# STATE OF MICHIGAN

# COURT OF APPEALS

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BERO MOTORS,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

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UNPUBLISHED
October 2, 2001

No. 224190
Delta Circuit Court
LC No. 98-014256-CK

Before: Sawyer, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Plaintiff Bero Motors appeals as of right from an order granting defendant General Motors Corporation's (GM) motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm in part and reverse in part.

This is a commercial dispute that alleges GM failed to fulfill an oral agreement to allow plaintiff to exercise GM's option for first refusal to purchase another automobile dealership. Following sale of the franchise to a third party and approval by GM, plaintiff brought suit offering four theories for recovery of economic loss: breach of oral contract, promissory estoppel, negligence, and breach of fiduciary duty. The present motion for summary disposition was filed by GM after completing discovery pursuant to MCR 2.116(C)(10), alleging that the provisions of the dealer sales and service agreement between the parties precluded oral modification to the contract or the creation of any fiduciary relationship, thus rendering all plaintiff's claims invalid. Defendant further argued that a December 11, 1997, agreement stipulated that any discussions with respect to plaintiff acquiring the dealership were preliminary and that no agreements existed or bound either party unless written, executed and approved by their authorized representatives. The trial court in its opinion found that the terms of the dealer service agreement or—"franchise agreement"—controlled and granted defendant's motion for summary disposition on all counts.

Plaintiff argues that the action arises out of GM's undertaking to assign its right of first refusal to Bero Motors and was outside the scope of the preexisting Bero Motors franchise agreement and, thus, the trial court erred when it decided the franchise agreement precluded the formation of an oral contract and plaintiff's action. We agree.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The moving party must specifically identify the matters that have no disputed factual issues, MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), and has the initial burden of supporting his position by suitable documentary evidence. MCR 2.116(G)(3)(b); *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999), quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). The burden then shifts to the opposing party to present evidentiary proofs creating a genuine issue of material fact for trial. *Id.* at 455-456 n 2. When deciding a motion for summary disposition under MCR 2.116(C)(10), the trial court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden, supra* at 120. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Maiden, supra* at 120. Because defendant accepted, for purposes of the motion, the existence of an oral promise, there was no genuine issue of material fact.

Central to a resolution of the breach of contract claim and indeed the present action was whether the franchise agreement controlled plaintiff's subsequent action in seeking the GMC franchise. We find that the scope of the franchise agreement was specific to the sale of Pontiac and Buick automobiles as evidenced by the language of § 17.11 that limits the requirement for written modification to "matters covered herein" and that, as a consequence, any addition to plaintiff's franchise would have had to be the fruition of a separate negotiation and written agreement. The trial court's determination of the scope of the contract was overbroad and extended the franchise agreement beyond the clear intent of the parties. There is nothing in the franchise agreement that contemplates the purchase of a GMC truck franchise, and all references are to the Pontiac and Buick sales. Thus, the scope of the franchise agreement's "all business language" pertains to the sale of Pontiac and Buick vehicles, and any other interpretation impermissibly broadened the scope of the agreement.

We believe that the Motor Dealer Act, MCL 445.1561 *et seq.*; MSA 19.856(21) *et seq.*, generally governs the relationship between a motor vehicle manufacturer and a new vehicle dealer and its definition of a "dealer agreement" is instructive in the instant dispute:

> [T]he agreement or contract in writing between a manufacturer, distributor, and a new motor vehicle dealer, which purports to establish the legal rights and obligations of the parties to the agreement or contract with regard to the purchase and sale of new motor vehicles and accessories for motor vehicles. [MSA 445.1562(2); MSA 19.856(22)(2).]

Although an issue of statutory interpretation is not presented, the dealings between the parties are governed by the MDA and as such, since the statute provides it own glossary, the term must be applied as expressly defined. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 136; 545 NW2d 642 (1996). The foregoing language leads us to conclude that the language of the agreement is confined to the sales and servicing of the existing franchise.

The parties generally agree that § 17.11 of the franchise agreement precludes oral modification of that agreement, but material to any resolution is the scope of the business

covered by the agreement. Under the rationale of *Pung v General Motors*, 226 Mich App 384; 573 NW2d 80 (1997), we conclude that the franchise agreement was separate from and did not give rise to or govern GM's undertaking to assist plaintiff in the purchase of Town and Country Motors.

In *Pung*, the defendant General Motors Corporation challenged a dealer's standing to bring suit under the Michigan Dealer Act (MDA), MCL 445. 1561 *et seq*.; MSA 19.856(21) *et seq*., after GM declined to give approval for an agreement between that plaintiff, who had an unrelated dealership agreement with GM, and another dealer to purchase its GMC franchise and assets. *Pung*, *supra* at 385. On appeal, the plaintiff argued that its status as an existing dealer conferred standing to sue under the MDA, notwithstanding that it sought to expand its product line through this unrelated purchase as a prospective dealer. *Id.* at 386. This Court reversed the trial court's finding that the plaintiff had standing to sue under the MDA after finding that:

> The fact that it is an existing dealership has nothing to do with the proposed purchase of [the dealership] assets. . . . The fact that it cannot expand its business by taking over the [franchise] dealership is no different than if another company, not currently a vehicle dealer, sought to purchase [the dealership] and defendant declined to grant it the franchise.
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> [I]ts status as a new vehicle dealer under that existing dealership agreement is irrelevant to this case. Rather, it is in the same situation as any other prospective new vehicle dealer, a group that has no standing under the MDA and to whom the MDA grants no remedies. [*Pung*, *supra* at 388.]

Essentially with respect to pending litigation, *Pung* allows a plaintiff to exist in two distinct positions, that of an existing dealer and that of a prospective new vehicle dealer.

Here, the circumstances are analogous; plaintiff would be precluded from bringing an action under the provisions of the MDA because the dispute represents a "proposed new motor vehicle dealership" and is separate and apart from the business relationship under the existing franchise agreement. Likewise, GM cannot claim the protections of the existing contract to protect itself from an oral agreement concerning a proposed new dealership. Contrary to defendant's assertion, plaintiff sought a GMC franchise for its own purposes since 1991 and *the proposed purchase was negotiated independent of GM*; its intercession was only requested when the negotiations deteriorated to the extent where there was a huge divergence between the seller and the buyer.

The evidence indicated that GM conducts business through its divisions, and in instances of multiple product lines, provides multiple contracts. Defendant's position that the oral promise would change the duties and obligations of the parties contravenes the logic of the evidence presented—while the parties agreed that any subsequent modification to the dealership

agreement would be in writing, the transfer of the GMC franchise would involve a new and separate agreement that would complement, not supersede, the existing agreement.

Likewise, defendant's arguments that the December 11, 1997, letter also forms an independent basis for dismissing the claim are unpersuasive. We agree with the trial court that the letter had no relevance to the issues presented and that "the terms of the letter do not answer the questions now before the Court on Defendant's Motion for Summary Disposition."

We conclude that, based on the holding of *Pung, supra,* the existing franchise agreement, while perhaps serving to form the context of the discussions that led to the oral promise, was a separate business arrangement, and its terms and conditions apply only to the specific circumstances of the sales of Pontiac and Buick motor vehicles. Consequently, whether the parties entered into an oral contract or simply an "actual clear and definite promise"[1] that was reasonably relied on is a question properly put to the trier of fact, and summary disposition on the claim of breach of oral contract and promissory estoppel was improperly granted. MCR 2.116(C)(10); *Maiden, supra* at 120.

Notwithstanding this Court's conclusion that the dealer sales and service does not control the oral promise, summary disposition on plaintiff's claims of negligence and breach of fiduciary duty was properly granted, albeit for the wrong reasons. Essential to a negligence claim is the existence of a duty owed by a defendant to a plaintiff and its existence is a question of law for the court to decide. *Otero v Warnick*, 241 Mich App 143, 147; 614 NW2d 177 (2000). However, in a contractual setting, an action in tort must rest on a breach of duty distinct from those imposed by contract. *Roberts v Auto-Owners*, 422 Mich 594, 603-604; 374 NW2d 905 (1995). Assuming arguendo the existence of the oral promise, it imposed no duty other than to assign the right of first refusal to plaintiff. As Professor Prosser succinctly stated in Handbook of the Law of Torts, 1st ed, 205, § 33, "if a relation exists which would give rise to a legal duty without enforcing the contract promise itself, the tort action will lie, otherwise not." *Hart v Ludwig*, 347 Mich 559, 565; 79 NW2d 895 (1956); see also *Ulrich v Federal Land Bank of St Paul*, 192 Mich App 194, 199; 480 NW2d 910 (1991).

Plaintiff alleges that GM was negligent because it (1) failed to advise of the pending sale, (2) failed to ascertain plaintiff's continued interest, (3) mistakenly determined that plaintiff had no continued interest, (4) misrepresented that it would assign the right of first refusal, and (5) approved the transfer of Town and Country to the third party.

These allegations do not give rise to a relationship that would create a legal duty that could be enforced without enforcing the oral promise; thus, no action may lie in tort. *Hart, supra* at 565. Accordingly, summary disposition was proper with respect to plaintiff's negligence claim.

Plaintiff also argued that because the franchise agreement does not control the oral promise, a fiduciary duty was established.

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[1] *Ypsilanti Twp v General Motors Corp*, 201 Mich App 128, 134; 506 NW2d 556 (1993).

A fiduciary duty arises where there is a fiduciary relationship between the parties. Familiar examples are: trustees to beneficiaries, guardians to wards, attorney to clients, and doctors to patients. *Portage Aluminum Co v Kentwood National Bank*, 106 Mich App 290, 294; 307 NW2d 761 (1981). Generally, whether a fiduciary relation exists is a question of fact. *Fassihi v Sommers, Schwartz, Silver, Etc*, 107 Mich App 509, 515; 309 NW2d 645 (1981). A person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation. See, 1 Restatement, Trusts, 2d, § 2, Comment b, p 6; *Melynchenko v Clay*, 152 Mich App 193, 197; 393 NW2d 589 (1986); *Ulrich, supra* at 196. Generally, this Court has been reluctant to extend the cause of action for breach of fiduciary relationship beyond the traditional context. See *Teadt v St John Evangelical Lutheran Church*, 237 Mich App 567, 581; 603 NW2d 816 (2000) (no fiduciary duty where interpersonal relationships are involved); *Farm Credit Services of Michigan's Heartland, PCA v Weldon,* 232 Mich App 662, 680; 591 NW2d 438 (1998), cert den 529 US 1021; 120 S Ct 1425; 146 L Ed 2d 316 (2000) (fiduciary relationship does not generally arise in the bank lender relationship).

We agree with the trial court's finding that *Ulrich, supra*, is persuasive because the parties were "experienced for-profit entities in a commercial setting" and plaintiff's simple allegations of reliance on another was insufficient to establish a fiduciary relationship.

In addition, the existence of § 17.1 of the franchise agreement and its statement that "[n]o fiduciary obligations are created by this agreement," provided notice of the context of the parties' course of business and thus any reposing of faith, confidence, and trust, and reliance upon the judgment and advice of another by plaintiff would have been misplaced, self-defeating and unwise. *Ulrich, supra* at 196.

Here, the parties' existing and continued relationship is driven by profits. Plaintiff's mere expression that it relied on GM to effect the oral promise is unconvincing against a commercial backdrop where sophisticated commercial entities, such as here present, regulate the minutiae of their relationship through written contracts. Accordingly, the trial court correctly granted summary disposition, although based on a different rationale. This Court does not reverse where the lower court reaches the correct result, albeit for the wrong reason. *Norris v State Farm Fire & Casualty Co*, 229 Mich App 231, 240; 581 NW2d 746 (1998); *Porter v Royal Oak*, 214 Mich App 478, 488; 542 NW2d 905 (1995).

Affirmed in part, reversed in part. The court's grant of summary disposition regarding plaintiff's claims of breach of contract and promissory estoppel is reversed. We remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Michael R. Smolenski