COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2005AP1398 **Cir. Ct. No. 2000CV2**

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

KRIST OIL COMPANY,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

BULK PETROLEUM CORPORATION,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from judgments and an order of the circuit court for Marinette County: DAVID G. MIRON, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Bulk Petroleum Corporation appeals two summary judgments and an order holding it violated the Unfair Sales Act, WIS. STAT. § 100.30,[1] on 238 days and awarding Krist Oil Company a total of $501,078.18 in statutory damages, plus costs and attorney fees. Bulk alleges multiple errors, including a constitutional challenge. Krist cross-appeals the order for costs and attorney fees, arguing the court erred by not granting the full amount of Krist's submitted expenses. We conclude the circuit court erred when it ruled that a lack of documentary evidence was fatal to Bulk's summary judgment defense. Accordingly, we reverse the judgments and remand for further proceedings. Because we reverse the judgments, the order for costs is correspondingly reversed. Therefore, we do not reach the merits of Bulk's cross-appeal and instead reverse and remand with directions for the circuit court to vacate the order.

Background

¶2 Krist operates a gas station in Niagara, Wisconsin. Bulk provides gasoline to stations and convenience stores,[2] including sites in Niagara and Iron Mountain, Michigan, just across the state border from Niagara.

¶3 In Wisconsin, gasoline pricing is governed by the Unfair Sales Act, WIS. STAT. § 100.30, which states, in relevant part:

> (3) ILLEGALITY OF LOSS LEADERS. Any sale of any item of merchandise … at less than cost as defined in this

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

[2] Bulk's brief merely tells us that the company "consigns" gasoline, and in at least one answer, it denied it is a retailer of gasoline. There is no dispute, however, that Bulk's sales practices fall under the ambit of WIS. STAT. § 100.30 and for purposes of discussion, we will refer to Bulk as though it is the owner/operator of the two stores.

> section with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor … is unfair competition and contrary to public policy and the policy of this section. Such sales are prohibited. Evidence of any sale … at less than cost[3] … shall be prima facie evidence of intent or effect to induce the purchase of other merchandise, or to unfairly divert trade from a competitor, or to otherwise injure a competitor.

¶4 WISCONSIN STAT. § 100.30(6) details exceptions to the minimum pricing rule. One of these exceptions is pricing "made in good faith to meet an existing price of a competitor." WIS. STAT. § 100.30(6)(a)7. A seller pricing merchandise to meet a competitor must send notice to the Department of Agriculture, Trade, and Consumer Protection (ATCP). WIS. STAT. § 100.30(7)(a). Failure to send this notice to ATCP is prima facie evidence the seller did not lower a price to meet its competitor's price. WIS. STAT. § 100.30(7)(b). Compliance with § 100.30(7)(a), however, results in statutory immunity from a private cause of action. WIS. STAT. § 100.30(7)(c).

¶5 On January 4, 2000, Krist filed this complaint against Bulk, alleging Bulk's Niagara store sold gasoline below cost, contrary to WIS. STAT. § 100.30(3), on multiple days in 1999. WISCONSIN STAT. § 100.30(5m) authorizes this private cause of action and allows the complainant to seek the greater of three times the actual monetary loss or $2,000 per day of violation.

¶6 During the pendency of the action, Krist amended its complaint multiple times to add violation dates. Bulk's primary defense was that it was meeting competitors' prices on all the alleged days. Krist countered that much of

[3] WISCONSIN STAT. § 100.30(2)(am)1m. explains how "cost" for "motor vehicle fuel" is computed and contains the minimum markup requirement.

the time, Bulk started the price drop by lowering its prices in Michigan, which evidently has no minimum markup law. Lower prices in Michigan forced stations in Niagara to lower their prices, which Bulk would then meet at its Wisconsin station. Krist asserted that when Bulk started the downward spiral, it could not claim it was, in good faith, meeting competition.

¶7 There are multiple motions for injunctions, summary judgment, or other requests. As relevant to this appeal, the court initially denied Krist's motion for an injunction, holding it had not adequately demonstrated injury or loss. In March 2003, however, following the release of a decision from this court,[4] the circuit court reversed its position and concluded Krist had made a sufficient showing of loss by averring that it had lost revenue. Further holding that Bulk failed to produce any documentation relevant to its meeting competition defense, the court granted Krist summary judgment for 147 days between July 1999 and September 2000.

¶8 There were, however, an additional 152 days where Bulk allegedly violated the minimum pricing requirement in WIS. STAT. § 100.30(3). The court dismissed forty-six of the days because Bulk was able to document that it had notified ATCP under WIS. STAT. § 100.30(7)(a). Accordingly, the court concluded Bulk was entitled to immunity under § 100.30(7)(c)2. There were fifteen days where the court decided the evidence was sufficient for jury trial.[5]

[4] *See* ***Gross v. Woodman's Food Market, Inc.***, 2002 WI App 295, 259 Wis. 2d 181, 655 N.W.2d 718.

[5] The parties agreed to forgo a jury trial on these dates. It is not entirely clear if the parties agreed to settle those days or if Krist agreed to dismiss its claims for those days. The disposition of those claims, however, is irrelevant to the appeal.

The court granted Krist summary judgment on the remaining ninety-one days because, it concluded, Bulk lacked sufficient documentation to support its defense, and because on many of the days, Bulk was the loss leader in Michigan. In accordance with WIS. STAT. § 100.30(5m), the court also awarded Krist attorney fees and costs totaling $29,078.18, far less than Krist had sought. Factoring in small adjustments, and after reversing itself as to two days, the total judgment against Bulk was $501,078.18, representing $2,000 per day for 236 days of violations plus statutory costs. Bulk appeals; Krist cross-appeals.

Discussion

¶9 Bulk makes several arguments on appeal, including claims the circuit court improperly acted as fact-finder despite the summary judgment posture of the case; should have made Krist prove its actual damages; and unconstitutionally applied WIS. STAT. § 100.30(3) to Bulk's pricing activities in Michigan. However, we need not reach any of these arguments. Instead, we conclude Bulk's additional argument, that the trial court misinterpreted the evidentiary requirements of § 100.30(6)(a)7., is dispositive. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

¶10 We review summary judgments de novo, using the same methodology as the circuit court. ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶8, 292 Wis. 2d 212, 713 N.W.2d 661. We first examine the moving papers and documents in support of the motion to determine whether the moving party has made a prima facie case. ***Kraemer Bros. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 566, 278 N.W.2d 857 (1979). If the submissions supporting the motion make a prima facie case for judgment, we examine the submissions in

opposition. *See* ***id.*** at 567. To defeat the motion for summary judgment, the opposing party must set forth facts demonstrating a genuine issue for trial. ***Id.*** If the material presenting on the motion is subject to conflicting interpretations, summary judgment is improper. *See* ***id.***

¶11 Statutory interpretation is also a question of law we review de novo. ***Pool v. City of Sheboygan***, 2007 WI 38, ¶9, ___ Wis. 2d ___, 729 N.W.2d 415. We begin with the language of the statute and, if it has a plain meaning, we normally stop our inquiry and apply the words chosen by the legislature. ***Id.***, ¶10.

¶12 Bulk disputes the circuit court's interpretation and application of both the statutory presumption found in WIS. STAT. § 100.30(7) and the evidentiary requirements in WIS. STAT. § 100.30(6)(a)7. Under § 100.30(7)(a), a retailer, who in good faith lowers the price of its gasoline to meet a competitor's price, must send a notice to ATCP. Under § 100.30(7)(b), "[f]ailure to comply with par. (a) creates a rebuttable presumption that the retailer … did not lower the price to meet the existing price of a competitor."

¶13 Thus, the circuit court properly observed that if "Bulk doesn't file those notices of the lower price [with ATCP], then there is a rebuttable presumption that the price was not lowered to meet a competitor's price." The court also properly dismissed Krist's claims for days where ATCP did have a copy of Bulk's notice or where Bulk produced its copy of a notice, consistent with the immunity provision of WIS. STAT. § 100.30(7)(c)2.

¶14 However, ATCP notices existed for only forty-six days: there were 192 additional days of alleged violations where Bulk claimed it was meeting competition. When a retailer lowers its price to meet a competitor's price, the retailer's lower price must be "based on evidence in the possession of the retailer

… in the form of an advertisement, proof of sale or receipted purchase, price survey or other business record maintained by the retailer … in the ordinary course of trade or the usual conduct of business." WIS. STAT. § 100.30(6)(a)7. Bulk stated it "can't find the information for it because it's so long ago" but offered testimony that Bulk was "pricing in accordance with the same method they were pricing in the dates for which there is price information" and that employees would have priced the gasoline based on price surveys.

¶15 The court rejected this proffered alternative evidence, concluding WIS. STAT. § 100.30(6)(a)7. required the court to "see the evidence in the possession of Bulk, such as the advertisements, the price surveys, whatever other business records they might have. … I think I need to have those for every day alleged." The court later held "there needs to be documentation … to establish any type of defense at all. It not only needs to be in existence at the time … but we need to have it now so we can look at it." Accordingly, the court concluded the testimonial evidence was insufficient to support the meeting competition defense and granted the summary judgments to Krist.[6]

¶16 Aside from the forty-six days the court dismissed, Bulk entirely lacks any evidence it filed meeting competition notices with ATCP. Thus, the

[6] For a series of days, the court also concluded Bulk would not have a *good faith* defense of meeting competitions because it was the loss leader in Michigan and "cannot rebut the prima facie case that Krist has established." Bulk objects to this ruling as an unconstitutional, extraterritorial application of WIS. STAT. § 100.30(3).

We decline to reach the constitutional question at this time. Bulk is entitled to present evidence that it was meeting competition. If Bulk fails to meet its burden, the question of good faith will be irrelevant. *See* ***City of West Allis v. Wisconsin Elec. Power Co.***, 2001 WI App 226, ¶46, 248 Wis. 2d 10, 635 N.W.2d 873 (we need not reach constitutional questions if we can resolve a case on non-constitutional grounds).

court appropriately applied the presumption that Bulk did not lower its prices to meet competition. A presumption, however, is neither fatal nor insurmountable; rather, a presumption shifts the burden of proof. A party relying on presumption must prove the basic facts to support applying the presumption, but "once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." WIS. STAT. § 903.01 (2005-06). In other words, failure to retain records to verify a lower competitor's price or to verify filing a notice with ATCP does not dispositively mean that Bulk was not meeting competition. It only means Bulk has the burden of establishing it actually was meeting competition in good faith.

¶17 When a retailer lowers its price to meet competition, the lower price must be "made in good faith to meet an existing price of a competitor and is based on evidence in the possession of the retailer …." WIS. STAT. § 100.30(6)(a)7. Based on this language, the court concluded Bulk could only prove it was meeting competition by producing any of the evidence specified in § 100.30(6)(a)7.[7] Indeed, the court questioned how Bulk could have failed to maintain business records vital to supporting its defense. This is a valid question, to be sure. But nothing about the plain language of § 100.30(6)(a)7. requires that the advertisements, price records, or other business records be produced at trial.

[7] Bulk was also concerned the court applied the presumption in WIS. STAT. § 100.30(3), that evidence of a sale below cost "shall be prima facie evidence of intent or effect" to somehow injure a competitor. Bulk complained the court was using this presumption as proof Krist was injured, rather than making Krist prove its damages or permitting Bulk to rebut the presumption of intent. We need not reach this argument on the present appeal—if Bulk establishes its meeting competition defense, question of injury and intent will be irrelevant.

¶18 Undoubtedly, the specified types of documentation, relied on at the time the price of gasoline is lowered, would be the best proof that could be provided. But the rules of evidence do not always require originals, permitting "other evidence of the contents of a writing" if "[a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." WIS. STAT. § 910.04 (2005-06). Nothing in WIS. STAT. § 100.30 suggests the ordinary rules of evidence are inapplicable. In other words, nothing in § 100.30 precludes Bulk from offering testimony about the documents it relied on when making the pricing changes.

¶19 Krist has hinted it suspects Bulk may be fabricating some of its documentation, and the court was concerned about the fact that Bulk had so many copies of meeting competition notices that ATCP could not find. But when the question is "[w]hether the asserted writing ever existed," a factual issue is raised. WIS. STAT. § 910.08(1) (2005-06). This itself precludes summary judgment, as does the question of whether, if the fact-finder believes Bulk's documents existed, the documents show Bulk was meeting competitors' prices.

¶20 We acknowledge a concern about permitting Bulk to simply offer testimony that it used to have paperwork. In this case, however, we note that despite Bulk's assertions to the contrary, ATCP initially claimed it had no copies of Bulk's meeting competition notices. Upon further searching, ATCP found notices for fifteen days—essentially, a $30,000 error. Thus, we conclude there is just enough credence to Bulk's assertion that its records were lost or inadvertently

destroyed to create a genuine issue of material fact as to whether Bulk was fairly lowering its prices to meet competition.[8]

By the Court.—Judgments and order reversed and cause remanded with directions. No costs on appeal.

Not recommended for publication in the official reports.

[8] As noted above, because we reverse the judgments, Krist is no longer the prevailing party below and we reverse the order for costs and fees. On remand, the court will vacate that order.