

IN THE MISSOURI SUPREME COURT

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No. SC88023

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RODNEY D. GIBBONS,  
Appellant,

V.

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

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

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**APPELLANT'S SUBSTITUTE REPLY BRIEF**

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**I. THE TRIAL COURT ERRED IN DISMISSING GIBBONS' CLAIM AGAINST FENTON FOR BREACH OF THE MERCHANDISING PRACTICES ACT, R.S.MO §§ 407.020 AND 407.025, FOR LACK OF PRIVITY, BECAUSE GIBBONS' 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.**

**A. REPLY TO FENTON'S ARGUMENT**

Summary of Argument

As Gibbons will set out below, glaring faults in Fenton's position include that Fenton: 1) now backs entirely away from its lack of "privity" argument, substituting meaningless and evasive "transactional nexus" and "conjunctive relationship" arguments; 2) provides no response to Gibbons' analysis of the MPA plain language; 3) ignores the extensive case law cited by Gibbons showing the remedial purposes of the MPA and the breadth with which MPA is construed; 4) ignores the Missouri cases cited by Gibbons showing no privity requirement in fraud, implied warranty, negligence, and many contract cases; and 5) ignores the heavy and almost uniform precedent from other states showing no privity requirement under similar consumer protection statutes. Fenton also provides weak and incorrect analyses in attempting to distinguish MPA cases particularly cited by Gibbons to show there is no MPA privity requirement. Fenton then asserts that Gibbons "failed to state a claim", an argument that amounts to a rehash of Fenton's previous arguments in another guise. And Fenton concludes with arguments that

permitting MPA claims against remote sellers would raise all kinds of unprecedented problems, but in making that argument Fenton ignores that many other theories (such as fraud) do not require privity, yet these problems have not arisen.

#### Detail of Argument

Suddenly, Fenton is completely avoiding use of the word “privity”. It obtained dismissal of this case in the trial court by asserting lack of “privity”. But its entire argument now is switched to arguing that the MPA requires a “transactional nexus” or a “conjunctive relationship” between the unlawful practice complained of and the sale of the merchandise to the consumer. These phrases are nothing but circumlocutions – neither is found in the statutes, just as “privity” is not found in the statutes. Gibbons agrees that there is a requirement in the MPA of a connection between the unlawful practice and the harm caused to the consumer buyer: the harm must be a “result” of the unlawful practice, as stated in § 407.025. The language is straightforward and clear, unlike Fenton’s obfuscations.

Fenton states baldly that Gibbons made arguments “without any considered analysis of the statute” (Fenton’s substitute brief, p. 9). But Fenton simply ignores the careful analysis of the statutes provided by Gibbons. And Fenton provides no discussion about, for example, the use of “another person” in § 407.025, or the use of the word “result”, or the contrast between the use of the word “person” with the use of the word “seller” in § 407.025. Fenton’s argument ultimately hangs on its argument that the venue clause in § 407.025 bars claims against remote sellers, because it provides for suits to be brought only “where the seller or lessor resides or the transaction complained of took

place”. But nothing in that clause restricts suits against “any person” who violates the statute, so the plain language of the statute does not help Fenton. Fenton speculates that if the legislature intended to allow suits against remote sellers, then “there is no reason why the consumer should not be allowed to sue in the county where the remote seller resides” (Fenton’s brief, p. 13). This argument both ignores the plain language of the statute allowing such claims, and attempts a most tenuous reverse engineering to demonstrate a negative legislative intent. Meanwhile, the vast body of Missouri case law showing the remedial purposes of the MPA is simply ignored by Fenton.

Moreover, Fenton eventually admits, at p. 22 of its brief:

Again, Fenton is not claiming that a consumer can never sue a remote seller under the MPA, but the consumer must plead and prove that the remote seller violated the Act in the course of the consumer’s own retail sales transaction.

This tangled admission surely goes most of the way to acknowledging that there is no requirement of “privity” or any such under the MPA. And Fenton’s equally tangled argument that the remote seller’s conduct must have a “transactional nexus” or “conjunctive relationship” with the buyer’s loss does not replace the clear language of the statute: if the defendant’s conduct in violation of § 407.020 “resulted” in the consumer’s loss when he/she purchased the goods, that violation is actionable.

Also, Fenton, having wandered into arguments about the intent of the MPA that go beyond its plain language, barely mentions the cases that recite the MPA’s remedial purposes and the liberal construction that should be used in construing it.

Fenton also completely avoids discussing the precedents cited by Gibbons, such as *O'Brien v. B.L.C. Insurance Company*, 768 S.W.2d 64, 67-69 (Mo. 1989), showing that there is no privity requirement in cases in fraud, negligence, implied warranty, and many breach of contract claims.

Fenton also totally ignores the nearly-uniform authority and cases from other states across the country, cited by Gibbons, showing no privity requirement in those states' similar "UDAP" consumer protection statutes.

Fenton next attacks the MPA cases particularly cited by Gibbons on the issue of any supposed "privity" requirement. Fenton asserts that *State v. Polley*, 2 S.W.3d 887, 892 (Mo.App. 1999), is inapposite because it relates to an action brought by Missouri's Attorney General. But in doing so Fenton ignores language in § 407.100.4, relied on by *Polley* and cited by Gibbons, that is nearly identical to the language in § 407.025. That language in § 407.100.4, providing that restitution may be given to any "person who has suffered any ascertainable loss . . . by means of any method, act, use, practice or solicitation . . . declared to be unlawful by this chapter", leads in *Polley* to the conclusion that there is no MPA privity requirement; the similar language in § 407.025 should lead to the same conclusion.

In attempting to distinguish *State ex rel Nixon v. American Tobacco Company, Inc.*, 34 S.W.3d 122 (Mo. banc 2000), Fenton has to go so far as to admit that at least some claims can be brought under § 407.025 against remote sellers, as noted above. The only thread of argument that Fenton has left is its assertion that the remote seller must have "committed a violation of the Act as part of the retail transaction by which the

consumer was damaged”. Now we have yet another shift in Fenton’s rhetoric: from “privity” to “transactional nexus” to “conjunctive relationship” to “as a part of the retail transaction”. As much as it dances around the point, Fenton does not succeed in evading the correct language describing the required connection, as specifically stated in the statute: “as a result”.

In attempting to distinguish *Grabinski v. Blue Springs Ford Sales, Inc.*, 136 F.3d 565 (8<sup>th</sup> Cir. 1998) (“*Grabinski I*”) and *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024 (8<sup>th</sup> Cir. 2000) (“*Grabinski II*”), Fenton goes all the way to asserting that the Eighth Circuit actually relied on an analysis of the wholesale seller’s conduct that is *not* in the *Grabinski* cases. Fenton’s distinction of *Grabinski* on the ground that there were significant ties between the wholesaler and the retailer is specious. Those cases – particularly *Grabinski I* – expressly state an analysis and holdings based on the separate conduct of the remote seller leading to harm caused to the plaintiff when she purchased her car from the retailer. In fact, in *Grabinski I*, quite contrary to Fenton’s arguments, the Eighth Circuit specifically noted, at p. 568:

Especially significant, we think, is Mr. Isom's [a manager of the retailer] statement to Ms. Grabinski that if the Jimmy was in bad shape when she bought it, BSF [the wholesaler] had "screwed" the Outlet [the retailer] by representing that it was in "good shape."

Finally, Fenton notes that *State ex rel. Ashcroft v. Marketing Unlimited of America, Inc.*, 613 S.W.2d 440, 447 (Mo.App. 1981), which held corporate officers individually liable for MPA violations, did not address liability of remote sellers. This is

true, but Gibbons did not cite *Marketing* to show directly that remote sellers are liable; rather, *Marketing* makes the point that the word “person” is not restricted to a “seller”, much less a “retailer”. In light of *Marketing*, it would make no sense to assert that a “person” who violates § 407.020, as referred to in § 407.025, would have to be a “seller”, much less a *retail* seller.

Fenton next argues that Gibbons’ Petition did not state a claim. But Fenton’s argument is first and foremost merely a restatement of its argument that the MPA requires privity, or “transactional nexus”, or a “conjunctive relationship”, and that Gibbons has not alleged such. Fenton also appears to suggest that the Petition is deficient because it alleges that Fenton “upon reasonable inspection . . . should have known”. This is obviously beside the point for the moment in deciding whether the Petition states a claim, because the Petition *also* alleges that Fenton “knew”, and the allegation that Fenton “should have known” was an alternative allegation. Clearly the allegation that Fenton “knew” is sufficient by any standard. Note also that, as stated in *Lone Star Industries, Inc. v. Howell Trucking, Inc.*, 199 S.W.3d 900 (Mo.App. 2006), at p. 905:

. . . when a challenge to a pleading for failure to state a claim is brought for the first time on appeal, the pleading will be more liberally construed than if the challenge was made via a motion to dismiss. [citation omitted] The purpose of pleadings is to present, define, and isolate the issues, so that the trial court and all parties have notice of the issues. [citation omitted] When an attack on the sufficiency of a petition is made for the first time on appeal, the

pleading will be held good unless it wholly fails to state a claim.

[citation omitted] In this determination, the petition will be given its fullest intendment as a claim for relief.

In addition, Gibbons already has cited to the language in § 407.020 that specifically refers to “concealment, suppression, or omission of any material fact”, and to the Attorney General regulations, all supporting his claim.<sup>1</sup>

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<sup>1</sup> Gibbons also notes, incidentally, that a dealer’s duty to inspect used vehicles before offering them for resale is both widely acknowledged even at common law, and separately imposed by such statutes as the Federal odometer statutes, Title 49 U.S.C. §§ 32701, *et seq.* See, for example, *Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275, 1282-4 (10th Cir. 1998); *Shroder v. Barron-Dady Motor Company*, 111 S.W.2d 66 (Mo.1937); *Standard Oil Company of Indiana v. Leaverton*, 192 S.W.2d 681 (Mo.App. 1946); *Gifford v. Bogey Hills Golf and Country Club, Inc.*, 426 S.W.2d 98 (Mo.1968); *Patton v. McCone*, 822 S.W.2d 608 (Tn. App. 1991); *Kopischke v. First Continental Corp.*, 610 P.2d 668 (Mt. 1980); *Crothers v. Cohen d/b/a Norm’s Auto Sales*, 384 N.W.2d 562, syl. 2 (Minn.App.1986); *Treadwell Ford, Inc. v. Campbell*, 485 So.2d 312, 316 (Ala.1986); *Payne v. Parks Chevrolet, Inc.*, 458 S.E. 2d 716 (N.C. App. 1995). With public safety so obviously dependent on the safety of motor vehicles, it is not too much to ask of dealers – experts in cars – that they refrain from closing their eyes to major previous damage that is readily visible to them.

Fenton concludes with its “parade of horrors” asserting that if claims were permitted under the MPA against remote sellers there would be extreme trouble. But Fenton – and *amici* – never mention how claims against remote sellers under the MPA would result in any more such trouble than fraud claims against remote sellers, or negligence claims, or implied warranty claims, or contract claims. Incidentally, Gibbons would note that under the federal odometer statutes these sorts of issues have been raised at times, and have obviously not proven particularly difficult. See, for example, *Stier v. Park Pontiac, Inc.*, 391 F.Supp. 397, 401 (S.D.W.Va. 1975); *Haynes v. Manning*, 917 F.2d 450, 453-4 (10<sup>th</sup> Cir. 1990); *Freeman v. Myers*, 774 S.W.2d 892, 894 (Mo.App. 1989); and *Roberts v. Korn*, 420 F.Supp.2d 1196 (D.Kan. 2006). And this Court’s decision in *O’Brien, supra*, clearly shows that claims of this kind against remote and immediate sellers are quite manageable. Fenton also asserts, in effect, that claims like the MPA claim at issue in this case would likely be brought without reasonable basis in fact; but that is an obvious *non sequitur*.

## B. REPLY TO BRIEFS OF AMICI

The heart of the brief of the Missouri Auto Dealers Association (“MADA”) is found at its page 8. There MADA baldly asserts the following facts, nowhere in the record in this case:

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. . . .

[the vehicle is] wholesaled “as is” with *no representations whatever as to the vehicle’s condition or history.*

(emphasis in original) MADA goes on to assert, again at p. 8-9:

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”.

These are rather blatantly false statements, and they are false statements about bedrock industry facts that are about as open and firm as the Statue of Liberty in New York Harbor. Gibbons attaches in his Appendix two affidavits of experts, simply and emphatically demonstrating that most dealer auction sales are *not* “as is”, and that in fact auction rules traditionally require dealers to disclose defects such as previous frame damage (repaired or unrepaired), flood damage, “salvage” title history, and odometer discrepancies, even when vehicles *are* sold “as is” at the auctions. To further make this point, Gibbons requests that this Court take judicial notice of the auction rules at the website for the St. Louis Manheim Auto Auction. The website is at [www.stlouisaa.com](http://www.stlouisaa.com); on the website if one clicks on the tab “auction policies”, one is taken to a page where one can click on “arbitration”. That brings up a page with a choice to “view arbitration policies”, and clicking on those words brings up Manheim’s national auction policies, followed at its St. Louis auction. Pages 3-4 of those policies displays a chart specifically noting that even “as is” vehicles must have “frame damage”, “unibody damage”, “flood damage”, “police cars”, “salvage history”, and a host of other defects disclosed.

MADA's brief is thus disingenuous, to use the kindest possibly-applicable word. And there is nothing whatsoever in MADA's brief that gives any reason why a consumer ought not to be able to assert claims against remote sellers just as the Attorney General can, or as the consumer could do with fraud, negligence, implied warranty, or contract claims. MADA also implies that permitting MPA claims against remote sellers makes them in effect "insurers" of the consumer purchasers against any kind of misconduct by subsequent sellers; however, as with Fenton's arguments, this is simply a *non sequitur*. Permitting a statutory form of fraud claim that has a somewhat relaxed standard does no such thing: the consumer plaintiff must plead and prove his/her case against any defendant in order to hold it liable.

Adesa's brief concludes:

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

Adesa's argument amounts to saying that the MPA has no value at all, and by Adesa's logic MPA claims should not be available for consumers against retail sellers, either. The legislature obviously saw things differently, or it would not have passed the MPA and in particular § 407.025. The MPA provides consumers a way to claim fraud or fraud equivalents without having to plead and prove "overly meticulous" requirements. It provides for attorney's fees. And, quite importantly, it expressly grants the courts equity

jurisdiction, to address the many circumstances that can only be addressed with equity. These are all important aspects of the MPA. In any event, it isn't for Adesa to say that the legislature passed a law that Missouriians could do without.

Like Fenton and MADA, Adesa implies that permitting claims by consumers against remote sellers under the MPA would invite baseless claims and make those sellers "insurers" of the conduct of subsequent purchasers. Again, those arguments are specious, and would apply at least equally well to claims based on fraud, negligence, implied warranty and contract. Similarly, such arguments would apply with equal force to permitting the Attorney General to bring such claims.

Adesa also points to *Pelster v. Ray*, 987 F.2d 514 (8<sup>th</sup> Cir. 1993), to show a possible threat to auto auctions – that they could conceivably be held liable under the MPA. The first thing to note is that *Pelster* was not an MPA case. But perhaps more to the point, Gibbons notes that a review of the sordid facts of that case, and of the auction's alleged deep involvement in helping wholesalers sell cars with rolled-back odometers, would only point to the importance of allowing legitimate claims to proceed against persons whose conduct is proven to be so culpable.

### **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 remand the cause to the Circuit Court for reinstatement, and for further proceedings in accordance with the Court's decision.

Respectfully submitted,

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## **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 3,233. 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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## CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the above Reply Brief of Appellant, and a floppy disk with this brief in Microsoft Word electronic format, were mailed, postage prepaid, this 13<sup>th</sup> day of February, 2007, to:

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