

2007

Larry J. Coet Chevrolet, Pontiac, Buick, Inc. v. Labrum Chevrolet, Pontiac, Buick, Inc. : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LARRY J. COET CHEVROLET,
PONTIAC, BUICK, INC.,

Appellant,

vs.

LABRUM CHEVROLET, PONTIAC,
BUICK, INC.

Appellee.

Case No. 200700051-CA

Fourth District Court No.
030500537

Priority No. _____

APPELLANTS' REPLY BRIEF

On Appeal from the Final Order of
the Fourth District Court
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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

FILED
UTAH APPELLATE COURTS
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PARTIES TO THE PROCEEDINGS BELOW

The caption of the case contains the names of all the parties to the proceeding from which review is sought as required by Rule 24 of the Utah Rules of Appellate Procedure.

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INTRODUCTION

This matter is one regarding maintaining the terms of a contract and effective dispute resolution. Coet and Labrum entered into an asset sale agreement for the sale of a new car dealership with the terms spelled out in the agreement. The relevant terms of the agreement are the attorneys' fees and costs provision for the prevailing party for sums expended with or without suit, at trial, on appeal or in any bankruptcy or insolvency proceeding. [R.416.] Additionally, this appeal will bring forth the issue of dispute resolution through Article VIII Utah State courts or alternative dispute resolution with the supervision of the courts. See Utah Constitution, Art VIII. Subsequent to Coet Chevrolet filing its complaint against Labrum Chevrolet, the parties stipulated and the trial court ordered and directed, a creative and effective alternative dispute resolution through a team of accountants (the "Evaluation Team") to research, evaluate and determine certain accounting matters included in the complaint, counterclaim and agreed-upon by the litigants. Labrum argues that the parties and the trial court agreed, through a written authorization and agreement to use an Evaluation Team, that they had the authority to determine legal issues. Specifically, Labrum argues that terms not included in the written authorization, unless specifically mentioned, were to be determined by the Evaluation Team. Ultimately, the legal issues are: (1) to determine if attorneys' fees were to be awarded and the amount, pursuant to the Asset Sale Agreement; and (2) if an award of pre-judgment interest and what that interest will be, regarding the Evaluation Team's determination of which party owed the other.

Coet asserts that the trial court erred in several of its determinations. The trial court erred in granting Labrum's Motion for Partial Summary Judgment precluding Coet from collecting his attorneys' fees and costs and the prejudgment interest due to him from Labrum. The trial court's decision comes despite the Evaluation Team's findings and award was in Coet favor, in excess of \$59,000.00. After the trial of the remaining issues, the trial court failed to find in favor of Coet as the prevailing party. Instead, the trial court, erroneously determined Labrum to be the prevailing party and awarded Labrum his attorneys' fees and costs. The trial court only considered the issues litigated and awarded fees to Labrum. The trial court completely disregarded the vast sum awarded to Coet by the Evaluation Team, and only considered the approximately \$11,000.00 Labrum was awarded after trial. Additionally, the court erred by finding Labrum met the evidentiary standard for Labrum's fraud claim, finding that Labrum relied upon an alleged comment made by Coet, refusing to acknowledge Labrum's experience, duty and that he had nearly completed the parts inventory. Lastly, the trial court erred in its finding that the certain 1992 Ford truck was in the inventory and worse allowed Labrum to take without compensating Coet for it.

ARGUMENT

I. LABRUM FAILS IN HIS ATTEMPT TO ARGUE THE ACCOUNTANTS' EVALUATION AGREEMENT AS AN ACCORD AND SATISFACTION TO THE ASSET PURCHASE AGREEMENT.

A. The Appropriate Standard Of Review For The Granting Of The Partial Summary Judgment Is "No Deference" And "Correctness."

Coet does not object to the findings included in the Order, prepared by Labrum, granting Labrum's Motion for Partial Summary Judgment. Coet did however, correctly object to several facts asserted by Labrum in Labrum's Memorandum in Support of Motion for Partial Summary Judgment. [R. 287-299.] The focus of this Court, regarding the trial court's granting of Labrum's Motion for Partial Summary Judgment ought to be, did the trial court apply the law correctly and was Labrum entitled to judgment as a matter of law?

A court appropriately grants summary judgment "only when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Benjamin v. Amica Mut. Ins. Co., 2006 UT 37, ¶ 12, 140 P.3d 1210 (quoting Swan Creek Vill. Homeowners Ass'n v. Warne, 2006 UT 22, ¶ 16, 134 P.3d 1122); see also Utah R. Civ. P. 56(c). Thus, this court should review the district court's grant of partial summary judgment "for correctness, granting no deference to the district court." Id. (quoting Swan Creek, 2006 UT 22 at ¶ 16, 134 P.3d 1122).

Coet asserts that the trial court incorrectly applied the law to the relevant material facts and Labrum was not entitled to judgment as a matter of law regarding the award of attorneys fees and costs and the award of prejudgment interest. The trial court failed to properly apply the terms and conditions of the Asset Purchase Agreement and the Accountants' Evaluation Agreement to the facts of the matter.

B. The Accountants Evaluation Agreement Dealt Exclusively With Accounting-Type Issues and Did Not Modify The Terms And Conditions Of The Asset Purchase Agreement.

The Asset Sale Agreement entered into by the parties is clear and unambiguous. It is undisputed that the Asset Sale Agreement governed the sale of the Coet Chevrolet to Labrum Chevrolet. Included in the terms of the Asset Sale Agreement was a provision for attorneys' fees and costs.

In the event any action or proceeding is taken or brought by either party concerning this Agreement, the prevailing party shall be entitled to recover its costs and reasonable attorneys' fees, whether such sums are expended with or without suit, at trial, or appeal or in any bankruptcy or insolvency proceeding.

[R. 416.] After the closing of the transaction for the purchase of the new motor vehicle dealership, disputations and claims arose between Coet and Labrum regarding the Asset Sale Agreement. [R. 324.] Pursuant to the parties' stipulation and the trial court's Order, Coet and Labrum entered into the Accountants Evaluation Agreement. [R. 81-86.] Coet asserts that the Accountants Evaluation Agreement was to resolve accounting-type issues that were among the disputations between Coet and Labrum relative to the Asset Sale Agreement. [R. 74; 83-85; 319-322.]

Both parties agree that the Accountants Evaluation Agreement is clear and unambiguous. See Labrum's Brief, pp. 20-21. The Accountants' Evaluation Agreement is a separate and distinct contract from the Asset Sale Agreement. The Asset Sale Agreement governed the sale of the new motor vehicle dealership. [R. 411-433.] The Accountants' Evaluation Agreement governed the alternative dispute resolution of certain accounting-type issues which arose from the sale of the new car dealership. [R. 73-79; 81-86.] Accountant Becky Taylor, selected by Coet and accountant Steven Racker, selected by Labrum,

comprised the Evaluation Team that entered into the Accountants Evaluation Agreement with Coet and Labrum to attempt to resolve the accounting-type issues in dispute. [R. 79.] The Accountants Evaluation Agreement did not incorporate, supercede, modify or change the terms and conditions or the rights of the parties provided in the Asset Sale Agreement. The Evaluation Team, after its investigation, came to the unanimous conclusion that Labrum owed Coet \$59,384.79. [R. 104-106.] Labrum did not dispute the ultimate finding of the Evaluation Team. Acknowledging the Evaluation Team's determination, eventually, Labrum paid Coet \$59,384.79. Moreover, Labrum has not disputed that based solely upon the Evaluation Team's conclusions, Coet is the prevailing party. So based upon the terms and conditions of the Asset Sale Agreement, Coet should be awarded his costs and reasonable attorneys' fees expended to enforce the Asset Sale Agreement.

However, Labrum asserts that the Accountants Evaluation Agreement precludes the Coet's right to attorneys' fees. The Accountants Evaluation Agreement mentions the Asset Sale Agreement to the extent the Accountants Evaluation Agreement was to resolve the disputes between the parties, as they related to accounting-type issues. [R. 73-79.] The Accountants Evaluation Agreement does not incorporate, supercede or modify the terms of the Asset Sale Agreement. The Accountants' Evaluation Agreement explains its objective.

3. Objective of Evaluation. The Evaluation is intended by Coet and Labrum to be, and shall be conducted by the Evaluation Team as, an independent examination, assessment, and application of the relevant provisions of the Asset Sale Agreement and related documents, for the purpose of resolving all of the respective claims between the parties, with the exception of whether either party is legally responsible to the other party for parts obsolescence.

[R. 76]. The Evaluation Team was hired to determine accounting-type issues. The scope of the Evaluation Team's evaluation was limited to accounting-type issues that they unanimously agreed upon. They were not to determine anything else relative to the Asset Sale Agreement.

The Accountants Evaluation Agreement also contains a claim preclusion paragraph upon which Labrum relies heavily.

10. Preclusive Effect on Additional Claims. The parties acknowledge and agree that the claims raised in this letter agreement constitute **all of the accounting-type claims** for damages related to the Asset Sale Agreement and closing. The parties shall be precluded from raising or asserting (in the Lawsuit or otherwise) any claims for damages related to the Asset Sale Agreement and the Closing, except for: (I) any accounting issues that are not resolved by the Evaluation Team and (ii) any legal issues that must be resolved in order to achieve a complete resolution of the accounting issues specifically addressed in this Agreement.

[R. 74] (emphasis added). Again, the terms contained in the Accountants Evaluation Agreement specify the area of accounting claims. This is appropriate and bargained-for by the parties, because the Evaluation Team are CPA's and their expertise is accounting and the specified areas to be evaluated were accounting-type issues. [R.76-79.]

Labrum also emphasizes his argument on the release language contained in Paragraph 9 in the Accountants' Evaluation Agreement. See Labrum's Brief pp. 21-23. The release included in the Accountants Evaluation Agreement contains very broad, boiler-plate terms. [R. 74-75]. The breadth of the release in the Accountants Evaluation Agreement includes the accounting issues with which the Evaluation Team was working to resolve. [R. 74-75.]

Thus, the release language applicability should be limited to accounting-type issues enumerated by the parties. The Court should consider that the paragraphs with specific terms and conditions should be given more weight and consideration than the general, boiler-plate, and over-reaching paragraphs. See Docutel Olivetti Corp. V. Dick Brady Sys., Inc., 731 P.2d 475, 480 (Utah 1986) (Howe, J., concurring in part, dissenting in part) (citing Restatement (Second) of Contracts § 203(c) for the rule that general terms of a contract are not given as much weight as specific terms).

Additionally, Labrum argues that the Accountants Evaluation Agreement “acted as a partial modification or partial accord and satisfaction, of the Asset Sale Agreement.” Labrum’s Brief, p. 31. Labrum’s argument that the Accountants Evaluation Agreement modifies the Asset Sale Agreement is incorrect.

An accord and satisfaction arises when the parties to a contract agree that a different performance, to be made in substitution of the performance originally agreed upon, will discharge the obligation created under the original agreement.” Golden Key Realty, Inc. v. Mantas, 699 P.2d 730, 732 (Utah 1985) (citations omitted). A party seeking to prove an accord and satisfaction must show (1) an unliquidated claim or a bona fide dispute over the amount due; (2) a payment offered as full settlement of the entire dispute; and (3) an acceptance of the payment as full settlement of the dispute.

Marton Remodeling v. Jensen, 706 P.2d 607, 609-10 (Utah 1985). Based upon Utah case law, Labrum’s argument that the Accountants Evaluation Agreement was an accord and satisfaction to the Asset Sale Agreement fails. The Accountants Evaluation Agreement was not an accord for the Asset Sale Agreement for the new motor vehicle dealership. It was an innovative attempt at alternative dispute resolution to resolve accounting-type disputes and

save judicial resources. The terms and conditions in the Accountants Evaluation Agreement are separate and independent of the Asset Sale Agreement. Given that the Accountants Evaluation Agreement was not an accord and satisfaction for the Asset Sale Agreement, this Court need only look to the clear and unambiguous terms of the Asset Sale Agreement to determine that Coet maintained his bargained-for right for attorneys' fees and costs incurred to enforce the terms of the Asset Sale Agreement.

This Court should give the trial court no deference and should look for correctness in its review of the trial court's Order granting Labrum's Motion for Partial Summary Judgment. The trial court erred in granting Labrum's Motion for Partial Summary Judgment improperly applying terms contained in the Accountants Evaluation Agreement instead of the clear and unambiguous terms of the Asset Purchase Agreement.

C. Labrum's Response Of "Put Everything on the Table" Failed to Harmonize The Conflicting Language Contained In The Four Corners Of The Accountants Evaluation Agreement.

Labrum agrees that the Accountants Evaluation Agreement is clear and unambiguous. See Labrum's Brief p. 20-21. Labrum discounts the facially conflicting terms contained within the clear and unambiguous Accountants Evaluation Agreement. Labrum insists that the facially conflicting terms contained in the Accountants Evaluation Agreement are acceptable because, "everything needs to be put on the table and addressed or waived." [R. 263.] Labrum persuaded the trial court to apply the conflicting terms to the undisputed facts, while concurrently failing to harmonize the conflicting terms. The trial court's application

of some of the conflicting terms lead directly to its erroneous granting of Labrum's Motion for Partial Summary Judgment.

The Accountants Evaluation Agreement is clear and unambiguous but contains provisions which conflict or are inharmonious with each other. The Accountants Evaluation Agreement was to provide authorization, direction and limitation to the Evaluation Team, pursuant to the trial court's Order, in attempting to resolve accounting issues in the case at bar. [R. 82 -86.] The predominant conflicting terms include: (1) the Evaluation Team was organized to evaluate and resolve accounting-type issues specifically listed, but also facially required to determine all issues, save for the general area of vehicle parts obsolescence [R. 74]; and (2) requirements set forth that only accounting-type issues were to be addressed by the Evaluation Team, yet include an expansive boiler plate release clause not only unspecified accounting issues, but legal issues as well. [R. 74-75.]

It is clear that the Evaluation Team was to address and attempt to resolve accounting-type issues only. The trial court included in its Findings, that "the [trial] court conducted a telephonic scheduling conference on January 20, 2005. During the scheduling conference, the parties discussed the advantages of involving an accounting team to evaluate the accounting-type issues, in this case." [R.-324](Emphasis added). The Stipulated Case Management Order, stated in part, "based upon the directive of the Court, the parties stipulate and agree as follows,

I. Submission of Accounting Disputes to Accounting Evaluation Team.

The parties shall submit all accounting disputes, including all accounting issues

raised as part of the claims or counterclaims in this lawsuit, to an accounting evaluation team consistent with the terms of the parties' letter agreement, a copy of which is attached as Exhibit "A".

2. Pretrial Deadlines of Accounting Issues are Resolved by Accountant's Evaluation. If the accounting evaluation team is successfully able to resolve all accounting issues between the parties, leaving only legal issues (and accompanying factual background) for resolution by the court, then the following deadline shall apply:

...

3. Pretrial Deadlines if One or More Accounting Issues are Not Resolved by Accountant's Evaluation. If the accounting evaluation team is not successfully able to resolve all accounting issues between the parties, leaving accounting issues as well as legal issues (and accompanying factual background) for resolution by the court, then the following deadlines shall apply:

...

[R. 84-85.] This Case Management Order ("CMO") is in fact an order of the Court and holds the same authority as any order of the trial court. Labrum's assertion that the trial court did not order, direct and supervise the Evaluation Team and the Accountants Evaluation Agreement is misleading. See Labrum's Brief, pp. 27-29. "The fact is that the Court accommodated the parties' agreement to submit their claims under the evaluation terms but it certainly did not require it, beyond approving the parties' stipulated order." [R. 28.] Labrum's argument that some orders are different than other orders of the court is not only confusing but not based on law. The language of the CMO again reinforces the Accountants Evaluation Agreement.

The CMO's reference to the Accountants Evaluation Agreement was appropriate wherein it states that the parties will submit their claims, "consistent with the parties' Letter

Agreement, a copy of which is attached at Exhibit “A.” [R. 85.] The Court and the parties had agreed to deal with the accounting-type issues to the extent possible with the unresolved accounting-type issues and all legal issues to return to the Court for resolution at a later trial date. It is not an error nor did Coet “expressly waive or release” his right to attorneys’ fees and costs pursuant to the Asset Purchase Agreement for the new motor vehicle dealership.

Coet should receive his costs and reasonable attorneys’ fees, pursuant to the Asset Sale Agreement, as the prevailing party for the time and activities between the execution of the Asset Sale Agreement and the finding of the Evaluation Teams.

Additionally, Labrum argues that Paragraph 9, is a type of contract. See Labrum’s Brief, p. 21. Importantly, the release language is not by itself a contract. It is part of the Accountants Evaluation Agreement, and as such must be considered with the terms and conditions set forth in the four corners of the contract.¹ Labrum wants this Court, like the trial court, to first ignore the terms and conditions of the Asset Sale Agreement and to consider only certain portions of the Accountants Evaluation Agreement, like the release language in its most expansive reading. Coet, however, petitions this Court to consider the terms of the Asset Sale Agreement and apply the entire Accountants Evaluation Agreement according to its terms, conditions and intent of the parties. Labrum argues that the

¹ “[i]f the language within the four corners of the contract is unambiguous, the parties’ intentions are determined from the plain meaning of the contractual language, and the contract may be interpreted as a matter of law.” Green River Canal Co. v. Thayn, 2003 UT 50, ¶ 17, 84 P.3d 1134.

Accountants Evaluation Agreement represents the parties' intent to put "everything on the table." See Labrum's Brief, p. 21. This representation is more than convenient, it is subterfuge. In the email cited by Labrum, prepared by Labrum's counsel to Coet's counsel and dated May 12, 2004, Labrum represents that "everything needs to be put on the table and addressed or waived." [R. 263.] However, the context of the email represents the context of the discussions between counsel and later on with the Court, in that the issues for the Evaluation Team to resolve were concerning all accounting-type issues. [R. 263.]

Labrum often repeats the argument that by the Accountant Evaluation Agreement, the parties agreed "to put everything on the table except for legal issues regarding the obsolescence parts." When in reality, what the parties were working toward was a way to get all the accounting-type issues on the table, getting both parties to focus and list what accounting-type issues existed between the parties and have the Evaluation Team attempt to resolve all the accounting-type issues it could, and send the remaining legal and unresolved accounting-type matters to be resolved by the trial court. It is quite simple. The Evaluation Team addressed and resolved all accounting-type issues that it could and left the remainder to the trial court. [R. 104-106.] Importantly, the trial court failed to harmonize the conflicting plain terms of the Accountants Evaluation Agreement. Labrum's arguments failed to establish that by putting everything (all accounting-type issues) on the table, the Evaluation Team would be able to resolve all issues, including legal issues such as denying any claims or attorneys fees and costs.

D. Coet Did Not Waive Its Right To Attorneys' Fees and Costs By Not Expressly Reserving Them In The Accountants Evaluation Agreement.

Labrum first argued that the Accountants Evaluation Agreement was an accord and satisfaction. See Labrum's Brief, p. 31. Also in his brief, Labrum asserts that the Accountants Evaluation Agreement is a settlement agreement. See Labrum's Brief, p. 24. Labrum argues that as a matter of law, claims that are not expressly preserved in a settlement agreement are waived. Id. The Accountants Evaluation Agreement is not a settlement agreement. It is specifically an agreement, pursuant to a court order, to enlist two accountants to help resolve certain accounting-type disputes between the parties. It is not a settlement agreement.

As such, Labrum's assertion that any claim not expressly made is expressly waived is incorrect. "Absent express language in the settlement agreement waiving the right to recover attorneys' fees, the intent of the parties governs. Brown v. General Motors Corp., Chevrolet Div., 722 F.2d 1009, 1012 (10th Cir.1983). In this action, the Accountants Evaluation Agreement is silent regarding Coet's right to recover fees and expenses. However, the Asset Sale Agreement² explicitly provides for the award of attorneys' fees and costs. Moreover, neither the parties, nor the trial court, authorized the Evaluation Team to

² When the intent of the parties to a contract is clearly ascertainable by construing the document from its four corners it is not considered ambiguous; although some terms may be conflicting, extrinsic evidence is inadmissible and rules of construction applicable to ambiguous contracts do not apply. Missouri Pacific R. Co. v. Kansas Gas and Elec. Co., 862 F.2d 796, 799 C.A.10 (Kan.),1988.

address or determine legal issues. It would be inappropriate to attempt to provide accountants the authority and the task of deciding legal issues such as the award of attorneys' fees and the amount. The award of attorneys' fees is a legal decision for the courts only,³ "attorney fees are awardable only if authorized by statute or by contract." Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988). In this instance, attorney fees are provided for by the Asset Sale Agreement. Therefore, the trial court should have awarded fees, "in accordance with the terms of the contract." Id.; see also Moore v. Smith, 2007 UT App 101, ¶ 49, 158 P.3d 562. When looking at the four corners of the Accountants Evaluation Agreement, it is clear and unambiguous that the parties, with the trial court Order, determined that the Evaluation Team was to deal with accounting-type issues only and any mention or failure to mention legal issues is not an express waiver of any rights or claims.

II. LABRUM FAILED TO ADDRESS COET'S ARGUMENT REGARDING THAT THE TRIAL COURT ERRED IN ITS DENIAL TO AWARD PRE-JUDGMENT INTEREST.

Labrum failed to make an argument against Coet's assertion that the trial court erred in denying Coet pre-judgment interest as set by Utah Code Ann. § 15-1-1 et seq. When the trial court granted Labrum's Motion for Partial Summary Judgment, a portion of the

³ "Calculation of reasonable attorney fees is in the sound discretion of the trial court, and will not be overturned in the absence of a showing of a clear abuse of discretion." Dixie State Bank v. Bracken, 764 P.2d 985, 988 (Utah 1988) (citation omitted). When determining what constitutes a reasonable award of attorney fees, the trial court should consider several factors, some of which include the amount of work actually performed and the amount of work "reasonably necessary to adequately prosecute the matter." Id. at 989-90. Moore v. Smith, 2007 UT App 101, ¶ 53, 158 P.3d 562.

argument opposing the denial of statutory pre-judgment interest is the same for the denial of attorneys' fees, *supra*. Furthermore, Coet asserts that the parties did not stipulate, nor did the trial court provide, the authority to the Evaluation Team to determine both accounting and legal issues. An award of pre-judgment interest is based in statute and determined by a court, because it is a legal issue. "A trial court's decision to grant or deny pre-judgment interest presents a question of law which is reviewed for correctness." Smith v. Fairfax Realty, Inc., 2003 UT 41, ¶ 16, 82 P.3d 1064.

A party is entitled to interest on past due money when both the amount due and the due date may be ascertained. See Lignell v. Berg, 593 P.2d 800, 809 (Utah 1979). Utah courts have described the standard for determining whether a given damage award merits prejudgment interest: "[W]here the damage is complete and the amount of the loss is fixed as of a particular time, and that loss can be measured by facts and figures, interest should be allowed from that time ... and not from the date of judgment." Canyon Country Store v. Bracey, 781 P.2d 414, 422 (Utah 1989) (alterations in original) (quoting First Sec. Bank of Utah v. J.B.J. Feedyards, Inc., 653 P.2d 591, 600 (Utah 1982)).

Crowley v. Black, 2007 UT App 245, ¶ 7, --- P.3d ----, 2007 WL 2007577 (Utah App.).

The Accountants Evaluation Agreement does not state explicitly or imply that Coet waived his right to pre-judgment interest. An award of pre-judgment interest is based in statute. It would be contrary to Utah law for the Evaluation Team to determine the amount of pre-judgment interest to be awarded to Coet based upon his award of \$59,384.79, because it is the responsibility of the court to determine the award of pre-judgment interest. Failure to request prejudgment interest prior to judgment is unnecessary because, "the interest issue is injected by law into every action for the payment of past due money." Fitzgerald v.

Critchfield, 744 P.2d 301, 304 (Utah Ct. App.1987) (quoting Lignell, 593 P.2d at 809). Crowley v. Black, 2007 UT App 245, ¶ 10, --- P.3d ----, 2007 WL 2007577 (Utah App.); “Pre-judgment interest is properly awarded when a damage is complete, the loss can be measured by facts and figures, and the amount of loss is fixed as of a particular time.” Orlob v. Wasatch Med. Mgmt., 2005 UT App. 430, ¶ 35, 124 P.3d 269.

III. COET IS THE PREVAILING PARTY IN THIS ENTIRE MATTER.

Labrum misstates the question at issue in this portion of the appeal by stating “the only relevant questions is: who is the prevailing party and therefore entitled to recover attorneys’ fees and costs with respect to claims asserted after May 13, 2005?” Labrum’s Brief, p. 30.

Such an assertion misstates and oversimplifies the issues and disrespects the trial court by discounting its ability to exercise its discretion and judgment. The real issue is who is, the prevailing party in this matter, including all decisions and awards from the filing of the Complaint to final resolution, including the award of the Evaluation Team?

As was argued before, the starting point for determining prevailing party is the net judgment rule. See Coet’s Appellant Brief, pp. 28 - 35; see also Occidental/Nebraska Fed. Sav. Bank v. Meyer, 791 P.2d 217, 221 (Utah Ct. App. 1990). Additionally, trial courts may also use “a flexible and reason approach.” See A.K. & R. Whipple Plumbing & Heating v. Guy, 2004 UT 47, ¶ 11, 94 P.3d 270. The determining time frame regarding the determination of the prevailing party should be, which party prevailed from the onset of litigation to the final resolution of the matter.

The established case law already allows for the Court's discretion in determining the prevailing party. See Myrah v. Campbell, 2007 UT App 168, ¶¶ 33-34, 163 P.3d 679. Labrum asserts that "it is extremely unworkable for trial courts to try to figure out who prevailed in negotiated settlement." See Labrum's Brief, p. 32. Labrum's general and oversimplified analysis is inapplicable to the case at bar. This Court has already established that a trial court has discretion in taking into consideration all facts and awards in a matter in the "flexible and reasoned approach." See A.K. & R. Whipple Plumbing & Heating v. Guy, 2004 UT 47, ¶ 11, 94 P.3d 270. Additionally, the Court of Appeals held,

In certain circumstances, a court may easily determine which party is the prevailing party. For example, "[w]here a plaintiff sues for money damages, and plaintiff wins, plaintiff is the prevailing party; if defendant successfully defends and avoids adverse judgment, defendant has prevailed." R.T. Nielson Co. v. Cook, 2002 UT 11, ¶ 23, 40 P.3d 1119. Other circumstances, however, may require more complex analysis, such as when the case involves "multiple claims and parties," when the court awards "non-monetary relief" to one or more parties, or when the "ultimate award of money damages does not adequately represent the actual success of the parties under the peculiar posture of the case." Mountain States Broad. Co. v. Neale, 783 P.2d 551, 555 n. 7 (Utah Ct. App. 1989). When undertaking this more complex analysis, courts consider additional factors, including the following: (1) contractual language, (2) the number of claims, counterclaims, cross-claims, etc., brought by the parties, (3) the importance of the claims relative to each other and their significance in the context of the lawsuit considered as a whole, and (4) the dollar amounts attached to and awarded in connection with the various claims. R.T. Nielson Co., 2002 UT 11 at ¶ 25, 40 P.3d 1119.

Crowley v. Black, 2007 UT App 245, ¶ 13, --- P.3d ----, 2007 WL 2007577 (Utah App.).

In this particular case no settlement money exchanged hands until after the Complaint was filed. The trial court was well aware of the months of negotiation which occurred prior

to the entry of the CMO directing the parties to use the Evaluation Team to attempt to resolve accounting-type issues. [R. 45-63; 72; 82-86; 675, 199:12-16.] The trial court was well aware of the amount of settlement determined by the accounting team that Labrum owed Coet. Moreover, the trial court was also aware as to the reason of the settlement between Coet and Labrum prior to the litigation of the remaining issues. Labrum's argument that the trial court was incapable of considering the award received by Coet through the alternative dispute resolution option of the Evaluation Team, insults the bench and the public policy in support of the flexible and reason approach established by A.K. & R. Whipple Plumbing & Heating Guy, 2002 UT App 73, 47 P.3d 92.

Labrum attempts to misguide this court with the argument that "the Resolution Agreement [Accountants Evaluation Agreement] acted as a partial modification, or partial accord in satisfaction, of the Asset Sale Agreement." See Labrum's Brief, p. 31. This assertion or description of the Accountants Evaluation Agreement is unsupported by the facts and by case law and is simply incorrect. The Asset Sale Agreement is the controlling document and pursuant to the terms and conditions agreed-upon therein, Coet is the prevailing party in this matter and should be awarded not only fees and costs for the entire matter from the filing of the Complaint until the final decree of this Court, but also receive an award of pre-judgment interest for the amount which has been paid and which will be paid to Coet by Labrum.

IV. LABRUM'S UNSUPPORTED RELIANCE UPON COET'S ALLEGED MISREPRESENTATION.

Labrum asserts that Coet's appeal relative to Labrum's cause of action of fraud is a question of fact requiring Coet to marshal the evidence in order to overturn the trial court's error regarding its ruling that Coet made a material misrepresentation that the dealership did not have an obsolete parts problem. See Labrum's Brief, pp. 32-35. Labrum mistakes Coets' arguments. This issue on appeal is whether the trial court erred in its legal conclusion based upon the facts, that Labrum acted reasonably or not, in relying upon Coet's statement. Typically, the question of reasonable reliance is a question of fact, however, there are instances, like here, where courts may conclude that as a matter of law, there was no reasonable reliance. See Gold Standard, Inc. V. Getty Oil, Co., 915 P.2d 1060, 1067 (Utah 1996).

Labrum failed to meet the evidentiary standard for reasonable reliance. The trial court considered Labrum's wife's testimony. The court should have also considered (1) Labrum's experience in a new motor vehicle dealership's parts department; (2) Labrum's experience as a comptroller in the new motor vehicle; (3) Labrum's literal, physical inventory of the dealership's parts; (4) Labrum's unqualified access to the dealership's parts; and (5) his attestation, on two separate documents, to his satisfaction that there was at least \$68,000.00 worth of non-obsolete parts in the parts inventory.

Moreover, a buyer of a business has certain duties. Labrum had to a duty to affirmatively investigate the business he was interested in purchasing. "[A] purchaser of a business is under a duty to investigate the financial condition of the business. Only a seller

of a business who is guilty of deliberately defrauding or misrepresenting the financial condition of a business who is liable therefor.” See Paz, supra, 36 Lehigh L.J. at 436. See also Suraci v. Ball, 160 Pa.Super. 349, 352, 51 A.2d 404, 406 (1947); Ashland Towson Corp. v. Kasunic, 110 Pa.Super. 496, 501, 168 A. 502, 503-04 (1933); and Bross v. Home Supermarket Grocery Co., 32 D. & C.2d 75, 80 (Phia.Co.1962).” In re Wright, 223 B.R. 886, 896 (Bkrtcy.E.D.Pa.,1998). The trial court questioned Labrum’s counsel about a buyer’s duty to investigate.

Q. [The Court] The other question that I had on the fraud issue is there is some case law in Utah that talks about the idea that when two parties engage – two sophisticated parties, which these apparently are when it comes to the issue of car dealerships, engage in a transaction – in an arm’s length transaction, the parties can’t simply accept at face value things that are told to them. They have a duty to investigate. Do you believe that the case law would be applicable here where obsolete parts is clearly a recognized issue in August of 2001. Your client has three months to look into this question. He’s a sophisticated party. He does the parts inventory. It seems to me that he may have that duty to find out before he closed.

[R. 674, 184:15-185:1.] Labrum’s response avoided answering what Labrum’s duty entailed, but focused upon some possible difficulties Labrum may have experienced had he tried. [R. 674, 185:2-186:16.] Simply put, Labrum failed to meet his duty.

Additionally, Mr. Coet’s testimony provided a more complete picture of what occurred in the late hours, while Mr. Labrum and three family members were conducting an inventory of the dealership’s parts. [R. 674, 185:18-24.]

Q. And did you in fact, did you and Mr. Labrum complete the parts inventory that night?

A. [Mr. Coet] We reached a point at which time Mr. Labrum says, "How do you feel about the parts count, Larry?" I said, "Danny," I said, "That's totally up to you. It's your money." He said, "Well, I feel satisfied." He said, "Let's call it a close."

Q. So did you terminate the parts counting? Were there still parts left to - -

A. There were still some parts left, yes.

Q. Okay. At that time, Mr. Coet, approximately if you can recall, what did your books show as far as the parts inventory?

A. Approximately a little over \$79,000.00 in parts.

Q. Okay. Did you put any pressure at all on Mr. Labrum to terminate the parts inventory that night?

A. No.

[R.674, 21:14-22:3]. It appears more than upon reliance of Mr. Coet's alleged stated assurance, that Mr. Labrum knew that he had reached the \$68,000.00 parts inventory threshold as provided in the Asset Sale Agreement. After conducting the parts inventory for several hours with family and Coet, Labrum was satisfied and terminated the inventory of his own accord. [R. 674, 185:18-24.]

The trial court appropriate question Labrum's counsel regarding his claim of reasonable reliance.

Now let me turn to the obsolete parts.

THE COURT: Let me just be clear on that question. In the absence of fraud, you would agree that there was no adjustment made for obsolete parts at the closing either.

MR. CALL: In the absence of fraud or misrepresentation there was no adjustment made for obsolete parts. I agree.

THE COURT: And you would have no cause of action.

MR. CALL: Pardon me?

THE COURT: You would have no cause of action.

MR. CALL: Absent defraud or misrepresentation and omission that's absolutely true, your honor.

THE COURT: Okay.

[R. 674, 182:21-183:7.] Based upon the standard set in Gold Standard, Inc. V. Getty Oil Co., 915 P.2d 1060, 1067 (Utah 1996), this Court can determine the trial court erred in its legal conclusion as a matter of law that there was no reasonable reliance by Mr. Labrum on Mr. Coet's alleged representations.

V. THE 1992 FORD TRUCK WAS INCLUDED ON THE USED VEHICLE INVENTORY LIST, BUT WAS NOT INCLUDED IN THE PURCHASE PRICE PAID BY LABRUM.

Labrum did not pay Coet for a certain 1992 Ford truck. The issue was presented at trial and framed by the trial court as, “this issue turns on whether the truck was, in the seller’s inventory at the time of closing and previously titled.” [R. 674, 196:6-8.] The issue, properly phrased is, was, did Labrum pay Coet for the 1992 Ford truck, with the payment for the used car inventory?

The facts regarding the 1992 Ford truck and how it came to be on the dealership premises on the closing date have been well documented in the previous briefs. It is undisputed that the 1992 Ford truck was on the dealership premises at the time of the closing. It is also undisputed that the 1992 Ford truck was listed on the inventory list of used vehicles. It is also undisputed that Labrum paid Coet \$290,275.00 for the used vehicle inventory. [R. 353.]

The issue on appeal is, did Coet receive compensation for the 1992 Ford truck? The answer is no. Notwithstanding Labrum’s argument that “[i]t is irrelevant whether each used

car in inventory was assigned a separate and definite price,⁴” the parties agreed upon a set price for each used car in inventory. The set price agreed to by Coet and Labrum, evidence by Plaintiff’s Exhibit 10, was the total amount Labrum offered and the amount included in the final purchase price. See Plaintiff’s Exhibits 2 and 3. Labrum inspected each used vehicle on the lot and offered a bid price. [R. 344; Plaintiff’s Ex. 10.] Labrum did not inspect and make a bid for the 1992 Ford truck. The reason he did not make a bid for the 1992 Ford truck is because it was not on physically on the dealership premises to be appraised. The truck had not yet been delivered to the dealership. The 1992 Ford truck was delivered on November 13, 2001. [R. 674, 85:18-23.] Labrum, with Coet observing, made the physical inventory of the used vehicles on November 12, 2001. [R. 674, 34:16-25.]

Adding up the individual prices offered by Labrum for all the used vehicles, save the 1992 Ford truck, equals \$290,275.00, the amount Labrum paid Coet for the used vehicle inventory. Labrum did not pay Coet for the 1992 Ford truck.

The trial court concluded that “the 1992 Ford truck was in the sellers inventory at the time of closing.” [R. 674, 196:14-15.] Based upon the evidence presented, the trial court erred in its determination, in that while the 1992 Ford truck was included on the list of used vehicles, it was not inspected nor bid upon by Labrum, nor included in the purchase price of the used vehicle inventory.

⁴ Labrum’s Brief, p. 37.

VI. THIS COURT SHOULD INSTRUCT THE TRIAL COURT TO INCLUDE COET'S ATTORNEYS' FEES, INCLUDING THOSE INCURRED IN THIS APPEAL.

It is expected for this Court to reverse and remand this matter to the trial court to determine the appropriate amount of costs, attorneys' fees and prejudgment interest Mr. Labrum owes Mr. Coet. Mr. Coet has incurred additional attorneys' fees in filing and briefing his appeal to uphold the terms of the Asset Sale Agreement. Therefore, this Court should include in its instructions to the trial court, to include attorneys' fees and costs incurred in the appellate process to the remainder of the matter and pay Mr. Coet.

CONCLUSION

WHEREFORE, as the detailed analysis above and in Coet's Appellant's and Reply Briefs establish, the trial court erred on several issues in the resolution of the disputes between Coet and Labrum. The trial court erred in its holding that Coet waived his right to attorneys' fees, costs and pre-judgment interest in the Accountants' Evaluation Agreement; Labrum was the "prevailing party" at the conclusion of the bench trial; Labrum's detrimental reliance on Coet's remark regarding the obsolete parts and the determination of the ownership issue relative to the 1992 Ford truck.

Coet respectfully requests that this Court reverse and remand this matter to the trial court with instructions to enter an order: (1) for an award to Coet for his attorneys' fees and costs; and/or (2) for an award to Coet for pre-judgment interest on his award as determined by the Evaluation Team; and/or (3) holding Coet as the prevailing party regarding the entire

matter; and/or (4) find that Labrum failed to meet the elements and standard of proof for fraud relative to the parts inventory obsolescence and/or (5) for the trial court to reconsider the ownership status of the 1992 Ford pickup; and/or (6) the repayment, with applicable interest, the monies paid by Coet to Labrum pursuant to the trial court's Order.

Respectfully submitted this 27th day of September, 2007.

A handwritten signature in black ink, appearing to read "Gary R. Howe", is written over a horizontal line.

GARY R. HOWE

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CERTIFICATE OF SERVICE

I HEREWITH CERTIFY that I am a member of and/or employed by the law firm of CALLISTER NEBEKER & McCULLOUGH, Zions Bank Building, Suite 900, 10 East South Temple, Salt Lake City, Utah 84133, and that in said two (2) true and correct copies of the attached **APPELLANTS' REPLY BRIEF** were caused to be served upon the following by depositing properly addressed envelopes containing the same in the U.S. Mails, postage prepaid thereon, this 27th day of September, 2007.

Keith A. Call
Snow, Christensen & Martineau
10 Exchange Place, 11th Floor
Salt Lake City, Utah 84145-5000


