FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-4865

BEATRICE HARRISON, on behalf
of herself and all others
similarly situated,

Appellant,

v.

LEE AUTO HOLDINGS, INC., d/b/a
LEE BUICK GMC, and LEE
NISSAN,

Appellee.

On appeal from the Circuit Court for Okaloosa County.
Terrance R. Ketchel, Judge.

April 29, 2020

ROWE, J.

Beatrice Harrison appeals a final summary judgment entered in a class action she brought against Lee Auto Holdings, Inc. based on fees it charged for electronic titling and registration of vehicles. Harrison alleged multiple violations of Florida's Deceptive and Unfair Trade Practices Act, including a claim that Lee Auto deceptively represented the electronic filing fee as a pass-through charge payable to the government or another third party. The trial court dismissed that FDUPTA claim. But the court found that Lee Auto's disclosure of the fee violated another provision of FDUTPA, requiring automobile dealers to make certain disclosures for

predelivery services. Even so, the court denied Harrison's class certification motion, entered judgment for Lee Auto, and dismissed Harrison's complaint because it found she did not suffer actual damages and thus lacked standing to sue. We reverse and remand for further proceedings because Harrison adequately alleged damages under FDUTPA. And when all doubts are resolved in Harrison's favor, material facts remain in dispute about whether the manner in which Lee Auto disclosed the fee was likely to mislead consumers.

Facts

Harrison bought a 2009 Kia Rio from Lee Auto. The cash price of the car included a $79 fee payable to Lee Auto for the real-time electronic filing of the vehicle's title and registration (EFF).

Harrison filed a class action complaint on behalf of consumers who bought vehicles from Lee Auto and paid the EFF. Harrison alleged multiple FDUTPA violations, asserting that Lee Auto's disclosure of the EFF was deceptive because it did not inform consumers that the EFF exceeded the amount Lee Auto paid to electronically file the title and registration.

In her amended class action complaint, Harrison alleged two FDUTPA counts on behalf of the class. In count one, Harrison asserted that Lee Auto violated FDUTPA by deceptively representing the EFF as a pass-through charge, payable to a government or third-party vendor, and then retaining much of the fee.

In count two, Harrison alleged that Lee Auto violated section 501.976(11), Florida Statutes (2014). That FDUTPA provision prohibits an automobile dealer from adding certain fees to the "cash price" of the vehicle without fully disclosing the fees to the customer. Harrison alleged that Lee Auto's disclosure was deceptive because it did not inform the customer that it charged more for the EFF than Lee Auto's cost to provide the service.

Lee Auto moved for summary judgment on the amended class action complaint. On count one, Lee Auto argued that it did not deceptively disclose the EFF as a pass-through charge. It

maintained that its contract disclosed that the fee was for electronic filing and that the fee was payable to Lee Auto. On count two, Lee Auto argued that it did not have to make the disclosure provided under section 501.976(11) because the EFF was not a fee added to the "cash price" of the vehicle. Instead, Lee Auto maintained that electronic registration and titling was "a service related to the sale" of the vehicle. Thus, the EFF was part of the "cash price" of the vehicle as the term was defined under section 520.02(2), Florida Statutes (2014).

After a hearing, the trial court granted summary judgment for Lee Auto. On count two, the court found no violation of section 501.976(11), agreeing with Lee Auto that the real-time electronic filing and registration of a vehicle was a "service related to the sale" of a vehicle. And so, the EFF was part of the "cash price" of the vehicle and not subject to disclosure under section 501.976(11). As to count one, the trial court entered judgment for Lee Auto without addressing any reasons for rejecting Harrison's claim that the EFF was a deceptive pass-through charge.

After entering summary judgment on the amended class action complaint, the trial court allowed Harrison to file an amended complaint. In her second amended complaint, Harrison raised a new FDUTPA claim. She alleged that Lee Auto violated section 501.976(18), Florida Statutes (2014), by not making the required disclosure under that provision when it charged customers for electronic titling and registration. Harrison alleged that such services qualified as "predelivery services" and under section 501.976(18), Lee Auto had to make the following disclosure: "This charge represents costs and profit to the dealer for items such as inspecting, cleaning, and adjusting vehicles, and preparing documents related to the sale." Harrison then moved to certify a class of consumers who bought vehicles from Lee Auto and paid the EFF.

Lee Auto opposed class certification and moved for summary judgment on the second amended complaint. It argued that electronic filing was not a "predelivery service" requiring the disclosure provided under section 501.976(18). Lee Auto also contended that Harrison lacked standing to sue under FDUTPA because she could not show actual damages.

After another hearing, the trial court denied the motion for class certification and entered summary judgment for Lee Auto. The trial court for the first time addressed, then rejected, Harrison's claim made in the first amended complaint that Lee Auto deceptively represented the EFF as a pass-through charge payable to the government or a third party. But the court agreed with the FDUTPA claim alleged in Harrison's second amended complaint. The court found that electronic filing was a predelivery service and that Lee Auto violated section 501.976(18) by failing to make the required statutory disclosure.

Even so, the trial court found that Harrison did not suffer actual damages because the only harm was that Lee Auto did not disclose that the EFF included overhead and profit to the dealer. Because Harrison could not show actual damages, the trial court determined that she lacked standing to bring the FDUTPA claim. Based on these rulings, the court denied the class certification motion, entered final summary judgment for Lee Auto, and dismissed the entire action with prejudice. This appeal follows.

Standards of Review

We review de novo the trial court's order granting summary judgment. *Maronda Homes, Inc. of Fla. v. Lakeview Reserve Homeowners Ass'n, Inc.*, 127 So. 3d 1258, 1268 (Fla. 2013). When conducting this review, we view the facts in a light most favorable to the nonmoving party. *Id.*

We review a trial court's decision on class certification for an abuse of discretion. *Baptist Hosp., Inc. v. Baker*, 84 So. 3d 1200, 1204 (Fla. 1st DCA 2012). We review de novo a court's decision on whether a plaintiff has standing to bring a class action. *Id.*

Analysis

The trial court erred in two primary respects when it granted final summary judgment for Lee Auto, denied Harrison's motion

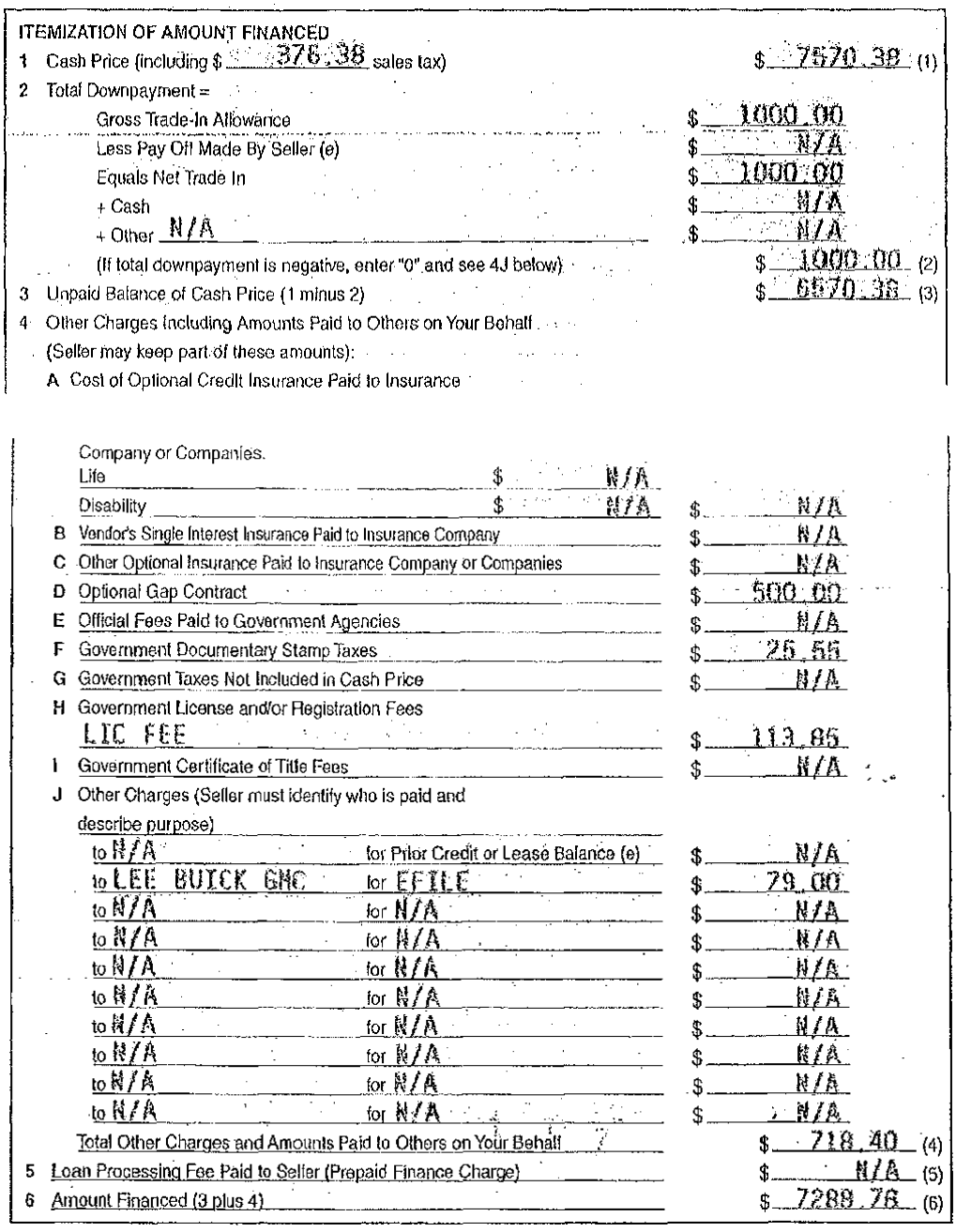
for class certification, and dismissed the complaint.[1] First, the court erred when it granted summary judgment on the first count of Harrison's amended complaint alleging that Lee Auto deceptively represented the EFF as a pass-through charge. When viewed in the light most favorable to Harrison, genuine issues of material fact remain in dispute on whether the way in which Lee Auto disclosed the EFF was likely to mislead consumers. Second, the trial court erred when it found that Harrison did not suffer actual damages and thus lacked standing to maintain a FDUTPA action on behalf of the class.

First Amended Complaint

When viewed in a light most favorable to Harrison, genuine issues of material fact remain as to whether Lee Auto deceptively represented the EFF as a pass-through charge payable to the government or another third party. Lee Auto's Retail Buyer's Order designated the fee as an "Electronic Filing Fee." And when Harrison bought the car, she executed Lee Auto's Retail Installment Sales Contract (RISC). The RISC itemized the EFF as a $79 fee paid "to LEE BUICK GMC for EFILE" and included the EFF in a category of "Other Charges Including Amounts Paid to Others on Your Behalf (Seller may keep part of these amounts)." Other fees in that category were: "Official Fees Paid to Government Agencies," "Government Taxes Not Included in Cash Price," and "Government License and/or Registration Fees." The category ends with a dollar amount totaling all fees charged and describes that total as "Total Other Charges and Amounts Paid to Others on Your Behalf."

---

[1] We agree with the trial court, that under the plain meaning of the statute, the real-time electronic filing of the title and registration is a "service related to the sale" of a vehicle. And so, that service is part of the "cash price" of the vehicle under section 520.02(2). Thus, the trial court did not err when ruling on the first amended complaint and finding that Lee Auto did not have to make the disclosure provided under section 501.976(11) when it charged the EFF.



ITEMIZATION OF AMOUNT FINANCED

1	Cash Price (including $ 376.38 sales tax)		$ 7570.38 (1)
2	Total Downpayment =		
	Gross Trade-In Allowance	$ 1000.00	
	Less Pay Off Made By Seller (e)	$ N/A	
	Equals Net Trade In	$ 1000.00	
	+ Cash	$ N/A	
	+ Other N/A	$ N/A	
	(If total downpayment is negative, enter "0" and see 4J below)		$ 1000.00 (2)
3	Unpaid Balance of Cash Price (1 minus 2)		$ 6570.38 (3)
4	Other Charges Including Amounts Paid to Others on Your Behalf (Seller may keep part of these amounts):		
	A Cost of Optional Credit Insurance Paid to Insurance Company or Companies.		
	Life	$ N/A	
	Disability	$ N/A	$ N/A
	B Vendor's Single Interest Insurance Paid to Insurance Company		$ N/A
	C Other Optional Insurance Paid to Insurance Company or Companies		$ N/A
	D Optional Gap Contract		$ 500.00
	E Official Fees Paid to Government Agencies		$ N/A
	F Government Documentary Stamp Taxes		$ 25.55
	G Government Taxes Not Included in Cash Price		$ N/A
	H Government License and/or Registration Fees		
	LIC FEE		$ 113.85
	I Government Certificate of Title Fees		$ N/A
	J Other Charges (Seller must identify who is paid and describe purpose)		
	to N/A for Prior Credit or Lease Balance (e)		$ N/A
	to LEE BUICK GMC for EFILE		$ 79.00
	to N/A for N/A		$ N/A
	to N/A for N/A		$ N/A
	to N/A for N/A		$ N/A
	to N/A for N/A		$ N/A
	to N/A for N/A		$ N/A
	to N/A for N/A		$ N/A
	to N/A for N/A		$ N/A
	to N/A for N/A		$ N/A
	Total Other Charges and Amounts Paid to Others on Your Behalf		$ 718.40 (4)
5	Loan Processing Fee Paid to Seller (Prepaid Finance Charge)		$ N/A (5)
6	Amount Financed (3 plus 4)		$ 7289.76 (6)

Harrison argues that Lee Auto's disclosure of the EFF in the same category as fees payable to the government or other third parties was likely to mislead consumers. And Harrison asserts that the manner in which Lee Auto disclosed the EFF violates FDUTPA because consumers were likely to view the fee as a pass-through charge payable to the government or third parties.

A practice is deceptive under FDUTPA when "there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *Zlotnick v. Premier Sales Grp., Inc.*, 480 F.3d 1281, 1284 (11th Cir. 2007) (quoting *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003)). An example of a charge likely to mislead consumers as a pass-through charge was discussed in *Latman v. Costa Cruise Lines, N.V.*, 758 So. 2d 699 (Fla. 3d DCA 2000). There, cruise passengers sued the cruise line, alleging that the cruise line violated FDUTPA by collecting "port charges" without disclosing that it was retaining part of the fee for itself. *Id.* at 701. It was irrelevant that the passengers were willing to pay the price charged or that they may have overlooked the charge. *Id.* at 703. The focus of the inquiry under FDUTPA was how a reasonable consumer would interpret the term "port charges." *Id.* The court found that the term "port charges" represented to a "reasonable consumer" that it was a pass-through charge paid to port authorities or other entities. *Id.*

Here, a question of fact remained as to whether a reasonable consumer reviewing the RISC and the other fees listed in the same category as the EFF would conclude that the EFF was a pass-through charge payable to the government or other third parties. The RISC presents the EFF in a total designated as "Total Charges and Amounts Paid to Others on Your Behalf," even though Lee Auto retained as profit $68 of the $79 fee it charged consumers. "[W]here the terms of the written instrument are disputed and reasonably susceptible to more than one construction, an issue of fact is presented as to the parties' intent which cannot properly be resolved by summary judgment." *Strama v. Union Fid. Life Ins. Co.*, 793 So. 2d 1129, 1132 (Fla. 1st DCA 2001) (quoting *Universal Underwriters Ins. Co. v. Steve Hill Chevrolet, Inc.*, 513 So. 2d 218, 219 (Fla. 1st DCA 1987)). Because the RISC is reasonably susceptible to more than one interpretation, Harrison's claim on behalf of the class was sufficient to go to the jury to determine whether a reasonable consumer would have believed the EFF was a pass-through charge payable to a third party. *Suris v. Gilmore Liquidating, Inc.*, 651 So. 2d 1282, 1283 (Fla. 3d DCA 1995) (holding that whether a specific practice is unfair or deceptive is a question of fact for the jury to determine). And so, we conclude that the trial court erred in entering summary judgment for Lee Auto

on Harrison's FDUTPA pass-through claim. *See Shands Teaching Hosp. & Clinic, Inc. v. Juliana*, 863 So. 2d 343, 348 (Fla. 1st DCA 2003) (stating that summary judgment is improper where there is even the slightest doubt that an issue of material fact might exist).

Actual Damages, Standing, and Class Certification

We also conclude that the trial court erred in finding that Harrison could not show actual damages and lacked standing to maintain a FDUTPA action on behalf the class. In her second amended complaint, Harrison alleged that Lee Auto's practice of charging the EFF was deceptive because Lee Auto failed to make the disclosures required under section 501.976(18), Florida Statutes. She argued that because electronic titling and registration were "predelivery services" under section 501.976(18), Lee Auto had to make the disclosures required under that statute. The trial court agreed with Harrison that Lee Auto was required under FDUTPA to make the disclosure provided under section 501.976(18) when charging consumers for electronic filing and titling services.[2]

Even so, the trial court found that Harrison did not suffer actual damages as a result of Lee Auto's failure to make the required disclosure. The court erred in reaching this conclusion because Harrison adequately alleged actual damages in her pass-through claim, which the court erroneously dismissed.[3]

---

[2] In a Notice of Supplemental Authority filed after oral argument in this appeal, Lee Auto casts doubt on the trial court's conclusion that the electronic filing for titling and registration was a "predelivery service" requiring disclosure under section 501.976(18). We do not address the question raised by the Notice, however, because Lee Auto did not cross-appeal. *See Nealy v. City of W. Palm Beach*, 442 So. 2d 273, 273 (Fla. 1st DCA 1983).

[3] Based on this determination, we need not address whether failure to make the disclosure required under section 501.976(18) would lead to actual damages under FDUTPA.

Actual damages may be measured in two ways under FDUTPA: "(1) the value between what was promised and what was delivered; or (2) the total price paid for a valueless good or service." *Waste Pro USA v. Vision Constr. ENT, Inc.*, 282 So. 3d 911, 920 (Fla. 1st DCA 2019) (quoting *HRCC, Ltd. v. Hard Rock Cafe Int'l (USA), Inc.*, 302 F. Supp. 3d 1319, 1321 (M.D. Fla. 2016)). As we recently observed in *Waste Pro USA*:

> The measure of actual damages in cases "where the alleged deceptive practice is defendant's misrepresentation of why a fee is being charged and where the money for the fee is being transferred" is "the amount retained by defendant despite the representation that the amount will be transferred to a third-party."

Id. at 920 (quoting *Morgan v. Pub. Storage*, No. 1:14–cv–21559–UU, 2015 WL 11233111, at *1 (S.D. Fla. Aug. 17, 2015)); *see also Latman*, 758 So. 2d at 703 ("[D]amages are sufficiently shown by the fact that the passenger parted with money for what should have been a 'pass through' port charge, but the cruise line kept the money.").

Harrison alleged that Lee Auto's failure to disclose that it was retaining a portion of the EFF as profit, rather than paying the fee to a third party, caused actual damages to consumers. She asserts that the measure of actual damages is the amount of the EFF retained by Lee Auto after it paid its actual costs for electronic filing and titling. Because Harrison's pass-through claim adequately alleged damages, the trial court erred in ruling that she lacked standing to bring an action under FDUTPA. *See Baptist Hosp.*, 84 So. 3d at 1204 (holding that a plaintiff asserting a FDUTPA claim must allege actual damages). And because the trial court's order on Harrison's class certification motion and its entry of final summary judgment for Lee Auto flowed from its ruling on Harrison's standing, we reverse those rulings, too.

Conclusion

Harrison stated a claim for actual damages under her FDUTPA pass-through count. And genuine issues of material fact remain as to whether Lee Auto's disclosure of the EFF with other

fees payable to third parties was likely to mislead consumers. For these reasons, we REVERSE and REMAND for proceedings consistent with this opinion.

WINOKUR and JAY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

John S. Mills, Courtney Brewer, and Jonathan Martin of The Mills Firm, P.A., Tallahassee; William C. Bielecky of William C. Bielecky, P.A., Tallahassee, for Appellant.

M. Stephen Turner and David K. Miller of Nelson Mullins Broad and Cassell, Tallahassee, for Appellee.