

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 12, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-1609  
STATE OF WISCONSIN**

**Cir. Ct. No. 00-CV-282**

**IN COURT OF APPEALS  
DISTRICT III**

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**ALBERT C. DIBBLES,**

**PLAINTIFF-APPELLANT,**

**V.**

**TRYGVE A. SOLBERG AND TULA SOLBERG,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Oneida County:  
MARK A. MANGERSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Albert Dibbles appeals a summary judgment dismissing his claim of tortious interference with a contract against Trygve and Tula Solberg. Dibbles argues that the circuit court erred by granting summary judgment in favor of the Solbergs. We conclude that Dibbles fails to demonstrate a claim upon which relief can be granted. Therefore, we affirm the judgment.

## BACKGROUND

¶2 The record discloses the following undisputed facts. Dibbles entered into a contract with the Albert G. Reeves Trust to purchase property in Rhinelander known as Reeves' Grocery Store. At the time the contract was signed, the property was leased to Fleming Companies, Inc. The lease between Fleming and the Trust gave Fleming a right of first refusal:

### PARAGRAPH 9 OPTION – RIGHT OF FIRST REFUSAL

Lessor gives to Lessee the sole option to purchase the described premises should Lessor desire to sell the property. The purchase price shall be equal to or greater than that which any other purchaser may offer. This option shall endure for twenty (20) years beyond the term of this lease including all options.

The lease also permitted Fleming to assign the lease and, by doing so, assign the right of first refusal:

### PARAGRAPH 14 ASSIGNMENT AND SUBLETTING

Lessee may assign this lease or sublease the premises or any part thereof without the written consent of Lessor. Any assignment or subletting shall not in any way release Lessee from its liability for the payment of rental as herein provided or for the performance of any of the other covenants and conditions of this lease.

¶3 Dibbles' right to purchase the property was thus contingent upon Fleming not exercising the right of first refusal before the closing. The contract between Dibbles and the Trust recognized the contingency by stating that the "Sellers [sic] obligation to conclude the transaction contemplated herein shall be conditioned upon Fleming Companies, Inc. failing to exercise its right of first refusal with respect to the property."

¶4 After Dibbles signed the contract with the Trust, but before closing the transaction, Fleming assigned the lease to the Solbergs. The Solbergs then exercised the right of first refusal granted by the lease and purchased the property for the same price as Dibbles had agreed to pay.

¶5 Dibbles filed a complaint alleging that the Solbergs intentionally interfered with his purchase contract by: (1) causing Fleming to assign its leasehold interest to the Solbergs; and (2) exercising the right of first refusal to usurp Dibbles' contractual right to purchase the property.

¶6 The Solbergs moved for summary judgment. They acknowledged that they interfered with the contract by taking assignment of the lease and then exercising the lessee's right of first refusal. However, the Solbergs asserted that any interference was justified because the means employed were lawful. The circuit court granted the Solbergs' motion for summary judgment.

#### STANDARD OF REVIEW

¶7 We review a circuit court's grant of summary judgment independently. *Weigel v. Grimmert*, 173 Wis. 2d 263, 267, 496 N.W.2d 206 (Ct. App. 1992). Pursuant to WIS. STAT. § 802.08(2), summary judgment must be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The inferences to be drawn from the underlying facts contained in the moving party's material should be viewed in the light most favorable to the party opposing the motion, and doubts as to the existence of a genuine issue of material fact are resolved against the moving party. *L.L.N. v. Clauder*, 209 Wis. 2d 674, 684, 563 N.W.2d 434 (1997).

## DISCUSSION

¶8 Dibbles argues that the circuit court erred by granting summary judgment because the undisputed facts establish the first four elements of the tort of interference with a contract.<sup>1</sup> We recognize “a cause of action for the intentional interference with another’s prospective contractual relation.” *Cudd v. Crownhart*, 122 Wis. 2d 656, 658-59, 364 N.W.2d 158 (Ct. App. 1985). However, interference alone does not establish the tort; the interference must be improper. *Mackenzie v. Miller Brewing Co.*, 2000 WI App 48, ¶63, 234 Wis. 2d 1, 608 N.W.2d 331. As stated in RESTATEMENT (SECOND) OF TORTS § 766 (1979):

One who intentionally and improperly interferes with the performance of a contract ... between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

¶9 A plaintiff seeking to recover based on tortious interference with a contract must prove that: (1) the plaintiff had a contractual relationship with a third party; (2) the defendant interfered with the relationship; (3) the interference was intentional; (4) a causal connection exists between the interference and the damages; and (5) the defendant was not justified or privileged to interfere. WIS JI—CIVIL 2780. The burden is on the plaintiff to prove elements one through four. *Id.* However, the burden of proof is on the defendant to prove element five. *Id.*

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<sup>1</sup> Dibbles also argues that: (1) the fifth element of tortious interference with contract, requiring the defendant to prove whether the interference was justified, is not proper for summary judgment; and (2) there are genuine issues of material facts pertaining to the fifth element. *See* WIS JI—CIVIL 2780. Because we hold that Dibbles did not establish a claim, we need not address the remaining arguments. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

¶10 Here, the right of first refusal was recognized in Dibbles' contract. The contract gave whoever held the right of first refusal the right to preempt Dibbles' rights. Our supreme court in *Edlin v. Soderstrom*, 83 Wis. 2d 58, 68, 264 N.W.2d 275 (1978), noted that a right of first refusal is sometimes called a right of preemption and adopted the following description:

A right of pre-emption is a right to buy before or ahead of others, thus, a pre-emptive right contract is an agreement containing all the essential elements of a contract, the provisions of which give to the prospective purchaser the right to buy upon specified terms, but, and this is the important point, only if the seller decides to sell. It does not give the pre-emptioner the power to compel an unwilling owner to sell, and therefore is distinguishable from an ordinary option. (Citation omitted.)

¶11 The effect of a right of first refusal is to add a party to the transaction. The right is “triggered by an offer of sale, and the effect is therefore to inject the holder of the right into the sale transaction.” *Frandsen v. Jensen-Sundquist Agency, Inc.*, 802 F.2d 941, 946 (7<sup>th</sup> Cir. 1986).

¶12 The Solbergs were “injected” into the Dibbles' contract by the nature of the right of first refusal. The Solbergs possessed a right to preempt the sale of the property to Dibbles. This preemption was a part of Dibbles' contract, not an interference with it. Dibbles could have negotiated with Fleming to purchase the lease rights. However, he took the risk that his right to purchase the property would not be preempted.

¶13 Dibbles is in a similar situation as in *Sampson Invs. v. Jondex Corp.*, 176 Wis. 2d 55, 499 N.W.2d 177 (1993). There, Jondex operated a supermarket in space leased in Sampson's shopping center. A rival shopping center, Mega Marts, during the term of the Sampson lease, contracted with Jondex to move the supermarket into Mega Mart's shopping center two blocks away.

Jondex continued to pay rent to Sampson on the empty space, but Sampson sued Mega Marts for tortious interference with its contract. Sampson's theory was that the lease required Jondex to keep its store operating, not just pay the rent. *Id.* at 60.

¶14 Our supreme court rejected Sampson's argument that moving the supermarket may impair the "value of the bargain." *Id.* at 72. The value of the bargain to Sampson was to have a fully-leased, operating shopping center where all tenants would benefit and profit by "high shopper traffic." *Id.*

¶15 The court held that a plaintiff seeking to maintain a claim for tortious interference with a contract must show some specific right that has been interfered with. *Id.* at 73. "To hold otherwise would allow [a plaintiff] to circumvent the limitations of the lease agreement and expand their rights through a tort claim." *Id.* at 72. "[T]ort liability may be imposed upon a defendant who intentionally and improperly interferes with the plaintiff's rights under contract with another person if the interference causes the plaintiff to lose a right under the contract or makes the contract rights more costly or less valuable." *Id.* at 72-73 (citing W. PAGE KEETON, ET AL., § 129 (5th ed. 1984)). Applying these principles, the court concluded that:

Sampson had no right to require Jondex to continuously operate a retail warehouse food store. Thus, even though Jondex refrained from using the premises, this action did not interfere with any of Sampson's rights. In fact, allowing Sampson's claim would grant them rights which the parties did not bargain for. The inability to show any right which was interfered with is fatal to Sampson's tortious interference claim.

*Id.* at 72-73.

¶16 As in *Sampson*, Dibbles is trying to obtain more rights than he bargained for. Dibbles had no right to buy the property until the lessee waived its right of first refusal or failed to exercise it. The contract provided that Dibbles had no right to buy if the right of first refusal was exercised. As a result, Dibbles cannot show any right that was interfered with, and that is fatal to his tort claim. Therefore, we conclude that the circuit court properly granted summary judgment.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

