IN THE SUPREME COURT
STATE OF MISSOURI

Keith Jackson ,	)	
	)	
Appellant,	)	
	)	
vs.	)	**Case No. SC95771**
	)	
Dennis J. Barton III,	)	
	)	
Respondent.	)	

APPELLANT'S SUBSTITUTE REPLY BRIEF

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

POINT I

Appellant's FDCPA claim was not barred by the statute of limitations, in that Respondent committed multiple discrete collection actions within one year of Appellant filing his Petition. (Point I of Appellant's Substitute Reply Brief).

Respondent does not contest that his actions constitute violations of the FDCPA; instead, his entire defense rests on establishing that those actions occurred more than one year from the filing date of Appellant's Original Petition. Unfortunately for Respondent, he made the deliberate choice of setting the case for trial without the means or intent to prove his claims on June 10, 2014, he sent a letter dated July 16, 2014 after the lawsuit was already dismissed which contained a discrepant amount than the amount sought during the lawsuit, and he reopened the dismissed debt collection lawsuit on August 7, 2014. *LF* 58 (First Amended Petition, ¶ 69, 72, 75). Each of these separate actions occurred less than one year from the date Appellant filed his FDCPA claim in St. Louis County Circuit Court on August 7, 2014.

Respondent is left to argue that each and every one of his subsequent actions are insulated from liability due to the fact that he also filed a lawsuit arising out of the same debt more than one year from the date Plaintiff filed his FDCPA claim. According to Respondent, the filing of a debt collection lawsuit immunizes a debt collector from subsequent violations during the course of – and even *after* – litigation. The text of the FDCPA does not support such an exemption, nor is it desirable to graft such a rule onto this consumer protection statute. Given the purpose of the FDCPA, Respondent cannot

demonstrate why this Court should create a rule that provides immunity for all debt collectors from the date of their filing of a debt collection lawsuit, even for violations that occur after the lawsuit is dismissed.

A. The Statute of Limitations for Collection Misconduct Attaches When Each Act "Occurs."

The FDCPA contains a one-year limitations period, running "from the date on which the violation occurs." 15 U.S.C. § 1692k(d) (emphasis added). Multiple violations, therefore, have their own limitations period from which a debtor may seek relief. Respondent focuses on when an FDCPA claim *accrues*, but the operative inquiry is when a violative action *occurs*. These are distinct legal concepts.

The word "occurs" refers to when an event takes place. The word "accrues," on the other hand, embodies the concept of when an enforceable claim comes into existence. See Henderson v. National Bearing Division, 267 S.W.2d 349, 352 (Mo. App. E.D. 1954); Black's Law Dictionary 21 (7th ed. 1999). The FDCPA uses the word "occurs," indicating that the statute of limitations runs from each and every discrete action. 15 U.S.C. § 1692k. Conversely, in Missouri, a civil action can only be commenced "after the causes of action shall have accrued." Mo. Rev. Stat. § 516.100. Thus, depending on when the damage is sustained and capable of ascertainment, the date from which the statute of limitations runs can vary significantly. See, e.g., Powel v. Chaminade College Preparatory, 197 S.W.3d 576, 579 (Mo. 2006).

Legislators know and understand the difference between statutory text that uses the more ambiguous accrual date and the actual date of occurrence. See McDonough v.

Anoka County, 799 F.3d 931, 943 (8th Cir. 2015). Inherent in Respondent's argument is an interpretation that Appellant's claim *accrued* at the time of filing, even though the violations may have *occurred* later. Appellant has already pointed out that courts should be cautious in adopting an interpretation of a consumer protection statute that contract a consumer's rights. See Wolff Shoe Co. v. Director of Revenue, 762 S.W. 2d 29, 31 (Mo. 1988). The multitude of cases that have adopted the "last opportunity to comply" approach all employ a framework that analyzes when any given collection act occurs. See, e.g., Naas v. Stolman, 130 F.3d 892, 893 (9th Cir.1997) (holding that statute of limitations runs from the time of the purported violation). In the context of a series of related violations, the fact remains that the FDCPA's statute of limitations is measured from "the *most recent date* on which the defendant is alleged to have violated the FDCPA." Padilla v. Payco General American Credits, Inc., 161 F.Supp.2d 264, 273 (S.D.N.Y.2001) (emphasis added).

Respondent is partially correct that an FDCPA claim premised *solely* upon the filing of a collection suit both "accrues" and "occurs" when the case is filed. This is because where the filing of the lawsuit itself is the one and only allegation, the filing date is necessarily the "last opportunity to comply" with the Act. Johnson v. Riddle, 305 F.3d 1107, 1111 (10th Cir. 2002). However, it does not necessarily follow that when a debtor seeks relief from conduct that occurs during litigation, the "last opportunity to comply" is *always* the filing of a lawsuit See Collins v. Erin Capital Mgmt., LLC, 290 F.R.D. 689, 698 (S.D. Fla. 2013). Here, none of Appellant's claims are predicated on the filing of the lawsuit itself. Rather, the three separate violations from which Appellant seeks relief

"occurred" on June 10, 2014, July 16, 2014, and August 7, 2014, respectively. Therefore, Respondent's argument that Appellant's FDCPA claims had already *accrued* before they even *occurred* is illogical.

B. Respondent's Invitation for this Court to Turn the Continuing Violation Doctrine On its Head Should Be Rejected.

Respondent attempts to invoke a novel inverse continuing violation theory – which no other court has adopted in any context – to place Respondent's violations outside of the limitations period. A "continuing violation" doctrine aggregates a series of related, wrongful acts into a single unit for limitations purposes. Miller v. Beneficial Mgmt. Corp., 977 F.2d 834, 843-44 (3rd Cir. 1992). The statute of limitations then runs from the most *recent* misconduct. O'Rourke v. City of Providence, 235 F.3d 713, 730 (1st Cir. 2001). It is plaintiffs who offensively assert this doctrine to capture additional conduct that otherwise occurred outside the limitations period. See id. Respondent, on the other hand, asks this Court to do the exact opposite: group similar actions together but run the statute of limitations from the earliest date of malfeasance. Appellant has found no court that has ever adopted such a formulation.

In contract, courts have explicitly rejected Respondent's argument in the context of the FDCPA as well. See, e.g., Craig v. Meyers, No. C-1-09-31, 2009 WL 3418685, at *3 (S.D. Ohio Oct. 19, 2009). In Craig, the plaintiff received a series of documents regarding post-judgment collection efforts, some of which the debt collector sent more than one year from the filing date of the FDCPA case. Id. The debt collector argued that "if the same information from a previous violation is included in a subsequent debt

collection activity, it is not a separate violation." Id. at *4. The district court disagreed. The court held that the "alleged violations occurring within the one year of the statute of limitations, even if inextricably linked to a former time barred violation" were actionable. Id. In so doing, the court relied upon the reasoning the United States Supreme Court has adopted when considering a series of acts that stem from an earlier, time-barred violation:

> Although discrete acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges a defendant's prior acts do not bar filing charges about related discrete acts so long as the acts are independent and charges addressing those acts are themselves timely filed. The violation must also occur within the limitations period, not just be the later effects of an earlier time-barred violation. **But of course, if one engages in a series of acts then a fresh violation takes place when each act is committed.**

Id. (citing Padilla, 161 F.Supp.2d at 273 (emphasis added) (internal citations omitted).

Respondent, on the other hand, cites to a single, unreported decision from the Sixth Circuit Court of Appeals, which does not even support his position: Slorp v. Lerner, Sampson & Rothfuss, 587 Fed. Appx. 249, 257 (6th Cir. 2014). As a preliminary matter, it must be noted that the unpublished Slorp opinion "is without precedential value except for purpose of establishing res judicata, estoppel, or law of case." In re Fixel, 286 B.R. 638, 644 (Bankr. N.D. Ohio 2002) (citing the Sixth Circuit's Local Rule 28(g)). "It cannot be ignored that the Sixth Circuit chose not to report the . . . decision" for "any

number of possible reasons." Id. Thus, Slorp carries little to no weight within the Sixth Circuit itself, much less in this forum.

Even so, the Slorp case did not even adopt Respondent's inverse continuing violation theory. Rather, the decision rejected the *consumer's* attempt use the more traditional continuing violation theory to capture additional, time-barred conduct that occurred outside of the limitations period. Slorp, 587 Fed. Appx. at 257-58. In doing so, the Sixth Circuit Court of Appeals acknowledged that "[l]iability attaches to a discrete act" when that "act occurs." Id. at 258. The Court then explained that "later effects" of *non-violative* acts do not restart the statute of limitations. Id. at 259 (citing Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 619 (2007) ("A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent **nondiscriminatory** acts that entail adverse effects resulting from the past discrimination.")) (emphasis added).

Respondent attempts to use his erroneous interpretation of the Slorp case to argue that his first, and only violation, was filing the original debt collection lawsuit. However, the debt collector's alleged violative action in Slorp was responding to the *consumer's* act of filing a motion for relief. Slorp, 587 Fed. Appx. at 259. In contrast to our case, the plaintiff in Slorp did not allege any separate, discrete, or independent conduct that the debt collector chose to take aside from filing the lawsuit and responding to the consumer's own motion. Id. As other courts have since noted, the *non-violative* act of responding to a motion for relief in Slorp "had no present legal consequences."

McNorrill v. Asset Acceptance, LLC, No. 1:14-CV-210, 2016 WL 3963077, at *4 (S.D. Ga. July 21, 2016).

The same is not true of filing a motion to reopen an already-dismissed case, as Respondent did in this case. Whereas opposing a motion for relief would, at most, maintain the *status quo*, Respondent's filing seeks to place "a debtor in a legally changed position vis-à-vis" the creditor. Id. As such, Respondent's independent choice to reopen the lawsuit was not just a "later effect" of (an already-dismissed) debt collection suit but rather a discrete action from which Appellant possessed one-year from the date the action "occurred" to file an FDCPA claim. See 15 U.S.C. § 1692k. Similarly, Respondent's act in setting the case for trial in order to induce a settlement payment from Appellant rather than incur the cost for trial was not a *non-violative* act without any "present legal consequences." Appellant pleaded that as a result of Respondent's subsequent action of setting the case for trial, Appellant was forced to incur additional attorney's fees in order to prepare for a trial on the merits for which Respondent never possessed the means or intent to pursue. *LF* 58.

Nor does Slorp save Respondent from his violations stemming from the post-suit collection letter. Recently, the Sixth Circuit Court of Appeals – the same court that issued the Slorp decision – had occasion to review a case where the defendant sent a series of collection letters of the course of a year and a half before the consumer ultimately filed an FDCPA claim. Michalak v. LVNV Funding, LLC, 604 Fed. Appx.

492, 493 (6th Cir. 2015).[1] In that case, like in this one, the communications contained varying amounts due. Id.; *LF* 57-58. Rather than apply – or even mention – its earlier Slorp decision, the Sixth Circuit Court of Appeals found that even if some of the prior collection communications relating to the same exact debt were time-barred, "each dunning letter may constitute a separate violation of the FDCPA." Id. Thus, in this case, even if Respondent's letters stem from the same alleged debt that formed the basi of the collection lawsuit, the communication is not a "later effect," but a separate discrete violative action.

Contrary to all existing case law, Respondent argues that each of his subsequent violations of the FDCPA, even those that occurred after the lawsuit was dismissed, "tie back" to his earlier violation in filing a lawsuit. In addition to not possessing any legal support, the adoption of Respondent's position would have troubling implications. If a collection lawsuit creates immunity from future violations, then debt collectors will simply start the collection process for any debt by filing a lawsuit first. A debt collector could then dismiss its own lawsuit and wait one year and a day to begin violating the FDCPA with impunity by arguing that its violative conduct "ties-back" to the earlier, dismissed lawsuit. Every debt collector in the state of Missouri – in contrast to every other state in the nation – would be immunized from any misconduct that occurred during

[1] Appellant notes that Michalak is an unreported decision. The only reason Appellant cites to the case is to demonstrate Respondent's faulty analysis in relying upon another unreported decision from the same Circuit.

or even after a lawsuit by simply filing a collection action. The FDCPA was enacted "to promote consistent State action to protect consumers" and curb this type of abusive debt collection conduct, not encourage it. See 15 U.S.C. § 1692(e) (emphasis added). Respondent's opportunistic interpretation of the FDPA was not intended, nor can it be tolerated.

C. Respondent Fails to Distinguish the Applicable, and Recent, Eighth Circuit Court of Appeals and Eastern District of Missouri Decisions Applying the FDCPA's "Last Opportunity to Comply" Standard.

It is impossible to adopt Respondent's argument while simultaneously acknowledging the reasoning of the Eight Circuit's decision of Hageman v. Barton, 817 F.3d 611 (8th Cir. 2016). Therefore, in order to side-step its holding, Respondent reasons that the registration of the foreign judgment created a "new action" that somehow allowed a new limitations period to attach. Notably, however, Respondent himself acknowledges that the debt collection attorney's violations in Hageman "during the registration of foreign judgment process was the *same* alleged violation he committed during the original suit." *Respondent's Substitute Brief*, at 12 (emphasis added).). Even though the violations were the same, the Hageman Court held that the actions that fell within the one-year limitations period were not time-barred whereas the same violative actions outside the limitations period were untimely. Hageman, 817 F.3d at 620. In other words, the Court necessarily rejected Respondent's argument that all violations with respect to a given debt "tie-back" to the filing date of a lawsuit – even if some of the violations take place after the lawsuit was already dismissed, as happened here. See id.

Likewise, Respondent's attempts to distinguish the post-Hageman decision of Wade v. Account Resolution Corporation, *et al.*, No. 4:15-CV-1354 JAR, 2016 WL 4415353 (E.D. Mo. Aug. 19, 2016) are mistaken. Within its Response Brief, Respondent devotes considerable effort to arguing that Judge Ross wrongfully applied the FDCPA's statute of limitations. *Respondent's Substitute Brief*, at 13-16. In Wade, Judge Ross held that (1) the alleged violation of seeking an unlawful amount of prejudgment interest within a collection petition was time-barred because it was filed more than one year from the date of the subsequent FDPCA claim, and (2) the debt collector's subsequent action of seeking the same unlawful amount of prejudgment interest within a default judgment – which "occurred" during the FDCPA's limitation period – was not time barred. Wade, 2016 WL 4415353 at *1-2. Under these facts, Respondent repeatedly accuses Judge Ross getting it wrong and protests that the Wade decision is an "outlier". *Respondent's Substitute Brief*, at 14. Respondent must take this exaggerated position because Judge Ross refused to adopt Respondent's exact same unsupported interpretation of the FDCPA's statute of limitations that Respondent is recycling here.

Another Eastern District of Missouri decision following Hageman illustrates that the Wade opinion is anything but an "outlier". For example, in Moss v. Barton, No. 4:13-CV-2535 RLW, 2016 WL 1441146 (E.D. Mo. Apr. 8, 2016), the Honorable Ronnie L. White analyzed the Hageman decision within the context of a single, uninterrupted lawsuit. In that case, the alleged violations first occurred within the body of a pre-suit collection letter that the attorney mailed to the consumer more than one year beore the filing of the FDCPA claim. Id. at *2-3. Even though the defendant's violations first

occurred more than one year from the date of the FDCPA claim, Judge White held that the *same violations* the attorney recommitted during the collection suit fell within the limitations period and were thus not time-barred. Id. at *2-3, 5. As Moss reiterates, the FDCPA's statute of limitations applies to each date a violation occurs, regardless of its alleged degree of similarity to a prior violation. The courts did not, as Respondent asks this Court to do, apply the statute of limitations to the debt collector's "first opportunity to comply" with the Act.

POINT II

The Court of Appeals erred in affirming the dismissal of Appellant's First Amended Petition with prejudice. (Point II of Appellant's Substitute Reply Brief).

Appellant respectfully submits that the Trial Court erred in granting a dismissal of Appellant's Petition with prejudice - as opposed to doing so without prejudice. Respondent simply misconstrues this issue by recasting the point on appeal to emphasize the appellate court's error in employing the summary judgment standard of review. Appellant's point, however, is that the Court of Appeals reached the wrong conclusion about whether the case should have been dismissed with prejudice because it employed the wrong standard of review. This Court has granted transfer before to address the court of appeals' failure to follow the correct standard of review. State v. Freeman, 269 S.W.3d 422, 424 [n4] (Mo. 2008). Nevertheless, Appellant asks this Court to focus on whether Appellant should have had an opportunity to amend his petition, as he would have done upon a dismissal without prejudice.

Dismissing Appellant's First Amended Petition with prejudice is a clear abuse of discretion. When a trial court concludes that pleadings do not state a cause of action, it is error to dismiss with prejudice "when adequate opportunity to amend" has not been provided. See Williams v. City of Kansas City, 841 S.W.2d 193, 198 (Mo.App. W.D. 1992) citing Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W.2d 503 (Mo. banc 1991). The Trial Court issued its order dismissing the entirety of the case with prejudice on August 19, 2015. *LF* 169. This is the first time that the Trial Court concluded that "Plaintiff's two count petition fails to state a claim against Defendant Barton." Id. The Order did not provide Appellant an opportunity to file an amended petition. Id.

Further support for a dismissal without prejudice can be found in Missouri Rule of Civil Procedure 67.03. Previously, this rule established that involuntary dismissals were to be deemed with prejudice unless designated as without prejudice. See State ex rel. Vicker's, Inc. v. Teel, 806 S.W.2d 113 (Mo.App. SD. 1991). In 1993, the rule was changed to make an involuntary dismissal without prejudice unless designed otherwise. Missouri Rule of Civil Procedure 67.03; Chromalloy American Corp. v. Elyria Foundry Co., 955 S.W.2d 1, 3 (Mo. banc 1997). In other words, the default status of a dismissed case is now to be considered without prejudice.

Appellant recognizes that he does not have an "absolute right" to file an amended petition. Koller v. Ranger Insurance Co., 559 S.W.2d 372, 373 (Mo.Ct.App. 1978). However, a trial court's discretion is limited by Rule 67.06. Id. That rule proclaims that "On sustaining a motion to dismiss a claim…the court *shall* freely grant leave to amend and *shall* specify the time within which the amendment shall be made or amended

pleading filed." Missouri Rule of Civil Procedure 67.06 (emphasis added). Appellant did not have to affirmatively ask for leave to amend the petition; the Order should have included that relief, as well as a time frame for doing so. Id. Given the Trial Court Order was also designated a final Judgment, Appellant was not authorized to then file a motion for leave to amend. Missouri recognizes only six "post-trial" motions that can be filed before a judgment becomes final. Burton v. Klaus, 455 S.W.3d 9, 12 (Mo.App. E.D. 2014). A motion for leave to amend a petition is not among those authorized motions. Id.

Respondent questions why Appellant did not raise the issue of equitable tolling at the Trial Court level, to which Appellant has three responses. First, the First Amended Petition did plead facts that would constitute equitable tolling. Appellant pleaded that Respondent knew he should not be pursing the debt, but employed misrepresentations to prevent Appellant from learning about this deception. *LF* 55-62 (First Amended Petition, ¶¶ 63-65, 70, 94-96). Second, equitable tolling should not have been necessary to combat Respondent's motion to dismiss. All of Respondent's debt collection activity from which Plaintiff sought relief occurred within twelve months of the lawsuit. Point I *supra*; *LF* 57 (First Amended Petition, ¶ 57). As described herein, no court has ever adopted the "inverse continuing violation theory" advanced by Respondent. Id. Third, the existing precedent in the Eighth Circuit Court of Appeals at the time held that the FDCPA's limitations period is jurisdictional and cannot be equitably tolled. Mattson v. USW Communications, Inc., 967 F.2d 259, 262 (8th Cir. 1992). The Opinion of the Court of Appeals was the first indication that consumers who do not "immediately recognize that

debt collection suits filed against them are unlawful pursuant to the FDCPA . . . can seek the remedies available under appropriate tolling doctrines." Opinion at 11.

The Court of Appeals reached the wrong result, though, by applying the standard of review for a motion for summary judgment. This Court has adopted a requirement that parties receive notice that a court will be converting a motion to dismiss to a motion for summary judgment. Hoover v. Mercy Health, 408 S.W.3d 140, 142 (Mo. 2013). Though Respondent defends the application of the summary judgment standard of review, he does not and cannot identify any such notice in the record. As in Hoover, there is "nothing in the record to suggest that the trial court notified the parties it would be treating the motion to dismiss as a motion for summary judgment pursuant to Rule 55.27(a)." Id. Appellant's Response to Respondent's Motion to Dismiss did not attach or reference any evidence, such as the depositions. *LF* 107-114. Finally, the Trial Court's Order does not demonstrate that it had actually considered any matters outside the pleadings. Id. at 169. The proper standard of review for this case is therefore that for a motion to dismiss.

Applying the wrong standard of review allowed the Court of Appeals to legitimize a dismissal *with* prejudice, which foreclosed the possibility of an amended pleading. A ruling on a motion to dismiss, finding that FDCPA violations are time-barred, does not, in and of itself, preclude the possibility of an amendment that changes the relevant statute of limitations period. The application of Missouri's tolling doctrines may change when the limitations begins to run. Thus, Appellant suffered material harm in losing the opportunity to show when his FDCPA cause of action accrued. Appellant presented the

excerpts of the depositions of Dr. Hebert, Dr. Blake Setien, and Dr. Brent Setien to show that any inadequacies in the petition could be cured. *LF* 124-155. Justice requires that the dismissal be reversed, and the case remanded so that Appellant may amend the petition.

POINT III

Respondent is subject to the MMPA because Respondent's conduct was in connection with Appellant's purchase of dental services. (Point III of Appellant's Substitute Reply Brief).

To avoid liability for unfair practices, Respondent argues that third-party debt collectors cannot be held liable under the MMPA. The text of the MMPA does not support such an exemption, nor would such a rule be desirable for this consumer protection statute. The MMPA covers violations committed by "any natural person or his legal representative, partnership, firm, for-profit or not-for-profit corporation, whether domestic or foreign, company, foundation, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof." Mo. Rev. Stat. § 407.010(5). Respondent, and debt collectors in general, fall within this broad list, and so Respondent asks this Court to impose a strained interpretation of a different section of the statute to carve out an exception for third-party debt collectors.

Given the consumer-oriented purpose of the MMPA, Respondent does not and cannot explain why this Court should reject the common-sense conclusion that the collection of a debt is "in connection with the sale or advertisement of any merchandise." Mo. Rev. Stat. § 407.020(1). A debt is defined as an "alleged obligation of a consumer to pay money arising out of a transaction." See 15 U.S.C. § 1692a(5); accord In re Estate of Downs, 300 S.W.3d 242, 247 (Mo. App. W.D. 2009) ("[A] debt is an obligation to pay money from the debtors own resources…that grows out of a consensual transaction between the creditor and the debtor."). Respondent concedes that he is a debt collector, and his efforts on behalf of LifeSmile were an attempt to collect the alleged obligation of Appellant due for dental services. *Respondent's Substitute Brief*, at 1 (citing *LF* at 87-88). In other words, Respondent admits that he is taking action related to and arising out of the transaction between LifeSmile and Appellant. As both Appellant and Respondent have now explained, this Court relied on a dictionary definition of "connect" to require no more than "a relationship between the sale of merchandise and the alleged unlawful action." Conway v. CitiMortgage, Inc., 438 S.W.3d 410, 414 (Mo. 2014). Respondent obfuscates the simple fact that payment is necessarily connected to a sale. An efficient application of Occam's razor obviates the need to engage in a more complicated analysis.

A. Respondent Wrongly Focuses on the Timing of His Services.

Respondent suggests a criterion that the parties must have contemplated his debt collection services at the time of the original transaction to be "in connection" with that sale. *Respondent Substitute Brief*, at *45*. Respondent misapprehends this Court's holding in Watson v. Wells Fargo Home Mortgage, Inc., 438 S.W.3d 404, 408 (Mo. 2014).

There, the only limitation to the otherwise broad scope of actions captured by the MMPA this Court identified is the instigation of a new, separate transaction. Watson, 438 S.W.3d at 408. This Court distinguished "enforcing the terms" of an original transaction from the creation of "a new agreement." Id. A new, separate agreement is not necessarily "in connection with" the original transaction, analogous to how a "superseding cause" can absolve a wrongdoer of liability. In this case, however, there is no new transaction between Respondent and Appellant to break the chain of liability. Respondent is, by his own admission, enforcing the terms of the original transaction, namely, the obligation to pay for the services rendered.

Guided by the broad remedial purpose of the MMPA, this Court has already rejected the application of a temporal scope of the MMPA. Thus, Respondent's argument that his actions "did not begin until after the sale was already completed" is not only false but unavailing. *Respondent's Substitute Brief*, at 47. First, "a violation can happen at any time before, during or after a sale." Conway, 438 S.W.3d at 414. That eighteen months may have elapsed between the last dental service and the date Appellant was served with the collection lawsuit is of no moment.

Second, Respondent need not be "a party to the transaction at the time the transaction was initiated." Conway, 438 S.W.3d at 415. Respondent emphasizes that he was not "involved" in the transaction until commencing his collection efforts. *Respondent's Substitute Brief*, at 40-41. This circular argument only begs the question, however, as to whether those collection efforts were "in connection with" the dental services. Adoption of Respondent's position would lead to an odd result. An attorney

that LifeSmile directly employed engaging in identical misconduct as Respondent would be held liable under the MMPA, while Respondent would be shielded from liability by virtue of no more than the mere designation of being a third-party debt collector. Such an artificial distinction is antithetical to the public policy behind the MMPA to provide protection to those consumers in need of it. See Huch v. Charter Commc'ns, Inc., 290 S.W.3d 721, 725-726 (Mo. banc 2009).

B. The Post-Sale Right to Obtain Payment on Any Past Due Amount Is 'In Connection With' the Transaction.

Even if, however, this Court intends to require that parties must prospectively contemplate defendant's violative debt collection service at the time of the transaction, Appellant has still alleged sufficient facts to demonstrate Respondent's actions were "in connection with" the transaction. Among the "rights and obligations" fixed at the outset of the transaction in question was the obligation to pay and the right to collect said payment. For a loan, the parties usually enter into a written contract. For medical services, like those in this case, the same obligation arises – even in the absence of a written contract – when "the patient requested that the hospital provide the services, patient accepted the services, and the hospital's charges were reasonable." St. Luke's Hospital v. Underwood, 957 S.W.2d 496, 498 (Mo. App. E.D. 1997). For these quasi-contractual situations, "both parties understand (whether verbally expressed or not) that the work that is performed will be compensated at a reasonable rate." Metropolitan St. Louis Sewer District . St. Ann Plaza, Inc., 371 S.W.3d 40, 45 (Mo. App. E.D. 2012) quoting Berlin v. Pickett, 221 S.W.3d 406, 413 (Mo. App. W.D. 2006). The possibility

of debt collection was inherently included in the transactions between LifeSmile and Appellant. Therefore, at a minimum, Appellant alleged facts to demonstrate "a relationship between the sale of merchandise and the alleged unlawful action" as required to state a claim under the MMPA. Conway v. CitiMortgage, Inc., 438 S.W.3d 410, 414 (Mo. 2014)

Furthermore, Appellant specifically pleaded that that his relationship with LifeSmile would not be complete until Appellant paid. *LF* 36 (First Amended Petition at ¶ 20). This Court need not declare that debt collection services are always implied in transactions between creditors and debtors, even in the absence of a written agreement. However, where the plaintiff has expressly alleged those requisite facts, for the purposes of a motion to dismiss, the allegations must be taken as true. Nazeri v. Missouri Valley College, 860 S.W.2d 303, 316 (Mo. banc 1993). Respondent wants to argue that it is "unreasonable to conclude" the transaction was not complete. *Respondent's Substitute Brief*, at 49. Appellant can find no case, and Respondent cites none, that allows such a deviation from a "test of the adequacy" of the Petition. Nevertheless, Appellant observes that LifeSmile certainly does not view the transaction as "complete," otherwise it would not be attempting to collect payment on the transaction.

Lastly, while Appellant does not concede that there must be an agreement at the time of sale to make payments over an extended period of time, Appellant also notes that the First Amended Petition in this case contains the very same allegations that this Court in Conway already deemed sufficient for purposes of pleading the requisite "connection" to the sale. Here, the parties explicitly agreed that LifeSmile would provide the medical

services on credit and collect payments from Appellant over an extended period of time, well-after the actual provision of medical services. In this regard, Appellant's allegations mirror those involving the past due amounts for the loans at issue in Conway. Compare LF at ¶¶ 17, 19, 36, 43 with Conway 438 S.W.3d at 415 (holding that a party's post-sale right to obtain payment on any past due amount "is part of that sale and is, therefore, 'in connection with' the loan.").

Therefore, Appellant alleged sufficient facts in his petition to meet the minimal standard at the initial pleadings stage of, at the very least, a "relationship" between the original transaction and Respondent's corresponding collection efforts.

C. Third Party Debt Collectors Are Not Entitled to a Blanket Exemption From the MMPA.

This Court has already held that debt collection, as a general matter, is subject to the dictates of the MMPA. Respondent attempts to narrow this Court's holding by reducing the Conway decision to its bare facts of the "borrower-lender" context. *Respondent's Substitute Brief*, at 46. Respondent's argument incorrectly only considers the FDCPA's use of the term "debt collectors"; namely, third-parties who do not participate in the original transaction. See 15 U.S.C 1692a(6). However, for the purpose of its MMPA analysis, this Court treated loan services as debt collectors. In the two recent cases, when the plaintiffs fell behind on payment obligations, defendants initiated collection activity. Conway, 438 S.W.3d at 413; Watson, 438 S.W.3d 406. Thus, if Respondent is correct that "debt collection activities" are not "in connection with" the sale of services, then the result in those cases should have been different.

Both Respondent and the Court of Appeals instead cite to two cases about third-party debt collectors that this Court overruled. Conway,438 S.W.3d at 415 (abrogating State ex rel. Koster v. Professional Debt Management, LLC, 351 S.W.3d 668, 674 (Mo. App. E.D. 2011) and State ex rel. Koster v. Portfolio Recovery Associates, LLC, 351 S.W.3d 661, 667 (Mo. App. E.D. 2011)). Given the facts of Conway, this Court could have distinguished the Koster decisions and limited its holding only to loan servicers and successors-in-interest. Instead, this Court found that its logic in reaching its decision necessarily required a holding that the Court of Appeals' Koster decisions "should no longer be followed. Id. at 416. Respondent cannot explain how this same reasoning should nevertheless compel an opposite conclusion in this case.

Not only does this Court's precedent disfavor an exemption for debt collectors, but so does the language of the statute and its implementing regulations. Appellant outlined in his Substitute Brief that the Missouri legislature did create certain exclusions from criminal liability under the MMPA. See Mo. Rev. Stat. § 407.020.2. While Respondent is correct that the MMPA does not explicitly *include* debt collectors, the cannons of statutory construction generally interpret a statute to be inclusive, unless a thing is otherwise explicitly excluded.

Similarly, Appellant pointed to the fact that the Attorney General has promulgated regulations covering debt collection activities, including but not limited to third-party debt collectors. 15 C.S.R § 60-8.100; 15 C.S.R § 60-8.110. The requirements for adopting these regulations included gathering "substantial evidence" and publication of a notice of proposed rulemaking in the Missouri Register. See Mo. Rev. Stat. § 536.016;

Mo. Rev. Stat. § 536.021. While the legislature has the power to invalidate the regulation pursuant to section 536.028, "state regulations, promulgated pursuant to properly delegated authority, have the force and effect of law and are therefore binding on courts." Pollock v. Wetterau Food Distribution Group, 11 S.W.3d 754, 766 (Mo. App. E.D. 1999). Therefore, consistent with the declared public policy of this state, the MMPA can, and does, apply unfair and deceptive practices that third-party debt collectors commit.

Rather than addressing the merits of Appellant's argument, Respondent defensively asks this Court to ignore the regulations altogether since Appellant did not cite to them previously. This is a tacit admission that, in the face of these regulations, Respondent no longer possesses any basis to argue against the MMPA's application to third-party debt collection conduct. Moreover, contrary to Respondent's assertion, Appellant has consistently raised the issue that the MMPA protects against debt collection misconduct, an issue to which these rules speak.

D. Whether Any Given Unlawful Act is Sufficiently "In Connection With" a Transaction is a Factual Inquiry.

One resolution Appellant proposed in his Substitute Brief, which Respondent ignored, is to recognize that whether any action is "in connection with" a sale is inherently a factual inquiry. Appellant asks for a broad application of the MMPA, consistent with the language and purpose of the MMPA and this Court's precedent. Respondent's argues for this Court to adopt a restrictive interpretation that exempts third-party debt collectors. Rather than issue a decision that creates a new bright line rule, this Court could leave the question open to be determined on a case-by-case basis. In this

way, debt collectors, as a group, are not automatically deemed to be acting in connection with the original transaction.

There is precedent for this approach. As Appellant noted, many relationships are considered a question of fact in Missouri. See Johnson v. Bi-State Development Agency, 793 S.W.2d 864, 867 (Mo. 1990) (principal-agent and employer-employee); Millard v. Corrado, 14 S.W.3d 42, 52 (Mo.App. E.D. 1999) (physician-patient); McFadden v. State, 256 S.W.3d 103, 160 (Mo. 2008) (attorney-client). The factors to be weighed in each situation are not susceptible to a mechanical application or prospective bright-line rules. See St. Charles County v. Hunter, 950 S.W.2d 593, 594 (Mo. App. E.D. 1997).

The Second Circuit Court of Appeals has also concluded "that whether a communication is 'in connection with the collection of [a] debt' is a question of fact to be determined by reference to an objective standard." Hart v. FCI Lender Services, Inc., 797 F. 3d 219, 225 (2nd Cir. 2015). In that case, the plaintiff received two written communications regarding a mortgage loan. Id. at 220. The defendant moved to dismiss, arguing that the first letter was "intended only to provide transfer-of-servicing information," and was not sent in connection with the collection of a debt. Id. at 224. The Court declined to engage in an in-depth examination of "the extent to which a communication…must be designed to induce the debtor's payment." Id. at 225. Instead, the Court concluded that the plaintiff had "plausibly alleged that the Letter was a "communication in connection with the collection of [a] debt." Id. at 228. Accordingly, the result was to reverse the district court's decision granting a motion to dismiss, and to remand for further proceedings. Id. at 29.

The Supreme Court of Iowa has also considered, in the context of a motion for summary judgment much less a motion to dismiss, whether a "trier of fact could find a nexus" between a sale and a later unfair practice under the Iowa Consumer Fraud Act ("ICFA"). State ex Rel. Miller v. Cutty's Des Moines Camping Club, Inc., 694 N.W. 2d 518, 528 (Iowa 2005). Like the MMPA, the ICFA defines an unlawful practice "as [t]he act, use or employment by a person of an unfair practice.... in connection with the ... sale ... of any merchandise...." Iowa Code § 714.16(2)(a).

Like this Court, the Iowa Supreme Court declined to adopt a "bright-line temporal rule" that would limit the scope of the ICF "to only those business practices occurring prior to or at the time of the sale." Cutty's, 694 N.W.2d at 526. Like this Court, the Iowa Supreme Court drew support for this conclusion from the common definition of the phrase "in connection with" as well as the liberal interpretation to be accorded the statute. Id. The Iowa Supreme Court collected numerous cases from other jurisdictions that found post-sale conduct to be "in connection with" the original transaction. Id. at 526-527. To adopt a *per se* rule "would ignore the plain language of the . . . statute and thereby eviscerate much of the statute's protection against unfair practices." Id. at 527.

The Iowa Supreme Court concluded that the evidence, viewed in the light most favorable to the party against whom summary judgment was being sought, could reveal a sufficient "connection" between the post-sale collection campaign and the sale of merchandise. Id. at 528. The Court refused to hold, as a matter of law, that "an aggressive collection campaign against owners…who had not paid their dues over the years" did not constitute an unfair practice "in connection with" the sale. Id. at 523.

Rather, "there is sufficient evidence in the summary judgment record before us to warrant a decision by the trier of fact." Id. at 529. The Court resolved the inquiry by stating the plaintiff "should get its day in court." Id. at 523.

As the Iowa Supreme Court recognized in Cutty's, a trier of fact is in the best position to gauge the *strength* of a connection between an alleged unfair practice and the sale of merchandise. A trier of fact can review evidence and analyze the nuances of specific fact patterns. The Court of Appeals can then function as intended: "an error-correcting court, not a policy-making court." Saint Francis Medical Center v. Watkins, 413 S.W.3d 354, 357 (Mo. App. S.D. 2013).

Accordingly, Appellant asks this Court to rule only that Appellant has pleaded the minimal facts necessary at the initial pleadings stage of a "relationship" between Respondent's collection conduct and the original sale and leave the ultimate question of whether it is sufficiently "in connection with" to a reasonable fact finder or, in the alternative, to allow Appellant to amend the petition to do so.

CONCLUSION

Appellant Keith Jackson therefore respectfully requests that this Court reverse the decision of the Trial Court and Court Appeals, and remand the case for further proceedings in accordance with the Missouri Rules of Civil Procedure.

Respectfully submitted,

BRODY & CORNWELL

/s/ Bryan E. Brody

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BRYAN E. BRODY, #57580MO
ALEXANDER J. CORNWELL, #64793MO
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

IN THE SUPREME COURT
STATE OF MISSOURI

Keith Jackson	)	
	)	
Appellant,	)	
	)	
vs.	)	**Case No. SC95771**
	)	
Dennis J. Barton III,	)	
	)	
Respondent.	)	

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Appellant's Substitute Reply Brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b).

Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 7,681.

Respectfully submitted,

BRODY & CORNWELL

/s/ Bryan E. Brody

_____

BRYAN E. BRODY, #57580MO
ALEXANDER J. CORNWELL, #64793MO
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

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	)	
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	)	
Dennis J. Barton III,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned does hereby certify that, on this November 9, 2016, a true and correct copy of the foregoing Appellant's Substitute Reply Brief was electronically served upon the attorney for Respondent, Dennis J. Barton III, via case.net at the date and time filed, and via electronic mail to dbarton@bartonlawllc.com.

Respectfully submitted,

BRODY & CORNWELL

/s/ Bryan E. Brody

_____

BRYAN E. BRODY, #57580MO
ALEXANDER J. CORNWELL, #64793MO
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