No. SC92594

IN THE MISSOURI SUPREME COURT

Janet Chochorowski, individually and as the Representative of a class of similarly-Situated persons,

Plaintiff-Appellant,

v.

Home Depot U.S.A., d/b/a The Home Depot,

Defendant-Appellee.

On Transfer from the Missouri Court Appeals Eastern District, No. ED97339, there on appeal from the Twenty-First Judicial Circuit, St. Louis County, Missouri, No. 08SL-CC01183-01

APPELLANT'S SUBSTITUTE BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

JURISDICTIONAL STATEMENT

Plaintiff-Appellant, Janet Chochorowski ("Plaintiff") appeals from an August 11, 2011 order of summary judgment entered under Missouri Supreme Court Rule 74.04 in favor of Defendant-Appellee, Home Depot U.S.A., Inc., d/b/a The Home Depot ("Home Depot" or "Defendant"). The judgment became final on September 2, 2011. Rule 75.01. Plaintiff timely filed a Notice of Appeal on September 8, 2011. Rule 81.04 (a). The Missouri Appellate Court, Eastern District, affirmed by an opinion filed on April 10, 2012. Plaintiff timely filed an Application to Transfer in the Appellate Court on April 25, 2012. Rule 83.02. The Appellate Court denied the Application on May 24, 2012. Plaintiff timely filed an Application to Transfer with this Court on June 4, 2012. Rule 83.04. The Court sustained the application on August 14, 2012. The Court now has jurisdiction under Mo. Const. Art. V, § 10.

STATEMENT OF FACTS

A. Plaintiff's experience renting from Home Depot.

Plaintiff wanted to rent a garden tiller to prepare her vegetable garden for planting. (LF 341-42). Plaintiff called the Home Depot store nearest to her home in Highland, Illinois to ask how much it would cost to rent a garden tiller for one day. (LF 341). She was told it would cost $25.00. (LF 889-90, 922).

Plaintiff and her husband drove to the Home Depot store to rent the tiller. (LF 491). When they arrived, they asked a Home Depot sales associate if they could rent a tiller. (LF 485). The sales associate retrieved a tiller for them. (LF 485). They asked the price and were told $25.00. (LF 485). The man showed Plaintiff's husband how to work it. (LF 892). Plaintiff then agreed to rent the tiller for $25.00. (LF 485).

Before Plaintiff could leave with the tiller, she was asked her name. (LF 486). The sales associate typed it into the Home Depot computer system and found a match. (LF 486). Then, the sales associate printed up a sheet and asked her to initial it in two places and sign it at the bottom. (LF 888).

After she was handed the sheet, Plaintiff noticed that the address at the top was no longer correct and changed the address to reflect Plaintiff's new address of 940 Ziles Road in Highland, Illinois. (LF 886). Plaintiff also corrected the driver's license information to show that she had an Illinois, not a Missouri, driver's license. (LF 886).

Plaintiff did not otherwise read the sheet because she had "bad eyes" and it was in "little bitty print." (LF 489). In addition, she did not read any more of it: "Because they rang it up and just handed it to me. And she said sign it here, initial it here, and that was it." (LF 888).

No one at Home Depot ever mentioned a damage waiver to

Plaintiff or explained what a damage waiver might be. (LF 494, 894). No one told her that a damage waiver was "applicable" to her rental. (LF 494, 894). No one told her whether the damage waiver was a required or mandatory charge. (LF 896).

Because she was asked to do so, plaintiff signed her initials underneath a box that included a lot of fine printing, including "2. I accept the benefit of the damage waiver if applicable described in paragraph 11 in the terms and conditions of this rental agreement." (LF 343, 888, 889) (emphasis added). The same box also included the statement, "1. I have been offered operating manuals on the above listed rental equipment and have accepted them," but no one at Home Depot offered Plaintiff an operating manual, and none was attached to or provided with the tiller. (LF 343, 891-92). The box also stated, "A cleaning charge of $25.00 will be assessed if the above listed rental equipment is not returned clean," but no one at Home Depot mentioned any cleaning charge. (LF 343, 494). Plaintiff was simply told that she must return the tiller clean. (LF 494, 850). Plaintiff provided her credit card number in lieu of a cash deposit. (LF 922).

After signing and initialing the sheet, Plaintiff left with the tiller. (LF 490). Plaintiff was not required to pay anything in advance and no charges were rung up for Plaintiff to review. (LF 490, 497).

Plaintiff first noticed the "2.50" next to "damage waiver" on the lower half of the sheet she had signed in the box entitled "Special Terms and Conditions" when she was sitting in the car while riding home. (LF 491). She decided to complain about it and question it when she brought the tiller back the next day. (LF 891).

The next day, Plaintiff returned the tiller. (LF 496). She was asked to pay $29.33 which included the "2.50" "damage waiver." (LF 497). Plaintiff wrote a question mark next to the "2.50" and asked why she was required to pay that part. (LF 897). She was told that "everybody" was charged that, and it was "insurance." (LF 897, 901). Plaintiff questioned further why she should have to pay it when she did not want it and did not break the tiller. (LF 903). She was then told they "charge everyone." (LF 903). Because she understood from what she was told that "she had no choice," she "had to pay it," and they "charge[d] everyone," Plaintiff paid the entire $29.33, including the $2.50 damage waiver. (LF 897-98, 901). Plaintiff understood based on what she was told that the damage waiver was not optional and that she was required to pay it. (LF 902). Based on the language on the form, Plaintiff did not believe the fee was optional because it did not say it was. (LF 903).

B. Home Depot's "damage waiver" profit scheme.

1. Home Depot automatically added the damage waiver to every rental.

The form that Plaintiff was asked to sign was generated by Home Depot's computer system. (LF 923-24). Every store uses the same software which generates the same forms with the same language. (LF 920). This is because Home Depot wants "every customer to be treated the same." (LF 921). Individual sales associates may not vary the language generated. (LF 926).

Home Depot's computer system was programmed to "pre-load" the damage waiver onto every rental agreement. (LF 908-910). It could be removed only if the rental sales associate affirmatively removed it by accessing the program used to generate the charges (LF 908-910).

2. Home Depot did not require sales associates to tell customers the damage waiver was optional.

As explained by Home Depot's Division Tool Manager for the West Coast, Home Depot did not require its personnel to tell customers the damage waiver was optional. (LF321; LF 514). It was sufficient if they simply handed the form to the customer and asked them to initial it. (LF 514) ("[T]he Associates find other ways to make that connection with the customer to go over it with them, whether it's highlighting,

circling, checking, or just turning to them and saying sign here. You're acknowledging this. I'm fine with that." (LF514) (emphasis added). Furthermore, The Rental Agreement does not state, explain, or indicate that the "damage waiver" is optional. (LF 343). The "damage waiver" is not offered as an option a customer can reject while still renting the tool. (LF 343).

The "damage waiver" fee automatically appears between the "Agreement Subtotal" and the "Sales Tax" without any prior notification from Home Depot, falsely implying that the "damage waiver" is a "tax" or "fee" that the renter must pay when renting a tool from Home Depot. (LF 343, 908-910). The Rental Agreement does not indicate in any way that the "damage waiver" can be declined or rejected. (LF 343). Home Depot's employee instructed Plaintiff to place her initials in a box and sign on the "x":

SPECIAL TERMS AND CONDITIONS

1. I HAVE BEEN OFFERED OPERATING MANUALS ON THE ABOVE LISTED RENTAL EQUIPMENT AND HAVE ACCEPTED THEM.

2. I ACCEPT THE BENEFIT OF THE DAMAGE WAIVER (IF APPLICABLE) DESCRIBED IN PARAGRAPH 11 IN THE TERMS AND CONDITIONS OF THIS RENTAL

AGREEMENT.

3. CLEANING CHARGE OF $ 25.00 WILL BE ASSESSED IF THE ABOVE LISTED RENTAL EQUIPMENT IS NOT RETURNED CLEAN.

I HAVE READ AND AGREE, AS INITIALED TO THE RIGHT, TO THESE SPECIAL TERMS AND CONDITIONS.

(LF 343, 887).

All three of these "Special Terms and Conditions" must be agreed together. (LF 343). The Rental Agreement did not offer an option to "decline" any of the "Special Terms and Conditions." (LF 343). The cleaning charge could not be declined. *Id.* The operating manuals could not be declined. (LF 343). The "damage waiver" is automatically added to the Rental Agreement—Home Depot calls that "accepted"—and the renter is not presented any means by which to reject the "damage waiver" and still rent the tool. (LF 343, 514).

The "damage waiver" clause on the Rental Agreement refers Plaintiff to "paragraph 11" of the "terms and conditions" of the Rental Agreement. (LF 343-44). The 11th paragraph was on the bottom of the second page of the form and appeared as follows:

Damage Waiver. If I pay the damage waiver charge for any Equipment, this agreement shall be modified to relieve me

> of liability for accidental damage to it, but not for any losses or damage due to theft, burglary, misuse or abuse, theft by conversion, intentional damages, disappearances or any loss due to my failure to care properly for such Equipment in a prudent manner (including without limitation by using proper fuel, oil and lubricants and not exceeding such Equipment's rated capacity, if applicable).

(LF344).

3. In apparent response to Plaintiff's lawsuit, Home Depot stopped automatically imposing the damage waiver fee, changed its disclosures, and started offering a truly optional "damage protection" coverage.

After Plaintiff filed her lawsuit, Home Depot stopped automatically charging damage waivers and started offering optional "Damage Protection" instead. (LF 562, 567-575). On its standardized Rental Agreements, Home Depot now offers renters the choice of specifically accepting or declining "Damage Protection." (LF 562, 571-72).

This new Rental Agreement was not part of Plaintiff's Rental Agreement, but was created after her lawsuit. (LF 343-44, 571-72). Home Depot's new Rental Agreement—in sharp contrast to the Rental

Agreement used for Plaintiff's transaction—unambiguously gives the customer an option to make a choice to "accept" or "decline" the Damage Protection. (LF 343-44, 571-72). In addition, the new version of "Paragraph 11" of the terms and conditions of the new Rental Agreement expressly states, "Damage Protection is an optional service offered by Home Depot," and the "Damage Protection" provides coverage where the "damage waiver" does not. (LF 571-72) (emphasis added).

4. The damage waiver provided nothing of value to the customer.

Dan McAreavey was part of the team at Home Depot that wrote the language used to describe the damage waiver and the terms of the damage waiver. (LF 925). The best he could explain its coverage was to state:

> The guidelines that are out there are that if a customer buys a damage waiver, that any accidental damage that happens to the tool, they will be covered for. If you don't have the damage waiver, there is a very good chance you will be charged for that.

(LF 930). He admitted, however, that the damage waiver would not cover any "failure to care properly for such equipment in a prudent

manner, including without limitation by using proper fuel, oil, lubricants, and not exceeding such equipment's related capacity if applicable." (LF 931).

Moreover, the sales associates charged with applying the damage waiver are given no further guidelines as to what it might cover, if anything. (LF 932). And the in-store personnel were given unfettered discretion to determine whether the damage waiver applied to any particular loss or damage. (LF 911-12). The only real difference is that if the damage waiver is on the paperwork, Home Depot is willing "to work with that customer," but if not, then Home Depot will not. (LF 932).

The vagueness of the coverage of Home Depot's damage waiver is matched by the arbitrariness of the amount of the charge Home Depot imposes for it. Home Depot charges 10% of the rental price for each damage waiver, but this charge is not based on any analysis of the costs of expected losses under the provision. (LF 933-34). Home Depot decided to charge 10% because it was "easy to remember." (LF 933). Home Depot made absolutely no effort to determine whether 10% reflected an accurate assessment of the value of the coverage or the expected losses that it might incur by offering the coverage. (LF 933-34). The 10% amount cannot be modified by anyone. (LF 938).

In contrast, Home Depot does not even record the losses on rental tools that are covered by the damage waiver as compared to losses on tools that are not covered. (LF 934). Home Depot also does not break down losses on rental equipment by their causes. (LF 935-36).

Home Depot carefully tracks of how much revenue it generates by imposing damage waivers. (LF 934, 937). Every store is judged on a monthly basis by the percentage of its rental revenue that is derived from the sale of damage waivers. (LF 943). Because a damage waiver is precisely 10% of each rental, if a damage waiver were sold with every single rental it would generate an additional 10% in total revenues. (LF 943). While stores might not generate the full 10%, stores have generated as high as 9.4%. (LF 943-44). This is 94% of the maximum potential revenue that could be generated if a damage waiver were imposed on every rental in the store. (LF 943-44). Mr. McAreavey described a 94% rate as proof "those guys are doing a good job of giving the customer a choice." (LF 170).

C. Procedural History.

Plaintiff filed a two-count Class Action Petition alleging Home Depot violated the Missouri Merchandising Practices Act, MO. REV. STAT. § 407.010, *et seq.* ("MPA"), by automatically charging and requiring Plaintiff to pay a 10% "Damage Waiver" when she rented a

garden tiller. (LF 8-31). Count I alleged that Home Depot violated the MPA by deceiving Plaintiff into believing a "Damage Waiver" was mandatory, when, according to Home Depot, it was in fact optional. (LF 16-18). Count II alleged that Home Depot violated the MPA by automatically imposing a "Damage Waiver" fee upon Plaintiff for a worthless damage waiver. (LF 18-20).

In 2008, Defendant filed a motion to dismiss Counts I and II. (LF 58-106). On February 6, 2009, the trial court granted Defendant's motion to dismiss. (LF 171). On September 22, 2009, the Appellate Court reversed. *Chochorowski v. Home Depot U.S.A., Inc., d/b/a The Home Depot*, 295 S.W.3d 194 (Mo. App. E.D. 2009). (LF 190-93).

After remand, Defendant filed a motion for summary judgment arguing that the Rental Agreement containing the "Damage Waiver" contradicted Plaintiff's allegations. (LF 351-380). On August 2, 2011, the trial court entered a one-sentence order granting Defendant's motion for summary judgment. (LF 964). Then on October 21, 2011, the trial court entered a Final Judgment for Defendant and against Plaintiff. (LF 978). Plaintiff timely filed her notice of appeal. (LF 965-970). The Appellate Court Eastern District then affirmed.

POINTS RELIED ON

A. **The Trial Court erred in granting summary judgment for Defendant because Defendant automatically included a damage waiver charge in its tool rental contract with Plaintiff and required Plaintiff to insist on its removal to avoid paying it, in violation of the "negative option" prohibition found in the MPA and 15 CSR 60-8.060.**

- Merchandising Practices Act, Mo. Ann. Stat. §407.020;
- 15 CSR 60-8.060;
- *Huch v. Charter Commc'ns, Inc.*, 290 S.W.3d 721 (Mo. 2009) (*en banc*).

B. **The Trial Court erred in granting Defendant's motion for summary judgment because Defendant's form contract did not make clear the damage waiver fee was optional, and Defendant's employee told Plaintiff we "charge everyone" in violation of the MPA's prohibition of "unfair practices."**

- Missouri Merchandising Practices Act, Mo. Ann. Stat. §407.020;
- *Edmonds v. Hough*, 344 S.W.3d 219 (Mo. App. E.D. 2011).

C. **The Trial Court erred in granting Defendant's motion for summary judgment because Defendant's "Damage Waiver" is worthless and, therefore, selling it was an "unfair practice" under the MPA.**

- Missouri Merchandising Practices Act, Mo. Ann. Stat. §407.020;
- *Edmonds v. Hough*, 344 S.W.3d 219 (Mo. App. E.D. 2011).

ARGUMENT

A. Standard of Review.

"We review the entry of summary judgment *de novo*. *Calvert v. Plenge*, 351 S.W.3d 851, 854 (Mo. App. E.D. 2011). "We review the record in the light most favorable to the party against whom judgment was entered." *Id.* "The burden on a summary judgment movant is to show a right to judgment flowing from facts about which there is no genuine dispute." *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.3d 371, 378 (Mo. 1993) (*en banc*). "The moving party bears the burden of establishing a right to judgment as a matter of law." *Powel v. Chaminade Coll. Preparatory, Inc.*, 197 S.W.3d 576, 580 (Mo. 2006) (*en banc*). "The propriety of summary judgment is purely an issue of law." *ITT Commercial*, 854 S.W.3d at 376. The meaning of contract language is also an issue of law that is reviewed de

novo. *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. 2010) (*en banc*).

B. Missouri Merchandising Practices Act.

In *Edmonds v. Hough*, 344 S.W.3d 219 (Mo. App. E.D. April 19, 2011), the appellate court recently described the MPA's remedial purpose as follows:

> The purpose of the MPA is "to preserve fundamental honesty, fair play and right dealings in public transactions." *State ex rel. Nixon v. Beer Nuts, Ltd.,* 29 S.W.3d 828, 837 (Mo. App. E.D. 2000). The Act "eliminates the need for the Attorney General to prove intent to defraud or reliance in order for the court to find that a defendant has engaged in unlawful practices." *Id.* "Intent and reliance are not necessary elements of the cause of action." *State ex rel. Webster v. Areaco Inv. Co.,* 756 S.W.2d 633, 636 (Mo. App. E.D. 1988). "Once the court finds that a violation of the Act has occurred or is about to occur, irreparable harm and harm to the public are presumed." *Beer Nuts* 29 S.W.3d at 837–838. While these authorities form the support for the issuance of an injunction in MPA cases brought by the attorney general, we have previously recognized their utility in illuminating the spirit of the legislation as

applicable to private causes of action. *See Clement v. St. Charles Nissan, Inc.,* 103 S.W.3d 898, 900 (Mo. App. E.D. 2003). In a private suit, a plaintiff must demonstrate that she: (1) purchased merchandise (which includes services) from the defendants (2) for personal, family, or household purposes and (3) suffered an ascertainable loss of money or property (4) as a result of an act declared unlawful under section 407.020. *Chochorowski v. Home Depot U.S.A., Inc.,* 295 S.W.3d 194, 198 (Mo. App. E.D. 2009).

344 S.W.3d at 223. The MPA declares all "unfair practices" to be unlawful:

> The act, use or employment by any person of any … unfair practice … in connection with the sale or advertisement of any merchandise … is declared to be an unlawful practice. … Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.

MO. REV. STAT. § 407.020.

It also creates a private right of action:

> Any person who purchases or leases merchandise … and

> thereby suffers an ascertainable loss of money or property … as a result of the use or employment by another person of a method, act or practice declared unlawful by section 407.020, may bring a private civil action…

MO. REV. STAT. § 407.025.

1. The MPA applies to Plaintiff's rental and to Home Depot's damage waiver charge.

The MPA clearly applies to this action. The MPA defines "merchandise" and "sale" as follows:

> As used in sections 407.010 to 407.130, the following words and terms mean:
>
> …
>
> (4) "Merchandise", any objects, wares, goods, commodities, intangibles, real estate or services;
>
> …
>
> (6) "Sale", any sale, lease, offer for sale or lease, or attempt to sell or lease merchandise for cash or on credit;

MO. REV. STAT. § 407.010.

Thus, "sale" includes a "lease" like Plaintiff's rental of the tiller from Home Depot, and "merchandise" includes Home Depot's damage waiver because it is a "service" or "intangible."

2. The MPA cannot be waived by contract.

The "public policy in Chapter 407 is so strong that parties will not be allowed to waive its benefits." *Huch*, 290 S.W.3d at 725 (citing *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 498 (Mo. 1992) (*en banc*) (quoting *Electrical and Magneto Serv. Co. v. AMBAC Int'l Corp.*, 941 F.2d 660, 664 (8th Cir. 1991)).

3. The Attorney General has declared negative option schemes like Home Depot's automatic damage waiver to violate the MPA.

In *Huch v. Charter Commc'ns, Inc.*, 290 S.W.3d 721, 724-25 (Mo. 2009) (*en banc*), the court explained that the Attorney General has the power to issue regulations defining "unfair" practices that are unlawful under the MPA:

> Although the legislature did not define deceptive practices, it granted the attorney general authority to promulgate "all rules necessary to the administration and enforcement" of the provisions of the act, which includes the authority to promulgate rules setting out the scope and meaning of the act. Section 407.145; *State ex rel Nixon v. Telco Directory Pub.,* 863 S.W.2d 596, 601 (Mo. banc 1993).

The Attorney General has promulgated a rule that declares

negative option schemes to be an "unfair practice":

> 15 CSR 60-8.060 Unsolicited Merchandise and Negative Option Plans
>
> (1) It is an unfair practice for any seller in connection with the advertisement or sale of merchandise to bill, charge or attempt to collect payment from consumers, for any merchandise which the consumer has not ordered or solicited.

"Because properly adopted and promulgated rules 'have independent power as law,' *see United Pharmacal Co. v. Mo. Bd. of Pharmacy,* 159 S.W.3d 361, 365 (Mo. banc 2005), the rule's declaration that the act of charging for unsolicited merchandise is an unfair practice makes that conduct unlawful under the act." *Huch,* 290 S.W.3d at 725.

C. Argument.

Defendant argued on summary judgment that Plaintiff was required to read the entire Rental Agreement and that, had she read it, she would have understood the damage waiver was optional. (LF 351-380). The Appellate Court adopted this reasoning, too. A7.

Defendant and the Appellate Court are both legally and factually wrong. They are legally wrong because 15 CSR 60-8.060 prohibits

merchants such as Home Depot from slipping unsolicited items into form agreements, so they can be charged to unsuspecting consumers such as Plaintiff. *Id.* They are factually wrong because the form agreement did not disclose that the damage waiver was optional and, more importantly, when Plaintiff inquired, Home Depot's representative told her that it was required. (LF897-903).

Defendant also argued that the damage waiver is not worthless because it provides "reasonable protection," and the Appellate Court also uncritically accepted this argument. (LF 379; A9). Defendant failed to explain what the "reasonable protection" is. A close look at the damage waiver indicates that it is an arbitrary fee—an extra 10% added to every rental—and that it provided Plaintiff with no extra value. The record also shows that not even Defendant could explain coherently what protection it actually provided. The Appellate Court's assertion, based on irrelevant case law, and not the record in this case, improperly ignored this evidence. *Compare* A8 *with* LF911-912, LF930-932.

1. The Trial Court erred in granting summary judgment for Defendant because Defendant automatically included a damage waiver charge in its tool rental contract with Plaintiff and required Plaintiff to insist on its removal to avoid paying it, in violation of the "negative option" prohibition found in the MPA and 15 CSR 60-8.060.

As a matter of law, Defendant violated the MPA by adding the damage waiver without first getting any indication from Plaintiff that she wanted it added. *See* 15 CSR 60-8.060. Home Depot's motion for summary judgment turned on the idea that a merchant can add charges for additional services not requested so long as, somewhere within the fine print, the merchant can show that the customer could have determined the charge was not required and demanded that it be removed. This argument is directly contrary to 15 CSR 60-8.060 and, if accepted, would render the section meaningless. Defendant cannot insulate itself from this section by the terms of its form contract. *Huch*, 290 S.W.3d at 725.[1]

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[1] Defendant relied heavily on *Rickher v. Home Depot, Inc.*, 2007 WL 2317188 (N.D. Ill. July 18, 2007), *aff'd in part*, 535 F.3d 661 (7th Cir. 2008), but *Rickher* did not consider the MPA or 15 CSR 60-8.060.

In *Huch*, a cable television provider allegedly sent programming guides to its customer without first asking them if they wanted the guides. 290 S.W.3d at 723. The cable television provider than added a charge for the guides to its customers' bills. *Id.* Some customers brought an action for violation of the MPA. *Id.* The cable television provider moved to dismiss on the theory that the voluntary payment doctrine barred the claims. *Id.* The voluntary payment doctrine provides "that a person who voluntarily pays money with full knowledge of all the facts in the case, and in the absence of fraud or duress, cannot recover it back, though the payment is made without a sufficient consideration, and under protest." *Id.* at 725. The trial court granted the motion, but the Supreme Court reversed.

The Supreme Court explained that the MPA was designed to "supplement the definitions of common law fraud in an attempt to

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In addition, the plaintiff in *Rickher* did not allege that he was told he had to pay the damage waiver and, unlike Plaintiff, did not complain about it before paying. The Appellate Court also cited *Pacholec v. Home Depot, U.S.A., Inc.*, 2007 WL 4893481 (D.N.J. July 31, 2001), but it also did not consider Missouri Law or a prohibition on negative option contracts. A8.

preserve fundamental honesty, fair play and right dealings in public transactions." 290 S.W.3d at 724. This means that "certain legal principles are not available to defeat claims authorized by the act." *Id.* at 725. The court reasoned that if the MPA could not be waived by "provision in a written contract," it likewise could not be waived by the voluntary payment doctrine. *Id.* at 727. The court concluded,

> [P]laintiffs allege that [defendant] provided unsolicited merchandise to consumers in the form of the channel guide and then billed and collected, or attempted to collect, payment for the unordered merchandise. This conduct, if proven, is an unfair practice that is prohibited by the act. 15 CSR 60-8.060 (1); section 406.020.1. To allow Charter to avoid liability for this unfair practice through the voluntary payment doctrine would nullify the protection of the act and be contrary to the intent of the legislature.

Id.

Importantly, the Supreme Court did not hold that the "voluntary payment" doctrine was merely insufficient to justify dismissal. *Id.* The Court held that the doctrine "was not available as a defense" to an MPA claim *Id.* at 727 n.5.

In the case at bar, Defendant and the Appellate Court cited

several cases for the legal principle that a party to a contract has a "duty to read the contract" before signing and cannot claim to be misled by oral statements that are contrary to the contract. (LF 369-72; A7) (citing *Lingo v. Hartford Fire Ins. Co.*, __ S.W.3d __, 2011 WL 1642223 (Mo. App. E.D. May 2, 2011); *Nunn v. C.C. Midwest*, 151 S.W.3d 388, 402 (Mo. App. W.D. 2004); *Binkley v.* Palmer, 10 S.W.3d 166, 171 (Mo. App. E.D. 1999); *Williams v. Mercantile Bank of St. Louis NA*, 845 S.W.2d 78, 84 (Mo. App. E.D. 1993)). *Nunn*, *Binkley* and *Williams* are not on point because they did not involve MPA claims, and while *Lingo* did, it did not involve a negative option.

The *Lingo* plaintiff alleged that although he wanted a fixed-rate loan, he understood at closing that his home mortgage loan documents provided for a variable-rate loan. 2011 WL 1642223 at *9. He claimed that when he asked about the variable-rate provision, he was promised it would later be refinanced to a fixed-rate loan, but defendant later ignored his requests for a refinance. *Id.* The court held that the plaintiff had failed to show the defendant concealed anything at closing and, therefore, could not state a claim under the MPA. *Id.* The court emphasized that MPA claims turn on "the unique facts and circumstances of each case." *Id.* at *8 (quoting *Clement v. St. Charles Nissan, Inc.*, 103 S.W.3d 899, 900 (Mo. App. E.D. 2003). *Lingo* should

be limited to its "unique facts" and has no bearing on the present case which involves violation of an express regulation applying the MPA promulgated by the Attorney General. *Huch*, 290 S.W.3d at 727. As in *Huch* to allow the merchant to evade the express provisions of 15 CSR 60-8.060 by simply adding boilerplate language to its contract of adhesion would nullify the regulation and be contrary to the MPA.

In the present case, Defendant seeks to use the fine print in its adhesion contract to nullify the express provisions of 15 CSR 60-8.060. It would be pointless to outlaw negative option contracts if the merchant could avoid liability simply by adding boilerplate language that might enable a vigilant customer to protest the charge. *Huch*, 290 S.W.3d at 724 ("To allow Charter to avoid liability for this unfair practice through the voluntary payment doctrine would nullify the protection of the act and be contrary to the intent of the legislature").

The Appellate Court reasoned that Plaintiff was deemed to have "ordered" the damage waiver by her failure to find and protest the charge when she initialed the Home Depot form, but this is contrary to the plain language and clear purpose of 15 CSR 60-8.060. A7. In *Huch*, the defendant sent guides and later added a fee for these guides to each customer's bill. By the Appellate Court's reasoning, the *Huch* defendant's scheme would have been legal if it had simply buried

boilerplate language in the guides that might have enabled a vigilant customer to lodge a protest in order to avoid being charged for the guide.

The purpose of 15 CSR 60-8.060 is to prevent merchants from slipping unsolicited items into bills, not to encourage merchants to develop more stealthy ways of doing so. Section 60-8.060 declares it an "unfair practice" to "bill, charge or attempt to collect payment from consumers, for any merchandise which the consumer has not ordered or solicited." It does not make an exception if the merchant discloses in the bill that the customer may refuse.

Here the record shows that Plaintiff never "solicited" the damage waiver. Consequently, under 15 CSR 60-8.060, Defendant could not legally add it to the lease form any more than it could add it to a bill the next day, especially where as here the effect was the same. A consumer should have no greater duty to scrutinize the lease form that Defendant used than a final bill. In fact, as this case shows, a customer is less likely to scrutinize or understand the lease form because Home Depot did not ring up any charges at that time, so Plaintiff could not see what her bill was or what charges were actually included in it.

Holding Plaintiff responsible for failing to protest the damage waiver when initialing Defendant's lease form makes no more sense

than requiring consumers to protest all "negative option" charges on the theory that consumers have "ordered" the added items if they do not notice and protest. A7. Defendant's addition of the damage waiver to the form it handed to Plaintiff was an illegal "negative option" in violation of 15 CSR 60-8.060, and the Trial Court erred in granting Defendant summary judgment.

2. The Trial Court erred in granting Defendant's motion for summary judgment because Defendant's form contract did not make clear the damage waiver fee was optional, and Defendant's employee told Plaintiff we "charge everyone" in violation of the MPA's prohibition of "unfair practices.".

Even if Home Depot's automatic, unsolicited addition of the damage waiver to Plaintiff's Rental Agreement is not expressly unlawful as a negative option under 15 CSR 60-8.060, it would still be an "unfair practice" in violation of the MPA. Home Depot argues the Rental Agreement expressly disclosed that the damage waiver was optional and, therefore, Plaintiff cannot prevail. But Home Depot's argument is premised on an incorrect characterization of the actual language used and the factual record in this case. Home Depot argues that it gave Plaintiff a choice, but it did not. Plaintiff agreed to rent the garden tiller after she was shown it and was told it would cost $25.00.

(LF 485). The paperwork did not disclose the damage waiver was optional and more importantly, when Plaintiff inquired, she was told it was "insurance" and "everybody gets charged this." (LF 897, 901). The Trial and Appellate Courts were not free to ignore this evidence and grant summary judgment for Defendant.

a. Home Depot's lease form did not state that the Damage Waiver could be declined.

The Appellate Court asserted without reference to any language in Home Depot's form that it "makes clear that the damage waiver was optional," but this is contrary to the record in this case. A7. Home Depot's form did not state the damage waiver was optional; instead, it stated, "I accept the benefits of the damage waiver if applicable." (LF 343). This makes the average consumer think the charge is something for his own good and discourages any effort to read further or otherwise think it is a charge for a worthless form of "insurance." Even if a renter could figure out what the damage waiver was, nothing suggests that he has any choice in the matter. The disclosure does not say it is optional and does not say the renter can decline it. (LF 343-44).

Home Depot's disclosures also do not explain what a damage waiver is, and there is no reason to assume that anyone renting a tool has any idea what it is. The disclosure references boiler-plate language

contained in a "paragraph 11 in the terms and conditions of the rental agreement" but it is not clear what that refers to either. In addition, even one of the drafters of that boilerplate language could not explain with clarity what it meant. (LF 927-29). Finally, "paragraph 11" was virtually illegible and was buried on the second page. (LF344). Moreover, nothing in paragraph 11 discloses the damage waiver was optional. *Id.* It merely states "if I pay," and once again this language does not suggest the renter has a choice. *Id.*

In any event, even if the forms put Plaintiff on notice that the damage waiver might be "optional," she could not have declined it anyway because when she did ask, she was told it was "insurance" and "everyone" was charged. (LF 898-901, 903). Thus, even when she inquired, she was not given an option. The Appellate Court's incorrect conclusion that it was clearly optional is simply contrary to the record.

b. Plaintiff was told the damage waiver was mandatory.

When Plaintiff first saw the damage waiver on her ride home, she made a note to ask about it when she returned the tiller. (LF 491, 891). When Plaintiff did ask about it, she was told that it was "insurance" and "everyone" was charged. (LF 898-901, 903). Thus, she was led to believe that it was a mandatory charge that she had to pay regardless of whether she wanted it or not. Contrary to Defendant's arguments,

Plaintiff had no duty to presume she was being lied to when the sales associate told her it was mandatory. *D'Arcy and Assoc., Inc. v. K.P.M.G. Peat Marwick, L.L.P.*, 129 S.W.3d 25, 32 (Mo. App. W.D. 2004) ("Although a party must exercise care and prudence for his own welfare, the rule has no application to a case in which the speaker makes a distinct and specific representation to induce action, and that does induce action. That the hearer stands on equal footing with the speaker or has equal knowledge or equal means for obtaining the information is of no consequence.") On this record it was clear error for the Trial Court to grant Defendant summary judgment on Count I, and the judgment should be reversed.

3. The Trial Court erred in granting Defendant's motion for summary judgment because Defendant's "Damage Waiver" is worthless and, therefore, selling it was an "unfair practice" under the MPA.

Home Depot has admitted that its decision to charge 10% for its damage waivers had no relation to the value of any services it might render in connection therewith. (LF 933-34). The 10% figure was arbitrary and imposed simply because it was "easy to remember." (LF 933-34). As further proof of the disproportionate nature of the amount charged, Home Depot has never made any effort to track the costs of

providing the damage waiver. (LF 933-34). Home Depot's only concern seems to be tracking how much money it collects, and whether its stores are able to maximize the number of damage waivers they "sell" each month. (LF 934, 937).

Home Depot first imposes draconian liability on its renters in the fine print of its paperwork and then purports to alleviate this strict liability by the vaguely defined damage waiver. (LF 927-30, 931-32). The damage waiver supposedly relieves the renter of liability for "accidental damage," but "accidental" does not include "theft, burglary, misuse or abuse" or "failure to care properly for such equipment in a prudent manner, including without limitation by using proper fuel, oil, lubricants, and not exceeding such equipment's related capacity if applicable." (LF 932). Home Depot personnel are given no further instruction on the meaning or coverage of the damage waiver, but they are authorized to interpret and apply it however they see fit. (LF 932). Apparently, the difference between having the damage waiver and not having it is that if the customer has it and there is damage, Home depot "is going to work with that customer," but if he does not, then Home Depot will not. (LF 932). Thus, it provides no clear coverage but is just a suggestion that Home Depot will be more lenient. (LF 932). This is an illusory contract that leaves unfettered discretion to Home Depot and

provides a renter with no discernible or legally enforceable rights. Plaintiff has, thus, plainly shown that she was charged a "disproportionate price for little or no services" in violation of the MPA.

CONCLUSION

The trial court erred in sustaining Defendant's motion for summary judgment. The evidence shows that Defendant's "Damage Waiver" was automatically added, and that it had no value. This Court should reverse and remand this case back to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the page limits of Rule 84.06(b) in that it contains fewer than 8,000 words.

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The undersigned attorney hereby certifies that, on September 4, 2012, a true and accurate copy of the foregoing brief was mailed, first class postage prepaid via United States Mail, and e-mailed, to the following persons:

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