

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 7, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2011AP2264

Cir. Ct. Nos. 2009CV6313
2010CV3884

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**FARM-TO-CONSUMER LEGAL DEFENSE FUND, GRASSWAY ORGANICS
FARM STORE LLC, GRASSWAY ORGANICS ASSOCIATION, KAY CRAIG
D/B/A GRASSWAY FARM AND WAYNE CRAIG D/B/A GRASSWAY FARM,**

PLAINTIFFS-CO-APPELLANTS,

v.

**WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER
PROTECTION,**

DEFENDANT-RESPONDENT.

**FARM-TO-CONSUMER LEGAL DEFENSE FUND, MARK ZINNIKER, PETRA
ZINNIKER, NOURISHED BY NATURE LLC, PHILIP BURNS, GAYLE
LOISELLE AND ROBERT KARP,**

PLAINTIFFS-APPELLANTS,

v.

**WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER
PROTECTION,**

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
PATRICK J. FIEDLER, Judge. *Affirmed.*

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

¶1 HIGGINBOTHAM, J. This is a consolidated appeal taken by Farm-to-Consumer Legal Defense Fund, Mark and Petra Zinniker (the Zinnikers), Nourished by Nature, LLC (Nourished by Nature), Philip Burns, Gayle Loiselle, and Robert Karp in one case; and Farm-to-Consumer Legal Defense Fund, GrassWay Organics Farm Store, LLC (the Store), GrassWay Organics Association (the Association), and Kay and Wayne Craig d/b/a GrassWay Farm in a second case. For ease of reference, we refer to the appellants in the first case as “the Zinniker plaintiffs,” and refer to the appellants in the second case as the “GrassWay plaintiffs.”

¶2 The Zinniker plaintiffs and the GrassWay plaintiffs appeal a circuit court order denying their respective motions for summary judgment. The Zinniker plaintiffs contend that the court erred in denying their motion for summary judgment, in which they requested the court to declare that they have a right to own cows, board those cows at a dairy farm, and consume the unpasteurized milk produced by those cows. However, we agree with DATCP that the dispositive issue is whether the Zinnikers are operating a dairy farm as milk producers without a license, which is an issue that precedes any question about the regulation

of unpasteurized milk. We conclude that the Zinnikers are operating a dairy farm as milk producers without a license in violation of WIS. STAT. § 97.22(2)(a) (2011-12),¹ and therefore, any contractual agreement among the Zinnikers, Nourished by Nature, and its members, under which the Zinnikers board dairy cows owned by Nourished by Nature and distribute milk produced by the herd to members of Nourished by Nature, is void as a matter of law.

¶3 The GrassWay plaintiffs contend that they are entitled to a declaration that they are in compliance with WIS. STAT. § 97.24 and that the Store is not required to obtain a retail food establishment license to sell or distribute milk to members of the Association. We conclude that the circuit court correctly concluded, based on the facts of record presented by the GrassWay plaintiffs on summary judgment, that the GrassWay plaintiffs were not entitled to the declarations that they had requested. Accordingly, we conclude that the circuit court properly denied summary judgment to the Zinniker plaintiffs and the GrassWay plaintiffs. We affirm.

BACKGROUND

¶4 The following facts were not disputed for purposes of summary judgment.

I. The Zinniker Plaintiffs

¶5 The Zinnikers own Zinniker Farm, Inc., located in Walworth County. Until 2009, the Zinnikers owned and operated a licensed dairy farm for

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the purpose of producing milk. However, in 2009, the Zinnikers' milk producer license was voided. The Zinnikers have not possessed a milk producer license since their license was voided.

¶6 In early 2010, Nourished by Nature, a limited liability corporation, was organized by individuals who share the belief that “the quality, taste and nutritional value of raw milk ... [is] superior to that of pasteurized milk” and share an interest in obtaining and consuming unpasteurized milk. Nourished by Nature entered into a contract with Zinniker Farm and purchased a herd of dairy cows from the Zinnikers. Two members of Nourished by Nature, Gayle Loiselle and Robert Karp, separately purchased a dairy cow from the Zinnikers.

¶7 The Zinnikers entered into a boarding contract with Nourished by Nature, providing that the Zinnikers would keep the herd purchased by Nourished by Nature at Zinniker Farm and “tend to, manage and take care of” the herd. In exchange, Nourished by Nature agreed to pay the Zinnikers an annual boarding fee commensurate with the costs of boarding the herd at the farm. The Zinnikers also entered into a boarding contract with Karp and Loiselle, providing that the Zinnikers would board the heifer owned by Karp and Loiselle at Zinniker Farm, and, in exchange, Karp and Loiselle would pay an annual boarding fee commensurate with the costs of boarding the heifer at the farm.

¶8 After the Zinnikers sold the herd to Nourished by Nature, members of Nourished by Nature periodically visited Zinniker Farm to collect milk from Nourished by Nature's herd for the purpose of taking the milk to their homes, where they and their families consumed the milk in its unpasteurized state. Karp and Loiselle also periodically visited Zinniker Farm to collect milk from their

heifer and to take the milk to their homes, where they and their families also consumed the milk in its unpasteurized state.

¶9 In September 2009, the Zinnikers' attorney wrote DATCP to obtain an opinion regarding whether the above described contractual arrangement between the Zinnikers and Nourished by Nature is legal under Wisconsin law. Shortly thereafter, DATCP wrote a letter to the Zinnikers' attorney informing him that such a contractual arrangement would be a "sham arrangement" that could result in "civil and criminal penalties."

¶10 Sometime later, the Zinniker plaintiffs filed a declaratory judgment action in the Walworth County Circuit Court, seeking a declaration that Nourished by Nature has a right to purchase a herd of dairy cows, board its herd at Zinniker Farm, and consume the unpasteurized milk produced by the herd. The Zinniker plaintiffs also sought a declaration that the contractual arrangement between the Zinnikers and Nourished by Nature does not violate WIS. STAT. § 97.24(2), which prohibits the sale or distribution of unpasteurized milk, unless it falls under an enumerated exemption.²

² WISCONSIN STAT. § 97.24(2) provides:

(2) REQUIREMENTS FOR MILK AND FLUID MILK PRODUCTS; GRADE A REQUIREMENT. (a) No person may sell or distribute any milk unless that milk is produced, processed and distributed in compliance with standards established by the department by rule under this chapter.

(b) No person may sell or distribute any milk or fluid milk products which are not grade A milk or grade A milk products to consumers, or to any restaurant, institution or retailer for consumption or resale to consumers. Grade A milk and grade A milk products shall be effectively pasteurized, and shall be produced, processed and distributed in compliance with

(continued)

¶11 A motion to change venue from Walworth County to Dane County was filed and granted by the court. After this case was transferred to Dane County, this case was consolidated with the GrassWay plaintiffs' case.

¶12 Subsequently, the Zinniker plaintiffs moved for summary judgment. The court concluded in relevant part:

[T]he Zinniker Plaintiffs are ... not entitled to a declaration stating that they have not violated Wis. Stat. § 97.24. Neither the Zinnikers, Burns, the LLC, Karp, nor Loisselle possess a milk producer license from the DATCP. The Farm was licensed as a milk producer, however, the license was automatically voided.... Because they do not own a milk producer license, any contract between the Zinniker Plaintiffs does not share the rights and responsibilities of owning a milk producer license. This is a clear violation of the DATCP's interpretation of Wis. Stat. § 97.24(2).

standards established by the department by rule under this chapter.

(c) No person may sell or distribute milk or fluid milk products which are labeled or otherwise represented as grade A milk or grade A milk products unless the milk and fluid milk products comply with this chapter and with standards established by the department by rule under this chapter.

(d) This section does not prohibit:

1. The sale of milk or fluid milk products which are heat sterilized in hermetically sealed containers.

2. Incidental sales of milk directly to consumers at the dairy farm where the milk is produced.

3. Incidental sales of pasteurized milk at a dairy plant licensed under s. 97.20.

4. The sale of grade A milk or grade A milk products which are produced and processed under equivalent laws or rules of another state or a local governmental unit, as provided under sub. (4)(b).

Therefore, the Zinniker Plaintiffs are not entitled to a declaration stating that they have not violated the statute.

¶13 The Zinniker plaintiffs later moved for the court to clarify its decision. The court responded in relevant part that:

[I]t is clear from their motion to clarify that the [Zinniker] Plaintiffs still fail to recognize that they are not merely attempting to enforce their ‘right’ to own a cow and board it at a farm. Instead, [the Zinniker] *Plaintiffs operate a dairy farm*. (Emphasis added.) As this court already said in its decision and order, if [the Zinniker] Plaintiffs want to continue to operate their dairy farm then they must do so in a way that complies with the laws of Wisconsin.

The Zinniker plaintiffs appeal.

II. The GrassWay Plaintiffs

¶14 Wayne and Kay Craig own GrassWay Farm, located in New Holstein. The Craigs are the principal owners of the Store, a Wisconsin limited liability corporation that holds a milk producer license issued by DATCP. The Craigs sold a herd of dairy cows to the Store and entered into a “custom hire agreement” with the Store, providing that the Craigs would “board, manage, milk and take care” of the Store’s herd of dairy cows at GrassWay Farm.

¶15 According to an affidavit by Wayne Craig, the Store owns and operates a separate, private store that is open only to the members of the GrassWay Association. Wayne Craig is the president and Kay Craig is the treasurer of the GrassWay Association. The members of the Association pay a fee to become members, and, in exchange, the members receive alleged ownership interests in the Store and, by virtue of their ownership interests in the Store, members are allowed to purchase unpasteurized milk produced by the Store’s

cows. According to Wayne Craig, the Association members are co-owners of the Store, and thus co-holders of the Store's milk producer license issued by DATCP.

¶16 In 2007, DATCP issued a warning letter to the Craigs, informing them that the sale or distribution of raw milk to owners of the Store may not occur in a retail food establishment licensed by DATCP. In 2009, a DATCP official informed the Craigs by letter that unpasteurized milk was being sold out of the Store, in violation of WIS. STAT. § 97.24(2), and that the Store's application for a retail food establishment license would be rejected. During the following months, DATCP and the Craigs' attorney exchanged correspondence regarding whether the Store and the Association members were in compliance with § 97.24 in certain respects.

¶17 With the intent of clarifying their legal status, the GrassWay plaintiffs filed a declaratory judgment action in the Dane County Circuit Court, seeking a declaration that the Store's sale or distribution of unpasteurized milk to the Association and its members does not violate WIS. STAT. § 97.24(2). The GrassWay plaintiffs also sought a declaration that the Store was not required to obtain a retail food establishment license in order to sell or distribute unpasteurized milk to the Association and its members.

¶18 In their brief in support of their motion for summary judgment, the GrassWay plaintiffs argued that the Store was in compliance with WIS. STAT. § 97.24 in all pertinent respects, and that the Store was not a retail food establishment within the meaning of WIS. STAT. § 97.30(1)(c) and therefore the Store was not required to obtain a license to operate a retail food establishment. The circuit court denied the motion on both issues. With respect to whether the

GrassWay plaintiffs were in violation of WIS. STAT. § 97.24(2), the court concluded that:

As to the Grass[W]ay Plaintiffs, the members do not share the rights and responsibilities of owning the milk producer license because the license is not used for its proper purpose of producing milk from cow, sheep, or goats, which will be sold or distributed into the [public] human food chain. In fact, none of the milk that is produced under the license is sold or distributed into the public because all ‘of the milk produced by the Store’s herd goes only to members of the Association and their respective families.’ (Grass[W]ay Supp. Br. 4). Thus, the Grass[W]ay Plaintiffs use their milk producer license solely for the purpose of allowing the Association members to purchase non-pasteurized milk. This set-up is clearly in violation of Wis. Stat. § 97.24(2). Therefore, the Grass[W]ay Plaintiffs are not entitled to a declaration stating that they have not violated the statute.

¶19 The circuit court also concluded that the GrassWay plaintiffs were not entitled to a declaration that the Store did not need a retail food establishment license to operate:

[The GrassWay plaintiffs] are not entitled to a declaratory judgment stating that no retail food establishment license is required for the Store. While they may be parties to a private contract, the court concluded that that contract does not meet the requirements of Wis. Stat. § 97.24. Because the contract does not meet the statute’s requirements, it is not a valid agreement sharing ownership in the milk producer license. Thus, the Association members are not valid owners of the milk producer license and therefore any sales to such members at the Store would qualify as sales to members of the public. Therefore, the Grass[W]ay Plaintiffs are not entitled to a declaratory judgment stating that the Store does not require a retail food establishment license because it is clearly selling unpasteurized milk to consumers as the term is used in Wis. Stat. § 97.24 and defined in the Wisconsin Food Code, App. to ATCP Ch. 75

....

¶20 The GrassWay plaintiffs moved for reconsideration. They challenged the circuit court’s statement in its summary judgment decision, recited

above, that there appeared to be no genuine issue regarding the fact that “none of the milk that is produced under the license is sold or distributed into the public because all ‘of the milk produced by the Store’s herd goes only to members of the Association and their respective families.’” In support of the motion for reconsideration, the GrassWay plaintiffs submitted an affidavit from Wayne Craig, in which he averred that ninety percent of the milk produced by the Store’s herd was transported to the Westby creamery and that ten percent of the milk was sold to members of the Association. The GrassWay plaintiffs did not specifically explain why they would have prevailed on summary judgment had the court had before it Craig’s averment that ten percent of the milk produced by the Store’s herd was sold to members of the Association. The circuit court did not rule on the motion for reconsideration. The GrassWay plaintiffs appeal.

DISCUSSION

¶21 We review a denial of summary judgment de novo, applying the same methodology as the circuit court. *State v. Bobby G.*, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when the affidavits and other submissions show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). “[W]e draw all reasonable inferences from the evidence in the light most favorable to the non-moving party.” *Burbank Grease Servs., LLC v. Sokolowski*, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781.

¶22 Whether to grant or deny a request for a declaratory judgment is a matter within the sound discretion of the circuit court and is generally upheld unless the circuit court has erroneously exercised its discretion. *James Cape & Sons Co. v. Streu Constr. Co.*, 2009 WI App 154, ¶5, 321 Wis. 2d 604, 775

N.W.2d 117. However, when the decision whether to grant or deny a request for a declaratory judgment raises a question of law, such as the application of a statute to undisputed facts, we review the circuit court’s decision de novo. *Id.*

¶23 As we noted, this is a consolidated appeal involving the Zinniker plaintiffs and the GrassWay plaintiffs. We address first the Zinniker plaintiffs’ arguments and then turn our attention to the GrassWay plaintiffs’ arguments.

I. The Zinniker Plaintiffs

¶24 The Zinniker plaintiffs make four arguments on appeal: (1) “DATCP lacks authority to regulate private contracts that concern the private boarding of privately owned cows at the farms of private farmers”; (2) Nourished by Nature and its members have a “right to privately own a cow or a herd of cows without being regulated by DATCP”; (3) Nourished by Nature and its members have a constitutional right to “private consumption of their own milk from their own cows without being regulated by DATCP”; and (4) Nourished by Nature and its members have a “right to privately board their cows at the farms of Wisconsin farmers” without being regulated by DATCP.

¶25 In response, DATCP does not challenge the Zinniker plaintiffs’ claims that a person is permitted to own cows and board those cows at a dairy farm. DATCP also does not take issue with the Zinniker plaintiffs’ claim that a person may consume unpasteurized milk, but contends that a person may not sell or distribute milk in violation of applicable statutes and regulations. DATCP contends that the Zinnikers have violated WIS. STAT. § 97.22(2) by distributing

milk produced on their farm without a milk producers license.³ We agree with DATCP.

¶26 At the core of the Zinniker plaintiffs' arguments is the idea that they have the right to consume unpasteurized milk without interference from DATCP. However, the Zinniker plaintiffs fail to come to grips with the fact that, even assuming that the members of Nourished by Nature have a right to consume unpasteurized milk,⁴ the Zinnikers do not have a legal right to operate a dairy farm as milk producers without a license. Because, as we discuss below, as a matter of law, based on the undisputed facts on summary judgment, the Zinnikers are operating a dairy farm as milk producers without a license in violation of WIS. STAT. § 97.22(2), we conclude that the contractual agreement between the Zinnikers and Nourished by Nature, under which the Zinnikers board Nourished by Nature's herd at their farm and distribute the milk produced by the herd, is void as a matter of law.

¶27 WISCONSIN STAT. § 97.22(2)(a) provides that: "No person may operate a dairy farm as a milk producer without a valid license issued by [DATCP] for that dairy farm." The Zinniker plaintiffs do not dispute that the Zinnikers do not have a license to operate a dairy farm as milk producers. We therefore must determine whether the Zinnikers are operating a dairy farm, and, if so, whether

³ DATCP also contends that the Zinnikers are distributing unpasteurized milk in violation of WIS. STAT. § 97.24(2). We need not address whether the Zinnikers have violated § 97.24(2) because, as we explain in the text of the opinion, we conclude that the Zinnikers are operating a dairy farm as milk producers without a license and therefore are prohibited from distributing any milk whatsoever, regardless whether it is pasteurized or unpasteurized.

⁴ We do not reach the issue of whether a person has a right to consume unpasteurized milk because resolution of that issue is not necessary to decide this appeal.

they are milk producers. To make these determinations, we turn to the definitions of these terms, as set forth in § 97.22(1).

¶28 A “dairy farm” is defined as “any place where one or more cows, sheep or goats are kept for the production of milk.” WIS. STAT. § 97.22(1)(a). It is undisputed based on the summary judgment record that Zinniker Farm is a “place where one or more cows ... are kept for the production of milk.” *Id.* Mark Zinniker averred in his affidavit in support of the Zinniker plaintiffs’ motion for summary judgment that Nourished by Nature’s herd is boarded at Zinniker Farm and that the herd produces milk that is collected by members of Nourished by Nature. Thus, based on these undisputed facts, we conclude that Zinniker Farm meets the definition of a “dairy farm.”

¶29 The Zinniker plaintiffs argue in general and conclusory terms that they do not operate a dairy farm. However, the Zinniker plaintiffs do not present a fully developed argument on this topic. Specifically, the Zinniker plaintiffs do not engage in any statutory analysis of WIS. STAT. § 97.22(1)(a), or offer any reason why their farm does not fall under the definition of a “dairy farm.” The Zinniker plaintiffs note that “production of milk” is not defined by statute. However, they do not explain why that matters, given that there is no dispute that the herd produces milk. The Zinniker plaintiffs also contend that it would be absurd to conclude that a dairy farm exists “wherever lactating cows are present.” Even putting aside that the statute does not define a dairy farm as any place where lactating cows are present, the Zinniker plaintiffs do not provide any argument as to why Zinniker Farm does not constitute a dairy farm within the statutory meaning of that term. Accordingly, we do not further consider this issue. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we need not address inadequately briefed issues).

¶30 Turning to the second term, a “milk producer” is defined as “any person who owns or operates a dairy farm, and sells or distributes milk produced on that farm.” WIS. STAT. § 97.22(1)(f). We have already concluded that the Zinnikers operate a dairy farm and that milk is produced on their farm. It is undisputed that the Zinnikers do not sell the milk produced on Zinniker Farm. Thus, to determine whether the Zinnikers are “milk producers,” the only question we must answer is whether the Zinnikers distribute milk that is produced on Zinniker Farm.

¶31 To determine whether the Zinnikers distribute milk produced on their farm, we must determine the meaning of “distribute” as set forth in the statute. “Distribute” as set forth in the statute must be given its plain, ordinary, and accepted meaning, unless the term has a technical or special definitional meaning. *See State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. “Distribute” is not defined in either WIS. STAT. ch. 97 or in WIS. ADMIN. CODE ch. ATPC 60, and it is undisputed that “distribute” does not have a technical meaning as used in the statute. Because “distribute” does not have a technical or special definitional meaning in this context, we give the term its plain and ordinary meaning. To ascertain the plain and ordinary meaning of “distribute,” we may refer to dictionary definitions. *See Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶21, 302 Wis. 2d 358, 735 N.W.2d 30.

¶32 “Distribute” is defined in Black’s Law Dictionary as: “**1.** To apportion; to divide among several. **2.** To arrange by class or order. **3.** To deliver. **4.** To spread out; to disperse.” BLACK’S LAW DICTIONARY 543 (9th ed. 2009). The definition that most clearly fits in the context of this statute is to deliver. Although the term “deliver” is not defined by Black’s Law Dictionary, it is

defined in Webster's New College Dictionary. The definition provided in that dictionary that most clearly fits here is to "transfer." *See* WEBSTER'S NEW COLLEGE DICTIONARY 382 (2005).⁵

¶33 Applying the plain and ordinary meaning of "distribute" to the undisputed facts here, we conclude that the Zinnikers have distributed milk that was produced on Zinniker Farm. As Mark Zinniker averred in his affidavit, members of Nourished by Nature "will periodically visit our [farm] in order to obtain and collect the milk produced by" Nourished by Nature's herd and "take the milk produced by [Nourished by Nature's] herd back to their own homes where it will be consumed by them and their respective families." The only reasonable inference to be drawn from this averment is that, at least on occasion, the Zinnikers distribute milk produced on the farm to members of Nourished by Nature. Accordingly, we conclude that the Zinnikers are milk producers within the statutory meaning.

¶34 The Zinniker plaintiffs state in their brief-in-chief that: "None of the milk [produced by the herd] is sold, offered for sale, or otherwise distributed to any member of the public," without referring us to any part of the summary judgment record in support of this conclusory statement. The Zinniker plaintiffs also do not meaningfully respond in their reply brief to DATCP's argument that, based on the undisputed facts, the Zinnikers "distribute" milk produced on their farm. We therefore do not consider their unsupported conclusory assertion that

⁵ Without relying on this as a significant interpretive signal, we observe that the dictionary definitions of "distribute" and "deliver" that we adopt here comport with how the legislature has defined those terms in at least one separate context. *See* WIS. STAT. § 961.01(6), (9) ("distribute" is defined as "deliver" and "deliver" is defined as "transfer" in the Uniform Controlled Substances Act).

the summary judgment record contains allegations supporting the inference that the Zinnikers do not distribute milk produced on their farm. *See Pettit*, 171 Wis. 2d at 646.

¶35 Based on our above analysis, we conclude that the Zinnikers are operating a dairy farm as milk producers without a license, in violation of WIS. STAT. § 97.22(2)(a). We further conclude that, because the Zinnikers are in violation of § 97.22(2)(a), the contractual agreements between the Zinnikers and Nourished by Nature and between the Zinnikers and Karp and Loiselle, under which the Zinnikers board dairy cows at Zinniker Farm and distribute unpasteurized milk to members of Nourished by Nature for consumption off the farm, is void and unenforceable as a matter of law. *See Jackson v. DeWitt*, 224 Wis. 2d 877, 888-89 n.6, 592 N.W.2d 262 (Ct. App. 1999) (“Contracts entered into in violation of a statute are void and unenforceable as a matter of law.”). We need not address whether the Zinnikers have violated WIS. STAT. § 97.24(2) because they do not have a milk producer license and therefore are prohibited from distributing any milk, regardless whether it is pasteurized or unpasteurized. Accordingly, we affirm the circuit court’s denial of the Zinniker plaintiffs’ motion for summary judgment.

II. The GrassWay Plaintiffs

A. The GrassWay Plaintiffs Have Not Demonstrated They Are Entitled to a Declaration that They Have Not Violated WIS. STAT. § 97.24

¶36 The GrassWay plaintiffs argue that the circuit court erred in concluding that they violated WIS. STAT. § 97.24 because “it erroneously understood that the store’s milk was *not* sold to the public food chain.” The GrassWay plaintiffs’ entire argument on this topic in their brief-in-chief on appeal

is as follows, which includes partial quotations from the circuit court's summary judgment decision:

[T]he trial court was in error when it stated that “none” of the milk produced by the Store's herd goes to the “public human food chain.” Indeed, 90% of the milk produced by the Store's herd goes to the public human food chain. Thus, the arrangement of the Craigs, the Store, and the Association comports with the “proper purpose of producing milk from cow, sheep, or goats, which will be sold or distributed into the [public], human food chain.”

This argument lacks merit on multiple grounds.

¶37 First, the GrassWay plaintiffs fail to offer any explanation as to why they are entitled to a declaration that they are in compliance with WIS. STAT. § 97.24 based on Wayne Craig's averment that ten percent of the milk produced by the Store's herd is sold to members of the Association and ninety percent goes to a creamery.

¶38 Second, we do not consider Wayne Craig's affidavit in support of the motion for reconsideration because that affidavit was not before the court at the time the court rendered its summary judgment decision. The order we now review here is the summary judgment order; there is no circuit court decision on the motion for reconsideration. Summary judgment methodology requires us to consider only the facts in the record at the time the court rendered its summary judgment decision, and not any evidentiary facts submitted after that time. *See Coopman v. State Farm Fire and Cas. Co.*, 179 Wis. 2d 548, 556, 508 N.W.2d 610 (Ct. App. 1993) (“our review is confined to the facts in the record before the trial court at the time it decided the motion for summary judgment”); *see also Howard v. Duersten*, 81 Wis. 2d 301, 307 & n.4, 260 N.W.2d 274 (1977) (we will

not consider affidavits that are not part of the record or that were not presented to the circuit court in making its ruling).

¶39 We conclude on our de novo review that the allegations of fact before the court on summary judgment support the court's decision. The GrassWay plaintiffs submitted an affidavit by Wayne Craig in support of summary judgment where he averred that “[o]nly members of the Association may purchase products from the private store owned and operated by the Store.” Viewing this averment in the light most favorable to DATCP, the circuit court could reasonably infer that all of the milk produced by the Store was sold to members of the Association. As best we can tell, there is no evidence in the summary judgment record that conflicts with Craig's averment or infers that the milk produced by the Store's herd was sold or distributed to anyone other than the Association members. Thus, the court's conclusion that the GrassWay plaintiffs were in violation of WIS. STAT. § 97.24 was based on reasonable inferences drawn from the facts of record presented by the GrassWay plaintiffs, which the circuit court properly took to be true and accurate on summary judgment. See *L.L.N. v. Clauder*, 209 Wis. 2d 674, 684, 563 N.W.2d 434 (1997) (“evidentiary facts set forth in the affidavits or other proof are taken as true by a court if not contradicted by opposing affidavits or other proof”). The only argument that the GrassWay plaintiffs now advance to challenge the summary judgment order depends on the contents of the reconsideration motion, which, as we have explained, we do not consider.

B. Retail Food Establishment

¶40 The GrassWay plaintiffs argue that the circuit court erred by concluding that the Store is a “retail food establishment” and that, on that basis,

the GrassWay plaintiffs are required to obtain a retail food establishment license. The GrassWay plaintiffs argue that the Store is not a “retail food establishment” within the meaning of WIS. STAT. § 97.30(1)(c),⁶ because the members of the Association are not members of the public and thus are not “consumers,” as defined in the appendix to WIS. ADMIN. CODE ch. ATCP 75, for the purpose of determining whether the Store is a “retail food establishment.”⁷ The GrassWay plaintiffs also maintain that the circuit court’s conclusion that the Store was a “retail food establishment,” rests on the circuit court’s erroneous belief that it was undisputed that the Store sold all of the milk produced by its herd to the Association members.

¶41 The circuit court concluded that the Store is a “retail food establishment” based on the following reasoning. The contractual arrangement among the Craigs, the Store, and the Association is unenforceable because it was created for the sole purpose of producing and selling unpasteurized milk to members of the Association, in violation of WIS. STAT. § 97.24. The court reasoned that, because the contractual arrangement is unenforceable, “it is not a valid agreement sharing ownership in the milk producer license.” Thus, according to the court, because the members of the Association do not have a valid ownership interest in the Store’s milk producer license, the members of the Association are “members of the public,” and therefore they are “consumers.”

⁶ A “retail food establishment” is defined as “a permanent or mobile food processing facility where food processing is conducted primarily for direct retail sale to consumers at the facility.” WIS. STAT. § 97.30(1)(c).

⁷ A “consumer” is defined as “an individual who is a member of the public, takes possession of FOOD, is not functioning in the capacity of an OPERATOR of a FOOD ESTABLISHMENT or FOOD PROCESSING PLANT, and does not offer the FOOD for resale.” WIS. ADMIN. CODE ATCP 75 app. 1-201.10(B).

Based on this rationale, the court concluded that the Store was a “retail food establishment” and that the Store cannot sell or distribute unpasteurized milk to the members of the Association without a retail food establishment license.

¶42 The GrassWay plaintiffs do not provide any reason for us to conclude that the circuit court’s logic is flawed. The GrassWay plaintiffs do not develop any argument as to why the members of the Association are not “consumers,” other than to state that they are “parties to a private contract.” However, the circuit court determined that any contractual arrangement among the Craigs, the Store, and the Association was invalid and the GrassWay plaintiffs do not develop any argument as to why that contractual arrangement is valid. Additionally, the GrassWay plaintiffs’ argument that the Store is not a retail food establishment hinges entirely on their argument that the court erroneously believed that all of the milk produced by the Store’s herd was sold to members of the Association, and we have already rejected that argument and do not reconsider it here.

¶43 Because the GrassWay plaintiffs do not develop any argument to the contrary, we conclude that the members of the Association are “consumers” and therefore the Store is a retail food establishment that operated without a retail food establishment license, in violation of WIS. STAT. § 97.30(1)(c).

CONCLUSION

¶44 Based on the foregoing reasons, we conclude that the circuit court properly denied the Zinniker plaintiffs’ and the GrassWay plaintiffs’ motions for summary judgment and dismissed their respective claims for declaratory judgment. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

