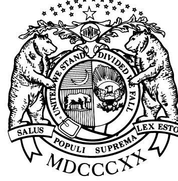

# In the Missouri Court of Appeals
# Eastern District

DIVISION THREE

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| JANET CHOCHOROWSKI, individually and as the Representative of a class of similarly-situated persons, | ) | ED97339 |
| Plaintiff/Appellant, | ) | Appeal from the Circuit Court of St. Louis County |
| v. | ) | |
| HOME DEPOT U.S.A., d/b/a THE HOME DEPOT, | ) | Honorable James R. Hartenbach |
| Defendant/Respondent. | ) | Filed: April 10, 2012 |

## Introduction

Janet Chochorowski, individually and as the Representative of a class of similarly-situated persons (Appellant), appeals from the summary judgment entered in favor of Home Depot U.S.A., d/b/a The Home Depot (Respondent). We affirm.

## Factual and Procedural Background

In 2002, Appellant rented a garden tiller from Respondent. The terms of Appellant's rental are set forth in a written Rental Agreement that Appellant initialed and signed. The Rental Agreement's "Special Terms and Conditions" includes an optional Damage Waiver, a service Respondent offers to relieve a renter of liability in the event a rented tool is damaged during the rental. The "Special Terms and Conditions" specifically refers the renter to the particular paragraph of the Rental Agreement that

explains the Damage Waiver and requires the renter to acknowledge a decision whether or not to purchase it, to-wit:

> I ACCEPT THE BENEFITS OF THE DAMAGE WAIVER (IF APPLICABLE) DESCRIBED IN PARAGRAPH 11 IN THE TERMS AND CONDITIONS OF THIS RENTAL AGREEMENT.

Paragraph 11 provides:

> If I pay the damage waiver charge for any Equipment, this agreement shall be modified to relieve me of liability for accidental damage to it, but not for any losses or damages due to theft, burglary, misuse or abuse, theft by conversion, intentional damage, disappearance or any loss due to my failure to care properly for such Equipment in a prudent manner....

Appellant initialed her consent in the box next to the optional Damage Waiver, thereby expressly acknowledging that:

> I HAVE READ AND AGREE, AS INITIALED TO THE RIGHT, TO THESE SPECIAL TERMS AND CONDITIONS.

Appellant then signed the Rental Agreement in its entirety, thus acknowledging that "I agree to the terms and conditions printed on this page and on the other page(s) of this agreement."

Appellant used the garden tiller and returned it with no damages. Upon its return, Respondent provided Appellant a rental invoice which separately listed the tool rental charges and the $2.50 Damage Waiver fee. Appellant maintains that she asked a sales associate about the Damage Waiver and was informed that Respondent "charges everybody" for it. Appellant paid the rental charges, and did not ask that the Damage Waiver fee be removed or indicate that she did not want it or agree to it.

On March 20, 2008, Appellant filed a "Class Action Petition for Statutory Fraud Pursuant to the Missouri Merchandising Practices Act" against Respondent. Appellant's two-count petition alleges that Respondent violated the Missouri Merchandising Practices Act (MMPA) by automatically charging and requiring Appellant to pay a 10% Damage Waiver when she rented the garden tiller. Count I alleges that Respondent violated the MMPA by deceiving Appellant into believing the Damage Waiver was mandatory when according to Respondent it was, in fact, optional. Count II alleges that Respondent violated the MMPA by automatically imposing the Damage Waiver fee upon Appellant which was worthless.

Respondent filed a motion to dismiss Counts I and II, which the trial court granted on February 6, 2009. This Court, on September 22, 2009, reversed the trial court's dismissal, finding that as to Count I, "A court may not grant a motion to dismiss for failure to state a claim based on a conclusion that the plaintiff is not entitled to relief on the merits of that claim," and as to Count II, "To determine whether or not the damage waiver was worthless in a manner that violates the MMPA would require a determination of the merits of Count II, which cannot be done on a motion to dismiss." See Chochorowski v. Home Depot U.S.A., Inc., 295 S.W.3d 194, 198, 199 (Mo.App. E.D. 2009). This Court determined that the trial court had considered materials outside of the four corners of the petition, namely the Rental Agreement, in deciding that Appellant's claims were without merit, without giving Appellant the opportunity to present the evidentiary basis, if any, for her allegations, and "[w]hether or not plaintiff can meet her burden of proof on this issue is also a question to be determined by summary judgment or by trial, not by a motion to dismiss." Id. at 199.

On remand, Respondent filed a motion for summary judgment pursuant to Rule 74.04,[1] arguing that the Rental Agreement and Damage Waiver contradicted and disproved Appellant's allegations. On August 2, 2011, the trial court entered its Order sustaining Respondent's motion for summary judgment. On October 21, 2011, the trial court entered a Final Judgment in favor of Respondent. This appeal follows.

Points on Appeal

In her first point, Appellant alleges that the trial court erred in sustaining Respondent's motion for summary judgment as to Count I because the evidence shows Respondent's automatic addition of the Damage Waiver without Appellant's consent when she leased a garden tiller violated 15 CSR 60-8.060 and the MMPA.

In her second point, Appellant contends the trial court erred in sustaining Respondent's motion for summary judgment as to Count I because the evidence shows Respondent did not give Appellant the choice of rejecting the Damage Waiver provision, which is an "unfair practice" under the MMPA.

In her third point, Appellant maintains that the trial court erred in sustaining Respondent's motion for summary judgment as to Count II because the evidence shows that Respondent's Damage Waiver is worthless.

Standard of Review

We review the trial court's grant of summary judgment essentially de novo. Ball v. Friese Const. Co., 2011 WL 4368540 *2 (Mo.App. E.D. 2011); ITT Comm. Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo.banc 1993). Whether to grant summary judgment is purely an issue of law. Ball, 2011 WL 4368540 *2. We will

[1] All rule references are to Mo. R. Civ. P. 2011, unless otherwise indicated.

uphold summary judgment on appeal only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Ball, 2011 WL 4368540 *2; ITT Comm. Fin. Corp., 854 S.W.2d at 376; Rule 74.04(c). The record is viewed in the light most favorable to the party against whom judgment was entered. Ball, 2011 WL 4368540 *2.

A defendant, as the movant, can establish a prima facie case for summary judgment by showing any of the following: (1) facts that negate any one of the elements of a claimant's cause of action; (2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements; or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support movant's properly pleaded affirmative defense. Ball, 2011 WL 4368540 *3. We will affirm the trial court's judgment if it is sustainable on any theory. Ball, 2011 WL 4368540 *3.

## Discussion

### Points I and II

Appellant maintains that Respondent's automatic addition of the Damage Waiver without Appellant's consent when she leased the garden tiller violated the MMPA and 15 CSR 60-8.060.

The MMPA's fundamental purpose is the protection of consumers, and, to promote that purpose, the act prohibits false, fraudulent or deceptive merchandising practices. Section 407.020[2]; Huch v. Charter Communications, Inc., 290 S.W.3d 721, 724 (Mo.banc 2009). The legislature did not define deceptive practices, but granted the

[2] All statutory references are to RSMo 2000, unless otherwise indicated.

attorney general authority to promulgate all rules necessary to the administration and enforcement of the provisions of the MMPA, which includes the authority to promulgate rules setting out the scope and meaning of the act. Section 407.145; State ex rel Nixon v. Telco Directory Pub., 863 S.W.2d 596, 601 (Mo.banc 1993). One of those rules is set out in 15 CSR 60-8.060, titled "Unsolicited Merchandise and Negative Option Plans," which provides in pertinent part: "(1) It is an unfair practice for any seller in connection with the advertisement or sale of merchandise to bill, charge or attempt to collect payment from consumers, for any merchandise which the consumer *has not ordered or solicited*." [Emphasis added.]

Section 407.020.1 provides that certain acts "in connection with the sale or advertisement of any merchandise in trade or commerce" are unlawful, to-wit:

> The act, use or employment by any person 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 ... is declared to be an unlawful practice.

[Emphasis added.] Section 407.010 defines "merchandise" and "sale" as follows:

> As used in sections 407.010 to 407.130, the following words and terms mean:
> …
> (4) "Merchandise", any objects, wares, goods, commodities, intangibles, real estate or services;
> …
> (6) "Sale", any sale, lease, offer for sale or lease, or attempt to sell or lease merchandise for cash or on credit….

A "Sale" includes a "lease" like Appellant's rental of the garden tiller from Respondent, and "Merchandise" includes a "service" or "intangible" like Respondent's Damage Waiver.

Section 407.020.1 prohibits "unfair practices" as unlawful. 15 CSR 60-8.060 declares a seller's attempt to collect a payment from a consumer for merchandise which the consumer *has not ordered* as an "unfair practice." Read together, Appellant argues that Respondent's charge for the Damage Waiver in connection with her rental of the garden tiller without Appellant's consent constitutes an unfair practice which is unlawful under the MMPA.

Facially, Appellant's argument states a claim for relief. However, an examination of the Rental Agreement at issue, specifically the Damage Waiver, makes clear that the Damage Waiver was optional. Even more importantly, Appellant initialed her signature next to the optional Damage Waiver, thereby electing the service, and signed the Rental Agreement in its entirety. These facts by themselves refute Appellant's claims as a matter of law.

A party is deemed to have knowledge of the contents of any contract she signs. Binkley v. Palmer, 10 S.W.3d 166, 171 (Mo.App. E.D. 1999). It has long been settled in Missouri that absent a showing of fraud, a party who is capable of reading and understanding a contract is charged with the knowledge of that which she signs. Id. Appellant has presented no evidence of fraud. As such, the Court must recognize that Appellant was capable of reading and understanding the Rental Agreement and is thus charged with knowledge of the contents. Id.

Appellant maintains that Respondent's personnel should have verbally informed her that the Damage Waiver was optional before she initialed it and signed the Rental Agreement. However, the Rental Agreement itself unambiguously discloses the optional nature of the Damage Waiver. Appellant cites no authority in support of her contention

that there exists an independent obligation for an extra oral recitation of the contents of a rental agreement. We find no unfair practice here. In accord, Pacholec v. Home Depot, U.S.A. Inc., 2007 WL 4893481 (D.N.J. July 31, 2007) (unpublished) (granting Home Depot's motion for summary judgment); Rickher v. Home Depot, Inc., 2007 WL 2317188, *4 (N.D. Ill. July 18, 2007) (unpublished) (granting Home Depot's motion for summary judgment).[3]

The Rental Agreement at issue, which Appellant voluntarily signed, discloses the optional nature of the Damage Waiver. Furthermore, the Damage Waiver is not a "negative option" because Appellant had a chance to read and review the Rental Agreement prior to signing it, and did not have to initial her consent to the optional Damage Waiver. Appellant was charged the $2.50 fee for the Damage Waiver service offered by Respondent and accepted by her. In accord, Rickher, 2007 WL 2317188 at *6 (finding that "the optional nature of the damage waiver was disclosed in the Rental Agreement" and refusing to find a negative option scheme because the plaintiff was given a chance to read and review the contract prior to signing it). Appellant presents no persuasive authority which compels us to reach a different conclusion.

Based on the foregoing, Points I and II are denied.

Point III

In her third point, Appellant claims that the Damage Waiver is worthless. However, the clear terms of the Rental Agreement belie this blanket claim about the value of the Damage Waiver. The Rental Agreement describes the Damage Waiver and makes clear that it protects Appellant from liability for damage to the garden tiller if the

[3] Although Pacholec and Rickher are unpublished opinions, Eighth Circuit Rule 32.1A allows parties to cite such decisions "if the opinion has persuasive value on a material issue and no published opinion of [the Eighth Circuit] or another court would serve as well."

garden tiller is damaged while she is using it for normal purposes during her rental. The Damage Waiver has value because it modifies the broad allocation of risk to Appellant by "relieving [her] from liability for accidental damage to the tool, both when the tool is being used properly and when the tool is not being used at all." See Rickher v. Home Depot, Inc., 535 F.3d 661, 668-69 (7th Cir. 2008) ("If a renter does not purchase the Damage Waiver protection, but accidentally damages the tool during proper use, or if the tool suffers damage when not in use, then under the terms of the contract, the renter will be liable for those damages. If a renter purchases the Damage Waiver, then the renter would not be liable for such damages."). Charging customers for the waiver and its corresponding shifting of risks is an acceptable arrangement that appears neither deceptive, nor unfair. Id. at 665. Courts which have construed like rental agreements have uniformly held that the Damage Waiver's value lies within its provision of coverage for certain types of losses, Pacholec, 2007 WL 4893481 at *4, and because it modifies the broad allocation of risk to the rental customer. Rickher, 535 F.3d at 669.

Based on the foregoing, we find Appellant's claim that the Damage Waiver in the Rental Agreement is worthless to be without merit. Accordingly, Point III is denied.

Conclusion

The judgment of the trial court is affirmed.

Sherri B. Sullivan, J.

Robert G. Dowd, Jr., P.J., and
Mary K. Hoff, J., concur.