[Cite as *Fleisher v. Ford Motor Co.*, 2009-Ohio-3846.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Robert Fleisher et al.,	:	
Appellants-Appellants,	:	No. 09AP-139 (C.P.C. No. 08 CV 012330)
v.	:	(REGULAR CALENDAR)
Ford Motor Company et al.,	:	
Appellees-Appellees.	:	

D E C I S I O N

Rendered on August 4, 2009

Morganstern, MacAdams & DeVito Co., LPA, *Christopher M. DeVito* and *Alexander J. Kipp*, for appellants.

Whann & Associates, LLC, and *Jay F. McKirahan*, for appellee Brondes Ford Maumee, Ltd.

Thompson Hine LLP, *Scott A. Campbell* and *Samir B. Dahman; Dickinson Wright, PLLC*, *Frank A. Hamidi* and *Courtney S. Law*, for appellee Ford Motor Co.

APPEAL from the Franklin County Court of Common Pleas.

TYACK, J.

{¶1} This is an administrative appeal, from the Ohio Motor Vehicle Dealer Board ("Board"). Robert Fleisher is the owner of Franklin Park Lincoln-Mercury, a Toledo-area new car dealership in operation since 1977. Fleisher appeals from the Board's decision allowing another same-line dealer to relocate its business within eight miles of Fleisher. The Board's decision was affirmed by the trial court.

{¶2} Fleisher assigns six errors for our consideration:

> [I.] The Court Erred as a Matter of Law and Deprived Appellants of Their Constitutional Right to a Full Hearing on the Merits.
>
> [II.] As a Matter of Law, Ford's Claimed Exemption(s) Do Not Apply.
>
> [III.] The Court Erred in Finding That the Proposed Transferee Intended to Engage in Business at the Existing Dealership Location.
>
> [IV.] As a Matter of Law, the Ohio Dealer Act Definition Section Supports the Determination That a Proposed Transferee is Not an Existing Dealer.
>
> [V.] The Court Erred as Matter of Law by Failing to Grant an Automatic Stay Pursuant to R.C. 4517.50(B).
>
> [VI.] A Motion for Summary Judgment is Not Authorized by the Ohio Dealer Act and Not Procedurally Proper in Ohio Administrative Proceedings.

{¶3} In February 2008, Rouen Automotive Group, Inc., which operated another Lincoln-Mercury dealership approximately 8.5 miles south of Fleisher's dealership, entered into a contract to sell its business to a third area dealer, Brondes Ford Maumee, Ltd. Brondes' dealership was approximately one-half mile north of Rouen (eight miles from Fleisher's dealership). The contract was conditioned on the manufacturer's approval of a relocation of the Rouen dealership to the existing Brondes location. Essentially, the combined effect of this acquisition placed a new car dealership selling *both* Ford and Lincoln-Mercury brands within eight miles of Fleisher's Lincoln-Mercury dealership.

{¶4} On February 7, 2008, Ford gave written notice to Fleisher: "We hereby are notifying you that Mike Rouen, Rouen Lincoln-Mercury, Maumee, Ohio has entered into a buy-sell agreement to sell his Lincoln-Mercury dealership to Phil Brondes, Maumee,

Ohio." Ford neglected to tell Fleisher that they were planning to co-locate both dealerships at the current Brondes location.

{¶5} Brondes took over the Rouen dealership, and conducted business at that location for about one business day. Then, on March 1, 2008, Brondes relocated its newly acquired Lincoln-Mercury dealership to its existing Ford dealership location.

{¶6} On March 13, 2008, Fleisher instituted a notice of protest with the Ohio Motor Vehicle Dealer Board, alleging that Ford violated the Ohio Motor Vehicle Dealers Act by failing to provide Fleisher with proper notice of the relocation, and failing to establish good cause to support the relocation. On April 28, 2008, Fleisher filed an emergency motion with the Board to enforce the automatic injunction under R.C. 4517.50(B). Ford filed a response to Fleisher's motion for injunction, and filed a motion to dismiss the proceeding.

{¶7} Without holding an evidentiary hearing, on June 25, 2008, a hearing examiner for the Board issued a report recommending that Fleisher's protest be dismissed. The hearing examiner based his decision on a finding that the relocation did not establish an additional motor vehicle dealer within Fleisher's relevant market area. The hearing examiner also found that because the relocation was less than one mile, the notice requirements in R.C. 4517.50 did not apply. As a result of these findings, Fleisher had no right to protest.

{¶8} Fleisher filed objections to the hearing examiner's report, but the Board nonetheless voted to confirm the report on August 13, 2008. On August 27, 2008, Fleisher filed a timely notice of appeal with the Franklin County Court of Common Pleas.

On January 5, 2009, the trial court issued its decision upholding the Board's disposition. Fleisher, then, brought this appeal.

{¶9} Appeals from administrative agencies are governed by R.C. 119.12. After hearing the parties, and reviewing the evidence, the court may affirm the agency's order provided that it is supported by reliable, probative, and substantial evidence, and is in accordance with law. See, e.g., *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. If the court finds otherwise, the court may reverse, vacate, or modify the agency's order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law.

{¶10} At this level of review, the common pleas court must give due deference to the administrative resolution of any evidentiary conflicts. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 111. This does not mean, however, that the agency's evidentiary findings are conclusive. Id. For example, if a witness's testimony is inconsistent, or if the witness was impeached using a prior inconsistent statement, the common pleas court may properly decide that this testimony should be given no weight. See id. The trial court's review of legal questions is de novo. See *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 471.

{¶11} At the court of appeals, our review is more limited than that of the trial court. We review the record to determine, only, whether the trial court has abused its discretion as to evidentiary issues. See id. An abuse of discretion is more than an error of judgment; rather, it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. We cannot substitute our judgment for that of the trial court, or that of the agency. Absent an abuse

of discretion, we must affirm the judgment of the trial court. *Pons*, supra (citing *Lorain City Bd. of Edn. v. State Emp. Relations Bd.* (1988), 40 Ohio St.3d 257, 260–61; *Rossford Exempted Village Sch. Dist. Bd. of Edn. v. State Bd. of Edn.* (1992), 63 Ohio St.3d 705, 707).

{¶12} Because it is dispositive of the entire case, we will first address the second assigned error, which turns on the following statutory language in the Ohio Motor Vehicle Dealers Act:

> (A) Except as provided in division (C) of this section, when a franchisor seeks to enter into a franchise to establish an additional new motor vehicle dealer in, or relocate an existing new motor vehicle dealer at a location in, a relevant market area where the same line-make of motor vehicle is then represented, the franchisor shall first give notice * * * to the motor vehicle dealers board and to each franchisee of such line-make in the relevant market area of the franchisor's intention to establish an additional new motor vehicle dealer in, or relocate an existing new motor vehicle dealer at a location in, that relevant market area. Each notice shall set for the specific grounds for the proposed establishment of an additional motor vehicle dealer or relocation of an existing motor vehicle dealer. Within fifteen days after receiving the notice * * * the franchisee of the same line-make may file with the board a protest against the establishment or relocation of the proposed new motor vehicle dealer. When such a protest has been filed, the board shall inform the franchisor that a timely protest has been filed and that hearing is required pursuant to [R.C. 4517.57]. * * *
>
> (B) No franchisor shall establish an additional new motor vehicle dealer or relocate an existing new motor vehicle dealer before giving notice as required in division (A) of this section or before the holding of a hearing on any protest filed under this section, and no franchisor shall establish or relocate such a dealership after the hearing if the board determines that there is good cause for not permitting the new motor vehicle dealer to be established or relocated.

> (C) Division (A) of this section does not apply to any of the following:
>
> (1) The relocation of an existing new motor vehicle dealer within one mile from the existing location;
>
> (2) The sale or transfer of an existing new motor vehicle dealer where the transferee proposes to engage in business at the same location[.]

R.C. 4517.50.

{¶13} Thus, R.C. 4517.50(A) prohibits Ford from opening a new dealership, or relocating an existing dealership without first giving notice to any existing same-line dealerships within the relevant market area. But R.C. 4517.50(C) creates two exceptions, both of which were found to apply under the facts in this case.

{¶14} Specifically with regard to R.C. 4517.50(C)(1), it is undisputed that the new Brondes dealership was less than one mile away from the existing Brondes dealership. Thus, R.C. 4517.50(C)(1) exempted Ford from the notice requirement in section (A).

{¶15} The Board and the common pleas court also had sufficient evidence to find "that the deal between Brondes and Rouen was for the sale or transfer of an existing new motor vehicle dealer," and that Brondes did propose to engage in business at the existing Rouen location albeit only briefly. (Trial court's decision, at 8.) Thus, R.C. 4517.50(C)(2) also exempted Ford from the notice requirement in section (A).

{¶16} Fleisher and Franklin Park complain about the fact that Ford neglected to include notice of the proposed relocation in its letter giving notice of the proposed transfer. (Appellants' brief, at 12–13.)

> * * * Ford misleads Franklin Park into believing that Brondes intended to engage in business at the existing Rouen location, when Ford knew that Brondes intended to move the

> Lincoln-Mercury dealership to the Brondes Ford location at 1511 Reynold[s] Road and create a [dualed] dealership with the existing Brondes Ford franchise. * * * Ford's intentional misrepresentation appears specifically intended to conceal and circumvent the statutory requirement [provided by R.C. 4517.50(A)].

Id. at 14.

{¶17} Appellants then cite case law purporting to condemn acts such as these. See *Mercure v. Gen. Motors Corp.* (Mar. 17, 2003), N.D.Ohio No. 4:02CV2124, slip opinion at 12 ("GM may not circumvent the intent and purpose of a remedial statute obviously intended to place franchisees and dealers on a more equal playing field.") But the facts in *Mercure* are clearly different from the facts here, because in this case, the franchisor's conduct falls squarely within a statutory exception.

{¶18} Indeed, Ford's letter did not fully communicate what was occurring. However, the statute does not guard against such conduct. The statute is clear and unambiguous. The legislature intended to exempt certain kinds of transfers and relocations from the notice requirement in R.C. 4517.50(A), including relocations of less than one mile, and transfers where the transferee *proposes* to engage business at the existing location. The statute does not place a requirement on the length of time that a transferee conducts business at the existing location.

{¶19} To adopt appellants' interpretation of R.C. 4517.50, we would have to superimpose a tacit, good-faith requirement therein. We would also have to add a time requirement for engaging in business, after the legislature chose not to do so. Although this might seem like a reasonable action for a court to take, given the specificity with which the legislature created the two exemptions in section (C), this court would be

legislating from the bench, were we to superimpose a time requirement for operating a business into the statute. We chose not to do so generally, and specifically in this case.

{¶20} Having found that either exemption in R.C. 4517.50(C) applies to the transaction at issue in this case, we overrule the second assignment of error. The first, third, fourth, fifth, and sixth assignments of error are thereby rendered moot.

{¶21} Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH, P.J., and BRYANT, J., concur.

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