

Summary of SC92675, *Tara L. Ward, et al. v. West County Motor Company, Inc d/b/a West County BMW*

Appeal from St. Louis County circuit court, Judge Richard C. Bresnahan

Argued and submitted November 13, 2012; opinion issued April 9, 2013, and modified on the Court's own motion May 28, 2013

Attorneys: The customers were represented by Mitchell B. Stoddard of Consumer Law Advocates in St. Louis, (314) 692-2001; the attorney general was represented by Douglas M. Ommen, Missouri Attorney General Chris Koster and Brian T. Bear of the attorney general's office in Jefferson City, (573) 751-7007; and West County BMW was represented by Bryan M. Kaemmerer and Brian E. McGovern of McCarthy, Leonard, Kaemmerer LC in St. Louis, (314) 392-5200.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: Customers of a car dealership appeal the trial court's judgment granting the dealership's motion to dismiss their claim for violating the Missouri Merchandising Practices Act (MMPA). In a 5-0 decision written by Chief Justice Richard B. Teitelman, the Supreme Court of Missouri affirms the trial court's judgment in part and reverses it and remands (sends back) it in part. The trial court correctly dismissed the customers' claims alleging violations of the MMPA based on violations of section 365.070.4, RSMo. The trial court erred in dismissing the customers' claims based on conversion, lack of good faith and an unlawful liquidated damages clause. This Court remands the case to the trial court to determine the appropriate amount of attorney fees for counsel's appellate work.

Facts: Each of the customers in this proceeding paid a deposit to West County BMW for the purchase of a vehicle. They signed a vehicle buyer's order stating that all deposits are non-refundable, but all but one of the customers alleges West County stated the deposits were refundable if the purchase was not completed. The customers decided not to purchase the vehicles and were told the deposits would not be refunded. The customers filed an action against West County for violating the MMPA by converting funds or property; for failing to act in good faith and using a liquidated damages clause that was really a penalty provision; and for conversion. West County filed a motion to dismiss for failure to state a claim on which relief could be granted, which the trial court granted. The customers dismissed their conversion claim and appeal.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Court en banc holds: The trial court correctly dismissed the customers' claims alleging violations of the MMPA based on violations of section 365.070.4. The trial court erred, however, in dismissing the customers' claims based on conversion, lack of good faith and an unlawful liquidated damages clause. Section 407.020, RSMo, of the MMPA authorizes a cause of action for a person who purchases merchandise for personal purposes and suffers a loss of money or property as a result of a method, act or practice declared unlawful under the statute. It also provides it is unlawful or deceptive to use deceptive or unfair practices connected to sale or

advertisement of merchandise in trade or commerce. Section 365.060.4, RSMo, provides that a buyer may rescind his agreement and receive a refund after delivery of a contract. West County correctly asserts that the customers did not enter a contract, and section 365.060.4 does not apply. The customers' claims based on conversion, lack of good faith and an unlawful liquidated damages clause are sufficient to survive a motion to dismiss because each constitutes an unlawful act that is an unfair practice.

As to the customers' motion for attorney fees on appeal, consistent with *Berry v. Volkswagen Group of America, Inc.*, ___ S.W.3d ___ (No. SC92770, decided April 9, 2013) (Mo. banc 2013), this Court remands the case to the trial court to determine the appropriate amount of attorney fees for counsel's appellate work.