

COURT OF APPEALS
DIVISION II

CLERK OF COURT

2011 OCT 14 PM 6:08

No. 41356-6-II

(Pierce County Superior Court No. 10-2-06803-7)

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

TACOMA AUTO MALL INCORPORATED, a Washington corporation,

Appellant/Cross-Respondent,

v.

NISSAN NORTH AMERICA, INC.,

Respondent/Cross-Appellant.

FILED
COURT OF APPEALS
DIVISION II
2011 OCT 14 PM 6:08

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

DORSEY & WHITNEY LLP
James E. Howard, WSBA #37259
Samantha E. Funk, WSBA #43341

Columbia Center
701 Fifth Avenue, Suite 6100
Seattle, WA 98104-7043
P: (206) 903-8800
F: (206) 903-8820

Attorneys for Respondent/Cross-Appellant
Nissan North America, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. ARGUMENT	2
A. TAM Has Not Raised Questions of Material Fact on the Necessary Elements of Its Tortious Interference Claim.....	2
1. TAM Cannot Establish a Valid Business Expectancy.....	4
2. The Alleged Interference Was Not Improper.	8
3. TAM Cannot Prove Resulting Damage with the Required Certainty.....	14
B. RCW Chapter 46.96 Provides an Exclusive Regulatory Scheme which Precludes TAM’s Common Law Claims.	17
III. CONCLUSION.....	24

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Birkenwald Distrib. Co. v. Heublin, Inc.</i> , 55 Wn. App. 1 (1989)	4, 7
<i>Brotten v. May</i> , 49 Wn. App. 564, 744 P.2d 1085 (1987)	7
<i>Caruso v. Local Union No. 690 of Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America</i> , 33 Wn. App. 201, 653 P.2d 638 (1982), <i>reversed on other grounds</i> 100 Wn.2d 343, 670 P.2d 240 (1983)	4
<i>Childers v. Childers</i> , 89 Wn.2d 592, 575 P.2d 201 (1978)	12
<i>Dowler v. Clover Park School District No. 400</i> , 258 P.3d 676 (2011)	18, 19, 20
<i>Eagle Group, Inc. v. Pullen</i> , 114 Wn. App. 409, 58 P.3d 292 (2002)	15, 16
<i>In re Indian Trail Trunk Sewer v. City of Spokane</i> , 35 Wn. App. 840, 670 P.2d 675 (1983)	14
<i>Larsen v. Walton Plywood Co.</i> , 65 Wn.2d 1, 390 P.2d 677 (1964)	16
<i>Leingang v. Pierce Cnty. Medical Bureau, Inc.</i> , 131 Wn.2d 133 (1997)	8, 14
<i>No Ka Oi Corp. v. National 60 Minute Tune, Inc.</i> , 71 Wn. App. 844, 863 P.2d 79 (1993)	16, 17
<i>Pac. Nw. Shooting Park Assoc. v. City of Sequim</i> , 158 Wn.2d 342, 144 P.3d 276 (2006)	3, 6
<i>Pleas v. City of Seattle</i> , 112 Wn.2d 794 (1989)	8

<i>Plumbers and Steamfitters Union Local 598 v. Washington Public Power Supply System,</i> 44 Wn. App. 906, 724 P.2d 1030 (1986).....	7
<i>Potter v. Washington State Patrol,</i> 164 Wn.2d 67, 196 P.3d 691 (2008).....	19, 20
<i>Roberts v. General Motors Corporation,</i> 138 N.H. 532, 643 A.2d 956 (N.H. 1994)	4
<i>Schmerer v. Darcy,</i> 80 Wn. App. 499 (1996)	8, 9
<i>Seto v. American Elevator, Inc.,</i> 159 Wn.2d 767, 154 P.3d 189 (2007).....	11
<i>Shoreline Cmty. College v. Employment Sec. Dep't,</i> 120 Wn.2d 394, 842 P.2d 938 (1992).....	5
<i>State ex rel. Madden v. PUD I,</i> 83 Wn.2d 219 (1973).....	21
<i>State v. Contreras,</i> 124 Wn.2d 741, 880 P.2d 1000 (1994).....	12
<i>State v. Jones,</i> 32 Wn. App. 359, 647 P.2d 1039 (1982).....	12
<i>State v. Keller,</i> 143 Wn.2d 267, 19 P.3d 1030 (2001).....	11
<i>State v. Keller,</i> 98 Wn.2d 725, 657 P.2d 1384 (1983).....	12, 13
<i>State v. Sigman,</i> 118 Wn.2d 442, 826 P.2d 144 (1992).....	12
<i>Statewide Rent-A-Car, Inc. v. Subaru of America,</i> 704 F. Supp. 183 (D. Montana 1988)	4
<i>Tiegs v. Watts,</i> 135 Wn.2d 1 (1998).....	14

<i>Town of Clyde Hill v. Rodriguez</i> , 65 Wn. App. 778, 831 P.2d 149, <i>rev. denied</i> , 119 Wn.2d 1022, 838 P.2d 692 (1992).....	12
<i>Tri-County Motors, Inc. v. Am. Suzuki</i> , 494 F. Supp.2d 161	4
<i>Washington Water Power Co. v. Graybar Elec. Co.</i> , 112 Wn.2d 847 (1989).....	21
<i>Westmark Development Corp. v. City of Burien</i> , 140 Wn. App. 540, 556-64. 166 P.3d 813 (2007)	6
<i>Wilmot v. Kaiser Aluminum and Chem. Corp.</i> , 118 Wn.2d 46, 821 P.2d 18 (1991).....	17, 18

STATUTES

RCW 46.70.021(1).....	11
RCW Chapter 46.96.....	passim

OTHER AUTHORITIES

Final Bill Report, ESHB 2547, 61 st Leg., Reg. Sess. (Wash. 2010).....	23
---	----

I. INTRODUCTION

Nissan North America, Inc. (“NNA”) pursued this cross-appeal on the grounds that the Pierce County Superior Court erred in denying summary judgment regarding Tacoma Auto Mall, Inc.’s (“TAM”) claim for tortious interference. NNA had provided evidence demonstrating that it conducted a thorough review before exercising its contractual and legal right to deny the proposed asset sale and dealer application. In response, TAM did not offer any facts or testimony suggesting that questions of material fact remain regarding the elements of tortious interference. The Superior Court recognized there was no such evidence, but did not recognize this also meant that TAM had not raised a question of material fact in opposition to a motion for summary judgment, thereby requiring any tortious interference claim to be dismissed.

Therefore, in its cross-appeal, NNA requested that the standard for summary judgment be applied, and that judgment be granted in favor of NNA. In its Response, TAM once more neglects to point to any evidence indicating that NNA improperly interfered with the proposed sale to TAM, and again, cannot support its speculative lost future profit claim. Rather, TAM relies on inapplicable case law which cannot overcome the weight of authority concluding that exercising a contractual or legal right to deny a transaction does not amount to tortious interference. Accordingly, TAM cannot withstand summary judgment in favor of NNA on this claim.

NNA also pointed out that the tortious interference claim may be dismissed on the independent basis that it is preempted by the exclusive statutory remedy provided in RCW 46.96.200. The statutory scheme shows that the legislature was interested in protecting actual dealers, and only allowed the owner of a dealership to protest the denial of a proposed sale. This limitation is explicit, and is also necessary from a practical perspective.

As NNA described in its cross-appeal, if the administrative remedy were not exclusive and disappointed purchasers were allowed to bring parallel proceedings regarding the same decision in state or federal court, the entire administrative scheme would become meaningless. Furthermore, the business relationship between the manufacturer and existing dealer, who would be free to sell to another candidate or to continue to operate the dealership, would remain unclear until the statute of limitations expired years later on various common law claims. As this case demonstrates, significant uncertainty would result for the parties involved, other potential dealers, and the consuming public. Thus, the tortious interference claim may also be dismissed for the independent reason that it is preempted by RCW 46.96.200.

II. ARGUMENT

A. TAM Has Not Raised Questions of Material Fact on the Necessary Elements of Its Tortious Interference Claim.

In moving for Summary Judgment, NNA demonstrated that it conducted a lawful and thorough review of the proposed sale, including

TAM's performance reports as a Dodge dealer and a substantive review of TAM's sale data under NNA's standard Regional Sales Effectiveness ("RSE") analysis. *See* CP 25-26; 37-38. In order to survive summary judgment, TAM was required to put forward admissible evidence establishing the existence of genuine issues of material fact for all five of the necessary elements of a tortious interference claim. *See Pac. Nw. Shooting Park Assoc. v. City of Sequim*, 158 Wn.2d 342, 350, 144 P.3d 276 (2006) (if the moving party demonstrates an absence of genuine issues of material fact, the burden shifts to the nonmoving party to present admissible evidence to the contrary). The trial judge recognized that TAM did not carry this burden, stating:

If Tacoma Auto Mall can prove that [NNA] intentionally interfered with [the] application process, that might establish tortious interference, and if there are some improper purpose behind her denial, if they can prove that, that might establish their claim. I think that's going to be kind of a tough burden.

RP 4 (emphasis added). Given that TAM did not even attempt to meet its summary judgment burden of providing evidence to support its tortious interference claim, summary judgment was required.

In its Response to NNA's Cross-Appeal, TAM again fails to point to any facts suggesting that NNA improperly interfered with or abused the customary application process. *See Reply Br. Appellant*, at 10-14. Rather, TAM attempts to force the facts of this case into the elements of tortious interference through a series of unavailing case citations.

However, TAM cannot overcome the sensible weight of authority, in Washington as well as other jurisdictions, that lawful denial of a proposed asset sale to a new dealer or franchisee candidate does not constitute tortious interference. *See, e.g., Birkenwald Distrib. Co. v. Heublin, Inc.*, 55 Wn. App. 1, 12 (1989) (dismissing tortious interference claim based on refusal to approve proposed transferee); *Tri-County Motors, Inc. v. Am. Suzuki*, 494 F. Supp.2d 161, 175 (manufacturer's right to turn down sale barred claim for tortious interference); *Roberts v. General Motors Corporation*, 138 N.H. 532, 541, 643 A.2d 956, 961-962 (N.H. 1994) (same); *Statewide Rent-A-Car, Inc. v. Subaru of America*, 704 F. Supp. 183, 186 (D. Montana 1988) (same).

1. TAM Cannot Establish a Valid Business Expectancy.

Preliminarily, TAM cannot show that its determination to own and operate a Nissan dealership was anything more than an aspiration. *Caruso v. Local Union No. 690 of Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 33 Wn. App. 201, 653 P.2d 638 (1982), *reversed on other grounds* 100 Wn.2d 343, 670 P.2d 240 (1983) (finding that plaintiff must prove that future business opportunity and profits were reasonable expectations). TAM's assertion that its contract with Puyallup Nissan was a "business expectancy from which TAM reasonably anticipated a substantial profit" is without basis, especially considering that TAM's Response ignores every document which emphasized that the sale might not be approved. Reply Br. Appellant, at

11; *see also* Resp. Br. Resp't, at 45 (asserting a legally protected interest not tortious interference).

There can be no doubt that TAM was well aware that the proposed sale was contingent on NNA's approval—this fact was made clear in the Asset Purchase Agreement entered into between TAM and Puyallup, in correspondence from Puyallup Nissan, in correspondence from NNA requesting that TAM submit certain information to initiate the evaluation process, and as part of the dealer application process. *See* CP 126-28; 171-72; 174-77. Further, the fact that only Puyallup Nissan had rights to protest the denial of the sale under RCW 46.96.200 is necessarily imputed into any contract that the parties would have signed. *See Shoreline Cmty. College v. Employment Sec. Dep't*, 120 Wn.2d 394, 410, 842 P.2d 938 (1992) (finding that parties are presumed to enter contracts in contemplation of existing law).

If TAM was concerned that Puyallup Nissan would not protest a denial of the proposed sale, it could have negotiated a term in the proposed Asset Purchase Agreement which required Puyallup Nissan to do so (or provided a fee if unsuccessful), but it did not. TAM cannot now attempt to rewrite the terms of this agreement to provide it with a valid business expectancy. Indeed, given that Chrysler had recently terminated TAM as a Dodge dealer and replaced it with a new Dodge and Jeep dealer at the same location, TAM was well aware that it may not meet NNA's required criteria. *See* CP 45 at ¶ 11. TAM's hope that it might be approved by a different manufacturer cannot be construed as a valid business expectancy.

TAM relies on both *Pacific Northwest Shooting Park Association v. City of Sequim* and *Westmark Development Corp. v. City of Burien* to argue that the proposed Asset Purchase Agreement was nevertheless a valid business expectancy. Neither of these cases support TAM's position. TAM cites to the dissent of *Pacific Northwest* in order to define a valid business expectancy under Washington law. 158 Wn.2d 342, 360, 144 P.3d 276 (2006). However, the question of tortious interference was never even examined by the majority in this case because plaintiff did not properly allege tortious interference in its complaint. *See id.* at 350-53.

In *Westmark*, Division I did affirm a finding of tortious interference in light of an over three-year delay in responding to an application for a permit to construct an apartment complex. 140 Wn. App. 540, 556-64. 166 P.3d 813 (2007). The linchpin in *Westmark*, however, was the unjustifiably prolonged delay. *See id.* at 564. Regardless of the outcome, plaintiff had a valid business expectancy to receive a ruling on the permit within a reasonable time. *Id.* The fact that the defendant intentionally delayed the application process ultimately supported the tortious interference claim. *Id.* No similar facts are present here.

Rather than address the process at issue in the instant case—which emphasized throughout that no rights were created prior to NNA approval—TAM focuses exclusively on the outcome. TAM baldly argues that it had a valid business expectancy to receive profits from a non-existent business, the creation of which was expressly conditioned on the consent of a third party. This claim is contrary to Washington law.

In *Brotten v. May*, 49 Wn. App. 564, 569, 744 P.2d 1085 (1987), the Court concluded that plaintiff did not have a valid business expectancy to a share of commissions on the purchase of property precisely because defendant had a right to withhold its consent to a commission agreement. Similarly, in *Birkenwald Distributing Co. v. Heublin, Inc.*, 55 Wn. App. 1, 10, 776 P.2d 721 (1989), the Court held that defendant's refusal to approve its distributor's proposed transferee did not constitute tortious interference, in part, because plaintiff did not "have a legal right to that which he claims to have lost." Likewise, TAM signed an asset purchase agreement explicitly conditioned upon NNA's authority to deny its application. The agreement and related documentation repeatedly emphasized that TAM had no legal right to become a Nissan dealer, and thus, it cannot claim to have been unlawfully deprived of that opportunity.

Finally, TAM again relies on a dissent in quoting *Plumbers and Steamfitters Union Local 598 v. Washington Public Power Supply System*, 44 Wn. App. 906, 724 P.2d 1030 (1986). However the majority in *Plumbers* actually rejected any tortious interference claim *even if all elements were present*, reasoning:

Even if all four elements are present (as the dissent contends they are here), interference is justified as a matter of law if the interferer has engaged in the exercise of an absolute right equal or superior to the right which was invaded.

Id. at 920 (internal citations omitted). Here, it is uncontroverted that NNA had a legal and contractual right to review and deny the proposed sale, and

that TAM's rights were expressly contingent upon NNA's approval. Therefore, NNA's rights must be considered superior in this context. Consequently, even if TAM had produced evidence on all elements of a tortious interference claim, it would still be without merit.

2. The Alleged Interference Was Not Improper.

TAM also fails to offer any evidence suggesting that NNA improperly interfered with the proposed sale. In the process TAM's Response also ignores the great weight of authority, cited in NNA's opening brief, that there can be no claim for tortious interference where a party makes an informed business decision pursuant to its contractual rights. *See* Resp. Br. Resp't, at 44-45. Nor does TAM dispute the fact that "asserting an arguable interpretation of existing law" does not satisfy the improper interference element. *See Leingang v. Pierce Cnty. Medical Bureau, Inc.*, 131 Wn.2d 133, 157 (1997).

Washington law recognizes that for the intentional interference element to be satisfied, the plaintiff must show "purposefully improper interference." *Schmerer v. Darcy*, 80 Wn. App. 499, 505 (1996); *Pleas v. City of Seattle*, 112 Wn.2d 794, 800 (1989). Or put another way, "an improper objective of harming the person or the use of wrongful means that in fact cause injury to the person's contractual or business relationships." *Schmerer*, 80 Wn. App. at 505. This element is clearly not present here, where NNA assessed TAM's sales data in the same way that

it evaluates all prospective and current dealers—through NNA’s standard Regional Sales Effectiveness (“RSE”) analysis. CP 45 at ¶ 10.¹

TAM has failed to advance any facts indicating that conformance with this standard procedure amounted to a bad faith intent to harm TAM, an unrelated third party. Rather, TAM reasons that denial of the proposed sale was for “an improper purpose or by improper means” because NNA’s conduct violated “common law reasonable business standards” and the Franchise Act. Reply Br. Appellant, at 13. TAM does not articulate any of the “reasonable business standards” that NNA purportedly breached in its review of the proposed sale, and cites to no case law describing such alleged standards.

Indeed, the only authority cited by TAM to support the heart of its tortious interference claim is NNA’s purported violation of RCW 46.96.200. TAM’s dependence on this code section exemplifies the fact that its claim is nothing more than a repackaged statutory violation claim, under which it has no standing to protest. As discussed in prior briefing, this statute makes clear that only the selling dealer may file an administrative protest alleging that a manufacturer unreasonably refused a proposed sale. RCW 46.96.200(6). In this case, Puyallup Nissan did not

¹ When NNA considered TAM’s performance as a Dodge dealer using the Nissan dealer RSE analysis, it found that TAM had been performing very poorly, ranking 29th out of 34 Dodge dealers in Washington State, despite being located in one of the largest markets. See CP 45 at ¶¶ 15-16. This result did not meet NNA’s uniform standards for the appointment of a new dealer. *Id.* at ¶ 17.

protest NNA's refusal of the proposed sale to TAM. CP 46 at ¶ 18. This ends any statutory inquiry.

In its Response, TAM nonetheless attempts to rely on RCW 46.96.200 to argue that simply because TAM was capable of obtaining a dealer's license, the statute mandated acceptance by NNA of the proposed sale. First, in opposing summary judgment, TAM did not make this argument in support of its tortious interference claim, and thus, it cannot do so now on appeal. *See* RAP 2.5(a). Second, even if this were a viable argument it would only be for Puyallup Nissan to make pursuant to the language of this same section. RCW 46.96.200(5)&(6). Third, the code section which TAM relies upon does not even support its argument. And fourth, as long as NNA was relying on an arguable interpretation of existing law, none of this could even theoretically demonstrate improper interference.

At the time of the denial (and prior to its recent amendment), the statute provided:

In determining whether the manufacturer unreasonably withheld its approval to the sale, transfer, or exchange, the manufacturer has the burden of proof that it acted reasonably. A manufacturer's refusal to accept or approve a proposed buyer who otherwise meets the normal, reasonable, and uniformly applied standards established by the manufacturer for the appointment of a new dealer, or who otherwise is capable of being licensed as a new motor vehicle dealer in the state of Washington, is presumed to be unreasonable.

RCW 46.96.200(5) (1994). TAM relies exclusively on the inclusion of the word “or” in the final clause of the last sentence to suggest that, if the proposed buyer is capable of receiving a dealer’s license, a sale must be approved as a matter of law. According to TAM, given the use of the word “or,” the rest of the discussion throughout RCW 46.96.200(1)-(5) regarding reasonableness, uniform standards, reasons for denial, and burdens of proof can simply be ignored.

When examined in context, it becomes apparent that this argument makes little sense. Anyone who wants to operate a dealership is legally required to have a dealer’s license. *See* RCW 46.70.021(1). If a license was all that was required to force approval of a sale, there would be no reason to have included any language about analysis of a manufacturer’s uniform standards, reasonableness, burdens of proof, or presumptions. The only inquiry would begin and end with whether the proposed purchaser was able to obtain a dealer license. The rest of the lengthy and detailed provisions that RCW 46.96.200(1)-(6) contained would be almost entirely irrelevant, and unnecessary.

It is a fundamental premise of statutory construction that a statute should be interpreted in a way that avoids rendering any portion of the statute meaningless or superfluous. *See Seto v. American Elevator, Inc.*, 159 Wn.2d 767, 774, 154 P.3d 189 (2007). Rather than isolating individual phrases, the statute must be read and properly understood in its entirety. *Id.* at 774. Each provision is viewed in relation to other provisions and harmonized, if at all possible. *State v. Keller*, 143 Wn.2d

267, 277, 19 P.3d 1030 (2001). In the process the Court should avoid constructions “that yield unlikely, strange or absurd consequences.” *State v. Contreras*, 124 Wn.2d 741, 747, 880 P.2d 1000 (1994).

TAM’s construction would contravene all of these principles of statutory construction. The entire scheme contemplated a manufacturer reviewing financial and personal data, and then articulating the basis for its decision. It provided in detail for an examination of the reasonableness of that decision, and set up burdens of proof and rebuttable presumptions. All of this would be superfluous if the proposed purchaser simply had to be able to obtain the required dealer’s license to end the inquiry.

When all of the provisions of 46.96.200 are examined, the “or is capable of being licensed” clause can only be given coherent meaning if it is interpreted to be conjunctive (“and”) rather than disjunctive. This is consistent with the manner in which Washington courts have resolved other statutory ambiguities. *See Childers v. Childers*, 89 Wn.2d 592, 595-96, 575 P.2d 201 (1978) (construing “or” in child support statute); *State v. Sigman*, 118 Wn.2d 442, 448, 826 P.2d 144 (1992) (construing “or” in criminal statute); *Town of Clyde Hill v. Rodriguez*, 65 Wn. App. 778, 782, 831 P.2d 149 (construing “or” in DUI statute), *rev. denied*, 119 Wn.2d 1022, 838 P.2d 692 (1992); *See State v. Jones*, 32 Wn. App. 359, 372, 647 P.2d 1039 (1982) (substituting “and” for “or” in a criminal statute). Indeed, as the Supreme Court observed in *State v. Keller*, 98 Wn.2d 725, 657 P.2d 1384 (1983):

In fact, the very word at issue here, “and,” has been frequently interpreted by courts to mean “or.” As noted by one leading commentator:

[t]here has been, however, so great laxity in the use of these [“and” and “or”] terms that courts have generally said that the words are interchangeable and that one may be substituted for the other, if to do so is consistent with the legislative intent.

Id. at 729. Similar reasoning applies here to harmonize the provisions of RCW 46.96.200.

Moreover, if the word “or” were considered to be used disjunctively, and TAM’s “matter of law” argument were viable, NNA could never refuse to approve an unqualified dealer candidate as long as that dealer candidate could obtain a dealer’s license. This would bestow upon the Washington Department of Licensing the absolute power to select NNA’s dealers.² Because the contract between manufacturer and dealer forms the foundation for the entire relationship and distribution network, removing the ability of the manufacturer to participate in the selection process of its dealer body would be absurd. If that was the legislative intent, words such as “unreasonable,” “reasonable,” “undue constraint,” “balance” and “fairness” would appear nowhere in RCW 46.96.010 and 46.96.200, nor would there be a burden of proof to allocate, or a rebuttable “presumption” of “unreasonableness” to overcome.³

² Such a construction would almost certainly raise issues as to the constitutionality of RCW 46.96.200.

³ TAM also argues that the last five words of RCW 46.96.200(5)—“is presumed to be unreasonable”—constitute a legal conclusion that the manufacturer acted unreasonably in denying a sale to anyone capable

To overcome TAM's tortious interference claim on summary judgment, NNA was only required to establish that there were no questions of material fact regarding whether NNA exercised an *arguably reasonable* legal interpretation when denying the proposed sale. See *Leingang v. Pierce Cnty. Medical Bureau, Inc.*, 131 Wn.2d 133, 157 (1997). NNA more than carried this burden, providing extensive evidence indicating that NNA complied with standard procedure when thoroughly evaluating the proposed sale to TAM. See CP 25-26. In response, TAM did not offer any admissible evidence suggesting that this was not the case. See RP 4.

3. TAM Cannot Prove Resulting Damage with the Required Certainty.

TAM contends that it has established damages with requisite certainty, but overlooks even the foundational question of whether lost profits were within the contemplation of the parties at the time of the contract. See *Tiegs v. Watts*, 135 Wn.2d 1, 17-18 (1998). NNA has

of receiving a dealer's license. However, presumptions are obviously not a conclusion, but rather a means of allocating the burden on a particular issue. See, e.g., *In re Indian Trail Trunk Sewer v. City of Spokane*, 35 Wn. App. 840, 843, 670 P.2d 675 (1983) (sole purpose of a presumption is to establish which party has the burden of proof, "To hold otherwise would make the presumptions . . . conclusive and render the hearing and statutory appeal process" useless); cf. Fed. R. Evid. 301 ("a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption"). Accordingly, the statute's reference to a presumption only serves to further emphasize the requirement for an administrative hearing on the reasonableness of NNA's decision if requested by the selling dealer.

pointed out that future profits could not have yet been considered given that the Dealer Agreement with Puyallup Nissan, proposed Asset Purchase Agreement, correspondence regarding the proposed sale, and dealer application all memorialized this fact with the reflection that any deal was entirely contingent upon NNA approval. *See* Resp. Br. Resp't at 48. TAM has not argued otherwise. The "lost profits" which TAM currently seeks fall short on this threshold inquiry alone.

Even if this basic deficiency is overlooked, TAM has utterly failed to provide evidence supporting the damages it seeks to recover with reasonable certainty. TAM contends that, in place of expert testimony, a party may assess lost profits according to its own profit history. TAM attempts to rely on *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 58 P.3d 292 (2002) to support this broad proposition. That case involved a general contracting firm that sued its former employee and competitor for violations of the Uniform Trade Secrets Act and various torts, basing its damages on lost profits allegedly caused by the closure of the firm's Portland office, which occurred shortly after the former employee left to work for a competitor. *Id.* at 412-13. The firm's expert testimony on damages ultimately became inadmissible, but the trial court allowed the firm to present the Portland office's previous revenue history in its place. *Id.* at 415. Given that the alleged harm was the closure of the Portland office, damages resulting from such harm could be directly measured by the profit history of that same office. The Court of Appeals affirmed,

concluding that “when the plaintiff can also establish a profit history ... expert testimony is not the only evidence of lost profits.” *Id.* at 419.

Here, by contrast, TAM has never sold Nissan cars, never operated at the proposed location, and had never run a Nissan dealership. A profit history for a shuttered Dodge dealership cannot take the place of expert testimony or other admissible evidence regarding the future profitability of a new Nissan dealership. TAM’s assertion that the profits might have been similar to the declining revenue it had earned prior to being terminated as a Dodge dealer is wholly unsupported. This type of rank speculation does not furnish the level of “reasonable certainty” required by Washington’s new business rule. *See Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 17, 390 P.2d 677 (1964).

Finally, as a last ditch effort TAM suggests that an analysis of lost profits is simply not required at all in the case of a national franchise. However, besides the fact that a Nissan dealership is not a “franchise” but rather an independently owned and operated business, the case law which TAM relies upon does not support such an expansive conclusion. In *No Ka Oi Corp. v. National 60 Minute Tune, Inc.*, 71 Wn. App. 844, 853, 863 P.2d 79 (1993), plaintiff offered qualified expert testimony based on sales data from 300 franchisees around the country, as well as the franchisor’s own revenue projections for franchisees. The Court emphasized that these franchisees operated in a unique national franchise environment, and that their actual sales data was used. Division I affirmed that such evidence “was sufficient to withstand a motion for summary judgment on the issue

of reasonable certainty.” *Id.* at 854. By contrast, here TAM provided no evidence based on sales information from other Nissan dealers. Nor would that even be sufficient, given the wide variability in markets and performance of automobile dealers, which do not operate in the same “cookie cutter” fashion as the national franchisee chains discussed in *No Ka Oi Corp.* Without *any* history, expert opinion, or analysis regarding future profits as a Nissan dealer, TAM did not properly oppose summary judgment.

B. RCW Chapter 46.96 Provides an Exclusive Regulatory Scheme which Precludes TAM’s Common Law Claims.

The claim for tortious interference also fails for the independent reason that it is preempted by the comprehensive regulatory scheme incorporated in RCW Chapter 46.96, which provides an exclusive remedy for the denial of a proposed sale of a dealership. RCW Chapter 46.96 necessarily bars common law claims in this context. If this were not the case, the right of selling dealers to pursue accelerated administrative review to obtain certainty regarding their dealerships would be eviscerated. *See* Resp. Br. Resp’t at 31-32; *see also Wilmot v. Kaiser Aluminum and Chem. Corp.*, 118 Wn.2d 46, 59, 821 P.2d 18 (1991) (statutory remedies that “provide a simple, quick resolution of disputes through an administrative procedure” weigh in favor of preemption).

Further, without preemption, the fate of dealerships, and the parties related to that dealership, would become uncertain well beyond the statutory protest period, until the statutes of limitations expired on various

common law claims. *See id.* This may suspend a sale indefinitely, as other prospective dealers would be hesitant to purchase a dealership subject to ongoing litigation. In the interim, consumers may lose access to reliable vehicle service—a fundamental principle which the Franchise Act is premised on protecting. *See* RCW 46.96.010. Finally, parallel actions in state or federal court and before the Office of Administrative Hearings regarding the same decision may obviously lead to inconsistent results. *See* Resp. Br. Resp't at 31-32.

Rather than substantively address the significant obstacles posed to prospective purchasers asserting common law claims in addition to the comprehensive regulatory scheme, TAM relies on unavailing case law to baldly conclude that the Washington legislature did not intend for RCW Chapter 46.96 to serve as an exclusive remedy. First, TAM relies on *Dowler v. Clover Park School District No. 400*, 258 P.3d 676 (2011), for the proposition that the existence of an administrative remedy does not necessarily preclude state law claims. *Dowler* held that IDEA, a federal statute with a prescribed administrative remedy, did not preempt state tort law claims given that claimants were only required to exhaust the administrative remedy specifically before filing a civil action under federal laws which protect the rights of students with disabilities. *Id.* at 682-83. Further, the administrative procedure at issue in *Dowler* was unrelated to plaintiff's tort and unlawful discrimination claims under state law. *Id.* Finally, "there [was] no indication from the statutory scheme of IDEA as a whole that it preempts state-law claims..." *Id.* at 683.

None of the factors cited in support of the *Dowler* ruling apply to this case. Here, TAM asserts common law claims arising out of the denial of the proposed sale of a motor vehicle dealership, despite a state statute which has created an administrative remedy specifically targeted at protesting such denials. In Washington, manufacturers must comply with the mandatory administrative process when withholding consent to the sale, transfer or exchange of a dealership. No later than sixty days after receiving personal financial information from the prospective purchaser, the manufacturer must provide written notice to the applicant, selling dealer and Department of Licensing, specifically stating the grounds for refusal. RCW 46.96.200(2)-(3). Within twenty days after receiving this notice, the selling dealer may file a protest with the Department of Licensing. RCW 46.96.200(4). The case will then be heard before an administrative law judge, in a proceeding restricted to the selling dealer and manufacturer. RCW 46.96.200(6). A final decision must be rendered no later than one hundred twenty days after the protest is filed. *Id.* The manufacturer or selling dealer has thirty days from the final order to appeal to superior court. RCW 46.96.200(7); 46.96.050(3); 34.05.542(2).

Potter v. Washington State Patrol, 164 Wn.2d 67, 196 P.3d 691 (2008), the only other case relied upon by TAM in opposing the exclusivity of RCW Chapter 46.96, is distinguishable on the very same grounds. The statute at issue in *Potter* provided for the right of redemption—reclaiming an impounded vehicle after paying all towing, removal and storage fees—as its only statutory remedy. *Id.* at 82.

However, plaintiff in that case sued for conversion—a common law action for recovery of the fair market value of property unjustifiably taken by another. *Id.* The court concluded that regaining possession of a vehicle is entirely different from seeking damages on the grounds that the car had been wrongly possessed by another. *Id.* Accordingly, it found that the relevant statute did not preclude the common law claim of conversion.

Here, by contrast, RCW 46.96.200 comprehensively addresses review of a manufacturer's denial of a proposed sale of dealership assets. An administrative law judge is exclusively tasked with determining whether the manufacturer unreasonably withheld consent under the statute and Dealer Agreement. RCW 46.96.200(5). If the dealer prevails: (1) the sale will be consummated; (2) a statutory violation is established; and (3) the dealer may then seek compensation for damages and attorneys' fees in superior court based on this violation. *See* RCW 46.96.260. Conversely, if the administrative law judge determines that the manufacturer acted reasonably, the proposed sale will fail and the dealer must pursue another purchaser or remain a dealer. Within this procedure, the role of the prospective purchaser is not overlooked. Prospective purchasers are entitled to receive notice of the specific grounds for the refusal to approve the sale. *See* RCW 46.96.200(2)-(3). However, they are expressly barred from protesting the denial and thereby seeking damages in superior court. *See* RCW 46.96.200(6)-(7).

Unlike *Dowler* and *Potter*, TAM has asserted common law claims entirely duplicative of the relief available to selling dealers through the

statute at issue. However, TAM cannot force approval of the sale and/or seek damages for the denial under the common law when it is specifically precluded from doing so under RCW 46.96.200. *See State ex rel. Madden v. PUD I*, 83 Wn.2d 219, 222 (1973) (where “the provisions of a later statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force, the statute will be deemed to abrogate the common law”). This conclusion is particularly salient in this case, where Puyallup Nissan accepted NNA’s denial and has continued to operate as a successful dealer. *See* CP 46 at ¶ 18. TAM’s current action has placed a cloud over Puyallup Nissan’s dealership, which in this case, is contrary to the interests of the selling dealer.

The present scenario makes clear that the interests of one party must be superior in this context, and the Washington legislature has elected the rights of the business owner: the selling dealer. If the rights of selling dealers did not override the interests of other parties, proposed buyers could subvert the entire regulatory scheme by asserting their divergent interests in a different venue. *See Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wn.2d 847, 852-54 (1989) (Washington Product Liability Act preempts common law claims because the Act would mean nothing without preemption).

TAM has not offered any evidence indicating that, despite the aforementioned inconsistencies, the legislature did not intend for the statutory remedy to be exclusive. In fact, all that TAM relies on in support of its argument are RCW code sections 46.96.240 and 46.96.260. The

first section is simply an assertion that Washington is the venue over disputes between manufacturers and dealers. As NNA has previously noted, the language of this section is necessarily broad. *See* Resp. Br. Resp't at 35. In particular, the reference to "one or more motor vehicle dealers" acknowledges the circumstances in which multiple dealers may simultaneously file a protest, such as approval of a new or relocated dealership. *See id.*; *see also* RCW 46.96.150(1).

TAM also relies on the phrase "arising under this chapter or otherwise" to argue that the legislature did not intend for the administrative procedures supplied in RCW Chapter 46.96 to serve as exclusive remedies. RCW 46.96.240; *see* Reply Br. Appellant, at 5. Again, this code section is broadly drafted in order to ensure that Washington is the venue for any dispute between manufacturers and motor vehicle dealers. It is not difficult to imagine circumstances where certain torts or contracts claims (product liability issues, facility improvements, etc.) are unregulated by the provisions of RCW Chapter 46.96. Contrary to TAM's assertions, this does not alter the fact that RCW 46.96.200 provides an exclusive remedy for the denial of the proposed sale of a dealership, which consequently preempts duplicative common law claims.

Finally, TAM argues that RCW 46.96.260 allows "*any* dealer to sue in superior court for violation of the Franchise Act without first pursuing an administrative remedy." Reply Br. Appellant at 7. Not only is this conclusion contrary to the plain meaning of the code section, it is

antithetical to what the legislature actually intended when recently enacting the provision. The final bill report for this code section states:

A dealer injured by a violation of the franchise provisions may bring a civil action to recover damages, together with the costs of the suit, including reasonable attorneys' fees *if the dealer prevails*.

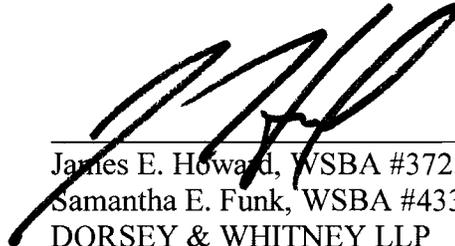
Final Bill Report, ESHB 2547, 61st Leg., Reg. Sess. (Wash. 2010) (emphasis added). This section was predicated on the understanding that when an administrative law judge concludes that a manufacturer violated RCW Chapter 46.96, the ALJ has no authority to also assess damages. Accordingly, the dealer may file an action in superior court for any damages resulting from the violation, as well as costs and fees. TAM's argument that RCW 46.96.260 provides prospective purchasers with standing to sue for any violation of RCW Chapter 46.96 is not supported by the statutory text nor the legislative intent.⁴

⁴ TAM's argument generates business uncertainty and added cost for actual business owners, such as Puyallup Nissan which has elected to maintain its Nissan dealership. Furthermore, if TAM's argument were accepted, it would ultimately affect the availability of services for consumers. If a prospective purchaser is allowed to tie a dealership up in litigation in state or federal court, it would be difficult for the selling dealer to proceed with the sale of the dealership. While the lawsuit is pending, which could last years in state or federal court, the dealership may be seriously harmed. For these reasons, implying a civil remedy for prospective purchasers under the statute is contrary to the underlying purpose of RCW Chapter 46.96, which is premised on the finding that "maintenance of strong and sound dealerships is essential to provide continuing and necessary reliable services to the consuming public in this state..." RCW 46.96.010.

III. CONCLUSION

For the foregoing reasons, NNA respectfully requests that this Court assign error to the Superior Court's refusal to dismiss TAM's tortious interference and future damages claims.

Respectfully submitted this 14th day of October 2011.



James E. Howard, WSBA #37259
Samantha E. Funk, WSBA #43341
DORSEY & WHITNEY LLP
701 Fifth Avenue, Suite 6100
Seattle, WA 98104-7043
P: (206) 903-8800
F: (206) 903-8820

Attorneys for Respondent/Cross-Appellant
Nissan North America, Inc.

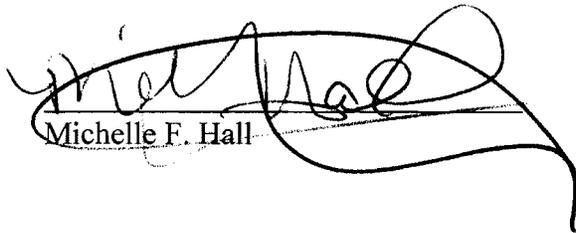
CERTIFICATE OF SERVICE

I hereby certify that on this date I caused to be served a copy of the foregoing on the following by the method indicated:

James A. Krueger
Lucy R. Clifthorne
Daniel Montopoli
Vandenberg Johnson & Gandara, LLP
1201 Pacific Avenue, Suite 1900
Tacoma, WA 98401

- Via Messenger
- Via ECF Notification
- Via Facsimile
- Via U.S. Mail
- Via Electronic Mail

Dated this 14th day of October 2011.


Michelle F. Hall

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 OCT 14 PM 6:08