CASE NO. A05-0497

STATE OF MINNESOTA
COURT OF APPEALS

PAULETTE B. LIABO,

Appellant,
v.

WAYZATA NISSAN, LLC,

Respondent.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

APPENDIX Table of Contents 3

TABLE OF AUTHORITIES 4

STATEMENT OF ISSUES 7

STATEMENT OF THE CASE 9

STATEMENT OF FACTS 9

ARGUMENT 12

I. STANDARD OF REVIEW 12

II. INTRODUCTION 13

III. TO THE EXTENT A BINDING CONTRACT EXISTED IT COULD ONLY HAVE BOUND APPELLANT TO PURCHASE ON CREDIT 14

IV. RESPONDENT VIOLATED THE TRUTH IN LENDING ACT (TILA) BY NOT PROVIDING THE REQUIRED DISCLOSURES PRIOR TO THE CUSTOMER BECOMING OBLIGATED TO ACCEPT CREDIT 16

V. RESPONDENT VIOLATED THE MINNESOTA MOTOR VEHICLE RETAIL INSTALLMENT SALES ACT (MVRISA) BY FAILING TO MAKE REQUIRED DISCLOSURES 21

VI. RESPONDENT HAS ENGAGED IN DECEPTIVE TRADE PRACTICES 24

1. Overview of Minnesota's Consumer Protection Statutes 24

2. Wayzata has engaged in the following deceptive trade practices:

- It has misrepresented or has engaged in conduct likely to lead to confusion as to the correct amount of the balance to finance and other terms appearing on the Delivery Sheet;
- It has misrepresented the Delivery Sheet as a binding contract; and
- It has engaged in deceptive trade practices by failing to make disclosures required by MVRISA and TILA. 26

CONCLUSION 32

APPENDIX

Table of Contents

Order and Memorandum dated May 22, 2000 1-15
Credit Application 16
Affidavit of Daniel Sinner dated August 3, 1999 17-20
Affidavit of Jill White Bryant 21-23
Deposition of Paulette Liabo 24-56
Order and Memorandum dated January 12, 2005 57-68
Rule 56 Motion for Summary Judgment and/or Protective Order
dated August 3, 1999 69-79
Defendant's Memorandum of Law in Opposition to Plaintiff's Motion
for Summary Judgment 80-107
Affidavit of Daniel Sinner dated April 20, 2000 108-118
Exhibit F 119

TABLE OF AUTHORITIES

Minnesota Cases

Albright v. Henry, 174 N.W.2d 106 (Minn. 1970) 12
Betlach v. Wayzata Condominium, 281 N.W.2d 328 (Minn. 1979) 13
C.E. Greer v. Kookier, 253 N.W.2d 133, 140 (Minn. 1977) 22
Church of the Nativity of our Lord v. WatPro, Inc., 474 N.W.2d 605 (Minn. App. 1991), *aff'd.* 491 N.W.2d 1 (Minn. 1992) 30
City of Coon Rapids v. Suburban Engineering, Inc., 167 N.W.2d 493 (Minn. 1969) 13
Claybourne v. Imsland, 414 N.W. 2d 449 (Minn. App. 1987) 30
D.A.B. v. Brown, 570 N.W.2d 168 (Minn. App. 1997) 29
Edina Educ. Ass'n v. Board of Educ. Of Independent School Dist. No. 273, 562 N.W.2d 306 (Minn. App. 1997) 14
Funchess v. Cecil Newman Corp., 632 N.W.2d 666 (Minn. 2001) 13
Grandnorthern, Inc. v. West Mall Partnership, 359 N.W.2d 41, 43-44 (Minn. App. 1984) 13
Illinois Farmers Ins. Co. v. Tapemark Co., 273 N.W.2d 630 (Minn. 1978) 12
Rathbun v. W.T. Grant Co., 219 N.W.2d 641 (Minn. 1974) 13
Ruona v. Freeway Dodge, Inc., 285 Minn. 23, 171 N.W.2d 212 (1969) 26
State by Humphrey v. Alpine Air Products, Inc., 490 N.W.2d 888, 892 (Minn. App. 1992), *aff'd.* 500 N.W.2d 788 (Minn. 1993) 28
State by Humphrey v. Phillip Morris, Inc., 551 N.W.2d 490, 496 (Minn. 1996) 28
Tollefson Development, Inc., v. City of Elk River, 665 N.W.2d 554 (Minn. App. 2003) 13
Van Asperen v. Darling Olds, Inc., 254 Minn. 62, 93 N.W.2d 690 (1958) 25

Case from Other Jurisdictions

April v. Union Mortgage Co., 709 F.Supp. 809 (N.D. Ill. 1989) 37
Basile v. H & R Block, Inc., 897 F.Supp. 194 (E.D. Pa. 1995) 18
Beard v. Gress, 413 N.E.2d 448 (Ill. App. 3d 1980) 31
Bizier v. Globe Financial Services, Inc., 654 F.2d 1 (1st Cir. 1981) 23
Brooks v. Creech, 2003 W.L. 174805 (Tenn. App. Jan. 28, 2003) 33
Bryson v. Bank of New York, 584 F.Supp. 1306 (S.D.N.Y. 1984) 19
Burnett v. Ala Moanz Pawn Shop, CCH Clearinghouse Review No. 46, 771 (D. Haw. 1991), *aff'd* 3 F.3d 1261 (9th Cir. 1993) 32
Carlock v. Pillsbury Co., 719 F.Supp. 791 (D. Minn. 1989) 29
Chroniak v. Golden Investment Corp., 983 F.2d 1140 (1st Cir. 1993) 32
Daenzer v. Wayland Ford, Inc., 2002 WL 1050209 (E.D. Mich. May 7, 2002) 36
Dryden v. Lou Budke's Arrow Finance Co., 630 F.2d 641, 647 (8th Cir. 1980) 23
Ellis v. General Motors Acceptance Corp., 160 F.3d 703, 707 (11 Cir. 1998) 24
Fairley v. Turan-Foley Imports, Inc., 65 F.3d 475 (5th Cir. 1995) 18
Ford Motor Credit Co. v. Milhollin, 440 U.S. 555, 559-60 (1980) 22
George Pharis Chevrolet v. Polk, 661 S.W.2d 314 (Tex. App. 1983) 36
Graves v. Tru-Link Fence Co., 905 F.Supp. 515 (N.D. Ill. 1995) 16
In Re Brown, 134 B.R. 134 (Bankr. E.D.Pa. 1991) 27
In Re Stewart, 93 B.R. 878 (Bankr.E.D. Pa. 1988) 37
Johnson v. Fleet Finance, Inc., 4 F.3d 946, 949 (11th Cir. 1993) 22

Jump v. ACP Enterprises, Inc., 224 F. Supp.2d 1216 (N.D. Ind. 2002) 27
Jung Kurth v. Eastern Financial Services, Inc., 74 B.R. 323 (Bankr. E.D. Pa. 1987) 32
Kidd v. Delta Funding Corp., 2000 N.Y.S. Misc. LEXIS 29 (Sup. Ct. Feb. 22, 2000) *aff'd* 751 N.Y.S. 2d 267 (App. Div. 2002) 32
Kleidon v. Rizza Chevrolet, Inc., 527 N.E.2d 374 (Ill. App. 3d 1988) 31
Knapp v. AmeriCredit Financial Services, Inc., 2003 WL 359 310 (W.D. W. Va. 2/18/03) 38
Kocsis v. Pierce, 480 N.W.2d 598 (Mich. App. 1991) 22
Kopley v. Rowna Enterprises, Inc., 423 F.Supp. 979 (S.D. Ohio 1976) 19
Lozada v. Dale Baker Oldsmobile, 197 F.R.D. 321 (W.D. Mich. 2000) 31
Mapp v. Toyoto World, Inc., 344 S.E.2d 297 (N.C. App. 1986) 35
McNamara v. Nomeco Bldg. Specialties, Inc., 26 F.Supp.2d 1168 (D. Minn. 1998) 30
Meyer v Dygert, 156 F. Supp. 2d 1081, 1086 (D. Minn. 2001) 29
Murphy v. Empire of America, FSA., 746 F.2d 931 (2nd Cir. 1984) 19
N.C. Freed Co., Inc. v. Governors of Federal Reserve System, 473 F.2d 1210, 1214 (2nd Cir. 1973), *cert. denied* 414 U.S. 827 (1973) 24
Nelson v. Associates Financial Services Co., 659 N.W.2d 635 (Mich. App. 2003) 32
P.Lorillard Co v FTC, 186 F.2d 52, 58 (4th Cir. 1950) 30
Packard v. KC One, Inc., 727 S.W.2d 435 (Mo. App. 1987) 30
People v. Conway, 42 Cal. App. 3d 875, 117 Cal.Rptr. 251 (1974) 37
Pescia v. Auburn Ford-Lincoln Mercury, 68 F.Supp. 2d 1269 (M.D. Ala. 1999) 36
Rayburn v. Car Credit Center Corp, 2000 U.S. Dist. LEXIS 14944 (No. Dist. Ill. 10/6/2000) . 36
Rivero v. J.P. Automobiles, Inc., 96-01010 CCH Rev. 52, 063 (Dist. Hawaii, 8/5/97) 19
Roche v. Fireside Chrysler-Plymouth, 600 N.E.2d 121 (Ill. App. 1992) 38
Rodash v. A.I.B. Mortgage Co., 16 F.3d 1142 (11th Cir. 1994) 24
Rowland v. Magna Milliken Bank, 812 F.Supp. 875 (C.D. Ill. 1992) 20
Smith v. Fidelity Consumer Discount Co., 898 F.2d 896, 898 (3rd Cir. 1988) 24
Tashof v. FTC, 437 F.2d 707 (D.C. Cir. 1970) 37
Taylor v. Bob O'Connor Ford, Inc., 1998 U.S. Dist. LEXIS 5095 (N.D. Ill. April 10, 1998) 31
Terry v. Whitlock, 102 F.Supp.2d 661 (W.D. Va. 2000) 15
Thomka v. A.Z. Chevrolet, Inc., 619 F.2d 247, 248 (3rd Cir. 1980) 24
Tinsman v. Moline Beneficial Finance Co., 531 F.2d 815 (7th Cir. 1976) 27
Wilder v. Squires, 315 S.E.2d 63 (N.C. App. 1984) 36
Williams v. Thomas Pontiac-GMC-Nissan-Hyundai, 1999 U.S. Dist. LEXIS 15045 (N. Dist. Ill. 9/22/99) 38

Minnesota Statutes

Minn. Stat. §168.66 *et seq.* 25
Minn. Stat. §168.66, Subd. 9 27
Minn. Stat. §168.71 ..... 7, 8, 26
Minn. Stat. §168.71 *et seq.* 9, 14, 22
Minn. Stat. §168.71(a)(1) 26
Minn. Stat. §168.71(b) 25
Minn. Stat. §168.71(b)(1) 26
Minn. Stat. §168.71(b)(1) and (4) 37
Minn. Stat. §168.71(b)(2) 26
Minn. Stat. §168.71(b)(5) and (7) 27

Minn. Stat. §168.71(b)(6) 26
Minn. Stat. §168.71(b)(7) 26
Minn. Stat. §168.78 20
Minn. Stat. §325 F.69 28
Minn. Stat. §325D.44 ..... passim
Minn. Stat. §325D.44 *et seq.* 28
Minn. Stat. §325D.47 29
Minn. Stat. §325F.68, Subd. 2 29
Minn. Stat. §325F.69 ..... 7, 8, 14, 29

Other Authorities

15 USC §1601 *et seq* 9, 14
15 USC §1601(1) 18
15 USC §1601(a) 23
15 USC §1602(f)(2) 21
15 USC §1638 ..... 7, 8
15 USC §1638(b)(1) 17
Federal Reserve Board Regulation Z, 12 CFR §226.01, *et seq* 17
Reg. Z §226.17(b) 17
Reg. Z §226.2(a)(13) 17
Reg. Z §226.2(a)(17)(B) 21
Reg. Z Official Staff Commentary §226.2(a)(17)-1 21
Reg. Z Official Staff Commentary §226.2(a)(17)-2 21
Reg. Z Official Staff Commentary, §226.2(a)(13)-1 18
Reg. Z Official Staff Commentary, §226.2(a)(13)-2 18

STATEMENT OF ISSUES

1. Where the parties, one of whom is an automobile dealer, execute a document which recounts an interest rate, a sales price, a cash downpayment, a "balance to finance", and states that it is a binding contract, may such a document constitute a binding contract to buy and sell on anything other than credit?

The Trial Court implicitly ruled in the affirmative.

2. If the answer to the preceding question is "No," must the seller provide the buyer with the disclosures required by the Federal Truth-in-Lending Act, 15 USC §1638 prior to the execution of said document?

The Trial Court implicitly ruled in the negative.

3. If the answer to 1, above, is "No," must the seller obtain the buyer's signature on a document containing the disclosures required by Minn. Stat. §168.71?

The Trial Court implicitly ruled in the negative.

4. If the answer to 1, above, is "No," is it a deceptive trade practice within the meaning of Minn. Stat. §325D.44 and Minn. Stat. §325F.69 to fail to provide the disclosures required by 15 USC §1638 and Minn. Stat. §168.71 prior to execution of the contract?

The Trial Court implicitly ruled in the negative.

5. If the parties execute a credit sale contract whose enforceability is orally agreed by them to be subject to the approval of the buyer's credit by a third party, is it a deceptive trade practice to prominently disclose on the contract that it is a "binding contract...fully enforceable" and to retain the buyer's downpayment where the buyer rescinds the

contract prior to receiving the disclosures described in 2 and 3 above?

The Trial Court implicitly ruled in the negative.

6. Is it a deceptive trade practice within the meaning of Minn. Stat. §325D.44 and Minn. Stat. §325F.69 for a retail seller to:

a. induce a buyer to sign a contract providing for the credit sale of an automobile, specifying an interest rate of 2.9% and a balance to finance of $18,207.85, and

b. require the buyer to make a $1,200.00 downpayment, and

c. orally agree that such will only be binding if accepted for assignment by a third party, and

d. submit an application to that third party but, without informing the buyer, increase the balance to finance to $20,576.00, and, thereafter

e. refuse to refund the buyer's downpayment when the buyer seeks to rescind the transaction prior to executing a motor vehicle installment sale contract pursuant to Minn. Stat. §168.71 and receiving disclosures required by 15 USC §1638?

The Trial Court implicitly ruled in the negative.

STATEMENT OF THE CASE

This is an appeal of two separate decisions of the trial court denying Appellant's motions for partial summary judgment and granting Respondent's motions for partial summary judgment.

The first motion concerned Appellant's claims under the federal Truth-in-Lending Act, 15 USC §1601 *et seq.* ("TILA") and the state Motor Vehicle Retail Installment Sales Act, Minn. Stat. §168.71 *et seq.* ("MVRISA") and was determined by the court's order dated May 22, 2000. The second motion concerned Appellant's claims under Minnesota Consumer Protection Statutes and was determined by the court's order dated January 12, 2005. Judgment was entered in this case on January 14, 2005 and Appellant served her Notice of Appeal on March 14, 2004.

STATEMENT OF FACTS

On or about May 30, 1998, in response to a television advertisement offering Nissan automobiles for sale at 2.9% APR financing, Appellant Paulette Liabo ("Liabo") visited the dealership owned by Respondent Wayzata ("Wayzata"). She met with a sales person named Jamie McGregor, who was employed by Wayzata and was acting within the course and scope of that employment. *See* Order and Memorandum dated May 22, 2000, App. p. 3. After discussing financing with McGregor, Liabo offered to purchase a 1998 Nissan Ultima GXE, contingent upon her credit being approved for the 2.9% financing. *Id.* At that point, Liabo paid Wayzata a deposit of $1,200.00 and executed a Delivery Sheet, a copy of which appears at App. p. 19. *See also* Order and Memorandum dated May 22, 2000, App. p.4. The Delivery Sheet provided for a "price" of $19,158.00

a "subtotal" of $17,990.00 (presumably although by no means certainly the balance after accounting for an unspecified trade-in). After adding in taxes and license fees, the "Sub." price of the vehicle would be $19,407.85 which, after deducting the deposit of $1,200.00, left a "balance to finance" of $18,207.85. Delivery Sheet, Affidavit of Daniel Sinner dated August 3, 1999, App. p. 19. It was understood between the parties that if Liabo was not approved for credit under the 2.9% interest financing program upon terms that were otherwise material to the Delivery Sheet, her deposit would be refunded in full. Order and Memorandum dated May 22, 2000, App. pp. 4-5. The parties intended to enter into a contract to purchase the vehicle, provided that Wayzata could find a financial institution that was willing to approve her credit and purchase the assignment of a contract embodying the above terms. *Id.*, App. p. 4. The Delivery Sheet was executed on May 30, 1999. *See* App. p. 19.

During that same visit, McGregor assisted Liabo in completing the top portion only of a credit application which was subsequently given to Jill White Bryant, the dealership's business manager. A copy of that application appears at App. p. 16. Nothing in the top portion of the application mentions the sale price of the vehicle. After Liabo left the dealership, Bryant, without meeting with or speaking to Liabo, completed the bottom portion of the credit application which, unlike the Delivery Sheet, specified a sales price of $20,576.00, and submitted the application to Nissan Motors Acceptance Corporation ("NMAC"). Aff. of D. Sinner dated April 20, 2000 ¶¶ 15, 17, App. pp. 112-114; Aff. of J. Bryant App. p. 22.

On June 3, 1998, Wayzata informed Liabo that her financing application had not

been approved. Order and Memorandum dated May 22, 2000, App. pp. 4-5. After being informed of the denial of her financing application, although she submitted additional paperwork to Wayzata concerning her creditworthiness, she test drove other cars at Wayzata Nissan (Deposition of Paulette Liabo, 91:16-17, App. p.46) at the suggestion of and with the assistance of Jamie McGregor. *Id.*, 93:11-15, App. p.47. Shortly after the credit denial, McGregor had contacted her and told her that some "newer" vehicles had recently arrived, that she might qualify for financing on those vehicles, and that she might be interested in test driving them. *Id.*, 97:13-19, App. p. 48. Liabo then visited the dealership and test drove the "newer" vehicles. *Id.*, 97:19-21, *Id.* She decided she preferred one of the "newer" vehicles.[1] *Id.*, 92:3-9; 98:21-99:8; 99:6-7, App. pp. 46 and 48. She filled out a new Delivery Sheet for that car. *Id.*, 98:21-23, App. p.48. She also testified that Jamie McGregor assured her that her $1,200.00 deposit could be used with other cars. *Id.*, 90:13-19, App. p.46. Liabo testified, ". . . [M]y understanding was I was denied on the initial delivery sheet so we had to go through the whole process again." *Id.*, 99:11-15, App. p.48.

While in the process of completing the paperwork, she was informed (for the first time) that the status of the rejection of her original credit application had changed, Wayzata had now secured financing at 2.9%, and that she was required to go through

[1] The district court stated in two memoranda, "NMAC approved a loan for Liabo on the Altima at a Tier 4 level, which did not qualify her for the special 2.9% APR. Bryant subsequently informed Liabo . . . . By the time Wayzata Nissan was able to secure the special 2.9% APR for her, Liabo had changed her mind and decided that she wanted to purchase an Altima GLE instead of the GXE model." Order and Memorandum dated May 22, 2000, App. p. 4; Order and Memorandum dated Jan. 12, 2005, App. p. 63.

with the purchase of the first automobile. *Id.*, 97:22 – 98:23, App. p.48. By this time, Liabo was no longer interested in that vehicle and no longer wished to accept the financing terms offered. Liabo refused to purchase the vehicle. Order and Memorandum dated May 22, 2000, App. p. 5. Wayzata refused to refund Liabo's $1,200.00 deposit. *Id.*, App. p. 6.

Without informing Liabo, Wayzata apparently had resumed attempting to arrange credit on the GXE and subsequently arranged 2.9% financing; however, it was conditioned on a cash sales price of $20,576.00. Affidavit of J. Bryant, App. p. 22. The evidence indicates that this figure was added to Liabo's credit application, after Liabo had left the premises and without consulting with her.

ARGUMENT

I. STANDARD OF REVIEW

A summary judgment proceeding determines whether or not relevant issues of fact exist but does not resolve disputed issues once identified. *Albright v. Henry,* 174 N.W.2d 106 (Minn. 1970). Summary judgment may be granted only where the undisputed material facts compel only one conclusion. *Illinois Farmers Ins. Co. v. Tapemark Co.,* 273 N.W.2d 630 (Minn. 1978). A genuine issue may exist even if it appears unlikely the opposing party will prevail at trial. *City of Coon Rapids v. Suburban Engineering, Inc.,* 167 N.W.2d 493 (Minn. 1969). Any doubt regarding the existence of an issue of material fact is to be resolved in favor of its existence. *Rathbun v. W.T. Grant Co.,* 219 N.W.2d 641 (Minn. 1974).

On appeal from summary judgment, it is the function of the appellate court to

determine whether genuine issues of material fact exist and whether the trial court properly applied the law. *Betlach v. Wayzata Condominium,* 281 N.W.2d 328 (Minn. 1979); *Grandnorthern, Inc. v. West Mall Partnership,* 359 N.W.2d 41, 43-44 (Minn. App. 1984); *Funchess v. Cecil Newman Corp.,* 632 N.W.2d 666 (Minn. 2001). Review by the Court of Appeals is de novo. *Tollefson Development, Inc , v. City of Elk River,* 665 N.W.2d 554 (Minn. App. 2003). The appellate court assumes the facts alleged by the party opposing summary judgment are true. *Edina Educ. Ass'n v. Board of Educ. Of Independent School Dist. No. 273,* 562 N.W.2d 306 (Minn. App. 1997).

II. INTRODUCTION

Wayzata is on the horns of a dilemma. Either the Delivery Sheet executed by Liabo on May 30, 1999 was, as it claimed to be, a "binding contract" or it was not. If the former, then by its terms, it could only have bound Liabo to purchase on credit, thereby obligating Wayzata to make those disclosures required by the federal Truth-in-Lending Act, 15 USC §1601 *et seq.* ("TILA") and the state Motor Vehicle Retail Installment Sales Act, Minn. Stat. §168.71 *et seq.* ("MVRISA"). The trial court misapplied the law when it concluded that Liabo was obligated to purchase the subject vehicle for cash. If, on the other hand, the Delivery Sheet was not a binding contract, then it was a deceptive trade practice within the meaning of Minn. Stat. §325D.44 and Minn. Stat. §325F.69 for Wayzata to represent it to be a binding contract and refuse to refund Liabo's down payment upon demand.

A matter the trial court failed to directly address was the effect of Wayzata's application for financing which, unbeknown to Liabo, involved a cash price of

$20,576.00, not the $19,407.00 quoted in the Delivery Sheet. It is a deceptive trade practice to represent Appellant's credit application had been approved without at the same time, as the evidence suggests occurred, at the same time disclosing the approval was at a significantly increased cash price.

III. TO THE EXTENT A BINDING CONTRACT EXISTED IT COULD ONLY HAVE BOUND APPELLANT TO PURCHASE ON CREDIT.

Assuming for purposes of argument that a binding contract existed, the uncontroverted testimony before the trial court was that the parties intended the Delivery Sheet to be binding only if Wayzata could find a financial institution willing to approve her credit and accept an assignment of the contract on the stated credit terms. The Delivery Sheet was subject to rescission if no such approval was forthcoming. Order and Memorandum dated May 22, 2000, App. pp. 4-5. The Delivery Sheet itself stated that after a down payment of $1,200.00, there remained a Balance to Finance" of $18,207.88, that the interest rate on such financing would be "2.9%," and that Liabo was obligated to "PERFORM ACCORDING TO TERMS." While the precise nature of all the "terms" may not be specified in the Delivery Sheet—specifically the dollar amount of the finance charge, and number, due dates and amounts of payments scheduled to repay the balance—what is clear is that after a down payment, the balance of the purchase price was to be financed at 2.9%. Because the Delivery Sheet contains terms clearly specifying the balance of the cash price was to be financed at 2.9%, it could only have been effective, if at all, to create a "credit" obligation. *Terry v. Whitlock,* 102 F.Supp.2d 661 (W.D. Va. 2000) (signed buyer's order recounting credit terms is a contract to buy on

credit); *Graves v. Tru-Link Fence Co.*, 905 F.Supp. 515 (N.D. Ill. 1995) (work order which stated price and credit terms, even if conditional on subsequent credit approval, is a contract to buy on credit).

Despite the uncontradicted evidence to the contrary, the trial court inexplicably concluded that the Delivery Sheet bound Liabo to purchase for cash. Order and Memorandum dated May 22, 2000, App. pp. 12-13. In a subsequent ruling, the trial court seems to have changed its position somewhat and concluded that the contract became binding on June 8, 1998 when NMAC approved financing at 2.9%. Order and Memorandum dated January 12, 2005, App. pp. 61 and 64.

Whether the contract became binding on May 30, 1998 or on June 8, 1998 when her credit was finally approved by NMAC, Liabo could only have been obligated to purchase on credit. The trial court apparently mistakenly concluded that, because she refused to go through with the purchase, Liabo's obligation was transformed into an obligation to purchase for cash. This could not be so. Certainly, assuming specific performance was even a possibility, Wayzata could not have forced Liabo to do anything but purchase the vehicle on installments. Had she been sued for damages for breach of contract after her allegedly wrongful repudiation (which suit has not occurred), she might conceivably have been found liable for the current value of the total of payments.[2] However, damages for breach should not be equated with the contractual obligation itself. At her sole option Liabo could have, had she so chosen, purchased the vehicle for cash,

[2] Assuming for purposes of argument Wayzata had no duty to mitigate, did not mitigate, and the deposit was not deemed part of a liquidated damage clause.

but she was only obligated to purchase on credit.

IV. RESPONDENT VIOLATED THE TRUTH IN LENDING ACT (TILA) BY NOT PROVIDING THE REQUIRED DISCLOSURES PRIOR TO THE CUSTOMER BECOMING OBLIGATED TO ACCEPT CREDIT.

Again, assuming for purposes of argument that the Delivery Sheet became effective either on May 30, 1998 when it was signed or on June 8, 1998, when NMAC notified Wayzata that Liabo's credit was accepted, she was nonetheless only obligated to purchase on credit. Wayzata was required to make TILA disclosures prior to that point in time. It made no TILA disclosures.

TILA requires that certain disclosures be made "before the credit is extended." 15 USC §1638(b)(1). Federal Reserve Board Regulation Z, 12 CFR §226.01, *et seq.* ("Reg. Z") expands upon this by using the phrase "before consummation." Reg. Z §226.17(b). "Consummation" in turn is defined as "the time that a consumer becomes contractually obligated on a credit transaction." Reg. Z §226.2(a)(13). This timing requirement is important because the disclosures are supposed to aid the consumer in making a rational economic choice about the financial attractiveness of the transaction *prior* to entering into it and to facilitate comparison shopping.

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit...

15 USC §1601(1). *See also, Basile v. H & R Block, Inc.,* 897 F.Supp. 194 (E.D. Pa.

1995). If disclosures may be delayed until after the consumer is already obligated to accept credit, those disclosures serve little or no value.[3]

Being "contractually obligated" may be determined either on the basis of a signed contract, contractual estoppel, or any other method of contract formation recognized by state law. *Fairley v. Turan-Foley Imports, Inc.,* 65 F.3d 475 (5th Cir. 1995). For TILA purposes, consummation occurs when the consumer is "legally obligated to accept a particular credit arrangement." Reg. Z Official Staff Commentary, §226.2(a)(13)-2. Whether or not and when a consumer becomes "contractually obligated" is an issue of state law. Reg. Z Official Staff Commentary, §226.2(a)(13)-1. Courts have held that where, as in this case, the consumer executes a document committing to a credit transaction and pays a nonrefundable fee, a credit transaction has been "consummated." *Murphy v. Empire of America, FSA.,* 746 F.2d 931 (2nd Cir. 1984). Statements by a car dealer on the record to the effect that a credit sale contract was binding estopped the dealer from later denying the same. *Rivero v. J.P. Automobiles, Inc.,* 96-01010 CCH Rev. 52, 063 (Dist. Hawaii, 8/5/97). Moreover, the fact that a contract provision exists making the contract conditional on credit approval is a condition subsequent, not a condition precedent, and thus the agreement is a contractual obligation for purposes of "consummation." *Graves v. Tru-Link Fence Co., supra,*; *See also Bryson v. Bank of New York,* 584 F.Supp. 1306 (S.D.N.Y. 1984); *Terry v. Whitlock, supra, Kopley v. Rowna*

[3] In its moving papers, Wayzata attempted to make much of the fact that Liabo supposedly used the Delivery Sheet to negotiate better terms through another dealer. Aff. of D. Sinner ¶¶ 5-6, App. p. Although the evidence on this point is purely hearsay, even if so, it is precisely what the drafters of TILA hoped would happen, i.e., that consumers would use advance disclosures of costs to shop around for the best credit deal.

Enterprises, Inc., 423 F.Supp. 979 (S.D. Ohio 1976); *Rowland v. Magna Milliken Bank*, 812 F.Supp. 875 (C.D. Ill. 1992).

The Delivery Sheet executed by Liabo on May 30, 1998 states in bold print that it is "**A BINDING CONTRACT**." Wayzata in its moving papers before the trial court argued at some length that the Delivery Sheet is a binding contract, even going so far as to explain that it departed from the statutory language mandated by Minn. Stat. §168.78 to make it perfectly clear that the Delivery Sheet was, in fact, a binding contract. *See* Defendant's memorandum for Rule 56 Motion for Summary Judgment and/or Protective Order dated August 3, 1999, App. pp. 73-74. Nonetheless, Wayzata argues and the trial court apparently held, without citing any authority, that no TILA disclosures were required either on May 30, 1998 or later on June 8, 1998 because "Liabo was never extended credit." *Id.*, at App. p. 65. This argument and the trial court's conclusion fly in the face of the plain language of the Delivery Sheet as well as the purposes of TILA. Assuming the Delivery Sheet to be a binding contract, it clearly provides that Wayzata will sell the vehicle in question to Liabo for a stated price, with a stated down payment and with the unpaid balance financed at 2.9% interest. Any other conclusion requires the Court, contrary to accepted canons of contract construction, to ignore all the entries at the bottom of the Delivery Sheet. According to Wayzata, Liabo obligated herself to accept these terms and made a non-refundable down payment on May 30, 1998. Such facts demonstrate a credit contract was consummated. Depending on whether the Court determines NMAC's agreement to accept assignment of the contract on the stated terms as a condition precedent or as a condition subsequent, the date the contract became

effective was either May 30, 1998 or June 8, 1998. In either case, no TILA disclosures were made prior to either of those dates.

The fact that Wayzata did not intend to require Liabo to honor the contract embodied in the Delivery Sheet unless and until it was able to find a third party willing to accept assignment of an installment sale contract to be executed later, does not alter the situation. The Delivery Sheet, to the extent it is a contract, is a contract only between Liabo and Wayzata. To the extent it obligates Liabo to make any payments, those payments are only to Wayzata. Under such circumstances, TILA defines Wayzata as the "creditor", even if the parties contemplate a later assignment of the contract, and obligates Wayzata to make the TILA disclosures because under the terms of the Delivery Sheet, payments are made initially to Wayzata. 15 USC §1602(f)(2); Reg. Z §226.2(a)(17)(B); Reg. Z Official Staff Commentary §226.2(a)(17)-1. Reg Z takes a strict position on the "initially payable rule." Even if the obligation by its terms is simultaneously to be assigned to a different entity, the entity to whom it is initially payable is the creditor for TILA purposes and is responsible for making the disclosures. Reg. Z Official Staff Commentary §226.2(a)(17)-2.[4]

The Delivery Sheet to the extent it may be deemed to constitute a binding contract, clearly binds Wayzata to sell on credit. Also, to the extent Liabo is bound to do anything, she is only bound to purchase on credit. The contract indicates that Liabo is agreeing to purchase the automobile for a definite price, after making a specified down payment, and

commits Wayzata to finance the balance at 2.9%. Ignoring for the moment the requirements of the Motor Vehicle Retail Installment Sales Act, Minn. Stat. §168.71 *et seq.*, the fact, assuming it to be the case, that Wayzata intended a later, more formal evidence of the contract, i.e., a motor vehicle installment sale contract, to be executed does not render the contract invalid or unenforceable. *See e.g., C.E. Greer v. Kookier,* 253 N.W.2d 133, 140 (Minn. 1977). Throughout the course of its dealing with Liabo, a period of over 15 months between the date the Delivery Sheet was executed and litigation commenced, Wayzata treated the Delivery Sheet as a "binding contract." It is estopped, as a last minute strategim for avoiding TILA liability, to argue that only some of its provisions, i.e., those relating to credit, were binding. If it is a binding contract, it must be binding according to all its terms, i.e. "balance to finance" at "2.9%." Wayzata agreed to sell on credit and Liabo was bound to purchase on credit. Therefore, TILA disclosures are required.

Wayzata is expected to argue that, had Liabo not sought to repudiate the contract, it would have provided her with TILA disclosures. Such an argument misses the point. The fact is it did not provide those disclosures prior to "consummation", and no matter what Liabo did would not have provided them before she was bound to accept credit. Such conduct violates TILA. Even a mutual abandonment of the transaction and refund of the consumer's money does not relieve Wayzata's liability. *See Dryden v. Lou Budke's Arrow Finance Co.,* 630 F.2d 641, 647 (8th Cir. 1980).

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[4] Official staff commentaries, unless demonstrably irrational, should be dispositive for TILA purposes. *Ford Motor Credit Co. v. Milhollin,* 440 U.S. 555, 559-60 (1980); *Johnson v. Fleet Finance, Inc.,* 4 F.3d

Any other ruling defeats the purpose of the Act. TILA was enacted to regulate the disclosure of the terms of credit transactions and to assist unsophisticated consumers in the comparison of credit costs *prior* to becoming obligated on the contract. 15 USC §1601(a). If a creditor could postpone disclosures until after the customer was obligated to purchase, comparison shopping, if not impossible, becomes merely an exercise in futility. TILA is a remedial statute designed to protect consumers, who are not on an equal footing with creditors, either in bargaining for credit terms or in knowledge of credit provisions. *Bizier v. Globe Financial Services, Inc.,* 654 F.2d 1 (1st Cir. 1981); *Smith v. Fidelity Consumer Discount Co.,* 898 F.2d 896, 898 (3rd Cir. 1988). As such, it is to be liberally construed to ensure consumers the protections afforded by disclosures. *Ellis v. General Motors Acceptance Corp.,* 160 F.3d 703, 707 (11 Cir. 1998); *N.C. Freed Co., Inc. v. Governors of Federal Reserve System,* 473 F.2d 1210, 1214 (2nd Cir. 1973), *cert. denied* 414 U.S. 827 (1973); *Thomka v. A.Z. Chevrolet, Inc.,* 619 F.2d 247, 248 (3rd Cir. 1980); *Rodash v. A.I.B. Mortgage Co.,* 16 F.3d 1142 (11th Cir. 1994). In effect, the trial court's rulings would force customers in Liabo's position to accept credit before receiving the disclosures required by TILA, thus eliminating the very protection the Act strives to create. A creditor cannot accept the benefits of a credit contract, including receipt of a nonrefundable deposit, without the obligation of making the required TILA disclosures.

V. RESPONDENT VIOLATED THE MINNESOTA MOTOR VEHICLE RETAIL INSTALLMENT SALES ACT ("MVRISA) BY FAILING TO MAKE REQUIRED DISCLOSURES.

946, 949 (11th Cir. 1993); *Kocsis v. Pierce,* 480 N.W.2d 598 (Mich. App. 1991).

The Complaint alleges that Wayzata violated MVRISA "by failing to make the disclosures required [by Minn. Stat. §168.71(b)]." MVRISA, Minn. Stat. §168.66 *et seq.* defines a "retail installment contract" as any agreement evidencing the retail installment sale of a motor vehicle when purchased primarily for personal, family or household use. Wayzata argues the Delivery Sheet was not an installment sale. Such an argument ignores the plain language of the document. The Delivery Sheet evidences a sale in which Liabo agrees that the unpaid balance of the purchase price, i.e., $18,207.85, is to be financed at 2.9%. Of course, one cannot "finance" the unpaid balance without paying that balance in installments. It simply cannot seriously be argued the parties did not contemplate Liabo would pay the balance off in installments. In effect, Wayzata argues that it is not an installment sale contract because Wayzata did not call it an installment sale contract. Wayzata cannot alter the nature of the agreement simply by giving it another name. Assuming the Delivery Sheet to be any kind of contract, it is a retail installment contract.

MVRISA serves several important purposes. It regulates and standardizes charges and practices in connection with automobile financing and ensures a meaningful disclosure of the costs of automobile financing. *Van Asperen v. Darling Olds, Inc.*, 254 Minn. 62, 93 N.W.2d 690 (1958); *Ruona v. Freeway Dodge, Inc.*, 285 Minn. 23, 171 N.W.2d 212 (1969). MVRISA accomplishes these purposes in part by requiring that every motor vehicle retail installment contract must be in writing and must contain the following:

1. "All the agreements of the parties," Minn. Stat. §168.71(a)(1);

2. The amount of the finance charge, Minn. Stat. §168.71(b)(6);

3. The total of payments, the number of payments and the amount of each payment necessary to pay off the contract, Minn. Stat. §168.71(b)(7);

4. The cash price of the vehicle. Minn. Stat. §168.71(b)(1); and

5. The amount of any down payment, whether cash or trade-in. Minn. Stat. §168.71(b)(2).

The Delivery Sheet does not contain these disclosures.[5]

The Delivery Sheet contains significant gaps. It does not disclose the dollar amount of the finance charge, the number of payments agreed upon to pay off the debt, or the dollar amount of each payment. It does not disclose the total of payments. If read between the lines, it suggests, but does not set forth, a trade-in allowance of $1,168.00 for an unidentified vehicle. All of these are disclosures required by Minn. Stat. §168.71 to be made explicitly and in writing. Although credit was eventually approved, it was conditioned upon a cash sale price of $20,576.00 (a figure added to the credit application without the knowledge or consent of Liabo) which appears nowhere in the Delivery Sheet and greatly exceeds the $19,158.00 specified therein.

The Delivery Sheet discloses a "document fee" of $44.00. Minn. Stat. §168.66, Subd. 9 precludes the imposition of a document administration fee in excess of $25.00. It follows that the document fee of $44.00 is unlawful to the extent it exceeds $25.00 and the excess, $19.00, cannot be included in either the "principal balance" or total of

payments required not just to be disclosed, but disclosed accurately under Minn. Stat. §168.71(b)(5) and (7). To the extent it was so included, those items are disclosed incorrectly. *See, e.g.*, *Tinsman v. Moline Beneficial Finance Co.*, 531 F.2d 815 (7th Cir. 1976) (disclosing a finance charge in excess of that permitted by law is an inaccurate disclosure); *In Re Brown,* 134 B.R. 134 (Bankr. E.D.Pa. 1991) (disclosing an annual percentage rate based on an illegal excessive charge is an inaccurate disclosure); *Jump v. ACP Enterprises, Inc.*, 224 F. Supp.2d 1216 (N.D. Ind. 2002) (disclosure of a finance charge exceeding that permitted by law is an inaccurate disclosure).

VI. RESPONDENT HAS ENGAGED IN DECEPTIVE TRADE PRACTICES.

1. Overview of Minnesota's Consumer Protection Statutes.

Minn. Stat. §325D.44 *et seq.* (Uniform Deceptive Trade Practices Act) and Minn. Stat. §325 F.69 (Consumer Fraud Act) are commonly read together and broadly prohibit the use of deceptive or unlawful trade practices in connection with the sale of goods and services. Minnesota's Consumer Protection statutes are remedial in nature and must be liberally construed in favor of protecting consumers. *State by Humphrey v. Alpine Air Products, Inc.*, 490 N.W.2d 888, 892 (Minn. App. 1992), *aff'd.* 500 N.W.2d 788 (Minn. 1993). These statutes "are generally very broadly construed to enhance consumer protection." *State by Humphrey v. Phillip Morris, Inc.*, 551 N.W.2d 490, 496 (Minn. 1996).

The Uniform Deceptive Trade Practices Act, at Minn. Stat. §325D.44, prohibits a

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[5] Minn. Stat. §168.71(b) allows Wayzata to substitute TILA disclosures for MVRISA disclosures but only if those disclosures do, in fact, satisfy the requirements of TILA. Wayzata has made no disclosures under

variety of practices in connection with one's trade or business, including but not limited to, misrepresenting or engaging in conduct which causes confusion concerning the approval, characteristics or benefits of services, advertising services without the intent to sell them as advertised, or engaging in any other conduct with similarly creates a likelihood of confusion or of misunderstanding. Although the Act, itself, does not define "services", it is *in pari materia* with the Consumer Fraud Act which defines goods and services to include loans and credit. *See, e.g.* Minn. Stat. §325F.68, Subd. 2; *Meyer v. Dygert*, 156 F. Supp. 2d 1081, 1086 (D. Minn. 2001) (Notes secured by mortgages were "merchandise" within the Minnesota Consumer Fraud Act).[6]

The per se deceptive trade practices defined in Minn. Stat. §325D.44 are supplemented by the broader prohibition against the use of "any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice" set forth in Minn. Stat. §325F.69.

The reach of both §325D.44 and §325F.69 is much broader than common law fraud. *Carlock v. Pillsbury Co.,* 719 F.Supp. 791 (D. Minn. 1989); *D.A.B. v. Brown,* 570 N.W.2d 168 (Minn. App. 1997). The modern concept of deception under these statutes substantially eliminates the common law proof requirements of fraud. For example, a practice need not be intentional to be deceptive. *Carlock*, 719 F.Supp. 791; *Church of the Nativity of our Lord v. WatPro, Inc.,* 474 N.W.2d 605 (Minn. App. 1991), *aff'd.* 491 N.W.2d 1 (Minn. 1992). Under §325F.69 a seller may be held liable for a negligent

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TILA, let alone disclosures which satisfy TILA.

misrepresentation even in the absence of a specific intent to falsely mislead the consumer. *McNamara v. Nomeco Bldg. Specialties, Inc.*, 26 F.Supp.2d 1168 (D. Minn. 1998). For purposes of injunctive relief, actual confusion or misunderstanding is unnecessary if the likelihood of confusion is established. *Claybourne v. Imsland,* 414 N.W. 2d 449 (Minn. App. 1987). In addition, while common law fraud must be proven with clear, convincing evidence, the deceptive trade practice standard is merely the preponderance of the evidence. *Humphrey,* 500 N.W.2d 790-91. It is generally accepted that a deceptive trade practice includes not merely affirmative misrepresentations, but also the failure to disclose material information. *See, e.g., Packard v. KC One, Inc.,* 727 S.W.2d 435 (Mo. App. 1987); *P.Lorillard Co. v. FTC,* 186 F.2d 52, 58 (4th Cir. 1950).

2. Wayzata has engaged in the following deceptive trade practices:

- **It has misrepresented or has engaged in conduct likely to lead to confusion as to the correct amount of the balance to finance and other terms appearing on the Delivery Sheet;**
- **It has misrepresented the Delivery Sheet as a binding contract; and**
- **It has engaged in deceptive trade practices by failing to make disclosures required by MVRISA and TILA.**

Misrepresenting and/or engaging in conduct likely to confuse significant portions of the public as to the terms and requirements of a contract, as discussed above, is a deceptive trade practice. It has long been recognized that failure to provide disclosures required by TILA is a deceptive trade practice. *See e.g., Kleidon v. Rizza Chevrolet, Inc.,* 527 N.E.2d 374 (Ill. App. 3d 1988); *Beard v. Gress,* 413 N.E.2d 448 (Ill. App. 3d 1980)

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[6]Because Minnesota's Uniform Deceptive Trade Practices Act is a "uniform statute," it is appropriate to

(failure to disclose finance charge). *See also*: *Lozada v. Dale Baker Oldsmobile*, 197 F.R.D. 321 (W.D. Mich. 2000) (failure to provide TILA disclosures prior to consummation is a deceptive trade practice); *Taylor v. Bob O'Connor Ford, Inc.*, 1998 U.S. Dist. LEXIS 5095 (N.D. Ill. April 10, 1998) (same holding); *Burnett v. Ala Moanz Pawn Shop,* CCH Clearinghouse Review No. 46, 771 (D. Haw. 1991), *aff'd* 3 F.3d 1261 (9th Cir. 1993) (same holding). It has also been held a deceptive trade practice to violate state credit disclosure statutes. *Chroniak v. Golden Investment Corp.*, 983 F.2d 1140 (1st Cir. 1993); *Losada, supra.* Imposition of charges prohibited by state law is a deceptive trade practice. *Jung Kurth v. Eastern Financial Services, Inc.*, 74 B.R. 323 (Bankr. E.D. Pa. 1987); *Nelson v. Associates Financial Services Co.*, 659 N.W.2d 635 (Mich. App. 2003); *Kidd v. Delta Funding Corp.*, 2000 N.Y.S. Misc. LEXIS 29 (Sup. Ct. Feb. 22, 2000) *aff'd* 751 N.Y.S. 2d 267 (App. Div. 2002). As discussed above, Wayzata failed to make a number of disclosures required by TILA and MVRISA and falsely claimed the right to collect a "document fee" of $44.00 contrary to Minn. Stat. §168.66 Subd. 9.

For example, failing to disclose or make confusing disclosures about the cash price of a product is a deceptive trade practice. In this case, the evidence shows that Wayzata has alternatively described the cash price of the vehicle in question as $19,158.00 on the Delivery Sheet and $20,576.00 on Liabo's credit application. The trial court in the Memorandum attached to its Order dated May 22, 2000 at p. 10, after reviewing the Delivery Sheet, mistakenly concluded that "the 'balance to finance' amount of $18,207.85 on the Delivery Sheet actually represented 'the cash sale price' of

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review the case law of other states adopting it. *See* Minn. Stat. §325D.47.

the automobile." If even the learned trial court can be confused by the circumstances surrounding the transaction, how much more so the average consumer? Certainly the record on this issue at least precludes summary judgment.

The trial court concluded Liabo, upon signing the Delivery Sheet, was obligated to purchase the vehicle in question for cash. Order and Memorandum dated May 22, 2000, App. pp. 12-13. Although Liabo disputes this conclusion, such a finding mandates the conclusion Wayzata engaged in a deceptive trade practice by leading Liabo to believe she was only obligated to purchase on credit. It is deceptive to misrepresent a transaction as one involving the extension of credit if the result is actually a cash sale. *Brooks v. Creech,* 2003 W.L. 174805 (Tenn. App. Jan. 28, 2003) (deceptive to represent a quit claim deed as a deed of trust).

In the alternative, Wayzata engaged in deceptive trade practices in that it represented to Liabo that the Delivery Sheet was, in fact, a "BINDING CONTRACT." The trial court effectively recognized this representation was incorrect when it ruled that obtaining the special 2.9% annual percentage rate financing was "a condition precedent that needed to be satisfied before Liabo's agreement to purchase...became binding." Order and Memorandum dated May 22, 2000, App. p. 11. Thus, according to the trial court's logic, while the Delivery Sheet had the potential at some future date to become a binding contract, as of May 30, 1998, it was not binding. It did not become a binding contract, if at all, until June 8, 1998. To state on May 30, 1998 that the Delivery Sheet was a **"BINDING CONTRACT"** without qualification was misleading. It was misleading because it carries with it the very real possibility of leading consumers such as

Ms. Liabo into believing that, prior to fulfillment of the "condition precedent", they are in fact bound to purchase. The effect is to blur the conditional nature of the agreement.

Wayzata's testimony on the subject is ambiguous. Wayzata submitted as Exhibit F to the Affidavit of D. Sinner dated April 20, 2000, App. p. 119, an unsigned purchase agreement, dated May 30, 1998 which, according to Wayzata, would have been prepared and signed at some future time. Defendant's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, p. 13, App. p. 92. Tellingly, Exhibit F contains the following entry: "If DEALER is arranging credit for you this CONTRACT is not valid until a credit disclosure is made as described in Regulation Z and you have accepted the credit extended." Wayzata then goes on to say, sometime after execution of the purchase agreement it would have created and finalized an installment sales contract containing TILA disclosures. Def. Mem., *supra* at 13, App. p. 92; Sinner Aff. ¶17, App. p. 113. On the one hand, Wayzata asserts the Delivery Sheet is a binding contract while on the other hand testifying that, at some later time, it intended to request Liabo to execute a purchase agreement stating that her agreement to purchase was not "valid" until she received TILA disclosures. When, before receiving TILA disclosures, Liabo attempted to rescind, Wayzata changed tack again and decided the Delivery Sheet was a "valid" contract after all.

Wayzata has used the ambiguity surrounding the Delivery Sheet to its own unfair advantage. This unfairness is illustrated by the fact that when the 2.9% financing initially fell through and Liabo demonstrated to Wayzata that she no longer wished to purchase the vehicle by responding to McGregor's invitation to enter into negotiations to purchase

other vehicles, Wayzata nonetheless behaved as if it had never intended to be bound by what the trial court described as a condition precedent. Instead, it arrogated to itself the power to secretly hold the condition open at its own pleasure and arbitrarily resubmit the application for credit on behalf of Liabo for the same vehicle while at the same time dangling other vehicles in front of her. Of course these positions are inconsistent. Either Liabo was free to enter into negotiations to purchase other vehicles as suggested by McGregor or she was bound to purchase the first vehicle on credit, but not both. Apparently, even Wayzata's own employees were confused as to whether the Delivery Sheet was binding. Misrepresenting or engaging in conduct which causes confusion as to the enforceability of a contract or the customer's ability to repudiate a contract is a deceptive trade practice. *Mapp v. Toyoto World, Inc.*, 344 S.E.2d 297 (N.C. App. 1986); *Daenzer v. Wayland Ford, Inc.*, 2002 WL 1050209 (E.D. Mich. May 7, 2002); *Pescia v. Auburn Ford-Lincoln Mercury,* 68 F.Supp. 2d 1269 (M.D. Ala. 1999); *Rayburn v. Car Credit Center Corp.*, 2000 U.S. Dist. LEXIS 14944 (No. Dist. Ill. 10/6/2000). It is deceptive to misrepresent that a contract is binding when it is not. *George Pharis Chevrolet v. Polk*, 661 S.W.2d 314 (Tex. App. 1983); *Wilder v. Squires*, 315 S.E.2d 63 (N.C. App. 1984).

At the same time Liabo executed the Delivery Sheet, Wayzata inserted a cash price on her credit application which exceeded that disclosed in the Delivery Sheet without any discussion with Liabo. As indicated by the testimony of Wayzata's finance manager, when financing was eventually approved, it was at a cash price of $20,576.00 as opposed to $19,158.00 as specified in the Delivery Sheet. Wayzata then informed Ms.

Liabo, without disclosing the crucial fact that the cash price had been increased by over $1,000, that her credit had been approved and she was now bound to purchase the vehicle. After the fact, Wayzata attempts to concoct a theory that counts a sales tax as part of the "cash price" of the vehicle, but MVRISA prohibits burying the sales tax in the cash price. *See* Minn. Stat. §168.71(b)(1) and (4). They are treated as separate charges. After-the-fact, self-serving testimony about what Wayzata might have done in the future cannot support summary judgment.

Secretly increasing the cash price of a product being sold on credit is deceptive. *April v. Union Mortgage Co., 709 F.Supp. 809 (N.D. Ill. 1989). In Re Stewart,* 93 B.R. 878 (Bankr.E.D. Pa. 1988). *People v. Conway,* 42 Cal. App. 3d 875, 117 Cal.Rptr. 251 (1974). Inadequate disclosure of the cash price, regardless of motivation, is a deceptive trade practice. *Tashof v. FTC,* 437 F.2d 707 (D.C. Cir. 1970).

As discussed above, because Liabo's financing was approved only at a cash price of $20,576.00, a figure nowhere mentioned in the Delivery Sheet, it never became a binding contract because one of the key terms, the cash price, was never approved. Respondent's representation that Liabo's credit had been approved was thus false in at least one very material aspect. That, combined with Respondent's refusal to refund her deposit, is also a deceptive trade practice.

Altering the terms of a credit application constitutes consumer fraud. *Knapp v. AmeriCredit Financial Services, Inc.,* 2003 WL 359 310 (W.D. W. Va. 2/18/03). In the present case, Wayzata, without consulting with Liabo, increased the cash price on her credit application by nearly $1,000. The evidence at least calls into question whether

Wayzata was even willing to sell to Liabo at the cash price set forth in the Delivery Sheet. Misrepresenting the dealer's willingness to sell at the terms specified constitutes consumer fraud. *Williams v. Thomas Pontiac-GMC-Nissan-Hyundai,* 1999 U.S. Dist. LEXIS 15045 (N. Dist. Ill. 9/22/99). *Roche v. Fireside Chrysler-Plymouth,* 600 N.E.2d 121 (Ill. App. 1992). The key facts here are not in dispute. It is not disputed that Wayzata promised a refund of Liabo's deposit in the event her application was denied, and that Liabo relied on that promise when she paid her deposit. It is not disputed that after informing Liabo her credit application had been denied, Wayzata invited Liabo to begin negotiating for the purchase of other vehicles is a manner which at least creates the impression the Delivery Sheet is no longer binding or that Liabo entered into such negotiations. It is not disputed that before providing TILA and MVRISA disclosures, Wayzata obtained approval of credit for Liabo which was conditioned on a higher purchase price than stated in the Delivery Sheet and that, despite this, Wayzata attempted to coerce Liabo to go through with the purchase by refusing to refund her deposit. It is not disputed that Wayzata attempted to collect a greater document preparation fee than allowed by law. These facts either establish consumer fraud as a matter of law or, at the least, raise sufficient issues of fact to preclude summary judgment on behalf of Wayzata.

CONCLUSION

If Liabo was bound by the Delivery Sheet she was bound only to perform "According to Terms." Delivery Sheet, App. p.19. Those "terms" included financing the balance at 2.9%. Because she could only have been bound to perform "According to Terms," either the execution of the Delivery Sheet constituted the consummation of a

credit sale for which Wayzata was obligated to make TILA and MVRISA disclosures or the later approval of her credit on Jun 8, 1998 constituted the date of consummation requiring such disclosures. Either way, the disclosures were not made.

If Liabo was not bound by the terms of the Delivery Sheet, then no contract existed and she was entitled to the refund of her $1200.00 deposit. It was a deceptive trade practice for Wayzata to falsely represent it was entitled to retain her deposit.

Finally, Wayzata claimed the right to assess a "document fee" in amount prohibited by state law. This too is a deceptive trade practice.

For all the reasons set forth above the trial court's award of Summary Judgment was reversible error.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).