

DOROTHY and RALPH POTTS, SR.,

CASE NO.: 99-10009 (25)

Plaintiffs,

INSTR # 104595192  
OR BK 35765 Pages 924 - 928  
RECORDED 12/28/04 06:08:53  
BROWARD COUNTY COMMISSION  
DEPUTY CLERK 2065  
#22, 5 Pages

vs.

AFCO FINANCE CORPORATION,

HON. ROBERT A. ROSENBERG

Defendant.

**AMENDED FINAL JUDGMENT**

RECORDED CIVIL 4  
2004 DEC 20 PM 3:00  
FILED FOR RECORDS  
CLERK OF CIRCUIT COURT  
BROWARD COUNTY FLORIDA

THIS CAUSE came before the court for trial. The court having heard testimony and received evidence, having reviewed applicable case law, and being otherwise duly advised in the premises, makes the following findings of fact and conclusions of law:

On June 3, 1999, the plaintiffs, Dorothy Potts and Ralph Potts, Sr., filed a four-count complaint against the Defendant, AFCO Finance Corporation, alleging Count 1 - Conversion; Count 2 - violation of the Motor Vehicle Retail Sales Finance Act; Count 3 - Fraud; and Count 4 - Deceptive / Unfair Trade Practices.

On September 28, 1996, the plaintiffs purchased a 1991 used Ford Pickup Truck from Discount Auto World for the cash price of \$12,000.00. The contract for the truck was assigned by Discount Auto World to AFCO which ultimately become the holder of the contract. To purchase this vehicle, the plaintiffs obtained a loan in the amount of \$10,500 with a finance charge of \$6,360. On March 4, 1999, AFCO repossessed the vehicle because of default for failure to meet contractual obligations.

The matter came before the court for trial on May 21, 2003. The court received testimony of the parties and the witnesses. Some facts are disputed and indeed testimony or other evidence is conflicting. The court has had the opportunity to evaluate and weigh all of the testimony presented, and has based on the its consideration on the intelligence, frankness, credibility, plausibility, character and competence of the witnesses. Moreover, it has been cognizant of the interest of the parties in the outcome of the case. The court has additionally had the opportunity to consider the reasonableness in light of all of the evidence. The Court has also carefully reviewed the record, arguments presented, and applicable case law.

12-04 (5)

Based on the premise that their vehicle was wrongfully repossessed, the plaintiffs allege a cause of action for Conversion and Fraud in Counts 1 and 3 of their complaint. However, they failed to prove that the repossession was improper. The unrefuted testimony is that the Mr. and Mrs. Potts failed to make all of their payments<sup>1</sup> and in fact made numerous payments untimely. In fact, Mrs. Potts testified that she mistakenly mailed one of the payments in dispute to APPCO, instead of mailing the payment to AFCO.<sup>2</sup> Based upon the testimony and evidence presented, the court finds that the repossession was proper and the plaintiffs claims for Conversion and Fraud are meritless.

In Count 2, for violation of the Motor Vehicle Retail Sales Finance Act, and Count 4, for Deceptive/Unfair Trade Practices, the plaintiffs allege that the defendant's liability is based upon the FTC holder Rule. The FTC Holder Rule effectively banned the utilization of the holder-in-due-course doctrine in consumer credit cases. 16 C.F.R. 433. The purpose of the rule is to remove the lender's insulation provided by the holder-in-due-course doctrine, and to allow consumers to recover from the lender for the acts of the seller. The rule is designed to compel creditors to either absorb seller misconduct costs or seek reimbursement of those costs from sellers. *Schauer v. General Motors Acceptance Corp.*, 819 So.2d 809 (Fla. 4th DCA 2002). In *Tinker v. DeMaria Porsche Audi, Inc.*, 459 So.2d 487 (Fla. 3d DCA 1984), the plaintiff brought an action against a car dealer and creditor alleging fraud and misrepresentation in connection with his purchase of a used car. The jury awarded damages to the plaintiff and against the car dealer, but found the consumer liable to the lender-creditor for the counterclaim resulting from the unpaid balance on the car finance agreement. The appellate court found that the fraud perpetrated by the seller was a complete defense to the creditor's counterclaim, and also added the consumer could have sought restitution against the creditor for payments already made. *Tinker*, at 492. Therefore, in this case, AFCO is liable not only for its conduct, but for the acts of the seller.

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA) is intended to protect the consuming public and make consumer protection consistent with established policies of federal law. *Fla. Stat. § 501.202*. The statute, frequently referred to as the little FTC (Federal Trade Commission) Act, is to be liberally construed in favor of promoting its consumer protection policies. *See Cummings v. Warren Henry Motors, Inc.*, 648 So.2d 1230 (Fla. 4th DCA 1995). The FTC has

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<sup>1</sup>The court is aware of the onerous nature of the obligation. Nothing in the opinion should be understood as the court's approval of the contract, and the contractual obligation.

<sup>2</sup>Deposition testimony of Dorothy Potts, Page 38, lines 16-25; Page 39, lines 1-12

promulgated specific regulations governing transactions such as the one before the court. For example, there are rules governing used car transactions (16 C.F.R. 455), the Holder Rule (16 C.F.R. 433.2), deceptive pricing (16 C.F.R. 233) and advertising of warranties and guarantees (16 C.F.R. 239).

Plaintiffs argued that as a part of the inducement for them to purchase the vehicle, they were provided a thirty-day warranty for a cost of \$100; in fact, the truck was sold "as is," thereby disclaiming all warranties. The plaintiffs also contend that the seller failed to complete the odometer disclosure forms as required by law. Had these forms been filled out properly, prior to the transaction being completed, the plaintiffs could have obtained the vehicle's true mileage history. Furthermore, the plaintiffs claim that the sales price of the vehicle was inflated by approximately \$2,000 based upon the N.A.D.A Official Used Car Guide and their expert David Stivers. FDUTPA is designed to protect consumers for those who commit deceptive trade practices. A violation of FDUTPA may be based on "unfair, deceptive, or unconscionable acts or practices." *Schauer*, at 812. Under the federal statute, an unfair practice is "one that 'offends established public policy' [and one that is] 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So.2d 489 (Fla. 4th DCA 2001). Oral and material misrepresentations and a failure to disclose relevant and material facts are also classified as unfair and deceptive acts. *Department of Legal Affairs v. Father and Son Moving & Storage, Inc.*, 643 So.2d 22 (Fla. 4th DCA 1994). A material misrepresentation or practice is one which is likely to affect a consumer's choice of or conduct regarding a product. Thus, if omitted information is material, injury is likely.

At trial, the plaintiffs argued that the conduct regarding the thirty-day warranty versus the "as is" form is deceptive. The defendant defended by claiming that the plaintiffs did not call anyone from the dealership to testify on this issue and that they failed to provide any damages. However, based on the testimony and the evidence presented, the court finds that the seller's actions were deceptive and unfair to the plaintiffs. The vehicle was sold to the plaintiffs with a warranty while at the same time the plaintiffs were directed to sign a disclaimer disclaiming all warranties. This action was deceptive and in violation of the federal FTC Used Car Rule, 16 C.F.R. 455.1, 4; thus, it was in violation of FDUTPA.

Plaintiffs further argued that the seller's failure to complete the odometer disclosure forms was deceptive and unfair. Had these forms been completed, the consumer could have obtained information regarding the truck's history through the Department of Motor Vehicles or CarFax

before purchasing the vehicle. Further, the plaintiffs would have learned that an odometer roll back was indicated. This misrepresented and omitted information was a crucial consideration that led the plaintiffs to purchase this particular vehicle. The defendant argued that the plaintiffs would have bought the truck even if they had this information. This court does not agree. The plaintiffs' expert, David Slivers, testified that the vehicle was oversold by \$2,000 because of this misrepresentation. Evidence of an odometer roll back, the high number of miles on the vehicle, and the N.A.D.A. book value, indicate a falsely inflated price. Had the plaintiffs had this pertinent information, they could have made a more intelligent decision about purchasing the truck. Thus, the seller acted unfairly and deceptively by not disclosing the proper mileage and the proper value at the time of the signing of the contract.

The plaintiffs also contend that the subject Retail Installment Sales Contract contained misaligned and illegible terms. The plaintiffs' expert testified that the misalignment of the terms on the retail installment contract rendered the terms of the contract illegible. Finance terms which are illegible violate the Florida Motor Vehicle Retail Sales Finance Act (FMVRSFA), Fla. Stat. § 420.07. Illegible entries or misalignments violate existing law because there is no meaningful disclosure of finance terms. In *Smith v. No. 2 Galesburg Crown Finance Corp.*, 615 F.2d 407 (7th Cir. 1980) overruled on different grounds by *Pridgon v. Gates Credit Union*, 683 F.2d 182 (7th Cir. 1982), the court found a cognizable violation where the amounts stated on the finance agreement were misaligned and illegible. Furthermore, federal regulations make it clear that the seller must make finance disclosures clearly and conspicuously. 12 C.F.R., 226.17(a)(1).

Under Florida law, the burden of proving disclosure compliance is on the party claiming compliance. Fla. Stat. 520.07. Here, the defendant merely argued that the plaintiffs knew what they were getting, thus there is no violation. The court disagrees with that argument. Without strict compliance with the technical requirements disclosure, consumers cannot make a meaningful comparison of available credit alternatives. *Sharif v. Throp Credit Inc. of Maryland*, 23 B.R. 519 (N.D. Ga. 1982). Here, the plaintiffs were unable to clearly read the contract due to the misalignment of the terms to the contract. The defendant did not argue that the misalignment was a mere printing error or that there were any measures in place to ensure that this type of activity does not take place in the future. *Id.* Therefore, since the terms of the agreement were misaligned and

illegible, the defendant is in violation of the FMVRSFA and the plaintiffs, pursuant to Florida Statute § 520.12, are entitled to recover any finance charges and fees charged to them.

Accordingly, it is hereby

ORDERED AND ADJUDGED that Judgment entered on October 1, 2004 is hereby Amended and Judgment shall be entered in favor of Dorothy Potts and Ralph Potts Sr., 1242 Northwest 16<sup>th</sup> Court, Fort Lauderdale, FL 33311, and against defendant AFCO Finance Corporation, 3650 North Federal Highway, Suite 214, Lighthouse Point, FL 33064, for a total amount of \$8,460 [\$2,000 (inflated sale price) + \$100 (warranty cost)] on the FDUTPA claim and \$6,360 under the [FMVRSFA] together with interest at the statutory rate of seven (7%) percent, for which let execution issue.

The court reserves jurisdiction to make an award of attorney's fees and costs.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 15 day of December, 2004.

*[Signature]*  
ROBERT A. ROSENBERG  
CIRCUIT COURT JUDGE

Copies to:

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STATE OF FLORIDA  
BROWARD COUNTY  
I DO HEREBY CERTIFY that the within and foregoing is a true and correct copy of the original as it appears on record and file in the office of the Circuit Court Clerk of Broward County, Florida.  
WITNESS my hand and official seal at Fort Lauderdale, Florida, this the 15 day of December, 2005.  
*[Signature]*  
Clerk  
BROWARD COUNTY