COURT OF APPEALS
DECISION
DATED AND FILED

February 23, 2012

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP1208 **Cir. Ct. No. 2010CV4648**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

ZIMBRICK, INC., D/B/A ZIMBRICK HONDA,

PETITIONER-APPELLANT,

V.

STATE OF WISCONSIN DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT,

WISCONSIN DEPARTMENT OF TRANSPORTATION,

RESPONDENT,

AMERICAN HONDA MOTOR CO., INC.,

INTERESTED PARTY-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: JOHN W. MARKSON, Judge. *Affirmed.*

Before Vergeront, Sherman and Blanchard, JJ.

¶1 VERGERONT, J. This appeal arises out of an objection by Zimbrick, Inc., d/b/a Zimbrick Honda (Zimbrick) to a notice from American Honda Motor Co., Inc. (Honda) that Honda intended to establish a second Honda dealership within Zimbrick's sales area. The Division of Hearings and Appeals (Division) found good cause to allow Honda's proposed dealership and the circuit court affirmed. On appeal, Zimbrick asserts that the Division deviated from a prior practice without explaining the deviation and this constitutes grounds for reversal under WIS. STAT. § 227.57(8) (2009-10).[1] According to Zimbrick, under the prior practice the "public interest factors" in WIS. STAT. § 218.0116(7)(b) disfavor the establishment of an additional dealership if that will reduce economies of scale for the existing dealership, unless there is a showing of insufficient competition in the relevant market area. Because we conclude that the Division does not have such a prior practice, we affirm the circuit court order affirming the Division's decision.

BACKGROUND

¶2 Honda is a California corporation licensed by the Wisconsin Department of Transportation (DOT) to engage in business as a motor vehicle manufacturer or distributor in Wisconsin. Zimbrick is a motor vehicle dealer licensed by DOT. Zimbrick holds a franchise from Honda granting it the right to buy, sell, and service Honda automobiles and light duty trucks. Honda assigned Zimbrick an area of sales responsibility consisting of Dane County and parts of Columbia, Green, Jefferson, Rock, and Sauk Counties.

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶3 In June 2008 Honda notified Zimbrick of Honda's intent to establish a second dealership within Zimbrick's sales area. Zimbrick filed a complaint pursuant to WIS. STAT. § 218.0116(7), which governs the establishment by a manufacturer of a motor vehicle dealership "within the relevant market area of an existing enfranchised dealer of the line make of motor vehicle." Pursuant to that section, upon a complaint by the existing motor vehicle dealer, the Division is to hold a hearing to decide if there is good cause for the proposed establishment of an additional dealer. § 218.0116(7)(a).[2]

¶4 After a hearing the Division issued a final decision determining there was good cause to permit the proposed dealership.[3] In arriving at this result, the Division considered and balanced the relevant factors as required by WIS. STAT. § 218.0116(7)(b). Under this subsection the Division is to "take into consideration the existing circumstances, including, but not limited to":

> 1. The amount of business transacted by existing enfranchised dealers of the line make of motor vehicle when compared with the amount of business available to them[;]
>
> 2. The permanency of the investment necessarily made and the obligations incurred by existing enfranchised dealers in the performance of their franchise agreements[;]
>
> 3. The effect on the retail motor vehicle business in the relevant market area[;]

[2] Zimbrick's complaint challenging a second dealership was consolidated for hearing with a prior complaint Zimbrick filed in response to Honda's notice that it intended to modify Zimbrick's area of assigned sales responsibility. The parties agreed that the modification complaint was subsumed by the issues in the complaint challenging a second dealership. We thus do not address the modification complaint.

[3] The hearing was held before an administrative law judge. The Division adopted the administrative law judge's proposed decision as its final decision, with the addition of two minor amendments that are not at issue in this appeal.

> 4. Whether it is injurious to the public welfare for the proposed dealership or outlet to be established or relocated[;]
>
> 5. Whether the establishment or relocation of the proposed dealership or outlet would increase competition and therefore be in the public interest[;]
>
> 6. Whether the existing enfranchised dealers of the line make of motor vehicle are providing adequate consumer care for the motor vehicles of that line make, including the adequacy of motor vehicle service facilities, equipment, supply of parts and qualified personnel[;]
>
> 7. Whether the existing enfranchised dealers of the line make of motor vehicle are receiving vehicles and parts in quantities promised by the manufacturer, factory branch or distributor and on which promised quantities existing enfranchised dealers based their investment and scope of operations[;]
>
> 8. The effect the denial of the proposed establishment or relocation would have on the license applicant, dealer or outlet operator who is seeking to establish or relocate a dealership or outlet.

§ 218.0116(7)(b).

¶5 The Division decided that the three factors relating to the effect of an additional dealership on the public interest (factors three, four, and five, collectively referred to as the "public interest factors") "overwhelmingly favor" the establishment of the proposed new dealer. Summarizing its analysis of these factors, the Division stated:

> Hildalgo/Wilde [the proposed dealership] will be part of a large, well-run motor vehicle dealer group. Hidalgo/Wilde, as part of the Wilde motor vehicle dealer group will enjoy significant economies of scale. The establishment of Hildalgo/Wilde as a Honda dealer in the Madison metropolitan market will introduce another strong competitor into the Madison metropolitan market and will add … both interbrand and intrabrand competition into the local market. The additional competition will be a benefit to the public interest….

….

> There is no evidence that the addition of [the] proposed dealer will be injurious to the public welfare in any manner.

¶6 Factors one and six, the Division decided, did not favor establishing a second Honda dealer in the Madison area. As for factor one, the Division determined that Zimbrick was adequately penetrating its assigned area and was selling all vehicles that Honda would provide to Zimbrick. As for factor six, the Division determined that customer surveys demonstrated that Zimbrick was providing adequate service to Honda customers.

¶7 The Division further decided that factor two, the effect on Zimbrick's investment, and factor eight, the effect of denial on the proposed dealer, were both neutral. Regarding factor two, the Division determined that, even accepting Zimbrick's expert's "overly pessimistic prediction, Zimbrick Honda's permanent investment will not be threatened … [and Zimbrick] will still be one of the largest volume Honda dealers in Wisconsin." Regarding factor eight, the Division determined that this neither favored nor disfavored a new dealership because, although the proposed dealer had already made a great investment, it did so with no assurance that the dealership would be approved.

¶8 The Division did not expressly refer to factor seven—whether existing dealers are receiving the vehicles and parts promised by the manufacturer—in its discussion of the statutory factors. However, in the Division's findings of fact, it found that Honda was providing Zimbrick with all

the vehicles that Zimbrick was entitled to receive pursuant to its agreement with Honda.[4]

¶9 Balancing its determinations on all these factors, the Division concluded that good cause existed to permit the establishment of the proposed dealership within the relevant market area.

¶10 Zimbrick sought judicial review in the circuit court, asserting that the decision was a deviation from a prior practice of the Division and the Division had not explained the deviation.[5] Zimbrick contended that three past Division cases evidenced a prior practice of analyzing the three public interest factors in a particular way. According to Zimbrick, under this prior practice, if the Division determines that an additional dealership will reduce economies of scale for the existing dealership, then the public interest factors disfavor the proposed dealership unless there is insufficient competition, which must be shown by evidence that consumers are paying higher-than-competitive prices and receiving inadequate consumer services under the status quo.

¶11 The circuit court affirmed the Division's decision. With respect to whether the decision was a deviation from a prior practice of the Division, the circuit court concluded that the cases cited by Zimbrick did not establish a practice. Instead, the court stated, in those cases, "the [Division] was examining the circumstances of the particular case before it. These statements are better

[4] It appears that this finding on factor seven is either neutral or favors the establishment of a second dealership. However, whether factor seven is neutral or favors or disfavors a second dealership does not affect our analysis of the issue presented on appeal.

[5] Zimbrick raised other arguments before the circuit court that it does not pursue on appeal.

classified as economic principles that may or may not be relevant to a particular case depending on the facts of that case."

DISCUSSION

¶12 On appeal Zimbrick renews its contention that the Division has a prior practice defining the process by which it analyzes the public interest factors under WIS. STAT. § 218.0116(7)(b) and that the Division deviated from that practice in this case without explanation. Honda responds that the circuit court correctly concluded that the Division decisions relied upon by Zimbrick do not constitute a prior agency practice and that those decisions are consistent with the Division's decision in this case. For the reasons we explain below, we agree with Honda and the circuit court.

¶13 A reviewing court must affirm the agency's action "[u]nless the court finds a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief …." WIS. STAT. § 227.57(2). The ground for reversal on which Zimbrick relies provides that "[t]he court shall reverse … if it finds that the agency's exercise of discretion … is inconsistent with … a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court…." WIS. STAT. § 227.57(8).[6] The statute does not define "a prior agency practice," but Zimbrick asserts that this dictionary definition of "practice" applies: "a repeated or customary action; … the usual way of doing something." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 974 (Frederick C. Mish ed., Merriam-Webster, Inc.,

[6] Honda also asserts that "it is questionable whether the Division even has the authority" to establish an agency "practice" within the meaning of WIS. STAT. § 227.57(8). However, because we conclude that the cases cited by Zimbrick do not establish the prior agency practice Zimbrick advances, we do not address this argument.

2003). We assume without deciding that this is the meaning of "practice" in § 227.57(8).

¶14 Zimbrick contends that we review de novo whether the Division has a prior agency practice. Honda does not develop an argument offering an alternative standard of review. It appears that the supreme court, in a similar case, applied de novo review when determining whether a prior agency practice existed. *See* ***Arrowhead United Teachers Org. v. Wisconsin Emp't Relations Comm'n***, 116 Wis. 2d 580, 588, 342 N.W.2d 709 (1984) (determining, without deference to the Wisconsin Employment Relations Commission (WERC), that past WERC decisions established a prior practice). Accordingly, we review de novo whether the Division has the prior practice that Zimbrick advances.[7]

¶15 Zimbrick's position is that three of the Division's cases show a prior practice of applying the following analysis when assessing the public interest factors: (1) if the establishment of an additional dealership will cause a reduction in economies of scale for the existing dealership, the public interest factors disfavor establishment of the additional dealership unless there is insufficient competition in the existing market; and (2) competition is insufficient only if consumers are paying higher-than-competitive prices and receiving inadequate consumer services under the status quo. The three cases on which Zimbrick relies are: ***Southgate Ford Sales, Inc. v. Ford Motor Co.***, Office of the Commissioner

[7] Ordinarily we review the order of the Division, not the order of the circuit court. *See* ***Volvo Trucks North Am. v. DOT***, 2010 WI 15, ¶8, 323 Wis. 2d 294, 779 N.W.2d 423. In this case, however, the issue of whether the Division deviated from a prior practice was not presented before the Division and the Division did not address it. Zimbrick first raised this issue in the circuit court. Honda did not argue in the circuit court and does not argue on appeal that Zimbrick forfeited the right to raise this issue on judicial review by not raising it before the Division. Accordingly, we address this issue.

of Transportation, Case No. H-270 (Jan. 5, 1984); ***Dodge City of Milwaukee, Inc. v. Chrysler Corp.***, Division of Hearings & Appeals, Case No. 94-H-852 (Apr. 28, 1995); and ***Don & Roy's Cycle Shop, Inc. v. Kawasaki Motors Corp.***, Division of Hearings & Appeals, Case No. TR-99-0047 (Aug. 15, 2001).

¶16 Turning to the first part of the purported prior practice, we examine the three cases to determine whether they demonstrate a practice whereby the public interest factors disfavor the establishment of an additional dealership that will cause a reduction in the economies of scale, unless there is insufficient competition. We conclude none of the cases show that this is a "repeated," "customary," or "usual" action of the Division.

¶17 In ***Southgate*** the addition of an eleventh Ford dealership in the relevant area was denied. The salient considerations in this decision were the existence of ten other dealerships and the fact that the annual numbers of car and truck sales by existing dealers were lower than the amounts Ford had estimated the dealers would sell. ***Southgate,*** Case No. H-270 at 2-4.

¶18 Zimbrick cites to this statement in ***Southgate***:

> Higher volume dealers are more efficient in per unit marketing. They have lower overhead to make up in per unit sales and they can afford to advertise more than smaller dealerships. That is an advantage both in inter and intrabrand competition.

Id. at 7. This is a statement that, in general, economies of scale result from higher volume sales and further both interbrand and intrabrand competition. However, there is no suggestion in this statement or the decision that, because these benefits stem from having high volume dealers, any decrease in a dealer's economies of

scale, for purposes of the public interest factors, can be justified only by evidence of insufficient competition in the relevant market area.

¶19 In ***Dodge City*** the Division's analysis of the three public interest factors is more extensive than that in ***Southgate***, but it, too, fails to support Zimbrick's position. In ***Dodge City*** the Division permitted the addition of a seventh Dodge dealership in the relevant area. ***Dodge City***, Case No. 94-H-852 at 5. The Division's analysis of the public interest factors began with the statement on which Zimbrick relies:

> An additional dealer will increase competition in the [sales area]. Increased competition, as a rule, is beneficial to the public. However, larger dealers enjoy economies of scale and achieve lower costs per unit. Assuming sufficient competition, this will ultimately mean lower prices to consumers. The required balancing involves the benefits to consumers of more dealers which, to a point, will increase competition and result in lower prices versus the efficiencies resulting from larger volume dealers.

Id. at 17.

¶20 This statement describes an approach that balances the benefits to consumers of more dealers against the benefits to consumers of the higher volume resulting from fewer dealers, all in the context of the facts of the particular case. The Division's ensuing discussion bears out this approach. In response to the existing dealers' argument that a seventh dealer would reduce their efficiency, the Division examined the facts before it, distinguishing between the facts regarding interbrand competition and intrabrand competition. The Division found that two of the existing dealers were "already forced to fully compete on an interbrand basis" and establishing an additional dealer would not increase interbrand competition. ***Id.*** at 18. However, with respect to intrabrand competition, the Division found that those two existing dealers were "dominant" and establishing

an additional dealer would "increase intrabrand competition," with "any loss in efficiency … justified by the increase in competition. ***Id.***

¶21 In addition to the balancing of the benefits of efficiency versus the benefits of increased competition, the Division in ***Dodge City*** also considered other circumstances in its discussion of the public interest factors. For example, the Division noted that, although there was evidence that adding a seventh dealership would decrease economies of scale in the existing dealerships, the manufacturer had considered other alternatives for obtaining additional representation, but nothing else had worked out. ***Id.*** Also, the Division noted that the manufacturer desired to establish a dealership in a "hot local market," and if this opportunity were denied "at a time when the industry as a whole is doing well and Dodge products particularly are in great demand, it is inconceivable a time would ever exist that this franchise would be permitted." ***Id.***

¶22 What we see from a complete examination of the public interest analysis in ***Dodge City*** is that it is not the rigid formulaic approach Zimbrick describes. Rather, in the factual context of that case, the Division balances the benefits to the public from greater efficiency of competitors (because of economies of scale) against the benefits from a greater number of competitors, and the Division takes into account additional circumstances that bear on the public interest, based on the evidence in that case.

¶23 In ***Don & Roy's*** the Division denied the addition of a fifth Kawasaki dealership in the relevant area. ***Don & Roy's***, Case No. TR-99-004 at 10. As in ***Dodge City***, the Division considered the benefits of economies of scale balanced against the increased competition from an additional dealer. ***Id.*** at 8. The Division stated that "the optimal balance is to have a sufficient number of dealers

in a market so there is strong competition but not too many dealers so that the dealers enjoy economies of scale and have lower costs." ***Id.*** The Division found that an additional dealer was not needed for healthy competition, and it considered evidence on a number of other statutory factors that favored not adding a fifth dealer. Accordingly, ***Don & Roy's***, like the two other cases we have discussed, does not support Zimbrick's position.

¶24 In summary, our analysis of these three cases persuades us that they do not show a practice of concluding that the public interest factors disfavor an additional dealership if the establishment of an additional dealer will cause a reduction in economies of scale, unless there is insufficient competition. Instead, they show that, in addressing the public interest factors, the Division considers, in the factual context of each case, the benefits to the public from economies of scale and the benefits to the public from an additional competitor, along with other circumstances relevant to the public interest.

¶25 Because of our conclusion rejecting the first part of the Division's purported practice, it is unnecessary to address the second part: that competition is insufficient *only if* consumers are paying higher-than-competitive prices and receiving inadequate consumer care. However, we address this second part in order to provide a complete analysis. Zimbrick asserts that using its proposed definition of "insufficient competition" is a prior practice of the Division based on the following statement in ***Don & Roy's***:

> A measure used to determine whether healthy competition exists in a particular market is whether consumers are receiving adequate service for their motorcycles and are being charged competitive prices for motorcycles and [service] to those motorcycles.

Id. at 8. The fallacy in Zimbrick's argument is twofold. First, this statement describes "[a] measure," not *the* measure. *See* ***id.*** Second, use of this measure in one case plainly does not establish a "repeated," "customary," or "usual" action of the Division.

¶26 Because we conclude that Zimbrick has not identified a prior agency practice, it necessarily follows that the Division has not deviated from a prior practice. Thus, no explanation for deviation is needed under WIS. STAT. § 227.57(8).

¶27 Although we conclude the three cases we have discussed do not establish the prior agency practice advanced by Zimbrick, we point out that the Division's decision in this case is consistent with those cases. The Division's decision in this case considers the effect of a second dealership on both economies of scale and on competition.

¶28 With respect to economies of scale, the Division found that both Zimbrick and the proposed dealership will enjoy large economies of scale. Specifically, the Division found that, despite any decrease in profits Zimbrick may experience because of the establishment of a new dealership, even under a "worst case scenario," Zimbrick would still be "a highly profitable motor vehicle dealer." Furthermore, the Division found, even if Zimbrick's assigned sales area is reduced, Zimbrick's sales area will "still represent one of the largest Honda sales opportunities in Wisconsin." Overall, the Division rejected Zimbrick's contention that approving the proposed new dealership would "replace one strong interbrand competitor with two weak competitors."

¶29 With respect to the effect of an additional dealer on competition, the Division found that the establishment of the proposed dealership "will inject

additional interbrand and intrabrand competition into the Madison metropolitan market. The additional competition will benefit consumers in the Madison area."[8]

CONCLUSION

¶30 We affirm the circuit court's order affirming the Division's decision.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[8] At points in its brief, Zimbrick suggests that the Division did not properly weigh the statutory factors and that certain evidence is lacking. In particular, Zimbrick appears to challenge the findings we refer to in paragraphs 28 and 29. We do not address this topic because Zimbrick does not present developed arguments with reference to the deference reviewing courts give administrative agencies on matters within their discretion and on fact finding. *See* WIS. STAT. § 227.57(8) (reviewing court "shall not substitute its judgment for that of the agency on an issue of discretion"); § 227.57(6) (reviewing court "shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact," but shall set aside or remand "if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record").