96-131

IN THE DISTRICT COURT OF JOHNSON COUNTY, KANSAS
DIVISION 10

STATE OF KANSAS, *ex rel.* CARLA J. STOVALL, ATTORNEY GENERAL, Plaintiff,	)	
vs.	)	Case No. 98 CO 9006
THRIFT DRUG, INC., d/b/a TREASURY DRUG #7746 Defendant.	)	

JOURNAL ENTRY OF JUDGMENT

NOW on this 25th day of February, 1999 comes on for hearing the plaintiff's motion for leave to file its Second Amended Petition and defendant's motion to dismiss. The motion for leave to file a Second Amended Petition, which petition is currently on file, is sustained.

After reviewing the parties' briefs and hearing arguments on counsel, the Court makes the following rulings with regard to the Defendant's motion to dismiss.

A. The Court adopts as its own, the following analysis of the Honorable Janice D. Russell in the case of State of Kansas v. Four B Corporation, d/b/a Ball's Price Chopper, District Court of Johnson County, Kansas, Case No. 98 C 09009:

Legal Discussion

Plaintiff's petition depends upon the contention that the "sale of tobacco products to consumers under the age of 18 years by defendant and its employee, agent or representative constitutes an inherently unconscionable act and practice in violation of K.S.A. 50-627(a) and (b)," and "an inherently deceptive act and

CERTIFICATE OF CLERK OF THE DISTRICT COURT THE ABOVE IS A TRUE AND CORRECT COPY OF THE ORIGINAL INSTRUMENT FILED ON THE 16 DAY OF Mar 19 99 AND RECORDED IN THIS COURT, 10th JUDICIAL DISTRICT, JOHNSON COUNTY, KANSAS.
DATED THIS 14 DAY OF Aug 20 01
CLERK OF THE DISTRICT COURT
BY [signature] DEPUTY

CLERK OF DISTRICT COURT
JOHNSON COUNTY, KS.
99 MAR 16 AM 10: 52

practice in violation of the Kansas Consumer Protection Act, 50-626(a) and (b) . . ." (Plaintiff's [Second] Amended Petition pp. [4 and 5].) Plaintiff's argument, in essence, is that the sale of tobacco to a minor is a *per se* violation of the Kansas Consumer Protection Act, thus subjecting the merchant to a civil penalty of up to $5,000 per violation.

Deceptive Acts and Practices

Plaintiff argues that the sale of a tobacco product to a minor is a deceptive act and practice, in violation of K.S.A. 50-626(a) and (b). Specifically, plaintiff argues that the sale in question violates the following subsections:

- 50-626(b) (1) (A). Plaintiff's argument is that when the defendant sold a tobacco product to the minor, it did so under authority of a state license, and thus represented or implied that it was legal to sell the tobacco product to the minor and that it was legal for the minor to purchase and possess it.

- 50-626(b)(1)(B). Plaintiff argues that by selling a tobacco product to a minor under authority of a state license, defendant represented or implied that it had authority to do so.

- 50-626(b)(1)(F). Plaintiff argues that by selling a tobacco product to a minor, the defendant represented or implied that the minor could legally purchase the product.

- 56-626(b)(3). Plaintiff argues that the defendant failed to disclose to the minor that it was illegal for him to purchase the tobacco product.

The Court cannot find that the sale, standing alone, constitutes a deceptive act or practice. Case law establishes that a defendant's actions must constitute an intentional concealment or omission: "K.S.A. 50-626(b)(3) requires that the failure to state, concealment, suppression or omission be intentional. K.S.A. 50626(b)(3) does not proscribe mere nondisclosure of a material fact." Heller v. Martin, 14 Kan.App.2d 48, 52, 782 P.2d 1241 (1989). Although Heller directly addresses only subsection (b)(3) of K.S.A. 50-626, it is equally clear that a

representation must be actual and intentional to violate subsections (b)(1)(A), (b)(1)(B) and (b)(1)(F).

The Court recognizes that whether a particular act or practice is deceptive is a question of fact, and normally would have to be submitted to the trier of fact through the trial process. However, here there is no allegation, either direct or reasonably inferable, that the defendant engaged in any intentionally deceptive behavior. Nothing in the facts alleged in the petition suggests that the defendant sold the tobacco to the youth pursuant to any motivation other than a judgment error concerning his age. A mistake is simply not a "representation made knowingly or with reason to know ..." or "a willful failure to state a material fact."

Unconscionable Acts or Practices

Plaintiff next argues that the sale of a tobacco product to a minor is an unconscionable act or practice, as prohibited by K.S.A. 60-627.

The statute itself clearly states that the unconscionability of a particular act or practice is a question for the court. K.S.A. 60-627(b). This principle has been confirmed and recognized by the Supreme Court. See, Stair v. Gaylord, 232 Kan. 765, 776, 659 P.2d 178 (1983).

Though the statute places upon the courts the ultimate responsibility of determining unconscionability, a number of factors are listed in the statute to give guidance to the courts. The plaintiff points to the following statutorily listed factors to support the argument that the defendant committed an unconscionable act or practice:

- 50-627(b)(1). Plaintiff argues that the defendant took advantage of the minor's inability to ascertain the illegal nature of his actions and the serious health risks associated with tobacco products.

- 50-627(b)(3). Plaintiff argues that the minor is unable to receive a material benefit from the transaction, because it is illegal for a minor to possess tobacco products under the Cigarette and Tobacco Products Act. See K.S.A. 79-3321(m).

- 50-627(b)(5). Plaintiff argues that the transaction was excessively one-sided in favor of the merchant, because the merchant received a monetary benefit from the transaction and the minor is legally prohibited from possessing the product he purchased. See K.S.A. 79-3321(m).

The Court does not find that the sale of tobacco, standing alone, constitutes an unconscionable act or practice under K.S.A. 50-627. There may be circumstances under which the sale of tobacco products to minors does constitute an unconscionable act (i.e., a marketing ploy deliberately employed by a retailer to entice minors to buy, or some other such specific effort to sell to minors), but a sale resulting from a mere failure to discover the purchaser's age is not an unconscionable act.

A similar argument was made in Mills v. City of Overland Park, 251 Kan. 434, 837 P.2d 370 (1992). In that case, a minor illegally purchased and consumed intoxicating liquor. In an intoxicated state, he left the bar ill-clad for the cold weather, and was subsequently found frozen to death. The minor's family brought an action against various defendants including the retailer who sold the liquor to the minor. The Supreme Court affirmed the district court's dismissal and held that statutes prohibiting the sale of liquor to minors did not intend to impose civil liability on the retailer. The Court reasoned that the minor had been made criminally responsible by state statute for the purchase or possession of alcohol. Therefore, it would be nonsensical to believe that it was the legislature's intent to simultaneously vest the minor with a cause of action against the retailer who sold him the alcohol.

The logic in Mills is applicable by analogy to this case. The Cigarette and Tobacco Products Act prohibits a minor from purchasing or possessing tobacco. Therefore, it would be nonsensical to vest the minor with a cause of action against the retailer who sold the tobacco product when the sale was made as a result of the defendant's mere failure to discover the underage status of the consumer. The Court recognizes that it is the Attorney General., not the minor, who is bringing this action. However, the Attorney General stands in the shoes of the minor in

this case. If the minor would not be entitled to prevail, neither would the Attorney General.

The Court also rejects the theory that the sale to the minor was without material benefit because of the harmful nature of tobacco products to one's health. The Court recognizes that medical research has shown that cigarettes are harmful to adults as well as minors. Whatever benefits people derive from tobacco products must be weighed against their potential harm. At this time, sales of cigarettes to adults are legal. A sale to a minor is illegal. The defendant sold a tobacco product to a minor under the mistaken belief that he was an adult. Because the transaction was illegal does not mean the consumer was without material benefit. In addition to any harmful results, a minor receives as much material benefit from tobacco products as anyone over the age of 18. That the use of tobacco is harmful to humans is irrelevant to the minor's ability to benefit therefrom.

Similarly, plaintiff alleges in Count I, paragraph [22(e)] of the [second] amended [petition] that the transaction was excessively one-sided in favor of defendant in violation of K.S.A. 50-627(b)(5), "because defendant received a monetary gain from the sale of the tobacco product, whereas the minor consumer was legally prohibited from purchasing or possessing the tobacco product." The Court rejects this argument regarding the unconscionability of the sale. The statutory comments state that an example of an excessively one-sided transaction would include, "such conduct as requiring a consumer to sign a one-sided adhesion contract which is loaded too heavily in favor of the supplier, even though some or all of the contract terms are lawful in and of themselves." In the case at hand, the minor received the product for which he paid. He was charged the same price as an adult would have been charged. That the sale of a tobacco product to a minor was illegal does not affect the relative fairness or equality of the transaction. Therefore, for the reasons set forth above, the Court finds that defendant did not commit an unconscionable act in violation of 50-627 of the KCPA.

To some extent, this case and the others that arose from the Attorney General's "sting operation" appear to be modeled after similar cases in other jurisdictions. In a California case, Stop Youth Addition, Inc. v. Lucky Stores, Inc., 71 Cal.Rptr.2d 731, 17 Cal. 4th 553, 950 P.2d 1086 (1998), the California Supreme Court upheld an action brought under the California Unfair Competition Law against a retailer who sold cigarettes to a minor. It is important to note, however, that the California statute at issue, Cal. Bus. & Prof. Code Sec. 17200, defines unfair competition to include "any unlawful, unfair or fraudulent business act or practice." (Emphasis added). In contrast, the Kansas Consumer Protection Act does not include any "unlawful act" language. Had the legislature intended to make all "unlawful" sales *per se* violations of the Consumer Protection Act, it certainly could have included that language in the statute.

The Court is mindful of the plaintiff's argument that the Kansas Consumer Protection Act is to be liberally construed to "simplify, clarify and modernize the law governing consumer transactions." (K.S.A. 50-623). However, the mandate of "liberal construction" does not authorize courts to infuse the KCPA with unlimited elasticity. Application of the KCPA to this transaction would stretch it far, far beyond the intent of the legislature.

Dismissal of this action does not leave the State without a remedy. The Cigarette and Tobacco Products Act, K.S.A. 79-3301 *et seq.*, provides specific remedies for the sale of cigarettes to minors and the State can punish retailers who make such sales, even if they make the sale under the mistaken belief that the purchaser is an adult, under that act.

B. The Court further finds that the Kansas Cigarette Tobacco Products Act, K.S.A. 79-3301 *et seq.* was and is a statute specifically relating to the sale of cigarettes and tobacco products, is complete in itself for purposes of this case and takes precedence over the Kansas Consumer Protection Act in the circumstances of this case. See Chelsea Plaza Homes, Inc. v. Moore, 226 Kan. 430, 601 P.2d 1100 (1979).

THEREFORE, this case and the claims of the plaintiff against the defendant set forth in the Second Amended Petition are hereby dismissed.

DONE this 15 day of March, 1999.

Kevin Moriarty, Judge Pro Tem for
The Honorable Larry McClain

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing JOURNAL ENTRY OF JUDGMENT was served by depositing the same in the United States Mail, postage prepaid, this 16 day of March, 1999, and addressed to the following:

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