IN THE SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, ex rel. JEREMIAH W. NIXON,	)	
Plaintiff/Respondent,	)	
vs.	)	No. 85399
QUIKTRIP CORP.,	)	
Defendant/Appellant.	)	

Appeal from the Circuit Court of
Jefferson County

The Honorable Timothy J. Patterson
Circuit Judge

Brief of Appellant
QuikTrip Corp.

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Table of Contents

Page

Table of Cases and Other Authorities

Cases **Page**

Page

Other Authorities

Jurisdictional Statement

This Court has jurisdiction of this appeal pursuant to Article V, § 3 of the Constitution of Missouri, in that the appeal involves the validity of a statute, the Missouri Motor Fuel Marketing Act, § 416.600 et seq., R.S.Mo. (the Act).

The Act prohibits the sale of motor fuel below cost, when either the intent or the effect of such sale is to injure competition or to unfairly injure competitors. The trial court held that below cost sales always violate the Act, because they always force competitors to either lower their prices or lose sales, thus causing them injury. Since that interpretation makes subsections (1) and (2) of § 416.615.1 entirely superfluous, QuikTrip intends to challenge the trial court's interpretation of the Act. QuikTrip believes that, properly construed, the Act prohibits only such below-cost sales as **unfairly** injure competitors, and there is no evidence that QuikTrip occasional below-cost sales have unfairly injured anyone.

Assuming that the trial court's interpretation of the Act is correct, the Act violates the due process clause of the Fourteenth Amendment to the United States Constitution and of Article I § 10 of the Constitution of Missouri. First, as applied to QuikTrip in the instant case, the Act serves no public purpose. The State made no effort to establish that QuikTrip's pricing practices were intended to or did injure competition. The two competitors who complained about QuikTrip's pricing practices are thriving, healthy operations that are in no danger of going out of business and whose profits are increasing. On these facts, the sole purpose of the Act, as construed by the trial court, is to increase the profits of already healthy

businesses at the expense of the consuming public. That is not a valid public purpose. Craigmiles v. Giles, 312 F.3d 220, 229 (6th Cir. 2002).

Second, as applied to QuikTrip in the instant case, the Act imposes requirements that are essentially impossible to meet. The record is uncontested that QuikTrip does not and cannot know its exact costs, to the level of detail required by the trial court, until days or weeks after the fact. The State claimed that QuikTrip was in violation of the Act on two days because its margin per gallon was a negative one thousandth of a cent – i.e., for every 100,000 gallons sold QuikTrip had miscalculated its costs by one dollar. It violates due process to require QuikTrip to perform the impossible. United States v. Dumas, 94 F.3d 286, 291 n.3 (7th Cir. 1996), cert. denied, 520 U.S. 1105 (1997).

This Court's jurisdiction extends to as applied constitutional challenges as well as facial challenges. Alumax Foils, Inc. v. City of St. Louis, 939 S.W.2d 907, 912 (Mo. banc 1997). These constitutional challenges to the Act confer appellate jurisdiction on this Court, even if the Court can dispose of the appeal on other grounds. Ports Petroleum Co. v. Nixon, 37 S.W.3d 237 (Mo. banc 2001) (challenge to constitutionality of the Motor Fuel Marketing Act).

Statement of Facts

1. The Parties.

QuikTrip Corporation is an Oklahoma corporation with its principal place of business in Tulsa, Oklahoma. L.F. 11 ¶ 2; 15 ¶ 2. QuikTrip is engaged, among other things, in the retail sale of gasoline and diesel fuel in the State of Missouri. L.F. 330-31. The QuikTrip facility at issue in this case is Store No. 611, located in Herculaneum. L.F. 12 ¶ 9; 16 ¶ 9.

The Attorney General of the State of Missouri, the Honorable Jeremiah W. Nixon, needs no introduction.

2. The Act.

As originally enacted and currently in effect, § 416.615.1 R.S.Mo., provides:

> It is unlawful for any person engaged in commerce within this state to sell or offer to sell motor fuel below cost as defined in subdivision (2) of section 416.605, if:
>
> (1) The intent or effect of the sale or offer is to injure competition; or

(2) The intent or effect of the sale or offer is to induce the purchase of other merchandise, to unfairly divert trade from a competitor, or otherwise to injure a competitor.[1]

Section 416.620.3 provides an affirmative defense of meeting competition.

The State has never suggested that QuikTrip's pricing policies were intended to or did injure competition. Tr. 64-65. Nor has the State suggested that QuikTrip intended to injure its competitors, or that the effect of its pricing policies was to induce the purchase of other merchandise. App. 3. The case turns on whether QuikTrip's occasional below-cost sales had the effect of "unfairly divert[ing] trade from a competitor" or otherwise "injur[ing] a competitor." App. 3; Tr. 65.

3. Operations At Store No. 611.

QuikTrip is an aggressive competitor when it comes to price. L.F. 75 ¶ 6. It is also a profitable competitor. QuikTrip's Store No. 611 earned an average margin for gasoline sales in the months about which the State complains of a positive 5.52 cents per gallon. L.F. 288 ¶ 103. Its average margin on diesel fuel for the months March 1997 through July 1999 was a positive 4.34 cents per gallon. L.F. 288 ¶ 101.

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[1] The trial court found, L.F. 433-44 n.2, and the parties agree, that the 1995 amendment to § 415.615 is null and void, having been declared unconstitutional in 1996.

On occasion, however, Store 611 did sell motor fuel at below its cost, as defined in the Act. On 22 days over the 33 months in question, it sold diesel fuel below cost and was not then matching a competitor's price. L.F. 279 ¶¶ 18; 20; 23; L.F. 281 ¶¶ 39-47; L.F. 282 ¶¶ 48-50; L.F. 283 ¶¶ 67-69; L.F. 284 ¶¶ 70-71; 75; L.F. 285 ¶ 82. On one day, it sold unleaded gasoline below cost. L.F. 285 ¶ 86.

On only five of the days on which the State alleged a below-cost sale did QuikTrip lower the price it charged. L.F. 293 ¶ 140. Properly calculated, QuikTrip was not selling below cost on three of those days, id. ¶ 141, and on a fourth it was matching a competitor's price. L.F. 295 ¶ 156. As a result, a reduction in the price caused the below-cost sale on only one of the 23 days in question.

The primary cause of those below-cost sales was unanticipated increases in QuikTrip's costs. QuikTrip submitted the affidavit of Chuck O'Dell, the division manager responsible for pricing decisions at Store No. 611 at the relevant times. L.F. 330 ¶ 1. Mr. O'Dell testified that he "did not and could not practically know the exact per gallon cost of either gasoline or diesel fuel" when he made his pricing decisions. L.F. 331 ¶ 5. The reasons for this uncertainty included:

- When QuikTrip acquired motor fuel by exchanging it with some other entity, it would not know the cost of the exchanged product until the end of the month when it purchased replacement fuel. L.F. 331-32 ¶ 5(A).

- The fuel vendor did not invoice until ten days after the sale, and there were often discrepancies between the amount shown on the bill of lading and the invoice, resolution of which would take another five days. L.F. 332 ¶ 5(B).
- The freight carrier did not invoice until seven days after the sale, which was the first notice to QuikTrip of the exact cost of the freight. L.F. 332 ¶ 5(C).

The State did not directly refute this affidavit. Instead, it submitted affidavits from three of QuikTrip's competitors. These affidavits averred, in general terms, that the competitor "knows its cost of fuel, including applicable federal and state taxes, freight charges and overhead, at the time it decides its retail price." L.F. 398 ¶ 8; L.F. 400 ¶¶ 3-5; L.F. 403 ¶ 7. These affidavits did not assert that the competitors knew those costs to the penny on the day of their pricing decisions.

Under the State's theory, pennies matter. The State alleged that, on March 14-15, 1999, QuikTrip had violated the Act by charging one thousandth of a cent per gallon below its costs. L.F. 47. If QuikTrip sold 30,000 gallons of diesel fuel on each day, that one thousandth of a cent negative margin reflects a total cost of 30 cents a day. There is no evidence that QuikTrip's competitors know their costs with that degree of precision.

4. <u>The Consequences Of QuikTrip's Occasional Below-Cost Sales.</u>

QuikTrip's occasional below-cost sales have had no adverse effect on competition for the sale of motor fuel. In the relevant time frame, there were at least 11 facilities competing with QuikTrip for the retail sale of gasoline. L.F. 288 ¶¶ 104-05. No competitor exited the market during that period and one new entrant joined it. L.F. 288 ¶ 107. QuikTrip's store No. 611 faces intense competition in the sale of gasoline.

The principal customers for diesel fuel are over-the-road truckers, who buy hundreds of gallons at a time. L.F. 289 ¶ 111. As a result, the radius of effective competition in the market for diesel fuel is well over 100 miles from Herculaneum and includes hundreds of competing service stations. L.F. 289 ¶ 112. QuikTrip faces intense competition in the sale of diesel fuel. L.F. 289 ¶ 113.

The nearest competitors to Store No. 611 are Midwest Petroleum, which operates a Citgo station in Imperial, L.F. 74 ¶ 3, and Arogas, which operates a Mr. Fuel in Herculaneum. L.F. 71 ¶ 3. The owners of both stations averred that they either had to reduce prices to match QuikTrip's price, or lose customers. L.F. 72 ¶ 9; L.F. 75 ¶ 6. Neither competitor identified any other kind of injury from QuikTrip's occasional below-cost sales.[2]

QuikTrip subpoenaed and analyzed the financial records of both competing facilities. The Midwest facility had a gross margin of 5.8% in 1998 and 6.4% in 1999 on its gasoline sales. L.F. 290 ¶ 121. It earned a profit in every year; that

[2] Midwest does not sell diesel fuel at its Imperial facility. L.F. 290 ¶ 116.

profit is increasing; and the facility is in excellent financial condition with no danger of going out of business. L.F. 291 ¶¶ 123-24.

The Arogas facility earned gross margins of 5.3% in 1997, 7.6% in 1998, 6.6% in 1999 and 6.8% in 2000 on its motor fuel operations. L.F. 292 ¶ 134. Apart from an unusual expense unrelated to motor fuel sales, the Arogas facility made a profit every year and that profit is increasing. L.F. 292 ¶¶ 135-36. The Arogas facility in Herculaneum is in sound financial condition and in no danger of going out of business. L.F. 292 ¶ 137.

5. Proceedings Below.

Each party filed a motion for summary judgment. L.F. 20; 308. Both parties agreed that there was no issue of fact on the 23 days on which QuikTrip had sold both below cost and below its competitors. Tr. 48-49. The issues were what the Act meant and whether it was constitutional as applied to QuikTrip's Store No. 611. Tr. 49.

The State's theory was that QuikTrip's occasional below-cost sales required its competitors either to lower their own prices or lose customers, and that this injury satisfied the statutory requirement that such sales unfairly divert trade from competitors or otherwise injure them. Tr. 67.

QuikTrip responded that this theory made subsections (1) and (2) of the Act redundant, because every below-cost sale would cause that kind of injury. QuikTrip argued that the inclusion of those subsections meant that below-cost sales not having the specified intent or effect were legal. Tr. 56. QuikTrip

suggested that the Act imposed a predation requirement: that the below-cost sales were either intended to or did injure competition or threaten the existence of a particular competitor. Tr. 32.

The trial court granted the State's motion for partial summary and denied QuikTrip's. L.F. 409. The trial court found that the Act did not require predation as defined by QuikTrip. L.F. 411-12. But it never responded to QuikTrip's argument that the State's theory made subsections (1) and (2) redundant. The trial court simply assumed that, if QuikTrip's interpretation were erroneous, the State's had to be right. L.F. 413 ("[b]ecause the state does not need to show a predatory effect, the next issue is the statute's constitutionality").

The closest that the trial court came to a definition of the "something more" that distinguishes an illegal below-cost sale from a legal one was that the sale had to be "unfair":

> [S]ales below cost are not unfair when it is a short-term promotion of a new product that is a "recognized and frequently used practice in the dairy industry, which had a legitimate business purpose and which has never heretofore been considered as against public policy or as characterized by deception, bad faith or fraud and which did not result in any substantial diversion of trade."

App. 6. The trial court did not, however, find that any of QuikTrip's below-cost sales satisfied any part of that definition.

Because the trial court's summary judgment order was essentially unresponsive to QuikTrip's arguments, QuikTrip filed a motion to reconsider. L.F. 426. That motion pointed out that the State's theory that below-cost sales always injure competitors, and are therefore always illegal, ignores subsections (1) and (2) of § 416.615. L.F. 426-27. The motion also pointed out the order's failure to make any finding that QuikTrip's below-cost sales were unfair, and argued that no evidence supported such a finding. L.F. 427. Finally, the motion observed that the order never considered QuikTrip's argument that the Act violated due process as applied to QuikTrip's Store No. 611. Id.

On rehearing, the trial court essentially adhered to its earlier order. L.F. 455. The State dismissed its claims of violation for any dates other than the 23 to which QuikTrip had stipulated so that a final judgment could be entered. L.F. 449. This timely appeal followed. L.F. 451.

Points Relied On

I. The Trial Court Erred In Entering Summary Judgment Against QuikTrip, And In Denying QuikTrip's Motion For Summary Judgment, Because The Trial Court Misinterpreted The Act, In That:

A. The Act Requires Proof Of An Unfair Effect On Competitors Beyond The Effects Of Below-Cost Sales; and

State ex rel. Thomason v. Adams Dairy Co., 379 S.W.2d 553 (Mo. 1964)

State ex rel. Davis v. Thrifty Foodliner, Inc., 432 S.W.2d 287 (Mo. 1968)

Mo. Rev. Stat. § 416.600 et seq. (2000) (Missouri Motor Fuel Marketing Act)

Borden Co. v. Thomason, 353 S.W.2d 735 (Mo. banc 1962)

B. The State Neither Articulated Nor Proved Any Such Unfair Effect.

Dierkes v. Blue Cross and Blue Shield of Missouri, 991 S.W.2d 662 (Mo. banc 1999)

L. Sullivan, Antitrust, § 6 at 26 (1977)

II. The Trial Court Erred In Entering Summary Judgment Against QuikTrip, And In Denying QuikTrip's Motion For Summary Judgment, Because The State Lacked A Submissible Case, In That There Is No Evidence To Support The Trial Court's Finding That QuikTrip's Pricing Policies Unfairly Injured QuikTrip's Competitors.

State ex rel. Thomason v. Adams Dairy Co., 379 S.W.2d 553 (Mo. 1964)

State ex rel. Davis v. Thrifty Foodliner, Inc., 432 S.W.2d 287 (Mo. 1968)

Dean Foods Co. v. Albrecht Dairy Co., 396 F.2d 652 (8th Cir. 1968)

III. The Trial Court Erred In Entering Summary Judgment Against QuikTrip, And In Denying QuikTrip's Motion For Summary Judgment, Because The Act Violates Due Process As Applied To QuikTrip's Store No. 611, In That Increasing The Profits Of An Already Healthy Business Is Not A Legitimate Governmental Purpose.

Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002)

Ports Petroleum Co. v. Tucker, 916 S.W.2d 749 (Ark. 1996)

Twin City Candy and Tobacco Co. v. A. Weisman Co., 149 N.W.2d 698 (Minn. 1967)

Commonwealth v. Zasloff, 13 A.2d 67 (Pa. 1940)

IV. The Trial Court Erred In Entering Summary Judgment Against QuikTrip, And In Denying QuikTrip's Motion For Summary Judgment, Because The Act Violates Due Process As Applied To

QuikTrip's Store No. 611, In That QuikTrip Does Not And Cannot Know Its Costs With The Precision That The Act Requires.

United States v. Dumas, 94 F.3d 286 (7th Cir. 1996), cert. denied, 520 U.S. 1105 (1997)

Southwestern Bell Telephone Co. v. State Corporation Comm'n, 219 P.2d 361 (Kan. 1950)

United States v. Gambill, 912 F. Supp. 287 (S.D. Ohio 1996), aff'd, 129 F.3d 1265 (6th Cir. 1997)

Argument

I. The Trial Court Erred In Entering Summary Judgment Against QuikTrip, And In Denying QuikTrip's Motion For Summary Judgment, Because The Trial Court Misinterpreted The Act, In That:

A. The Act Requires Proof Of An Unfair Effect On Competitors Beyond The Effects Of Below-Cost Sales; and

B. The State Neither Articulated Nor Proved Any Such Unfair Effect.

Throughout this case, the State has proceeded on the assumption that it makes a prima facie case merely by proving that QuikTrip sold motor fuel below cost. The assumption is wrong. The Act plainly does not ban all below-cost sales, only those sales that have the intent or the effect specified in the Act. The State has never even identified, let alone tried to prove, the "something more" that the Act unquestionably requires.

The proper construction of a statute is "a question of law," as to which this Court "conducts a de novo review." Delta Air Lines, Inc. v. Director of Revenue, 908 S.W.2d 353, 355 (Mo. banc 1995).

A. **The Act Requires Proof Of An Unfair Effect On Competitors Beyond The Effect Of Below-Cost Sales.**

As previously noted in the statement of facts, this case turns entirely on the meaning of the last two prongs of § 416.615(2): did QuikTrip's occasional below-cost sales have the effect of "unfairly divert[ing] trade from a competitor" or otherwise "injur[ing] a competitor." App. 3; Tr. 65.

The canons of statutory construction are well established. The Court determines legislative intent "from the plain and ordinary meaning of the terms in the statute." In re Beyersdorfer, 59 S.W.3d 523, 525 (Mo. banc 2001). The Court must strive to give meaning to each word and each section of the statute:

> It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute.

Hyde Park Housing Partnership v. Director of Revenue, 850 S.W.2d 82, 84 (Mo. banc 1993). Accord, Civil Service Comm'n of the City of St. Louis v. Members of the Board of Aldermen of the City of St. Louis, 92 S.W.3d 785, 788 (Mo. banc 2003).

In light of these principles, it is immediately apparent that the Act does not prohibit all below-cost sales of motor fuel. If that were the objective, the legislature would not have included subsections (1) and (2); it would simply have

made it illegal to sell motor fuel below cost. If every below-cost sale violates the statute, subsections (1) and (2) serve no purpose, contrary to the most basic rules of statutory construction.

Thus, the legislature clearly envisioned that some below-cost sales would be legal – those that did not satisfy the criteria of subsections (1) and (2). Under the plain terms of the statute, only those below-cost sales that **unfairly** divert trade or **unfairly** injure competitors are illegal. And in order to give subsections (1) and (2) meaning, that unfairness has to be in addition to whatever unfairness might be inherent in below-cost sales.

No Missouri court has construed the terms of the Act. This Court has construed the Unfair Milk Sales Act, § 416.410, et. seq, which has an essentially similar prohibition. Section 416.415.1 provides:

> No processor or distributor shall, with the intent or with the effect of unfairly diverting trade from a competitor, or of otherwise injuring a competitor, or of destroying competition, or of creating a monopoly, advertise, offer to sell or sell within the state of Missouri, at wholesale or retail, any milk product for less than cost to the processor or distributor.

As the trial court correctly held, App. 5, the milk statute is "nearly identical" to the Act.

This Court's precedents construing the milk statute have made it quite clear that the word "unfairly" modifies both "diverting trade" and "otherwise injuring a

competitor." Those precedents also establish that below-cost sales, without more, do not violate the statute:

> Whether or not a sale below cost has **unfairly** diverted trade is a matter of proof in each instance and must depend on the facts and circumstances shown.

Borden Co. v. Thomason, 353 S.W.2d 735, 754 (Mo. banc 1962) (emphasis added).

In State ex rel. Thomason v. Adams Dairy Co., 379 S.W.2d 553, 554 (Mo. 1964), the dairy gave away coupons for free milk as an introductory promotion. One effect of this promotion was that some competitors lost sales. The trial court held that these losses "'did not have the effect of unfairly diverting trade from a competitor,'" and this Court affirmed:

> The evidence shows only a recognized and frequently used practice in the dairy industry, which had a legitimate purpose and which has never heretofore been considered as against public policy or as characterized by deception, bad faith or fraud, and which did not in fact result in any substantial diversion of trade. Upon this record the conclusion is required that respondent, in conducting its promotional program involving giving milk to users, did not intend or have the effect of unfairly diverting trade from a competitor.

379 S.W.2d at 556. The same is true in the instant case.

In State ex rel. Davis v. Thrifty Foodliner, Inc., 432 S.W.2d 287, 289 (Mo. 1968), the defendant sold milk below cost during a four day event promoting the opening of two new grocery stores. Within hours, wholesalers and other retailers reduced their prices to match Thrifty's. 432 S.W.2d at 289. Again, this Court affirmed a judgment for defendant:

> It was the view of the Trial Court that respondent's one time use of a private label brand of fresh milk as a "leader," under the circumstances shown by the evidence served a legitimate business purpose. Upon our independent review of the record, we reach the same conclusion . . . .

432 S.W.2d at 291.

In both Adams Dairy and Thrifty Foodliner, this Court specifically rejected the State's theory that below-cost sales, standing alone, established the requisite unfairness. In each case, there was no question that the sale was below cost and no question that it had injured competitors, either by depriving them of sales or by forcing them to lower prices. If that proof alone made a submissible case of unfair competition, those cases come out the other way. Instead, they expressly rejected the State's theory:

> If that argument is valid, no possible reason exists for the inclusion by the legislature of the requirement of Section 416.440 that the giveaways (and other acts) prohibited are only those done with the intent or the effect of unfairly diverting trade. . . . The state's argument appears to us to overlook the fact that, according to the explicit language of the section in question,

giving away milk is not illegal (a violation of the act) unless it is done with the intent or with the effect of unfairly diverting trade from a competitor.

Adams Dairy, 379 S.W.2d at 555-56. Accord, Thrifty Foodliner, 432 S.W.2d at 291 (below-cost sale "is not 'in and of itself' illegal, unless the intent or effect is not merely to divert trade but to unfairly divert such trade") (emphasis original).

The trial court ignored those unambiguous holdings. Instead, it purported to distinguish these cases on the ground that:

- The Motor Fuel Marketing Act expressly prohibits the use of loss leaders, whereas the milk statute does not.
- Section 416.445(1) expressly allows below-cost sales of milk in isolated transactions, whereas the Act does not.

App. 5-6.

These distinctions simply do not matter. The State has stipulated that loss leaders have "[n]ever been an issue in this case." Tr. 65. Neither Adams Dairy nor Thrifty Foodliner relied on the isolated sale exception to the milk statute. Instead, both opinions squarely held that the below-cost sales were not illegal because they were not unfair.

More importantly, these distinctions simply do not respond to the key holdings in Adams Dairy and Thrifty Foodliner: that the intent or effect language in the milk statute has no meaning unless the State has to prove something more than a below-cost sale. Those holdings are just as in point in interpreting the Act.

Neither the State nor the trial court has ever responded to QuikTrip's argument that subsections (1) and (2) are meaningless if all below-cost sales are illegal.

Under any rational interpretation of the Act, the State must prove something more than a below-cost sale in order to establish a violation.

B. The State Neither Articulated Nor Proved Any Unfair Effect.

The State argued that below-cost sales injure QuikTrip's competitors, because the competitors must either lower their prices or lose customers. Tr. 65. The evidence in the record was that, rather than lose customers, the competitors lowered their prices. L.F. 27 ¶¶ 92-94; L.F. 286-87 ¶¶ 92-94.

That sort of effect on competitors, however, cannot be enough to establish a violation of the Act. Every below-cost sale produces that kind of injury, but every below-cost sale is not illegal. The competitors in Adams Dairy and Thrifty Foodliner faced exactly the same choice and suffered the same injury, but this Court held the below-cost sales were not unfair. The State's theory does not give any meaning to subsections (1) and (2).

At oral argument on the motion to reconsider, the State claimed that its theory would give meaning to the Act, because below-cost sales by a gasoline station with no competitors would not injure anyone. Tr. 72. A gasoline station with no competitors is a monopolist. The defining characteristic of monopolies is that they "produce less, charge a higher price, and earn a larger aggregate profit than would that industry with a competitive structure." L. Sullivan, Antitrust, § 6 at 26 (1977).

Under the State's theory, therefore, the Act allows below-cost sales in the one scenario in which that result is certain never to occur, and bans all other below-cost sales. That is an irrational construction. "This Court will not assume that the legislature intended an absurd or unreasonable construction of the statutes." Dierkes v. Blue Cross and Blue Shield of Missouri, 991 S.W.2d 662, 669 (Mo. banc 1999).

Apart from its monopoly theory, the State has never even tried to explain what distinguishes a legal below-cost sale from an illegal one, let alone pointed to any evidence that QuikTrip's pricing policies fall on the illegal side of the line. Since the State has the burden of proof, that alone requires a judgment for QuikTrip.

For the most part, the trial court never tried to explain what distinguishes a legal below-cost sale from an illegal one. QuikTrip had argued that the Act requires proof of predation – i.e., that its pricing practices were intended to put competitors out of business or were likely to have that effect. The trial court held that the Act did not impose such a requirement. App. 5-6.

Contrary to the trial court's apparent belief, a finding that QuikTrip's interpretation of the Act was wrong does not automatically mean that the State is right. As the party with the burden of proof, the State is still obliged to articulate a coherent interpretation of the Act. Apart from its theory that all below-cost sales are always illegal, which is self-evidently wrong, it has never done so.

Technically, QuikTrip cannot appeal the trial court's denial of its motion for summary judgment. But Rule 84.14 authorizes this Court to give "such judgment as the trial court ought to have given." Both parties agree that there are no disputed issues of material fact. Tr. 48-49. In those circumstances, it is appropriate for this Court to exercise its power under Rule 84.14 and render the correct judgment in favor of QuikTrip.

Loomstein v. Medicare Pharmacies, Inc., 750 S.W.2d 106 (Mo. App. 1988), is in point. There, the trial court sustained defendant's motion for a new trial but denied its motion for judgment notwithstanding the verdict. When defendant attempted to appeal the latter ruling, the court of appeals correctly held that it had no standing to do so. Because plaintiff had not in fact made a submissible case, the court of appeals exercised its power under Rule 84.14 and ordered that judgment be entered in favor of defendant. 750 S.W.2d at 115. This Court should do the same.

II. The Trial Court Erred In Entering Summary Judgment Against QuikTrip, And In Denying QuikTrip's Motion For Summary Judgment, Because The State Lacked A Submissible Case, In That There Is No Evidence To Support The Trial Court's Finding That QuikTrip's Pricing Policies Unfairly Injured QuikTrip's Competitors.

In the course of rejecting QuikTrip's theory that the Act required proof of predation, the trial court did hint at a definition of "unfair":

> [S]ales below cost are not unfair when it is a short-term promotion of a new product that is a "recognized and frequently used practice in the dairy industry, which had a legitimate business purpose and which has never heretofore been considered as against public policy or as characterized by deception, bad faith or fraud and which did not in fact result in any substantial diversion of trade."

App. 6, quoting Adams Dairy, 379 S.W.2d at 556.

The trial court did not find that QuikTrip's pricing policies satisfied any part of that definition, and there is no evidence to support any such finding. On the contrary, the undisputed facts prove that QuikTrip's pricing policies are not unfair under that definition. Since the "propriety of summary judgment is purely an issue of law," this Court's "review is essentially de novo." ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993).

1. "Short Term Promotion." To the extent that this refers to loss leaders, it is irrelevant, because that was "[n]ever . . . an issue in this case." Tr. 65. To the extent it refers to the duration of below-cost sales, there were 23 such days in the 33 months that the State examined. On the other 967 days in that period, QuikTrip either earned a positive margin or was meeting the price of one of its rivals. On average, QuikTrip had positive margins of 4.34 cents per gallon of diesel and 5.52 cents per gallon unleaded. L.F. 288 ¶¶ 101; 103.

2. A "recognized and frequently used practice which had a legitimate business purpose." QuikTrip's business philosophy is to compete aggressively on price, on the theory that high volumes generate substantial profits even if the margin is low. That is a well-recognized and entirely legitimate philosophy, even if there are a few days in a given year in which the low-cost competitor sells at a few tenths of a cent below cost.

3. "Never before considered contrary to public policy." Ports holds that even below-cost sales that violate the Act are not an unfair practice under the Merchandising Practices Act. 37 S.W.3d at 241. Since the Act does not ban all below-cost sales, the legislature could not have thought that occasional below-cost sales are contrary to public policy.

4. "Not characterized by deception, bad faith or fraud." There was nothing deceptive or fraudulent about QuikTrip's pricing; the prices were posted on the pumps. There is no evidence of bad faith.

5. "No substantial diversion of trade." As noted, the competitors generally lowered their prices to compete with QuikTrip. L.F. 27 ¶¶ 92-94; L.F. 286-87 ¶¶ 92-94. Thus, there could not have been any substantial diversion of trade. Certainly, there is no evidence to the contrary.

The only case to sustain a plaintiff's verdict under the milk statute is Dean Foods Co. v. Albrecht Dairy Co., 396 F.2d 652 (8th Cir. 1968). In Dean, a milk distributor named Sunny Hill entered the market in Memphis and underpriced Dean. As this Court explained in Thrifty Foodliner, distinguishing Dean:

> By way of retaliation and essentially as a punitive measure against Sunny Hill, which has a high percentage of its sales in Cape Girardeau, Dean entered the Cape market with milk as its single product. From the very inception of its operations in Cape, Dean priced its milk at substantially less than cost and operated at a loss for the entire period of its venture extending over a year.

432 S.W.2d at 291. That evidence established the requisite "intent or effect of unfairly diverting trade." Id.

It is conspicuous by its absence in the instant case. QuikTrip may be an aggressive price competitor, but it is also a profitable one. There is nothing unfair about an occasional day in which unexpected cost fluctuations make the margin negative. Under the trial court's own definition, the evidence clearly proves that QuikTrip's pricing practices have not **unfairly** diverted trade or injured competitors.

III. The Trial Court Erred In Entering Summary Judgment Against QuikTrip, And In Denying QuikTrip's Motion For Summary Judgment, Because The Act Violates Due Process As Applied To QuikTrip's Store No. 611, In That Increasing The Profits Of An Already Healthy Business Is Not A Legitimate Governmental Purpose.

According to the trial court, the purpose of the Act is to "protect competition and to protect competitors." App. 8. The State stipulated that injury to competition has "never been an issue in this case." Tr. 65. It is undisputed that QuikTrip's competitors are thriving, healthy businesses. On this record, the trial court's flat prohibition against any below-cost sales would serve only to increase the already substantial profits of those competitors. Since that is not a legitimate public purpose, the Act violates due process as applied to QuikTrip's Store No. 611.

"Constitutional interpretation is an issue of law that this Court reviews de novo." Farmer v. Kinder, 89 S.W.3d 447, 449 (Mo. banc 2002). There are two kinds of constitutional challenges: facial and as applied. State ex rel. Chiavola v. Village of Oakwood, 886 S.W.2d 74, 77 (Mo. App. 1994), cert. denied, 514 U.S. 1078 (1995). A facial challenge argues that the statute is invalid on its face – i.e., "no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). A facial challenge is "the most difficult challenge to mount." Id.

An as applied challenge refers "not only to the language of the statute but also the manner in which it had been administered in practice." Bowen v. Kendrick, 487 U.S. 589, 601 (1988). This kind of challenge claims that "the application of the regulations in question" to the particular facts and circumstances of a given case "violated . . . constitutional rights." Boot Heel Nursing Center, Inc. v. Missouri Dep't of Social Services, 826 S.W.2d 14, 16 (Mo. App. 1992). As QuikTrip told the trial court, its challenge to the Act is an as applied challenge. Tr. 37; 60.

"[O]ne of the rights protected by the due process clause" is "liberty to contract." Gideon-Anderson Lumber Co. v. Hayes, 156 S.W.2d 898, 899 (Mo. 1941). Of course, that right is subject to reasonable regulation by the State. To be reasonable, the regulation must bear "a rational relationship to a legitimate state interest." Blue Cross Hospital Service, Inc. v. Frappier, 681 S.W.2d 925, 930 (Mo. banc 1984), vacated on other grounds, 472 U.S. 1014 (1985).

As applied to QuikTrip's Store No. 611, the Act flunks that test. Forcing QuikTrip to raise its prices to guarantee that it will never slip below cost serves only to inflate the already substantial profits of its competitors. That is not a legitimate public purpose.

It is uncontested that both of the complaining competitors are thriving, healthy businesses. The Midwest Petroleum facility is in sound financial condition and in no danger of leaving the motor fuel business. L.F. 291 ¶ 124. It

makes a profit every year and that profit increased between 1998 and 1999. L.F. 291 ¶ 123.[3]

The Mr. Fuel store that Arogas operates in Herculaneum is in sound financial condition and is in no danger of exiting the motor fuel business. L.F. 292 ¶ 137. Its gross margins vary between 5.3% and 7.6%. L.F. 292 ¶ 134. With the exception of an unusual expense item in 1999, the Mr. Fuel store is profitable and that profit is increasing. L.F. 292 ¶ 136.

Eliminating the occasional below-cost sale by QuikTrip, therefore, is entirely unnecessary to keep these competitors in business, or to assure that they make a profit, or to assure that their profits increase each year. By forcing QuikTrip to abandon its low price business strategy and raise its prices, this lawsuit will accomplish only one thing: it will permit these thriving businesses to raise their prices and earn still higher profits at the expense of the consuming public. That is not a legitimate public purpose.

In Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002), plaintiffs challenged a Tennessee statute that allowed only licensed funeral directors to sell caskets. The state required a two-year course of study and an examination to qualify as a funeral director. Very little of either the study or the examination related to

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[3] Of the 23 alleged violations, only one involved the sale of gasoline. L.F. 285 ¶ 86. Midwest does not sell diesel fuel, L.F. 290 ¶ 116, so below-cost sales of that product could not injure Midwest.

caskets. Funeral directors took advantage of this statute to charge prices for caskets substantially in excess of those charged by the plaintiffs.

In sustaining a due process challenge to the statute, the Sixth Circuit observed that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." 312 F.3d at 224. The Court considered the various legitimate interests the state set forth to justify the statute and concluded that the statute bore no rational relationship to any of them.

As a result, "we are left with the more obvious illegitimate purpose to which the licensure provision is very well tailored" – "protecting licensed funeral directors from competition on caskets." 312 F.3d at 228:

> [W]e invalidate only the General Assembly's naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from customers. This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review.

Id. at 229. Accord, R.J. Reynolds Tobacco Co. v. Bonta, 272 F.Supp. 2d 1085, 1109 (E.D. Cal. 2003).

These holdings are squarely in point. The only thing this lawsuit can accomplish is to privilege QuikTrip's competitors at the expense of consumers. That is no more a legitimate public policy than protecting Tennessee's funeral directors from competition.

Courts in other states have gone considerably further than QuikTrip asks this Court to go in reviewing below cost statutes. In Ports Petroleum Co. v. Tucker, 916 S.W.2d 749 (Ark. 1996), the statute prohibited below-cost sale of motor fuel "where the effect may be to injure competition." The Arkansas Supreme Court held that this statute on its face violated due process. The Court recognized that preserving competition and preventing predatory practices were legitimate purposes, but concluded that the statute was not "reasonably designed to accomplish that purpose." Id. at 755. The reason was that the statute:

> prohibits legitimate and innocent competition fostered by below-cost sales. Had the Act included a prohibition against such sales made with predatory intent to damage and destroy competition . . . , due process impairment would not be a concern. But here legitimate and innocent below-cost strategies are precluded, and that is a burden on legitimate competition that we cannot condone.

916 S.W.2d at 755-56.

In Twin City Candy and Tobacco Co. v. A. Weisman Co., 149 N.W.2d 698 (Minn. 1967), the statute prohibited all below-cost sales of cigarettes, subject to four narrow exceptions. The basis for the ban was a legislative finding that below-cost sales "have the intent or effect of injuring a competitor, destroying or lessening competition." 149 N.W.2d at 700. The Minnesota Supreme Court held that this statute, on its face, "denies the defendant due process of law." Id. at 703:

> [T]here is no opportunity for a vendor to show he mistakenly sold below cost to meet what he honestly believed was the legal price of his competitors, or that he innocently erred in arriving at his own cost figures. Under our statute all of these hypothetical sales are subject to criminal and civil sanctions without permitting the defendant to prove they occurred without predatory intent or without any harmful effect on legitimate competition.

Id. Accord, Commonwealth v. Zasloff, 13 A.2d 67, 70 (Pa. 1940) (flat prohibition against below-cost sales is "arbitrary, and the means which it employs are grossly out of proportion to the object which it seeks to attain").

QuikTrip does not ask this Court to hold that the Act, as construed by the trial court, is facially unconstitutional. It is sufficient that the Court hold that the Act is unconstitutionally applied when its sole effect is to increase the profits of otherwise healthy private businesses.

The trial court's judgment is not responsive to these arguments. In the first place, it does not acknowledge that QuikTrip is making an as applied, rather than a facial, challenge, and all of the cases it cites involved facial challenges. In a facial challenge, it is appropriate to ask what conclusions "the legislature might possibly draw" about the effect of the legislation. Coldwell-Banker v. Missouri Real Estate Com'n, 712 S.W.2d 666, 668 (Mo. banc 1986). In an as applied challenge, the Court considers the actual effect of the statute on the particular facts of the case.

In the second place, the judgment completely fails to recognize that QuikTrip is challenging the public purpose prong of due process analysis, and not the rational relationship prong. If gouging the public to inflate the profits of already healthy businesses were a legitimate public purpose, QuikTrip does not dispute that the Act, as construed by the trial court, is a rational way to accomplish it.

As a result, most of the trial court's findings are simply irrelevant to the issues. It is certainly true that the wisdom of a statute, including the balancing of advantages and disadvantages, is for the legislature, and that courts must defer to the legislature. App. 7-8; 10-11. The judgment assumes that "protecting competitors" is a legitimate public purpose. App. 8; 10. It never explains why the type of protection conferred in the instant case – higher profits for healthy private businesses at the expense of the public – serves a legitimate public purpose.

The judgment find that states may "regulate[] the retail sale of motor fuel" without violating due process. App. 8, citing Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978). The State in that case had banned refiners from owning gasoline stations, because the refiners naturally favored their own stations in times of shortages. The Supreme Court rejected a facial challenge to that statute on the theory that "enhancing competition" was a valid public purpose and the courts should defer to the legislature on whether the statute would achieve it. 437 U.S. at 124. No one suggested that enhancing competition was not a legitimate public purpose.

The judgment also cites the ancient case of Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183 (1936), for the proposition that "protecting a particular business interest" is a proper public purpose. App. 10. What the case actually holds is that "protect[ing] the property . . . of the producer" – to wit, the value of its trademark – is a "perfectly legitimate end." 299 U.S. at 193. Obviously, it is legitimate for government to protect private property. What that has to do with increasing the profits of already thriving businesses the judgment does not explain.

As construed by the trial court, and as applied to the facts of this case, the Act does not serve a valid public purpose.

IV. The Trial Court Erred In Entering Summary Judgment Against QuikTrip, And In Denying QuikTrip's Motion For Summary Judgment, Because The Act Violates Due Process As Applied To QuikTrip's Store No. 611, In That QuikTrip Does Not And Cannot Know Its Costs With The Precision That The Act Requires.

Under the trial court's judgment, QuikTrip automatically violates the Act every time it sells below cost. In almost every case, however, the cause of that below-cost sale was an increase in QuikTrip's costs, rather than a reduction in the price. On the day it sells its fuel, QuikTrip does not and cannot reasonably know what those costs are with the precision that the trial court's judgment requires.

Due process prohibits imposing a penalty for violating a statute with which QuikTrip cannot comply.[4]

Numerous state and federal courts have held that it violates due process to penalize someone for failing to do the impossible:

> Statutory provisions which are unworkable and impossible to comply with may be invalidated on the ground that they constitute a denial of substantive due process.

Brunetti v. Borough of New Milford, 350 A.2d 19, 31 (N.J. 1975), and cases there cited. Accord, United States v. Dumas, 94 F.3d 286, 291 n.3 (7th Cir. 1996), cert. denied, 520 U.S. 1105 (1997) ("The validity of a law with which it is impossible to comply may be questioned"); Sayre & Fisher Brick Co. v. Dearden, 93 A.2d 52, 56 (N.J. Super. 1952) (statute that "imposes duties and requirements which are not capable of performance . . . is not a valid enactment").

In the instant case, there is no practical way for QuikTrip to comply with the statute as interpreted by the State. On only five of the 76 days on which the State alleged that QuikTrip sold below cost did QuikTrip reduce the price it charged. L.F. 293 ¶ 140. On three of those days, QuikTrip in fact sold above cost, id. ¶ 141, and on a fourth it was matching the price that Mr. Fuel charged. L.F.

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[4] The standard of review on this issue is also de novo. Farmer, 89 S.W.3d at 449.

295 ¶ 156. Thus, the source of the below-cost sales was almost always an increase in QuikTrip's costs rather than a reduction in price.

The reason is that QuikTrip does not know and cannot reasonably ascertain its exact costs on the day that it sets its prices. L.F. 293 ¶ 142. Sometimes QuikTrip exchanges fuel that it owns in some other city for someone else's fuel in St. Louis. L.F. 293 ¶ 143. QuikTrip does not know what the price of that exchange is until it buys fuel to replace the fuel it exchanged, which does not occur until the end of the month. Id. When QuikTrip purchases fuel, it does not know the exact cost until it compares the bill of lading with the invoice and reconciles any discrepancies, which takes from ten to fifteen days after the purchase. L.F. 293-94 ¶ 144. In a substantial number of cases, QuikTrip may not even know the identity of the vendor until it receives the invoice. Id. In every case, the freight bill varies depending on the location of the tank from which the fuel is drawn and again QuikTrip does not know the amount of that charge until the invoice arrives, usually a week after the delivery. L.F. 294 ¶ 145.

As a result, QuikTrip has to rely on good faith estimates of its costs. Sometimes, those estimates may be off by a penny or two a gallon. In a low margin business like motor fuel, that can make the difference between a profitable and an unprofitable sale. Of the 76 dates on which the State alleges a below-cost sale, none exceeded 2¢ per gallon; only 11 exceeded 1¢ per gallon; and the average alleged undercharge was less than half a cent a gallon. L.F. 287 ¶¶ 96-98.

On March 14-15, 1999, the alleged undercharge was one **thousandth** of a cent per gallon. L.F. 47.

With margins that narrow, even the tiniest change in the cost of the fuel or the freight can tip the balance between a profitable and an unprofitable sale. A half cent margin on 30,000 gallons a day – a huge volume – is only $150. A margin of one thousandth of a cent on 30,000 gallons is thirty cents. The record is uncontradicted that QuikTrip does not and cannot practically know its costs with that degree of precision until days after it has made its pricing decision.

The Kansas Supreme Court decision in Southwestern Bell Telephone Co. v. State Corporation Comm'n, 219 P.2d 361 (Kan. 1950), is directly in point. At that time, Bell was a wholly owned subsidiary of AT&T. AT&T and another subsidiary, Western Electric, supplied goods and services to Bell. The applicable state law prohibited Bell from basing its rates on anything other than the "actual cost" to these affiliates for the goods and services provided. 219 P.2d at 363-64. Bell submitted the actual billings sent to it by Western Electric, involving almost 2 million separate transactions. The Commission held that this was insufficient to show the actual cost to Western of those goods and services. 219 P.2d at 365.

Bell argued that, as a practical matter, it was impossible to prove that cost with respect to each of the 2 million transactions. As a result, Bell alleged that the Commission's interpretation of the statute denied Bell "due process of law because of the impossibility of compliance." 219 P.2d at 377. The trial court agreed. It held that it would require 500 man-years of accounting to compile the necessary

data, even assuming it existed, and this "constitutes impossibility for all practical purposes." Id. at 370. To avoid the constitutional issue, the trial court held that the statute merely required such itemization "as would be practicable and reasonable in the circumstances of the particular case." Id. at 373. The Kansas Supreme Court affirmed based on the trial court's opinion. Id.

In United States v. Gambill, 912 F. Supp. 287 (S.D. Ohio 1996), aff'd, 129 F.3d 1265 (6th Cir. 1997), one statute required persons owning machine guns to register them with the government and pay a tax thereon. A subsequent statute prohibited the possession of machine guns and forbade the government to register such guns or accept taxes thereon. The government prosecuted Gambill for failing to register his machine gun and pay the requisite tax. The Court held that his conviction on that count violated due process:

> It, however, is fundamentally unfair to prosecute citizens, like Mr. Gambill, for failing to register and pay taxes on their machine guns now that the Government prohibits them from complying with the statute.
>
> . . . . Mr. Gambill's conviction for possessing an unregistered machine gun is a violation of his due process rights.

912 F. Supp. at 290.

The trial court's judgment acknowledged that it violates due process to enact a statute with which compliance is essentially impossible. App. 11-12. The judgment rejected QuikTrip's argument on two grounds. First, the judgment held that the "uncontroverted facts show that motor fuel marketers know the cost of

fuel, including taxes and other expenses and are aware of all of these costs at the time they make their pricing decisions." App. 12.

Even on its own terms, that finding does not support the trial court's legal conclusion. General awareness of the costs that marketers of motor fuel incur does not translate to a specific awareness of the exact cost incurred on a given day down to the few dollars or even few pennies that the State's theory requires to avoid liability. The trial court made no finding that marketers have that precise a knowledge of their costs and the record would not support any such finding.

The only evidence supporting the trial court's conclusion are three affidavits by competitors of QuikTrip, each of which asserts that the competitor "knows its cost of fuel, including applicable federal and state taxes, freight charges and overhead, at the time it decides its retail price." L.F. 398 ¶ 8; L.F. 400 ¶¶ 3-5; L.F. 403 ¶ 7.

These conclusory affidavits do not assert that the affiants had knowledge of exact costs at the level of precision required to avoid liability. Such conclusory affidavits are simply insufficient to respond to the detailed reasons QuikTrip have as to why it could not know its costs at that level of precision:

> The proper function of an affidavit is to state facts, not conclusions. . . . The affidavit, being conclusory, does not maintain a fact dispute for a jury.

Reid v. Johnson, 851 S.W.2d 120, 122 (Mo. App. 1993). Accord, McDowell v. Waldron, 920 S.W.2d 555, 561 (Mo. App. 1996); Missouri Ins. Guaranty Ass'n v. Wal-Mart Stores, Inc., 811 S.W.2d 28, 34 (Mo. App. 1991).

The trial court also held that QuikTrip's affidavit to the contrary was insufficient to prove it could not know precise costs because, for example, the store receives a bill of lading and is therefore "aware of the wholesale cost and the freight cost at that time." App. 12. This finding assumes that the bill of lading includes the freight charge. There is no evidence to support that assumption, and the Odell affidavit states that QuikTrip would not know the cost of the freight until seven days after delivery. L.F. 332 ¶ 5(C). It also assumes that the bill of lading accurately states the cost; the evidence is that there were "often" discrepancies between the bill of lading and the vendor's invoice, the resolution of which may take fifteen days after delivery. L.F. 332 ¶ 5(B).

Granted, these discrepancies may not amount to a substantial number of dollars. When even a few dollars in cost may make the difference between a below-cost sale and an above-cost sale, however, these discrepancies may be critical.

QuikTrip's evidence also established that, in the event of an exchange, QuikTrip would not know the precise cost of its fuel until the end of the month when it replaced the exchanged fuel. L.F. 331-32 ¶ 5(A). The trial court rejected that argument on the theory that QuikTrip knew the cost of the original fuel that it exchanged. App. 12. This theory assumes that the cost of the original fuel is an

appropriate measure of the cost of the exchange. There is no evidence to support that assumption and the Odell affidavit specifically states to the contrary. L.F. 331-32 ¶ 5(A).

On the admissible evidence in this case, QuikTrip cannot know the exact amount of its costs with the precision required to avoid liability under the trial court's interpretation of the Act. Thus, applying the Act to QuikTrip violates due process.

Conclusion

For the foregoing reasons, QuikTrip respectfully prays that the Court reverse the judgment of the trial court and remand with instructions to enter judgment in favor of QuikTrip.

Respectfully Submitted,

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Certificate of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 9943 words, exclusive of the sections exempted by Rule 84.06(b)(2) of the Missouri Supreme Court Rules, based on the word count that is part of Microsoft Word 2002 SP-2. The undersigned counsel further certifies that the diskette has been scanned and is free of viruses.

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Mark G. Arnold

Certificate of Service

I certify that one copy of this brief and one copy on floppy disk, as required by Missouri Supreme Court Rule 84.06(g), were served on each of the counsel identified below by hand delivery or placement in the United States Mail, postage paid, on this 3rd day of November, 2003:

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