

1988

H. LeRoy Cobabe, Lewis R. Canfield, and St.
George Toyota v. B. Glen Crawford, Paula
Crawford, and Crawford Investment Company :
Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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880567

IN THE COURT OF APPEALS OF THE STATE OF UTAH

H. LeROY COBABE, LEWIS R. CANFIELD,
and ST. GEORGE TOYOTA, INC.,

Plaintiffs-Respondents,

vs.

B. GLEN CRAWFORD, PAULA CRAWFORD, and
CRAWFORD INVESTMENT COMPANY, a Utah
limited partnership,

Defendants-Appellants.

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Case No. 880567-CA

Argument Priority
Classification: 14.b

APPELLANTS' BRIEF

Appeal from an Order of Dismissal With Prejudice of the
Fifth Judicial District Court for Washington County
The Honorable J. Philip Eves, District Judge

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COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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and ST. GEORGE TOYOTA, INC.,	:	
	:	
Plaintiffs-Respondents,	:	
	:	
vs.	:	Case No. 880567-CA
	:	
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- APPENDIX 1: Agreement of Purchase and Sale of Assets
- APPENDIX 2: Reporter's Hearing Transcript, Tuesday, June 7, 1988
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- APPENDIX 4: Reporter's Hearing Transcript, Thursday, July 21, 1988
- APPENDIX 5: Order of Dismissal With Prejudice, July 13, 1988

* * *

KEY TO ABBREVIATIONS

- I Record, Volume I
- II Record, Volume II
- GCI Deposition of Glen Crawford,
November 17, 1986
- HLC Deposition of H. LeRoy Cobabe,
January 26, 1986
- LCI Deposition of Lewis R. Canfield,
November 18, 1986
- T1 Reporter's Transcript of Hearing,
June 7, 1988
- T2 Reporter's Transcript of Hearing,
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IN THE COURT OF APPEALS OF THE STATE OF UTAH

H. LeROY COBABE, LEWIS R. CANFIELD, and ST. GEORGE TOYOTA, INC.,	:	
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Plaintiffs-Respondents,	:	
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CRAWFORD INVESTMENT COMPANY, a Utah	:	Classification: 14.b
limited partnership,	:	
	:	
Defendants-Appellants.	:	

JURISDICTION OF UTAH COURT OF APPEALS
PROCEEDINGS BELOW

This appeal is from an order of dismissal with prejudice entered on July 13, 1988, in the Fifth Judicial District Court, in and for Washington County, State of Utah, the Honorable J. Philip Eves presiding. (See Record, Vol. II [hereinafter II], at 91-92.) Jurisdiction for appeal to the Utah Supreme Court was conferred pursuant to Rule 3(a), Rules of Utah Supreme Court. Appellants perfected their appeal with the district court on August 10, 1988. (II at 126-133) Thereafter, the Utah Supreme Court transmitted this appeal to the Utah Court of Appeals, pursuant to its vested authority, over the signature of Geoffrey J. Butler. (II at 138)

This case was initiated by Respondents in December of 1985, seeking \$100,000 in liquidated damages, lost profits, costs, and attorney's fees solely alleging Appellants' breach of a cove-

nant not to compete. (See Record, Vol. I [hereinafter I], at 3.) Appellants answered, denying their breach, and requested attorney's fees in defending the suit pursuant to Section 78-27-56 of the Utah Code Annotated, or, alternatively, "as provided in the parties' contract." (I at 24) Trial was set for June 22 and 23 of 1988. (II at 26) **Less than one month prior to trial**, Respondents filed a motion, absent any supportive memorandum or rule of civil procedure, requesting the district court to dismiss their complaint solely because Respondents were then "unable to further prosecute the suit." (II at 35) This motion was initially heard on June 7, 1988. At that time, Respondents indicated that they might be agreeable to a dismissal with prejudice. (Reporter's Transcript, June 7, 1988 [hereinafter T1], at 4.) Respondents, however, resisted Appellants' responsive contention that in the event of dismissal, Appellants were entitled, as prevailing parties, to present evidence of their attorney's fees. Barring that, Appellants resisted dismissal of the claim. (Id. at 6; see also, II at 40.)

Despite Appellants' counsel's indications to the district court that, after 30 months of litigation, he was prepared to go forward with evidence as to Appellants' attorney's fees, subject to cross examination, the lower court denied Appellants this opportunity. (See Reporter's Transcript, June 20, 1988 [hereafter T2], at 8-9.) The lower court's rationale was as follows:

Having reviewed the memoranda filed by the counsel, the motion to dismiss is granted.

The trial date which was this Wednesday is vacated.

The motion for attorney's fees is denied. The reason being that it is apparent from the pleadings in the file that the reason the Plaintiffs have sought to dismiss the case is not because they feel they have not prevailed or could not prevail, but because they were under extreme financial pressures which prevent them from going forward.

Under those circumstances, I find that neither party has prevailed, and neither party is entitled to attorney's fees under the contract. (Id. at 9)

From the above ruling, Appellants, who believe they prevailed as a matter of law and contract right, have brought this appeal. An examination of the record reveals that the judge's usage of the plural "memoranda" was incorrect; on June 20, 1988, only Appellants had filed a memorandum with the court. (II at 53)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Are Appellants (Defendants in the district court) prevailing parties where Respondents' case against them was dismissed with prejudice less than two days prior to trial?

2. Are Appellants entitled to a hearing to set attorney's fees as successful parties within the parameters of the parties' contractual agreement both for their counsel's work before the district court as well as on appeal?

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND RULES

Citations to constitutional provisions, statutes, ordinances, and rules, wherever appropriate, will occur in the text

of the brief.

STATEMENT OF THE CASE

In 1976, Glen Crawford acquired a franchise from Toyota of America and operated in St. George under the name of Crawford Toyota for approximately nine years. (Deposition of Glen Crawford, November 17, 1986 [hereinafter GCI] at 27) On or about October of 1984, Respondents Cobabe and Canfield approached Crawford in reference to purchasing Crawford Toyota. (Deposition of Lewis R. Canfield, November 18, 1986 [hereinafter LCI] at 40-41) Canfield had extensive expertise with automobile franchises and dealerships. (Id. at 1-41) Thereafter, Respondents Cobabe and Canfield retained Attorney John Palmer to negotiate the purchase of Crawford Toyota from Mr. Crawford. (Id. at 49-50) Subsequent thereto, on January 24, 1985, an Agreement of Purchase and Sale of Assets was executed between Mr. Crawford, his wife Paula Crawford, and Crawford Investment Company and Respondents. A copy of the contract is attached hereto as Appendix 1, and was the contract pled by Respondents in the case below. (See I at 1-11.) Subsequently, an addendum was signed, but the material provisions of the original agreement incident to this appeal were not modified thereby. (See GCI, Depo. Ex. 3.)

As part of the sales contract with Respondents, Appellants agreed "not to compete with a new car franchise within a 30 mile radius of currant [sic] dealership for a period of two (2) years from date of closing." (See Appendix 1, ¶ 2.) While perhaps immaterial at this juncture, this Court should understand that, as

referenced in the contractual agreement, the word "franchise" does not refer to the franchise being sold but rather the means by which Appellants were barred from competing in the St. George area. (See LCI at 85-86.)

Several months after the sale, Crawford and other individuals not named in the complaint predictably obtained a used motor vehicle dealer's license under the name and sign of Desert Auto Sales. All the parties understood that Crawford contemplated this transition at the time of the sale of his franchise with Toyota. (See e.g. LCI at 60, 70.)

At all applicable times herein, Section 41-3-7 of the Utah Code defined a used motor vehicle dealer as "a person engaged in the business of selling or exchanging used motor vehicles." Thereafter, Crawford, as a principal and salesman for Desert Auto Sales, sold used vehicles as allowed by Utah law. Significantly, in Utah at all applicable times herein, a used motor vehicle dealer could sell current model vehicles provided they were sold and licensed as used cars. (See Affidavit of John R. McKnight, I at 198-99; see also Utah Code Ann. § 41-3-7.)

Appellants believe that the record on appeal demonstrates that Respondents' case was ill-conceived and meritless. As stated by Respondent Cobabe, the contractual clause did not prevent Crawford from going into the used car business or doing anything that a used car dealer could otherwise legally do, including selling current model cars in St. George. (See Deposition of H. LeRoy Cobabe, January 26, 1986 [hereinafter HLC], at 30-31, 33,

36.) This is all Crawford did. Significantly, Crawford never acquired a franchise from a manufacturer defined by § 41-3-7(12) of the Utah Code as "a contract or agreement between a motor vehicle dealer and a manufacturer of new motor vehicles or its distributor or factory branch by which the dealer is authorized to sell any specified make or makes of new motor vehicles." (See also the definition of "new motor vehicle dealer" § 41-3-7(17) Utah Code Ann.)

On November 20, 1985, Respondents' counsel sent a demand letter to Appellant Glen Crawford alleging Crawford's breach of the prior non-competition clause and requesting that Crawford execute a new expansive, two-page non-competition clause, comply with it in detail, and pay Respondents the sum of \$30,000 in cash. (See LCI, Depo. Ex. A.) Crawford refused Respondents' unilateral demands, and less than two weeks later, on December 3, 1985, Respondents filed their complaint. (I at 1)

Significant to this appeal, Respondents' complaint attached the January 24, 1985, agreement, alleged Appellants' renewed oral promise not to violate the same in September of 1985, and requested \$100,000 in liquidated damages, additional lost profits, together with all costs and attorney's fees incurred in bringing the action. (See I at 2-3, ¶¶ 4, 8, 11, 12, and 13.)

Paragraph 23 of the parties' contract states their negotiated agreement pertaining to attorney's fees as follows:

In the event of any litigation between the parties hereto to enforce any provision or rights hereunder, the unsuccessful party to such litigation shall pay to the successful

party therein all costs and expences [sic] expressly including, but not limited to, reasonable attorneys' fees and court costs incurred herein by such successful party, which costs, expenses and attorney's fees and court costs incurred by such party or in connection with such litigation.

There is only one cause of action pled in Respondents' complaint and only one contract which Respondents alleged gave rise to their damages. Paragraph 31 of that contract requires any modification thereof to be in writing executed by the parties thereto, of which there were five signatories. (Appendix 1)

Appellants' answer denied any breach and specifically set forth Appellants' entitlement to attorney's fees as follows:

As a further and separate affirmative defense, these Defendants allege that Plaintiffs' cause of action is without merit and is not brought or asserted in good faith, and, pursuant to Utah Code Annotated § 78-27-56, these Defendants are entitled to a reasonable attorney's fee for defense of each cause of action against it listed in Plaintiffs' complaint, or as provided in the parties' contract.

WHEREAS, these Defendants pray that the Plaintiffs' complaint be dismissed as against these Defendants, and that these Defendants receive their costs incurred herein and for attorney's fees, and for such other and further relief as the Court deems just and equitable. (I at 24.)

Respondents pursued their suit with vigor. Respondents noticed up five separate depositions comprising over 332 pages of transcribed testimony. Appellants noticed up three depositions comprising 199 pages of transcribed testimony. Respondents submitted three sets of interrogatories and two sets of requests for production of documents to Appellants. (See e.g., I at 135-

141.) Appellants contented themselves with one set of interrogatories, one request for production of documents, and one series of requests for admissions. (Note: Appellants' only request for production of documents, entitled "Second Request," was a misnomer. [I at 116].)

Appellants' depositions taken of Respondents clearly indicate that Crawford could maintain a used car franchise and sell current-model cars in St. George without violating the non-competition clause as drafted between the parties. (See e.g., HLC at 30-31, 33, 36.) Indeed, at the deposition of Dr. Cobabe, it became clear that Appellant Crawford had not broken the agreement as written, but that Respondents simply desired that the previous agreement, now unsatisfactory to them, be expanded. In calling Dr. Cobabe's attention to paragraph four of his complaint and the proposed Addendum to Agreement of Purchase and Sale, attached as Exhibit "A" (3 pp.) to the November 18th deposition of Lewis Canfield, Dr. Cobabe conceded that paragraph four of the complaint does not even correctly state the agreement as executed among the parties, but, rather, pleads the contractual provision as Dr. Cobabe "**wished**" it had been written! (See HLC at 38-41.)

Appellants, attempting to cut through the chaff of this litigation, moved for summary judgment and attorney's fees in December of 1987, together with supporting affidavits. (I at 196-233) Respondents opposed the motion, filing a lengthy memorandum and affidavit contending, contrary to the written contract and Utah law as articulated in Coombs v. Ouzounian, 24 Utah 2d 39, 465 P.2d

356 (1970), that two signatories to the written contract had somehow orally modified it. (II at 7-24) Despite the plethora of testimony and other evidence to the contrary, the lower court denied Appellants' motion and set the matter for trial on June 22 and 23 of 1988, at 9:30 a.m.

Compromise Negotiations

Compromise negotiations are, by their nature, normally inadmissible in evidence as a matter of public policy. (Rule 408, Utah Rules of Evidence) Respondents, however, openly set forth before the lower court their prior offer of dismissal; and Appellants' reply, which took the form of a letter drafted by Appellants' counsel dated May 18, 1988, was later attached to Respondents' counsel's affidavit. (II at 37-40) In reference to Respondents' offer to dismiss the case, Appellants' position was abundantly clear:

At the present time, we are considering your offer, but feel that Mr. Crawford's attorney's fee should be partially compensated by the Plaintiffs.

As a result thereof, I would make the following counteroffer to you: First, that the matter be dismissed with prejudice on both sides, so that no further discovery time, attorney's fees, or costs need be incurred on behalf of Mr. Crawford. In addition thereto, Mr. Crawford would receive \$1,000.00 a month from Mr. Cobabe, for a period of twelve months, to offset his attorney's fees. In exchange therefor, the matter would be dismissed with prejudice on the merits. (II at 40)

The Respondents' Motion to Dismiss
and Supportive Affidavit

After receiving Appellants' refusal to dismiss without an assessment of fees, Respondents' counsel filed a notice of withdrawal; and, **subsequent thereto**, Respondents' motion to dismiss. This motion does not state what rule Respondents relied on or whether such dismissal was sought with or without prejudice. (II at 33-40) The only affirmative statement is that Respondents requested dismissal because they were unable to further prosecute the suit. The entire text of their motion is as follows:

COMES NOW THE PLAINTIFFS IN THE ABOVE ACTION AND move to dismiss the complaint against the Defendants on the grounds that the Plaintiffs are unable to further prosecute the same. (II at 35)

Significantly, this motion was filed less than one month prior to trial. In their supportive affidavit, once again, Respondents failed to note whether they requested such dismissal with or without prejudice, but stated that despite Respondents' "belief in the merits of the suit, it . . . [was] not financially possible for Plaintiffs to continue the case." (See II at 37-38, especially ¶ 7.) Regrettably, Respondents should have been more cautious when they filed their ill-conceived suit 30 months before. Not unsurprisingly, Respondents provided Appellants only five days' notice on their motion set for June 7, 1988. (II at 41-42)

Respondents did not provide Appellants any authority in support of their motion until June 9, 1988, at which time, Respondents mailed a one-page memorandum to Appellants. (See II at 80-

81.) The original Respondents' "memorandum" was never deposited with the lower court, although copies of Respondents' cases were apparently placed in the file at II 43-52. Indeed, Respondents' "memorandum" appears in the file only because it is attached as an exhibit to a responsive Appellants' memorandum.

The Hearings

Because Appellants believe that the preamble to the order of dismissal with prejudice prepared by Respondents' counsel misrepresents what occurred in this case, Appellants requested and received all three transcripts pertaining to entry of the order of dismissal with prejudice found at II 91-92. The first hearing, on Tuesday, June 7, 1988, clearly indicates that, while Appellants' counsel did not object to the case being dismissed, he did expect an opportunity on the 22nd and 23rd of June to go forward on the basis of attorney's fees expended in defending the case. (See T1 at 2-3.) Respondents' counsel, without tendering any authority to Appellants, then cited a case entitled Mobile Power Enterprises v. Power Vac, infra, at p. 21, and indicated to the lower court that this abortive opinion was consistent with other cases in which Plaintiffs had sought dismissal with prejudice. (T1 at 3-4) This was the first time Appellants knew that Respondents sought a dismissal with prejudice. Respondents thereafter cited two cases and indicated to the lower court that they had been unable to uncover any cases of dismissal with prejudice on the Plaintiffs' motion where attorney's fees had been awarded. (Id. at 5) Thereafter, Respondents' counsel indicated that, despite Appel-

lants' reliance on a contractual provision for attorney's fees, they were not entitled to the same by reason of the fact that Plaintiffs were dismissing because financial resources were otherwise exhausted. (Id. at 6) Thereafter, Appellants' counsel indicated that barring an assessment of attorney's fees, Appellants would resist dismissal of Respondents' complaint.

The second hearing was held Monday, June 20, 1988, only two days prior to the scheduled trial. At that time, Appellants' counsel tendered a copy of a responsive memorandum to the lower court indicating that the original had been filed with the clerk; and, indeed, this representation was accurate. (See II at 53; cf. incorrect preamble II at 91-92.) Respondents argued that to obtain attorney's fees Appellants were required to file a counterclaim. By reason of this, Respondents argued, Appellants could not be deemed the prevailing party. This was somehow made clear, they added, by the personal bankruptcy of one of the Respondents. (See T2 at 2-3.) Appellants' counsel argued that whether a dismissal was with or without prejudice, Defendants (Appellants here) would be prevailing parties, and this was even more so when the dismissal was with prejudice. (See T2 at 5-7.) Appellants' counsel also noted to the lower court that Respondents should have addressed the expenses of litigation **before** filing, and that the record clearly reflected that "the majority of expenses incurred in this lawsuit was [sic] incurred on the motion or on the request under the discovery principles by the Plaintiffs, [t]hey drove up their own costs." (T2 at 7) Appellants' counsel also indicated he was

prepared to testify on attorney's fees, subject to cross-examination, two days later at the trial. (T2 at 8-9) That afternoon, the lower court, **outside the presence of counsel**, made the following ruling correctly reported in three terse paragraphs:

Having reviewed the memoranda filed by the counsel, the motion to dismiss is granted. The trial date which was this Wednesday is vacated.

The motion for attorney's fees is denied. The reason being that it is apparent from the pleadings in the file that the reason the Plaintiffs have sought to dismiss the case is not because they feel they have not prevailed or that they could not prevail, but because they were under extreme financial pressures which prevent them from going forward.

Under those circumstances, I find that neither party has prevailed, and neither party is entitled to attorney's fees under the contract. (T2 at 9)

Simply stated, even though Appellants obtained a dismissal with prejudice of Respondents' case against them, Appellants were unsuccessful because Respondents felt that, if they had the money to fund the suit, they **might** win. The West's keynote might read as follows: Plaintiffs' speculations cause loss to defendants. And, though Respondents could not expense the trial, Appellants' counsel is quite sure they will uncover the funds to defend the appeal. (II at 40)

Basically stated, the lower court found that after two and one-half years of extensive litigation, where Plaintiffs decided less than a month prior to trial that they did not want to go forward because they could not afford it, Defendants, having

obtained a dismissal of Plaintiffs' cause of action with prejudice, had, nonetheless, not prevailed.

Respondents' counsel, whose withdrawal had not yet been granted, prepared an order of dismissal with prejudice. (II at 91-92; T1 at 7) Appellants objected to the proposed order because the preamble thereto was nothing more than a self-serving statement. (See II at 75-79.) Indeed, the entire preamble does not recite one argument set forth by Appellants for an award of attorney's fees based upon the parties' contractual agreement. Appellants have even heard that Respondents may, in effect, argue on appeal that Appellants stipulated to the dismissal with prejudice without an award of fees. The executed order appealed from contains one finding of fact and two conclusions of law. They are as follows:

1. The parties are in agreement that the case should be dismissed with prejudice.

2. There is no reason the Court should not dismiss the case with prejudice.

3. Neither party has prevailed in this action, and neither party to this suit is "successful" within the meanings of the terms of the agreement entitling an award of attorney's fees. (See II at 92.)

The order of dismissal with prejudice found in the record at II, 91-93, was never mailed in its executed form by Respondents' counsel or the court to Appellants' counsel. (See II at 93.) As a result, on July 21, 1988, Appellants' counsel was, as yet, unaware that any order had been signed. (See Transcript July 21, 1988 [hereinafter T3] at 2-3.) Appellants' counsel at this hearing indicated that Respondents' counsel had earlier agreed to the entry

of an order proposed for the district court's signature found at II 85-86. (Id.) Appellants' counsel's major inquiry then pertained to the executed order's preamble's inferences that the district court did not consider Appellants' arguments, or that they had somehow been untimely submitted. The district court, to allay any problems this Court may have, responded as follows:

I did not read the order that way in the first place. And if that's what you want me to cover, I certainly did have your arguments in mind and had received your arguments at the time I made the decision. (T3 at 4.)

SUMMARY OF ARGUMENT

I. The parties in the case at bar executed a contract which provided that, in the event of litigation, the "successful" party was entitled, inter alia, to attorney's fees. The lower court, cognizant of this provision, found that, despite the resultant dismissal of Respondents' case with prejudice, Appellants had not been successful. The dismissal, however, was in conformity with Appellants' prayer for relief and was legally equivalent to a favorable judgment on the merits after trial. As attorney's fees, when allowed by contract, are allowed in Utah as a matter of law, the judicial failure to designate Appellants as prevailing parties is an unconscionable and onerous redrafting of the parties' contract.

II. Appellants are entitled to attorney's fees in pursuing this appeal. This result is mandated by the Utah Supreme Court's reasoning in Management Services Corp. v. Development

Assoc., infra, at p. 21.

III. Respondents' lead case recited below is inapposite to this case, and, despite its limited applicability in general, has been highly criticized. That case, Mobile Power Enterprises, Inc. v. Power Vac, Inc., infra, at 21, involved a plaintiff who had received a satisfactory monetary settlement of its diversity claims from other named defendants. Plaintiff then sought a dismissal with prejudice against the other named defendants, who in turn requested attorney's fees. The court, in Mobile Power, held that defendants had not properly pled any contract upon which an award of fees could be based. But, with all deference to Mobile Power, the opinion **confused** the issue of awarding attorney's fees with that of determining a prevailing party. Thus, Mobile Power held defendants were not even entitled to costs, citing Smoot v. Fox, 340 F.2d 301 (6th Cir. 1964). But in Smoot, defendants had been found to prevail and were awarded costs. Subsequent federal citators and case law have noted Mobile Power's limited applicability and the confusing and, indeed, illogical nature of the court's rationale. Regardless, the case at bar is not one where any Defendant settled with Plaintiffs or modified its behavior in any regard arguably favorable to Plaintiffs. **Respondents, Plaintiffs below, obtained nothing by way of their complaint.**

IV. Utah case law supports Appellants' proposition that they are prevailing parties as a matter of law. This is particularly so where Plaintiffs, on the eve of trial, declined to go forward on the merits of their suit. Simply stated, a prevailing

party is one in whose favor an affirmative judgment is rendered. Dismissal of Respondents' case with prejudice amounts to an affirmative judgment in favor of Appellants. It cannot be logically seen in any other light.

V. Numerous other jurisdictions support Appellants' proposition that they are the prevailing party as a matter of law. The Utah Supreme Court, in 1981, quoted favorably cases from both Florida and Washington. Both these jurisdictions would soundly and summarily reject the lower court's reasoning. Cases from Oregon and Arizona also support Appellants' position that a dismissal of Respondents' case with prejudice renders Appellants prevailing parties for the purpose of awarding costs, and, where available, attorney's fees.

VI. The lower court reasoned that Appellants did not prevail because Respondents indirectly indicated, through their counsel, that if they had the funds to pursue a trial, **Respondents thought they might prevail**. This rationale is untenable. Respondents, not Appellants, drove up the cost of litigation in the case at bar. Furthermore, an analysis of Respondents' case reveals it to be what Appellants' counsel affectionately refers to as a "Bowser" -- a doggy case with a lot of bark but no bite. Regardless, neither Respondents' nor Appellants' subjective feelings as to the merits of Respondents' suit are material; once the same is dismissed **with prejudice**, absent any consideration in exchange therefor, Appellants have prevailed.

VII. There is no presumption of validity which attaches to the portion of the lower court's opinion appealed from below. Rule 52(a), U.R.C.P. is inapplicable because there was no trial on the merits. Indeed, as the lower court's ruling as to who prevailed amounts to a conclusion of law, the ruling is not entitled to any special deference on appeal.

ARGUMENT

I.

THE ARBITRARY DENIAL OF ANY ATTORNEY'S FEE TO APPELLANTS IN THIS CASE AMOUNTS TO A JUDICIAL REWRITING OF THE CONTRACT OF THE PARTIES

It has long been held that the purpose of contracts is to reduce to writing the terms and conditions upon which the parties have met and to fix their rights and duties in respect thereto. A lower court's desire to modify or ignore, subtly or otherwise, clearly expressed contractual obligations of the parties is rarely countenanced on appeal and often results in little more than a judicial rewriting of the parties' contract. (See e.g., Dalton v. Jericho, 642 P.2d 748 [Utah 1982]; Jensen v. Bouwhuis, 577 P.2d 555 [Utah 1978]; Ephraim Theatre Co. v. Hawk, 7 Utah 2d 163, 321 P.2d 221 [1958].) This Appellate disdain for **judicially rewritten** contracts is equally applicable to the attorney's fees provisions thereof. (See Jenkins v. Bailey, 676 P.2d 391 [Utah 1984].)

In the instant case, Appellants did prevail below. The purpose of Appellants' defense was to ethically obtain the

dismissal of Respondents' case with prejudice, whether by trial or otherwise. Appellants had a right, arising from their contract as the successful party, to an assessment of attorney's fees. By denying these attorney's fees, the lower court has frustrated the objective expectations of the parties and effectively deleted in substance paragraph 23 of the Agreement of Purchase and Sale of Assets executed January 24, 1985. (See Appendix 1, ¶ 23.)

It is the accepted rule in Utah that attorney's fees cannot be recovered unless provided for by contract or statute. (Turtle Management, Inc. v. Haggis Management, 645 P.2d 667 [Utah 1982].) This rule is met in the present case, and the lower court should not "ignore the parties' arms-length transaction" in regard to attorney's fees. (See Jenkins v. Bailey, supra.) In the Jenkins case, appellant's counsel successfully argued to the Utah Supreme Court that, absent a "compelling or persuasive precedent that supports an exception from the general rule," the denial of an award of attorney's fees "can only be seen as error." (Jenkins, supra, at 392-393) The fact that one of the Respondents filed a personal bankruptcy, or, alternatively, that Respondents, as the record indicates, expensed themselves out of their own lawsuit, hardly seem compelling reasons to ignore the contractual provisions executed by Respondents upon which they also initially sought relief in the form of attorney's fees. Ultimately, the lower court's ruling precluded Appellants' counsel from proceeding at the time of trial with testimony, subject to cross-examination, pertaining to a reasonable amount of attorney's fees.

As stated in Turtle Management, Inc., supra, attorney's fees must be provided by contract or statute. When they are provided on either basis, however, their allowance is a matter of legal right. For example, in Cabrerra v. Cottrell, 694 P.2d 622 (Utah 1985), a party had been awarded attorney's fees in the **successful defense** of a case arising out of a uniform real estate contract, which commonly carries contractual terms for the award of a reasonable attorney's fee. On appeal, Appellants contended that attorney's fees were a matter of equity and should be denied. This contention was unanimously and soundly rejected by all five of the present judges of the Utah Supreme Court in an opinion authored by Justice Stewart. His paragraph rejecting this contention is directly applicable to the instant case:

Furthermore, contrary to Appellant's contention that attorneys fees should be determined on the basis of an equitable standard, **attorneys fees, when awarded as allowed by law, are awarded as a matter of legal right.** (Id. at 625, emphasis added)

II.

APPELLANTS ARE ENTITLED TO ATTORNEY'S FEES IN PURSUING THE APPEAL

In Management Services Corp. v. Development Assoc., 617 P.2d 406 (Utah 1980), the Utah Supreme Court, citing with approval the Colorado case of Zambruk v. Perlmutter 3rd Generation Builders, 510 P.2d 472 (Colo. App. 1973), stated that in order to fully and contractually indemnify a prevailing party, attorney's fees should be awarded in the event of a successful appeal. Similarly here, in the event the Court of Appeals remands this case for trial on

the issue of attorney's fees, it is respectfully submitted that the remand should include an assessment of attorney's fees incident to the perfection of the appeal in this matter. (Id.; see also, Cabrerra v. Cottrell, supra; Centurian Corporation v. Cripps, 624 P.2d 706, 713 [Utah 1981].)

III.

**THE LEAD CASE RELIED ON BY RESPONDENTS BEFORE
THE LOWER COURT IS INAPPOSITE TO THE INSTANT
CASE, VERY LIMITED IN ITS APPLICABILITY, AND
HIGHLY CRITICIZED**

Respondents' counsel sought denial of Appellants' attorney's fees in the court below primarily based upon the federal case of Mobile Power Enterprises, Inc. v. Power Vac, Inc., 496 F.2d 1311 (10th Cir. 1974). (See T1 at 3-4.) Indeed, Respondents indicated that the Mobile Power case was "consistent with other cases in which a plaintiff seeks a dismissal with prejudice," and that under these circumstances, the trial court "lacks power to allow costs, barring exceptional circumstances, if the dismissal is without prejudice." (Id.) An examination of Mobile Power, however, reveals that decision's limited inapplicability to the case at bar. Furthermore, Mobile Power has also been criticized for both misinterpreting the law or as simply being an anomalous, confusing decision.

In Mobile Power, Mobile filed suit against Power Vac, Inc. and Anilas Corporation. Subsequently, Mobile obtained a satisfactory offer of settlement from Power Vac and, accepting the same, sought an order of dismissal with prejudice against both

defendants. Anilas Corporation then sought attorney's fees under an Oklahoma statute, claiming it was a prevailing party. The Mobile Power court held that, where Mobile had elected to settle and receive its full monetary recovery from Power Vac, co-defendant Anilas was not thusly transformed into a prevailing party. The court further held that it had no contractual authority to award Anilas costs because Anilas had technically failed under federal law to plead the contractual provision allowing for fees prior to dismissal of the case. (See Mobile Power, supra at 1312-1313.) Importantly, however, in Mobile Power there were two distinguishing factors: (1) The plaintiff Mobile Power had indeed prevailed in that it had received a satisfactory settlement offer from one of the two named defendants, resulting in monetary recovery to the plaintiff; and (2) the federal appellate court noted that there was no authority by statute or rule, or by reliance upon any written contract, on which to award defendant Anilas costs and fees. In the case at bar, Respondents sued all of the Appellants and received absolutely nothing from their efforts. Furthermore, there is contractual authority clearly relied on by Appellants in the pleadings for an award of fees.

Following the Mobile Power case in search of the consistency elucidated by Respondents' counsel is, at best, difficult. (T1 at 3-4) In Ryan v. Hatfield, 578 F.2d 275 (10th Cir. 1978), the United States Court of Appeals, Tenth Circuit, cited Mobile Power as calling for the equitable award of attorney's fees when plaintiff's action is dismissed without prejudice in the absence

of a contract or statute authorizing the same. (Id. at 277.) The rationale, apparently, is that otherwise the Defendants would be unduly prejudiced by the dismissal in the event plaintiff thereafter chose to refile its action. But in Ryan, as in Mobile Power, there were no contracts or statutes which could be relied on authorizing an award of fees.

In 6 Moore's Federal Practice, § 54.70 Pocket Part, at 22, n. 16, in reference to textual p. 1310, the authors criticize Mobile Power as follows:

When an action is dismissed by the plaintiff without prejudice the court may award expenses and attorney's fees as well as statutory costs, but when dismissal is with prejudice, the rule is otherwise. Smoot v. Fox (CA 6th, 1965) 353 F.2d 830, 9 FR Serv. 2d 41a.26, Case 1. See also, Mobile Power, . . . [Id.] In the latter decision it is stated that when a voluntary dismissal is with prejudice the court "lacks power to award costs, barring exceptional circumstances," citing Smoot v. Fox, supra. With deference, this appears to be incorrect. In Smoot, costs were awarded. See, Smoot v. Fox, (CA 6th, 1964) 340 F.2d 301, 9 FR Serv.2d 41a.22, Case 2. What was decided in the second Smoot case was the question of whether costs would include nonstatutory expenses and attorney's fees.

Mobile Power then basically misinterpreted the Smoot case, which the Mobile court heavily relied on. (Mobile, supra at 1312) Indeed, in Smoot, the defendant Fox had prevailed, and Mobile had only managed to unduly confuse the issue of a prevailing party with attorney's fees. In many cases, parties prevail, but have no basis for an award of attorney's fees. In Utah, however, when attorney's fees are allowed by contract or statute,

a prevailing party should obtain them as a matter of contractual right and not as a matter of equity. (See Cabrerra v. Cottrell, supra.) The issue presented to the Court of Appeals is whether Appellants under the facts and circumstances of **this case**, to-wit: H. LeRoy Cobabe, et.al. v. B. Glen Crawford, et.al., are prevailing or successful parties. If so, it follows that by reason of the contract executed between the litigants, Appellants are entitled, as a matter of right, to a fair and reasonable assessment of attorney's fees.

In Wainwright Securities, Inc. v. Wallstreet Transcript Co., 80 F.R.D. 103 (S.D. N.Y. 1978), the federal district court noted that the Plaintiff was seeking a dismissal with prejudice which had the effect of a final adjudication on the merits favorable to the defendant. As a result, the Wainwright Court noted that as the dismissal with prejudice was favorable to the defendants as a matter of law, the defendant was deemed the prevailing party, entitled not only to recover its costs, but any damages it may have suffered because of an earlier issuance of an injunction in favor of the plaintiff. Attorney's fees were denied, however, not because defendant was unsuccessful, but because copyright law dictated otherwise. As stated by the Wainwright court:

[A]n award of attorney's fees under § 116 [Copyright Act, 17 U.S.C., § 101-810] is not mandatory but rather a matter for the court's discretion. In copyright cases, attorney's fees are generally not awarded to a successful defendant except as "a penalty imposed upon the plaintiff for institution of a baseless, frivolous, or unreasonable suit, or one

instituted in bad faith." (Wainwright, supra, citations omitted.)

Clearly, Wainwright ruled that the Defendant was a prevailing or successful party. In the Wainwright decision, however, though defendants were allowed costs and damages resulting from the injunction, the dismissal with prejudice did not rise, per se, to the burden of proving plaintiff had acted in a frivolous and unreasonable manner. Thus, absent other statutory or contractual provisions, an award of attorney's fees was denied the otherwise successful defendant. Nonetheless, the probative thrust of Wainwright is, simply stated, that defendant was a successful, prevailing party, despite plaintiff's voluntary dismissal with prejudice.

Other courts, despite the obvious limited applicability of the Mobile Power case, have been, nonetheless, less kind in their assessment of its merits. For example, in Schwarz v. Folloder, 767 F.2d 125 (5th Cir. 1985), the federal district court had denied the prevailing defendant its costs, apparently in reliance on Mobile Power. The 5th Circuit Court of Appeals noted that a dismissal of an action with prejudice is a complete adjudication of the issues presented and a bar to further action between the parties, "consequently, no matter when a dismissal is granted, the defendant receives all that he would have received had the case been completed." (Id. at 129-30.) The United States Court of Appeals, Fifth Circuit, thereafter held as a matter of law that the defendant was indeed a prevailing party and entitled to

a strong presumption that it would be awarded costs. (See 767 F.2d 125 at 131.) In commenting on Mobile Power, the Schwarz Court dismissed the same with the following footnote:

In Mobile Power Enters., Inc. v. Power Vac, Inc., 496 F.2d 1311 (10th Cir. 1974), the Tenth Circuit stated that while a defendant can receive an award of costs following a dismissal **without prejudice**, he cannot receive an award of costs after a dismissal **with prejudice**. Id. at 1312. With all due respect to the court in Mobile Power, we are completely at a loss to explain this distinction, unless the court, in interpreting the phrase "dismissal with prejudice," was perhaps confusing prejudice to the plaintiff and to the defendant. A dismissal with prejudice affords a defendant considerably more relief than a dismissal without prejudice. Therefore, we fail to see how the latter could make the defendant a prevailing party if the former does not. See 6 J. Moore, W. Taggart & J. Wicker, supra ¶54.70[4], at 79 n.16 (Supp. 1984-1985 J. Lucas ed.) (criticizing Mobile Power). (767 F.2d at 131, n. 8)

And, contrary to Mobile Power, in the case at bar, Respondents obtained nothing by reason of their complaint.

IV.

UTAH CASE LAW SUPPORTS THE PROPOSITION THAT APPELLANTS ARE PREVAILING PARTIES AS A MATTER OF LAW

Both Appellants and Respondents cited Murray First Thrift and Loan Co. v. Benson, 563 P.2d 185 (Utah 1977) to the district court to substantiate their claim that Appellants were or were not prevailing parties. The lower court apparently believed the case to support Respondents' position. An analysis of the five paragraph decision, drafted by Justice Maughn, is telling. In Murray First Thrift, the case had been 16 months in preparation, and all

parties represented that they were prepared at the appointed time for trial. During a noon recess, the plaintiff, Murray First Thrift, settled its case against the Bensons. Thereafter, Murray First Thrift, which also had brought a third-party complaint against Ruff, requested that this cause of action be dismissed without prejudice. Their reasoning, recited to the trial court, was that until they had liquidated a parcel of property tendered by the Bensons in settlement, they did not know to what extent they had been injured by the third-party defendant Ruff. Counsel for Ruff objected, indicating that he had been in preparation for trial for 16 months and that he was ready to proceed. The third-party plaintiff's counsel indicated he was not willing to go forward with trial, and Ruff's counsel then requested that the third-party plaintiff's complaint be dismissed with prejudice. The district court ordered a dismissal with prejudice.

On appeal, the Utah Supreme Court, in Murray First Thrift, affirmed the district court's judgment of dismissal with prejudice, and implicitly held Ruff to be the prevailing party. In the first paragraph of Justice Maughn's opinion, the award of costs is telling:

Before us is an order of the court below dismissing, with prejudice, counts two and three of plaintiff's third-party complaint against George P. Ruff. We affirm that order, and award costs to Ruff. (Id., 563 P.2d at 186; emphasis added.)

Clearly, Ruff was found, upon the dismissal with prejudice, to be the prevailing party. Indeed, that is the highest and

best result defense counsel can obtain in a case, and to think the result otherwise defies logic and reason. It is submitted to this Court that were Ruff to have had a contract providing for attorney's fees with Murray First Thrift, he would have been similarly entitled to this relief upon proper petition to the Supreme Court. This additional award would have followed, given these circumstances, once again, as a matter of right. (Cabrerra v. Cottrell, supra.)

In the instant case, similar to Murray First Thrift, Appellants were in preparation some two and one-half years prior to trial. Similar to Murray First Thrift, Respondents, on the eve of trial, moved to dismiss their case; immediately prior to trial, Respondents revealed that they were not opposed to a dismissal with prejudice. Unlike Murray First Thrift or Mobile Power, Respondents in the action before the Court at bar recovered nothing by reason of their complaint nor by reason of their lengthy depositions and exhaustive discovery. Similar to the third-party plaintiff in the Murray First Thrift case, Respondents below simply indicated that they did not wish to proceed with trial -- not because they didn't know the extent of recovery, **but because they were unwilling to further expense the lawsuit they filed.** But, again, the reasons for failing to proceed were not probative to the determination of a prevailing party in Murray First Thrift. Indeed, where the third-party defendant was prepared to proceed, the third-party defendant prevailed and was entitled to costs. In the case at bar it is submitted that Appellants prevailed and are entitled to costs

and, in addition thereto, are entitled to reasonable attorney's fees as contractually agreed to between the parties.

Respondents also relied upon the case of Lake Creek Irrigation Co. v. Clyde, 22 Utah 2d 222, 451 P.2d 375 (1969). In Lake Creek, there was no statute or contract which provided for the granting to defendant of an attorney's fee. As the plaintiff desired to dismiss without prejudice, however, the trial judge assessed a fee pursuant to Rule 41(a)(2) of the Utah Rules of Civil Procedure as a condition precedent to the dismissal without prejudice. Justice Ellett, in a heavily contested three-to-two decision, deemed this to be reasonable in light of the fact that under these circumstances, where plaintiff could arguably refile its case, the condition of imposing an attorney's fee was not an abuse of discretion. The Lake Creek case, however, does not stand for the proposition that, upon the granting of a dismissal with prejudice, defendant would not be a prevailing party and, indeed, does not address that issue whatsoever.

In Highland Construction Co. v. Stevenson, 636 P.2d 1034 (Utah 1981), the Utah Supreme Court undertook to define a prevailing plaintiff under Title 14 of the Utah Code which statutorily provides that the prevailing party "upon each separate cause of action, shall recover a reasonable attorney's fee to be taxed as costs." In Highland, the Supreme Court did not finally resolve the issue because, although the plaintiff had recovered \$10,300.78 some 164 days after filing its action, it was unclear whether at the time of filing the action the monies were past due or that the

defendant otherwise had legal justification for not paying the sum before the commencement of the action. As a general rule, however, the Utah Supreme Court cited several decisions from Washington and Florida concluding that "a party in whose favor an affirmative judgment is rendered, whether or not the judgment is for less than originally sought in the complaint is a prevailing party' within the meaning of a statute awarding attorney's fees to the prevailing party." (636 P.2d at 1038.) Obviously, however, had the defendant in Highland, absent tender of any consideration, obtained a dismissal of plaintiff's suit **with prejudice**, defendant, under the statutory scheme, would have been a prevailing party. Indeed, a defendant in a contractor's bond case can achieve no higher result than a dismissal of the same with prejudice; and, in the instant case, paragraph 23 of the parties contract provides Appellants' similar contractual relief to that statutorily afforded litigants under § 14-1-8 of the Utah Code. Indeed, who prevails is simply defined in Black's Law Dictionary (5th Ed. 1983) as follows:

Prevailing party. The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered. The party ultimately prevailing when the matter is finally set at rest. May be the party prevailing in interest, and not necessarily the prevailing person. To be such does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who has made a claim against the other, has successfully maintained it.

V.

OTHER JURISDICTIONS SUPPORT THE PROPOSITION
THAT APPELLANTS ARE DEEMED PREVAILING PARTIES
UNDER THE FACTS AND CIRCUMSTANCES OF
THIS CASE AS A MATTER OF LAW

The Utah Supreme Court, in Highland Construction, relied in part upon Florida, Washington, and California cases. (See 636 P.2d at 1038.) An examination of cases from several jurisdictions may aid the Court of Appeals in accurately responding to this appeal. Indeed, the primary function of an appellate court is as a safeguard against decisions which may, however innocently, be misguided and without foundation in law. In Anderson v. Goldseal Vineyards, 505 P.2d 790 (Wash. 1973), the Washington Supreme Court recognized that, where no judgment is entered against a defendant in an action at law, he is entitled to his costs as a prevailing party. (Id. at 792.) In the Anderson case, the plaintiff had voluntarily dismissed his action against the third-party defendant after the initiation of trial. In determining that the third-party defendant was a prevailing party, the Washington Supreme Court noted that to be a prevailing party does not depend upon the degree of success at different stages of the suit, but whether, once serving the other party, the party who has made a claim against the other has successfully maintained it. In Anderson, the third-party defendant, having been served, was required to retain counsel and defend the cause of action; the Washington Supreme Court held that the third-party defendant was a prevailing party.

In 1986, the Washington Supreme Court considered the exact issue which is before the Utah Court of Appeals. In Western Stud Welding v. Omark Industries, 716 P.2d 959 (Wash. App. 1986), the plaintiff voluntarily dismissed its lawsuit as against defendant with prejudice. The Washington Court of Appeals, Chief Justice Schofield authoring the opinion, noted that Washington law did not provide for attorney's fees in the absence of a contract or statute or a recognized basis in equity. (716 P.2d 959, at 961.) But in Western Stud, as here, there was such a contract. Citing the 1973 Anderson v. Goldseal case, the Court in Western Stud found that under these circumstances the defendant is deemed the prevailing party, entitled to costs, and, by reason of the contract, was further eligible as the prevailing party for the purpose of determining attorney's fees. (See id. at 960-61.) The opinion was unanimous.

The Anderson v. Goldseal case was cited once again by the Washington Court of Appeals in Richter v. Trimberger, 750 P.2d 1279 (Wash. App. 1988). This case ruled simply and succinctly that a prevailing party, for purposes of determining a contractual award of attorney's fees, is one against whom no affirmative judgment is entered. Similarly, in the instant case, upon Respondents' motion, Respondents' cause of action was dismissed **with prejudice** as against Appellants. Appellants cannot, in all due deference to the lower court, understand how they can be deemed anything else but a prevailing or successful party under the terms of the parties' agreement and the pleadings on file.

Oregon cases similarly assert that, where plaintiffs voluntarily non-suit themselves, defendants are nonetheless entitled to attorney's fees. For example, in Ferrell v. Leach, 520 P.2d 358 (Or. 1974), the plaintiffs contended that "defendants did not prevail because the action based on an earnest money receipt was terminated by a voluntary non-suit." The trial court in Oregon had agreed with this proposition. The Supreme Court reversed and indicated that defendants were indeed entitled, as prevailing parties, to attorney's fees as allowed by the contract.

In Dean Vincent, Inc. v. Krishell Laboratories, Inc., 532 P.2d 237 (Or. 1975), the plaintiff requested and was granted a voluntary non-suit two days prior to trial. Thereafter, the trial court denied defendant attorney's fees, despite a broker's contract which allowed them. Defendant appealed. The Oregon Supreme Court found once again that the defendant qualified as a prevailing party and was entitled to its fees. (See also, Wacker Siltronic Corp. v. Packos, 646 P.2d 1366 [Or. 1982].)

In Willamette View Associates v. Pettibon, 82 Or. App. 425, 728 P.2d 573 (1986), defendant filed a counterclaim on a promissory note executed by Beeson and Lord. This claim against Beeson and Lord was dismissed with prejudice at the outset of trial. The trial court designated Beeson and Lord as prevailing parties and awarded them \$17,661 in attorney's fees. On appeal, the defendant-counterclaimant, citing the Dean Vincent and Wacker Siltronic cases, unsuccessfully argued that as the voluntary dismissal was with prejudice the trial court had erred in designat-

ing Beeson and Lord as prevailing parties. The Oregon Appellate Court held that even though the Dean Vincent case and Wacker Siltronic case dealt with voluntary dismissals without prejudice, there was no reason to find Beeson and Lord not to have prevailed when the claims against them were dismissed with prejudice. (728 P.2d at 574) Indeed, a dismissal "of an action with prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties. An adjudication in favor of the defendants, by court or jury, can rise no higher than this." (Smoot v. Fox, supra)

Since the Utah Supreme Court, in Highland Construction, favorably referenced two Florida cases, the status of Florida law should perhaps also be considered by this Court. (See Highland Construction Co. v. Stevenson, supra, at 1038.) In McKelvey v. Kismet, Inc., 430 So. 2d 919 (Fla. App. 3rd Dist. 1983), a vendor had coupled a foreclosure and an unlawful detainer claim against a purchaser. Plaintiff voluntarily dismissed his foreclosure claim against the defendant with prejudice. Even though the matter had never been set for trial and there were pending unresolved claims between the parties, the Florida Supreme Court held that the purchaser, for purposes of the foreclosure action, was a prevailing party and entitled to attorney's fees and costs under the contract between the parties. (See 430 So. 2d at 922.)

In Arizona, in Mark Lighting Fixture Co., Inc. v. General Electric Supply Co., 745 P.2d 123 (Ariz. App. 1986), the Arizona Appellate Court attempted to construe the definition of a success-

ful party pursuant to §12-341 of the Arizona Revised Statutes. It was clear to the Arizona court that defendants who obtained dismissals with prejudice were prevailing parties. The issue before it was whether a mere dismissal without prejudice entitled the defendant to be deemed a successful party for purposes of statutory recovery of costs and attorney's fees pursuant to Arizona Revised Statutes § 12-341.01(A). The appellate court held that, despite plaintiff's claim being dismissed without prejudice, defendants had prevailed, nonetheless, and were entitled to attorney's fees incurred in defending the case as well as those fees incurred on appeal. The thrust, however, of the Mark Lighting case, is that were defendants to have prevailed by obtaining a dismissal with prejudice there would have been no issue whatsoever as to their entitlement to fees, and the only issue before the court was, once again, whether a mere dismissal without prejudice similarly entitled them to be designated as successful parties pursuant to the Arizona statutory code.

VI.

THE LOWER COURT'S POLICY IN DENYING APPELLANTS THE STATUS OF A PREVAILING PARTY IS UNTENABLE

Respondents, not Appellants, filed this suit before the district court. Respondents, not Appellants, sought \$100,000 in liquidated damages, additional lost profits, costs of court, and attorney's fees. Appellants merely defended, seeking dismissal of Respondent's claim and for attorney's fees as allowed for under the contract. The majority of discovery in this case was conducted by

Respondents. At no time did the district court ever sanction Appellants for failure to abide by the Utah Rules of Civil Procedure or for any action contrary to good faith in defending this suit. Respondents would have been foolhardy to even make such a suggestion. Indeed, Appellants' counsel's letter of May 18, 1988, reflects, as does the conduct of Appellants throughout this matter, the courtesy afforded Respondents and their counsel toward the efforts of all parties to prepare for trial. Paragraphs one and five of that letter are telling:

I received your letter of May 9, 1988. I would be happy to sit down with you and go over all the documents you have promised us in the depositions of your clients, particularly the several contracts they attempted to negotiate through their attorneys in Salt Lake. If you would provide me a list of the documents you wish, I will spend the time with Mr. Crawford and obtain those for you.

. . . .

In the event you want to try the matter, please advise me, and we will be more than happy to sit down with you and provide the written documents you desire if they are available to my client. You should understand, however, that every hour we spend, together with subpoena fees and witnesses from Las Vegas and Salt Lake, will, should we prevail, be assessed against your client individually, as he is an individually-named Plaintiff. (II at 40)

When attorney's fees are commonly allowable to prevailing parties, refusals to grant such awards invariably require a judicial specification of those special circumstances supporting the refusal. (See e.g. Concerned Democrats v. Reno, 601 F.2d 891 [5th Cir. 1979].) For example, in Jenkins v. Bailey, supra,

appellant's counsel set forth in his brief on appeal a rather comprehensive list of those reasons effectively held to bar attorney's fees as theretofore decided by either Utah or federal law. The Utah Supreme Court, in Jenkins, reviewed the Utah cases which had upheld the trial court's refusal to award attorney's fees in contract cases at 676 P.2d 391-93. Indeed, appellant Bailey's counsel was earlier involved in the Fulmer v. Blood case, 546 P.2d 606 (Utah 1976), where fees, as a matter of public policy, were denied.

The lower court's policy in the instant case, however, is baffling. Faced with Appellants' counsel's willingness to go forward at trial with testimony as to a reasonable attorney's fee, the lower court declined to find that Appellants were successful parties despite dismissing Respondents' case **with prejudice**. The conclusions of the lower court, however, are inconsistent and have no justification in either law or equity under the facts of this case. As stated at T2, page 9:

The motion for attorney's fees is denied. The reason being that it is apparent from the pleadings in the file that the reason the Plaintiffs have sought to dismiss the case is not because they feel they have not prevailed or that they could not prevail, but because they were under extreme financial pressures which prevent them from going forward.

Under those circumstances, I find that neither party has prevailed, and neither party is entitled to attorney's fees under the contract.

Absent a finding of vexatious defense, this rationale is absolutely untenable. **And the real issue is not the denial of**

attorney's fees, but whether the appellants prevailed below. Indeed, Appellants' counsel knows of no case in all of the jurisdictions of the United States which has held that a plaintiff's economic inability to pursue the lawsuit precludes the defendant who obtains a judgment on the merits from being classified as a prevailing party. Respondents' impecuniosity may very well affect the ability of Appellants to collect a judgment for fees, but, once again, absent a specific finding of vexatious defense or the obstreperous or abusive use of the discovery processes, the rationale cited by the district court simply cannot be sustained. Indeed, Appellants were more than happy to go to trial and more than happy to provide any and all additional documents to aid the Respondents in their trial preparation. (II at 40) Appellants welcomed trial and the ultimate relief they would have obtained in the event of their prevailing, to-wit: a dismissal with prejudice of Respondents' case against them.

This case is not dissimilar to the Murray First Thrift and Loan v. Benson case, supra, 563 P.2d 185 (Utah 1977). In that case, the third party plaintiff desired to dismiss because at the time of trial third party plaintiff's counsel indicated that they **did not feel prepared** to go forward and accurately determine their damages. The third party defendant's counsel objected, pointing out to the trial court that they had been sixteen months in preparation for trial and that they were indeed ready to proceed. Third-party defendants prevailed. Similarly, in the instant case, Appellants spent two and one-half years in preparation for trial,

and Appellants were indeed ready to proceed.

Appellants' counsel has examined the court file to determine whether there is some evident reason therein upon which a policy argument might be made that Appellants should not be treated as prevailing parties. There is none. The simple fact of the matter is that, if Respondents ran out of funds to pursue **their litigation**, they did so by reason of the extensive discovery Respondents themselves conducted. (T2 at 7) Once again, the record is evident that Respondents noticed up five of the eight depositions taken and that, in terms of discovery, Respondents barraged ^{Appellants} ~~plaintiffs~~ with three sets of interrogatories and two requests for production of documents. Appellants complied with these requests and, a month prior to trial, worrying that yet another continuance might occur, offered to sit down with Respondents' counsel and exchange all remaining undiscovered material so that both parties might otherwise have been fully prepared to go forward. (II at 40)

Appellants strongly call to each Justice your recollection of trial practice. Each will recall that, when representing defendants without counterclaims, your highest goal was to obtain a dismissal of the plaintiff's case with prejudice, zealously, yet ethically, within the parameters of Rule 11 of the U.R.C.P. Appellants request this Court, as a body, to indicate that defendants, who obtain dismissals with prejudice of plaintiffs' cases, even upon Plaintiffs' motion, are prevailing parties. This should be particularly the case when such a dismissal is

obtained based upon a motion filed less than one month prior to trial and after two and one-half years of extensive litigation with its associated costs, expenses, and, to Appellants here, the obvious mental anguish associated with being sued. If Respondents are so impecunious, how is it that they have obtained counsel to yet pursue this ruling on appeal? The fact that Mr. Canfield has filed bankruptcy is also not probative. Indeed, how can one Respondent's personal financial affairs affect a legal conclusion as to who prevailed below? Appellants urge this Court that compelling logic and reasoning mandate a determination that they are prevailing parties.

VII.

THERE IS NO PRESUMPTION OF VALIDITY APPLICABLE TO THE LOWER COURT'S CONCLUSION THAT APPELLANTS DID NOT PREVAIL

Pursuant to Rule 52(a) U.R.C.P., a trial court's factual findings "shall not be set aside unless clearly erroneous." (See e.g., Barker v. Francis, 741 P.2d 548 [Utah App. 1987].) This rule, however, applies only to actions tried upon the facts without a jury or with an advisory jury where due regard is given "to the opportunity of the trial court to judge the credibility of the witnesses." (Rule 52(a) U.R.C.P.) In this case, that portion of the lower court's ruling appealed from was entered without trial and absent any direct evidence on the part of any of the litigants. Under these circumstances, the matter comes to the Court of Appeals in a posture not unlike that of a summary judgment which requires particular appellate scrutiny. (See e.g., Sandberg v. Klein, 576

P.2d 1291 [Utah 1978].)

Moreover, it ultimately becomes clear that the portion of the lower court's opinion appealed from is a conclusion of law. As a conclusion of law, the Court of Appeals must review its correctness without any special deference. (Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co., 744 P.2d 1376 [Utah 1987].) With due deference to the lower court's conclusion, it cannot withstand critical scrutiny.

CONCLUSION

Rule 24(a)(10), Rules of Utah Court of Appeals, mandates "a short conclusion stating the precise relief sought." In the case at bar, Respondents sued Appellants. Appellants defended for two and one-half years and were prepared for trial. The parties' agreement provided that, in the event of litigation, the successful party would be entitled to a reasonable attorney's fee. Utah law mandates such a recovery if contractual provisions support it. The lower court, while orally dismissing Respondents' case with prejudice less than two days prior to trial, inconsistently found that Appellants, nonetheless, had not prevailed. The lower court's reasoning was bottomed on Respondents' belief that they might have won if only they had possessed the resources to pursue the trial. This rational is untenable.

Appellants seek the Court of Appeals to conclude that Appellants are, as a matter of law, prevailing parties. Appellants seek the remand of this case for a further hearing to determine a

reasonable amount of attorney's fees pursuant to their written contract. The district court erred in refusing Appellants this opportunity. Appellants also seek costs and attorney's fees on appeal.

RESPECTFULLY SUBMITTED this 25th day of October, 1988.


MICHAEL D. HUGHES, OF
THOMPSON, HUGHES & REBER

AFFIDAVIT OF MAILING

I hereby certify that four full, true and correct copies of the above and foregoing **APPELLANT'S BRIEF** were placed in the United States mail at St. George, Utah, with first-class postage thereon fully prepaid on the 25th day of October, 1988, addressed as follows:

Mr. Russell J. Gallian
Mr. James E. Slemboski
P.O. Box 367
St. George, Utah 84770



AGREEMENT OF PURCHASE AND SALE OF ASSETS

THIS AGREEMENT, made and entered into this 24th day of January, 1985, by and between B. GLEN CRAWFORD & PAULA CRAWFORD, His Wife, dba CRAWFORD TOYOTA OF ST. GEORGE, and CRAWFORD INVESTMENT COMPANY, a Utah Limited Partnership collectively referred to as "Parties of the First Part" or "Sellers" herein, and H. LeROY COBARE and LEWIS R. CANFIELD, or nominee, hereinafter referred to as "Party of the Second Part", or "Buyer" herein:

WITNESSETH:

THAT WHEREAS, Seller owns, controls and operates an automobile dealership under the name CRAWFORD TOYOTA; and

WHEREAS, Seller desires to sell, and transfer certain Assets of Dealership i.e. CRAWFORD TOYOTA, subject to certain of its obligations to Buyer on the terms hereinafter set forth; and Buyer further desires to purchase from Seller the real property upon which the automobile dealership is operated (Business Premised), all which are more particularly set forth on the attached Schedules "A" & "B" herein, subject to the terms and conditions of this Agreement.

NOW THEREFORE, in consideration of the sum of \$20,000.00 (Twenty Thousand Dollars) Earnest Money herein deposited, the receipt of which is hereby acknowledged, and in consideration of their Mutual Covenants and promised, each to the other given, it is hereby agreed as follows, to wit:

1. That the purchase price of the real property and improvements thereon, shown on the attached Schedule "A" herein, which Crawford Investment Company is the fee owner on, shall be the sum of \$425,000.00. (Four Hundred Twenty Five Thousand Dollars).
2. That Seller covenants for a fee of \$100,000.00 (One Hundred Thousand Dollars) not to compete with a new car franchise within a 30 mile radius of current dealership for the period of two (2) years from date of closing.
3. That the purchase price of certain fixed assets, machinery, parts bins, furniture and fixtures to be listed in Schedule "B" to be attached hereto and made part hereof, which are used in connection with Sellers dealership, all for the purchase price of \$160,000.00. (One Hundred Sixty Thousand Dollars). Said assets are now and will be at closing in working order. Such price shall also include the current telephone numbers of Seller which Seller shall assign for the exclusive use of Buyer and all forms such as repair orders, counter tickets for an additional \$1.00 (One Dollar).
4. In addition to the above purchase price, Seller shall sell to Buyer, and Buyer shall purchase all of Seller's new or rebuilt and undamaged and unused Toyota parts and current accessories, wheels, tires ect.

which the Seller has on hand at the time of closing. The cost of these parts and accessories which Seller has on hand at the time of closing. The cost of these parts and accessories which Buyer shall pay to seller at close of escrow and through escrow shall be the current net wholesale price for said items as published in the most recent Distributors's price books. An inventory shall be taken by both Buyer and Seller prior to the closing of escrow by an inventory service mutually acceptable to the parties with the cost of the inventory to be equally divided and paid by both parties, through escrow, for the parts and accessories inventory. The inventory will be taken in the presence of a representative of both Buyer and Seller. The parties agree that, for the purpose of the escrow pursuant to the Agreement, and subject to adjustment as a result of the inventory, the value of the parts shall be \$30,000.00 (Thirty Thousand Dollars). Such adjustment will be accomplished Five (5) days after receipt of the written inventory by each of the parties, by payment in cash from Buyer to Seller, of Seller to Buyer as the case may be. Seller shall assign to Buyer all of Seller's parts return rights, if any, between Seller and the respective automobile manufacturing corporations.

5. Buyer agrees to assume balance of Sellers one year contract with K.C.L.G Radio Station, and to purchase from Seller balance of credit with K.C.L.G at face value less 15% dicount not to exceed \$2200.00. (Twenty Two Hundred Dollars). Payment to be within two weeks of close of escrow.

6. That the above items shown in #2, #3, #4, and #5 are in addition to the purchase price stated in #1 Above.

7. That the terms and conditions of payment for said items 1 through 4 inclusive above, is total in CASH, due at Close of Escrow, which shall occur on or before March, 24, 1985. (30 day extension to be grante if financing is not finalized prior to March 24, 1985.)

8. That this purchase does not include any motor vehicles. If Seller desires to sell and Buyer desires to buy automobile inventory, as of closing date, the parties will inspect each vehicle and agree upon the purchase price of such car. Provided, however, as to any vehicle which the parties do not agree upon, as to value, such vehicles shall be retained by Seller and not become part of this transaction.

9. Seller shall sell and Buyer shall purchase all of Seller's work-in progress and sublet repair inventory and other miscellaneous inventories (such as lubes, gas, grease, nuts, bolts, ect.) related to the operation of the dealership. The price shall be paid by Buyer to Seller at close of escrow and through escrow, and shall be based on a physical inventory of said assets and shall be valued at Seller's costs. Such inventory shall be taken by a representative of both Buyer and Seller, with the cost of taking such inventory to be divided and paid equally by the parties. Work in Progress and sublet repairs shall refer to service work on repair orders)customer, insurance or warranty) written by seller prior to date of closing of escrow, but not complete as of that date.

Buyer agrees to complete all said work-in-process. On payment by Buyer, for such work-in-process or sublet repairs, Buyer is authorized to bill the customer when the work is completed by Buyer for the entire service to the customer, and Seller shall have no claim to that billing.

10. Seller shall retain all factory warranty and other claims, tax credits and claims for refunds, together with contracts, accounts and notes receivable. It is intended that Seller will collect all such receivables and will change Seller's address to a different postal address for such purposes; however, Buyer agrees to cooperate and deliver to Seller all payments and materials concerning same received by Buyer.

Ten (10) years per J.A.C. J.R.C.

11. That for the period of Thirty (30) years following the Close of Escrow of this transaction, Seller has the right to purchase two (2) new Toyota's per year of his choice at "invoice cost", the delivery of which shall occur Thirtys (30) days or before after ordering. Deliverance is subject to availability of such cars from factory. This right is non-assignable by Seller and in the event Buyer herein resells said dealership his Buyer shall own the dealership subject to this covenant, which shall be binding upon the heirs, executors, assigns, nominees and grantees of the Buyer herein.

12. This transaction shall be consummated through an escrow with Southern Utah Title Company. Upon opening of escrow, Buyer shall deposit \$20,000.00 Earnest Money towards the purchase price.** See attached On or before close of escrow (which shall take place on or before the Escrow Instructions 24th day of March, 1985) buyer shall deposit in escrow the balance of the purchase price due to Seller which is to be transmitted through escrow. If buyer fails to make afore mentioned deposit, this agreement is voidable by written notice by either party without further consideration. Seller shall comply with the Bulk Sales Law through escrow, and Seller and Buyer shall execute all documents relation thereto, bills of sale, and other documents reasonably required pursuant to the terms of this Agreement. The parties hereto agree to execute the escrow company's standard form of escrow instructions incorporating the terms and conditions of this Agreement; and in the event of any conflict between said escrow instructions and the Agreement, the terms and conditions set forth in this Agreement shall control.

13. At the Close of Escrow Buyer shall be responsible for obtaining his own liability and fire insurances, and that general property taxed shall be prorated at close of escrow, and any escrow or documentation needed in this transaction, with all costs of same being borne equally 50/50, except that Buyer shall provide own title insurance if he desires same.

14. All obligations of Buyer, at its option, are subject to the fulfillment, prior to or at close of escrow, of the following conditions:

(A) The franchisors for the automobile and truck franchises presently held by Seller shall issue to Buyer new dealership sales agree-

ments or acceptable commitments, to Buyer in substantially the same form as now exists between said franchisors and Seller, which franchise terms shall be acceptable to Buyer. Buyer and Seller will cooperate and use their best efforts to effect said termination and reissuance of dealership sales agreements.

(B) Buyer's obtaining all required licenses and permits from governmental or other agencies to operate a new car dealership at the premises occupied by Seller. Buyer agrees to use its best efforts to obtain all such required licenses and permits.

(C) Buyer's receipt of approval from Buyer's lending institution as to flooring and financial arrangements satisfactory to Buyer required by this agreement.

15. Buyer is not assuming any liabilities of Sellers. Buyer is specifically not assuming any warranty liabilities except for factory issued warranty of Seller for sales of automobiles or for work done by Seller prior to the Closing Date.

16. Buyer hereby agrees to indemnify, defend and hold Seller harmless against and in respect of any and all claims, demands, losses, costs, expenses, obligations, liabilities, and damages, that Seller shall incur or suffer, which arise or result from the use of the Assets or the operation of the Dealership subsequent to the Closing Date.

17. Seller makes the following representations and warranties:

(A) Seller is not aware of any union organizing efforts which have occurred with respect to the Dealership.

(B) With the exception of the new car inventory, all inventory of Seller being transferred herein is fully paid for and there is no related obligation of liability currently outstanding with respect to any portion of said inventory, except as disclosed on Exhibit "A" attached hereto, and unsecured accounts payable.

(C) Within the times and the manner described by law, seller, to the best of its knowledge, has filed all federal, state, and local tax returns required by law with respect to the Dealership, and has paid all taxes, assessments and penalties due and payable thereon. Said tax returns reflect the correct and full amount of any tax liability owing by Seller on said returns. Seller has made all estimated tax payments required to be made for payroll taxes up to the Closing Date.

(D) All the assets are usable and are in reasonably good condition, normal wear and tear excepted.

(E) To the best of its knowledge, Seller has complied with and is not in violation of applicable federal, state or local statutes, laws, and regulations affecting the assets of the Dealership or the operation of the Dealership business.

(F) There are no claims, actions, suits or proceedings pending whether administrative or otherwise, or to the knowledge of Seller,

threatened against them with respect to the Dealership.

(G) The execution and performance of this Agreement will not result in any breach or violation of, or be in conflict with, any agreement instrument, or contract relation to Dealership.

(H) Seller has the right, power, legal capacity and authority to enter into and perform its respective obligations under this Agreement, and no approvals or consents of any other persons are necessary to transfer to Buyer the Assets set forth in this Agreement, other than the consent of the respective automobile manufacturing corporations.

(I) All representations and warranties made by Seller herein shall survive the closing.

18. Buyer represents and warrants and such representations and warranties shall survive the closing, that:

(A) The execution and delivery of this Agreement and the consummation of the transaction by Buyer have been duly authorized and no further corporate authorization is or will be necessary on the part of the Buyer.

(B) Neither the execution nor delivery of this Agreement nor its performance will result in a violation or breach of any term or provision of, nor constitute a default under, any material contract or agreement to which Buyer is a party.

19. All representations and warranties of Buyer and Seller set forth in this Agreement will also be true and correct as of the Closing Date as if made on that date.

20. That the Earnest Money shown herein shall apply towards the purchase price shown in #1, #2, #3, \$ #4, inclusive, but in the event Buyer defaults in the purchase herein, except for the reasons shown on Item #14 above, said Earnest Money shall be forfeited to Seller as liquidated damages.

21. This Agreement shall be binding upon and inure to the benefit of the successors, assigns, personal and legal representatives of Buyer and Seller. However, Buyer may transfer its rights to a nominee provided that Buyer and Nominee shall both be liable for full performance of this agreement.

22. This agreement sets forth the entire understanding between the parties in connection with the transfer of assets, there being no terms, conditions, warranties or representations other than those contained herein, attached hereto, or provided for herein.

23. In the event of any litigation between the parties hereto to enforce any provision or rights hereunder, the unsuccessful party to such litigation shall pay to the successful party therein all costs and expenses expressly including, but not limited to, reasonable attorneys'

fees and court costs incurred herein by such successful party, which costs, expenses and attorneys fees and court costs incurred by such party in or in connection with such litigation.

24. All notices, requests, and demands and other communications hereunder shall be in writing, including telegrams, and shall have been deemed duly given if personally delivered or sent by registered or certified mail, postage prepaid, return receipt requested, or by telegram, rate paid confirmation requestee.

If to Escrow Holder:

Southern Utah Title Company
P. O. Box 190
St. George, Utah 84770

If to Buyer:

H. L. Cobabe
1 Crestwind Drive
Rancho Palos Verdes, CA. 90274

If to Seller:

B. Glen Crawford
109 West Hope Street
St. George, Utah 84770

25. Buyer agrees that prior to the Closing date (and thereafter if the closing fails to occur), Buyer and his representatives will hold in strict confidence all data and information obtained in connection with this transaction.

26. Buyer may, at its option, assign all of its rights and obligations hereunder to a corporation which Buyer may form prior to closing. However, said assignment shall not relieve Buyer of its obligations hereunder.

27. Buyer will, as of the date of Closing, terminate those of its employees who will not continue to work for Seller. At the time of termination, Seller will pay to its employees all prorated vacation benefits to which they are entitled at the time of their termination. Seller shall provide each employee with a notice of such termination and use its best efforts to obtain an acknowledgment by each terminated employee of their receipt of said notice. The acknowledgment by each employee shall be kept in each employee's personnel file. All employee personnel files shall remain the property of Seller on closing: However, Buyer shall have reasonable access thereto if needed by Buyer. Buyer has no obligation to hire any of Seller's present employees.

28. Pending consummation of the sale and purchase described in this agreement, Seller shall continue to operate said business in substantially the same manner as it has been operated by Seller in the past and Shall:

(A) Use its best efforts to maintain pleasant and harmonious relationships with all suppliers, customers, employees and others having contact with said business..

(B) Maintain in full force and effect, at its own cost and expense, insurance policies insuring for their full insurable value the tangible assets of said business against loss or destruction by fire, the elements, theft or civil disorder.

(C) Exercise due diligence in safeguarding and maintaining the confidentiality of all books, reports, and data pertaining to such business.

(D) Grant no increases in salary, pay or other employment related benefits to any officers, employees, or agents of said business without the written consent of Buyer.

(E) Enter into no contracts or transactions, except in the ordinary course of business, on account of said business, without the written consent of Buyer.

29. All actions to be taken on the closing date pursuant to this Agreement shall be deemed to have occurred simultaneously, and no action, document or transaction shall be deemed to have been taken, delivered or effected, until all such actions, documents and transactions have been taken, delivered or effected.

30. Should any term, provision or paragraph of this Agreement be determined to be illegal or void or of no force and effect, the balance of the Agreement shall survive except that, if the Buyer cannot acquire all of the assets described herein, Buyer may terminate this Agreement, and it shall be of no further force and effect.

31. This Agreement may not be changed, modified, or amended except by writing signed by the parties hereto, and this agreement may not be discharged, except by performance in accordance with the terms, or by writing signed by the parties hereto.

32. Time is of the essence in this agreement, and all of the terms, covenants and conditions thereof.

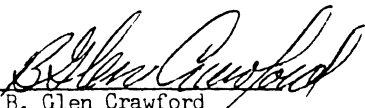
33. At Closing Seller shall have the right and option of purchasing any vehicles (at invoice cost) now ordered which have not yet been delivered which Seller has deposits on.

34. That any parts, supplies or inventory which the Seller has already ordered which are delivered after close of escrow or after inventory taken (whichever occurs latest) shall be the responsibility of the Buyer, including the payment therefor.

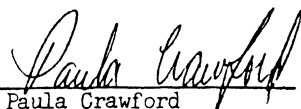
35. All Deposits and prorates which are normal and reasonable shall be made by Escrow as of Closing.

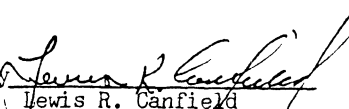
IN WITNESS WHEREOF, the parties hereto have excuted this Agreement
on the 24th Day of January, 1985

CRAWFORD TOYOTA

By 
B. Glen Crawford

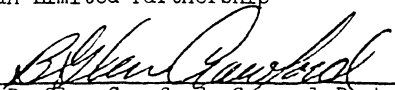
By 
H. Leroy Cobabe

By 
Paula Crawford

By 
Lewis R. Canfield

"SECOND PARTIES"

CRAWFORD INVESTMENT COMPANY, a
Utah Limited Partnership

By 
B. Glen Crawford, General Partner

"FIRST PARTIES"

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF WASHINGTON, STATE OF UTAH

HON. J. PHILIP EVES, Judge

H. LEROY COBABE, and LEWIS R.
CANFIELD, and ST. GEORGE
TOYOTA, INC.,

Plaintiffs,

vs.

Civil No. 85-0518

B. GLEN CRAWFORD, PAULA
CRAWFORD, and CRAWFORD
INVESTMENT COMPANY, a
Utah Limited Partnership,

Defendants.

REPORTER'S HEARING TRANSCRIPT

Tuesday, June 7, 1988

APPEARANCES OF COUNSEL:

For the Plaintiffs: SNOW, NUFFER, ENGSTROM & DRAKE
BY: DAVID O. NUFFER, ESQ.
90 East 200 North
St. George, Utah 84770

For the Defendants: THOMPSON, HUGHES & REBER
BY: MICHAEL D. HUGHES, ESQ.
148 East Tabernacle Street
St. George, Utah 84770

Reported By: PAUL G. MCMULLIN, CSR, RPR

PAUL G. MCMULLIN
OFFICIAL COURT REPORTER

P.O. BOX 1534
ST. GEORGE, UTAH 84770
(801) 673-5315

1 ST. GEORGE, UTAH; TUESDAY, JUNE 7, 1988

2 -oOo-

3

4 THE COURT: 85-0518, Cobabe and Canfield and
5 St. George Toyota versus Crawford.

6 These are added on cases, I'm informed.

7 MR. NUFFER: Mr. Hughes has been around this
8 morning, Your Honor. I'm not sure where he is now.

9 There are two motions up. Both are mine. A
10 motion for withdrawal and a motion to dismiss the
11 plaintiffs' Complaint. There haven't been any responsive
12 pleadings filed, but I know that Mr. Hughes would not sign
13 the stipulated dismissal of the case; so, he must object
14 in some way to the motion.

15 THE COURT: The matter has been noticed for this
16 morning for a hearing; is that correct?

17 MR. NUFFER: Yes.

18 THE COURT: In the absence of Mr. Hughes, your
19 motion is granted. Here comes Mr. Hughes.

20 I just granted the motion, Mr. Hughes. Did
21 you want to comment on it?

22 MR. HUGHES: I don't object to their case being
23 dismissed, Your Honor, except I hopefully would have the
24 opportunity to go forward on the basis for my attorney's
25 fees which I've expended in defending it thus far.

1 THE COURT: Have you filed a Counterclaim?

2 MR. HUGHES: No. But I've defended the action and
3 have incurred attorney's fees. And the action was
4 defended under a written contract that in the event of a
5 lawsuit, the prevailing party is to receive attorney's
6 fees.

7 MR. NUFFER: Your Honor, on that issue, I have some
8 authorities that I'd like to give the Court and
9 Mr. Hughes, dealing specifically with this issue.

10 Mr. Hughes raised the concern about having
11 attorney's fees awarded. I'd refer the Court and
12 Mr. Hughes to the last case in this compilation, which is
13 a Tenth Circuit Federal case.

14 This case is one in which the plaintiff --

15 THE COURT: What's the name of the case you're
16 referring to?

17 MR. NUFFER: Mobile Power Enterprises versus Power
18 Vac.

19 THE COURT: Let me see if I can find that.

20 MR. HUGHES: And I've been around Mr. Nuffer for
21 about three hours this morning, and I've just received
22 this, Your Honor. And I wish he would have given it to me
23 about 9:30.

24 MR. NUFFER: This is a Tenth Circuit case decided
25 in 1974. It's consistent with other cases in which a

1 plaintiff seeks a dismissal with prejudice.

2 And I'd refer you to the third page of this
3 printed material, which is actually Page 6 of this WestLaw
4 printout.

5 The defendant in this case, Anilas, suggests
6 that where a plaintiff voluntarily dismisses an action,
7 the defendant is entitled to recover costs. While this is
8 an accurate statement of the law with respect to dismissal
9 of actions without prejudice, the Court lacks power to
10 allow costs, barring exceptional circumstances, if the
11 dismissal is with prejudice.

12 And then skipping down to the next
13 paragraph. Anilas also relies on the lease/purchase
14 agreement for justifying the trial court decision. Before
15 Anilas could rely on this contract provision, however, it
16 must have filed a Counterclaim as required by Rule 13(a).

17 Now, we contend, therefore, that this same
18 rule that a -- would apply. Because we're seeking a
19 dismissal which the Court may order with prejudice, and
20 because there was no Counterclaim filed with regard to the
21 claim for attorney's fees, that an award of attorney's
22 fees and costs on this dismissal would not be
23 appropriate.

24 The other two cases that I've given are Lake
25 Creek Irrigation versus Clyde, a Utah case, in which a

1 dismissal without prejudice was made and attorney's fees
2 were assessed.

3 This is not -- this is consistent with the
4 Mobile Power case. The theory being that if the dismissal
5 is without prejudice, the defendant may again be put to
6 the cost of the litigation. Where the dismissal is with
7 prejudice, as in the other case, Murray First Thrift
8 versus Benson -- and also a Utah case -- where the
9 dismissal is with prejudice, there is no award of
10 attorney's fees as in Mobile Power. But here in Murray
11 First Thrift, we see a decision of this district in which
12 a dismissal with prejudice was made after the plaintiff
13 moved for dismissal without prejudice; fees were not
14 awarded.

15 And I'll grant that the Murray First Thrift
16 case does not even consider the award of fees, but I will
17 represent to the Court that my research has not been able
18 to uncover the case of dismissal with prejudice on the
19 plaintiff's motion where fees have been awarded.

20 So we submit that the dismissal should be
21 granted without an assessment of fees.

22 Other factors that would militate against an
23 award of fees are that I am informed and Mr. Hughes has
24 been informed that one of the individual plaintiffs has
25 filed bankruptcy. And as I pointed out, there was not a

1 Counterclaim for the attorney's fees relief.

2 Further, the provision I think under which
3 Mr. Hughes would claim attorney's fees is a provision of
4 the contract providing that the successful party in
5 litigation would be entitled to an award of fees. And in
6 this case, the plaintiff is moving for dismissal, and I
7 would submit that that does not indicate success on the
8 part of the defendant, rather it indicates the
9 plaintiff -- the plaintiff's financial resources are
10 simply exhausted and can't go forward.

11 THE COURT: Mr. Hughes?

12 MR. HUGHES: Your Honor, I would object to the
13 Court even considering this authority. As I indicated,
14 I've been here about 90 minutes in the courtroom and
15 received this hand-delivered by Mr. Nuffer. I assume he's
16 had it in his hand.

17 If the Court were to even consider to dismiss
18 the action without an assessment of attorney's fees, we'd
19 like at least 10 days to respond to the research which was
20 hand-delivered to me at an embarrassingly late time, I
21 think.

22 THE COURT: I'll be glad to give you the time to
23 respond.

24 MR. HUGHES: And, Your Honor, it's our feeling that
25 barring that, we would resist dismissal of the claim.

1 I might also indicate that as a matter of
2 housekeeping in here, the order of Mr. Nuffer's filing
3 documents is somewhat quizzical to defendant's counsel, in
4 that he files not a motion to withdraw, but a simple flat
5 withdrawal of counsel. Then immediately thereafter --
6 apparently after filing his withdrawal -- made several
7 motions on behalf of the plaintiffs, including the motion
8 in oral argument today. And I need to know whether I need
9 to file a motion for the other side to appear in person,
10 or whether Mr. Nuffer has withdrawn and has argued these
11 as a courtesy to his ex-clients, or whether he's still in
12 the case. I don't know.

13 THE COURT: I can decide that. He's still in the
14 case.

15 MR. HUGHES: Okay. We'd like to respond to this,
16 Your Honor. And we are prepared to go to trial later this
17 month.

18 THE COURT: All right. I'll give you the time you
19 need to respond to the motion to dismiss.

20 When is the case set for trial?

21 MR. NUFFER: The 22nd, I think.

22 THE COURT: All right. We'll have the matter back
23 on on the law and motion day on the 20th for decision.
24 You have until then to submit your points and authorities.

25 MR. HUGHES: Thank you, Your Honor.

1 THE COURT: All right.

2 MR. NUFFER: Your Honor, could I just indicate in
3 that regard while still on this case, that no response has
4 been filed by Mr. Hughes to the pleadings that have been
5 filed to this point. And we would object to his
6 submissions as being untimely. There is no objection to
7 the motions, either one.

8 MR. HUGHES: And you can see from my letter which
9 is attached to Mr. Nuffer's Affidavit that says, "In the
10 event you intend to go forward, please advise me, and I'll
11 provide whatever additional discovery you may need," Your
12 Honor.

13 And we would be willing to do that, but I
14 don't want to expend another \$2,000 in attorney's fees on
15 a case in which I think that liability is at best
16 questionable.

17 If I may recall to the Court one statement
18 that the Court --

19 THE COURT: Well, I think what Mr. Nuffer is
20 saying, you didn't file any response to his motion to
21 dismiss.

22 MR. NUFFER: That's what I'm saying. And that's --

23 THE COURT: And that's correct?

24 MR. HUGHES: That's true, Your Honor. I didn't.
25 But there's no memorandum in support of it. It's just

1 these allegations that his client can't afford counsel,
2 and therefore they want to dismiss the cause of action. I
3 don't think that's proper grounds for dismissal with
4 prejudice without an award of attorney's fees.

5 Now, he's come up with some memoranda I would
6 like to respond to. Had I had these cases, I would have
7 prepared a response.

8 THE COURT: You've got that time.

9 MR. HUGHES: Thank you, Your Honor.

10 THE COURT: We'll see you both on the 20th.

11 (Whereupon the proceedings in the
12 above-entitled matter were concluded.)

C E R T I F I C A T E

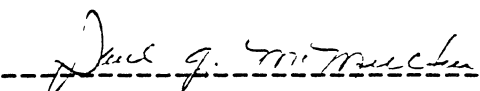
STATE OF UTAH)
) ss.
COUNTY OF WASHINGTON)

I, PAUL G. MCMULLIN, CSR, RPR, a Notary
Public, in and for the County of Washington, State of
Utah, do hereby certify:

That, the foregoing matter, to wit, H. LEROY
COBABE, et al. VS. B. GLEN CRAWFORD, et al., Civil
No. 85-0518, was taken down by me in shorthand at the time
and place therein named and thereafter reduced to
computerized transcription under my direction.

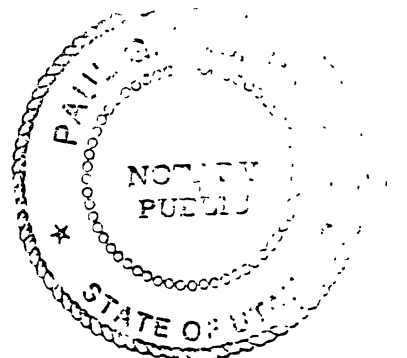
I further testify that I am not interested in
the event of the action.

WITNESS my hand and seal this 26th day of
August, 1988.



PAUL G. MCMULLIN, CSR, RPR

RESIDING AT: St. George, Utah
MY COMMISSION EXPIRES: 6-17-91



ORIGINAL

Appendix 3

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF WASHINGTON, STATE OF UTAH

HON. J. PHILIP EVES, Judge

H. LEROY COBABE, and LEWIS R.
CANFIELD, and ST. GEORGE
TOYOTA, INC.,

Plaintiffs,

vs.

Civil No. 85-0518

B. GLEN CRAWFORD, PAULA
CRAWFORD, and CRAWFORD
INVESTMENT COMPANY, a
Utah Limited Partnership,

Defendants.

REPORTER'S HEARING TRANSCRIPT

Monday, June 20, 1988

APPEARANCES OF COUNSEL:

For the Plaintiffs: SNOW, NUFFER, ENGSTROM & DRAKE
BY: DAVID O. NUFFER, ESQ.
90 East 200 North
St. George, Utah 84770

For the Defendants: THOMPSON, HUGHES & REBER
BY: MICHAEL D. HUGHES, ESQ.
148 East Tabernacle Street
St. George, Utah 84770

Reported By: PAUL G. MCMULLIN, CSR, RPR

PAUL G. MCMULLIN
OFFICIAL COURT REPORTER

P.O. BOX 1534
ST. GEORGE, UTAH 84770
(801) 673-5315

1 ST. GEORGE, UTAH; MONDAY, JUNE 20, 1988

2 -oOo-

3

4 THE COURT: Civil No. 85-0518, Cobabe and others
5 versus Crawford. Motion to dismiss.

6 Mr. Nuffer?

7 MR. NUFFER: This is a motion that was on the
8 calendar, was it two weeks ago?

9 MR. HUGHES: It was on about that time.

10 Your Honor, I might apologize to the Court.
11 I intended to get my memorandum to the Court Friday. I
12 was in Las Vegas taking depositions and discovered this
13 this morning. So I had it hand-delivered this morning to
14 the Court and to Mr. Nuffer. And we, of course, don't
15 oppose the motion to dismiss.

16 THE COURT: Is this your memorandum?

17 MR. HUGHES: If it --

18 THE COURT: It's not the original. Do you have an
19 original copy of it?

20 MR. HUGHES: I have -- I think I filed the original
21 with the clerk. And I think that's what the court clerk
22 is trying to indicate.

23 Your Honor, I wanted to get sufficient copies
24 around, and I wasn't aware whether the Court had pulled
25 the file or not. So that is probably a copy of the -- the

1 original would have been filed this morning.

2 And as I was indicating to the Court, we
3 don't oppose the dismissal with prejudice that Mr. Nuffer
4 has indicated, we simply submit that we are entitled to
5 fees pursuant to Paragraph 23 of the contract that was
6 sued upon.

7 THE COURT: Mr. Nuffer, anything?

8 MR. NUFFER: Well, our position is that the
9 response and the request are untimely, and that the case
10 law cited in the memorandum delivered this morning does
11 not deal with any of the authority that was presented to
12 the Court two weeks ago; that there was no Counterclaim
13 for attorney's fees filed or pleading of the contract by
14 the defendant; that bankruptcy has, in fact, been filed by
15 one of the plaintiffs in the lawsuit, Mr. Lewis
16 Canfield -- I received notice of that last week -- that,
17 in fact, the defendants had not been successful within the
18 contemplation of the term of the contract; so, there's no
19 basis for an award of attorney's fees.

20 Further, that the award of attorney's fees
21 would be discretionary with the Court, and that the case
22 law which was cited last time regarding the fact of a
23 dismissal with prejudice not justifying an award of fees
24 is appropriate.

25 And I believe the case should be dismissed

1 with prejudice without any award of costs or fees to
2 either party. I would point to the Court that the case is
3 set to begin on trial later this week.

4 THE COURT: On Wednesday.

5 MR. HUGHES: Your Honor, I think the cases I've
6 cited to the Court from the Washington and Oregon
7 jurisdictions are exactly on point. The one case alone,
8 Western Stud Welding, Inc. Versus Omark Industries, Inc.,
9 involved a quasi noncompetition clause.

10 In that particular instance, there was a
11 voluntary dismissal with prejudice. And that court held
12 that the attorney's fees were allowed under those
13 circumstances when they were otherwise allowed by the
14 contract.

15 The Oregon ruling even cites that that ruling
16 is -- the question there is whether a dismissal without
17 prejudice should entitle someone to fees as a dismissal
18 with prejudice ordinarily does. And the Supreme Court in
19 Oregon states that voluntary dismissal without
20 prejudice -- that there is no reason to hold them any
21 different than when claims are dismissed with prejudice
22 for purposes of attorney's fees; that there is a
23 prevailing party.

24 I might indicate that there is a citation --
25 I have an Arizona case, if I may, Your Honor. And it has

1 a citation. I just read it. And I would indicate to the
2 Court that when our Answer seeks attorney's fees in
3 defending, they are put on notice that we do seek and
4 claim fees. And I believe that this is sought for in our
5 relief, and it is plainly before the Court in a contract.

6 We'd submit it.

7 If I may have a minute, I'd like to find that
8 Oregon case. It's in 646 P.2d, and I just read it in the
9 office. It was a rehearing denied case.

10 THE COURT: While you're looking, let me just ask
11 you have you filed any Affidavit or anything stating your
12 claim for attorney's fees?

13 MR. HUGHES: I haven't filed an Affidavit, Your
14 Honor. Because attorney's fees, as the Court is well
15 aware, under Utah law is subject to cross-examination. I
16 filed pleadings in this case. I'm sure my Answer seeks
17 attorney's fees.

18 The Oregon case that I'd cite to the Court --
19 just a minute. I believe I have it. As I look at this
20 case, it may be an Arizona case. There's a case Mark
21 Lighting Fixture Company Versus General Electric Supply.

22 Just a minute, Your Honor. Yes. I believe
23 the Oregon case, Your Honor, is Wacker Siltronic Corp.
24 Versus Pakos, 646 P.2d 1366. And in that case, there was
25 an issue of whether or not there was a responsive pleading

1 filed and the mere fact that because of a letter in that
2 case, the attorney has been put on notice by defense
3 counsel that they would, in fact, seek attorney's fees.

4 I think if the Court examines my Answer in
5 this case, we're defending on a contract and say, "No.
6 We're not liable. We're entitled to attorney's fees on
7 the terms -- under the terms of the contract." And I
8 think that sets up the defense of attorney's fees in this
9 case. I might -- and I believe that squarely sets it
10 before the Court.

11 THE COURT: All right. I'll take the matter under
12 submission and rule on it this afternoon after I've read
13 your case.

14 MR. HUGHES: Thank you, Your Honor. And I -- if
15 the Court desires, I could get a copy of -- and I believe
16 it's that Pakos case -- to Mr. Nuffer and the Court
17 momentarily. I just read it.

18 THE COURT: That's all right. I can just look at
19 it in the book.

20 There is one other matter, though, that I
21 want to address. Is there a question of anybody that
22 there's a resolution of the lawsuit in anybody's favor?
23 As I understand the lawsuit, it was decided to dismiss the
24 case because the plaintiffs can't afford to finance the
25 lawsuit any further, even though they think they're in the

1 right.

2 Do you want to address that issue as it
3 relates to your right to recover attorney's fees?

4 MR. HUGHES: Your Honor, I don't think -- obviously
5 we can't get a judgment against Mr. Canfield. I think the
6 filing of his bankruptcy is absolutely superfluous to the
7 Court's ruling. Because we're not requesting a judgment
8 against Mr. Canfield, we're obviously requesting a
9 judgment for fees against the remaining nonbankrupt
10 plaintiffs.

11 As far as whether they can afford to go on or
12 not, that's a problem they should have addressed when they
13 filed the lawsuit. I think an examination of the record
14 would reveal that a majority of the interrogatories and a
15 majority of the depositions in this case -- almost a
16 two-to-one ratio -- were noticed up by the plaintiffs, and
17 so this is not a case where the defendants have
18 obstreperously tried to cost-out the plaintiffs in the
19 lawsuit. And I would simply say that the record would
20 reflect that the majority of expenses incurred in this
21 lawsuit was incurred on the motion or on the request under
22 the discovery principles by the plaintiffs. They drove up
23 their own costs.

24 THE COURT: Response, Mr. Nuffer?

25 MR. NUFFER: The Pakos case that Mr. Hughes cites

1 is another case of a dismissal without prejudice. One of
2 the cases that we cited at our last hearing deals with the
3 question of whether there is a successful party. And I
4 don't have that -- those cases again with me, but they
5 were given to the Court at the last hearing.

6 THE COURT: I'll look at those.

7 MR. HUGHES: But the point of the Pakos case, Your
8 Honor, is discussed --

9 THE COURT: I can derive my own opinion from it.
10 I'll just read it.

11 MR. HUGHES: And the Willamette case which I cited
12 cites Pakos and says there's no difference. I might
13 indicate that the following three jurisdictions follow
14 that rule, that there's no difference as far as the award
15 of attorney's fees. Washington, Oregon, and Arizona
16 follow both of those in the case of Mark Lighting Fixtures
17 versus General Electric Supply Company, which is at
18 745 P.2d 123.

19 And in those cases, the issue is whether or
20 not they should award attorney's fees when it's without
21 prejudice, clearly stating that when it's with prejudice,
22 the attorney's fees should be awarded.

23 THE COURT: All right. I'll pass the matter.

24 Now, as I understand it, what you're saying,
25 Mr. Hughes, is if I decide to rule in your favor, you'd be

1 prepared to go forward with evidence as to your attorney's
2 fees, subject to cross-examination?

3 MR. HUGHES: That's correct.

4 THE COURT: All right. I'll review it later this
5 afternoon.

6 MR. HUGHES: Thank you.

7 (Whereupon, the matter was passed.)

8 THE COURT: Let me just make a record on
9 Civil No. 85-0518, H. LeRoy Cobabe versus B. Glen
10 Crawford.

11 Having reviewed the memoranda filed by the
12 counsel, the motion to dismiss is granted. The trial date
13 which was this Wednesday is vacated.

14 The motion for attorney's fees is denied.
15 The reason being that it is apparent from the pleadings in
16 the file that the reason the plaintiffs have sought to
17 dismiss the case is not because they feel they have not
18 prevailed or that they could not prevail, but because they
19 were under extreme financial pressures which prevent them
20 from going forward.

21 Under those circumstances, I find that
22 neither party has prevailed, and neither party is entitled
23 to attorney's fees under the contract.

24 We'll ask the clerk to make notification of
25 that and ask Mr. Nuffer to prepare the appropriate order.

1 (Whereupon the proceedings in the
2 above-entitled matter were concluded.)
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C E R T I F I C A T E

STATE OF UTAH)
) ss.
COUNTY OF WASHINGTON)

I, PAUL G. MCMULLIN, CSR, RPR, a Notary
Public, in and for the County of Washington, State of
Utah, do hereby certify:

That, the foregoing matter, to wit, H. LEROY
COBABE, et al. VS. B. GLEN CRAWFORD, et al., Civil
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and place therein named and thereafter reduced to
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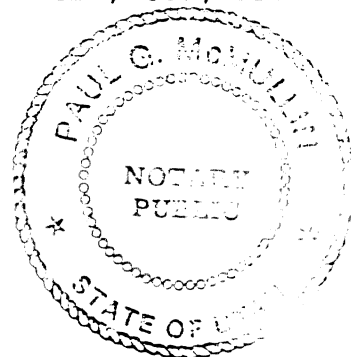
I further testify that I am not interested in
the event of the action.

WITNESS my hand and seal this 26th day of
August, 1988.

Paul G. McMullin

PAUL G. MCMULLIN, CSR, RPR

RESIDING AT: St. George, Utah
MY COMMISSION EXPIRES: 6-17-91



ORIGINAL

Appendix 4

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
IN AND FOR THE COUNTY OF WASHINGTON, STATE OF UTAH

HON. J. PHILIP EVES, Judge

H. LEROY COBABE, and LEWIS R.
CANFIELD, and ST. GEORGE
TOYOTA, INC.,

Plaintiffs,

vs.

Civil No. 85-0518

B. GLEN CRAWFORD, PAULA
CRAWFORD, and CRAWFORD
INVESTMENT COMPANY, a
Utah Limited Partnership,

Defendants.

REPORTER'S HEARING TRANSCRIPT

Thursday, July 21, 1988

APPEARANCES OF COUNSEL:

For the Plaintiffs:

SNOW, NUFFER, ENGSTROM & DRAKE
BY: DAVID O. NUFFER, ESQ.
90 East 200 North
St. George, Utah 84770

For the Defendants:

THOMPSON, HUGHES & REBER
BY: MICHAEL D. HUGHES, ESQ.
148 East Tabernacle Street
St. George, Utah 84770

Reported By: PAUL G. McMULLIN, CSR, RPR

PAUL G. McMULLIN
OFFICIAL COURT REPORTER

P.O. BOX 1534
ST. GEORGE, UTAH 84770
(801) 673-5315

1 ST. GEORGE, UTAH; THURSDAY, JULY 21, 1988

2 -oOo-

3
4 THE COURT: The next matter is Civil No. 85-0518,
5 Cobabe versus Crawford.

6 I'm not sure what this is on for.

7 MR. NUFFER: Well, this is the case that I still
8 want to get out of after a couple months.

9 THE COURT: Okay.

10 MR. NUFFER: Mr. Hughes would like to publish some
11 depositions on my way out, but the Court has an order of
12 dismissal -- well, the Court actually has three different
13 orders of dismissal and an order allowing my withdrawal --
14 all proposed and some objected to -- and I would like to
15 see the case terminated. I'd like to be relieved of my
16 responsibilities to act as counsel.

17 THE COURT: I've already signed the order of
18 dismissal, and I believe I've already signed your order
19 allowing your withdrawal.

20 MR. HUGHES: Which order of dismissal did you
21 sign?

22 THE COURT: The one submitted by Mr. Nuffer.

23 MR. HUGHES: Your Honor, just for purposes of the
24 record, when I read -- Mr. Nuffer responded to a letter
25 and indicated that he did not oppose the shorter version

1 of the order.

2 Is the Court indicating -- I oppose the
3 language of his longer version because it seemed to me
4 that that version did not set out one single argument I
5 had earlier made to this court to grant us attorney's
6 fees. And when I checked with the Court staff yesterday
7 to find out what order of dismissal had been executed, we
8 were told that it had not been. But we would suggest --

9 THE COURT: It has been. As has the order allowing
10 withdrawal. They were both in the file, as are your
11 proposed orders, which I have not signed.

12 MR. HUGHES: Did the Court -- well --

13 THE COURT: So that was done on July 13 after I --

14 MR. HUGHES: I assume the Court took into account
15 all the arguments I presented and were recorded by
16 Mr. McMullin. I simply wanted to preserve those for
17 appeal, and I don't think those arguments were preserved
18 in the order.

19 THE COURT: Why not? You mean in his order?

20 MR. HUGHES: In his order.

21 THE COURT: Well, I'm not sure that they have to
22 be. But I've signed the orders. The matter is now
23 dismissed, and Mr. Nuffer is now out of the case. I've
24 made a matter of record your proposed orders which are in
25 the file. Frankly, I just for the record don't see a

1 great deal of difference in any of the orders submitted.

2 MR. HUGHES: The only thing I wanted to make note
3 of and I wanted the Court to note is that Mr. Nuffer had
4 at least intimated in his order that the Court did not
5 have my arguments in mind, or that somehow they had been
6 submitted untimely. And I did not understand the Court to
7 say that.

8 THE COURT: I did not read the order that way in
9 the first place. And if that's what you want me to cover,
10 I certainly did have your arguments in mind and had
11 received your arguments at the time I made the decision.

12 MR. HUGHES: Thank you. That's the only thing I
13 wanted to preserve for appeal.

14 And on the motion to publish the depositions,
15 I have made a motion that all depositions be published for
16 part of the record. And I would assume there is no
17 objection to that.

18 THE COURT: Well, at this point, Mr. Nuffer isn't
19 in the case. There's nobody to object. So, I suppose if
20 you want to proceed any further, you'll need to give
21 notice to the plaintiffs to appear in person or appoint
22 successor counsel.

23 MR. HUGHES: All right.

24 (Whereupon the proceedings in the above-entitled matter
25 were concluded.)

C E R T I F I C A T E

STATE OF UTAH)
) ss.
COUNTY OF WASHINGTON)

I, PAUL G. MCMULLIN, CSR, RPR, a Notary
Public, in and for the County of Washington, State of
Utah, do hereby certify:

That, the foregoing matter, to wit, H. LEROY
COBABE, et al. VS. B. GLEN CRAWFORD, et al., CIVIL
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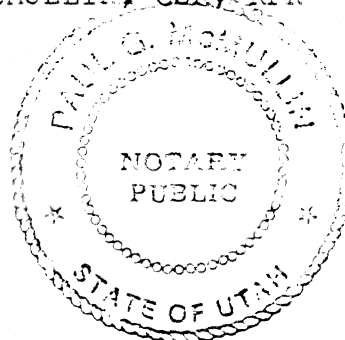
I further testify that I am not interested in
the event of the action.

WITNESS my hand and seal this 26th day of
August, 1988.



PAUL G. MCMULLIN, CSR, RPR

RESIDING AT: St. George, Utah
MY COMMISSION EXPIRES: 6-17-91



Appendix D

FILED
FIFTH DISTRICT COURT
WASHINGTON COUNTY

'88 JUL 13 PM 1 23

CLERK
DEPUTY *R. Williams*

DAVID NUFFER - A2431
SNOW, NUFFER, ENGSTROM & DRAKE
A Professional Corporation
90 East 200 North
P.O. Box 400
St. George, Utah 84770
801/628-1611
File #265201/di2

IN THE FIFTH JUDICIAL DISTRICT COURT

IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

H. LEROY COBABE and LEWIS R.
CANFIELD, and ST. GEORGE
TOYOTA, INC.,

Plaintiffs,

vs.

B. GLEN CRAWFORD, PAULA
CRAWFORD, and CRAWFORD
INVESTMENT COMPANY, a Utah
Limited Partnership,

Defendants.

**ORDER OF
DISMISSAL
WITH PREJUDICE**

Civil No. 85-0518

This matter was submitted to the Court on the Motion of Plaintiffs for Dismissal filed May 23, 1988, for the stated reason that Plaintiffs were financially unable to continue to prosecute the case. The Defendants made no response to the Motion until June 7, 1988, the date of hearing thereon, and filed no written response to the Motion until June 21, 1988.

The Court heard the arguments of counsel on June 7, 1988, and then heard the Defendants' request for an award of attorneys fees against the Plaintiffs. The parties agreed that dismissal was appropriate. The Court then considered the authorities submitted by Plaintiffs in opposition to such an award of attorney's fees, together with other objections, and set the matter for June 21, 1988, to allow Defendants time to submit responsive authorities.

On June 21, 1988, the Court again heard counsel, who agreed as to the dismissal, and heard the Defendants' request for an award of fees. Plaintiffs objected on the grounds that the request and response to Plaintiffs' motion was untimely, that Defendants had filed no counterclaim, that one Plaintiff had filed bankruptcy, that as the dismissal was with prejudice there should be no award, that there was in fact no successful party in the litigation, within the meaning of the contract, and that such an award was within the discretion of the Court. The Court, having reviewed the file, and being fully advised in the premises, now finds that:

1. The parties are in agreement that the case should be dismissed with prejudice.
2. There is no reason the Court should not dismiss the case with prejudice.
3. Neither party has prevailed in this action, and neither party to this suit is "successful" within the meaning of the terms of the agreement entitling award of attorney's fees.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above matter is Dismissed, with Prejudice. The trial setting is vacated. Each party shall bear its own costs and attorney's fees.

DATED this 13th day of July, 1988.

BY THE COURT:


J. PHILIP EVES
District Court Judge

MAILING CERTIFICATE

I hereby certify that on the 22nd day of June, 1988, I served an unsigned copy of the foregoing on the following by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

Michael D. Hughes, Esq.
Thompson, Hughes, & Reber
148 East Tabernacle
St. George, UT 84770

Mr. Lewis R. Canfield
5479 Indian Hills Drive
Simi Valley, CA 93063-2029

Mr. LeRoy Cobabe
1021 South Valley View Drive
St. George, UT 84770

St. George Toyota, Inc.
100 West St. George Blvd.
St. George, UT 84770



MAILING CERTIFICATE

I hereby certify that on the _____ day of _____, 1988, I served a signed copy of the foregoing on the following by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

Michael D. Hughes, Esq.
Thompson, Hughes, & Reber
148 East Tabernacle
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