

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

RESPONDENT'S SUBSTITUTE BRIEF

P.C.

Paul E. Martin, #34428
Keith K. Cheung, #40908
Curtis, Heinz, Garrett & O'Keefe,

130 South Bemiston, Suite 200
Clayton, Missouri 63105
TEL: (314) 725-8788
FAX: (314) 725-8789
Email:

kcheung@lawfirmemail.com

pmartin@lawfirmemail.com

Auto

Attorneys for Respondent
J. Nuckolls, Inc., d/b/a Fenton

Sales

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ISSUE PRESENTED

Missouri's Merchandising Practices Act permits a consumer to sue for deceptive practices in sales transactions. Fenton wholesaled a used car to Napleton, who retailed it to Gibbons while (allegedly) falsely claiming the car had never been wrecked. Fenton had no involvement with Gibbons, but Gibbons sued Fenton for failing to disclose the car's accident history to Napleton. Can Gibbons sue Fenton under the Act, even though Fenton had no connection to the sale?

ARGUMENT SUMMARY

No. The Act does not allow Gibbons to sue remote seller Fenton without a transactional nexus to the alleged injurious sale. The Act permits a consumer to bring a private right of action only against a person who violates the Act in the course of a retail transaction. On Gibbons' pleadings, Fenton did not sell the car to Gibbons, and Fenton had no part in the retail transaction between Gibbons and Napleton. Gibbons failed to state a claim.

FACTS

Respondent J. Nuckolls, Inc., d/b/a Fenton Auto Sales (“Fenton”) is dissatisfied with the completeness of appellant Gibbons’ statement and accordingly submits the following supplemental statement of facts relevant to the issue to be decided.¹

Gibbons’ petition does not allege any facts establishing:

- (1) That Fenton sold the vehicle in question to Gibbons;
- (2) That Fenton misrepresented anything concerning the vehicle to Gibbons, or to the general public, through any form of advertisement;
- (3) That Fenton failed to disclose any material fact to Gibbons;
- (4) That Fenton had any dealings or interaction of any kind with Gibbons; or
- (5) That Fenton conspired with Napleton to mislead or defraud Gibbons in the purchase of the vehicle.

In sum, Gibbons’ petition fails to allege any fact establishing that Fenton had any part in or nexus to the retail transaction between Gibbons and Napleton.

L.F. 5-8.

¹ R. 84.04 (c, f), Mo. Rules Civ. Pro.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT FENTON'S MOTION TO DISMISS BECAUSE THE COURT CORRECTLY INTERPRETED AND APPLIED THE MISSOURI MERCHANDISING PRACTICES ACT IN THAT THE ACT PERMITS A PRIVATE RIGHT OF ACTION ONLY WHEN A DEFENDANT VIOLATES THE ACT AS PART OF A RETAIL TRANSACTION, AND SINCE GIBBONS DID NOT ALLEGE THAT FENTON PARTICIPATED IN HIS RETAIL SALE WITH NAPLETON, GIBBONS FAILED TO STATE A CLAIM.

(This point responds to appellant's sole point relied on.)

Standard Of Review

Fenton agrees with the *de novo* standard of review espoused by appellant Gibbons. Fenton moved to dismiss the action below because Fenton "had no legal cause of action" under Missouri's Merchandising Practices Act (the "MPA") "for lack of privity, contractual or otherwise." *L.F.* 13. The trial court dismissed the case without explanation. *L.F.* 23. This Court generally would presume the dismissal was based on the grounds stated in the motion and would affirm the dismissal if it could be sustained on any ground supported by the motion.²

² Lueckenotte v. Lueckenotte, 34 S.W.3d 387, 391 (Mo. banc 2001).

The Court, however, is not bound by the scope of Fenton’s motion to dismiss, specifically with regard to the lack of privity. While the parties lacked contractual privity, the underlying, broader, and more critical factor is the absence of *any* connection (i.e., “privity, contractual *or otherwise*”) between Fenton and Gibbons. Absent such a nexus, Gibbons has not stated a claim against Fenton under the MPA. In that failure to state a claim is jurisdictional³ and may be raised at any time,⁴ the Court must determine whether the facts alleged by Gibbons establish a private civil action under the MPA.⁵

Introduction

What does the MPA require to state a private claim? Fenton contends that there must be a transactional nexus between the parties; the defendant must be accused of some statutory violation made in the course or as part of the retail transaction. Relying on the posture of the case below, Gibbons argues that “privity” is not a requirement under the MPA, but his argument also suggests that any subsequent purchaser can sue any remote seller or distributor, without regard to whether that person’s allegedly offensive act had any connection to the

³ Lane v. Lensmeyer, 158 S.W.3d 218, 222 (Mo. banc 2005).

⁴ R. 55.27(g)(2, 3), Mo. R. Civ. Pro.; see Kelch v. Kelch, 450 S.W.2d 202, 204 (Mo. 1970).

⁵ See Bosch v. St. Louis Healthcare Network, 41 S.W.3d 462, 464 (Mo. banc 2001).

injurious retail transaction. In effect, Gibbons claims the MPA supports a private claim based solely on a nexus between a defendant and the merchandise rather than between the defendant's actions and the retail sale.

In support of this position Gibbons offers a parade of horribles and policy arguments, without any considered analysis of the statute, but the issue presented is strictly one of legislative intent and statutory interpretation. Careful analysis of the statute's language, the history of the Act, and Gibbons' own case law show that the MPA requires actionable conduct made in the context of a retail transaction. The Legislature simply did not intend to establish a private claim for damages against a remote seller with no nexus to the injurious sale. Any other interpretation of the MPA could lead to an explosion of speculative claims against remote sellers and many substantive and procedural legal complications.

Argument

A. Analysis of the Statute

The transactional nexus requirement for private rights of action under the MPA is made plain in Section 407.025 R.S.Mo., the authorizing statute. Section 1 of the provision states:

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.

Section 407.025.1, RSMo. 2000.

The very first phrase of the statute identifies a consumer transaction as the basis of any private claim: “Any person who purchases or leases merchandise primarily for personal, family or household purposes” This clause predicates the claim on an end-user’s “purchase or lease” of merchandise for domestic purposes. Business transactions are excluded from the statute’s scope.

The statute’s next phrase continues in this same vein. The right to sue is reserved to a consumer who has purchased or leased merchandise and “*thereby* suffers an ascertainable loss of money or property, real or personal” (emphasis added). The term “thereby,” means “by that means” or “connected with,”⁶ and it patently refers back to the retail transaction contemplated by the first clause, i.e., a consumer sale or lease. The Legislature’s use of “thereby” requires a causative relationship between the consumer’s loss and the consumer’s transaction.⁷

⁶ See The American Heritage Dictionary of the English Language, 3rd Ed. 1992, and Webster’s New Collegiate Dictionary, 1979.

⁷ See Jackson v. Charlie’s Chevrolet, Inc., 664 S.W.2d 675, 677 (Mo. App. 1984) (“A private cause of action is given only to one who purchases and suffers damage”).

The next clause of the statute continues to tie the consumer’s right to sue to the consumer transaction. The loss incurred by the consumer must be “as a result of the use or employment” of an unlawful practice established in Section 407.020.” That section provides:

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 facts in connection with the sale or advertisement of any merchandise in trade or commerce or the solicitation of any funds for any charitable purpose, as defined in section 470.453, in or from the State of Missouri, is declared to be an unlawful practice.

Section 407.020.1, RSMo. 2000.

Gibbons suggests that Section 407.020.1 expands the rights of consumers as granted in Section 407.025.1, and on one hand, this section certainly expresses a broad intent by its repeated use of the word “any”—any person, any deception, any material fact, any merchandise, any funds, and any charitable purpose. But what can’t be overlooked is the fact that the Legislature enacted Section 407.020.1 to establish the *Attorney General’s* authority to fight unfair trade practices. See Argument §B, below. The Attorney General’s authority isn’t limited to consumer purchases of domestic merchandise; rather the Attorney General may enforce the

MPA against *any* unlawful trade practice occurring in *any* transaction.⁸ On its face, Section 407.025.1 is limited to *consumer* transactions.

When read in context with Section 407.025.1's consumer limitation, the use of Section 407.020.1's phrase "in connection with" demonstrates a conjunctive relationship between the unlawful practice and "the sale or advertisement" of merchandise. And the legislature's use of the definite article "the" denotes a *particular* sale or advertisement that can only refer to the consumer transaction on which the plaintiff's private action is predicated.⁹ Section 407.025.1's reference to Section 407.020.1 accordingly demonstrates that for private rights of action an unlawful practice does not exist in a vacuum; it must occur in the course of a

⁸ Section 407.100.1, RSMo. 2000. E.g., see State ex rel. Ashcroft v. Marketing Unlimited of America, Inc., 613 S.W.2d 440 (Mo. App. 1981)(action for injunction and restitution over the fraudulent sale of corporate distributorships).

⁹ See BP America Production Co. v. Madsen, 53 P.3d 1088, 1091-92 (Wyo. 2002)(Courts generally "agree that, in construing statutes, the definite article 'the' is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'"); Coffey v. Colorado School of Mines, 870 P.2d 608, 610 (Colo. App. 1993)(It is a "familiar principle of statutory construction that the use of the definite article particularizes the subject which it precedes.").

particular retail transaction, the transaction that causes immediate harm to the consumer.¹⁰

Returning to Section 407.025.1, that portion of the statute that establishes venue finally affirms the retail transaction nexus. Suit may be brought *only* in the county “where the seller or lessor resides or [where] the transaction complained of took place.” If the legislature had wanted to grant a private right of action by the consumer against any remote seller who was not involved in the direct sale to the consumer, there is no reason why the consumer should not be allowed to sue in the county where the remote seller resides.

Curiously, in his *amicus* brief the Attorney General argues that the isolated venue language of Section 407.025.1 cannot be construed as limiting the scope of private action defendants to retailers because of the number of other venue possibilities recognized in other sections of the MPA. *Attorney General’s Brief*, 7-11. But the Attorney General fails to grasp that those other venue provisions apply solely to other enforcement tools held *only* by the Attorney General. The private right of action established by Section 407.025.1 is a remedy separate and distinct

¹⁰ Section 407.020.1’s application to advertisers again confirms this view. The very nature of advertising is directed at potential purchasers to encourage or induce entry into a transaction. For advertisers, the statute itself acknowledges the nexus between the unlawful trade practice and the transaction fostered by that practice.

from the Attorney General’s enforcement authority, see Argument §B, below, so one would expect the Legislature to establish a separate and distinct venue provision for private consumer actions, one applicable to the retail transaction implicit in the “seller or lessor” language of Section 407.025.1¹¹

In sum, Section 407.025.1 establishes as an element of a private civil action a nexus between the offensive activity and the consumer transaction that causes the injury. The defendant’s actionable activity must take place within the context of the retail sale; it cannot occur in the course of remote transactions having no connection or relation to that sale.¹²

B. History of the MPA

The history of the MPA also bears out this conclusion. When first enacted in 1967, the statute defined and prohibited certain unfair trade practices and

¹¹ This is not the only time the Attorney General confuses his own enforcement authority with the private consumer rights established by Section 407.025.1. See Argument at 15-16, below.

¹² See Duvall v. Silvers, Asher, Sher & McClaren, 998 S.W2d 821 (Mo. App. 1999) for a case interpreting an analogous private rights of action in a manner consistent with the MPA’s transactional nexus requirement. In Duvall the court refused standing to a private litigant under Missouri’s antitrust statute because the defendant’s actionable activity was directed toward a third party, while the harm suffered by the plaintiff was indirect and tangential. Duvall, 998 S.W2d at 827.

provided for exclusive enforcement by the Missouri Attorney General.¹³ Under the 1967 enactment, the Attorney General’s authority included the rights to criminally prosecute and to seek injunctive relief against and restitution from any person who had engaged in unfair trade practices, at any level of the commercial chain and without limitation to consumer transactions.¹⁴ Unlike the private right of action created by Section 407.025.1, the Legislature did not require a consumer purchase “as a condition precedent to the Attorney General’s exercise of power to obtain relief.”¹⁵

Those portions of the MPA applicable to the Attorney General are written expansively to afford the Attorney General the opportunity to enforce the Act to the fullest extent possible, consistent with the Attorney General’s discretion. Under the statute’s broad language (including but not limited to Section 407.020), the Attorney General has the power to select for investigation and enforcement whatever transactions are deemed problematic. As the holder of elective public office, the Attorney General need not personally have privity or any other nexus to

¹³ See Laws 1967, p. 607; Section 407.020, RSMo. 2000.

¹⁴ *Id.*; Section 407.100, RSMo. 2000. See State ex rel. Ashcroft v. Marketing Unlimited of America, Inc., 613 S.W.2d 440 (Mo. App. 1981)(action for injunction and restitution over the fraudulent sale of corporate distributorships).

¹⁵ State ex rel. Nixon v. Telco Directory Publishing, 863 S.W.2d 596, 599 (Mo. banc 1993).

the unlawful transaction as a condition for exercising statutory authority; instead, the Attorney General may inquire into any transaction or series of transactions affecting the public interest.¹⁶

It is entirely logical, then, that in providing for a private right of action the Legislature chose not to interfere with, or duplicate, or muddle, these broad enforcement powers. Unlike the Attorney General's legislated interest in the public welfare, a consumer's interest generally involves the consumer's pocketbook. The private consumer action established by the MPA directly serves the latter while promoting the broader public interest only indirectly. The Legislature recognized this reality by only authorizing a private right of action to the extent a private plaintiff could establish direct injury from participating in a transaction in which a defendant perpetrated an unlawful practice.

By suggesting that the consumer's authority to sue necessarily extends to remote sellers who lack any connection to the consumer transaction, Gibbons is essentially suggesting that the Court rewrite the statute. If the legislature wanted to achieve that goal, it could have easily permitted each consumer to become a private attorney general, attacking unfair trade practices at any level of the commercial chain and regardless of the remote seller's participation in the actual

¹⁶ Fenton agrees with the breadth of the Attorney General's authority under the MPA. See Attorney General's Brief, 7-11.

sale. While Gibbons suggests that this is what Section 407.025.1 actually *means*, it is not what the statute *says*.

While both Gibbons and the Attorney General suggest that the Court is free to stretch the bounds of Section 407.025.1 because of the liberal construction generally afforded remedial statutes, this latitude does not constitute license to avoid the MPA's plain language.¹⁷ The judiciary is not at liberty to disregard the legislature's words, nor to interpolate provisions that are not plainly written or necessarily implied from the legislature's chosen language. Instead, courts must give effect to every word, clause, sentence, and provision.¹⁸

On the face of these distinct statutory remedies, the Attorney General's enforcement authority is plainly broader than that of the private consumer. Sections 407.020 and 407.100 impose no limits on the Attorney General's authority to enforce the MPA at any level of the commercial chain. Section 407.025.1, on the other hand, permits consumers to sue only on fair trade violations that occur in the course of retail transactions. Only in such a context,

¹⁷ State ex rel. American Asphalt Roof Corporation v. Trimble, 44 S.W.2d 1103, 1105 (Mo. banc 1931); State ex rel. LeFevre v. Stubbs, 642 S.W.2d 103, 106 (Mo. banc 1982).

¹⁸ See Hyde Park Housing Partnership v. Director of Revenue, 850 S.W.2d 82, 84 (Mo. banc 1993); State ex rel. D.M. v. Hoester, 681 S.W.2d 449, 452 (Mo. banc 1984).

when a wholesaler steps outside of the role of a middleman, can he be deemed a “seller” subject to suit under the MPA, and in such a case a plaintiff must establish the remote seller’s transactional nexus to the retail sale.

C. Gibbons’ Argument

Gibbons relies on four Missouri cases to support his conclusion that the MPA authorizes a private action against a remote seller, but not one of his cases presents a factual scenario that lacks a transactional nexus between the defendant and the consumer sale.

Gibbons’ best Missouri case is State ex rel. Nixon v. Polley, 2 S.W.2d 887 (Mo. App. 1999), an action for injunction and restitution brought by the Attorney General against a home siding contractor on behalf of several consumers. One of these consumers had no direct relationship with the defendant; rather, the defendant supplied the siding to a builder who had been hired to construct a home for the consumer. The court awarded restitution to the State and against the defendant in favor of this consumer, and the award was upheld on appeal. Polley, 2 S.W.2d at 891-892. Both Gibbons and the Attorney General suggest that this “remote liability” for restitution under Section 407.100 somehow extends to a

private damages action under Section 407.025.1. *Appellant's Substitute Brief, 19; Attorney General's Brief, 6-7.*¹⁹

This is not true. In Polley the Western District addressed only whether the broad restitution provisions of Section 407.100.4 encompassed the consumer in question. Gibbons and the Attorney General confuse the very broad nature of the authority granted by Section 407.100 (restitution through the State/Attorney General) with the limited private consumer remedy established by Section 407.025.1.²⁰ Polley involved the former. Under Section 407.100.4 the Attorney General may seek restitution on behalf of “any person who has suffered any ascertainable loss,” and under the MPA the Attorney General’s authority extends to any level of commercial activity. As the Western District noted, under the broad authority granted by Section 407.100.4, restitution was appropriate. Polley, 2 S.W.2d at 891-892.

Here, Gibbons’ claim is a private action brought under Section 407.025.1. That statute grants private enforcement authority only to the consumer and only against those who have harmed the consumer in the course of a retail transaction.

¹⁹ The Attorney General goes so far as to imply disingenuously by omission that the consumer brought the action in Polley rather than the Attorney General. See *Attorney General's Brief, 6-7.*

²⁰ See Argument, §§A and B, above. See also State ex rel. Nixon v. American Tobacco Company, Inc., 34 S.W.3d 122, 130 (Mo. banc 2000).

The Polley case did not involve a private claim under Section 407.025.1. While one can speculate about whether the consumer could have stated such a claim, the fact remains that Polley involved a “public” action brought by the Attorney General. Neither Gibbons nor the Attorney General offer any coherent explanation as to why Gibbons’ limited private remedy should be infused with the broad statutory authority granted to the Attorney General under Section 407.100.4.

In sum, Polley does not stand for the proposition that the disparate public and private enforcement remedies found in the MPA are somehow coextensive, nor does it establish that remote sellers, who lack any transactional nexus with a consumer, are proper defendants in a consumer’s private action under Section 407.025.1. Polley is simply not applicable to private consumer claims under the MPA.

Gibbons also relies on State ex rel. Nixon v. American Tobacco Company, Inc., 34 S.W.3d 122 (Mo. banc 2000), but that case has no bearing whatsoever on the instant question. In American Tobacco, two consumers attempted to intervene in a declaratory judgment action challenging the legality of the settlement of the State’s suit against the tobacco industry. As grounds for intervention the consumers alleged that they would be deprived of any recovery from the tobacco defendants if not allowed to intervene. This Court denied intervention, noting among other things that the consumers could bring suit under Section 407.025.1 of the MPA. American Tobacco, 34 S.W.3d at 130-131.

The Court's observation, however, did not establish that a private consumer action made directly against a manufacturer would unequivocally state a cause of action. While a private action under the MPA might well state a claim against cigarette manufacturers,²¹ that wasn't the issue presented in American Tobacco. It bears repeating here that Fenton is not asserting that a remote seller can never be sued. What Fenton contends is that to bring a private action under the MPA the consumer must plead that the defendant committed a violation of the Act as part of the retail transaction by which the consumer was damaged. American Tobacco says nothing to the contrary.

In Grabinski v. Blue Springs Ford Sales, Inc., 136 F.3d 565 (8th Cir. 1998) a wholesale auto dealer was held liable by a consumer in an MPA claim. While the wholesaler tried to escape liability because of its distance from the offensive retail transaction, the facts establish that the wholesaler was part and parcel of the retail experience, thus an actionable nexus existed between the wholesaler and the consumer. In Grabinski the wholesaler and retailer shared common ownership and management, the retailer obtained 70% of its inventory from the wholesaler, the wholesaler made affirmative misrepresentations to the retailer, knowing and

²¹ The Act permits a private action for unlawful practices made in the course of advertising a product. Section 407.025.1 references Section 407.020, which specifically addresses advertising. Thus a manufacturer's false product advertising would likely establish the required transactional nexus.

expecting that the retailer would pass it along to the buyer, and the retailer did so in the course of the sale transaction. *Id.*

Under these facts, the retailer was nothing more than the alter ego of the wholesaler, and the misrepresentations perpetrated by both established a connection to the sale sufficient to establish MPA liability. 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.

Finally, while Gibbons relies on State ex rel. Ashcroft v. Marketing Unlimited of America, Inc., 613 S.W.2d 440 (Mo. App. 1981), that case did not involve a private claim under the MPA and is otherwise of no use to Gibbons. He cites it seemingly for the proposition that remote sellers can be held liable under the Act, but in Marketing Unlimited the sellers at issue were far from remote. Individual corporate officers had engaged in false promises and deception while selling distributorships, and the issue was whether those offices could be held individually liable in restitution for their misrepresentations. The court held that they could. Marketing Unlimited, 613 S.W.2d at 447. Marketing Unlimited has nothing to do with whether a transactional nexus is required to state a private claim under Section 407.025.1, although such a nexus existed.

D. Gibbons' Petition Does Not State A Claim

Gibbons' petition fails to allege any facts establishing that Fenton committed its alleged transgression in the course of Gibbons' purchase from Napleton.

Gibbons admits that he purchased the car from Napleton, a retailer, not Fenton, a wholesaler. *L.F.* 1, 3. Gibbons acknowledges that Napleton, not Fenton, told him that the car had never been in an accident. *L.F.* 2. Gibbons fails to assert any facts that Fenton misrepresented the condition of the car to him or that Fenton had any obligation to disclose to him the car's accident history. Gibbons does not plead any facts suggesting that Fenton and Napleton were alter egos of each other or conspired to mislead him. *L.F.* 5-8. In sum, Gibbons' petition fails to allege any connection whatsoever between Fenton's purported MPA violation and Gibbons' purchase of the car.

What Gibbons *does* allege, what he uses to justify suing Fenton, is that "upon information and belief,"

[Fenton] failed to disclose existing accident damage to Napleton about which [Fenton] 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 to a consumer prior to sale.

L.F. 9. There are several problems with this approach in stating an MPA claim.

If Gibbons is truly suggesting that Fenton participated in Napleton's representation of the automobile to him as "accident free," then Gibbons should be held to a standard of pleading other than "upon information and belief." The MPA was created as a supplement to common law fraud and to relieve consumers of the need to prove each element of the cause of action.²² But nothing in the statute relieves Gibbons from the responsibility to plead with specificity what he contends to be a statutory violation based on fraud.²³ Either Fenton was a part of the transaction or it wasn't, and Gibbons, having been involved in the transaction, should know and should plead accordingly.

In fact, Gibbons' "information and belief" pleading is a tacit admission that Fenton was not involved in the sales transaction and that Gibbons does not know what, if anything, transpired between Fenton and Napleton. If this is the case, then Gibbons' "information and belief" claim is rank speculation. Surely the MPA

²² Clement v. St. Charles Nissan, Inc., 103 S.W.3d 898, 899-900 (Mo. App. 2003).

²³ See Baryo v. Philip Morris USA, Inc., 435 F. Supp. 961, 968 (W. D. Mo. 2006)(plaintiffs must specifically plead MPA claim under R. 9(b), Fed. R. Civ. Pro., including the time, place, maker, and content of false representations); see also Rhodes Engineering Co., Inc. v. Public Water Supply District No. 1 of Holt County, 128 S.W.3d 550 (Mo. App. 2004)(failure to plead specific elements of fraud renders petition subject to dismissal under R. 55.15, Mo. R. Civ. Pro.) .

can't be interpreted to allow any plaintiff to sue any and every prior owner of consumer merchandise based on "information and belief" that the prior owner had violated the statute?

Gibbons also attempts to inject into his MPA claim an unfounded negligence theory. He alleges that "upon reasonable inspection," Fenton "should have known" of the accident damage that Fenton purportedly failed to disclose to Napleton, thus imputing to Fenton a duty to inspect the product and disclose the results of that inspection. *L.F. 5*. Nothing in the MPA, nothing in Missouri's substantial history of MPA case law, and nothing in the accepted trade practices of the industry suggests that a seller has such an obligation. On its face the MPA outlaws affirmative misconduct in consumer transactions—one cannot misrepresent or omit to disclose a known defect—but the Act does not prohibit the wholesale buying and selling of merchandise in an arms' length, "as is" transaction between sophisticated commercial entities. Gibbons cannot be allowed to engraft onto the MPA a ubiquitous duty for wholesalers and distributors to inspect merchandise prior to its purchase or sale to retailers.

Thus, Gibbons' own petition demonstrates that he never had any kind of relationship with Fenton, at least prior to this suit, and as a result he has failed to plead any transactional nexus between Fenton's alleged statutory violation and his purchase of the vehicle. On its face, the MPA requires that nexus. And while it appears that Missouri courts have not confronted the question head on, Fenton is not aware of any case allowing a private recovery to a consumer under an unfair

trade practices statute when the consumer's loss was not related to an alleged statutory violation.²⁴

In sum, Gibbons' petition fails to plead any facts establishing any relationship whatsoever with Fenton or that Fenton's alleged MPA violation was made in the course of Napleton's sale of the vehicle to him. Gibbons has failed to state a cause of action.

E. The Consequences of Gibbons' MPA Interpretation

This appeal raises an issue not previously addressed in the past 34 years, since the adoption of the MPA's private right of action provision. If Gibbons is correct that a remote seller can be sued under the MPA without a transactional nexus to the injurious consumer sale, then Missouri businesses can expect a future of consumer litigation without parallel in any other state.

If the MPA does not require any nexus between the consumer and the remote seller, and the alleged unfair trade practice does not need to occur in the course of the sale to the consumer, then the consumer can sue virtually all previous owners, on "information and belief" that a violation occurred. Consumers would be able to plow through the chain of title, and no one would be safe from

²⁴ Of the non-Missouri courts that have addressed the necessity of causation as an element to a statutory fair trade practices claim, all seem to agree that it is essential. See Right to Private Action Under State Consumer Protection Act—Preconditions to Action, 117 A.L.R.5th 155, §11.

suit, not even the original consumer who had the accident that damaged the car that was traded to a dealer that was auctioned to a wholesaler who sold it to a retailer to be purchased by the complaining plaintiff. The end user could sue everyone on the mere representation that “on information and belief,” each remote seller had violated the MPA by not disclosing the car’s accident history.²⁵

Such a scenario also raises questions concerning the responsibility for, and the allocation of, damages. If a consumer sues a used car wholesaler for failing to disclose a car’s accident history, what right does the wholesaler have to implead upstream members of the chain who preceded the wholesaler’s ownership? Remember that wholesalers have no private right of action under the MPA.²⁶ And how would liability be allocated? Would it be joint and several, or does a person who knowingly misleads a purchaser (whether a business or a consumer), bear different responsibility than the person who simply fails to inspect and disclose what he did not know? Does the failure to include each remote seller, up to the person who damaged the car, deprive the court of parties necessary to a just resolution of the claim?

²⁵ See Chong v. Parker, 361 F.3d 455, 459-460 (8th Cir. 2004), in which the court held that the MPA applies equally to individuals and business who retail used cars.

²⁶ Section 407.025.1 limits the action to “[a]ny person who purchases or leases merchandise primarily for personal, family or household purposes.”

What happens if the consumer sues both the retailer and one or more remote sellers under the MPA? Can the retailer then sue the remote seller(s) as well, to the extent that he was also misled and paid more for the defective vehicle than he would have if he had not also been defrauded? This scenario raises the possibility of upstream sellers paying duplicative damages to the consumer and to downstream sellers. Private litigants under the Sherman and Clayton Acts have long been denied access to the courts because suits against remote sellers raise the prospect of allocating and duplicating damages. See Campos v. Ticketmaster Corporation, 140 F.3d 1166, 1169-1172 (8th Cir. 1998).

What happens when an MPA plaintiff recovers through a private action and then in turn sells the defective product to another consumer? Can that buyer revisit the actionable conduct perpetrated by remote sellers, and so expose them to multiple damage claims? Can that buyer file suit against remote sellers who weren't included in the original case? If a nexus is not required, the MPA, as interpreted by Gibbons, would seem to support such lawsuits.

If the MPA establishes a private right that can be brought in the absence of a transactional nexus between the plaintiff and a defendant, or on an allegation of that nexus "on information and belief," then Missouri courts will be forced to address the parade of defendants, and the accompanying procedural and substantive issues, that will necessarily follow, and the claims will extend far

beyond the used car wholesaling industry. Any business that handles, modifies, or improves a product in connection with its resale would be vulnerable.²⁷

CONCLUSION

For these reasons, to establish a private action under Section 407.025.1 a plaintiff must plead and prove that a defendant violated the MPA in the course of the injurious retail transaction. Gibbons failed to plead this transactional nexus, and as such he failed to state a claim. The trial court did not err in dismissing his petition, and the judgment should be affirmed.

CURTIS, HEINZ, GARRETT & O'KEEFE, P.C.

Paul E. Martin, #34428
Keith K. Cheung, #40908
130 South Bemiston, Suite 200
Clayton, MO 63105
(314) 725-8788
(314) 725-8789 Fax

²⁷ For example, the food industry's commercial chain would seem to be especially susceptible to all kinds of claims, from farmers to distributors to supermarkets and restaurants.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies as counsel of record for respondent that respondent's brief includes all information required by Rule 55.03, that the brief complies with the limitations contained in Rule 84.06(b), that the word count for this brief is 4,721 per MS Office Word 2003 and that the diskette provided to the court and to the respondent has been scanned for viruses and is free of same.

CURTIS, HEINZ, GARRETT & O'KEEFE, P.C.

Paul E. Martin, #34428
Keith K. Cheung, #40908
130 South Bemiston, Suite 200
Clayton, MO 63105
(314) 725-8788
(314) 725-8789 Fax

Attorneys for J Nuckolls, Inc., d/b/a
Fenton Auto Sales

CERTIFICATE OF MAILING

The undersigned certifies that a copy of Respondent's Substitute Brief and a diskette of same were mailed first class, postage prepaid this _____ day of January, 2007 to:

Bernard E. Brown
The Brown Law Firm
4350 Shawnee Mission Parkway
Suite 250
Fairway, Kansas 66205-2513

Mitchell B. Stoddard
Consumer Law Advocates
11330 Olive Blvd., Suite 222
St. Louis, Missouri 63141

Jeremiah W. (Jay) Nixon
Attorney General
Supreme Court Building
207 West High Street
P.O. Box 899
Jefferson City, Missouri 65102

CURTIS, HEINZ, GARRETT & O'KEEFE, P.C.

Paul E. Martin, #34428
Keith K. Cheung, #40908
130 South Bemiston, Suite 200
Clayton, MO 63105
(314) 725-8788
(314) 725-8789 Fax

Attorneys for J Nuckolls, Inc., d/b/a
Fenton Auto Sales