

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 30, 2008

David R. Schanker
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. 2007AP1727

Cir. Ct. No. 2003CV1015

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

RACINE HARLEY-DAVIDSON, INC.,

PLAINTIFF-APPELLANT,

V.

HARLEY-DAVIDSON MOTOR COMPANY, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County:
CHARLES H. CONSTANTINE, Judge. *Reversed and cause remanded with
directions.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 SNYDER, J. Racine Harley-Davidson, Inc. (Racine Harley) appeals from a summary judgment in favor of Harley-Davidson Motor Company, Inc. (Harley-Davidson). Racine Harley argues that the circuit court erred in two

respects. First, it failed to recognize that another case between these two parties pending before the Division of Hearings and Appeals need not be resolved before this action could go forward. Second, Racine Harley asserts that when faced with Harley-Davidson's motion for summary judgment, the court disregarded the summary judgment methodology and improperly dismissed Racine's complaint for failure to state a cause of action. We agree that the matter was not properly resolved and we reverse the judgment and remand the matter for further proceedings.

BACKGROUND

¶2 Harley-Davidson manufactures and sells motorcycles, parts and accessories and distributes these products through a network of authorized retail dealers. Racine Harley is one of these authorized retailers and is licensed as a motor vehicle dealer under the provisions of WIS. STAT. ch. 218 (2005-06).¹ In December 1992, Racine Harley and Harley-Davidson entered into a dealer contract that allowed Racine Harley to sell primarily to customers residing or doing business in Racine county. Subsequent contracts between the parties were executed as prior contracts expired. Racine Harley first opened for business at a facility on Commerce Drive in Racine, but in 1998 it moved to a new building on Oaks Road in Racine, where it continues to operate as an authorized Harley-Davidson dealer.²

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² According to Racine Harley, it built the Oaks Road store because it needed to expand to accommodate its increasing allocation of new motorcycles. Racine Harley's president, Mark Ulinski, speaking generally, stated that demand for the motorcycles exceeded supply and that the dealership was able to sell for a profit every Harley-Davidson motorcycle that was allocated to it.

¶3 In 1994, the parties settled a dispute that arose when Harley-Davidson began defining territories by zip code. Using this new territory definition, Harley-Davidson proposed removing the Burlington zip code from Racine Harley's territory and reassigning it to a dealership in Kenosha. Racine Harley filed a complaint with the Division of Hearings and Appeals, which was resolved when Harley-Davidson agreed to keep the Burlington zip code as part of Racine Harley's territory. The Burlington zip code remained part of Racine Harley's territory until 2003, at which time it was temporarily reassigned to the Kenosha dealership, but has since returned to Racine Harley's territory and remains there to the present time.³

¶4 In January 1998, Harley-Davidson announced a program regarding the establishment of secondary retail locations (SRLs). According to Harley-Davidson's director of dealer development, an SRL is "designed primarily for convenience of service and, on a smaller scale, selling parts, accessories and motorcycles." A dealer must apply to Harley-Davidson for approval before opening an SRL. Harley-Davidson reviews applications to determine whether the dealership meets SRL program eligibility requirements. "If the dealer is qualified, Harley-Davidson then reviews the market and, based on this review, exercises its discretion and makes a determination as to whether the [SRL] request should be approved or denied."

³ At oral argument, Harley-Davidson explained that the Burlington zip code was reassigned to Kenosha following a DHA decision favoring Harley-Davidson. The zip code remained with Kenosha until the supreme court ultimately reversed the outcome and remanded the dispute back to the agency. As a result of the reversal, Harley-Davidson returned the Burlington zip code to Racine Harley.

¶5 Racine Harley decided to pursue an SRL in Burlington. Company President Mark Ulinski identified a location in Burlington that would add approximately seven thousand square feet to its current eighteen thousand square foot facility. In December 1999, he approached Harley-Davidson with his request. He submitted the paperwork in January 2000 and then learned that Harley-Davidson's service operations area manager would not recommend Racine Harley's SRL request because of "service operations" concerns. Ulinski worked to address the service concerns and again approached Harley-Davidson with the SRL request. Sometime after March 2000, Harley-Davidson informed Ulinski that Racine Harley's SRL request was on hold pending completion of a market study.⁴

¶6 In November 2001, Harley-Davidson informed Racine Harley that the SRL request "was rejected because [Racine Harley] did not meet the criteria." This rejection came despite the fact that the "comprehensive study of the Southeastern Wisconsin market" was "not yet completed."⁵ At the same time, Harley-Davidson notified Racine Harley that the Burlington zip code would be transferred to the Kenosha dealer because the new Kenosha facility was closer to the "centroid of the [Burlington] zip [code]."

⁴ Harley-Davidson decided to conduct a comprehensive market study because "several other dealers expressed interest in applying for SRLs in the region, and [Harley-Davidson] needed to better understand the market before deciding whether it would support one or more SRLs"

⁵ The comprehensive market study was completed in June 2002. Based on the results, Harley-Davidson decided to allow the New Berlin dealership to open an SRL in Mukwonago and to allow the Woodstock, Illinois dealership to open an SRL in Lake Geneva. In all, four dealerships adjacent to the Racine Harley territory were permitted to establish SRLs, including the Kenosha dealership, which had received permission in 1999.

¶7 In response, Racine Harley filed a complaint with the DHA to protest the removal of the Burlington zip code from its territory. In January 2003, the DHA granted summary judgment in favor of Harley-Davidson. Racine Harley sought circuit court review and the court reversed the DHA. Harley-Davidson appealed and we, in turn, reversed the circuit court. *See Racine Harley-Davidson, Inc. v. DHA*, 2005 WI App 6, 278 Wis. 2d 508, 692 N.W.2d 670. Racine Harley appealed from our decision and the supreme court reversed and remanded the zip code case back to the DHA. *See Racine Harley-Davidson, Inc. v. DHA*, 2006 WI 86, 292 Wis. 2d 549, 717 N.W.2d 184.

¶8 Shortly after filing its complaint with the DHA, Racine Harley had filed a civil complaint challenging Harley-Davidson's denial of its SRL request.⁶ Harley-Davidson moved for summary judgment on all four claims. The motion was granted by written decision on August 16, 2004, and on August 25 the court ordered dismissal of all of Racine Harley's claims. Racine Harley appealed.

¶9 By the time the SRL case arrived in the court of appeals, our supreme court had decided the zip code case, holding in favor of Racine Harley and remanding the matter for further proceedings. Consequently, we reversed the circuit court's summary judgment in favor of Harley-Davidson on the SRL claims, and remanded them to the circuit court. We stated, "The Wisconsin Supreme Court's decision impacts the parties' relationship, and arguably influences the issues in this appeal. We therefore vacate the circuit court's August 25, 2004 order, and remand the matter to the circuit court to revisit the issues in this

⁶ The original civil complaint challenged both the zip code assignment and the SRL denial. In January 2004, Racine Harley filed an amended complaint presenting four claims based on the SRL denial only.

litigation in light of that decision.” *Racine Harley-Davidson, Inc. v. Harley Davidson Motor Co.*, No. 2004AP2370, unpublished slip op. at 2 (WI App Nov. 1, 2006). We did not presume what the impact might be, but concluded that the circuit court was the proper place to resolve that question.

¶10 Following our remand, the parties jointly requested that the DHA stay the zip code matter until a final judgment could be rendered in the SRL case. The DHA granted the request and adjourned the matter until advised by the parties that further proceedings were requested.

¶11 Harley-Davidson then submitted a “motion to confirm summary judgment,” arguing that the circuit court’s 2004 decision on the SRL matter was correct. Racine Harley responded, arguing that summary judgment was not appropriate where genuine issues of material fact exist. The circuit court held that summary judgment was appropriate and issued an order dismissing Racine Harley’s claims. Thus, the case returns to us on Racine Harley’s appeal.

DISCUSSION

¶12 Racine Harley presents four issues on appeal. The first three issues address the circuit court’s dismissal of Racine Harley’s statutory claims, asking whether a reasonable jury could conclude that Harley-Davidson’s denial of the SRL request was unfair, unreasonable, inequitable or unconscionable. The remaining issue asks whether a reasonable jury could conclude that Harley-Davidson breached its implied duty of good faith when it denied Racine Harley’s SRL request. Essentially, Racine Harley argues that summary judgment was not the proper vehicle for resolving these claims because genuine issues of material fact preclude summary judgment.

¶13 We review a summary judgment de novo, using the same methodology as the trial court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08(2). However, our review of the record reveals that the circuit court did not employ a summary judgment methodology when it decided to dismiss Racine Harley’s claims. We quote extensively from the circuit court’s June 2007 decision, because it drives the resolution of this appeal:

On or about August 25, 2004, this Court granted summary judgment in favor of Harley-Davidson Motor Company, Inc., and against Racine Harley-Davidson, Inc....

....

[T]his Court is satisfied that its initial decision granting summary judgment to Harley-Davidson ... was appropriate and reaffirms its decision.

....

[T]his court views this case and the [zip code] case decided by the Supreme Court as intertwined. But it holds that to the extent Racine Harley ... may ultimately have a claim based upon its pleadings in [the SRL case], there must first be a final decision made by the state hearing examiner on the issue of whether the Burlington territory should remain with Racine Harley-Davidson.

....

The problem that this Court sees is that the determination as to whether or not the reassignment of the zip code was unfavorable, unreasonable or inequitable is one that must be determined by the hearing examiner. The Supreme Court in its decision held just that.

This Court, in its initial decision, held that if there was ultimately a determination that Harley-Davidson could not

reassign the Burlington zip code and subsequent to that decision Harley-Davidson made a determination not to grant Racine Harley-Davidson an SRL, there then possibly could be a claim that could be asserted.

[I]n the event the hearing examiner (and subsequent appellate Courts) hold that the Burlington territory must remain with Racine Harley-Davidson and subsequent to that decision an SRL is not granted to Racine Harley-Davidson, then depending upon the basis for the denial of the SRL, Racine Harley-Davidson may have a claim asserting the denial of the SRL was unreasonable, unfair, or inequitable.

¶14 Although the circuit court hearkened back to its original summary judgment ruling of August 2004, the language of the 2007 order is akin to a ripeness analysis. *See State v. Armstead*, 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998) (a claim that depends on future events is not ripe for judicial review). The court indicated that certain events had to take place before Racine Harley could present a cognizable claim. Specifically, the court held that the zip code case must be resolved, a new SRL denial must occur, and the denial must be based on unfair, unreasonable, or inequitable factors in order for Racine Harley to state a claim. The court made this determination despite the agreement by both parties that the zip code case should be stayed while the SRL case is resolved. The circuit court's belief that Racine Harley's claims were premature is a strong indicator of the court's rationale for dismissing all four claims.⁷

⁷ Harley-Davidson asserts that because the circuit court expressly referred back to its August 2004 decision, we should consider the circuit court's reasoning in that initial grant of summary judgment. There, the circuit court emphasized that Racine Harley's claims could not overcome the fact that SRL approval by Harley-Davidson was discretionary. The court noted that the parties never entered into an SRL contract and concluded that the protections afforded dealers under WIS. STAT. ch. 218 along with the contractual duty of good faith did not apply. We decline, however, because the rationale of the June 2007 decision clearly focused on the need for the zip code case to be resolved first.

¶15 Whether we focus our analysis on the circuit court’s express grant of summary judgment to Harley-Davidson or on the court’s legal predicate that the claims were not ripe, our standard of review is the same, de novo. *See Olson v. Town of Cottage Grove*, 2008 WI 51, ¶39, ___ Wis. 2d ___, 749 N.W.2d 211. Accordingly, we turn to the claims made and the facts presented to determine whether the summary judgment was appropriate.

¶16 At oral argument, Racine Harley emphasized that the zip code case pending before the DHA will resolve whether Racine Harley is entitled to include the Burlington zip code in its territory from this point forward. In contrast, this SRL lawsuit asks whether past actions by Harley-Davidson were unfair, unreasonable, inequitable, retaliatory or unconscionable, or in violation of the implied duty of good faith. This distinction, Racine Harley asserts, shows that the circuit court erred in determining the SRL claims were premature.

¶17 Three of the SRL claims that Racine Harley made against Harley-Davidson were based on statutory provisions addressing manufacturer and dealer relationships. In WIS. STAT. § 218.0123, which covers vehicle allocations to dealers, the legislature provided that no manufacturer “shall adopt, change, establish or implement” a plan for the allocation of new motor vehicles “that is not fair, reasonable and equitable.” Harley-Davidson asserts that the statute does not apply to the SRL program because the decision to grant an SRL is discretionary and a dealer never has an absolute right to an SRL, even if all program criteria are met. The circuit court agreed, stating that the “granting of an SRL would lead to more motorcycles being awarded, [however] in the absence of an obligation to grant an SRL, there is no basis for asserting that a violation [of §] 218.0123 has occurred.”

¶18 Racine Harley counters that the SRL program is an implementation of the vehicle allocation terms of the dealership contract. Although Harley-Davidson has the authority to deny an SRL request, Racine Harley asserts that the decision must be made on a fair, reasonable and equitable basis under the statute. Harley-Davidson allocates a maximum of thirty-five additional motorcycles to dealerships with an SRL. Ulinski estimated that Racine Harley would have been entitled to increase its allocation by the maximum thirty-five units had the SRL been approved. Racine Harley does not challenge the allocation plan on its face, but rather as it was implemented. Racine Harley alleges that it received unfair treatment from Harley-Davidson's service operations representative, that the results of the market study were unreasonably interpreted to deny the Burlington SRL, and that four adjacent dealerships were granted permission to establish SRLs and increase their vehicle allocations. Racine Harley does not dispute that there is no absolute right to an SRL; however, it contends that "once Harley-Davidson decided to allocate more vehicles to those dealers who establish SRLs, it was obligated to consider [Racine Harley's] SRL proposal in a fair, reasonable and equitable manner."

¶19 Racine Harley also argues that Harley-Davidson's SRL denial violated WIS. STAT. § 218.0124, which prohibits manufacturers from applying performance standards "that may have a material effect on a dealer" in an unfair, unreasonable or inequitable way. Racine Harley emphasized that its Harley-Davidson district manager, Todd Roundtree, recommended Racine Harley's SRL request be approved. On January 13, 2000, Harley-Davidson's regional dealer relations representative submitted the file to Bob Jankowski, business management representative, for review. On January 19, Jankowski advised Harley-Davidson that market conditions supported the establishment of an SRL in Burlington. The

progress of Racine Harley's SRL request then stopped with the service operations representative, Pat Cunningham. Cunningham opined that Racine Harley had "not demonstrated best practices in service." Racine Harley asserts that the service performance standards it was required to meet were unclear and arbitrary. It directs our attention to Cunningham's various references to "best practices," "minimum service standards," and "service select standards" when describing the standard Racine Harley was expected to meet. Racine Harley argues that Harley-Davidson's application of performance standards was unfair, unreasonable and inequitable and that Harley-Davidson's resort to elusive service standards as a means of denying the SRL request had a material effect on the dealership.

¶20 Racine Harley's third statutory claim rests on WIS. STAT. § 218.0116(1)(f), which prohibits unconscionable practices related to the licensed business activity. This section applies to manufacturers as well as dealers. *See Bob Willow Motors, Inc. v. General Motors Corp.*, 872 F.2d 788, 794 (7th Cir. 1989).⁸ The *Bob Willow* court explained that this "is a remedial statute with a purpose to furnish a motor vehicle dealer with some protection against unfair treatment by a manufacturer" and "was enacted in recognition of the long history of abuse of dealers by manufacturers." *Id.* (citation omitted). The court held that interpreting the statute to prohibit unconscionable actions by manufacturers was "in complete harmony with the purpose of protecting dealers" from abuse. *Id.*

¶21 Racine Harley asserts that after it commenced legal action to preserve the integrity of its sales territory in 1994, it met with retaliation from

⁸ *Bob Willow Motors, Inc. v. General Motors Corp.*, 872 F.2d 788 (7th Cir. 1989), considered WIS. STAT. § 218.01(3)(a)11., which is the predecessor to WIS. STAT. § 218.0116(1)(f). *See* 1999 Wis. Act 31, § 134.

Harley-Davidson in the form of the SRL denial. Racine Harley offered affidavits to show that Harley-Davidson failed to respond to inquiries, created unusual delays, and imposed unreasonable criteria for approval on Racine Harley's SRL request. Further, Ulinksi stated that on November 21, 2002, Harley-Davidson representatives made a personal visit to the dealership and told Ulinksi that if Racine Harley proceeded with legal action challenging the denial of the SRL, Harley-Davidson would classify Racine Harley as a dealer "not in good standing," which would make it ineligible for performance awards, dealer incentives, new product franchises or SRLs. Racine Harley argues that Harley-Davidson's denial, which worked to cap Racine Harley's vehicle allocation, was an unconscionable response to the dealership's attempts to protect its business.

¶22 Harley-Davidson responds that none of its actions on Racine Harley's SRL request were outside the bounds of what was acceptable. It denies that Racine Harley was treated differently than other dealers or that the market study created an impermissible delay for the review process. Harley-Davidson distinguishes the facts of *Bob Willow*, arguing that the actions of GM in that case violated the contractual obligations between the parties while here, the dispute is about Harley-Davidson's exercise of its own business discretion. We agree that there are two ways to view the events that occurred, but we disagree that summary judgment is the proper vehicle to determine what is fair, reasonable, equitable or unconscionable under the facts asserted. Those are questions for the fact finder.

¶23 Finally, Racine Harley asserts that summary judgment on its breach of contract claim was error. In Wisconsin, every contract "requires that each party act in good faith towards the other party and deal fairly with that party" when performing the contract's express terms. WIS JI—CIVIL 3044; *Crown Life Ins. Co. v. LaBonte*, 111 Wis. 2d 26, 44, 330 N.W.2d 201 (1983) (recognizing "the

basic principle of contract law that the obligation of good faith is an implied condition in every contract”). The duty of good faith means that a party to a contract will not do anything that injures or destroys the right or ability of the other to receive its benefits under the contract. WIS JI—CIVIL 3044. The touchstones of good faith are honesty and reasonableness. *Schaller v. Marine Nat’l Bank*, 131 Wis. 2d 389, 403, 388 N.W.2d 645 (Ct. App. 1986). The duty of good faith conduct in all contracts “is intended as a guarantee against ‘arbitrary or unreasonable conduct’ by a party.” *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 796, 541 N.W.2d 203 (Ct. App. 1995). It is aimed at stopping “opportunistic behavior that a mutually dependent, cooperative relationship might enable in the absence of rule.” *Market Street Assoc. Ltd. v. Frey*, 941 F.2d 588 (7th Cir. 1991). A contracting party can breach the duty of good faith even if it does not violate any express term of the contract. *Foseid*, 197 Wis. 2d at 796.

¶24 Racine Harley asserts that the duty of good faith is particularly important where one party is given “contractual discretion.” Here, Racine Harley argues, once Harley-Davidson made the SRL program available to its dealers, it was duty-bound to exercise its discretion in good faith and to avoid arbitrary or unreasonable conduct.

¶25 Harley-Davidson emphasizes that its decision to deny Racine Harley’s SRL application was “in accordance with its contractual rights” and followed the policy set forth in the SRL guidelines, which made approval of SRL applications a purely discretionary act. Harley-Davidson disputes that its denial represented anything other than a reasonable response, considering the market study, and therefore the decision to locate SRLs in adjacent communities rather than Burlington was in good faith.

¶26 Racine Harley offered the opinion of Professor John Matthews of the University of Wisconsin Business School, who reviewed Harley-Davidson's market study. Professor Matthews stated that the study "demonstrates clear support for the [Racine Harley] proposal to establish an SRL in the Burlington zip code," and opined that the Lake Geneva and Mukwonago SRL sites, which were approved by Harley-Davidson, was counter to the data underlying the report. Professor Matthews stated, "[T]he data in the report do not favor these two locations as the most promising." Harley-Davidson responds that, even if one were to accept Professor Matthew's conclusion, it reflects at worst bad judgment, but does not rise to the level of a breach of good faith. The ultimate question is whether a jury could reasonably conclude that Harley-Davidson had evaded the spirit of the dealership contract. *See id.* at 797.

¶27 Taking all of the facts in Racine Harley's favor, as we must when reviewing a summary judgment, we conclude that the outcome of the zip code case pending before the DHA is not determinative of the SRL claims put forth by Racine Harley. At the time of the January 2000 SRL request and up to the time of the denial and the conclusion of the market study, the Burlington zip code remained in Racine Harley's territory. Harley-Davidson's official July 2002 denial⁹ of the SRL request and the grounds for that denial are in the record. Both parties agreed to proceed to a decision on the merits and nothing in the record convinces us that they should not be afforded that opportunity.

⁹ The official response came in July 2002; however, in a letter dated November 2001, Racine Harley had already been advised the SRL request would be denied.

CONCLUSION

¶28 Racine Harley need not develop a further record in order to proceed; all of the acts alleged to support the claims have already occurred. Whether Racine Harley ultimately wins the right to keep the Burlington zip code in its territory is irrelevant to the question of whether Harley-Davidson wrongfully denied its request to establish an SRL there. Thus, the claims presented here were not premature, but rather are ripe for resolution. We reverse the summary judgment and remand for further proceedings.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

