

IN THE SUPREME COURT OF MISSOURI

RODNEY D. GIBBONS,
Appellant,

v.

J. NUCKOLLS, INC., d/b/a FENTON AUTO SALES
Respondent

No. SC88023

Appeal from the Circuit Court of St. Louis County
Hon. Patrick Clifford, Jr.
Division No. 39

BRIEF OF AMICUS CURIAE ADESA MISSOURI, INC.

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POINTS RELIED ON

I. THE EASTERN DISTRICT'S HOLDING IS TOTALLY IRRELEVANT TO THE ATTORNEY GENERAL'S ABILITY TO ENFORCE THE MISSOURI MERCHANDISING PRACTICES ACT.

State ex rel. Nixon v. Telco Directory Pub., 863 S.W.2d 596 (Mo. 1993)

II. RESPONDENT'S DIATRIBE ON "THE PROBLEM OF WHOLESALE CAR FRAUD" IS AN IMPROPER ATTEMPT TO MANIPULATE CONSIDERATION OF STATUTORY INTERPRETATION WITH RUMOR, HEARSAY, INNUENDO AND SPECULATION.

III. PERMITTING VEHICLE PURCHASERS TO SUE EVERYONE IN THE CHAIN OF TITLE IS UNNECESSARY, AND WOULD BE UNFAIR AND CAUSE MORE PROBLEMS THAN IT WOULD SOLVE.

Westerhold v. Carroll, 419 S.W.2d 73, 77-78 (Mo. 1967)

State ex rel. Nixon v. Continental Ventures, Inc., 84 S.W.3d 114 (Mo. App. W.D. 2002)

IV. THERE IS NO PERSUASIVE AUTHORITY CONTRARY TO THE DECISION OF THE COURT OF APPEALS, IN THAT: (1) THERE IS NO CONFLICT WITH ANY OPINION IN ANY OTHER DISTRICT OR THIS COURT; (2) THE STATUTES IN OTHER STATES ARE NOT SUFFICIENTLY SIMILAR TO RENDER

INTERPRETATION THEREOF PERSUASIVE; AND (3) THE ABSENCE OF PRIVACY REQUIREMENTS FOR OTHER CAUSES OF ACTION IS NOT RELEVANT TO INTERPRETATION OF SECTION 407.025 OF THE MERCHANDISING PRACTICES ACT.

State ex rel. Nixon v. Estes, 108 S.W.3d 195 (Mo. App. W.D. 2003)

Williams v. Regency Fin. Corp., 309 F.3d 1045 (8th Cir. 2002).

ARGUMENT

I

THE EASTERN DISTRICT'S HOLDING IS TOTALLY IRRELEVANT TO THE ATTORNEY GENERAL'S ABILITY TO ENFORCE THE MISSOURI MERCHANDISING PRACTICES ACT.

General Nixon is crying "Wolf!" The Eastern District's holding that a dissatisfied purchaser of merchandise cannot utilize MO. REV. STAT. § 407.025 to walk back up the distribution chain seeking wholesalers to inflict punitive damages upon is completely unrelated to the Attorney General's authority to enforce MO. REV. STAT. § 407.020, or to utilize the provisions of §§ 407.030 through 407.100 to do so. The Attorney General's cry of alarm that "The Eastern District's broadly stated holding improperly limits the Attorney General's ability to enforce the MPA" is a red herring dreamt up by taking selected phrases from the opinion completely out of context. Br. of Att'y Gen. 1, 4, 7-11. Respondent also takes a swipe at creating this straw man with a subheading titled: "The Threat of Interference With Law Enforcement." Resp. Subst. Br. 2, 29. Respondent makes no attempt to explain how the opinion below could threaten interference with the Attorney General's enforcement powers. *Ibid.*

From General Danforth through General Nixon, the chief law enforcement officers of this state have brought suits against unfair trade practices under the provisions of the

Merchandising Practices Act, e.g., State ex rel. Nixon v. Estes, 108 S.W.3d 195 (Mo. App. W.D. 2003); State ex rel. Nixon v. Continental Ventures, Inc., 84 S.W.3d 114 (Mo. App. W.D. 2002); State ex rel. Nixon v. American Tobacco Co., 34 S.W.3d 122 (Mo. 2000); State ex rel. Nixon v. Beer Nuts, Ltd., 29 S.W.3d 828 (Mo. App. E.D. 2000); State v. Polley, 2 S.W.3d 857 (Mo. App. W.D. 1999); State ex rel. Nixon v. Telco Directory Pub., 863 S.W.2d 596 (Mo. 1993)(En Banc); State ex rel. Webster v. Milbourn, 759 S.W.2d 852 (Mo. App. E.D. 1988); State ex rel. Webster v. Areaco Invest. Co., 756 S.W.2d 633 (Mo. App. E.D. 1988); State ex rel. Ashcroft v. Marketing Unlimited, 613 S.W.2d 440 (Mo. App. E.D. 1981); State ex rel. Danforth v. Independence Dodge, Inc., 494 S.W.2d 362 (Mo. App. K.C. Dist. 1978). Since suit is brought by the state itself, the concept of “privity” never arises in these cases. Cases involving the attorney general are not cited, distinguished, criticized, or overruled in the Eastern District’s opinion in the instant case, and cannot be affected thereby.

In the instant case, the sole question before the Circuit Court for St. Louis County and the Missouri Court of Appeals for the Eastern District was the interpretation of the section of the Act, § 407.025, creating a private right of action. This section was added seven years after the original passage of the Merchandising Practices Act, and has nothing to do with the other provisions thereof, except insofar as it creates an avenue for private enforcement of the substantive provisions thereof. While the Attorney General argues that the Eastern District’s reliance on the venue provision of § 407.025 somehow proves

that the Eastern District intended to limit his enforcement powers “to direct sellers - and not to distributors, wholesalers or manufacturers” (Br. of Att’y Gen. 9), the opposite is true. The Eastern District’s reliance on the venue provision of § 407.025 demonstrates that the Court’s ruling is a limitation on private plaintiffs, not on the Attorney General.

That the Attorney General’s enforcement powers are not confined by the limitations on private suits found in § 407.025 is demonstrated by State ex rel. Nixon v. Telco Directory Pub., 863 S.W.2d at 599. Defendant therein was an out-of-state publisher which sent deceptive solicitations to businesses in Missouri. Defendant argued that the Act only applied to purchases for “household or personal use.” Noting that this limitation was found only in the section creating private enforcement, this Court held: “The legislature did not impose a similar requirement of purchase for personal or household use as a condition precedent to the attorney general’s exercise of power to obtain relief.”

II

RESPONDENT’S DIATRIBE ON “THE PROBLEM OF WHOLESALE CAR FRAUD” IS AN IMPROPER ATTEMPT TO MANIPULATE CONSIDERATION OF STATUTORY INTERPRETATION WITH RUMOR, HEARSAY, INNUENDO AND SPECULATION

Respondent proclaims ominously that “reading a ‘lack of privity’ defense into the MPA would have sweeping bad implications for the policing of” “car fraud in the wholesale industry.” Resp. Br. 26, 28. “Policing” the used car industry is a job which the

legislature delegated to the Attorney General and prosecuting and circuit attorneys in the various counties. MO. REV. STAT. §§ 407.020, 407.030, 407.040, 407.050, 407.060, 407.070, 407.080, 407.090, 407.095, 407.100, 407.110. The issue in this case is § 407.025 creates a civil cause of action in favor of a consumer against a wholesaler from whom he did not purchase merchandise—and that is the only issue on this appeal. The powers of the attorney general and prosecuting and circuit attorneys to prosecute wholesalers is not at issue herein. The outcome of this case has no bearing upon “the policing of car fraud in the wholesale industry.”

Respondent’s “evidence” of “car fraud in the wholesale industry” consists of evidence offered by plaintiffs in five cases, plus a plea that this Court “take judicial notice” of a settlement involving State Farm Insurance Company. In DeLong v. Hilltop Lincoln-Mercury, Inc., 812 S.W.2d 834, 842 (Mo. App. E.D. 1991),¹ plaintiff elicited testimony from a loan officer and a state trooper that auction cars had a “reputation” for rolled-back odometers. In Pelster v. Ray, 987 F.2d 514, 516 (8th Cir. 1993),² an opinion reversing a plaintiff’s verdict because of the admission of hearsay concerning rolled-back cars being sold at an auto auction, one federal judge made a colorful reference to “the

¹ The suit was for common-law fraud and violation of the federal odometer statute; it was not brought under § 407.025.

² The suit was for common-law fraud and violation of state and federal odometer statutes, and not under § 407.025.

shadowy netherworld of used car wholesalers and dealers.” In O’Brien v. B.L.C. Ins. Co., 768 S.W.2d 64 (Mo. 1989)(En Banc), an insurance company sold a wrecked car without a salvage title, and with a rolled-back odometer.³ In Werremeyer v. K.C. Auto Salvage Co., Inc., 134 S.W.3d 633 (Mo. 2004)(En Banc), plaintiff purchased a car which had been “‘chop shopped’ from two different cars.”⁴ Maugh v. Chrysler Corp., 818 S.W.2d 658 (Mo. App. W.D. 1991), plaintiff purchase a vehicle as new from a Chrysler dealer, not knowing that it had been involved in a collision while being test-driven by a Chrysler employee.⁵

The sum total of appellant’s evidence of “rampant, *wholesale*, frauds” (Resp. Br. 27), is that one manufacturer sold multiple vehicles as new without disclosing prior damage, one insurance company sold multiple vehicles without obtaining salvage titles, two wholesalers in Missouri sold vehicles with rolled-back odometers, and two wholesalers in Missouri sold vehicles which had been in wrecks.

³ The suit was brought under statutes relating to salvage titles, rolled-back odometers, and transfer of certificates of title—an *not* under § 407.025 or the Merchandising Practices Act.

⁴ The suit was for common-law fraud and violation of a statute forbidding sale of a motor vehicle from which the manufacturer’s identification number had been removed, and not under § 407.025.

⁵ The suit was for common-law fraud, and was not brought under § 407.025.

The statute being interpreted (MO. REV. STAT. § 407.025) was enacted in 1973. Appellant’s “evidence” dates from 1989 through 2004. If this “evidence” had been presented in legislative hearings prior to passage of the statute, it *might conceivably* have been relevant in determining legislative intent. As presented in appellant’s brief, it is completely irrelevant.

In assessing the “need” to interpret the statute in the manner promoted by appellant, it appears relevant that none of the cases cited involving suits brought by the attorney general under the Missouri Merchandising Practices Act involved wholesale auto dealers, and counsel for *amicus* is not aware that any such cases exist. It is also significant that none of the cases cited to prove “rampant” fraud in the wholesale car business were brought pursuant to Section 407.025.⁶

III

PERMITTING VEHICLE PURCHASERS TO SUE EVERYONE IN THE CHAIN OF TITLE IS UNNECESSARY, AND WOULD BE UNFAIR AND CAUSE MORE PROBLEMS THAN IT WOULD SOLVE

⁶ Appellant also cites Krysa v. Payne, 176 S.W.3d 150 (Mo. App. W.D. 2005), and Grabinski v. Blue Springs Ford Sales, Inc., 203 F.3d 1024 (8th Cir. 2000), for the proposition that the rebuilt vehicles sold therein were unsafe. In each of these cases, plaintiff sued the dealer he purchased the vehicle from for, *inter allia*, violation of MO. REV. STAT. § 407.020.

The Missouri Merchandising Practices Act “serves as a supplement to the definition of common law fraud; it eliminates the need to prove an intent to defraud or reliance.” Schuchmann v. Air Services Heating & Air, 199 S.W.3d 228, 232-33 (Mo. App. S.D. 2006); *accord*, State ex rel. Nixon v. Beer Nuts Ltd., 29 S.W.3d at 837. It “is not to be limited by our common law definition of fraud.” State ex rel. Ashcroft v. Marketing Unlimited, 613 S.W.2d at 447. “It is not necessary in order to establish ‘unlawful practice’ to prove the elements of common law fraud.” State ex rel. Webster v. Areaco Inv. Co., 756 S.W.2d at 635.

Although it is not totally clear, it appears that the Merchandising Practices Act also eliminates the need to prove scienter. “It is the defendant’s conduct, not his intent, which determines whether a violation has occurred.” *Ibid.* All that needs to be proved is “that the defendant has engaged in, is engaging in or is about to engage in an unlawful practice as defined by the Act.” State ex rel. Nixon v. Beer Nuts Ltd., 29 S.W.3d at 837. *See* Werremeyer v. K.C. Auto Salvage Co., Inc., 134 S.W.3d at 635 (knowledge not an element of MO. REV. STAT. § 301.390 forbidding sale of a motor vehicle with manufacturer’s identification number removed). This is defensible where the fraud involves an affirmative representation, or in the case of odometer fraud, in light of the requirement of mileage certificates and the fact that the misrepresented mileage actually appears on the odometer itself. The problem arises where the fraud alleged is failure to disclose.

A consumer can show that the dealer who sold him a vehicle which has been

damaged and repaired should have known such through expert testimony, *e.g.*, Cohen v. Express Fin. Serv., Inc., 145 S.W.3d 857, 866 (Mo. App. W.D. 2004). As pointed out in a footnote in Appellant's Substitute Brief (App. Sub. Br. 14 n.3), a regulation promulgated by the Attorney General provides: "Omission of a material fact is any failure by a person to disclose material facts known to him/her, or [which] upon reasonable inquiry would be known to him/her." Although counsel for *amicus curiae* has not found any Missouri law directly in point, courts elsewhere have held that the knowledge of a prior owner may be imputed to a subsequent owner. Byrne v. Autohaus of Edens, Inc., 488 F. Supp. 276, 281 (N.D. Ill. 1980). Thus, it could be argued that the knowledge of the owner at the time the vehicle was wrecked could be imputed to all subsequent owners. If plaintiff herein is permitted to sue defendant wholesaler for failure to disclose hidden damage to the vehicle, the question becomes whether he can make a submissible case simply by showing that there was damage to the vehicle when he bought it, that the entity he bought it from did not disclose it to him, and that any dealer should have spotted the damage. If this would be true as to defendant wholesaler herein, there is no logical place in the chain of title to stop. A purchaser of a motor vehicle with hidden damage then could simply sue everyone on the chain of title back to the original purchaser, and place the burden on these defendants to prove when the vehicle was damaged.

Alternatively, if proof of knowledge is required in a failure to disclose case, then suits under the Merchandising Practices Act become indistinguishable from suits alleging

common-law fraud.

The Eastern District pointed out that a suit for common-law fraud against Respondent was available to Appellant (Opinion 3); *accord*, Freeman v. Myers, 774 S.W.2d 892, 893-94 (Mo. App. W.D. 1989). It appears that the elements of common-law fraud are pled in the petition as to Respondent. L.F. 8-9. Appellant has argued in its Substitute Brief that privity is not required in suits for common-law fraud, negligence, or breach of implied warranty of merchantability (*see* Groppel Co. v. United States Gypsum Co., 616 S.W.2d 49, 58-60 (Mo. App. E.D. 1981)(App. Subst. Br. 21-22), which means that these alternative remedies were available to him, but he chose not to pursue them. The problem, of course, is that he would have had to prove knowledge on the part of defendant wholesaler.

It does not appear that the legislature would have approved a provision inflicting liability for nondisclosure on entities not in direct contact with the consumer who did not have actual knowledge of damage to a vehicle they sold at wholesale. In the original act, “[t]he legislature excluded the media when there was no knowledge that an advertisement disseminated to the public violated the Act.” William Webster, Combatting Consumer Fraud In Missouri: The Development of Missouri’s Merchandising Practices Act, 52 Mo. L. REV. 365. 370 (1987). They did this “so that the sanctions to be imposed for violation of section 407.020 would *properly* impinge only upon that class of possible merchants that shared culpability with the ‘person’ perpetrating the fraud.” *Id.* at 371 (Emphasis added.).

Appellant argues that, if the decision below is affirmed, and “the retailers were insolvent, the consumers would be left ‘holding the bag.’” App. Subst. Br. 27. In positing this supposed unacceptable result of affirmance, Appellant completely forgets that, only a handful of pages earlier, it had touted several alternative remedies available to it. Further, purchasers of used cars are not left “‘holding the bag’” if a retailer is insolvent, because he can always collect on the dealer’s bond. MO. REV. STAT. § 301.500.1(4); see State ex rel. Webb v. Hartford Cas. Ins. Co., 956 S.W.2d 272, 273-74 (Mo. App. W.D. 1997). This bond is required to be at least \$25,000, which would cover the actual damages on almost any used car transaction imaginable. Thus, the only advantage to the consumer in going back up the chain of title is to multiply the number of entities from which he might collect punitive damages.

Appellant further argues that “the retailers can’t sue the wholesalers under the MPA, either, because they did not purchase for ‘personal, family or household’ uses.” App. Subst. Br. 27. This argument is at best disingenuous, because the retailer certainly can bring the wholesaler in as a third party, and clearly would have a common-law fraud claim if it had been deceived by the wholesaler.

Effectively, the Merchandising Practices Act has been interpreted as strict liability in tort. In 402A cases, the Missouri Legislature effectively has immunized the middlemen. MO. REV. STAT. § 437.562. Rejection of the Eastern District’s opinion would place automobile wholesalers in a much more difficult position than wholesalers of

defective and dangerous products. This Court long ago cautioned that relaxation of privity requirements should be done with care. Westerhold v. Carroll, 419 S.W.2d 73, 77-78 (Mo. 1967); *see generally* Hatch v. Rhyne, 253 S.W.2d 170, 172 (Mo. 1952); De Tienne v. Peters, 188 S.W.2d 954, 955 (Mo. 1945). The justification for giving “liberal construction” to section 407.100 in suits for injunctive relief has been that injunctive relief “is remedial, not punitive.” State ex rel. Nixon v. Continental Ventures, Inc., 84 S.W.3d at 120. Where the only advantage to extending suits authorized under § 407.125 up the chain of title is to obtain multiple punitive damage awards, construing the statute to permit consumers to do so would be “punitive,” not “remedial.”

In light of strict liability interpretations of the Merchandising Practices Act, extending the reach of private litigants poses an especial danger to wholesale auto auctions. Under certain circumstances, an auto auction may be dragged in by the ultimate purchaser of a car sold at its auction. *See, e.g.,* Pelster v. Ray, 987 F.2d at 520-24. Literally hundreds of vehicles may be run through a wholesale auction on a sale day. Many of these cars are not even brought to the auction until shortly before it begins. It is a physical impossibility for the employees of a wholesale auto auction to give each vehicle brought thereto for sale the type of inspection for hidden damages which plaintiff’s expert witness gave the vehicle in Cohen v. Express Fin. Serv., Inc., 145 S.W.3d at 866. Moreover, the punitive damage exposure under the Missouri Merchandising Practices Act can be financially ruinous. *See* Krysa v. Payne, 176 S.W.3d 150, 155 (Mo. App. W.D.

2005)(\$500,000); Freeman v. Myers, 774 S.W.2d at 895; Grabinski v. Blue Springs Ford Sales, Inc., 136 F.3d 565, 566 (8th Cir. 1998)(\$210,000).

Wholesale motor vehicle auctions are authorized by Missouri. *See, e.g.*, MO. REV. STAT. § 301.559. Low and middle-income wage earners need low-cost transportation. Wholesale auto auctions help dealers find cars which fit the needs of their customers. Making it economically unfeasible for wholesale auctions, or their customers, to transact business in the State of Missouri would severely curtail the availability of low-cost transportation for lower income customers. Extending the potential for strict liability all the way up a chain of title to the first owner will encourage plaintiffs' attorneys who follow the "Big Daddy Lipscomb" theory of practice to sue everyone in sight,⁷ and leave it up to defendants to sort out who owned the vehicle when it was wrecked. While wholesalers (and individual sellers) will be able to make third-party claims as to each person on the chain of title above them, the third-party claims will have to sound in common-law fraud, or negligence, or breach of warranty, since only persons who buy for their own use can use § 407.025. The anomaly in such suits will be that third-party claimants will have to prove that sellers in the chain of title above them acted with knowledge and intent, while the original plaintiff/consumer will not have to prove either

⁷ "Big Daddy" Lipscomb was a Hall of Fame defensive lineman for the old Baltimore Colts whose approach to sacking quarterbacks was to gather up everyone in the backfield and throw them away one at a time until he got to the quarterback.

of these elements as to such persons. Since dealer bonds ensure compensation from the retail dealer for actual damages, and common-law fraud provides adequate opportunity to obtain punitive damages from wholesalers, extension of strict liability actions by retail customers against wholesalers for the sole purpose of multiplying potential subjects of punitive awards would result in a proliferation of multiple-defendant lawsuits with no discernible gain to the public.

IV

THERE IS NO PERSUASIVE AUTHORITY CONTRARY TO THE DECISION OF THE COURT OF APPEALS, IN THAT: (1) THERE IS NO CONFLICT WITH ANY OPINION IN ANY OTHER DISTRICT OR THIS COURT; (2) THE STATUTES IN OTHER STATES ARE NOT SUFFICIENTLY SIMILAR TO RENDER INTERPRETATION THEREOF PERSUASIVE; AND (3) THE ABSENCE OF PRIVACY REQUIREMENTS FOR OTHER CAUSES OF ACTION IS NOT RELEVANT TO INTERPRETATION OF SECTION 407.025 OF THE MERCHANDISING PRACTICES ACT

The Attorney General is incorrect in stating that State ex rel. Nixon v. Polley, 2 S.W.3d 887 (Mo. App. W.D. 1999), demonstrates a split of authority with the opinion below. The suit against Polley was not brought under MO. REV. STAT. § 407.025.

Therefore, it is not authority for the proposition that suits may be brought by consumers against wholesalers with whom they did not deal.

There are no Missouri cases holding that Section 407.025 permits suits by consumers against wholesalers with whom they did not deal. “We have found no Missouri cases, nor have the parties cited any, in which one who is not a direct party to the ‘sale or advertisement’ in which the ‘unfair practice’ or otherwise violative conduct occurs has been held to have a cause of action under the MPA.” Williams v. Regency Fin. Corp., 309 F.3d 1045, 1050 (8th Cir. 2002).

Appellant relies heavily on cases from other jurisdictions interpreting their own state statutes. App. Subst. Br. 23-27. It refers to the language of these other statutes as “similar.” *Id.* at 22. However, as the Western District held in State ex rel. Nixon v. Estes, 108 S.W.3d at 199, statutory interpretation is neither grenades nor horseshoes: “[D]espite the claim in Estes brief that the statutes construed in those cases were ‘framed essentially identical to’ Missouri’s MPA, none of these decisions involved statutes containing language *identical* to that found in sections 307.020.1 and 407.010(7). Consequently, they provide this court *no useful guidance.*” (Emphasis added.).

As far as the cases concerning lack of privity in common-law fraud claims, negligence suits, breach of implied warranty allegations, and even some contract charges (App. Subst. Br. 21-22), the bottom line is that none of these cases involve statutory interpretation—and, in particular, none of them involve interpretation of section 407.025 of the Merchandising Practices Act. They are thus totally useless in divining legislative intent in the passage of section 407.025.

CONCLUSION

Plaintiff pled all of the elements of common-law fraud. There is no sound reason for expanding the universe of potential defendants who can be sued under MO. REV. STAT. § 407.025 to give him the same opportunity to obtain actual and punitive damages which are available to him under common-law fraud.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the length requirements of Rule 84.06

in that it contains 3797 words, exclusive of the Table of Contents and Authorities and signature block, and with the typeface requirements in that it was prepared using WordPerfect 9 in 12 point Times New Roman. The disks provided have been scanned virus free using AVG Antivirus Free and found to be virus free.

CERTIFICATE OF SERVICE

Copies of the foregoing, with accompanying discs, were served on Appellant by mailing same to Mitchell B. Stoddard, Consumer Law Advocates, 11220 Olive Blvd., St. Louis, MO 63141, and on the Attorney General as Amicus Curiae by mailing same to Jeremiah W. (Jay) Nixon, Attorney General, P.O. Box 899, Jefferson City, MO 65102, and on Respondent by mailing same to Paul E. Martin, Curtis, Heinz, Garrett & O'Keefe, P.C., 130 S. Bemiston, Clayton, MO 63105, on this 31st day of January, 2007.
