DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2010

PETIT PAUL DORESTIN and **JEANNETTE K. DORESTIN,**
Appellants,

v.

HOLLYWOOD IMPORTS, INC., a Florida corporation, d/b/a **MAROONE HONDA OF HOLLYWOOD,**
Appellees.

No. 4D08-44

[August 11, 2010]

WARNER, J.

A jury determined that appellee/cross-appellant Maroone Honda fraudulently induced the appellants to enter into a vehicle purchase, causing appellants $5,000 in damages; violated the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), causing $1,380 in damages; and violated the Florida Credit Service Organization Act ("FCSOA") but causing no damages. The trial court entered a judgment notwithstanding the verdict as to the fraudulent inducement claim, concluding that the claim was barred by the *in pari delicto* doctrine. It also determined that the Florida Credit Service Organization Act did not apply to the transaction. It entered judgment on the FDUTPA claim. Appellants appeal the court's entry of judgment notwithstanding the verdict on the fraudulent inducement claim as well as the Credit Service Organization Act claim, and appellee appeals the judgment against it on the FDUTPA claim. We affirm the judgment notwithstanding the verdict but reverse the judgment on the FDUTPA claim, because the jury's damage verdict did not constitute damages either pled or allowed pursuant to the act.

The facts of this case are lengthy and complicated, not all of which are necessary to the determination of the issues in this case.[1] The Dorestins

[1] Review of this record has been especially difficult because the court reporting firm, Official Reporting Service, LLC, and its reporter did not include an index, which is a violation of Florida Rule of Appellate Procedure 9.200(b)(2). "Each volume [of the transcript] shall be prefaced by an index containing the

wanted to purchase a used vehicle. Through Mrs. Dorestin's sister, they contacted Michael Clark, who took them to Maroone Honda to look at vehicles. A Maroone salesman, Mr. Simms, was present with Clark at the dealership. During the process of selecting and securing financing on the vehicle, Clark told the Dorestins that their credit was bad. He suggested paying to get a co-signer on a loan and making up employment for Mrs. Dorestin. Although she knew that this was probably illegal, she filled out portions of the credit application, including parts involving her non-existent employment. She also knew that Clark was going to supply fake employment records in support of the credit application.

They could not complete the first transaction, because the co-signer whom Clark arranged to have co-sign the note never appeared to sign the documents. The Dorestins then shifted their attention to a second vehicle. With the assistance of Maroone's financing director, they secured financing on that vehicle with their credit application showing Mrs. Dorestin's fictitious employment. They also agreed to pay additional cash to close the deal. As part of that transaction, although Clark had already secured $3,000 from them, he asked Mr. Dorestin for an additional $3,000 check for the car, and promised that the check would not be cashed. Mrs. Dorestin drove away with the vehicle.

Once in possession of the vehicle, the Dorestins discovered that the year-old car had 40,000 miles on it instead of the 12,000 represented at the dealership. Also, after they returned home, Mr. Dorestin told his wife about the additional $3,000 check that he had written.

Angry at this turn of events, Mrs. Dorestin put a stop payment on the $3,000 check to the dealership. When the finance director, Mr. Young, discovered that they had stopped payment on the check, he threatened to have them arrested. Mrs. Dorestin told him that they had already paid Clark the $3,000. Young advised them that Clark did not work for Maroone. Eventually, according to the testimony, Clark paid the

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names of the witnesses, a list of all exhibits offered and introduced in evidence, and the pages where each may be found." Other good court reporters also include the pages where opening and closing argument, motions for directed verdict, and jury instruction conference and charge are also found. In the future, transcripts not containing the proper index may be rejected. Appellants also have the duty to see that the transcript is submitted correctly. *See* Fla. R. App. P. 9.200(e).

dealership the $3,000 which constituted the money that the Dorestins had paid to Clark and made up the down payment on the vehicle.

The Dorestins also complained to the dealership about the excessive miles on the Caravan. After Young and the used car sales manager learned of the excessive miles on the Caravan, they informed the Dorestins that the finance company did not want to continue with the contract. The financing company considered it "high risk" due to the high mileage on the vehicle. Young ripped the contract up in front of them and said they had to "go into a new deal."

The salesman showed the Dorestins a second vehicle, a 2001 Honda Odyssey, which was older and yet cost more. With no offer of a refund, the Dorestins didn't want to lose their $4,800 down payment, so they negotiated over the price, and eventually received credit of $1,000 more on their trade-in vehicle. The actual motor vehicle installment sales contract reveals a purchase price of $17,461.04, a cash down payment of $4,000, and a trade-in credit of $1,800. Clark was not involved in any of the negotiations over the purchase of the Odyssey.

As a result of the changes in financing, the interest rate on the loan increased significantly. Mrs. Dorestin testified that they were also told by Mr. Young that they had to purchase a two-year extended warranty in the amount of $1,380 which was required by the lender. Including the finance charge for the life of the loan, the total that they were obligated to pay for the Odyssey amounted to $28,246.72. The Dorestins actually paid the loan off early, thus reducing the actual interest they paid.

Unhappy with their treatment by the dealership, including the fact that a collection agency harassed them about the check on which they had stopped payment, the Dorestins sued Maroone Honda alleging various causes of action. They alleged fraudulent inducement to purchase the Odyssey based on all the circumstances leading up to the purchase, including the transaction involving the initial purchase of the Caravan.

They also alleged causes of action for violation of the Florida Deceptive and Unfair Trade Practices Act. The Dorestins' complaint also included a claim under the Florida Motor Vehicle Retail Sales Finance Act ("FMVRSFA") and a claim under the Florida Credit Service Organizations Act ("FCSOA") for which they sought damages, including a return of monies paid, and a declaration that the contract was void.

Maroone Honda filed a counterclaim seeking damages and rescission based on the credit application signed by the Dorestins which falsely showed that Mrs. Dorestin was employed. Maroone also raised three defenses – unclean hands, fraudulent representations, and *in pari delicto*[2].

In their response to the counterclaim the Dorestins contended that Maroone Honda had filled out the credit application and knowingly put the false information on it; thus, the Dorestins claimed that Maroone suffered no damages because the company knew of the misrepresentation.

At trial, the Dorestins offered expert evidence, over Maroone's strenuous objection, that the vehicle had been in an undisclosed accident, reducing its value. Maroone argued that the Dorestins had never pled that it had fraudulently represented the condition of the vehicle; nevertheless, the court permitted the jury to hear the evidence.

After a lengthy trial, Maroone moved for directed verdict on various grounds, including that the Dorestins should be barred from recovery on any of the claims because of the *in pari delicto* defense, but the court submitted all claims to the jury. In particular, the court submitted to the jury the factual question as to whether the Dorestins engaged in fraudulent misrepresentations of their financial condition on the credit application. However, the court reserved to the post-verdict stage the application of that finding upon the various causes of action. The jury found that Clark acted as the actual or apparent agent of Maroone. The jury determined that Maroone had fraudulently induced the Dorestins to sign the retail installment sales contract for the 2001 Honda Odyssey resulting in $5,000 in damages; that Maroone did not violate the Florida Motor Vehicle Retail Sales Finance Act; that Maroone did violate the Florida Deceptive and Unfair Trade Practices Act resulting in $1,380 in damages; and that Maroone violated the Florida Credit Service Organization Act, but it resulted in zero damages. Finally, the jury answered "yes" to the question, "Did the Dorestins submit false information on their credit application to induce Maroone Honda into the transactions?"

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[2] Black's Law Dictionary defines the "in pari delicto doctrine" as "The principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." *Black's Law Dictionary* 806 (8th ed. 2004).

Both sides filed post-trial motions. As a result of those motions and after an extensive hearing, the court determined that the evidence was undisputed that Clark was not an agent for Maroone. The court also determined that the Dorestins also engaged in fraud, which prevented them from recovering on the fraud in the inducement claim. The court applied the *in pari delicto* doctrine and entered a judgment notwithstanding the verdict for Maroone on the fraudulent inducement claim. The court entered judgment for the Dorestins on Maroone's violation of FDUTPA. Regarding the Florida Credit Service Organization Act, the court ruled that FCSOA did not apply, but since the jury had awarded no damages it was moot. Both parties appeal the final judgment.

We first address the trial court's entry of a judgment notwithstanding the verdict on the Dorestin's fraudulent inducement claim. Review of a ruling on motion for judgment notwithstanding the verdict is de novo. *City of Hollywood v. Hogan*, 986 So. 2d 634, 640-41 (Fla. 4th DCA 2008). The Dorestins argue that evidence supported the claim that Clark was the agent of Maroone, but even if he were not, the court improperly applied the *in pari delicto* doctrine to this case. We conclude that the court did not err in entering judgment for Maroone, as the trial court did not err in its application of the *in pari delicto* doctrine to this case where the Dorestins participated in the illegal conduct of falsifying employment history to secure a loan.

We discussed the doctrine in *Turner v. Anderson*, 704 So. 2d 748 (Fla. 4th DCA 1998). There, both an employee and his company were defendants in an arbitration proceeding. The arbitrators ruled against both, awarding the greater amount of damages against the employee. Later, the employee sued his attorney, who had represented both the employer and employee. The employee alleged that the lawyer had encouraged him to lie in his testimony, which he did to his detriment. The employee also alleged that the lawyer conducted a defense so as to shift a greater share of the liability to the employee instead of the employer. We cited *Feld and Sons, Inc. v. Pechner, Dorfman, Wolfee, Rounick, & Cabot*, 312 Pa.Super. 125, 458 A.2d 545 (1983), which noted that in Story Equity Jurisprudence, two qualifications to the application of the doctrine were recognized:

> And indeed in cases where both parties are *in delicto*, concurring in an illegal act, it does not always follow that they stand *in pari delicto*; for there may be, and often are, very different degrees in their guilt. One party may act under circumstances of oppression, imposition, hardship, undue

> influence, or great inequality of condition or age; so that his guilt may be far less in degree than that of his associate in the offense. And besides, there may be on the part of the court itself a necessity of supporting the public interests or public policy in many cases, however reprehensible the acts of the parties may be.

Feld, 312 Pa.Super. at 130, 458 A.2d at 548. Given the sophistication of the employee, as well as his understanding of the illegality of committing perjury, we applied the doctrine and affirmed the dismissal of the employee's suit based upon the perjury.

In the present case, the trial court applied *Turner* when it considered whether, under the doctrine of *in pari delicto*, the wrongful act barred recovery by the Dorestins. While the Dorestins were unsophisticated in financial matters, Mrs. Dorestin testified that she knew that falsifying her employment history was wrong. The jury found that the Dorestins had submitted false information on the credit application. The trial court could not condone those illegal acts. It did weigh the comparative positions of both Maroone and the Dorestins and determined that the Dorestins had full knowledge of their illegal acts and should not be allowed to recover on the fraudulent inducement claim. The court found that courts should not reward either party for fraudulent conduct. The court specifically "weigh[ed] and assess[ed] the guilt, shall we say, of the alleged frauds perpetrated . . . ." Based upon the trial court's superior vantage point, having listened to all the witnesses and being able to judge their credibility, the jury's findings, and the court's application of the law, the court did not err in entering a judgment notwithstanding the verdict on the fraudulent inducement claim.

The Dorestins also appeal the trial court's determination that the Credit Service Organizations Act does not apply to car dealers who assist their customers in finding financing. Maroone was not a "creditor" within the meaning of section 817.7001(2)(a), Florida Statutes (2004), which defines a credit service organization. That section provides that a credit service organization, to which the act's provisions apply, means:

> [A]ny person who, with respect to the extension of credit by others, sells, provides, performs, or represents that he or she can or will sell, provide, or perform, in return for the payment of money or other valuable consideration, any of the following services:
> 1. Improving a buyer's credit record, history, or rating;
> 2. Obtaining an extension of credit for a buyer; or

> 3. Providing advice or assistance to a buyer with regard to the services described in either subparagraph 1. or subparagraph 2.

As the trial court noted, no facts came out at trial which would somehow create liability under this section for Maroone. Although there are no Florida cases on this issue, in *Cannon v. William Chevrolet/Geo, Inc.*, 341 Ill.App.3d 674, 794 N.E.2d 843 (Ill. App. Ct. 2003), the court held that an automobile dealership which assisted its customers in obtaining financing for the purchase of vehicles was not a credit service organization, because the customer did not pay the dealership a fee or give other valuable consideration for assisting in obtaining a loan. Because there were no facts proved which would place the dealership within the confines of the act, we agree with the trial court that the act did not apply.

We reverse on the cross-appeal, concluding that the Dorestins could not recover under FDUTPA, based upon the jury's verdict. The trial court should have entered a judgment notwithstanding the verdict on this claim. The jury found that Maroone violated FDUTPA and awarded $1,380. In their brief the Dorestins acknowledge that the sum constituted the amount of the extended service contract that the Dorestins purchased, and that is the claim which should be considered. The Dorestins maintain that Young forced them to purchase the extended warranty and told them that they could not finance the vehicle without it.

The specific claim regarding the warranty contract was never pled as one of the deceptive acts that Maroone allegedly committed. The Dorestins claimed that they had not been provided a buyer's guide (a sheet of information pasted on the window of the vehicle) which would show how much original warranty remained. They did not make any allegation in connection with the extended warranty which they purchased. Although they now attempt to marry the failure to disclose the buyer's guide to the purchase of the extended warranty, we fail to see the connection.

Proof of actual damages is necessary to sustain a FDUPTA claim. *See Rollins, Inc. v. Heller*, 454 So. 2d 580, 585 (Fla. 3d DCA 1984). The statute does not allow the recovery of other damages, such as consequential damages. *See Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati*, 715 So. 2d 311 (Fla. 4th DCA 1998). The Dorestins did not prove any actual damages connected with the failure to supply the window buyer's guide. The cost of the service contract was not the

actual damage of failing to supply it. If the buyer's guide had been disclosed, it would have revealed that the original warranty had expired. Thus, if the Dorestins wished to protect themselves against potential repairs and defects, they would have purchased the extended warranty, which they did. Moreover, the Dorestins have already collected on the extended warranty plan for repairs needed to the vehicle. Having accepted its benefits, they should now be estopped from asserting that they should recover its expense under FDUTPA. *See Billings v. City of Orlando*, 287 So. 2d 316, 318 (Fla. 1973) ("[A] person may be estopped from asserting rights otherwise existing by virtue of the acceptance and retention, by one having knowledge or notice of the facts, of benefits from a transaction, instrument, regulation or statute which he might have rejected or contested.").

Finally, the Dorestins claim that they were told by Maroone that they had to buy the extended warranty to get the car; however, this contradicts the actual language of the warranty contract placed in evidence, which states: "The . . . purchase of this contract is not a requirement to purchase your vehicle or obtain financing." "Assuming for purposes of argument that the oral statement is fraudulent, a party cannot recover for fraudulent oral representations which are covered in or contradicted by a later written agreement." *Giallo v. New Piper Aircraft, Inc.*, 855 So. 2d 1273, 1275 (Fla. 4th DCA 2003). A FDUTPA claim cannot be stated based upon oral representations which are in contradiction of written terms of a contract, because reliance on such representations is unreasonable as a matter of law. *See Mac-Gray Serv., Inc. v. DeGeorge*, 913 So. 2d 630, 634 (Fla. 4th DCA 2005).

For all of the foregoing reasons, we reverse the judgment in favor of the Dorestins on the cross-appeal. We affirm the judgments in favor of Maroone Honda. We remand for entry of judgment in accordance with this opinion.

Affirmed in part, reversed in part and remanded.

LEVINE, J., concurs.
GROSS, C.J., concurs specially with opinion.

GROSS, C.J., concurring specially.

I agree with the majority's conclusion that the judgment in favor of the Dorestins on the FDUTPA claim must be reversed because the claim on which they recovered was never pled as one of the deceptive acts Maroone committed. However, the majority cites to two lines of Florida

cases which, in my view, have improperly limited FDUTPA; in the right case, we should recede from those of our cases that have followed such authority and adopt an interpretation of the statute that carries out the legislature's intent in passing this consumer protection legislation.

I

The Line of Cases Following Rollins, Inc. v. Heller*, 454 So. 2d 580 (Fla. 3d DCA 1984), Improperly Limits Recoverable Damages Under FDUTPA*

To define recoverable "actual damages" within the meaning of section 501.211(2), Florida Statutes (2008), Florida case law has adopted the definition of *Rollins, Inc. v. Heller*, 454 So. 2d 580 (Fla. 3d DCA 1984), which limits "actual damages" to "benefit of the bargain" damages. This limitation is contrary to the legislative intent of FDUTPA, which is to liberally construe the statute to protect the consuming public, and contrary to the way many state courts have construed identical language in similar consumer protection statutes.

The FDUTPA Statutory Framework

Subsection 501.204(1), Florida Statutes (2008), declares the following to be unlawful: "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." In construing this subsection, "great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. s. 45(a)(1) as of July 1, 2006." § 501.204(2), Fla. Stat. (2008). Similarly, to determine whether a "violation of this part"[3] has occurred, a court may look to rules promulgated "pursuant to the Federal Trade Commission Act" and the "standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts." § 501.203(3), Fla. Stat. (2008).

According to the legislature, FDUTPA "shall be construed liberally to promote the following policies":

> (1) To simplify, clarify, and modernize the law governing consumer protection, unfair methods of competition, and unconscionable, deceptive, and unfair trade practices.

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[3]Part II of Chapter 501, Florida Statutes (2008), is the Florida Deceptive and Unfair Trade Practices Act. *See* § 501.201, Fla. Stat. (2008).

> (2) To protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.
> (3) To make state consumer protection and enforcement consistent with established policies of federal law relating to consumer protection.

§ 501.202, Fla. Stat. (2008).

Part of the "liberal" construction required by the statute is to construe statutory damage remedies in a way that makes consumers whole. The section of FDUTPA that addresses a consumer's damage remedy is subsection 501.211(2). Under that provision, a "person who has suffered a loss as a result of a violation of" FDUTPA "may recover actual damages." *Id.* A statutory limitation on such "actual" damages is that FDUTPA "does not apply to . . . [a] claim for personal injury or death or a claim for damage to property other than the property that is the subject of the consumer transaction." § 501.212(3), Fla. Stat. (2008). FDUTPA does not define "actual damages."

Rollins, Inc. v. Heller *Narrowly Defines "Actual Damages"*

In *Heller*, the third district adopted a definition of "actual damages" that narrowly focused on the cost of the service that was the subject of the FDUTPA violation in that case. *Heller* involved a deceptive and unfair trade practice in connection with the installation and servicing of a burglar alarm system. 454 So. 2d at 582. The system did not work at the time of a burglary and the trial court ordered $128,487 in "compensatory damages . . . based upon the value of the unrecovered stolen items." *Id.* The third district reversed this damage award. *Id.* Although it acknowledged the Texas Supreme Court's holding that "actual damages are those damages recoverable at common law," the third district nonetheless adopted a narrower definition of "actual damages" from an intermediate Texas appellate court which interpreted a statute "similar" to FDUTPA:

> Generally, the measure of actual damages is the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties. [citations omitted] A notable exception to the rule may exist when the product is rendered valueless as a result of the defect—then the

> purchase price is the appropriate measure of actual damages. [citation omitted]

Id. at 585 (alteration in original) (quoting *Raye v. Fred Oakley Motors, Inc.*, 646 S.W.2d 288, 290 (Tex. App. 1983)). This "benefit of the bargain" measure of damages "utilizes an expectancy theory, evaluat[ing] the difference between the value as represented and the value actually received." *Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 163 (Tex. 1992) (Phillips, C.J., concurring).

Since *Heller*, Florida courts have used the test lifted from *Raye* as the definition of "actual damages" under section 501.211(2).[4] For example, *Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati*, 715 So. 2d 311 (Fla. 4th DCA 1998), involved a car dealer who sold the plaintiff a used BMW with the false representation that the car had never been in an accident. *Id.* at 312. The trial court awarded the plaintiff damages that attempted to accomplish restitution by restoring the status quo. *Id.* at 313. Reversing for a new trial on damages, we applied the *Heller* definition of actual damages, and noted that the plaintiff "failed to sustain his burden of demonstrating the market value of the car [at issue], a limited production vehicle, in its diminished value, assuming an accident, in order for the trial court to ascertain his actual damages." *Id.* at 314.

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[4] *Urling v. Helms Exterminators, Inc.,* 468 So. 2d 451 (Fla. 1st DCA 1985) (denying, as special or consequential damages, repair costs for termite damage to house purchased in reliance on false termite inspection certificate); *Rodriguez v. Recovery Performance & Marine, LLC*, 35 Fla. Law Weekly D1122, 2010 WL 1979286 at *1-*2 (Fla. 3d DCA May 19, 2010) (denying recovery of down payment and loan payments towards purchase of jet boat as outside the actual damage measure of the market value of the jet boat); *Rollins, Inc. v. Butland,* 951 So. 2d 860, 869, 873 (Fla. 2d DCA 2006) (denying class-wide proof of damages where some members could only prove nominal damages); *Tri-County Plumbing Servs., Inc. v. Brown*, 921 So. 2d 20, 22 (Fla. 3d DCA 2006) (plaintiff awarded purchase price under *Heller* exception where her plumbing was "rendered valueless" due to defendant walking off the job); *Collins v. DaimlerChrysler Corp.*, 894 So. 2d 988, 990 (Fla. 5th DCA 2005) (diminution of car value due to defective seatbelts is adequate actual damage to sustain a cause of action under FDUTPA); *H & J Paving of Fla., Inc. v. Nextel, Inc.*, 849 So. 2d 1099 (Fla. 3d DCA 2003) (where defendant did not inform plaintiff it would be discontinuing radio service in the area, actual damages is difference between value of radio system at time of sale based on promised lifespan of eight years and value of system that would be obsolete within a few years); *Smith v. 2001 S. Dixie Hwy., Inc.*, 872 So. 2d 992, 994 (Fla. 4th DCA 2004) (loss of employment is an indirect and consequential result of a FDUTPA violation; therefore, reinstatement of employment is not an available remedy under the Act).

Applying *Heller*, Florida courts have held that "actual damages" under FDUTPA do not include "consequential,"[5] "special,"[6] or "incidental"[7] damages. *See Butland*, 951 So. 2d at 869-70 (stating that "[f]or purposes of recovery under FDUTPA, 'actual damages' do not include consequential damages"); *City First Mortg. Corp. v. Barton*, 988 So. 2d 82, 86 (Fla. 4th DCA 2008) (stating that FDUTPA "provides for recovery only of 'actual damages,' which cannot include consequential or special damages"); *2001 S. Dixie Hwy., Inc.*, 872 So. 2d at 994 (indicating that "actual damages" under FDUTPA do "not include 'actual consequential' damages"); *Orkin Exterminating Co. v. Petsch*, 872 So. 2d 259, 263 (Fla. 2d DCA 2004) (observing that "special, consequential, and incidental damages" are "not available under FDUTPA").

Heller*'s Narrow Definition of "Actual Damages" Is Contrary to the Legislative Intent of FDUTPA Favoring Liberal Construction*

Heller's narrow, "benefit of the bargain" definition of "actual damages" is contrary to the view that FDUTPA should be liberally construed to achieve its goals. The "obvious purpose" of FDUTPA "is to make consumers whole for losses caused by fraudulent consumer practices." *LaFerney v. Scott Smith Oldsmobile, Inc.*, 410 So. 2d 534, 536 (Fla. 5th DCA 1982) (quoting *Marshall v. W & L Enters. Corp.*, 360 So. 2d 1147, 1148 (Fla. 1st DCA 1978), *disapproved on other grounds*, *Hubbel v. Aetna Cas. & Sur. Co.*, 759 So. 2d 94 (Fla 2000)). Limitation of FDUTPA "actual damages" to *Heller* "benefit of the bargain" damages does not, in all cases, fully compensate injured consumers for losses caused by a deceptive trade practice. As the Ninth Circuit has explained, using the example of a dishonest rhinestone merchant, to curtail remedies for dishonest trade practices is contrary to the purpose of consumer protections statutes, which is to restore the victim to the status quo:

> Customers who purchased rhinestones sold as diamonds should have the opportunity to get all of their money back. We would not limit their recovery to the difference between

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[5]"Consequential" or "special" damages are those "which do not necessarily result from the injury complained of or which the law does not imply as the result of that injury." 17 Fla. Jur. 2d *Damages* § 140.

[6]*See* footnote 5, *supra.*

[7]"Incidental" damages are "costs incurred in a reasonable effort, whether successful or not, to avoid loss." *Capitol Envtl. Servs., Inc. v. Earth Tech, Inc.,* 25 So. 3d 593, 597 (Fla. 1st DCA 2009) (quoting *Restatement (Second) Of Contracts* § 347 cmt. c (1981)).

> what they paid and a fair price for rhinestones. The seller's misrepresentations tainted the customers' purchasing decisions. If they had been told the truth, perhaps they would not have bought rhinestones at all or only some. The fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds or to refunds for each detector that is not useful to them.

Fed. Trade Comm'n v. Figgie Int'l, Inc., 994 F.2d 595, 606 (9th Cir. 1993) (involving a cause brought under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45).

Courts in other states have not followed Florida's lead and limited the definition of "actual damages" in consumer protection statutes analogous to FDUTPA. In fact, although *Heller* relied on Texas law to fashion its narrow damage remedy, Texas does not limit "actual damages" under its Deceptive Trade Practices Act to the single formulation drawn from *Raye*. Rather, Texas recognizes that "[a]ctual damages" under the Texas Deceptive Trade Practices Act[8] "means those recoverable at common law." *Brown v. Am. Transfer & Storage Co.*, 601 S.W. 2d 931, 939 (Tex. 1980). Thus, after *Raye*, the Texas Supreme Court held that "actual damages" under the Texas Deceptive Trade Practices Act is broader than the benefit of the bargain measure announced in *Raye*:

> However, the DTPA [Deceptive Trade Practices Act] allows recovery for actual damages. TEX. BUS & COM. CODE § 17.50(b)(1). This court has defined actual damages under the DTPA as "the total loss sustained [by the consumer] as a result of the deceptive trade practice." *Kish v. Van Note*, 692 S.W.2d 463, 466 (Tex.1985); *Smith v. Baldwin*, 611 S.W.2d 611, 617 (Tex.1981). Actual damages "includ[e] related and reasonably necessary expenses." *Kish*, 692 S.W.2d at 466; *see also* DAVID F. BRAGG, PHILIP K. MAXWELL, JOE K. LONGLEY, TEXAS CONSUMER LITIGATION § 8.03 (2d ed. 1983 & Supp.1992). Therefore, such direct measures as "benefit-of-the-bargain" and "out-of-pocket" are not exclusive. We have permitted other damages to ensure that the plaintiff is made whole. *See Kish*, 692 S.W.2d at 466-68 (damages for removing defective product); *White v. Southwestern Bell Telephone Co.*, 651 S.W.2d 260 (Tex.1983) (lost profits); *Smith v. Baldwin*, 611 S.W.2d 611, 617 (Tex.1981) (interest

[8]Tex. Bus. & Com. Code Ann. § 17.41 *et seq.*

> on indebtedness); *see also Mead v. Johnson Group, Inc.*, 615 S.W.2d 685, 687 (Tex.1981) (loss of credit); *Village Mobile Homes, Inc. v. Porter*, 716 S.W.2d 543 (Tex.App.-Austin 1986, writ ref'd n.r.e.) (loss for improvements made).

Henry S. Miller Co., 836 S.W.2d at 162 (footnotes omitted).

Like Texas, other states with consumer protection statutes similar to Florida's have not limited "actual damages" to "benefit of bargain" damages. For example, the Washington Supreme Court has held that "damage to business reputation and loss of goodwill are compensable damages" under Washington's consumer protection act.[9] *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 1063 (Wash. 1993). Other state courts have also found that there is no exclusive damage calculation available to consumers under state consumer protection statutes. *See, e.g.*, *Elliot v. Staron*, 735 A.2d 902, 910-11 (Conn. Super. Ct. 1997) (court held that under Connecticut Unfair Trade Practices Act[10] plaintiffs were entitled to "actual damages," which are "appropriately and fully represented by the plaintiffs' recovery of lost profits"), *aff'd*, 736 A.2d 196 (Conn. App. Ct. 1999); *Taylor v. Medenica*, 479 S.E.2d 35, 45 (S.C. 1996) ("Actual damages [under the state's unfair trade practices act[11]] include special or consequential damages which are the natural and proximate result of the deceptive conduct" (citations omitted)); *see also Avery v. Indus. Mortg. Co.*, 135 F. Supp. 2d 840 (W.D. Mich. 2001) (applying Michigan law and holding that "actual damages" under the Michigan Consumer Protection Act[12] include noneconomic compensatory damages such as mental distress).

Interestingly, when the Florida Supreme Court has defined the term "actual damages" in a context that, unlike FDUTPA, did *not* call for a liberal interpretation of the term, the Court has found that "actual damages" are synonymous with "compensatory damages." In *Ross v. Gore*, 48 So. 2d 412 (Fla. 1950), the Supreme Court construed a libel statute[13] which allowed the recovery of "only actual damages":

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[9]Section 19.86.090, Washington Revised Code, provides that a person injured by a violation of the Consumer Protection Act "may bring a civil action in superior court to enjoin further violations, to recover the *actual damages* sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee." (Emphasis added).

[10]Conn. Gen. Stat. § 42-110a, *et seq.*

[11]S.C. Code Ann. § 39-5-140(a).

[12]Mich. Comp. Laws § 445.903(n), (bb).

[13]§ 770.02(1), Fla. Stat. (2008) (providing that a plaintiff "shall recover only actual damages").

> As to the provision limiting the plaintiff to the recovery of 'actual damages,' it will be noted that the statute does not define this term, nor have we been able to find a case in which this court has specified, categorically, the elements included in the term 'actual damages.' Since it is used synonymously with 'compensatory damages' in many of our decided cases, we think it is fair to assume that 'actual damages' mean 'compensatory damages.'

Id. at 414. "Actual or compensatory damages are those amounts necessary to compensate adequately an injured party for losses sustained as the result of a defendant's wrongful or negligent actions." *Bidon v. Dep't of Prof'l Regulation, Fla. Real Estate Comm'n*, 596 So. 2d 450, 452 (Fla. 1992) (citation omitted). The purpose of actual or compensatory damages is to provide "fair and just compensation commensurate with the loss sustained in consequence of the defendant's act which give rise to the action." *Hanna v. Martin*, 49 So. 2d 585, 587 (Fla. 1951). Many types of damages fit under the umbrella of "actual" or "compensatory" damages, beyond benefit of the bargain damages.[14] For example the Supreme Court has written that "[c]ompensatory damages are defined as such as arise from actual and indirect pecuniary loss, mental suffering, value of time, actual expenses, and bodily pain and suffering." *Margaret Ann Super Mkts., Inc. v. Dent*, 64 So. 2d 291, 292 (Fla. 1953) (quoting *Smith v. Bagwell*, 19 Fla. 117 (1882)). The Supreme Court's interpretation of the term "actual damages" as being synonymous with "compensatory damages" suggests that *Heller*'s limitation on the term is inappropriate, especially when the term appears in a statute that is to be liberally construed to provide a genuine remedy to an injured consumer.

By adhering to the benefit of the bargain measure of actual damages injected into Florida law by *Rollins*, this court has strayed from the intent of the legislature that FDUTPA be liberally construed to protect the consumer. Enforcing a broader definition of "actual damages" would

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[14]It is hornbook law that actual or compensatory damages are classified by the law as either general or special. *See* 17 Fla. Jur. 2d *Damages* § 8. General damages are those that directly and naturally flow from a wrongful act or omission, or are presumed by the law to have resulted therefrom. *Id.* "Special" or "consequential" damages are those that "do not necessarily, but do directly, naturally, and proximately result from" the injury for which compensation is sought. *Moses v. Autuono,* 47 So. 925, 926 (Fla. 1908); *see* 17 Fla. Jur. 2d *Damages* § 140.

bring Florida law into conformity with the national consensus on the definition of "actual damages" in state consumer protection statutes similar to Florida's. Most importantly, by rectifying an erroneous interpretation of actual damages, this court will ensure that consumers have the full protection intended under FDUTPA.

II

The majority opinion references a second line of cases that improperly limits the scope of the FDUTPA remedy for a consumer by transplanting common law fraud principles into a FDUTPA analysis.

The majority opinion states that a "FDUTPA claim cannot be stated based upon oral representations which are in contradiction of written terms of a contract, because reliance on such representations is unreasonable as a matter of law." As authority for that legal proposition, the opinion cites *Mac-Gray Services, Inc. v. DeGeorge*, 913 So. 2d 630, 634 (Fla. 4th DCA 2005). Without discussion or analysis, *Mac-Gray* adopted that principle from *Rosa v. Amoco Oil Co.*, 262 F. Supp. 2d 1364, 1368-69 (S.D. Fla. 2003). To a FDUTPA claim, *Rosa* applied the legal principle that "[a] party has no right to rely upon alleged oral misrepresentations that are adequately covered and expressly contradicted in a later written contract." *Id.* at 1368. To support that statement of law, *Rosa* cited *Hillcrest Pacific Corp. v. Yamamura*, 727 So. 2d 1053, 1056 (Fla. 4th DCA 1999). *Rosa*, 262 F. Supp. 2d at 1368.

The problem with *Rosa*'s reliance on *Hillcrest* is that *Hillcrest* did not involve a FDUTPA claim; it involved a cause of action for fraud in the inducement. 727 So. 2d at 1056. Without any consideration of the public policy behind FDUTPA, *Rosa* summarily inserted a fraud concept into the law of this consumer protection statute. This application of fraud principles to a FDUTPA claim improperly constricts the broad remedy intended by the legislature.

One of the reasons that consumer protection statutes like FDUTPA were passed was that the common law claim for fraud did not adequately provide a remedy for all the deceptive practices that victimized consumers. As the Texas Supreme Court has recognized for a statute almost identical to FDUTPA,[15] such consumer protection acts do

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[15]The purpose and construction of the Texas Deceptive Trade Practices Act (DTPA) are similar to those of FDUTPA. *See* Tex. Bus. & Com. Code Ann. § 17.44 (West 2004). The definition of unlawful acts and practices under

> not represent a codification of the common law. A primary purpose of the enactment of the [Texas Deceptive Trade Practices Act] was to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit.

Smith v. Baldwin, 611 S.W. 2d 611, 616 (Tex. 1980) (citations omitted). One of the common defenses to a fraudulent inducement claim is that the plaintiff did not reasonably rely on a misrepresentation of material fact. This fraud concept is the basis of the rule that *Mac-Gray* and *Rosa* applied to FDUTPA claims. Yet, "reasonable reliance" has no place in a FDUTPA case. As the first district has observed,

> [a] deceptive or unfair trade practice constitutes a somewhat unique tortious act because, although it is similar to a claim of fraud, it is different in that, unlike fraud, a party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue.

State, Office of Att'y Gen. Dep't of Legal Affairs v. Wyndham Int'l, Inc., 869 So. 2d 592, 598 (Fla. 1st DCA 2004) (citation omitted). An aggrieved party may thus establish a FDUTPA violation under section 501.211(1) without showing actual reliance on the misconduct that amounted to a statutory violation.

A second problem with *Mac-Gray* and *Rosa* is that the cases narrowly focus on the contradictions between oral representations and a written contract. To decide whether a FDUTPA violation has occurred, a fact finder must evaluate an entire consumer transaction, taking into consideration all of the parties' dealings, including oral promises and a later written contract.

The legislature passed FDUTPA with the purpose of expanding the protections afforded to consumers. The statute seeks to "protect the consuming public" by broadly prohibiting, *inter alia*, "unfair or deceptive acts or practices in the conduct of any trade or commerce." §§ 501.202(2), 501.204(1), Fla. Stat. (2008). "[A] deceptive practice is one that is likely to mislead consumers, and an unfair practice is one that offends established public policy or is immoral, unethical, oppressive,

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FDUTPA and the DTPA are also alike. *Compare* § 501.204, Fla. Stat. (2004), *with* Tex. Bus. & Com. Code Ann. § 17.46 (West 2004).

unscrupulous or substantially injurious to consumers." *Bookworld Trade, Inc. v. Daughters of St. Paul, Inc.*, 532 F. Supp. 2d 1350, 1364 (M.D. Fla. 2007) (citation omitted) (internal quotations omitted).

Because the statute is designed to protect consumers, the scope of the conduct that may constitute an "unfair or deceptive" practice is "extremely broad." *Day v. Le-Jo Enters., Inc.*, 521 So. 2d 175, 177 (Fla. 3d DCA 1988). A "claim under FDUTPA is not defined by the express terms of a contract, but instead encompasses unfair and deceptive practices arising out of business relationships," including oral representations and misrepresentations that precede the execution of a contract. *Siever v. BWGaskets, Inc.*, 669 F. Supp. 2d 1286, 1293 (M.D. Fla. 2009). Although the express terms of a contract shed light upon the course of the business dealings that may give rise to a claim under FDUTPA, they are not dispositive. "[D]eception [under FDUTPA] occurs if there is a 'representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.'" *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003) (quoting *Millennium Commc'ns & Fulfillment, Inc. v. Office of the Attorney Gen.*, 761 So. 2d 1256, 1263 (Fla. 3d DCA 2000)).

Applying these principles, a contradiction between oral representations and a written contract, which is dispositive of a claim under *Ros*a and *Mac-Gray*, should be but one factor that is taken into consideration in deciding whether a FDUTPA violation has occurred. A FDUTPA claim may rest on "extra- and pre-contractual statements; neither the merger doctrine nor the parol evidence rule serves to exclude such statements, either from evidence or as the basis of the claim." *Bakhico Co., Ltd. v. Shasta Beverages, Inc.*, No. Civ.A.3:94-CV-1780-H, 1998 WL 25572 at *7 (N.D. Tex. Jan. 15, 1998) (discussing Texas Deceptive Trade Practices Act).

A Texas court confronted the *Rosa*/*Mac-Gray* fact pattern in *JMB Income Properties, Ltd.-X v. Big Al's, Inc.*, No. 05-91-00063-CV, 1992 WL 48143 at *4 (Tex. App. Mar. 16, 1992). There, the Court of Appeals for Dallas addressed a Deceptive Trade Practices Act claim based upon oral representations that contradicted the written terms of a contract. *Id.* at *1. Noting that the defendant did not breach the written terms of the lease agreement, the court permitted the DTPA claim based on the defendant's actions contrary to its oral representation. *Id.* at *4. The court held:

> A party cannot avoid liability under the DTPA by entering into a contract concerning the same subject matter which

> contains provisions inconsistent with a prior representation. It is the oral representation that forms the basis of the DTPA action.

Id. at *4 (citations omitted).

In the right case, we should recede from *Mac-Gray*.

* * *

Appeal and cross-appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Miette Burnstein, Senior Judge; L.T. Case No. 04-10526 14.

Rebecca J. Covey of Rebecca J. Covey, LLC, Fort Lauderdale and Diane H. Tutt of Diane H. Tutt, P.A., Davie, for appellant.

Nancy W. Gregoire of Kirschbaum, Birnbaum, Lippman & Gregoire, PLLC, Fort Lauderdale and Richard A. Ivers of Law Office of Richard Ivers, Coral Springs, for appellee.

Not final until disposition of timely filed motion for rehearing.