

No. 40357-9-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

MB AUTO WHOLESALE AND LEASING LLC, a Washington limited
liability company, f/k/a NISSAN OF FIFE, LLC,

Respondent

v.

NISSAN NORTH AMERICA, INC., a California corporation,

Appellant

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
(Hon. Thomas P. Larkin)

RESPONDENT'S ANSWERING BRIEF

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I. INTRODUCTION AND SUMMARY

When MB Auto Wholesale and Leasing LLC, f/k/a Nissan of Fife, LLC (“MB Auto”) wanted to sell its Nissan dealership, it found a willing and able buyer in Bruce Titus. Under Washington’s auto dealer franchise statutes, Titus was a “qualified buyer” because he satisfied both Nissan North America, Inc.’s (“NNA”) “standards ... for the appointment of a new dealer” and was “capable of being licensed as a new motor vehicle dealer in the state of Washington.” RCW 46.96.200(1). Indeed, Titus already owned and operated two Nissan dealerships in Washington.

MB Auto fully expected NNA’s prompt approval. Under *former* RCW 46.96.200, it was “unreasonable,” and therefore impermissible, for a manufacturer to withhold consent to a dealer’s sale to a “qualified buyer” such as Titus. But NNA ignored the statute, and rejected the proposed sale on the grounds that Titus’s ownership of a third Nissan dealership violated NNA’s purported “contiguous market policy.” Although NNA’s rejection succeeded in scuttling MB Auto’s sale to Titus, MB Auto filed an administrative complaint with the DOL to challenge NNA’s conduct.

In the agency proceedings, MB Auto asked the ALJ to conclude that NNA violated RCW 46.96.200(1) as a matter of law. The ALJ refused, and instead accepted NNA’s argument that the statute allowed a manufacturer to withhold consent to an otherwise “qualified buyer” upon a

showing of reasonableness. MB Auto filed a timely petition for review in the Superior Court and again moved for judgment as a matter of law on the statutory interpretation issue. After considering the same arguments, the trial court reversed the ALJ and granted judgment in MB Auto's favor.

This Court should affirm the trial court. The former version of RCW 46.96.200(1), in effect when the trial court ruled, was ambiguous; not only did the parties read the statute differently, so did the ALJ and trial court. In the end, however, the trial court's interpretation was the most reasonable, and best fulfilled the legislature's stated purpose of giving dealers the right to sell their dealerships "without undue constraints." RCW 46.96.010. In providing that manufacturers cannot "unreasonably withhold consent ... to a qualified buyer," the legislature deemed it per se "unreasonable" for a manufacturer to reject a dealer's proposed sale to a "qualified buyer." That is precisely, and admittedly, what NNA did here.

After the trial court ruled, the legislature amended RCW 46.96.200 to clarify the statute and remove its ambiguities. That clarification shows beyond doubt that the trial court's construction of the former version of RCW 46.96.200 was the correct one. More importantly, the current version of RCW 46.96.200(1) applies on appeal because it is "curative" legislation intended to retroactively clarify ambiguous statutory language and legislative intent in the face of an ongoing controversy. In short, both

the former and the current versions of RCW 46.96.200(1) entitle MB Auto to a judgment as a matter of law.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the trial court properly deny NNA's motion to dismiss for lack of subject matter jurisdiction and determine that MB Auto timely filed its petition for review when:

a. the ALJ's November 17, 2008 initial order was not a "final order" within the meaning of the APA because it contemplated a further administrative hearing and lacked the statutorily required statements regarding post-hearing remedies;

b. both parties recognized the non-finality of the initial order and agreed that NNA should request the ALJ to amend the order to cure the deficiency, which NNA did on November 24, 2008;

c. in response, the ALJ entered an amended order on December 10, 2008, which specifically stated that the ruling was a "final Order subject to judicial review" and included the requisite statutory language of finality; and

d. MB Auto filed its petition for review in the trial court on January 9, 2009, within 30 days of entry of the amended order?

2. Did the trial court properly grant MB Auto's motion for summary judgment and determine that NNA's refusal to grant consent to MB

Auto's proposed sale to Bruce Titus violated the former version of RCW 46.96.200(1) when:

- a. the statute's phrase "unreasonably withhold consent ... to a qualified buyer" was ambiguous and could be reasonably interpreted in more than one way;
 - b. the trial court reasonably interpreted the phrase to mean that the legislature deemed it per se "unreasonable" whenever a manufacturer refused consent to a "qualified buyer" who satisfied at least one of the two criteria listed in the statute; and
 - c. there was no dispute on the summary judgment record that Titus satisfied one or both criteria for being a "qualified buyer" and, thus, NNA was statutorily forbidden from refusing consent to MB Auto's proposed sale?
3. Do the recent legislative amendments to RCW 46.96.200 provide additional grounds to affirm the trial court's judgment when:
- a. the amendments confirm that the trial court's construction of the original version of RCW 46.96.200 was the correct one; and
 - b. the amendments are "curative" in nature and, thus, must be applied by this Court retroactively on appeal?

III. COUNTERSTATEMENT OF THE CASE

NNA's brief is replete with factual assertions going to the very issue the trial court determined NNA could not prove as a matter of law: the purported reasonableness of its refusal to consent to MB Auto's sale of its dealership to Bruce Titus. Under RCW 46.96.200(1), NNA's refusal was *per se* unreasonable, and neither the ALJ nor the trial court ever considered NNA's proffered facts. NNA's factual claims are likewise irrelevant to the statutory interpretation issues central to this appeal and should be ignored. MB Auto states the relevant, undisputed, facts below.

A. **NNA Refuses To Give Consent To MB Auto's Sale Of The Dealership To Titus.**

Mary Byrne and her husband Kevin became majority owners and operators of MB Auto in Fife, Washington in 1999 pursuant to a Nissan Dealer Sales & Service Agreement ("Dealer Agreement") with NNA. CP 141 (Byrne Decl. ¶¶ 2, 3); CP 145-169 (dealer agreement). The Dealer Agreement incorporated certain Standard Provisions that required MB Auto to provide NNA with prior written notice of any proposed sale or transfer of the dealership, and required NNA to promptly consider the proposal. CP 171-205 (standard provisions).

Ms. Byrne decided to sell her Nissan dealership in the Fall of 2007. CP 142 (¶ 5). On February 27, 2008, MB Auto entered into an asset purchase agreement with Bruce Titus ("Titus"), in which Titus agreed to

purchase the assets of MB Auto along with the underlying real estate, subject to NNA's approval. *Id.*; CP 207-284 (asset and real estate purchase agreements). At the time, Titus was currently licensed as a new motor vehicle dealer in Washington and, indeed, he owned and operated two existing Nissan franchises in Tacoma and Olympia. *Id.* (¶ 6).

Pursuant to the Dealer Agreement, on February 29, 2009, MB Auto sent NNA a written request to approve the proposed sale to Titus. *Id.*; CP 286-287. NNA rejected the request. In a letter dated March 18, 2008, NNA informed MB Auto that it "refuses to consent to Titus as the new dealer for this location and thus does not consent to the proposed sale." CP 289-291. NNA's notice stated that the sale would violate Nissan's "contiguous market policy" because Titus already owned two dealerships in markets contiguous with the Fife market area. Similarly, NNA stated that a sale to Titus would violate Nissan's "multiple dealership ownership requirements" because Titus had not demonstrated superior sustained performance at his existing dealerships. *Id.*

B. MB Auto Challenges NNA's Refusal With The Washington Department Of Licensing.

MB Auto's further efforts to obtain NNA's consent failed. CP 143 (¶¶ 9, 10); CP 293-297. On April 14, 2009, MB Auto filed a "Petition for Determination of Unreasonably Withheld Consent to Sale, Transfer, or Exchange of Franchise" with the Washington Department of Licensing.

AR 2-4. MB Auto filed the petition pursuant to RCW 49.46.200(4), which permits auto dealers to “protest the refusal to approve the sale, transfer, or exchange.” MB Auto requested the DOL to determine that NNA’s refusal violated RCW 46.96.200(1). AR 2-4. At the time the petition was filed, and when the trial court ruled, that provision stated in relevant part:

Notwithstanding the terms of a franchise, a manufacturer shall not unreasonably withhold consent to the sale, transfer, or exchange of a franchise to a qualified buyer who meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer or is capable of being licensed as a new motor vehicle dealer in the state of Washington.

Former RCW 46.96.200(1). As discussed in greater below, during the pendency of this appeal, the legislature amended RCW 46.96.200.

The matter was assigned to an ALJ in the DOL’s Office of Administrative Hearings. Based on its interpretation of RCW 46.96.200, MB Auto believed it was entitled to judgment as a matter of law on its petition, and it informed NNA that it planned to move for summary judgment on the statutory interpretation issue. The parties stipulated to a briefing schedule and further stipulated that should MB Auto’s motion for summary judgment not be granted, then the ALJ’s ruling “shall be deemed a final decision denying the relief requested in the Petition and the Order entered a final Order subject to judicial review.” AR 23-24. In other

words, MB Auto stipulated that, if it could not prevail on the statutory interpretation issue, it would not further contest NNA's refusal.

C. The ALJ Denies MB Auto's Motion For Summary Judgment And Enters An Initial Order.

MB Auto filed its motion for summary judgment and NNA opposed. AR 29-199 (motion); AR 200-375 (opposition); AR 376-382 (reply). The parties argued the motion and, on November 17, 2008, the ALJ issued an initial "Decision and Order Denying Motion for Summary Judgment" ("Initial Order"). AR 383-386. The ALJ noted that NNA did not dispute that Titus met NNA's standards for the appointment of a new dealer and was licensed as a new motor vehicle dealer in Washington. Nevertheless, the ALJ ruled that NNA's refusal to give consent to the Titus sale was only "presumptively unreasonable" and, therefore, MB Auto was not entitled to a judgment as a matter of law. AR 385.

Although, as discussed above, the parties had previously stipulated that the ALJ's ruling on MB Auto's motion should be deemed a final order, the Initial Order did not refer to the stipulation, nor did seem to contemplate finality. On the contrary, the Initial Order expressly stated that, "[t]here are material facts at issue." AR 386. Moreover, the Initial Order did not contain the requisite "final order" language regarding post-hearing remedies and that right to judicial review required by the Administrative Procedure Act ("APA"). RCW 34.05.461(3).

D. After NNA Questions The Finality Of The Initial Order, The ALJ Enters A Corrected Order.

The parties recognized the deficiency in the Initial Order almost immediately. On or about November 19, 2008, NNA's counsel contacted MB Auto's counsel, and they agreed that the Initial Order was inconsistent with their prior stipulation regarding finality and should include the mandatory post-hearing remedies language. CP 81-82 (Beighle Decl., ¶ 5). Indeed, MB Auto's counsel was concerned that until and unless the Initial Order was amended to reflect finality, MB Auto could not seek judicial review. *Id.* Both parties agreed that NNA's counsel would contact the ALJ and request the Initial Order to be amended. *Id.*

In a letter dated November 24, 2008—a mere 7 days after entry of the Initial Decision—NNA's counsel wrote the ALJ in pertinent part:

Nissan North America, Inc. (“NNA”) requests that the Order be clarified to confirm the agreement embodied in the Joint Stipulation Additionally, given the mandate of WAC 10-08-210(6), the Order should be amended to address “post-hearing remedies.” . . .

While your Order states that it is a “Final Order” in paragraph 2, page 1, there is no mention that the Protest is deemed dismissed nor, as required by WAC 10-08-210, is there any reference to “available post-hearing remedies.”

So as to avoid any misunderstanding, NNA would appreciate clarification and, if deemed necessary by you, issuance of an amended Order.

CP 45. In response to NNA's request, on December 10, 2008, the ALJ issued a "Corrected Decision and Order Denying Motion for Summary Judgment" ("Corrected Order"). AR 387-391.

Unlike the Initial Order, the Corrected Order expressly incorporated and quoted the parties' earlier stipulation regarding finality and added, "[p]ursuant to the terms of the attached Joint Stipulation, no hearing date will be scheduled." The Corrected Order also contained the APA's requisite post-hearing remedy and judicial review language. *Id.* Notably, the ALJ did not direct that the Corrected Order replace or amend the Initial Order *nunc pro tunc*. On January 7, the ALJ *sua sponte* entered a "Second Corrected" version of the Corrected Order, this time simply to correct an erroneous docket number in the caption. AR 392.¹

E. NNA Unsuccessfully Moves To Dismiss MB Auto's Petition For Review In Superior Court.

On January 9, 2009, within 30 days after service of the December 10, 2008 Corrected Order (and January 7, 2009 Second Corrected Order), MB Auto filed its petition for review in the Superior Court. CP 1-26. NNA moved to dismiss. CP 27-65. NNA argued, as it does on appeal, that the trial court lacked jurisdiction because MB Auto did not file its

¹ In contrast to the Corrected Order, when the ALJ entered the "Second Corrected" order, she directed that it replace "the first page of the Decision issued December 10, 2008." AR 392.

petition for review with 30 days of the November 17, 2008 Initial Order. *Id.* MB Auto responded and, among other things, pointed out that it was NNA's own letter questioning the finality of the Initial Order that precipitated entry of the Corrected Order. CP 66-112. On February 27, 2009, following a hearing, the court denied NNA's motion. CP 124-125.

F. The Superior Court Reverses The ALJ And Grants MB Auto's Motion For Summary Judgment.

As in the administrative proceedings, MB Auto moved for summary judgment on the statutory interpretation issue, and NNA opposed. CP 126-134 (motion); CP 315-365 (opposition); CP 366-373 (reply). The parties made the exact same arguments and submitted the same declarations and materials that they submitted in the earlier proceedings. *Id.* In fact, NNA simply attached and incorporated its prior opposition and materials by reference. CP 317.

This time, however, the outcome was altogether different. On January 22, 2010, after two hearings (December 18, 2009 and January 22, 2010), the trial court granted MB Auto's motion for summary judgment. In its written order, the court concluded that:

Respondent Nissan North America, Inc. violated RCW 46.96.200(1) by withholding consent to Petitioner [MB Auto's] sale of its Nissan dealership to prospective purchaser Bruce Titus, as Bruce Titus was capable of being licensed as a new motor vehicle dealer.

CP 374-375. NNA timely filed a notice of appeal. CP 376-381.

G. During The Pendency Of NNA’s Appeal, The Legislature Clarifies RCW 46.96.200.

In response to the ALJ’s construction of former RCW 46.96.200, the legislature amended RCW 46.96.200. Laws of 2010, ch. 178, § 7 (“ESHB 2547”). The amended version of RCW 46.96.200(1), which became effective June 10, 2010, now reads in pertinent part:

Notwithstanding the terms of a franchise, a manufacturer shall not withhold consent to the sale, transfer, or exchange of a franchise to a qualified buyer who meets the normal, reasonable, and uniformly apply standards established by the manufacturer for the appointment of a new dealer who does not already hold a franchise with the manufacturer or is capable of being licensed as a new motor vehicle dealer in the state of Washington.

ESHB 2547 clarified ambiguities in the former statute by, among other things, striking the word “unreasonably” prior to the phrase “withhold consent,” clarifying the term “new dealer” by adding the phrase “who does not already hold a franchise,” and eliminating the burden of proof provision found in *former* RCW 46.96.200(5).

IV. ARGUMENT

A. The Trial Court Properly Denied NNA’s Motion To Dismiss Because MB Auto’s Petition For Review Was Timely.

The ALJ entered the Corrected Order on December 10, 2008. AR 387-391. MB Auto filed its petition for review on January 9, 2009 (CP 1-26)—within the 30-day appeal period. RCW 34.05.542(2). Because the Corrected Order was the first “final order” entered by the ALJ, MB Auto’s

petition was timely. Even if the Initial Order were deemed final, MB Auto's petition was still timely because (a) the Corrected Order was appealable in its own right, and appeal therefrom necessarily brought up the Initial Order for review, and (b) NNA's request for an amended order effectively tolled the 30-day appeal period. Any doubts on the finality issue must be resolved in MB Auto's favor. *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 634, 733 P.2d 182 (1987); *WCHS, Inc. v. City of Lynnwood*, 120 Wn. App. 668, 679, 86 P.3d 1169 (2004).

1. The Initial Order Was Not A Final Order.

NNA's entire argument is predicated on the faulty assumption that the ALJ's November 17, 2008 Initial Order was a "final order" within the meaning of the APA. It was not. While it is true that the parties stipulated that the ALJ's ruling on MB Auto's motion for summary judgment should be "entered [as] a final Order subject to judicial review" (AR 23-24), it is equally clear that—either through inattention or omission—the ALJ did not do so. As NNA would later recognize, and ask the ALJ to rectify, the Initial Order (erroneously) presumed that the parties' case would continue and, in any event, lacked the statutory requisites for finality.

The Initial Order states that it is a "Decision and Order Denying Motion for Summary Judgment," and it concludes that MB Auto's motion could not be granted because "[t]here are material facts at issue." AR 386;

also AR 385 (“Whether NNA’s refusal was reasonable is a question of material fact.”). Apparently because the ALJ believed that a hearing would later decide those “material facts,” she did not reference the parties’ stipulation regarding finality, nor did she state that “no hearing date will be scheduled,” as she would later write in the Corrected Order. *Compare* AR 383-386 (Initial Order) *with* AR 387-391 (Corrected Order).

Moreover, the Initial Decision lacked the express indicia of finality required by the APA. The ALJ proceedings were governed by the APA, which allows an aggrieved party to seek judicial review of a “final order” only. RCW 46.96.050. The APA, in turn, requires final orders to “include a statement of the available procedures and time limits for seeking reconsideration or other administrative relief.” RCW 34.05.461(3); *also* WAC 10-08-210(6) (orders must contain “a statement describing the available post-hearing remedies”). The Initial Order contained no such statement. AR 383-386. Indeed, as discussed below, NNA recognized this defect and requested the ALJ to cure it by amendment.

In contrast, the Corrected Order demonstrates finality by its own terms, expressly incorporating the parties’ stipulation that the decision “be deemed ... a final Order subject to judicial review,” and containing the requisite statement regarding post-hearing remedies. AR 387-391. These additions were hardly “clerical” corrections or “housekeeping matters” as

NNA suggests. NNA Br. at 14. Were that the case, the ALJ would have directed that the Corrected Order replace the Initial Order *nunc pro tunc*, as she did with the Second Corrected Order, which truly did correct a “clerical” mistake (the wrong docket number in the caption). AR 392 n. 1. Instead, the Corrected Order was entered separately, as the first *final* order entered in the proceedings. MB Auto’s petition was timely.

2. NNA’s Conduct Conceded That The Initial Order Was Not Final, And Gives Rise To Judicial Estoppel.

NNA’s conduct following entry of the Initial Order demonstrates that neither party understood the order to be final and appealable. After consulting with MB Auto, NNA wrote to the ALJ to alert her that, “[w]hile your Order states that it is a ‘Final Order’ in paragraph 2, page 1, there is no mention that the Protest is deemed dismissed, nor as required by WAC 10-08-210, is there any reference to ‘available post-hearing remedies.’” CP 45. NNA specifically requested the ALJ to issue an “amended Order,” not to make “housekeeping” corrections to the existing one. *Id.* NNA’s suggestion that it made the request for the *ALJ’s benefit*, rather than to comply with the final order rule, is not credible. *See* NNA Br. at 14-15 (claiming that NNA’s request “was intended to assure that Judge Boivin was aware that no further dates would be scheduled”).

More than that, having questioned the finality of the Initial Order and having requested the ALJ to issue another order, NNA cannot now

claim the Initial Order was final all along. “Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (internal quotation marks omitted). The doctrine applies if “the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Id.* at 538-39. Although the trial court did not have occasion to consider judicial estoppel, this Court can. RAP 2.5(a).

NNA should not be permitted to exploit its inconsistent positions. It was NNA that contacted MB Auto with concerns regarding the finality of the Initial Order. CP 81-82 (Beighle Decl., ¶ 5). Both parties agreed that the order did not conclude the case with the needed finality, and that is why they agreed that NNA should contact the ALJ to request an amendment. *Id.* Indeed, MB Auto believed that, without a final order, it could not properly file a petition for review. *Id.* Both NNA’s words and conduct led MB Auto to reasonably believe that NNA understood the Initial Order to be less than final and appealable. Certainly, had NNA expressed a contrary view, MB Auto would have filed a premature petition for review to avoid any dispute regarding the timeliness of its appeal. NNA’s timeliness argument should be rejected on this basis as well.

3. Even If The Initial Order Were Final, MB Auto's Timely Appeal Of The Corrected Order Brought The ALJ's Underlying Decision Up For Review.

The trial court still had subject matter jurisdiction to review the ALJ's summary judgment ruling even if this Court deems the Initial Order final and appealable. *First*, under RAP 2.4(b), which applies here by analogy,² a timely appeal from an amended judgment or other post-judgment ruling brings up for review a prior order, even if the prior order was appealable in its own right. *Franz v. Lance*, 119 Wn.2d 780, 836 P.2d 832 (1992); *Wlasiuk v. Whirlpool Corp.*, 76 Wn. App. 250, 884 P.2d 13 (1994).³ This rule was specifically designed to eliminate "a trap for the unwary" in cases where a party may not recognize an appealable order. *Fox v. Sunmaster Products, Inc.*, 115 Wn.2d 498, 505, 798 P.2d 808 (1990). Certainly, given the parties' doubt regarding the finality of the

² See *King County v. Central Puget Sound Growth Management Hearings Bd.*, 91 Wn. App. 1, 18-19, 951 P.2d 1151 (1998) (RAP applies by analogy to APA review in superior court); *Vasquez v. Dep't of Labor & Industries*, 44 Wn. App. 379, 383, n. 3, 722 P.2d 854 (1986) (same)

³ Notably, RAP 2.4(b) was amended in 2002 to abrogate the rule established in cases like *Franz* and *Wlasiuk*, but only as it related to post-judgment rulings on attorney fees. The rule now contains the following exception: "A timely notice of appeal of a trial court decision *relating to attorney fees and costs* does not bring up for review a decision previously entered in the action that is otherwise appealable under rule 2.2(a) unless a timely notice of appeal has been filed to seek review of the previous decision." (Emphasis added.) The amendment left the general rule intact and, of course, the attorney fee exception does not apply here.

Initial Order, and NNA's request for an amended order to resolve that doubt, MB Auto was entitled to wait and appeal the Corrected Order with confidence that it would bring the ALJ's underlying order up for review.

Second, NNA's written request for an amendment to the Initial Order was equivalent to a motion to amend the judgment or for reconsideration, which automatically toll the time to file an appeal. RAP 5.2(e); RCW 34.05.470(3) ("the time for filing a petition for judicial review does not commence until the agency disposes of the petition for reconsideration"). The APA, like the Civil Rules, requires post-judgment motions to be made within 10 days of the final order. RCW 34.05.470(1); CR 59(b) & (h). NNA sent its letter to the ALJ on November 24, 2008, within 10 days of the November 17, 2008 Initial Order. The letter specifically requested the "issuance of an amended Order." CP 45. MB Auto was entitled to wait until the ALJ acted on NNA's request, and then timely file a petition within 30 days—which it did.⁴

The opinion in *Structural's Northwest, Ltd. v. Fifth & Park Place, Inc.*, 33 Wn. App. 710, 658 P.2d 679 (1983), is on point. There, the trial

⁴ There was no risk that NNA's request for an amended judgment, if not acted upon, would toll the time to file a petition for review indefinitely. Under the APA, if the ALJ does not act upon a motion for reconsideration within 20 days, it is deemed to be denied. RCW 34.05.470; *Trohimovich v. State*, 90 Wn. App. 554, 557, 952 P.2d 192 (1998) (30 day period to file for petition for review runs from the date agency is deemed to have denied a motion for reconsideration).

entered a judgment, but the parties agreed that it needed to be clarified and they stipulated to an amended judgment. *Id.* at 713. The trial court entered the amended judgment, and the defendants filed a notice of appeal within 30 days of the amendment, but more than 30 days from the original judgment. *Id.* The court of appeals concluded the appeal was timely:

While the stipulation allowing entry of the amended judgment was technically not a motion for amended judgment brought under CR 59, we note that in all practical effect the result is the same as if such a motion had been made and granted. The stipulation was entered within 5 days of the [original] judgment, as required for a post-judgment motion. CR 59(h). ... RAP 5.2(e) provides that the notice of appeal from such a post-trial order must be filed within 30 days of the order. ... [¶] The rules of court are designed to “allow some flexibility in order to avoid harsh results;” substance is preferred over form. Treating the [amended] judgment as having been entered pursuant to a motion to amend, ... [t]he appeal is timely and encompasses the [original] judgment.

Id. at 714 (citations omitted). This reasoning applies here. NNA’s November 24, 2008 letter was “in all practical effect” a timely motion to amend the judgment. This Court should reject NNA’s argument that form should prevail over substance to avoid “harsh results.”

NNA’s reliance on *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), is inapposite given this Washington authority. The rule in that case doesn’t help NNA anyway. “Only when the lower court changes matters of substance, *or resolves a genuine ambiguity*, in a judgment previously rendered should the period within which an appeal

must be taken ... begin to run anew.” *Id.* at 211 (emphasis added). There was genuine ambiguity regarding the finality of the Initial Order, and that is why NNA requested the ALJ to “clarify” and “amend” the order. CP 45. Moreover, the federal courts recognize that *Minneapolis-Honeywell* rule doesn’t apply where, as here, the amended judgment is the result of a timely post-judgment request for an amendment or correction. *See Catz v. Chalker*, 566 F.3d 839, 841 n. 1 (9th Cir. 2009). The trial court’s denial of NNA’s motion to dismiss should be affirmed.

B. The Trial Court Properly Granted MB Auto’s Motion For Summary Judgment Because, Under *Former* RCW 46.96.200, NNA’s Refusal Was Unreasonable As A Matter Of Law.

The trial court reversed the ALJ, and concluded that NNA violated RCW 46.96.200(1) by withholding consent to MB Auto’s proposed sale to Titus because Titus “was capable of being licensed as a new motor vehicle dealer.” CP 374-375. As explained in Section C.2, the court’s ruling must be affirmed based on the plain and unambiguous language of the *amended* version of RCW 46.96.200(1), which this Court must apply retroactively. Moreover, and for the reasons discussed immediately below, even under the ambiguous language of the *former* version of RCW 46.96.200, the trial court properly granted MB Auto’s motion for summary judgment.

1. The ALJ's Interpretation Of *Former* RCW 46.96.200 Is Not Entitled To Any Deference.

NNA's argument that the ALJ's denial of MB Auto's motion for summary judgment must be "presumed correct" is overstated. NNA Br. at 23. As NNA concedes, the ALJ's summary judgment ruling was based entirely on its interpretation of *former* RCW 46.96.200. Under the APA, a reviewing court must overturn an agency order if the ALJ "erroneously interpreted or applied the law." RCW 34.05.570(3)(d). "With respect to issues of law under RCW 34.05.570(3)(d), we essentially review such questions de novo. We accord deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues, but we are not bound by an agency's interpretation of a statute." *Utter v. Wash. Dept. of Social and Health Services*, 140 Wn. App. 293, 300, 165 P.3d 399 (2007) (quoting *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)).

Here, the ALJ did not purport to apply any specialized expertise when interpreting *former* RCW 46.96.200, and none was required. AR 387-391. The statute specifies the forum and standards for adjudication of an essentially private dispute; it does not involve agency oversight or regulation. Not surprisingly, the ALJ merely recited the statutory language and (erroneously) applied maxims of statutory interpretation to decide the case. In short, the "ALJ's construction of the statute does not

necessarily indicate the agency's interpretation and, therefore, the superior court need not defer to the ALJ's decision." *Wash. Dept. of Labor and Indus. v. Davison*, 126 Wn. App. 730, 735, 109 P.3d 479 (2005).

2. Under Former RCW 46.96.200(1), A Manufacturer's Withholding Of Consent To A Dealer's Sale To A Qualified Buyer Was Deemed Per Se Unreasonable.

This Court reviews questions of statutory interpretation *de novo*. *City of Pasco v. Pub. Employment Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992). The fundamental objective of statutory interpretation is to carry out the intent of the legislature. *City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006). When faced with an unambiguous statute, this Court can derive the legislature's intent from the plain language alone. *Waste Mgmt. of Seattle, Inc., v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994). But when a statute is ambiguous, the Court may apply principles of statutory construction, legislative history, and case law to assist its interpretation. *Yousoufian v. Office of King County Executive*, 152 Wn.2d 421, 434, 98 P.3d 463 (2004). A statute is ambiguous if it can reasonably be interpreted in more than one way. *Id.* at 433-34. The Court should adopt whichever interpretation best advances the legislative purpose. *Rozner v. Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991).

The former version of RCW 46.96.200(1), in effect at the time the trial court entered judgment in MB Auto’s favor, read in pertinent part:

Notwithstanding the terms of a franchise, a manufacturer shall not *unreasonably* withhold consent to the sale, transfer, or exchange of a franchise to *a qualified buyer* who [1] meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer *or* [2] is capable of being licensed as a new motor vehicle dealer in the state of Washington.

(Italics and brackets added.) Former RCW 46.96.200(1), and particularly the meaning and context of the word “unreasonably,” is ambiguous because it can be interpreted in two ways. It can be interpreted—as the trial court held—to mean that the legislature deemed it “unreasonable” whenever a manufacturer withheld consent to the sale of a dealership to a “qualified buyer” who satisfied at least one of the two criteria listed in the statute. On the other hand, it can be interpreted—as the ALJ held—to afford a manufacturer the opportunity to prove that it acted reasonably in withholding consent, even where the buyer is otherwise “qualified.”

The trial court’s interpretation best fulfills the legislature’s intent, and should be affirmed. To curtail over-reaching by manufacturers, the legislature limited a manufacturer’s right of refusal to a proposed sale to two carefully defined circumstances: where a proposed buyer (1) does not “meet the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer”; or (2) is not

“capable of being licensed as a new motor vehicle dealer in the state of Washington.” *Former* RCW 46.96.200(1). Where the proposed buyer is not “qualified” because he or she cannot satisfy either criteria, then the manufacturer can withhold consent, although it still has “the burden of proof that it acted reasonably.” *Former* RCW 46.96.200(5).

Where, however, the proposed buyer is “qualified” because he or she satisfies one or both criteria set forth the statute, then a manufacturer’s refusal is automatically “presumed to be unreasonable,” *former* RCW 46.96.200(5), thereby violating *former* RCW 46.96.200(1). In such cases, the statute simply does not afford the manufacturer an opportunity to prove up some other basis—reasonable or otherwise—for blocking a sale to a qualified buyer; the manufacturer must consent or violate the auto dealership franchise law. Any other interpretation of the statute would undermine the legislature’s obvious intent to make it fair, easy and affordable for dealers to transfer ownership to qualified buyers.

The findings set forth in RCW 46.96.010, which this Court can consider to discern legislative intent, support this interpretation:

The legislature further finds that there is a substantial disparity in bargaining power between automobile manufacturers and their dealers,

The legislature recognizes it is in the best interest for manufacturers and dealers of motor vehicles to conduct business with each other in a fair, efficient, and competitive manner. ***The legislature declares the public interest is best***

served by dealers being assured of the ability to manage their business enterprises under a contractual obligation with manufacturers where dealers do not experience unreasonable interference and are assured of the ability to transfer ownership of their business without undue constraints. ...

RCW 46.96.010 (emphasis added). By expressly defining two alternative criteria for qualified buyers, the legislature created a safe-harbor that would make it easier for dealers to identify buyers to whom they could transfer ownership “without undue constraints.” At the same time, RCW 46.96.200(1) prevented manufacturers from relying on vague, internal or subjective policies to block the sale to buyers whom the legislature deemed sufficiently qualified to protect the manufacturer’s interests.

NNA’s contrary interpretation would further the very “undue constraints” to sales the legislature sought to prevent. A manufacturer would be free to block a proposed sale to an admittedly “qualified buyer,” as defined by RCW 46.96.200(1), and threaten to embroil the dealer in a lengthy and costly adjudication regarding a “reasonableness” standard untethered to any objective or statutory foundation—the very tactic NNA used to block MB Auto’s proposed sale to Titus. In most cases, the burden and delay involved in such a process would either force the dealer to abandon the sale or cause the proposed buyer to look elsewhere. The trial court properly rejected NNA’s request to adopt an interpretation so patently contrary to legislative intent, and so should this Court.

NNA's argument that the word "or"—which separates the alternative criteria to be a "qualified buyer" under RCW 46.96.200(1)—should be interpreted to mean "and" is both irrelevant and wrong. NNA Br. at 28-32. As discussed below, there was no dispute below that Titus was a "qualified buyer" under *both* prongs of RCW 46.96.200(1). Thus, even if "or" means "and," MB Auto prevails. Regardless, NNA points to nothing in the statute or its history to suggest that the legislature wanted the criteria to be considered conjunctively, and there are good reasons why the legislature wanted them to apply alternatively.⁵ Indeed, a conjunctive construction could make it easier for a manufacturer to delay or block a sale. NNA may like that result, but the legislature's intent was exactly the opposite. The legislature confirmed that original intent when it amended RCW 46.96.200 without any change to the word "or." *See* Section C.1.

There is likewise no merit to NNA's claim that the trial court's construction will "bestow upon the Washington Department of Licensing the absolute power to select NNA's dealers." NNA Br. at 32. Putting aside the fact that DOL's licensing requirements are stringent and

⁵ For example, it requires a manufacturer to approve a sale to a dealer "capable of being licensed as a new motor vehicle dealer" where the manufacturer has not yet determined if the buyer "meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer"—thereby speeding up the approval process. As discussed above, however, the statute does not deprive the manufacturer the ability to ultimately choose its franchisee.

adequate to protect the manufacturer, *see* RCW 46.70 *et seq.*, DOL requires applicants to have “received a franchise,” RCW 46.70.041(1)(h),⁶ and to submit a “sales and service agreement for each manufacturer.” *See* www.dol.wa.gov/forms/700182.pdf (dealer addendum to master business application form). Thus, while RCW 46.96.200(1) requires manufacturers to approve a sale to a buyer “capable of being licensed,” manufacturers never lose the ultimate right to select their franchisees. The court’s interpretation of *former* RCW 46.96.200(1) was correct.

3. The Trial Court Properly Ruled That NNA Violated Former RCW 46.96.200(1) Because Titus Was “Capable Of Being Licensed As A New Motor Vehicle Dealer.”

Given the trial court’s proper ruling on the statutory interpretation issue, it follows that its grant of summary judgment in MB Auto’s favor must be affirmed. Pointing to the second kind of “qualified buyer” defined in RCW 46.96.200(1), the court held that NNA’s rejection of MB Auto’s proposed sale to Titus violated the statute because “Titus was capable of being licensed as a new motor vehicle dealer.” CP 375. Titus’s status as a dealer is not disputed. As the ALJ found, at the time NNA rejected the sale, Titus was licensed as a new motor vehicle dealer in

⁶ A “franchise” is defined as “one or more agreements ... between a manufacturer and a new motor vehicle dealer, under which the new motor vehicle dealer is authorized to sell, service, and repair new motor vehicles, parts, and accessories under a common name, trade name, trademark, or service mark of the manufacturer.” RCW 46.96.020(3).

Washington, and he already owned and operated two existing Nissan franchises. AR 388 (FF ¶ 1); *also* AR 42 (Byrne Decl., ¶ 6); CP 142 (same). For the reasons discussed above, no further analysis is required.

Although this Court need not reach the issue, it is equally clear that NNA's rejection of Titus also violated RCW 46.96.200(1) because Titus met the "standards established by [Nissan] for the appointment of a new dealer." NNA was required to give MB Auto notice stating its "specific grounds for the refusal." RCW 46.96.200(3). In its notice, NNA relied solely on its purported "contiguous market policy" to reject MB Auto's proposed sale, *not* its new dealer standards. CP 289-291. Indeed, NNA could not rely on those standards since it had previously approved Titus as a new dealer. After reviewing NNA's notice and declarations, the ALJ found that "NNA did not explicitly assert that Mr. Titus failed to meet new dealer standards," and therefore, "he is considered to meet the standards for a new dealer." AR 388 (FF ¶ 2).⁷ Because NNA does not assign error to that finding, it is a verity. RAP 10.3(g); *Haley v. Medical Disciplinary*

⁷ It is difficult to square the ALJ's specific finding that Titus met NNA's new dealer standards with NNA's claim that, "[t]his argument was rejected by the ALJ, and was not accepted by the superior court." NNA Br. at 33. To the extent NNA refers to its strained argument that RCW 46.96.200(1)'s reference to "new dealers," actually means "pre-existing dealers that seek to purchase a new dealership," the ALJ implicitly rejected that interpretation, and the trial court never even considered it.

Bd., 117 Wn.2d 720, 728, 818 P.2d 1062 (1991) (agency findings are verities on appeal where party fails to assign error under RAP 10.3(g)).

NNA cannot avoid this uncontested fact by now arguing that *former* RCW 46.96.200(1)'s reference to "new dealers" actually meant "pre-existing dealers that seek to purchase a new dealership," as NNA suggests. NNA Br. at 33-35. To begin with, NNA did not make this argument to the ALJ or trial court and, thus, this Court need not and should not consider it on appeal. RAP 2.5(a); *State v. Kirvin*, 37 Wn. App. 452, 461-62, 682 P.2d 919 (1984) (court refused to consider statutory construction issue not raised in trial court); *see* CP 323-333 (NNA's brief to the ALJ, incorporated by reference in trial court proceedings).

Regardless, the legislature did not mean "existing dealers" when it referenced "new dealers." The legislature knows the difference between the two. In statutes governing a manufacturer's plan to add or relocate a dealership, the legislature repeatedly refers to "existing dealers," "existing new motor vehicle dealer," and "existing motor vehicle dealer of the same line make." RCW 46.96.140(3); RCW 46.96.160(1) & (10); RCW 46.96.180(1), (2) & (5). The legislature would have used similar terms in RCW 46.96.200 if it wanted "new dealers" to include "existing dealers," but it intentionally chose not to. *In re Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990) (where "Legislature uses certain statutory language in one

instance, and different language in another, there is a difference in legislative intent”).⁸ The ruling below was correct for this reason too.

C. The Amendments To RCW 46.96.200 Confirm The Trial Court’s Interpretation Of The Former Statute And, In Any Event, Must Be Applied Retroactively By This Court.

During the pendency of this appeal, the legislature amended RCW 46.96.200 to remove ambiguity from the statute and to ensure that the anomalous decision reached by the ALJ would not be repeated. The trial court granted MB Auto’s summary judgment on January 22, 2010. CP 374-375. ESHB 2547 passed both houses in early March 2010, and was signed by the governor on March 23, 2010. Laws of 2010, ch. 178. The amendments became effective on June 10, 2010. *Id.* As discussed below, these amendments confirm the trial court’s interpretation of the *former* RCW 46.96.200(1) and, moreover, they apply retroactively to provide another, conclusive, ground for affirmance in this case.

1. The Amendments To RCW 46.96.200 Are Strong Evidence Of Legislative Intent Regarding The Meaning Of The Former Version Of The Statute.

The most significant amendment to RCW 46.96.200 is the removal of the superfluous and confusing word “unreasonable” from the *former*

⁸ Any doubt on this issue was put to rest by the legislature’s amendment of RCW 46.96.200(1). In it, the legislature clarified the meaning of “new dealer” by adding the phrase “who does not already hold a franchise with the manufacturer.” Laws of 2010, ch. 178, § 7.

RCW 46.96.200(1). The statute now reads in relevant part:

Notwithstanding the terms of a franchise, a manufacturer shall not withhold consent to the sale, transfer, or exchange of a franchise to a qualified buyer who meets the normal, reasonable, and uniformly apply standards established by the manufacturer for the appointment of a new dealer who does not already hold a franchise with the manufacturer or is capable of being licensed as a new motor vehicle dealer in the state of Washington.

RCW 46.96.200(1); Laws of 2010, ch. 178, § 7. Moreover, and contrary to NNA’s argument that the legislature must have meant “and” instead of “or” in *former* RCW 46.96.200(1), the legislature retained the “or”—leaving no doubt that that a buyer is *per se* “qualified” if he or she satisfies *either* criteria listed in the statute. Finally, to prevent manufacturers from exploiting section (5)’s burden of proof provision to argue that are entitled to show that rejection of an otherwise “qualified buyer” was somehow reasonable, the legislature struck that section entirely.

It is well-established that, “where the original enactment was ambiguous to the point that it generated dispute as to what the Legislature intended, a subsequent amendment can enlighten courts as to a statute’s original meaning.” *Ravsten v. Dep’t of Labor & Indus.*, 108 Wn.2d 143, 150-151, 736 P.2d 265 (1987) (*citing Overton v. Econ. Assistance Auth.*, 96 Wn.2d 552, 637 P.2d 652 (1981)). Put differently, where a statute is amended, the amendment is strong evidence of the legislature’s intent regarding the meaning of the former statute. *Waggoner v. Ace Hardware*

Corp., 134 Wn.2d 748, 755-56, 953 P.2d 88 (1998) (citing 2B Norman J. Singer, Sutherland Statutory Construction § 49.11, at 83 (5th ed. 1992)).

Even putting the retroactivity issue aside, the amendments support the trial court's construction of *former* RCW 46.96.200(1). To be sure, as discussed herein, the statute was ambiguous, and its wording generated disputes regarding the legislature's intent; the ALJ construed the statute one way, the trial court another. The amendments are compelling evidence that the legislature disagreed with the ALJ's construction of the statute. The amendments, both in terms of what they change (removal of the word "unreasonable") and what they do not (the word "or"), confirm the legislature's original intent that *former* RCW 46.96.200 be construed to forbid manufacturers from blocking sales to qualified buyers under the guise of proving "reasonableness." The trial court came to this conclusion without the benefit of considering the statute's amendments. The amendments simply show that the trial court had it right all along.

2. The Amendments To RCW 46.96.200 Are Curative And Therefore Apply Retroactively.

The amendments do more than merely highlight legislative intent, they apply retroactively in this case. Generally, statutory amendments apply prospectively. *McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs.*, 142 Wn.2d 316, 324, 12 P.3d 144 (2000). Amendments may, however, apply retroactively to effectuate legislative intent. *Id.* An

amendment applies retroactively when it is either (1) intended by the legislature to be retroactive, (2) “curative” in nature, or (3) “remedial.” *Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 536-37, 39 P.3d 984 (2002) (citing *McGee*, 142 Wn.2d at 324-25). The current version of RCW 46.96.200 applies retroactively because it was “curative” legislation intended to clarify ambiguous statutory language in the face of an ongoing controversy regarding the meaning of the former version of the statute.

“A statutory amendment is curative if it clarifies or technically corrects an ambiguous statute.” *McGee*, 142 Wn.2d at 325 (citation omitted). A statute is ambiguous if it can be reasonably interpreted in more than one way. *Id.* “The legislature’s intent to clarify a statute is manifested by its adoption of the amendment ‘soon after controversies arose as to the interpretation of the original act.’” *Id.* (quoting *Johnson v. Cont’l W., Inc.*, 99 Wn.2d 555, 559, 663 P.2d 482 (1983)). Indeed, Washington courts “often apply amendments retroactively ‘where an amendment is enacted during a controversy regarding the meaning of the law.’” *Id.* (quoting *Tomlison v. Clarke*, 118 Wn.2d 498, 511, 825 P.2d 706 (1992); also *Wash. St. Farm Bureau Fed. v. Gregoire*, 162 Wn.2d 284, 303, 174 P.3d 1142 (2007); *Barstad*, 145 Wn.2d at 538).

For the reasons described above, *former* RCW 46.96.200(1) was ambiguous. That ambiguity was manifest in the language of the statute;

specifically, the phrase “unreasonably withhold consent” could mean that a manufacturer was deemed to have acted “unreasonably” any time it rejected an otherwise “qualified buyer” (the trial court’s construction), or it could mean that a manufacturer could prove it acted “reasonably” in such cases (the ALJ’s construction). That this same language in *former* RCW 46.96.200(1) could give rise to two reasonable interpretations is evident by the proceedings below. The ALJ and the trial court considered the same arguments and evidence, and on precisely the same record, came to differing and conflicting interpretations of the statute. Even NNA conceded ambiguity in the statute—at least when it would benefit NNA. *See* CP 328-331 (arguing that statute’s use of “or” was ambiguous).

NNA complains that RCW 46.96.200 was amended because of this dispute, but that fact only supports retroactivity.⁹ As noted, “[l]itigation often brings to light latent ambiguities or unanswered questions that might not otherwise be apparent.” *Wash. St. Farm Bureau Fed.*, 162 Wn.2d at

⁹ NNA’s suggestion that Ms. Byrne “lobbied” the legislature for the amendments in a private capacity is factually incorrect and legally irrelevant. At the time she testified to the Committee on Commerce and Labor, Ms. Byrne was the president of the Washington State Auto Dealers Association, and it was in that capacity which she testified in favor of HB 2547’s various provisions—not just those at issue here. And, certainly there was nothing untoward in Ms. Byrne publicly relating her personal experience in the ALJ proceedings; that is precisely the information the legislature needs to determine whether there is an existing “controversy regarding the meaning of the law.” *McGee*, 142 Wn.2d at 325.

304 (quoting *U.S. v. Morton*, 467 U.S. 822, 835 n. 21 (1984)). Indeed, curative amendments are proper even when they overrule a trial court decision or an agency adjudication. *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 627, 90 P.3d 659 (2004); *Pierce County v. State*, 144 Wn. App. 783, 819, 185 P.3d 594 (2008). ESHB 2547’s bill history shows that it was introduced in the House on January 11, 2010—before the trial court ruled on MB Auto’s motion for summary judgment. Thus, it cannot be disputed—and, indeed, NNA appears to concede—that the amendments were a response to the ALJ’s construction of former RCW 46.96.200. They must be deemed “curative” for this reason as well.

For similar reasons, retroactive application of RCW 46.96.200(1) would not violate separation of powers principles. “[T]he legislature is precluded by the constitutional doctrine of separation of powers from making *judicial* determinations. . . . [S]eparation of powers problems are raised when a subsequent legislative enactment is viewed as a clarification and applied retroactively, if a subsequent enactment contravenes the construction placed on the original statute by this court.” *Wash. St. Farm Bureau Fed.*, 162 Wn.2d at 303-304 (internal quotations and citations omitted) (emphasis in original). The amendment does not contradict a construction placed on former RCW 46.96.200 by any court; indeed, the clarification is entirely *consistent* with the trial court’s construction.

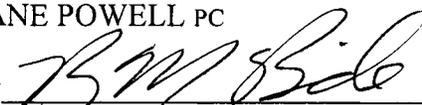
Ultimately, ESHB 2547 was enacted *after* the trial court reversed the ALJ and, in this way, the amended version of RCW 46.96.200 simply confirms the trial court's construction of the former statute. But more than that, because it is retroactive, this Court must apply the current version of the statute on appeal—even though it directly affects a pending case. *Wash. St. Farm Bureau Fed.*, 162 Wn.2d at 304; *Pollution Control Hearings Bd.*, 151 Wn.2d at 627; *Marine Power & Equip. Co. v. Wash. St. Human Rights Comm'n*, 39 Wn. App. 609, 620, 694 P.2d 697 (1985). The statute eliminates the ambiguities in *former* RCW 46.96.200 to make it clear that a manufacturer cannot withhold consent to a qualified buyer by claiming a right to show that its non-statutory grounds for rejection were somehow reasonable. NNA does not, and cannot, dispute that MB Auto is entitled to judgment based on the clarified wording of RCW 46.96.200.

V. CONCLUSION

For all the reasons set forth above, this Court should affirm the trial court's summary judgment ruling and find that NNA violated both former and current versions of RCW 46.96.200(1).

RESPECTFULLY SUBMITTED this 12th day of August, 2010.

LANE POWELL PC

By 

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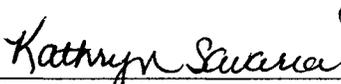
CERTIFICATE OF SERVICE

I hereby certify that on August 13th, 2010, I caused to be served a copy of the foregoing RESPONDENT'S ANSWERING BRIEF on the following person(s) in the manner indicated below at the following address(es):

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Kathryn Savaria