

2000

John Watson Chevrolet v. Buick Motors Division General Motors Corporation : Brief of Appellant

Utah Court of Appeals

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Attorneys for Plaintiff/Appellant

JOHN WATSON CHEVROLET,	:	
	:	
Plaintiff/ Appellant,	:	BRIEF OF APPELLANT
	:	
vs.	:	
	:	
BUICK MOTORS DIVISION,	:	Appellate Court No. 20000351-CA
GENERAL MOTORS CORPORATION,	:	
	:	Priority No. 15
Defendant/ Appellee.	:	

APPEAL FROM THE SECOND DISTRICT
WEBER COUNTY
JUDGE STANTON M. TAYLOR

Attorneys for Plaintiff/Appellant

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JOHN WATSON CHEVROLET,	:	
	:	
Plaintiff/Appellant,	:	
	:	
vs.	:	
	:	
BUICK MOTORS DIVISION,	:	Appellant No. 20000351-CA
GENERAL MOTORS CORPORATION,	:	
	:	Priority No. 15
Defendant/Appellee.	:	

The Utah Court of Appeals has jurisdiction in this matter by assignment from the Utah Supreme Court pursuant to Utah Code Ann. §78-2-2(4) (1996).

A. Whether the trial court erred in finding on Summary Judgment that no material fact was in dispute regarding the issue of equitable estoppel where the court found only that the defendant made no promise or took no other promissory action upon which the plaintiff could have reasonably relied to its detriment, damage or loss but failed to address issues of equitable estoppel wherein the reasonableness of the defendant's actions would be an issue for the finder of fact.

Standard of Review: Correction of Error; *Mast v. Overson*, 971 P.2d 928, 931 (Utah

Ct. App. 1998)

B. Whether the trial court erred in finding on Summary Judgement that there were no genuine issues of material fact regarding the issues of interference with contractual relations or prospective economic advantage where the court found that the plaintiff had no vested right as to whether the defendant followed its internal policy and exercised its right of first refusal in its contract with Helsco even though Utah law prohibits a franchisor from unreasonably withholding its consent to any transfer of ownership and the issue of the reasonableness is a question for the trier of fact.

Standard of Review: Correction of Error; *Mast v. Overson*, 971 P.2d 928, 931 (Utah Ct. App. 1998)

C. Whether the trial court erred in finding that the plaintiff failed to state facts sufficient to support a claim for conspiracy where a finder of fact may conclude that the defendant's conduct in dealing with Helsco after the plaintiff already had a contract with Helsco for the sale of an automobile dealership constitutes civil conspiracy.

Standard of Review: Correction of Error; *Mast v. Overson*, 971 P.2d 928, 931 (Utah Ct. App. 1998)

**DETERMINATIVE CONSTITUTIONAL
PROVISIONS, STATUTES, ETC.**

Utah Code Annotated §13-14-3 (1979)*:

Notwithstanding the terms of any new motor vehicle franchise, no franchisor shall terminate or refuse to continue any existing franchise

unless:

(1) The franchisee has received written notice from the franchisor as follows:

(b) fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld;

*Later amended in 1996

STATEMENT OF THE CASE

A. **Nature of the Case:** Plaintiff/Appellant is a Chevrolet automobile dealer in Ogden, Utah who applied with the defendant/appellee to become the Ogden Buick dealer after making arrangements to have a restraining order dismissed which prohibited sale of the Buick dealership. Plaintiff/Appellant was denied the dealership under General Motors Project 2000 plan even though Project 2000 had been waived for the previous applicant. General Motors then sought the local Pontiac dealer's application for the Buick dealership in violation of its own policy regarding the number of applications which can be considered. Appellant claims damages against the appellee in the amount of \$7,500,000.00 general damages on each of four (4) causes of action and punitive damages.

B. **Course of Proceedings and Disposition Below:** This matter was filed with the Second District Court in 1992. After significant discovery, the court heard and

granted the defendant's Motion for Summary Judgment. The Order for Summary Judgment was entered on April 5, 2000 and appeal was filed by the plaintiff on April 19, 2000.

C. **Statement of Facts:**

1. On February 10, 1990, Helsco, Inc. dba Sierra Buick-Jeep-Eagle (hereinafter "Helsco" when referring to the corporation and "Sierra Buick" when referring to the function of the dealership) entered into a Dealer Sales and Service Agreement (hereinafter the "Dealer Agreement") with defendant/appellee, Buick Motor Division, General Motors Corporation, (hereinafter "defendant") for the operation of a Buick dealership in Ogden, Utah (Complaint paragraph 8).

2. Among other things, the Dealer Agreement granted defendant a right of first refusal to purchase the dealership assets in the event Helsco submitted a proposal for change in ownership. The right of first refusal was granted to defendant "regardless of whether the proposed buyer is qualified to be a dealer" (Dealer Agreement paragraph 12.3). The Dealer Agreement is attached hereto as Addendum "1."

3. Sierra Buick became an under performing dealership and in March and April of 1992 lost some of its key personnel. Helsco attempted to sell Sierra Buick to Rick Warner Enterprises, and entered into a Buy and Sell Agreement dated the 2nd day of April, 1992. (Record P. 003). Thereafter Sierra Buick failed to open during normal business hours, and finally closed its doors in May, 1992.

4. Rick Warner was approved as the Ogden Buick dealer by defendant and then later Ray Norda was approved as the dealer on behalf of Rick Warner Enterprises when Rick Warner was not able to personally meet the financing requirements. In order to approve Warner/Norda, defendant had to waive the Project 2000 alignment of dealerships. Buick did not exercise its right of first refusal under the Dealer Agreement.

5. During the Warner-Sierra negotiations, John Watson expressed interest in filing an application for the Buick dealership at Ogden, Utah, and was advised by defendant's San Francisco office that they had a dealer in place and would not discuss the matter with any other applicant. (Watson Dep. P. 31-34; Garove Dep. P. 17-18; Woodley Dep. P. 64-66). Deposition pages and Memorandum are attached as addendum "2."

6. Helsco had purchased the Buick dealership from James Whetton (hereinafter "Whetton"), who then obtained an injunction against Helsco prohibiting it from selling any of its assets on June 17, 1992, and the Warner Buy and Sell Agreement was mutually rescinded on August 13, 1992. (Record P. 004)

7. Under the Dealer Agreement, defendant had a right to terminate Sierra Buick pursuant to a Notice of Termination and then purchase the Sierra Buick assets at appraised value, however, defendant could not enforce that portion of the Dealer Agreement because of the Whetton restraining order. Defendant then served Helsco with a sixty-day (60) notice dated August 19, 1992, terminating their Buick franchise,

where no new Buick automobiles had been sold at Ogden, Utah for approximately five (5) months, although the zone manager claimed that he was unaware of the notice or the lack of sales. (Garove Dep. P. 34, 37) Deposition pages and Notice of Termination are attached as addendum "3."

8. Plaintiff/ Appellant, John Watson Chevrolet, Inc. (hereinafter "Watson" or "Plaintiff") then negotiated a Buy and Sell Agreement with Helsco dated the 31st day of August, 1992. (Record P. 004). Helsco was faced with selling to Watson or filing bankruptcy because they had been served with the termination notice by defendant. The Buy and Sell Agreement is attached as addendum "4."

9. As a condition precedent to the execution of the Buy and Sell Agreement between Helsco and Watson, Watson would use his influence with Whetton to get the temporary injunction against sale of Sierra assets dismissed. While defendant claims it was not aware of Watson's ability and agreement to get the TRO dismissed, both Koch and Mixon claim to have given defendant notice. Watson fulfilled his obligation and on August 24, 1992, the Whetton TRO was dismissed. Defendant then sent an application to Watson and he applied to defendant to become the Buick dealer in Ogden, Utah on September 2, 1992. (Koch Dep. P. 19-20, Watson Dep. P. 54, Mixon Dep. P. 52, 67-69) Deposition pages are attached as addendum "5."

10. John Watson is qualified to be a Buick dealer and had previously been the Buick dealer at Rock Springs and Evanston, Wyoming and during the pendency of this

action, he was appointed the Buick dealer at Logan, Utah.

11. During the time that the Watson application was pending and unknown to Watson, defendant negotiated with Henry Mixon of Helsco agreeing not to execute defendant's Notice of Termination in exchange for which Mixon agreed not to bankrupt Helsco. Defendant feared that if Helsco filed bankruptcy the purchaser in the bankruptcy court might be an "unsatisfactory" dealer. (Business Case document from the San Francisco Zone to defendant in Detroit. Document attached as addendum "6."

12. It has been a long standing policy of General Motors Corporation and a standard within the industry that when an application for a Dealer Sales and Service Agreement accompanied by a Buy and Sell Agreement has been received, no other application will be entertained, and Buick Motor Division will not discuss the qualifications of any other applicant until it has notified the selling dealer that the application under consideration and the Buy and Sell Agreement has been rejected. See addendum 2.

13. At least nine (9) days prior to October 15, 1992, the date of defendant's rejection letter on the Watson application, defendant, through its Pontiac Division, initiated contact with other prospective applicants to see if they were interested in the Buick dealership in Ogden, Utah, among whom was Kent Petersen, who was recruited by Buick's San Francisco zone manager, Tom Garove before the 6th day of October, 1992. (Garove Dep. P. 91-92; Petersen Dep. P. 13) Deposition pages are attached as addendum

"7." See also addendum 6.

14. David Koch was the dealer/operator of the Sierra Buick dealership and no representative of General Motors talked to David Koch to get permission to talk to other dealers as alleged by Mr. Garove. Instead, Garove claims to have obtained permission from Henry Mixon who was the majority stockholder in Helsco although Mixon claims no recollection of the conversation. (Garove Dep. P. 85-92 and 101; Koch Dep. P. 22-23; Mixon Dep. P. 84) Deposition pages are attached as addendum "8."

15. Defendant had in its possession a copy of Buy and Sell Agreement between Sierra and Watson and knew that Sierra had contracted to do everything in its power to see that John Watson was appointed as the Buick dealer at Ogden, Utah. Defendant solicited Kent Petersen's application by asking him to accept the terms and conditions of the Watson-Sierra Buy and Sell Agreement while it was still a valid agreement between Watson and Helsco. Defendant accepted Kent Peterson application to be the Ogden dealer on October 13, 1992. See addendum "7."

16. The only reason given by Mr. Garove to Kent Petersen for the rejection of the Watson application and the exercise of a right of first refusal by defendant was the Project 2000 Alignment promulgated by General Motors Corporation for the Ogden area putting Buick, Pontiac and GMC trucks together in one dealership even though it had been waived for Rick Warner. See addendum "7."

17. Jim Whetton was attempting to regain the Buick dealership at Ogden, Utah

and defendant claimed that it was concerned that if John Watson was the appointed Buick dealer, Jim Whetton would have some ownership interest (Koch Dep. P. 20-21) though the Watson-Sierra Buy and Sell Agreement contains provisions preventing the involvement of Whetton. Deposition pages attached as addendum "9."

18. Though Kent Petersen was aware that Sierra Buick was for sale, he did not attempt to negotiate a purchase even after he knew that the Warner purchase had fallen through and knew that the purchase by any other dealer was contrary to Project 2000. Kent Peterson assumed that John Watson would be appointed the Buick dealer in Ogden, Utah and did not make application for the Buick dealership until he was approached by defendant's Pontiac Division. (Peterson Dep. P. 11-12) Deposition pages are attached as addendum "10."

SUMMARY OF ARGUMENTS

Defendant presumes that its right of first refusal takes precedence over the Utah Statute that prohibits a franchisor from unreasonably withholding its consent to appoint the dealer of choice of its franchisee. The defendant's own Business Case identifies its three (3) alternatives: (1) appoint John Watson who had a Buy-Sell Contract with the existing dealer; (2) risk that Helsco will file bankruptcy and an "unsatisfactory" dealer will bid in the bankruptcy court; or, (3) use Project 2000. Defendant chose to use its Project 2000 alignment policy which had not previously been exercised in the Zone and had been waived for the prior applicant as a means to manipulate the dealer

appointment and in doing so unreasonably refused John Watson's application. The determination of the reasonableness of the defendant's withholding of its consent is a question for the jury. Defendant then had to exercise improper means in order to use Project 2000, interfering with the Watson-Sierra Buy-Sell Agreement and contacting Kent Peterson while the John Watson application was pending in violation of its own policy. A jury may also determine improper purpose when the totality of the facts of defendant's convenient waivers and conduct are presented.

A jury could reasonably determine that plaintiff should be compensated for his loss through the doctrine of equitable estoppel where defendant, through its conduct of previous waivers and failure to exercise its right of first refusal, by its silence led plaintiff to a course of conduct which included arranging for the dismissal of the Temporary Restraining Order believing that he could then purchase the Buick dealership. In so doing, the door was left open for defendant to then broker the Sierra Buick dealership in one hand while accepting plaintiff's dealer application with the other.

Defendant was part of a civil conspiracy with Henry Mixon when together they arranged for the delay of the Termination Notice sixty-day (60) deadline in exchange for a promise from Mixon not to take Helsco into bankruptcy in order to have more time to work out a Buy-Sell Agreement with Kent Peterson. Defendant unlawfully violated the statute by withholding its consent for John Watson to become the dealer in order to

further their plan. It is a question for the jury to determine whether the defendant states a sufficient business purpose in its conduct or has committed an unlawful act to the detriment of the plaintiff.

ARGUMENT

I. THE REASONABLENESS OF THE DEFENDANT'S CONDUCT IN INTERFERING WITH THE BUY-SELL AGREEMENT AND REJECTING PLAINTIFF'S DEALER APPLICATION IS A QUESTION OF FACT FOR THE JURY.

Although the defendant had a right of first refusal contractually with Sierra Buick-Jeep-Eagle to purchase the assets of the dealership under Section 12.3.2 of the Dealer Sales and Service Agreement (See attached addendum 1), defendant gave no notice of their intent to do so. Defendant had the opportunity to give notice of its intent to exercise its right of first refusal before approving Warner/Norda as a dealer, after the rescission of the Warner/Norda contract on August 13, 1992 and at the time that they served the Notice of Termination of the dealership on Sierra on August 19, 1992. In addition, defendant could have actually exercised its right of first refusal after the Whetton Temporary Restraining Order was dismissed on August 24, 1992 and prior to the Watson-Sierra Buy Sell Agreement execution on August 31, 1992. Instead, defendant sent an application for the dealership to John Watson and accepted his application on September 2, 1992.

John Watson had been the Buick dealer in both Evanston and Rock Springs,

Wyoming and since the commencement of this action has been appointed the Buick dealer in Logan, Utah and was qualified to be appointed the Buick dealer at Ogden, Utah.

Utah Code Annotated §13-14-3 (1979) provides in part:

Notwithstanding the terms of any new motor vehicle franchise, no franchisor shall terminate or refuse to continue any existing franchise unless:

(1) The franchisee has received written notice from the franchisor as follows:

(b) fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be *unreasonably withheld*; (emphasis added)

The Western District of Pennsylvania in Crivelli et al vs. General Motors Corporation, 40 F. Supp.2d 639 (W.D. Penn), relied on the similar language in the Pennsylvania code in determining that General Motors' contractual right of first refusal was subject to the reasonableness language in the statute as follows:

(b) Violations. It shall be a violation of this Act for any manufacturer, factory branch, distributor, field representative, officer, agent or any representative whatsoever of such manufacturer, factory branch or distributor licenced under this Act to:

(3) *Unreasonably withhold consent to the sale, transfer or exchange of the franchise to a qualified buyer capable of being licensed as a new vehicle dealer in this commonwealth who meets the manufacturer's or distributor's reasonable requirements for appointment as a dealer.* (Emphasis added)

63 P.S. §818.12

General Motors also made a Motion for Summary Judgment in the Crivelli matter which was denied by the court on the ground that the issue of whether the consent was *unreasonably* withheld was an issue to be determined by the trier of fact. In its Memorandum Decision the Pennsylvania court stated:

On February 6th defendant exercised its right of refusal and notified plaintiffs of its action. GM contends that this amounted to nothing more than an exercise of its "considered business judgment" in selecting franchisees for its dealerships, and therefore was not unreasonable. . . We have considered In Re Headquarters Dodge, Inc., 13 F.3rd 674 (3d Cir. 1993) where the Court of Appeals found that an issue of material fact arose in a similar situation. . . The Court found that a finder of fact would have to determine whether the denial of approval was unreasonable. Applying that teaching we find that plaintiffs have adduced sufficient evidence to present a genuine issue of material fact. Plaintiff's claims will survive summary judgment.

A copy of the decision on summary judgment is attached hereto as addendum "11."

In the instant case, the circumstance for the trier of fact to determine the reasonableness of the defendant's refusal to appoint John Watson as the Ogden, Utah Buick dealer include Watson's qualifications as a dealer, Watson's ability to do what no one else had accomplished, (including defendant) in arranging for the dismissal of the Whetton Temporary Restraining Order, and whether the Project 2000 alignment was appropriately applied. Project 2000 was a variable internal policy being constantly revised by defendant at its convenience to promote the very type of contract

interference that occurred to Watson where the purchasing dealer, though meeting all of the General Motors dealer criteria, is not the candidate that has the inside track with the division: witness the selection of Warner over Peterson (defendant failed to contact Peterson when Warner was selected as the dealer even though Peterson met the Project 2000 criteria) and the selection of Peterson over Watson. A trier of fact could reasonably determine that where Project 2000 was waived for the Warner/Norda contract, it was unfairly and improperly applied to the Watson contract.

This selection process by defendant is best illustrated by the defendant's own Business Case which was the Zone's recommendation to Buick Division in Flint, Michigan sent October 7, 1992(see attached addendum 6). The Zone identified three (3) alternatives for appointment of a dealer/operator in Ogden, Utah. First, defendant could exercise its right of first refusal, citing Project 2000, which would require the appointment of Kent Peterson as the Buick dealer/operator; secondly, if defendant did not use its right of first refusal Helsco would file bankruptcy and defendant might be forced to accept an "unsatisfactory" dealer purchasing out of the bankruptcy court as occurred in Crivelli; the third alternative was to, once again, waive Project 2000 and appoint John Watson as the Buick dealer. The recommendation of the Business Case was to select the Project 2000 alignment soliciting Kent Peterson's cooperation.

In order to submit the Business Case and perpetuate defendant's method of dealer selection by using Project 2000, defendant had to violate its standard policy of

considering only one application at a time as explained by the Buick Zone Manager, Tom Garove in his deposition and in John Watson's deposition in the attached addendum "2." By employing the Project 2000 control, defendant had no alternative but to solicit Kent Peterson. Defendant had to assure that Kent Peterson would be willing to make application for the dealership, that he was at least as qualified as John Watson, that he had the financial backing and that he was willing to match the terms of the already existing Watson-Sierra Buy-Sell Agreement. Had Kent Peterson not qualified or been unable to meet the Watson-Sierra Buy-Sell terms, it is logical that defendant would have waived Project 2000 regardless of the applicant.

There is sufficient evidence to support a jury determination that Project 2000 implementation through the right of first refusal was an improper means to accomplish an improper purpose because it permitted the defendant to engineer any Buy and Sell Agreement and, in this case, reject the Watson application contrary to the Utah statute. This concept is further illustrated by a note to the Zone file, handwritten by Tom Garove wherein, Garove identifies three (3) similar alternatives in what appears to be a draft of the Business Case. However, Garove's handwritten version does not identify use of the Project 2000 pretense, instead, Garove states, "Turn down based on sales effectiveness and lack of performance." See addendum "12." The right of first refusal was used, not to reject an unqualified dealer, but to manipulate the selection process as explained by Garove in his deposition pages 86-89 which are included in addendum 8

and contrary to the Utah statutory requirement of reasonableness.

In Alyeska Pipeline Service v. Aurora Air Service, 604 P.2d 1090 (Ala. 1979), the Alaska Supreme Court said

We reject Alyeska's contention that a privilege arising from a contractual right is absolute and may be exercised regardless of motive. It is a recognized principal that a party to a contract has a right of action against a third party who has intentionally procured the breach of that contract by the other party without justification or privilege.

Id. at 1093. The Alaska Supreme Court went on to state

The question of justification for invading the contractual interest of another is normally one for the trier of fact, particularly when the evidence is in conflict. In the case at bar, the central factual issue, as to which there was evidentiary conflict was whether Alyeska was genuinely furthering its own economic and safety interests or was using them as a facade for inflicting injury upon Aurora. There was sufficient evidence upon which the jury could properly find that Alyeska was acting out of ill will towards Aurora, rather than to protect a legitimate business interest. The trial judge correctly denied Alyeska's motion for summary judgment and submitted this issue to the jury. (Citations and footnotes omitted.)

Id. at 1094.

In Leigh Furniture & Carpet Co. vs. Isom, 657 P.2d 293 (Utah 1982), the Court recognized that individual improper acts may not by themselves constitute improper means but the cumulative effect of those acts may be "improper means." The Utah Supreme Court stated in Leigh:

Neither a deliberate breach of contract nor an immediate

purpose to inflict injury which does not predominate over a legitimate economic end will by itself satisfy this element of the tort. However, they may do so in combination. This is so because contract damages provide an insufficient remedy for a breach prompted by an immediate purpose to injure, and that purpose does not enjoy the same legal immunity in the context of contract relations as it does in the competitive market place.

Id. at 309. Thus, even though defendant argues a legitimate economic end in implementing Project 2000 that predominates any other consideration, Alyeska and Leigh Furniture clearly teach that defendant's claimed legitimate economic end cannot be obtained by using an improper means or improper purpose or both. See also Pratt vs. Prodata, Inc. 885 P.2d 786 (Utah 1994); St. Benedicts Dev. v. St. Benedicts Hos., 811 P.2d 194 (Utah 1991).

Further, Leigh Furniture confirms that the plaintiff is not required to negate defendant's claims of privilege to interfere with the contract between Watson and Helsco because of defendant's right of first refusal in its contract with Helsco. The privilege is an affirmative defense requiring the defendant to present evidence that will convince the trier of fact. Id. at 302-3.

Finally, it is a question for the jury to determine whether the defendant employed improper means and/or improper purpose and whether defendant's conduct constitutes an inappropriate interference with the plaintiff's contract with Helsco. The jury may conclude improper purpose based on any of the following:

1. Project 2000 was waived for Warner/Norda and Warner was approved

by defendant to dual the Buick-Jeep-Eagle dealership with Mitsubishi and was later approved to dual Buick with Chrysler-Plymouth but defendant used Project 2000 to reject Watson's application believing he would dual Buick with his already existing General Motors Chevrolet dealership and eventually comply with the Project 2000 requirements. See addendum "13" handwritten and typed version of the Mitsubishi dual and handwritten Note to File by Garove for approval of Chrysler dual.

2. Only John Watson could get the Whetton Temporary Restraining Order released. See addendum "5."

3. After defendant admitted that the rejection of the Watson application was not related to his prior performance as a Buick dealer, defendant accused Watson of being an underperforming dealer in Rock Springs and Evanston, Wyoming. Defendant then solicited Kent Peterson as the Buick dealer even though he was currently an underperforming Pontiac-GMC dealer. See addendum "14."

4. Helsco had contractually agreed in the Buy and Sell Agreement with Watson to use its best efforts to assist Watson in obtaining consent and approval from General Motors to become the dealer. Defendant then did an end-run around David Koch, who was the Sierra dealer/operator, and claims to have talked to Henry Mixon, a stockholder in Helsco, to obtain permission to contact

Kent Peterson. Mixon claims that he does not recall the conversation and had previously written a letter to the Zone Manager stating that he was not even an officer of Helsco. See addenda 4 and 8 and addendum "15."

5. Defendant approached Henry Mixon and offered to extend the sixty-day (60) time limit on the termination of the dealership so that a Buy-Sell Agreement could be reached with Kent Peterson if Mixon would agree that Helsco would not file bankruptcy in order to avoid an "unsatisfactory dealer" from the bankruptcy court. See addendum "6" and "16."

In addressing the principle of improper means the Utah Supreme Court in St. Benedicts Dev. v. St. Benedicts Hos., 811 P.2d 194 (Utah 1991) expounded upon the Leigh Furniture case confirming that "Means may also be improper or wrongful because they violate 'an established standard of a trade or profession.'" Id. at 201 (Citation omitted). Similarly, in Big Apple BMW, Inc. vs. BMW of North America, 974 F. 2d 1358, the Third Circuit Court of Appeals held that "factual underpinnings of the tort claims are intertwined" with the plaintiff's statutory claims, and a finder of fact would need to determine whether the actions constituted improper interference. Id. at 1382. See addendum "17." See also 9 ALR2d 228 and 5 ALR4th 9.

Defendant argues that they are entitled to summary judgment because their right of first refusal trumps the Utah statute and all other conduct in this matter. The trial court bought defendant's argument as the basis for granting summary judgment. The

same argument was presented and rejected in Crivelli

There is no merit to GM's argument that the contractual right of the Dealer Sales and Service Agreement trumps the statutory mandate that a manufacturer cannot unreasonably withhold its consent to a qualified buyer. The Court of appeals has held that a fact finder must resolve the question whether General Motors acted unreasonably and in bad faith in violation of the New Jersey Franchise Act when it rejected a purchaser's application to become a dealer. In re Headquarters Dodge, Inc., 13 F.3d 674 (3rd Cir. 1993). There, as here, General Motors possessed a contractual right of first refusal.

Crivelli, Order on Motion.

Like, Crivelli, the State of Utah has a statute designed to set out public policy for the protection of its citizens and businesses that prohibits defendant from unreasonably withholding its consent to the appointment of the franchisee's choice of dealers when a contract exists between the franchisee and the proposed dealer. The determination of whether defendant acted reasonably is a question for the jury. Further, whether defendant's conduct constituted an improper purpose or used improper means are questions exclusively for the jury.

**II. ESTOPPEL MAY OCCUR BY ACT AND DEED,
RATHER THAN VERBAL OR WRITTEN
REPRESENTATION.**

In United American Life Ins. Co. v. Zion's First National Bank,

641 P.2d 158 (Utah 1982) the Utah Supreme Court defined equitable estoppel as

"conduct by one party which leads another party in reliance thereon, to adopt a course

of action resulting in detriment or damage if the first party is permitted to repudiate his conduct.” Id. at 161. In an earlier case, Morgan v. Board of State Lands, 549 P.2d 695 (Utah 1976) the Utah Supreme Court defined conduct by stating

Estoppel is a doctrine of equity purposed to rescue from loss a party who has, without fault, been deluded into a course of action by the wrong or neglect of another. The measure we apply to plaintiffs’ claim of estoppel is an adaptation to this case of the standard heretofore approved by this court: Estoppel arises when a party (defendant Board) by his acts, representations, or admissions or by his silence when he ought to speak, intentionally or through culpable negligence, induces another (plaintiffs) to believe certain facts to exist and that such other (plaintiffs) acting with reasonable prudence and diligence, relies and acts thereon so that he will suffer an injustice if the former (Land Board) is permitted to deny the existence of such facts. (*citations omitted*)

Morgan, at 697.

The following facts are undisputed:

1. Defendant was, or soon after became aware that Sierra had closed its doors and few, if any, Buick automobiles were being sold in Ogden, Utah after March 1, 1992. See Tim Martin memo to Buick San Francisco Zone Office dated May 6, 1992 and Woodley memo dated June 30, 1992 attached as addendum “18.”
2. To approve the Warner/Norda application defendant had to waive their Project 2000 requirement and make no contact with Kent Peterson, the existing Pontiac-GMC dealer.

3. Defendant did not exercise its right of first refusal prior to the Warner/Norda deal, after the Warner/Norda contract was rescinded or the equivalent right to purchase assets at market value after the Whetton TRO was dismissed or prior to the Watson Buy-Sell Agreement and application. See addendum 1 paragraph 12.3.2(b).

4. Defendant was aware that John Watson was interested in the purchase of the Sierra assets and becoming the Ogden Buick dealer prior to the approval of the Warner/Norda contract. Watson was told at that time that defendant would consider only one (1) dealer application at a time. See addendum 2.

5. Defendant was also aware that John Watson could get the Whetton TRO dismissed before Watson and Helsco entered into their Buy and Sell Agreement. Koch deposition pages 19-20 in addendum 5.

6. After receiving the Watson-Sierra Buy-Sell Agreement defendant forwarded a dealer application to John Watson and on or about September 29, 1992 defendant inspected Watson's facilities which was the building where Mercedes had previously been housed adjacent to the Chevrolet showroom on Wall Ave. The Zone Manager, upon his inspection, stated to Watson that he did not want the Buick franchise in "that maze of franchises out on Riverdale Road," where Kent Peterson's

dealerships are located. See Watson Dep. P. 64 and Garove Dep. P. 61 attached as addendum "19."

7. By sending its Notice of Termination to Helsco on August 19, 1992, defendant had to know that they would be purchasing the Sierra assets under Section 12.3.2(b) of the Dealer Sales and Service Agreement because no Buy-Sell Agreement existed at that time, however, the Whetton TRO was still in place prohibiting the transfer of any Sierra assets. In his deposition the Zone Manager denied a Notice of Termination was sent but the letter bears his signature. See addenda 1 and 3.

8. But for the Watson-Helsco Buy-Sell Agreement, Helsco was going to be forced into bankruptcy because of the Notice of Termination. Later, while the Watson application was pending, defendant promised Helsco that the sixty-day (60) termination would be extended in order to enter into a Buy-Sell Agreement with Kent Peterson if Helsco would agree not to file bankruptcy. See addendum 16.

The Restatement of Contracts, 2nd Sec. 59, Comment a, states:

An assertion may also be inferred from conduct other than words. Concealment or even non-disclosure may have the effect of a misrepresentation under the rules stated in Sections 160 and 161, whether a misrepresentation is fraudulent is determined by the rules stated in Section 162(1). However, an assertion need not be fraudulent to be a misrepresentation. . .whether an assertion is material is determined by the

rules stated in Section 162(2).

Restatement of Contract, 2nd Sec. 161:

A person's nondisclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only

(b) Where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

(c) Where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part.

Comment a: Concealment Distinguished.

Like concealment, non-disclosure of a fact may be equivalent to a misrepresentation.

Defendant needed the Whetton TRO dismissed in order to even exercise its right of first refusal and sell any Buick automobiles in Ogden, Utah. Defendant also wanted to assure that Helsco would not file bankruptcy and allow for an “unsatisfactory dealer” to bid for the Sierra assets in the bankruptcy court. Defendant knew that other applicants for the Sierra Buick dealership would believe that their application would be treated exactly the same as the Warner/Norda application, i.e. defendant would not exercise its right of first refusal and Project 2000 would be waived, and defendant did nothing that would indicate otherwise to plaintiff, happily accepting that plaintiff could get the TRO dismissed. See addendum 5. To the plaintiff’s face, the defendant

proceeded to process the plaintiff's application for the dealership. At the same time, defendant was negotiating with Helsco and with another dealer to obtain commitments that would permit defendant to select a favored dealer all behind plaintiff's back.

**III. DEFENDANT ENGAGED IN CIVIL CONSPIRACY
IN ACTING AS A BROKER FOR THE TRANSFER OF
THE DEALERSHIP TO A BUYER WHO HAD NO
CONTRACT TO PURCHASE FROM SIERRA.**

In Israel Pagan Estate v. Cannon, 746 P.2d 785 (Utah App. 1987), the Utah Court of Appeals defined the elements of civil conspiracy as

(1) a combination of two or more persons, (2) an object to be accomplished (3) a meeting of the minds on the object or course of action, (4) one or more unlawful overt acts, and (5) damages as a proximate result thereof. . . Plaintiff must present clear and convincing evidence to carry his burden of proof on a charge of civil conspiracy.*(citations omitted)*.

Id. at 791. The Court went on to state

[I]t is not necessary in a civil conspiracy action to prove that the parties actually came together and entered into a formal agreement to do the acts complained of by direct evidence...instead, conspiracy may be inferred from circumstantial evidence, including the nature of the act done, the relations of the parties, and the interests of the alleged conspirators.

Id. at 791.

Plaintiff asserts that the parties involved in the conspiracy were defendant and Henry Mixon, who was the principle investor in Helsco but was not an officer of the corporation nor the appointed dealer. The object to be accomplished was the transfer of

the Helsco assets. Defendant needed to sell Buicks in Ogden, Utah and Henry Mixon (hereinafter "Mixon") needed to stop his financial hemorrhaging and recoup whatever funds possible.

Plaintiff need not show a formal agreement between defendant and Mixon. The objective evidence demonstrates that defendant had a clearly delineated standing policy of considering only one dealer application at a time. See addendum 2. Contrary to the identified policy, Tom Garove, the Zone Manager, ignored the dealer/operator designated in paragraph third (3rd) of the Dealer Sales and Service Agreement (Koch) and represents that he contacted Mixon to obtain permission to solicit Kent Peterson's application even though Helsco was under an affirmative obligation to do everything in its power to assure that Watson would be appointed as the Buick dealer by defendant. Mixon stated that he had no recollection of the contact. See addenda 1 and 8. Nonetheless, Kent Peterson was contacted and at the urging of the defendant, Peterson agreed to accept the terms of the Watson-Sierra Buy-Sell Agreement while the Watson application was pending.

Defendant and Mixon further pursued their course of conduct agreeing to delay their individual rights of action in order to create enough time to establish the Peterson Buy-Sell Agreement. Defendant agreed to extend the time deadline on its Notice of Termination. Mixon agreed not to take Helsco into bankruptcy. See addendum 19. In conjunction with the defendant's conduct, Mixon was also in violation of the Watson

Buy-Sell Agreement paragraph 4d committing the seller, Helsco, to use its best efforts to obtain the approval of defendant for Watson to be appointed as the new Buick dealer. See addendum 4. Defendant accepted Peterson's application dated October 13, 1992. Defendant rejected Watson's application on October 15, 1992. Defendant stated to Peterson and identified in its Business Case that the reason for the denial for the Watson application was the nebulous and ever changing Project 2000 alignment which had never before been used as a criteria for transfer of dealerships in the zone. See addendum 6 and 7 and Woodley Dep. P. 69-71 attached as addendum "20."

Defendant argues that it did nothing unlawful because it had a contract right of first refusal and therefore there is no civil conspiracy. However, in discussing the "improper means" prong the Utah Supreme Court also identified at least a partial list of unlawful acts in the Leigh Furniture case

The alternative requirement to improper means is satisfied where the means used to interfere with the party's economic relations are contrary to law, such as violations of statutes, regulations, or recognized common-law rules. Such acts are illegal or tortious in themselves and hence are clearly "improper" means of interference, unless those means consist of constitutionally protected activity, like the exercise of First Amendment rights. . . Means may also be improper or wrongful because they violate "an established standard of the industry." (*Citations omitted*).

Leigh Furniture, 293 P.2d at 308. Civil conspiracy does not require a criminal act, only a "unlawful" overt act. Defendant was unlawful in its violation of the terms of Utah Code Ann. §13-14-3 by unreasonably withholding its consent for John Watson to

become the Ogden Buick dealer. Defendant attempts to argue that its right of first refusal overrides the statute and that it chose to exercise its right of first refusal apparently for purposes of the Project 2000 alignment even though it had waived Project 2000 for the previous applicant. In order to use Project 2000 to attempt to avoid a statutory violation, defendant also interfered with the Plaintiff Buy and Sell Agreement with Sierra by dealing with Henry Mixon to arrange for more time to set up the sale to Kent Peterson, the only dealer who could comply with Project 2000, using the terms of the Plaintiff's own Buy and Sell Agreement. Defendant had to violate its own policy and a standard of the industry to contact Kent Peterson while the Watson application was pending.

Plaintiff performed on his portion of the contract to date of the rejection of his application by defendant. Plaintiff made the requested deposit of a substantial part of the purchase price of the Helsco assets in escrow pending his appointment as the Buick dealer. After defendant exercised its right of first refusal, that money was returned to plaintiff but plaintiff's damages for defendant's conduct are substantial even if by the nature of the circumstances they are somewhat uncertain. In Atkin, Wright & Miles v. Mountain States Tel & Tel Co. 709 P.2d 330 (Utah 1985), the Utah Supreme Court held

The evidence must do more than merely give rise to speculation that damages in fact occurred; it must give rise to a reasonable probability that the plaintiff suffered damage as a result of a breach. Second, the plaintiff must prove the amount of damages. The level of persuasiveness required to establish the *fact* of loss is generally higher than that

required to show the *amount* of loss. It is, after all, the wrongdoer, rather than the injured party, who should bear the burden of some uncertainty in the amount of damages. (Citations omitted).

Id. at 336. See also Gould v. Mountain States Telephone and Telegraph Co., 309 P.2d 802 (Utah 1957). Logic dictates that the Ogden Buick dealership could have been profitable for John Watson and has, in fact, been profitable for Kent Peterson. While John Watson must and can show the jury that there is a reasonable probability of loss to him, it should be up to the jury to determine the amount.

In Gammon v. Federated Milk Producers Assoc., Inc., 363 P.2d 402 (Utah 1963) a milk delivery driver sued Federated when they encouraged all of their milk producers to switch to the tank method of delivery. The court determined that the trial court was in error for granting summary judgment when it was a question for the jury to determine whether the interference in the contract was based on illegal price fixing or a legitimate business change. Similarly, the jury in this matter should hear and make the determination as to whether the defendant unlawfully withheld its consent under the statute or if the statute is subservient to the contractual right of first refusal.

CONCLUSION

Defendant cannot be allowed to use its right of first refusal and Project 2000, a nebulous and ever changing alignment policy never implemented in the Zone prior to rejecting plaintiff's application, to control buy and sell agreements and manipulate the appointment of dealers. Logically, Utah Code Ann. §13-14-3 was enacted to deter just

such conduct. The Project 2000 policy is ignored if the purchaser is in favor with the zone management as was Warner Enterprises in this matter, but implemented for unstated reasons against John Watson even though Watson was a qualified Buick dealer and had agreed to conform to the Project 2000 alignment, agreed not to dual Chevrolet and Buick, agreed to construct a new, separate showroom, and agreed to meet all other conditions imposed by the zone as set forth in their case.

In order to implement Project 2000, defendant had to violate it's own policy to solicit Kent Peterson's cooperation to apply for the dealership which he had not done in competition to Warner/Norda or John Watson until asked to do so by defendant while Watson's application was still pending. Peterson was also required to accept the basic terms of the Buy-Sell Agreement between Watson and Helso even though that agreement was still valid. In order to have time to develop a Peterson Buy-Sell Agreement, defendant had to conspire with Henry Mixon to delay a Helsco bankruptcy and the sixty-day (60) Termination Notice consequences. The exercise of the right of first refusal under the guise of Project 2000 was not in good faith and violated the "improper purpose" prong of Leigh Furniture, and the solicitation of Petersen Motor violated the "improper means" prong of Leigh Furniture.

Questions of reasonableness of the defendant's rejection of John Watson's application, improper purpose/improper means, conduct sufficient to rise to the level of equitable estoppel and civil conspiracy are all questions of fact for the jury.

Defendant must not be allowed to have such total control over the selection of dealers by camouflaging its conduct under the guise of "legitimate business interests" which is only a vapor arising from the cauldron of ever-changing internal policies selectively enforced in an adhesion contract provision of a right of first refusal.

Respectfully submitted this 10 day of October, 2000.

BEAN & SMEDLEY



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CERTIFICATE OF MAILING

I hereby certify that on this 10 day of October, 2000, I mailed two (2) true and correct copy of the foregoing BRIEF OF APPELLANT and ADDENDA to the following postage prepaid:

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