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

REPLY BRIEF OF APPELLANTS DWAYNE HAWKINS and MILLARD G. RIPLEY

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I. INTRODUCTION

Mr. Hawkins and Mr. Ripley will reply below to the arguments raised by Appellee, Ford Motor Company, ("Ford") and Amici Curiae, International Automobile Manufacturers, Inc. and American Automobile Manufacturers Association, ("Amici Curiae") which address the issue put before this Court by the United States Court of Appeal for the Eleventh Circuit. They will also reply briefly to new issues interjected by Ford and Amici Curiae in their briefs which go beyond the certified question. However, as a preliminary matter, Mr. Hawkins and Mr. Ripley note that there is no basis for the Court to address these issues.

The Eleventh Circuit certified the following question to this Court:

> 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 interest in a motor vehicle dealership?

Hawkins v. Ford Motor Co., 135 F.3d 1443, 1445 (11th Cir. 1998). Notwithstanding the scope of the Eleventh Circuit's question, Ford and Amici Curiae ask this Court, on the basis of the standard certification language that the scope of

inquiry is not meant to be restricted, to rule that Mr. Hawkins and Mr. Ripley do not have standing to bring their action, or that an interpretation of section 320.643(2)(a) different from that espoused by Ford and Amici Curiae would be unconstitutional. Amici Curiae also attempt to raise as an issue whether treble damages can be allowed under section 320.697, Florida Statutes. That portion of the Amici Curiae brief is the subject of Appellants' separate motion to strike which is before the Court.

Ford asked that the Eleventh Circuit certify, in addition to the question certified, the following question: "Under the Florida Dealer Act, does a prospective transferee of the stock of a dealership have standing to sue a manufacturer for alleged wrongful objection to a transfer?" *See* Joint Stipulation of Certification at p. 6 (In Appendix). The Court declined to certify that question as well as another which Appellants requested. Clearly, the Eleventh Circuit was quite sure of the question it wished to have answered in order to conclude its deliberations.

What is behind the effort of Ford and Amici Curiae to enlarge the scope of this Court's inquiry is their

dissatisfaction with the holdings in *Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of North America, Inc.*, 32 F.3d 528 (11th Cir. 1994)(Barkett, J.). In that case, the court held that a disappointed buyer does have standing to sue under section 320.697, Florida Statutes, and a successful plaintiff may recover treble damages. *Id.* at 531, 533-34. Thus, these are matters upon which the Eleventh Circuit requires no guidance in the present case. Moreover, with respect to constitutional issues, certainly the Eleventh Circuit is able to apply the Constitution without difficulty, and Ford and Amici Curiae attempt to raise no constitutional issues peculiar to the Florida Constitution.

In sum, Mr. Hawkins and Mr. Ripley addressed the question certified in their Initial Brief. While they will respond to these "newly raised" issues in this reply, they are confident that this Court will not feel obliged to reopen *Mike Smith Pontiac* at Appellee's urging, or to address constitutional issues upon which the Eleventh Circuit is not seeking advice.

II. FORD AND AMICI CURIAE MAKE NO ARGUMENT AGAINST THE CLEAR AND UNAMBIGUOUS LANGUAGE OF SECTION 320.643(2)(a), FLORIDA STATUTES.

Even a superficial reading of the briefs of Ford and Amici Curiae reveals that their arguments are defeated by a threshold principal of statutory interpretation, namely, that clear and unambiguous statutes are given effect as written. Resorting to hypothetical horror stories of what might happen if the statute is applied as written and to arguments suggesting that good public policy would be served by the application they espouse, they hope to induce the Court to believe that application of section 320.643(2)(a) as it is written would lead to absurd results. In fact, their arguments are more properly directed to the legislative branch than to the judiciary.

Indeed, far from thinking the application of section 320.643(2)(a) urged by Appellants to be absurd, others who have looked at the statute have found no problem applying it as written. The court in the Middle District of Florida did so in *Morse v. Ford Motor Co.*, No. 94-1013-CIV-T-17C (M.D. Fla. June 7, 1996), a decision discussed at length in Appellants' Initial Brief. Since the filing of the Initial

Brief, an Administrative Law Judge of the Florida Division of Administrative Hearings has also found this interpretation reasonable:

> Under the statutory scheme in Section 320.643, Florida Statutes, a manufacturer may prevent a transfer of a franchise agreement if the prospective transferee lacks "good moral character" and fails to meet the "written, reasonable, and uniformly applied standards or qualifications, if any, of the [manufacturer] relating to business experience of executive management required by the [manufacturer] of its motor vehicle dealers." Section 320.643(1)(a), [*sic*] Florida Statutes. In addition, a manufacturer may prevent a sale of all or part of the stock of a dealer if the prospective transferee lacks "good moral character." Section 320.643(2)(a), Florida Statutes.
>
> Because the transaction at issue involves the sale of stock, and not a sale of the franchise agreements, the only portion of Section 320.643 applicable here is Subsection (2)(a), which allows a manufacturer to prevent a stock sale only if it can prove that the prospective transferee lacks "good moral character." Accordingly, Petitioner's reliance on Subsection (1)(a) [*sic*] is misplaced, and those allegations in its complaint which are grounded on that provision will not be considered in the disposition of the case.
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> In making this ruling, the undersigned has relied on the plain and unambiguous language of the statute, the two Florida decisions cited by the parties, one federal and one administrative,[1] which

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[1] The Florida administrative case is *Heintzelman's Truck Center, Inc. v. Western Star Trucks,* DOAH Case No. 87-5308 (Department of Highway Safety and Motor Vehicles, Final Order, Sept. 27, 1988), *see* pp. 7-8. A copy of this unpublished opinion is found in the record at II. #44 (App. 6).

support this more persuasive view, and the recent federal decision cited by Respondents, which interprets a similar Ohio franchise law.

Nissan Motor Corp. in U.S.A., v. Sunrise Nissan of Orange Park, Inc., DOAH Case No. 98-0395 (Order Mar. 24, 1998) at 2. (In Appendix).

A. Ford Erroneously Claims that Section 320.643(2)(a) is Non-Exclusive.

Faced with the undisputable fact that section 320.643(2)(a) on its face regulates transfers of equity interests, Ford and Amici Curiae attempt to overcome this clarity by suggesting that other sections, namely, section 320.643(1) and section 320.644, must also apply in addition to section 320.643(2)(a) when there is a proposed transfer of all equity interest (or a majority interest according to Amici Curiae) and a proposed change of executive management. Further, Ford asserts that section 320.643(1) can apply when there is a transfer of the franchise agreement. These arguments are specious, disingenuous, and illogical.

1. There is no transfer of the franchise agreement.

In the first instance, Ford makes much of the fact that Mr. Hawkins and Mr. Ripley wanted an asset deal and argues

that the proposed stock purchase was the same as a transfer of the franchise. In fact, what Mr. Hawkins and Mr. Ripley wanted is irrelevant They contracted for a stock purchase, and thereby took the bad with the good. Moreover, it is simply not true that the franchise agreement would have transferred. As the stock purchase contract acknowledged, after closing, Ford might wish to issue a new franchise agreement to Wilson Davis Ford, Inc., or to amend the franchise agreement to reflect the new owners. However, regardless of whether Ford would have issued a new franchise agreement or an amendment, there would have been no transfer of the agreement--Wilson Davis Ford, Inc. remained the franchisee. In fact, as Ford's own documents of record indicate, the franchise agreement would have been amended to reflect the names of the new owners. *See* V. #54 (App. A to Ford's Mot. for Summ. J.), for example, HAW1 4097 *et seq.*, HAW1 4093 *et seq.*, HAW1 4090 *et seq.*, HAW1 4093 (Davis-Clark Ford, Inc. replaced Wilson Davis Ford, Inc. when Wilson P. Davis becomes sole owner by ***amendment***, Wade A. Bodiford, Jr. added as manager by ***amendment***, Wade A. Bodiford, Jr. added as owner by ***amendment***). It is disingenuous of Ford to suggest

that there would have been a transfer of the franchise agreement.

2. Section 320.643(2)(a) applies to equity transfers "in whole or in part."

Forced to explain away the plain language of section 320.643(2)(a) that it governs equity transfers "in whole or in part," Ford asserts "in whole or in part" means only that all or a part of what a shareholder owns may be transferred. Ford Br. at 30. True enough, but it makes no sense then to reason that therefore (somehow) the section does not govern a transfer of 100% of the stock.

Suppose a person owned 100% of the stock, as Mr. Davis did in Wilson Davis Ford, Inc. before transferring 20% to Mr. Davis and as would often be the case in a closely held corporation. Surely, then, "in whole or in part" applies to a 100% transfer, even on Ford's reasoning. If section 320.643(2)(a) were not the governing statute for such a transfer, that is, if section 320.643(1), with its different standard of review, also applied, what would be the purpose of section 320.643(2)(a)? Moral character of a proposed transferee is scrutinized under section 320.643(1), as well as

business experience. There is no limitation to the applicability of section 320.6453(2)(a). It applies to transfers "in whole or in part." To apply the different standard of review of section 320.643(1), notwithstanding the language of section 320.643(2)(a), would render section 320.643(2)(a) a nullity, a result directly contrary to the rules of statutory interpretation. The legislature surely did not intend such a result when it created two sections from one in 1984, making both a distinct franchise transfer section and a distinct equity transfer section.

3. Ford's argument with respect to section 320.644 misses the point.

Finally, Ford seems to argue that to interpret section 320.643(2)(a) as it is written would deprive a manufacturer of the right to examine business experience of a propose new executive manager. That is simply not the case. Mr. Hawkins and Mr. Ripley have never argued that section 320.644 does not apply where there is a proposed change of executive management. It certainly does, but that section is not under discussion. Buyers certainly may be allowed to buy equity, but required collaterally to submit new management for review.

B. Ford Advances Extreme Hypotheticals in an Effort to Attempt to Paint Absurd Results.

Ford goes to great lengths to suggest that dealerships will be ruined by reckless buyers unless Ford can examine their business experience and finances.[2] In doing so, Ford posits situations in which persons are not functioning as rational economic actors. However, the statutes, quite reasonably, are meant to regulate rational activity affecting motor vehicle dealerships and the public.

In the rational world, those who can afford to purchase stock in motor vehicle dealerships invest their money in anticipation of making a return. It is illogical to assume that they intend to destroy the financial or operational structure of the dealership in which they invest.[3] Acceptable

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[2] It is not clear that Ford can examine financial qualifications even in an asset transfer governed by section 320.643(1). *See Mercedes-Benz of North Am. v. Mike Smith Pontiac GMC, Inc.*, 561 So. 2d 620, 624 n.8 (Fla. 1st DCA 1990).

[3] Ford indicates that section 320.64(18), Florida Statutes, allows a manufacturer to reject heirs who have inherited an interest in a motor vehicle dealer and do not meet the manufacturer's "standard qualifications." This is exactly in line with the regulation of section 320.643(2)(a) as opposed to section 320.643(1). An heir acquires an interest in a dealership "accidently," and may have no interest in or understanding of the business in which the heir has inherited stock. By contrast, a purchaser invests his or her own money

management is already in place, the manufacturer having had the opportunity to examine the credentials of managers before they were appointed. If management is to change, section 320.644 affords the manufacturer the opportunity to investigate the business experience of proposed new management. If the unexpected happens, section 320.641 allows the manufacturer to terminate a dealership which does not live up to its franchise obligations. It is not extreme to have the manufacturer rely upon this final remedy. Again, the statutes assume rational economic actors, not irrational gamblers. Rather, it is indeed extreme for Ford to postulate economic disaster from financially leveraged purchases when the buyers whom Ford ultimately approved to buy the equity of Wilson Davis Ford, Inc. ***borrowed*** $1,273,000 of the $1,407,000 used to buy the stock!

The basis of the arguments of Ford and Amici Curiae is all too clear. They argue quite simply that the interpretation of the statutes which they espouse makes better policy than does the clear and unambiguous language of section

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intentionally and so can be expected to understand the investment and not to make it unless he or she expects to preserve the investment.

320.643(2)(a). Obviously, Mr. Hawkins and Mr. Ripley believe the contrary. The legislature has protected manufacturers while providing owners of stock with free alienability of their investments, provided only that they do not sell to persons of bad moral character. The persons who buy either leave the dealership under existing management or must submit new management to the manufacturer's scrutiny. In the unlikely event that the buyer goes mad and works to destroy the dealership, the manufacturer may terminate its relationship. This is all clear on the face of the statutes. Ford and Amici Curiae are not asking the Court to interpret statutes; they are asking it to legislate.

III. Mr. Ripley and Mr. Hawkins have Standing.

Both Ford and Amici Curiae, using essentially the same arguments, invite this Court to take up an issue outside the scope of the certified question, that is, the standing afforded by section 320.697, Florida Statutes, the section which provides a private right of action to those injured by a manufacturer's violation of any section of sections 320.60-.70. *See* Ford Br. at 37-45; Amici Br. at 26-31. Indeed, the Eleventh Circuit was well aware that it had already decided

action to franchisees or motor vehicle dealers. This is not analogous to section 320.697, Florida Statutes, which provides an action to "any person."

A second group of cases is duly reported by Ford as going the other way, that is, as acknowledging standing to prospective buyers. One of these, *Bertera Chrysler Plymouth, Inc. v. Chrysler Corp.*, No. Civ. A. 97-30334-FHF, 1998 WL 25751 (D. Mass. Jan. 12, 1998), is on such peculiar facts that it is inapposite. The other, *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358 (3d Cir. 1992), does establish that a disappointed purchaser does have standing to sue, interpreting Pennsylvania law. *Id.* at 1382-83. To this case, Ford and Amici Curiae might have added *Glen's Chevrolet and Subaru Co. v. General Motors Corp.*, Case No. CV 95-0049-E-BLW (D. Idaho Sept. 30, 1996), upholding a magistrate's recommendation interpreting Idaho law. (In Appendix). In both Pennsylvania and Idaho, which have virtually identical statutes, a right of action is provided to "any person who is or may be injured by a violation of this act," and "any party to a franchise who is injured in his business or property by a violation of the act." *See Big Apple BMW*, 974 F.2d at 1382

(quoting 63 Pa. Stat. Ann. § 818.20(a)(now § 818.29)); *see* Idaho Code § 49-1610(2)(identical to Pennsylvania except for "chapter" instead of "act"). Both courts held that a prospective purchaser was indeed "any person." 974 F.2d at 1382-83; *Glen's Chevrolet* at 3, 5, 6.

Ford would, of course, distinguish these cases on grounds that both "any person" and "any party to a franchise" are found in the operative private right of action statutes, whereas in section 320.697, Florida Statutes, there is no mention of franchisee or dealer. What this distinction overlooks, however, is that the Florida legislature has limited a cause of action to a motor vehicle dealer when it wished to do so. In section 320.695, Florida Statutes, which gives a cause of action to the Department of Highway Safety and Motor Vehicles or to a motor vehicle dealer in the name of the Department to enjoin a violation by a manufacturer of sections 320.60-.70. In clear contrast, section 320.697 gives a cause of action for damages to "[a]ny person who has suffered pecuniary loss or who has been otherwise adversely affected" by a violation. As Judge Barkett observed, writing for the court in *Mike Smith Pontiac*, "The use of the phrase

'any person' does not lend itself to ambiguity and the court finds none." 32 F.3d at 531.

Ford and Amici Curiae direct the Court's attention also to *Roberts v. General Motors Corp.*, 643 A.2d 956 (N.H. 1994) and *Key v. Chrysler Motors Corp.*, 918 P.2d 350 (N.M. 1996), which interpret "any person" to be limited to franchisees. These cases are distinguishable because of the wording of the statutes which they interpret. Both New Hampshire and New Mexico have statutes which give a right of action to "any person who is injured in his business or property." 643 A.2d at 958; 918 P.2d at 355. *Roberts* was decided several months before the Eleventh Circuit's decision in *Mike Smith Pontiac*. The *Key* court, however, had the benefit of *Mike Smith Pontiac*, and recognized the rationale for the Eleventh Circuit's action:

> On the other hand, comparable legislation in Florida grants a right of action to "any person." Fla.Stat. ch. 320.697 (1993). Additionally, the Florida Act specifically addresses the prospective franchisee of a franchise. *See* Fla.Stat. ch. 320.643 (1993). Accordingly, the federal court, interpreting the Florida statute, granted a prospective franchise standing. *See Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of N. Am., Inc.*

32 F.3d 528,531 (11th Cir. 1994), cert. denied, __ U.S. ___, 116 S.Ct. 702, 133 L.Ed.2d 659 (1996).

918 P.2d at 357.

The difference in language between section 320.697 and the New Mexico and New Hampshire statutes is significant. The New Hampshire court noted that the legislature had limited "any person" to one whose "business or property" was affected. 642 A.2d at 959. Section 320.697 does not so limit, but gives an action to any person suffering "pecuniary loss, or who has been otherwise adversely affected." Thus, where the language of the New Mexico and New Hampshire statutes is limited to injuries to an existing business or property, that of the Florida statute is broad. Finally, as has been noted above, this unlimited right is contrasted to the right to injunction created in section 320.695, Florida Statutes, which is limited to the Department of Highway Safety and Motor Vehicles or to a motor vehicle dealer in the name of the Department. Clearly, the legislature knew how to limit the right to damages. Instead, it granted a broad right to any person injured.

As Mr. Hawkins and Mr. Ripley observed at the start of this discussion, there is no reason for the Court to expand

and a denial of equal protection. It is unclear from Ford's argument as to the basis for its assertion that this statutory scheme violates these basic tenants of constitutional law. Indeed, Ford's claim is especially curious in that it appears that Ford has no problem with the limitations applicable to asset transfers found in section 320.643(1). It is only if section 320.643(2)(a) is read as Mr. Hawkins and Mr. Ripley urge that constitutionality is in question. Once again, Ford misstates the facts. As Appellants have noted, in an equity transfer there is no change in the contractual parties to the franchise agreement. It remains between Ford and the dealer entity. In arguing otherwise, Ford is asking this Court to disregard the corporate structure of the dealer entity, and to pierce the corporate veil by finding that the owners of the corporation not the entity is the franchisee, a manifestly false conclusion.

Although the Amici Curiae devote somewhat more space to the constitutional argument than does Ford, their argument is even less compelling for the simple reason that they admit that "such a constitutional challenge is not before this Court, and would require a fuller factual record." Amici Br.

at 22. Despite this fact, the Amici Curiae assert that the construction of section 320.643, Florida Statutes, urged by Mr. Hawkins and Mr. Ripley violates the manufacturer's constitutional right of access to courts, might result in a taking of property in violation of due process, and might violate the Dormant Commerce Clause of the United States Constitution.

As the Amici Curiae freely admit, their arguments with respect to a potential taking and a potential violation of the Dormant Commerce Clause concern a hypothetical unconstitutional application of section 320.643, Florida Statutes, not its facial unconstitutionality. In this respect, the Amici Curiae admit that in determining whether the statutory scheme would be unconstitutional as applied would require the evaluation of a great deal more facts than are presented in this record. Thus, the as-applied arguments presented by the Amici Curiae are no more than hypothesis and conjecture at this point, and not appropriate for discussion by the Court in responding to the certified question.

In short, the constitutional arguments presented by Ford and the Amici Curiae are nothing more than weak attempts to

support their already strained arguments. It is noteworthy that in neither brief is there any suggestion that the regulation resulting from section 320.643 is without a legitimate public purpose. Indeed that question, which is the fundamental test for the type of constitutionality claims asserted by Ford and the Amici Curiae, has been definitively answered. In *Plantation Datsun, Inc. v. Calvin*, 275 So. 2d 26 (Fla. 1st DCA 1973), the First District was faced with a due process challenge to section 320.642, Florida Statutes. In finding the statute constitutional, the court wrote, "The legislature is empowered to select the object of regulation. Where there is a legitimate interest to be protected and there is a rational relationship between the legislation and those interests, the courts will uphold the law." *Id.* at 28. Similarly, in *J.R. Furlong, Inc. v. Chrysler Corp.*, 419 So. 2d 385 (Fla. 3rd DCA 1982), the Third District rejected an equal protection challenge to the attorney's fee provision of section 320.641, Florida Statutes, stating:

> If no public interests were at stake here, there would be no need for the extensive regulation undertaken by the legislature of motor vehicle manufacturers, factory branches, distributors or importers, §§ 320.61—320.70, Fla. Stat. (1981), and

> the entire statutory scheme would be unconstitutional. Obviously, that is not the case, and no effort has been made either below or here to attack the entire legislative scheme . . . . Quite apart from the wisdom of this policy decision and the corresponding statutory scheme, we cannot say that the legislative decision to provide special protection here for motor vehicle dealers has no reasonable basis; indeed, this legislative scheme has been upheld in Florida and elsewhere against similar constitutional attack. *See e.g., New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978); *Plantation Datsun, Inc., v. Calvin*, 275 So.2d 26 (Fla. 1st DCA 1973); *Forest Home Dodge, Inc. v. Karns*, 29 Wis.2d 78, 138 N.W.2d 214 (1965).

Id. at 388.

The opinion of the United State's Supreme Court in *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, is also worth noting. In that case the Supreme Court was faced with a due process challenge to a portion of the California Automobile Franchise Act. The Supreme Court summarized the constitutional argument as follows, "Appellees' argument rests on the assumption that General Motors has a due process protected interest right to franchise at will--which asserted right survived the passage of the California Automobile Franchise Act." *Id.* at 439 U.S. 106. In rejecting this argument the Supreme Court wrote:

> Even if the right to franchise had constituted a protected interest when California enacted the Automobile Franchise Act, California's Legislature was still constitutionally empowered to enact a general scheme of business regulation that imposed reasonable restrictions upon the exercise of the right . . . . In particular, the California Legislature was empowered to subordinate the franchise rights of automobile manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices. "[S]tates have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law. . . . [T]he due process clause is [not] to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare." *Lincoln Union v. Northwestern Co.*, 335 U.S. 525, 536-537, 69 S.Ct. 251, 257, 93 L.Ed. 212 (1949). *See also North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973); *Ferguson v. Skrupa, supra; Williamson v. Lee Optical Co., supra.*

Id. at 439 U.S. 106-07.

In summary, quite apart from the fact that these constitutional arguments are irrelevant to the question posed to this Court by the Eleventh Circuit, they are without merit. The legislature certainly has the constitutional power to legislate in this way.

V. Conclusion

The arguments of Ford and Amici Curiae do not address the fact that section 320.643(2)(a), Florida Statutes, is clear on its face. They are blatant attempts at legislation. The certified question must be answered in the affirmative.

Respectfully submitted this 12th day of May, 1998.

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Appendix

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DWAYNE HAWKINS and MILLARD G. RIPLEY, Plaintiffs, v. FORD MOTOR COMPANY, Defendant.	)	CIVIL ACTION FILE NO. 95-55-CIV.T-21-(E)

APPENDIX OF
REPLY BRIEF OF APPELLANTS
DWAYNE HAWKINS AND MILLARD G. RIPLEY

1. Joint Stipulation of Certification

2. Nissan Motor Corp. In U.S.A., v. Sunrise Nissan of Orange Park, Inc., DOAH Case No. 98-0395 (Order Mar. 24, 1998)

3. Glen's Chevrolet and Subaru Co. v. General Motors Corp., Case No. CV 95-0049-E-BLW (D. Idaho Sept. 30, 1996)

Appendix Part 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DWAYNE HAWKINS and MILLARD G. RIPLEY,

Appellants,

v.

FORD MOTOR COMPANY,

Appellee.

Case No. 96-2306

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

JOINT STIPULATION OF CERTIFICATION

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JOINT MOTION FOR CERTIFICATION

The parties hereby file their joint stipulation of certification in this matter, responding to the Clerk's memorandum to counsel dated December 5, 1997, with the deadlines for response extended through today at the request of the parties and by order of the Court.

As noted in the proposed stipulation, the *Morse* case, No. 96-3633, has settled and a stipulation of dismissal has been filed with the Court. This stipulation is thus presented on behalf only of the parties in the *Hawkins* case. As the stipulation reflects, the parties are in agreement as to the characterization of the background of the dispute and as to one question to be certified. The bracketed, boldfaced portion of the attachment at pp. 6-7 reflects the parties' disagreement over two additional questions which might be certified. Each party requests one and opposes the other, for the reasons set out in the bracketed portion of the attachment.

The parties would of course be happy to provide any further information which may be of assistance to the Court.

Respectfully submitted, this 15th day of January, 1998.

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CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF FLORIDA PURSUANT TO ARTICLE 5, SECTION 3(b)(6) OF THE FLORIDA CONSTITUTION.

TO THE SUPREME COURT OF FLORIDA AND ITS HONORABLE JUSTICES:

This case came to the United States Court of Appeals for the Eleventh Circuit on appeal from the United States District Court for the Middle District of Florida. It appears to the United States Court of Appeals for the Eleventh Circuit that this case involves unanswered questions of Florida law that are determinative of this appeal.[1] Therefore, we certify the following questions of law, based on the background recited below, to the Supreme Court of Florida for instruction.

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[1] The present case was consolidated on appeal with *Morse v. Ford Motor Co.*, Case No. 96-3633, also on appeal from the Middle District of Florida. With respect to the issues of law central to this case and on substantially similar facts, the district court judges came to opposite conclusions. The appeal in the *Morse* case was dismissed prior to this Court's certification.

The complaint in this matter was filed in the District Court for the Middle District of Florida, Tampa Division, in 1995. The complaint contained two counts, one claiming a violation of section 320.643, Florida Statutes, the other claiming tortious interference with contract. The case arose from the attempt of plaintiffs, Mr. Hawkins and Mr. Ripley, to purchase all the stock from the owners of a company, Wilson Davis Ford, Inc., which operated as a motor vehicle dealer under a franchise agreement, as that term is used in sections 320.60-.70, Florida Statutes, with Ford Motor Company ("Ford"), a "licensee" (or motor vehicle manufacturer) as the term is used in those sections.

The sellers gave notice of an intent to transfer ownership pursuant to section 320.643, Florida Statutes, and Wilson Davis Ford, Inc. gave notice of an intent to change its executive management pursuant to section 320.644, Florida Statutes (from the sellers, Mr. Davis and Mr. Bodiford, to the proposed purchasers of the stock, Mr. Hawkins and Mr. Ripley). Ford responded to this notice by filing a verified complaint with the Florida Department of Highway Safety and Motor Vehicles ("DHSMV") opposing both the proposed transfer under section 320.643 and the proposed change of management under section 320.644.

With respect to its opposition to the proposed transfer of stock, Ford's complaint alleged several deficiencies in the financial qualifications of Mr. Hawkins

and Mr. Ripley and several performance deficiencies of a Lincoln-Mercury dealership in which Mr. Hawkins had an ownership interest, which, according to Ford, meant that Mr. Hawkins did not meet Ford's reasonable standards for executive management. With respect to the proposed change of management, Ford's complaint alleged these same deficiencies.

Following the filing of Ford's complaint in the DHSMV, the contract to sell the stock was terminated, and the administrative proceeding was dismissed as moot. Plaintiffs subsequently brought this action in the District Court for the Middle District of Florida, including a count under section 320.697, Florida Statutes, alleging that Ford had violated section 320.643, Florida Statutes, when it opposed the transfer of equity to Mr. Hawkins and Mr. Ripley with a complaint which was facially deficient.

Plaintiffs' position is that by its express provisions, notwithstanding the terms of a franchise agreement, section 320.643(2)(a) governs the prospective transfer of shares in a motor vehicle dealership. Under this section, according to plaintiffs, Ford could object to such a transfer only on the basis that the proposed transferee was not of good moral character. Ford's verified complaint did not allege that either Mr. Hawkins or Mr. Ripley was not of good moral character. Consequently, argue Plaintiffs, because Ford's complaint did not oppose the transfer

on grounds permitted by section 320.643(2)(a), Ford's compalint was facially insufficient, and Ford's opposition was in violation of the statute.

Defendant's position is that in the case of a proposed complete transfer of equity interest leading also to a change of executive management, the practical effect of such a transfer will be the transfer of the franchise agreement. A proposed transfer of a franchise agreement is regulated by the terms of section 320.643(1), under which a manufacturer may object to a proposed transfer on grounds that the transferee is not financially qualified or does not meet a manufacturer's uniformly applied reasonable standards or qualifications with respect to executive management. Consequently, Ford contends that it could properly object to the management experience and financial qualifications of Mr. Hawkins and Mr. Ripley, as it did in its verified complaint to the DHSMV.

In the trial court in this case, Judge Nimmons agreed with Ford and held as a matter of law that "when transfer of 100% of stock is contemplated, the provisions regarding transfer of a franchise agreement and change in executive management control should apply." Judge Kovacevich, in the *Morse* case (now settled) reached the opposite legal conclusion on similar facts; finding that only section 320.643(2)(a) applies to the proposed transfer of 100% of the stock, so that only moral character could be considered.

In this case, Judge Nimmons also decided as a matter of law that Ford's objection to the proposed transfer was reasonable. In making this determination, the trial court applied the following standard:

> Ford should be granted summary judgment if the reasons it assigned for objecting to the instant transfer, supported by substantial evidence, were consistent with its written standards for judgment dealer applicants if those standards were reasonable, and if they were standards which Ford applied in the circumstances of the other applicants.

While the Eleventh Circuit has construed some aspects of section 320.643, Florida Statutes,[2] there are controlling questions of law of in the present case on which judges in the Middle District of Florida have arrived at different conclusions. The question of what standards a manufacturer may consider in evaluating proposed transfers of controlling interests of stock of dealership corporations is a recurring one of significant importance to Florida businesses and the public. Consequently, we certify the following question[s]:

> "Does section 320.643(2)(a) provide the exclusive basis for objection by a motor vehicle manufacturer to the proposed transfer of all the equity

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[2] *See Mercedes-Benz of North America v. Mike Smith Pontiac GMC, Inc.*, 32 F.3d 528 (11th Cir. 1995).

in interest in a motor vehicle dealership?"

[Both parties agree that the foregoing question should be certified.

In addition, Ford proposes that the following question should be certified, as it is dispositive and has not been decided in the Florida courts:

> **"Under the Florida Dealer Act, does a prospective transferee of the stock of a dealership have standing to sue a manufacturer for alleged wrongful objection to a transfer?"**

Plaintiffs do not agree that this question should be certified, because this court has decided the question adversely to Ford's position in the *Mike Smith Pontiac* case, *supra*.

Finally, Plaintiffs propose that the following question be contingently certified, if the agreed upon question is answered in the negative,

> **"Is the reasonableness of 'standards or qualifications' as used in section 320.643(1), Florida Statutes, to be judged from the subjective point of view of the motor vehicle manufacturer?"**

Ford does not agree that this question should be certified, because, Ford contends, the question mischaracterizes Judge Nimmons' opinion, depends at least in part on subquestions of federal procedural law, and may not be dispositive of the case.

Ford and the Plaintiffs agree in any event that the following language would be appropriate in the certification:]

We do not mean for this description of the case and the contentions of the parties to be a substitute for a full statement to the Supreme Court of Florida by counsel for the parties. Further, we do not intend the particular phrasing of the question(s) to limit the Supreme Court of Florida in its considerations of the problems posed by this case. The Court is at liberty to consider the problems and issues involved in this case as it perceives them to be. To assist consideration of the case, the entire record, along with the briefs of the parties, shall be transmitted to the Supreme Court of Florida.

Appendix Part 2

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NISSAN MOTOR CORPORATION IN U.S.A.,	)	
Petitioner,	)	
vs.	)	Case No. 98-0395
SUNRISE NISSAN OF ORANGE PARK, INC.; SUNRISE NISSAN OF JACKSONVILLE, INC.; and REPUBLIC INDUSTRIES, INC.,	)	
Respondents.	)	

ORDER

This matter came before the undersigned on Respondents' Motion to Dismiss or, in the Alternative, for Summary Final Order. A Response in opposition to the motion has been filed by Petitioner. Having considered the motion and response, it is concluded that the undersigned lacks jurisdiction to consider certain matters raised in the Verified Complaint. While dismissal of those matters will be deferred until a Recommended Order is entered at the conclusion of this case, a brief discussion of the reasons for dismissal is appropriate.

This proceeding involves a complaint filed by Petitioner under Section 320.643, Florida Statutes, challenging a proposed transfer of all of the stock of Sunrise Nissan of Orange Park, Inc., and Sunrise Nissan of Jacksonville, Inc., to Republic Industries, Inc. The complaint also contains allegations that a proposed change in "executive management control" of the two dealerships will occur, and that the new executive management is

not qualified under Section 320.644, Florida Statutes.

Under the statutory scheme in Section 320.643, Florida Statutes, a manufacturer may prevent a transfer of a franchise agreement if the prospective transferee lacks "good moral character" and fails to meet the "written, reasonable, and uniformly applied standards or qualifications, if any, of the [manufacturer] relating to the business experience of executive management required by the [manufacturer] of its motor vehicle dealers." Section 320.643(1)(a), Florida Statutes. In addition, a manufacturer may prevent a sale of all or part of the stock of a dealer if the prospective transferee lacks "good moral character." Section 320.643(2)(a), Florida Statutes.

Because the transaction at issue involves the sale of stock, and not a sale of the franchise agreements, the only portion of Section 320.643 applicable here is Subsection (2)(a), which allows a manufacturer to prevent a stock sale only if it can prove that the prospective transferee lacks "good moral character." Accordingly, Petitioner's reliance on Subsection (1)(a) is misplaced, and those allegations in its complaint which are grounded on that provision will not be considered in the disposition of the case.

In making this ruling, the undersigned has relied on the plain and unambiguous language in the statute, the two Florida decisions cited by the parties, one federal and one administrative, which support this more persuasive view, and the recent federal decision cited by Respondents, which interprets a similar Ohio franchise law. Assuming, however, for the purposes

of this motion that the factual allegations in the complaint are true, Petitioner has adequately pled, and may seek to prove, that the prospective transferee lacks "good moral character" within the meaning of Section 320.643(2)(a).

Section 320.644, Florida Statutes, allows a manufacturer to object to a change in "executive management control" if the new executive management lacks good moral character and does not meet the "written, reasonable, and uniformly applied standards of the [manufacturer] relating to the business experience of executive management required by the [manufacturer] of its motor vehicle dealers." Petitioner has sought to invoke the terms of this statute by alleging that even though Phil Risley and Ken Pence (the present owners) will continue to manage the dealerships after the transfer occurs, Republic Industries, Inc. will nonetheless "usurp executive management control of the dealerships."

By its own terms, Section 320.644 does not become operative until a dealer provides the statutory notice to the manufacturer that it "desires to change its executive management control." There is no indication by the parties that such a notice has been filed. Assuming for the sake of argument that such a claim could be independently raised, however, Petitioner has cited no authority for the proposition that a claim under Section 320.644 can be filed in the context of a proceeding brought pursuant to a notice of transfer of stock under Section 320.643(2)(a).

Therefore, before Republic Industries, Inc. can change the executive management control of the subject dealerships, it would

be required to file a notice under Section 320.644, Florida Statutes, which would provide a new point of entry for the manufacturer. Alternatively, if such a notice is not filed, and Petitioner believes that the dealers are not complying with the terms of their respective agreements, presumably it may utilize the franchise agreement cancellation provisions contemplated under Section 320.641, Florida Statutes. In any event, the allegations brought under Section 320.644 are inappropriate for disposition in this case.

Finally, the Motion for Summary Final Order is denied. See Rule 60Q-2.030(1), Florida Administrative Code, which still controls the use of this procedural remedy.

DONE AND ORDERED this 24th day of March, 1998, in Tallahassee, Leon County, Florida.

Donald R Alexander

DONALD R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of March, 1998.

Appendix Part 3

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

GLEN'S CHEVROLET AND SUBARU COMPANY; C. GLEN HUFF; YOUNG CHEVROLET AND SUBARU COMPANY; SELDON YOUNG AND SPENCER YOUNG, Plaintiffs, v. GENERAL MOTORS CORPORATION, Defendant.	Case No. CV 95-0049-E-BLW ORDER ON REPORT AND RECOMMENDATION

I. INTRODUCTION

On June 12, 1996, United States Magistrate Judge Larry M. Boyle entered his Report and Recommendation in the above-entitled action. On June 13, 1996, Judge Boyle entered a Supplemental Order, Report and Recommendation.[1] In the June 12, 1996, Report and Recommendation, Judge Boyle recommends that the defendant's Motion for Summary Judgment on All Claims be granted in part and denied in part. Specifically, Judge Boyle recommended that

[1] The Supplemental Order, Report and Recommendation merely contains a section of the June 12, 1996, order that was deleted. The supplemental portion only addresses the standing issue raised in Count I with respect to Seldon and Spencer Young in their individual capacities. It does not alter the original order in any way.

the motion should be denied as to Count I, but should be granted as to Counts II and III of plaintiffs's Amended Complaint.

Pursuant to 28 U.S.C. § 636(b)(1), the parties had ten days in which to file written objections to the recommendations of Judge Boyle. On June 25, 1996, the plaintiffs filed their Appeal of Recommendation of Magistrate Judge, to which the defendant file a response on July 9, 1996. On June 26, 1996, the defendant filed its Appeal From and Objections To Magistrate Judge Boyle's June 12, 1996 Order, Report and Recommendation on GM's Motion for Summary Judgment on All Claims. Plaintiffs filed their response on July 15, 1996.[2]

II. DISCUSSION[3]

In light of the objections filed by both parties, this Court is required to engage in a de novo review pursuant to 28 U.S.C. § 636(b)(1). The Court has engaged in an exhaustive and detailed review of the entire record in this matter, including all of the memoranda, affidavits, and exhibits filed by the parties in relation to the Motion for Summary Judgment on All Claims, as well as the parties' objections to the Order, Report and Recommendation and the respective responses. Having conducted this thorough and independent review of the record, in light of the facts presented in this case and the substantive law applicable thereto, this Court finds that Judge Boyle

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[2]The Court will consider all appeals from the Order, Report and Recommendation to be in the nature of objections to it.

[3]The Court finds Judge Boyle's recitation of the facts to be concise and accurate, and thus the Court will not restate them here.

did not err when he concluded that the defendant's Motion for Summary Judgment on All Claims should be granted in part and denied in part. Because Judge Boyle's original and supplemental Order, Report and Recommendation is concisely-written and well-reasoned, this Court will not belabor its analysis, but will instead concentrate on certain of the objections made.

A. Count I

With regard to Count I, Judge Boyle found that the plain and obvious meaning of the Idaho Motor Vehicle Code ("IMVC"), I.C. § 49-1610(2), grants a potential or prospective purchaser standing to bring an action if a violation of the statute occurs and the prospective purchaser is injured. Additionally, Judge Boyle found that plaintiffs Seldon Young and Spencer Young do not have standing to pursue claims as shareholders, managers, or employees of young's Chevrolet in this action.

In their objections, plaintiffs concede that Seldon and Spencer Young do not have standing to bring the tort claims, counts II and III. They do contend, however, that they are "persons" within the IMVC, and thus under count I, have reasonably foreseeable injuries that are individual in nature, such as wage loss. This Court cannot agree with plaintiffs' arguments, but rather agrees with Judge Boyle's analysis of the standing issue. The individual plaintiffs were not parties to the purchase agreement, as only the corporation was. Therefore, the Court agrees with Judge Boyle's analysis that Seldon and Spencer Young are not "persons" within the purview of I.C. § 49-1610(2).

As to the substance of Count I, defendant argues that the IMVC claim depends upon the

existence of an enforceable purchase agreement. Defendant argues that the contract, in addition to the requirement of defendant's approval, had a number of conditions precedent, such as approval from Subaru, which were never satisfied. Because of the failure to satisfy those conditions, no enforceable contract ever arose and the IMVC can provide no cause of action. Plaintiffs contend that this argument is a red herring, as the reason the contract was never performed was because of defendant's failure to consent to the purchase agreement, and that all other conditions precedent could either be completed or waived. The Court finds that the reasonableness of the refusal is still in dispute.

Defendant also contends that Judge Boyle failed to address its argument and wrongly assumed that the IMVC did not change the common law by imposing any duties upon defendant to select a prospective purchaser as its new dealer, and did not confer any "rights" in a prospective purchaser. Defendant specifically claims that plaintiffs' IMVC allegations implicitly requires defendant to appoint Young as the new dealer, and that the IMVC conferred upon Young the "right" to be a new dealer. Defendant contends that both of those assumptions are incorrect. Plaintiff, however, agrees with defendant that there is no statutory right to purchase a dealership, but maintains only that it has a right to contract to purchase assets which may not be unreasonably denied by defendant.

Defendant further argues that the IMVC does not confer any legal rights on prospective purchasers of automobile dealerships, but its intent is instead to protect the interests of existing dealers. The plaintiffs argue that defendant's lengthy arguments on whether an implied right of

action exists is superfluous, because Judge Boyle found that the IMVC contains an express right of action. The Court agrees that the IMVC creates such a right of action.

Finally, plaintiffs argue that the phrase "any person" is not ambiguous and that prospective franchisees are within its purview when the additional language of I.C. §49-1610(2), "or any party to a franchise" is included. The Court agrees with Judge Boyle's analysis of this issue.

B. Counts II and III

With regard to Counts II and III, the Magistrate Judge found that plaintiffs had not set forth facts sufficient to give rise to a claim that defendant intentionally or tortiously acted to cause a breach of contract, or intentionally or tortiously acted to interfere with prospective economic benefit. Judge Boyle found that to the extent that defendant's unreasonable refusal contributed to damages, the remedy is properly found in the Idaho Motor Vehicle Code, and not in the intentional tort of interference with contract. This Court agrees.

In their objections, plaintiffs specifically argue that the issue of the reasonableness of defendant's failure to approve the purchase agreement is a question of fact for the jury, and thus summary judgment was improper. However, the Court cannot find, as a matter of law, that the plaintiffs have satisfied their burden of showing that the other elements of a tortious interference claim have been met. First, plaintiffs have not shown how the defendant could have interfered with the contract or with the prospective economic relationship when all it did was exercise its contractual rights. Second, the defendant had to accept the purchase agreement in order for it to

be enforceable. It chose not to accept it, and thus the contract was unenforceable. Therefore, there could be no breach, because a condition precedent did not occur.

The Court notes, that the plaintiffs, in their objections, do not offer the Court any new authority which would cause it to reverse or modify the Report and Recommendation of Judge Boyle. Nor does the defendant offer any new authority in support of its contentions, aside from the case of *Key v. Chrysler Motors Corporation*, 918 P.2d 350 (N.M. 1996). Instead, both parties simply restate the arguments made to Judge Boyle which he carefully considered and rejected.

With respect to the Motion for Summary Judgment, the Court notes that its findings are based upon a careful review of the facts, which has been conducted with the principle in mind that the facts are to be viewed in the light most favorable to the plaintiff as the nonmoving party. In summary, the Court is not persuaded that the Order, Report and Recommendation entered by Judge Boyle on June 12, 1996, nor the Supplemental Order, Report and Recommendation entered by Judge Boyle on June 13, 1996, warrants modification. On the contrary, the Court commends Judge Boyle for his well-reasoned decision. The Court finds it unnecessary to explain to the plaintiffs again the reasons why summary judgment is proper on Counts II and III, and Count I as to the individual defendants. The Court further finds it unnecessary to explain to the defendants again the reasons why summary judgment is not proper as to the corporate defendant on Count I. Rather, the Court hereby incorporates the findings, reasoning, and conclusions of Judge Boyle by reference in this order.

III. ORDER

Based on the foregoing and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the findings, reasoning, and conclusions contained in the Order, Report and Recommendation (Docket No. 82) filed June 12, 1995, and the Supplemental Order, Report and Recommendation (Docket No. 83), filed June 13, 1996, should be, and are hereby, ADOPTED in their entirety and INCORPORATED herein by reference.

IT IS FURTHER ORDERED that defendants' Motion for Summary Judgment on All Claims (Docket No.38), filed November 22, 1995, should be, and is hereby, GRANTED IN PART and DENIED IN PART. The motion is granted as to Counts II and III of plaintiff's Amended Complaint, and as to the individual defendants, Seldon and Spencer Young, with regard to Count I. The motion is denied as to the corporate plaintiff in Count I.

DATED this 30th day of September, 1996.

B. LYNN WINMILL
UNITED STATES DISTRICT JUDGE