IN THE SUPREME COURT OF MISSOURI

SC93769

SHELBY E. WATSON, PLAINTIFF/APPELLANT,

V.

WELLS FARGO HOME MORTGAGE, INC. AND FEDERAL NATIONAL MORTGAGE ASSOCIATION, DEFENDANTS/RESPONDENTS

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL CIRCUIT COURT,
THE CITY OF ST. LOUIS, MISSOURI
THE HONORABLE BRYAN L. HETTENBACH, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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A. Introduction

According to Respondents' argument, as soon as the ink was dry on Watson's loan documents, Respondents were free to lie, cheat, steal, harass, defraud, and commit every type of malicious conduct imaginable without violating the MMPA because (1) Respondents were not parties to the original transaction, and (2) Respondents did not commit any unlawful acts while the ink was still wet. (Resp. Br. at 8-9). Respondents have obviously embraced the Eastern District's narrow interpretation of "in connection with," and ignored the fact that a "sale" encompasses much more than simply signing a contract. Respondents' analysis however, just like the Eastern District's, is grossly flawed.

B. Respondents' Examples of MMPA Violations are no Different from Unlawful Foreclosures or Unlawful Debt Collection Activities

In their brief, Respondents offered four examples of post-sale unlawful conduct that Respondents believe would likely violate the MMPA, namely:

> (1) demand[ing] payments in excess of the stated payment,
>
> (2) unfairly chang[ing] the interest rate,
>
> (3) impos[ing] unfair penalties, and
>
> (4) harassing Appellant about making payments on the loan.

(Resp. Br. at 14). The first three examples involve unlawfully charging money that is not owed. The fourth example mirrors the facts in *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).

Presumably, Respondents were trying to make the point in their first three examples that changing the terms of an agreement post-sale directly *relates* to a "claim or representation" at the time of the sale. This assumes the existence of a pre-sale agreement that sets forth specific terms, such as how much a loan servicer can or cannot charge for various obligations, services and infractions. For example, if a contract states a loan servicer can only demand a monthly payment of $1,000.00, but it instead it demands $1,250.00, Respondents' seem prepared to admit this conduct would likely violate the MMPA. Similarly, if a contract allows for a $50.00 late fee but the servicer demands $100.00, Respondents presumably would also agree this conduct likely violates the MMPA.

The question, then, is why should the outcome be different in the absence of a pre-sale agreement? Assume, based on the same facts, that a contract was *silent* about late fees, but the creditor nevertheless demanded a $100.00 late fee several years after-the-fact. Respondents presumably would argue this conduct does *not* violate the MMPA because the unlawful demand for a late fee did not *relate* to a "claim or representation" pre-dating the initial transaction. Thus, charging an unlawful late fee that *exceeds* the contract rate conceivably states a claim under

the MMPA, while charging an unlawful late fee in the *absence* of any contract does not. If this is, in fact, Respondents' argument, it is not supported by logic.

This example can easily be flipped to accommodate the instant facts as well. Assume, for example, that Watson's deed of trust contained a provision expressly prohibiting "unlawful foreclosures." Respondents presumably would agree that Watson's MMPA claim should survive, simply because the unlawful foreclosure "related to a claim or representation" contained in the deed of trust. In such case, Respondents' liability under the MMPA would not turn on whether the foreclosure was *unlawful*, but whether the unlawful foreclosure was specifically addressed in the deed of trust. Requiring unlawful acts to relate to a pre-sale "claim or representation" as a condition of MMPA liability thus leads to arbitrary, illogical and even absurd results. In many instances, MMPA liability will not depend on the nature of the unlawful act itself, but on whether the parties anticipated and accounted for the unlawful act at the time of their initial transaction.

C. Respondents Correctly Acknowledge that "Harassing" Debt Collection Activity Violates the MMPA

In their fourth example, Respondents' freely admit that "harassing Appellant about making payments on the loan" is an example of conduct that would likely violate the MMPA. (Resp. Br. at 14). Respondents are absolutely correct on this point. By this lone admission, however, Respondents' have completely unraveled their own argument.

Respondents have astutely described an example of unlawful debt collection activity when they refer to "harassing" Watson about making her loan payments. However, unlawful debt collection activity does not normally relate to a "claim or representation" at the time of the sale (i.e., few contracts expressly prohibit "harassing debt collection"). Thus, Respondents have unwittingly provided the Court with at least one example where, by their own admission, an MMPA violation does *not* have to relate to a "claim or representation" at the time of the sale.

In a way, home foreclosures are an extreme form of debt collection. If "harassing" debt collection violates the MMPA, then "unlawful" debt collection should as well. Watson's unlawful foreclosure claim is entirely consistent with Respondents' fourth example of an MMPA violation.

Moreover, Respondents' fourth example of an MMPA violation makes it difficult to justify the holdings in *Prof'l Debt* and *Portfolio Recovery*. In those cases, the Attorney General specifically alleged the defendants violated the MMPA by using "deception and unfair practices to collect debts . . ." *Prof'l Debt*, 351 S.W.3d at 670; *Portfolio Recovery*, 351 S.W.3d at 662. This is no different from alleging "harassment" in the collection of debts.

Respondents' examples amply demonstrate that weak theories have difficulty standing up to serious scrutiny. "Relationship in fact" is an arbitrary standard that effectively insulates post-sale unlawful acts from MMPA liability. The Legislature

could not have included "after the sale" in the MMPA with the expectation that almost no post-sale unlawful conduct will ever violate the statute.

D. DePeralta v. Dlorah, Inc.was Correctly Decided Because the Alleged Unlawful Activity had no "Connection" Whatsoever to the Sale

Respondents' reliance on *DePeralta v. Dlorah, Inc.*, 2012 WL 4092191 (Mo.App. W.D. 2012) is misplaced. *DePeralta* is an example of an unlawful act having no connection *whatsoever* to the alleged sale, and serves to demonstrate that the MMPA does *in fact* have boundaries. In *DePeralta*, the defendant was an educational institution that provided paralegal training to the public. *Id*. at *1. However, the plaintiff apparently learned the defendant was not paying its employees in accordance with U.S. Department of Education guidelines. *Id*. at *7. Since the defendant was presumably operating in violation of federal law, the defendant alleged this was an "unfair practice" pursuant to 15 CSR 60-8.020(1) and 15 CSR 60-8.090(1). *Id*. at *7-8.[1] The plaintiff then attempted to use this DOE violation as grounds for alleging a "parade of horribles," which allegedly induced the plaintiff to enroll in the school. However, there was no indication that the same "parade of horribles" would not have occurred if the DOE regulations had been properly observed.

[1] These regulations (paraphrased) state it is an unlawful practice to violate any state or federal law intended to protect the public.

By contrast, all of *Watson*'s allegations directly stem from the extension of her mortgage loan in 2006. (L.F. at 10-15). If there had been no mortgage loan, there could have been no unlawful foreclosure. Thus, the unlawful act had a direct "link" to the sale, and did not rely on some unrelated violation of a federal or state law.

E. Respondents have Ignored the Edict in Gibbons; There is no Place for any Consideration of "Privity" in an MMPA Claim

Gibbons v. J. Nuckolls, Inc., 216 S.W.3d 667 (Mo. 2007), once again, establishes that non-parties to a transaction *are* liable under the MMPA if their conduct occurs "in connection with" the sale of the merchandise in question. *Gibbons*, 216 S.W.3d at 669. This is because *Gibbons* eliminated privity as an element of an MMPA claim. *Id*. at 669.

In *Gibbons*, the "sale" was the retail sale of an automobile to the plaintiff by a retail automobile dealership. *Id*. at 668. However, prior to the sale, the defendant, a *wholesale* automobile dealership, sold the vehicle to the retail dealership without disclosing the vehicle's accident history. *Id*. at 668. Thus, while the defendant was a party to *a* sale (i.e., with the retailer), the defendant was not a party to *the* sale (i.e., with the consumer).

Contrary to Respondents' assertion to the contrary (Resp. Br. at 25), the issue in *Gibbons* was whether privity of contract was required to state a claim under the

MMPA.[2] The parties were in compete agreement that the defendant was not a party to *the* sale. However, the trial court dismissed the case, and the Eastern District affirmed, solely based on their conclusions that the MMPA required *privity*.[3] This Court settled that question when it held to the contrary.

The fact that privity is unquestionably outside the scope of the MMPA means that *any* consideration of a non-party's involvement in the sale is misguided. Even assuming the Court finds that Respondents' conduct *did* not occur "in connection with" the sale, it is nevertheless *irrelevant* whether Respondents were parties (or non-parties) to the original transaction. Thus, establishing a party's involvement (or lack thereof) in a given sale does nothing to advance the inquiry of whether the party's unlawful act occurred "in connection with" the sale.

F. Respondents failed to Rebut Watson's "Lack of Good Faith" Argument

Respondents have largely ignored Watson's argument that the failure to act in good faith states a claim under the MMPA, per *Ward v. West County Motor Company*, 403 S.W.3d 82 (Mo. 2013). Since the duty to act in good faith arose at

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[2] *Gibbons*, 216 S.W.3d at FN 13

[3] See, *Gibbons v. J. Nuckolls, Inc.*, 2006 WL 2008372 (Mo.App. E.D. 2006) ("Gibbons urges us to find that the MPA does not require privity of contract . . . We are not persuaded by Gibbons's arguments"). *Id.* at *2.

the time of the loan, any breach thereof should *relate* to a "claim or representation" during the same transaction. Rather than address this argument "head-on," Respondents instead alluded to a "pre-sale promise" that allegedly was breach by the *Ward* defendant. (Resp. Br. at 27). By so doing, Respondents set up a "straw-man" in that (1) there was no "pre-sale promise" in *Ward*, and (2) even if there were a "pre-sale promise," the breach of duty of good faith violates the MMPA *independently* of any "pre-sale promise." Respondents should not be allowed to get away with side-stepping Watson's argument merely by substituting "pre-sale promise" for "duty of good faith" as the basis for MMPA liability.

Watson has posited the question of whether a duty to act in good faith arose at the time she took out her mortgage loan. If so, why would this not constitute a pre-sale obligation that could be breached at a later date, similar to the lifetime warranty in *Schuchmann v. Air Services Heating & Air Conditioning, Inc*?[4] In such case, the post-sale breach of one's duty of good faith would directly *relate* to a pre-sale obligation implied by law. When the Eastern District spoke to pre-sale "claims and representations" relating to post-sale unlawful acts, the court neither included nor excluded obligations imposed by law. Similarly, Respondents have decided not to weigh in on the matter either.

[4] 199 S.W.3d 228 (Mo.App. S.D. 2006).

G. Huffman Supports Watson's Argument that the MMPA Applies to Post-Sale Unlawful Conduct

Huffman v. Credit Union of Texas, 2011 L 5008309 (W.D. Mo 2011) involved several allegations of unlawful conduct, including unlawful repossessions, unlawful notices of repossession, and false representations and omissions that were included in subsequent letters pertaining to the repossessions. *Id*. at *1. The plaintiffs filed suit alleging violations of the Uniform Commercial Code, the Merchandising Practices Act and conversion. *Id*. at *1. The MMPA claim itself was broken down into three parts: (1) material omissions made at the time of the loan, (2) using pre-sale notifications that violated the UCC, and (3) the use of misleading communications once the UCC violations were discovered. *Id*. at *1.

The court dismissed the UCC and conversions claims based on the statute of limitations. However, the court requested additional briefing on the MMPA claims to determine whether "post-transaction (including particularly post-default) activities could give rise to a violation of the MMPA." *Id*. at *5. In finding that they did, the court refused to dismiss the MMPA claim, even though the defendant was not a party to the sale of the vehicle, and was only connected to the extension of financing indirectly through its "agent." *Id*. at *6.

H. Watson's Argument that the Loan Modification is a Separate "Sale" is Consistent with the Missouri Supreme Court Rules

In Missouri, the courts are required to give pleadings a liberal construction to determine whether the plaintiff has stated a claim. *Lawson v. Higgins*, 350 Mo. 1066, 1068-69, 169 S.W.2d 881, 882 (1943). The plaintiff is required to plead facts sufficient to state a claim, and may not rest on mere conclusions of law. *Id*. at 882.

Watson admits she never specifically pleaded the loan modification was a separate "sale" in her second amended petition. However, Waston *did* plead that on June 16, 2010, she received a loan modification agreement from Wells Fargo, and on June 18, 2010, she signed and sent it back to Wells Fargo. (L.F. at 11-12, ¶ 13). Moreover, Watson called Wells Fargo on June 24, 2010 to verify it received the signed loan modification agreement, which is when Watson first learned the agreement was never processed and the foreclosure was allowed to go forward. (L.F. at 12, ¶ 15). Thus, Watson pled facts sufficient to state a claim based on the modification agreement being a separate "sale."

According to Rule 55.04, "[n]o technical forms of pleading or motions are required." According to Rule 55.05, a valid pleading requires (1) "a short and plain statement of the facts showing that the pleader is entitled to relief" and (2) "a demand for judgment for the relief to which the pleader claims to be entitled."

Watson's petition, although admittedly *inartful*, nevertheless states a claim based on the modification agreement being its own separate sale.

I. The Scope of "Sale" Under the MMPA

The MMPA defines "sale" as "any sale or lease, offer for sale or lease, or attempt to sell or lease merchandise for cash or credit." § 407.010(6) RSMo. Unfortunately, the MMPA does not tell us when a sale begins or ends, and both Respondents and the Eastern District have applied the narrowest interpretation possible. Whether or not a sale encompasses future activities is generic to the sale itself. A one-night stay at a hotel is entirely different from a one-year apartment lease, or a 30-year home mortgage. The sale may begin once the ink has been penned to paper, but it may not end until many years later. However, identifying the specific beginning and ending points of a sale is purely academic, since the MMPA applies to unlawful practices that occur *before, during or after* the sale.

CONCLUSION

For the foregoing reasons, Watson prays the Court to reverse the trial court's entry of summary judgment and to overrule the Eastern District's opinions in *Prof'l Debt* and *Portfolio Recovery*.

Respectfully Submitted,

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CERTIFICATION

The undersigned certifies that on this 6th day of March 2014, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following: David T. Hamilton, Attorney for Respondents, 200 North Third Street, St. Charles, Missouri 63301.

The undersigned further certifies this Substitute Reply Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains a total of 2,883 words.

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