

SC92675

IN THE SUPREME COURT OF MISSOURI

TARA L. WARD, et al.,

Plaintiffs/Appellants,

v.

WEST COUNTY MOTOR CO., INC

d/b/a WEST COUNTY BMW,

Defendant/Respondent.

Appeal from the Circuit Court of St. Louis County, Missouri

The Honorable Richard C. Bresnahan, Circuit Judge

Case No. 09SL-CC04138

Transferred from the Missouri Court of Appeals, Eastern District

Appeal No. ED97592

SUBSTITUTE BRIEF OF RESPONDENT

Brian E. McGovern, #34677

Bryan M. Kaemmerer, #52998

McCarthy, Leonard, Kaemmerer, L.C.

400 South Woods Mill Road, Suite 250

Chesterfield (St. Louis), MO 63017-3481

(314) 392-5200

(314) 392-5221 (Fax)

Attorneys for Defendant/Respondent

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POINTS RELIED ON

- I. The judgment of the Trial Court should be affirmed because the provisions of the Motor Vehicle Time Sales Law - R.S.Mo. § 365.070.4 - which provide a consumer with a limited right to rescind, were not triggered in that Plaintiffs failed to allege that they actually entered into a retail installment contract (as opposed to merely *intending to* enter into one)

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II. The judgment of the Trial Court should be affirmed because Plaintiffs' allegations regarding conversion, lack of good faith, and an unenforceable liquidated damages clause are premised on a right to rescind their transaction with Defendant under the Motor Vehicle Time Sales Law - R.S.Mo. § 365.070.4 – in that they explicitly allege that Defendant accepted their deposits but refused to return them before they took delivery of vehicles

Responds to Plaintiffs' Point Relied On I

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Responds to Plaintiffs' Point Relied On I

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IV. In the alternative, the judgment of the Trial Court should be affirmed because the presence of the liquidated damages clause was not the cause of Plaintiffs' ascertainable loss of their deposits in that it was the *misrepresentation* (which was not alleged) that the deposits would be refundable which induced Plaintiffs to provide them to Defendant

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- V. The appeal should be dismissed because this Court lacks jurisdiction to hear the appeal in that the claims that Plaintiffs voluntarily dismissed arose from the same underlying facts as those which were dismissed by the Court such that the dismissal did not dispose of a distinct judicial unit

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LEGAL ARGUMENT

1. The judgment of the Trial Court should be affirmed because the provisions of the Motor Vehicle Time Sales Law - R.S.Mo. § 365.070.4 - which provide a consumer with a limited right to rescind, were not triggered in that Appellants failed to allege that they actually entered into a retail installment contract (as opposed to merely *intending to enter into one*)

This is an issue of statutory interpretation. It is also an issue of first impression given that this Court has not previously had the opportunity to interpret the meaning of R.S.Mo. § 365.070.4.

The primary rule of statutory interpretation is to ascertain the intent of the Legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning. *S. Metro Fire Pro. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009). It is also fundamental that a section of a statute should not be read in isolation from the context of the whole act. *State v. Rousseau*, 34 S.W.3d 254, 260 (Mo. App. W.D. 2000), citing *Richards v. United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 592, 7 L.Ed.2d 492, 499 (1962). Thus, in interpreting legislation, the Court must not be guided by a single sentence but should look to the provisions of the whole law, and to its object and policy. *Id.*

Moreover, the title of a statute is necessarily a part thereof and it to be considered in construction. Missouri Const. Art. 3, § 23; *Gurley v. Missouri*

Board of Private Investigator Examiners, 361 S.W.3d 406, 413 (Mo. banc 2012);
Bullington v. State, 459 S.W.2d 334, 341 (Mo. 1970).

The crux of Count I of Plaintiffs' Second Amended Petition is that they had a right to rescind their transaction, and therefore receive a refund of the deposit that the previously provided to Defendant, based upon the provisions of R.S.Mo. § 365.070.4, which provides in pertinent part as follows:

The seller shall deliver to the buyer, or mail to him at his address shown on the contract, a copy of the contract signed by the seller. Until the seller does so, a buyer who has not received delivery of the motor vehicle may rescind his agreement and receive a refund of all payments made and return of all goods traded in to the seller on account of or in contemplation of the contract, or if the goods cannot be returned, the value thereof.

Significantly, R.S.Mo. § 365.020(10) defines the term "contract" as an agreement evidencing a retail installment transaction entered into in this state pursuant to which the title to or a lien upon the motor vehicle, which is the subject matter of the retail installment transaction is retained or taken by the seller from the buyer as security for the buyer's obligation. Thus, there can be no dispute that the "contract" referenced in R.S.Mo. § 365.070.4 refers to the *Retail Installment Contract* (i.e. the document whereby a customer finances the purchase price of their motor vehicle) as opposed to the *Vehicle Buyer's Order* (i.e. the document whereby a customer purchases a vehicle from a motor vehicle dealer)(L.F. 40-41).

These contracts serve separate and distinct purposes. Of course, not all motor vehicle purchasers finance the purchase price of their transaction. Indeed, some individuals are true “cash buyers” who pay for the entire purchase price of the vehicle with a check, money order, etc. In this instance, the parties never enter into a retail installment contract.

The title to the statute in question – i.e. the Missouri Motor Vehicle Time Sales Law – reinforces the conclusion that the “contract” contemplated by R.S.Mo. § 365.070.4 is the retail installment contract because there is no “time sale” in the context of a cash buyer; rather, a time sale only incurs when an individual enters into a retail installment contract and pays for the purchase price of the vehicle over time. R.S.Mo. § 365.010.

Plaintiffs’ Second Amended Petition fails to allege that they ever entered into a Retail Installment Contract with Respondent. Rather, Appellants Ward, Toole, Zargan, and LaBarge merely allege that they “intended to” enter into a Retail Installment Contract. See Pl. 2nd Amend Pet. at ¶ 9 (L.F. 51), 24 (L.F. 53), 31 (L.F. 54), 37 (L.F. 55), and 49 (L.F. 56)(“Plaintiffs intended to finance the purchase of a motor vehicle with West County.”). Conversely, Appellants Kamal and Mona Yassin alleged that they intended to pay cash for the purchase price of the vehicle (i.e. they were cash buyers as referenced above). See Pl. 2nd Amend Pet. at ¶ 16 (“Yassins intended to pay cash for the M3 . . .”)(L.F. 52). However, Defendant’s obligation to provide its customers with a copy of their Retail Installment Contract, and the customer’s corresponding right to rescind the

transaction unless and until the dealership does so, all as set forth in § 365.070.4, does not arise unless and until the customer actually signs a Retail Installment Contract. Because none of the Plaintiffs alleged that they actually entered into a Retail Installment Contract with Respondent, Count I of their Second Amended Petition failed to state a claim upon which relief can be granted.

Additionally, in attempting to ascertain the Legislative intent, Courts seeks to avoid absurd and unreasonable results. *State ex rel, Jackson County v. Spradling*, 522 S.W.2d 788, 791 (Mo. banc 1975); *Davidson v. Lazcano*, 204 S.W.3d 213, 217 (Mo. App. E.D. 2006). However, Plaintiffs' interpretation of R.S.Mo. § 365.070.4 leads to an absurd result in that it would require Defendant to perform an impossible act – to provide its customers with a copy of a retail installment contract *prior to* the point in time that they have actually *entered into* a retail installment contract. On the other hand, a far more plausible interpretation of what the Missouri Legislature intended when it enacted R.S.Mo. § 365.070.4 is that the protections contained therein are simply not triggered unless and until a customer actually signs a retail installment contract. Prior to that point, it is impossible for a business to provide its customer with a copy of a retail installment contract. This is a common sense reading of the statute, and is also in accordance with the conduct which the Legislature was presumably attempting to correct (i.e. customers not getting a copy of their retail installment contracts).

Any change in the plain meaning of the statute must come from the Legislature, and not the Judiciary. *State ex. rel. Koster v. Professional Debt Management, LLC*, 351 S.W.3d 668, 675 (Mo. App. E.D. 2011)(“However, we cannot undertake a legislative role and write into the MPA language that simply does not exist.”).

For the foregoing reasons, the decision of the Trial Court should be affirmed.

II. The judgment of the Trial Court should be affirmed because Plaintiffs’ allegations regarding conversion, lack of good faith, and an unenforceable liquidated damages clause are premised on a right to rescind their transaction with Defendant under the Motor Vehicle Time Sales Law - R.S.Mo. § 365.070.4 – in that they explicitly allege that Defendant accepted their deposits but refused to return them before they took delivery of vehicles

Initially, it is important to note that the only “unlawful practice” set forth in R.S.Mo. § 407.020 that Plaintiffs’ allege in their Second Amended Petition is an “unfair practice”. L.F. 50 – 60.

Thus, there are not any allegations of deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact.¹

Furthermore, Plaintiffs' Second Amended Petition explicitly premises its allegations regarding the unfair practices on a right to rescind provided by the Missouri Motor Vehicle Time Sales Law - R.S.Mo. § 365.070. To wit:

46. **In accepting deposits from Plaintiffs and then refusing to return the deposits before Plaintiffs took delivery of the vehicles**, West County engaged in unfair practices in connection with the sale or lease of a vehicle in one or more of the following respects:

- a. By converting the funds or property paid by Plaintiffs when it failed to apply them to the purchase or lease of a motor vehicle;
- b. By failing to act in good faith when it refused to make like-kind refunds of deposits after the sale or lease had been terminated, and before Plaintiffs had taken delivery of a motor vehicle; and

¹ Note that Plaintiffs' re-filed their law suit and explicitly alleged a "misrepresentation" because Defendant's employees purportedly told them that the deposits would, in fact, be refundable, despite the clear contractual language to the contrary. This case, Cause No.11SL-CC04357 is currently pending in the Circuit Court of St. Louis County before the Honorable Stephen Goldman.

- c. By using a liquidated-damages clause in its contracts that was really a disguised penalty provision.

L.F. 56 (emphasis added).

Thus, Plaintiffs' allegations that Defendant converted their deposits, failed to act in good faith, and included of an unlawful liquidated damages clause in the contract, are all premised upon the unfounded assumption that Plaintiffs had a right to rescind their transactions with Defendant under R.S.Mo. § 365.070 (as discussed *supra*).

Of course, a plaintiff is the master of his or her petition. *Trainwreck West Inc. v. Burlington Ins. Co.*, 235 S.W.3d 33, 41 (Mo. App. E.D. 2007). Thus, it is entirely possible for a plaintiff to plead him or herself out of Court. *Kemper v. Gluck*, 39 S.W.2d 330, 333 (Mo. banc 1931). Indeed, the law from this Court has been well-established for over a century that it is the plaintiff's burden to make his or her pleadings sufficiently definite and certain:

The primary duty to make the pleading clear and unequivocal is on the party who drafts it. He it is who, without motion or suggestion from his adversary on whom rests the onus of making the pleading definite and certain, which burden cannot be cast on the adversary by the fault of the pleader failing to perform his own duty. And notwithstanding our statute requires pleadings to be liberally construed, etc., this only extends to the form of the pleadings, and does not apply to the fundamental requirements of a good pleading; and the pleader is not allowed now, any more than

formerly, by inserting doubtful or uncertain allegations in a pleading, to throw upon his adversary the hazard of correctly interpreting its meaning. *Sidway v. Missouri Land & Livestock Co.*, 63 S.W. 705, 713-14 (Mo. 1901); *Frye v. Warren*, 176 S.W. 289, 290 (Mo. App. 1915).

There is simply no plausible reading of Plaintiffs' Second Amended Petition which would support their unsubstantiated assertion that their allegations regarding conversion, lack of good faith, and liquidated damages as being separate and distinct from their claim pursuant to R.S.Mo. § 365.070.4. To the contrary, the lynchpin of Count I of their Second Amended Petition is their belief that R.S.Mo. § 365.070.4 provides them with a right to rescind their transactions with Defendant. Without the benefit of this lynchpin, their remaining allegations, which are necessarily dependent on the presence of the lynchpin, must also fail.

The fact that ¶ 46(b) of Plaintiffs' Second Amended Petition explicitly references taking delivery of the vehicle clarifies that the allegations are dependent on R.S.Mo. § 365.070; if they were not, then it would not be necessary to reference taking delivery of the vehicle since that provision is only made necessary by the statute.

Let us also not forget that this is the third Petition involved in this law suit (i.e. original petition, first amended petition, and second amended petition). If Plaintiffs truly intended to allege unfair practices independent of R.S.Mo. § 365.070 then they had three swings at the ball in order to do so. It is now time for the Court to declare them to be out.

The question of whether allegations of conversion, inclusion of an unenforceable liquidated damages provision, etc. can constitute an “unfair practice” under the MMPA *independent of* a presumed right to rescind under R.S.Mo. § 365.070 should be left for another day (let us not forget that these same allegations, along with additional allegations of misrepresentation, were included in the re-filed law suit which is pending in St. Louis County Circuit Court). Accordingly, re-transfer to the Court of Appeals pursuant to Rule 83.09 is an appropriate remedy.

III. In the alternative, Plaintiffs’ failure to include legal argument regarding their allegation that Defendant (i) failed to act in good faith, and (ii) converted their deposits, in their Substitute Brief results in abandonment of that claim pursuant to Rule 83.08(b)

Rule 83.08(b) of the Missouri Rules of Civil Procedure provides as follows:

Substitute Briefs. A party may file a substitute brief in this Court. The substitute brief shall conform with Rule 84.04, shall include all claims the party desires this Court to review, shall not alter the basis of any claim that was raised in the court of appeals brief, and shall not incorporate by reference any material from the court of appeals brief. *Any material included in the court of appeals brief that is not included in the substitute brief is abandoned.*

Emphasis added. See also *Lane v. Lensmeyer*, 158 S.W.3d 218, 230. (Mo. banc 2005)

In their Appellant's Brief to the Court of Appeals, Plaintiffs included a portion which specifically argued that their allegations about conversion violated the MMPA. See Respondent's Brief at p.18-20. They likewise included a portion that argued that Defendant failed to act in good faith when it failed to return their deposits. See Respondent's Brief at p.20-21.

However, nowhere in the Points Relied Upon in their Substitute Brief do Plaintiffs include similar arguments. See generally Plaintiffs Substitute Brief at p.9-18. Rather, Plaintiffs choose to focus solely on their argument that inclusion of the liquidated damages provision serves as an independent basis for a MMPA violation. See Plaintiffs Substitute Brief at p.15-18. Accordingly, Plaintiffs have abandoned these claims by failing to explicitly include these arguments in their Substitute Brief pursuant to Rule 83.08(b).

IV. The judgment of the Trial Court should be affirmed because the presence of the liquidated damages clause was not the cause of Plaintiffs' ascertainable loss of their deposits in that it was the *misrepresentation* (which was not alleged) that the deposits would be refundable which induced Plaintiffs to provide them to Defendant

Due to the fact that "the literal words [of the MMPA] cover every practice imaginable and every unfairness to whatever degree," it is up to the Courts to declare what practices run afoul of its provisions by engaging in a case-by-case,

fact-intensive inquiry. *Ports Petroleum Co., Inc. v. Nixon*, 37 S.W.3d 237, 240 (Mo. banc 2001); *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721, 724 (Mo. banc 2009)(“This leaves to the court in each particular instance the determination of whether fair dealing has been violated.”).

Plaintiffs allege that Defendants violated the MMPA by including an unenforceable liquidated damages provision in its Vehicle Buyer’s Order. L.F. 56. Specifically, Plaintiffs argue that “damages are relatively easy to measure in a car sales transaction [thus] West County has no legitimate need for a liquidated damages clause.” Appellants Substitute Brief at p.18.

The MMPA grants a private a cause of action as follows:

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.

R.S.Mo. § 407.025.1 (emphasis added).

Accordingly, by use of the phrase “as a result of,” the Legislature has made it crystal clear that there must be a causal relationship between the ascertainable loss of money or property and the practice declared to be unlawful

by R.S.Mo. § 407.020.1 in order for a person to be able to bring a private cause of action.

Thus, when read together, R.S.Mo. § 407.020 and § 407.025, require the following four (4) elements to be present in order to successfully plead a private cause of action under the MMPA:

- (1) There must be a use or employment of a deception, a fraud, a false pretense, a false promise, a misrepresentation, an unfair practice, or a concealment, suppression or omission of a material fact;
- (2) The unlawful act must occur in connection with the sale or advertisement of any merchandise in trade or commerce;
- (3) The unlawful act must result in ascertainable loss of money or real or personal property; and
- (4) The loss must occur to a person who purchases primarily for personal, family or household purposes.

In re Geiler, 398 B.R. 661, 671-72 (E.D. Mo. Bankr. 2008).

Although the MMPA is a broad statute, its scope is not unlimited. For instance, in *State ex. rel. Koster v. Professional Debt Management, LLC*, 351 S.W.3d 668 (Mo. App. E.D. 2011) the Court held that the second element (i.e. in connection with a sale or advertisement) was not present where a debt collector purportedly used illegal practices to collect debts, but there was no allegation that the debt collector was a party to the initial transactions, or that there were any

unfair practices or acts of deception made with regard to the initial consumer transactions. Accordingly, any change in the plain language of the statute must come from the Legislature, and not the Courts. *Id.* at 675.

Here, the third element is at issue – i.e. whether the presence of the liquidated damages provision was the inducement underlying Plaintiffs decision to provide the deposits to Defendant and thereby caused them an ascertainable loss.

Although no Missouri cases have addressed this issue in this context, the most factually analogous case is *DePerlata v. Dlorah, Inc.*, 5:11-cv-1102-ODS, 2012 WL 4092191 (W.D. Mo. 2012). In *DePerlata*, a former student in a paralegal program sued an educational institution alleging that its practice of paying admissions representatives in a manner that violated regulations issued by the United States Department of Education violated the MMPA. In so doing, the plaintiff relief upon the Attorney General’s definition of “unfair practice” set forth in 15 C.S.R. § 60-8.020(1) to form the basis of her MMPA violation. The *DePerlata* court rejected this argument and held that the plaintiff did not suffer an ascertainable loss as a result of the illegal pay practices because she could not demonstrate any material manner in which Defendant’s payment of its admissions personnel affected her decision to become a student at the school.

In this case, Plaintiffs alleged that they were induced to make a deposit with Defendant based upon the representation that the deposit would be refunded if the transaction did not ultimately materialize. L.F. 51-55. Indeed, Plaintiffs’ factual allegations can be concisely summarized as follows: if you give me a

deposit, and things don't work out, you will get your money back. It makes sense that a consumer who has these representations made to him or her would be induced to provide the deposit. Thus, these are the representations which caused their ascertainable loss, not the presence of a liquidated damages clause.

On the other hand, it is counterintuitive to suggest that a contractual provision stating that the company has a *right to retain* a deposit made by a customer *is the very inducement for the customer to provide the company with the deposit in the first instance*. It makes no sense that a company telling a customer that they are not going to get their deposit back would be the inducement for the customer to pay the money.

The simple fact of the matter is that this case should have been brought as a misrepresentation claim from the beginning. It was not, despite Plaintiffs having three (3) opportunities to amend their lawsuit. The only possible basis to allege, in the alternative, an "unfair practice" as a separate and distinct MMPA violation was to show a violation of § 365.070.4. This attempt failed.

Plaintiffs' assertion that this case is of great public importance is not well taken. Rather, the scope of the Court of Appeals holding is fairly limited - § 365.070.4 is not implicated where, as here, the parties did not enter into a retail installment contract, and therefore cannot serve as the basis for a corresponding violation of the MMPA under an unfair practice theory. Presumably, any consumer that encounters similar conduct in the future will simply proceed on a misrepresentation theory instead of asserting convoluted claims of unfair practices

even absent a statutory violation. Accordingly, Plaintiffs' remaining remedy is to pursue the re-filed suit pending in the Trial Court as a misrepresentation claim given that the liquidated damages provision did not cause the ascertainable loss of their deposits.

V. The appeal should be dismissed because this Court lacks jurisdiction to hear the appeal in that the claims that Plaintiffs voluntarily dismissed arose from the same underlying facts as those which were dismissed by the Court such that the dismissal did not dispose of a distinct judicial unit

Appellate jurisdiction in this case turns on the interplay between the well-established notion that a judgment is only final for purposes of appellate review when it disposes of a "distinct judicial unit", and the rule of civil procedure which permits a party to dismiss a cause of action without prejudice. Of course, if the Court lacks jurisdiction to hear the appeal, then it must be dismissed. *Hoewing v. Howeing-Kurtz*, 29 S.W.3d 473, 475-76 (Mo. App. E.D. 2000). Indeed, the statutes regarding Missouri appellate procedure (i.e. R.S.Mo. § 512.020) make a final judgment a prerequisite to appellate review. *State ex rel. Mo. Gas Energy v. Public Serv. Comm'n.*, 50 S.W.3d 801, 804 (Mo. App. W.D. 2001).

According to this Court, a judgment is final only when it disposes of a "distinct judicial unit". *Gibson v. Brewer*, 952 S.W.2d 239, 244 (Mo. banc 1997). The phrase "distinct judicial unit" has a settled meaning – i.e. the final judgment on a claim, and not a ruling on some of several issues arising out of the same

transaction or occurrence which does not dispose of the claim. *Gibson*, 952 S.W.2d at 244. Thus, an order dismissing some of several alternative counts, each stating only one legal theory to recover damages for the same wrong, is not considered an appealable judgment while the other counts remain pending because the counts are concerned with a *single fact situation*. *Id.* Rather, it is differing, separate, distinct transactions or occurrences that permit a separately appealable judgment, not differing legal theories or issues presented for recovery on the same claim. *Id.*; See *Shelter v. Vulgamott*, 96 S.W.3d 96, 106 fn.8 (Mo. App.W.D. 2003)(“A judgment that disposes of only one of several remedies and leaves other remedies relating to the same legal rights open for future adjudication is not a final judgment under Rule 74.01(b).”).

The final judgment rule is based on the belief that piecemeal appeals are oppressive and costly, and that optimal appellate review is achieved by allowing appeals only after the entire action is resolved in the trial court. *Wilson v. Hungate*, 434 S.W.2d 580, 583 (Mo. 1968). In other words, the requirement that a final judgment be entered before an appeal can be taken is designed to avoid disruption of the trial process, to prevent appellate courts from considering issues that may be addressed later in trial, and to promote judicial efficiency. *Bleche v. Goodyear Tire & Rubber Co.*, 28 S.W.3d 484 (Mo. App. E.D. 2000).

Applied to the facts of this case, it is apparent that the Trial Court did not dispose of a “distinct judicial unit” because both counts of Plaintiffs’ law suit arose from *precisely the same underlying facts*, and merely presented alternative

legal theories for recovery on the same claim. Plaintiffs' Second Amended Petition (L.F. 50 – L.F. 60) alleged two causes of action – Count I for violation of the Missouri Merchandising Practices Act (“MMPA”) – and Count II for Conversion. It is readily apparent that these two claims involve the same underlying fact pattern (i.e. Defendant's failure to return certain monetary deposits that Plaintiffs made in connection with efforts to purchase or lease motor vehicles from it). Compare ¶ 46 of Plaintiffs' Second Amended Petition under the MMPA (“In accepting deposits from Plaintiffs and then refusing to return the deposits before Plaintiffs took delivery of the motor vehicles, West County engaged in unfair practices in connection with the sale or lease of a vehicle . . .”) with ¶ 65 of Plaintiffs' Second Amended Petition for Conversion (“By refusing to make like-kind returns of the deposits paid by Plaintiffs, West County converted the deposits to its own use without authorization or justification.”).

The Trial Court granted Defendant's Motion to Dismiss Count I of Plaintiff's Second Amended Petition (i.e. the MMPA claim) for failure to state a claim upon which relief can be granted (L.F. 110). Plaintiffs then made a strategic decision to dismiss Count II (i.e. the Conversion claim) without prejudice, and subsequently re-filed the case to cure a defect in their pleadings.

As noted in the “Judgment” dismissing the remaining claims without prejudice (L.F. 111), after the Trial Court granted Defendant's Motion to Dismiss Count I of their Second Amended Petition, Plaintiffs sought leave to once again amend their Petition to explicitly allege that Defendant engaged in

“misrepresentations” under the MMPA (which was not alleged in their Second Amended Petition). Given that the case was set for trial only five (5) days thereafter, the Trial Court declined to allow Plaintiffs leave to amend their suit at this very late juncture.

It was only at that point that Plaintiffs decided to dismiss their remaining cause of action without prejudice. The re-filed suit, which is Cause No. 11SL-CC04357, is presently pending before Judge Stephen Goldman, and is also a two-count Petition for violation of the MMPA and for Conversion in connection with the deposit issue.

As is often the case with the law, there is no *per se* rule that whenever a case is dismissed without prejudice after an earlier ruling on the merits of a claim in the same case (here, the ruling on the Motion to Dismiss), that it automatically does not dispose of a distinct judicial unit. Rather, it will depend on the facts and circumstances of each case to determine whether the claims that were dismissed without prejudice arise from the same underlying facts as those that were dismissed on the merits.

For instance, imagine a scenario in which Plaintiffs’ Second Amended Petition contained a third count, say for Negligence, in connection with service work that the dealership performed on other vehicles that Plaintiffs brought to Defendant’s dealership for oil changes, wheel alignments, tire rotations, etc. Imagine further that the Trial Court dismissed this claim on the basis of the statute of limitations. Because the claim for Negligence did not arise from the same

underlying facts as the claims for violation of the MMPA and for Conversion, the dismissal would have disposed of a distinct judicial unit vis-à-vis the Negligence claim, which would have been ripe for judicial review. However, because the MMPA and Conversion claims were essentially pled in the alternative and based on the same underlying facts, these claims would need to be re-filed and disposed of in the second proceeding before being ripe for appellate review.

Moreover, *Magee v. Blue Ridge Professional Building Co., Inc.*, 821 S.W.2d 839 (Mo. banc 1991) is factually and legally distinguishable. In *Magee* the plaintiff sued several defendants for injuries that she incurred when she fell on the stairway of an office building. *Id.* at 841. The appeal arose after the trial court granted a former owner's motion to dismiss on statute of limitations grounds; thus, the order disposed of all claims as to this individual. *Id.* The only remaining claims were against other defendants. *Id.* Approximately nine (9) months after the trial court granted the motion to dismiss, the plaintiff dismissed the claims against all remaining defendants and pursued an appeal to challenge the constitutionality of the statute of limitations found in R.S.Mo. § 516.097. *Id.* at 841. In this limited context, the *Magee* Court found that the dismissal of the remaining defendants allowed the order of dismissal for failure to state a cause of action against the former building owner to become a final judgment.

This Court's *Magee* decision is easily harmonized with its *Gibson* ruling approximately six (6) years later. Simply put, the claim in *Magee* on appeal disposed of a distinct judicial unit (i.e. a single claim against a single defendant on

a single legal basis – the statute of limitations). In contrast, the *Gibson* decision involved claims pending in the trial court for battery, negligent infliction of emotional distress, and intentional infliction of emotional distress against the same defendant, and based upon the same underlying conduct (i.e. alleged clergy sexual abuse) upon which the claims on appeal (breach of fiduciary duty and conspiracy) were also based.

The facts of this case are far more analogous to *Gibson* than they are to *Magee*. This is not a case where Plaintiffs dismissed claims against other defendants after all of their claims against Defendant were resolved. Rather, this is a case in which the claims which remain pending in the re-filed suit arose out of the same underlying facts as those pending on this appeal.

Essentially, Plaintiffs have forced Defendant to fight a two-front war. Plaintiffs are entitled to have the merits of their case heard by an Appellate Court; however, the time is not now. Once the litigation plays out in the re-filed litigation, Plaintiffs will be well within their rights to pursue the matter on appeal if they do not like the ultimate result therein. As it presently stands, however, the logic underlying the final judgment requirement of avoiding disruption of the trial process, preventing appellate courts from considering issues that may be addressed later in trial, and promoting judicial efficiency, mandates appellate judicial restraint pending further proceedings below.

For the foregoing reasons, the above-captioned appeal should be dismissed for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, the Judgment of the Trial Court should be affirmed.

McCarthy, Leonard, Kaemmerer, L.C.

/s/ Bryan M. Kaemmerer

Brian E. McGovern, #34677

Bryan M. Kaemmerer, #52998

400 South Woods Mill Road, Suite 250

Chesterfield (St. Louis), MO 63017-3481

(314) 392-5200

(314) 392-5221 (Fax)

Attorneys for Defendant/Respondent

CERTIFICATE PURSUANT TO RULES 84.06(c) and 84.06(g)

The undersigned counsel for Defendant/Respondent hereby states:

- 1) The foregoing brief contains 5,433 words, which is within the applicable limitations in length set forth in Rule 84.06(b); and
- 2) The foregoing certifies this electronic version of this brief that is provided has been scanned for viruses under Trend Micro Client/Server Security agent v 5.1, and has been found to be virus-free.

McCarthy, Leonard, Kaemmerer, L.C.

/s/ Bryan M. Kaemmerer
Brian E. McGovern, #34677
Bryan M. Kaemmerer, #52998
400 South Woods Mill Road, Suite 250
Chesterfield (St. Louis), MO 63017-3481
(314) 392-5200
(314) 392-5221 (Fax)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of October, 2012, the foregoing was filed electronically with the Clerk of Court, therefore to be served electronically by operation of the Court's electronic filing system upon the following:

Mitchell B. Stoddard, Esq.
Consumer Law Advocates
11330 Olive Boulevard, Suite 222
St. Louis, MO 63141
Attorney for Appellant

Chris Koster, Esq.
Douglas M. Ommen, Esq.
Brian T. Bear, Esq.
Office of the Attorney General of Missouri
P.O. Box 899
Jefferson City, MO 65102

/s/ Bryan M. Kaemmerer
Brian E. McGovern, #34677
Bryan M. Kaemmerer, #52998
400 South Woods Mill Road, Suite 250
Chesterfield (St. Louis), MO 63017-3481
(314) 392-5200
(314) 392-5221 (Fax)