IN THE
SUPREME COURT OF MISSOURI

No. SC 87691

DENNIS E. HESS,

Appellant; Cross-Respondent,

v.

CHASE MANHATTAN BANK USA, N.A.,

Respondent; Cross-Appellant.

BRIEF OF ATTORNEY GENERAL OF MISSOURI AS AMICUS CURIAE

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INTEREST OF AMICUS

The Attorney General appears as amicus curiae in this case under Rule 84.04(f)(4), for the purpose of addressing one issue raised in the opinion by the Court of Appeals for the Western District which is uniquely within the practice and experience of the Attorney General as the State's primary enforcer of Missouri's Merchandising Practices Act.

ARGUMENT

1. Introduction: The Appellate Court Improperly Applied Common Law Fraud Principles In Applying the Missouri Merchandising Practices Act

Despite recognizing in its opinion that "[t]o prove a MPA violation, the elements of common law fraud do not have to be proven", the Western District proceeded to rely on elements of common law fraud for guidance in its determination of the requisite elements of proof in a private action brought under the Missouri Merchandising Practice Act (MPA). Dennis Hess, appellant, alleged in Count III brought under the MPA that Chase Manhattan Bank omitted to disclose the material fact that the EPA had been involved with the property it sold to Hess. In reaching its decision to allow Hess's claim to go forward, the appellate court's articulation of the elements to be proven in an "omission of material fact" allegation under § 407.020, RSMo 2000[1] misapplies existing law. Specifically, the Court of Appeals omitted to reference or to follow the applicable rules promulgated regarding Chapter 407, the MPA. As a result, the court's enunciation of the requisite elements of the unlawful practice of omission of material fact is inconsistent with those rules and improperly relies on common law.

[1]All statutory references are to Missouri Revised Statutes 2000 unless otherwise indicated.

2. The Merchandising Practices Act Supplants the Common Law

The MPA was enacted to supplement and expand upon the definitions of common law fraud "in an attempt to preserve fundamental honesty, fair play and right dealing in public transactions." *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W.2d 362, 368 (Mo. App. W.D. 1973); *State ex rel. Ashcroft v. Marketing Unlimited of America, Inc.*, 613 S.W.2d 440, 445 (Mo. App. E.D. 1981). The statutory remedy provided by the MPA supplants the common law in virtually all aspects including the abrogation of traditional common law elements of fraud. For example, a seller may violate the MPA irrespective of his intent, purpose or knowledge of falsity: The statute proscribes conduct even in the complete absence of knowledge by the seller engaging in that conduct. *See, e.g., State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635 (Mo. App. E.D. 1988) ("It is the defendant's conduct, not his intent, which determines whether a violation has occurred."). Thus, an actionable misrepresentation may even be made by mistake or in ignorance of its falsity and be found violative of the MPA. Likewise, traditional common law defenses are inapplicable to an MPA action, such as the doctrine of merger or the inadmissibility to parole evidence: "Prior and contemporaneous oral statements are not merged into the written contract when the fraudulent representations were made for the purpose of inducing a party to enter into the contract." *Id.* at 636. Parol evidence is admissible because, if misrepresentations, deceptions or unfair practices are used to solicit a sale,

"the statute has been violated whether or not the final sales papers contain no misrepresentation or even correct the prior misrepresentation." *Id.*

Missouri courts have held that the MPA is to be given liberal interpretation and so as to effectuate its purpose. *State ex rel. Nixon v. Continental Ventures, Inc*., 84 S.W.3d 114, 117 (Mo .App. W.D. 2002)*; Marketing Unlimited,* 613 S.W.2d at 445. Thus, the MPA's purpose has been described as for the protection of consumers. *State ex rel. Nixon v. Polley*, 2 S.W.3d 887, 892 (Mo. App. W.D. 1999).

3. Application of the Merchandising Practices Act Requires Reference to the Regulations Promulgated by the Attorney General

Section 407.145 authorizes the Attorney General to promulgate interpretive rules outlining the elements of the unlawful practices proscribed by § 407.020. Following the decision by this Court in *State ex rel. Nixon v. Telco Directory Publ'g, Inc.*, 863 S.W.2d 596 (Mo. banc 1993), the Attorney General promulgated additional rules in accordance with his rule making authority, including rules regarding "Unfair Practices" and "Fraudulent and Omissive Acts and Practices." These latter rules, located at 15 CSR 60-9.010, *et seq.*, include rules defining the unlawful practices of omission, concealment or suppression of a material fact, the unlawful practice which was alleged by Hess in the instant case.

The rules applicable to Appellant's cause of action are 15 CSR 60-9.010(1)(C), which defines "material fact," and 15 CSR 60-9.110, which gives meaning to the terms "concealment of material fact," "suppression of material fact," and "omission of material

fact." Omission of material fact is defined as "any failure by a person to disclose material facts known to him/her, or upon reasonable inquiry would be known to him /her." 15 CSR 60-9.110(3). The rule also states that "[r]eliance and intent that others rely upon such concealment, suppression or omission are not elements of concealment, suppression or omission as used in section 407.020.1, RSMo." 15 CSR 60-9.110(4).

The determination of "materiality" of the omitted fact is addressed by 15 CSR 60-9.010(1)(C) which provides four alternative definitions:

1. Any fact which a reasonable consumer would likely consider to be important in making a purchasing decision,

2. Any fact which would be likely to induce a person to manifest his/her assent,

3. Any fact which the seller knows would be likely to induce a particular consumer to manifest his/her assent, **or**

4. Any fact which the seller knows would be likely to induce a reasonable consumer to act, respond or change his/her behavior in any substantial manner.

15 CSR 60-9.010(1)(C) (bold emphasis added). These alternative approaches to determining materiality allow the fact finder to consider the circumstances of the sale objectively and/or subjectively.

The Attorney General's rules have the force and effect of law. *Hankins v. Director of Revenue*, 998 S.W.2d 879, 881 (Mo. App. S.D. 1999).

4. Analysis of the Decision Below

In the decision below, the Court of Appeals correctly recognized *Clement v. St. Charles Nissan, Inc*., 103 S.W.3d 898, 900 (Mo. App. E.D. 2003) and *State ex rel. Webster v. Eisenbeis,* 775 S.W.2d 276, 278 (Mo. App. E.D. 1989), for the proposition that the elements of common law fraud do not have to proven in a Merchandising Practices action. *Hess v. Chase Manhattan Bank USA, N.A.*, 2006 WL 768513 at *12 (Mo. App. W.D. March 28, 2006). The court also acknowledged, through existing case law, that the Act serves to supplement common law definitions and has as its purpose "to preserve fundamental honesty, fair play and right dealings in public transactions." *Id.*, citing *Clement*, 103 S.W.3d at 899. It further confirmed that neither intent to defraud nor reliance are elements to be proven, and that it is the actor's conduct rather than his intent that determines a violation. *Hess,* at *13, citing *State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828, 837 (Mo. App. E.D. 2000), and *Eisenbeis*, 775 S.W.2d at 278-29.

However, the Court of Appeals then attempted to extrapolate what it thought were the requisite elements of Hess's "material omission" claim under the MPA, based upon what it viewed as the "operative facts" for such a claim by working from the verdict director submitted on the Hess's common law fraud allegation. *Hess,* at *14-15. The Court of Appeals identified those operative facts as:

> (1) the EPA was involved with the property;
>
> (2) Chase knew of the EPA's involvement, which knowledge was not within the fair and reasonable reach of Hess;
>
> (3) Chase did not disclose to Hess the EPA's involvement with the property;

(4) Chase's failure to disclose this fact to Hess was material to the sale of the property; and,

(5) such failure, directly resulted in damage to Hess.

Hess, at *14.

In setting forth these "operative facts" as the elements of an MPA claim for omission of material fact, the Court of Appeals failed to apply the regulations promulgated by the Attorney General more than a decade ago.

5. The Western District's Opinion Improperly Relies on Common Law and Is Inconsistent with the Application of Existing Rules

While the appellate court's enunciated elements are slightly more relaxed than those of a common law fraud action, they are still too stringent for the application of the Merchandising Practices Act and are contrary to the rules defining "omission of material fact." It appears that the Western District relied, in part, upon the common law, because, as the opinion states "[t]here is no definitive definition of deceptive practices", citing *Clement*, 103 S.W.3d at 900. While the phrase "deceptive practices" is not specifically defined, law exists to guide the courts in determining the elements of proof for an action brought under the MPA. In this instance, the appellate court's proposed requisite elements for "omission of material fact" are inconsistent with current case law and the promulgated rules under the MPA.

First, one of the court's elements inappropriately requires a seller to have *actual* knowledge of the fact being omitted (i.e., "Chase knew of the EPA's involvement"). This

requirement parallels common law fraud which requires that the speaker have knowledge of the falsity or ignorance of its truth. *Marketing Unlimited*, 613 S.W.2d at 445 n.5, citing *Twiggs v. National Old Line Ins. Co.*, 581 S.W.2d 877, 880 (Mo. App. E.D. 1979). However, the Western District's element requiring actual knowledge of the fact being omitted is contrary to 15 CSR 60-9.110(3) which instructs that such a fact may alternatively be one that would be known to the seller **or** would be known upon reasonable inquiry. Accordingly, subjective knowledge is not a requisite element of this cause of action.

The court also viewed as an element that the seller's knowledge is "not within the fair and reasonable reach" of the consumer. This requirement is also not grounded in the rules. Nowhere in the rules (nor in any Missouri case law) is there any suggestion that the Merchandising Practices Act imposes a duty of due diligence on purchasers. To the contrary, persons purchasing merchandise in the State of Missouri are entitled to rely - and presumed to rely – on the seller and the "obligation of fair dealing" imposed by the Merchandising Practices Act on sellers of merchandise. *Areaco Inv.*, 756 S.W.2d at 627.

In the common law fraudulent misrepresentation instruction, the MAI requires that a plaintiff have relied on the representation and "in so relying plaintiff used that degree of care that would have been reasonable in plaintiff's situation." MAI 23.05 (as set forth in *Hess*, at *14). However, the rules defining an MPA cause of action for omission of

material fact specifically declare reliance is not an element, and hence, no inquiry by the consumer is required. 15 CSR 60-9.110(4).

Finally, the court opined that the omitted fact must be "material to the sale", a quality that, in light of 15 CSR 60-9.010(1)(C), would offer alternative assessments of materiality depending on the purchaser's circumstances and whether the omitted fact might objectively be viewed as "important" under 15 CSR 60-9.010(1)(C). The appellate court, however, failed to set forth or refer to these alternative approaches for determining materiality in a case brought under the MPA. Without such guidance, interested parties relying upon the court's decision would likely look no further than the common law definition of "material" rather than the substantive elements declared in the rule to apply to an MPA action.

6. Remanding Count III to the Trial Court for Assessment of Damages

The Western District held that the jury instruction on Hess's Count II for fraud "implicitly included" "all five proof elements of Hess's MPA count". *Hess*, at *15. The court further concluded: "Thus, inasmuch as the underlying operative facts were identical, the jury, in finding for Hess on Count II, would have been duty-bound to have found for him on Count II, as to liability, had it been submitted." *Id.*

The court's language raises the question of whether it actually needed to enunciate the elements plaintiff Hess had prove to establish his MPA claim in Count III. Because the case law and the rules make very clear that a claim for omission of material fact under the MPA is less stringent than a claim for common law fraud, the appellate court's

enumeration of the elements for such a cause of action is arguably dicta. However, should this Court remand this matter for further proceedings, proper application of the MPA case law and the promulgated rules will yield elements consistent with current law and the

7. Applicability of Section 407.020 RSMo to the Sale of Merchandise

On a related matter involving Count III in Hess's petition, the Western District held that the term "merchandise" is defined by § 407.010(4) to specifically include real estate and that § 407.020 states that the practice of omitting a material fact is unlawful in connection with "the sale or advertisement of any merchandise." The Attorney General agrees with the Western District that under § 407.020, sellers of real estate, like sellers of all other forms of merchandise, are prohibited from employing the listed unlawful acts and practices with this interpretation. The Attorney General has taken numerous enforcement actions against sellers of real estate during the past three decades of enforcing Missouri's Merchandising Practices Act. *See, e.g., Eisenbeis*, (Attorney General action involving the sale of real estate in a vacation development); *see also State ex rel. Webster v. Freedom Fin. Corp.*, 727 F.Supp. 1313 (W.D. Mo. 1989) (Attorney General action involving the sale of time share properties).

CONCLUSION

In light of the above authorities, the Attorney General encourages the Court to utilize the guidance provided by the Attorney General's Rules promulgated under the

Merchandising Practices Act and related case law in addressing the appellate court's decision in *Hess v. Chase Manhattan Bank* regarding Count III brought under the MPA.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06 AND CERTIFICATE OF SERVICE

This brief complies with the type-volume limitation of Rule 84.06 because this brief contains 2,774 words, excluding the parts of the brief exempted by Rule 84.06(b). This brief further complies with the typeface requirements of and type style requirements of Rule 84.06(a) because this brief has been prepared in a proportionally spaced typeface using WordPerfect Version 9 in 13 point Times New Roman. In compliance with Rule 84.06(g) the diskette provided has been scanned for viruses and is virus free.

I hereby certify that on the __th day of August, 2006, I served the following two typewritten copies and one diskette copy of the foregoing brief via United States Mail, postage prepaid:

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