SC86948

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI EX REL.

GENERAL MOTORS ACCEPTANCE CORPORATION,

Relator,

vs.

THE HONORABLE RICHARD E. STANDRIDGE,

Respondent.

On Petition for Writ of Prohibition from the Circuit Court of Jackson County, Missouri, Associate Circuit Judge Division The Honorable Richard E. Standridge

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BRIEF OF RESPONDENT THE HONORABLE RICHARD STANDRIDGE

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STATEMENT OF FACTS[1]

Respondent takes issue with Relator's Statement of Facts in several particulars, below, and also supplies certain facts GMAC has left out:

A. Collection Action and Counterclaim

GMAC states: "Upon sale of a vehicle, a dealership is responsible for causing the State to deliver title in a timely fashion."[2]

This is not a statement of fact, but of law, and an incorrect one at that. The seller, not the State, is required to deliver the vehicle's title to the buyer, both in Missouri and Kansas. *See* § 301.210 RSMo and K.S.A. 8-135(c)(7). GMAC acknowledges as much at page 19 of its Brief, where it says, "It is the dealer who is responsible to deliver title, and a dealer's failure to discharge that responsibility directly and adversely impacts GMAC."[3] GMAC also states in its Petition, at ¶ 4,

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[1] GMAC's Petition for Writ of Prohibition will be cited as "Petition ¶ ___," and the Appendix of Exhibits submitted by GMAC with its Petition will be cited "GMAC Appendix ___." Respondent's Return to Preliminary Writ will be cited as "Return ¶ ___," and the Appendix of Exhibits submitted by Respondent with his Return will be cited "Resp. Appendix ___." Items in the appendix to this brief will be cited as "(A-___)."

[2] GMAC's Brief, pp. 7, 8.

[3] GMAC did not sue the dealership for its failure. It sued Marcum.

"Upon purchase of a vehicle, a dealership is responsible for delivering title to the customer in a timely fashion."

GMAC states: "In this instance, Ray Shepherd Motors failed to get the State to deliver title by the time of vehicle delivery to Marcum."[4]

Here GMAC not only misstates the law, as pointed out above, but also cites to non-existent record support. Nothing in paragraphs 3 through 5 of GMAC's Petition or in GMAC Appendix 1, 5-6 (a copy of the contract) supports GMAC's statement that the State had to do anything or that the dealer failed "to get the State" to do anything.

GMAC states: "After Marcum failed to remit timely payments on the contract for several months, GMAC repossessed the vehicle in January 2001 and sold it at auction for $12,300."[5]

Marcum did not "fail" to remit payments he had no obligation to make. The contract was void, due to the dealership's failure to deliver title. GMAC conceded as much when, in the face of Marcum's allegation, in his Answers, that GMAC could not prevail on its claim against him, instead of challenging Marcum's summary judgment motion, GMAC dismissed its lawsuit with prejudice. Petition, ¶ 4; GMAC Appx. p. 9, ¶ 19 and p. 10, ¶ 22; GMAC Brief, p.8.

B. The Missouri and Kansas Title Discovery

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[4] GMAC's Brief, p. 8.

[5] *Id*.

Marcum served his discovery on GMAC on July 20, 2004. GMAC Appx. pp. 46, 59. Interrogatory Nos. 8 and 9 sought discovery of any transactions in which GMAC had any knowledge that the buyer did not timely receive title and Interrogatory No. 10 sought discovery of transactions for the preceding five years, i.e., contracts assigned to GMAC "on or after August 18, 1999," involving buyer complaints about the selling dealer's failure to assign title. GMAC Appx. pp. 24, 25. Request No. 4 sought communications between GMAC and state agencies regarding the vehicles referred to in the interrogatories. GMAC Appx. p. 30.

GMAC objected to these interrogatories - even Interrogatory No. 10, which was limited to five years - as "unlimited in time and scope and nature and [as] overly broad". GMAC Appx. pp. 24, 25. GMAC did not object to Request No. 4; GMAC claimed it had no responsive documents. GMAC Appx. p. 32.

GMAC did not assert, in its initial objections, that it would be unduly burdensome to produce the information sought. GMAC Appx. pp. 24, 25. The first time GMAC mentioned burdensomeness was in its suggestions opposing Marcum's discovery motion, complaining that the "requests require GMAC to search all of its records from the beginning of time". Resp. Appx. p. 2. In his reply suggestions, Marcum agreed to limit the requests to the preceding ten years. Resp. Appx. p. 11. GMAC continued to assert no objection to Request No. 4. *Id*.

Also in its suggestions opposing Marcum's discovery motion, GMAC claimed difficulty in identifying vehicles with title problems, saying, "Moreover, it

is the vehicle dealerships, not GMAC, who send the title application paperwork to the state department of motor vehicles." Resp. Appx. p. 2.

GMAC's Title Administration Department sent Marcum a form letter dated November 21, 2000, telling him, "Our records indicate that we have not yet received a title in your name on the above vehicle." (A-5); GMAC repossessed the vehicle in January, 2001, and subsequently sent the Missouri Department of Revenue an affidavit, along with GMAC's application for a repossession title, certifying that GMAC never received the vehicle's title. Petition, ¶ 6; Resp. Appx. p. 10.

Upon GMAC's filing of its Motion for Protective Order on April 25, 2005, Marcum offered to narrow his similar transactions request to letters GMAC's Title Administration Department had sent to other buyers, similar to the one sent by GMAC's Title Administration Department to Marcum, and identification of any deficiency claims by GMAC against those buyers. A-3-5; GMAC Appx. pp. 101-103. GMAC did not do so.

In addition to the Customer Comment screens GMAC claims to maintain in an unsearchable format, GMAC also has something known as "Debt Manager Screens" for loss accounts which contain references to the requested information. GMAC Appx. p. 69, n. 3. Neither the number of the loss account Debt Manager Screens nor whether they are in a searchable computer format is mentioned by either of the affidavits attached to GMAC's Motion for Protective Order. GMAC Appx. pp. 74-81. The cost figures in the affidavits are premised upon a search of

customer comment screens over a ten-year period. No mention is made of the cost of a search limited to a five-year period. No mention is made of how many Debt Manager Screens there are, or whether they, too, would have to be searched screen-by-screen. No mention is made of records kept in GMAC's Title Administration Department or whether, and if so, in what manner, those records are searchable. *Id*.

C. Respondent's Discovery Orders

GMAC did brought no facts before the Court prior to the March 29, 2005 hearing regarding any alleged undue burden or cost in responding to Marcum's similar transaction discovery. Resp. Appx. pp. 1-7. At the hearing, Respondent, in line with Marcum's concession to limit his similar transaction discovery to the previous ten years (Resp. Appx. p. 11), granted that relief to GMAC, ordering GMAC to respond accordingly. Petition, ¶ 20. Respondent did not tell counsel he would consider arguments to reduce the scope of discovery and/or shift costs at the May 3, 2005, docket call. Return, ¶ 20. GMAC's Motion for Protective Order contains no indication of being filed pursuant to any alleged expressed willingness by Respondent to consider arguments on cost-shifting and restricting the scope of discovery. GMAC Appx. 64-88.

D. Proceedings Before The Court of Appeals

Despite Marcum's offer to limit his similar transaction discovery to a match of GMAC Title Administration Department records with GMAC's records of deficiency claims, GMAC sought a writ of prohibition from the Missouri Court of

Appeals for the Western District, which was denied, "…because the issue of jurisdiction is not clear cut …… and because it is not clear that the trial court's discovery rulings exceed its jurisdiction." Petition ¶ 32; GMAC Appx. p. 130.

E. Information Retrieval Procedures and Costs

The affidavit of Gerald Kline filed with GMAC's Motion for Protective Order indicates that he has "some" familiarity with GMAC's customer information; he does not mention GMAC's Title Administration Department. GMAC Appx. p. 74, ¶ 4. The affidavit of Deborah Affinito indicates that she has "some" familiarity with GMAC's customer information; she does not mention GMAC's Title Administration Department. GMAC Appx. p. 78, ¶ 4. Neither affidavit discusses the feasibility or cost of a search limited to the five-year period of Interrogatory No. 10. Neither affidavit discusses the feasibility or cost of a search of GMAC's loss account Debt Manager Screens. Neither affidavit discusses the feasibility or cost of a search of GMAC's Title Administration Department records.

POINTS RELIED ON

I. This Honorable Court Should Quash its Preliminary Writ of Prohibition and Deny Relator the Relief It Seeks, Because Respondent Did Not Abuse His Discretion in Ordering Relator to Respond to Marcum's Discovery Requests, in that (1) Relator Failed to Present Respondent With Anything Other Than Vague and Conclusory Boilerplate Objections Prior to His Ruling and (2) Respondent Nevertheless In Fact Granted Relator Relief by Limiting Discovery to the Previous Ten Years; moreover, Respondent Did Not Abuse His Discretion in Denying Relator's Motion for a Protective Order Because (1) Relator Failed to Offer any Reason Why It Failed to Bring the Alleged Facts in its Motion for Protective Order to Respondent's Attention Prior to Submission of Marcum's Discovery Motion for a Decision; (2) Relator Failed to Contact Marcum's Counsel Prior to Filing the Motion for Protective Order, in Violation of Local Rule 33.5; (3) Relator's Contention that it Would Incur $1,000,000 in Costs for a Screen-By-Screen Computer Search for Title Problems is Belied by the Fact that Relator's Title Administration Department Routinely Sends Form Title Inquiry Letters to Consumers When Relator Becomes Aware of a Title Problem; and (4) Relator's Attempt to Belittle Marcum's Complaint as "Disproportionate" Illustrates Relator's Cavalier Attitude Towards Discovery and Underscores Relator's

Failure to Offer Anything Other than Vague and Conclusory Boilerplate Objections—Without Any Explanation—Until After Being Ordered to Comply With Discovery.

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996)

Brockman v. Regency Financial Corp., 124 S.W.3d 43 (Mo. App. 2004)

State ex rel. Ford Motor Co. v. Nixon, 160 S.W.3d 379 (Mo. banc 2005)

State ex rel. Ford Motor Co. v. Messina, 71 S.W.3d 602 (Mo. banc 2002)

State ex rel. Grimes v Appelquist, 706 S.W.2d 526, 529 (Mo.App.S.D. 1986)

State ex rel. Kawasaki Motors Corp., 777 S.W.2d 247 (Mo. App. 1989)

State ex rel. Madlock v. O'Malley, 8 S.W.3d 890 (Mo. banc 1999)

II. Relator Is Not Entitled To An Order In The Alternative That Discovery Response Costs Be Shifted To Marcum Because Respondent Did Not Abuse His Discretion In Denying Cost Shifting, In That Relator Failed To Request Any Cost Shifting Prior To Submission Of Marcum's Discovery Motion For Decision And Relator's Subsequent Motion Contained Inflated Cost Figures Based On Relator's Choice To Maintain Its Records In An Unsearchable Format And Failed To Make Any Mention Relator's Title Administration Department Records And The Requested Information Is Crucial To Marcum's Case And The Cost Of Its Retrieval Is Not Disproportionate To This Case.

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996)

Brockman v. Regency Financial Corp., 124 S.W.3d 43 (Mo. App. 2004)

Rowe Entertainment, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421 (S.D.N.Y. 2002)

State ex rel. Ford Motor Company v. Westbrooke, 151 S.W.3d 364, 369 (Mo.banc 2005)

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III. Respondent's Exercise Of Jurisdiction Over The Underlying Case Is Unquestioned And Proper.

Brockman v. Regency Financial Corp., 124 S.W.3d 43 (Mo. App. 2004)

Burnett v. GMAC Mortgage Corp., 847 S.W.2d 82 (Mo. App. 1992)

J.C. Jones & Co. v. Doughty, 760 S.W.2d 150 (Mo.App.S.D. 1988)

Lindsay v. Evans, 174 S.W.2d 390 (Mo. App. 1943)

McClelland v. Dougherty, 204 S.W. 201 (Mo.App.1918)

Schwartz v. Coastal Physician Group, Inc., 172 F.3d 63, 1999 WL 89037, (10th Cir. 1999)

T. H. Blake Contracting Co. v. Sorrells, 426 S.E.2d 85 (N.C.App. 1993)

ARGUMENT

Standard of Review

Trial courts, in administering the rules of discovery, are accorded broad discretion. *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607 (Mo. banc 2002). The burden is upon the party seeking a writ of prohibition to prove the trial court abused this discretion. *Id*. In cases without a record of the hearing, a reasonable basis for the trial court's action is presumed. *State ex rel. Grimes v Appelquist*, 706 S.W.2d 526, 529 (Mo.App.S.D. 1986).

I. This Honorable Court Should Quash its Preliminary Writ of Prohibition and Deny Relator the Relief It Seeks, Because Respondent Did Not Abuse His Discretion in Ordering Relator to Respond to Marcum's Discovery Requests, in that (1) Relator Failed to Present Respondent With Anything Other Than Vague and Conclusory Boilerplate Objections Prior to His Ruling and (2) Respondent Nevertheless In Fact Granted Relator Relief by Limiting Discovery to the Previous Ten Years; moreover, Respondent Did Not Abuse His Discretion in Denying Relator's Motion for a Protective Order Because (1) Relator Failed to Offer any Reason Why It Failed to Bring the Alleged Facts in its Motion for Protective Order to Respondent's Attention Prior to Submission of Marcum's Discovery Motion for a Decision; (2) Relator Failed to Contact Marcum's Counsel Prior to Filing the Motion for Protective Order, in Violation of Local Rule 33.5;

(3) Relator's Contention that it Would Incur $1,000,000 in Costs for a Screen-By-Screen Computer Search for Title Problems is Belied by the Fact that Relator's Title Administration Department Routinely Sends Form Title Inquiry Letters to Consumers When Relator Becomes Aware of a Title Problem; and (4) Relator's Attempt to Belittle Marcum's Complaint as "Disproportionate" Illustrates Relator's Cavalier Attitude Towards Discovery and Underscores Relator's Failure to Offer Anything Other than Vague and Conclusory Boilerplate Objections—Without Any Explanation—Until After Being Ordered to Comply With Discovery.

A. Legal Standards

As this Court has aptly stated, 'The rules of discovery are intended to allow pretrial discovery to be conducted as promptly and inexpensively as possible. Missouri litigators should act accordingly." *State ex rel. Ford Motor Company v. Westbrooke*, 151 S.W.3d 364, 369 (Mo.banc 2005). The discovery rules are not designed to be a battleground tilted in favor of the most clever and combative adversary. *State ex rel. Castillo v. Clark*, 881 S.W.2d 627, 630 (Mo. 1994). Nor are they designed for a game of hide and seek. *Moore v. Weeks*, 85 S.W.3d 709, 722 (Mo.App.W.D. 2002) ("The rules of discovery are designed to allow the litigants to determine the facts prior to trial, obtain access to information about the respective contentions, to preserve evidence, prevent concealment and unjust surprise, and formulate issues for trial.")

Respecting discovery of similar transactions in this malicious prosecution action, i.e., other transactions in which GMAC has wrongfully pursued consumers for payment of contracts void for titling irregularities, "Missouri courts 'are rather liberal with respect to the variety of evidence permitted on the issue of malice.'" *Brockman v. Regency Financial Corp*., 124 S.W.3d 43, 50 (Mo.App.W.D. 2004).

B. The Discovery Sought Is Highly Relevant to Pleaded Issues

As GMAC acknowledges, no title was delivered to Marcum in his August 18, 2000 transaction for the purchase of the vehicle in question. Petition, ¶ 5. Moreover, the November 21, 2000 letter GMAC's Title Administration Department sent to Marcum asking after the title clearly shows GMAC's knowledge of a titling irregularity. (A-5); GMAC Appx. p. 103. Also illustrative of GMAC's knowledge of a titling irregularity is the fact that GMAC, following repossession of the vehicle from Marcum, applied for a repossession title and submitted an affidavit, signed by GMAC's "Title Manager", certifying that GMAC did not receive title to the vehicle. Resp. Appx. p. 10, n. 5. Significantly, over three years elapsed between GMAC's repossession the vehicle in January 2001 and GMAC lawsuit against Marcum for an alleged deficiency balance filed on April 28, 2004. Petition, ¶¶ 6, 7.

Because GMAC obviously had notice of a titling irregularity and just as obviously had failed to conduct any reasonable investigation in the intervening three years, as to whether Shepard Motors had delivered a title to Marcum within

the time required by law, Marcum promptly responded to GMAC's lawsuit with a counterclaim for malicious prosecution on June 18, 2004. GMAC Appx. pp. 8-11. After GMAC dismissed its lawsuit with prejudice nearly a month later (GMAC Appx. p. 43), Marcum promptly served his First Interrogatories and First Request for Production on July 20, 2004, seeking discovery of similar transactions in which GMAC had pursued other consumers on void contracts. GMAC Appx. pp. 44-54.

In his malicious prosecution counterclaim, Marcum seeks both actual and punitive damages. GMAC's attempt to limit discovery to the facts and circumstances of Marcum's individual transaction, as they relate to GMAC's decision to sue him, wholly ignores Marcum's punitive damages claim. Being bound to present sufficient evidence of GMAC's intent in order to recover punitive damages, Marcum is undeniably entitled to seek out evidence of similar transactions in which GMAC has sued consumers "even though problems with the delivery of title or procurement of repossession title existed", because such evidence of GMAC's "pursuit of lawsuits without concern for the validity of the underlying sales tends to show an absence of mistake and a pattern of conduct." *Brockman, supra,* at 51. Discovery of similar transactions involving titling irregularities is therefore clearly aimed at uncovering highly relevant and admissible evidence.

Despite Marcum's clear right to seek evidence of similar transactions, GMAC neither promptly nor timely responded to any of his discovery. GMAC

took over two months after the discovery was served, and then only after prompting from Marcum, to serve its responses on September 29, 2004 - responses that consisted for the most part of evasive answers and conclusory boilerplate objections. GMAC Appx. pp. 20-28, 32-37. Significantly, GMAC did not object to the similar transaction discovery in Interrogatory Nos. 8-10 and Request No. 4 as burdensome. *Id.*

Marcum's counsel promptly wrote to GMAC's attorney pointing out the deficiencies in GMAC's responses and requesting that the deficiencies be remedied within ten days, so as to not to involve the court. GMAC Appx. 38-42. Another month went by with no response from GMAC, so Marcum filed his Motion to Enforce Discovery on December 1, 2004.

GMAC then switched lawyers and tendered a few supplemental responses two weeks later, but still refused to produce any similar transaction information. Resp. Appx, pp 1-7. Although GMAC now claimed for the first time that it would be burdensome to search its records for similar transaction information, GMAC furnished no details as to why, other than stating that the requests would "require GMAC to search all of its records from the beginning of time." Resp. Appx. p. 2.[6] And although GMAC claimed the vehicle dealerships handled the title paperwork, so that it would be "extraordinarily difficult to identify accounts that exhibited title

[6] GMAC did not explain how Interrogatory No. 10, limited on its face to the preceding five years, would require a search from the beginning of time.

problems," GMAC did not bother to tell the court about its Title Administration Department that keeps track of title problems in order to make sure title papers are properly filed to perfect GMAC's lien. *Id*.; GMAC Appx. 103.[7]

In any event, Marcum, on December 24, 2005 promptly responded to GMAC's "beginning of time" complaint by agreeing to limit his similar transaction discovery to ten years. Resp. Appx. p. 11. Between then and the March 29, 2004 hearing on Marcum's discovery motion, GMAC failed to offer any other facts or reasons in support of its belated claim of burdensomeness. Therefore, having nothing before him other than GMAC's "beginning of time" objection and Marcum's agreement to limit his requests to ten years, Respondent made a reasonable ruling, well within the bounds of his broad discretion, ordering GMAC to produce the information requested for the preceding ten years.

GMAC continued to drag its feet. Then, a month later, on April 25, 2005, with another docket call looming, GMAC went on the offensive, filing what

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[7] Although GMAC also claimed the requests seek "confidential information regarding GMAC's customers" as a reason for not divulging the information, as Marcum pointed out, GMAC's concern lies not so much in keeping him from finding out who GMAC has wrongfully sued as in keeping those GMAC has wrongfully sued from finding out. Resp. Appx. 9-10. In any event, GMAC has apparently abandoned this "confidentiality" defense to disclosure of similar transactions, as no mention is made of it in GMAC's brief.

amounted to a motion for reconsideration, styled a Motion for Protective Order. GMAC did not bother to contact Marcum's counsel beforehand, as required by Local Rule 33.5. A-3, 4. For the first time - ten months after Marcum served his discovery - GMAC put before the trial court something somewhat more specific than a vague and unsupported boilerplate assertion of burdensomeness. GMAC now claimed that, because its records of customer contacts were kept in an unsearchable format, it would take a screen-by-screen search of its "customer comments screens" to ferret out similar transactions involving titling irregularities and that such a search would cost close to a million dollars. GMAC Appx. pp. 44-88. No mention was made in the motion, or in the attached affidavits, of GMAC's title tracing letters and records in its Title Administration Department. Mention of a third database - the "Debt Manager Screens" - was tucked away in a footnote, with no mention in the motion or affidavits as to the size, searchability or cost of searching this database. GMAC Appx. p. 69.

Even after Marcum proposed matching GMAC's Title Administration Department records with deficiency suits filed by GMAC, thus considerably narrowing the search by any standards, GMAC still balked, resulting in "the impasse" mentioned by GMAC. Petition ¶ 25; GMAC Appx. pp. 101-03.

Justifiably frustrated by GMAC's foot-dragging tactics and by GMAC's surprise post-hearing motion containing matters GMAC had failed, without excuse, to earlier bring to his attention in the orderly process of the discovery

proceedings, Respondent, acting within the broad parameters of his discretion, denied GMAC's motion.

Respondent respectfully submits that Marcum has sought to conduct discovery in accordance with this Court's directives, just as intended by the rules - "as promptly and inexpensively as possible" - and has heeded this Court's admonition to "act accordingly", in consistently responding to GMAC's complaints, justified or not, by agreeing at every turn to limit his requests to meet any complaints. *See Westbrooke*, *supra*, at 369. Despite this, GMAC has acted only to stymie him at every turn.

GMAC's cite to *State ex rel. Madlock v. O'Malley*, 8 S.W.3d 890, 891 (Mo. banc 1999), in which this Court rejected the notion that the discovery process is a "scorched earth battlefield", hits the mark, but not the one intended by GMAC. As is obvious from the above recount of the discovery proceedings, GMAC, not Marcum, wields the flamethrower in this case, burning up ground as fast as Marcum gives it in his futile attempts to coax information from GMAC, information that GMAC is clearly required to divulge under *Brockman, supra*. Just as the discovery process should not be a "scorched earth battlefield", neither should it be a game of hide and seek.

GMAC cites several products liability cases prohibiting discovery concerning dissimilar products. Such cases are clearly distinguishable. In this case GMAC's conduct and intent in pursuing consumers for payment on void contracts is at issue, not one of numerous products manufactured by GMAC.

Whether GMAC uses one type of paper or another to frame its unfounded claims is immaterial. The controlling common thread is whether the consumer timely got a title. If the consumer did not, the contract was void and GMAC accordingly was without any right to pursue the consumer for payment.

GMAC's attempt to limit discovery to instances where it filed suit defies logic. Whether GMAC sues or only threatens to sue is of little moment. In either event, GMAC's conduct is obviously undertaken "with the intent to intimidate the [consumer] into paying a debt on a void sale". *See Brockman, supra*, at 51. Extracting payment on a void contract by threatening suit would be no less culpable than actually filing suit, as the threat accomplishes the same wrongful result as the suit. Because GMAC's state of mind is at issue, such pattern conduct - extracting money from an innocent consumer, instead of going after the culpable dealer that sold GMAC the void and worthless contract - is relevant to GMAC's state of mind, whether GMAC sues or simply threatens to sue the consumer.

And, despite GMAC's claim to the contrary, Marcum is not on a fishing expedition. His discovery is focused, seeking only to net transactions similar to his. Were one to drain GMAC's pond, after all the time and effort GMAC has expended to muddy the waters, one would likely find only the red herring with which GMAC stocked the pond to deflect discovery. Marcum is not fishing; GMAC is playing hide and seek.

Just as whether GMAC has sued or simply threatened to sue is not determinative, it matters not whether Shepard Motors or some other dealer

contracts to sell a vehicle, then delivers it absent a valid transfer of title. The net result, a void contract, is the same. Likewise, GMAC's conduct of pursuing consumers on the void contracts instead of making the dealers repurchase them is just flat wrong, no matter which of its assignor dealers starts the ball rolling.

GMAC's attempt to distinguish *Brockman* by saying the close connection between the finance company and the dealer there was _____ is wrong. Although the court noted that the two entities shared a title clerk, the finance company's attorney testified that his lack of concern over whether the consumers he was suing had gotten titles to their cars was due to the finance company's lack of concern about titling questions. *Id*. at 50. In this case, GMAC has not just a title clerk, but an entire "Title Administration Department" as well as a "Title Manager". GMAC Appx. 103; Resp. Appx. p. 10, n. 3. The close tab GMAC keeps on the titling process is the relevant consideration here, not whether GMAC shares or doesn't share title clerks with its assignor dealers. As held by the court in *Brockman*:

> Regency's conduct in suing the other parties, even though problems with the delivery of title or procurement of repossession title existed, is sufficiently similar to its conduct toward Brockman to warrant the admission of the evidence to prove Regency's mental culpability. The evidence of Regency's pursuit of lawsuits without concern for the validity of the underlying sales tends to show an absence of mistake and a pattern of conduct.

Id. at 51. How GMAC obtains its knowledge of a titling irregularity, whether through its own Title Administration Department, its Title Manager, or from a given assignor dealer's title clerk, makes no difference. The pivotal fact is GMAC notice of titling irregularities, followed by its choice to intimidate the innocent consumer into paying on the void contract, instead of going after the lawbreaking dealer it paid for the void contract.[8] Discovery of titling irregularities is highly relevant to this lawsuit.

C. GMAC's Suspect Claims of Undue Burden and Cost

GMAC's attempt to glean support from *State ex rel. Kawasaki Motors Corp. v. Ryan*, 777 S.W.2d 247 (Mo.App.E.D. 1989) for stonewalling Marcum's discovery requests should be rejected. This is not a products liability case involving a dispute over discovery concerning dissimilar products. To the extent *Kawasaki Motors* has any application here, it is found in that court's recognition of the fact that:

> We have come a long way since the days of the "sporting theory of justice." The modern philosophy of pre-trial discovery is salutary and performs important and legitimate functions. The benefits of

[8] GMAC's own form contract used by Shepard Motors, captioned "GMAC Flexible Finance Plan", contains a bold-print clause subjecting GMAC to claims Marcum arising out of the dealer's conduct. GMAC Appx. p. 7.

> pre-trial discovery are numerous: liberal discovery aids in the ascertainment of truth, surprise is eliminated, issues are narrowed, trial preparation is facilitated, and "relevant" information is obtained.

GMAC's approach to discovery in this case harkens back to the days of justice as sport. GMAC seeks by gamesmanship to hide the ascertainment of truth by holding back relevant information, precisely the kind of conduct the *Kawaski Motors* court would condemn, not condone.

The posture of the plaintiff and the sweeping discovery at issue in *State ex rel. Ford v. Nixon*, 160 S.W.3d 381 (Mo. banc 2005) could not be further from that of Marcum and the focused discovery in this case. As pointed out earlier herein, *only one* of Marcum's discovery requests at issue, Interrogatory No. 9, as originally drafted, was unlimited in time, a flaw promptly remedied by Marcum's proposed ten-year time limit, adopted by Respondent. The other interrogatory, No. 10, was from the outset limited to five years. Request No. 4, though belatedly challenged by GMAC, drew no objection at all initially. Although Marcum would have been perfectly justified giving no credence at all to GMAC's belatedly-filed affidavits that went on and on about the supposed astronomical cost of a manual search of computer screens, but failing to mention anything at all about GMAC's Title Administration Department records, Marcum made yet another proposal to pare down discovery by simply matching up GMAC's title department records with the deficiency actions it filed. GMAC, consistent with its prior conduct, ignored his proposal.

Unlike Marcum, plaintiff in *Nixon* gave not an inch, leaving this Court with no alternative but to make its preemptory writ permanent. In light of Marcum's record of doing his level best to work with GMAC, only to be stiff-armed, this Court should reject GMAC's gamesmanlike approach to withholding discovery by quashing its preliminary writ. For whereas the discovery sought in Nixon was plainly beyond "the reasonable parameters of the petition" in that case, the discovery sought here is just as plainly within the parameters of the pleadings. As much is clear from *Brockman's* holding that similar transaction evidence is admissible, and hence clearly discoverable, to prove intent and lack of mistake on GMAC's part in suing Marcum on a void contract.

Not only is such discovery allowed, it is all but required when punitive damages are sought. This is because Marcum would need to establish that this case follows the guideposts set out in *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996) for evaluation of punitive damages awards, the most important of which is the “reprehensibility” factor. *Gore*, at 575. *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003), repeats five factors from *Gore* that help elaborate on the “reprehensibility” requirement: whether 1) the harm caused was physical as opposed to economic; 2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; 3) the target of the conduct had financial vulnerability; 4) the conduct involved repeated actions or was an isolated incident; and 5) the harm was the result of intentional malice, trickery, or deceit, or mere accident. The latter three factors would all come into

play in this case. To shield any punitive damages award from attack, Marcum will need to show other instances of GMAC's pursuit of financially vulnerable consumers instead of culpable car dealers, who would likely be more financially impervious to GMAC's pressure. Marcum will need also to show that GMAC's similar pursuits of others on void contracts, so that its pursuit of him was not an isolated event. Lastly, he would need to prove GMAC sued him with malicious intent and not by accident, and it takes evidence of pattern conduct to do this. To deny Marcum the discovery he seeks would leave him facing the prospect either of recovering no punitive damages or of recovering such an award only to watch it vanish on appeal.

D. Respondent Did Not Abuse His Discretion

That GMAC calls this an "ordinary" case simply serves to highlight how low is its regard for Marcum and to illustrate GMAC's ordinary response to getting stuck with a void contract, i.e., to intimidate people like Marcum into paying, rather than forcing dealers like Shepard Motors to give back the money GMAC paid it for a void contract.

Given this, Respondent, far from abusing his discretion, merely followed *Brockman* in ordering GMAC to respond to Marcum's similar transaction discovery. GMAC certainly brought nothing to his attention that would have compelled him to do otherwise, so that his order can neither be said to have been clearly against the logic of the circumstances, arbitrary and unreasonable or to indicative of a lack of careful consideration. *See State ex rel. Ford Motor Co. v.*

Messina, 71 S.W.3d at 607. Moreover, GMAC's after-the-fact motion for protective order served only to bolster the presumption of correctness to be accorded Respondent's ruling under *Appelquist*, 706 S.W.2d at 529, in that GMAC offered no explanation in its belated motion why it failed to bring the "facts" therein to Respondent's attention either before or at the hearing on Marcum's discovery motion. Moreover, GMAC demonstrated a complete lack of credibility by crowing about the great cost of searching the customer contact screens it maintains in an unsearchable format, while remaining mute about its Title Administration Department records of titling irregularities, the number and searchability of its Debt Manager Screens and the cost of a five year search.

GMAC's request that this Court limit discovery to purchasers against whom it has filed collection actions *and* who purchased their vehicles from Ray Shepard Motors should be soundly rejected. To so limit discovery would be illogical and would, in effect, close the door to any meaningful discovery.

II. Relator Is Not Entitled To An Order In The Alternative That Discovery Response Costs Be Shifted To Marcum Because Respondent Did Not Abuse His Discretion In Denying Cost Shifting, In That Relator Failed To Request Any Cost Shifting Prior To Submission Of Marcum's Discovery Motion For Decision And Relator's Subsequent Motion Contained Inflated Cost Figures Based On Relator's Choice To Maintain Its Records In An Unsearchable Format And Failed To Make Any Mention Relator's Title Administration Department Records; The

Number And Searchability Of Its Debt Manager Screens And The Cost Of A Five Year Search. Moreover, The Requested Information Is Crucial To Marcum's Case And The Cost Of Its Retrieval Is Not Disproportionate To This Case.

As pointed out above, the discovery Marcum seeks has far more than "some conceivable value or purpose in this case." It is absolutely relevant and crucial to the issue of GMAC's intent in choosing to sue Marcum instead of the dealer who sold it Marcum's void contract. Therefore, GMAC's entire argument under this point, premised on characterizing the discovery's value as "marginal", collapses in the starting blocks.

Respondent has no argument with the concept of cost-shifting or the guidelines for it set forth *Rowe Entertainment, Inc. v. William Morris Agency, Inc*., 205 F.R.D. 421, 428 (S.D.N.Y. 2002) and *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 321 (S.D.N.Y. 2003). He strongly disagrees, however, with GMAC's analysis of this case in light of those factors.

As made clear in the above response regarding Point I, Marcum seeks information that is not only highly relevant, but indeed critical, to his counterclaim, information which he is not only entitled, but virtually obligated, to seek under the *Brockman, Gore* and *Campbell* decisions. So factors (2) and (5) from *Rowe*, as well as factor (2) from *Zubulake*, militate against shifting costs to Marcum.

GMAC's suspect cost calculations, which GMAC failed to present to Respondent prior to or at the hearing on Marcum's discovery motion; which contain no cost calculations for the five year's worth of information sought by Interrogatory No. 10; and which fail to mention GMAC's Title Administration Department records, their searchability or the cost of searching them, merit little serious consideration. Accordingly, using those calculations to apply *Rowe* factor (6) and *Zubulake* factor (1) to this case would be totally unwarranted. Lacking any credible basis for comparing the cost of the discovery with the amount in controversy, GMAC's attempt to have the costs shifted to Marcum must fail.

With regard to other sources and the ability to control costs (*Rowe* factors (3) and (7)), GMAC once again ignores the fact that Marcum twice agreed to pare down his discovery requests in a good faith effort to obtain the highly relevant and critical information he needs. Notably, his suggestion that GMAC search "another source", i.e., its Title Administration Department records, was rebuffed. GMAC's rebuff of Marcum's overtures indicates that it is not so much concerned with cost of production as it is with totally blocking production by any artifice it can erect.

GMAC has the ability to control costs. It could maintain its customer comment screens in a searchable format, instead of a format that purportedly requires the virtual equivalent of a manual box-by-box search. That GMAC chooses not to do so in this day and age should not mean it can saddle Marcum with the alleged cost of a million-dollar search, especially in light of the fact that it admittedly sued him on a void contract.

As with the issues of relevance and undue burden discussed in Point I, there is nothing in the trial court record to suggest that GMAC gave Respondent, either prior to or at the hearing, any reason to consider cost-shifting, or that it was needed to "level the playing field" between GMAC and Marcum. It was not until *after* Respondent ruled on Marcum's discovery motion that GMAC, absent any explanation for its failure to present any cost-shifting claim previously, filed its belated motion for reconsideration, styled as a motion for a protective order.

Respondent was wholly justified, and acting well within his broad discretion, in rejecting this belated "scorched earth" tactic of GMAC. He cannot be faulted by GMAC for failing to consider cost-shifting factors when GMAC itself failed to raise any issue of cost-shifting in response to Marcum's discovery motion. Instead, GMAC lay in the weeds, holding back its cost argument until after Respondent heard and ruled on the motion. Respondent, in order to keep GMAC from making a mockery of the orderly process of discovery, was more than justified in denying such scorched earth stealth tactic, a tactic that was, under any circumstance, lacking in substance in the particulars pointed out above.

In summary, even if GMAC's calculation of $1,000,000 for a screen-by-screen review of customer comment screens can be given any credence, GMAC's rejection of Marcum's attempt to identify an alternative source for the information, GMAC's Title Administration Department Records, belies GMAC's asserted cost concerns. Given GMAC's persistent attempts to stymie the orderly process of discovery at every turn in this case, the Respondent acted well within his

considerable discretion to deny GMAC's belated, unexcused and unsupported attempt at a second bite of the apple.

III. Respondent's Exercise Of Jurisdiction Over The Underlying Case Is Unquestioned And Proper.

Before responding to GMAC's Point III, Respondent would respectfully point out that this Court's Preliminary Writ of Prohibition does *not* to command him to show cause why he should do anything other than dismiss the underlying case. Instead, the Writ commands him to show cause why he should *do* anything other than *vacating* his order of June 7, 2005, and *entering an order* sustaining GMAC's motion. In light of this language, it appears this Court does not question Respondent's jurisdiction over the underlying case, especially in light of the fact that the record contains a *sua sponte* probe of jurisdiction by the court of appeals, with no similar concern expressed by this Court. Nevertheless, Respondent will briefly respond to GMAC's point on jurisdiction.

When Marcum filed his counterclaim for malicious prosecution, he accurately alleged that GMAC could not prevail on its claim against him and, upon dismissal of GMAC's claim, it would "be wholly ended." GMAC Appx. pp. 8-11. "Wholly ended" is the functional equivalent of "prosecuted to a conclusion" in Rule 55.06(b), which provides that:

> *Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action*; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. For example, a plaintiff may state a claim for money and a claim to

> have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money. (emphasis added)

Under this plain and unambiguous language, a malicious prosecution action, one that under pre-existing case law was cognizable only after the claim at which it was aimed was prosecuted to a conclusion, can be joined with the opposing claim in a single action. Additionally, Rule 55.32(d), relating to counterclaims and cross-claims, provides:

> A *claim* that either *matured* or was acquired by the pleader *after serving the pleading* may, with the permission of the court, be presented as a counterclaim by supplemental pleading. (emphasis added)

And finally, Rule 55.33(d), governing amended and supplemental pleadings, provides:

> Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit service of a supplemental pleading setting forth transactions or occurrences or events that have happened since the date of the pleading sought to be supplemented. Permission may be granted *even though the original pleading is defective in its statement of a claim for relief* or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefore. (emphasis added)

Taken together, and read in light of Rule 41.03, providing that the rules are to be construed to secure the just, speedy and inexpensive determination of every action, Marcum submits the rules clearly contemplate and permit the filing of a malicious prosecution counterclaim in response to a creditor's clearly unfounded claim on a void obligation.

Although GMAC faults Respondent for citing *Brockman v. Regency Financial Corp.*, 124 S.W.3d 43 (Mo. App. 2004), and *Burnett v. GMAC Mortgage Corp.*, 847 S.W.2d 82 (Mo. App. 1992) as examples of malicious prosecution counterclaims because no evident jurisdictional challenges were made by the parties in those cases, neither did the courts in the cases cited by GMAC, save *J.C. Jones & Co. v. Doughty*, 760 S.W.2d 150 (Mo.App.S.D. 1988), consider the interplay of the above rules in their findings.

And even though the *Doughty* did mention Rule 55.06(b), the reason it found that rule inapplicable is instructive. The reason was based on a crucial distinction between the wrongful attachment claim asserted there and the malicious prosecution claim asserted here.

In *Doughty*, the plaintiffs sued the defendants for breach of contract and, after posting an attachment bond, seized defendant's checking account. When the court later dissolved the attachment, the defendants filed a counterclaim for wrongful attachment. The trial resulted in a judgment against the plaintiffs on their claim and for the defendants on their counterclaim. The plaintiffs appealed and posted and appeal bond. Reversing the appeal court held that the attachment bond, in tandem with the appeal bond, had operated to prevent the trial court's ruling dissolving the attachment from becoming final until the appeal was over, hence there had been no final termination in defendants' favor below upon which to base the wrongful attachment counterclaim and the trial court accordingly had no jurisdiction to consider it. *Id.* at 158-60.

Here there can be no doubt but what GMAC's suit against Marcum was terminated with resounding finality when GMAC, of its own accord, dismissed it *with prejudice* on June 18, 2004. GMAC Appx. p. 43. Indeed, GMAC's action in this regard can be likened to that of the plaintiff in *McClelland v. Dougherty*, 204 S.W. 201 (Mo.App.1918), cited by the court in *Doughty* as an example of a case in which an action for wrongful attachment was found proper, even though the main action was on appeal when it was filed, because the plaintiff did not object to the dissolution of the attachment. *Id*. at 160.

Although Marcum has found no Missouri case discussing the interplay of the foregoing rules in the context of a malicious prosecution counterclaim, in *T. H. Blake Contracting Co. v. Sorrells*, 426 S.E.2d 85 (N.C.App. 1993) an appeal was dismissed as premature where a malicious prosecution counterclaim remained pending after a directed verdict was entered on the plaintiff's claims. North Carolina Rule 18(b) is substantially the same as Missouri Rule 55.06(b). Both track the language of Rule 18(b) of the Federal Rules. At least one court has even held that, under the language of North Carolina Rule 18(b), a failure to raise a malicious prosecution claim by way of counterclaim bars its assertion in a subsequent proceeding. *Schwartz v. Coastal Physician Group, Inc.*, 172 F.3d 63, 1999 WL 89037, **3, **4 (10th Cir. 1999) (citing *Sorrells, supra*).

CONCLUSION

This Court should quash its Preliminary Writ of Prohibition, because Respondent acted well within the broad parameters of his discretion in denying

GMAC's Motion for Protective Order, in that the motion was based on inherently suspect cost calculations due to (1) GMAC's silence regarding records maintained in its Title Administration Department; (2) GMAC's failure to present any calculations regarding the cost of compliance with Interrogatory No. 10, which only seeks information for a five year period; (3) GMAC's failure to present calculations as to the amount of information contained in its "Debt Manager Screens" or the cost of searching them; and (4) GMAC's failure to offer any explanation at all why it waited until a month after the hearing on Marcum's discovery motion - nine months after the discovery was served - to bring forth any facts, other than in the most vague and conclusory fashion, as to the nature of its records and what it takes to access them. GMAC's continued back-pedaling and refusal to cooperate with Marcum in finding alternative sources for critical information evidences an attitude toward discovery that is in serious need of adjustment. Faced with such an attitude, Respondent was perfectly justified in denying GMAC's motion.

Date: October 11, 2005.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. The brief includes the information required by Rule 55.03;

2. The brief complies with the limitations contained in Rule 84.06(b);

3. According to the word count function of counsel's word processing software (Microsoft® Word), the brief contains 8671 words; and

4. The floppy disk submitted herewith containing a copy of this brief has been scanned for viruses and is virus-free.

_____
Dale K. Irwin

CERTIFICATE OF SERVICE

On this 11th day of October, 2005, I hereby certify that two copies of the above and foregoing brief, together with a copy of same on disk, were served by hand delivery, addressed to:

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