IN THE
SUPREME COURT OF MISSOURI

No. SC 88023

RODNEY D. GIBBONS,

Appellant,

v.

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

Respondent.

BRIEF OF MISSOURI AUTOMOBILE DEALERS' ASSOCIATION

AS AMICUS CURIAE

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INTEREST OF AMICUS

The Missouri Automobile Dealers Association ("MADA") appears herein pursuant to Rule 84.05(f) (2) and (3) for the purpose of addressing serious policy implications inherent in Appellant's suggestion that this Court should expand the reach of Missouri's Merchandising Practices Act ("MPA") to include wholesalers of motor vehicles having no transactional nexus with the ultimate consumer/purchaser of such motor vehicles.

MADA represents the interests of its members, consisting of over 500 franchise new motor vehicle dealers operating in the state of Missouri, as well as over 200 associate members in the used motor vehicle, powersport, and boat industries. MADA is a Missouri non-profit corporation in good standing, Charter No. N00040236.

MADA has an interest in protecting its members from the greatly expanded and unwarranted potential for civil liability which they would face should Appellant's arguments prevail. Each of MADA's members are, with varying frequency, in the position of being a "wholesaler" of motor vehicles and thus have standing in this matter to oppose an extension of the MPA which would leave them open to unforeseeable, unavoidable, and potentially crippling civil claims brought by consumers with whom they have no relationship and to whom they owe no duty.

FACTS

In lieu of a separate recitation, amicus MADA hereby adopts and incorporates the Supplemental Statement of Facts as set forth in the brief of Respondent Nuckolls, Inc. d/b/a Fenton Auto Sales, as if fully set forth herein. Throughout this brief, "Fenton" shall refer to Respondent Nuckolls, Inc. d/b/a Fenton Auto Sales, and "Napleton" shall refer to Napleton Honda, which retailed the disputed motor vehicle to Appellant.

ARGUMENT

I. The trial court's dismissal of claims against Respondent Fenton should be upheld for the reasons enumerated by the Eastern District Court of Appeals, and because to otherwise expand the reach of the Merchandising Practices Act to wholesalers or other third parties, with whom the ultimate consumer has no transactional nexus, would create a substantial, unwarranted, and unreasonable financial and legal hardship for all Missouri motor vehicle dealers.

1. Background/Interest of Amicus

The Missouri Automobile Dealers Association was formed in the 1930's (originally as a "benevolent" corporation under then-existing statutes) in order to represent and coordinate the interests of Missouri's retail franchise new motor vehicle dealers. Over the years, MADA's role has expanded to include associate memberships for used motor vehicle, boat, and powersport (i.e. motorcycles, all-terrain vehicles, etc.)

dealers, as well as the provision of numerous services to members to assist them in conducting business in the retail and wholesale motor vehicle sales business.

MADA is dedicated to acquiring, preserving, and disseminating information to all branches of the automotive industry. MADA holds a strong commitment to engaging in non-profit scientific and educational activities as a commercial and trade association and business league in connection with the sale, marketing, promotion and delivery, repair and use of motor vehicles. MADA promotes the spirit of cooperation among its members and cooperating with the National Automobile Dealers Association and other organizations; and studying the general public with a focus on maintaining its confidence and goodwill, and further provides educational materials in an ongoing effort to educate the public about the purchase and use of motor vehicles. MADA takes an active interest in its members' welfare and success, and is compelled thereby to offer the following suggestions in opposition to the arguments being espoused by the Appellant in this matter.

In its opinion upholding the trial court's grant of Respondent/Defendant Fenton's motion to dismiss, the Eastern District carefully examined the relevant language of the MPA, specifically sections 407.020.1 and 407.025.1, RSMo. 2000, as well as previous appellate cases which have been decided in reliance on those statutes, and determined that "the MPA was intended to apply to consumer transactions – such as the sale between Napleton and Gibbons, but not the sale between Fenton [wholesaler] and Napleton [retailer]." *See* Opinion of the Court of Appeals of

Missouri, Eastern District, Division Two, No. ED87508 (filed July 18, 2006) at p. 3. Accordingly, the appellate court specifically declined "to expand the purview of the MPA *beyond the scope which was intended by its statutory language and confirmed by Missouri case law." Id.* (emphasis added). MADA urges that this Court follow the holding of the Eastern District, both for the reasons stated therein and because to hold otherwise, and thereby expand the reach of the MPA to include wholesalers of motor vehicles, would create severe and potentially crippling hardships for Missouri motor vehicle dealers.

Any person[1] who engages in business as or acts as "a motor vehicle dealer, boat dealer, manufacturer . . . [public or wholesale] motor vehicle auction or wholesale motor vehicle dealer" must first obtain a license from the Department of Revenue. *See* §301.559[2]. Wholesale dealers are a subset of motor vehicle dealers, meaning that any person licensed as a "motor vehicle dealer" may also engage in wholesaling motor vehicles. However, the Missouri dealer licensing scheme further establishes a separate license for a "wholesale motor vehicle dealer", which is "a motor vehicle dealer who sells motor vehicles *only* to other new motor vehicle

[1]" . . .includes an individual, a partnership, corporation, an unincorporated society or association, joint venture or any other entity . . ."; section 301.550(10), RSMo. 2000.

[2]Unless otherwise noted, all statutory references shall be to RSMo. 2000.

franchise dealers or used motor vehicle dealers or via auctions limited to other dealers of any class." *See* §301.550(19) (emphasis added). Thus, Missouri dealers possessing a motor vehicle dealer's license, which is not limited to wholesale transactions only, may buy and sell motor vehicles at retail and at wholesale.

All MADA members are licensed by the Missouri Department of Revenue as either motor vehicle dealers or wholesale motor vehicle dealers, and hence *all* MADA members are authorized to buy and sell motor vehicles at wholesale. It thus follows that any expansion of the scope of civil liability available against motor vehicle wholesalers in this state stands to produce a very dramatic effect on MADA's members, in a manner which, we join in arguing, was unintended by the Legislature in its choice of language for §§407.020.1 and 407.025.1, and in a manner which would unfairly shift responsibility from the retail merchant to any previous supplier in the merchandise/product chain, even though that person or entity may (as in the present case) have no connection whatever to the retail transaction which actually resulted in the plaintiff's alleged damages. As an obvious means of seeking out additional or deeper pockets from which to choose, Appellant's arguments must be rejected out of hand in light of the far reaching implications of their suggestion that creating this form of "vertical liability" is somehow rooted in sound public policy. It is not. It is, instead, simply another effort to cast a wider net in a fishing expedition for monetary damage claims against small business. The case against Appellant's position is additionally fortified by the plain language of the statutes at issue, as so well addressed by the Eastern District.

2. Impossible Standard

As stated previously, all licensed motor vehicles buy and sell on a wholesale basis, and most do so frequently. Wholesale dealer auctions are the most common venue for dealer wholesale activity, and every licensed dealer has, at one time or another, bought and sold vehicles through such auctions, which are located at many different points around the state. Many, if not most licensed dealers buy and sell through such auctions on a weekly or monthly basis. When a dealer buys or sells a vehicle at such "dealer only" wholesale auctions, he is buying or selling the vehicle "as is" and this is clearly noted in the documents accompanying the sale. Further, many trade-in vehicles are accepted by dealers with the immediate intention of wholesaling the vehicle, due to its age or other factors. In neither of these very common situations will the wholesaler (i.e. the auction or the dealer) "interrogate" the person from whom *they* obtained the vehicle, because they know the vehicle will be wholesaled "as is" with *no representations whatever as to the vehicle's condition or history.*

This is the way the industry has operated for decades, and it works to properly place the burden of inspection on the *retail seller*, i.e. the dealer who will be selling the vehicle finally to a consumer. This system properly assumes that it is the retail dealer who will be actually representing the vehicle to the consumer, and thus removes the wholesaler from the chain of those responsible for ensuring that those representations are correct and complete. To adopt Appellant's position would abrogate this system and would also, in effect, abrogate the long-recognized doctrine

of "as is" sales by making a wholesaler liable notwithstanding the sale being made "as is."

"Dealer trades" are another example of dealer wholesale activity, whereby Dealer B has a customer ("Consumer") wishing to purchase a particular vehicle (new or used) not currently in his inventory, and finds that Dealer A has such a vehicle. In many cases Dealer B will have something that Dealer A wants, and a trade is arranged. If not, Dealer A may simply wholesale the vehicle to Dealer B outright, who then sells it to Consumer. In such an instance, where Consumer has neither visited Dealer A nor sought to make a purchase from him/her, where Consumer has not been made aware of Dealer A wholesaling the vehicle to Dealer B, indeed where Consumer likely does not even know of Dealer A's *existence,* how can Dealer A possibly take steps to safeguard against the imposition of this kind of remote liability? As a practical matter, in these instances Dealer A does not and *cannot* know what representations Dealer B may or may not make about the vehicle to Consumer, *regardless of whatever Dealer A may disclose to Dealer B about the vehicle.* Are we then to make insurers or indemnitors of wholesalers, by making them ultimately responsible for whatever might occur during the *retail* transaction between the selling dealer and his/her customer? In essence, this would be the practical result of expanding the MPA as suggested by Appellant – Missouri motor vehicle dealers would wind up as insurers of the other dealers to whom they wholesale vehicles for retailing to consumers.

3. Unlimited Scope of Liability

A broader implication of Appellant's position is the essentially unlimited numbers of parties that could be subject to liability as a result of any retail transaction. If a wholesaler in this scenario can be held liable, it necessarily follows that all persons or entities possessing the vehicle prior to the wholesaler can also be subject to liability, all the way back to the original owner at the time the vehicle was damaged. This would be the logical result of Appellant's suggestions, in that Appellant/Plaintiff's original allegation consisted only of his "information and belief" to the effect that Respondent . . . "failed to disclose existing accident damage to Napleton [retail seller] about which [Respondent] knew, or upon reasonable inspection, should have known, and when they further *knew or had reason to believe that Napleton was not likely to disclose the accident damage prior to sale."* L.F. 9 (emphasis added). Other than erroneously ascribing what appears to be a negligence standard to violations of the MPA (as more thoroughly addressed in Respondent's Brief), this allegation would, if allowed to be the basis of an MPA claim, assign an impossibly high burden to wholesalers – i.e. the ability to know with any degree of certainty what the retail seller may or may not represent to the consumer about the vehicle. There was never any allegation by Appellant that he had any discussions or contact whatsoever with Fenton about the vehicle, or that Fenton and Napleton had somehow conspired to mislead him about the previous damage. Without such allegations or evidence, how would wholesalers possibly act in any manner to avoid potential liability under such a broad standard? They could not, and thus if

Appellant's position is adopted, all Missouri dealers shall henceforth be looking over their shoulders each time they wholesale a motor vehicle, with fingers crossed that the retail dealer makes no omission or misrepresentation in his dealing with the ultimate consumer, lest the consumer bring an action which will follow back through to the wholesaler. Such a climate cannot be tolerated.[3]

4. Choice of Defendant Undermines MPA

MADA members are kept well-informed of their duties and responsibilities to retail consumers under the MPA. There is no attempt being made herein or otherwise to diminish the rights of consumers in retail transactions, and MADA believes strongly that all Missouri dealers should take very seriously their obligations to

[3]As noted in Respondent's Brief, wholesalers would have no recourse under the MPA against the person or entity from which they obtained the vehicle, because of the MPA's limitation of actions to "[a]ny person who purchases or leases merchandise primarily for personal, family or household purposes." Section 407.025.1.

consumers under the MPA and other principles of law[4]. Only by doing so can our dealers maintain and further the integrity of their businesses[5]. However, Appellant's argument, if followed, may actually work *against* providing any incentive for retail dealers to be vigilant and scrupulous in their dealings with consumers, by offering disgruntled consumers a "choice" of who to sue. By allowing a consumer to target the potentially deeper pockets of the wholesaler, the retail dealer who actually committed the alleged omission or misrepresentation could be exonerated of his

[4]As evidence of this assertion, during the present Session of the Missouri Legislature MADA has drafted and obtained House and Senate sponsorship of a bill to be entitled the "Car Buyer's Bill of Rights," modeled after a recently enacted California act which grants specific rights to purchasers of used motor vehicles; including rights to full disclosure, rights concerning return of the vehicle and refund of the purchase price, and many other rights not currently found in Missouri law. As of this writing there has not been a bill number assigned, however MADA anticipates numbering, introduction and initial action on the bill within the near future.

[5]MADA further has no quarrel with the Attorney General regarding that office's broader authority under the MPA to take legal action against more remote parties in the merchandising chain, as addressed in its amicus brief. However, to the extent that the Attorney General argues in favor of this broader authority being extended to individual parties bringing private civil actions, MADA disagrees.

wrongdoing, simply because the wholesaler made a more attractive defendant in the case at hand. The proponents of this outcome should be the last who would want the retail dealer exonerated in this fashion, yet their position would leave would-be plaintiffs the choice of defendants which would allow that result.

On a related note, Appellant does not argue that he cannot be made whole in this case by seeking his remedies only against Napleton, the retail dealer with whom he dealt. There is no assertion that his claims on the merits, if supported by the evidence, cannot be satisfied through a judgment solely against the retail seller. This is therefore, on its face, an improper case in which to address any issue concerning vertical liability to the wholesaler – there is no need to reach that question under the present fact setting, as alleged by Appellant/Plaintiff.[6]

WHEREFORE, for all of the aforesaid reasons, Amicus Missouri Automobile Dealers Association respectfully requests that this Court uphold the Judgement and Order of the Circuit Court of St. Louis County, Missouri, dismissing Respondent Nuckolls, Inc. d/b/a Fenton Auto Sales as a defendant in the suit brought by Appellant pursuant to Chapter 407, RSMo., and further respectfully requests such other relief as may be just and proper in the circumstances.

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[6]It is also noteworthy that in recent years the Missouri Legislature has elected to tighten the limits on joint and several liability for tortfeasors in general. *See* §537.067, RSMo. Supp. 2006 (as amended by House Bill 393 during the 2005 Legislative Session).

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that ten true and correct copies, plus one receipt copy, of the above and foregoing document were hand delivered on this ____ day of January, 2007 to Mr. Thomas F. Simon, Clerk, Missouri Supreme Court, 207 W. High Street, Jefferson City, MO 65102.

I hereby certify that a true and correct copy of the above and foregoing document, were sent via United States Mail or hand delivered on this ____ day of January, 2007 to each of the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 84.06 that this brief in the above-captioned case was prepared using Microsoft Office Word 2003, in 13-point Times New Roman font and it contains 2,826 words, as determined by the Microsoft Office Word 2003 word-counting system. I also certify that the diskettes of the brief filed with the Court and served upon all parties have been scanned for viruses and are virus-free.

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