IN THE SUPREME COURT OF FLORIDA

DWAYNE HAWKINS and MILLARD G. RIPLEY, Plaintiffs/Appellants, v. FORD MOTOR COMPANY, Defendant/Appellee.	)	Case No. 92,503 (96-2306)

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

INITIAL BRIEF OF APPELLANTS DWAYNE HAWKINS and MILLARD G. RIPLEY

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STATEMENT OF THE CASE AND OF THE FACTS

I. Introduction

This case is before the Court on a certified question from the United States Court of Appeals for the Eleventh Circuit. While the answer to the certified question is determinative, there are other issues raised in the appeal before the Eleventh Circuit that do not bear directly upon the question which has been certified. Cognizant of this, Appellants, Mr. Hawkins and Mr. Ripley provide a history of the proceedings and a statement of facts which bear directly upon the certified question. However, preferring to err on the side of fullness and understanding the Court will pass over such information as may be irrelevant to its considerations, they will provide additional information which may be strictly speaking unnecessary to answering the certified question, but which is background to the case at large.

II. Statement of the Case

Plaintiffs filed their Complaint and Demand for Jury Trial in the United States District Court for the Middle District of Florida, Tampa Division, on January 18, 1995.[1] [II. #1] The Complaint contained two counts, one alleging

[1] Citations to the record are as the record has been maintained by the Eleventh Circuit and transmitted to this Court. Roman numerals indicate the numbered volumes of the transmitted record, followed by the item number, for example, II #2. Note also that some of the record (principally deposition transcripts) is presented in "Folders" which are separately numbered and will be cited as "Folder II #42).

violation of section 320.643, Florida Statutes[2] (the statute regulating transfers of interests in motor vehicle dealerships) and tortious interference with contract. Defendant served its answer and affirmative defenses on February 23, 1996. [II. #2] On January 16, 1996, Plaintiffs and Defendant each filed motions for summary judgment with supporting memoranda. [II. ##33-34, 43-44] Plaintiffs' motion was for partial summary judgment with respect to liability on Count One of the Complaint (alleging violation of section 320.643, Florida Statutes). Defendant's motion sought summary judgment with respect to both counts. On February 8, 1996, the Court entered an order denying Plaintiffs' motion for summary judgment and granting Defendant's motion for summary judgment with respect to both counts. *Hawkins v. Ford Motor Co.*, No. 95-55-CIV-T-21E)(M.D. Fla. Feb. 8, 1996)(In Appendix). Judgment was entered on the same day. [III. #58] On February 27, 1996, Plaintiffs filed a timely notice of appeal. [III. #59] During the pendency of the appeal, the United States District for the Middle District of Florida, Tampa Division, granted partial summary judgment to plaintiffs in the case of *Morse v. Ford Motor Co.*,No. 94-1013-CIV-T-17C (M.D. Fla. June 7, 1996)(In Appendix) on facts and legal issues virtually identical to those of the present case. That

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[2] Events giving rise to this action occurred in Fall 1994, the action being filed in January 1995. Appellants will present a survey of the statutory history below. Essentially, the statutes under which this case proceeds were put in place by a legislative revision of Chapter 320 in 1988.

matter was taken to the Eleventh Circuit on interlocutory appeal (Case No. 96-3633) and consolidated with the present case. Oral argument on the two cases was held on September 11, 1998. Subsequent to oral argument, the *Morse* matter settled, and the appeal was dismissed. By order of March 2, 1998 (filed in this Court on March 4, 1998), the Eleventh Circuit certified the following question:

> Does Fla. Stat. § 320.643(2)(a) provide the exclusive basis for objection by a motor vehicle manufacturer to the proposed transfer of all the equity in interest in a motor vehicle dealership?

Hawkins v. Ford Motor Co., No. 96-2306, 1998 WL 85795, *2 (11th Cir. Mar. 2, 1998)(In Appendix).

III. Statement of the Facts

In 1994, Dwayne Hawkins and Millard G. Ripley negotiated to purchase the stock of an existing Ford dealership, Wilson Davis Ford, Inc., located in Plant City, Florida. Mr. Hawkins has been a motor vehicle dealer since 1969. [Folder II #42, pp. 7-8] When this case began he had majority ownership interest and/or operated at least eight dealerships representing at least eighteen line-makes. [Folder II #42, pp. 10-25] He has been a dealer for Ford Motor Company through its Lincoln-Mercury division since 1978. [Folder II #42, p. 8] Millard G. Ripley began working in his family's motor vehicle dealership in 1955, becoming sole owner of the dealership in 1966. In 1976, he became an owner and the operator of a dealership in St. Petersburg, Florida, acquiring full ownership in 1988. [Folder I #41, pp. 5-18] From 1990 until

1993, he was general manager of a multi-line dealership in St. Petersburg, Florida. [Folder I #41, p. 21-24]

On August 4, 1994, Mr. Hawkins and Mr. Ripley entered into a contract with Wilson P. Davis, Jr. and Wade A. Bodiford to purchase the shares of Wilson Davis Ford, Inc., 800 of which were owned by Mr. Davis, 200 by Mr. Bodiford. [II. #44 (App. 1, Ex. C, p. 1)] The contract contained as a purchaser's condition to closing that Ford approve the proposed transfer of shares. [II. #44 (App. 1, Ex. C, pp. 20, 21)] It also contained a provision allowing any party to terminate the contract if it did not close by November 12, 1994. [II. #44 (App. 1, Ex. C, pp. 7-8)] By letter of August 12, 1994, Mr. Davis and Mr. Bodiford informed Ford of the proposed transfer as required by statute. § 320.643, Fla.Stat. [II. #44 (App. 1, Ex. D, E)] In addition to the letter notice, Mr. Hawkins and Mr. Ripley provided applications to Ford, which indicated Mr. Hawkins would own 80% of the dealership, Mr. Ripley the remainder, and that Mr. Ripley would be the dealer-operator or on-site manager. The applications also contained full statements of the two men's associations with other motor vehicle dealerships. [Folder I #40, Ex 8; #41, Ex. 1]

These are the facts essential to answering the certified question, namely, the structure of the transaction between Mr. Hawkins and Mr. Ripley, as stock purchasers, and Mr. Davis and Mr. Bodiford, as stock sellers and the notice given to Ford.

Clearly, however, this controversy developed because Ford did not approve this transaction in violation, Mr. Hawkins and Mr. Bodiford contend, of section 320.643(2)(a), Florida Statutes. It is expected that the Court will wish to know the facts underlying that controversy.

Within the period required by statute, Ford filed a verified complaint with the Florida Department of Highway Safety and Motor Vehicles objecting to the proposed transfer of stock and to the proposed change in management of the dealership. Ford's objections with respect to the transfer, however, were not to the moral character of either Mr. Hawkins or Mr. Ripley. Rather, Ford made several objections to Mr. Hawkins' business experience based on the performance of a Ford Motor Company dealership, specifically a Lincoln-Mercury dealership in Tallahassee, Florida, in which Mr. Hawkins has the controlling interest. Ford further objected based on financial grounds both with respect to Mr. Hawkins and to Mr. Ripley. Its objections to transfer of stock ***and*** to change of management were the same.

According to Ford personnel, Ford relies on certain written policies in reviewing the qualifications of applicants. [Folder I #39 (Stone Dec. ¶¶ 3, 6)] These policies are supplied nationwide to Ford's regions by its national office. [Folder I #39 (Martin Dec. ¶ 8)] The process involves, along with other matters, examination of customer satisfaction performance at other, non-Ford dealerships owned

or operated by the applicant, focusing on the measurements used by the line-makes to rank their respective dealers with regard to customer satisfaction surveys. [Folder I #39 (Stone Dec. ¶¶ 11, 14-16)] It also examines the sales effectiveness of such other dealerships. [Folder I #39 (Stone Dec. ¶ 18)]

In the case of customer service, if an applicant owns Ford or Lincoln-Mercury dealerships, the performance in such dealerships is given special emphasis in the review process. [Folder I #39 (Stone Dec. ¶ 11)] Ford's standards provide that a dealer with an existing Ford or Lincoln-Mercury dealership should be in the top half of customer service rankings. An applicant whose existing Ford product dealership ranks in the third quartile can be considered for a term, or interim agreement containing contingencies with respect to improvement of customer service scores. A dealer in the fourth quartile "should" not be considered for an additional dealership, although it appears this is not a hard and fast rule. [Folder I #39 (Stone Dec. ¶¶ 15-16); III. #52 (App. A)] In the case of sales performance, "optimally" Ford looks for dealers with sales performance records at existing dealerships above the zone, region, and national averages in their respective line-makes. If the performance is "significantly" below group or region average, an applicant is not accepted. [Folder I #39 (Stone Dec. ¶ 18)] There is at least one instance in Florida, however, in which a transfer was approved

to a person with existing dealerships performing below these levels. [III. #52 (App. B)]

Ford also reviews the financial standing of applicants, assessing their ability to maintain "adequate" capital and a one-to-one equity-to-debt ratio in the dealership. [Folder I #39 (Stone Dec. ¶ 22)]

At the time of the application to Ford, Mr. Hawkins' Lincoln-Mercury dealership had for the preceding several years been in the fourth quartile in customer service rankings. That dealership had also been below the regional and national average in market share. [Folder I #39 (Stone Dec. ¶¶ 15, 16] A holding company through which Mr. Hawkins owns several of his dealerships was in Chapter 11 bankruptcy proceedings. Ford employees met with Mr. Davis, Mr. Hawkins and Mr. Ripley to express their concern about these matters, and about Mr. Ripley's lack of ready cash. Mr. Hawkins explained that the bankruptcy proceeding was not brought on by insolvency, but by a lease problem with one of the dealership facilities. [Folder I #39 (Stone Dec. ¶¶ 23, 24)] Mr. Hawkins' financial statement presented with his application showed a net worth of $23,531,000. [Folder I #40 (Ex. 8, HAW1 6145-48)] Further, Mr. Ripley explained that he could readily borrow the funds needed to pay for his shares. [Folder I #41, p. 56]

Notwithstanding, on August 25, 1994, Ford informed Mr. Davis (and Mr. Hawkins and Mr. Ripley) that it would not approve the proposed transfer, and it filed a verified

complaint in opposition with the Florida Department of Highway Safety and Motor Vehicles. [II #44 (App. C, Ex. A)] The verified complaint raised no objection to the moral character of either Mr. Hawkins or Mr. Ripley. [III. #49 (Ex. A)] Without the contingency of Ford approval being fulfilled, closing on the stock purchase contract was delayed. After the passing of the November 12 closing deadline, the sellers gave notice they were terminating the contract. [II. #44 (App. 1, Ex. B)] As a consequence of this termination, the administrative hearing initiated by Ford's verified complaint was dismissed as moot. [II. #44 (App. 5)]

Mr. Davis subsequently sold his shares in Wilson Davis Ford, Inc. The purchasers in that transaction put up $134,000 unencumbered cash and borrowed $1,273,000. [III. #52 (App. E)]

SUMMARY OF ARGUMENT

Mr. Hawkins and Mr. Ripley will present in detail the reasons why the certified question must be answered in the affirmative. However, in summary, the Court must answer the certified question in the affirmative because the clear and unambiguous language of section 320.643(2)(a), Florida Statutes, compels it to do so.

Florida's legislature has chosen to regulate the relationship of motor vehicle manufacturers and their dealers with respect to the transfer of interests in dealerships. It began such regulation in 1980 with a statute that mandated a manufacturer could not unreasonably withhold approval of a proposed transfer of a franchise agreement. In 1984, it created distinct provisions, one regulating proposed transfers of franchise agreements, the other transfers of the whole or part of a person's equity interest in a motor vehicle dealership. At that time, the legislature also created a provision which requires that proposed changes of executive management in dealerships must be approved by manufacturers.

These provisions are clear and unambiguous and provide a reasoned balance of the interests of manufacturers, dealers, and equity owners. One district court, in *Morse,* correctly applied the sections as written and concluded that section 320.643(2)(a) exclusively governs equity transfers in whole or in part. In contrast, the other district court, in *Hawkins* concluded otherwise for reasons, Appellants argue, that are

based on the court's preference for a different policy than that enunciated in the statutes.

In fact, although the clear and unambiguous language of the statute compels the result in this case, even if one engages in a "fairness" argument, one must conclude that the balance provided by the legislature does not leave a manufacturer without recourse to protect its legitimate interests in having persons of good character associated with its dealerships and of having competent management in place to operate them. The legislative scheme consciously and carefully balances the interests of manufacturers, dealers, dealership owners, and the public.

ARGUMENT

I. Introduction

At the heart of this litigation is the application of Florida's statutes related to motor vehicle manufacturers and their dealers, sections 320.60-.70, Florida Statutes. In 1988, the legislature made substantial revisions to certain of these sections. Since that time there have been no revisions affecting the present case, which began in January 1995. Although the Florida District Courts of Appeal and courts in the federal Eleventh Circuit have construed the statutes relevant to this dispute on a number of related issues, this Court has not reviewed these statues, and no Florida state or federal court (except for the decisions discussed here) has addressed the question certified to the Court by the Eleventh Circuit.

At issue here are provisions which regulate the transfer of interests in motor vehicle dealerships. Mr. Hawkins and Mr. Ripley contend the case is clearly governed by section 320.643(2)(a), Florida Statutes, the section directed to transfers of equity interests in dealerships. Ford has argued, citing a variety of reasons, that section 320.643(1), Florida Statutes, is the controlling statute. The Eleventh Circuit's analysis of the case has reached a point, however, that it has asked this Court for an answer to the question raised by this difference between the litigants as decisive of the case.

The issue has been addressed in two unpublished district court decisions in which the district court judges came to diametrically opposite conclusions on the same legal issue under the same facts. In the present case, the court concluded that despite the language of section 320.643(2)(a), because the facts involved purchase of all the stock of a dealership and a proposed change of executive management, Ford could properly object to the proposed transaction as if it were a transfer of the franchise, a circumstance regulated by section 320.643(1), and ruled in favor of Defendant. *Hawkins* at 5. In *Morse*, however, the court reasoned that section 320.643(2)(a) regulates all equity transfers "in whole or in part," and ruled in favor of Plaintiffs. *Morse* at 6.

Mr. Hawkins and Mr. Ripley are confidant that when this Court examines the question, it will conclude that the decision in *Morse* is correct. The plain meaning of the statutes assures this result. Notwithstanding, Plaintiffs are well aware in view of the divergence in two decisions from the same district court and the certification from the Eleventh Circuit that this Court will review the legislation carefully. To assist that review, in their brief they will focus upon the reasons why the plain meaning of the statute requires that result, beginning with a review of the statutory scheme.

II. An Overview of §§ 320.60-.70, Fla.Stat.

A. Legislation with Respect to Motor Vehicle Manufacturers and Dealers

Florida began regulating motor vehicle manufacturers by requiring licensing in 1941. Ch. 20236, § 2, Laws of Fla. (1941). In 1970, the legislature made substantial additions to this legislation, which added regulation of various aspects of the manufacturer/dealer relationship. Ch. 70-424, § 9, Laws of Fla.; Ch. 70-439, § 1, Laws of Fla. This legislation is codified in Chapter 320, Florida Statutes.

Since 1970, sections 320.60-.70 have been amended from time to time, with a major revision in 1988. Ch. 88-395, Laws of Fla. Since 1988, only minor changes have been made, none affecting the provisions at issue here, except for the gender equalization bill of 1995 (Ch. 95-148, Laws of Fla.) which has made "his" to "his or her" changes in the language. For convenience of reference, therefore, references to Florida Statutes will be to the 1997 edition.

This sort of regulation is commonplace. Virtually every state has some statutory regulation of motor vehicle manufacturers and their relationships with their dealers. The statutory language and the areas of that relationship which are regulated by statute vary from state to state. Nonetheless, state regulation in this area is ubiquitous. *See, e.g., New Motor Vehicle Bd. v. Orrin W. Fox Co.,* 439 U.S. 96, 192 n.4-5, 99 S.Ct. 403, 408 n.4-5, 58 L.Ed.2d 361 (1978).

B. The Statutory Scheme of §§ 320.60-.70

In section 320.605, Florida Statutes, the legislative purpose of the statutory scheme is proclaimed:

> It is the intent of the Legislature to protect the public health, safety, and welfare of the citizens of the state by regulating the licensing of motor vehicle dealers and manufacturers, maintaining competition, providing consumer protection and fair trade and providing minorities with opportunities for full participation as motor vehicle dealers.

The legislation regulates motor vehicle manufacturers and distributors (referred to in the statue as "licensee"; here as simply "manufacturer") directly through a licensing requirement. §§ 320.61, 320.615, 320.62, 320.63 In addition, certain aspects of the relationship between manufacturers and distributors are the subject of specific sections.

Section 320.64 enumerates twenty-three constraints on a manufacturer's behavior, violation of which can affect its licensing, some of which may also be violations against its dealers, that is, its franchisees. In section 320.645, the legislature has prohibited manufacturers from owning dealerships except under very specific circumstances. Section 320.696 requires manufacturers to compensate dealers promptly for warranty work done on consumers' vehicles. There are other provisions of a technical nature relating to the franchise agreement offered by the manufacturer to its dealers and to relations between manufacturers and the Department of Highway Safety and Motor Vehicles. In addition, in the area of enforcement, section 320.695 creates an injunction to prevent violations by the manufacturer, specially issuable without bond; section 320.697 provides for a damage remedy for injury suffered as a result of a violation, including trebling

of damages and attorney's fees; section 320.698 establishes civil fines for violations; and section 320.699 provides for administrative proceedings with respect to certain sections.

Four sections address quite specifically issues affecting dealers and the public in a manner that supersedes contractual provisions in the franchise agreement between manufacturer and dealer. In section 320.641, prospective discontinuation, cancellation, nonrenewal, and modification of a dealer franchise agreement is regulated. This section establishes the manner in which a manufacturer may seek to "terminate" or modify its franchise with a dealer, prescribes the parameters within which such action may be taken, and creates an administrative proceeding in which a dealer may oppose a proposed discontinuation, cancellation, nonrenewal, or modification.

In section 320.642, the legislature has recognized the special place distribution of motor vehicles has in our society by regulating the placement of a new dealership, or the relocation of an existing dealership within an area currently served by existing dealers. This statute provides the opportunity to existing dealers situated in such a position as to be affected by such proposed changes in the market to protest the establishment or relocation of a dealership in an administrative hearing where the manufacturer must put on its proof that such a proposed change is needed,

considering the public interest and that of the manufacturer and protesting dealer.

With section 320.643, the state has regulated the transfer of franchise agreements (section 320.643(1)) and equity interests in dealerships (section 320.643(2)(a)), superseding franchise provisions with respect to transfers of interest. This is the statute most closely related to the present case and cited in the certified question. Obviously, Appellants will have much more to say on this subject.

Recognizing there will be occasions in which a dealer will wish to change management of a dealership and that such a decision may have a significant effect on the dealership, in section 320.644 the legislature has mandated that a manufacturer must have the opportunity to review and object to proposed changes in management.

As this overview demonstrates, the state's regulation in this area is extensive and well articulated. As the statement of intent articulated in section 320.605 suggests, these statutes consider the public welfare and the competitive needs of the industry. The needs of the public, of franchise dealers, and of manufacturers are balanced in a fair manner. In view of this scheme, this Court will readily conclude the plain meaning of section 320.643(2)(a) requires an affirmative answer to the certified question.

III. The Certified Question Must be Answered in the Affirmative.

The holdings of the divergent federal district court opinions exemplify the question presented to this Court and implicitly point to the arguments of the litigants.

In *Morse v. Ford Motor Co.*,the court wrote:

> Defendant company argues that "[w]hen 100% of the stock is sold to a third party, . . . it is apparent that the parties are seeking to transfer the franchise agreement and change executive management control, so that both sections 320.643 and 320.644 are applicable." (Dkt. 77 at 7). Defendant company also argues that there is nothing in the statute or legislative history which suggests that a proposed 100% sale of stock, [*sic*] could not be reviewed under both sections.
>
> Florida Statute section 320.643(1) applies to the transfer, assignment, or sale of a franchise agreement. Fla. Stat. § 320.643(1). Florida Statute § 320.643(2)(a) applies to the transfer or sale of all or a part of the equity interest. Fla. Stat. § 320.643(2)(a). Section 320.643(2)(a) specifically states that:
>
> > [n]otwithstanding the terms of any franchise agreement, a licensee shall not by contract or otherwise, fail or refuse to give effect to, prevent, prohibit, or penalize, and [*sic* for "any"] motor vehicle dealer or any proprietor, partner, stockholder, owner, or other person who holds or otherwise owns an interest therein from selling, assigning, transferring, alienating, or otherwise disposing of, <u>in whole or in part</u>, the equity interest of any of them in such motor vehicle dealer . . . unless the licensee proves at a hearing pursuant to this section that such sale, transfer, alienation, or other disposion [*sic*] is to a person who is not, or whose controlling executive management is not, of good moral character. Fla. Stat. § 320.643(2)(a).
>
> The Florida Supreme Court has held that "where the language of a statute is plan and unambiguous

there is no occasion for judicial interpretation." Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 454 (Fla. 1992). In construing statutory language, courts are confined "to the plain meaning of the words the legislature chose to employ." Baskerville-Donovan Engineer, Inc. v. Pensacola Executive House Condo Ass'n., Inc., 581 So. 2d 1301, 1302 (Fla. 1991).

This Court finds that only section 320.643(2)(a) applies because it is undisputed that this proposed transfer agreement involved the transfer of the equity interest in the car dealership. The plain meaning of section 320.643(2)(a) covers proposed transfers of equity in whole or in part. Fla. Stat. § 320.643(2)(a). Therefore, this section applies even if there is 100% sale of the stock, as was proposed in this case. Sections 320.643(1) and 320.644 are not triggered simply because this proposed transfer involved the sale of 100% of the car dealerships stock.

Morse at 5-6. The Plaintiffs and Defendant made precisely the same arguments in this case as in *Morse.*

In *Hawkins*, however, the court reasoned thus:

Plaintiff contends that § 320.643(2)(a) applies, and Defendant contends that §§ 320.643(1) and 320.644 apply. Section 320.643(2)(a) permits manufacturers to contest proposed transfers of stock only on the basis of the absence of good moral character on the part of the proposed buyer or transferee. Subsection (1), however, first provides that a motor vehicle dealer shall not transfer a franchise agreement to another person without written notice to the manufacturer. The manufacturer then has 60 days within which to approve or reject the sale or transfer on the basis of either the moral character or the written, reasonable, and uniformly applied standards or qualifications of the proposed transferee. Section 320.644 applies to a change of executive management control, and it also permits consideration of the character and qualifications of the proposed buyer or transferee.

The Court finds that the sections which Defendant relies upon are applicable to the instant case. First, the record shows that Plaintiff

> Hawkins wanted an asset purchase of the Wilson Davis Ford dealership, but Wilson Davis wanted a stock sale. Nevertheless, it was clear that the end result would be the same regardless of the manner in which the deal was structured. (Dkt. 41, pp. 38-39 & Dkt. 42 p. 92). Further, Defendant points out that the language of the Ford Sales and Service Agreement makes no distinction between stock sales and assets sales. Second the language of §§ 320.643(1) and 320.644 is not limited to transfer of a franchise only in connection with a proposed asset purchase. It is, therefore, appropriate that when transfer of 100% of stock is contemplated, the provisions regarding transfer of a franchise agreement and change in executive management should apply. Finally, Plaintiffs have made no mention of any legislative history or public policy based upon a distinction between sale of 100% of stock and sale of 100% of assets. Rather, it appears that where transfers of a franchise agreement and executive control are anticipated, the manufacturer should be entitled to consider the proposed transferees' qualifications despite the fact that the deal proposes a transfer of stock. As Defendant has persuasively argued, manufacturers have a substantial and legitimate business interest in choosing their dealers. The Court therefore finds that §§ 320.643(1) and 320.644 apply to the instant case.

Hawkins at 4-5. In so holding, the district court decided what it believed "should" be afforded to manufacturers, but ignored what the Florida legislature has enacted and the establish rules of interpretation employed to construe that enactment.

A. The Plain Language of § 320.643(2)(a), Fla.Stat. Requires that the Certified Question Must be Answered in the Affirmative.

No principle of statutory interpretation is more fundamental than the rule that "[w]here the language of a statute is plain and unambiguous there is no occasion for judicial interpretation." *Forsythe v. Longboat Beach Erosion*

Control Dist., 604 So.2d 452, 454 (Fla. 1992); *see also Nicoll v. Baker*, 668 So.2d 989, 990-91 (Fla. 1996); *Starr Tyme, Inc. v. Cohen*, 659 So.2d 1064, 1067 (Fla. 1995)("We have repeatedly explained that when the language of a statute is unambiguous and conveys a clear and ordinary meaning, there is no need to resort to other rules of statutory construction; the plain language of the statute must be given effect."). The statute in question here could not be clearer.

1. The Development of § 320.643, Fla.Stat.

Section 320.643(2)(a) reads as follows:

> Notwithstanding the terms of any franchise agreement, a licensee [manufacturer] shall not, by contract or otherwise, fail or refuse to give effect to, prevent, prohibit, or penalize, or attempt to refuse to give effect to, prevent, prohibit, or penalize, any motor vehicle dealer or any proprietor, partner, stockholder, owner, or other person who holds or otherwise owns an interest therein from selling, assigning, transferring, alienating, or otherwise disposing of, ***in whole or in part, the equity interest*** of any of them in such motor vehicle dealer to any other person or persons, including a corporation established or existing for the purpose of owning or holding the stock or ownership interests of other entities, ***unless the licensee proves at a hearing pursuant to this section that such sale, transfer, alienation, or other disposition is to a person who is not, or whose controlling executive management is not, of good moral character.*** A motor vehicle dealer, or any proprietor, partner, stockholder, owner, or other person who holds or otherwise owns an interest in the motor vehicle dealer, who desires to sell, assign, transfer, alienate, or otherwise dispose of any interest in such motor vehicle dealer, shall notify, or cause the proposed transferee to so notify, the licensee, in writing, of ***the identity and address of the proposed transferee.*** A licensee who receives such notice may, within 60 days following such receipt, file with the department [Department of Highway Safety and Motor Vehicles] a

> verified complaint for a determination that the proposed transferee is not a person qualified to be a transferee under this section. The licensee has the burden of proof with respect to all issues raised by such verified complaint. The department shall determine, and enter an order providing, that the proposed transferee either is qualified or is not and cannot be qualified for specified reasons; or the order may provide the conditions under which a proposed transferee would be qualified. If the licensee fails to file such verified complaint within such 60-day period or if the department, after a hearing, dismisses the complaint or renders a decision other than one disqualifying the proposed transferee, the franchise agreement between the motor vehicle dealer and the licensee shall be deemed amended to incorporate such transfer or amended in accordance with the determination and order rendered, effective upon compliance by the proposed transferee with any conditions set forth in the determination or order.

(emphasis added).

This section stands in sharp contrast with section 320.643(1):

> A motor vehicle dealer shall not transfer, assign, or sell a franchise agreement to another person unless the dealer first notifies the licensee [manufacturer] of the dealer's decision to make such transfer, by written notice setting forth the prospective transferee's name, address, financial qualification, and business experience during the previous 5 years. The licensee shall, in writing, within 60 days after receipt of such notice, inform the dealer either of the licensee's approval of the transfer, assignment, or sale or of the unacceptability of the proposed transferee, setting forth the material reasons for the rejection. If the licensee does not so inform the dealer within the 60-day period, its approval of the proposed transfer is deemed granted. ***No such transfer, assignment, or sale will be valid unless the transferee agrees in writing to comply with all requirements of the franchise then in effect.*** Notwithstanding the terms of any franchise agreement, the acceptance by the licensee of the proposed transferee shall not be unreasonably withheld. ***For the purposes of this section, the***

> ***refusal by the licensee to accept a proposed transferee who is of good moral character and who otherwise meets the written, reasonable, and uniformly applied standards or qualifications, if any, of the licensee relating to the business experience of executive management required by the licensee of its motor vehicle dealers is presumed to be unreasonable.*** A licensee who receives such notice may, within 60 days following such receipt, file with the department a verified complaint for a determination that the proposed transferee is not a person qualified to be a transferee under this section. The licensee has the burden of proof with respect to all issues raised by such verified complaint. The department shall determine, and enter an order providing, that the proposed transferee is either qualified or is not and cannot be qualified for specified reasons, or the order may provide the conditions under which a proposed transferee would be qualified. If the licensee fails to file such verified complaint within such 60-day period or if the department, after a hearing, dismisses the complaint or renders a decision other than one disqualifying the proposed transferee, the franchise agreement between the motor vehicle dealer and the licensee shall be deemed amended to incorporate such transfer or amended in accordance with the determination and order rendered, effective upon compliance by the proposed transferee with any conditions set forth in the determination or order.

(emphasis added).

Indeed, comparison with the original statute (Ch. 80-217, Laws of Fla.) is even more instructive:

> A motor vehicle dealer shall not transfer, assign, or sell a franchise agreement to another person unless the dealer first notifies the licensee [manufacturer] of his decision to make such transfer, by written notice setting forth the prospective transferee's name, address, financial qualification, and business experience during the previous 5 years. The licensee shall, in writing, within 60 days after receipt of such notice, inform the dealer either of his approval of the transfer, assignment, or sale or of the unacceptability of the proposed transferee, setting forth the material reasons for the rejection. If the licensee does not so inform the dealer within the 60-day period, his

> approval of the proposed transfer is deemed granted. No such transfer, assignment, or sale shall be valid unless the transferee agrees in writing to comply with all requirements of the franchise then in effect. Acceptance by the licensee of the proposed transferee shall not be unreasonably withheld.

§ 320.643, Fla.Stat. (1981).

The present statutory form was established in 1984. Ch. 84-69, § 8, Laws of Fla. That statute is precisely the same as the present statute with one exception. Section 320.643(1) did not contain the "verified complaint" section which was in section 320.643(2)(a), that is, the section beginning "A licensee who receives such notice may, within 60 days ..." through the end of the section. In 1988, the legislature added this "verified complaint" provision to section 320.643(1), so that the procedure for manufacturers to object to proposed transfers was clearly placed in both sections.

Finally, in 1984, when the legislature divided section 320.643 into a "franchise transfer" section and a "equity transfer" section, it created section 320.644, regulating proposed changes of executive management at dealerships (Ch. 84-69, Laws of Fla.).

2. By its Plain Language, Section 320.643 Regulates Proposed Transfers of Equity Interests, in Whole or in Part.

The Eleventh Circuit has asked the question:

> Does Fla. Stat. § 320.643(2)(a) provide the exclusive basis for objection by a motor vehicle manufacturer to the proposed transfer of all the equity in interest in a motor vehicle dealership?

Section 320.643(2)(a) unambiguously governs transfers of equity interest ***in whole or in part***. Consequently, the question must be answered in the affirmative.

One does not need to move beyond the four corners of the section 320.643(2)(a) to reach this result:

> ***Notwithstanding the terms of any franchise agreement,*** a licensee [manufacturer] shall not, by contract or otherwise, fail or refuse to give effect to, prevent, prohibit, or penalize, or attempt to give effect to, prevent, prohibit, or penalize, any motor vehicle dealer or any proprietor, partner, stockholder, owner, or other person who holds or otherwise disposing of, ***in whole or in part***, the equity interest of any of them in such motor vehicle dealer to any person or persons, including a corporation established or existing for the purpose of owning or holding the stock or ownership interests of other entities, unless the licensee proves at a hearing pursuant to this section that such sale, transfer, alienation, or other disposition is to a person who is not of good moral character.

(emphasis added). This language is specific and inclusive. In the first instance, this statute controls regardless of the language of the franchise agreement. Next, it governs transfers of every type of equity interest in a motor vehicle dealer. A motor vehicle dealer is defined in section 320.60(11)(a) as one who is a party to a franchise agreement defined in section 320.60(1)) with a manufacturer (or distributor). In the present case, the motor vehicle dealer is Wilson Davis Ford, Inc. (*see* V. #54 (Wilson Davis Ford agreement internal number HAW1 4090). It is undisputed that the proposed transfer in question was one of stock. The two owners each wished to transfer their shares, in this instance,

all of their shares. The amount of shares does not matter, however. The equity interest of any owner, in whole or in part, is subject to this particular section.[3]

Ford is expected to argue, as it did to the federal district court, that this section is not exclusive, however, and that a complete transfer of stock with a related notice of proposed change of dealer executive management "amounts to" a transfer of the franchise agreement, so that section 320.643(1) and section 320.644 may control such a case.

This sort of "interpretation" clearly violates the well established principles that "where the language of a statute is plain and unambiguous there is no occasion for judicial interpretation," and "all parts of a statute must be read together in order to achieve a consistent whole." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 454, 455 (Fla. 1992). Indeed, when one acknowledges that legislative intent is a central issue in interpreting statute, if, as here, "the language of the statute is clear and unambiguous, a court must derive legislative intent from the words used without rules of construction or speculating as to what the legislature intended." *State v. Dugan*, 685 So.2d

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[3] The legislature might have made distinction among amounts of ownership transferred, but chose not to. *Cf.* Ohio Rev. Code Ann. § 4517.56(A): "If the sale or transfer of the business and assets ***or all or a controlling interest in the capital stock*** of a new motor vehicle dealer ..." (emphasis added).

1210, 1212 (Fla. 1996); *see also Zuckerman v. Alter*, 615 So.2d 661, 663 (Fla. 1993).

If, however, one wished to explore further the question of legislative intent, the simple history of section 320.643 must convince the Court that in regulating transfers in the dealer-manufacturer relationship, the legislature quite intentionally created distinct provisions with slight but significant differences to regulate transfers of franchise agreements on the one hand, and transfers of equity interests on the other.

In 1980, section 320.643 was implicated when a motor vehicle dealer proposed to "transfer, assign, or sell a franchise agreement to another person." § 320.643, Fla.Stat. (1981). In such a circumstance, notice was required to be sent to the manufacturer with "the prospective transferee's name, address, financial qualification, and business experience during the previous 5 years." *Id.* Acceptance of a proposed transferee could not be "unreasonably withheld." *Id.* The statute only addressed those situations in which a franchise agreement was to be transferred, and there was no special direction with respect to reasonableness, nor was there a reference to equity transfers.

Upon reflection, one realizes that a transfer of the franchise agreement, that is, the contractual right to sell a manufacturer's product, occurs when the holder of the right transfers the right to another. However, if the holder of the

right is a corporation, transfer of equity interests in the franchisee corporation does not affect the "person" holding the franchise. *See Cruising World, Inc. v. Westermeyer,* 351 So.2d 371, 372 (2d DCA 1977)(citing *Damico v. State,* 153 Fla. 850, 16 So.2d 43, 45 (1944): "The sale or transfer of stock of the corporation does not reduce or impair the corporate assets.") Nonetheless, the legislature might choose to regulate such transfers in addition to equity transfers of the franchise agreement. That is precisely what happened in 1984.

The 1984 revision created two very distinct statutory provisions, one, section 320.643(1), regulating transfers of franchise agreements, the other, section 320.643(2)(a), regulating transfers of equity interests, regardless of the amount of interest. A holder of equities may transfer that interest in whole or in part, whether such a person owns all or a part of the equity of the dealership, subject to the requirements of section 320.643(2)(a).

A small but significant difference between the two provisions is the basis upon which a manufacturer may state an objection to a proposed transfer. If the franchise agreement is to be transferred, the manufacturer is entitled to examine information with respect to financial wherewithal and business experience of the proposed transferee, as well as having, of course, the name and address of the transferee so that the manufacturer may make inquiries as to moral character. The manufacturer may oppose such a transfer if it is to someone

not of good moral character, or to someone who does not meet its normal requirements for business experience of those who are to operate its franchises, provided these requirements are reasonable.

By contrast, in the case of an equity transfer, the manufacturer is given the name and address of the proposed transferee, in order to allow for examination of moral character only. A little reflection confirms this is what one should expect. There is no change of the franchise agreement, the franchisee remaining the same; consequently, the finances and business experience are already in place at the dealership. The manufacturer may assure itself, however, that persons of bad moral character are not owners of its dealerships.

The creation of section 320.644 by the 1984 legislature confirms the distinction between section 320.643(1) and section 320.643(2)(a) is quite intentional. Certainly, a manufacturer has an interest in competent management of its dealerships. If that management is to change, it may wish to examine not only the moral character, but the business experience of the proposed new management. Section 320.644 provides precisely this opportunity. Notice must be given to the manufacturer of proposed new executive management's "name, address, and business experience." § 320.644, Fla.Stat. The manufacturer may object to unacceptable proposals in the same manner as in the case of objections to proposed transferees in

sections 320.643(1), again based on its normal, reasonable standards. *Id.*

Thus, these three statutory provisions operate together, each having its own clear function. They allow a balance to be struck between complete control by the manufacturer's franchise agreement, negotiated from a position of very superior strength, and complete autonomy by franchisees and their owners. Manufacturers may not prevent transfer of franchise agreements out-of-hand, but they may scrutinize the experience and qualifications, as well as the moral character, of proposed transferees of franchise agreements. Owners of equity interests in dealerships, in contrast, regardless of the terms of the franchise agreement, will have free alienability of their equity interests, provided they do not propose to transfer to persons not of good moral character. If there is a proposed change in executive management, it must be to a person of good moral character and with proper experience.

While the Court need not speculate on legislative rationale in interpreting clear and unambiguous statutes such as these, here it is easy to see that the interests are nicely balanced. Those buying a franchise must present their character, their finances, and their business experience. Finances and business experience have already been examined for existing dealerships, and owners need only be of good moral character. Thus, alienability of an equity interest is

freer than of a franchise agreement. However, manufacturers are assured of the right to examine executive management through the provisions of section 320.644. Indeed, from the viewpoint of the public at large, it is advantageous for new owners to purchase stock rather than the franchise agreement and other assets of the dealership corporation. Stock owners take the corporation as they buy it, complete with its existing liabilities and obligations. In contrast, asset purchasers eschew existing liabilities of the corporation from which assets are purchased.

Unquestionably, section 320.643(2)(a) is the exclusive provision governing the basis for objection to a proposed transfer of 100% (or 1%) equity interest in a dealership.

B. The Federal District Court in *Hawkins v. Ford* Impermissibly Modified the Clearly Expressed Statutory Provisions to Promote a Policy Favored by the Court.

The provisions just analyzed are so clear that only the divergence of two decisions on virtually identical sets of facts and law would require the Eleventh Circuit to seek an opinion from this Court on the question certified. Examination of the basis for decision in the two cases shows clearly, however, that the *Morse v. Ford Motor Co.* court applied the established principal of giving effect as written to clear and unambiguous language while the court in *Hawkins v. Ford Motor Co.* allowed itself to be swayed by policy arguments of what the statutes ought to have said.

Compare:

> The Florida Supreme Court has held that "where the language of a statute is plan and unambiguous there is no occasion for judicial interpretation." Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 454 (Fla. 1992). In construing statutory language, courts are confined "to the plain meaning of the words the legislature chose to employ." Baskerville-Donovan Engineer, Inc. v. Pensacola Executive House Condo Ass'n., Inc., 581 So. 2d 1301, 1302 (Fla. 1991).
>
> This Court finds that only section 320.643(2)(a) applies because it is undisputed that this proposed transfer agreement involved the transfer of the equity interest in the car dealership. The plain meaning of section 320.643(2)(a) covers proposed transfers of equity in whole or in part. Fla. Stat. § 320.643(2)(a). Therefore, this section applies even if there is 100% sale of the stock, as was proposed in this case. Sections 320.643(1) and 320.644 are not triggered simply because this proposed transfer involved the sale of 100% of the car dealerships stock.

Morse at 5-6.

with:

> The Court finds that the sections which Defendant relies upon are applicable to the instant case. First, the record shows that Plaintiff Hawkins wanted an asset purchase of the Wilson Davis Ford dealership, but Wilson Davis wanted a stock sale. Nevertheless, it was clear that the end result would be the same regardless of the manner in which the deal was structured. (Dkt. 41, pp. 38-39 & Dkt. 42 p. 92). Further, Defendant points out that the language of the Ford Sales and Service Agreement makes no distinction between stock sales and assets sales. Second the language of §§ 320.643(1) and 320.644 is not limited to transfer of a franchise only in connection with a proposed asset purchase. It is, therefore, appropriate that when transfer of 100% of stock is contemplated, the provisions regarding transfer of a franchise agreement and change in executive management should apply. Finally, Plaintiffs have made no mention of any legislative history or public policy based upon a distinction between sale of 100% of stock and sale of 100% of assets. Rather, it appears that where transfers of a franchise agreement and executive

> control are anticipated, the manufacturer should be entitled to consider the proposed transferees' qualifications despite the fact that the deal proposes a transfer of stock. As Defendant has persuasively argued, manufacturers have a substantial and legitimate business interest in choosing their dealers. The Court therefore finds that §§ 320.643(1) and 320.644 apply to the instant case.

Hawkins at 5.

The *Hawkins* rationale is replete with statements to support what public policy the court thought should be supported: "First, the record shows that Plaintiff Hawkins wanted an asset purchase of the Wilson Davis Ford dealership, but Wilson Davis wanted a stock sale. Nevertheless, it was clear that the end result would be the same regardless of the manner in which the deal was structured." Indeed, it is irrelevant to the present case that the buyers would have preferred an asset purchase. Had they gotten what they preferred, the case would clearly have been governed by section 320.643(1). This was not the case, and Mr. Hawkins and Mr. Ripley accepted the potential liabilities, the difference in tax treatment, and the debts of the corporation that went with an equity purchase as opposed to an asset purchase. The end result simply would not have been the same. There would have been a change of ownership of the dealership but the franchise would have remained with the franchisee, that is, Wilson Davis Ford, Inc. Moreover, those who had dealt with Wilson Davis Ford, Inc., including its creditors

and its customers, would have continued to deal with the same legal entity.

"Further, Defendant points out that the language of the Ford Sales and Service Agreement makes no distinction between stock sales and assets sales." It is simply irrelevant what the language of the franchise says. Section 320.643(2)(a) unambiguously applies "[n]otwithstanding the terms of any franchise agreement." *See Bayview Buick GMC Truck, Inc. v. General Motors Corp.*, 597 So.2d 887, 890 (Fla. 1st DCA 1992)(manufacturer expressly prohibited from exempting itself from section 320.643 by franchise agreement); *see also* § 320.64(22), Fla.Stat. (dealer may not be required to waive its rights under sections 320.60-.70).

"Second the language of §§ 320.643(1) and 320.644 is not limited to transfer of a franchise only in connection with a proposed asset purchase. It is, therefore, appropriate that when transfer of 100% of stock is contemplated, the provisions regarding transfer of a franchise agreement and change in executive management should apply." In so reasoning, the court would ignore the direct applicability of section 320.643(2)(a) to equity transfers. Such an interpretation runs directly counter to the well established principle that "all parts of a statute must be read together to achieve a consistent whole." *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 455 (Fla. 1992); *T.R. v. State*, 677 So.2d 270, 271 (Fla. 1996). Under this interpretation,

and in the face of the expressed statement that it applies to transfers of equity interests in whole or in part, when would section 320.643(2)(a) apply? The court's interpretation would reduce the statute to a nullity.

Rather, the court's choice of words shows clearly what is happening. The court is indicating what it believes to be "appropriate." Such a statement is a clear indication of preferred policy. "Appropriate" or not, this is simply not how the Florida legislature has constructed its statutes.

What follows underscores this point:

> Finally, Plaintiffs have made no mention of any legislative history or public policy based upon a distinction between sale of 100% of stock and sale of 100% of assets. Rather, it appears that where transfers of a franchise agreement and executive control are anticipated, the manufacturer should be entitled to consider the proposed transferees' qualifications despite the fact that the deal proposes a transfer of stock. As Defendant has persuasively argued, manufacturers have a substantial and legitimate business interest in choosing their dealers.

As Mr. Hawkins and Mr. Ripley have demonstrated above, the historical changes in this legislation shows a clear legislative policy. There is a clear distinction between an asset transfer, that is, a transfer of the franchise agreement, and an equity transfer, and there simply is a legal and practical difference between an asset sale and a stock transfer.

The court tells us what "should" be allowed and what it believes a manufacturer's "legitimate interest" to be. In fact, "it is not the court's duty or prerogative to modify or

shade clearly expressed legislative intent in order to uphold a policy favored by the court." *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984); *see also State v. Jett,* 626 So.2d 691, 692 (Fla. 1993)("unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language").

The court implies that to apply section 320.643(2)(a) to a 100% stock sale with proposed change of executive management violates a manufacturer's legitimate interests. Even if this were so, in the face of the clear language of the statute, the court would be bound to apply the provision nonetheless, it being for the legislature rather than the court to balance the interests involved. It is, however, equally clear the legislature through the passage of section 320.644 has accounted for this very contingency.

If a proposed transferee is of good moral character, a manufacturer must approve a proposed equity transfer. If there is a collateral proposed change of executive management, the manufacturer may object if the proposed management is not of good moral character or does not meet reasonable requirements with respect to business experience. The legislature has determined that on balancing the legitimate concerns of manufacturers and owners of equity, equity interests may be passed to anyone of good moral character. This does not mean the dealership may be run by unqualified

persons. Changes in executive management may be scrutinized by business experience.[4]

The conclusion is inescapable. The court in *Hawkins* applied the statute as it would have written the law, not as the Florida legislature wrote it. The court in *Morse* applied the statute as it is written and is a clear model for the reasoning that requires an affirmative answer to the certified question.

Finally, Ford makes much of its perceived deficiencies in the financial qualification of Mr. Hawkins and Mr. Ripley and of Mr. Hawkins' business experience at a Lincoln-Mercury dealership of which he is the owner. The underlying assumption, which so influenced the district court, is that Ford should not have to do business with those who do not meet its standards. This is not the place to point out that Ford's concerns are technical, that Mr. Hawkins' Lincoln-Mercury dealership continues to represent Ford with Ford's blessing, and that Mr. Hawkins continues to function as a dealership owner apparently without the financial crisis or operational disaster that Ford poses.

The point is that Ford may not object to a proposed equity transfer except on grounds of moral character.

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[4] In fact, in the present case, Mr. Hawkins and Mr. Ripley were both proposed as executive management. Mr. Ripley was to be the on-site operator. Ford made no objection to Mr. Hawkins character but did object to his business experience. It made no objection to Mr. Ripley's character or to his business experience. An acceptable manager had been proposed.

Presumably, if the proposed transferee cannot afford to pay for the stock, the transfer will not take place. As for fears about the financial viability of the dealership after a change of ownership, the financial condition of the dealership does not change by a transfer of equity ownership. If after a transfer the new owners engage in policies which threaten the dealership's operations and violate the franchise agreement, the legislature has provided Ford the remedy of termination in section 320.641, Florida Statutes.

If the new owners also wish to change executive management of the dealership, it must notify Ford, which may object if the business experience of the proposed management is not acceptable. In the end, new management must pass muster, and Ford's legitimate interests are thereby protected.

There is nothing illogical about the balance which the legislature has created. Nor is Ford left at the mercy of incompetents who threaten to destroy its dealerships. Ford may prefer another legislative scheme, and so may the district court judge, but these are matters for the Florida legislature, not for Ford or the courts.

CONCLUSION

Because the clear and unambiguous language so requires, the Court must answer the certified question in the affirmative.

Respectfully submitted this 24th day of March, 1998.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the forgoing has been furnished by U.S. Mail to Dean Bunch, Esquire, Sutherland, Asbill & Brennan, 2282 Killearn Center Boulevard, Tallahassee, FL 32308 and to John H. Fleming and Dulaney L. O'Roark, III, Esquires, Sutherland, Asbill & Brennan, 999 Peachtree Street, N.E., Atlanta, GA 30309 on this 24th day of March, 1998.

_____
Attorney