101261-6

No. 83124-1-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

LARSON MOTORS, INC. and RJ 35700, LLC,

Petitioners,

v.

JET CHEVROLET, INC., DAN JOHNSON,
and JIM JOHNSON,

Respondents.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

Larson Motors, Inc. and RJ 35700, LLC ("Larson")[1] ask for review of the Court of Appeals decision terminating review set forth in Part B.

B. COURT OF APPEALS DECISION

The Court of Appeals issued its opinion addressing the $7 million sale of the Jet Chevrolet dealership in Federal Way to Larson on August 8, 2022. A copy of that opinion terminating review is set forth in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

> Did the trial court err in granting summary judgment to a seller on a purchaser's breach of contract claim involving the sale of an automobile dealership where there were genuine issues of material fact as to whether the seller acted in bad faith, as required by express contract terms and the implied covenant of good faith and fair dealing, by not appealing the automobile manufacturer's disapproval of the sale?

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[1] Robert Larson, Larson's principal, is an experienced automobile dealership owner. His Larson Automotive Group operates numerous dealerships in the Puget Sound region, including a Cadillac dealership for GM in Fife. https://www.larsonautomotivegroup.com/

D. STATEMENT OF THE CASE

The Court of Appeals opinion sets forth the facts and procedure in this case. Op. 2-5. Certain factual points, however, are omitted from the court's factual recitation, and bear emphasis.

On October 23, 2020, Larson and the Johnsons formally agreed to Jet Chevrolet's sale, executing the Asset Purchase Agreement ("APA"), CP 65-89, and the Real Estate Purchase and Sale Agreement ("REPSA"). CP 90-102. The APA contains critical cooperation and exclusivity provisions in paragraphs 5.1 and 5.5. CP 73, 75. A condition to closing this deal was General Motors Corporation's ("GM") approval of Larson's purchase of Jet. CP 105. The Johnsons were contractually obligated to assist in securing GM's approval of the deal. CP 77 (¶ 5.13), 105. Pursuant to the APA, the sale was to close no later than December 20, 2020. CP 86.

On March 19, 2021, GM informed Dan Johnson that it was rejecting Larson's application in accordance with RCW

46.96.200 (*see* Appendix) and would not approve Jet's sale to Larson.[2] CP 48-49, 105. It informed Larson by a separate letter. CP 105. Upon receiving GM's rejection, the parties agreed to extend the closing date to April 19, 2021; Larson was required to either terminate the APA and REPSA or decide to close the transaction by April 8, 2021. CP 105-06.

Following GM's unexpected rejection, Larson's attorney, Brian King, who is experienced in auto dealership sales, had numerous discussions with the Johnsons' counsel and brokers Mark Johnson and Mark Topping. CP 106. Specifically, King advised that, based on his considerable experience, GM's decision would not withstand scrutiny under RCW 46.96. *Id*. GM did not serve any of the requisite parties in the manner prescribed by the statute (*i.e.*, within 60 days from the date it received Larson's application), and failed to properly consider

[2] GM did not comply with the requirements of this statute, and its purported failure to consent to the sale is likely invalid for the reasons King detailed to the Johnsons' counsel. CP 106, 112-114.

Larson's other, non-GM vehicle lines. *Id.* King later detailed these concerns in an April 16, 2021 letter to Cliff Spencer, the Johnsons' counsel. CP 112-14. He also indicated that GM had given *de facto* consent to the transaction when it failed to notify the requisite entities within the sixty day review period. RCW 46.96.200(1)) (manufacturer's failure to timely respond "is deemed to be consent to the request").

The Johnsons, and only the Johnsons, not Larson, op. 8 n.2,[3] could have sought administrative remedies under RCW 46.96.200(4) up until April 12, 2021.[4] Although an appeal petition was drafted for their signature by Larson's counsel, RP 42, they instead refused to sign without imposing illusory and

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[3] The *only* party to the sale who can appeal any improper denial by an auto manufacturer of such approval is the dealership seller, here, the Johnsons. *Tacoma Auto Mall, Inc. v. Nissan North America*, 169 Wn. App. 111, 118-24, 279 P.3d 487, *review denied*, 175 Wn.2d 1024 (2012). The Johnsons conceded that fact below. CP 12.

[4] A selling dealership like Jet has twenty days after receipt of the manufacturer's notice of refusal to approve a dealership sale to file a petition with the Department of Licensing ("DOL") to protest the refusal. RCW 46.96.200(4).

unreasonable conditions on Larson. CP 106-07. Those conditions included, but were not limited to the following: (1) Larson had to pay all of their legal fees to date, *sign a release and promise not to sue them*; (2) the Johnsons refused to extend the closing date pending resolution of the petition; and (3) the Johnsons would only extend the closing deadline to May 1, 2021, despite being advised and being aware that the DOL administrative hearing would likely not take place until long after this short extension. *Id*.

Notwithstanding GM's disapproval of Jet's sale, Larson even told the Johnsons that he would agree to close on the transaction, despite GM's disapproval, if they would simply agree to appeal GM's disapproval to DOL. CP 374-75; RP 50-57. They refused. Larson even offered to pay their legal fees in pursuing the administrative appeal, and to indemnify them, CP 107, but the Johnsons still refused to sign an administrative

petition to DOL Larson had already prepared.[5]

King sent a March 31, 2021 letter to GM asking it to retract its improper and untimely refusal to approve the transaction, but GM then told Larson on April 8, 2021 that it would not rescind its rejection. CP 44-46, 107.

Later that same day, faced with the Johnsons' failure to accept any good faith options to salvage and complete the transaction, Larson notified them that it had no reasonable option other than terminating the APA and REPSA, and that it was considering legal action to find out what had really transpired. CP 54-55, 107.[6]

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[5] Division I gave scant attention to the fact well-documented by Larson, CP 283, 287, 290, 342-43, that the Johnsons were motivated to torpedo the deal. They thought the dealership was worth far more than Larson paid them for it, and they hoped a new buyer would pay them more. *Id.* In fact, the Johnsons have now sold the dealership for considerably more money to another dealer.

[6] The parties subsequently executed a rescission addendum and escrow instructions, terminating the transaction. CP 57-58. That agreement was a prerequisite to obtaining a return of Larson's earnest money, as provided for by the

King testified that had the Johnsons cooperated in securing GM's approval, there was a "strong chance of success under the plain language of RCW 46.96.200." CP 108. Indeed, Larson filed an action against GM that is presently in federal court in the Western District of Washington. *Larson Motors, Inc. v. General Motors, LLC.* (No. C21-1367-JCC). The district court recently denied GM's motion to dismiss Larson's tortious interference claim against it, further evidencing the legitimacy of Larson's claims against GM. 2022 WL 952182.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED[7]

Division I's restrictive interpretation of this Court's decisions on good faith merits review. RAP 13.4(b)(1).

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purchase documents; it was not executed because Larson wished to terminate the transaction. CP 107.

[7] Although Larson is not raising the Johnsons' breach of the exclusivity provisions in their agreements in this petition, it is important to note that Ken Dinsmore, a key figure in Larson's belief that the Johnsons were likely negotiating with others during the exclusivity period, recently purchased Jet from the Johnsons.

(2) The Johnsons Had Contractual and Implied Good Faith Obligations to Larson to Effectuate Jet's Sale

(a) Contractual Covenants

In multiple instances in the APA and REPSA, the Johnsons expressly covenanted to cooperate in the performance of their contractual obligations. For example, § 5.1 of the APA states:

> **5.1 Cooperation; Further Action.** Each Party will fully cooperate with the other Party and with the other's employees, agents, attorneys and accountants in connection with any steps required to be taken as part of its obligations under this Agreement. Each Party will use its reasonable best efforts to cause all conditions to this Agreement and the transactions described in this Agreement to be satisfied as promptly as possible and to obtain all consents and approvals necessary for the due and punctual performance of this Agreement and for the satisfaction of the conditions herein on its part to be satisfied. No Party will undertake any course of action inconsistent with this Agreement or which would make any representations, warranties or agreements made by it in this Agreement untrue or any conditions precedent to this Agreement unable to be satisfied at or prior to the Closing. In case at any time after the Closing any further action is necessary or desirable to carry out the purposes of this Agreement, each Party to this Agreement shall use its reasonable best efforts

to take all such action.

CP 73. Specifically, with regard to their obligation to secure GM's approval of the sale, § 5.3 states:

> **5.3 Third Party Consents.** Prior to the Closing, the Seller and Purchaser will endeavor to procure, in writing, all third-party consents and approvals as may be required to consummate the transactions contemplated hereby. Seller and Purchaser shall work together and cooperate in obtaining consents to the assumption by Purchaser of Seller's obligations with regard to the Assumed Liabilities. Failure to obtain consent to an assignment before Closing shall not relieve Purchaser from the financial obligation associated with the contract for which the parties have not obtained such consent to the assignment. The parties agree post-closing to continue to work together to obtain such consents.

CP 75.

Likewise, in the REPSA in § 12.9, the Johnsons agreed to comply with all applicable laws such as RCW 46.96:

> 12.9 Compliance with Laws. The Parties hereto agree to comply with all applicable federal, state, and local laws, regulations, codes, ordinances and administrative orders having jurisdiction over the Parties, Property or the subject matter of this Agreement.

CP 100.

Giving effect to *all* of the contracts' provisions[8], the substance of them was that the Johnsons were obligated to put forward their legitimate best efforts to effectuate the sale to Larson, including taking the steps necessary to obtain GM approval. The Johnsons are obliged to take no course of action that would make "any conditions precedent to this Agreement unable to be satisfied at or prior to the Closing." And, the obligation extends past closing:

> In case at any time after the Closing *any* further action is necessary or desirable to carry out the purposes of this Agreement, each Party to this Agreement *shall* use its reasonable best efforts to take *all* such action.

CP73 (emphasis added). The DOL appeal falls within the scope of the parties' agreements. The parties expressly noted that GM's approval had to be secured in ¶ 5.3 and ¶ 12.9 referenced all applicable laws, necessarily encompassing RCW 46.96. By

[8] In interpreting the parties' agreements, it has long been the rule that courts must construe those agreements as a whole, giving force and effect to all provisions. *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App 706, 712-13, 334 P.3d 116 (20014).

its express terms, nothing in ¶ 5.3 limited its *broad* direction to facilitate the deal; *nothing* there said the Johnsons were not obliged to appeal on Larson's behalf to DOL.

¶ 5.3 mandated that they and Larson "shall work together and cooperate in obtaining consents to the assumption by [Larson] of [the Johnsons'] obligations with regard to the Assumed Liabilities." CP 75. And that cooperation extended beyond closing: "The parties agree post-closing to continue to work together to obtain such consents." *Id*. Although the Johnsons vaguely asserted a concern about future relations with GM if they petitioned DOL, *nothing* in the parties' agreements said that they were entitled to avoid their contractual duty because of their putative future relations with GM. Resp'ts br. at 10, 26.[9]

[9] Moreover, nothing in the record documented to what extent the Johnsons would have any ongoing relationship with GM once they sold Jet, in any event. GM was not going to prevent any dealership from being located at the Jet Federal Way site, CP 226, so the Johnsons knew a sale to someone would ultimately occur. Dan Johnson's statement about future

Taken as a whole, as Division I should have done, the parties' agreements *mandated* cooperation to secure GM's approval of the sale, including an appeal to DOL of any improper withholding by GM of Jet's sale, particularly where there was a legitimate basis for Larson's petition and the Johnsons did not need to expend resources for such a petition – they merely needed to sign it.

Such contractual covenants of cooperation in the implementation of contract terms are routinely enforced in Washington. In *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 961 P.2d 358 (1998), this Court held that an insured who refused to provide financial records to his insurer for its fraud investigation violated the cooperation clause in the insurance contract, vitiating coverage. As noted in 35 *Wash. Practice Insurance Law and Litigation* (2020-2021 ed.) at §

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interaction with GM was that he did not want to be on GM's bad side because "Maybe some day my kids down the road may want to buy a small dealership in Eastern Washington and I don't want to burn any bridges." CP 221.

3:3:

> Bad faith failure is essential to the insurance relationship because that relationship involves a continuous exchange of information between insurer and insured interspersed with activities that affect the rights of both. The relationship can function only if both sides cooperate. Cooperation clauses also guard against collusion and fraud.

Division I misinterpreted the powerful imperative of these contract provisions that directed the Johnsons to cooperate with Larson to implement the Jet deal. Instead, it focused inordinately on the Johnsons' authority to terminate the contract, op. 10, missing the point that the parties' sales agreement could have been effectuated by the simple step of the Johnsons *signing* the DOL petition to appeal GM's arbitrary, legally invalid refusal to approve Larson's purchase of the dealership where they were the *only* parties with standing to petition DOL. The public policy addressed in cases like *Tran* is no less true here, and this Court should grant review to reaffirm that cooperative principle for contracts generally. RAP 13.4(b)(4).

(b) Implied Covenant of Good Faith

The duties of parties to real estate contracts to faithfully perform their obligations are reinforced by an overarching duty of good faith and fair dealing[10] in Washington law that supplements or supports the already powerful cooperation policy built into the parties' APA and REPSA. "There is in every contract an implied duty of good faith and fair dealing" that "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). *See also, Restatement (Second) of Contracts* § 205.

The core of that implied covenant bars a party to a contract from hindering other parties to the contract from implementing their obligations under the contract. "This covenant casts on each party a duty not to interfere with the

[10] In the commercial setting, good faith is a well-understood concept. "Good faith" is defined in RCW 62A.1-201(20) as "honesty in fact and the observance of reasonable commercial standards of fair dealing." *See* cmt. a, *Restatement (Second) of Contracts* § 205.

other party's performance." *State v. Trask*, 91 Wn. App. 253, 272-73, 957 P.2d 781 (1998), *review denied*, 137 Wn.2d 1020 (1999).[11] It is difficult to discern how the Johnsons' failure to take a simple petition/appeal to DOL that *only* they could take, that so prejudiced Larson, does not meet this basic imperative.

"The duty of good faith requires 'faithfulness to an agreed common purpose and consistency with the justified

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[11] As noted in cmt. d to the *Restatement (Second) of Contracts*, this implied duty is broad in its scope, forbidding *inaction* in the face of contractual duties:

> Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: *bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty*. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

(emphasis added).

expectations of the other party.'" *Edmondson v. Popchoi*, 172 Wn.2d 272, 280, 256 P.3d 1223 (2011) (quoting *Restatement (Second) of Contracts* § 205 cmt. a (1981)). Larson justifiably expected that the Johnsons would take the appeal to DOL that only they could take to effectuate the parties' agreement to seek GM's approval of Jet's sale.

Division I asserts that the implied covenant of good faith and fair dealing is confined to specific contract terms. Op. 11. That assertion is too narrow. This Court in *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 111-12, 323 P.3d 1036 (2014) seemingly rejected such a narrowing of contractual parties' good faith obligations, observing:

> As the Seventh Circuit has said, "It is, of course, possible to breach the implied duty of good faith even while fulfilling all of the terms of the written contract." *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 766 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1784 (2011). Similarly, the California Supreme Court observed that the breach of a specific provision of the contract is not a necessary prerequisite [to a breach of good faith and fair dealing claim]. Were it otherwise, the covenant would have no practical meaning, for any

> breach thereof would necessarily involve breach of some other term of the contract." *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal. 4th 342, 373, 826 P.2d 710, 6 Cal. Rptr. 2d 467 (1992) (citation omitted).

In *Rekhter*, the Court specifically concluded, unlike Division I, that a party can violate the duty of good faith and fair dealing without violating a specific term of the contract, stating "[s]uch a requirement would render the good faith and fair dealing doctrine superfluous…" *Id.* at 111-12. But, in any event, as Larson has noted, the parties' APA/REPSA clearly contemplate that the parties will cooperate to secure GM's approval of the sale. The implied duty *is* rooted in the contracts' terms.

This Court's decision in *Edmondson* is squarely on point. There, this Court held that a property seller breached its duty to defend the title to the property required by a statutory warranty deed by settling a third party's title claim rather than defending the purchaser's title. The seller breached the implied covenant of good faith in so doing. 172 Wn.2d at 280-81. As this Court observed, "the promise that a grantor will defend against all

other claims to title must mean something more than that the grantor will do nothing but concede such claims." *Id.* at 280. It is *no different* where the parties agree to cooperate in securing GM's approval for Jet's sale, but the Johnsons refused to appeal GM's arbitrary disapproval when only they could take that appeal, there were solid grounds for it, and such an appeal would not cost them anything.

Division I's truncated good faith analysis, both as to the contractual and implied good faith covenants, merits this Court's review. RAP 13.4(b)(1).

(2) Questions of Fact Were Present as to Whether the Johnsons Failed to Act in Good Faith to Obtain GM's Approval of the Deal

Ultimately, Division I's opinion misapplies good faith in the contract setting. Op. 8-13. Good faith is generally a *question of fact. See e.g., Sumner Plains 84, LLC v. Wakefield*, ___ Wn. App. 2d ___, 2022 WL 3043543 (2022) at *7-8 (reversing summary judgment); *Somarakis v. U.S. Nat'l Bank Ass'n*, 21 Wn. App. 2d 1008, 2022 WL 601882 (2022) at *9

(same).

It was a question of fact as to whether the Johnsons acted in bad faith here by not taking the minimal step of appealing GM's disapproval of the sale to DOL, as Larson requested. It was not because of *cost*. Larson covered that. It was not because of any difficulty in appealing. A letter to DOL was straightforward. It was not because a petition to DOL was baseless. Larson's counsel offered numerous legal arguments as to why a petition was legitimate and likely to succeed, CP 106, 112-14, arguments with which the Johnsons' real estate broker, Mark Johnson, agreed. CP 290-92.

The Johnsons failed to take the necessary steps, mandated by the parties' express contractual performance undertakings and the implied covenant of good faith and fair dealing, to secure GM's approval of Jet's sale to Larson. The Johnsons affirmatively agreed to "provide necessary documentation and information requested by [Larson] to facilitate completion of a new dealer sales and service

application to General Motors." CP 77. They agreed as well to "perform any [sic] all acts reasonably necessary to carry out the terms of [the APA]." CP 84. Washington law contemplates that manufacturer approval for a dealership sale must be secured. RCW 46.96.200 (*see* Appendix).[12] Division I agreed that this is so. Op. 8 n.2.

The Larson-Johnsons agreements acknowledged GM's

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[12] The Legislature fully appreciated the undue power of automobile manufacturers in their relationship with dealers:

> The legislature finds that there is a substantial disparity in bargaining power between automobile manufacturers and their dealers, and that in order to promote the public interest and the public welfare, and in the exercise of its police power, it is necessary to regulate the relationship between motor vehicle dealers and motor vehicle manufacturers, importers, distributors, and their representatives doing business in this state, not only for the protection of dealers but also for the benefit for the public in assuring the continued availability and servicing of automobiles sold to the public.

RCW 46.96.010. And it certainly did not help here where the Johnsons chose to roll over when GM wrongfully denied approval of Jet's sale to Larson.

approval authority. That authority, by statute, was subject to appeal, as the parties knew. Both parties agreed to perform *all* acts reasonably necessary to carry out the APA's terms. ¶ 5.3 of the APA mandated that the parties would cooperate to secure third party consent to the deal. That contemplated challenging GM's improper withholding of its approval of the transaction, if necessary, where the Johnsons were the *only* party with standing to appeal.

Although questions of fact were present as to the Johnsons' cooperating in securing GM's approval they were contractually bound to secure, Division I's opinion simply ignores those contrary facts in ruling as a matter of law that "reasonable best efforts" cannot be read to include an appeal to DOL. Op. 10, 12. Division I's conclusion begs the central question of how *Larson* could protect itself from GM's arbitrary denial when only *the Johnsons* could appeal to DOL and they obstinately refused to do so. Such an appeal did not require serious exertion on the Johnsons' part – the appeal was

drafted, such a petition was well-grounded in fact and law as attorney King's April 16, 2021 letter to the Johnsons' counsel detailed. CP 112-14.[13] Thus, there was a *reasonable* basis for petitioning DOL regarding GM's improper withholding of its approval for the deal. And Larson agreed to pay for the appeal. CP 107.[14]

Taking the facts on good faith in a light most favorable to

[13] Not only did King so opine, CP 108, but Mark Johnson opined that GM "stumbled a bit" and may have done so intentionally. CP 290. He thought that Larson likely provided GM all the necessary documents for its decision, despite GM's contrary position. CP 291.

[14] Division I's opinion recites that the Johnsons offered to take some steps in light of GM's rejection of the sale, op. 3, but those steps were hardly the cooperation the parties' agreements or the implied good faith covenant required. The Johnsons would only agree to extend the closing deadline to May 1, 2021, a meaningless offer because such a short extension would clearly not allow sufficient time for their RCW 46.96 petition to be heard by DOL. They denied Larson's reasonable requests to extend the deadline to allow DOL to make a decision. CP 106-07. Moreover, the Johnsons conditioned their pursuit of the statutory administrative process on Larson's release of any future litigation, something *nowhere* permitted by the parties' agreements. These are all the facts, however, for the trier of fact.

Larson as the nonmoving party, *Ranger Ins. Co. v. Pierce Cnty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008), clear questions of fact as to whether the Johnsons fully cooperated with Larson to secure GM's approval of the sale.

Under the specific cooperation provisions of the APA and REPSA, and under the implied covenant of good faith and fair dealing, the Johnsons had a duty to Larson to challenge GM's disapproval of Jet's sale. That duty to "secure third party consent" included the obligation to at least appeal GM's wrongful denial of approval where RCW 46.96.040 contemplates an administrative appeal, and *only* the Johnsons could file it, as they admitted. CP 12 ("Only the selling dealer may avail itself of this petition procedure."). As King's April 16, 2021 opinion letter and Mark Johnson's March 24, 2021 email indicated, CP 112-14, 290-92, there were ample good faith grounds for such an appeal. And Larson made such an appeal easy for the Johnsons by drafting the appeal petition and agreeing to pay their expenses associated with it. The

Johnsons' bad faith failure to fulfill their obligation can only be explained by their desire to torpedo the deal in favor of a buyer or buyers who would pay them more. A fact question existed on the Larson's good faith.

Not only is review merited under RAP 13.4(b)(1)-(2), but this case implicates RAP 13.4(b)(4) as well. The case law on RCW 46.96 is sparse. The public policy behind the statute as articulated in RCW 46.96.010 indicates the public interest in addressing the role of automobile manufacturers in dealership sales. Division I's truncated sense of a selling auto dealership's good faith obligation to secure manufacturer approval will have repercussions in every sale of an auto dealership in Washington. Review is merited.

F. CONCLUSION

For the reasons enumerated herein, this Court should grant review and reverse the trial court's summary judgment on breach of contract in the Johnsons' favor.

This document contains 4,439 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 7th day of September, 2022.

Respectfully submitted,

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APPENDIX

West's Revised Code of Washington Annotated
Title 46. Motor Vehicles (Refs & Annos)
Chapter 46.96. Manufacturers' and Dealers' Franchise Agreements (Refs & Annos)

West's RCWA 46.96.010

46.96.010. Legislative findings

Currentness

The legislature finds and declares that the distribution and sale of motor vehicles in this state vitally affect the general economy of the state and the public interest and public welfare, that provision for warranty service to motor vehicles is of substantial concern to the people of this state, that the maintenance of fair competition among dealers and others is in the public interest, and that the maintenance of strong and sound dealerships is essential to provide continuing and necessary reliable services to the consuming public in this state and to provide stable employment to the citizens of this state. The legislature further finds that there is a substantial disparity in bargaining power between automobile manufacturers and their dealers, and that in order to promote the public interest and the public welfare, and in the exercise of its police power, it is necessary to regulate the relationship between motor vehicle dealers and motor vehicle manufacturers, importers, distributors, and their representatives doing business in this state, not only for the protection of dealers but also for the benefit for the public in assuring the continued availability and servicing of automobiles sold to the public.

The legislature recognizes it is in the best interest for manufacturers and dealers of motor vehicles to conduct business with each other in a fair, efficient, and competitive manner. The legislature declares the public interest is best served by dealers being assured of the ability to manage their business enterprises under a contractual obligation with manufacturers where dealers do not experience unreasonable interference and are assured of the ability to transfer ownership of their business without undue constraints. It is the intent of the legislature to impose a regulatory scheme and to regulate competition in the motor vehicle industry to the extent necessary to balance fairness and efficiency. These actions will permit motor vehicle dealers to better serve consumers and allow dealers to devote their best competitive efforts and resources to the sale and services of the manufacturer's products to consumers.

Credits
[1989 c 415 § 1.]

Notes of Decisions (1)

West's RCWA 46.96.010, WA ST 46.96.010
Current with all effective legislation of the 2021 Regular Session of the Washington Legislature.

End of Document

West's Revised Code of Washington Annotated
Title 46. Motor Vehicles (Refs & Annos)
Chapter 46.96. Manufacturers' and Dealers' Franchise Agreements (Refs & Annos)

West's RCWA 46.96.200

46.96.200. Sale, transfer, or exchange of franchise

Effective: June 10, 2010
Currentness

(1) Notwithstanding the terms of a franchise, a manufacturer shall not withhold consent to the sale, transfer, or exchange of a franchise to a qualified buyer who meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer who does not already hold a franchise with the manufacturer or is capable of being licensed as a new motor vehicle dealer in the state of Washington. A decision or determination made by the administrative law judge as to whether a qualified buyer is capable of being licensed as a new motor vehicle dealer in the state of Washington is not conclusive or determinative of any ultimate determination made by the department of licensing as to the buyer's qualification for a motor vehicle dealer license. A manufacturer's failure to respond in writing to a request for consent under this subsection within sixty days after receipt of a written request on the forms, if any, generally used by the manufacturer containing the information and reasonable promises required by a manufacturer is deemed to be consent to the request. A manufacturer may request, and, if so requested, the applicant for a franchise (a) shall promptly provide such personal and financial information as is reasonably necessary to determine whether the sale, transfer, or exchange should be approved, and (b) shall agree to be bound by all reasonable terms and conditions of the franchise.

(2) If a manufacturer refuses to approve the sale, transfer, or exchange of a franchise, the manufacturer shall serve written notice on the applicant, the transferring, selling, or exchanging new motor vehicle dealer, and the department of its refusal to approve the transfer of the franchise no later than sixty days after the date the manufacturer receives the written request from the new motor vehicle dealer. If the manufacturer has requested personal or financial information from the applicant under subsection (1) of this section, the notice shall be served not later than sixty days after the receipt of all of such documents. Service of all notices under this section shall be made by personal service or by certified mail, return receipt requested.

(3) The notice in subsection (2) of this section shall state the specific grounds for the refusal to approve the sale, transfer, or exchange of the franchise.

(4) Within twenty days after receipt of the notice of refusal to approve the sale, transfer, or exchange of the franchise by the transferring new motor vehicle dealer, the new motor vehicle dealer may file a petition with the department to protest the refusal to approve the sale, transfer, or exchange. The petition shall contain a short statement setting forth the reasons for the dealer's protest. Upon the filing of a protest and the receipt of the filing fee, the department shall promptly notify the manufacturer that a timely protest has been filed, and the department shall arrange for a hearing with an administrative law judge as the presiding officer to determine if the manufacturer unreasonably withheld consent to the sale, transfer, or exchange of the franchise.

(5) The administrative law judge shall conduct a hearing and render a final decision as expeditiously as possible, but in any event not later than one hundred twenty days after a protest is filed. Only the selling, transferring, or exchanging new motor vehicle dealer and the manufacturer may be parties to the hearing.

(6) The administrative law judge shall conduct any hearing as provided in RCW 46.96.050(2), and all hearing costs shall be borne as provided in that subsection. Only the manufacturer and the selling, transferring, or exchanging new motor vehicle dealer may appeal the final order of the administrative law judge as provided in RCW 46.96.050(3).

(7) This section and RCW 46.96.030 through 46.96.110 apply to all franchises and contracts existing on July 23, 1989, between manufacturers and new motor vehicle dealers as well as to all future franchises and contracts between manufacturers and new motor vehicle dealers.

(8) RCW 46.96.140 through 46.96.190 apply to all franchises and contracts existing on October 1, 1994, between manufacturers and new motor vehicle dealers as well as to all future franchises and contracts between manufacturers and new motor vehicle dealers.

Credits

[2010 c 178 § 7, eff. June 10, 2010; 1994 c 274 § 7; 1989 c 415 § 18. Formerly RCW 46.96.120.]

Notes of Decisions (2)

West's RCWA 46.96.200, WA ST 46.96.200
Current with all effective legislation of the 2021 Regular Session of the Washington Legislature.

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FILED
8/8/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

LARSON MOTORS, INC. and RJ 35700, LLC, Appellant, v. JET CHEVROLET, INC., DAN JOHNSON, and JIM JOHNSON, Respondent.	No. 83124-1-I UNPUBLISHED OPINION

CHUNG, J. — This matter between Larson Motors (Larson) and Jet Chevrolet (Jet) arises out of the failed sale of an auto dealership. In 2020, Larson contracted with Jet to purchase its business assets and real property. The transaction fell through after General Motors denied Larson's application for a dealer license. Larson sued for breach of contract and breach of the duty of good faith and fair dealing. The trial court granted Jet's motion for summary judgment. On appeal, Larson challenges the grant of summary judgment, the denial of its motion for a continuance under CR 56(f), and the trial court's award of attorney fees to Jet, which was based on contract language providing for attorney fees in arbitration.

We affirm the trial court's summary dismissal of Larson's breach of contract claims and the denial of the CR 56(f) motion, but reverse the award of attorney fees.

FACTS

This dispute arises from a failed business transaction. In October 2020, Rob Larson of Larson Motors entered an agreement with Jim and Dan Johnson, owners of Jet Chevrolet, for the purchase of an existing automobile dealership. The parties executed two contracts—an Asset Purchase Agreement (APA) for the sale of the dealership assets and a Real Estate Purchase and Sale Agreement (REPSA) for the sale of the real property. Broadly, the contracts contained covenants that the parties would: (1) fully cooperate with one another and use their "reasonable best efforts" to satisfy the conditions of the agreement; (2) endeavor to procure all necessary third-party consents; and (3) refrain from discussing the sale or any information regarding a possible sale with any outside party.

A condition of the sale was that "[Larson] shall be approved and appointed by General Motors as a franchised Chevrolet dealer at [Jet's] Dealership location in Federal Way, Washington and a standard Chevrolet Dealer Sales and Service Agreement shall be approved and appointed by General Motors making [Larson] a franchised Chevrolet dealer." The contracts assured that Jet would submit written notice of the transaction to GM and would authorize GM to communicate directly with Larson regarding the transaction. Further, the contracts stated that Jet would provide any necessary documentation requested for Larson to complete its new dealer sales and service application.

The parties contracted to close on the sale "no later than December 20, 2020." However, the APA specifically anticipated having to extend the closing

date in order to wait for GM's approval. Larson would have a right to extend the closing date unless GM informed the parties it would not approve Larson's application:

> [I]n the event Closing cannot occur by on or before December 20, 2020 because Purchaser has not received General Motors' commitment to issue it a standard Dealer Sales and Service Agreement on terms subject to the discretion of Purchaser in Purchaser's sole discretion, the Closing date of December 20, 2020 is extended thirty (30) days unless General Motors has informed Purchaser it will not grant it a sales and service agreement.

Otherwise, the contract provided that either party had the right to terminate the agreement if the sale were not able to close on time.

Jet notified GM of the proposed sale to Larson shortly after the contracts were signed. For various reasons, including Larson's loss of a key employee who was responsible for gathering the necessary documentation, GM did not receive a completed application from Larson until January 27, 2021—more than a month after the original closing date. The parties extended the closing date multiple times while Larson worked through GM's application process. Jet's owners contacted various partners at GM in an attempt to expedite or assist in the review so that the transaction could move forward.

GM notified Jet on March 19, 2021, that it had rejected Larson's dealer application. It provided Larson separate written notification of the decision on March 23. Jet and Larson sent a letter to GM asking it to reconsider its decision, but GM refused. Jet's owner also called personally to ask GM to reconsider.

Larson, however, demanded that Jet appeal GM's decision to the State Department of Licensing and extend the closing date indefinitely, pending the

resolution of the appeal. Larson offered to pay the full purchase price if Jet would agree to close the transaction without GM's authorization. Larson also offered to pay Jet's legal fees for, and indemnify it in, the proposed administrative hearing or any future litigation against GM. Jet rejected these terms. Jet offered to file the administrative appeal only if Larson agreed to pay its attorney fees to date and release future claims against Jet and its owners. In addition, Jet offered to extend the closing several additional weeks, until May 1, 2021. Larson, unsatisfied with these terms, rejected the proposals and terminated the contract.

The APA and REPSA each included an enforcement provision, which described dispute resolution procedures and payment of costs and attorney fees for mediation and arbitration of disputes. However, in lieu of those procedures, Larson filed a complaint in King County Superior Court on April 15, 2021. Jet did not object to Larson's failure to seek mediation or arbitration. Instead, it responded to Larson's complaint and immediately moved for summary judgment dismissal. Larson, in turn, moved for a CR 56(f) continuance to conduct further discovery. Specifically, Larson requested discovery from Jet's real estate broker, whom it believed had withheld copies of his text messages soliciting buyers for Jet. The court heard oral argument on June 18, and granted Larson a three-month continuance.

A second summary judgment hearing took place on September 10, 2021. Larson expressed continued frustration with Jet's insistence on moving for early summary judgment rather than continuing the discovery process; however, Jet's counsel did not request a second continuance.

After hearing oral argument, the trial court granted Jet's motion for summary judgment and awarded Jet attorney fees. Larson appeals.

ANALYSIS

I. Denial of CR 56(f) Continuance

As a preliminary matter, Larson argues that the trial court abused its discretion by not continuing the summary judgment hearing a second time to allow Larson to engage in further discovery. In spite of the initial three-month continuance, Larson argued that summary judgment was still premature, yet it did not request another continuance. Instead, at the summary judgment hearing, the court noted there had already been two rounds of briefing and that she needed "to decide it based on the pleadings that have already been submitted unless there's a compelling reason to grant another continuance," and later reiterated it was her obligation "to decide the case based on the record that's before me at the present time, not things that come in later." Subsequently, the court granted summary judgment, without allowing a continuance or submission of additional evidence.

We review a trial court's decision on a request to continue a summary judgment hearing for abuse of discretion. Bldg. Indus. Ass'n of Washington v. McCarthy, 152 Wn. App. 720, 743, 218 P.3d 196 (2009). A trial court abuses its discretion if it bases its decision on untenable or unreasonable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A trial court may continue a summary judgment hearing if the nonmoving party shows a need for additional time to obtain additional affidavits, take

depositions, or conduct discovery. CR 56(f); Winston v. Dep't of Corr., 130 Wn. App. 61, 64-65, 121 P.3d 1201 (2005). "The trial court may deny a motion for a continuance when (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact." Butler v. Joy, 116 Wn. App. 291, 299, 65 P.3d 671 (2003) (citing Tellevik v. 31641 W. Rutherford St., 120 Wn.2d 68, 90, 838 P.2d 111, 845 P.2d 1325 (1992)). Denial is proper if based on any one of these factors. Pelton v. Tri-State Mem'l Hosp., Inc., 66 Wn. App. 350, 356, 831 P.2d 1147 (1992).

At the September 2021 hearing, Larson's counsel noted that the discovery cutoff was not until February 2022, and suggested Jet's broker was "intentionally not providing documents," and Larson did not "have the ability to get complete documents." Yet Larson did not move for a second continuance. When a party has not clearly requested a continuance, the trial court does not err in deciding a summary judgment motion based on the evidence before it. Bldg. Indus. Ass'n of Wash., 152 Wn. App. at 742; see also Turner v. Kohler, 54 Wn. App. 688, 692-94, 775 P.2d 474 (1989) (affirming denial of a continuance where the party's summary judgment affidavits did not explicitly request a continuance, reference CR 56(f), or state the reason for delay); Burmeister v. State Farm Ins. Co., 92 Wn. App. 359, 368 n.6, 966 P.2d 921 (1998) ("an oral request for a continuance does not appear to comply with the requirement in CR 56(f) that such a request be made by affidavit"). Moreover, while CR 56(f) allows a court to order a

continuance "[s]hould it appear from the affidavits of a party opposing the motion that . . . the party cannot present by affidavit facts essential to justify the party's opposition," here, Larson did not submit any affidavits regarding the need for a second continuance.[1]

Larson not only did not provide a reason for its delay in obtaining the discovery sought, it did not explain how additional discovery would lead to new evidence that would raise an issue of material fact. While the record shows that at his deposition, Jet's broker indicated it was "possible" he received text messages regarding the Jet-Larson deal that he had not searched for on his phone, his counsel later confirmed that he had checked and had "none related to Jet Chevrolet." Speculation that there were additional relevant texts was insufficient to support a continuance. There is also no evidence that Larson had sought to depose the people it later claimed in its brief on appeal that it needed to depose (Axel Johnson, Russell Lloyd, or Court Pixton).

Under the circumstances, the trial court did not abuse its discretion in failing to grant a continuance that Larson had not properly requested and for which there was no factual or legal support.

II. Breach of Contract Claims

Larson appeals the trial court's grant of summary judgment dismissing its claims against Jet. We review rulings on summary judgment de novo. Am.

[1] In her affidavit in support of Larson's opposition to the motion for summary judgment, Larson's attorney stated only, "Plaintiffs still need to depose Mr. Dinsmore regarding the documents he produced in response to their subpoena." There was no information about any efforts to seek his deposition or explanations for the delay in doing so.

Legion Post No. 149 v. Dep't of Health, 164 Wn.2d 570, 584, 192 P.3d 306 (2008). Summary judgment is appropriate where there is no genuine issue as to any material fact—if from all the evidence, reasonable persons could reach but one conclusion. CR 56(c); Wojcik v. Chrysler Corp., 50 Wn. App. 849, 853, 751 P.2d 854 (1988). If so, then the moving party is entitled to judgment as a matter of law. Meyers v. Ferndale Sch. Dist., 197 Wn.2d 281, 287, 481 P.3d 1084 (2021). The court must view the facts and reasonable inferences in the light most favorable to the nonmoving party. Id.

Larson's complaint stated breach of contract as the sole cause of action. This claim was based on allegations that Jet: (1) breached its contractual duty to cooperate in gaining GM's consent to the sale; (2) violated the implicit duty of good faith and fair dealing; and (3) disregarded the contract's exclusivity provision by negotiating with and/or seeking alternative buyers while still under contract with Larson. We address these arguments in turn.

A. Cooperation to Effectuate the Sale

Larson contends that the cooperation language of the APA obligated Jet to appeal GM's rejection of Larson's dealer application, regardless of how long the appeal process may have taken.[2] "Where the facts are undisputed, such as where the parties agree that the contract language controls and there is no extrinsic evidence to be presented," contract interpretation is a matter of law.

[2] By statute, only the current dealer has standing to appeal GM's decision. RCW 46.96.200. In a separate action, the federal court recently dismissed Larson's claim that it was a third-party beneficiary of Jet's dealer contract with GM. See Larson Motors v. General Motors, No. C21-1367 (W.D. Wash. March 30, 2022), 2022 WL 952182.

Mutual of Enumclaw Ins. Co. v. USF Ins. Co., 164 Wn.2d 411 n.9, 191 P.3d 866 (2008). "An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective." GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 126, 140, 317 P.3d 1074 (2014).

Section 5.1 of the APA required each party to use "reasonable best efforts to cause all conditions to this Agreement and the transactions described in this Agreement to be satisfied as promptly as possible and to obtain all consents and approvals necessary for the due and punctual performance of this Agreement." More specifically, Section 5.13 prescribed these actions by Jet:

> Seller will (i) submit to General Motors written notice of the proposed transaction authorizing General Motors to discuss with Purchaser all relevant matters pertinent to completing this transaction as contemplated by this Agreement; and (ii) provide necessary documentation and information requested by Purchaser to facilitate completion of a new dealer sales and service application to General Motors.

It was undisputed that Jet notified GM of its intent to sell the dealership. Further, Jet agreed to extend the closing date multiple times, even though the delay was due to Larson's failure to timely provide the necessary documentation for the dealer application and the extensions required Jet to pay additional financing fees.

Larson's proffered interpretation of the contract—that Jet was required to appeal GM's decision—ignores the plain language of Section 6.1, which lays out the circumstances under which the parties may terminate the agreement. Specifically, Section 6.1(g) states that either party would be entitled to terminate

the agreement "if the Closing shall not have occurred on or before December 20, 2020, or such subsequent date as agreed by the Parties in writing." Recognizing that GM's approval was a necessary condition to the sale, Section 6.1(g) further provides:

> [I]n the event Closing cannot occur by on or before December 20, 2020 because Purchaser has not received General Motors' commitment to issue it a standard Dealer Sales and Service Agreement ... the Closing date of December 20, 2020 is extended thirty (30) days unless General Motors has informed Purchaser it will not grant it a sales and service agreement.

(Emphasis added.) Thus, a plain language reading of this termination language anticipates two possibilities: (1) if the parties had not received a commitment from GM by December 20—i.e., they had not yet received a response—the closing date would automatically be extended, but (2) if the parties had received a negative response from GM by December 20, then the closing date would not automatically be extended. In the second situation, if the closing date were not extended, then under Section 6.1(g), either party would be allowed to terminate the APA.

Larson's proposed interpretation of the contract terms would functionally eliminate Jet's right to terminate for lack of GM's approval. To give effect to both Section 5.1's "reasonable best efforts" language and Section 6.1(g)'s language providing a right to terminate if GM denied approval, "reasonable best efforts" cannot be read to require Jet to appeal GM's denial.

B. Duty of Good Faith and Fair Dealing

Larson next argues that Jet's refusal to pursue the administrative appeal violates the duty of good faith and fair dealing. The parties dispute the scope of

this implied duty. Larson argues that the duty of good faith transcends the specific contract provisions and requires Jet to take all actions necessary to effectuate the contract, while Jet argues that the duty can apply only in relation to specific contract terms.

Every contract includes an implied duty of good faith and fair dealing. Badgett v. Sec. State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). This implicit duty "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." Id. Direct interference with or failure to cooperate in the other party's performance may violate the duty of good faith. Edmonson v. Popchoi, 172 Wn.2d 272, 280, 256 P.3d 1223 (2011).

The duty of good faith "requires only that the parties perform in good faith the obligations imposed by their agreement." Badgett, 116 Wn.2d at 569. It neither requires that a party accept material changes to, nor injects substantive terms into, the agreement. Id. "The duty of good faith requires 'faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.' " Edmonson, 172 Wn.2d at 280 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981)). Further, "[t]he implied duty of good faith is derivative, in that it applies to the performance of specific contract obligations. If there is no contractual duty, there is nothing that must be performed in good faith." Johnson v. Yousoofian, 84 Wn. App. 755, 762, 930 P.2d 921 (1996) (citations omitted).

In addition to arguing generally that the good faith obligation is broad, Larson appears to suggest the relevant contract terms that require this duty are

the obligation in Section 9.7 to "perform any [sic] all acts reasonably necessary to carry out the terms" of the APA. But not only is the contract quite specific as to what those obligations are—such as the obligation to provide necessary documentation and information to facilitate completion of a new dealer sales and service application to GM—the contract also already includes a "reasonable best efforts" clause.

To the extent that there is a duty of good faith regarding the performance of the "reasonable best efforts" provision, there is no issue of material fact as to whether Jet satisfied this duty. Washington law requires manufacturer approval for a dealership sale. RCW 46.96.200. Jet provided GM with notice of the sale and agreed to multiple closing extensions to allow Larson to complete the application. Jet's owners repeatedly reached out to their business contacts at GM, first in an effort to move the review process along, and then asking them to reconsider the denial. GM declined to do so, and by the terms of the contract itself, once GM denied approval, either party could terminate the APA. Thus, Jet's failure to agree to petition the Department of Licensing and extend the closing date—in other words, to negotiate new terms—does not constitute evidence of bad faith with regard to the original contract.

Finally, Larson argues that Jet acted in bad faith to torpedo the sale because Jet's owners were unhappy with the original valuation of the property and believed they could get a better price from another buyer. This speculation as to Jet's possible motive to breach ignores the fact that the parties entered into a contract only after Larson increased its initial offer to a mutually agreeable

sales price. Larson cannot rely on such conclusory allegations and speculative statements to defeat summary judgment. Boyd v. Sunflower Props., LLC, 197 Wn. App. 137, 142-43, 389 P.3d 626 (2016). While bad faith interference in one party's ability to perform may breach the implied duty of good faith, Edmonson, 172 Wn.2d at 280, here, Jet did not interfere with Larson's dealer approval process.

C. Breach of Exclusivity Provision

Larson further alleges that Jet breached the APA's and REPSA's exclusivity requirements and solicited alternative buyers while under contract with Larson. At the hearing, Larson relied on the following: (1) a sworn declaration by Larson's deal counsel stating that Larson "had reason to believe" Axel Johnson, the son of one of the owners, was looking for buyers, based on inadmissible hearsay; (2) a statement by another attorney who declined to represent Jet in the sale due to a potential conflict of interest to another client who was interested in purchasing the dealership; (3) an email from Jet to GM intimating that they had another buyer lined up; and (4) a series of communications between Jet's broker and another potential buyer after the Jet-Larson deal fell through, ostensibly discussing a new deal.

As the trial court noted, there was some evidence that Jet had conversations with another potential buyer both before Jet entered into an agreement with Larson and shortly after Larson terminated the contract. However, not only did such conversations not occur while the contract was in effect, but there was no evidence that any such actions were a proximate cause

of the contract termination, or of Larson's alleged damages. A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. NW Ind. Forest Mfrs. v. Dep't of Labor & Indus., 78 Wn. App. 707, 712, 899 P.2d 6 (1995). Because Larson failed to present any evidence that Jet's alleged breach of exclusivity was the proximate cause of the contract termination and any resulting damages, Jet was entitled to judgment as a matter of law.

III. Attorney Fees

Larson also challenges the trial court's fee award as unsupported by the terms of the contract. A trial court may grant attorney fees only if the request is based on a statute, a contract, or a recognized ground in equity. Gander v. Yeager, 167 Wn. App. 638, 645, 282 P.3d 1199 (2012). We review the trial court's decision to award fees de novo. Id.

The parties present the issue as whether, by waiving the right to arbitrate, the parties also waived the right to fees. Yet both ignore the plain language of the agreements, which both provide that all disputes should first be submitted to mediation, if reasonably possible, and at that stage, "[e]ach party shall pay its attorney fees and costs for the mediation and one-half of the mediator's fees and costs." The contracts further state that if mediation "reaches such an impasse, said dispute shall be determined by binding arbitration in accordance with the laws of the state of Washington." Regarding costs and fees in arbitration, the APA provided:

> Each party shall pay one-half of the arbitrator's fees and costs, unless one party is ruled the prevailing party by the arbitrator, in

> which case the arbitrator, subsequent to the arbitration itself, may award the prevailing party the arbitrator's fees and costs and the prevailing party's attorney fees and costs with the fees and costs to be determined subsequent to the arbitration itself.

(Emphasis added.) The REPSA contained a similar, but not identical, provision:

> Each party shall pay one-half (1/2) of the arbitrator's fees and costs, unless one party is ruled the prevailing party by the arbitrator, in which case the arbitrator, subsequent to the arbitration itself, shall award the prevailing party the arbitrator's fees and costs and the prevailing party's attorney fees and costs with the fees and costs to be determined subsequent to the arbitration itself.

(Emphasis added.) The trial court held that the REPSA's language mandated an award of fees to the prevailing party, even though the parties had waived their rights to arbitration.[3]

The contracts anticipate both mediation and arbitration and address attorney fees differently for each. This distinction suggests that the right to attorney fees is specific to the type of enforcement proceeding and, thus, that the right to attorney fees and costs applies solely to arbitration—not to mediation or litigation in a court. To grant Jet attorney fees would be to rewrite the contract to provide a benefit for which the parties did not negotiate. Therefore, the trial court erred by awarding Jet fees.

Jet also requests its fees on appeal. RAP 18.1(a) allows an award "[i]f applicable law grants to a party the right to recover reasonable attorney fees."

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[3] The contractual right to arbitration may be waived through a party's conduct if not timely invoked. Shepler Const., Inc. v. Leonard, 175 Wn. App. 239, 248, 306 P.3d 988 (2013). Though Jet relies on Shepler to support its argument for fees, the Shepler court did not address the issue of whether an arbitration clause's fee-shifting provision should apply when the parties waived arbitration; rather, the court simply awarded fees without analysis. Thus, Shepler does not provide a basis to disregard the plain language of the contract here.

Because the contract does not provide for attorney fees in litigation at trial or on appeal, there is also no basis for a fee award on appeal.

We affirm the trial court's denial of a CR 56(f) continuance, affirm the summary judgment dismissal, reverse the award of fees below, and deny Jet's request for attorney fees on appeal.

Cheung, J.

Smith, A.C.J. Mann, J.

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Petition for Review*** Court of Appeals Division I Cause No. 83124-1 to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 7, 2022 at Seattle, Washington.

/s/ Brad Roberts
Brad Roberts, Legal Assistant
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