No. SC89361

IN THE SUPREME COURT OF MISSOURI

JAMES HUCH and RYAN CARSTENS,

Plaintiffs-Appellants

v.

CHARTER COMMUNICATIONS, INC.,

Defendant-Respondent

On Appeal From The Circuit Court Of St. Louis County
Division 3
Hon. Mark D. Seigel, Circuit Judge

RESPONDENT'S SUBSTITUTE BRIEF

THOMPSON COBURN LLP
James W. Erwin, #25621
Roman P. Wuller, # 36115
Robert J. Wagner, #46391
One U.S. Bank Plaza
St. Louis, Missouri 63101
Tel: 314-552-6000
Facsimile: 314-552-7000
jerwin@thompsoncoburn.com
rwuller@thompsoncoburn.com
rwagner@thompsoncoburn.com

Attorneys for Respondent
Charter Communications, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF FACTS

Plaintiffs James Huch and Ryan Carstens are cable television customers of Charter Communications, Inc. L.F. 3. (A third plaintiff, Wendy Santiago, dropped her claim before the trial court ruling. L.F. 127.) Huch and Carstens sued Charter to recover payments that they made for a monthly paper channel guide that was separately itemized in their monthly cable bills. Because this case comes to the Court on a motion to dismiss, it is important to look at what the plaintiffs actually allege in their petition, rather than their and the *amici*'s "spin" on it. The sum total of plaintiffs' pertinent factual allegations are:

Par. #	**Petition Allegations**
7.	"Plaintiff Huch contracted to begin receiving cable television channels and services from Defendant Charter in October, 2005."
8.	"Plaintiff Carstens contracted to begin receiving cable television channels and services from Defendant Charter in or around July, 2005."
9.	"No Plaintiff requested the Guide from Defendant Charter."
10.	"Defendant Charter did not inform Plaintiffs that it would be charging them for the Guide."

11.	"The Guide is not included as part of Plaintiffs['] monthly cable television channels or services."
12.	"The Guide has been appearing as a separate line item on the monthly bills of Plaintiffs."[1]
13.	"Defendant Charter charged and continues to charge the Plaintiffs $2.99/month or $3.24/month for said Guide."

Petition, ¶¶ 7-13, L.F. 3-4.

Plaintiffs received the guide for an unspecified period of time. Petition, ¶¶ 37, 42, 43, L.F. 9, 12-13.

Plaintiffs filed suit alleging that Charter knowingly engaged in "negative option billing." L.F. 4. Plaintiffs sought to represent a class described as "All Missouri citizens who, as customers of Defendant Charter have been charged fees by Defendant Charter for receiving the Guide, where such customers did not request the Guide from Defendant Charter or agree to pay Defendant Charter a separate fee, in addition to their monthly fee for cable service, for receipt of the Guide." L.F. 5. Plaintiffs sought actual and punitive damages for alleged violations of the Missouri Merchandising Practices Act, §§ 407.010

[1] The monthly bills Charter sent to Huch and Carstens show a separate line item identified as "1 paper guide" for which they were charged either $2.99 or $3.24 per month. Plaintiffs attached copies of sample bills and a copy of the cover of a sample channel guide to their surreply memorandum. *See* L.F. 111, 113.

et seq. ("MMPA"). L.F. 10-11, 14. (Plaintiffs also sought injunctive relief, but they have not challenged the dismissal of that claim in their Substitute Brief.)

Charter filed a motion to dismiss, alleging that the face of the petition showed that plaintiffs' action was barred by the affirmative defense of voluntary payment. L.F. 20-21. Charter did not move to dismiss the case for failure to state a claim.

The trial court agreed that the petition on its face showed that plaintiffs were fully aware that they had been charged for a product they claim they did not order and voluntarily paid the entire bill any way. L.F. 117-119. Specifically, the court concluded that plaintiffs' petition alleged that Charter itemized the charge for the paper guide on the monthly bills sent to plaintiffs. Plaintiffs paid the bills without protest until the filing of this lawsuit. Plaintiffs did not allege that they objected or challenged the charges on the bills prior to paying them. Plaintiffs did not allege that they were coerced or threatened by Charter to pay for the guides. Moreover, the court held that plaintiffs failed to allege any facts that would rise to the level of economic duress.

The court dismissed plaintiffs' petition on May 21, 2007. L.F. 117-119. This appeal followed on June 21, 2007. L.F. 121. On April 15, 2008, the Missouri Court of Appeals, Eastern District, unanimously affirmed the judgment of the circuit court. App. Appx. at A-11-A28. On June 24, 2008, the Court ordered this appeal transferred.

ARGUMENT

Introduction

James Huch and Ryan Carstens are Charter cable customers. They allege that they never ordered a paper channel guide from Charter, yet Charter began sending them guides anyway. According to plaintiffs, Charter disclosed that it was charging them for the guides by "a separate line item" on their monthly bills. Huch and Carstens repeatedly paid the bills month after month before filing suit. The dispositive question is whether the plaintiffs' repeated payments were knowing and voluntary. They were, of course, as established by the foregoing allegations. Thus, the affirmative defense of voluntary payment applies, and the judgment should be affirmed.

Plaintiffs complain that the lower courts have misconstrued their petition, but plaintiffs' quibbles fail to hold up under examination. Plaintiffs say that the courts were unjustified in finding that they knew what cable services they ordered, yet the sole alleged premise of this suit rests upon plaintiffs knowing what they did — and did not — order from Charter. Petition, ¶ 9, L.F. 3. Plaintiffs complain that the courts were unjustified in finding that both of them knew they were being charged for the channel guide, but the petition makes clear that the charge was "a separate line item" that appeared on the monthly bills they received. Petition, ¶ 12, L.F. 4. Plaintiffs don't allege that they failed to read the bills, or that Charter somehow induced them not to read the bills.

Plaintiffs complain that the courts were unjustified in finding that they paid the bills voluntarily, but the petition is clear that they did just that. There is no allegation that the payments were involuntary or were made under duress or were otherwise somehow induced by Charter in any fashion other than sending the bills with the "separate line item" for the channel guide.

These facts — drawn from the allegations of the petition — demonstrate the necessary elements of the affirmative defense of voluntary payment: a knowing and voluntary payment of a charge that allegedly was not owed. Even the Attorney General agrees that these facts would show that plaintiffs are not entitled to recover under the MMPA, although he characterizes it as a failure to establish damages proximately caused by the defendant's alleged fraud.

Most of plaintiffs' brief is devoted to bemoaning the effect of the voluntary payment doctrine on the ability of potential plaintiffs to pursue an action under the MMPA. But the voluntary payment doctrine is an affirmative defense — a type of waiver, as this Court has repeatedly recognized. The existence of an affirmative defense has no effect on the viability of a cause of action under the MMPA. Would the plaintiffs and their *amici* be wringing their hands if the affirmative defense was *res judicata* or release or even waiver — all affirmative defenses expressly recognized by Rule 55.08?

Plaintiffs' historical analysis is flawed. Instead of an even-handed look at the doctrine, plaintiffs cite only cases where Missouri courts (and courts of other states) have supposedly "hesitated" to apply the voluntary payment doctrine. The "hesitation,"

however, is attributable to the lack of one or more elements of the defense, not to qualms about its general applicability. The defense is recognized and applied virtually everywhere. The few cases declining to apply it on grounds other than the failure to establish its elements are distinguishable, or offer no reasoned explanation for doing so beyond an invocation of the mantra of a "liberal construction" of the statute.

But the MMPA itself does not abolish or abrogate any affirmative defense. Rule 55.08 contains no exceptions to application of affirmative defenses to statutory actions of any kind, including the MMPA. And in the few instances where the application of a common law defense to a statutory claim has arisen, Missouri courts have not "hesitated" to apply the defense where the facts warrant it.

Plaintiffs rebuke Charter for claiming that "the sky is falling," but it is plaintiffs themselves who have provided an extended lamentation built on the fallacious theme that allowing this affirmative defense "dramatically alters" the scope of the voluntary payment doctrine. The trial court's decision was extremely narrow — plaintiffs who knowingly pay for a product they claim was never ordered cannot sue to recover those payments.

Affirmance of the judgment will only apply the doctrine as it has always been applied — a person cannot recover payment voluntarily made with full knowledge of the facts. That is what the petition itself pleads, and no amount of "spin" by plaintiffs can change what they themselves allege the facts are.

I.

The Facts Pleaded In The Petition Show That Plaintiffs Voluntarily Paid Their Charter Bill With Full Knowledge That A Line Item In The Bill Reflected A Charge For A Channel Guide They Claim They Did Not Order

A.

The Facts Alleged Here Fall Squarely Within the Doctrine of Voluntary Payment

This appeal comes to the Court on a motion to dismiss. The standard for review of an order granting a motion to dismiss is settled: the Court accepts all properly pleaded facts as true, the court gives the petition its broadest intendment, and the Court construes all allegations favorably to the plaintiffs. *Bachtel v. Miller County Nursing Home District*, 110 S.W.3d 799, 801 (Mo. banc 2003). But it is equally settled that a petition that on its face shows that an affirmative defense exists may be dismissed on a motion under Rule 55.27. *Elam v. Dawson*, 156 S.W.3d 807, 808 (Mo. App., W.D. 2005).

Plaintiffs relegate discussion of what the petition in this case actually alleged to Point III of their brief. But the allegations in the petition should be the starting point for the analysis, not an afterthought.

Here, plaintiffs allege that they did not order a monthly paper channel guide when they ordered their cable service from Charter. Petition ¶ 9, L.F. 3. Plaintiffs allege that Charter sent them a bill showing "a separate line item" charging them either $2.99 per month or $3.24 per month for the guide. Petition, ¶¶ 12-13, L.F. 4. Plaintiffs received the guide for a number of months. Petition, ¶¶ 37(b), 42(c), L.F. 9, 12. *See also* Petition ¶ 25,

L.F. 5 (defining the putative class as customers who were charged for receipt of the guide). Plaintiffs allege that they repeatedly paid the bills, including the charge for the channel guide they allegedly did not order. Petition, ¶¶ 13-14, L.F. 4. These allegations — even under the liberal standard applied to motions to dismiss — establish that plaintiffs voluntarily paid the charges for the channel guide with full knowledge of whether they ordered the guide.

The voluntary payment doctrine is a "universally recognized rule that money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment cannot be recovered back on the ground that the claim was illegal, or that there was no liability to pay in the first instance." *American Motorists Ins. Co. v. Shrock*, 447 S.W.2d 809, 811 (Mo. App. 1969).

Without the voluntary payment doctrine, plaintiffs would (under their theory) be permitted to make monthly payments for use of products for years knowing that they were going to file suit just before the statute of limitations ran. There is nothing "equitable" in that. As soon as they discovered or should have discovered the disputed charge, the plaintiffs could have brought the matter to Charter's attention. A simple telephone call would either have resolved the matter without the need for expensive litigation, or made it apparent that legal action was necessary. *See, e.g., Cridlebaugh v. Putnam County State Bank of Milan*, 192 S.W.3d 540, 544 (Mo. App. W.D. 2006) ("A person must resist an unjust demand at the beginning of the matter, and make his defense prior to paying the money, *not after*.") (emphasis added) (citation omitted).

If plaintiffs intended to litigate the issue, they should have done so "in the first instance — not later, after paying the money and biding the course of uncertain future events." *Shrock*, 447 S.W.2d at 812. The reason for the rule is that "it would be inequitable to give such person the privilege of selecting his own time and convenience for litigation short of the bar of the statute of limitations." *Id*. This is especially true in the case where the plaintiffs received a real product that cost money to print and procure on their behalf. This is *not* a case about an add-on charge where a plaintiff receives nothing in exchange.

As plaintiffs admit, the doctrine is founded upon the principles of consent and waiver. *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 339 (Mo. banc 2007). The voluntary payment doctrine is a variant of waiver — an affirmative defense that is expressly recognized by Rule 55.08. The two critical elements are full knowledge of the facts and the voluntariness of the payment.

In Point I of their brief, plaintiffs concede that the doctrine as traditionally applied would act as an affirmative avoidance of liability under the MMPA. They claim that permitting a defendant to use this affirmative defense in these circumstances will "dramatically alter the scope" of the voluntary payment doctrine. But this is empty exaggeration. The facts alleged here provide a straightforward application of the affirmative defense in Missouri. *See Benton House, LLC v. Cook & Younts Ins., Inc.*, 249 S.W.3d 878, 881-884 (Mo. App. W.D. 2008); *Kep-Co, Inc. v. Regency Savings Bank*, 2007 WL 607745 (E.D. Mo. 2007); *Shrock*, 447 S.W.2d at 809; *Jurgensmeyer v. Boone*

Hosp. Center, 727 S.W.2d 441 (Mo. App. W.D. 1987) (the most recent cases applying Missouri's voluntary payment doctrine to bar recovery of payments made with knowledge of the facts and without duress).

Cases from throughout the United States confirm that plaintiffs' alleged payments of specifically itemized charges fit easily within the doctrine. In fact, the Circuit Court of St. Clair County, Illinois recently dismissed an identical lawsuit with identical claims filed by the same attorneys. The ruling — which the plaintiff did not appeal — barred an identical statutory consumer fraud claim under the defense of voluntary payment.

> Plaintiff does not allege that she made payment under compulsion or duress…. Plaintiff instead invokes the "mistake of fact" exception to the Doctrine. In her opposition brief, Plaintiffs contends that for two years she paid her monthly bills without even knowing that she was being charged for the Guide she was receiving. Without such awareness, Plaintiff could not be expected to protest or to resist payment.
>
> This argument is contrary to Plaintiff's allegation that each of her monthly bills included a "separate line item" for the Guide…. [A] plaintiff may not avoid the Doctrine by not reading or investigating the plain face of the bill.

Hurley v. Charter Communications, Inc., No. 06-L-655 (St. Clair County Circuit Court, Ill., February 28, 2007), L.F. 96-102. *Accord Williams-Ellis v. Mario Tricoci Hair Salons and Day Spas*, 2007 WL 3232490 (N.D. Ill. 2007) (applying doctrine because "Ellis' receipt clearly discloses the amount of the charge and the reason ("Ethnic Hair Charge").

Ellis should have, but did not, review the receipt before paying."); *Spagnola v. The Chubb Corp.*, 2007 WL 927198 (S.D.N.Y. 2007) ("It is a little late now, after he has enjoyed the benefits and protections of Great Northern's coverage for more than five years, to come by and successfully challenge the propriety of such coverage."); *Cook v. Home Depot U.S.A., Inc.*, 2007 WL 710220 (S.D. Ohio 2007) (holding that doctrine barred claim to recover itemized charges on bill); *Butcher v. Ameritech Corp.*, 298 Wis.2d 468, 727 N.W.2d 546 (Wis. Ct. App. 2006), *review denied*, 732 N.W.2d 859 (Wis. 2007)("customers in the plaintiffs' situation, once they have the information appearing on the Ameritech bills, are presumed to know the law and are responsible for making additional inquiries if they want more information on which of the itemized services have been subject to the state five percent tax."); *Morales v. Copy Right, Inc.*, 28 A.D.3d 440, 813 N.Y.S.2d 731 (2006), *leave to appeal denied*, 819 N.W.S.2d 873 (N.Y. 2006)(doctrine barred claims to recover photocopying charges); *Newman v. RCN Telecom Servs., Inc.*, 238 F.R.D. 57 (S.D.N.Y. 2006), *reconsideration denied*, 448 F. Supp.2d 556 (S.D.N.Y. 2006) (holding that the doctrine would bar consumer fraud claims by internet subscribers who, alleging slower than advertised service, continued to pay for and use the service); *Smith v. Chase Manhattan Mortg. Corp.*, 2006 WL 353975 (W.D. Ark. 2006) (holding that doctrine applied where plaintiff "was aware of the fax fee, aware of the amount of the fax fee, paid it, and did not protest it."), *aff'd. on other grounds*, 222 Fed.Appx. 533 (8th Cir. 2007); *King v. First Capital Financial Services, Corp.*, 215 Ill.2d 1, 828 N.E.2d 1155 (2005) (affirming that claims were barred under voluntary payment

doctrine); *Jenkins v. Concorde Acceptance Corp.*, 345 Ill.App.3d 669, 802 N.E.2d 1270 (2003) (affirming dismissal of consumer fraud claim under voluntary payment doctrine); *Putnam v. Time Warner Cable*, 255 Wisc.2d 447, 649 N.W.2d 626 (2002) (invoking doctrine to affirm dismissal of consumer fraud claims to recover cable late fee payments); *Dillon v. U-A Columbia Cablevision*, 100 N.Y. 2d 525, 790 N.E.2d 1155 (2003) (affirming dismissal of cable late fee claims under voluntary payment doctrine); *Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663 (7th Cir. 2001) (affirming that voluntary payment defense barred claims to recover payments); *Hassen v. MediaOne of Greater Fla., Inc.*, 751 So.2d 1289, 1290 (Fla. Ct. App. 2000) (affirming dismissal of cable late fee claims under voluntary payment doctrine); *Telescripps Cable Co. v. Welsh*, 542 S.E.2d 640, 642 (Ga. Ct. App. 2000) (reversing refusal to dismiss cable late fee claims under voluntary payment doctrine); *Hill v. Telecom*, 2000 WL 264325 (N.D. Miss. 2000) (holding that cable late fees could not be recovered due to defense of voluntary payment); *McWethy v. Telecommunications*, 988 P.2d 356 (Okla. Civ. App. 1999) (holding that motion to dismiss on claim that late fee was an illegal penalty was properly granted under voluntary payment doctrine); *Horne v. Time Warner Operations, Inc.*, 119 F. Supp.2d 624 (S.D. Miss. 1999), *aff'd*, 228 F.3d 408 (5th Cir. 2000) (holding that cable operator's threat to discontinue service if subscribers failed to pay late fee was not duress sufficient to warrant recovery of voluntarily paid late fees); *Sanchez v. Time Warner, Inc.*, 1998 WL 834345 (M.D.Fla. 1998), *rehearing denied*, 1999 WL 1338446 (M.D. Fla. 1999)(holding that voluntary payment doctrine barred suit to recover cable

late fees); *Dreyfus v. Ameritech Mobile Comm., Inc.*, 298 Ill.App.3d 933, 700 N.E.2d 162 (1998) (holding that cellular phone service was not purchased under duress because it was not a necessity in that there were reasonable alternatives to cellular phone service).

B.

The Missouri Merchandising Practices Act Does Not Abrogate The Voluntary Payment Doctrine

Plaintiffs say that public policy does not allow the "erasure of an entire field of MPA claims by application" of the voluntary payment doctrine. App. Br. at 12. This is yet another exaggeration. The voluntary payment doctrine is an affirmative defense. It cannot "erase" a claim under the MMPA that a defendant has engaged in conduct that constitutes prohibited negative option billing. Indeed, no affirmative defense "erases" a properly pleaded claim. At best, such a defense concedes the viability of the claim, but establishes facts that demonstrate an affirmative avoidance of liability. *See* Rule 55.08. Under plaintiffs' theory of the MMPA, *any* affirmative defense is invalid because any set of facts that would result in a judgment for a defendant would "erase" the claim.

Nothing in Charter's motion, the trial court's decision, or the Court of Appeals' detailed analysis suggests that plaintiffs failed to state a claim under the MMPA. Plaintiffs' problem here is that they pleaded themselves into a well-established affirmative defense that bars recovery for the alleged billing error. *See, e.g., Harris v. ChartOne,* 362 Ill.App.3d 878, 841 N.E.2d 1028 (2005) ("The voluntary-payment doctrine applies to any cause of action which seeks to recover a payment on a claim of

right, whether that claim is premised on a contractual relationship or a statutory obligation, as in the case at bar.") (citing *Smith v. Prime Cable of Chicago,* 276 Ill.App.3d 843, 658 N.E.2d 1325, 1334 n. 8, 1335 n. 10 (1995) (affirming dismissal of cable late fee claims under the defense of voluntary payment)).

Moreover, their notion that the legislature somehow abolished the affirmative defense of voluntary payment for MMPA claims has no basis in the statutory language. Certainly, neither plaintiffs nor their *amici* point to any such language. Legislators know how to abolish common law affirmative defenses. For example, § 537.600 RSMo. expressly abrogates the common law defense of sovereign immunity in defined circumstances. Section 287.280.1 RSMo. of the Workers' Compensation Law expressly precludes employers in defined circumstances from raising certain common law affirmative defenses. Likewise, § 537.180 RSMo., expressly bars railroads and mines from asserting the common law defense of negligence by a fellow servant. The MMPA includes no such preclusions.

The notion that Missouri never recognizes common law defenses to statutory actions is unsupported by any authority, and for good reason. It's not true. Although the issue has rarely come up, it was decided in *Crews v. Tusher*, 651 S.W.2d 677 (Mo. App., S.D. 1983). In *Crews*, the plaintiffs sued for trespass and the cutting of timber on their land. The trial court found that plaintiffs consented to the entry on their land on one occasion, but not on another. Plaintiffs attacked the judgment, arguing that they pleaded a cause of

action for statutory trespass under § 537.340 RSMo., but the judgment was based on a common law trespass claim.

The court noted that the two causes of action are different. *See id*. at 679. But that didn't change the result because "consent bars a recovery upon either common law or statutory trespass." *Id*. Consent to a trespass is, of course, a common law defense that was applied in *Crews* to a statutory claim. *See also Muir v. Ruder*, 945 S.W.2d 33, 35 (Mo. App., E.D. 1997)(same).

Plaintiffs cite several cases for the proposition that claims under the MMPA cannot be waived. None of the cases actually hold that.

In both *Eisel v. Midwest BankCentre*, 230 S.W.3d 335 (Mo. banc 2007) and *Carpenter v. Countrywide Home Loans*, 250 S.W.3d 697 (Mo. banc 2008), the Court held that the voluntary payment doctrine did not apply to claims of violation of statutes prohibiting the unauthorized practice of law. The reason for so holding, however, was not "public policy" or some broad principle that common law defenses do not apply to statutory actions. Rather, it was a straightforward application of the doctrine: a layperson could not be expected to recognize the unauthorized practice of law. Therefore, a layperson could not waive or consent to the violation of the statute. *Eisel*, 230 S.W.3d at 339-340; *Carpenter*, 250 S.W.3d at 703.[2]

[2] *Eisel* and *Carpenter* are independently supported by statutory language that specifically addresses pre-suit payments: "Any person … who shall violate the foregoing prohibition … *shall be subject to be sued for treble the amount which shall have been paid*."

This analysis fits neatly into the classic statement of the doctrine because the Court concluded that the knowledge element was missing. If the plaintiff lacked knowledge that the conduct was the unauthorized practice of law, they could not consent to the conduct or waive it.

Here, by contrast, the plaintiffs were given a bill that charged them for a product that they claim they did not order — a paper channel guide. Plaintiffs also admit that they

---

§ 484.020 RSMo.(emphasis added). Such mandatory language leaves no room for waiver or consent. Virtually identical language in § 408.050 RSMo. abrogates the doctrine in usury cases. Absent such mandatory language, the voluntary payment doctrine would apply. *See Central Nat. Bank v. Haseltine,* 155 Mo. 58, 55 S.W. 1015 (1900), *aff'd. on other grounds,* 183 U.S. 132 (1901) (noting that prior to statutory enactment, "it was the rule in Missouri that 'one who voluntarily pays unlawful interest upon a usurious contract cannot recover it by suit.' ") (citations omitted). The MMPA contains no such language. In fact, although the pertinent statutory provision, § 407.200 RSMo., supplies a defense to bills for unordered merchandise, it does *not* say that the sender "shall" be subject to suit "for any and all sums of money paid" for such bills. § 408.050 RSMo. Missouri courts have long enforced such legislative distinctions. *See e.g., Central Nat. Bank,* 55 S.W. at 1016 (noting that while an early version of Missouri's usury statute created a set-off defense, it did "not give the borrow a right to sue for and recover usurious interest already paid.").

received the guide, and that the charge for the guide appeared as "a separate line item" on the monthly bill. The plaintiffs had to know whether they ordered the channel guide. It takes no special expertise, nor is it beyond a layperson's ken to realize that he or she has been billed for a product they did not order. And, as the Court of Appeals pointed out, selling a channel guide is not inherently unlawful like the unauthorized practice of law is. *See* App. Appx. at A-19.

Plaintiffs cite *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493 (Mo. banc 1992) for the proposition that the Court has already held that application of the MMPA cannot be waived. (The provisions at issue in *High Life* were restrictions on termination of liquor distributorship franchises.) Plaintiffs both misconstrue the effect of an affirmative defense and the holding of *High Life*.

Proving an affirmative defense to an MMPA claim does not "waive" the application of the statute — unless one says that any time a defendant wins the MMPA is "waived." That would be an absurd interpretation. The MMPA is certainly not a strict liability statute by any means. There may be a number of facts that an MMPA plaintiff does not have to prove as compared to a common law fraud plaintiff, but even the Attorney General in his *amicus* brief recognizes that more than a mere violation is needed for a private party to win damages under the statute. (This case does not concern the ability of the Attorney General to obtain injunctive relief in the absence of damages.)

Nothing in *High Life* or the Eighth Circuit case it quotes, *Electrical and Magneto Service Co., Inc. v. AMBAC International Corp.*, 941 F.2d 660 (8th Cir. 1991), suggests

that the statute prohibits *all* affirmative defenses or waiver as an affirmative defense to liability in particular. *Electrical Magneto* involved the choice of law — should the court apply South Carolina or Missouri law to a cause of action for the alleged wrongful termination of a franchisee located in Missouri. It did not decide or comment on what defenses could be raised under the MMPA.

High Life dealt with an outbound forum selection clause that would have required the case to be tried in Kentucky, not an affirmative defense. After approving such clauses generally, the Court held that it would be unreasonable to have a Missouri cause of action under the MMPA tried in Kentucky because that state had no similar statute. In addition, it would be unreasonable to require a Missouri plaintiff to litigate a Missouri claim in a Kentucky court, based on a statute that even Missouri courts had not interpreted at the time. *See id*. at 498-499.

Whitney v. Alltel, 173 S.W.3d 300 (Mo. App., W.D. 2005) provides no help to plaintiffs either. In that case, the court found that an arbitration agreement that prohibited class actions was unconscionable because it purported to take away a procedural device expressly permitted by Chapter 407. *See id*. at 309. The court also concluded that substantive provisions of the contract also were unconscionable because they limited the plaintiff's right to recover certain damages, and thus made an arbitral forum an ineffective method of vindicating the plaintiffs' rights. *See id*. at 314. The court did *not* hold that any affirmative defense was invalidated by the MMPA. Indeed, as noted above, the statute is silent as to the abrogation of any defense.

Plaintiffs' discussion of limitation of liability clauses is irrelevant. There is no allegation that such a clause even exists, and certainly Charter did not attempt to rely upon a limitation of liability provision. Thus, whether a defendant could "exculpate" themselves from MMPA liability by "inserting a clever phrase in a contract" is a *non sequitur*. Charter told the plaintiffs in a separate line item on the bill that it was charging them for a paper channel guide that they allege they didn't order.

Neither *High Life, Whitney*, nor limitation of liability clauses are relevant for an even more basic reason. In each of those instances, the defendant took action to alter the legal landscape before a claim even arose. By contrast, an affirmative defense is based upon the *plaintiff's* action or inaction — not the defendants. Here, it is the *plaintiffs'* conduct — not Charter's — that the voluntary payment defense is concerned with.

Telling someone how much they owe, and what they owe it for, hardly qualifies for the scorn that plaintiffs heap on it. If plaintiffs didn't want to pay for the guide, they should have just not paid for it. Consumer disclosure laws assume that consumers will act in their own best interests if they are told all of the facts about the transaction. Here, plaintiffs criticize full disclosure — not because Charter somehow deceived them by telling them what it was charging, but because the plaintiffs, with full knowledge that they didn't order the channel guide *and* that they were being charged for it, paid anyway without any compulsion or duress.

C.

Plaintiffs' Cases Are Easily Distinguished

Plaintiffs try to stretch an exception to the voluntary payment doctrine for payments made by governmental entities to a general "public policy" exception. But those cases rely on the principle that public officers who make or authorize mistaken payments are dealing with public monies. Such persons act as trustees for the people and the public fisc. Where public money is involved the doctrine does not apply. *See, e.g.*, *Lamar Township v. City of Lamar*, 261 Mo. 171, 169 S.W. 12, 15-16 (1914); *City of St. Louis v. Whitley*, 283 S.W.2d 490, 492-493 (Mo. 1955); *Engelman v. City of Dearborn*, 544 S.W.2d 265, 268 (Mo. App. 1976). But these same cases recognize that, as between private parties, the availability of the voluntary payment doctrine "is too well settled for argument." *Lamar Township v. City of Lamar*, 169 S.W. at 15.

Plaintiffs also cite *Niedermeyer v. Curators of the University of Missouri*, 61 Mo. App. 654, 1985 WL 1669 (1895). The result in *Niedermeyer*, however, is explained (as are many of the cases where plaintiffs say the courts were "hesitant" to apply the voluntary payment doctrine, *see* Part II.B, *infra*) by evidence that the plaintiff acted under duress. In other words, one of the essential elements of the doctrine was missing — the voluntariness of the payment. *See id*., 1895 WL 1699 at *4. Plaintiffs here do not allege that they acted under any duress.

Similarly, plaintiffs' reliance on cases such as *MacDonell v. PHH Mortgage Corp.*, 846 N.Y.S.2d 223 (A.D. 2007) is misplaced. The statute in *MacDonell* prohibited

charging fees for sending payoff documents on mortgages that defendant collected. *MacDonell* specifically relied on the decision in *Negrin v. Norwest Mortgage, Inc.*, 700 N.Y.S.2d 184, 189 (A.D. 1999). In both *MacDonell* and *Negrin*, the plaintiffs had to pay a fee prohibited by statute to receive payoff documents necessary for the plaintiffs to obtain a new loan. Thus, the plaintiffs were, as the *Negrin* court put it, "at [the lender's] mercy." 700 N.Y.S.2d at 193. They had no choice but to pay the fee. In other words, as in *Niedermeyer*, the payments were made under duress, and they were therefore not voluntary.

Plaintiffs cite selected cases from other jurisdictions, but they are easily distinguished or support Charter's position.[3]

For example, the Indiana Supreme Court acknowledged that it was adopting the minority rule in limiting the voluntary payment doctrine. *See Time Warner Entertainment*

[3] Plaintiffs also cite an unreported decision of a federal district court rejecting the voluntary payment doctrine in a case challenging the imposition of a late fee by a cable company. App. Br. at 50, *citing Steward v. Falcon Cable Holding Group. LP*, No. 98-CV-0349 (E.D. Mo, Nov. 10, 1998). (The *Steward* opinion is not available on LEXIS, Westlaw or PACER.) Plaintiffs fail to note or discuss the decision of a Missouri circuit court considering an identical claim, which held (as does the vast majority of states) that it was barred by the voluntary payment doctrine. *See Eppert v. Tele-Communications, Inc.*, No. 972-09146 (Mo., 22d Judicial Circuit, April 19, 2002), L.F. 86-95.

Co. v. Whiteman, 802 N.E.2d 886, 891-893 (Ind. 2004).[4] But part of the rationale for limiting the voluntary payment doctrine in *Whiteman* was the notion that failure to pay the late fee would result in an immediate termination of cable services, *see id*. at 891 — in other words, the Indiana court found there was duress. (This was a minority position, too. Most courts don't find cable television to be a necessity of life. *See Smith v. Prime Cable*, 276 Ill.App.3d at 852-853, 658 N.E.2d at 1332-1333).

Moreover, *Whiteman* relied on the proposition advanced by the dissent in *Putnam* that cable service was a form of government-sponsored monopoly that required the courts

---

[4] *Whiteman* relied on a decision in a Texas Court of Civil Appeals case, *TCI Cablevision of Dallas v. Owens*, 8 S.W.3d 837 (Tex. Civ. App. 2000), the *dissenting* opinion in a Wisconsin Supreme Court case *upholding* the application of the doctrine, *Putnam v. Time Warner Cable*, 255 Wis.2d 447, 649 N.W.2d 626 (2002), and the *dissenting* opinion in *Putnam* in the Wisconsin Court of Appeals, *Putnam v. Time Warner Cable*, 247 Wis.2d 41, 633 N.W.2d 254 (Ct. App. 2001) — all for the proposition that application of the voluntary payment doctrine was not completely unanimous. *See Whiteman*, 802 N.E.2d at 892. The Texas Supreme Court noted that the *TCI* case was right in saying there was a "split of authority," but only because *TCI* itself created such a split at the time by citing its own decision. *See BMG Direct Marketing v. Peake*, 178 S.W.3d at 771-772. Every other state except Indiana (which cited *TCI*) applied the doctrine. *See BMG Direct Marketing v. Peake*, 178 S.W.3d at 771-772.

to give cable customers "special protection" because they had no where else to go for the services offered by cable companies. 802 N.E.2d at 892. However true that might have been in 2002 (when the *Putnam* dissent was written) or in 2004 (when *Whiteman* was decided), it is no longer true at all. Persons seeking similar services can get them from satellite television, (in some places) from telephone companies, and from the Internet.

Plaintiffs cite *Pratt v. Smart Corp*., 968 S.W.2d 868 (Tenn. App. 1998), for the proposition that the voluntary payment doctrine should not apply where the defendant's conduct violates a statute. The Tennessee court acknowledged that it reached a different result on identical facts from cases in other jurisdictions because of a Tennessee Supreme Court decision. *Pratt*, 968 S.W.2d at 871-872. *See, e.g., Cotton v. Cor Health Information Solutions, Inc.*, 221 Ga. App. 609, 472 S.E.2d 92 (1996); *see also Harris v. ChartOne*, 362 Ill.App.3d 868, 841 N.E.2d 1028 (2005). But the violation of a statute by a defendant is not a basis to reject the voluntary payment doctrine in Missouri. *See Ferguson v. Butler County*, 297 Mo. 20, 247 S.W. 795 (banc 1923)(payment of criminal fine in excess of that authorized by statute barred by voluntary payment).

Plaintiffs cite *Criterion Ins. Co. v. Fulgham*, 219 Va. 294, 247 S.E.2d 404 (1978), where the Virginia Supreme Court declined to apply the voluntary payment doctrine to a significantly different set of facts than we have here. In *Criterion*, the insurance company mistakenly wrote a check to its insured for medical expenses he incurred in connection with an accident. But the policy did not provide coverage for medical expenses. The

insurance company immediately notified the insured — who had not yet cashed the check — and requested that he return it. He refused to do so.

The insurance company immediately stopped payment on the check. Fulgham sued on the check rather than on the insurance policy. The court declined to apply the voluntary payment doctrine because the recipient of the check did not cash it, and therefore did not rely on its receipt to his detriment. *See id*., 247 S.E.2d at 407. (And, it should be noted, there was no "payment" because the check was not paid.)

The Virginia Supreme Court hardly abolished the voluntary payment doctrine. Indeed, it later recognized that *Criterion* was one of the "decidedly few" exceptions to the voluntary payment doctrine that it had approved since it was first adopted in the Nineteenth Century. *Williams v. Consolvo*, 237 Va. 608, 379 S.E.2d 333, 336 (1989). In *Williams*, as in this case, the plaintiff knew all of the facts upon which he later based his claim before he made any payment at all. Thus, there was no inequity in applying the doctrine. *See id*., 379 S.E.2d at 337.

Plaintiffs put a good deal of reliance on *Indoor Billboard/Washington, Inc. v. Integra Telecom*, 162 Wash.2d 59, 170 P.3d 10 (2007) because it appears to be the only case that has held that the voluntary payment defense is inapplicable to a claim under a state consumer protection act.[5] But the *Integra* opinion's analysis was cursory, to say the least.

[5] *Putnam v. Time Warner Cable*, 255 Wis.2d at 469 n. 12, 649 N.W.2d at 637 n. 12, specifically applied the voluntary payment doctrine to a claim under that state's consumer protection act. Plaintiffs dismiss the Wisconsin Supreme Court's ruling as "peripheral."

After restating the doctrine and noting it is generally applied in Washington to contract cases, the sum total of its reasoning was: "We agree with Indoor Billboard that the voluntary payment doctrine is inappropriate as an affirmative defense in the CPA [Consumer Protection Act] context, as a matter of law, because we construe the CPA liberally." *Id*., 170 P.3d at 24.

The court offered no explanation why a "liberal construction" of the statute requires abrogating the voluntary payment defense. It did not rely on any particular language in the statute. By the same logic, *every* affirmative defense not specifically allowed by the statute would be abrogated. But invalidating a defense by judicial fiat is hardly appropriate, and the example of the Washington Supreme Court —which stands out by its singularity — should not be followed.

A liberal construction of the statute usually refers to finding that its language is extended to cover a particular claim that is not specifically mentioned, but which is within the spirit of the law. *See, e.g., State ex rel. LeFevre v. Stubbs*, 642 S.W.2d 103, 106 (Mo. banc 1982). There is no need for any construction of a statute, liberal or otherwise, when the statute is clear. *Metro Auto Auction v. Director of Revenue,* 707 S.W.2d 397, 401 (Mo. banc 1986)(declining to find that Director of Revenue had statutory authority to investigate alleged violations of odometer fraud statute, § 407.536

However, if the Wisconsin Supreme Court believed that the defense should not apply to the state's consumer protection act, it certainly would have reached a different result.

RSMo., where transferor of title submits certification of mileage). In interpreting a statute, the courts should be guided by what the legislative said — "not by what the Court thinks it meant to say." *Id.* at 401. The courts lack the power to "engraft upon the statute provisions which do not appear in explicit words or by implication from the words in the statute." *Id.* at 402.

Here, neither the language of the MMPA nor the Court's own civil rules suggest that the voluntary payment doctrine is unavailable as an affirmative defense where the facts warrant it. Indeed, the only possible reference one can glean from either source is Rule 55.08, which expressly recognizes waiver as an affirmative defense without qualification. And of course, the defense is founded on waiver. *Eisel v. Midwest BankCentre*, 230 S.W.3d at 339.

D.

The Principles Of Waiver Underlying The Voluntary Payment Doctrine Are The Same That Form The Basis For Waiver Of Breaches Of Warranty And For Waiver Of Tax Refunds In The Absence Of A Statutory Refund Procedure

Plaintiffs contend that the voluntary payment doctrine is outmoded because it compares unfavorably to breach of warranty claims or claims for tax refunds one can make with the Internal Revenue Service or the Missouri Department of Revenue. These analogies make no sense.

A breach of warranty is based on either an express promise or a promise implied by law. It is founded on a breach of contract by the defendant. And of course a breach of

warranty *can* be waived by the person purchasing the product if the waiver is conspicuous and in writing. *See, e.g.*, § 400.2-316 RSMo. The theory underlying § 400.3-316 is that waivers of warranty claims are effective if the consumer is told that the warranties are being excluded or modified, and the consumer voluntarily chooses to purchase the product anyway — exactly the kind of waiver we have in this case.

Likewise, the ability to obtain tax refunds is based upon statutes that alter the general rule that an overpayment of taxes cannot be recovered even if the tax is illegal or otherwise improperly collected. *See Kleban v. Morris*, 363 Mo. 7, 20, 247 S.W.2d 832, 840 (Mo. 1952). If the taxpayer does not comply with the refund statute, then he or she is not entitled to a refund regardless of the circumstances. *See, e.g.*, § 144.190 RSMo.; *Ford Motor Co. v. Director of Revenue*, 97 S.W.3d 458 (Mo. banc 2003).

Plaintiffs suggest that the voluntary payment doctrine should be abolished because if a consumer sends a check that is for less than an undisputed amount agreed to be due, the payee business could still seek payment of the balance. Of course, the fallacy with this hypothetical is that plaintiffs in this case did not pay a balance that was undisputed. If plaintiffs agreed that they owed for the channel guide, there would be no case at all. Plaintiffs in this case paid knowing that they did not order the channel guide and did not owe anything for it. Therefore, the debt was disputed.[6]

[6] Moreover, plaintiffs' hypothetical suffers from another deficiency. The use of checks to pay underlying obligations is governed by the Uniform Commercial Code. A check suspends the underlying obligation until it is paid. § 400.3-602(a) RSMo. Merely sending

The existence of a dispute also negates plaintiffs' claim that the Tentative Draft of the *Restatement (Third) of Restitution & Unjust Enrichment*, § 6 precludes the application of the voluntary payment doctrine as an affirmative defense in these circumstances. The Comments, for example, say that the rule proposed in the *Restatement (Third)* "does not impute knowledge of relevant circumstances of which the payor is not in fact aware." *See id*., comment e. But here, plaintiffs were in fact aware that they had not ordered a channel guide and they paid anyway. Nothing in the Tentative Draft of the *Restatement* suggests that a person who is actually aware of all of the circumstances (as plaintiffs were here), and who pays a debt the person knows is not owed, should be able to obtain restitution.

When the payor knows all of the relevant facts and pays a debt he or she knows was not incurred, the payor waives any claim to restitution. To hold otherwise makes no sense at all.

---

a check for less than the full amount to settle a disputed obligation without any indication that the check is intended as full satisfaction of a disputed debt is ineffective to discharge the entire underlying obligation. § 400.3-311 RSMo. Even if one sends a check to a business with a conspicuous notation that it is payment in full, it may not be effective in some circumstances. *See* § 400.3-311(c) RSMo. One can carp about the lack of reciprocity, but the rule is a practical one that prevents unscrupulous persons from making such notations on every check, whether the debt is actually disputed or not.

As for the rationale that a person ought to be able to pay for several years without any protest or attempt to bring the matter to the payee's attention (as plaintiffs did here) and then sue for damages, courts routinely reject it. For example, the Texas Supreme Court says that the underlying public policy favors the doctrine because a person "should not pay out his money, leading the other party to act as though the matter were closed, and then be in a position to change his mind and invoke the aid of the courts to get it back." *BMG Direct Marketing v. Peake*, 178 S.W.3d 763, 768-769 (Tex. 2005), *quoting Ladd v. Southern Colton Press and Manufacturing Co.*, 53 Tex. 172 (1880). The voluntary payment rule "also encourages discourse, rather than litigation, between customers and private enterprises" over disputed charges. *BMG Direct Marketing v. Peake*, 178 S.W.3d at 772.

Indeed, there is no reason to believe that had plaintiffs tried "discourse" — a simple telephone call when they got the first bill — that the whole matter would not have been resolved. Instead, plaintiffs' position would encourage potential plaintiffs to wait as long as possible, and file a lawsuit on the eve of the running of the statute of limitations. Under plaintiffs' theory they could successfully postpone the lawsuit to run up the damages even though they were fully aware from the first day they received a bill that they were being charged for a product they did not order. The voluntary payment doctrine, however, properly prohibits such opportunistic manipulation of claims. *Putnam*, 649 N.W.2d at 637 ("Abandoning the voluntary payment doctrine here would open the

door for a wide array of challenges to past payments in the name of protecting persons who were tardy in inquiring into and contesting demands for payment.")

E.

The Missouri Merchandising Practices Act Does Not Have Any Provision Evidencing "Specific Intent" To Abrogate The Affirmative Defense Of A Voluntary Payment Made With Full Knowledge Of The Relevant Facts

Finally, plaintiffs claim that allowing a defendant to rely on the affirmative defense of the voluntary payment doctrine would violate the "specific intent" of the legislature in enacting the MMPA. But plaintiffs focus on the underpinnings of the claim they allege in the petition — not the affirmative defense. Charter has not challenged the petition as failing to state a claim under the MMPA for allegedly using negative option billing. (Of course, for purposes of a motion to dismiss, the Court assumes the plaintiffs' properly pleaded facts are true, whether they can ultimately be proven or not.)

Plaintiffs ask what would happen if a defendant asserted as a defense to an MMPA claim that the plaintiff could not recover for an economic loss. They answer their own question — the statute permits such a recovery.[7] And as noted earlier, plaintiffs do not

[7] In support of their argument that the MMPA purportedly trumps common law defenses, plaintiffs cite Missouri's economic loss doctrine. App. Br. at 33. Plaintiffs suggest that the MMPA and the economic loss doctrine conflict, and that it goes without saying that the MMPA trumps the doctrine. Plaintiffs then go on to reason that since the MMPA easily trumps the economic loss doctrine, it must easily trump the voluntary payment

cite any provision of the statute, or the regulations promulgated under it, that abrogates the affirmative defense of the voluntary payment doctrine. *See In re Abatement Environmental Resources, Inc.,* 301 B.R. 830, 834 (D. Md. 2003) (in reviewing applicability of defense, observing that there is "no identified rationale to suggest that the General Assembly intended the [Maryland Uniform Fraudulent Conveyance Act] to be used as an exception to the 'voluntary payment' doctrine.").

Plaintiffs say that the doctrine is limited to a narrow set of circumstances. App. Br. at 34. Charter agrees. And this is one of those narrow situations. That may be illustrated by what is *not* alleged. Plaintiffs do *not* allege that Charter sent them a lump sum bill that

---

doctrine, too. The fallacy here is that the economic loss doctrine could never apply to — or conflict with — an MMPA claim. This is because the common law specifically reserves the doctrine for "tort" actions. *Wilbur Waggoner Equipment and Excavating Co. v. Clark Equipment Co.,* 668 S.W.2d 601, 602 (Mo. App. E.D. 1984). By contrast here, the voluntary payment doctrine is not so limited. It applies to any cause of action which seeks to recover payment of a claim of right, whether the claim is premised upon equitable principles, *see Shrock,* 447 S.W.2d at 809, a contractual relationship, *see Benton*, 249 S.W.3d at 878, or a statutory requirement, *see Ferguson,* 297 Mo. at 20, 247 S.W. at 795, as in the case at bar. *See also Harris,* 841 N.E. 2d at 1031 (citing *Smith,* 658 N.E.2d at 1334, n. 8, 1335 n. 10). Plaintiffs' reliance upon the economic loss doctrine is not helpful.

failed to identify a separate charge for the channel guide, thus concealing the fact that Charter was charging for it. Plaintiffs do *not* allege that Charter misrepresented or incorrectly identified the charge for the channel guide as a charge for some other product or service. Plaintiffs *do* allege that Charter identified the charge for the channel guide, and that the charge was in "a separate line item" so that anyone reading the bill would know what was being charged for and how much was being charged for it.

The Attorney General, like the plaintiffs, focuses most of his argument on whether the petition states a claim under the MMPA — an issue that is not in dispute on this appeal. The "liberal construction" both the plaintiffs and the Attorney General argue for relates to the allegations of a petition and whether certain conduct is covered by the statute. They do not cite any Missouri case where a court has decided that a liberal construction of the statute authorizes a court to simply invalidate an affirmative defense. Certainly, such a result must be tied to some statutory language. And abrogation of the voluntary payment doctrine or waiver finds no source in the statutory language.

Moreover, the statute was enacted in 1975 and amended several times since without adding any provision that invalidates the voluntary payment doctrine, or any affirmative defense for that matter. The legislature could hardly be unaware that the doctrine has been recognized by Missouri for well over a century, or that it has been used in situations where persons have tried to recover payments for charges they claim were unjustified or even illegal. Yet, unlike tax statutes, which for example, now allow a taxpayer to seek a

refund if he or she pays an illegal tax, the MMPA has no provision prohibiting the use of such the voluntary payment defense.

The Attorney General, at bottom, agrees with Charter that a "consumer who, fully knowing the existence and purpose of a charge and paying the same without protest" cannot recover under the MMPA. AG Brief at 11. The Attorney General prefers to rely on these facts as showing a failure to demonstrate that an "ascertainable loss" was the result of the allegedly "unlawful act," *i.e.*, a lack of causation. AG Brief at 11-12 & n.4.[8] But this contention merely serves to confirm that an affirmance here would have no effect on the scope or operation of the MMPA.

The consumer groups' *amicus* brief largely parrots the plaintiffs' brief. Its citation to English and Australian law is not helpful. Nor is its self-referential reliance on its own publications. *See* Gateway Br. at 14 nn.20-22. (The attempt to blame the state of the Consumer Confidence Index on the voluntary payment doctrine, *id.* at 19 n.41, is, not to put too fine a point on it, a stretch.) The consumer groups argue that consumers are under some duress to pay their bills because of the fear of the consequences, such as the loss of health care benefits. *See, e.g., id*. at 17.

[8] The Court may, of course, affirm the judgment on any ground supported by the record — even one not relied on by the trial court. *Missouri Soybean Association v. Missouri Clean Water Commission,* 102 S.W.3d 10, 22 (Mo. banc 2003).

But there is no allegation in the petition that plaintiffs were under any kind of duress at all. Plaintiffs do not, for example, plead that they would lose their cable service if they failed to pay for the guide. Even if they had made that allegation, it wouldn't amount to duress sufficient to make the payment involuntary because cable television service is not a necessity of life such as health care, utilities, or other requirements of safety, health or welfare. *Cf. Smith v. Prime Cable*, 276 Ill.App.3d at 852-853, 658 N.E.2d at 1332-1333. (No duress from the threat of terminating cable television service because television is not a necessary service). Moreover, consumers have many options for obtaining the television programs offered by cable, such as satellite television or the Internet.

Plaintiffs rebuke Charter for supposedly claiming that the "sky is falling," and attempting to "stem a tide that is not washing in." App. Br. at 30. This empty rhetoric is belied by plaintiffs' own brief. It is plaintiffs and their *amici* who cry that the sky is falling, because Charter seeks to have the Court approve the application of a defense in a narrow set of circumstances that Missouri courts have found for 150 years to be proper for the assertion of the affirmative defense of the voluntary payment doctrine. It is a simple and fair rule of law — when the plaintiffs (as they did here) knowingly and voluntarily pay a charge that is fully disclosed on the bill, even though they were under no legal or moral obligation to do so, they cannot come back years later and recover the payment.

The judgment should be affirmed.

II.

The History Of The Voluntary Payment Doctrine Shows A Consistent Application Of Its Principles — A Voluntary Payment Made With Full Knowledge Of The Facts Is A Defense To Claim Of Restitution Regardless Of Plaintiff's Theory Of Liability

A.

Fraud Or "Other Improper Conduct" Negates The Affirmative Defense Of Voluntary Payment Only If It Causes A Person To Act Without Full Knowledge Of The Facts Or Affects The Voluntariness Of The Payment

In their second point, plaintiffs contend that the statutory fraud alleged in the petition that created the controversy in the first place — alleged use of a negative billing option — forecloses the affirmative defense of waiver under the voluntary payment doctrine because "fraud or other improper conduct" is alleged to be involved in the transactions. Plaintiffs offer a skewed history of the doctrine accompanied by an appendix listing cases where the courts were "hesitant" to apply the doctrine. But plaintiffs confuse the elements of the defense. To bar a claim with the voluntary payment doctrine, a defendant must show that the payment was made knowingly — *i.e.*, with full knowledge of the relevant facts — and voluntarily.

The question of fraud or "other improper conduct" that initially creates the controversy does not enter into the equation. Rather, the issue is whether the fraud or other improper conduct negates either the plaintiffs' knowledge or the voluntariness of their payment. *See, e.g.*, C.J.S. *Payment* § 170 ("[W]here a payment is made with full

knowledge of the facts, and the fraud, if any, is not an inducement to the payment, the rule as to voluntary payments applies, and the payment cannot be recovered.").

Here, there is no allegation of fraud or other improper conduct beyond that which originally created the controversy — sending an itemized bill for a product the plaintiffs say they did not order. There is no allegation that Charter engaged in any other fraudulent conduct, whether common law fraud or a deceptive practice under the MMPA. If, for example, Charter had sent a bill with a lump sum amount that covered all of the services and products it was providing, including those that were not ordered, so that plaintiffs could not tell whether they were paying for the channel guide — that could be considered a deceptive practice. This is the sort of claim found in cases relied on by plaintiffs in such cases as *Time Warner Entertainment Co. v. Whiteman*, 802 N.E.2d 886 (Ind. 2004).

In *Whiteman* (admittedly an outlier, *see id*. at 892 and Part I. C., *supra*), the allegation was that the late fee charged by the cable company was deceptive because it purported to represent that the cost of collecting late payments was more per account than it actually was, thus converting a liquidated damage provision into an alleged penalty. *See id*. at 887. The court also found that the doctrine did not apply because the plaintiffs were presented with an "immediate deprivation of goods or services if they did not pay" the late charge. *See id*. at 891. There is no such allegation in this case.

This brings us to the second requirement for application of the doctrine — that the payment be voluntary. The voluntariness of the payment has by far given rise to the most cases in Missouri. Indeed, by their own description in their appendix, at least eight of the

cases cited there were decided on the voluntariness issue. Where the plaintiff is subjected to duress or other improper compulsion, the payment is not voluntary. The defense fails, not because it is invalid or because the court is "hesitant" to apply it, but because the defendant did not prove an essential element of the defense — that the payment was voluntary.

The so-called "long and tumultuous history" of the voluntary payment doctrine is a figment of the plaintiffs' imagination. The history is long, but hardly tumultuous or even controversial. Plaintiffs find a reluctance to apply the doctrine because reported cases applying it have not flooded the law books. They cite four cases decided since 1923 where the defense was found to be successful.[9] There are others.[10]

---

[9] *Ferguson v. Butler County*, 247 S.W. 795 (1923); *American Motorists Ins. Co. v. Schrock*, 447 S.W.2d 809 (Mo. App. 1969); *Jurgensmeyer, v. Boone Hospital Center*, 727 S.W.2d 441 (Mo. App., W.D. 1987); and *Benton House LLC v. Cook & Younts Insurance, Inc.*, 249 S.W.3d 878 (Mo. App., W.D. 2008).

[10] *See, e.g., Franke v. City of St. Louis*, 249 S.W. 379 (Mo. 1923)(claim for recovery of taxes barred because plaintiffs had full knowledge of facts and decided to pay rather than contest the assessment); *R.S. Jacobs Banking Co. v. Federal Reserve Bank*, 34 S.W.2d 173 (Mo. App. 1930)(bank could not recover funds paid to failed bank because it made payments voluntarily with full knowledge of the facts); and *Watkins v. Floyd*, 492 S.W.2d 865 (Mo. App. 1973)(payments by sheriff at his own execution sale later voided by court could not be recovered because he made payments with full knowledge of facts).

And the notion that the doctrine has fallen into disuse nationwide is belied not only by the Western District's opinion in *Benton House* earlier this year, but also by the numerous recent cases that Charter cited at the outset of this brief that apply the doctrine. Many of those cases specifically apply it to cable customer claims. *See, e.g.*, *Hassen v. MediaOne of Greater Florida*, 751 So.2d 1289, 1290 (Fla. App. 2000); *Telescripts Cable Co. v. Welsh*, 542 S.E.2d 642-643 (Ga. App. 2000)(Georgia has a statute making a voluntary payment a defense); *Smith v. Prime Cable of Chicago*, 276 Ill.App.3d 843, 658 N.E.2d 1325 (1995); *Horne v. Time Warner Operations, Inc.*, 119 F.Supp 2d 624, 628-630 S.D. Miss. 1999), *aff'd*, 228 F.3d 408 (5th Cir. 2000); *Dillon v. U.A. Columbia Cablevision*, 100 N.Y.2d 525, 526, 790 N.E.2d 1155, 1156 (2003); *McWethy v. Telecommunications, Inc.*, 988 P.2d 356, 357-358 (Okla. Civ. App. 1999); *Putnam v. Time Warner Cable*, 255 Wis.2d 447, 649 N.W.2d 626 (2002); *Sanchez v. Time Warner, Inc.*, 1998 WL 834345 (M.D. Fla. 1998).

The cases applying the voluntary payment doctrine have not been limited to just claims about alleged penalties. *See King v. First Capital Financial Services Corp.*, 215 Ill.2d 1, 828 N.E.2d 1155 (2005)(unauthorized practice of law); *Morales v. Copy Right, Inc.*, 28 A.D.3d 440, 813 N.Y.S.2d 731 (2006)(plaintiffs paid bills for photocopying that disclosed the amount charged without protest) and *Sid Patterson Advertising, Inc. v. Giuffre Auto Group, LLC*, 17 Misc.2d 1127, 851 N.Y.S.2d 74 (2007)(defendant not entitled to discount on invoices paid without protest where amount charged was fully disclosed).

As with any affirmative defense, the failure to prove the elements of the defense — voluntary payment with full knowledge of the relevant facts — means it is unsuccessful. Plaintiffs have not cited a single case where Missouri courts have pondered, Hamlet-like, whether the defense should be allowed at all as plaintiffs imply. Rather, it has been recognized for more than 100 years, and applied throughout that time where the facts warrant it.

B.

Appellants' History Of "Hesitant" Court Decisions Is Misleading Because It Attributes The Refusal To Apply The Defense To Qualms About Its Validity When The Decisions Actually Conclude That The Defendant Failed To Prove One Or More Elements Of The Defense

Plaintiffs' list of 19 cases where the courts were "hesitant" to apply the doctrine is likewise misleading.

In nine cases, the court concluded that the defense failed because the payments were not voluntary. *See Westlake & Button v. City of St. Louis*, 77 Mo. 47 (1882) (finding in a dispute between a corporation and the City of St. Louis regarding charges for water licenses, that the voluntary payment doctrine did not apply because the corporation had "objected and protested [to making payment] from the start," and because the corporation was under duress each time payment was made because it feared having the water turned off which would force the business to shut down); *Niedermeyer v. The Curators of the University of Mo.*, 61 Mo.App. 654 (1895) (finding in a suit by a law student against the

University of Missouri, that the university's act of compelling the student to pay higher tuition fees than originally agreed to in order to remain in school amounted to duress and therefore the voluntary payment did not apply); *Am. Brewing Co. v. City of St. Louis*, 86 S.W. 129 (Mo. 1905) (holding that the voluntary payment doctrine did not preclude recovery of overcharges under the duress exception in a dispute over the rates charged for water used by a brewery, as the brewery was completely dependent on the city for water and would have to close down if the city shut the water off); *Am. Mfg. Co. v. City of St. Louis*, 192 S.W. 399 (Mo. 1916) (holding that taxes paid to a license collector were not voluntarily paid by the plaintiff, and were therefore recoverable, since duress existed at the time the plaintiff paid the unconstitutional licensing fees based on the licensing agent's power to shut down the plaintiff if the fees went unpaid); *Miss. Valley Trust Co. v. Begley*, 252 S.W. 76 (Mo. 1923) (finding that duress existed, and that the defendant's could seek to recover the funds at issue, when the plaintiff trust company threatened criminal action against the defendants' son if they did not sign and take responsibility for the notes their son had obtained via fraud); *White v. McCoy Land Co.*, 87 S.W.2d 672 (Mo. Ct. App. 1935) (finding in suit by plaintiff to recover money obtained by defendant via "extortion" and "coercion" that existence of duress precluded defendant from relying on voluntary payment doctrine to prevent recovery of funds by the plaintiff); *Freund Motor Co. v. Alma Realty*, 142 S.W.2d 793 (Mo. Ct. App. 1940) (finding in a dispute between landlord and tenant that in regards to rent overpayments the voluntary payment doctrine did not apply because the rent payments were made under compulsion (duress)

for fear of invoking the forfeiture provisions of the lease); *Mfrs. Cas. Ins. Co. v. Kansas City*, 330 S.W.2d 263 (Mo. Ct. App. 1959) (finding that the taxes collected pursuant to an invalid statute could be recovered by the plaintiff, even though no protest was made when the taxes were paid, because the "compulsion" that attaches to paying taxes in order to avoid the harsh penalties of non-payment creates an implied duress making the payment involuntary); *Ticor Title Ins. Co. v. Mundelius*, 887 S.W.2d 726 (Mo. Ct. App. 1994) (finding that the voluntary payment doctrine did not apply, as payment made by title company was "made in performance of its duty as" an escrow agent, and thus was not made voluntarily, taking it outside the confines of the voluntary payment doctrine).

In three cases the court declined to apply the doctrine because the plaintiff sought to recover public funds. *See Lamar Township. v. City of Lamar*, 261 Mo. 171, 169 S.W. 12 (1914) (recognizing in a dispute over tax revenue between two municipal corporations that while the voluntary payment doctrine generally precludes recovery of payments voluntarily made, in the context of public funds an exception must be made and such funds must be recoverable); *City of St. Louis v. Whitley*, 238 S.W.2d 490 (Mo. 1955) (citing *Lamar*, the court found that the voluntary payment doctrine does not prevent recovery of voluntary payments made by public officials out of public funds, thereby allowing the city to recover monies paid to a dog catcher who never actually engaged in the act of collecting stray dogs); *Engleman v. City of Dearborn*, 544 S.W.2d 265 (Mo. Ct. App. 1976) (relying on *Lamar*, in a dispute between the estate of a county collector and the County, the court recognized that the voluntary payment doctrine does not apply to

transactions involving public funds and therefore reversed the lower courts granting of defendants' motion to dismiss).

In one case, the court held that plaintiff did not have full knowledge of the facts, thus precluding application of the defense. *See Commercial Union Ins. Co. v. Farmers Mut. Fire Ins. Co.*, 457 S.W.2d 224 (Mo. Ct. App. 1970) (holding in a dispute between insurance companies involving payments to an insured having policies with both companies, that the voluntary payment doctrine only applies in the context of a volunteer who pays money having "full knowledge of all the facts in the case," and that since the plaintiff was unaware of the existence of the other firm's policy this element was not met).

In the two most recent cases, in *Eisel v. Midwest BankCentre*, 230 S.W.3d 335 (Mo. banc 2007) and *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697 (Mo. banc 2008), the Court found that the missing element was the plaintiffs' lack of full knowledge of the facts. The Court did not foreclose the application of the voluntary payment doctrine in every case involving consumers. Plaintiffs fail to make the crucial distinction between the ability of a layperson to recognize the unauthorized practice of law and the ability to realize that one has been charged for an unwanted product.

In *Eisel*, the plaintiffs borrowed money from the defendant to buy real property. The bank charged them a "document preparation fee" for completing the mortgage form. The Court held that filling out such forms for a valuable consideration was the unauthorized practice of law. Thus, collection of the fee violated § 484.020. The Court held that the

voluntary payment doctrine did not apply. But the reason it gave had nothing to do with any of the reasons plaintiffs propose here for discarding the doctrine.

Rather, the Court said that the voluntary payment doctrine is based on waiver and consent. *See id*. at 339. The Court simply held that § 484.020 — prohibiting the unauthorized practice of law — was not a provision of law that a person could waive or consent to. "To hold otherwise — that a customer, not a mortgage lender, would be burdened with the responsibility to recognize the unauthorized business of law and be barred from recovery due to having made a voluntary payment — would be illogical." *Id*. at 339-340. The Court reached the same conclusion in *Carpenter* on the same point. *See id*. at 703.

Whether conduct is or is not the unauthorized practice of law as defined in the statute is not readily apparent to a non-lawyer. Indeed, the specific conduct at issue in *Eisel* and *Carpenter* was a matter of controversy among lawyers in this state until the court settled the issue. And courts in other states have reached a different result on similar facts. *See, e.g., King v. First Capital Financial Services Corp.*, 215 Ill.2d 1, 828 N.E.2d 1155 (2005). But it takes no special expertise or training to know whether you have been charged for a product you have not ordered.

As plaintiffs' amended petition makes clear, both Huch and Carstens knew from the time they received their first bill in 2005 that they were being charged for a channel guide that they claim they did not order. Yet, they went ahead and paid for it anyway for

months before bringing this action. That is a waiver, and (as *Eisel* recognizes) a firm basis for application of the voluntary payment doctrine.

Plaintiffs' summary of the cases is misleading in other respects as well. For example, plaintiffs characterize *Wilkins v. Bell's Estate*, 261 S.W. 927 (Mo. App. 1924) as holding that the voluntary payment doctrine does not apply whenever there is improper conduct on the part of the payee. App. Br. at 9, 21. The *Wilkins* court actually held for the defendant on the basis of the voluntary payment doctrine. Its comment about "improper conduct" was a quotation from a now long-discontinued treatise restating the rule. *See id*. at 928.

In *Courtney v. Boswell*, 65 Mo. 196, 1877 WL 9137 (Mo. 1877), cited by plaintiffs as support for a court "hesitant" to apply the defense, the court rejected the voluntary payment defense, not because it had doubts about its validity, but because the defendant failed to plead it in his answer. *See id*., 1877 WL 9137 at *3. In *Divine v. Meramec Portland Cement and Material Co.*, 353 S.W. 444 (Mo App. 1923), the court found the doctrine inapplicable — again, not because it thought it invalid, but because the payment was made to a third party, not the defendant. *See id*. at 447. And *National Enameling & Stamping Co. v. City of St. Louis*, 328 No. 648, 0 S.W.2d 593 (1931) was not a fraud case, as plaintiffs imply, but one where the issue was the existence of duress. *See id*., 328 No. 653-656, 40 S.W.2d at 596-596.

The skepticism that the a federal district court showed concerning the application of the voluntary payment doctrine to an action under Illinois' consumer fraud act, *Brown v.*

SBC Communications, Inc., 2007 WL 684133 (S.D. Ill., March 1, 2007), must give way to the Illinois Supreme Court's decision in *King v. First Capital Financial Services Corp.*, 215 Ill.2d 1, 828 N.E.2d 1155 (2005). Plaintiffs also cite *Brown* for the "interesting" comment by the court that the plaintiffs in that case paid the defendant under a mistake of fact as to whether they had actually ordered the services. App. Br. at 55. That is *not* the allegation here. Even plaintiffs have to concede that the petition alleges that they did not order the channel guide from Charter, and it gives no hint that they were mistaken as to that fact. Thus, *Brown* by its own terms doesn't apply.

Curiously, plaintiffs ignore another trial court decision directly on point that held that the voluntary payment doctrine bars a consumer act claim under exactly these circumstances. *Hurley v. Charter Communications, Inc.*, No. 06-L-655 (St. Clair County Circuit Court, February 28, 2007), L.F. 96-102. We say "curiously" because plaintiffs' counsel in this case were also plaintiffs' counsel in *Hurley* and the claims in *Hurley*, were *identical* to those in this case. Equally curious is that plaintiffs did not appeal the trial court's decision in *Hurley* — most likely because such an appeal would have undoubtedly been unsuccessful.

There is no provision in the Illinois consumer act that would account for a different result in *Hurley* than was reached here by the trial court and the court of appeals under the MMPA. Illinois, like Missouri, gives its consumer act a liberal construction, and Illinois has been equally zealous in protecting consumers.

Plaintiffs also cite an alternative holding in *Ramirez v. Smart Corp.*, 371 Ill.App.3d 797, 863 N.E.2d 800 (2007) to the effect that the voluntary payment doctrine does not apply to a claim under an Illinois statute that specifies how much can be charged for medical records. App. Br. at 54. The primary holding in the case is that the defendant did not establish the voluntary payment defense as a matter of law because the plaintiff provided evidence that she made the payment under duress — obtaining the records was a necessity and she had no reasonable alternative. *See id*., 863 N.E.2d at 802-803. The *Ramirez* court distinguished *Harris v. ChartOne*, 362 Ill.App.3d 878, 841 N.E.2d 1028 (2005), which had applied the doctrine to defeat a plaintiff's similar claim, on the ground that the plaintiff (unlike in *Harris*) had an affidavit showing that she could not obtain the records elsewhere. *See id*. at 803. The court also said that there was a genuine issue of fact as to whether the plaintiff made a mistake of fact, thus negating the full knowledge requirement. *See id*. at 805-806.

Every case involving the voluntary payment doctrine starts with a request for payment that is unjustified for some reason. As an affirmative defense, reliance on the voluntary payment doctrine concedes as much. The battleground for the application of the defense is whether the plaintiff made the payment with knowledge of the relevant facts and made that payment voluntarily. If, due to fraud, the plaintiff did not have full knowledge of the facts, then the defense fails. If, due to fraud, the plaintiff did not make the payment voluntarily because the plaintiff acted under duress or due to improper compulsion, the defense fails. But if, despite the alleged fraud, the plaintiff had full

knowledge of the facts (including the facts constituting the alleged fraud) and still made the payment without compulsion or while under any duress, the defense succeeds.

The voluntary payment doctrine as applied in this case is not inconsistent with the MMPA or the principles underlying it. Even the Attorney General agrees that, at least in the narrow situation we have here — where persons have full knowledge of that they have been charged for a product they did not order, and they pay without compulsion or under duress — there is no liability under the MMPA. AG Brief at 12-13.[11]

This is a textbook example of the application of the voluntary payment doctrine. Plaintiffs allege that they did not order the channel guide, but Charter sent them the channel guide any way. Charter disclosed in a separate line item on the monthly bill that it was charging for the channel guide, and plaintiffs knew it. Plaintiffs paid the bill without protest for months.

To borrow the Attorney General's words (if not his rationale), "when a consumer knowingly and voluntarily accepts and pays for merchandise," dismissal of an MMPA claim on the basis of the voluntary payment doctrine is absolutely consistent with the letter *and* the spirit of the statute.

---

[11] The Attorney General relies on the lack of causation in such situations. AG Brief at 12-13. The Attorney General also contends that he may bring an action for an injunction, civil penalties, and other relief, regardless of whether any consumer has actually suffered any ascertainable loss. AG Brief at 13. That type of claim is not at issue on this appeal.

III.

The Trial Court Properly Construed The Petition To Allege That Plaintiffs Voluntarily Paid Their Charter Bills With Full Knowledge That The Bills Had A Line Item Charge For A Product That Plaintiffs Knew They Did Not Order

A

The Trial Court Applied The Proper Standard For Consideration Of A Motion To Dismiss Where The Face Of The Petition Shows The Existence Of An Affirmative Defense

There is something Orwellian about plaintiffs' last argument. They claim, for example, that the petition should be construed "favorably" to mean they didn't know whether they ordered the channel guide when paragraph 9 alleges that they didn't ask for the guide. L.F. 3. Plaintiffs claim that it is improper to infer from their allegations that they "were, or should have been, aware that their cable bills separately listed a monthly charge for the guide." App. Br. at 57. This in the face of an allegation that the "Guide has been appearing as a separate line item on the monthly bills of Plaintiffs." L.F. 3.

Plaintiffs even say that it is improper to infer that they paid the bills without objection or protest when the petition gives no hint of any such objection or protest. (The petition doesn't specifically allege that plaintiffs paid the bills, but presumably they don't object to that inference — otherwise, they are out of court for failure to sustain an ascertainable loss. *Cf.* AG Brief at 12-13.)

While the Court accepts all properly pleaded facts as true and gives the pleadings their broadest intendment, *Bachtel v. Miller Nursing Home District*, 110 S.W.3d 799, 801

(Mo. banc 2003), the Court does not accept the pleader's conclusions. *Jurgensmeyer,* 727 S.W.2d at 443-444 (disregarding the plaintiff's conclusory allegation that he paid under duress and thus the doctrine barred his claim). The Court also gives the pleader the benefit of all *reasonable* inferences, *State ex rel. Union Electric Co. v. Dolan,* 256 S.W.3d 77, 82 (Mo. banc 2008), but the Court need not avert its eyes from the reasonable inferences that demonstrate that the plaintiff has pleaded facts that show the existence of an affirmative defense. With these principles in mind, we turn to each of the challenged facts and inferences from the facts to determine whether they are reasonable.

B.

Each Of The Facts Showing The Existence Of The Affirmative Defense Of Voluntary Payment On The Face Of The Petition Was Expressly Pleaded Or Was The Only Reasonable Inference From The Facts Pleaded

Plaintiff's first complaint is that the trial court (and the Court of Appeals) concluded that plaintiffs "knew exactly what services they ordered." App. Br. at 57. But the sole alleged premise of this suit rests upon plaintiffs knowing what they did — and did not — order from Charter. The petition alleges that "No plaintiff requested the Guide from Defendant Charter." L.F. 3. What are we to make of a claim that it is improper or unreasonable to infer from this allegation that plaintiffs knew they did not order the channel guide? Isn't that an accurate restatement of the allegation in the petition? Plaintiffs offer no explanation why such an inference is unreasonable.

The plaintiffs' second complaint is that the courts below should not have concluded that plaintiffs "were, or should have been, aware that their cable bills separately listed a monthly charge for the Guide." App. Br. at 57. The petition alleges: "The Guide has been appearing as a separate line item on the monthly bills of Plaintiffs. . . . Defendant Charter charged and continues to charge the Plaintiffs $2.99/month or $3.24/month for said Guide." L.F. 3.

The petition lacks any allegation that plaintiffs were *not* aware of what the Charter bill said. Nor do plaintiffs plead anywhere that Charter somehow did something that prevented plaintiffs from finding out that they were being charged for the channel guide. To the contrary, the petition specifically alleges that the charge for the channel guide was expressly disclosed as "a separate line item" on the monthly bills. L.F. 4. Plaintiffs try to avoid the effect of their own plain statement of the facts by suggesting that the charge was "small," and that they were supposedly unable to discern that the channel guide they received was the "paper guide" for which they were charged. App. Br. at 59 n.21 & 60. These allegations were missing from the petition, and as the Court of Appeals held, App. Appx. at A-16, cannot be considered on a motion to dismiss.

Consumers — like any other contracting party — are presumed by the law to read the documents they receive governing their legal relationships unless there is an affirmative effort to prevent them from doing so. *Warren v. Paragon Technologies Group, Inc.*, 950 S.W.2d 844, 846 (Mo. banc 1997)(collecting cases). Certainly, plaintiffs cite no cases that even hint at the proposition that parties know or are presumed to know only "large"

amounts on bills they receive. Plaintiffs' brief says the charges were "inconspicuous and unrecognized," App. Br. at 61 — a claim that is conspicuous by its absence from the allegations of the petition.[12] Moreover, the petition does *not* plead that plaintiffs were baffled by receiving a channel guide and billed for a "paper guide." The Court of Appeals chastised plaintiffs for adding allegations on appeal that were never made in the trial court. *See* App. Appx. at A-16. Such attempts in this Court should not be countenanced either.

[12] The line items for the paper guides were in the same size type as the charges for cable service and appeared in the same list of "Monthly Charges." L.F. 111, 113. Where the petition alleges the existence of a document, the plaintiff may plead it according to its legal effect or attach it as an exhibit. Rule 55.22. Here, *plaintiffs* ultimately attached samples of the bills to their surreply memorandum in opposition to the motion to dismiss. *See* L.F. 111, 113. But even if they had not, the Court may consider the text of such documents without taking Charter's motion out of the realm of a motion to dismiss. *See, e.g., Silver v. H & R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997). *See also* 5B Charles Alan Wright & Kenneth W. Graham, Jr., FEDERAL PRACTICE AND PROCEDURE § 1357. Moreover, plaintiffs can hardly be heard to complain of the Court's consideration of documents *they* attached and placed in the record — particularly when they made no such complaint in the trial court. *See, e.g., Rosenfeld v. Thoele*, 28 S.W.3d 446, 449 (Mo. App., E.D. 2000).

Plaintiffs' third complaint is the inference that they "possessed full knowledge at the time of payment that they were being billed for services [actually a product] which they allegedly never asked for or agreed to." App. Br. at 57. Once again plaintiffs offer no explanation of why such an inference from the plain statement in the pleadings should not be drawn. If (as plaintiffs allege in the petition) they did not order the channel guide, if the guide was billed as a separate line item, and if the plaintiffs paid the bill — what other inference can be drawn? What knowledge was missing and what in the petition would support an inference that there was something that plaintiffs didn't know that would make their payments of the bill without full knowledge?

Plaintiffs' last complaint is that there is supposedly no basis for the inference that they "repeatedly paid the amount billed for the Guide without objection or protest." App. Br. at 57. Presumably, plaintiffs do not quarrel with inference that they paid the amount billed, including the amount billed for the channel guide. As noted above, if plaintiffs did not pay for the guide, then they have no claim at all under the MMPA because they suffered no ascertainable loss. *See* § 407.025 RSMo.; AG Brief at 12-13. Plaintiffs knew as early as April 2005 that they did not order the guide, and they knew from the moment they received the first bill that they were being charged for it.

The petition has no allegation that plaintiffs protested or objected or in any way tried to make known to Charter that they did not want the guide or that they would not pay for it. There is no allegation that Charter somehow forced the plaintiffs to pay, or Charter exerted pressure to pay the bill that amounted to duress or compulsion. The petition

alleges that plaintiffs paid the bill knowing that the charges included a separate line item for a product they claim they did not order. Indeed, the bulk of plaintiffs' brief is devoted to arguing that the affirmative defense should not apply even though the petition alleges facts on its face that irrefutably show that they voluntarily paid with full knowledge of all of the relevant facts.

Plaintiffs have simply pleaded themselves out of court. The amended petition itself pleads that they knew when they received the first bills that they were being charged for a paper guide they didn't order, but they paid the bill anyway. Nothing in the amended petition pleads any fact that wasn't apparent from the bills Charter sent them at the time they made their payments.

The notion that consumers do not have to read documents is antithetical to long-standing Missouri law and to the purpose of consumer protection statutes themselves. Parties — even consumers — have some obligation to protect themselves, particularly when all of the relevant facts surrounding the transaction are made known to them. Otherwise, what is the point of consumer protection laws that require disclosure? If disclosures have no practical or legal consequence, requiring them to be made is an hollow gesture.

If the plaintiffs here did not want the paper guide and did not want to pay for it, they should have protested immediately. Had they done so, this case would likely never have seen the light of day. Having made monthly payments for more than a year with full

knowledge of every fact necessary to refuse to pay or to bring this action, the cause of action is barred by the voluntary payment doctrine.

CONCLUSION

For the foregoing reasons, Respondent Charter Communications, Inc. requests that the Court affirm the judgment, and grant such other and further relief as the Court deems proper in the circumstances.

Respectfully submitted,

THOMPSON COBURN LLP

By _____

James W. Erwin, #25621
Roman P. Wuller, # 36115
Robert J. Wagner, #46391
One U.S. Bank Plaza
St. Louis, Missouri 63101
Tel: 314-552-6000
Facsimile: 314-552-7000
jerwin@thompsoncoburn.com
rwuller@thompsoncoburn.com
rwagner@thompsoncoburn.com

Attorneys for Respondent
Charter Communications, Inc.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information required by Rule 55.03, that it complies with the limitations in Rule 84.06(b), and it contains 14,323 words, excluding the parts of the brief exempted by Rule 84.06, that it has been prepared in proportionally spaced typeface using Microsoft Word 2003 in 13 point Times New Roman font; and that it includes a virus free 3.5" floppy disk in Microsoft Word 2003 format.

_____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of the foregoing and a virus-free diskette were mailed, first class postage prepaid this ___ day of September 2008 to:

Erich Vieth
Amy Collignon Gunn
John E. Campbell'
SIMON – PASSANANTE, PC
701 Market Street, Suite 1450
St. Louis, Missouri 63101

Jeremiah W. (Jay) Nixon
James R. Layton
Peter Lyskowski
Attorney General's Office
Supreme Court Building
207 West High Street
Jefferson City, Missouri 65102

Alicia Campbell
Michael Ferry
Philip Senturia
Gateway Legal Services, Inc.
200 North Broadway, Suite 950
St. Louis, Missouri 63102

_____