

2000

# John Watson Chevrolet v. Buick Motors Division, General Motors Corporation : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JOHN WATSON CHEVROLET,

Plaintiff/Appellant,

vs.

BUICK MOTORS DIVISION,  
GENERAL MOTORS  
CORPORATION,

Appellate Court No. 20000351-CA

Priority No. 15

Defendant/Appellee.

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BRIEF OF APPELLEE

---

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

---

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**FILED**  
Utah Court of Appeals

DEC 11 2000

Paulette Stagg  
Clerk of the Court

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## STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal pursuant to U.C.A. § 78-2A-3(2)(j) by assignment from the Utah Supreme Court pursuant to U.C.A. § 78-2-2(4).

## STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court properly ruled that plaintiff's claim of promissory estoppel has no factual basis because plaintiff has admitted that defendant did not make any promise or commit any action upon which plaintiff relied to plaintiff's detriment and injury.

STANDARD OF REVIEW: Correctness. *Blue Cross/Blue Shield v. State*, 779 P.2d 634, 636 (Utah 1989).

Record: This issue is raised in defendant's Memorandum in support of its Summary Judgment (R. 250), and decided in favor of defendant (R. 381).

2. Whether the district court properly granted summary judgment on plaintiff's claim of interference with contractual relations or prospective economic relations with a third-party dealer based on defendant's exercise of its own contractual option to purchase the third-party dealer's assets, to which plaintiff was not a party.

STANDARD OF REVIEW: Correctness. *Warren v. Provo City Corporation*, 838 P.2d 1125, 1128 (Utah 1992).

Record: This issue was raised in defendant's Memorandum in support of its Motion for Summary Judgment (R. 250), and decided in favor of defendant (R. 381).

3. Whether the district court properly granted summary judgment on plaintiff's

conspiracy claim when the court held as a matter of law that plaintiff did not have a claim for any underlying tort or wrongdoing on the part of defendant.

STANDARD OF REVIEW: Correctness. *Id.*

Record: This issue was raised in defendant's Memorandum in support of its Motion for Summary Judgment (R. 250), and decided in favor of defendant (R. 381).

### **DETERMINATIVE LEGAL PROVISIONS**

This case is governed by the terms of the Dealer Sales and Service Agreement between defendant and Helsco, Inc., relevant portions of which are set out in the Addenda to Brief of Appellant at Tab 1 (R. 017 - 039).

### **STATEMENT OF THE CASE**

This is an action by a current Chevrolet automobile dealer in Ogden, Utah, which applied for a Dealer Sales and Service Agreement to become a Buick dealer with the defendant.

The then current Buick dealer submitted a proposal for a change of ownership of the dealership's assets, first to one person and then to plaintiff. Pursuant to the Dealer Sales and Service Agreement between defendant and that dealer, to which plaintiff was not a party, defendant exercised its contractual right of first refusal to purchase the dealership assets.

When plaintiff submitted its application to become a Buick dealer, plaintiff's principal knew the possibility that its application to defendant could be rejected. It is



admitted by the parties that defendant did not make any promises to plaintiff, nor did defendant make any comment that would lead plaintiff or its principal to believe that the application to become a Buick dealer would be accepted. Plaintiff did not lose any money in the Agreement it or its principal executed with the former dealer. There is no claim of any out-of-pocket loss to plaintiff at all.

Plaintiff's Complaint alleges three causes of action against defendant from which it is appealing: (1) promissory estoppel; (2) intentional interference with contractual relations and future economic relations; and (3) conspiracy.

The Complaint was filed with the Second District Court in 1992. Defendant moved for summary judgment on undisputed facts. Summary judgment was entered on April 5, 2000, in favor of the defendant on the three claims for relief, and the appeal was filed by plaintiff on April 19, 2000. The Utah Supreme Court transferred the case to this Court pursuant to its jurisdiction under U.C.A. § 78-2-2(4).

### **STATEMENT OF FACTS**

The following facts were admitted by the plaintiff in the Motion for Summary Judgment, moving papers, in the pleadings, and in discovery (R. 262-63). Plaintiff did not have any substantial dispute with any of the facts elicited below.

On February 10, 1990, Helsco, Inc., d/b/a Sierra Buick (hereinafter "Helsco") entered into a Dealer Sales and Service Agreement (hereinafter "Dealer Agreement") with defendant for the operation of a Buick dealership in Ogden, Utah (R. 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 (R. 29). The right of first refusal was granted to defendant regardless of whether the proposed buyer was qualified to be a dealer (R. 29).

In May of 1992, Helsco encountered financial difficulties and “failed to open its doors for business” according to plaintiff’s Complaint (R. 3).

Before it closed its doors, Helsco attempted to sell the dealership assets to Rick Warner Enterprises. A Buy/Sell Agreement was executed between those two entities on April 2, 1992 (R. 3). A temporary injunction was obtained by James Whetton, the predecessor Buick dealer, against Helsco, which prohibited Helsco from selling any of its assets. As a result, the Helsco-Warner sale was never consummated (R. 3).

Plaintiff owns and operates an automobile dealership also located in Ogden, Utah, and had and currently has a Dealer Agreement with the Chevrolet Division of this defendant (R. 1). After the injunction was obtained by Whetton, plaintiff negotiated a Buy/Sell with Helsco, dated August 31, 1992, wherein plaintiff agreed to purchase the Buick dealership assets of Helsco. As part of that transaction, plaintiff obtained a dismissal of the Whetton lawsuits (R. 4).

After the Helsco-plaintiff Buy/Sell Agreement was executed, defendant, at the request of plaintiff, forwarded the appropriate application documents to plaintiff to become a Buick dealer/owner/operator (R. 5).

On September 1, 1992, plaintiff's principal submitted his application to defendant to become a Buick dealer/owner/operator in Ogden, Utah (R. 6). On October 15, 1992, defendant advised Helsco and plaintiff that it was exercising its right of first refusal pursuant to the Dealer Agreement (R. 6).

Plaintiff's principal understood an existing dealer could not transfer a Dealer Agreement as part of an asset sale. He understood that defendant could either reject, accept, or request a modification of the proposal of a new dealer/owner/operator (R. 403, p. 51).

He was also aware of the possibility that the application could be rejected (R. 403, 51). Plaintiff's principal also admitted that defendant did not in any way indicate to plaintiff that plaintiff's principal would be a suitable candidate, that his application or proposal would be accepted, made any comments that would lead him to believe that the application would be accepted, or, in essence, do anything by way of word or deed to plaintiff that could be construed as any kind of promise (R. 403, p. 52).

Plaintiff did not lose any money, did not lose any out-of-pocket expense, and did not change his position by any act of this defendant (R. 403, p. 68).

### **SUMMARY OF ARGUMENT**

As to the promissory estoppel claim, defendant's Motion for Summary Judgment was based on the fact that the estoppel claims have no factual assertion based on any verbal promise, act, or deed by defendant, as admitted by plaintiff, or that plaintiff relied

on any promise by defendant which induced it to act to its detriment. Plaintiff could not in the court below establish any promise, any action, or any reliance upon anything that defendant did upon which a claim for promissory estoppel under Utah law would apply.

As to the claim of intentional or tortious interference with existing contract or prospective economic advantage, the exercise of this defendant's own contractual rights with Helsco, to which plaintiff was not a party, is a defense as a matter of law to an action for tortious interference with contractual rights or other economic relations. The exercise of a preexisting contractual right, therefore, could not be for an improper purpose or by improper means, as required under Utah law.

Plaintiff's citation to the United States District Court Opinion of *Crivelli v. General Motors Corp.*, 40 F.Supp.2d 639 (W.D. Pa. 1999), is misplaced and misleading, in that *Crivelli* was reversed by the Third Circuit on the precise point cited in support of plaintiff's proposition. *Crivelli v. General Motors Corp.*, 215 F.3d 386 (3d Cir. 2000), reversing *Crivelli v. General Motors Corp.*, 40 F.Supp.2d 639 (W.D. Pa. 1999). The reversal and publication of the decision occurred prior to the filing of plaintiff's brief on appeal to this Court.

Finally, a naked claim of conspiracy without any underlying tort or other wrongdoing committed by defendant is not actionable as a matter of law.

## ARGUMENT

### I.

#### **PLAINTIFF'S CLAIM FOR PROMISSORY ESTOPPEL HAS NO FACTUAL OR LEGAL BASIS.<sup>1</sup>**

Plaintiff's principal has admitted that he did not rely on any representation of defendant in executing his agreement with Helsco, and knew at all times that his application could be refused. Plaintiff's principal further concedes that defendant never asked plaintiff to take any action with regard to Helsco, or with regard to the lawsuit brought by Whetton. A promissory estoppel claim simply does not exist where there is no representation by defendant and there is no action taken in reliance thereon.

Promissory estoppel, as pled and construed under Utah law, is an equitable doctrine which is intended to provide a remedy in the absence of an actual agreement between the parties concerning the subject matter of the alleged promise. Utah has adopted the Restatement (Second) of Contracts, § 90, which recognizes promissory estoppel as an actionable claim for relief. *See Skanchy v. Calcados Ortopesa*, 952 P.2d 1071, 1076 (Utah 1998). The Utah Supreme Court has held that to establish a claim for promissory estoppel, the claimant must demonstrate that: (1) the plaintiff acted with prudence and in reasonable reliance on a promise made by the defendant; (2) the

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<sup>1</sup>Plaintiff has indicated that the first issue presented for review is its promissory estoppel claim and that its second issue is the intentional interference claim. Plaintiff's first and second issues are reversed, however, in its argument. Defendant presents the argument in the same order as the issues presented for review for clarity.

defendant knew that the plaintiff had relied on the promise which the defendant should reasonably expect to induce action or forbearance on the part of the plaintiff or a third person; (3) the defendant was aware of all material facts; and (4) the plaintiff relied on the promise and the reliance resulted in a loss to the plaintiff. *Id.* at 1077; *See also, Tolboe Construction Company v. Staker Paving and Construction Company*, 682 P.2d 843, 845-46 (Utah 1984).

In this instance, plaintiff could not establish in the court below any promise, could not establish any action, and could not establish any reliance. According to plaintiff's principal's own deposition, Watson admitted that he was well aware of the possibility that his application to defendant could be rejected. Watson's communication with defendant's Zone Manager, the only person to whom he spoke concerning his application, did not in any way indicate to Watson that he would be a suitable candidate or that his application or proposal would be accepted. Watson further admitted that defendant did not in any way request Watson, or Helsco, for that matter, to do anything at all.

Plaintiff cites the Restatement (Second) of Contracts, § 59 [sic], and § 161 for the proposition that nondisclosure may have the effect of a misrepresentation. Sections 159 and 161 relate to what constitutes a misrepresentation in connection with contract formation and the good faith necessary in the bargaining process of contract formation. There is no claim here that there was any contract at issue between plaintiff and defendant, or any contract formation that is relevant to the contract at issue: the one

between plaintiff and Helsco. There is simply no misrepresentation or nondisclosure issue applicable to this factual situation.

As to its promissory estoppel claim, plaintiff can only contend that it undertook certain actions with the former Buick dealer in connection with the Whetton TRO, in the hope of obtaining a Buick Dealer Sales and Service Agreement while admittedly knowing that there was a possibility that it would not occur. Even if Watson believed his application would be approved, the doctrine of promissory estoppel requires more than the party's subjective understanding of conversations or events. It certainly requires more than subjective hope. Indeed, in *Larson v. Wycoff Company*, 624 P.2d 1151 (Utah 1981), the Court held that a party claiming an estoppel could not rely on representations or acts if they are contrary to his own knowledge of truth. Here, plaintiff has conceded that there is no factual basis for its claim. The trial court's summary judgment order should be affirmed.

## II.

**DEFENDANT DID NOT INTERFERE WITH THE BUY/SELL AGREEMENT BETWEEN WATSON AND HELSCO, BECAUSE DEFENDANT'S EXERCISE OF THE RIGHT OF FIRST REFUSAL IS EXPRESSLY PERMITTED UNDER A CONTRACT TO WHICH PLAINTIFF IS NOT A PARTY.**

Plaintiff asserted in the court below, and asserts here, that defendant tortiously interfered in the contract between Watson and Helsco because it purportedly violated the Utah Automobile Franchise Act, stating that consent to the transfer of any ownership or

interest shall not be unreasonably withheld, and citing the United States District Court Opinion of *Crivelli v. General Motors Corp.*, 40 F.Supp.2d 639 (W.D. Pa. 1999). Plaintiff's argument is wrong as a matter of law, and the authority it cites has been reversed. *Crivelli v. General Motors Corp.*, 215 F.3d 386 (3d Cir. 2000).

First, Utah Code Ann. § 13-14-3, the Utah Automobile Franchise Act, which plaintiff mistakenly relies upon, is for the exclusive benefit of an existing franchisee of an existing franchise under the Statute:

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

As this language makes clear, the statute is for the benefit of the existing franchisee, not for the benefit of any prospective franchisee. In this instance, the existing franchisee was not terminated, and he is not the one who is complaining. As numerous courts have determined, a disappointed applicant for a dealership does not have standing to assert a claim for a purported violation of the transfer provision of a state dealer law. *See, e.g., Pung v. General Motors Corp.*, 573 N.W.2d 80 (Mich.Ct.App. 1998); *Roberts v. General Motors Corp.*, 643 A.2d 956 (N.H. 1994); *Blair v. General Motors Corp.*, 838 F.Supp. 1196 (W.D. Ky. 1993); *Beard v. Toyota Motor Distributors, Inc.*, 480 N.E.2d 303 (Mass. 1985).



Second, plaintiff does not purport to bring an action under the Utah Automobile Franchise Act in its Complaint. Third, any relief afforded under the Utah Automobile Franchise Act is specifically delineated in Utah Code Ann. §§ 13-14-7 and 13-14-8, permitting courts merely to enjoin violations of certain notice requirements under Utah Code Ann. § 13-14-5. In short, reliance upon the Utah Act is misplaced, not pled, provides no relief, and plaintiff has no standing in any event to plead it or seek relief under it.

In the case upon which plaintiff principally relies, *Crivelli v. General Motors Corp.*, 40 F.Supp.2d 639 (W.D. Pa. 1999), the district court construed a provision of the Pennsylvania Board of Vehicles Act which provided that it is a violation of Pennsylvania law to “unreasonably withhold consent to the sale, transfer, exchange of the franchise to a qualified buyer capable of being licensed as a new vehicle dealer in this Commonwealth” (citing 63 P.S. § 818.9). The Utah Automobile Franchise Act had no such provision.

Further, the District Court opinion in *Crivelli* was reversed by the Third Circuit Court of Appeals on the precise point for which it was cited prior to the filing of plaintiff’s brief on June 14, 2000, in *Crivelli v. General Motors Corp.*, 215 F.3d 386 (3d Cir. 2000). In the Third Circuit Opinion, the Court was construing the identical provision of defendant’s right of first refusal that defendant had with Helsco in the present case. The Court noted that defendant expressly retained the right of first refusal at its sole

discretion, so long as it matched the purchase price, and met the other terms of a bona fide buy/sell agreement. It had been plaintiff's argument in the Third Circuit that notwithstanding this provision in the contract, defendant's exercise of its right of first refusal was subject to the reasonableness standard of the Pennsylvania Automobile Franchise Act. The Third Circuit, however, held that a manufacturer had an absolute right to exercise the right of first refusal option it had with the third-party dealer and had no obligation to approve or even consider the agreement between that third-party dealer and the new applicant:

*Crivelli* offers no explanation why the Pennsylvania legislature would turn away from the common law principle of freedom of contract and impose a reasonableness standard on aspects of a private contract between the manufacturer and dealer that, like the exercise of a right of first refusal, presents little, if any, likelihood of harm to the dealer.

215 F.3d at 392.

The Third Circuit also distinguished its decision in *Big Apple BMW, Inc., v. BMW of North Am., Inc.*, 974 F.2d 1358 (3d Cir. 1992), another case upon which plaintiff relies. The Third Circuit distinguished its opinion in *Big Apple* because the franchisor in that case "did not assert a contractual right of first refusal whereas here GM asserted a bona fide right of first refusal designed to protect its interest in its franchise." 215 F.3d at 395.

Whatever argument plaintiff attempts to make under the Utah Franchise Act, the citation to the lower court opinion in *Crivelli* and its citation to *Big Apple*, as can be seen, is misplaced and misleading. It should be rejected here.

Plaintiff further argues that defendant, by soliciting a future buyer if defendant exercised its contractual right of first refusal, engaged in conduct that was somehow wrongful. That argument is clearly wrong. It is well established in Utah that the exercise of a legal right is a defense to an action for tortious interference with contractual rights or other economic relations:

It is also generally recognized that even though a defendant's action brings about a breach of contract, he is not liable where the breach was caused by the doing of an act which he had a legal right to do. This rule is applied by Prosser in his *Law of Torts*, page 737, Sec. 106, as follows:

If (defendant) has a present, existing economic interest to protect, such as the ownership or condition of property, or a prior contract of his own, or a financial interest in the affairs of the person persuaded, he is privileged to prevent performance of the contract of another which threatens it . . .

*Brummel v. Bills*, 368 P.2d 597, 602-603 (1962).

Plaintiff's citation of *Leigh Furniture and Carpet Company v. Isom*, 657 P.2d 293 (Utah 1982), is also of no aid to plaintiff. *Leigh Furniture* requires plaintiff, in order to prove a prima facie case for tortious interference, to establish that defendant committed an intentional interference for an "improper purpose" or by "improper means."

Defendant could not have used improper means by exercising its own right of first refusal contained in the contractual language between Helsco and itself. As explained in *Coronado Mining Corp. v. Marathon Oil Co.*, 577 P.2d 957 (Utah 1978), a defendant who has a present, existing economic interest to protect, such as a prior contract of his

own, or a financial interest in the affairs of the person persuaded, is privileged to prevent performance of the contract of another which threatens it. A contractual right of first refusal presupposes a subsequent contractual proposal between the existing dealer and a third party. Exercising a contractual right, without more, is clearly not improper means.

According to Utah law, improper means is present only “where the means used to interfere with a party’s economic relations are contrary to law, such as violations of statutes, regulations, or recognized common-law rules.” *St. Benedict’s Co. v. St. Benedict’s Hospital*, 811 P.2d 194 (Utah 1991), citing *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293 (Utah 1982). The court in *St. Benedict’s* further stated that improper means includes “violence, threat or other intimidation, deceit or other misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood.” As can be seen, exercising a contractual right is not the type of improper means that the Utah courts were referring to in *Leigh Furniture* or in *St. Benedict’s*.

Improper purpose likewise is not present as a matter of law. Improper purpose, according to the Utah Supreme Court, is “established by a showing that the actor’s predominant purpose was to injure the plaintiff . . . . An immediate intent to injure a competitor may be motivated and outweighed by a legitimate long-range interest in furthering one’s own economic condition.” *St. Benedict’s Co. v. St. Benedict’s Hospital*, 811 P.2d 194, 201. There is absolutely no showing here as a matter of law that defendant’s predominant purpose was to injure plaintiff. That assertion is absurd. Even

plaintiff acknowledges that the exercise of first refusal rights was to further defendant's own business plan, not to injure plaintiff. [Appellant's Brief at 17.]

In *Crivelli*, cited *supra*, the Third Circuit also addressed whether the exercise of a contractual right of first refusal in construing the same contract which is at issue here can constitute intentional interference. The Court specifically held that this exercise cannot ordinarily give rise to a claim of intentional interference construing Pennsylvania law which had adopted the Restatement elements of the tort as well as Kansas law and New York law. While Utah has adopted the Oregon approach to the tort of intentional interference as opposed to the Restatement approach, the same factor is determinative: was the nature of the defendant's conduct improper. The *Crivelli* Court held that exercise of a preexisting contractual right is not comparable to the type of conduct previously found actionable under the Restatement approach as well as the Utah approach (threats of physical violence, fraudulent misrepresentations, economic pressure, etc.). 215 F.3d at 395. The Court stated:

The conduct *Crivelli* attacks by its tort claim, GM's decision to exercise its right of first refusal, is not comparable to any of these examples and, as we have just decided, violated no statute, regulation, or governing judicial decision.

*Id.*

Defendant's exercise of its preexisting contractual rights cannot support a claim of tortious interference here. The trial court's ruling was correct as a matter of law. It should be affirmed.

### III.

#### **THE NAKED CONSPIRACY THEORY FAILS AS A MATTER OF LAW.**

Despite its failure to state a substantive claim for relief, plaintiff attempts to hold onto its conspiracy claim. The question becomes, a conspiracy to commit what unlawful act? Plaintiff failed to answer that question in the court below, and still has not answered it here on appeal.

Because plaintiff's predicate claims are without merit, its conspiracy claim also fails. In *Israel Pagan Estate v. Cannon*, 746 P.2d 785 (Utah App. 1987), *cert. denied*, 771 P.2d 1032 (Utah 1989), the Utah Court of Appeals states:

To assert civil conspiracy, plaintiff must . . . prove that the alleged conspirators performed one or more unlawful, overt acts. If the object of the alleged conspiracy or the means used to attain it is lawful, even if damage results to plaintiff or defendant acted with a malicious motive, there can be no civil action for conspiracy. "If such were not the rule, obviously many purely business dealings would give rise to an action in tort on behalf of one who may have been adversely affected."

746 P.2d at 792 (emphasis added) (citation omitted).

That is the exact situation before the Court here: a legitimate business decision, which may have "adversely affected" the plaintiff, does not support a conspiracy claim.

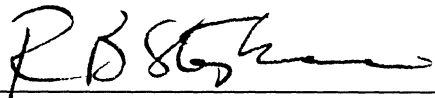
The trial court correctly ruled that defendant is entitled to summary judgment on plaintiff's conspiracy claim.

### CONCLUSION

For the foregoing reasons, the Summary Judgment granted in favor of defendant and against plaintiff should be affirmed.

DATED this 11<sup>th</sup> day of December, 2000.

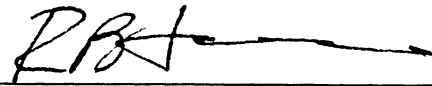
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**CERTIFICATE OF SERVICE**

I hereby certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLEE were sent by United States Mail, postage prepaid, to the following this 11th day of December, 2000:

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