ORAL ARGUMENT – 2/14/01
00-0292
SUBARU V. DAVID MCDAVID NISSAN

MORRIS: This is an original jurisdiction case, not an exclusive remedies case. More specifically, factually this case involves a dealer relocation.

As the opinion currently stands either a dealer or a manufacturer can end run the board's jurisdiction in the core relocation issue by merely filing a DC action that omits the express statutory violations under §5.02.

This raises three issues this morning. First, did the board have original jurisdiction either express or implied over the claims made by Mr. McDavid? Secondly, did the primary jurisdiction require adjudication of the board claims first? And thirdly, is §3.01(b) of the Code unconstitutional?

With regards to the first issue, petitioner submits that the board had original exclusive jurisdiction to regulate the particular claim...

HANKINSON: I'm a little bit confused about what your second question is then if your first question goes to - are you saying that there is exclusive jurisdiction or primary jurisdiction?

MORRIS: I'm saying that in this particular case that the board had exclusive jurisdiction. Alternatively, if this court holds that there was not exclusive jurisdiction...

BAKER: But your briefing - all your points just talk about primary jurisdiction.

MORRIS: My briefing may not have been clear, but I believe...

BAKER: That's why we're asking the question. So you're now arguing that in fact you think there is exclusive jurisdiction in the board for everything, and you do recognize a difference between the two doctrines?

MORRIS: Yes.

BAKER: And I think that's important in this case so tell us why you think it is exclusive then.

MORRIS: I believe if you read §3.01(a) and 3.01(b), §3.01(a) specifically says the board has original power and jurisdiction to regulate all aspects of a sale and distribution including whether specifically designated or implied. That includes the original jurisdiction to determine its own jurisdiction.

ABBOTT: Original but not exclusive.

MORRIS: The statute does not say exclusive in 3.01(a).

BAKER: But it does in (b).

MORRIS: Yes.

BAKER: Do you think that's a significant omission in (a) vis-a-vis your argument that original means exclusive too?

MORRIS: I believe that §3.01(a) and 3.01(b) should be read together. If you look at the statute, the subsection specifically is jurisdiction. And so petitioner submits that you have to read those provisions specifically together.

With regards to the claims in this case they are very limited. They go to the absolute core issue of relocation. With regards to the specific claims that are currently on appeal, there was a claim for good faith and fair duty. The second one, breach of an oral agreement as well as - those are the two main ones.

With regards to the duty of good faith claim, that is specifically created by statute under §6.06(e). And the code expressly requires that under §6.06(a), that it states in any action brought under this section, which is 6.06, that if there is a judgment that any court shall pay due deference to the findings. Thus, with regards to the case of duty of good faith and fair dealing, that provision expressly requires findings by the commission. Thus, logic dictates that in order for a court to review the findings it must have gone to the commission first.

BAKER: The arguments made by the other side that there's a difference between what 6.06(e) and the section that talks about the DTPA claim in findings based on violations before you can file a DTPA, but that language is not in (e). And it also says that the good faith and fair dealing gives rise to a tort claim in the TC. Doesn't that make a significant difference between these two?

MORRIS: With regards to the duty of good faith and fair dealing, it is our position that the fact that it talks about the duty in tort goes to remedies. It does not go to original jurisdiction.

BAKER: But also the commission cannot award damages for breach of the good faith and fair dealing when it's brought as a DTPA action can it?

MORRIS: In this particular case, the commission was not even given the opportunity to decide that issue.

BAKER: If it doesn't have the power under the statute how can it decide one way or the

other when it's limited to civil penalties, injunctive relief, and some third thing that doesn't include awarding common law damages, or damages under the DTPA?

MORRIS: Under the statute §6.06 does not specifically give the commission power to...

BAKER: But the other part that does tell them what they can do by way of remedy is pretty specific isn't it?

MORRIS: Yes, under 6.06(a). But I believe 6.06(a) the first part of it talks specifically about the DTPA and the remedies available to it. But it also specifically says, in any action brought under this section, being §6.06, which in this particular case would include the breach of good faith and fair dealing as to franchise agreements, and in the interest of judicial economy a judgment rendered shall pay due deference to the findings of fact and conclusions of law.

HANKINSON: By referencing all of these particular provisions aren't you in fact then acknowledging that there is not exclusive jurisdiction?

MORRIS: We believe that, with regards to the breach of good faith and fair dealing, that that is special, that is expressly...

HANKINSON: Your first position is that the board has exclusive jurisdiction. What test for exclusive jurisdiction are you asking us to apply in this case?

MORRIS: I'm limiting this to the particular facts in this case.

HANKINSON: It seems to me it's a question of law whether or not the legislature has in fact given the board exclusive jurisdiction. Either it has or it hasn't.

MORRIS: I agree.

HANKINSON: So what test are you applying then to make a determination that exclusive jurisdiction lies with the board?

MORRIS: It is our position that with regards to the duty of good faith and fair dealing claim, that if you look at the express language of the code it gives the commission original jurisdiction.

HANKINSON: This court's jurisprudence on the question of exclusive jurisdiction requires us to determine whether or not the statute reveals the legislature's intent to replace the plaintiff's common law remedies with the exclusive remedies provided in the act. If you are taking that position, and I realize you're talking about a statutory claim now which is a little bit different, applying that test, which is my understanding of what we need to apply if there is exclusive

jurisdiction, then you wouldn't allow the claim to go to the TC and pursue common law remedies because common law remedies would be subsumed by the act. I'm trying to understand what your position is on that issue. Because what I'm hearing you say with respect to the breach of the duty of good faith and fair dealing what the statute says is a duty sounding in tort. We're dealing with common law there. How in the face of those provisions you can take the position that exclusive jurisdiction lies with the board when the statute itself contemplates actions in trial courts for common law causes of action?

MORRIS: The distinction that I am trying to make is that we're talking about original jurisdiction. We're not talking about exclusive remedies. It is our position the way that the act should be interpreted is at least for the original determination of whether it's within the jurisdiction on these particular claims, that it would go to the _____.

O'NEILL: Under your scenario, the exclusive remedy would be defined _____ the statute. In other words, what would your case look like when it went to DC?

MORRIS: With regards to how it would like it, it would have gone to the commission first, and there would have been findings. It is our position that the findings with regards to the oral agreement are subsumed by any findings made as to §5.02...

O'NEILL: Would there be any panel or vehicle to obtain damages in the DC?

MORRIS: Yes.

O'NEILL: How is that under the statutory scheme if the board can't grant damages and review is limited to substantial evidence, how do you get to a damage claim?

MORRIS: Under §6.06 with regards to the DTPA claim, as well as under the duty of good faith and fair dealing, I believe that the statute specifically allows damages under those claims. With regards to the violation of §5.02 and the litany of those violations, I do not believe that the DC will have the ability to award damages in that particular issue.

HECHT: Why not?

MORRIS: I'm basing that on the Kawasaki case in 1993, and most recently the interpretation in the sports coach case. And they claimed that because of the statute not having the exclusive remedies aspect and not specifically giving the commission under its interpretation of the statute the right to award damages, that the commission did not have that authority.

HECHT: On the breach of contract and the promissory estoppel claims why aren't there open court's problems if that's your view?

MORRIS: In this particular case, I believe that there are certain problems with the CA actually reaching that decision.

HECHT: Because it wasn't raised?

MORRIS: Yes. It was not raised properly. More importantly, the Texas AG was not served with this complaint. And under §37.006 of the Civ. Pract. & Rem. Code, we believe that's jurisdictional. Second of all, because of the fact that the respondent never actually went to the commission to be told you don't have any remedies, we believe that's no standing. And I think that's the logic that was used by this court in the Texas Worker's Comp. v. Garcia case.

BAKER: In your brief there's a footnote that says that McDavid didn't ask the TC to determine 3.01 unconstitutional in its declaratory judgment part of its pleading. Did they also raise that as the ground in response to your summary judgments that 3.01 was unconstitutional?

MORRIS: They did at the TC. Yes. They did not plead it though.

BAKER: So it was a response in the motion for summary judgment?

MORRIS: Yes. But the problem is is they have an affirmative duty under 37.006 to give the Texas AG the opportunity to weigh in on this issue. We believe that §37.006 is jurisdictional in that the CA should have had the opportunity and the Texas AG should have had the opportunity at that level to weigh in on the decision and be involved if they so chose to file briefs, argue, respond in kind, etc. And we believe that that is a jurisdictional issue. And that's the way that statutes been...

O'NEILL: Well we have to be mindful of open court's problems. We can't just turn a blind eye to them. How would you answer the open court's question?

MORRIS: With regards to the open court's questions. First of all it's our position that that's not right in this particular case. For example, the sports coach case, which just came out a few months ago, that's where they've actually decided a remedies issue and interpreted §6.06 under an exhaustion of remedies analysis. I would respectfully submit that would be more appropriate than at this time.

The court has held that you can't arbitrarily withdraw all remedies if it's a well-defined common law cause of action in 1876. First of all, with regards to the good faith and fair dealing, that was not a common law cause of action. So that does not apply. Second of all with regards to the promissory estoppel, we would submit that the SC did not adopt a cause of action to promissory estoppel till the case of Wheeler v. White which was in 1966. So at that point, that's also outside that analysis. And thirdly, the second issue is with regards to the oral breach of contract. A court should consider both the purpose of the statute, which in this case is that the commission is

supposed to regulate motor vehicle distribution and sales. And second of all the extent of the harm done if the common law action is not allowed. In this particular case, under these particular facts Mr. McDavid would not have been harmed in any event.

With regards to the breach of contract we are dealing with also the claim of good faith and fair dealing. If the commission had held that we had breached the contract, it would also probably have held that there was a breach of the good faith and fair duty. Second of all, the breach of the contract also would allow the DTPA claims in damages and remedies. So, thus, even though with regards to the oral agreement, we submit that under §5.02(12) that that should go within that area, Mr. McDavid would have gotten the same actual damages, the same attorney's fees and a punitive aspect if in fact they could prove his case in the DC.

ENOCH: To go with your _____, you're essentially arguing that the court should give a broad reading to the statutory provisions that govern the conduct _____?

MORRIS: I'm not necessarily saying that. What I'm saying is that under these facts, the commission should have had the original jurisdiction at least in part to determine whether there had been a violation of the code. If the commission had decided that it was not a violation of the code...

ENOCH: But your argument is to get to that, we have to acknowledge that there in the absence of denying the board's authority to make rules in certain areas, there's an implication that they could?

MORRIS: We're saying that with regards to an absence of an express that the underlying factual underpinnings that in order to facilitate the commission's duties it is necessary that they weigh in.

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RESPONDENT

KHOURY: I would like to first start out by addressing what appears to be a metamorphosis in the arguments made by Subaru throughout the trial of this lawsuit. In the summary judgment motion, their position was the jurisdiction of the TMVB was jurisdictional, and that is was exclusive, and that as a result of that following Navistar the Texarkana case and the dicta in Texarkana that all common law causes of action are preempted. His argument to the court was, we had no lawsuit for damages by way of contract, promissory estoppel or any other cause of action. He held that view up in the arguments and in front of the Dallas CA. They rejected it. And I think on the strength of the TADA amicus brief filed here and the strength of the AG's brief filed here, that argument now has changed or modified itself to be one of primary jurisdiction, or now what is somehow ambiguously labeled as original primary exclusive jurisdiction and those concepts I think have all been blended without any clear delineation.

BAKER: So your view is then that we're really talking about a primary jurisdiction issue and we need to apply that test. Is that correct?

KHOURY: I think so. And with respect to the argument in its pristine form as they made it here, they would have this court believe that if you read 3.01 literally, and that is that all aspects of any dealings between car dealers or in the automobile business could be subjected to an exclusive jurisdiction of the board. And that means that the most trivial or most mundane cause of action for debt insofar as a failure on the part of a dealer to pay the inventory or floor plan to the manufacturer, for enforcement of indemnities between the two, or for that matter if you read it broad enough as they did with no limitation it would encompass common law actions between a consumer and a car dealer for any breach in the sales transaction or failure in the service contract. To take this theory then each and every common law action, many of which have already been litigated, and to that extent if there was no jurisdiction between manufacturer and dealers in the legions of cases filed over the last...

ABBOTT: Well then what is the scope of 3.01(b)? The way you're talking about it it makes it seem virtually meaningless.

KHOURY: I'm not sure I know what the legislature meant when it said unless specifically delegated or set out by Texas law to the contrary.

ABBOTT: The way you're talking makes it seems as though in reality as you would apply it no dispute concerning the distribution or sale of motor vehicles must be brought through this act. It can be brought separately in a state DC.

KHOURY: I think what the legislature was trying to do and the TADA wanted at the time with respect to their efforts to protect franchise dealers against franchisors was to give the board that exclusive power to deal in areas that were contained in the act. As opposed to trying to regulate and give them power to regulate common law cause of action. I think that the only interpretation you can glean from this if you take the position that 3.01(b) says, unless Texas law specifically sets out to the contrary, which must include common law cause of action, if that's what they mean by specifically, and if other statutory claims or other things set out in the statute are not in conflict with this act, then the only thing that the board does have jurisdiction to handle are those specific delineated provisions within the TMVB code.

ABBOTT: Under 5.02?

KHOURY: Under 5.02 is one of them. The lemon law is under the Texas Motor Vehicle Act. There are other provisions that we use everyday in the practice of law for redress that...

ABBOTT: 5.02(3)(a) talks about terminating for refusing to terminate any franchise with a dealer or directly or indirectly force or attempt to force a dealer to relocate.

KHOURY: I think as a matter of practice and as a matter of law, that has always been the exclusive jurisdiction and purview of the board. They have specialized knowledge and have for 30 years dealt with the challenge or the wrongfulness in a termination. I think that also applies to relocation of dealerships. I don't think there's any question about when a request is made and the dealer objects that the board has the initial exclusive jurisdiction to deal with that issue.

HECHT: But how is this really any different? What's the difference in effect between oral and written?

KHOURY: The biggest difference here is this was not a case where we are testing the reasonableness of the request to relocate. The facts in this case are that we had a deal to relocate. We never had a written request before the board that they challenged. The issue now becomes a reasonableness of the move. That's what the board has jurisdiction to - whether it's written or oral - that's what their jurisdiction is in my opinion.

The facts in this case show that Mr. Gage and Mr. McDavid made a deal, albeit a handshake agreement, that Mr. McDavid moved on because that's his nature to deal in relationships and orally with people. He made a deal. As a result of that affirmative agreement to permit him to move, he not only spent $350,000, he moved the Oldsmobile dealership from 6800 Gulf Freeway to the 11200 Gulf Freeway, and was in position now to have to move Subaru to the 6800 address because Oldsmobile was now dealing with Nissan. There wasn't any room to operate another dealership, so at that point in time he gets a letter from Mr. Gage that says, I don't know what you think you're doing or what agreement you think I made, but you don't have a right to move your dealership. So now he's stuck with a franchise that he can't operate in that location. And now he's told he can't move. And we know the TMVB process is anywhere from 12-18 months, so he can't hold his assets there and his personnel there and not operate for 18 months while his reliance damages continue to mount and hemorrhage, so he terminates his dealership. And then 4 months after the termination Gage and Subaru permit a Subaru dealer to be installed at 6700 Gulf Freeway, which is a matter of inches from our location at 6800. So we say the facts in this case are that we had a deal and they breached it, and we are seeking reliance damages and that the board can't pass on reasonableness, because there wasn't an issue as to whether or not it was reasonable to move.

HECHT: The DTPA claim and the bad faith claims are based on the same allegations?

KHOURY: Yes.

HECHT: Why don't you have to go to the board first on those?

KHOURY: The CA decided that we had to go to the board on the DTPA. They did not decide that way for the tort of good faith and fair dealing.

HANKINSON: Do you agree with the CA that the board has primary jurisdiction over the

DTPA claim and you've got to go there first on that claim?

KHOURY: If the language in the statute means what the CA in Dallas thought it meant...

HANKINSON: Do you agree with that or do you have a different interpretation?

KHOURY: I have a question in that I'm not sure I know what the language in 6.06 means when it says we are to pay due deference to findings of the board. Does that mean that as far as now the statutory action of the DTPA we must first go to the board and get findings as to the liability, and then subsequent to that flip it into the DC for now a trial on the damage issue that a jury decides?

HANKINSON: What else could it mean? Doesn't it require some action on the part of the board? You agree with that at least?

KHOURY: I think implicit in its language. It calls for some action by the board. I've just not in my experience...

HANKINSON: So is it your position then that you do have to take the DTPA claim to the board first for something, even though you're not sure what?

KHOURY: If the statute means that findings should be made first by the board with respect to liability. I do not believe in the scheme of any administrative act that I'm aware of, that we have this hybrid where the board is permitted to find the issues of liability initially and then flip it to the DC after that finding that now they pay due deference to with respect to liability and have a trial on the damage issue.

HANKINSON: What is it you're asking us to do with the DTPA claim, then? I keep hearing you're not quite sure.

KHOURY: We didn't appeal it to this court. So we're basically hung with it. And I think our main issue in this case, and has always been a breach of contract claim and promissory estoppel.

HANKINSON: Is it your position that on the breach of contract and promissory estoppel claims, that the board has no primary jurisdiction over them?

KHOURY: Has no jurisdiction over them. And need not be permitted and shouldn't be permitted to pass on the question as to whether or not they could be brought in a common law cart because it doesn't have the power expressly given it to in the statute or by implication to do it.

HANKINSON: Aren't you still alleging though a violation of the statute as well 5.02(b)(15)?

KHOURY: And I think that that has been decided by the CA too that we did not appeal

to this court.

HANKINSON: So what you're asking us to decide in this case now are the breach of contract and promissory estoppel claims, and that's all that's left, you are going to sit with what the CA did on the other claims?

KHOURY: I don't know...

HECHT: But as long as you have to go to the board on the DTPA and the bad faith claim, why shouldn't the breach of contract and promissory estoppel claims which are based on the same allegations abate until findings are made by the board?

KHOURY: They may have to abate. I think dismissal would be the wrong and most egregious penalty.

HECHT: But you agree that if they are based on the same allegation, you can't really divide them up and let both the board and the court go forward?

KHOURY: No, I think you can divide them up. And I say that it would be impracticable in our scheme to require a litigant to take those just because they arise out of the same facts. The board obviously has its jurisdiction that it can handle. The fact that another cause of action arises out of the same facts doesn't give the board any more power to address those issues, the common law issues. So I would say the fact that they have commonality of facts should not be a determining factor insofar as whether you go to the board.

HANKINSON: But doesn't the law require that when concurrent jurisdiction exists in the TC on certain claims, and in an administrative agency on other claims, that the agency should proceed first before the court does?

KHOURY: Except to the extent that the other causes of action being sought are outside the ability of the tribunal to...

HANKINSON: And I understand that. That's my question. You've got some claims that you're saying that the board does not have jurisdiction over, does not have primary jurisdiction over. They are outside the board's power to hear and they belong in the courts. And you've got other claims that by virtue of not challenging at least what the CA did we now know by the CA's opinion as to this case that the board has primary jurisdiction over them. So we've got claims where we've got the board having jurisdiction over some of them, and claims where the court does. And if that's the case, then we've got concurrent jurisdiction over a set of claims arising out of the same set of facts. And my question to you is, under Texas law aren't we then required to allow the agency to proceed first before the TC does?

KHOURY: I don't think there's anything in Texas law that prevents the litigant from filing in DC for the common law claim.

BAKER: That's not her question. Her question is, once you've filed it can you go ahead in the DC while the board is deciding the factual issues in the ones that they have?

KHOURY: I think the appropriate procedure is to abate. I think the reason we must be permitted to file our action in DC and not the board is to preserve statute of limitation problem.

HANKINSON: Don't you agree though that the DC proceeding would be abated under your theory of how the statute would be interpreted?

KHOURY: I do not object to that. I object to dismissal in the DC.

OWEN: You said you're seeking just reliance damages. Could you be more specific about exactly what you are seeking damage wise?

KHOURY: Insofar as the agreement that was made permitted us to move, and Mr. McDavid's company spent $350,000 in relocation expenses in reconstituting the dealership where the Oldsmobile dealership was going to in order to satisfy Oldsmobile's manufacturer's requirement with respect to that. And made the same sort of accommodations to the 6800 address where Subaru was going. So our action was to recover the damages that we spent and that we lost with respect to terminating this Subaru dealership that we could not move now and had no ability to...

OWEN: So your damages are simply limited to relocation damages. You are also suing for wrongful termination?

KHOURY: For the consequential damages that arose from the failure now to operate up until the time that we terminated the dealership.

HECHT: But you position would be that if you abandon your DTPA and bad faith claims, then you could just forward on your contract claim and your promissory estoppel claim, there would be no impediment to that?

KHOURY: They are outside the code in my opinion.

BAKER: But you're not suggesting that you are abandoning those claims are you? You are just saying that you didn't appeal those here and you're content with them going back to the board. Is that correct?

KHOURY: Correct

BAKER: And only if you abandon them would you be able to proceed under what we just talked about in the DC?

KHOURY: Yes.

HECHT: Under that scheme does the statute violate open courts?

KHOURY: Well then I think you have a case by case determination as to what the statute means. I think the CA in Dallas concluded what you can only conclude if you read the very expansive language in 3.01. And that is, it eats up everything. And to that extent, it is clearly violative of the open courts provision. And with respect to the no notice to the AG, I have a clear disagreement with respect to what 37.006 says in terms of having to give the AG notice. And I think the cases back that up in that notice is not required in an action that declaratory judgment is not alleged or a municipal ordinance or municipal franchise is not alleged. And in the event constitutionality is raised with respect as a result of a motion being filed or in the case of Spurlock case that they filed as support of their position when the court sua sponte decided that the statute was unconstitutional in those situations notice to the AG are not required. And I think Justice O'Neill pointed out, the practical result is they are here. And I'm not sure any of those arguments - I don't think they are jurisdictional. And their argument is now that somehow that the State of Texas and the citizens thereof have been prejudiced because the AG was not notified is moot because they are here and they are before us and they weighed in on this issue. And their brief is not inconsistent with our position that the board does not have exclusive jurisdiction on common law claims.

OWEN: Let's assume for a minute that you had had a written contract, and initially Subaru had said, yes you can go ahead and move, we are not going to object. Then within the 90 day period in the statute, they then submitted in writing to no we've changed our mind, we don't want you to move. Would you have to go to the board under those circumstances?

KHOURY: I don't think so. I don't think the rationale is any different whether it's written or oral.

OWEN: If you're going to sue not just for reliance damages in the beginning to relocate and you're going to sue for the inability to move, go beyond that and also sue for the inability to move, why isn't that within the board's jurisdiction at least initially on whether Subaru was reasonable in saying no we don't want you to move?

KHOURY: Because I think 5.02(15) gives them the jurisdiction to determine whether or not a requested relocation is reasonable or not.

OWEN: But what if the board - if Subaru had taken it to the board and the board would say, yes Subaru was reasonable in denying you permission to move even though they initially said okay. When they changed their mind they were reasonable in denying it. Wouldn't you have to go

to the board...

KHOURY: Then I think they've overstepped their jurisdictional bounds and find whether or not there was an agreement between the parties and whether or there was an actionable breach. Because once an agreement is made, 5.02(15) is irrelevant. 5.02(15) just deals with a dealer's request to move in writing that a manufacturer _____.

OWEN: You're saying once the dealer either orally or otherwise consents, they can't change their mind?

KHOURY: In the words of the great Professor Horner, A deal is a deal, is a deal, is our opinion.

ENOCH: If I understand your argument, dealers and manufacturers in this state can contract to do something that the board might otherwise not let them do if somebody challenges it based on reasonableness. But if they have contracted there is still a binding obligation on one party to the other for damages even if the board later determines that they could not have entered into that contract?

KHOURY: I think so. Now the issue becomes in our case as to whether or not Mr. McDavid's franchise would have been licensed to move. We all know that dealers make business arrangements with other dealers who might ultimately protest the relocation well before they've ever decided to go to the manufacturer. Because you don't want to spend that kind of money without that. But in this case, I think factually it's moot because 4 months after we terminated they put a Subaru dealership in a block away or next door to where we were. So the issue with respect to that is an element of proof that will be before the DC is not something before this court, but obviously I think from a factual standpoint is moot

ENOCH: Is there some logic to the notion that if you have a regulated industry, which this is to a certain extent, that any contracts among the players by implication will incorporate the regulations? In other words, because the location of a dealership is subject to regulation by a board isn't it reasonable to say that a contract between a dealer and a manufacturer about locating the dealership by implication is subject to those regulations?

KHOURY: I think with respect to the issue as to reasonableness on relocation it falls within that purview. But as to whether or not they can move based on whether or not they will be a licensed dealer, I think is outside the code. I know that the TMVB code regulates contracts between manufacturers and franchisees and say this is going to be in your contract whether you like it or not, and anything to the contrary notwithstanding. But I guess you're saying that if there is an agreement that somehow conflicts with the power of the board and the board ultimately finds otherwise?

ENOCH: The dealership can't be located there unless the board says so. I mean it could be. But if somebody challenges it, the board makes the decision whether or not the dealership could be located there doesn't it?

KHOURY: Yes.

ENOCH: And that's by law. So isn't it reasonable to say that any contract for the relocation of a dealership between private parties by implication must incorporate the regulation of the state that if there's an objection there won't be a relocation?

KHOURY: Yes. It is implicitly incorporated, but it's the second step to the process. And I would point out that a simple objection does not mean that the board is going to deny your right to move. And all I'm saying is is that is I think an element of our proof in our damage model that we would have been permitted to relocate and the board would not have otherwise stopped that without which we could not probably have recovered any reliance damages.

HECHT: Why shouldn't the board answer that question now before you go forward rather than just litigate about what they might have done?

KHOURY: If the issue of abatement occurs, the protest with respect to the relocation may be an area that they look into. I don't know that the board would go into a - it's like this court would not render an opinion on a hypothetical set of facts.

OWEN: This is what's troublesome. Let's suppose that you asked Subaru to relocate and they say, no. You say, well I don't have the money, and I can't wait the 18 months to a board decision, so I'm just going to terminate my dealership, and then now sue Subaru for failure to allow me to move. And you're saying that since there is no move, the board doesn't get to resolve that issue. And aren't we really making an end-run then around what the statute...

KHOURY: I don't think so, because in your situation there was not an agreement. There was a request and a denial. So then you are required to go to the board to get...

OWEN: But you're suing for denial when it's never been before the board. Then you are arguing in front of a judge or jury what the board would or would not have done.

KHOURY: I say we're suing for a breach of an agreement to move.

OWEN: I've got a different example. You ask for permission, you're denied permission, and you say I can't keep my dealership here for the next 18 months, I'm just going to terminate the dealership...

KHOURY: He's denied permission by whom?

OWEN: Subaru says you can't move so you terminate your dealership and then you sue Subaru for the failure to grant permission to move without going to the board. And you're saying the board would not look at those facts because it's ongoing.

KHOURY: No. I think in that situation the plaintiff gets thrown out for not going to the board in contesting the denial as being unreasonable. I think the dealer has to go to the board when you ask the dealer, the manufacturer to move and they say no...

OWEN: Why shouldn't you have to go to the board on that one piece of your damage model on the Subaru unreasonable in ultimately denying you the right to move. It's one thing to sue for reliance damages on an oral contract. Why wouldn't you have to get a board determination on the reasonableness of the ultimate refusal to allow you to move?

KHOURY: Reasonableness or licenser of the location?

OWEN: Reasonableness of them saying you can't move. We're not going to let you move.

KHOURY: Because we had a deal where the manufacturer agreed we could move. Going to the court with respect to the unreasonableness of the denial is not the question.

OWEN: And then they changed their mind and said, no, we're not going to let you move.

KHOURY: Well that's what happened here.

OWEN: That's my point. Why wouldn't you have to go to the board to get the second piece of your damages on the denial of _____?

KHOURY: At that time they've got tar all over them that they can't just simply wipe off by their denial. We've got reliance. We've got promissory estoppel. We have a breach of contract. I know they would like to now say, no. We said yes.

OWEN: But the board could say, Subaru is well within its rights for not allowing you to move. That doesn't mean that you can't sue for the reliance damages that you suffered up until the time they said no.

KHOURY: I would say that I don't think the board has the power to say that we can't after a deal was struck where both parties agreed we could. I don't think they can come back - I don't think they have the power expressly or implicitly to undo our agreement after it's already made. And Subaru should respond to damages on the breach. If you didn't have that, then there wouldn't be any recourse for a manufacturer to say, yes, and then let you do what you want to do and decide later to

say no because they know that that issue has to be determined by the board and they have a good chance of beating you there. I think you deprive the citizens of the common law rights to sue for the damages or the reliance...

OWEN: You could sue for your reliance damages. All the costs that you incurred in getting ready to relocate. But isn't it a different issue when you now sue for failure to grant permission to move?

KHOURY: I see the distinction you're drawing, but I can't seem to get over the issue of the deal having been done. And there's nothing that's within the purview of the court as to the reasonableness of the move, because we've already got the deal.

ABBOTT: So you're saying that if this was a failure to grant permission to move, it could be within the board's purview?

KHOURY: I think it is.

ABBOTT: But that's not what happened here. You had a deal and then they called off the deal. And you're suing because they called off the deal and that's totally different than a rejection of a relocation request?

KHOURY: I think the CA seized on that as the distinction.

O'NEILL: If the deal was done can a third-party _____?

KHOURY: They can with respect to the licenser of the move.

O'NEILL: And what would be the effect of that? Let's say that you had an agreement and the third-party challenged it before the board. What could the board do? Could the board then say there is no duty, and if so, would the damages there still be a cause of action then...

KHOURY: I think you would have a cause of action. I think the damages would be zero. I think if you had a deal to move, and the manufacturer went along with it all the way through the board process, and you went and spent $350,000 to do the move, and you got to the protest portion - it's a two step process. First you've got the agreement. Second, you put it out in public notice that McDavid is going to put a Subaru dealership in this location. Everybody who is within 15 miles or has a protest filed. And once that's done, if the protest comes back and the board finds that we're not going to let McDavid move over there, then I think we have no cause of action against Subaru because we've got no damages. We're not going to come back and sue them.

I think the most telling bit of evidence in this case is is that 3 months after we terminated, they did put a Subaru dealership there. And I think that sends very clear signals as to

what the status of the protest was in that area in that there was none.

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REBUTTAL

MORRIS: There's several issues I'd like to address. First of all, we are not saying that all issues regarding a manufacturer/dealer situation goes to the board. That's not what we're saying at all. What we're saying, because of the special nature of relocation issues under this particular fact pattern, these claims that respondent made should have gone to the board.

ABBOTT: But is the specifics of this fact pattern that your opposition contends takes it outside of that board's purview, which is that it wasn't a relocation request that was denied. It was a deal struck that was later rescinded. And why would that latter category fall within the board's purview?

MORRIS: The way a relocation procedure works, there are several hoops someone must go through. A dealer cannot unilaterally agree with a manufacturer to relocate.

ABBOTT: They're saying it was not unilateral.

MORRIS: Even if there is an agreement, they cannot make that decision. Reading specifically from the friendly(?) case that was cited in our brief, the board has said, The motor vehicle board has virtually absolute power to deny the applicant the right to move and the prudent businessman will seek the state's permission to relocate...

ABBOTT: They said that didn't happen. They said that everyone agreed.

MORRIS: Under the facts in the record as compared to some of the facts that are not in the record, Mr. McDavid under §4.02 of the Code, before a relocation can take place the dealer must have a written application granted, not applied for before they can relocate. And the reason being is under the statutory scheme, relocation does not just affect the manufacturer and the dealer. It also affects third-party dealers that may have a protest right as well as consumers that may have a protest right.

HANKINSON: But doesn't that all go to defenses that you might have in connection with a breach of contract action to recover damages? For example, well we may have a deal but you didn't do what you were supposed to do and you wouldn't have gotten the board's permission, so it wasn't us that caused damage. Fit it in the context of these common law claims.

MORRIS: That would be our argument.

HANKINSON: Well then why isn't that a defense to a common law cause of action that

belongs in the DC?

MORRIS: Because we believe the issue goes to the original jurisdiction of the primary _____.

HANKINSON: You keep talking about original jurisdiction. And I know that that word is in there, but we've been talking with you about exclusive jurisdiction and primary jurisdiction since that seems to be the issue we have to decide. Now if I understood the response to your questions earlier, you're not really contending, I think, that there is exclusive jurisdiction that the legislature intended the remedies in the act to be exclusive and to wipe out common law remedies. Is that right?

MORRIS: I agree. I believe that there is exclusive original jurisdiction. I do not believe there is exclusive remedies.

HANKINSON: I don't understand what you mean by exclusive original jurisdiction.

MORRIS: By that I mean that all that was required is that you go to the commission first, get factual findings on the issues before the commission, and then it goes back up.

HANKINSON: Why isn't that a matter of primary jurisdiction as opposed to exclusive jurisdiction - concurrent primary jurisdiction in that there are certain matters that have to go to the board first, but that the board is not going to hear the common law causes of action and the TC just must wait until the board gets done?

MORRIS: It can be.

HANKINSON: So you agree this is a case of primary jurisdiction then?

MORRIS: Alternatively yes.

HECHT: What are you going to ask the board to decide? What specific things should the board decide? Whether we would have agreed with the relocation? Approved it?

MORRIS: First of all, under the fact pattern, the respondent would have had to have filed a written application to relocate.

HECHT: I just want you to tell me what you want the board to decide. What issue do they need to decide so that the DC can go forward?

MORRIS: They would need to decide whether the - if there was such a denial, and there was, whether that denial was reasonable. Then the second step would be if they found that denial was unreasonable, then they would then need to wait and send out a protest letter, which is required

under the statute, and then see if there is any third-party...

O'NEILL: There seems to be a fundamental disagreement between you two as to whether a manufacturer and dealer can enter into an agreement outside the board. If the parties can enter into an agreement on their own without going before the board, the agreement would be the case. Would you agree with your opponent's position then?

MORRIS: With regards to that it depends on what the contract is. With regards to the facts under this case, ie, I will agree for you to relocate, _____ from a high crime area to a nice NASA area, and then Subaru...

O'NEILL: Are you saying that parties cannot enter into relocation agreements without going to the board in the first instance?

MORRIS: You mean to enforce a breach of that agreement?

O'NEILL: No. I mean could this agreement have gone forward without it going to the board?

MORRIS: No. And the reason I say that is under §1.04 of the Act. The act specifically says, any agreements in violation of the act are void or unenforceable.

O'NEILL: Can they or can they not agree between themselves to relocation without going to the board?

MORRIS: The answer is they can agree and in most instances they do. The legal effect of that agreement is irrelevant until the board officially accepts the relocation.