STATE OF MICHIGAN

COURT OF APPEALS

GENERAL MOTORS CORPORATION, Plaintiff-Appellant,	UNPUBLISHED July 24, 2007
v	No. 270430 Wayne Circuit Court
ALUMI-BUNK, INC., and ERIC JAIN, Defendants-Appellees.	LC No. 04-422587-CB

Before: Meter, P.J., and Kelly and Fort M. Hood, J.J.

Kelly, J. *(dissenting).*

I respectfully dissent from that portion of the majority opinion reversing the trial court's order granting defendant's motion for summary disposition on plaintiff's claim of fraudulent inducement. I would affirm the trial court's ruling in all respects.

In 2003, the parties entered into negotiations to allow AB to purchase hundreds of Chevrolet Silverado trucks from an Ohio dealer at a substantial discount. Eric Jain handled the negotiations on behalf of Alumi-Bunk, Inc. (AB). General Motors Corporation (GM) submitted a written offer to defendant entitled "Competitive Assistance Program" (CAP). According to the terms of the CAP, GM's offer was "based on [defendant's] representation that they have received a competitive offer lower than that offered by General Motors Fleet and Commercial Operations."[1] AB accepted the CAP in total. Although GM now contends that defendants agreed to modify, or "upfit," the vehicles before reselling them so they would not compete with the sale of non-modified vehicles on the market, this "term" or "representation" was not included in the CAP that was drafted and presented to defendants by GM and accepted by AB.[2]

[1] This is consistent with GM employee Erich Raich's position that he did not "really care how they get sold as long as we can conquest this current Ford customer. Five hundred or more units a year is 500 units we don't currently have. I just want to get the business if at all possible."

[2] Although Mark Kline, a former employee with Ganley Chevrolet, Inc., the dealership that sold the trucks in question, stated that GM would not offer a CAP discount "without a requirement that the vehicles purchased be up-fitted," it is uncontested that GM did, in fact, offer the CAP without such a requirement.

GM filed its complaint alleging fraud; negligent, innocent, and/or intentional misrepresentation; and breach of an express or implied contract. Each count explicitly referred to defendant's failure to "upfit" the vehicles after purchase and prior to resale. Defendants thereafter moved for summary disposition. When granting defendants' motion, the trial court stated, in part:

> There's clearly a contract here where [AB] is purchasing these vehicles. And it's a written contract and the written contract I think it's pretty much agreed doesn't say anything about upfitting. There's a significant discount, to be sure, but the contract doesn't speak to that. And there's no representation in the contract about upfitting and what's required for the upfitting. And this is really GM's contract and any ambiguities or unclearness is construed against [GM].
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> And really, as I looked at the whole issue, because I was really kind of struggling with this case, the only case that I thought came close to keeping [GM's] case alive is the argument that you make about fraud in the inducement. . . .
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> But . . . really the fraud claim has to be independent of contract claims. And there, the fraud and the contract claim is [sic] so intertwined and it's really the contract claim itself, and this fraud in the inducement that you're arguing really is part and parcel of the contract itself.
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> And, you know, to get right to the bottom line, I really just don't see that [GM] has any leg to stand on in this case. The UCC applies and you've done a very creative job in trying to separate out this representation about the upfitting from the contract itself, but that's a very extremely [sic] strained argument to say that this case doesn't fall within the UCC.
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> *And I think this is really just a case where GM kind of got caught with, as they say, with their pants down because the upfitting agreement or any upfitting allegations should have been written right into the contract. It should have been part and parcel of the written contract. And now for GM to turn around and say that this upfitting obligation is part of this agreement and they were – [AB] was to do this or that and nobody even knows what this or that was. And again, that ambiguity is to be construed against the drafter.* [Emphasis added.]

In my opinion, the trial court did not err in granting summary disposition.

The majority correctly concludes that the Uniform Commercial Code (UCC) and the economic loss doctrine govern this transaction. And, as noted by the majority, "[t]he economic loss doctrine, simply stated, provides that [w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in *contract alone*, for he has suffered only economic losses." *Neibarger v Universal Cooperative, Inc*, 439 Mich 512, 520; 486 NW2d 612 (1992) (emphasis added, punctuation omitted). In this

case, GM is claiming only economic losses stemming from a written contract. Consequently, it is limited to contractual remedies.

While under certain circumstances claims of fraudulent inducement are not barred by the economic loss doctrine, *Huron Tool & Engineering Co v Precision Consulting Services, Inc,* 209 Mich App 365, 372-374; 532 NW2d 541 (1995), such circumstances are not present in this case. As noted in *Huron Tool*,

> Fraud in the inducement presents a special situation where parties to a contract appear to negotiate freely – which normally would constitute grounds for invoking the economic loss doctrine – but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior. In contrast, where the only misrepresentation by the dishonest party concerns the quality or character of the goods sold, the other party is still free to negotiate warranty and other terms to account for possible defects in the goods. [*Id*. at 372.]

The *Huron Tool* panel further noted:

> The distinction between fraud in the inducement and other kinds of fraud is the same as the distinction drawn by a New Jersey federal district court between fraud extraneous to the contract and fraud interwoven with the breach of contract. With respect to the latter kind of fraud, the misrepresentations relate to the breaching party's performance of the contract and do not give rise to an independent cause of action in tort.
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> "Such fraud is not extraneous to the contractual dispute among the parties, but is instead but another thread in the fabric of [the] plaintiffs' contract claim. . . . [It] is undergirded by factual allegations identical to those supporting their breach of contract counts. . . . This fraud did not induce the plaintiffs to enter into the original agreement nor did it induce them to enter into additional undertakings. It did not cause harm to the plaintiffs distinct from those caused by the breach of contract. . . ." [*Id.* at 373 (citations omitted).]

Pursuant to *Huron Tool*, a claim for fraudulent inducement must be separate from the claim of breach of contract:

> [A] claim of fraud in the inducement, by definition, redresses misrepresentations that induce the buyer to enter into a contract but that do not in themselves constitute contract or warranty terms subsequently breached by the seller.
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> To that end, we must look to the four corners of plaintiff's complaint, accept all factual allegations as true, and determine whether the fraud claim falls out side the economic loss doctrine. . . . The fraudulent representations alleged by plaintiff concern the quality and characteristics of the software system sold by defendants. These representations are indistinguishable from the terms of the contract and

warranty that plaintiff alleges were breached. Plaintiff fails to allege any wrongdoing by defendants independent of defendants' breach of contract and warranty. Because plaintiff's allegations of fraud are not extraneous to the contractual dispute, plaintiff is restricted to its contractual remedies under the UCC. [*Id.* at 375.]

Applying these principles and reviewing GM's complaint, it becomes clear that its fraud claim is not viable. The alleged misrepresentations that form the basis of GM's fraud claim are precisely the same as those alleged in its breach of contract claim:

FACTUAL BACKGROUND

"26. Based upon information and belief, almost immediately after defendant Alumi-Bunk took delivery of the vehicles, Alumi-Bunk and/or its brokers and agents began selling those vehicles as "new" across the country *without having upfitted them* for a specialized purchase and *in direct breach* of its representation to GM that the vehicles were purchased for the express purpose of being upfitted.

27. Based upon information belief, defendant Alumi-Bunk resold all of the vehicles purchased from GM under the Competitive Assistance Program *without having upfitted* any of them *in direct breach* of its representations to GM.

* * *

FRAUD

32. Defendants Jain and Alumi-Bunk knowingly misrepresented that any fleet vehicles purchased under the Competitive Assistance Program *would be upfitted* before the resale of those vehicles to the general public. . . .

* * *

NEGLIGENT, INNOCENT AND/OR INTENTIONAL MISREPRESENTATION

39. Defendants Jain and Alumi-Bunk represented to GM on several occasions that any fleet vehicles purchased under the Competitive Assistance Program *would be upfitted* before the resale of those vehicles to the public.

* * *

BREACH OF EXPRESS/IMPLIED CONTRACT

48. On or about August 18, 2003, GM and defendants Jain and Alumi-Bunk agreed that Alumi-Bunk could participate in the Competitive Assistance Program and purchase up to 400 light duty trucks only on the condition *that Alumi-Bunk upfit* any such vehicles before reselling them to the general public.

> 49. That agreement constituted a valid and binding express and binding contract by and among GM, on the one hand, and defendants Jain and Alumi-Bunk, on the other hand.
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> 50. In breach of the express and/or implied contract by and among the parties, defendants Jain and Alumi-Bunk resold the fleet vehicles . . . .

Clearly, the fraud allegations are not extraneous to the contractual dispute as GM's allegations of fraud are so intertwined with its allegations of breach of contract to be indistinguishable.

The majority disregards *Huron Tool's* requirement that "we must look to the four corners of plaintiff's complaint, accept all factual allegations as true, and determine whether the fraud claim falls out side the economic loss doctrine," *id.* at 376, by simply declaring "[h]ere there was both evidence of improper inducement on the part of defendants and evidence that defendants agree to the upfitting with the present intent *not to perform."* In addition to disregarding the proper method for reviewing this claim, I would also note that the majority fails support this blanket assertion with any reference either in the complaint or the lower court record. In this record, there is a glaring absence of any evidence at all that would even inferentially support this speculative assertion. Under these circumstances, I believe GM is restricted to its contractual remedies under the UCC.

Finally, GM has failed to allege any specific facts that would support a claim of fraudulent inducement. Such an action may only be predicated on statements relating to a past or existing fact. "Future promises cannot constitute actionable fraud." *Kamalnath v Mercy Memorial Hosp Corp*, 194 Mich App 543, 554; 487 NW2d 499 (1992). The entirety of GM's allegations regarding AB's representations all relate to future promises. A party's "intention must be gathered not from what a party now says he then thought but from the contract itself." *Fletcher v Bd of Ed of Sch Dist Fractional No 5*, 323 Mich 343, 348; 35 NW2d 177 (1948) (citation and punctuation omitted). By definition, all contract negotiations occur before a contract is formed. Under the reasoning of the majority, parole evidence of any statement made prior to the signing of a contract and related to the contract would be admissible to support an action in fraud regardless of what terms are included in a written contract. As argued by defendants, I agree that this would turn contract law on its head, render the UCC meaningless, and cause contract law to "drown in a sea of tort." *Neibarger, supra* at 531 (citation omitted).

What GM asserts amounts to fraudulent inducement was actually GM's unilateral mistake of failing to include in a term in the CAP that GM later realized was critical. This Court does not consider a unilateral mistake sufficient to modify a previously negotiated agreement. *Hilley v Hilley,* 140 Mich App 581, 585-586; 364 NW2d 750 (1985). At all times, GM was free to guard against any potential or perceived economic risk of defendants' failure to upfit the vehicles by including a provision in the CAP. Defendants cannot be held liable for GM's failure

to do so.[3]

The trial court did not err in granting defendants' motion for summary disposition on GM's claim of fraudulent inducement. The language of the CAP is straightforward, unambiguous and clearly falls within the scope of the UCC and the economic loss doctrine. I would affirm.

/s/ Kirsten Frank Kelly

[3] The policy behind the economic loss doctrine " 'encourages parties to negotiate economic risks through warranty provisions and price' " and " 'shield[s] a defendant from unlimited liability for all economic consequences of a negligent act, particularly in a commercial setting, thus keeping the risk of liability reasonably calculable.' " *Huron Tool, supra* at 372 (citations omitted).