

COURT OF APPEALS  
DIVISION II

No. 41356-6-II  
(Pierce County Superior Court No. 10 2 06803 7)  
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STATE OF WASHINGTON  
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DEPUTY

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

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TACOMA AUTO MALL INCORPORATED, a Washington corporation,

Appellant/Cross-Respondent,

v.

NISSAN NORTH AMERICA INC.,

Respondent/Cross-Appellant.

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**REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT**

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## I. REPLY TO RESPONDENT'S BRIEF

In its response, Nissan North America Inc. (“Nissan”) relies upon the alleged exclusivity of the administrative proceeding in RCW 46.96.200(4) (1994) as the linchpin for its entire argument. Nissan argues that because Tacoma Auto Mall Incorporated (“TAM”) cannot pursue the administrative remedy in RCW 46.96.200(4), TAM lacks standing to sue. Resp. Br. at 2-3. Nissan also argues that this exclusive administrative remedy preempts all common law claims. Resp. Br. at 3.

Nissan’s argument fails, however, because: (1) the legislature never intended for the administrative remedy in RCW 46.96.200(4) to be the exclusive remedy, (2) there is no administrative remedy available to TAM, and (3) TAM is not required to exhaust an administrative remedy prior to filing suit.

### A. **The Legislature Never Intended the Administrative Proceeding in RCW 46.96.200(4) To Be the Exclusive Remedy when a Manufacturer Unreasonably Refuses To Consent to a Transfer of a Franchise.**

In its brief, Nissan claims that RCW 46.96.200 (1994) “*expressly* provides that prospective purchasers may not object to the manufacturer’s refusal to approve a proposed sale of a dealership” and that the statute “*specifically* bars TAM from pursuing [its] claims.” Resp. Br. at 2 (emphasis added).

These statements are wrong and a gross mischaracterization of RCW 46.96.200. On the contrary, there is nothing in RCW 46.96.200, or

in the entire Franchise Act, RCW 46.96 et al., that bars TAM from pursuing its claims in court.

While RCW 46.96.200 offers an administrative remedy to selling dealers frustrated by a manufacturer's refusal to allow a sale of their dealerships, the existence of this remedy to the selling dealer does not prohibit—either expressly, impliedly or otherwise—a purchasing dealer from filing suit for its damages.

Nissan also argues that TAM must “first exhaust its administrative remedies” prior to filing suit. Resp. Br. at 3. As a purchasing dealer, however, TAM has no administrative remedy. Even more importantly, however, there is nothing in the Franchise Act that requires a selling or purchasing dealer to exhaust its administrative remedy prior to filing suit.

As the Washington Supreme Court recently held, the mere existence of an administrative remedy does not prohibit state law claims. *Dowler v. Clover Park Sch. Dist. No. 400*, \_\_ Wn.2d \_\_, 2011 WL 3716997 (Aug. 25, 2011). In *Dowler*, the trial court held that the existence of administrative remedies offered to special education students and their parents required that plaintiffs exhaust their administrative remedies prior to filing suit. *Id.* at \*1-\*2.

On direct review, however, the *Dowler* court reversed the trial court and held that the existence of these administrative remedies did not preempt state law claims or require exhaustion of administrative remedies prior to filing suit:

[T]here is no indication from the statutory scheme of IDEA as a whole that it preempts state-law claims in any way or requires Appellants to exhaust administrative remedies before filing civil actions under state law. [citations omitted]

In sum, it is plain that parties are not required to exhaust the administrative remedies available through an IDEA due-process hearing before filing a civil action under state laws in state court. We so hold.

*Id.* at \*5-\*6.

Here, as in *Dowler*, there is no indication that the Franchise Act preempts state-law claims in any way or that the Act requires exhaustion of administrative remedies prior to filing suit. Thus, Nissan's preemption and exhaustion arguments fail as a matter of law.

Moreover, Washington courts hesitate to deviate from the common law absent a clear directive from the legislature:

In general, our state is governed by the common law to the extent the common law is not inconsistent with constitutional, federal, or state law. RCW 4.04.010. The legislature has the power to supersede, abrogate, or modify the common law. [citations omitted] However, we are hesitant to recognize an abrogation or derogation from the common law absent clear evidence of the legislature's intent to deviate from the common law. "It is a well-established principle of statutory construction that '[t]he common law ... ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.'" *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co. of Virginia*, 464 U.S. 30, 35-36, 104 S.Ct. 304, 78 L.Ed.2d 29 (1983) (alterations in original) (quoting *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623, 3 L.Ed. 453 (1812)). A law abrogates the common law when "the provisions of a ... statute are so inconsistent with and repugnant to the prior

common law that both cannot simultaneously be in force.” *State ex rel. Madden v. Pub. Util. Dist. No. 1*, 83 Wash.2d 219, 222, 517 P.2d 585 (1973). A statute in derogation of the common law “must be strictly construed and no intent to change that law will be found, unless it appears with clarity.” *McNeal v. Allen*, 95 Wash.2d 265, 269, 621 P.2d 1285 (1980).

*Potter v. Washington State Patrol*, 165 Wn. 2d 67, 76-77, 196 P.3d 691 (2008) (footnotes omitted).

According to *Potter*: “The first consideration in determining the exclusivity of a statute is whether the statute contains an exclusivity clause.” *Id.* at 80. If there is no exclusivity clause, the court will “examine the language and provisions of a statute to determine whether the legislature intended a statutory remedy to be exclusive.” *Potter*, 165 Wn.2d at 81. In the absence of statutory language or provisions clearly establishing the exclusivity of a remedy, a court may “look to ‘other manifestations of legislative intent’ to determine whether the legislature clearly intended a statute to be an exclusive remedy.” *Id.* at 84. Finding neither an exclusivity clause nor any other indication that the legislature clearly intended the statutory remedy to be exclusive, the *Potter* court held that the statute did not preempt common law claims. *Id.* at 89.

As in *Potter*, RCW 46.96.200 does not contain an exclusivity clause. As in *Potter*, there is nothing in RCW 46.96.200 that clearly indicates that the legislature intended RCW 46.96.200 to be the exclusive remedy. As in *Dowler*, there is nothing in RCW 46.96.200 that requires plaintiffs to exhaust their administrative remedies prior to filing suit.

On the contrary, the Franchise Act’s venue provision establishes that the legislature did not intend for the Franchise Act to be the exclusive remedy. This provision states that venue for *lawsuits* arising under the Franchise Act or *otherwise* shall be in Washington:

Notwithstanding the provisions of a franchise agreement or other provision of law to the contrary, the venue for **a cause of action, claim, lawsuit**, administrative hearing or proceeding, arbitration, or mediation, whether **arising under this chapter or otherwise**, in which the parties or litigants are a manufacturer or distributor and **one or more motor vehicle dealers**, is the state of Washington. It is the public policy of this state that venue provided for in this section may not be modified or waived in any contract or other agreement, and any provision contained in a franchise agreement that requires arbitration or litigation to be conducted outside the state of Washington is void and unenforceable. . . .

RCW 46.96.240 (emphasis added). That this venue provision addresses lawsuits or administrative hearings arising under the Franchise Act “or otherwise” establishes that the legislature did not intend for the administrative procedures in the Act to be the exclusive remedies.

Nissan’s brief simply ignores the “or otherwise” language. *See* Resp. Br. at 35. If the legislature intended the Franchise Act to be the exclusive remedy, there would be no need to address venue arising outside of the Act. That the legislature did address venue arising outside of the Franchise Act indicates that the legislature did not intend the Act to be the exclusive remedy.

Moreover, the venue provision is not limited to *selling* dealers. Instead, RCW 46.96.240 applies to an automobile manufacturer and “one

or more motor vehicle dealers,” which indicates that the legislature did not intend to limit the lawsuit to a single, selling dealer.

Nissan attempts to minimize the importance of the venue provision by citing to RCW 46.96.260. Resp. Br. at 35.<sup>1</sup> According to Nissan, “after a violation is established in an administrative proceeding, a civil action may follow in Superior Court to recover damages flowing from violation of the Chapter. RCW 46.96.260.” Resp. Br. at 35.

Nissan’s statement suggesting that an administrative proceeding must precede the filing a civil action in superior court is not supported by the plain text of RCW 46.96.260. This statute, which was enacted in 2010, states:

Civil actions for violations:

A new motor vehicle dealer who is injured in his or her business or property by a violation of this chapter may bring a civil action in the superior court to recover the actual damages sustained by the dealer, together with the costs of the suit, including reasonable attorneys' fees if the new motor vehicle dealer prevails.

RCW 46.96.260 (2010).

Contrary to the statement in Nissan’s brief, there is nothing in RCW 46.96.260 to suggest that an administrative hearing must precede the filing of a civil action. Nor does the plain text of RCW 46.96.260 limit

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<sup>1</sup> Nissan’s brief, however, fails to acknowledge that RCW 46.96.260 was enacted in 2010, after this lawsuit was filed. Because the enactment took effect after this suit was filed and does not apply retroactively, it does not govern this suit.

civil actions to only selling dealers. Under RCW 46.96.260, *any* dealer may sue in superior court for a violation of the Franchise Act without first pursuing an administrative remedy.

Because RCW 46.96.260 became effective after this lawsuit was filed, it does not govern this case. The statute, however, is instructive because it indicates that the legislature never intended the administrative proceeding in RCW 46.96.200(4) to be the exclusive remedy.

Applying the *Potter* principles establishes that the legislature did not intend the administrative proceeding in RCW 46.96.200(4) to be the exclusive remedy. First, there is no exclusivity clause in the Franchise Act. Second, there is no statutory language or provision in the Franchise Act that clearly establishes the exclusivity of the administrative remedy. Third, there are no “other manifestations of legislative intent” to suggest that the legislature intended the statute to be the exclusive remedy.

On the contrary, the venue provisions in RCW 46.96.240 and the plain text of RCW 46.96.260 indicate that the legislature did not intend for the administrative proceeding in RCW 46.96.200(4) to be the exclusive remedy when a manufacturer wrongfully refuses to approve the transfer of a franchise.

Because the legislature did not intend for RCW 46.96.200(4) to be the exclusive remedy, TAM has standing to sue because Nissan unreasonably refused to consent to the transfer of the franchise. As discussed in TAM’s opening brief and in the following section, there are additional grounds to support standing for TAM.

**B. TAM Has Standing To Pursue Claims Based Upon Violations of the Franchise Act.**

To have standing, a party must demonstrate (1) that it falls within the zone of interests that a statute protects or regulates and (2) that it has or will suffer an injury in fact, economic or otherwise, from the proposed action. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wash.2d 173, 186, 157 P.3d 847 (2007). In addition, the superior court in Washington has original jurisdiction over all matters not otherwise provided for. Const. art. IV, § 6. There is nothing in the Franchise Act which limits this original jurisdiction.

In a recent case, Division I held that a party had standing to challenge the enactment of an Initiative because the enactment would adversely affect the party's contract with a municipal government. *Am. Traffic Solutions, Inc. v. City of Bellingham*, \_\_ Wn. App. \_\_, 2011 WL 3903427 (Sept. 6, 2011). In that case, American Traffic Solutions ("ATS") entered into a contract with the City to install automatic traffic safety cameras. In 2011, an Initiative was put forth, which if enacted, would prohibit the City from installing or using an automatic traffic camera system unless approved by a majority of the city council and a majority of the voters. *Id.* at \*1. ATS sued to prevent the Initiative from being placed on the ballot. *Id.*

On expedited review, the Court of Appeals held that ATS had standing because the Initiative would adversely affect ATS's contract with the City:

If enacted, Initiative No.2011-01 would potentially mandate termination or modification of ATS's contract with the City to install and maintain the automatic traffic safety cameras, causing specific and perceptible harm. As a party to that contract, ATS clearly has standing to challenge the proposed action.

*Id.* at \*2.

Here, a prospective purchaser like TAM is within the zone of interests to be protected by the Franchise Act. First, a primary purpose behind the Act is to facilitate the transfer of a franchise without “undue constraints.” RCW 46.96.010. Second, the Act provides that a manufacturer may not refuse unreasonably to consent to the transfer to a qualified buyer, and if consent is withheld, the dealer must provide notice to the prospective buyer of the specific reasons for withholding consent. RCW 46.96.200 (1994). These protections inure directly to the benefit of a prospective buyer, and the buyer suffers a direct injury from a violation.

Because TAM was a qualified buyer, it was within the zone of interests to be protected by the Franchise Act. Because TAM was damaged by Nissan’s unreasonable refusal to consent, it has standing to sue. At the very least, there are factual issues as to whether Nissan acted unreasonably, and these factual issues render summary judgment inappropriate.

**C. The Franchise Act Does Not Preempt TAM’s Common Law Claims For Promissory Estoppel and Breach of Contract.**

As discussed in TAM’s opening brief and in Section I.A above, the Washington Legislature never intended for the Franchise Act to be the

exclusive remedy whenever a manufacturer wrongly refuses to consent to the transfer of a franchise. Thus, Nissan's argument that the Franchise Act preempts TAM's claims for promissory estoppel and breach of contract is without merit. *See* Resp. Br. at 30-40.

Nissan's rather lengthy recitation of the facts in this case does establish one thing: there are genuine issues of material fact that make summary judgment inappropriate. Regarding promissory estoppel, genuine issues of material fact exist as to whether TAM had the right to rely on Nissan's implicit promise to comply with the Franchise Act.

Similarly, Nissan's failure to comply with its application process and with the Franchise Act also supports TAM's breach of contract claim based upon (1) TAM's status as a third-party beneficiary of Nissan's contract with Puyallup Nissan and (2) TAM's claim based upon a unilateral contract with Nissan. Because genuine issues of material fact exist as to whether Nissan unreasonably refused to consent to the transfer, summary judgment should not have been granted.

## **II. TAM'S RESPONSE TO NISSAN'S CROSS-APPEAL**

In its cross-appeal, Nissan argues that the trial court erred in failing to dismiss TAM's tortious interference with a contract or business expectancy claim as a matter of law. Resp. Br. at 40-47. Nissan again argues, incorrectly, that this claim is preempted by the Franchise Act. Resp. Br. at 46. As discussed above and in TAM's opening brief,

preemption is not proper because the legislature did not intend the Franchise Act to be the exclusive remedy.

In addition, the trial court properly allowed TAM's tortious interference claim to stand because genuine issues of material fact exist that preclude summary judgment. This claim has the following elements:

- (1) the existence of a valid contractual relationship or business expectancy;
- (2) the defendant's knowledge of that relationship;
- (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy;
- (4) the defendant's interference for an improper purpose or by improper means; and
- (5) resulting damage.

*Leingang v. Pierce Cy. Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997).

As to the first two elements, Nissan was aware that TAM had a purchase and sale agreement with Puyallup Nissan. CP 216. TAM's contract with Puyallup Nissan for the sale of its franchise is a "business expectancy" from which TAM reasonably anticipated a substantial profit. Washington law allows recovery for losses incurred as a result of tortious interference with a business expectancy as well as a contract, so it is immaterial that the contract was conditioned on Nissan's consent, not to be unreasonably withheld. *See, e.g., Westmark Development Corp. v. City of Burien*, 140 Wn. App. 540, 166 P.3d 813 (2007), *review denied*, 163

Wn.2d 1055 (2008). In Washington, a business expectancy “includes any prospective contractual or business relationship that would be of pecuniary value.” *Pacific Northwest Shooting Park Ass’n v. City of Sequim*, 158 Wn.2d 342, 360, 144 P.3d 276 (2006) (quoting *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 144 Wn. App. 151, 158, 52 P.3d 30 (2002)). TAM and Puyallup Nissan negotiated and signed a final agreement to transfer a Nissan dealership to which both parties ascribed significant pecuniary value. CP 108-38, 214-16.

Regarding the third element, interference is intentional if:

the actor acts for the primary purpose of interfering with the contract or *if the actor* does not act for the purpose of interfering with the contract or desire it, but *knows that the interference is certain or substantially certain to occur as a result of his action*. In other words, the rule applies to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his actions.

*Plumbers and Steamfitters Union Local 598 v. Washington Public Power Supply System*, 44 Wn. App. 906, 928, 724 P.2d 1030 (1986) (citing Restatement (Second) of Torts § 766, comment j) (emphasis added).

Thus, Nissan’s interference is “intentional” as long as Nissan was “substantially certain” TAM could not purchase Puyallup Nissan without Nissan’s consent. It is uncontroverted that Nissan had that knowledge here, so the third element is met.

The fourth element is met when interference is wrongful by some measure beyond the interference itself, such as a statute, regulation,

recognized rule of common law, or an established standard of trade or profession. *Pleas v. City of Seattle*, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989) (citation omitted). Here, Nissan's conduct was wrongful under both common law reasonable business standards, and the standards articulated in the Franchise Act. Under the Franchise Act, a manufacturer may not unreasonably withhold consent to the sale or transfer of a franchise and a manufacturer's refusal to approve a proposed buyer "is presumed to be unreasonable" when the proposed buyer is capable of being licensed as a new motor vehicle dealer. RCW 46.96.200 (1994). Having operated a successful dealership for over 36 years, TAM was clearly capable of being licensed as a new motor vehicle dealer in Washington.

Nor can Nissan seriously argue that TAM was not damaged by its loss of the sale. *See Resp. Br.* at 49. A party is damaged by the loss of a profitable opportunity, and Nissan itself described the Puyallup Nissan dealership as remaining profitable even after Nissan refused to consent to TAM's purchase of the Puyallup Nissan franchise. CP 26, 46.

Similarly, Nissan's argument that TAM's damages are too speculative to be recoverable is without merit. Since at least 1964, Washington courts have awarded lost profits to new businesses when a reasonable estimation of damages can be made based on the profits of similar businesses operating under substantially the same market conditions. *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 16, 390 P.2d 677 (1964). In *Larsen*, the court awarded damages based solely on expert testimony; however, a party may also demonstrate lost profits by evidence

of its own profit history. *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 419, 58 P.3d 292 (2002).

Although lost profits of a new business have generally been proven by evidence of the profitability of identical or similar businesses, this is not necessary in the case of a national franchise. *See No Ka Oi Corp. v. National 60 Minute Tune, Inc.*, 71 Wn. App. 844, 851, 863 P.2d 79 (1993). In *No Ka Oi Corp.*, for example, the court held that “proof of the nationwide character of the franchise business at issue provided an ample basis for computation of probable losses.” *Id.* When evidence of lost profits is available, the evaluation of that evidence is for the trier of fact. *No Ka Oi Corp.*, 71 Wn. App. at 854.

Here, the president of TAM, Philip Schaefer, is an experienced operator of a new automobile dealership in this area, and thus competent to testify to TAM’s reasonable lost profits. CP 8, In addition, TAM has submitted its federal tax returns to demonstrate its profit history and to establish damages of at least \$3 million. CP 10-11, 14-16. Because evidence of lost profits is available, the trial court correctly allowed TAM’s tortious interference claim to go forward.

### III. CONCLUSION

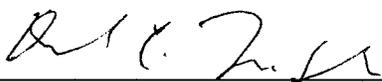
Nissan’s argument primarily relies upon the supposed exclusivity of the administrative remedy in RCW 46.96.200(4) and the requirement that this administrative remedy be exhausted prior to filing suit. Nissan’s argument fails, however, because: (1) the Franchise Act does not contain

an exclusivity clause; (2) the legislature never intended the Act to preempt other claims for relief; (3) there is no administrative remedy available to TAM, and (4) there is no requirement that the administrative remedy in RCW 46.96.200(4) be exhausted prior to filing suit.

For these reasons, TAM requests that this Court reverse the trial court's dismissal of TAM's claims for violation of the Franchise Act, promissory estoppel and breach of contract. In addition, TAM requests that this Court affirm the trial court's ruling that TAM's tortious interference claim may proceed to trial.

DATED this 15<sup>th</sup> day of September, 2011.

VANDEBERG JOHNSON & GANDARA,  
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COUNTY OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY C  
DEPUTY

### CERTIFICATE OF SERVICE

The undersigned makes the following declaration under penalty of perjury as permitted by RCW 9A.72.085.

I am a legal assistant for the firm of Vandeberg Johnson & Gandara. On the 15<sup>th</sup> day of September, 2011, I deposited in the mails of the United States a properly stamped and addressed envelope, and sent an email, containing a copy of the foregoing to:

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

Dated this 15<sup>th</sup> day of September, 2011, at Tacoma, Washington.

Barbara Anderson  
Barbara Anderson