a mutual intention to contract and the minds of the parties must meet. ***Kramer v. City of Hayward***,

57 Wis.2d 302, 306-07, 203 N.W.2d 871, 873-74 (1973); ***Superview Network, Inc. v. SuperAmerica***, 827 F. Supp. 1392, 1396 (E.D. Wis. 1993). Whether there was an implied agreement upon incorporation of the business presents a question of law because the material facts and reasonable inferences from those facts are undisputed. *See* ***Howell Plaza, Inc. v. State Highway Comm'n***, 92 Wis.2d 74, 80, 284 N.W.2d 887, 889 (1979).

We conclude that there was an implied agreement between the parties upon incorporation of the business. The parties to the original agreement changed and Cargill acknowledges that it acquiesced in Golper Inc.'s decision to do business as a corporation. Although Cargill argues that there were no material or substantive changes in the way the parties conducted business after the incorporation, we view Cargill's acquiescence in David Golper Co.'s change in ownership and business structure as a "significant alteration of the relationship between the parties." *See* ***Kealey Pharmacy & Home Care Servs.***, 539 F. Supp. at 1363; ***Bostwick-Braun Co. v. Szews***, 645 F. Supp. 221, 226 (W.D. Wis. 1986) (franchise agreement is between grantor and corporate entity, not grantor and individual shareholders; shareholders are exposed only to limited liability). The first agreement was between Cargill and David Golper Co., a sole proprietorship; the new agreement was between Cargill and Golper Inc., a newly-established corporation. We interpret this as a "fresh decision" by the parties to conduct business relations with one another. *See* ***Kealey Pharmacy & Home Care Servs.***, 539 F. Supp. at 1363.

Because we conclude that the parties entered into an agreement after the effective date of the WFDL, ***Wipperfurth*** does not apply. *See also* ***E. A. Dickinson & Assocs. v. Simpson Elec. Co.***, 509 F. Supp. 1241, 1247 (E.D. Wis. 1981) ("If a contract is renewed or amended after the effective date of the Act, or a new contract is entered into, that contract is governed by the Act").

Cargill next contends that the WFDL does not apply because the parties did not have a dealership agreement for purposes of the WFDL. The WFDL protects dealers against unfair treatment by grantors by prohibiting grantors from terminating dealerships without good cause and ninety days' notice. Sections 135.03 and 135.04, STATS. The purpose of the WFDL is "[t]o protect dealers against unfair treatment by grantors, who inherently have superior economic power and superior bargaining power in the negotiation of dealerships." Section 135.025(2)(b), STATS.

Section 135.02(3), STATS., defines "dealership" as (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).

The parties agree that the first two elements of a dealership are satisfied. The dispute centers on whether the third element, a "community of interest," existed between the parties. Section 135.02(1), STATS., defines community of interest as "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." It is this element which most distinguishes dealerships from other business relationships and it is difficult to define with precision. ***Ziegler Co. v. Rexnord, Inc.***, 139 Wis.2d 593, 600, 407 N.W.2d 873, 877 (1987). However, our supreme court has aided our analysis by providing two guideposts: (1) "interdependence"--some degree of cooperation, coordination of activities and sharing of goals between the grantor and grantee, and (2) a continuing financial interest--a shared financial interest in the operation of the dealership or the marketing of a good or service. ***Ziegler***, 139 Wis.2d at 604-05, 407 N.W.2d at 878-79. According to the ***Ziegler*** court, these guideposts are closely related aspects of the concept of community of interest and should assist courts in parsing the facts in an individual case. ***Id.*** at 605, 407 N.W.2d at 879.

The ***Ziegler*** court also described ten facets of the parties' relationship for a court to examine in relation to one or both of the two guideposts: (1) the length of the parties' relationship; (2) the extent and nature of obligations imposed by the parties' contract or agreement; (3) the percentage of time or revenue the grantee devotes to the grantor's products or services; (4) the percentage of the grantee's gross proceeds or profits that the grantee derives from the grantor's products or services; (5) the extent and nature of the grantor's grant of territory to the grantee; (6) the extent and nature of the grantee's uses of the grantor's proprietary marks; (7) the extent and nature of the grantee's financial investment in inventory, facilities, or goodwill of the alleged dealership; (8) the personnel devoted to the alleged dealership by the grantee; (9) the extent of the grantee's expenditures on advertising or promotion for the grantor's products or services; and (10) the extent and nature of any supplementary services provided by the grantee to consumers of the grantor's products or services. ***Ziegler***, 139 Wis.2d at 606, 407 N.W.2d at 879-80. Each of

the facets may relate to one or more of the guideposts and the list is not exhaustive. ***Id.*** at 605-06, 407 N.W.2d at 879.

In essence, the two guideposts require an alleged grantee:

> [T]o 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 (thus giving the grantor inherently superior bargaining power). The alleged dealer's economic health is threatened where a termination, cancellation, failure to renew, etc., a business relationship would have a significant economic impact on the alleged dealer.

Ziegler, 139 Wis.2d at 605, 407 N.W.2d at 879.

If the material facts are undisputed, whether or not a community of interest exists within the meaning of the WFDL is a question of law. ***Guderjohn***, 179 Wis.2d at 205, 507 N.W.2d at 117. We decide questions of law without deference to the opinion of the trial court. ***Id.***

INTERDEPENDENCE

The interdependence guidepost requires a showing by the alleged grantee that the parties shared common goals and engaged in a cooperative effort more significant than in a typical vendor/vendee relationship. ***Ziegler***, 139 Wis.2d at 605, 407 N.W.2d at 879. At the outset, we acknowledge that a number of the ***Ziegler*** facets weigh in favor of Golper Inc.'s position. The parties' business relationship exceeded eighteen years. Golper Inc. was authorized to use, and in fact did use, Nutrena's name and trademarks on its signs and vehicles and in its advertising and promotions. The relationship between Rosman and Golper Inc., on the one hand, and Cargill's territory sales manager, Peter Brandt, on the other, reveals a degree of cooperation and coordination not typically associated with a vendor/vendee relationship. As indicated, Rosman was hired on the recommendation of Cargill and, for a time, Cargill assisted Golper Inc. in paying a portion of Rosman's salary. Brandt visited on at least a weekly basis and generally spent a half-day on each visit working with Rosman and other Golper Inc. employees. Cargill also provided Golper Inc. with advertising and promotions identifying Golper Inc.'s Sunrise Agri-Service division with Nutrena feeds. Finally, although not required by the agreement, Golper Inc. offered what the parties refer to as "supplementary services" to its customers, including feed testing and ration balancing.

However, we are persuaded by the absence of other ***Ziegler*** facets that Golper Inc. has not made a sufficient showing of interdependence. First, and most significantly, Cargill did not grant Golper Inc. an exclusive territory. *See* ***Guderjohn***, 179 Wis.2d at 212, 507 N.W.2d at 120 (no dealership when, among other things, grant of territory was not exclusive). *See also* ***Frieburg Farm Equip., Inc. v. Van Dale, Inc.***, 978 F.2d 395, 399 (7th Cir. 1992) (the grant of an exclusive territory is an attribute of a dealership); ***C.L. Thompson Co. v. Festo Corp.***, 708 F. Supp. 221, 226 (E.D. Wis. 1989). Second, Golper Inc. was permitted to sell competing products and was not required to use its best efforts to sell Nutrena feeds. *See* ***Guderjohn***, 179 Wis.2d at 212, 507 N.W.2d at 120 (no dealership when, among other things, alleged dealer could sell other products and was not required to use its best efforts to sell grantor's products). Third, Cargill did not impose any minimum purchase requirements or certain inventory levels. *See* ***Guderjohn***, 179 Wis.2d at 212, 507 N.W.2d at 120 (no dealership when, among other things, alleged dealer was not required to maintain a certain inventory); ***Cajan of Wisconsin, Inc. v. Winston Furniture Co.***, 817 F. Supp. 778, 779 (E.D. Wis. 1993) (no dealership when, among other things, alleged grantor did not impose minimum inventory), *aff'd*, 21 F.3d 430

(7th Cir. 1994) (Table). Fourth, Cargill did not require sales quotas and did not impose any performance reviews. *See* ***Guderjohn***, 179 Wis.2d at 212, 507 N.W.2d at 120 (no dealership when, among other things, alleged dealer was not subject to any performance evaluations); ***Cajan of Wisconsin***, 817 F. Supp. at 779 (no dealership when, among other things, no sales quotas or performance standards were required).

Considering all of the relevant ***Ziegler*** facets in light of the interdependence guidepost, we conclude the relationship between Cargill and Golper Inc. is not significantly different from the typical vendor-vendee relationship.

CONTINUING FINANCIAL INTEREST

In ***Ziegler***, our supreme court explained that in order to establish a dealership, the alleged grantee must demonstrate a financial interest in the relationship such that termination would have significant economic consequences. ***Ziegler***, 139 Wis.2d at 605, 407 N.W.2d at 879. This type of financial interest is not present here.

In terms of Golper Inc.'s financial investment in the alleged dealership, it is undisputed that Golper Inc. maintained a warehouse used for the storage of bagged Nutrena feeds, a truck used for the delivery of bag and bulk feeds, a van for use by its route salesman, and a mineral mixer for mixing livestock feeds for its customers. However, with respect to the warehouse, Golper Inc. does not claim that it was constructed or acquired to house Nutrena feeds. *See* ***Ziegler***, 139 Wis.2d at 609, 407 N.W.2d at 881 (issue of material fact as to whether buildings were acquired or constructed in furtherance of dealership). Moreover, Golper Inc. has not provided any evidentiary facts that the warehouse would be worth less in another use or for a different supplier. *See* ***Moore v. Tandy Corp.***, 819 F.2d 820, 823 (7th Cir. 1987) (no dealership where alleged grantee did not make an investment "sunk in specialized resources ... which would be worth less in another use"). With respect to the vehicles, Golper Inc. has failed to present any evidence on how they would be worth less in another use or for a different supplier, or why it could not recover their value by selling them. *See* ***Frieburg Farm Equip.***, 978 F.2d at 399 (a dealership exists if the alleged grantee has made sizable, not-fully-recoverable investments specialized in some way to the grantor's goods or services). The concern of the

WFDL is with the grantee that makes a financial investment that may become unrecoverable if he or she is terminated by his or her supplier. ***Moore***, 819 F.2d at 824. Golper Inc. is not such a grantee.

In terms of what percentage of gross proceeds or profits derive from the alleged grantor's products or services, it is true that a significant percentage of Golper Inc.'s total sales were derived from the sale of livestock feeds. In the fiscal year ending September 30, 1990, 23.5% of Golper Inc.'s total sales were attributable to livestock feeds; in the fiscal year ending September 30, 1991, 19.0% of Golper Inc.'s total sales were attributable to livestock feeds; and in the fiscal year immediately prior to the commencement of the lawsuit, 15.0% of Golper Inc.'s total sales were attributable to livestock feeds.[3] Golper Inc. also argues that more than one-third of its workforce was devoted principally to its livestock feed business and that, at least in one year, the majority of Sunrise Agri-Service's operating expenses were attributable to its feed business. However, as with its investments, Golper Inc. has not presented any evidentiary facts establishing why it could not substitute another brand of feed for Nutrena feeds.

Following the interdependence and continuing financial interest guideposts and using the ***Ziegler*** facets, we conclude that there was not a community of interest in the parties' relationship such that a dealership existed within the meaning of the WFDL. Accordingly, the trial court properly granted summary judgment to the defendants on Golper Inc.'s claim under the WFDL.

UNFAIR COMPETITION CLAIM

Golper Inc. contends that Cargill and Rosman engaged in unfair competition when Rosman left his employment with Golper Inc. and took with him a customer list, route itineraries and purchase information belonging to Golper Inc. in order to sell Nutrena feeds on behalf of Cargill.

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[3] Although Golper Inc. states that in the fiscal year ending September 30, 1991, 60% of Sunrise Agri-Service's sales were attributable to livestock feeds, and that in the fiscal year ending September 30, 1992, nearly 53% of Sunrise Agri-Service's sales were attributable to livestock feeds, the relevant inquiry is the whole company, not one division. *See* ***Kayser Ford, Inc. v. Northern Rebuilders, Inc.***, 760 F. Supp. 749 (W.D. Wis. 1991).

In order to prevail on its unfair competition claim, Golper Inc. must show that the materials allegedly taken by Rosman and used by Cargill and Rosman constituted trade secrets. *See* ***Abbott Laboratories v. Norse Chem. Corp.***, 33 Wis.2d 445, 456, 147 N.W.2d 529, 534 (1967). The term "trade secret" is defined under § 134.90(1)(c), STATS., as follows:

> "Trade secret" means 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.

Although Albert Grunewald's affidavit asserts that he was unable to locate the materials after Rosman left, Rosman denies that he took the customer list, route itineraries and purchase information belonging to Golper Inc. when he terminated his employment, and Golper Inc. has not provided any evidentiary facts to show that Rosman or Cargill used any of the materials to unfairly compete with Golper Inc. However, even if we assume Rosman did take materials from Golper Inc. when he left and that Rosman and Cargill used the materials to sell livestock feeds, the evidence, including all reasonable inferences viewed in Golper Inc.'s favor, is insufficient as a matter of law to establish that the materials were the subject of reasonable efforts by Golper Inc. to maintain their secrecy. First, Grunewald acknowledges that Golper Inc. shared its customer information with Cargill on a regular basis. Second, while Grunewald states that only employees with business needs for the information had access to customer information and that Rosman knew that Golper Inc. did not want customer information in the hands of competitors, Grunewald acknowledges in his deposition that customer information was stored on Golper Inc.'s computer and that many employees had access to the computer. *See* ***Corroon & Black v. Hosch***, 109 Wis.2d 290, 297, 325 N.W.2d 883, 887 (1982) (no trade secret where most, if not all, employees had access to the information).

The evidence, including all reasonable inferences drawn in Golper Inc.'s favor, is also insufficient as a matter of law to establish that the materials derived economic value from not being generally known to, and not being readily ascertainable by proper means by, others who could obtain economic value from them. Rosman states in his affidavit that he was able to compile the names and addresses of potential customers using his knowledge of the farmers in the area and a telephone directory. *See* ***Gary Van Zeeland Talent, Inc. v. Sandas***, 84 Wis.2d 202, 207, 267 N.W.2d 242, 245 (1978) (no trade secret because "it would be possible to compile or prepare a list like the one taken ... from other sources"). Grunewald concedes in his deposition that Rosman would have general knowledge of the information regarding selected customer names and addresses and information regarding past purchases, without having access to any of the materials allegedly taken. Grunewald also agrees that information regarding the feeds that a particular farmer has used in the past and the prices he paid can be obtained by asking the farmer.

We also note that Golper Inc. has not established that it invested any amount of time or money in developing the information contained in the materials allegedly taken by Rosman.[4] It appears that any time and money expended by Golper Inc. was spent on the development of the market of farmers in the Watertown area which the customer list and other materials represent, not on the compilation of the information itself. *See, e.g.*, ***Corroon & Black***, 109 Wis.2d at 297, 325 N.W.2d at 887. This type of information is not in need of protection because legal protection would not provide any incentive to compile it; it would be developed in the normal course of business anyway. ***Id.*** at 296, 325 N.W.2d at 886.

[4] Although the definition of trade secret under § 134.90, STATS., supersedes the definition of trade secret found in 4 RESTATEMENT (FIRST) OF TORT § 757 (1939), used by the court in ***Corroon & Black v. Hosch***, 109 Wis.2d 290, 325 N.W.2d 883 (1982), the *Restatement* test still provides helpful guidance in deciding whether certain materials are trade secrets under the newer definition. ***Minuteman, Inc. v. Alexander***, 147 Wis.2d 842, 853, 434 N.W.2d 773, 777-78 (1989). The six elements outlined in the *Restatement* are: (1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to plaintiff and to competitors; (5) the amount of effort or money expended by plaintiff in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. ***Id.*** at 851, 434 N.W.2d at 777.

DUTY OF GOOD FAITH

Golper Inc. alleges that Cargill breached its duty of good faith owed to Golper Inc. both in tort and contract law by enticing Rosman to leave his employment with Golper Inc. and by "us[ing] its position of trust and mutual assistance to secretly and successfully plot the takeover of Golper's customer base."

We conclude the trial court properly dismissed Golper Inc.'s tort of bad faith claim. The parties do not dispute that the tort of bad faith, to date, has not been extended in Wisconsin outside of insurance cases. ***Ford Motor Co. v. Lyons***, 137 Wis.2d 397, 423, 405 N.W.2d 354, 365 (Ct. App. 1987). In ***Ford Motor Co.***, we declined to extend the tort of bad faith beyond the insurance setting to the dealership setting. We decided that "[s]uch an exception is more appropriately created by the supreme court, in the exercise of its function of overseeing and implementing the statewide development of the law." ***Id.*** at 424-25, 405 N.W.2d at 365.

We also conclude that the trial court properly dismissed Golper Inc.'s claim based on Cargill's alleged breach of its contractual duty of good faith. It is true that Wisconsin law recognizes that every contract implies good faith and fair dealing between the parties and a duty of cooperation on the part of both parties. ***Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.***, 146 Wis.2d 568, 577, 431 N.W.2d 721, 726 (Ct. App. 1988). However, Golper Inc. has not set forth any evidentiary facts to support its claim that Cargill violated this duty. The parties agree that Cargill never promised that it would not sell Nutrena feeds directly to consumers in the Watertown area. The parties also agree that Cargill never agreed not to hire former Golper Inc. employees in furtherance of its direct sales efforts. In fact, Golper Inc. concedes Cargill was free to hire Rosman. Although Golper Inc. complains that "Cargill did not just hire an employee, it took Golper's business," it offers no evidence that Cargill did anything besides hiring Rosman.

DUTY OF LOYALTY CLAIM

Golper Inc. alleges that Rosman breached his duty of loyalty to Golper Inc., citing ***Burg v. Miniature Precision Components, Inc.***, 111 Wis.2d 1, 7-8, 330 N.W.2d 192, 195 (1983). However, Golper Inc. has not alleged that Rosman engaged in any disloyal conduct while a Golper Inc. employee. Moreover, because Rosman was not subject to any restrictive covenant, he was free to terminate his employment with Golper Inc. and begin work immediately for a competitor. As a former employee of Golper Inc., Rosman was free to compete with Golper Inc. just as a stranger might do, subject to the rule that he could not compete with his former employer fraudulently, by misappropriating trade secrets. ***Gary Van Zeeland Talent, Inc.***, 84 Wis.2d at 214, 267 N.W.2d at 248. We have already held that Rosman did not appropriate trade secrets.

The crux of Golper Inc.'s claim is that it was unfair for Rosman to leave its employment and begin work for Cargill, using the skills and experience he had gained while a Golper Inc. employee for the benefit of Cargill. However, as explained in ***Gary Van Zeeland Talent, Inc.***:

> The law, however, does not protect against that type of unfairness, if unfairness it be. Rather, it encourages the mobility of workers; and so long as a departing employee takes with him no more than his experience and intellectual development that has ensued while being trained by another, and no trade secrets or processes are wrongfully appropriated, the law affords no recourse.

Id. at 214, 267 N.W.2d at 248.

INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS

Golper Inc. alleges that Cargill and Rosman intentionally interfered with Golper Inc.'s prospective contractual relations with its Nutrena feeds customers. Golper Inc. contends that, immediately upon leaving Golper Inc.'s employment, Rosman began to solicit Golper Inc.'s customers for Cargill directly, that he took records and information belonging to Golper Inc., that Cargill's actions were intentional, and that substantial losses have resulted.

In Wisconsin, a plaintiff has a remedy in a common law action for intentional interference with prospective contractual relations. ***Cudd v. Crownhart***, 122 Wis.2d 656, 658-59, 364 N.W.2d 158, 160 (Ct. App. 1985). However, the only example of improper conduct alleged by Golper Inc. is that Rosman took information belonging to Golper Inc. and used this information for the benefit of Cargill. However, we have held that Rosman was free to compete with Golper Inc. for sales since there was no restrictive covenant. We have also held that there was no misappropriation of trade secrets. It is undisputed that Cargill never agreed not to compete with Golper Inc. for Nutrena feeds customers. Because Golper Inc. has failed to establish a factual dispute on the issue of improper conduct by Rosman and Cargill, the trial court properly granted summary judgment on this claim.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

SUNDBY, J. (*dissenting*). Because of the broad definition of "dealership,"[5] it will be a rare case in which the existence of a dealership may be established by summary judgment. Summary judgment is a poor substitute for trial when the intent of the parties is an issue. *See* ***Erickson v. Gunderson***, 183 Wis.2d 106, 115, 515 N.W.2d 293, 298 (Ct. App. 1994). Only if that intent is clearly shown is it appropriate to grant summary judgment on the basis of affidavits and documentary evidence. I conclude that in this case summary judgment was inappropriate. I therefore dissent.

I agree with the authors of THE WISCONSIN FAIR DEALERSHIP LAW that it is helpful to think of a dealership as a type of relationship. MICHAEL A. BOWEN & BRIAN E. BUTLER, THE WISCONSIN FAIR DEALERSHIP LAW § 3.5 (1993); *see also* ***id.*** at § 3.30 (Supp. 1993) (citing ***Byrns Equip. & Serv. Co. v. Hesston Corp.***, No. 91-C-0589-C (W.D. Wis. Feb. 18, 1992) (summary judgment is inappropriate if any of the facts determinative of a facet of the business relationship are in dispute)).

The prevailing "facet" of a dealership is the existence of a "community of interest." The statute's definition of "community of interest" is of little help. Section 135.02(1), STATS., provides: "`Community of interest' means 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." Whether a "community of interest" exists must be at least in part a question of fact.

As determined by the Wisconsin courts, whether a community of interest exists requires consideration of ten "facets" of the parties' relationship.

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[5] Section 135.02(3), STATS., provides:

> "Dealership" means a contract or agreement, either expressed or implied, whether oral or written, between 2 or more persons, by which a person is granted the right to sell or distribute goods or services, or use a trade name, trademark, service mark, logotype, advertising or other commercial symbol, in which there is a community of interest in the business of offering, selling or distributing goods or services at wholesale, retail, by lease, agreement or otherwise.

Ziegler Co. v. Rexnord, Inc., 139 Wis.2d 593, 605-06, 407 N.W.2d 873, 879-80 (1987). The majority has listed these facets in its opinion. Most of these facets require determination of facts. Some of those facts will be disputed in the usual case.

I suggest that whether a "community of interest" exists depends on the extent to which the grantor has attempted to create an economic family. I suggest "community of interest" is more of a feeling than a fact. In this case, the documentary evidence establishes that Cargill, Incorporated (Cargill) attempted to adopt David Golper Co., Inc. (Golper Inc.) into its economic family. For example, Cargill periodically published "Feedback" intended to provide an exchange of ideas and sales information with Nutrena dealers. One such publication begins: "My wife, Lee, and myself are excited about returning to the Janesville District to once again join a bunch of old friends and we are looking forward to meeting a bunch of new ones." I would expect to read such sentiments on a Hallmark greeting card from intimate friends and family.

As is typical of dealerships, Cargill offered instruction and encouragement to its dealers. In fact, it established Feed Division Districts supervised by Territory Managers. As an integral part of its Nutrena Dairy Herd Profile/Dairy Ration System Program, Cargill created a computer software package for use by participants. It loaned this software to its dealers as long as they were participants in Cargill's program. Sunrise Agri-Service, one of Golper Inc.'s divisions, entered into a Software Loan Agreement with Cargill April 5, 1990. It hardly needs argument to conclude that a vendor does not generally make such agreements with a mere vendee.

In all of its dealings with Golper Inc., Cargill referred to it as a "dealer." On February 7, 1985, Cargill made an agreement with Golper Inc. for the hiring of a Nutrena Dealer Fieldman. That agreement provided, among other things, that: "You hire the field manager and he is an employee of your dealership. Cargill will assist in training, motivation, appraisal, and supervision of the field manager." The agreement prescribed the duties of the field manager including the filling out of daily field manager report forms, attending dealer training sessions conducted by the Nutrena territory manager, and attending periodic training schools conducted by other Nutrena personnel. Again, such agreements are not typically made between a vendor and a vendee.

I conclude that the evidence clearly establishes that Golper Inc. was a Nutrena dealer. We should grant summary judgment to Golper Inc. At the least, we must remand this matter for trial of the disputed issues of material fact.