**COURT OF APPEALS
DECISION
DATED AND FILED**

August 25, 2016

**Diane M. Fremgen
Clerk of Court of Appeals**

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Appeal No. 2015AP2366 **Cir. Ct. No. 2014CV180**

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

THOMAS F. BENSON, MARK RECHLICZ, MARK RECHLICZ ENTERPRISES, INC., ROBERT J. MURANYI, RJM PRO GOLF INCORPORATION AND WILLIAM J. SCHEER,

PLAINTIFFS-APPELLANTS,

V.

CITY OF MADISON,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 LUNDSTEN, J. Many years ago, the City of Madison began contracting with several golf professionals (the "Golf Pros") to run most

operations at City-owned golf courses.[1] At the end of 2012, the City decided to not renew the Golf Pros' contracts and to use City personnel to run all golf course operations. The Golf Pros sued the City under the Wisconsin Fair Dealership Law, alleging that they had dealerships within the meaning of that Law and that the City's actions violated dealership protections under the Law. The circuit court concluded on summary judgment that the Golf Pros did not have dealerships and, consequently, dismissed their Dealership Law action against the City. The Golf Pros appeal.

¶2 The parties dispute whether a municipality is subject to the Dealership Law. We need not address that question. We assume, without deciding, that the Dealership Law applies to municipalities, and agree with the circuit court that, regardless, the Golf Pros did not have dealerships. More specifically, we conclude that the Golf Pros' arrangement with the City, at a minimum, fails to satisfy the second of three statutory elements for the existence of a dealership. Applied here, the second element requires the grant of a right to sell or distribute the City's goods or services or to use the City's commercial symbols. We affirm.

Background

¶3 The City owns four golf courses, including land and structures, that the City makes available to the public as part of its Parks Department. For each course, the City had an arrangement with a Golf Pro that was governed by a

[1] Unless the context indicates otherwise, like the parties, we use the catch-all term "Golf Pros" to refer to all six plaintiffs-appellants in this case: Thomas Benson, Mark Rechlicz, Mark Rechlicz Enterprises, Inc., Robert Muranyi, RJM Pro Golf Incorporation, and William Scheer.

written operating agreement.[2] As material here, there is no dispute that the operating agreements were the same.

¶4 As part of the parties' arrangement under the operating agreements, the City maintained the golf course grounds. As noted, the Golf Pros performed most other golf course operations. This included managing and controlling use of the golf courses; providing golfing equipment for rental, including motorized golf carts and clubs; operating food and beverage concessions; providing lessons to golf course patrons; and operating pro shops that sold golf-related products. The Golf Pros employed staff to assist in carrying out these contractual obligations.

¶5 In the Discussion section that follows, we reference additional details of the parties' arrangement.

Discussion

¶6 The parties agree on the facts but disagree whether, based on those facts, the Golf Pros had dealerships within the meaning of the Wisconsin Fair Dealership Law. This presents a question of law for de novo review. ***Bush v. National Sch. Studios, Inc.***, 139 Wis. 2d 635, 645-46, 407 N.W.2d 883 (1987); ***Kania v. Airborne Freight Corp.***, 99 Wis. 2d 746, 762-63, 300 N.W.2d 63 (1981).

¶7 As pertinent here, a "dealership" is:

> 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

[2] During limited time periods, the Golf Pros continued operating golf courses for the City while no agreement was in effect, but the parties do not suggest that this matters.

> 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.

WIS. STAT. § 135.02(3)(a).[3]

¶8 Our supreme court has explained that this definition of "dealership" consists of three elements, with the second and third elements including multiple alternatives:

> 1. a contract or agreement between two or more persons;
> 2. by which a person is granted
>   a. the right to sell goods or services;
>   b. the right to distribute goods or services; or
>   c. the right to use a trade name, trademark, service mark, logotype, advertising or other commercial symbol; and
> 3. in which there is a community of interest in the business of
>   a. offering goods or services;
>   b. selling goods or services; [or]
>   c. distributing goods or services ….

Foerster, Inc. v. Atlas Metal Parts Co., 105 Wis. 2d 17, 25, 313 N.W.2d 60 (1981) (quoting ***Kania***, 99 Wis. 2d at 763 (internal quotation marks omitted)).

[3] There is another category of "dealership," which is not at issue here, that relates to certain wholesalers and intoxicating liquor. *See* WIS. STAT. § 135.02(3)(b). All references to the Wisconsin Statutes are to the 2013-14 version. We cite the current version of the statutes for ease of reference. There have been no recent changes to the pertinent statutes here.

¶9 The parties disagree on whether the undisputed facts satisfy each of the three dealership elements. As we explain below, we conclude that the Golf Pros did not have dealerships because their arrangement with the City, at a minimum, fails to satisfy the second dealership element.[4]

¶10 Before proceeding to our elements analysis, we pause to address the Golf Pros' reliance on the statutory directive that the Wisconsin Fair Dealership Law is to be "liberally construed and applied to promote its underlying remedial purposes and policies." *See* WIS. STAT. § 135.025(1).[5] The Golf Pros argue that this liberal construction rule is "[t]he most important rubric" for us to apply here. We disagree.

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[4] Our conclusion that the Golf Pros did not have dealerships makes it unnecessary to address other issues relating to the statute of limitations, notices of claim, and governmental immunity.

[5] WISCONSIN STAT. § 135.025 provides, more fully, as follows:

> **(1)** This chapter shall be liberally construed and applied to promote its underlying remedial purposes and policies.
>
> **(2)** The underlying purposes and policies of this chapter are:
>
> (a) To promote the compelling interest of the public in fair business relations between dealers and grantors, and in the continuation of dealerships on a fair basis;
>
> (b) To protect dealers against unfair treatment by grantors, who inherently have superior economic power and superior bargaining power in the negotiation of dealerships;
>
> (c) To provide dealers with rights and remedies in addition to those existing by contract or common law;
>
> (d) To govern all dealerships, including any renewals or amendments, to the full extent consistent with the constitutions of this state and the United States.

¶11 As the City correctly explains, our supreme court has rejected the proposition that courts use this liberal construction rule to take an expansive approach to the threshold question of whether a "dealership" exists. Specifically, the supreme court in ***Kania*** explained as follows:

> Kania argues that the ch. 135 dealership definition should be liberally construed in accord with the legislative intent expressed in sec. 135.025, Stats…. We do not agree with [Kania]'s claim that the legislature intended the definitions in ch. 135 to be construed so liberally as to make ch. 135 applicable to the facts of this case. We agree with the common sense approach and reasoning of the federal district court in ***H. Phillips Co. v. Brown-Forman Distiller Corp.***, 483 F. Supp. 1289 (W.D. Wis. 1980), wherein the court stated:
>
> "[the] direction by the Legislature to the courts to construe and apply the statute [Chapter 135] liberally does not mean that the boundaries of its coverage should be construed expansively. That is to say, the Legislature has acted to protect 'dealers' from 'grantors' rather zealously, particularly with respect to the continuation of 'dealerships.' *If a relationship is a dealership, the protections afforded the dealer are to be construed and applied liberally to the dealer. But the statute itself undertakes to draw a line to encompass the kinds of enterprises and relationships which are to enjoy such protection….*"

Kania, 99 Wis. 2d at 774-75 (emphasis added); *see also* MICHAEL A. BOWEN ET AL., THE WISCONSIN FAIR DEALERSHIP LAW § 4.13 (4th ed. 2012) (citing ***Kania*** for the proposition that: "The Wisconsin Supreme Court has held … that [the liberal construction] rule does not apply to the construction of the term dealership and that, to the contrary, this term should not be construed expansively.").

¶12 Notably, the Golf Pros do not direct our attention to any instance in which a court has applied the liberal construction rule when addressing the threshold question of whether a dealership exists. And, in any event, ***Kania***

controls here and dictates that the legislature's liberal construction directive does not apply to the initial question regarding whether a dealership exists.

¶13 We return now to the dealership elements. We begin by briefly discussing the first element and explaining why we choose to assume, without deciding, that the Golf Pros satisfy this element. We then discuss the second element and explain why we conclude that the Golf Pros fail to satisfy that element.

A. First Dealership Element: Contract Or Agreement Between Two Or More "Persons"

¶14 As noted, the first element requires a contract or agreement between two or more "persons." *See* WIS. STAT. § 135.02(3)(a). "Person," for purposes of the Wisconsin Fair Dealership Law, is defined as "a natural person, partnership, joint venture, corporation or other entity." WIS. STAT. § 135.02(6). The parties dispute whether a municipality is a "person." This dispute is part of a broader dispute as to whether the legislature intended the Dealership Law to cover municipalities.

¶15 We do not resolve the parties' dispute over the first element. Rather, we follow the advice that "[a]n appellate court should decide cases on the narrowest possible grounds." *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997). Still, we comment briefly on this first element.

¶16 Among other arguments, the parties both make facially persuasive arguments regarding the definition of "person" and the legislative history of the Wisconsin Fair Dealership Law. However, although both parties have admirably briefed a fact-intensive case with several potential issues, it seems to us that there is more to consider than the topics addressed by the parties. Our questions go to

the more general issue of applying the Dealership Law, a law that is ordinarily associated with the private sector, to governmental contracting.[6] If the Dealership Law applies to municipalities, might it also apply to other governmental units? And, if the Dealership Law applies to municipalities (and potentially other governmental units), is there any reason why these governmental units could not be *dealers* as well as *grantors*? What sorts of dealerships might result? Airports, parking ramps, and even charter schools, among other possibilities, come to mind. Finally, if conflicts arise between the Dealership Law and other statutes governing municipalities (or other governmental units), how would we resolve those conflicts? That is to say, there may be ambiguity in the coverage of the Dealership Law and reason to question whether the legislature intended that the Law apply to contracting involving governmental entities. Regardless, we leave that issue for another day.

B. Second Dealership Element: Grant Of Right To Sell Goods Or Services Or To Use A Commercial Symbol

¶17 To repeat, the second dealership element provides multiple alternatives. The alleged dealer must be granted:

a. the right to sell goods or services;

b. the right to distribute goods or services; or

[6] A number of terms in the Dealership Law appear to reflect this ordinary association with the private sector. This includes terms such as “the dealership business” and “marketing” (WIS. STAT. § 135.02(1)); “advertising,” “commercial symbol,” and related terms (§ 135.02(3)(a) and (b)); “in the business of” (§ 135.02(3)(a)); “fair business relations” (WIS. STAT. § 135.025(2)(a)); “competitive circumstances” (WIS. STAT. §§ 135.04 and 135.05); and “inventories” (WIS. STAT. § 135.045).

> c. the right to use a trade name, trademark, service mark, logotype, advertising or other commercial symbol.

See ***Foerster***, 105 Wis. 2d at 25 (quoting ***Kania***, 99 Wis. 2d at 763 (internal quotation marks omitted)).

¶18 For purposes here, we combine the first two alternatives. That is, we speak in terms of the Golf Pros' right to sell or distribute City goods or services. Thus, as applied here, to satisfy the second element, the undisputed facts need to show that the parties' arrangement granted the Golf Pros either: (1) the right to sell or distribute City goods or services or (2) the right to use a City trade name, trademark, service mark, logotype, advertising, or other commercial symbol. We sometimes refer to the first alternative as the "goods or services" alternative and to the second alternative as the "commercial symbols" alternative. We conclude for the reasons that follow that the Golf Pros fail to satisfy either alternative.

1. Second Element—Goods Or Services Alternative

¶19 The Wisconsin Fair Dealership Law provides no technical definition of "goods" or "services," or of what it means to be "granted the right" to sell or distribute a grantor's goods or services. Thus, we decide whether the Golf Pros were granted the right to sell or distribute City goods or services based on the parties' operating agreements, other pertinent facts, case law, and, last but not least, common sense.

¶20 The operating agreements expressly state that "the City does *not* grant Golf Pro the right to sell or distribute any goods or services provided by the City" (emphasis added). The Golf Pros do not explain why this unambiguous contract language should not control. We suspect the reason is that there is case

law support for the proposition that, in the Wisconsin Fair Dealership Law context, unambiguous contract language is important but not conclusive. *See* ***Ziegler Co. v. Rexnord, Inc.***, 139 Wis. 2d 593, 611, 407 N.W.2d 873 (1987) (stating, as part of its analysis of the third element, that the parties' contract language was "important" but not "conclusive"); *see also, e.g.*, ***Bush***, 139 Wis. 2d at 653 (considering, as part of its analysis of the second element, the parties' "*actual* duties and responsibilities") (emphasis added)). We will apply this same "important [but] not conclusive" approach here, and turn to the other facts.

¶21 As noted in ¶4 above, the Golf Pros' obligations fell into essentially five categories:[7]

- Managing and controlling use of the golf courses, including collecting greens fees, selling season passes and discount cards, and managing play;
- Providing golfing equipment, including motorized golf carts and clubs, for rental to golf course patrons;
- Operating food and beverage concessions;
- Providing lessons to golf course patrons; and
- Operating pro shops that sold golf-related products.

¶22 The Golf Pros received compensation in three ways:

- The City paid the Golf Pros a set annual "retainer" amount that ranged from $24,000 to $44,500;

[7] The circuit court concluded that the Golf Pros' obligations fell into roughly three categories. Our five categories are consistent with, but more detailed than, the circuit court's three categories. Our analysis here was aided by the circuit court's thorough written decision.

- The Golf Pros kept most of the revenue from equipment rentals and from concessions sales, with the City taking 15% of rentals and 11% of concessions sales; and

- The Golf Pros kept all revenues from the lessons they gave and from pro shop sales.

¶23 The Golf Pros set the prices for concessions and for merchandise at the pro shops. The City set the prices for greens fees, passes, and lockers. Finally, the City provided all of the equipment that was necessary to process payments for those fees, and retained 100% of the revenue from the greens fees and passes.

¶24 Turning to the Golf Pros' arguments based on these facts, we find it difficult to pin down precisely what *City* goods or services the Golf Pros argue they were selling or distributing. In at least one instance in their briefing, the Golf Pros appear to assert that the City "service" they were selling or distributing was the provision of golf courses or, more broadly, the provision of parks for public use. In other instances, however, the Golf Pros assert that they were selling or distributing a "package" or "variety" of goods and services. According to the Golf Pros, the City "goods" included greens fees, season passes, and discount cards, and the "principal service was operating the City's municipal golf courses, which included taking tee times, running tournaments, organizing golf leagues, and supervising play on the courses." To us, this second assertion comes close to a concession that the Golf Pros were principally engaged *not* in selling *City* goods or services but in selling *the Golf Pros' own professional golf course management services to the City*, with the sale of alleged City "goods" being incidental.

¶25 In the circuit court, the Golf Pros candidly acknowledged that the pertinent City good or service was not easy to identify, while seeming to make yet

another assertion, namely, that the pertinent City goods or services could be the opportunity to golf:

> What we're saying is this is kind of a strange opportunity goods service to try to characterize. We believe it is either a good or a service. We haven't conceded that it's not one or the other because we don't want to be gapped….
>
> The opportunity that you're talking about to golf is different than services [deemed insufficient in other cases]….
>
> ....
>
> Here you've got people that are given the opportunity to go, participate, and partake in an activity.

¶26 We too acknowledge difficulty in identifying whether the Golf Pros were actually selling or distributing any City goods or services and, if so, what those City goods or services were. We agree that, at the most abstract level, it might be said that the Golf Pros sold or distributed a City "service," namely, the service of providing golf courses for public use. However, we conclude, much as the circuit court did, that the most accurate way to view the unique facts here is that the Golf Pros were *not* selling or distributing *City* goods or services; rather, the Golf Pros were engaged in the business of selling or renting *non-City goods* (golfing equipment, concessions, and pro shop items) and selling *their own professional services* to the City and the public, including golf course management services to the City and golf lessons to golf course patrons.[8]

[8] We note that the Golf Pros do not disagree that they must be selling or distributing at least some *City* goods or services. The Golf Pros do not, for example, argue that they could satisfy the goods or services alternative simply because the City granted them the right to sell non-City goods and their own services on City property.

¶27 Our conclusion that the Golf Pros were providing non-City goods and their own professional services is consistent with the parties' unambiguous contract language stating that "the City does not grant Golf Pro the right to sell or distribute any goods or services provided by the City." While not conclusive, this fact is important. *See* ***Ziegler***, 139 Wis. 2d at 611. The Golf Pros' position, in contrast, is impossible to reconcile with this contract language.

¶28 The only case law support the Golf Pros provide for their argument on the goods or services alternative is ***Bush***, 139 Wis. 2d 635. The Golf Pros argue, for purposes of the goods or services alternative, that their case is "directly analogous to ***Bush***." We disagree.

¶29 In ***Bush***, the alleged dealer was a photographer and the alleged grantor was a company engaged in the school student photography business. ***Id.*** at 637-38. The photographer agreed to pay $150,000 "for the right to take school photographs using [the company's] name and services." ***Id.*** at 656. In addition, he paid half of the advertising costs and he purchased film and other materials. ***Id.*** at 639. In return, he received a 40% commission on the company's net sales in his territory. ***Id.*** The photographer traveled to schools within this territory and solicited business for the company. ***Id.*** at 639-40. He used the company's name and logo on a variety of items, including business cards, stationery, advertising, identification badges, calendars, and pens. ***Id.*** He set prices, collected payment, and extended credit. ***Id.*** at 653. Finally, although he took the photographs, he mailed the exposed film to the company, which processed, packaged, and distributed the finished portraits to the schools. ***Id.*** at 639-40.

¶30 The parties in ***Bush*** agreed that the first dealership element was met, but disputed the second and third elements. *See* ***id.*** at 652, 654. The court in ***Bush*** concluded that the photographer met both elements. ***Id.*** at 636-37, 657.

¶31 As we understand it, the Golf Pros argue that the facts here, for purposes of the goods or services alternative, are much like those in ***Bush***. We agree that there are many similarities, but there are also many differences. More to the point, and as we now explain, the ***Bush*** court's second element discussion does not aid our analysis here.

¶32 The ***Bush*** court's second element discussion did not separately discuss the goods or services alternative and the commercial symbols alternative, nor did it analyze what goods or services the photographer was selling or distributing. *See* ***id.*** at 653-54. As far as we can tell, this was because the only dispute relating to the second element in ***Bush*** had to do with whether the photographer was a "conventional" employee. *See* ***id.*** at 652. That is, the company in ***Bush*** argued that the photographer was a conventional employee and that such employees never have the "right to sell or distribute" goods or services within the meaning of the Wisconsin Fair Dealership Law. *See* ***id.*** In making this argument, the company appeared to rely on the fact that the photographer's contract was designated as an "employment contract," and on the fact that the photographer was treated as an employee for tax purposes. *See* ***id.*** at 653. The court in ***Bush*** made quick work of this argument by pointing out the many duties and responsibilities the photographer had that were not like those of a conventional employee. *See* ***id.*** at 653-54. The ***Bush*** court's second element analysis ended there, with no apparent reason to analyze what company goods or services the photographer was selling or distributing. *See* ***id.***

¶33 Here, in contrast, there is no dispute that the Golf Pros were independent contractors, not conventional City employees. Instead, as we have indicated, we are presented with a more difficult and nuanced question of what might constitute City goods or services. We conclude that ***Bush*** is not helpful in deciding that question.

¶34 If anything, we are more persuaded by the circuit court's and the City's reliance on ***Bakke Chiropractic Clinic, S.C. v. Physicians Plus Insurance Corp.***, 215 Wis. 2d 605, 573 N.W.2d 542 (Ct. App. 1997). In ***Bakke***, the alleged grantor, an HMO, was required by law to make chiropractic services available to its members, and the HMO contracted with independent chiropractors, the alleged dealers, to provide such services. *See* ***id.*** at 608-09, 618. We concluded in ***Bakke*** that the chiropractors were selling their own professional services to the HMO and to the HMO members, and we further concluded that the chiropractors were *not* granted the right to sell or distribute any *HMO* goods or services within the meaning of the Wisconsin Fair Dealership Law. ***Id.*** at 616, 618, 619-20. Although there are differences between the parties in ***Bakke*** and the parties here, and although we have simplified the facts of ***Bakke*** for the sake of space, we conclude, as we now explain, that ***Bakke*** provides support for our conclusion as to the Golf Pros.

¶35 As we understand it, the Golf Pros argue that they must have been selling City goods or services because, absent the Golf Pros, the City needed to, and did, find another way to do what the Golf Pros were doing. The Golf Pros make this argument in several different ways. To provide one example, they assert: "The Golf Pros' fundamental duty was to provide goods and services to the public which the City would otherwise have provided in their absence."

¶36 This Golf Pros' argument, apart from any other problems it might have, appears to founder on ***Bakke***. What prompted the chiropractors' lawsuit in ***Bakke*** was the HMO's decision to terminate its contract with the chiropractors, and to contract instead with a "chiropractic management company" that, in turn, obtained chiropractic services for the HMO's members. *See* ***id.*** at 610-11. The fact that the HMO in ***Bakke*** needed to, and did, find another way to do what the chiropractors were doing did not matter to our analysis in ***Bakke***. As such, we are not persuaded by the Golf Pros' argument here.

¶37 To sum up so far, we agree with the circuit court and the City that the Golf Pros were not granted the right to sell City goods or services within the meaning of the Wisconsin Fair Dealership Law. Thus, the Golf Pros fail to satisfy the goods or services alternative of the second dealership element.

2. Second Element—Commercial Symbols Alternative

¶38 As we have seen, the Golf Pros may alternatively satisfy the second dealership element by showing that they were granted the right to use a City trade name, trademark, service mark, logotype, advertising, or other commercial symbol. The Golf Pros' argument that they satisfy this commercial symbols alternative is easily dispatched.

¶39 As with the goods or services alternative, the parties' operating agreements expressly address the commercial symbols alternative, providing that "the City does not grant Golf Pro ... the right to use a City trade name, trademark, service mark, logotype, advertising or other commercial symbol." And, in fact, the Golf Pros' actual use of City marks, whether contemplated by the agreement or not, was minimal. First, the Golf Pros contributed a modest amount of funds ($1,000 or $3,500 per year, depending on the pro) to a joint advertising campaign

with the City that used the slogan "Golf Madison Parks." Second, the City provided each Golf Pro with a "window cling" printed with the same slogan that the Golf Pros displayed in the clubhouses.

¶40 These facts are no more compelling for the Golf Pros than what we deemed insufficient for the chiropractors in ***Bakke***. In ***Bakke***, the chiropractors' agreements with the HMO were less restrictive, providing a limited right to use the HMO's marks for certain purposes, and the chiropractors used the HMO's marks in advertising or by posting signs indicating their affiliation with the HMO. *See* ***id.*** at 620-22.

¶41 Instead of addressing ***Bakke*** in this context, the Golf Pros rely on the federal case of ***John Maye Co. v. Nordson Corp.***, 959 F.2d 1402 (7th Cir. 1992). We question whether the result would be different if we applied the pertinent discussion from ***John Maye***. *See* ***id.*** at 1410 ("Judicial interpretation of the WFDL … has made it clear that more is required than the mere right to use a commercial symbol, or even *de minimis* use."). Regardless, we are bound by ***Bakke***, not ***John Maye***, and, applying ***Bakke***, we conclude that the Golf Pros do not satisfy the commercial symbols alternative.

¶42 In sum, we conclude that the Golf Pros did not have dealerships because, at a minimum, they fail to satisfy the second dealership element.

Conclusion

¶43 For the reasons above, we affirm the circuit court's judgment dismissing the Golf Pros' Wisconsin Fair Dealership Law claims against the City.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.