

1988

H. LeRoy Cobabe, Lewis R. Canfield, and St.  
George Toyota, INC., v. B. Glen Crawford, Paula  
Crawford, and Crawford Investment Company, a  
Utah Limited Partnership : Brief of Respondent

Utah Court of Appeals

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#### Recommended Citation

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DOCKET NO. 890567 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

CASE NO. 890567-CA

Argument Priority  
Classification 14.b

BRIEF OF RESPONDENT

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

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DEC 14 1988

COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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H. LEROY COBABE, LEWIS R.	)	
CANFIELD, and ST. GEORGE	)	
TOYOTA, INC.,	)	
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CRAWFORD, AND CRAWFORD	)	Argument Priority
INVESTMENT COMPANY, A Utah	)	Classification 14.b
Limited Partnership,	)	
Defendants-Appellants	)	

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BRIEF OF RESPONDENT

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Response to Appeal from an Order of Dismissal With Prejudice  
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The Honorable J. Philip Eves, District Judge

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<u>APPENDIX 5:</u>	Order of Dismissal With Prejudice, July 13, 1988

IN THE COURT OF APPEALS OF THE STATE OF UTAH

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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. 2 [hereafter 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, 1985, seeking \$100,000.00 in liquidated damages, lost profits, costs, and attorney's fees alleging Appellant's breach of covenant not to compete (see Record, Vol. 1 [hereafter 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). Approximately one month prior to trial, Respondents filed a motion, requesting the District Court to dismiss their complaint because Respondents were then financially 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 (Recorder's Transcript, June 7, 1988 [hereinafter T1], at 4.) Respondents resisted Appellant's 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.) Appellant's counsel requested that he be permitted to go forward with evidence as to Appellant's attorney's fees, subject to cross-examination. However, the lower court denied Appellants this opportunity (See Reporter's Transcript, June 20, 1988. [hereinafter T2] at 8-9.) The lower court rationale was as follows:

Having reviewed the Memorandum 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 reasons that Plaintiffs have sought to dismiss the case is not because they feel that they have not prevailed or could not prevail, but because they were under extreme financial pressures which prevented 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 have brought this appeal.

#### STATEMENT OF ISSUES FOR REVIEW

1. Does the Trial Court have sole discretion regarding the award of attorney's fees?

2. Did the trial court abuse its discretion in finding that neither party prevailed within the meaning of the contract and that no attorney's fees should be awarded either party.

#### CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

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

#### STATEMENT OF THE CASE

The parties negotiated through late 1984 and early 1985 to reach an agreement for Plaintiffs to buy the business of Defendants, known as Crawford Toyota. (See generally Deposition of Lewis Canfield, November 18, 1986, [hereafter Lewis Canfield I], pp. 47-50). Crawford had operated Crawford Toyota for a decade, making it a successful dealership for Toyotas and used cars. He always participated personally in sales and managed the business alone as it grew. (See Deposition of Glen Crawford, January 5, 1988, [hereafter Glen Crawford II, pp. 29-30.)

The Toyota line included small trucks, small cars, sports cars, and larger sedans. Competition with this line of new cars came from many other car dealerships in St. George, i.e., Sunland or Anthony

Chevrolet, Bradshaw Ford, Peterson or Newby Buick Pontiac Oldsmobile. Later Nissan or Datsun and Mazda dealerships also competed with the Toyota vehicle line. According to Crawford, a buyer's interest and therefore market competition was focused primarily or principally on price. Often buyers would shop other dealers outside the immediate area in search of the best price. Make or model was not as important to a buyer who was shopping for a certain class of automobile. The critical factor was price. Crawford was in competition with dealers for all different makes of the same class of automobile. (Glen Crawford II, pp. 15-16).

The Plaintiffs had searched throughout the West for a dealership that they could purchase. Plaintiffs located the Crawford business, and made preliminary investigations of the market and Crawford's reputation. All indications were deservedly positive. (See Deposition of LeRoy Cobabe, January 26, 1987, [hereafter LeRoy Cobabe] pp. 17-22.)

When Crawford and Plaintiffs came to discuss terms, Crawford insisted on receiving \$200,000.00 more than the value of the hard assets of the business. (Glen Crawford II, pp. 48-49.) The real estate was worth \$425,000.00, and equipment and inventory were worth approximately \$80,000.00. Since the cars on the lot were financed (floored) they were not included in the price calculations. Crawford called the \$200,000.00 premium "Blue Sky"; it was the value he placed on the ongoing business. He also called it "good will". (Glen Crawford II, p. 49.) (See also Deposition of Lewis Canfield January 6, 1987, [hereafter Lewis Canfield II], p. 9). Crawford had

some old auto sale agreements from which he was preparing a draft for this transaction. He proposed in the first draft of the agreement he typed that the \$200,000.00 of "Blue Sky" be allocated to "obsolete equipment" i.e. other than those shown on Schedule B" (Deposition of Glen Crawford, November 17, 1986, [hereafter Glen Crawford I] p. 119, Exhibit 4).

Plaintiffs, however, were not willing to pay \$200,000.00 for imaginary equipment. Since they insisted Crawford not compete with the business to preserve the value of the goodwill and going concern of the purchase, they suggested that they allocate \$100,000.00 to Crawford's covenant not to compete. Crawford agreed. Since the business they were buying was built by Crawford, keeping him out of competition was essential to maintaining the value of the "going concern" and "goodwill" they were buying. (Lewis Canfield II, p. 10). The parties discussed the plans Crawford had for becoming a wholesaler of used cars. This meant he would have a used car lot in St. George as well. They discussed that Plaintiff might add another line of cars. They agreed that Crawford would not sell new cars and would not be in competition with the Toyota business he was selling. Crawford insisted on a right to do what he wanted in Cedar City, on his father's lot, known as Crawford Motors. (Lewis Canfield Deposition, pp. 15, 30.)

Once Crawford agreed that he would not sell new cars, (Deposition of Lewis Canfield I, p. 60-61) (See also Deposition of LeRoy Cobabe, pp. 27-29) the Plaintiffs were ready to place \$20,000.00 earnest money in escrow. Crawford agreed to retype the

agreement. (Record II, pp. 22-23)

A revised agreement was first shown to Plaintiffs at the office of Southern Utah Title Company in St. George. Plaintiff Canfield asked Crawford about the language. The document read:

2. The seller covenants for a fee of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) not to compete with a new car franchise within a 30 mile radius of current dealership for a period of two years from the date of closing.  
(Record II, p. 23)

The paragraph exempted Cedar City from its coverage by the 30 mile radius. It included the reference to the \$100,000.00. At the time a period of two years was also included. Canfield asked Crawford if it meant that he wouldn't sell new cars. Crawford said that is what it said and that is what it meant. (Id.) Crawford would not compete with a new car franchise. He would not compete with a new car franchise that was sold, or a new car franchise that the Plaintiff acquired, or with any of the others in town, because that would put Crawford in the new car market. He was selling his piece of that market to Plaintiffs for \$100,000.00. (Lewis Canfield II, p. 10.)

Crawford, however, violated that agreement several times. He obtained new Toyota automobiles from Toyota dealerships out of the area and sold them to customers from his used car lot. (Record II, p. 23 and Glen Crawford I, pp. 146-166.) He personally sold to at least one of those customers who had shopped the St. George Toyota lot owned by Plaintiffs. Crawford made the sale because his price was lower. (Glen Crawford II, pp. 40, 54.)

After a few incidents of sales of new Toyotas from his lot, the

word got back to Plaintiffs that Crawford claimed he could beat their price on new Toyotas. Word of Plaintiff's reaction got back to Crawford. He came to Plaintiff's lot and admitted that he should not be selling new Toyotas, and then sold his remaining stock of new Toyotas back to plaintiffs. (Lewis Canfield II, p. 23, and Record II, p. 23.) Crawford continued to sell Toyotas, however. After a demand that he stop was made and ignored, this suit was filed. Crawford now claims the agreement means that he will not have a new car franchise. He denies it means he will not compete with Plaintiffs or any other new car franchise. (Glen Crawford I, p. 179.)

Defendants approach to this suit is to ignore the clear construction of the non-competition provision, because the only way to avoid liability is to make the provision meaningless.

Defendants have also focused a great deal on the remedial document proposed by Plaintiff. (Lewis Canfield I, Ex. A.) This agreement was proposed in an effort to have Defendants put in writing the original agreement and understanding regarding noncompetition that Crawford once acknowledged. Nothing is inconsistent about this proposed document, as Plaintiffs only say that is how the original agreement should have been written to prevent Defendants from attempting to avoid their contractual duties.

Defendants have attempted to justify their selling of new vehicles by their relying upon the technical wording of a definitional provision in the Utah Motor Vehicle Code. From that

technical wording of the code, defendants have formulated three propositions: (1) Cars sold by the defendants were not new because they were licensed as used cars by the buyers of the vehicle, (2) Cars sold by defendants could not be new because they sold them as a used car dealer, and (3) Defendants did not violate the law, and therefore did not violate its agreement with Plaintiffs. Defendants conclude that since they were licensed to sell used cars they could sell new cars.

All these arguments hinge on Defendant's reading of the agreement as only prohibiting them from having a new car franchise. But the agreement itself says (and was affirmed by Crawford) that Defendants will not conduct business that will compete with the new car franchise. Clearly selling low mileage, new Toyotas is competitive with any new car franchise and is clearly competitive with Plaintiff's business. Whether a state calls a car new on its records is irrelevant to whether it is competitive with Plaintiffs and the franchise sold to them. Nothing in the agreement references state law or permits what ever state law will allow. Plaintiffs have testified in their depositions that their agreement with Defendants did not consider or countenance the provisions of the Utah State Motor Vehicle Code. They just relied on what the agreement was intended to accomplish. (Lewis Canfield I, p. 71.) The agreement prohibited or was intended to prohibit competitive activity. Crawford himself admits that a few hundred miles on a car does nothing to reduce its value as compared with a no-miles car. (Glen Crawford II, pp. 36-37.) He states that buyers bought from

him because he gave them the best price. (Id. p.40.) He was clearly competing with a new car franchise, even though state law may have allowed him to sell "new" cars and label them "used".

Defendant's agreement that there would be no competition with the new car business was crucial in Plaintiff's purchase of Defendant's "goodwill". The name Crawford was synonymous with Toyota in St. George. Crawford had an extensive reputation and considerable customer loyalty. This was the basis of value of the business and the reason for Plaintiff's willingness to pay \$200,000.00 more than the value of the assets for the business. In order to insure that plaintiffs received the bargained for "goodwill" and "going concern", and that it was not stolen away from them, the covenant not to compete was essential. Defendants boldly admit that they have sold new Toyotas within 30 miles of the dealership they sold, within two years of the date of closing. (Glen Crawford II, pp. 37,54.) (See also Defendant's Answer to Plaintiff's First Set of Written Interrogatories and Requests for Production, March, 1986.)

#### SUMMARY OF ARGUMENT

1. Utah Code Annotated §78-27-56.5 and caselaw empower the trial court to exercise discretion to award or not award attorney's fees.

2. The Trial Court did not abuse its discretion in denying to Defendants an award of attorney's fees. This result should be upheld by the Higher Court since the decision was appropriately made after evidence was presented before the Court that Defendants had

breached a covenant not to compete, Defendants had agreed that dismissal would be appropriate, one of the Plaintiffs had filed bankruptcy, the remaining Plaintiff was financially unable to continue in the lawsuit, and because Defendant's request was untimely.

3. The contract provision requiring defendant "not to compete with a new car franchise within a 30 mile radius of current dealership for a period of two (2) years from the date of closing" was drafted by Defendant. Defendant used the ambiguity of this provision to compete with Plaintiff by selling new cars in derogation to previous verbal and written agreements between the parties. The Defendant's conduct was clearly unconscionable and resulted in his receiving a windfall of \$100,000.00 since his conduct deteriorated the "goodwill" he had sold to the Plaintiffs. Defendants should not merit an award of attorney's fees under these set of facts.

4. Appellant should be estopped from claiming attorney's fees since their conduct and disregard of the parties' agreement renders the noncompetitive provision null and void.

5. If Appellant prevails in their appeal, attorney's fees should not be awarded since Appellants were not defending a result in their favor from the lower court.

#### ARGUMENT

##### I

U.C.A. §78-27-56.5 EMPOWERS THE TRIAL COURT WITH DISCRETION TO AWARD OR NOT AWARD ATTORNEY'S FEES.

There are two basic approaches to allocating costs in a



lawsuit. The majority rule followed by most countries is known as the "English Rule" and awards attorney's fees to the prevailing party. The American legal system on the other hand utilizes the "American Rule" and requires each individual to pay his own attorney's fees in the absence of a statute or an enforceable contract providing otherwise. (1984 Utah Law Review 533.) The American rule had arisen as a result of our country's desire to insure that an individual have free access to the courts. ( Id. at 534.)

Utah has two types of fee shifting statutes: discretionary and nondiscretionary. Discretionary fee shifting statutes do not necessarily guarantee a recovery of fees, but rather give the trial court discretion to decide whether fees should be awarded. (1984 Utah Law Review, at 554.) The Trial Court's discretion, however, is not unlimited, there must be a sufficient evidentiary basis in the record to support the trial court's decision to award fees. Mason v. Mason, 160 P.2d 730 (Utah 1945).

Nondiscretionary awards of attorney's fees are provided in all suits brought against state officers or where violation of Fourth Amendment rights is alleged. In any event these statutes provide that the prevailing party "shall" be awarded attorney's fees. (1984 Utah Law Review 556.) Contrary to the nondiscretionary statute where attorney's fees are mandatory, discretionary statutes vest discretion in the trial court to determine if fees are justified. The obvious distinguishing characteristic between the two statutes is the use of the word may in the discretionary statute as opposed

to the use of the word shall in the nondiscretionary one. The Utah Legislature is clearly aware of this distinction and strictly abides by the distinguishing language.

The 1981 version of U.C.A. Section 78-27-56 is entitled: Attorney's Fees-Award Where Action or Defense in Bad Faith. That section provided that the court "may award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit". The amendment of this statute in 1988 changed the statute from a discretionary one to a nondiscretionary statute by inserting the word shall for the word may. Interestingly, the statute now provides for an exception to the mandate of awarding reasonable attorney's fees which is provided under subsection (2). The statute reads as follows:

(1) In civil actions, the court shall award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under subsection (2).

(2) The Court, in its discretion, may award no fees or limited fees against a party under subsection (1), but only if the court: (a) finds the party has filed an Affidavit of Impecuniosity in the action before the court; or (b) the Court enters in the record the reason for not awarding fees under the provisions of subsection (1).

Here we have an interesting approach by the Legislature which has made an award of attorney's fees mandatory and yet has provided for an equitable exception to that rule (giving the Court discretion) in the event the party against whom the attorney's fees would ordinarily be awarded is in a state of impecuniosity. Moreover, the court may upon appropriate basis not award attorney's

fees at all under subsection (b).

U.C.A. Section 78-27-56.5 entitled Attorney's Fees-Reciprocal Rights to Recover Attorney's Fees is clearly discretionary. It provides the following language:

A court may award costs and attorney's fees to either party who prevails in a civil action based upon any promissory note, written contract, or any writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney's fees.

This provision of the Code basically codifies what has been held by case law in Utah for some time. It would be fascinating indeed if the proposition of Appellants were correct that Trial Courts must award attorney's fees to a prevailing party. This is particularly true because trial courts have now been given discretion in cases involving actions or defenses in bad faith, to withhold the award of attorney's fees in cases where there is good cause to do so, such as one of the parties being impoverished. Surely parties who bring causes of action in bad faith have not been given a preferred status. The trial court has the discretion under Section 78-27-56.5 to award or refuse to award attorney's fees especially where the facts and circumstances dictate that no award should be made.

The nature of our Utah discretionary statute makes it difficult to compare caselaw with other jurisdictions. For example, Washington and Oregon each have non-discretionary statutes.

Oregon Revised Statute 20.096(1) provides:

In any action or suit on a contract, where such contract specifically provides that attorney fees and costs

incurred to enforce the provisions of the contract shall be awarded to one of the parties, the prevailing party, whether that party is the party specified in the contract or not, at trial or on appeal, shall be entitled to reasonable attorney fees in addition to costs and necessary disbursements.

With regard to contract actions the Revised Code of Washington Annotated 4.84.330 provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

This court should not base its decision on the laws of Washington and Oregon and Appellant's reliance on the laws of those states is misplaced.

Appellants cite case after case, both in Utah and in other jurisdictions where trial courts have been upheld in their determination of the prevailing party and award of attorney's fees. It is interesting in light of that weight of authority that Appellant attempts in its brief to characterize the Utah law as mandating that the trial court award attorney's fees without acknowledging the discretion that lies in the trial court to determine these matters. The clear position of the Utah courts is that an award of attorney's fees is in the sole discretion of the trial court and will not be overturned in absence of showing clear abuse of that discretion. Sears v Riemersma, 655 P.2d, 1105, 1110 (Utah 1982). Beckstrom v. Beckstrom, 578 P.2d 520, 524 (Utah 1978).

20 AM Jur 2d 59, §73.

## ARGUMENT

### II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING AN AWARD OF ATTORNEY'S FEES TO DEFENDANT AND SHOULD BE UPHELD BY THE COURT OF APPEALS.

Appellant has argued extensively in his brief that Appellant should have been determined to have been the "prevailing" party since Plaintiff dismissed with prejudice. Further, Appellant maintains that based upon the prevailing status he should have obtained, the Trial Court would have been obligated as a matter of law to award attorney's fees to Defendant.

However Appellant's position is not the law in Utah as will be seen in argument hereafter. A finding by the court that one party has prevailed does not rob the court of its discretion with regard to an award of attorney's fees.

In the Supreme Court case of Jenkins v. Bailey, 676 P.2d 391 (Utah 1984) the Earnest Money Receipts and Offer to Purchase contained the provision that all expenses of enforcing the agreement or of any action arising out of breach thereof would include a reasonable attorney's fees. The court's award of attorney's fees to Zion and Limbacher on a counterclaim against Bailey was obviously predicated on the provision in the Agreement for Fees. However, Bailey's attorney had testified as to the reasonable value of his services but the trial court did not award him any amount of attorney's fees nor offer any explanation for his failure to do so. Since Bailey's action was based on a cause of action for breach of

the agreement and Zion-Limbacher's cause of action was based on conversion, the court determined that the disparity could only be seen as error. Jenkins, at 392.

The case at bar is easily distinguished from the Jenkins case since no obvious error was apparent on the part of the trial court in its denial of attorney's fees to Defendant. It properly considered the evidence it had viewed of Defendant's breach of the covenant not to compete, the claim of Defendant that it was proper for him to sell new cars, the financial distress of Plaintiffs after 30 months of litigation, and Defendant's failure to timely request attorney's fees.

However, the Supreme Court in Jenkins then cited Fireman's Insurance Co. vs. Brown, Utah, 529 P.2d 419 (1974) which had upheld the trial court's refusal to award any attorney's fees in a contract case since the buyer had been in default for twenty months and the seller had refused to convey the property on proper tender by the buyer. The court made an interesting point and stated: "If the trial court believed the dispute between Bailey, Zion and Limbacher to be comparable to the Fireman's Insurance case, then the court should not have awarded attorney's fees to either party." That statement by the court clearly indicates its support for the proposition that the trial court has the clear discretion to refuse an award of attorney's fees to either party in an action where the circumstances warrant such an approach. Furthermore, both the Brown case and the Bailey case seem to indicate that the trial court may consider equitable factors in refusing to award attorney's fees.

This would be consistent with the fact that courts in our modern judicial system are not merely courts of law but courts of equity and can administer equitable remedies in addition to those that are legal.

In the case of Wainwright Securities Inc. vs. Wallstreet Transcript Co., 80 FRD 103 (S.D.N.Y.1978), the Federal District Court determined that the defendant was a prevailing party entitled to recover costs because the Plaintiff had sought and obtained a dismissal with prejudice. The court determined that this result had the effect of a final adjudication on the merits favorable to defendant. Although defendant was considered the prevailing party, attorney's fees in this case were denied. As stated by the Wainwright court: "An award of attorney's fees under §116, Copyright Act, 17 U.S.C., §101 through 810 is not mandatory but is matter for the court's discretion".

A case in which the trial court's discretion was very broadly acknowledged by the Utah Supreme Court was that of Lake Creek Irrigation Co. v. Don Clyde, 451 P.2d 375 (Utah 1969). In this case the plaintiff was granted his motion to dismiss without prejudice. There was no statute or contract involved that would serve as the basis for an award of attorney's fees. What the court did in that case was to condition the granting of plaintiff's motion to dismiss on his payment of \$250.00 as attorney's fees. The court stated that "we cannot see any abusive discretion on the part of the trial judge in assessing attorney's fees as a condition to the granting of a motion as made by the plaintiff". ( Ibid p. 378.) That is a very

unique set of facts and circumstances with a very unique result. Probably the only one of its kind. Nonetheless the discretion of the trial court was upheld because of the basic rule of law that an award of attorney's fees is within the discretion of the trial court. Our case likewise is very unique in that the lower court decided or determined as a matter of law that there was no successful or prevailing party in the lawsuit consistent with the provisions of the contract and that an award of attorney's fees under the circumstances would not be appropriate. Just as in the cases previously cited, the trial court's discretion which is based upon proper evidence should be upheld.

#### ARGUMENT

#### III

DEFENDANT'S CONDUCT OF SELLING NEW CARS WAS IN DEROGATION TO PREVIOUS VERBAL AND WRITTEN AGREEMENTS AND WAS CLEARLY UNCONSCIONABLE SINCE IT RESULTED IN DETERIORATION OF "GOODWILL" SOLD TO PLAINTIFF AND CREATED WINDFALL TO DEFENDANT OF \$100,000.00 AND SHOULD APPROPRIATELY BE THE BASIS FOR A DENIAL OF ATTORNEY'S FEES.

A case where the Supreme Court has upheld a trial court's denial of attorney's fees upon equitable considerations is the case of Fullmer v. Blood, 546 P.2d 606 (Utah 1976). In that case the assignee of a vendor's interest in a real estate sales contract brought an action against assignees of the purchasers to quiet title to the real property covered by the contract and declare forfeiture of sums paid thereunder.( Ibid at 607.) The Uniform Real Estate Contract had a provision in it for awarding attorney's fees "in case of default the defaulting party shall pay costs and expenses,



including a reasonable attorney's fee incurred in enforcing the agreement, or in pursuing any remedy with respect to the property." ( Ibid at 610.) The court in analyzing the case indicated that due to the complicated nature of the case that both parties thought that they had some justification for making their respective claims in the property. ( Ibid.) Then the court made a very interesting statement:

A suit of this nature involving the invocation of a forfeiture and/or the enforcement of a purchase contract invokes consideration of the principles of equity which address itself to the conscience and discretion of the trial court. ( Ibid.)

The court in looking at the Blood case noted that plaintiffs had received \$12,150.00 which was forfeited and not recoverable to the Defendant. The Court then stated that "in view of these circumstances we are not persuaded that the trial court abused its discretion in refusing to require defendant to pay the plaintiff's attorney's fees". What the court was saying basically is that the plaintiff had already been benefited or aggrandized by the forfeiture. Therefore, the court was remiss to permit the plaintiff further recovery by awarding it attorney's fees.

Our case is very similar to that one in that Mr. Crawford had already received 200,000.00 for goodwill in the enterprise which he sold. His conduct which deteriorated the goodwill which he sold to plaintiffs resulted in a windfall to him. Such conduct should shock the conscience of the higher court and should not be further rewarded by an award of attorney's fees in this action.

Defendants-Appellants accepted the provision in the contract

constituting his agreement not to compete against Plaintiffs-Respondents in the new car business. This provision of the contract stipulated that defendant would "not compete with a new car franchise within a 30 mile radius of a current dealership for a period of two years from the date of closing". Defendant had agreed verbally with Plaintiffs as to the meaning of said provision, i.e. that he would not sell new cars, and it was upon such representations by defendant that plaintiffs entered into and executed said agreement. Defendant Crawford then turned around and used the ambiguity of this provision to surreptitiously sell current model cars claiming that the sale of these cars was not countenanced within this provision. This conduct clearly was contrary to the verbal and written agreements between the parties and was unconscionable. Furthermore, when Plaintiffs determined that Defendant was in the business of selling new cars, Plaintiffs confronted Defendant with that fact. Defendant sold his remaining new car inventory to the Plaintiffs and then proceeded to continue to operate in competition with the distributorship that he had sold.

The trial court was fully apprised of these facts as a result of the Motion for Summary Judgment made by Defendants wherein they sought to be dismissed from the case. (Record II.) This matter was fully briefed by memoranda from the respective parties and a hearing was held on the matter. Thus, the court was fully apprised of Mr. Crawford's conduct which he never denied but fully acknowledged. However, based on his technical reading of the Motor Vehicle statutes, Appellant Crawford believed his conduct did not violate

the contractual agreement that he had entered into with Plaintiffs.

Appellants in support of their conduct in selling new cars repeatedly refer to the definitional provisions of the Utah Motor Vehicle Code. For the Court's benefit let us look at those provisions. Utah Code Annotated Section 41-3-7 "Definitions" provides the following:

(16) "New motor vehicle" means a motor vehicle which has never been titled or registered and has been driven less than 7,500 miles, unless the motor vehicle is a trailer or mobile home, in which case the mileage limit does not apply.

(17) "New motor vehicle dealer" means a person who has a franchise from a manufacturer of motor vehicles to sell new motor vehicles and who is engaged in the business of selling or exchanging new or new and used motor vehicles, or who sells, displays for sale, offers for sale, or exchanges three or more new or new and used motor vehicles in any 12-month period.

Under subparagraph 17 a "new motor vehicle dealer" is not just one who has a franchise from a manufacturer. According to the latter part of that provision one can also be classified as a "New motor vehicle dealer" if he "sells...three or more new...vehicles in any 12-month period".

Therefore, not only were Appellants violating the noncompetitive agreement with Respondents, they were also violating the dealer licensing laws of the State of Utah.

The trial court stated in its Memorandum of Decision that it considered all of the facts and evidence before it in making the determination that there was not a prevailing party in this lawsuit. That undoubtedly was based upon the unconscionable conduct of Mr. Crawford. Respondents herein contend that the unconscionable

conduct on the part of Defendant Crawford should form the basis for a denial of attorney's fees.

The second factor which the court considered in its determination that neither party was entitled to attorney's fees was that Respondents did not dismiss the case with prejudice because of a lack of confidence in their position. Quite the contrary, the Plaintiffs felt and still feel that the position they maintained in this lawsuit would have been successful had the matter been litigated on the merits. As is noted in the court record, one of the Plaintiffs filed bankruptcy and consequently withdrew that financial support from the case. Mr. Cobabe, the other Plaintiff, after 30 months of litigating this matter clearly ran out of resources to continue to pursue legal action against Defendants. This factor along with the fact that Plaintiffs had paid to Mr. Crawford \$200,000.00 for the goodwill of this enterprise forced the court to consider the equitable positions of these parties and rule in the manner it did.

#### ARGUMENT

#### IV

APPELLANTS SHOULD BE ESTOPPED FROM MAKING A CLAIM FOR ATTORNEY'S FEES SINCE THEIR CONDUCT AND READING OF THE CONTRACT RENDERS THE NONCOMPETITIVE PROVISION NULL AND VOID.

In the case of Turtle Management, v. Haggis Management, Utah, 645 P.2d 667 (1982) the court was faced with determining the appropriateness of an award of attorney's fees. Prior to resolving that issue the court stated that Utah adheres to the well

established rule that attorney's fees generally cannot be recovered unless provided for by statute or by contract. ( Ibid 71.) Then the court went on to say that if the award for attorney's fees was by contract that such an award would only be allowed in accordance with the terms of the contract. ( Ibid.) Appellants are maintaining that despite the clear language of the noncompetition provision in the contract and the prior understanding of the parties that they are nonetheless able to conduct themselves in derogation to this provision because of the definitional provisions in the Utah Motor Vehicle Code. Since their position is one of clearly disavowing the noncompetitive clause, it is inconsistent for them to now reverse that position and attempt to rely upon the selfsame provision in the contract for an award of attorney's fees.

#### ARGUMENT

##### V

ATTORNEY'S FEES ON APPEAL SHOULD NOT BE GRANTED SINCE APPELLANT IS NOT DEFENDING SUCCESSFUL LOWER COURT RULING AND RESPONDENTS HAVE HAD NO CHOICE BUT TO RESPOND.

The Utah cases to date which have awarded attorney's fees for appeal as well as at trial involve cases where the appellant successfully defended a favorable lower court ruling. In the case of Jenkins v. Bailey, which was cited earlier, Bailey was denied attorney's fees although he was considered to be the prevailing party at the trial court level. Furthermore, the Defendant who had prevailed on a counterclaim based on a cause of action for conversion was granted attorney's fees. In that case Bailey was considered to be entitled to a reasonable attorney's fee in bringing

the appeal in addition to attorney's fees that were awarded for his activity at trial. Our case is distinguished from that one because neither party was deemed to be a prevailing or successful party. Consequently, this is a case of first impression and should be regarded as being unique from the cases cited earlier. The case of Cabrera v. Cottrell, 694 P.2d 622 (Utah 1985) is a typical case whereby attorney's fees were rendered for successful defense on appeal arising out of an action to enforce a Uniform Real Estate Contract.

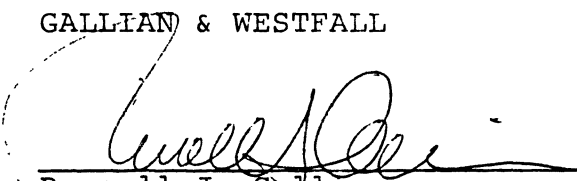
#### CONCLUSION

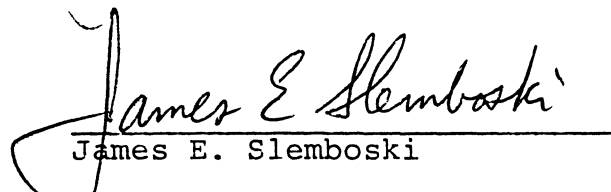
U.C.A. Section 78-27-56.5 provides that a court may award costs and attorney's fees to either party that prevails. The statute clearly places discretion in the trial court regarding the award of attorney's fees. This prerogative on the part of the lower court is consistently upheld by Utah case law. Appellants contend that a technical reading of definitional provisions of the Utah Motor Vehicle Code permits them to conduct themselves contrary to the clear intent of a noncompetitive clause in their contract with Respondent. Respondent contends that Appellant's reading of the statute is incorrect, their conduct clearly violated the agreement of the parties and was patently unconscionable. The lower court considered the evidence and acknowledged that Plaintiffs had a legitimate cause of action against Defendants. That coupled with Respondent's inability to continue in the lawsuit, served as a basis for the court's dismissal with prejudice without an award of attorney's fees.

We have seen in the discussion which has preceded this Conclusion that the Utah courts have in some cases acknowledged equitable considerations in matters regarding the award of attorney's fees. Respondents herein ask the court to consider the unconscionable conduct of Appellants coupled with the fact that they have been benefited in a windfall fashion in receiving \$200,000.00 for goodwill that Appellants themselves had deteriorated by their competitive conduct in selling new cars within a 30 mile radius of the dealership that they had just sold.

Respectfully submitted this 12 day of December, 1988.

GALLIAN & WESTFALL

  
\_\_\_\_\_  
Russell J. Gallian

  
\_\_\_\_\_  
James E. Slemboski

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies of the foregoing Brief of Respondent to Michael D. Hughes, of THOMPSON, HUGHES AND REBER, Attorneys for Defendants-Appellants, 148 East Tabernacle, St. George, Utah, postage prepaid, this 12 day of December, 1988.

  
\_\_\_\_\_  
James E. Slemboski

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 COBARR 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 Premises), 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.



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% discount 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 granted 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 for B.C. JRC*

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 Thirts (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 Instruction 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

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:	<u>Southern Utah Title Company</u> <u>P. O. Box 190</u> <u>St. George, Utah 84770</u>
If to Buyer:	<u>H. L. Cobabe</u> <u>1 Crestwind Drive</u> <u>Rancho Palos Verdes, CA. 90274</u>
If to Seller:	<u>B. Glen Crawford</u> <u>109 West Hope Street</u> <u>St. George, Utah 84770</u>

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 as 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.

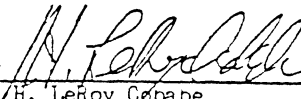
34. That any parts, supplies or inventory which the Seller has already ordered which are delivered after close of escrow or after inventory taken (whichever occurs latest) shall be the responsibility of the Buyer, including the payment therefor.

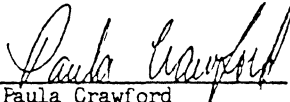
35. All Deposits and prorates which are normal and reasonable shall be made by Escrow as of Closing.


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

CRAWFORD TOYOTA

By   
E. Glen Crawford

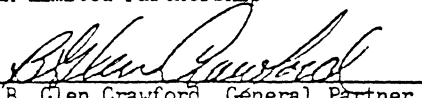
By   
H. Leroy Cobabe

By   
Paula Crawford

By   
Lewis R. Canfield

"SECOND PARTIES"

CRAWFORD INVESTMENT COMPANY, a  
Utah Limited Partnership

By   
B. Glen Crawford, General Partner

"FIRST PARTIES"

ORIGINAL

Appendix 2

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, CSP, 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

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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 ~~the~~  
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 ~~the~~  
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.)

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C E R T I F I C A T E

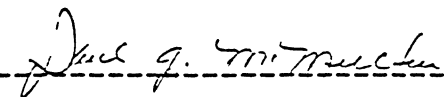
STATE OF UTAH                    )  
                                      ) ss.  
COUNTY OF WASHINGTON )

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

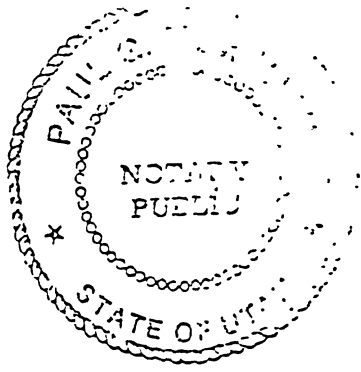
That, the foregoing matter, to wit, H. LEROY  
COBABE, et al. VS. B. GLEN CRAWFORD, et al., Civil  
No. 85-0518, was taken down by me in shorthand at the time  
and place therein named and thereafter reduced to  
computerized transcription under my direction.

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 J

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:

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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.

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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

*is stated  
issue?*

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  
that and ask Mr. Nuffer to prepare the appropriate order.

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(Whereupon the proceedings in the  
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:

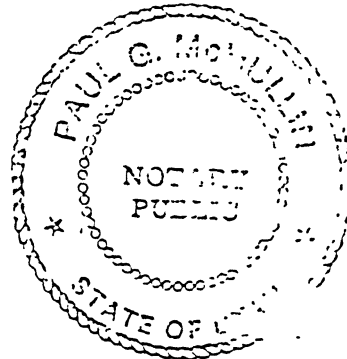
That, the foregoing matter, to wit, H. LEROY  
COBABE, et al. VS. B. GLEN CRAWFORD, et al., Civil  
No. 85-0518, was taken down by me in shorthand at the time  
and place therein named and thereafter reduced to  
computerized transcription under my direction.

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*  
-----  
PAUL G. MCMULLIN, CSR, RPR

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



# ORIGINAL

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:

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

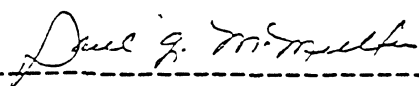
STATE OF UTAH                    )  
                                      ) ss.  
COUNTY OF WASHINGTON )

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  
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.

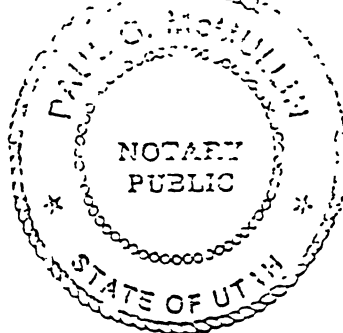
I further testify that I am not interested in  
the event of the action.

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



Appendix 5

FILED  
FIFTH JUDICIAL DISTRICT COURT  
WASHINGTON COUNTY

'88 JUL 13 PM 1 23

CLERK  
DEPUTY *[Signature]*

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

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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 13<sup>th</sup> day of July, 1988.

BY THE COURT:

  
J. PHILIP EVES  
District Court Judge