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Supreme Court of Texas.
Hanan BUTNARU and Gil Butnaru, Petitioners,
v.
FORD MOTOR COMPANY, Respondent.
No. 00-0513.

February 14, 2001.

Appearances:

Andrew L. Kerr, Strasburger & Price, LLP, San Antonio, Texas, for petitioner.

Jon David Ivey, Baker & Hostetler LLP, Houston, Texas, for respondent.

Before:

Chief Justice Thomas R. Phillips, Justice Priscilla Richman Owen, Justice Harriet O'Neill, Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Deborah G. Hankinson, Justice James A. Baker, Justice Craig T. Enoch, Justice Greg Abbott.

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JUSTICE: Thank you. Be seated. Our Court is ready to hear arguments from petitioners Butnaru v. Ford Motor Company.

SPEAKER: May it please the Court. Mr. Andrew Kerr will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF ANDREW L. KERR ON BEHALF OF THE PETITIONER

MR. KERR: Good morning. May it please the Court. First of all, I wanna thank this Court for taking this case along with the McDavid-Subaru case to address the important issues about the scope of the Texas Motor Vehicle Board's jurisdiction and particularly in our case throughout the prospective dealers to bring an action when their rights have also been violated.

This is a case about the rights of those who contract to purchase automobile dealerships in Texas, their right to complain when an automobile manufacturer acts without justification to prevent them from the obtaining a dealership and their right to a form and wish to bring their complaint. Hanan and Gil Butnaru are father and son who contracted by the Ford, Lincoln, Mercury dealership in Del Rio. Their application to be approved by Ford as an authorized dealer was short

circuited when Ford decided to exercise a right of first refusal, but Ford had exerted into its franchise agreement with its dealer Martin Graf. The right of first refusal itself is a violation in Section 5.02(b)(8) of the code which prevents a manufacturer from preventing or failing to get effect to a transfer of an automobile dealership.

Under the code, under Section 104 of the code, it is void and unenforceable because it is ineffective waiver provisions of that section of Section 5.02(b)(8). It is also inconsistent with the provisions -- with that provision of the code which makes it unenforceable under Section 4.03(e) of the code. In fact, the Motor Vehicle Board -- Motor Vehicle Board itself has failed of the right of first refusal can't be used to bypass state law to prevent a transfer of an automobile dealership. That was in the Star Motor Cars v. Mercedes-Benz case that is cited in the brief in, I believe, footnote 4 and 6. The Butnarus following the exercise or notice of the exercise [inaudible] --

JUSTICE: [inaudible] are you saying that the Board's ruling is that a -- by the first refusal is void as against public policy or depending on how it's exercised it's not permitted?

MR. KERR: I believe the Board found in that case, your Honor, that as the right of first refusal was exercised in the Star Motors case that it was unenforceable under the provisions of the code and would not be permitted.

JUSTICE: But just the fact that there is a right of first refusal in the franchise agreement itself was not void.

MR. KERR: Well, I don't know that the Board held that, your Honor. There is authority for that proposition not in Texas, but in the Bayview -- in Florida there was a decision of the Court there, it's the Bayview v. General Motors case, and in that case, the Board and court held that the right of first refusal on its face was a violation of public policy as against the standards that has been set in that statute with respect to the transfers -- transferred dealership.

JUSTICE: What statute is similar to this?

MR. KERR: It is similar to our statute, your Honor. It's not as detailed as our statute in terms of the process by which a prospective transferee must meet in order to become a dealer, but it does set up a process whereby transfers of dealerships are regulated and in that regard the cite on that case is Bayview Buick v. General Motors it's at 597 So. 2d 887, that's a 1992 case, at the First District Court of Appeals in Florida.

In this case, the Butnarus has filed suit to prevent the transfer of the dealership before claiming tortious interference with their contracts about the dealership and seeking a declaratory judgment to their rights and to their contracts in the effect of the right of first refusal on their rights. The district court determined that the transfer should be enjoined. It found that Ford made have violated those Sections 5.01(b) of the code and 5.02(b)(8) of the code attempting to prevent the transfer to the Butnarus without following the process for approving prospective dealers and set forth in Section 5.01(b) of the code.

On appeal, the Court of Appeals threw out the Butnarus case against Ford. They did that based on its view that the code gave the Board exclusive jurisdiction overall disputes involving the distribution and sale of motor vehicles thereby ousting the district court of subject matter jurisdiction. The Court of Appeals also found that Butnarus had no standing to complain Ford's conduct because as prospective dealers, they were afforded no rights or remedies under the

code. The Court of Appeals decision leads the Butnarus in all prospective dealers in Texas. Without any forum or complaint about the unlawful conduct of a manufacturer that prevents them from requiring an automobile dealership in Texas. What the Butnarus want is for the code to be enforced and to be free from conduct that violates the code and interferes with their contractual right to purchase this dealership.

JUSTICE: Do you believe that -- that you can win solely on [inaudible] there's ordinance for the constitutional claim?

MR. KERR: Well, your Honor, what is the reason? Yes, we believe that the Board just not had exclusive jurisdiction and therefore the district court is not ousted of its jurisdiction and therefore the constitutionality of the code will not be called into play. However, as the McDavid court in the Dallas Court of Appeals decided, if its interpretation of the court's doctrine --

JUSTICE: But you believe that McDavid interpretation is not correct? I mean that's only your alternative --

MR. KERR: That is correct. We believe that there is no provision that gives the Board exclusive jurisdiction to adjudicate the claims that Butnarus have asserted here or really over any claim involving the sale and distribution of motor vehicles except in very limited circumstances which are contained in Section 5.014 of the code. And there, the legislature expressed and explicitly stated there that the Board has exclusive jurisdiction to determine whether signage complies with the code. But if you look throughout the rest of the code there is no evolution of exclusive jurisdiction. If you look at Section 3.01(a) of the code, it gives the Board general and original jurisdiction to regulate all aspects of the distribution, sale, and leasing of motor vehicle, but it does not give an exclusive jurisdiction either to regulate or adjudicate. Courts are not ousted from jurisdiction unless the legislature explicit -- explicitly grants exclusive jurisdiction to the administrative body, that's the holding in Gregg v. Delhi. Here, the legislature did not grant exclusive jurisdictions of the Board.

Now, Section 3.01(b) of the code states that all aspects of the distribution and sale of motor vehicles shall be governed exclusively by the provisions of the code. But it does not say that the Board has exclusive jurisdiction to adjudicate disputes that involved the code. It said that if you want to know what you have to do for instance to transfer a dealership then you look to the code and the code alone and that governs all aspect of the transfer, of the dealership. But it does not give the Board exclusive jurisdiction to determine all disputes arising out of that.

As further evidence of the legislature's intent not to grant exclusive jurisdiction in this area, there is only -- it does not require exhaustion of administrative remedies. There is only one section of the code that requires the exhaustion of the administrative remedies, that's in Section 6.07 dealing with warranty performance obligations. This Court observed in Cash America case that when the legislature vests exclusive jurisdiction in an agency, exhaustion of administrative remedies is required because there is no such requirement in the code related to actions arising out of violations of Section 5.02. The legislature must not have and did not intend the Board to have exclusive jurisdiction.

Now, both the San Antonio Court in this case and the Dallas Court of Appeals in the McDavid case determine that the code gave the Board exclusive jurisdiction. No, we disagree with that conclusion but we do agree with the Dallas Court that if the code in fact gives the Board exclusive jurisdiction, the code violates the open courts provision of

the Texas Constitution. Legislation violates the open courts provision and it's a denial of the process if its effect is to abrogate common law rights to assert common law causes of action without such treating other reasonable remedies. And that's exactly the way the San Antonio Court of Appeals has interpreted the code in this case. First in the court's view, the district court has no jurisdiction to adjudicate tortious interference claims.

JUSTICE O'NEILL: But what would happen [inaudible] under reasonable remedies under the DTPA claim breach [inaudible] in the brief --

MR. KERR: You're talking about in McDavid case?

JUSTICE O'NEILL: Uh hum.

MR. KERR: Well, your Honor, I can't [inaudible]. I'm going to think about that for a minute. I really have to focus on the DTPA and other claims that were asserted in that case. But if those remedies are provided, I don't know that they really stand from being provided by the code so much of the existed independent of the code and the code essentially adopted them as remedies that could also be pursued in good faith in fair dealing cases.

JUSTICE: Are there other remedies though within the act that ultimately will protect you or will substitute the common law claim?

MR. KERR: Well, your Honor, I don't believe with regard to rising out of violations of Section 5.02(b)(8) that there are any other remedies provided in the code other than in the sense that the code extends protection of prospective dealership as well as dealers themselves. What the code does provide in Section 5.01(b) is a means by which a protest can be filed if a prospective dealer -- if a prospective dealer is disapproved. In other words, if his qualifications or his business experience don't measure up to approval by the manufacturer, in that event then -- well, we're talking about it's not unlawful conduct that's prescribed by Section 5.02(b)(8), but we're talking about a disapproval of a prospective dealer based on his qualifications and business experience.

In that event, the code provides a process by which a dealer may protest the rejection of the prospective transfer and the Board can then determine the qualifications of the prospective transferee. So, that is not exactly our case but if it got that fault and that's what -- what the Butnarus are asking is that it allowed to be get that -- to get that far in the process so that their qualifications can be fairly determined. And -- and then a question wouldn't be here unless you believe the Butnarus qualified to this and if they -- on a fair determination of good qualifications, they would become the dealers in Del Rio.

JUSTICE: Mr. Kerr, let's talk about jurisdiction only. This is an appeal from a temporary injunction or the dismissal of the temporary injunction, but its own matters are still pending in the trial court.

MR. KERR: That's correct.

JUSTICE: And so our jurisdiction, what -- what is our jurisdiction based on in this case?

MR. KERR: Well, there are two bases for the jurisdiction in this case, your Honor. First of all, you look to Section 22.225 of the Texas Government Code and it provides that the Court has jurisdiction over if there's a conflict in decisions among the Court of Appeals or a dissent in the Court of Appeals in this case which there was not. But the other basis of the jurisdiction --

JUSTICE: Is there a conflict?

MR. KERR: Yes. There are two conflicts, your Honor.

JUSTICE: Okay.

MR. KERR: The first conflict is between the McDavid case and this case with regard to whether the Board has exclusive jurisdiction and if the Board has exclusive jurisdiction what the consequences of that are, whether it's unconstitutional or constitutional.

JUSTICE: What cases are decided with exclusive jurisdiction?

MR. KERR: Both cases decided that there was an exclusive jurisdiction, both the Butnaru court of appeals and the McDavid court.

JUSTICE: There wasn't a conflict there?

MR. KERR: Well, the conflict came in the results of that conclusion that there was exclusive jurisdiction. The McDavid court said, exclusive jurisdiction, common law claims are abrogated; therefore, the grant of exclusive jurisdiction is unconstitutional. The Court of Appeals in San Antonio said exclusive jurisdiction, this common law claims may be abrogated but that's not unconstitutional. And so that's the conflict between those two cases.

JUSTICE: When you started you say there was another basis.

MR. KERR: Yes. The other basis this Court in the Houston Federation case decided in 1987 stated that in an appeal of the temporary injunction that was decided on jurisdictional grounds, the Supreme Court had jurisdiction notwithstanding the limitations on its jurisdiction under 22.225. And so that is another basis for the court exercises jurisdiction --

JUSTICE HANKINSON: What was that holding again in that case?

MR. KERR: It said that was a temporary fulfillment -- a temporary injunction case. The Court stated -- noted that normally, its jurisdiction would be limited by Section 22.225, but when the case has been decided on jurisdictional grounds the Supreme Court has jurisdiction to hear that. Because that's the case here and we're before the Court --

JUSTICE: What about the Court of Appeals jurisdiction that to hear more than a temporary injunction on interlocutory review?

MR. KERR: Well, obviously, your Honor -- well, that whether the Court of Appeals had jurisdiction to decide whether the trial court had jurisdiction --

JUSTICE: To understand the only order that you took up is the temporary injunction.

MR. KERR: That's correct.

JUSTICE: That's the only one that's positioned. Everything else is still there in the run.

MR. KERR: That's correct. It is correct.

JUSTICE: Can the court decide the merit of the claim when you only have a total merits if you sum the order on appeal --

MR. KERR: Well --

JUSTICE: -- and hear all that kind of interlocutory appeal?

MR. KERR: You mean can the Supreme Court can --

JUSTICE: No, the Court of Appeals.

MR. KERR: No. The Court of Appeals can't decide the merits of the case. It should only be able to look to whether the trial court abused its discretion in granting the temporary injunction.

JUSTICE: Any other questions? Thank you, Counsel.

The Court is ready to hear arguments from the respondent.

SPEAKER: May it please the Court. Mr. David Ivey will present argument for the respondents.

ORAL ARGUMENT OF JON DAVID IVEY ON BEHALF OF THE RESPONDENT

MR. IVEY: Good morning. May it please the Court. My name is David Ivey. I'm here representing Ford Motor Company in this case arising out of position in the district court in [inaudible] County in Texas. Our argument is brief and we'll go ahead in answering your questions. The statute at issue, the Texas Motor Vehicle Code, in particular Section 3.01 -- 3.01(b) confer original exclusive jurisdiction of the Texas Motor Vehicle -- Motor Vehicle Board to determine solely the provisions within statute.

JUSTICE: [inaudible]

JUSTICE: You determine violations of the code?

MR. IVEY: That's correct, sir.

JUSTICE: Is that -- as far as you think, is that exclusive jurisdiction doctrine?

MR. IVEY: Absolutely.

JUSTICE: Well, the --

JUSTICE: So that we've already -- although looked at primary jurisdiction on the issue if the Ford --

MR. IVEY: No, your Honor, I do not believe that the reason that the issue before this Court is whether the petitioner's claims would be based upon the provisions of the act. The Board has to look to the act to make the determination as to whether a prospective dealer has any rights under this act. Nowhere in the act does the term prospective dealer appear.

JUSTICE: Well, what is your definition of exclusive jurisdiction?

MR. IVEY: Definition of exclusive jurisdiction is -- is the definitions of court in Houston and Cash America, which is where the legislature has given to a body the exclusive right to determine an issue obviously subject to -- in the face of administrative body. The administrative appeals process where --

JUSTICE OWEN: I thought that was primary jurisdiction.

MR. IVEY: Primary jurisdiction is a concurrent jurisdiction where an action may be brought in the state in the court of general jurisdiction. That court then considers the arguments of the parties as to whether the action of the State in the district court will be referred to the administrative body.

JUSTICE OWEN: Okay. Regardless of what we call it or not, is it your position that the legislature intended with the statute to replace the plaintiff's common law remedies with the remedies provided in the act.

MR. IVEY: Absolutely not.

JUSTICE OWEN: Okay. So, it's not an exclusive jurisdiction case then it's a primary jurisdiction case.

MR. IVEY: I still believe it's an exclusive jurisdiction case --

JUSTICE OWEN: Okay. But you disagree what exclusive jurisdiction is.

JUSTICE: Well, I believe your court said that we conclude the trial court has now have jurisdiction of the Butnarus' claim to the extent their claims are based on violations of the act. That's consistent with the 3.01(b) --

MR. IVEY: The exclusive --

JUSTICE: -- but that doesn't say that the rest of their claims that are not based on violation [inaudible] are within jurisdiction of the Board.

MR. IVEY: That's absolutely correct.

JUSTICE: So we've been looking to primary jurisdiction to see the basis for the common law claim.

MR. IVEY: I don't need -- I don't believe we need to look to primary jurisdiction. I believe in the Butnaru case, that the Butnarus properly invoked the jurisdiction of the Del Rio District Court, the court of general jurisdiction. The issue was then raised as to whether there was the ability of that court to adjudicate claims based on these provisions of the code and while in the brief of the petitioners, they made the claims that they're not making claims under the code and appendix F of this brief, page 8, Section 4 causes of actions in very first sentence, Ford's attempted exercise of the right of first refusal is in violation of the code.

JUSTICE OWEN: But you just said that they properly invoked the jurisdiction in the district court.

MR. IVEY: That's correct.

JUSTICE OWEN: But how did they do that?

MR. IVEY: The court has supported general jurisdiction and their claims are stated as common law claims; they're simply based upon interpretations of the statute.

JUSTICE OWEN: Does that include the breach of contract claim?

MR. IVEY: That's correct. They -- they alleged in their -- in their causes of action that each cause of action is based on a violation of the code. The proper thing is the remedy set by the court of appeals for those claims to be sent to the Board for determination and that's what happened when Butnarus filed a protest to the Board, the Board held an evidentiary hearing as to whether or not they had jurisdiction.

JUSTICE OWEN: So, then after the Board is done determining if there's a violation, what would you abate? The district court proceeding should be abated in the interim?

MR. IVEY: In the interim, yes.

JUSTICE OWEN: Then you could go back -- and then go back and try their damage claims in the district court after -- after the Board was completed.

MR. IVEY: Absolutely.

JUSTICE: Do you think the Board has the statutory authority to review this claim?

MR. IVEY: I don't believe the Board has the statutory authority to hear the claims asserted by the Butnarus in the original petition because they are based on the motor vehicle act, and the motor vehicle act does not provide any relief for a prospective dealer, other than if the Board believed that there was violation of the act in some point of action. It could initiate its own proceeding to investigate that in its enforcement section. It can't grant the Butnarus relief, but it could file the violation of the enforcement section -- under the enforcement section which would then possibly give the petitioners a basis to go forward in the State court action supported by findings by the Board.

JUSTICE OWEN: We come out now specifically with the right of first refusal. The Board can decide whether that violates the code or not.

MR. IVEY: Yes, yes, Justice Owen. In my -- in my opinion, the Court could have taken up on its -- excuse me, the Board could have taken up on its own the question of whether the right of first refusal was improper under the code and it would've done that by referring it to the enforcement section.

JUSTICE: Did the prospect itself does have a cause of action because of right of first refusal that the Board could've claimed?

MR. IVEY: Yes.

JUSTICE: And they've chosen to exercise that apparently they reached the deal of the code.

MR. IVEY: That's -- that's well, the right of first refusal arose in amendment to the dealership agreement, well, prior to the Butnarus' request to purchase the dealership.

JUSTICE: But I mean, they would have had, I suppose, authority to go to the Board and say this part of our contracted [inaudible] the file that exist of the section.

MR. IVEY: No question.

JUSTICE: And they chose not to do that.

MR. IVEY: They chose not to do that.

JUSTICE OWEN: I mean, I thought your position to as that -- as prospective purchasers or prospective dealers that the Butnarus had an outstanding complaint with the Board about the violation of the code.

MR. IVEY: That's correct.

JUSTICE OWEN: So, how are they supposed to get into determination from the court -- from the Board that there was a violation of the code and you said they can't hurt them? I'm not quite sure how this is going back to the court, it works under these circumstances.

MR. IVEY: Well, they have -- the Board found they have no standing to complain in the [inaudible] fashion they attempted to complain which was to [inaudible] Graf Ford the ownership of the deal -- the dealerships, the owner of the dealership and put themselves in that position and say, what should've happen is a normal process that Ford should've reviewed the application for dealership, made a determination, and based on that determination, we could protest that finding or granted a right to take the dealership. The Board lifted that and said no, you don't have standing to do that. You're a prospective dealer. This code was inactive to protect dealers.

JUSTICE OWEN: Well, if that's the case then, I don't understand how the Board could have jurisdiction of any kind over the claims that the Butnarus are making in the district court. If you say they don't have standing to be heard in the Board and why does a jurisdiction resolve all of this while in the district court?

MR. IVEY: Because they do have standing to ask the Board for an enforcement action, that the Board can bring in enforcement action on its own and that enforcement action doesn't grab the remedies that the Butnarus may be entitled to a common law. But in accordance with the Code, the Butnarus if they prevail under a complaint process could've been taken that to the district court and say we have findings by administrative body that this action was improper and we ask if you look to those with deference and only set them aside from abuse of discretion.

JUSTICE OWEN: On what provisions of the code are you relying the claim with respect to the fact that that should've gone to the Board for enforcement proceedings? And I take it that it would be litigated, there would be their alleged violation of the code. Is that right?

MR. IVEY: That's correct.

JUSTICE OWEN: On what provision of statute [inaudible] for that?

MR. IVEY: 3.05(a). Whenever the Board has reason to believe to have received other complaint or otherwise that a violation of this act or a Board rule order or decision has occurred or it's likely to occur, the Board shall conduct an investigation unless it determines that a complaint is privileged for the purpose of the harassment.

JUSTICE: [inaudible] tell you the time exclusive or not. Your -- I'm finding your argument you really lead to a result that is abatement of the plaintiff's case away in the administrative agency to make it

truly and then come back to the trial court to -- to litigate the remaining claim not otherwise exposed of by the Board's decision.

MR. IVEY: Yes. Yes.

JUSTICE: And given the deference to the fact finding [inaudible] that relate to the remaining causes of action.

MR. IVEY: Yes. Yes, it did.

JUSTICE OWEN: But what is it you want the Board to do in this case?

MR. IVEY: The Board is done what they want to do in this case, Justice Owen. There was administrative law proceeding, administrative law judge, issue for proposal for decision. The Board considers that and the Board rule that the Butnarus lack standing to bring a protest because the code, the act doesn't provide any relief for prospective dealers.

JUSTICE OWEN: So, now we are procedurally, where are we?

MR. IVEY: Well, I guess procedurally, I'm not sure of the time table. Perhaps the Butnarus could appeal that to administrative procedure and bring that up into the courtroom consideration as to whether that was a proper decision or not. Or they can accept that finding and go back to Del Rio rephrase the causes of action which is what the court of appeals told me to do and bring tortious interference, breach a contract in declaratory judgment. They just can't do it based upon the act of the code under the current law.

JUSTICE OWEN: This --

JUSTICE: So does that then mean because of that ruling that clearly the Butnarus at least have the opportunity to plead and try to prove common law causes of action and get the remedy to those claims would provide in the state district court.

MR. IVEY: Absolutely.

JUSTICE OWEN: So, it's your -- I don't understand having -- I'm sorry, go back to the enforcement proceedings again, but if they went through the administrative proceeding and there was a determination, they have no standing to protest. In other words, you can't complain about violation of the act. I take that that means what good in an enforcement proceeding do then? What is the enforcement proceeding have to do about this because could they really actually comply an enforcement proceeding as well if they don't have standing to complain when the act is violated?

MR. IVEY: Well, they don't have standing to bring a protest because they're not covered by that portion of the act. They're not -- prospective dealers are not covered. This gets back to this --

JUSTICE OWEN: I know, but if they're not covered by that piece of the act, if that really is the case, then what's gonna happen in enforcement proceeding? They're not a person who can save the Board. You should do something about this situation, isn't it?

MR. IVEY: Well --

JUSTICE OWEN: I'm just missing that.

MR. IVEY: Anyone could come forward. Any citizen of the state can come forward to the Board and requests the enforcement action to be brought. And again, I'm not up on the time table as to whether that period has run for the Butnarus. I also have not briefed the issue of the conclusiveness of the finding by the Board like a standing to bring the protest as opposed to --

JUSTICE OWEN: Well --

MR. IVEY: -- a complaint.

JUSTICE OWEN: -- but can they file a complaint alleging a violation of Section 5.02(b)(8).

MR. IVEY: They could have at least initially. I'm not sure of these procedural states that they can do that, but they could've come in.

JUSTICE OWEN: I thought they didn't have standing to complain about a violation of that particular section of the code.

MR. IVEY: They do have standing to complain about that. Any citizen has standing to bring a complaint. Only those protected by the other provisions of the Motor Vehicle Act --

JUSTICE: [inaudible] to bring a request for enforcement.

MR. IVEY: That's correct.

JUSTICE: But the remedies are penalty, decisions of these are injunctive.

MR. IVEY: That's correct.

JUSTICE: If they penalized forward in a dollar amount, who gets the money of the State? So effectively that doesn't really compensate the Butnarus.

MR. IVEY: That's correct.

JUSTICE: At least under this, what can the Butnarus get through exclusive of this order issued by the Board?

MR. IVEY: Well, perhaps the cease and decess order did prevent the Board from exercising its right of first refusal retroactively. The main thing that I believe could have happened if the protest action have been brought -- excuse me, a complaint have been brought unfortunately, is that the findings then by the Board, if the Board took the complaint could then be taken over to Del Rio and if -- if one of the findings was this right of first refusal is what the petitioner say it is, it's an attempt to circumvent the act, then they can go before the district court judge and say we now have a finding by the Board that's final, that this right of first refusal was invalid under the code and used that as a basis for their claim.

JUSTICE: Was that -- was that result in that analysis means that the Butnarus have circumvented the act by going through the enforcement procedure to get a finding if the Board would make under any other section which other Board holds they don't have standing under the act, that's akin.

MR. IVEY: They -- they don't have standing to bring a protest to complain about these procedures.

JUSTICE: But that still gets the same -- well, the policy made is that the Butnarus are prospective dealers; the act doesn't cover them at all.

MR. IVEY: No, the --

JUSTICE: Right? But as a citizen, they could come in and say enforce the act force, but the result is they get the same end result as if they got it under the other part of this don't make sense.

MR. IVEY: The distinction is, if they have pursued a protest action and had standing to pursue a protest action, the Board then would've had power --

JUSTICE: I understand that too but the Board said you can't do that.

MR. IVEY: That -- that's correct, but under the enforcement action the Board cannot say that she violated this particular portion of the act with respect to approval of the dealership or not. It could simply say whether this right of first refusal was valid or not. So I believe there's a distinction and it is not one side of the point versus the other.

JUSTICE: It seems to me your position is stronger if indeed the Board routinely listens to these complaints and issues cease and

decease orders, rather order that don't result in a monetary transfer of one party to the other, so that the Board failing to take action here wouldn't affect the regarded as a determination by the Board in this matter. But if I -- if I'm on target to it, we take additional notice of how many complaints were filed by the citizens by [inaudible] they request to the Board and [inaudible] is impermissible rather?

MR. IVEY: I would think that that would be permissible.

JUSTICE OWEN: I have also holding complaints about advertising in lemon law and all those kinds of things, etc. Consumer complaints would come underneath that too, would it not?

MR. IVEY: No --

JUSTICE OWEN: No?

MR. IVEY: -- Madam Justice, I don't believe it would because those are areas that are specifically addressed as available to citizens as opposed to dealers and manufacturers. I believe Justice Phillips' question is the point question of how many consumer complaints on issues similar to what the Butnarus are bringing where they're saying we're not specifically covered by the acts such as coverage under the lemon law, but we think something went wrong and we want the Board to consider.

JUSTICE OWEN: But I understand, but isn't the -- don't -- are they in for investigation and enforcement proceedings that the Court typically sees? Aren't they related to more consumer type of complaints with respect to dealing without the dealers or manufacturers?

MR. IVEY: Well, I think that they are and I think --

JUSTICE OWEN: And I can say lemon law compliance and advertising compliance, and various other kinds of things like that of the act to converse as well?

MR. IVEY: I think that it's absolutely correct, and I think that's very consistent with the Board's decision here where it could have on its own based on the protest that the Butnarus filed, said we don't believe a protest is proper but we're gonna make a referral to the enforcement section and allow the enforcement section to make a decision.

JUSTICE OWEN: I just wanna make sure I'm clear what your vision is and what happens when you hear that's what [inaudible] what you want to happen. You go back to the trial court and the Butnarus just say, we still think that the right of first refusal violates the code and we don't have a definitive determination from the Board on that. He got to decide that issue.

MR. IVEY: Well, I think at this point, we do have definitive -- definitive answer from the Board on that issue. Now, that issue then could be preserved for appeal obviously and the courts of appeals could then revisit the issue whether a prospective dealer to make the complaint under provisions of the act. But I believe at this point procedurally where we stand is we should go back to Del Rio and try our lawsuit under the recognized common law causes of action. If we're able to approve them and they prevail --

JUSTICE OWEN: But you're saying the Butnarus cannot argue in the trial court that the right of first refusal violates the act.

MR. IVEY: At this point, that's what I believe. Yes.

JUSTICE OWEN: Even though you nod, they can bring an enforcement proceeding and we can get a determination of the Board in one way or the other.

MR. IVEY: I'm not certain that they could. I believe originally they could have. I'm just not certain --

JUSTICE OWEN: If the Board refuses to address that why -- when can

a court step in to decide? Does the right of first refusal violate the code or not?

MR. IVEY: Well, if -- if the Board had simply refused to opine on the question of whether the Butnarus are standing or not, it would have left no alternative fact for the trial court a Board of general jurisdiction to make that determination. But the Board in this case accepted the case, heard the evidence, and issued its finding that there was no violation that there was no standing on the part of the Butnarus to sue under the code, but based the common law causes of action [inaudible].

JUSTICE: Any other questions? Thank you.

MR. IVEY: Thank you.

SPEAKER: May it please the Court. Mr. Andrew Kerr will present the rebuttal for the petitioners.

REBUTTAL ARGUMENT OF ANDREW L. KERR ON BEHALF OF THE PETITIONER

MR. KERR: If I may paraphrase a sentence of the Cash America opinion, the act in this case must be read to constrain manufacturers not to restrict the remedies of prospective dealers. What we have here is a question not only a primary jurisdiction which I applied to various briefing, but also a question of what rights are afforded of prospective dealers under the act.

First of all, the primary jurisdiction doctrine is the principle that determines whether the court or agencies should make the initial decision in the case. We believe that both the Board and the district court in this situation generally have concurrent jurisdiction, but whether primary jurisdiction would vest the district court's jurisdiction or not is subject to several standards. First of all, where the warrant -- were the issues won inherently judicial in nature, the court returning its jurisdiction and that was set forth in Gregg v. Delhi-Taylor case. Also, if the agency is powerless to grant the relief, the court retains its jurisdiction. And if the agency has authority to make incidental findings and the matter can be abated in the action deferred to the agency and then after the agency has made its findings return to the district court.

But what we have here is that -- we have two things. Number one, that Butnarus have brought a tortious interference with their contract's claim. In that claim, there's opinion upon facts to be found by the court or by the jury and determined by the Court as to whether there's been a tortious interference through the actions of Ford. Ford's defense to that claim is that its actions were justified. It had a right of first refusal. Well, even if that -- if the complaint didn't implicate the code, the Court will have a jurisdiction to hear challenge to the exercise of the right of first refusal. That's the Abraham Investment v. Payne Ranch case decided by the Amarillo Court of Appeals that --

JUSTICE: That any justification is not long? If there's a first right of first refusal, then the justification is not long.

MR. KERR: Well, even the Amarillo Court of Appeals in the Abraham case said, your Honor, that -- that right has to be exercised properly and if it's not exercised properly it can be challenged by the purchaser in their contract, and they have standing to challenge that right. And so, in terms of the jurisdiction of the court then --

JUSTICE: But that would be -- that would simply be under contract principles on the exercise of the right of first refusal. That wouldn't be tortious -- that would be a tort -- a tortious-interference.

MR. KERR: No. Well, it could be. I mean the right of first refusal isn't interference in the contract and the questions becomes under the --

JUSTICE: Justification.

MR. KERR: It becomes justification which is an affirmative defense, which is something that the defense has to establish not the plaintiff. And so, in that instance, from the plaintiff's point of view, establishing its case in the district court there really is no primary jurisdiction issue there. The primary jurisdiction issue comes with respect to Board's defense of justification and that is whether it had an enforceable right of first refusal and that is purely a legal question. It's whether the right of first refusal --

JUSTICE: Tell me your conclusion in this case would it simply be a matter of time when the court of appeals where it went wrong was the crime in that jurisdiction and dismissing it and what I've really should have done was to make the -- make the claims handing the Board determine the validity of the right of first refusal.

MR. KERR: Well, I agree with the first part of that, your Honor, which is that the Court of Appeals should tell the district court they has jurisdiction because it does. The second part of that, we believe, is that the decision that whether to accede to the agency's determination is a matter left with the district court, that the district court makes the decision in its discretion about whether to defer to the agency's jurisdiction or whether to retain jurisdiction and continue along with the case. And so, we believe that that decision should be right with the district court. That is another decision that has been made or even address [inaudible] --

JUSTICE OWEN: No one asked this --

MR. KERR: No one asked it, that's correct.

JUSTICE OWEN: -- district court to defer.

MR. KERR: Where you left it was the district court felt like this conduct should be enjoined and we should move on to a determination of whether the right of first refusal was enforceable and whether the process evaluate in Butnarus' qualifications could be -- could go forward. Because what has happened is all the evaluations or qualifications stopped once the right of first refusal was exercised, but we're not giving a meaningful review of their qualifications. And so that's what we seek is to go back to the district court, to have the right of first refusal thrown out to enjoin the transfer of the dealership to Ford Motor Company and it is signed and to get this whole process back on track under Section 5.01(b).

JUSTICE: What if the -- but your claim starting out the right of first refusal is based on legal violation of the code which is something that the Board would have imposed and determined?

MR. KERR: I think that it would.

JUSTICE: So, the Board could determine that it did have jurisdiction because it's not a dealer or the Board can determine it did have jurisdiction because it was a prospective dealer and decide the merits, but in either way you end up back into district court after that to find out whether or not there was a proper right of first refusal.

MR. KERR: I believe that's correct.

JUSTICE OWEN: What -- what would you do if someone made -- go back to district court, you try to proceed in the trial court and enforce --

wait a minute, now let's ask primary jurisdiction deferral and let the commission or Board decide whether the right of first refusal violates the code. Then what -- where are you procedurally in front of the Board -- what would you do then?

MR. KERR: Well, where we are procedurally in front of the Board, your Honor, is kind of where we are right now. We -- the Butnarus filed a complaint with the Board --

JUSTICE OWEN: And called a protest.

MR. KERR: Pardon, not a protest, and that's an important distinction made. A protest is filed under Section 5.01(b) to complain about whether the qualifications are properly considered in approving or disapproving a dealer.

JUSTICE OWEN: So, you filed the complaint?

MR. KERR: We filed the complaint saying the -- because the Ford has signed or trying to get this thing transferred through the Board and when we found out of that and say we got to go to the Board and stop the issue and set a new license for the new dealer and that they --

JUSTICE OWEN: How would they get the [inaudible], how would you know that the issue? But would it be the right of first refusal resolves the Board? What procedural vehicles are open if you need to do that?

MR. KERR: Well, the Board has conceded basically that there -- there's this right of enforcement or action, enforcement action that we could bring.

JUSTICE OWEN: Why haven't you brought that?

MR. KERR: Well, because we didn't bring this complaint which in our opinion frankly, your Honor, we think the Board should consider whether it is still the complaint or enforcement action or whatever, but if the Board requires the enforcement action, we filed an enforcement action if we are relegated to the Board to have that issue decided. And that was procedurally how we will proceed. But we would need -- frankly, we need some direction and some affirmance of the Board's jurisdiction to hear our complaint or our enforcement action so that we don't run up against this wall again where we're totally we don't have standing. Notwithstanding the fact that Section 5.01(b) of their plea, I think there are over 20 references of prospective transferee in Section 5.01(b) alone.

JUSTICE: But does that contemplate in the district dealer as to the prospective transferee as opposed to a prospective dealer in the first instance?

MR. KERR: No, your Honor, I don't believe so. I think that if you're a prospective transferee, it doesn't matter whether you're existent dealer or nondealer that in terms of the process and the Board's view of where do you have standing or not, it's gonna be depending upon your role in that transaction as opposed to whether you're an existing dealer --

JUSTICE: I hate to follow up on this, but narrowing things up that I didn't get from your brief or from your initial argument, which is you think the act properly read -- let you come in to the Board on the same terms as somebody as already a dealer?

MR. KERR: We think that there are two bases for jurisdiction in our standing, I guess. Number one is that we have a common law rights to allege that our contract has been tortuously interfered with and to have those elements determined by court -- by the district court. Secondly, we believe -- [audio rewinds]

-- affirmance of the Board's jurisdiction to hear our complaint or

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Secondly, we believe that we do have the right to bring a direct action or violation of the code because we believe the code does protect --

JUSTICE: Meanwhile, so -- so really there's three arguments you've done, as I understand it. Then the court -- the courts below were dealing with the mystery of the code because in fact as a prospective dealer, you could bring a claim in the Board and get Board relief. Secondly, no, you can't -- you don't bring a claim on the Board or you could, but you can also go to district court and get damages. Thirdly, no, you can't bring any claim in the Board that violates the constitution. But you're giving us three choices that kinda go across the hope possible of what.

JUSTICE: Am I getting it all now?

MR. KERR: Well, I think that's right, your Honor. I mean it's reflected of what's happened to the Butnaru. They have been [inaudible] between the district court and the administrative court and they just -- they wanna place to bring their complaint.

JUSTICE: But you think it's a valid reason in statute that the Board is a place to bring that complaint?

MR. KERR: I think it is. I think that --

JUSTICE: But I didn't feel that proceed in this brief.

MR. KERR: Well, in the brief, we -- we argued about the private cause of action and the fact that private cause of action can be implied from the statute, if you follow the --

JUSTICE: I don't wanna talk about that.

MR. KERR: Okay.

JUSTICE: I want you to go to the Board and getting relief from the Board.

MR. KERR: Well -- right. Well -- and we believe it yes and that would be consistent with the concurrent --

JUSTICE: And not something that they can hear if they want to, but the Board would have to hear them right.

MR. KERR: Right. That's consistent, your Honor, with concurrent jurisdiction. What we're saying is, yes, the Board and the Court have concurrent jurisdiction. If we decide to bring our action in district

court then it becomes a question of primary jurisdiction about whether the Board has the first shot at this or whether the court can go forward. But that is not saying that they're mutually exclusive except under the analysis of primary jurisdiction which you look to see whether it's a matter of inherently judicial in nature whether the Board can provide you a remedy or whether there's a remedy under the code. So far, we've been told that there is no remedy under the code, so that would support the district court going forward.

JUSTICE O'NEILL: Have you appealed or sort of review of the Board's determination dealt with that standing?

MR. KERR: There's a motion for rehearing the pending, that would be decided either this Friday or this Monday, and we don't know the outcome of that and depending upon the outcome obviously will depend upon what we do.

JUSTICE: Any other questions?

JUSTICE: Yes. And so far as the district court action, all of your common law claim is still pending, is that correct?

MR. KERR: Yes. They did.

JUSTICE: Including --

MR. KERR: Well, I'll take that back. The tortious interference claim which the court of appeals held was based on the act has been dismissed.

JUSTICE: By the trial court?

MR. KERR: By the Court of Appeals for lack of jurisdiction.

JUSTICE: But I thought they said -- yes, I see what they did to you.

MR. KERR: Yes.

JUSTICE: I did that, yes. So you would have to refile those unless

--

MR. KERR: Not unless you --

JUSTICE: -- and reverse that and decide the Court of Appeals or judge did in this case.

MR. KERR: And --

JUSTICE: But this scenario that you talked about that going back to the court was based on the fact that the common law claims was still there?

MR. KERR: Well, they're not --

JUSTICE: Uh-huh.

MR. KERR: -- with respect to Ford, and they would love for us to go back and have our common law claims against Graft Ford, Lincoln, Mercury because we wouldn't have the claims left to conform. And so that we're asking this Court to do is to reverse the court of appeals' decision and dismiss those claims for lack of jurisdiction and held that the district court --

JUSTICE: On the basis of, say, the Foreign case that the proper disposition under this kind of conclusion is for the trial court to have abated it or wait the outcome what happened if not, and so the court of appeals don't have the authority or the discretion to dismissal.

MR. KERR: Well, and I guess really beyond the Foreign case, your Honor, it would be under [inaudible] and under the exclusive jurisdiction argument that we made earlier that the code is not to vest the district court of jurisdiction because exclusive jurisdiction is not given to the Board.

JUSTICE: Uh-huh.

MR. KERR: Therefore, the district court has jurisdiction over our claims notwithstanding with the fact that they may involve in the

construction of the act by virtue of Ford's defense to our tortious interference claim.

JUSTICE: Okay. Thank you.

JUSTICE: All right. Thank you, Counsel.

MR. KERR: Thank you.

JUSTICE: That concludes the argument in the second case. We will take another brief. Recess.

SPEAKER: All rise.

2001 WL 36160894 (Tex.)