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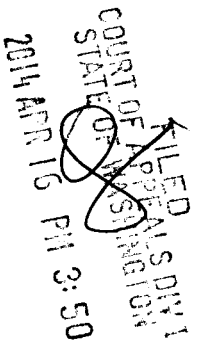


No. 68374-8-I

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

GMAC, aka ALLY FINANCIAL, INC. a Delaware corporation,

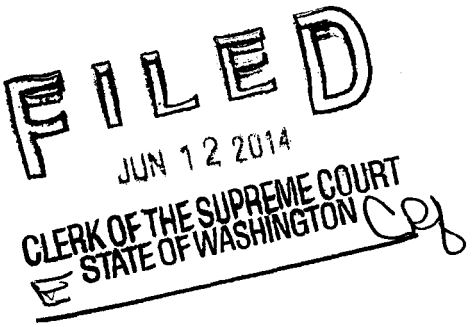
Plaintiff/Petitioner,

vs.

EVERETT CHEVROLET, INC. a Delaware corporation,
JOHN REGGANS, and JANE DOE REGGANS

Defendants/Respondents.

DEFENDANTS EVERETT CHEVROLET, INC. AND REGGANS' PETITION FOR REVIEW



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I. IDENTITY OF PETITIONER

Petitioners Everett Chevrolet, Inc., and John and Carmenlydia Reggans (hereinafter collectively referred to as "ECI"), defendants at the trial court and respondents at the Court of Appeals, ask this Court to accept review of the decisions identified below.

II. CITATION TO COURT OF APPEALS DECISION

ECI asks this Court to accept review of (1) the decision by Division One of the Court of Appeals, *GMAC v. Everett Chevrolet, Inc.*, 317 P.3d 1074 (2014) (Cause No. 68374-8-1 January 27, 2014), which reversed the Snohomish County Superior Court's order denying GMAC's motion for summary judgment dismissal of ECI's bad faith contract and tort counterclaims; and (2) Division One's Order Denying ECI's Motion for Reconsideration entered March 17, 2014.

III. ISSUES PRESENTED FOR REVIEW

1. Whether this Court should reverse Division One in light of *Rekhter v. DSHS*, 2014 WL 1321008 (Wash. April 3, 2014) acknowledging that a claim for the breach of the duty of good faith and fair dealing may be sustained even where there is no breach of a specific contractual term for "were it otherwise, the covenant [of good faith and fair dealing] would have no practical meaning." Citing with approval *Carina Developers, Inc. v. Marathon Dev. Cal., Inc.*, 2 Cal.4th 342, 373,

826 P.2d 710 (1992) and *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 766 (7th Cir. 2010).

2. Whether this Court should reverse Division One for wrongly applying *Allied Sheet Metal Fabricators Inc. v. Peoples National Bank*, 10 Wash. App. 530 (1974) and *Badgett v. Security State Bank*, 116 Wn.2d 563 (1991) to modern day automobile dealership wholesale flooring processes.

3. Whether this Court should reverse Division One where it erroneously concludes there is no difference in application between a demand note, a demand obligation or demand language.

4. Whether this Court should reverse Division One where it expands a lender's contractual protection under a demand note/obligation to a complete bar to tort claims contrary to this Court's decision in *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 393 (2010) (no bar to recovery in tort "where misconduct implicates tort duty").

5. Whether this Court should reverse Division One where it seems to substitute its judgment for the judgment of the trial court on issues of credibility where the trial court had the opportunity to hear live testimony over a three week evidentiary hearing.

IV. STATEMENT OF THE CASE

The interlocutory appeal to Division One was premised on GMAC's argument that its standard Wholesale Security Agreement, which underpins the operations of virtually every GM dealer that obtains floor plan financing through GMAC, is payable in full on demand at any time, for any reason or for no reason at all — even in the face of fraud, misrepresentation, tortious interference or otherwise — although no court has reached that conclusion. Having repeatedly made and lost the "demand note" argument in courts across the country, GMAC asked Division One to *assume* the WSA is, in fact, a demand note, even though this assumption requires the Court to negate the operative payment and default terms of the contract, and ignore the fact that GMAC never treated the WSA as a demand note in its course of dealings. GMAC conspicuously failed to bring to Division One's attention the fact that it consistently lost this "demand note" argument in other dealer cases involving virtually identical Wholesale Security Agreements, including a case decided by the United States Court of Appeals for the Third Circuit. *Mente Chevrolet Oldsmobile, Inc. v. GMAC Inc. (now known as Ally Financial Inc.)*, 451 F. App'x 214 (3d Cir. 2011). Research shows that no court has accepted GMAC's tortured reading of the WSA, or found that

the WSA is payable on demand irrespective of the existence of a bone fide default.

To the contrary, every court that has addressed the issue has found that there are inherent ambiguities in the WSA that require a finder of fact to determine under what conditions GMAC may demand immediate payment. Can GMAC accelerate all outstanding indebtedness and demand payment in full any time, for any reason or for no reason at all? If so, then GMAC could terminate dealers across the country with abandon under identical provision of the WSA without legal recourse. For policy reasons, this Court should not allow the inclusion of magic "demand obligation" words in commercial contracts to provide lenders a way out of compliance with the covenant of good faith and fair dealing.

During ECI's long relationship with GMAC and GM, GMAC provided wholesale inventory financing (known as "floor plan" financing) for the acquisition of new and used vehicles for resale. Floor plan financing is the life blood of any GM dealership, without which it cannot operate. The master agreement that governs the wholesale financing relationship between GMAC and ECI is the WSA. (R. Ex. 3.) ECI entered into the WSA with GMAC on December 10, 1996. (R. Ex. 3.) (*See also* R. App. B at CP 82 ¶¶3-4.)

The structure of the relationship was such that (1) GM would sell vehicles to ECI, (2) GMAC would advance funds to ECI and take a security interest in the floor planned vehicles and the proceeds thereof, and (3) GM would be paid upon shipment of the vehicles to the dealership. (R. Ex. 3.) ECI was required to repay GMAC "faithfully and promptly" after each vehicle was sold to a retail customer. (R. Ex. 3.) When vehicles were sold, ECI would continue to purchase new vehicles from GM, financed through GMAC.

ECI also had a revolving line of credit with GMAC, dated October 16, 2000. (R. Ex. 8.) In 2007, GMAC increased that line from $500,000 to $800,000, to be used for ECI's working capital needs, with interest only payments at the rate set forth in the contract. (R. Ex. 8, RP Vol. I at 18:24-25, 19:21-25, 58.) The Revolving Line of Credit Agreement ("RCLA") permitted GMAC to terminate its lending obligations only upon the occurrence of an enumerated contingency, or 30 days after receipt of written notice of termination. (R. Ex. 8.)

ECI entered into a Security Agreement, dated June 15, 1999 ("Security Agreement"), which granted GMAC a security interest in its fixed assets, including its machinery, shop equipment, tools and furniture,

to further secure credit extended under the WSA and the RCLA. (R. Ex. 2.)

All of these GMAC financing agreements were form contracts drafted solely by GMAC. (R. Ex. 2-3, 6-8.)

ECI entered into these agreements and continually increased its overall indebtedness to GMAC with the understanding that the Dealerships were only obligated to make payment to GMAC within a reasonable time after the sale of a vehicle to allow time for ECI to process paperwork and collect the sales proceeds from the retail customer or its bank retail financing source. (RP Vol. XI at 107-109, Vol. XV at 18-20.) This arrangement was consistent with the parties' ongoing course of performance. (*Id.*)

Indeed, there was no specified period of time within which to make payment for the sums advanced under the WSA other than the requirement that those payments be made "faithfully and promptly" after each vehicle sale. (R. Ex. 3.)

A. The Wholesale Security Agreement

The WSA is a one-page form agreement, drafted by GMAC. (R. Ex. 3.) The operative language of the WSA provided that "as each vehicle is sold, or leased, we [the dealership] will, faithfully and promptly remit to

you [GMAC] the amount you advance or have become obligated to advance on our behalf to the manufacturer, distributor or seller, with interest at the designated rate per annum then in effect under the GMAC Wholesale Plan." (R. Ex. 3.) The WSA does not define "sale" or "faithfully and promptly."[1]

The WSA also provides for actions that may be taken by GMAC in the event of a default. "In the event of a default in payment under and according to this agreement" or other enumerated contingencies, GMAC may repossess the floor planned vehicles. (R. Ex. 3) The term "event of default" is not defined in the WSA.

The WSA also states that the dealer shall "upon demand" pay to GMAC the amounts owed under the WSA. (R. Ex. 3.) The WSA is silent as to the conditions upon which GMAC may exercise the right to demand payment or how this relates to the "faithfully and promptly" and "event of default" provisions.

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[1] When a dealer fails to remit proceeds of a vehicle sales to GMAC within a reasonable period of time following sale or lease of that vehicle, it is considered "out of trust." (RP Vol. I at 44:7-14.) There is no uniform period of time within which a dealer must remit proceeds under the WSA, nor is there a uniform definition of "out of trust." GMAC's own witnesses could not agree on what constituted the "sale date." According to Mr. Davoudpour, a GMAC Portfolio Manager, the "sale date" is deemed to occur on a date agreed upon in consultation with the dealer (RP Vol. VI at 88: 1-22). According, to Mr. Modrzejewski, a GMAC auditor, the "sale date" occurs upon approval of third party retail financing for the transaction (RP Vol. IV (3/23/09) at 73: 2-11.) According to Ms. Smith, a GMAC Operations Manager, the "sale date" occurs even if the third party retail financing is never approved and the deal is being unwound. (RP Vol. VIII at 112: 6-19).

The Security Agreement provides collateral security for Everett Chevrolet's inventory financing obligations under the WSA. (R. Ex. 2) GMAC could only take possession of the collateral covered by the Security Agreement upon the occurrence of an "event of default" or one of the enumerated contingencies. (R. Ex. 2) The term "event of default" is not defined in the Security Agreement.

Under these operative inventory financing agreements: (i) the dealer is required to "faithfully and promptly" remit proceeds to GMAC reasonably promptly after the "sale or lease" of a vehicle; (ii) the dealer's failure to "faithfully and promptly" pay within the meaning of the WSA constitutes a breach of the WSA; and (iii) unless cured, GMAC may give Notice of Default, "demand payment" and, repossess its collateral under the WSA and Security Agreement.[2] This relationship is not a pure lending relationship to which *Allied* or *Badgett* might apply. To blindly apply these decisions without regard to the complex realities of the modern day automobile industry should not be sustained.

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[2] This is precisely the manner in which GMAC interpreted the WSA, when it gave Notice of Default and Demand for Payment on December 19, 2008, alleging a purported breach of the "faithfully and promptly" requirement as the predicate for calling a default and demanding payment. (R. Ex. 83.)

B. GMAC Gives Notice of Default

On December 19, 2008, GMAC gave Notice of Default and Demand for Payment to Everett Chevrolet, alleging that it was in breach of the WSA because of a supposed failure on the part of ECI to pay for certain vehicles "upon their sale or lease" as of that date.

> You are hereby notified that Everett Chevrolet, Inc. ("Dealership") is in **default under its wholesale financing agreements** with GMAC for failure to pay GMAC $206,806.18 for vehicles upon their sale or lease.
>
> **As a result, GMAC hereby demands** that the Dealership immediately remit payment of all amounts owed to GMAC under its wholesale credit line....

(R. Ex. 83)[3] (emphasis supplied). On the basis of that alleged default, GMAC demanded payment in full of all outstanding obligations, and in short order put ECI out of business. (R. Ex. 83)

The question of whether ECI was in breach of the "faithfully and promptly" payment terms of the WSA when GMAC called a default on

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[3] It is established that the alleged payment delay was due to the local bank closing early because of a massive blizzard on December 18, 2008, before funds could be transferred before the close of business that day. (R. Ex. 105, RP Vol. X at 161-66) The next day, without an opportunity to cure, GMAC gave Notice of Default, accelerated the entire outstanding amount of all floorplan financing for sold and unsold vehicles, and demanded payment by the close of business. (R. Ex. 83.)

that basis is hotly disputed. ECI contends that it was not. ECI asserts claims for breach of contract and breach of implied covenant of good faith and fair dealing against GMAC for wrongfully calling a default under the "faithfully and promptly" terms of the WSA, and/or taking actions in bad faith to manufacture a default where none existed. (App. H.)

A three-week hearing was held on precisely this issue. Throughout that hearing, the dominant issue was whether ECI was "out of trust," i.e., whether it had failed to pay GMAC for vehicles sold when payment was due.

GMAC claimed the term "faithfully and promptly" required ECI to pay GMAC immediately upon the sale of a vehicle but GMAC granted a three-day "release period" following the sale in which to pay. (RP Vol. I at 39:1-18.) GMAC admitted that it never included the three-day payment requirement as a contract term in the WSA (RP Vol. XV at 56-57.) The evidence further showed that the "release period" varied from dealer to dealer, that the date of "sale" was negotiable, and that dealers regularly had periodic delays in payment where GMAC did not call a default under the WSA or terminate financing. (Vol. I at 52: 1-11, 127-132, 146:1-8; Vol. II at 63: 3-17; Vol. VI at 77-78, 86, 88, 96-98.) The GMAC witnesses who conducted the December 18 audit could not confirm that

the $206,806.18 for vehicle sales as of December 18 was actually due and owing when Notice of Default was given. (RP Vol. IV (3/23/09) at 99-100, 108-109, 114-116.)

In addition, ECI presented fact testimony that, for the entirety of its relationship with GMAC, it was ECI's regular practice to receive payment from the vehicle's buyer or a third-party lender providing financing for the vehicle before remitting payment to GMAC.[4]

GMAC knew how long it took for ECI to receive third-party funds with which to pay GMAC because GMAC, for many years, regularly conducted floor plan audits which included a review of when ECI received payment for the vehicles sold. (RP Vol. XI at 23:18-21) At the end of an audit, GMAC would provide ECI a list of vehicles and associated dollar amounts that were due to be paid by the dealership. (Ex. 91) No specific deadline was given. (*Id.*) When the number of delays in any audit

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[4] Mr. Reggans testified that, under applicable law in the State of Washington (the Bushing Law), any dealer contract for the purchase of a vehicle can be automatically unwound within four days of execution unless bank financing for the deal is approved. "[U]ntil we have a cashable contract it's not a sale." (RP Vol. XII at 108:13-14.) He explained that, in the State of Washington, a vehicle can be off the lot for up to 72 hours, without the customer having the obligation to purchase. (*Id.* at 109:407.) "A sale is when we have a contract that we can cash and consummate the deal." (*Id.*, at 109:12-13.) Until the deal is consummated, the obligation to remit proceeds does not arise.

exceeded the threshold that GMAC deemed satisfactory, GMAC would caution that increased interest charges could result. (*Id.*)

The GMAC witnesses confirmed that GMAC gave Notice of Default and Demand for Payment based on an alleged *default* under the WSA arising from ECI's alleged breach of its obligation to "faithfully and promptly" remit the amount owed for each vehicle upon its sale or lease. (RP Vol. XIII at 7:5-25, 8:1.) None of the GMAC witnesses identified even a single instance when GMAC demanded payment in full under the WSA in the absence of an alleged default. In fact, Michelle Smith, the GMAC Operations Manager in charge of the ECI account, testified that GMAC's "***discretion***" to limit or terminate the dealer's floor plan financing is "***tied to the dealership's compliance with the agreements***." (RP Vol. VIII at 63:19-25 (emphasis added)).

At the conclusion of the hearing, GMAC urged the court to deem the WSA a "demand note" irrespective of the fact that GMAC had given Notice of Default, as the predicate for accelerating all outstanding indebtedness and demanding payment in full. (RP Vol. XV at 36-41, 48:20-25, 49:1, 51:6-13, 55:13-25, 56-57, 96-100.)

In so doing, GMAC asked the trial court to ignore the specific terms governing payment and default. (RP Vol. XV 55:13-25, 56-57.)

GMAC also asked the court to ignore the three weeks of testimony and all evidence of GMAC bad faith efforts to manufacture a default, claiming that it never needed a default in the first place.

ECI urged the trial court to consider *all* the terms of the WSA, the interplay of the "faithfully and promptly" and "default" provisions of the contract, as well as the evidence that GMAC gave Notice of Default based expressly on an alleged breach of the "faithfully and promptly" payment terms of the contract. (RP Vol. XV at 69-71.) ECI argued that GMAC had breached the WSA by wrongfully alleging a default of the "faithfully and promptly" requirement, and giving Notice of Default thereunder, when no such default existed.

Given the weight of the evidence, the trial court found that GMAC did not simply call a "demand" note—GMAC had relied on an alleged default under the WSA as the predicate for demanding payment in full, and that the alleged default had been "manufactured" by GMAC in an effort to put ECI out of business. (App. J at 12:2-4.) On this basis, the trial court found that GMAC had breached its obligations under the WSA, and violated its obligations of good faith and fair dealing, and denied GMAC's motion for replevin. (*Id.* at 21.)

On the initial appeal, Division One held it was error for the trial court to reach the merits of ECI's breach of contract claims against GMAC in the context of a replevin hearing. Division One reversed the trial court's order denying GMAC replevin and remanded the matter back to the trial court for further proceedings on the underlying merits of ECI's claims. *GMAC v. Everett Chevrolet, Inc.*, No. 63331-7-I, 2010 WL 4010113, at *1 (Wn. App. Oct. 11, 2010) (unpublished).) Division One expressly noted that it did not reach the underlying issue of whether the WSA was a "demand" note or whether the duty of good faith and fair dealing attached. *Id.* at *5n.1. Those issues were specifically left for further determination by the trial court.

On remand GMAC amended its complaint and ECI renewed its bad faith claims and asserted multiple tort claims. By motion dated November 11, 2011, GMAC moved for summary judgment dismissal of ECI's bad faith claims on the grounds that there were no disputed facts as to whether the WSA was a "demand note." As such, GMAC had no duty of good faith and fair dealing in performance of the contract. (App. D.) In support of its Motion for Summary Judgment, GMAC submitted the entire Verbatim Report of Proceedings from the earlier three week hearing before the same trial judge. (App. D.)

The voluminous record of that hearing contains conflicting testimony and other evidence as to the import of the WSA and related agreements, the meaning of their terms, and the historical practices of the parties. (RP Vol. I-XV) Based on that record, GMAC asked the trial court to find there were no disputed facts on the issue of whether the WSA should be deemed a "demand note" irrespective of substantial evidence to the contrary. GMAC offered nothing new, other than Division One's earlier replevin decision which expressly reserved these issues for determination by the trial court.

At GMAC's request, the trial court reviewed and relied upon that extensive record of trial testimony and disputed facts in rendering its decision. Among other things, the record of that hearing shows that GMAC took the position that the "relevant contract terms" are found in the related financing agreements, taken as a whole: the WSA, the amendments thereto (including the DPP amendment), the Security Agreement and the Revolving Credit Agreement. (RP Vol. XV at 36:8-11, 37:2-25.) GMAC suggested to the trial court that it should rely exclusively on the "upon demand" language in the WSA and ignore the "faithfully and promptly," "default" and "event of default" provisions of the related agreements. (*Id.* at 38-41, 56-57.) GMAC essentially asked the trial court to cherry pick the terms of the relevant contracts in

determining whether the WSA was payable on demand or upon default. (*Id.* at 37-41.)

GMAC dealt in a similar fashion with the undisputed evidence that GMAC had specifically relied on an alleged *default* on December 19, 2008 when it gave Notice of Default and, on that basis, demanded payment in full. According to GMAC, it was irrelevant that GMAC demanded payment based on an alleged default, because it could have done so for any reason or no reason at all. GMAC asked the trial court to consider ***not*** what GMAC actually did, but what it ***might have*** done. (RP Vol. XV at 48:21-25, 49:1, 51:6-13, 96:12-25 through 101:1-12.)

GMAC's contentions were disputed by ECI, and contradicted by the weight of documentary evidence and, in some cases, by GMAC's own witnesses. (RP Vol. XV at 68:25 through 89.)

The trial court found there were disputed facts as to the meaning of the contractual terms of the WSA and related agreements, and rejected GMAC's contention that it should nullify all operative terms of those contracts other than the "upon demand" clause.

> In the instant case, there are no demand notes. The only thing that exists in this relationship is the various security agreements, where you identified the wholesale security agreements with all of its various amendments or revolving line of credit agreement. The security agreements are contracts with demand provisions, not notes.

(App. B, Ex. 1 at 49:21-25, 50:1-2.) The trial court also rejected GMAC's contention that it should ignore what GMAC actually did (demand payment based on a specific alleged default) and speculate as to what GMAC might have done in the absence of a default.

> These inferences in favor of ECI show that GMAC injected itself into the day-to-day management of ECI and then managed it into a default position, then GMAC made its demand.

(*Id.* at 56:4-7.) Viewed in a light most favorable to the non-moving party, the trial court found there were disputed facts as to the proper interpretation of the financing agreements that precluded a judicial finding that the WSA was a simple "demand note" and, in fact, the evidence weighed heavily in favor of finding that GMAC had manipulated a technical default so that it would have a basis for demanding payment in full. (*Id.* 56:8-16.)

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review under RAP 13.4(b)(1) and (4). Division One's decisions conflict with this Court's decision in *Rekhter v. DSHS*, 2014 WL 1321008 (Wash. April 3, 2014) and in *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 388 (2010) ("economic losses are sometimes recoverable in tort, even if they arise from

contractual relationship."). Division One's decisions involve multiple issues of substantial public interest, including the scope of demand notes, demand obligations, or demand language in all commercial lending relationships and the applicability of the economic-loss rule to professional commercial lending relationships.

On motion for reconsideration Everett Chevrolet pointed out that Respondents alleged in their Answer Affirmative Defenses and Counterclaims a host of facts which if considered in the light most favorable to Respondents establish genuine issues of material fact bearing on those counterclaims.[5] ECI's Answer Affirmative Defenses and counterclaims CP 229-249 Each of the allegations is supported by the verbatim report of proceedings and as determined by the trial judge following his judgment on the credibility of the witnesses. See CP 29-35 and CP 35:

> These inferences in favor of ECI show that GMAC injected itself into the day-to-day management of ECI and then managed it into a default position, then GMAC made its demand.
>
> It is this Court's view that those efforts, at least for purposes of summary judgment, show disputed material facts with regard to GMAC's actions under the wholesale security agreement. These acts, if true as construed, indicated a violation of statutory covenant of good faith and fair dealing, because it is obviously unfair to manage an

> owner's business in favor of the manager to the owner's detriment. As such GMAC and Allied's [sic] motion for summary judgment is denied.

CP35, lines 4-16; CP 202-228; CP 234-241.

Moreover, these specific findings of the trial court support Respondents' Counterclaims for Unfair Business Practices, Civil Conspiracy, Tortious Interference, and Fraud and/or Negligent Misrepresentation. These are tort claims independent of ECI's contractual relationship with GMAC and should be viewed in light of *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380.

Division One apparently applied the economic loss rule to bar ECI's tort claims based on demand language as it denied ECI's motion for reconsideration. It is impossible to reconcile Division One's decision with this Court's decision in *Eastwood.*

CONCLUSION

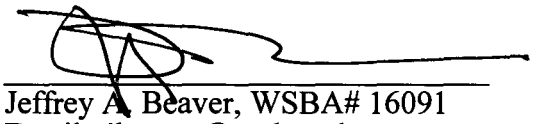
This case is ripe for decision by this Court given the recent holding and analysis in *Rekhter,* and the 2010 analysis of the economic loss rule and the independent duty rule of *Eastwood.* Here, ECI's independent tort claims should be allowed to proceed regardless of whether the agreements at issue constitute demand obligations. Division One's reversal of the trial court's denial of summary judgment should not be sustained given that the trial judge in the first instance made credibility determinations in the record

submitted for consideration on summary judgment. Finally, Where GMAC retained unfettered discretion to determine ECI management and control, good faith and fair dealing should operate as a control on how GMAC is to exercise management and control over ECI.

Accordingly, ECI respectfully asks this Court to grant review, reverse Division One, and reinstate the correctly entered trial court's order denying GMAC's motion for summary judgment dismissal of ECI's bad faith contract and tort claims.

Respectfully submitted this 16th day of April, 2014.

GRAHAM & DUNN PC

By 

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Attorneys for Defendants / Respondents John Reggans, Jane Doe Reggans and Everett Chevrolet, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true, correct and complete copy of the foregoing **Petition for Review** to be served by the method indicated below, and addressed to each of the following parties:

John E. Glowney STOEL RIVES LLP 600 University Street, Suite 3600 Seattle, WA 98101 jeglowney@stoel.com *Attorneys for GMAC, n/k/a Ally Financial, Inc.*	____ ____ X X	U.S. Mail, Postage Prepaid Hand Delivered Overnight Mail Email
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Dated this 11th day of April, 2014.

Heidi A. Reynolds, Legal Assistant

RICHARD D. JOHNSON,
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January 27, 2014

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CASE #: 68374-8-I
GMAC, aka Ally Financial, Inc., App. v. Everett Chevrolet, et al., Res.
Snohomish County, Cause No. 08-2-10683-5

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"We now reverse and remand with directions, this time to a different judge."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of $200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure

c: The Honorable Eric Z. Lucas

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

GMAC, a Delaware corporation, Petitioner, v. EVERETT CHEVROLET, INC., a Delaware corporation; and JOHN REGGANS and JANE DOE REGGANS, and their marital community, Respondents.	No. 68374-8-I DIVISION ONE PUBLISHED FILED: January 27, 2014
ALLY FINANCIAL, INC., a Delaware corporation, Petitioner, JOHN REGGANS, an individual; and the marital community of JOHN REGGANS and CARMENLYDIA REGGANS, husband and wife, Respondents.	

Cox, J. — This is the second time that this case is before this court on discretionary review. Previously, we reversed and remanded for further proceedings.[1] We now reverse and remand with directions, this time to a different judge.

[1] GMAC v. Everett Chevrolet, Inc., noted at 158 Wn. App. 1004, 2010 WL 4010113 (2010), review denied, 171 Wn.2d 1007 (2011).

Everett Chevrolet ("EC") was a car dealership in Everett, Washington. John Reggans is its sole shareholder. GMAC provided financing for EC to purchase new and used vehicles. In exchange, EC granted GMAC a security interest in EC's equipment, inventory, and proceeds.

A core document governing the financing arrangement is the Wholesale Security Agreement ("WSA"), which is dated December 10, 1996. It contains provisions that we more fully describe later in this opinion.

The parties signed several amendments to the WSA. None appear to have changed the relevant provisions of this agreement.

EC also had a revolving line of credit with GMAC. This is documented in the Revolving Line of Credit Agreement ("RLCA"), which is dated October 16, 2000. We also discuss provisions of this agreement later in this opinion.

Reggans testified that in 2006, the auto market started declining. He testified that EC earned approximately $700,000 in 2006 but earned only $28,000 in 2007. In late 2007, Reggans sought a $300,000 increase in the credit limit. GMAC agreed and increased the credit line to $800,000.

During 2008, the situation deteriorated. EC was unable to improve its position.

By letter dated December 15, 2008, GMAC terminated EC's wholesale credit line and revolving line of credit and also made demand for full payment of both. The principal amounts then due were $5,530,666.13 on the wholesale credit line and $738,000.00 on the revolving line of credit.

This litigation followed. GMAC sought to enforce its rights as a secured creditor seeking replevin of its security. A three-week hearing on this request occurred in March and April 2009. The trial court denied GMAC's request for replevin.

GMAC sought discretionary review, which we granted. This court reversed the trial court's denial of replevin and remanded.[2] This court did not reach the merits of the underlying dispute between the parties.[3]

On remand, GMAC moved for summary judgment to dismiss EC's "bad faith" counterclaims. The trial court orally denied GMAC's motion. In the order that followed, the court incorporated its oral rulings, which articulated its reasons for denying the motion.

GMAC sought discretionary review for a second time. We granted review on the basis that the trial court's denial of summary judgment was probable error that limited the freedom of a party to act.[4]

SUMMARY JUDGMENT

GMAC argues that the trial court erred by failing to grant GMAC's motion for summary judgment to dismiss EC's bad faith claims. GMAC identifies these as "EC's first through third counterclaims and EC's affirmative defense of

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[2] Id.

[3] Id. at *5 n.1.

[4] GMAC v. Everett Chevrolet, Inc., No. 68374-8-I, 2012 WL 3939863 (Wash. Ct. App. Aug. 16, 2012).

Estoppel in Pais . . . and its untitled affirmative defense, contained in ¶ 2.6 of EC's Answer."[5] We agree.

"In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact."[6] If the moving party meets this burden, "the inquiry shifts to the party with the burden of proof at trial . . . ."[7] The nonmoving party must then set forth specific facts showing a genuine issue for trial.[8] Summary judgment is appropriate only if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.[9]

On appeal, a denial of summary judgment is reviewed de novo, and an appellate court performs the same inquiry as the trial court.[10]

We deem abandoned any matters argued below that are not raised on appeal.[11]

Demand Obligation

GMAC asserts that the duty of good faith does not limit GMAC's right to demand repayment at any time for any reason. In opposition, EC contends that

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[5] Clerk's Papers at 506.

[6] Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

[7] Id.

[8] LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975).

[9] CR 56(c).

[10] Macias v. Saberhagen Holdings, Inc., 175 Wn.2d 402, 407, 282 P.3d 1069 (2012).

[11] See Coggle v. Snow, 56 Wn. App. 499, 512, 784 P.2d 554 (1990).

GMAC's argument is based on the "false premise" that GMAC had a demand note. Accordingly, EC disputes that GMAC had the authority under the WSA to demand payment for all amounts advanced under this agreement. We conclude that the WSA contains a demand obligation and, because controlling law holds that a good faith obligation does not bar enforcing a demand obligation, we agree with GMAC.

Whether the WSA contains a demand obligation is the threshold and controlling issue in this case. If we decide that the only reasonable reading of the WSA is that it contains a demand obligation, then Allied Sheet Metal Fabricators Inc. v. Peoples National Bank[12] controls. Accordingly, GMAC's enforcement of the demand obligation would not be barred by a good faith obligation.

"The 'touchstone of contract interpretation is the parties' intent.'"[13] "Washington courts follow the objective manifestation theory of contracts, imputing an intention corresponding to the reasonable meaning of the words used."[14]

"An interpretation which gives effect to all of the words in a contract provision is favored over one which renders some of the language meaningless

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[12] 10 Wn. App. 530, 518 P.2d 734, review denied, 83 Wn.2d 1013, and cert. denied, 419 U.S. 967, 95 S. Ct. 231, 42 L. Ed. 2d 183 (1974).

[13] Realm, Inc. v. City of Olympia, 168 Wn. App. 1, 4-5, 277 P.3d 679, (quoting Durand v. HIMC Corp., 151 Wn. App. 818, 829, 214 P.3d 189 (2009)), review denied, 175 Wn.2d 1015 (2012).

[14] Id. at 5.

or ineffective."[15] A court will not read ambiguity into a contract "'where it can reasonably be avoided.'"[16]

Whether a contract is ambiguous is a question of law.[17] A contract provision is not ambiguous merely because the parties to the contract suggest opposing meanings.[18] "If only one reasonable meaning can be ascribed to the agreement when viewed in context, that meaning necessarily reflects the parties' intent; if two or more meanings are reasonable, a question of fact is presented."[19] Summary judgment as to a contract interpretation is proper if the parties' written contract, viewed in light of the parties' other objective manifestations, has only one reasonable meaning.[20]

A demand note is payable immediately on the date of its execution.[21] This court in Allied set forth the general rule regarding such matured obligations:

> "An instrument is payable immediately if no time is fixed and no contingency specified upon which payment is to be made. A

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[15] Seattle-First Nat. Bank v. Westlake Park Assocs., 42 Wn. App. 269, 274, 711 P.2d 361 (1985).

[16] Mayer v. Pierce County Med. Bureau, Inc., 80 Wn. App. 416, 421, 909 P.2d 1323 (1995) (quoting McGary v. Westlake Investors, 99 Wn.2d 280, 285, 661 P.2d 971 (1983)).

[17] Syrovy v. Alpine Res., Inc., 68 Wn. App. 35, 39, 841 P.2d 1279 (1992).

[18] Mayer, 80 Wn. App. at 421.

[19] Martinez v. Kitsap Pub. Servs., 94 Wn. App. 935, 943, 974 P.2d 1261 (1999).

[20] Go2Net, Inc. v. C I Host, Inc., 115 Wn. App. 73, 85, 60 P.3d 1245 (2003).

[21] Allied, 10 Wn. App. at 536.

> demand note is payable immediately on the date of its execution—that is, it is due upon delivery thereof; and, unless a statute declares otherwise, or a contrary intention appears expressly or impliedly upon the face of the instrument, a right of action against the maker of a demand note arises immediately upon delivery and no express demand is required to mature the note or as a prerequisite to such right to action, commencement of a suit being sufficient demand for enforcement purposes."[22]

Here, the document that is the basis of EC's primary challenge is the WSA, not a promissory note like in Allied. But a demand obligation is not confined to promissory notes. Thus, there is no reason to conclude that the analysis of the legal issues is any different when a demand obligation is contained in an agreement other than a promissory note. EC fails to cite any authority to support such a difference.

In general, when an agreement includes demand language along with other contract terms, a court must carefully consider the agreement to determine if it contains a true demand obligation. We do so here.

In this case, the "upon demand" provision in the second paragraph of the WSA is unambiguous and is a demand obligation. It states:

> [EC] agree[s] ***upon demand*** to pay to GMAC the amount it advances or is obligated to advance to the manufacturer or distributor for each vehicle with interest at the rate per annum designated by GMAC from time to time and then in force under the GMAC Wholesale Plan.[23]

This provision contains express demand language on its face. Consistent with the authority we previously quoted from Allied, there is no time fixed for

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[22] Id. quoting (11 AM. JUR. 2d Bills & Notes § 286 (1963)).

[23] Clerk's Papers at 86 (emphasis added).

when payment is due for GMAC's advances. The obligation matures when made. Likewise, there is no contingency specified upon which payment of the advances is to be made. And there is no contrary intention that appears either expressly or impliedly upon the face of this provision of the agreement. By these terms, the obligation of EC to pay its financial obligations to GMAC is upon demand by GMAC.

We also note that the "upon demand" provision appears to be a material provision governing the parties' lending relationship. The "upon demand" provision is located in the second paragraph of the WSA. It immediately follows language that establishes the lending relationship. That language states: "[EC] desire[s] [GMAC] to finance the acquisition of such vehicles and to pay the manufacturers or distributors therefor."[24] The location of the "upon demand" provision within the agreement suggests that the parties intended their relationship to be controlled by the "upon demand" terms.

In addition, the "upon demand" provision is one of few provisions restated in amendments to the WSA. The emphasis placed on this provision further supports our conclusion that the parties intended this provision to be central to their lending relationship.

EC initially argues that this provision is not a demand obligation because "there were contingencies upon which payment was to be made (i.e., the sale of vehicle followed by the corresponding payment to be made in a 'faithful and

[24] Id.

prompt' manner)."[25] But the "faithfully and promptly" provision, which is discussed later in this opinion, relates only to payments after the sale of vehicles. It does not affect EC's obligation to pay all amounts outstanding when GMAC makes demand for payment. There are no contingencies that affect a demand for payment. Thus, this argument is not persuasive.

EC also argues, without citation to any relevant authority, that the provision at issue is not a demand provision because it allegedly was not payable immediately on execution. Specifically, EC argues that on the date of execution of the WSA, no amounts were immediately due because no funds had been advanced and no vehicles had yet been sold. But a monetary obligation is matured and payable immediately "if no time is fixed and no contingency specified upon which payment is to be made."[26] That no funds had yet been advanced at the time the demand obligation was incurred does not affect the nature of the demand obligation. EC does not argue that once funds were advanced the demand obligation that then existed was magically extinguished. For these reasons, we also reject this argument.

Further, we will not read ambiguity into an agreement where it can reasonably be avoided.[27] Construing this provision as a demand obligation does not give rise to ambiguity due to other provisions of the WSA, as EC argues.

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[25] Everett Chevrolet's Response Brief at 23 n.13.

[26] Allied, 10 Wn. App. at 536.

[27] See Mayer, 80 Wn. App. at 421 (quoting McGary, 99 Wn.2d at 285).

That is because all provisions to which these parties invite our attention can be harmonized and are not inconsistent.

Specifically, EC argues that the "interplay" between the "faithfully and promptly" language, set forth in the seventh paragraph of the WSA, and the "upon demand" language in the second paragraph that we just discussed creates ambiguity. We disagree.

The "faithfully and promptly" provision in the seventh paragraph, on which EC relies, states:

> [EC] understand[s] that [EC] may ***sell and lease*** the vehicles at retail in the ordinary course of business. ***[EC] further agree[s]*** that as each vehicle is sold, or leased, [EC] will, ***faithfully and promptly*** remit to [GMAC] the amount [GMAC] advanced or ha[s] become obligated to advance on [EC's] behalf to the manufacturer, distributor or seller, with interest at the designated rate per annum then in effect under the GMAC Wholesale Plan . . . .[28]

The plain words of the first sentence of this provision authorize EC to sell or lease, in the ordinary course of business, the vehicles that serve as collateral for its financial obligations to GMAC. The plain meaning of the second sentence of this provision is that EC "further agrees" to "faithfully and promptly" remit to GMAC the proceeds of such sales or leases to be applied to EC's financial obligations to GMAC. Significantly, the "further agrees" language of this provision separately obligates EC to remit sales and lease proceeds to GMAC. This obligation is in addition to its obligation to pay "upon demand" its financial obligations to GMAC that is contained in the earlier provision we already

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[28] Clerk's Papers at 86 (emphasis added).

discussed in this opinion. There simply is no other reasonable meaning of this "faithfully and promptly" provision.

Nothing in the language of this provision diminishes or affects EC's separate obligation to pay GMAC "upon demand" for its financial obligations to GMAC. EC fails to establish that any claimed "interplay" between the "faithfully and promptly" language of this provision affects the express demand obligation in the second paragraph of the WSA. There simply is no genuine issue of material fact regarding the relationship of the "faithfully and promptly" provision to the "upon demand" provision.

Similarly, the existence of the "default" provision in the ninth paragraph of the WSA also does not give rise to ambiguity within the agreement. This provision addresses GMAC's ability to repossess collateral after default. It states:

> In the event [EC] default[s] in payment under and according to this agreement . . . GMAC may take immediate possession of said vehicles, without demand or further notice and without legal process . . . .[29]

This "default" provision does not refer either to the "upon demand" provision stated in the second paragraph of the WSA or to the "faithfully and promptly" provision in the seventh paragraph of this agreement. In short, this "default" provision does not affect EC's obligation to make payments under either of the other two provisions. Rather, it addresses GMAC's rights under the Uniform Commercial Code and otherwise to take possession of collateral

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[29] Id.

securing the obligations of EC to GMAC in the event of a default. Accordingly, this "default" provision also does not create ambiguity regarding GMAC's right to demand payment under the second paragraph of the WSA.

Moreover, as our courts have consistently held, "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."[30] There is nothing in this WSA that supports the view that other provisions are rendered either illogical or unnecessary if the "upon demand" provision of the second paragraph is construed as a demand obligation. In fact, if the agreement were construed in any other way, it is the "upon demand" provision that would be rendered meaningless.

To support its argument that there is ambiguity in the WSA, EC relies on authorities from other jurisdictions. They are not persuasive.

In Mente Chevrolet Oldsmobile Inc. v. GMAC, the United States Third Circuit Court of Appeals considered GMAC's appeal of an order denying its motion for judgment as a matter of law after a jury found in favor of Mente on its breach of contract claim.[31] Under the financing agreement between the parties in that case, Mente was required to make payments to GMAC "faithfully and promptly" upon the sales of cars.[32] Mente's breach of contract claim was

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[30] Wagner v. Wagner, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980).

[31] Mente Chevrolet Oldsmobile, Inc. v. GMAC, Inc., 451 F. Appx. 214, 216 (3rd Cir. 2011).

[32] Id.

premised on the fact that GMAC declared Mente "out of trust" for failing to make payments "faithfully and promptly."[33]

At trial, GMAC argued that it had a right to demand payment immediately upon sale of a car.[34] In contrast, Mente argued that the parties' course of dealing showed otherwise.[35] The jury found that GMAC had breached the financing agreement, presumably on the basis that immediate payment on sale was not required.[36]

Following the jury verdict, GMAC renewed its motion for judgment as a matter of law on the breach of contract claim.[37] GMAC argued that the "faithfully and promptly" provision of the financing agreement was unambiguous.[38] The federal district court denied GMAC's motion.[39]

On appeal, the Third Circuit held that the district court was correct. The court stated that the financing agreement was ambiguous "because the contract did not define 'faithfully and promptly' and the phrase is capable of being reasonably understood in more than one way."[40]

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[33] Id.

[34] Id. at 217.

[35] Id.

[36] Id.

[37] Id.

[38] Id.

[39] Id.

[40] Id.

In a footnote, the court addressed a different argument by GMAC. GMAC argued that it was entitled to demand immediate payment by virtue of what the court described as "another clause" in the financing agreement.[41] The court gave no further explanation of what the other clause said. Nevertheless, it stated that "[t]he interaction between that clause and the 'faithfully and promptly' clause . . . is a question of fact that was properly submitted to the jury."[42]

The analysis in Mente is not helpful to our inquiry in this case. Whether the clause "faithfully and promptly" is capable of being understood in more than one way is not the proper focus of our inquiry. Our analysis is focused on the "upon demand" language in the second paragraph of this WSA. As we have already explained in this opinion, that language is not ambiguous. And the "faithfully and promptly" remit language of a separate provision does not create ambiguity for the "upon demand" provision.

While we could speculate on what the other clause to which the Mente court referred in the footnote in its opinion actually said, we decline to do so. The passing reference to "another clause" in the footnote is simply too incomplete to warrant the reliance on that opinion as EC argues.

Further, even if we speculated that the other clause briefly mentioned in the Mente footnote was a demand provision like the one here, the interaction between the clauses in this WSA is not a question of fact because this agreement is not ambiguous. As we have discussed in this opinion, the co-

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[41] Id. at 217 n.3.

[42] Id.

existence of these provisions in this WSA does not give rise to ambiguity. The resolution of the relationship among the various provisions in this agreement is a question of law that we resolve in favor of GMAC.

EC also relies on Mente to argue that GMAC should be collaterally estopped from obtaining a different contract construction in this proceeding when it has previously litigated and lost the identical issue.[43] Because EC makes this argument for the first time on appeal and fails to establish a right to do so, we decline to address this argument.[44]

The other case on which EC relies is equally unpersuasive. In Bob Smith Automotive Group Inc., et al. v. Ally Financial Inc., a Maryland trial court judge considered Ally's motion for summary judgment on claims brought by Bob Smith Automotive for breach of contract and breach of the implied covenant of good faith and fair dealing.[45] Ally argued that it did not breach any contract because it made a simple and independent demand for immediate payment, that such a demand was authorized by the contracts, and that good faith did not apply. The court held that there were disputed material facts that precluded summary judgment.

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[43] Everett Chevrolet's Response Brief at 25 n.15 (citing Mente, 451 F. Appx. 214 (3rd Cir. 2011)).

[44] See RAP 2.5(a).

[45] Bob Smith Auto. Grp., Inc. v. Ally Fin., Inc., No. 20-C-11-0075750 (Circuit Court, Talbot County, Md., 2012).

The judge examined provisions there that appear to be identical to those in the WSA at issue here. That judge held that the relationship between these provisions was ambiguous. Specifically, the judge stated:

> It is unclear when looking within the four-corners of the Wholesale Security Agreements as to whether the "on demand" provision in the WSA is independent of the "faithfully and promptly" and default provisions, or whether the three provisions are related in the ways alleged by the Plaintiffs. Such ambiguity is for a fact-finder to determine.[46]

Additionally, the court concluded that there was ambiguity as to how the "on demand" provisions within other agreements related to the provisions contained in that WSA.

We assume for purposes of this discussion that the trial judge's decision in that case has no precedential value in Maryland. Such a decision by a trial judge in Washington would lack precedential value. Nevertheless, we consider the rationale that judge stated.

For the reasons we already discussed in this opinion, we disagree with that judge's conclusion that there is any ambiguity about whether the "upon demand" provision in this WSA is independent of the "faithfully and promptly" provision. Likewise, there is no ambiguity about whether the "upon demand" provision in this WSA is affected by the "default provision."

Additionally, unlike Bob Smith Automotive, in this case there is no argument that the "on demand" provisions in agreements other than the WSA create ambiguity. This fact is a further material distinction of this case from that.

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[46] Id.

Finally, we note that the Revolving Line of Credit Agreement between these parties also has a demand provision as one of its terms. Specifically, that agreement provides, in part, as follows:

> (ii) Mandatory Repayment of Credit Line Advances.
>
> . . .
>
> (C) ***If demanded***, the full amount of the Credit Line Advances plus accrued interest must be paid immediately upon demand by GMAC.[47]

By letter dated December 15, 2008, GMAC made demand for payment of the full credit line advances in addition to demand for payment of the amounts owed under the WSA. EC does not argue that the demand provision of the RLCA is unenforceable. Accordingly, there is no genuine issue of material fact whether this agreement also contains a demand obligation.

In sum, the only reasonable reading of the WSA is that the financing relationship is governed by the unambiguous demand obligation stated in the second paragraph of the agreement. Likewise, the demand language in the RLCA is also a demand obligation. Accordingly, case law examining the relationship between demand obligations and the duty of good faith is instructive.

Duty of Good Faith and Demand Obligations

GMAC argues that the trial court erred by applying the duty of good faith to a demand obligation, contrary to Washington case law. Specifically, GMAC argues that any attempt to rely on the duty of good faith to bar the right to make a demand under a demand obligation fails as a matter of law. We agree.

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[47] Clerk's Papers at 272-73 (emphasis added).

The controlling case in Washington is Allied.[48] In that case, Peoples National Bank of Washington financed Allied's sheet metal fabricating plant under the terms of security agreements.[49] Allied pledged accounts receivable and other collateral to secure the loans.[50] The loans in question were made on the basis of demand promissory notes.[51]

After making additional loans, Peoples decided to take immediate steps to collect Allied's total accrued debt which totaled over $420,000.[52] It took action by applying Allied's checking account deposits in the bank to the debt.[53] Peoples did not give prior notice to Allied, and outstanding checks issued by Allied were dishonored.[54] Peoples then demanded payment of the entire remaining loan balance.[55] Allied sued Peoples for damages, claiming bad faith on the part of the bank.[56] The trial court granted Peoples' motion for summary judgment.[57]

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[48] 10 Wn. App. 530, 518 P.2d 734 (1974).

[49] Id. at 531.

[50] Id.

[51] Id.

[52] Id.

[53] Id.

[54] Id.

[55] Id. at 532.

[56] Id.

[57] Id. at 534.

On appeal, this court affirmed.[58] This court's analysis focused on the nature of the agreements between Allied and Peoples. Specifically, it held that the terms of these agreements gave Peoples the right to demand payment of these notes and offset the checking accounts without notice "because they are demand notes, because that is the contract that the parties made."[59]

Furthermore, this court noted that although the action taken by Peoples caused problems for the borrower, "that is the agreement that the parties made by appropriate written instruments."[60] The court stated:

> Although these facts might raise questions as to the bank's business judgment, they create no factual issue as to the bank's right to do what it did, and so are not material facts. This is particularly so under our interpretation of what constituted the agreement between the parties, namely, the terms of the demand notes.[61]

This court then affirmed the grant of summary judgment in favor of Allied.[62] Our supreme court denied review.

This approach is consistent with the majority of courts who have examined demand instruments in the context of good faith claims.[63] Courts have generally rejected the application of good faith on the grounds that it may not be applied to

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[58] Id. at 541.

[59] Id. at 534.

[60] Id.

[61] Id. at 536 n.5.

[62] Id. at 541.

[63] GERALD L. BLANCHARD, 1 LENDER LIABILITY: LAW, PRAC. & PREVENTION § 2:13 (2013).

"override the intention of the maker, who signed the instrument, to grant the holder the option to call for payment, with or without reason."[64] Courts carefully protect the principle of freedom to contract and establish the terms of the contract.[65]

Here, as in Allied, the "upon demand" provision gave GMAC a right to make a demand for payment of all accrued amounts for any reason or no reason. This is so even if GMAC chose, as in this case, to specify reasons in its December 15, 2008 letter why it was making demand. Moreover, as in Allied, possible detriment to EC's business did not bar the right to make demand.

In sum, GMAC's demand was not barred by the duty of good faith.

EC argues that even if GMAC had a demand obligation, it did not make a simple demand but instead declared an alleged default. Thus, EC argues that GMAC is now estopped from claiming that it could have called a simple demand based on the demand provision discussed above. But EC fails to establish the required elements to support this claim.

"Equitable estoppel is based on the notion that 'a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied

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[64] Carolyn M. Edwards, Article 3 Demand Notes and the Doctrine of Good Faith, 74 MARQ. L. REV. 481, 483 (1991).

[65] Id. at 485.

thereon.'"[66] "The elements of equitable estoppel are: '(1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or admission.'"[67]

The party asserting equitable estoppel must prove each of its elements "by clear, cogent, and convincing evidence."[68]

EC fails to do this on appeal. EC only makes argument related to the first element—that GMAC acted inconsistently with its stated reasons for making the demand. But there is no evidence that EC reasonably relied on GMAC's initial reason for calling the demand. EC also fails to show that it was injured as a result of this alleged reliance. Accordingly, there is no genuine issue of material fact supporting this claim. We reject it.

We also note that EC's argument is based on a letter from GMAC dated December 19, 2008, and EC ignores the earlier letter dated December 15, 2008. The earlier letter made demand for payment of all amounts accrued under both the WSA and RLCA. In view of that undisputed fact, it is difficult for us to see

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[66] Lybbert v. Grant County, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000) (quoting Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wn.2d 738, 743, 863 P.2d 535 (1993)).

[67] Id. (alteration in original) (quoting Bd. of Regents of U.W. v. City of Seattle, 108 Wn.2d 545, 551, 741 P.2d 11 (1987)).

[68] Robinson v. City of Seattle, 119 Wn.2d 34, 82, 830 P.2d 318 (1992).

why the December 19, 2008 letter creates any genuine issue of material fact for trial. EC's arguments to the contrary are unpersuasive.

Breach of Specific Contract Terms

GMAC next contends that the duty of good faith exists only in relation to performance of a specific contract term. GMAC argues that EC did not identify any specific contract term breached in bad faith and that summary judgment should have been granted in its favor. We again agree.

The controlling case is Badgett v. Security State Bank.[69] The Badgetts brought an action for damages against Security State Bank after it refused to restructure their agricultural loans.[70] The Badgetts wanted to retire from the dairy business and participate in the federal government's Dairy Termination Program.[71] They asked the Bank to accept partial payment of the debt and deferral of a portion of the payments due.[72] Negotiations with the Bank failed, and the Badgetts stopped making payments.[73]

The Badgetts sued the bank for $2,000,000 in damages alleging that the bank had unreasonably refused permission for the Badgetts to participate in the federal program.[74] The trial court granted summary judgment to the Bank, ruling

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[69] 116 Wn.2d 563, 807 P.2d 356 (1991).

[70] Id. at 565.

[71] Id. at 566.

[72] Id.

[73] Id. at 567.

[74] Id.

that it was under no duty to negotiate and that a prior course of conduct cannot create a new obligation on the Bank.[75]

On appeal, Division Two reversed.[76] It held that there was enough evidence "to support a reasonable inference that the parties' course of dealing had created a good faith obligation on the part of the Bank to consider the Badgetts' proposals."[77] It also held that the existence of a course of dealing and good faith are issues of fact.[78]

The supreme court reversed.[79] It held that the duty of good faith does not inject substantive terms into the contract; rather, "it requires only that the parties perform in good faith the obligations imposed by their agreement."[80] The duty arises "only in connection with terms agreed to by the parties."[81] There is not a "free-floating duty of good faith unattached to the underlying legal document."[82]

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[75] Id. at 567-68.

[76] Id. at 568.

[77] Id. (quoting Badgett v. Security State Bank, 56 Wn. App. 872, 878, 786 P.2d 302 (1990)).

[78] Id.

[79] Id. at 575.

[80] Id. at 569.

[81] Id.

[82] Id. at 570.

The court held that "[a]s a matter of law, there cannot be a breach of the duty of good faith when a party simply stands on its rights to require performance of a contract according to its terms."[83]

Here, EC failed to identify any specific contract term that GMAC allegedly breached. In its opposition to summary judgment, EC argued that GMAC's failure to disclose material facts "constituted a breach of the implied duty of good faith and fair dealing."[84] But, as Badgett held, the duty of good faith does not inject substantive terms into the contract, and the duty arises only in connection to the underlying legal document.[85]

EC's only attempt to connect GMAC's alleged bad faith to the contract terms was when it argued that GMAC's bad faith "interfered with EC's business operations and ability to perform under the contract."[86] But this assertion falls short of what Badgett requires. It does not specify what contract terms were allegedly at issue.

At oral argument before the trial court, the court even remarked that EC had failed to identify a contract provision that GMAC had violated. EC did not make any further attempt to identify a specific contract term.

EC argues that Badgett presents no bar to its claim because "GMAC's conduct of which Everett Chevrolet complains stems directly from the rights and

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[83] Id.

[84] Clerk's Papers at 62.

[85] Badgett, 116 Wn.2d at 569.

[86] Clerk's Papers at 76.

obligations expressly stated in the WSA and RLCA (i.e., the circumstances under which a default may properly be declared and the circumstances under which a default, left uncured, can lead to a demand)."[87] But, as we discussed earlier in this opinion, this general claim simply falls short of Badgett's requirements.

EC also argues that GMAC breached the "faithfully and promptly" provisions of the WSA by wrongfully calling a default based on a purported failure to pay upon sale or lease of the vehicles. But this argument is raised for the first time on appeal. For the same reasons we do not reach the collateral estoppel argument, we do not reach this argument.[88]

In sum, we conclude that the "upon demand" provision in the WSA is a demand obligation that is not barred by the duty of good faith. For the same reason, the demand language in the RLCA is not barred by the duty of good faith. We also conclude that EC failed to allege a claim based on a specific contract term as required by Badgett. For these reasons, denial of summary judgment was improper.

TORTIOUS INTERFERENCE CLAIMS

EC argues that GMAC has abandoned its argument that it is entitled to summary judgment on EC's claims for tortious interference. We disagree.

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[87] Everett Chevrolet's Response Brief at 31.

[88] See RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995) ("As a general rule, appellate courts will not consider issues raised for the first time on appeal.").

In GMAC's motion for summary judgment, GMAC asked the court to enter an order of summary judgment dismissing "EC's claims of bad faith."[89] In a footnote, GMAC indicated that this included "EC's first through third counterclaims . . . ."[90]

EC's first through third counterclaims were as follows: (1) breach of contract by wrongful acceleration of wholesale financing arrangement, (2) breach of duty of good faith and fair dealing, and (3) tortious interference with business expectancies. These counterclaims were based on GMAC's alleged bad faith conduct.

The order entered by the trial court denied GMAC's motion for summary judgment.[91] We conclude that the order was directed to all claims that GMAC identified in its motion, including the tortious interference claim.

These claims appear to have been intertwined from the outset, and the record indicates all claims were before the court in GMAC's motion. EC's arguments to the contrary are unpersuasive.

MOTION TO STRIKE AND REQUEST FOR SANCTIONS

GMAC moves to strike ultra-jurisdictional authority cited by EC in its brief and also seeks sanctions for the unauthorized citations to unpublished authority. We grant, in part, the motion to strike, disregarding certain materials not properly before us. We deny the motion for sanctions.

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[89] Clerk's Papers at 506.

[90] Id.

[91] Id. at 21.

Motion to Strike

Under RAP 10.4(h) and GR 14.1(b), a party may cite to an unpublished opinion of a court from another jurisdiction "only if citation to that opinion is permitted under the law of the jurisdiction of the issuing court."[92]

In its Response Brief, EC cites to three unpublished cases that are ultra-jurisdictional: (1) Bob Smith Automotive,[93] an unpublished memorandum opinion and order of a trial judge in Maryland; (2) Weed v. Ally Financial Inc.,[94] an unpublished order on a motion for summary judgment issued from a federal district court in Pennsylvania; and (3) Mente,[95] an unpublished opinion from the Third Circuit.

We have exercised our discretion and have considered the first and third of the above cases, as shown by our discussion of them earlier in this opinion. But GR 14.1(b) states that the party citing the opinion "shall file and serve a copy of the opinion with the brief or other paper in which the opinion is cited." EC did not comply with this requirement because it did not file and serve a copy of the Weed case with its brief. Accordingly, we grant the motion, in part, and do not consider the Weed case.

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[92] GR 14.1(b).

[93] No. 20-C-11-0075750 (Circuit Court, Talbot County, Md., 2012).

[94] No. 2:11-cv-2808 (E.D. Pa., 2013).

[95] 451 F. Appx. 214 (3rd Cir. 2011).

Sanctions

GMAC seeks imposition of sanctions upon EC for unauthorized citation to unpublished cases. Because we have considered two of the three cases and do not perceive any substantial prejudice to GMAC in doing so, we deny the motion for sanctions.

APPEARANCE OF FAIRNESS

GMAC argues that reversal and remand to a different trial judge is necessary in order to safeguard the appearance of fairness.

It is "fundamental to our system of justice" that judges are fair and unbiased.[96] Moreover, "[t]he appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice."[97] "The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial."[98] Even "a mere suspicion of irregularity, or an appearance of bias or prejudice" should be avoided by the judiciary.[99]

Litigants "must submit proof of actual or perceived bias to support an appearance of impartiality claim."[100] The "critical concern in determining whether

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[96] Chi., Milwaukee, St. Paul. & Pac. R.R. Co. v. Wash. State Human Rights Comm'n, 87 Wn.2d 802, 807, 557 P.2d 307 (1976).

[97] State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972).

[98] Id.

[99] Pac. R.R. Co., 87 Wn.2d at 809.

[100] Magana v. Hyundai Motor Am., 141 Wn. App. 495, 523, 170 P.3d 1165 (2007), rev'd on other grounds, 167 Wn.2d 570, 220 P.3d 191 (2009).

a proceeding satisfies the appearance of fairness doctrine is how it would appear to a reasonably prudent and disinterested person."[101]

Here, GMAC submitted evidence of perceived bias, which we need not detail in this opinion. But we conclude that it is unnecessary to decide whether the trial judge violated the appearance of fairness doctrine in this case. Rather, we conclude from this record and the history of this case that a just and expeditious resolution of this case will be best served by remanding this case to a different judge for further proceedings on remand. That judge will have the opportunity to provide a fresh perspective to the proper and prompt resolution of this case.

We reverse the order denying GMAC's motion for summary judgment, remand this case to a different judge, direct that judge to enter summary judgment on these claims in favor of GMAC and to conduct such further proceedings in this case as are required. We grant, in part, GMAC's motion to strike and deny its motion for sanctions.

Cox, J.

WE CONCUR:

Spearman, A.C.J.

Appelwick, J.

[101] Pac. R.R. Co., 87 Wn.2d at 810.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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March 17, 2014

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CASE #: 68374-8-I
GMAC, aka Ally Financial, Inc., App. v. Everett Chevrolet, et al., Res.
Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure
c: The Reporter of Decisions.

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

GMAC, a Delaware corporation, Appellant, v. EVERETT CHEVROLET, INC., a Delaware corporation; and JOHN REGGANS and CARMEN REGGANS, and their marital community, Respondents.	No. 68374-8-I ORDER DENYING MOTION FOR RECONSIDERATION

Respondents, Everett Chevrolet, Inc. and John and Carmen Reggans, have moved for reconsideration of the opinion filed in this case on January 27, 2014. The panel hearing the case has called for an answer from appellant GMAC. The court having considered the motion and appellant's answer has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

Dated this 17th day of March 2014.

For the Court:

Cox, J.

Judge