IN THE SUPREME COURT
STATE OF MISSOURI

KEITH JACKSON	)	
	)	
Appellant/Plaintiff,	)	
	)	Case No. SC95771
vs.	)	
	)	
DENNIS J. BARTON III	)	
	)	
Respondent/Defendant	)	

RESPONDENT'S SUBSTITUTE BRIEF

Dennis J. Barton III #55176
The Barton Law Group, LLC
17600 Chesterfield Airport Road
Suite 201
Chesterfield, MO 63005
(636) 778-9520 Telephone
(636) 778-9523 Facsimile
dbarton@bartonlawllc.com
Attorney for Respondent/Defendant

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STATEMENT OF FACTS

On June 22, 2011, Appellant first sought dental services from LifeSmile Dental Care ("LifeSmile"). See Legal File ("LF") at 52. Appellant also sought treatment on three other dates: March 22, 2012; April 2, 2012; and April 25, 2012. See LF at 52-57. On August 22, 2013, LifeSmile signed an affidavit that stated Appellant had an outstanding balance of $458.52 related to unpaid dental bills ("balance"). LF at 85. On September 9, 2013, LifeSmile, by and through its attorney, Respondent, filed a collection action against Appellant to recover the balance entitled *LifeSmile Dental Care North v. Keith D. Jackson*, case number 13SL-AC29643 ("collection action"). LF at 83-85.

Appellant did not plead that Respondent is affiliated with LifeSmile in any way except as an attorney in the collection action. See generally LF at 50-63. Respondent did not (1) provide any dental services to Appellant, (2) support LifeSmile in its delivery of dental service to Appellant, (3) negotiate or execute any written or oral agreement between LifeSmile and Appellant, or (4) have any involvement with Appellant until Respondent commenced collection efforts on behalf of LifeSmile. See LF at 50-63.

Appellant retained defense counsel to represent him in the collection action. See LF at 87-88. The collection action was set for trial on July 10, 2014. LF at 89. Respondent did not appear for the trial, and the case was dismissed without prejudice for failure to prosecute. LF at 89. On July 16, 2014, Respondent filed a

Motion to Vacate and Set Aside the dismissal. LF at 90-92. Respondent explained that his absence was unintentional and was due to a scheduling error. LF at 90.

On August 7, 20I4, the judge in the collection action granted Respondent's Motion to Vacate and Set Aside. LF at 93. In doing so, that court found that Respondent's failure to appear was neither deliberate nor intentional and that pursuant to Rule 74.06(b), the dismissal should be set aside. See LF at 90-93; see generally

The case was reset for a new trial date of October 2, 2014. See LF at 94. On that date, LifeSmile dismissed the collection action voluntarily without prejudice. LF at 94. Since that date, neither LifeSmile nor Respondent made any further attempts to collect any debt from Appellant, including without limitation contacting Appellant or filing a lawsuit. See LF at 50-63.

On January 29, 2015, Appellant filed this action against Respondent and the other defendants, entitled *Keith Jackson v. Dennis J. Barton III, et al.*, case number 15SL-CC00296. See LF at 8-19. He alleged violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA") and the Missouri Merchandising Practices Act, § 407.010, *et seq.* ("MMPA"). On March 16, 2015, the Circuit Court granted Appellant leave to file his First Amended Petition, and it was so entered (hereinafter "Petition"). LF at 50-63. Respondent filed a Motion to Dismiss and Memorandum in Support arguing that Appellant's FDCPA claim was filed untimely because it accrued more than one year prior to the filing of the initial petition, and the MMPA claim did not state a claim because Respondent's

collection activities were not in connection with the sale of LifeSmile's dental services. See LF at 73-94.

On August 19, 2015, Judge Richard C. Bresnahan in Division 18 of the St. Louis County Circuit Court ("Circuit Court") entered an Order and Judgment that granted Respondent's Motion to Dismiss, and dismissed all claims against Respondent with prejudice ("Judgment"). See LF at 169.

The Circuit Court granted Respondent's Motion to Dismiss. LF at 169. The Circuit Court found that the Petition failed to state a claim as to Count I's FDCPA violation because "Count I is time barred…pursuant to the FDCPA's one-year statute of limitation[.]" LF at 169. The trial found that Count II, the MMPA claim, "fails in that [Respondent] had no connection with the sale of dental services to Plaintiff nor was there a lender-borrower relationship between Barton and Plaintiff." LF at 169. The Circuit Court dismissed both counts against Respondent with prejudice. LF at 169.

Appellant filed a timely notice of appeal. On April 26, 2016, the Missouri Court of Appeals for the Eastern District of Missouri ("Eastern District") issued an opinion affirming the Circuit Court's Judgment in favor of Respondent ("Opinion"). On August 23, 2016, this Court sustained Appellant's Motion for Transfer to this Court.

POINT I (RESPONDING TO APPELLANT'S POINT I)

THE APPELLATE COURT CORRECTLY AFFIRMED THE CIRCUIT COURT'S DISMISSAL OF COUNT I OF APPELLANT'S PETITION FOR FAILING TO STATE A CLAIM UNDER THE FDCPA BECAUSE THAT CLAIM ACCRUED MORE THAN ONE YEAR PRIOR TO THE FILING OF APPELLANT'S FDCPA ACTION AND WAS BARRED BY THE FDCPA'S ONE-YEAR STATUTE OF LIMITATION.

15 U.S.C. § 1692k(d)

Mattson v. U.S. West Communications, Inc., 967 F.2d 259 (8th Cir. 1992)

Hageman v. Barton, 817 F.3d 611 (8th Cir. 2016)

Slorp v. Lerner, Sampson & Rothfuss, 587 Fed.Appx. 249 (6th Cir. 2014)

Calka v. Kucker, Kraus & Bruh, LLP, No. 98 Civ. 0990 (RWS), 1998 WL 437151 (S.D.N.Y Aug. 3, 1998)

POINT II (RESPONDING TO APPELLANT'S POINT II)

THE APPELLATE COURT DID NOT COMMIT ANY MATERIAL ERROR BY TREATING COUNT I OF THE CIRCUIT COURT'S JUDGMENT AS A SUMMARY JUDGMENT BECAUSE ANY ERROR IS IRRELEVANT WITH THIS COURT REVIEWING THE JUDGMENT *DE NOVO,* AND IT WAS HARMLESS BECAUSE IT DID NOT CHANGE APPELLANT'S BEHAVIOR OR THE RULE OF THE COURTS.

Rule 83.08

Rule 84.13

Foster v. State, 352 S.W.3d 357 (Mo. banc 2011)

Benton v. Cracker Barrel Old Country Stores, Inc., 436 S.W.3d 632 (Mo.App. E.D. 2014)

Barkley v. McKeever Enterprises, Inc., 458 S.W.3d 826 (Mo. banc 2015)

POINT III (RESPONDING TO APPELLANT'S POINT III)

THE EASTERN DISTRICT CORRECTLY AFFIRMED THE CIRCUIT COURT'S DISMISSAL OF COUNT II OF APPELLANT'S PETITION BECAUSE RESPONDENT'S DEBT COLLECTION ACTIVITIES WERE NOT IN CONNECTION WITH LIFESMILE'S SALE OF DENTAL SERVICES TO APPELLANT, SO APPELLANT FAILED TO STATE A CLAIM UNDER THE MMPA.

Section 407.020.1

Conway v. CitiMortgage, Inc., 438 S.W.3d 410 (Mo. banc 2014)

Watson v. Wells Fargo Home Mortg., Inc., 438 S.W.3d 404 (Mo. banc 2014)

Wivell v. Wells Fargo Bank, N.A., 773 F.3d 887 (8th Cir. 2014)

STANDARD OF REVIEW

This Court has a *de novo* standard of review of a trial court's granting of a motion to dismiss. *Foster*, 352 S.W.3d at 359; *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008). "In reviewing the propriety of the trial court's dismissal of the petition, this Court considers the grounds raised in the defendant's motion to dismiss and does not consider matters outside the pleadings." *Foster*, 352 S.W.3d at 359 (citing *City of Lake Saint Louis v. City of O'Fallon*, 324 S.W.3d 756, 759 (Mo. banc 2010)). The Court "reviews the petition to determine whether the facts alleged by the plaintiff meet the elements of a recognized cause of action or of a cause of action that might be adopted in that case." *In re Estate of Austin*, 389 S.W.3d 168, 171 (Mo. Banc 2013). The trial court's ruling is only reversed "if the motion to dismiss cannot be sustained on any ground alleged in the motion." *Id.*; *Farm Bureau Town and Country Ins. Co. of Missouri v. Angoff*, 909 S.W.2d 348, 351 (Mo. banc 1995).

POINT I (RESPONDING TO APPELLANT'S POINT I)

THE APPELLATE COURT CORRECTLY AFFIRMED THE CIRCUIT COURT'S DISMISSAL OF COUNT I OF APPELLANT'S PETITION FOR FAILING TO STATE A CLAIM UNDER THE FDCPA BECAUSE THAT CLAIM ACCRUED MORE THAN ONE YEAR PRIOR TO THE FILING OF APPELLANT'S FDCPA ACTION AND WAS BARRED BY THE FDCPA'S ONE-YEAR STATUTE OF LIMITATION.

On September 9, 2013, Respondent, on behalf of LifeSmile, filed the collection action against Appellant. On January 29, 2015, one year and three months later and after the voluntary dismissal of the collection action, Appellant filed a petition that alleged the collection action sought a higher dollar amount from Appellant than he owed in principal and interest, and that Respondent lacked a legal basis to seek attorney's fees. See LF at 14-19. Appellant alleged that Respondent violated § 1692d-g of the FDCPA and the MMPA[1] by misstating the amount of the debt Appellant owed to LifeSmile. LF at 59-62 (Petition) ¶¶ 81-100.

Prior to filing this instant case, Appellant recognized the harsh reality that the FDCPA has a one-year statute of limitations (see discussion, I.A., *infra*) and that more than one year had passed since Respondent filed the allegedly violative collection action on behalf of LifeSmile. In an effort to still pursue Respondent,

[1] Respondent addresses only the FDCPA claim in his response to Point I of Appellant's Brief and the MMPA claim in his response to Point III.

Appellant alleged in his Petition that Respondent committed three acts after the filing of the collection action that he claimed were separate violations. All three acts happened within the one-year of the filing of this case, but they all occurred during the litigation of the collection action.

The three alleged FDCPA violations are: (1) Respondent failed to appear for trial (see LF 58 ¶ 69); (2) Respondent mailed Appellant a demand for an amount that exceeded the amount Appellant felt he owed (see *Id.* ¶ 72); and (3) Respondent revived the dismissed collection action. See *Id.* ¶ 75.

All alleged violations are out-of-time because they all tie back to the filing of the collection action, which was filed more than a year prior to the filing of this FDPCA case. The Circuit Court found that the three alleged violations failed to give rise to a claim that accrued within the operative statute of limitations. See Judgment, LF 169. The Eastern District affirmed the Judgment stating, "we must conclude that [Appellant] is claiming that the *initial action* against him violated the FDCPA[.]" Opinion at 8 (emphasis added). It further held, "[t]hese alleged actions are not 'discrete violations' of the FDCPA but merely the 'later effects of an earlier time-barred violation,' namely the original suit brought by Barton, on behalf of LifeSmile, against Jackson in 2013." Opinion at 8.

A. The Circuit Court Correctly Held Respondent's Last Opportunity to Comply with the FDCPA was the Filing of the Collection Action.

Any action brought to enforce a provision of the FDCPA must be filed "within one year from the date on which the violation occurs." 15 U.S.C. §

1692k(d). The statute of limitations that applies to a violation contained within a collection action petition begins to run on the date it was served upon the consumer. *Anderson v. Gamache & Myers, P.C.*, No. 4:07-CV-336-MLM, 2007 WL 1577610, *8 (E.D. Mo. May 31, 2007); see *Freyermuth v. Credit Bureau Services, Inc.*, 248 F.3d 767, 770 (8th Cir. 2001) (citing to *Mattson v. U.S. West Communications, Inc.*, 967 F.2d 259, 261 (8th Cir. 1992)). When a FDCPA claim is barred by the one-year statute of limitations, the Court will not evaluate the merits of the claim. *James v. Ford Motor Credit Co.*, 47 F.3d 961, 963 (8th Cir. 1995).

In this case, Appellant was served with the collection action on October 7, 2013. See Affidavit of Process Server, LF at 86. There is no dispute that Appellant was served as he filed an Answer on October 28, 2013. See collection action Answer, LF at 87-88. Appellant's filed the instant action against Respondent on January 29, 2015. See LF at 8. That is more than one year and three months after Appellant was served with the collection action. Any alleged FDCPA violation relating to the amount of damages sought or the inclusion of attorney's fees accrued no later than October 7, 2013, the time of service. *Anderson*, 2007 WL 1577610, at *8.

Appellant argues that the *Mattson*'s test of "last opportunity to comply" means that Respondent's last opportunity to comply with the FDCPA covers every actions throughout the litigation of the collection action until that case came to a close. See App. Brief p. 20. That is far from the holding in *Mattson* and the many

cases that cite to it. *Mattson* addressed the FDCPA's statute of limitations and whether a claim for a FDCPA violation relating to a collection letter accrued when the defendant sent the letter or when the letter was received. *Mattson*, 967 F.2d at 261. The Eighth Circuit contemplated when the collector had the last opportunity to prevent the FDCPA claim from occurring. *Id*. It held that the last chance to prevent the violation was when the letter was mailed because that was the last opportunity for the collector to comply with the FDCPA. *Id*.

Other cases that cite to *Mattson* considered a similar question: when does a FDCPA claim accrue when it arises from language within a petition that initiates a lawsuit? See, *e.g.*, *Johnson v. Riddle*, 305 F.3d 1107, 1113 (10th Cir. 2002). In *Johnson*, the court examined whether the FDCPA claim should accrue when the lawsuit was filed with the court or served upon the consumer. *Id*. at 1113-14. That court held the claim should accrue (and the statute of limitation should start to run) when the consumer is served because (s)he has no awareness of the violation until served. *Id*. at 1113. That case also supports the "last opportunity" philosophy in that serving the case was the last opportunity for compliance because the filed case could be dismissed prior to service. *Id*. at 1113.

While these cases differ as to whether a claim accrues (and the statute of limitation starts to run) on the date of mailing/filing or receipt/service, both agree the claim accrues at one of those times. Neither court held that the claim would not accrue (and the statute of limitations would be stayed) depending upon what happened afterwards.

Appellant's application of the "last opportunity" philosophy creates a new standard that exceeds section 1692k(d)'s statute of limitations and jurisdictional boundaries. See *Mattson* at 262. ("We are not at liberty to disregard the jurisdictional limitations Congress has placed upon the federal courts[.]"). "Statutes of limitations are not simply technicalities; on the contrary, they have long been respected as fundamental to a well ordered judicial system.'" *Id.* (quoting *Board of Regents v. Tomanio,* 446 U.S. 478, 487, 100 S.Ct. 1790, 1796, 64 L.Ed.2d 440 (1980)); *Hageman v. Barton*, 817 F.3d 616-17 (8th Cir. 2016).

It is this jurisdictional boundary in the Eighth Circuit that prohibits equitable tolling in FDCPA cases. *Id.* at 616 ("It is well-established, as a general matter in the Eighth Circuit, that jurisdictional limitation periods are not subject to equitable tolling.") (citing to *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000)).

Although relied on by Appellant, *Hageman* does not help him expand the "last opportunity" standard of *Mattson* or *Johnson* because he misconstrues the facts and the holding. *Hageman*, like the instate case, involves Respondent filing a collection action in St. Louis County, Missouri, and the plaintiff (also represented by Appellant's firm) filing a FDCPA action more than one year after the plaintiff was served with the collection lawsuit. See *Hageman*, 817 F.3d at 612-14. That suit alleged multiple violation including the filing of a violative petition, the improper taking of a default judgment, and an improperly filed garnishment in Illinois. *Id.* at 613-14.

The *Hageman* court held that the FDCPA claim relating to any alleged violation arising out of the collection lawsuit and default judgment were time-barred. *Id*. at 616. That court went on to hold that although the alleged "misconduct during the registration of foreign judgment process was the same [alleged] violation he committed during the original suit[,]" the alleged violations in the garnishment did not relate back to the filing of the petition and were not time-barred. See App. Brief at 21 (citing to *Hageman*, 817 F.3d at 616).

Appellant argued that this holding "implicitly acknowledges that each step of litigation constitutes a new 'communication' and possesses its own limitations period." See App. Brief at 22 (citing to *Id*. at 619). This argument is wholly undercut by the fact that the *Hageman* court found a discrete violation arising from the garnishment action because it was a *new action against the employer* rather than a continuation of the collection lawsuit against the consumer. See *Hageman*, 817 F.3d at 617-20.

Appellant cited to four other cases in an attempt to expand the "last opportunity" standard beyond its proper scope. See App Brief at 22. *Puglisi v. Debt Recovery Solutions*, LLC, No. 08–CV–5024, 2010 WL 376628 (E.D.N.Y. January 26, 2010) fails to support his position because of the dissimilar facts in that case. *Puglisi*, 2010 WL 376628, at *3 (the court held that the collection agency's previous letters did not preclude a claim for an "early withdrawal of funds from plaintiff's account … prior to the date on which the parties allegedly agreed the transfer would occur.").

Huertas v. U.S. Dept. of Education, Civil No. 08–3959, 2009 WL 3165442 (D.N.J. 2009) is another case cited by Appellant (See App. Brief at 22), and it actually supports Respondent. In that case, the court dismissed the claims as being time-barred. *Huertas*, 2009 WL 3165442 at *3 ("The Third Circuit has held that violations of the FDCPA are not subject to the continuing violations doctrine, meaning a series of violations cannot constitute a single actionable violation.") (citing to *Schaffhauser v. Citibank (South Dakota) N.A.*, No. 08–2275, 2009 WL 2400254, at *2 (3d Cir. Aug.6, 2009)).

Plaintiff cites to two other cases that both relate to collection agencies sending collection letters (rather than lawyers litigating cases). See App. Brief at 22 (citing to *Kaplan v. Assetcare, Inc.*, 88 F.Supp.2d 1355 (S.D. Fl. 2000); *Pittman v. J.J. MacIntyre Co. of Nevada, Inc.*, 969 F. Supp. 609 (D. Nev. 1997)). In both cases, the respective courts allowed FDCPA claims relating to letters sent within one-year statute of limitations even though other letters were sent more than one year before the filing of the FDCPA cases. See *Kaplan*, 88 F.Supp.2d at 1360; *Pittman*, 969 F. Supp. at 611.

In *Kaplan*, though, the court explains that these cases are distinguishable from the instant appeal. That court recognized that litigation is different and that such a rule does not apply to representations made during the course of litigation in support of the lawsuit. See *Kaplan*, 88 F.Supp.2d at 1360 (citing to *Calka v. Kucker, Kraus & Bruh, LLP*, No. 98 Civ. 0990(RWS), 1998 WL 437151, at *3 (S.D.N.Y Aug. 3, 1998)).

Lastly, Appellant also cites to *Wade v. Account Resolution Corporation, et al.*, No. 4:15-CV-1354 JAR, 2016 WL 4415353 (E.D. Mo. Aug. 19, 2016). That plaintiff filed a FDCPA case that alleged a previous collection lawsuit illegally sought interest because the affidavit attached to the petition did not seek interest. The FDCPA case was filed more than one year after the service of the collection lawsuit. *Wade,* 2016 WL 4415353, at *1. The plaintiff alleged the collection attorney violated the FDCPA when he submitted a default judgment to the trial court that included the interest. *Id.* The court held that the plaintiff stated a claim under the FDCPA because the default judgment was submitted in the collection case less than one year prior to the filing of the FDCPA case. *Id. at *3.*

Wade is an outlier case that with faulty logic and a misunderstanding of the cases to which it cites. That court mainly based its decision on *Coble v. Cohen & Slamowitz,* LLP, 824 F.Supp.2d 568 (2011), which is a case with facts so different from *Wade* that it should have not been considered as persuasive authority. *Coble* is a case in which the plaintiff alleged that fraudulent affidavits were used by the collector to support default judgments in violation of the FDCPA. *Coble*, 824 F.Supp.2d at 569. That is a materially distinguishing fact from the allegations in *Wade* because *Wade*'s affidavit was not alleged to be fraudulent. *Wade,* 2016 WL 4415353, at *1.

An even greater distinguishing aspect between *Coble* and *Wade* is that all claims were out-of-time as pleaded in *Coble,* but that court allowed for equitable tolling due to the allegation of fraud. *Coble*, 824 F.Supp.2d at 569. Tolling of the

statute of limitations is not a choice for district courts like the *Wade* court sitting in the Eighth Circuit. See *Hageman*, 817 F.3d 616-17. More importantly, the fact that the *Coble* court tolled the statute of limitation means that it did analyze whether or not a default judgment is an extension of the collection action because it was irrelevant once tolling was allowed. *Id.*

The most telling difference between *Coble* and *Wade* is that the affidavit at issue in *Wade* was in the consumer's possession when the lawsuit was served upon Mr. Wade more than one year prior to him filing his FDCPA case. *Wade*, 2016 WL 4415353, at *1. In *Coble* and the other three cases cited in *Wade* to support its unprecedented extension of *Mattson*'s "last opportunity" test, all of the affidavits from which those FDCPA claims arose were filed for this first time with the default judgment rather than served with the petition at the outset of the collection action. See *Wade*, 2016 WL 4415353, at *2 (citing *Hasbrouck v. Arrow Fin. Servs. LLC*, 09 Civ. 748(GLS), 2010 WL 1257885, at *1–3 (N.D.N.Y. Mar. 26, 2010); *Gargiulo v. Forster & Garbus Esqs.*, 651 F. Supp.2d 188, 191–92 (S.D.N.Y. 2009); *Stolicker v. Muller, Muller, Richmond, Harms, Myers, and Sgroi, P.C.*, 04 Civ. 733(RHB), 2005 WL 2180481, at *4–5 (W.D. Mich. Sept. 9, 2005).

Hasbrouck and *Gargiulo* were also both cited by *Coble*, which may be why the *Wade* court cited to them. See *Wade*, 2016 WL 4415353, at *2. While those cases shared the same fact pattern as in *Coble*, the use of them as authority by in *Wade* demonstrates that *Wade* is an outlier case that is unsupported by the same

law that formed the basis of its holding. *Wade* should not be considered as persuasive authority by this Court.

Therefore, Appellant failed to show that "last opportunity" standard of *Mattson* should be expanded. Instead, Respondent's last opportunity to prevent the alleged violations in this case was when Appellant was served. That is the time the statute of limitation began to run for any FDCPA violation because all violations relate to the allegations in the collection action.

B. The Circuit Court Correctly Found that all Alleged Violations were Later Effects of the Collection Action.

To support his position, Appellant cited to cases holding that attorneys can commit FDCPA violations during the course of litigation. See App. Brief at 27 (citing, *e.g.*, *Heintz v. Jenkins*, 514 U.S. 291 (1995)). That is not the issue in this case. No one is arguing that attorneys are immune to the FDCPA after a case is filed. The issue in this case is whether the alleged violations were reaffirmations of the petition filed in the collection action or new and discrete acts that were filed timely.

In affirming the Circuit Court's Judgment, the Eastern District wrote, "Barton did not commit a fresh violation of the FDCPA in each event or communication in which he attempted to reaffirm the legitimacy of his suit against Jackson." Opinion at 8. Appellant now attempts to convince this Court that both the Circuit Court and the Eastern District were wrong on this point. They were not.

All three of the alleged wrongdoings were tied to the initial petition, which was filed after the running of the FDCPA's statute of limitations.

1. The Circuit Court correctly found that the "no show" was not a discrete violation and not filed timely.

The first of the three allegedly discrete violations is that Respondent "'no showed' the trial date of July 10, 2014." *LF* 58 (Petition, ¶ 69). Appellant further alleged that this was "a tactic designed to harass Plaintiff by causing Plaintiff to incur substantial and unnecessary fees[.]" *Id*. Appellant also alleged that Respondent did this because "Defendants knew the suit against Plaintiff was baseless and full of falsities and Defendants had no evidence with which they could prevail against Plaintiff[.]" *Id*. at ¶ 70.

The Circuit Court dismissed this claim as untimely because it did not consider it a discrete violation separate from the filing and litigating of the collection action. Not only can this Court look to the Judgment of the Circuit Court and the Opinion of the Eastern District, it can also look to the trial court in the collection action. Appellant's FDCPA action was not before that court, but that judge already entered an order that preclude the filing of a FDCPA claim related to the "no show."

The judge hearing the collection action dismissed the case for failure to prosecute after Respondent failed to appear on behalf of LifeSmile for the July 10, 2014 trial. See LF 89. Six days later on July 16, 2014, Respondent filed a Motion to Vacate and Set Aside the dismissal pursuant to Rule 74.06(b). See LF 90-92.

That trial court, after a hearing on the motion, ruled on the issue of whether the "no show," as Appellant labeled it, was purposeful and deliberate or an unintended good faith mistake. See LF at 90-91.

That court granted Respondent's motion and in doing so without saying otherwise it ruled that Respondent committed a good faith error and was not "[e]ngaging in harassing, abusive, misleading, deceptive, and unconscionable conduct in an attempt to collect a debt[.]" See LF at 93; see also LF 90-93 (quoting Rule 74.06(b)). Not only is this claim untimely, this claim is precluded by a prior court ruling that was not appealed or challenged in any way after its entry.

Appellate alleged that Respondent violated the FDCPA by litigating the collection action while not believing he had "underlying evidence to support its allegations." *Id*. Even though the collection action's trial court ruled otherwise, taking that allegation as true does not aid Appellant. If Respondent brought this case without "underlying evidence," he did so when the case was filed one year and three months *before* the FDCPA claim was filed making this claim untimely.

Appellant cited to *Chamineak v. Jefferson Capital Systems, LLC*, No. 4:15-CV-419 (CEJ), 2015 WL 4207084, *4 (E.D. Mo. July 10, 2015). In this case, the court held the plaintiff stated a claim by alleging that the collector violated the FDCPA when it filing a collection action knowing it lacked sufficient evidence to prove its claim. *Id*. Again, even if this Court takes as true that Respondent acted like the defendant in *Chamineak*, the allegation violation is still untimely because it still accrued when Respondent filed the collection action.

Appellant then asks the Court to compare this case with *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324 (6th Cir. 2006). See App. Brief 28. In that case, the court dismissed the FDCPA action which alleged - and the court expressed confusion about what was being alleged - either that the collector (1) "filed the complaint without *having on hand at the time of filing* the means to prove the complaint, or (2) [defendants] filed the complaint without the means of *ever being able to obtain sufficient proof* of the debt-collection action." *Harvey*, 453 F.3d at 327-28. Again, this offers Appellant no help because those facts either do not give rise to a FDCPA claim, or they do and such a claim would be untimely against Respondent given that he filed the collection action outside the statute of limitations. See *Id.*

Appellant's "no show" allegation was already determined to lack the essential elements to be a FDCPA violation. Even if it the pleadings could be seen as a violation, said violation was untimely. The cases cited by Appellant to support his position are easily distinguishable from this case or have outcomes counter to his arguments. Therefore, the Circuit Court's order should be affirmed as to its dismissal of this first alleged violation.

2. The Circuit Court correctly found that Defendant's written demand was not a discrete violation and not filed timely.

Appellant's second alleged violation at issue is that Respondent sent a written demand to Jackson on July 16, 2014 in attempt to collect amounts Jackson did not owe. See LF at 58-59. Specifically, Appellant alleged, "[t]he amount of the

debt in this demand was grossly false, and both Barton and LifeSmile knew it to be false." LF 58 ¶ 73.

Compare this to earlier in the Petition when Appellant alleged, "[a]s of the date of this Petition, Barton is actively suing Plaintiff in the Circuit Court for St. Louis County, Missouri, Associate Division for '$458.52 together with interest, reasonable attorney's fees pursuant to contract, costs of court and for all other further relief this Court deems just and proper.'" LF 57 at ¶ 61 (emphasis added). Although the Petition did not cite to the document it was quoting, the quoted document was the petition Respondent filed in the collection action. See LF 84, Wherefore clause following ¶ 9. This shows that Appellant acknowledges, even if inadvertently, that Respondent sought the same relief since the time he filed the time-barred collection action.

The Petition's next paragraph alleged, "[i]t is improper and unlawful for Barton and Lifesmile [sic] to be actively seeking this relief from Plaintiff because (1) Plaintiff does not owe the debt and (2) it is not possible for Plaintiff to owe attorney's fees or other 'contractual' charges because of the absence of any such contract between LifeSmile and Plaintiff.'" LF at 57 ¶ 62. Again, the Petition's use of the phrase "this relief" is referring to the language quoted in the preceding paragraph taken from the collection action's wherefore clause. See LF 57 ¶¶ 61, 62. Paragraph 62 of the Petition also quotes that same wherefore clause of the collection action by quoting the word "contractual" in reference to attorney's fees. See LF 57 ¶ 62.

Paragraphs 61 and 62 reveal that it is the relief sought in the collection action's petition that is the source of Appellant's FDCPA claim. Both the Circuit Court and Eastern District found that the allegation relating to the July 16, 2014 "demand for payment" failed to state a timely claim because it was an "attempted to reaffirm the legitimacy of [Respondent's] suit against Jackson." Opinion at 8.

a. Reaffirmations of Alleged FDCPA Violations are Not Separate and Discrete Violations, and They are Time-Barred if the Initial Violation is Time-Barred.

If an act that occurred within the statute of limitations is simply the continuation of an improper attempt to collect an improper amount that initially commenced outside of the statute of limitations, the subsequent and "continuous" act does not revive the FDCPA's statute of limitations or give rise to a new and timely claim. See *Slorp v. Lerner, Sampson & Rothfuss*, 587 Fed.Appx. 249, 257-58 (6th Cir. 2014) ("No court of appeals has held that debt-collection litigation (or a misleading statement made in connection with that litigation) is a continuing violation of the FDCPA.") (citing *Schaffhauser v. Citibank (S.D.) N.A.*, 340 Fed.Appx. 128, 131 (3d Cir. 2009) (holding that ongoing debt-collection litigation does not constitute a continuing violation of the FDCPA)).

"Most district court decisions have held that the continued prosecution of a collection suit is not a continuing violation under the FDCPA." *Slorp*, 587 Fed.Appx. at 258, n. 4 (string citation omitted). In *Calka v. Kucker, Kraus & Bruh, LLP*, No. 98 Civ. 0990(RWS), 1998 WL 437151, at *3 (S.D.N.Y Aug. 3, 1998),

just as here, the plaintiff argued that although the collection action was filed outside of the statute of limitations, the filing of an amended pleading and motion for summary judgment against Ms. Calka extended the statute of limitations. *Calka*, 1998 WL 437151, at *3.

The *Calka* court held that a violation relating to the "inflated" debt occurred when the collection action was filed seeking an excess amount, and later representations echoing that position do not toll the statute of limitations or give rise to separate violations. *Id.* (citing to § 1692k(d)). The plaintiff in *Nutter v. Messerli & Kramer, P.A.*, 500 F.Supp.2d 1219 (D. Minn. 2007) also pleaded that each new communication regarding a previously filed pleading began a new statute of limitations. *Nutter,* 500 F.Supp.2d at 1223. That court held, "'[n]ew communications ... concerning an old claim ... [do] not start a new period of limitations.'" *Id.* (quoting *Campos v. Brooksbank,* 120 F.Supp.2d 1271, 1274 (D. N.M. 2000); *see also Kirscher v. Messerli & Kramer, P.A.*, No. 05-1901, 2006 WL 145162, at *3 (D. Minn. Jan. 18, 2006).

These cases demonstrate that when Respondent sought payment from Appellant at any time after the filing of the collection action for the allegedly illegal amounts sought in the collection action ("$458.52 together with interest, reasonable attorney's fees pursuant to contract"), Respondent was continuing the initial (and out-of-time) violation. That does not give rise to a separate and discrete violation where a new claim accrues and a new statute of limitation applies. See *Slorp*, 587 Fed.Appx. at 258, n. 4; see *Nutter*, 500 F.Supp.2d at 1223.

Appellant asserts that these cases are inapposite because the "continuous violation" theory is used by plaintiffs to extend the statute of limitations. App. Brief at 24. Appellant misunderstands the application of this theory. He claims that the continuous-violation theory is one that says plaintiffs can use acts that occurred within the statute of limitations to capture acts that happened outside of the statute of limitations. App. Brief at 24 (citing to *Midwestern Machinery v. Northwest Airlines,* 392 F. 3d 265, 269 (8th Cir. 2004) (case regarding a violation of the Clayton Act) and *Pollock v. Wetterau Food Distribution Group*, 11 S.W.3d 754, 763 (Mo.App. E.D. 1999) (case alleging violation of the Missouri Human Rights Act).

That may true in way how the continuous-violation theory is used in other types of cases, but that is not how it is applied to FDCPA claims. See, *e.g. Slorp*, 587 Fed.Appx. at 258-59. Under the continuous-violations theory in a FDCPA case, a plaintiff attempts to categorize actions that occur inside the statute of limitation as "discrete acts" when really those acts are only continuance of an initial and untimely violation. *Slorp*, 587 Fed.Appx. at 259. "But the violations that occur within the limitations window must be discrete violations; they cannot be the later effects of an earlier time-barred violation." *Id.* (citing *Purnell v. Arrow Fin. Servs., LLC,* 303 Fed.Appx. 297, 302 (6th Cir. 2008) (citing *Ledbetter v. Goodyear Tire & Rubber Co.,* 550 U.S. 618, 628, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub.L. No. 111–2, 123 Stat. 5).

Regarding the July 16, 2014 demand letter, the Eastern District correctly sided with the trial court when it concluded, "Jackson was not 'deceived or abused anew' by the subsequent demand letter since Barton, on behalf of LifeSmile, was merely reaffirming the same allegedly unlawful claims to Jackson's outstanding debt." Opinion at 9 (citing to *Slorp*, 587 Fed.Appx. at 259).

Appellant cited to a number of cases that hold a collector can violate the FDCPA by sending multiple collection letters with different amounts "where there was no legal explanation to the rate of the increase in the second letter." App. Brief at 30-31 (citing *DeFrancesco v. Veripro Sols. Inc.*, 2:14-CV-27-FTM-29DNF, 2015 WL 179376, at *2 (M.D. Fla. Jan. 14, 2015)). While that may be true in some instances, even Appellant acknowledged that during the collection action, Respondent attempted to collect "'$458.52 together with interest, reasonable attorney's fees pursuant to contract [and] costs of court.'" App. Brief at 31 (quoting LF 57 (Petition) ¶ 61) (quoting LF 84 (petition in collection action)), Wherefore clause). This further reveals Appellant's true understanding that all claims originated from the out-of-time collection action.

b. Respondent filed the Motion to Vacate and Set Aside the dismissal of the collection action on the same day he sent the written demand.

Appellate attempted to plead the written demand was separate from the collection action because that case was dismissed at the time of Respondent's demand. See App. Brief at 31-32. That is not accurate. The alleged written

demand was made on the same day that Respondent, on behalf of LifeSmile, filed a Motion to Vacate and Set Aside the dismissal of the collection action. See LF at 58 ¶ 72; see LF at 91.

Even if the Court somehow takes as true that the collection action was dismissed at the time of the demand, that settlement attempt should still be considered part of an effort to pursue the collection action because it was dismissed without prejudice. Opinion at 9 ("the possibility of reinstatement existed as of the moment it was dismissed because it was dismissed without prejudice."). That is further supported by the fact that only six days passed between the dismissal and Respondent filing the Motion to Vacate and Set Aside. For these reasons, the Circuit Court's order should be affirmed as to its dismissal of this second alleged violation.

3. The Circuit Court correctly found that the reinstatement of the collection action was not a discrete violation and not filed timely.

The third violation Appellant claims as timely was a "communication" in the form of the collection action being "reinstated" after the dismissal was vacated and set aside. See App. Brief at 33. Appellant's theory requires this Court to agree with the notion that vacating and setting aside a dismissal for failure to prosecute created a new action resetting the statute of limitations. That is a position that no Missouri court has ever taken. This Court should also reject such an argument.

a. Vacating and setting aside of the collection action's dismissal for failure to prosecute did not result in a new action.

Appellant argued, "it has long been the rule that 'a motion to set aside...is an *independent action*, the determination of which is an independent judgment.'" App. Brief at 33 (quoting *Kueper v. Murphy Distributing*, 834 S.W.2d 875, 878 (Mo.App. E.D. 1992)) (emphasis in App. Brief, but not in the case). This is a new argument that was neither before the trial court nor the Eastern District. For that reason, it should be disregarded. See *State v. Davis*, 348 S.W.3d 768, 770 (Mo. banc 2011). Even if not disregarded, this argument should not be persuasive.

Both the Circuit Court and Eastern District rejected the idea that a new action was created by vacating the July 10, 2014 dismissal. See Opinion at 9 ("As for the order setting aside the dismissal for lack of prosecution, we consider this a 'later effect' of the petition filed in 2013 because there is no allegation that the claims against Jackson changed once the original case was reinstated[.]"). Moreover, the Missouri Rules of Civil Procedure reject how Appellant applied *Kueper*.

Under Missouri Rules, "A civil action is commenced by filing a petition with the court." Rule 53.01. Pursuant to Rule 54.01, a county's Clerk of the Court is to issue the required summons or other process after the pleading is filed, which it then delivers to either the sheriff or to the party to be served by special process server. Rule 54.01. Pursuant to Rule 54.02, a summons shall be signed by the Clerk of the Court, which "shall state the time within which and the place where

the defendant is required to appear and defend as provided by law and shall notify the defendant that in case of failure to do so judgment by default will be entered against the defendant for the relief demanded in the petition." Rule 54.02

Rule 54.04 requires "[a] copy of the summons and petition shall be served together except when service is by publication." Rule 54.04. Rule 54.13 states that personal service within the state occurs by delivering a copy of the summons and petition personally to the individual…." Rule 54.13(b)(1).

After the judge in the collection action granted Respondent's Motion to Vacate and Set Aside, no new petition was filed pursuant to Rule 53.01. The Clerk did not issue or sign a summons pursuant to Rules 54.01 and 54.02. Appellant was not personally served with a new summons and a new petition pursuant to Rules 54.04 and 54.13.

This, of course, is likely no surprise to this Court because it would not expect a defendant to be served with a new petition after a dismissal is set aside for failure to appear at trial, especially when that motion was filed only six days after the trial date. Respondent knows of no instance of a new petition needing to be filed and served in order to reinstate a case under after the judgment such as this one was vacated and set aside. Judges put cases back on a call, motion, or trial docket, which is what happened in this case; it was put back on the trial docket. App. Appendix, A64.

Respondent's position is that his Motion to Vacate and Set Aside was part of litigating the collection action. If, however, this Court interprets the motion as

creating an "independent action," the scope of the "action" was only how the trial court ruled on the Motion to Vacate and Set Aside, not how the collection action unfolded afterwards. See *Kueper*, 834 S.W.2d at 878 ("We now hold that because a motion to set aside a default judgment is an independent action which does not automatically terminate after 90 days, the trial court's determination of *whether to grant or deny such a motion* is an independent judgment.") (emphasis added).

When the collection action was resumed, it involved the same parties litigating the same allegations in the same petition with no new action filed or pleadings amended. Therefore, the confines of any new "action" was the litigation of the Motion to Vacate and Set Aside, which would have started on July 16, 2014 when the motion was filed and ended when the Court granted the motion on August 7, 2014. See LF at 90-93.

In order to state a claim for a FDCPA violation, Respondent's filing of the Motion to Vacate and Set Aside must have been an attempt to collect a debt from Appellant. See *Pace v. Portfolio Recovery Associates, LLC*, 872 F.Supp.2d 861 (W.D. Mo. 2012). The *sole* relief requested by Respondent's motion to vacate and set aside (filed on behalf of LifeSmile) was the removal of the judgment that dismissed the collection action. See LF at 91. That is not an attempt to collect a debt. It was an attempt to remedy excusable negligence that came in the form of a calendaring error. See LF at 90-91; see Rule 74.06. Even if this court views the Motion to Vacate and Set Aside as a separate and independent action from the collection action, which it should not, vacating the dismissal of the collection

action creates the *opportunity* for Respondent to continue his collection of the debt, not an attempt itself. Therefore, any such independent action would not be a FDCPA violation.

b. *Glazewski* is not persuasive authority to support Appellant's claim that a motion to vacate and set aside creates a new action for the purposes of a FDCPA action.

In support of his argument that vacating the dismissal of the collection action revived Appellant's otherwise untimely claims, Appellant could find only one case, state or federal, in the entire country that has *ever* reached such a finding. See App. Brief at 34 ("Based on Appellant's research, only one other court has addressed the applicability of the FDCPA's statute of limitations to the revival of a previously-dismissed lawsuit.") (citing *Glazewski v. CKB Firm P.C.*, 14-C-7150, 2015 WL 661278 (N.D. Ill. Feb. 15, 2015)). The facts in *Glazewsi* are so different from the case at bar that it should carry no persuasive value.

Both the trial court and the Eastern District agreed and concluded the following:

> Not only are we not bound by Glazewski, but we find its analysis distinguishable given that the court specifically viewed the facts through the lens of the venue provision of the FDCPA, which is not at issue here … and did not consider the analysis of FDCPA statute of limitations claims in other circuit and district court cases that predated its decision and remain good law.

Opinion at 10 (citing to *Slorp*, 587 Fed. Appx. 249; *Campos*, 120 F. Supp. 2d 1271; *Fraenkel v. Messerli & Kramer, P.A.*, No. Civ. 04–1072-JRT-FLN, 2004 WL 1765309 (D. Minn. July 29, 2004); *Calka*, 1998 WL 437151).

In *Glazewski*, the defendant collector CKB filed a prior collection action in an Illinois state court against the plaintiff in 2012. *Glazewski*, 2015 WL 661278 at *1. The collection action was dismissed that same year after the parties reached a settlement agreement that included a payment plan. *Id*. Approximately two years later in 2014, Glazewski defaulted on the settlement agreement, and CKB "caused the suit to be reinstated." *Id*. That court believed that CBK's reinstatement was "close enough to the filing of a suit to constitute 'bring[ing] legal action' against Glazewski within the meaning of section 1692i(a)." *Id*. at *2; Section 1692i(a)(1) ("Any debt collector who brings any legal action on a debt against any consumer shall … bring such action only in a judicial district or similar legal entity in which such real property is located[.]").

Several facts distinguish *Glazewski* from the one at bar. First, two years separated the dismissal of the collection case and its reinstatement in *Glazewski* compared to only six *days* passing between the dismissal of Appellant's action and Respondent filing a motion to set aside. Under Missouri law, had Respondent attempted to file his Motion to Vacate two years after the dismissal, such a filing would have been untimely, and the motion would have been denied. See Rule 74.06(c).

Second, CKB reinstated its collection case after Glazewski stopped complying with a payment arrangement after years of doing so compared to Respondent seeking to set aside the dismissal of his client's collection action based on a good faith failure to appear.

Third, the finding of the *Glazewski* court that the reinstatement of the action restarted the one-year statute of limitations rested on the fact that it believed that reinstating an action was a violation of the FDCPA's *venue* statute. *Id*. at *2. If § 1692i(a) was not a claim in that case (and it is not in Appellant's), the *Glazewski* court may very well have reached a different decision. Taking all of the circumstances into account, the *Glazewski* decision should have no persuasive value given how different the facts are and that no other court in the land has ever reached such a conclusion.

Appellant also cited to other cases whose facts (and holdings) are not applicable to this appeal because they relate to venue and garnishment proceedings. App. Brief at 35 (citing to *Fox v. Citicorp Credit Svcs., Inc.*, 15 F.3d 1507, 1515 (9th Cir. 1994); *Blakemore v. Pekay*, 895 F.Supp. 972, 983 (N.D. Ill. 1995) see also *Sprinkle v. SB&C Ltd.*, 472 F.Supp.2d 1235 (W.D. Wa. 2006); *Collins v. Erin Capital Mgmt., LLC*, 290 F.R.D. 689, 698 (S.D. Fla. 2013) The filing of a garnishment is a separate action against the employer rather than the consumer, so it is not a continuation of a collection lawsuit filed against the consumer. *Hageman*, 817 F.3d at 617-20. That, though, is unrelated to whether the vacating and setting aside of a dismissal restarted the statute of limitations.

Therefore, these cases should also be given no persuasive value.

Appellant than tried to find support by citing to *Boldon v. Riverwalk Holdings, Ltd.*, Civil NO. CV 15-2105 (JRT/JSM), 2016 WL 900639, at *3 (D. Minn. Mar. 9, 2016). See App. Brief at 35. This case held that violations in a *second* and new collection lawsuit triggered a new limitations period. *Boldon*, 2016 WL 900639, at *3. Again, the facts of this case are not applicable to this appeal because no new action was created by the collection action's trial court vacating and setting aside its earlier dismissal.

At no time did Appellant, his collection action defense attorney, or his present counsel file a timely FDCPA claim. Their failure to do so means that Appellant's FDCPA claim is now time-barred pursuant to § 1692k(d)'s one-year statute of limitations. The Circuit Court was correct when it dismissed that claim against Respondent with prejudice; the Eastern District was correct when it affirmed the Circuit Court; and Respondent urges this Court to join those lower courts and affirm the Judgment.

POINT II (RESPONDING TO APPELLANT'S POINT II)

THE APPELLATE COURT DID NOT COMMIT ANY MATERIAL ERROR BY TREATING COUNT I OF THE CIRCUIT COURT'S JUDGMENT AS A SUMMARY JUDGMENT BECAUSE ANY ERROR IS IRRELEVANT WITH THIS COURT REVIEWING THE JUDGMENT *DE NOVO*, AND IT WAS HARMLESS BECAUSE IT DID NOT CHANGE APPELLANT'S BEHAVIOR OR THE RULE OF THE COURTS.

Appellant's second point of appeal is that the Eastern District applied the wrong standard of review. Specifically, Appellant argues that the Eastern District committed error because it "treated [Respondent's Motion to Dismiss] as one for summary judgment." See App. Brief at 37 (citing to Opinion at 3-4). Appellant's larger concern is that he would have added more evidence to the record had he known the Eastern District was going to review the Judgment as a summary judgment. See App. Brief at 40-48. Both of these arguments fail because the standard of review used by the Eastern District is now meaningless and Appellant waived an equitable tolling argument because it was not presented to the trial court.

A. The Eastern District's Standard of Review is No Longer Relevant and Did Not Result in Material Error.

First and foremost, this argument is not now irrelevant. Whether or not the Eastern District used the proper standard is meaningless because this Court is now reviewing Respondent's Motion to Dismiss *de novo*. See *Foster,* 352 S.W.3d at

359. The actual conclusions of the Eastern District far outweigh the method by which they reached them. More importantly, this Court will soon sustain or reverse the Circuit Court's Judgment, not the Opinion of the Eastern District. See *Angoff*, 909 S.W.2d at 351. The Court's *de novo* review will lead to a conclusion that is independent of the Eastern District's Opinion regardless of the basis for the Opinion.

To the extent this Court is concerned with whether the Eastern District improperly converted Respondent's Motion to Dismiss to a motion for summary judgment, Point II of Appellant's Brief is still without merit. First, the Eastern District was permitted to apply the summary judgment review standard to the first point of the appeal. Second, even if it was not permitted to do so, the Eastern District only reviewed Point I with that standard and not Point II relating to the MMPA claim. Third, even if it applied the wrong standard to Point I of the appeal, the Eastern District committed a harmless error that should not result in a reversal of the Judgment.

1. The Eastern District Properly Used the Summary Judgment Standard to Review Respondent's Motion to Dismiss.

Appellant argues that the Eastern District error in converting Respondent's Motion to Dismiss into a Motion for Summary Judgment because the Eastern District did not give notice to the parties that it intended to do so. See App. Brief at 38-40 (citing to *Hoover v. Mercy Health*, 408 S.W.3d 140, 142 (Mo. 2013). Appellant further contends that he would have produced more evidence to the

Eastern District to support his position had he been given notice that the Court would use the summary judgment standard. See App. Brief, pp. 39-45.

Appellant argues this, though, while producing almost *130 pages* of deposition transcripts that he *did* include in the Eastern District's Legal Files. See LF 124-155 (four deposition transcript pages per one Legal File page). In his current brief, Appellant quoted different portions of different transcripts for two and half consecutive pages, which were indisputably outside of the pleadings. App. Brief at 42-45. Due to this and the fact that Respondent attached to the Motion to Dismiss court filings from the underlying collection action, the Eastern District stated that it reviewed the Judgment as a summary judgment. Opinion at 2-3 (citing to *Mitchell v. McEvoy*, 237 S.W.3d 257, 259 (Mo.App. E.D. 2007)).

Appellant's only argument as to the proper standard is that the Eastern District committed error by converting Defendant's Motion to Dismiss into a motion for summary judgment without giving notice of the conversion. The legal authority cited by Appellant relates conversions by *trial* courts rather than an appellate court such as the Eastern District. See, *e.g.*, *Hoover*, 408 S.W.3d 140.

The significant distinction being that at the appellate level, unlike in trial court, the parties do not stay proceedings to conduct further discovery or fact finding to add to the record. Therefore, the failure to give notice not create an error in the court of appeals like it does in the circuit courts. This is especially true given the Appellant invited this error by filing the deposition transcripts as part of the Eastern District's Legal File. "The general rule of law is that 'a party may not

invite error and then complain on appeal that the error invited was in fact made.'" *Lau v. Pugh*, 299 S.W.3d 740, 757 (Mo.App. S.D. 2009) (quoting *Rosencrans v. Rosencrans*, 87 S.W.3d 429, 432 (Mo.App. S.D. 2002).

2. The Eastern District Did Not Convert Respondent's Motion to Dismiss into a Motion for Summary Judgment as to Point Two of the Appeal.

Point II of Appellant's Brief implies the Eastern District used the summary judgment standard for both points of his appeal. See generally *Id*. at 37-48. That is incorrect. Even if this Court were to conclude that the Eastern District examined Point I of the appeal (timeliness of the FDCPA claim) using the summary judgment standard, the Eastern District employed the motion to dismiss standard as to Point II of Appellant's appeal (pleading sufficiency of MMPA claim). *Opinion* at 3-4, 11 (quoting *Benton v. Cracker Barrel Old Country Stores, Inc.*, 436 S.W.3d 632, 633 (Mo.App. E.D. 2014)) ("Our review of a trial court's grant of a motion to dismiss is *de novo*, and 'we view the facts in the light most favorable to plaintiff, treating the facts as alleged as true, to determine whether the facts pleaded and the inferences reasonably drawn therefrom state any ground for relief.'").

Even if the Eastern District used the wrong standard of review and even if that error resulted in material harm (which it did not, see pp. 37-40, *infra*), that error is limited to the Eastern District's review of Point I. Point II is unaffected and reversal or remand of the Eastern District's opinion based on a finding of error

should be limited to Point I.

3. Any Conversion of Respondent's Motion to Dismiss into a Motion for Summary Judgment Did Not Result in Material Harm to Appellant.

Rule 84.13(b) states, "[n]o appellate court shall reverse any judgment unless it finds that error was committed by the trial court against the appellant materially affecting the merits of the action." Rule 84.13(b). Even if this Court rules that the Eastern District improperly converted Respondent's Motion to Dismiss into a Motion for Summary Judgment, the error is irrelevant now because the Judgment is before this Court for its review.

This Court's standard of review is a *de novo* as to the *trial* court's Judgment, not the Eastern District's opinion. The only relevant review is that of the alleged facts and legal arguments before the Circuit Court. The conclusions reached by this Court are independent of the *standard* used by the Eastern District.

Appellant argues that he would have produced more evidence to the Eastern District to support his position had he been given notice that the Court would use the summary judgment standard. See App. Brief at 39-45. He does this, though, while producing almost *130 pages* of deposition transcripts that he *did* include in the Eastern District's Legal Files. See LF at 124-155 (four deposition transcript pages per one Legal File page). These documents were not before the Circuit Court.

Appellant complains that he would have supplied the Eastern District with

a copy of the allegedly fraudulent contract between LifeSmile and Appellant. App. Brief at 42. He does not explain how or why he feels he was prevented from adding this contract when at the same time he felt free to add almost 130 pages of deposition testimony. See *Id*. Although Respondent did not object in the Eastern District to the addition of the deposition testimony, all of these documents are outside of the pleadings, and none of them were before the Circuit Court when it ruled on Respondent's Motion to Dismiss. Regardless of whether these documents should have been added, Appellant had the opportunity in the Circuit Court to add them to the record and chose not to do so. Therefore, Appellant cannot now argue material harm.

B. Appellant's Equitable Tolling Argument was Waived and Should be Disregarded.

Appellant spends a considerable amount of time arguing to this Court that the statute of limitations for his FDCPA claim should be equitably tolled. See App. Brief at 40-42, 45-48, 62-63. His brief filed with this Court is the first time he every articulated an equitable tolling argument to anyone in this case. This theory was not voiced to the Eastern District or, far more importantly, the Circuit Court. An argument not raised in the trial court will not be considered by on appeal. *Dieser v. St. Anthony Medical Center*, No. SC 95022, 2016 WL 5791250, *8 (Mo. Banc Oct. 4, 2016) (quoting *Davis*, 348 S.W.3d at 770) ("An issue that was never presented to or decided by the trial court is not preserved for appellate review.").

Rule 84.13(a) unambiguously provides, "[a]part from questions of jurisdiction of the trial court over the subject matter, allegations of error not briefed or not properly briefed shall not be considered in any civil appeal[.]" Rule 84.13 Rule 83.08(b) allows parties to file substitute briefs, but it prohibits appellants from "alter[ing] the basis of any claim that was raised in the court of appeals brief[.]" *Barkley v. McKeever Enterprises, Inc.*, 458 S.W.3d 826, 839-40 (Mo. banc 2015) (quoting Rule 83.08(b)).

In *Barkley*, the plaintiff lost his appeal, and put forth a new theory to support reversal of the trial court's judgment that was voiced by the dissenting judge in the court of appeals. *Barkley*, 458 S.W.3d at 839. In rejecting the new theory, this Court held, "it simply is not the role of the court of appeals or this Court to grant relief on arguments that were not presented to or decided by the trial court." *Id.*

This holds true "regardless of the merits of the new argument." *Id.* "'Appellate courts are merely courts of review for trial errors, and there can be no review of a matter which has not been presented to or expressly decided by the trial court.'" *Id.* (quoting *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 814 (Mo. banc 2011) (quoting *Robbins v. Robbins*, 328 S.W.2d 552, 555 (Mo. 1959)); also citing *Brown v. Brown*, 423 S.W.3d 784, 788 (Mo. banc 2014) ("'issue that was never presented to or decided by the trial court is not preserved for appellate review'"); also citing *Smith v. Shaw*, 159 S.W.3d 830, 835 (Mo. banc 2005).

Just as in *Barkley*, the only reference to equitable tolling prior to

Appellant's Brief was a general reference to it in the Eastern District's Opinion. See Opinion at 11 ("Should consumers not immediately recognize that debt collection suits filed against them are unlawful pursuant to the FDCPA, they can seek the remedies available under appropriate tolling doctrines."). Only after reading that did Appellant espouse the theory. Like *Barkley*, this argument is made without ever having been before the trial court (or the Eastern District), which means it is improperly presented by Appellant before this Court and should be disregarded.

POINT III (RESPONDING TO APPELLANT'S POINT III)

THE EASTERN DISTRICT CORRECTLY AFFIRMED THE CIRCUIT COURT'S DISMISSAL OF COUNT II OF APPELLANT'S PETITION BECAUSE RESPONDENT'S DEBT COLLECTION ACTIVITIES WERE NOT IN CONNECTION WITH LIFESMILE'S SALE OF DENTAL SERVICES TO APPELLANT, SO APPELLANT FAILED TO STATE A CLAIM UNDER THE MMPA.

Appellant alleged that he sought dental services from LifeSmile on only four occasions: June 22, 2011; March 22, 2012; April 2, 2012; and April 25, 2012. LF at 52-57. Appellant does not allege any dental treatment by LifeSmile after April 25, 2012. Respondent is not affiliated with LifeSmile in any way except as an attorney in the collection action. See generally LF at 50-63. Respondent did not (1) provide any dental services to Appellant, (2) support LifeSmile in its delivery of dental service to Appellant, (3) negotiate or execute any written or oral

agreement between LifeSmile and Appellant, or (4) have any involvement with Appellant until Respondent commenced collection efforts on behalf of LifeSmile. See LF at 50-63.

Nevertheless, Count II of Appellant's Petition alleged a violation of the MMPA. Sections 407.020.1 is the central MMPA statute at issue. *Conway v. CitiMortgage, Inc.*, 438 S.W.3d 410, 415-416 (Mo. banc 2014) and *Watson v. Wells Fargo Home Mortg., Inc.*, 438 S.W.3d 404 (Mo. banc 2014), which were decided on the same day, are the controlling authority on the issue now before the Court: whether Appellant pleaded sufficient facts to state a claim under the MMPA against Respondent, a third-party debt collector with no prior participation between Appellant and LifeSmile. This specific issue is one of first impression for this Court.

Respondent's only involvement with LifeSmile or Appellant was representing LifeSmile in the collection action. (See LF at 57-59, 62). Appellant alleged that these collection activities violated the MMPA. (See LF at 60-62). Both the Circuit Court and the Eastern District disagreed and found that he failed to state a claim because Respondent's debt collection activities were not in connection with LifeSmile's sale of dental services to Appellant. The law supports affirmation of the Circuit Court's Judgment dismissing this claim against Respondent.

A. Third Parties to a Transaction are Not Liable under the MMPA When Their Acts Do Not Have a Relationship with the Sale of Merchandise.

The MMPA makes unlawful "[t]he act, use or employment ... of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact *in connection with the sale* or advertisement of any merchandise in trade or commerce." Section 407.020.1 (emphasis added). The act also provides consumers a private cause of action. Section 407.025.

State ex rel. Koster v. Professional Debt Management, LLC, 351 S.W.3d 668 (Mo.App. E.D. 2011) and *State ex rel. Koster v. Portfolio Recovery Associates, LLC*, 351 S.W.3d 661 (Mo.App. E.D. 2011) both held that that the MMPA did not apply to third-party debt collectors because those actions are not in connection with the underlying transaction. *Professional Debt Management*, 351 S.W.3d at 674; *Portfolio Recovery Associates*, 351 S.W.3d at 667. In both of these cases, the defendant debt collectors were loan servicers. See *Conway v. CitiMortgage, Inc.,* 438 S.W.3d 410, 415-416 (Mo. banc 2014).[2]

[2] Respondent cites to *Conway* because neither *Professional Debt Management, LLC* nor *Portfolio Recovery Associates, LLC* address these parties as loan services. In those cases, the type of third party was irrelevant to the holding, but that fact is highly relevant to this appeal.

Conway and *Watson* are the two most recent cases that will most likely direct this Court's analysis. They brought clarity to the MMPA's use of the term "in connection with" and what constitutes a "sale of merchandise."

1. *Conway* explains that ongoing servicing of a loan by a third party to the initial transaction is still "in connection with" the sale of the original loan.

In *Conway*, the Court revisited the issues in *Professional Debt Management, LLC* and *Portfolio Recovery Associates, LLC*. *Conway* is a case in which the plaintiffs obtained a mortgage for a home from Pulaski Bank, which then assigned it to Fannie Mae, and CitiMortgage serviced the loan. *Conway*, 438 S.W.3d at 413. After circumstances that led to the plaintiffs falling behind on the mortgage, CitiMortgage foreclosed on the home. *Id*. The plaintiffs filed a MMPA claim against Fannie Mae and CitiMortgage. *Id*. Those defendants filed a motion to dismiss arguing they could not be liable under the MMPA because pursuant to *Professional Debt Management, LLC* and *Portfolio Recovery Associates, LLC* third parties to the initial contract cannot be liable. *Conway*, 438 S.W.3d at 415. The trial court dismissed the case, and this Court took the appeal. *Id*.

The Court recognizes some boundaries to the MMPA and that it does not cover all acts that relate to a sale, only those that in connection with it. See *Id*. at 414. The phrase "in connection with" is not defined in the statute, so the Court looked to a dictionary for the definition of "to connect," which is defined as "to have relationship." *Id*. at 414 (citing WEBSTER'S THIRD NEW INTERNATIONAL

DICTIONARY 480 (1993). The Court concluded, "section 407.020.1 prohibits the use of the enumerated deceptive practices if there is a relationship between the sale of merchandise and the alleged unlawful action." *Id.* Pleading such a relationship between the sale of the merchandise and the alleged illegal act is necessary to state a claim for a MMPA violation. See *Id.* at 415.

When defining the term "sale," the Court recognized that the services provided by a loan servicer like CitiMortgage are different than many other products or services. The Court described it as a "bundle of related service" that "creates a *long-term relationship in which the borrower and the lender continue to perform various duties*, such as making and collecting payments *over an extended period of time*." *Id.* at 415 (emphasis added). The sale *continues over the life of the loan because of the ongoing performance* by both parties. *Id.* A loan servicer may not have been a party to the original loan agreement, but this *ongoing* involvement with an *ongoing* transaction makes collection procedures "in connection with" the original loan agreement. *Id.* at 416.

The *Conway* Court held that the MMPA applied to the loan servicer CitiMortgage because even though it was not a not party to the original loan agreement, its ongoing servicing of plaintiffs' loan made its foreclosure activities "in connection with" the original loan. In reaching that decision, this Court wrote, "[t]o the extent that *Professional Debt* and *Portfolio Recovery Associates* conflict with this holding, they should no longer be followed." *Conway*, 438 S.W.3d at 416.

2. *Watson* clarified the scope of *Conway* by limiting the definition of "in connection with the sale" to services included in the original transaction.

In *Watson*, the Court heard a MMPA case similar to *Conway* involving a loan servicer and the issue of whether Wells Fargo's actions were "in connection with" the original sale of the loan even though it was not a party to the initial transaction. *Watson*, 438 S.W.3d at 406. The plaintiff alleged that Wells Fargo "(1) wrongfully foreclosed on her deed of trust; and (2) engaged in bad faith negotiations of a loan modification, even thought there was no obligation to renegotiate under the terms of the original loan." *Id.* at 406.

This Court held in *Watson*, just as you did in *Conway*, that the loan servicer could be liable under the MMPA for the wrongful disclosure because the "sale" of the original loan "is not complete when the lender extends the credit, but continues throughout the time the borrower is making payments on the loan. *Id.* at 407 (citing *Conway*, 438 S.W.3d at 415). *Watson* reiterated *Conway*'s message that "the enforcement of the loan's terms is 'in connection with' the sale of the loan because the sale continues for the life of the loan." *Watson*, 438 S.W.3d at 407 (citing *Conway*, 438 S.W.3d at 415).

Unlike in *Conway*, however, this Court in *Watson* held that Wells Fargo could not be liable under the MMPA related to the loan modification negotiations. *Watson*, 438 S.W.3d at 408. The Court found they "were not 'in connection with' the sale of this loan because that was not a service the lender agreed to sell or the

borrower agreed to buy when the parties agreed to the loan." *Id*.

3. The Eighth Circuit construes *Conway* to mean actions by thirty-party debt collectors are not "in connection with" the sale of merchandise when they had no participation in the underlying transaction.

The Eighth Circuit Court of Appeals has already held that the *Conway* ruling does not apply to cases like the one brought by Appellant because *Conway*'s holding is limited to collection activities as part of an ongoing relationship like that between a lender and borrower. See *Wivell v. Wells Fargo Bank, N.A.*, 773 F.3d 887, 895 (8th Cir. 2014). Respondent does not assert that this Court is bound by the Eighth Circuit's ruling, but the *Wivell* decision is persuasive authority that is informative as to this dispute. That is especially true given the lack of extensive citation or interpretation of *Conway* and *Watson* to date.

The Wivells borrowed money from Wells Fargo to purchase residential property, and they signed a promissory note secured by a deed of trust. *Id*. at 891-92. The trustee was Kozeny & McCubbin, L.C. *Id*. The Wivells brought multiple claims, including MMPA, against both Wells Fargo and Kozeny after Wells Fargo foreclosed on the property, and Kozeny sold it at a foreclosure sale. *Id*. at 892.

The *Wivell* court held that the MMPA did apply to the lender Wells Fargo because it was a party to a lender-borrower relationship. *Id*. at 899. As to Kozeny, though, the court found that, unlike in *Conway* where the lender and borrower had contracted to have continual duties to one another, a deed of trust trustee did not

assume such duties. *Id*. at 895. The Eighth Circuit explained, "the deed of trust established a narrow, contingent role for Kozeny in the event that the Wivells defaulted." *Id*. Therefore, the court held as to Kozeny that it did not continue to perform duties "'for the life of the loan,'" so "the rule established by *Conway*…does not apply to a trustee like Kozeny." *Id*.

B. Respondent is Not Liable Under the MMPA Because His Collection Activities Were Not "in Connection with" the Sale of the Dental Services by LifeSmile to Appellant.

Appellant contends that *Conway* and *Watson* opened the doors wide for him to sue Respondent arguing that all third party debt collectors are now subject to the MMPA. See App. Brief at 53-55. Specifically, Appellant interprets *Conway* to mean that all payment attempts are in connection with the original contract even if they occur well after the underlying sale. App. Brief at 54. Even a cursory review of *Conway* reveals the flawed nature of that analysis. Respondent's collection activities were not "in connection with" LifeSmile's dental services because Respondent's acts started after the sale of the dental services was completed, and the collection activities were not a part of the negotiated transaction.

1. Respondent's collection activities were not "in connection with" LifeSmile's sale of dental services because Respondent's acts did not begin until after the sale was already completed.

The Eastern District recognized that a lender-borrower relationship like the

one described in *Conway* is far more complicated than many other types of business transactions. Opinion at 16 (quoting *Bland v. LVNV Funding, LLC*, No. 4:15 CV 425 RWS, 2015 WL 5227414, *8 (E.D. Mo Sept. 8, 2015) ("finding relationship created by the parties to a mortgage are 'complex, long-term, and imposes greater duties on the parties to the loan.'"). The Eastern District likened Respondent's role in this case to Kozeny's role in *Wivell* in that Respondent's "role was narrow and contingent and only took effect once Jackson failed to pay the debt owed LifeSmile." Opinion at 16 (citing *Wivell*, 773 F.3d at 895). Based on this finding, the Eastern District concluded that Appellant failed to state a claim against Respondent under the MMPA because Respondent's acts were not "in connection with" LifeSmile's sale of dental services to Appellant. Opinion at 16.

In order for Appellant to state a claim against Respondent, he must have alleged facts to support a relationship between the sale of dental services and the collection action. *See Conway*, 438 S.W.3d at 415. Appellant alleged that "[t]he collection activities of Barton and LifeSmile are in connection with the sale of the dental work in 2011 and 2012 described herein, as those transactions remain incomplete." LF at 57 ¶ 60. The conclusion that "those transactions remain incomplete" is proven false and inconsistent with other facts alleged in the Petition.

LifeSmile provided Appellant with its final dental service on April 25, 2012. See LF at 56 ¶ 51. Beginning on or about June 15, 2012, "LifeSmile began sending Plaintiff dunning letters to Plaintiff claiming that Plaintiff owed LifeSmile

an additional $184.20 for work performed on all of the dates referenced above." LF at 56 ¶ 53. A "dunning letter" is a letter demanding payment for an outstanding debt. See *Owens v. Hellmuth & Johnson, PLLC*, 550 F.Supp.2d 1060 (D. Minn. 2008) ("'Dun' means to demand payment from a delinquent debtor … Debt-collection letters, therefore, are frequently referred to as 'dunning letters.'") (citing Black's Law Dictionary 502 (6th ed.1990).

LifeSmile also charged Appellant monthly late fees beginning on June 14, 2012. LF at 57 at ¶ 55. Taking these allegations as true, LifeSmile charging late fees and sending letters demanding payment of a defaulted balance demonstrates that the transaction between LifeSmile and Appellant was complete, and payment for services already provided was owed by Appellant.

Respondent did not file the collection action in this case until September 9, 2013, well over a year after LifeSmile's last dental service to Appellant or Appellant made any payments to LifeSmile. See LF at 56 ¶¶ 51-53. The fact LifeSmile forwarded Appellant's account to an attorney for suit is a strong indication that the transaction (and the business relationship as a whole) was over before Respondent ever acted. Moreover, Appellant does not assert that these parties had any dealings from the last dental service on April 25, 2012 to October 7, 2013 when Appellant was served with the collection action. Taking these facts as true, it is unreasonable to conclude that after eighteen months with no interaction between LifeSmile and Appellant that the transaction was not complete long before Respondent commenced with collection activities.

This is not to suggest that the MMPA cannot apply to wrongdoings that occur after a transaction, but that party must have had a relationship with sale before the alleged violation. See *Conway*, 438 S.W.3d at 415 (citing *Schuchmann v. Air Services Heating & Air Conditioning*, 199 S.W.3d 228 (Mo.App. S.D. 2006)) (involved a plaintiff who sued a manufacturer under the MMPA claim for failure to honor the *lifetime* warranty.); see also *Conway*, 438 S.W.3d at 416 (citing *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667 (Mo. banc 2007)) (this Court determined that a plaintiff could prevail on an MMPA claim against a wholesaler who was not directly involved in the relevant transaction but sold the vehicle to the car dealer that sold it to the plaintiff.).

The alleged violations in *Schuchmann* and *Gibbons* differ significantly from the instant case because Respondent was not a party to the initial agreement or a seller of any product or service, directly or indirectly, to Appellant. Respondent's collection activities, unlike the lifetime warranty, was not a service that LifeSmile sold to Appellant. Respondent also did not sell products or services to LifeSmile who then resold them to Appellant as in *Gibbons*. Respondent's collection activities were independent from LifeSmile's dental services and occurred long after those services were complete.

Appellant argued, "[o]ne of the conclusions in *Watson* was that the consumer stated a claim under the MMPA relating to 'a party's rights to collect.'" *Watson*, 438 S.W.3d at 407-408. This is a conspicuously incomplete quotation in that Appellant ended the sentence with the word "collect," but that is not the last

word of that sentence in the *Watson* opinion. *Id.* ("the plaintiff was able to state a claim under the MMPA against the foreclosing entity, regardless of whether that entity was a party when the loan was first procured, because 'a party's rights to collect *a loan* is part of that sale and, therefore, "in connection with" the loan.'" *Id.* (citing to *Conway*, 438 S.W.3d at 415) (emphasis added).

Appellant's partial quotation removes it from the context and overall meaning of the full quotation, which is that the party's right to collect (and connection with the sale) only flowed from that party's ongoing participation in the transaction prior to the need to collect. See *Watson*, 438 S.W.3d at 407-408. Respondent had no prior ongoing relationship with Appellant (or LifeSmile), so the collection activities, unlike the foreclosures in *Conway* and *Watson*, were not "in connection with" the sale of dental services.

2. Respondent's collection activities were not "in connection with" LifeSmile's sale of dental services because Respondent's acts were not contemplated by LifeSmile or Appellant at the time of the sale.

In *Watson*, this Court held that Wells Fargo was not liable under the MMPA for alleged violations that arose from loan modification negotiations because that was a service to which the lender and the borrower had not agreed at the time of the original transaction. *Watson*, 438 S.W.3d at 408. The same is also true as to Respondent's alleged collection activities. Unlike a mortgage agreement and deed of trust that include both payment arrangements and what occurs in the

event of a default, no contract existed between LifeSmile and Appellant (or Respondent and Appellant) that addressed payment or the consequences of default. See LF 53 ¶ 23 ("At no time did Plaintiff ever sign any agreement of any kind with LifeSmile relating to the dental work or the charges that LifeSmile could assess related to the dental work or extension of credit LifeSmile was granting Plaintiff with respect to that dental work.").[3]

In the absence of the parties bargaining for and agreeing that a specific service is part of the sale, that service will not be in connection with the sale. See *Watson*, 438 S.W.3d at 408 ("The loan modification negotiations…were not "in connection with" the sale of this loan because that was not a service the lender agreed to sell or the borrower agreed to buy when the parties agreed to the loan.").

Collection activities were not "in connection with" LifeSmile's dental services because they were not included as part of the "bundle of services" for which LifeSmile and Appellant bargained and agreed. See *Id.;* see *Conway*, 438 S.W.3d at 414. Respondent's collection activities should not be considered as part of LifeSmile's sale of dental services to Appellant because Appellant did not allege that he and LifeSmile ever discussed or contemplated the use of collection activities if Appellant failed to pay. Therefore, Appellant failed to state a claim

[3] The petition filed in the collection action alleges the existence of a contract, and Respondent does not now stipulate that no contract existed or that it was fraudulent. Plaintiff's allegations at this stage, though, are taken as true.

against Respondent for a violation of the MMPA.

C. The MMPA's Failure to Specifically Exclude Debt Collectors Does Not Equate to Appellant Stating a Claim against Respondent.

Appellant argued that the MMPA would have specifically excluded debt collectors if that was the legislature's intent. See App. Brief at 59 (citing to Section 407.020.2). By that same logic, the legislature did not expressly include debt collectors either. Respondent does not seek from this Court a blanket exclusion for all debt collectors at all times. That is unreasonable. It is equally unreasonable, though, to conclude that debt collectors are subject to the MMPA under any circumstance simply because they are not excluded.

Appellant implied that if this Court does not expand the MMPA's definition of "in connection with" to include debt collection attorneys (even when they have relationship to the sale of merchandise), Missouri consumers will be left without adequate protection. See App. Brief at 59-60. This is wholly untrue. As even Appellant recognized, the FDCPA already protects Missouri's consumers independent of the outcome of this case. See *Id*.

He expresses concern that the FDCPA's statute of limitations is only one year, and expanding the scope of the MMPA will mean increasing the statute of limitations to five years for debt collection violations. *Id*. at 60. Such a goal is not to be accomplished by this Court but by federal legislators if they wish to change the FDCPA or by Missouri legislators if they wish to create new law.

Another argument made by Appellant to expand the MMPA beyond its

proper scope is that "Missouri, unlike other states, does not have a separate statute dealing specifically with debt collection activity[, which] lends further support for the legislature's intent that the MMPA to apply to debt collectors." App. Brief. At 59. Using this same logic, the absence of a specific state statute to regulate debt collectors is more likely to mean that the Missouri legislature believe collectors are already sufficiently regulated by the FDCPA without needing a state law.

In fact, other states do have consumer law statutes like the MMPA without having it apply to debt collectors. Just like Missouri, Minnesota does not have specific statutes or rules that regulate debt collectors, but it does have a consumer law statute substantially similar to the MMPA, the Minnesota Deceptive Trade Practices Act ("MDTPA"). See Minn.Stat. § 325F.69, subd. 1.[4] That statute does not apply to most debt collection activities. See *Thinesen v. JBC Legal Group, P.C.*, Civ. 05-518-DWF-SRN, 2005 WL 2346991, *6 (D. Minn. Sept. 26, 2005) (holding the plaintiff failed to state a claim under the MDTPA because "Defendants' collection letters do not make representations regarding goods or services."). While there is a limited instance in which a collector can be held liable for threatening to withhold medical care until payment of the debt, most collection

[4] "The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon *in connection with the sale of any merchandise*[.]" See Minn.Stat. § 325F.69, subd. 1 (emphasis added).

activities do not fall under the MDTPA's "catch-all provision" for unfair trade practices. *Id.* at n. 1.

Appellant also cited to the Code of State Regulations in support of his argument that the legislature intended for the MMPA to always include debt collectors. See App. Brief at 48, 60-61 (citing 15 C.S.R. § 60-9.040; 15 C.S.R. § 60-9.100; 15 C.S.R. § 60-9.110). Appellant also discussed and cited to a letter written by the Attorney General with proposed rules and debt collection statistics. See. App. Brief at 60-61 (citing Appendix pp. A40-A85).

This is the first time that Appellant has referenced Missouri codes or the Attorney General's letter and its attachments. They were not presented to the trial court (or the Eastern District) at any time, and should not be allowed now.[5] See *Dieser*, 2016 WL 5791250, at *8. That is especially true as to the letter and its exhibits because the trial court never made no ruling as to their admissibility, and they were not entered into the trial court record.

Even if the Court were to consider the codes, they do not further the analysis of this appeal because the authority of all codes to which Appellant cites

[5] Respondent recognizes that it did not argue the similarity between the MMPA and the MDTPA at the trial court level, but the reference to the statute is in response to Appellant's claim related to the laws of other states. See App. Brief at 59. Respondent has not made a similar invitation for new information regarding the Code of State Regulations or the Attorney General.

is based on the MMPA, specifically section 407.020. See, *e.g.*, 15 C.S.R. 60-8.100 ("AUTHORITY: section 407.020.1, RSMo Supp. 2014[.]"). This Court's ruling on the scope of section 407.020 will directly affect the interpretation of the codes, not the other way around. Therefore, they are neither binding nor persuasive authority.

Conway and *Watson* explained that in order for a plaintiff to state a claim under the MMPA, he must allege that the defendant's wrongful acts were "in connection with" the sale. Appellant did not plead that. He failed to adequately allege that Respondent was involved with LifeSmile's dental services until long after those services ended. The Circuit Court and the Eastern District both found that Respondent is not the type of third-party collector contemplated by *Conway* and *Watson* because of how removed Respondent was from the underlying dental services prior to filing the collection action. As such, the Circuit Court entered the Judgment, which dismissed Appellant's MMPA claim against Respondent with prejudice. The law supports this Court affirming that Judgment.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that this Court affirm the Circuit Court's Judgment that dismissed Appellant's FDCPA and MMPA claims against Respondent with prejudice.

Respectfully submitted,

DENNIS J. BARTON III

By: /s/ Dennis J. Barton III
Dennis J. Barton III #55176
The Barton Law Group, LLC
17600 Chesterfield Airport Road,
Suite 201
Chesterfield, MO 63005
(636) 778-9520
(636) 778-9523 Facsimile
dbarton@bartonlawllc.com
Attorney for Respondent/Defendant

CERTIFICATE OF COMPLIANCE

I, Dennis J. Barton III, hereby certify that the foregoing brief complies with Missouri Supreme Court Rule 84.06(c) in the following ways:

(1) The foregoing brief includes the information required by Rule 55.03;

(2) The foregoing brief complies with the limitations contained in Rule 84.06(b); and

(3) The foregoing brief includes 15,879 words as calculated by using the word count function of Microsoft Word.

/s/ Dennis J. Barton III, #55176

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2016, the foregoing was served electronically to all counsel of record by the Missouri Court's e-filing system pursuant to Missouri Supreme Court Rule 103.

Bryan E. Brody, #57580MO
Alexander J. Cornwell, #64793MO
Brody & Cornwell
1 North Taylor Ave.
St. Louis, Missouri 63108
Phone: (314) 932-1068
Fax: (314) 228-0338
Bryan.E.Brody@gmail.com
Alexander.J.Cornwell@gmail.com
Attorneys for Appellant/Plaintiff

/s/ Dennis J. Barton III, #55176