IN THE MISSOURI SUPREME COURT

No. SC88023

RODNEY D. GIBBONS,
Appellant,

V.

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

APPEAL FROM THE
CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
THE HONORABLE PATRICK CLIFFORD, JR.
DIVISION 39

APPELLANT'S SUBSTITUTE BRIEF

Bernard E. Brown, No. 31292
The Brown Law Firm
4350 Shawnee Mission Parkway, Suite 250
Fairway, KS 66205-2513
Tel: (913) 789-9400
Fax: (913) 789-9470
Email: brlawofc@swbell.net

Mitchell B. Stoddard, MBE # 38311
Consumer Law Advocates
11330 Olive Boulevard, Suite 222
St. Louis, Missouri 63141
Tel: (314) 692-2001
Fax: (314) 692-2002
E-Mail: mbs@clalaw.com

ATTORNEYS FOR APPELLANT

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JURISDICTIONAL STATEMENT

The Circuit Court of St. Louis County entered judgment October 31, 2005, against plaintiff Rodney D. Gibbons ("Gibbons"), granting the motion to dismiss of defendant J. Nuckolls, Inc., d/b/a Fenton Auto Sales ("Fenton"), which asserted that Gibbons's claim against Fenton under R.S.Mo. §§ 407.020 and 407.025 of the Merchandising Practices Act was barred because of a lack of privity between Gibbons and Fenton. Mr. Gibbons asserts in this appeal that this "lack of privity" is not a defense to his claim, and that his petition asserted a valid cause of action. Judgment dismissing Gibbons's claims against another defendant in the case was not entered until December 12, 2005, and Gibbons's notice of appeal was timely filed on January 11, 2006. Because this appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of this Court under Article V, § 3 of the Missouri Constitution, the Court of Appeals, Eastern District, had jurisdiction of the appeal under Article V, § 3, and R.S.Mo. § 477.050. After the Court of Appeals rendered its decision Gibbons filed his motion for rehearing or transfer with the Court of Appeals, which was overruled on August 31, 2006; Gibbons filed his motion for transfer with this Court on September 15, 2006, which was sustained by the Court and the cause ordered transferred on October 31, 2006. Jurisdiction is vested with this Court pursuant to Article V, § 10 of the Missouri Constitution.

STATEMENT OF FACTS

The petition filed by plaintiff/appellant Rodney D. Gibbons ("Gibbons") in the Circuit Court stated a single claim against defendant/respondent J. Nuckolls, Inc., d/b/a Fenton Auto Sales ("Fenton"), under the Missouri Merchandising Practices Act ("MPA"), R.S.Mo §§ 407.020 and 407.025.[1] (L.F. 5-6 and 8-9) The following are among the allegations included in the petition:

1) On December 27, 2004, Gibbons visited a dealership named Ed Napleton Honda ("Napleton Honda") in St. Peters, Missouri, and became interested in a 2003 Honda Accord ("the Accord"). (L.F. 6-7)

2) Gibbons asked a representative of Napleton Honda if the vehicle had ever been in an accident, and was told, "no"[2]. (*Id.*)

3) Gibbons purchased the vehicle primarily for personal, family or household purposes. (L.F. 8)

4) The Accord had been purchased by Napleton Honda from Fenton. (L.F. 6-7)

5) The Accord had in fact been involved in a front-end collision prior to the sale of the vehicle by Fenton to Napleton Honda. (*Id.*)

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[1] All statutory references in this Brief are to RSMo (2000).

[2] Gibbons also sued Napleton Honda for an MPA violation and fraud (L.F. 6-8 and 9-11), but those claims were dismissed with prejudice on Napleton Honda's motion to compel arbitration (Apx. p. 2), and only the dismissal of Gibbons's claim against Fenton is at issue on this appeal.

6) Fenton never informed Napleton Honda that the vehicle had been involved in an accident prior to the sale. (*Id.*)

7) Fenton "used deception, fraud, false pretense . . . misrepresentation or unfair practice, or concealed, suppressed, or omitted a material fact in connection with the sale of the vehicle when . . . they failed to disclose existing accident damage to [Napleton Honda] about which they knew or, upon reasonable inspection, should have known, and when they further knew or had reason to believe that [Napleton Honda] was not likely to disclose the accident damage to a consumer prior to sale." (L.F. 9)

8) Fenton's conduct was "willful, wanton and malicious, and was done with evil motive or reckless indifference to the rights of [Gibbons]". (*Id.*)

9) "As a result of [Fenton's conduct]" Gibbons "suffered an ascertainable loss of money or property".

Fenton filed its motion to dismiss the MPA claim, asserting as its sole argument:

> Plaintiff has no legal cause of action against J. Nuckolls, Inc. for the reasons that there is no privity between plaintiff and J. Nuckolls, Inc., contractually or otherwise. Consequently, J. Nuckolls, Inc. did not owe any duty to plaintiff.

(L.F. 12-13) Gibbons filed detailed suggestions opposing that motion. (L.F. 14-22) The Circuit Court then granted Fenton's motion and entered judgment against Gibbons, without giving any reason for its ruling. (Apx. p. 1)

POINT RELIED ON

I. THE TRIAL COURT ERRED IN DISMISSING GIBBONS'S CLAIM AGAINST FENTON FOR BREACH OF THE MERCHANDISING PRACTICES ACT, RSMO §§ 407.020 AND 407.025, FOR LACK OF PRIVITY, BECAUSE GIBBONS'S CLAIM WAS NOT BARRED BY A LACK OF PRIVITY, IN THAT LACK OF PRIVITY IS NOT A BAR TO CLAIMS UNDER THESE MERCHANDISING PRACTICES ACT STATUTES.

State ex rel. Danforth v. Independence Dodge, Inc., 494 S.W.2d 362 (Mo.App. 1973)

State v. Polley, 2 S.W.3d 887, 892 (Mo.App. 1999)

State ex rel Nixon v. American Tobacco Company, Inc., 34 S.W.3d 122, 130-1 (Mo. banc 2000)

Grabinski v. Blue Springs Ford Sales, Inc., 136 F.3d 565 (8th Cir. 1998)

R.S.Mo. §§ 407.010, 407.020, 407.025, 407.100

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING GIBBONS'S CLAIM AGAINST FENTON UNDER THE MERCHANDISING PRACTICES ACT, R.S.MO §§ 407.020 AND 407.025, FOR LACK OF PRIVITY, BECAUSE GIBBONS'S CLAIM WAS NOT BARRED BY A LACK OF PRIVITY, IN THAT PRIVITY IS NOT AN ELEMENT OF CLAIMS UNDER THE MERCHANDISING PRACTICES ACT.

A. Standard of Review

Review of the Circuit Court's order granting the motion to dismiss is *de novo*. *Burke v. Goodman*, 114 S.W.3d, 276, 279 (Mo.App. E.D. 2003). The Circuit Court did not state a basis for its dismissal. As stated in *Lueckenotte v. Lueckenotte*, 34 S.W.3d 387, 391 (Mo. banc 2001):

> If a trial court fails to state a basis for its dismissal, this Court presumes the dismissal was based on the grounds stated in the motion to dismiss. *Shaver v. Shaver*, 913 S.W.2d 443, 444 (Mo. App. 1996). This Court must affirm the dismissal if it can be sustained on any ground supported by the motion to dismiss. *Id.*

Since the sole ground asserted in the motion to dismiss was the lack of privity, the question is simply the legal question of whether privity is an element of a claim under the MPA.

B. Privity Is Not An Element Of A Claim Under The MPA

1. The Plain Language of the MPA

The appropriate starting point is a review of the plain language of the MPA.

When interpreting a statute, the courts are to determine the intent of the legislature, giving the language used its plain and ordinary meaning, and giving effect to that intent, if possible. *State ex rel. Riordan v. Dierker*, 956 S.W.2d 258, 260 (Mo. banc 1997); *Cline v. Teasdale*, 142 S.W.3d 215, 222 (Mo. App. 2004). If the intent of the legislature is clear and unambiguous, by giving the language used in the statute its plain and ordinary meaning, then the courts are bound by that intent and cannot resort to any statutory construction in interpreting the statute. *Preston v. State*, 33 S.W.3d 574, 579 (Mo. App. 2000); *Kearney Special Rd. Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo. *banc* 1993). "When the legislative intent cannot be ascertained from the language of the statute, by giving it its plain and ordinary meaning, the statute is considered ambiguous and only then can the rules of statutory construction be applied." *Bosworth v. Sewell*, 918 S.W.2d 773, 777 (Mo. *banc* 1996)

R.S.Mo. § 407.020 provides, in relevant portion:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or

> commerce . . . in or from the state of Missouri, is declared to be an unlawful practice. . . . Any act, use or employment declared unlawful by this subsection violates this subsection whether committed before, during or after the sale, advertisement or solicitation.[3]

Definitions of relevant terms are found in § 407.010:

> (5) **"Person",** any natural person or his legal representative, partnership, firm, for profit or not for profit corporation, whether domestic or foreign, company, foundation, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof;
>
> (6) **"Sale"**, any sale, lease, offer for sale or lease, or attempt to sell or lease merchandise for cash or on credit;
>
> (7) **"Trade"** or **"commerce"**, the advertising, offering for sale, sale, or

[3] As an aside, Gibbons notes that Missouri Attorney General regulations under Chapter 407 at 15 CSR 60-8.010 *et seq.* and 15 CSR 60-9.010 *et seq*., which have the force of law per § 407.145, give important depth to this language. In particular, 15 CSR 60-9.110, at subsection 3, provides "Omission of a material fact is any failure by a person to disclose material facts known to him/her, or upon reasonable inquiry would be known to him/her."

> distribution, or any combination thereof, of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value wherever situated. The terms "trade" and "commerce" include any trade or commerce directly or indirectly affecting the people of this state.

Applying this language to the allegations in this case, Fenton is a "person" that, taking the allegations of the petition as true, engaged in conduct clearly proscribed by § 407.020. The conduct was indisputably "in connection with" at least the "sale" to Napleton Honda. There is no ambiguity to any of this. Certainly there is no reference in § 407.020, or the definitions, to "wholesalers" or "retailers", or to whom the merchandise is sold or for what purpose it is purchased.

The consumer lawsuit provision, § 407.025 (which was not enacted until six years after §407.020), provides, in relevant portion:

> 1. Any person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by section 407.020, may bring a private civil action in either the circuit court of the county in which the seller or lessor resides or in which the transaction complained of took place, to recover actual damages.

This is easy enough to follow: the legislature's enactment of § 407.025 in 1973 gave

consumer purchasers of merchandise standing to sue for § 407.020 violations that resulted in losses to those consumers. Previously, only the Attorney General had been authorized to sue persons that violated § 407.020 (pursuant to § 407.100), though the Attorney General had been (and remains) authorized to seek restitution for *any* person (consumer or otherwise) who suffered a loss as a result of another person's violations of § 407.020[4].

Gibbons is clearly a person who purchased the Accord primarily for personal, family or household purposes, and thereby suffered an ascertainable loss of money or property. Fenton is obviously "another person" that violated § 407.020. The statute does not restrict the consumer purchaser to suing only the "seller", but instead expressly permits suit against "another person" that violated § 407.020. Was the loss suffered by Gibbons "as a result" of Fenton's conduct violating § 407.020? Gibbons specifically alleged that it was; and, according "result" its plain meaning, Gibbons's purchase and loss was not only a "result", but was exactly a predictable "result" of Fenton's conduct. Fenton's sale of the Accord to Napleton Honda without disclosure of the damage resulted

[4] See § 407.100.4, which provides, *inter alia*, that "The court, in its discretion, may enter an order of restitution, payable to the state, as may be necessary to restore to *any person* who has suffered any ascertainable loss, including, but not limited to, any moneys or property, real or personal, which may have been acquired by means of any method, act, use, practice or solicitation, or any combination thereof, declared to be unlawful by this chapter." (emphasis supplied)

in the Accord being resold to without disclosure of the damage to Gibbons. Some consumer was going to be cheated, Fenton knew; it happened to be Gibbons. Again, there is no ambiguity in the wording of any of this; at trial of course there are questions of fact ultimately to be determined by a jury, such as whether indeed Fenton's conduct resulted in Gibbons's loss, but the allegations fit squarely within the plain language of the statutes.

Gibbons notes that Fenton's conduct in violation of § 407.020 was also "in connection with" the sale by Napleton Honda to Gibbons. "In connection with" is a phrase with a very long pedigree, and with a most expansive meaning. In addition, § 407.020 goes so far as to say that the described conduct is prohibited "whether committed before, during, or after the sale". This is therefore a second way in which the plain language of the statutes provides that Fenton is liable to Gibbons, and thus it is a second way of showing that "privity" is not an element of an MPA claim.

2. MPA Cases, And Analysis Beyond The Plain Language

If for any reason one looks beyond the plain language of the MPA to answer the question of whether "privity" is an element of a consumer MPA claim, the answer becomes only more emphatically, "no".

Gibbons will first review authorities on the purposes and construction of the MPA, and then will discuss cases specifically supporting the conclusion that privity is not an element of an MPA claim.

As stated in the original case under the MPA, *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362 (Mo.App. 1973), at p. 368:

> The purpose of these statutes is to supplement the definitions of common law fraud in an attempt to preserve fundamental honesty, fair play and right dealings in public transactions.

Independence Dodge goes on to note that the MPA is written to "give broad scope to the statutory protection" and "to prevent ease of evasion because of overly meticulous definitions". *Id.* These purposes have been reiterated and followed by numerous Missouri cases. Similarly, as explained by *Clement v. St. Charles Nissan, Inc.*, 103 S.W.3d 898, 899-900 (Mo.App. 2003), "It is not necessary in order to establish 'unlawful practice' to prove the elements of common law fraud". *Accord, Schuchmann v. Air Services Heating & Air Conditioning, Inc.*, 199 S.W.3d 228, 232 (Mo.App. 2006) (referring to "the plethora of case law holding that the MMPA serves as a supplement to the definition of common law fraud" and noting that "it eliminates the need to prove an intent to defraud or reliance.") And this Court, in *High Life Sales Company v. Brown-Forman Corporation*, 823 S.W.2d 493, 498 (Mo. *banc* 1992), quoted the Eighth Circuit with apparent approval, saying "Chapter 407 is . . . paternalistic legislation designed to protect those that could not otherwise protect themselves" (*Electrical and Magneto Service Co., Inc. v. AMBAC International Corp.*, 941 F.2d 660, 663-4 (8th Cir. 1991)). Similarly, *Antle v. Reynolds*, 15 S.W.3d 762, 766 (Mo.App. 2000), notes that "§ 407.025 is a remedial statute because it introduces new regulation conducive to the public good", and that as such it should be "construed liberally". Thus, any reading of the MPA that

would *add* a privity restriction that does not exist for common law fraud, or *add* a limitation so that the MPA applies to retail sellers only and not to wholesalers (which limitation again does not exist in common law fraud), would turn things rather violently upside-down, and would be patently contrary to the purposes and previous construction of the MPA.

A number of cases clearly support MPA claims against persons not in privity with the ultimate purchasers of the merchandise. In *State ex rel. Nixon v. Polley*, 2 S.W.3d 887, 892 (Mo.App. 1999), defendant Polley owned a business that installed siding on homes. The Attorney General brought MPA claims against him for his deceptive practices in violation of § 407.020 relating to selling and installing siding, and obtained an order of restitution against him under § 407.100 on behalf of several homeowners. Polley asserted on appeal that he was not liable to pay restitution for one of the consumers, because in that instance he had dealt only with the builder, and had no contract or dealings with the consumer. The Court of Appeals disagreed and upheld the judgment, necessarily holding that this sale conduct was actionable under the MPA, and further expressly holding that the consumer was entitled to restitution as a "person who has suffered any ascertainable loss . . . by means of any method, act, use, practice or solicitation . . . declared to be unlawful by this chapter". That language, in § 407.100.4, is practically identical to the language in § 407.025 on which private consumer actions are based. And as the Court of Appeals commented at the close of its discussion, "To hold [remote seller Polley not liable] would undermine the fundamental purpose of the Act: the protection of consumers." *Id.*

Also, in *State ex rel Nixon v. American Tobacco Company, Inc.*, 34 S.W.3d 122 (Mo. banc 2000), this Court specifically noted, at p. 130-1, that consumers could sue the cigarette manufacturers (which obviously sell cigarettes at wholesale) under the MPA:

> [consumers] may protect their interest by bringing a private action [against the cigarette manufacturers] pursuant to section 407.025. Section 407.025.1 permits "any person" who purchases goods for personal or family use and who "suffers an ascertainable loss of money or property ... as a result of the use ... by another person of a method, act or practice declared unlawful by section 407.020, ... [to] bring a private civil action ... to recover damages....".

In a rebuilt wrecked car case that for purposes of this appeal is nearly identical to the instant case, *Grabinski v. Blue Springs Ford Sales, Inc.*, 136 F.3d 565 (8th Cir. 1998) (*"Grabinski I")* and *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024 (8th Cir. 2000) (*"Grabinski II"),* a dealer sold a rebuilt wrecked vehicle at wholesale to another dealer, representing it as "very nice" and "driving fine" and as needing only a cleanup and standard servicing. *Grabinski I*, at 566-7. The second dealer sold the vehicle at retail to the consumer, Grabinski, pursuant to representations that the vehicle was in "A-1" condition, had never been in a wreck, and ran perfectly. *Id*. Ms. Grabinski brought suit against both dealers under the MPA and for common law fraud, and won judgments on both claims against both dealers, obtaining actual and punitive damages. *Id*., at 566, 568. On appeal the first dealer – the one that had sold the vehicle at wholesale – asserted that the fact that its representations were not made "directly to" Ms. Grabinski was a defense

to her claims. The Eighth Circuit rejected that argument, citing *Freeman v. Myers*, 774 S.W.2d 892, 894 (Mo.App. 1989) (a common law odometer fraud case that similarly rejects a privity defense, following *Restatement (Second) of Torts*, § 533 (1977)). The Eighth Circuit noted that the first dealer expected its representations "to extend to and be relied upon by a retail purchaser of the car from the automobile dealership to whom [it] sold the car", quoting *Freeman*, at p. 893-4. (And the importance of this decision in *Grabinski I* upholding the MPA claim was clear in *Grabinski II*, when the Eighth Circuit reversed the district court for failure to award Ms. Grabinski attorney's fees under the MPA.)

Similarly, in *State ex rel. Ashcroft v. Marketing Unlimited of America, Inc.*, 613 S.W.2d 440, 447 (Mo.App. 1981), individual officers of a corporate seller of the merchandise at issue were specifically held to be "persons" liable for violations of § 407.020 and remedies under § 407.100.

3. The Defense of "Lack Of Privity" In Other Contexts In Missouri Law

In Missouri cases lack of privity (however described) is not recognized as a defense to claims based on such theories as common law fraud, *see Freeman v. Myers*, 774 S.W.2d 892, 893-4 (Mo.App. 1989)); or negligence, *see O'Brien v. B.L.C. Insurance Company*, 768 S.W.2d 64, 67-69 (Mo. 1989); or breach of the U.C.C. implied warranty of merchantability, *see Groppel Co., Inc. v. United States Gypsum Co.*, 616 S.W.2d 49, 58 (Mo. Ct. App. E.D. 1981); or in many circumstance based on breach of contract, *see Westerhold v. Carroll*, 419 S.W.2d 73, 76-80 (Mo. 1967). *O'Brien* deserves particular

note here. It is essentially a car fraud case in which a salvage car was sold at wholesale without a required salvage title, and then resold to an unsuspecting consumer. This Court upheld the consumer's judgment against the remote seller. The Court rejected multiple arguments by that seller based on its remoteness from the consumer purchaser, and the Court provided a lengthy discussion articulating how as a practical matter this seller's misconduct indeed would have the result of harm to the consumer.

It would stand as a remarkable exception to these cases if a privity defense were read into the MPA.

4. The Defense Of "Lack Of Privity" In Other States Under Similar Laws

As stated in National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (6th. ed. 2004), § 4.2.15.3:

> The concept of privity of contract is irrelevant to UDAP ["unfair and deceptive acts and practices"] claims, since they are not based on contract. Instead, whether a consumer can sue a particular defendant is a question of interpretation of terms in the UDAP statute.

The great majority of cases addressing the issue of privity under state "UDAP" statutes across the country thus expressly hold that lack of privity is not a defense, though language variations often prevent exact comparisons with the MPA. For the sake of providing a thorough background discussion on this issue, Gibbons will list a few salient examples.

Tandy v. Marti, 213 F. Supp. 2d 935 (D. Ill. 2002), is a case practically on all fours with the instant case, and it applies the Illinois UDAP, which in substance is practically identical to the MPA. There the consumer purchaser of a rebuilt wrecked car sued the upstream dealer that sold it to the retail dealer from whom the consumer purchased it. The upstream dealer moved to dismiss for lack of privity. The court, at 936-8, discussed the UDAP language (nearly identical to § 407.020), and discussed the plaintiff's standing to sue (he had to be a "consumer", i.e. a purchaser of an item for personal or household purposes, and he had to "suffer actual damage as a result of a violation of the Act committed by any other person", all in effect identical to § 407.025). The court expressly held that the UDAP did not require privity, and that the plaintiff stated a claim against the wholesale seller. *Id*., at 937.

Waterbury Petroleum Products, Inc. v. Canaan Oil and Fuel Company, Inc., 193 Conn. 208, 477 A.2d 988 (Conn. 1984), has a revealing discussion of three versions of the Connecticut UDAP that all bear very close resemblance to the MPA, the first two of which clearly required privity, and the last of which did not. The first version provided for private actions by:

> [a]ny person who purchases or leases goods or services from a seller or lessor primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment *by such seller or lessor* of a method, act or practice prohibited by section 42-110b. . . .

Id., at 477 A.2d 1000; emphasis supplied. The second version provided for private actions by:

> [a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment *by such seller or lessor* of a method, act or practice prohibited by section 42-110b, or any person who purchases or leases goods or services from a seller or lessor primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment *by such seller or lessor* of a method, act or practice prohibited by section 42-110b. . . .

Id.; emphasis supplied. But in a footnote, the court commented on the third version:

> n27 There appears to be no dispute that under [the Connecticut UDAP's] current private right of action provision, the plaintiff would be authorized to bring a private action. The current statute, as amended in 1979; Public Acts 1979, No. 79-210, § 1; authorizes a private action for "[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b. . . ." General Statutes (Rev. to 1983) § 42-110g (a).

Id. *Waterbury* provides a roadmap for exactly how the MPA could have required privity if the legislature had so intended. And it shows a current version of the Connecticut UDAP that, like the MPA, clearly does not require privity.

In *Warren v. Monahan Beaches Jewelry Center, Inc*., 548 So.2d 870, 873 (Fla. App. 1989), the court held that "nothing in the [Florida UDAP] or in case law limits causes of action to the immediate purchaser." In *Maillet v. ATF-Davidson Co., Inc.*, 407 Mass. 185, 190-91, 552 N.E.2d 95, 98-99 (1990), the court held that the language "[a]ny person … who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two or any rule or regulation issued thereunder …" did not require privity between the seller and purchaser. *Accord*, *Speakman v. Allmerica Fin. Life Ins. & Annuity Co.*, 367 F.Supp.2d 122, 142 (D.Mass. 2005). In *Katz v. Schachter*, 251 N.J. Super. 467, 474, 598 A.2d 923, 926, (App.Div. 1991), the court commented that since the language of the New Jersey Consumer Fraud Act granted a remedy to "any person who suffers any ascertainable loss," there was no requirement of privity. In *Garner v. Borcherding Buick, Inc.*, 84 Ohio App. 3d 61, 64, 616 N.E.2d 283 (1992), the court held that privity of contract was not required where the language of the statute read "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction" (though other language in the statute imposes a requirement that the defendant be engaged in the business of effecting consumer transactions and have some connection to the transaction in question). In *Raudebaugh v. Action Pest Control, Inc.*, 59 Ore. App. 166, 170-71, 650 P.2d 1006, 1008-09 (1982), the court construed the language "[a]ny person who suffers any

ascertainable loss of money or property, real or personal, as a result of willful use or employment by another person of a method, act or practice declared unlawful … may bring an individual action …" as not requiring privity of contract. In *Valley Forge Towers South Condominium v. Ron-Ike Foam Insulators, Inc.*, 393 Pa. Super. 339, 351, 574 A.2d 641, 647 (1990), the court held that the language "[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action …" did not require privity of contract between the seller and purchaser. In *State ex rel. Miller v. Cutty's Des Moines Camping Club, Inc.*, 694 N.W.2d 518 (Iowa 2005), the court held broadly, at 530-1, that the Iowa UDAP (with language nearly identical to the MPA) reached "any person" violating the UDAP, not just immediate sellers. Finally, in *Bohls v. Oakes*, 75 S.W.3d 473, 479 (Tx.App. 2002), the court held that "[p]rivity between the plaintiff and defendant is not a consideration in deciding the plaintiff's consumer status under the [Texas UDAP]."

The great weight of authority from other states holds the "lack of privity" not to be a bar to UDAP claims, and Missouri would stand practically alone if it held lack of privity to be a bar under the language in the MPA.

5. The MPA And The Problem of Wholesale Car Frauds

While reading a "lack of privity" defense into the MPA would have sweeping bad implications for the policing of wrongdoing in many industries in which the wrongdoers

work behind the scenes at the wholesale level, the used car industry at issue in this case gives a particularly clear picture of what is at stake here.

Wholesale car frauds are exactly of a nature that will lead directly to harm to consumers. As stated in *Clark v. McDaniel*, 546 N.W.2d 590, 593-4 (Ia. 1996):

> It is difficult to conceive of a commodity that is any more likely to involve knowledge by a seller "that there is an especial likelihood that [a misrepresentation] will reach [third] persons and will influence their conduct," Restatement § 531 cmt. d, than in the case of a motor vehicle.

The imposition of a privity defense to suits under the MPA would bar consumers who have purchased rebuilt wrecks or flood cars from suing the very perpetrators that start the frauds rolling in the first place. Moreover, they would be barred from suing the perpetrators that commit rampant, *wholesale*, frauds. And they would in effect be pressured to sue only the retailers. Of course, if the retailers were insolvent, the consumers would be left “holding the bag”. Meanwhile, the retailers can’t sue the wholesalers under the MPA, either, because they did not purchase for “personal, family or household” uses. Establishing such a “lack of privity” defense thus would be a nearly complete get-out-of-jail-free card under the MPA for sellers that commit wholesale car fraud.

The sales of rebuilt wrecked cars implicate major safety issues. *See*, for example, the lengthy discussion in *Krysa v. Payne*, 176 S.W.3d 150, 161 (Mo.App. 2005), about the threat to the safety of buyers and the general public posed by the fraudulent sales of these vehicles. *See also* the *Grabinski II* decision, *supra*, holding that the sale of the

rebuilt wrecked vehicle without disclosure by the wholesaler “demonstrated a clear and disturbing disregard for [plaintiff]'s safety" (at 203 F.3d, 1027).

Car fraud cases reflect the extent of car fraud in the wholesale industry, which of course means the extent of car fraud that *starts* at the wholesale level and then *ends up* at the retail level. *See*, for example, *DeLong v. Hilltop Lincoln-Mercury, Inc.*, 812 S.W.2d 834, at 842 (Mo.App. 1991), which approved the reception of evidence that “when you deal with auctions, ... you have about a fifty percent chance of getting a car that's either a rollback in the odometer, or it's a misrepresented car"; that this is common knowledge with dealers; and that many "main" dealers avoided auction cars because of their reputation. *See also Pelster v. Ray*, 987 F.2d 514 (8th Cir. 1993), a car fraud case that reveals rampant wholesale car frauds, and refers to “the shadowy netherworld of used car wholesalers and dealers” (*Pelster*, at 516). *See also O’Brien*, *supra*, *Werremeyer v. K.C. Auto Salvage Co., Inc.*, 134 S.W.3d 633 (Mo.*banc* 2004), involving the fraudulent wholesale sale of a salvage vehicle to a retail dealer, and thence to the consumer; and *Maugh v. Chrysler Corporation*, 818 S.W.2d 658 (Mo.App. 1991), involving the fraudulent wholesale sale of a “new” car by Chrysler that had been wrecked and repaired, and was one of some 60,000 cars fraudulently sold by Chrysler to dealers (a case that Chrysler defended by saying that its conduct was consistent with industry practice).

The Court can also take judicial notice of the widely-publicized settlement of 49 states (including Missouri) with State Farm insurance company in January of 2005 of a case involving the sale by State Farm of over 30,000 salvage cars nationwide without the required salvage titles, resulting in the subsequent rebuilding and then resale of those cars

to unwitting consumers. The list of the 265 such cars resold to Missouri consumers – that were still on the road at the time of the settlement - can be found at the Missouri Attorney General's website at http://www.ago.mo.gov/newsreleases/2005/102505salvaged cars.htm.

If there is one place where the MPA is needed, it is in fighting such wholesale fraudulent car sales.

6. The Threat Of Interference With Law Enforcement

As noted above, the MPA from its inception provided for enforcement by the Attorney General. At present the Attorney General – and only the Attorney General – can take action against breaches of the MPA that take place at the "wholesale" level and do not, or have not yet, harmed consumers. If for any reason the MPA were narrowed so as not to cover misconduct in sales that are at the "wholesale" level,or are from business to business (or to individuals purchasing for business purposes), that would impose a sweeping limitation on the Attorney General's policing of such activities. It would thoroughly undermine the purpose of the MPA to "attempt to preserve fundamental honesty, fair play and right dealings in public transactions".

Conclusion

Gibbons submits that the Circuit Court plainly erred when it dismissed his MPA claim against Fenton for lack of privity, in that privity is not an element of a claim under the MPA. The plain language of the MPA clearly provides no such bar to a consumer claim. Any reading of the MPA to inject such a bar would be contrary to every purpose of the MPA, to the holdings of multiple cases under the MPA, to the nearly-uniform law under similar statutes in other states across the country, and to common sense.

Gibbons prays that this Court reverse the Circuit Court's dismissal of the cause, and remand the cause to the Circuit Court for reinstatement and for further proceedings in accordance with this Court's decision.

Respectfully submitted,

by:_____

Bernard E. Brown, Mo. Bar #31292
THE BROWN LAW FIRM
4350 Shawnee Mission Prkwy, Ste. 250
Fairway, KS 66205-2513
Tel: (913-)789-9400
Fax: (913)789-9470
Email: brlawofc@swbell.net

Mitchell B. Stoddard, MBE # 38311
CONSUMER LAW ADVOCATES
11330 Olive Boulevard, Suite 222
St. Louis, Missouri 63141
Tel: (314) 692-2001
Fax: (314) 692-2002
E-Mail: mbs@clalaw.com

Attorneys for Appellant Rodney D. Gibbons

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information required by Rule 55.03 and complies with the limitations of Rule 84.06(b). The Microsoft Word program indicates that the total number of words contained in this brief, excluding the parts of the brief exempted, is 6,334. This brief has been prepared using Microsoft Word 2000 in 13 point, Times New Roman font. Filed with this brief is an electronic copy of the brief in Microsoft Word, which has been scanned for viruses by the AVG anti-virus program and has been found to be virus free.

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Bernard E. Brown, Mo. Bar #31292
Attorney for Appellant Rodney D. Gibbons

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