

APPELLATE COURT CASE NO.: A05-0497

STATE OF MINNESOTA
COURT OF APPEALS

PAULETTE B. LIABO,

Appellant,

v.

WAYZATA NISSAN, LLC,

Respondent.

REPLY BRIEF OF APPELLANT PAULETTE B. LIABO

ALLEN H. GIBAS, P.A.
Allen H. Gibas (34472)
1422 West Lake Street, Suite 320
Minneapolis, MN 55408
(612) 821-0528

JOHNSON, PROVO-PETERSON, L.L.P.
Gregory J. Johnson (202678)
Klay C. Ahrens (236913)
332 Minnesota Street, Suite West 972
St. Paul, MN 55101
(651) 227-2534

Attorneys for Respondent

MANSFIELD, TANICK & COHEN, P.A.
Richard J. Fuller (32669)
1700 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, Minnesota 55402-4511
(612) 339-4295

Attorneys for Appellant

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INTRODUCTION

When reviewing an appeal from summary judgment, an appellate court must determine whether there are any material issues of fact or whether the district court erred in its application of the law. *Offerdahl v. University of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). The court of appeals views the evidence in the light most favorable to the nonmoving party. *Abdallah, Inc. v. Martin*, 242 Minn. 416, 424, 65 N.W.2d 641, 646 (1954). 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, 634 (Minn. 1978). The appellate court presumes 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, 309 (Minn. App. 1997).

In this case, Defendant-Respondent Wayzata Nissan, LLC's ("Wayzata Nissan") argument hinges on a question of contract construction, namely, whether the Delivery Sheet executed by the parties constitute a binding contract, and, if so, did Paulette B. Liabo ("Liabo") obligate herself to do anything other than purchase the subject vehicle on credit. If, as Liabo argues, the contract is clear in obligating her to purchase the subject vehicle only on credit, then Wayzata Nissan was required to provide disclosures complying with the Federal Truth-in-Lending Act, 15 USC § 1601 *et. seq.* ("TILA") and disclosures pursuant to Minn. Stat. § 168.71 (2003), and the trial court's grant of summary judgment was improper. If, after keeping in mind that an ambiguous contract is to be interpreted against the drafter, the court concludes the contract was unclear, then the trial court must resort to extrinsic evidence to determine whether the parties intended the

Delivery Sheet to obligate Liabo to purchase for cash or on credit. If the extrinsic evidence is conflicting in any material respect, a genuine issue of material fact is raised, thus rendering summary judgment inappropriate.

Ultimately Wayzata Nissan is on the horns of a dilemma and is in danger of being gored whichever way the dilemma is resolved. Either the Delivery Sheet signed by Liabo was a binding contract or it was not. If it was a binding contract, it could only have been binding upon its own terms, which call for financing at 2.9%. Under such a binding contract, Wayzata Nissan was required by law to provide Truth-In-Lending and MVRISA disclosures prior to the consummation of the binding contract. If it is not a binding contract, then Wayzata Nissan has violated Minnesota's deceptive trade practice statutes either by representing that it was a binding contract or by otherwise engaging in conduct likely to confuse Liabo on this issue.

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING LIABO'S TRUTH-IN-LENDING CLAIMS.

Respondent paints a picture of two transactions, one in which Liabo agrees to purchase the auto and a second in which she applies for credit. In reality there was only one transaction and credit was an integral part of that transaction. Wayzata Nissan argues at length that the Delivery Sheet executed by Liabo was a "binding contract." If so, it could only be binding according to its own terms. Wayzata Nissan points out the Delivery Sheet was "contingent upon qualifying for the 2.9% APR through Nissan Motors Acceptance Corporation ("NMAC')." Res. Brf. at 7-8. In other words, Liabo

was only obligated to purchase on credit. Under no conceivable set of circumstances could Wayzata Nissan have forced Liabo to purchase the subject vehicle for cash.

The Delivery Sheet itself states that "...THIS IS A BINDING CONTRACT AND I WILL LOSE ANY DEPOSIT IF I DO NOT PERFORM ACCORDING TO ITS TERMS." The "terms" included in the Delivery Sheet specify a "price" of \$19,158.00, a subtotal of \$17,990.00, a cash down payment of \$1,200.00, a balance to finance of \$18,207.85, and an APR of 2.9%. Liabo was only obligated to perform "according to [the] terms" of the Delivery Sheet and those terms clearly specify a credit transaction. Contract terms should be given their plain and ordinary meaning. *Brookfield Trade Center v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). Wayzata Nissan, impermissibly stepping outside the four corners of the document actually signed, argues that the Delivery Sheet somehow created an obligation on Liabo's part to purchase the vehicle for cash. No such obligation is fairly imputable from the language of the contract itself.

Oddly, Wayzata Nissan then argues that because the Delivery Sheet was actually a contract to purchase the vehicle in question for cash, no TILA disclosures were due. Such a construction is belied by Wayzata Nissan's own statement of facts.

Liabo agreed to purchase the 1998 Altima GXE ... provided she qualified for the NMAC special 2.9% advertised APR ... Initially, Liabo was reluctant to sign the Delivery Sheet because it did not indicate that her agreement to purchase the Altima GXE was conditioned upon her qualifying for the special 2.9% APR ... Before signing the Delivery Sheet, Liabo wanted language added to it indicating that her agreement to purchase was contingent upon qualifying for the 2.9% APR ... Accordingly, the dealership added language, stating: "Special 2.9% O.A.C."... Both parties understood that if Liabo did not qualify for the

2.9% APR through NMAC, Liabo would not be obligated to purchase the Altima GXE ... Both parties also understood that if Liabo was approved for the 2.9% financing, Liabo would be obligated to purchase the Altima GXE.

Res. Brf. at 7-8 (citations omitted).

Given these admitted facts, it is inconceivable that Liabo could, under any circumstances, have been obligated to purchase the vehicle for cash. Rather, it is obvious that Liabo could have been obligated to purchase the vehicle on credit at the 2.9% APR stated in the Delivery Sheet. Assuming the Delivery Sheet to be a binding contract, upon qualifying for the 2.9% financing, Wayzata Nissan may have been able to require Liabo to purchase the vehicle but it could not have required her to purchase the vehicle for cash, only upon credit. Moreover, Liabo's only obligation was to "perform according to terms," i.e. finance the balance of the purchase price at 2.9% as arranged by Wayzata Nissan.

Wayzata Nissan concedes that it was obligated to make TILA disclosures "at the point in time that the consumer becomes contractually obligated on a credit transaction." Res. Brf. at 27. This misstates the rule, TILA disclosures must be made "before consummation." 12 C.F.R. § 226.17(b).¹ "Consummation" in turn is defined as the point at which the consumer becomes contractually obligated on a credit transaction. 12 C.F.R. Z § 226.2 (a)(13); *Jackson v. Grant*, 590 F.2d 118 (9th Cir. 1989). The question then is at what point in time Liabo became obligated on a credit transaction. Assuming she, in fact,

¹ This requirement is important because the disclosures are supposed to guide the consumer in making a rational economic choice about the financial attractiveness of the transaction before entering into it and to facilitate comparison shopping. Truth-In-Lending, 5th Ed. 2003, National Consumer Law Center ¶ 4.3.1.

ever became obligated to any purchase under the terms of the Delivery Sheet, the latest possible answer to that question is June 8, 1998, “when NMAC finally agreed to extend the 2.9% APR ...” Res. Brf. at 11. Yet, no TILA disclosures were ever provided to Liabo before or after that date.

Wayzata Nissan incorrectly argues that no credit contract was ever consummated. Where a buyer executes a document, such as that executed by Liabo, specifying the material financing terms and indicating it is a binding contract, a credit transaction is consummated. See e.g., *Terry v. Whitlock*, 102 F.Supp. 2d 661, 664 (W.D. Va. 2000); *Graves v. Tru-Link Fence Co.*, 905 F.Supp. 515, 519-520 (N.D. Ill. 1995) (execution of a fencing proposal stating cash price, balance to finance, and installments conditioned upon credit approval constitutes consummation); *Copely v. Rona Enterprises, Inc.*, 423 F.Supp. 979, 983 (S.D. Ohio 1976) (where purchase agreement bound buyers to purchase on credit, even though conditioned upon acceptance of borrower’s credit by a third party assignee, a credit contract is consummated upon signing).

Defendant characterizes the 2.9 % financing as a condition precedent because Liabo was, according to Defendant, “free to decline and arrange some alternative method of pay[ment].” Res. Brf. at 32-34. This is both incorrect as a matter of fact and erroneous as a matter of law. A provision to a contract is a condition precedent subject to waiver if it exists for one party’s “sole benefit” and the other party has “no interest” in the provision. *Miracle Const. Co. v. Miller*, 251 Minn. 320, 326, 87 N.W.2d 665, 670 (Minn. 1958). Here, the provision existed for the benefit of both parties: Liabo received the benefit of having payments no greater than those calculated on the Delivery Sheet

based on a 2.9% rate. At the same time, Wayzata Nissan received the benefit of consummating a sale which, in the absence of the financing, might have gone to a competitor and assuring it would not have to extend credit before locating an assignee. To understand this it is helpful to review the financing process. NMAC does not extend credit directly to automobile purchasers. Instead, it agrees to accept assignment of installment sale contracts initially payable to the dealer. The dealer, not wishing to be permanently obligated to extend credit, conditions the transaction on its being able to locate a third party, in this case NMAC, willing to purchase the assignment of a contract on the terms agreed to between the dealer and the customer. As a result, conditioning the contract on locating a willing assignee benefits the dealer as much as the customer. It would be preposterous to suggest that Wayzata Nissan has "no interest" in that provision: it is a key factor that drove the bargain. Because this provision benefits both parties, neither is "free to reject the contract."

The requirement of loan approval can be either a condition subsequent or precedent and the difference is not normally significant since failure of either renders the contract unenforceable. *451 Corporation v. Pension System for Policemen and Firemen*, 310 N.W.2d 922, 924 (Minn. 1981). However, in a case such as the one before this Court, where liability hinges on the present existence of a contract, the difference is important. "A condition subsequent is ... a condition referring to a future event, upon the happening of which the obligation becomes no longer binding on the other party..." *Black's Law Dictionary, 5th Ed.* A condition precedent is one which must be performed before the agreement becomes effective. *Id.* The courts will not presume the existence

of a condition precedent, it must be clearly set out in the contract. *Piche v. Independent School District No. 621*, 634 N.W. 2d 193, 195, 203 (Minn. App. 2001).

In the instance case Liabo executed a document which stated explicitly "this is a binding contract." She had a vested right to purchase the automobile in question at 2.9%. At no time was she divested of that right. There was a condition subsequent to Wayzata Nissan's obligation to sell Liabo the automobile on credit at a 2.9% APR, i.e., NMAC's agreement to accept on assignment, but not a condition precedent. The situation in this case differs from *Scott v. Forest Lake Chrysler-Plymouth Dodge*, 611 N.W. 2d 346 (Minn. 2000) because, in *Scott* the parties had actually executed two documents, one stating "THIS MAY BE A BINDING CONTRACT" and a Conditional Delivery Agreement, incorporated by reference, stating that if financing was not approved, the sale would be "null and void." 611 N.W.2d at 348. No such agreement was executed in this case.

The instant case is analogous to *Gaona v. Town & Country Credit*, 324 F.3d 1050, 1054 (8th Cir. 2003) which is accepted law in this circuit. There the court, applying Minnesota law, rejected the argument that a contract provision conditioning the loan on a subsequent appraisal meant no loan contract had been consummated for purposes of TILA prior to the appraisal. Plaintiffs argued that despite signing the closing documents to their mortgage, they weren't obligated (i.e. consummation for TILA purposes did not occur) until several days later because the documents recited that the loan was "conditioned on a satisfactory appraisal review." *Id.* They argued that this created a condition precedent and that the contract was not binding until the review was

completed. *Id.* The court disagreed and held that the credit transaction was consummated at signing:

We agree with the district court that a “condition precedent to the lender’s performance does not affect the [consumer’s] obligation, and indeed, such a condition precedent also does not mean that the lender is not contractually obligated.

Gaona, 324 F.3d at 1054.

It appears the 8th Circuit treated the requirement of subsequent approval as a condition precedent to the creditor’s performance, not as a condition precedent to the customer’s performance. However, whether treated as a condition precedent to the lender’s or the borrower’s performance, the rationale of the decisions is the same: it does not delay consummation of the agreement for TILA purposes. Here, the transaction depended upon satisfactory review by NMAC of Liabo’s qualification for the 2.9% rate. In *Gaona* the transaction depended upon a satisfactory appraisal. Since the facts are analogous, the rationale of the 8th Circuit is compelling, and the holding should be followed by this Court. Just as in *Gaona*, in the instant case there is no condition precedent delaying consummation of the credit transaction.

The facts on record in the instant case support the proposition that Liabo is not “free to reject” the financing terms and is committed to a credit transaction. Just as in *Gaona* the so-called Delivery Sheet signed by both parties in the instant case claims to be a binding contract, and in fact, states in bold letters: “**I UNDERSTAND THAT THIS IS A BINDING CONTRACT**” and later recounts Liabo’s obligation to perform “according to terms.” This contract includes the term “special 2.9% O.A.C.,” to which both parties,

including Liabo, are bound. If a binding contract, it can only be binding in accordance with its printed terms.

If Wayzata Nissan wished to delay consummation and TILA disclosures, it could have done what most other dealers in Minnesota do, indeed, what Wayzata Nissan claims is its customary practice when arranging credit (Aff. of D. Sinner ¶ 7, WN App. 30), provide Liabo with a "Purchase Agreement" bearing the 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.

WN App. P. 40.

Had Wayzata Nissan intended the Delivery Sheet to constitute something other than the consummation of a contract to sell on credit, thereby entitling it to delay TILA disclosures, it had a procedure in effect for accomplishing that end. Wayzata Nissan departed from its alleged customary practice and, instead of providing Liabo with a Purchase Agreement clearly stating the contract was not valid until TILA disclosures were made, it simply provided a Delivery Sheet recounting credit terms and declaring the existence of a binding contract. Its arguments are belied by what it concedes to be its customary practice. As Wayzata Nissan argues, consummation occurs when the parties "sign[] the agreement, thus becoming contractually obligated on its terms." See *Rucker v. Sheehy Alexandria, Inc.*, 244 F.Supp.2d 618, 623 (E.D. Va. 2003). Here, consummation occurred when Liabo and Wayzata Nissan signed the "Delivery Sheet."

The purposes of TILA disclosures are, in part, to provide customers with the information necessary to compare credit terms before becoming obligated on the credit

transaction and to provide disclosure of credit terms so the customer can engage in credit shopping before committing themselves financially. 15 USC § 1601(a); *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978) *cert denied* 439 U.S. 934. Delaying disclosures until after the consumer is already obligated to purchase defeats this purpose.

Confusing an option with an obligation, Wayzata Nissan argues that on June 8, 1998 Liabo could have purchased the vehicle for cash and, therefore, was not legally obligated to accept credit. Such an exception swallows the TILA disclosure rule. Of course, any customer who agrees to purchase on credit always has the option of prepaying the contract in cash and receiving a credit for unearned interest. See Minn. Stat. § 168.73 subd. 1 (2001). If prepayment occurs at closing, no interest is earned. Accepting Wayzata Nissan's argument and following it to its logical end leads to the absurd conclusion that TILA disclosures need never be given prior to the customer signing the contract and leaving the dealership after the close of business because up until then the customer could always pay off the contract and avoid a finance charge.

When Liabo signed the Delivery Sheet, Wayzata argues she was, in effect, presented with a Hobson's choice: if approved she could purchase on credit before being informed of all the credit terms, pay a cash price of \$19,158.00, or forfeit her deposit. The purpose of TILA is to provide disclosures before the consumer is forced to make this choice. In reality, Liabo's only economically realistic alternative was to accept the financing. It is clear from the history of the parties' negotiations and the document they executed that the parties intended their agreement to be effective only as a credit contract and that a cash sale was not contemplated.

In fact, Liabo was only obligated to purchase on credit and not for cash. The seller's obligation is to transfer and deliver and the buyer's is to accept and pay in accordance with the terms of the contract. Minn. Stat. § 336.2-301. In this case, the only contract is the Delivery Sheet and it can only be enforced in accordance with its terms. There is no doubt in the instant case that Wayzata Nissan could not have subjected Liabo to any form of coercion or punishment had she refused to purchase the subject vehicle for cash and insisted on using the 2.9% financing program Wayzata Nissan had arranged. Under such circumstances, it is readily apparent that Liabo had no obligation to purchase the subject vehicle for cash and that her only obligation to purchase was on credit.

II. THE TRIAL COURT ERRED IN DISMISSING LIABO'S MVRISA CLAIMS.

As Wayzata Nissan points out, the purpose of MVRISA "is to inform the installment buyer of the cost of credit extended to him." Res. Brf. at 38. "A retail installment contract 'sets forth the details of how the financing is to work – the interest rate, the finance charge, amount financed, total payment and total sales price'." Res. Brf. at 37. Wayzata Nissan argues, in effect, that because the Delivery Sheet does not set forth the entire details of the transaction as required by MVRISA, there can be no retail installment sale contract. The requirements of MVRISA, if it is to have any effect at all, cannot be circumvented so easily. Wayzata Nissan argues for a tautology: 1) MVRISA requires the parties to a retail installment sales agreement to reduce their agreement to writing; 2) the sales agreement in question is not entirely reduced to writing; therefore, 3) it cannot be a retail installment sale contract. By this logic one could always escape

liability under MVRISA simply by never reducing the contract to a complete writing. If MVRISA is to have any meaning, the Court must look behind the labels on the documents to the intent of the parties to the contract.

It is evident from the record that Wayzata Nissan intended to sell and Liabo intended to buy the vehicle on credit. Wayzata Nissan testified it intended at some future date to reduce their agreement to writing in the form of an installment sale contract incorporating all of the relevant disclosures of Minn. Stat. § 168.71. See Aff. of D. Sinner at ¶ 7; Res. Brf. at 30, 42-44. The fact that such did not occur was due, not to the fact that the parties did not have a binding agreement to enter into a credit sale, but instead because Wayzata Nissan wrongly concluded that as of the time of executing the Delivery Sheet such disclosures were unnecessary.

This case must be distinguished from *Scott v. Forest Lake Chrysler*, 611 N.W.2d 346 (Minn. 2000) where the court concluded no MVRISA violation existed because the contract in question never became effective and expressly stated that it might not become effective. *Id.* At 352. Neither circumstance exists in this case. The parties executed a document whereby Wayzata Nissan agreed to sell and Liabo agreed to purchase a motor vehicle on credit. Wayzata cannot escape the strictures of MVRISA simply through clever contract labeling and drafting. It is the substance of the agreement which controls, not what Wayzata Nissan decided to title the document. The Delivery Sheet states that Liabo will perform “according to terms,” with an APR of 2.9%, a cash price, a down payment and a “balance to finance.” Wayzata Nissan seeks to go outside the four corners of the Delivery Sheet and argue that it meant something other than what it said, i.e., that

Liabo had actually agreed to purchase the vehicle for cash. This argument fails because it is not supported by either the language of the Delivery Sheet itself or the testimony that makes up the record in this case.

The Court of Appeals views the evidence in the light most favorable to the nonmoving party. *Abdallah, Inc.* at 242 Minn. at 424, 65 N.W.2d at 646, and the evidence in the instant case demonstrates that 1) the parties intended from the very beginning of their negotiations that Liabo would only enter into the agreement if she could be assured of purchasing on credit; 2) the contract (although subsequently assigned to NMAC) would be initially payable to Wayzata Nissan; and 3) that Wayzata Nissan and/or NMAC would retain a security interest until the balance was paid off. Such an agreement, even though not yet reduced to a complete writing, fits the definition of a “retail installment contract” in Minn. Stat. § 168.66, subd. 19 (2002). As such, it must be reduced to writing, Minn. Stat. § 168.71(a)(1), and must contain the disclosures, as applicable, set out in Minn. Stat. § 168.71(b). Wayzata Nissan did not fulfill these requirements.

III. THE TRIAL COURT ERRED IN DISMISSING LIABO’S CFA AND DTPA CLAIMS.

In its Brief Wayzata Nissan attempts to argue that a misrepresentation of the legal effect of a contract is not actionable under Minnesota’s Consumer Protection Statutes. However, Wayzata Nissan does not cite any cases interpreting Minnesota’s Consumer Protection Statutes in support of this argument. Instead, Wayzata Nissan cites Minnesota cases involving common law fraud to support its position. In doing so,

Wayzata Nissan, confuses an action for common law fraud with a deceptive trade practice claim. A deceptive trade practice claim is distinct from a common law fraud claim and the tests are not the same. *Meyer v. Dygert*, 156 F. Supp. 2d 1081, 1085-1088 (D. Minn. 2001); *State by Humphrey v. Alpine Air Products, Inc.*, 490 N.W. 2d 888, 892 (Minn. App. 1992), *aff'd* 500 N.W. 2d 788.

Minnesota's deceptive trade practice statutes are remedial in nature and should be liberally construed in favor of protecting consumers:

“...[C]onsumer protection statutes are remedial in nature and are to be liberally construed in favor of protecting consumers. See *State ex rel. Spaeth v. Eddy Furniture Co.*, 386 N.W.2d at 901, 903 (N.D. 1986). Consumer protection laws were not intended to codify the common law; rather they were intended to broaden the cause of action to counteract the disproportionate bargaining power present in consumer transactions. See *Id.* See also *Jensen v. Touche Ross & Co.*, 335 N.W.2d 720, 727 (Minn. 1983) (the public policy which prompted the consumer fraud act was the protection of innocent customers); *LeSage v. Norwest Bank Calhoun-Isles, NA*, 409 N.W.2d 536, 539 (Minn. App. 1987) (the “Consumer Fraud Act is broader than common law fraud”)...”

Alpine Air Prods., Inc., 490 N.W.2d 892. Such 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). See *State v. Alpine Air Prod.*, 500 N.W.2d 788, 799 (Minn. 1993).²

² The accepted rule nationwide is that deceptive trade practice statutes are to be liberally construed to protect consumers. *Norman Gershman's Things to Wear, Inc. v. Mercedes Benz of N. Am., Inc.*, 558 A.2d 1066, 1074 (Del. Super. Ct. 1989); *People ex rel. Daley v. Datacom Sys. Corp.*, 585 N.E.2d 51, 57 (Ill. 1991); *Price v. Long Realty, Inc.*, 502 N.W.2d 337, 342 (Mich. Ct. App. 1993); *Chiropractic Clinic of Solon v. Kutsko*, 636 N.E.2d 422, 423 (Ohio Ct. App. 1994); *State ex rel. Stephan v. Bhd. Bank & Trust Co.*, 649 P.2d 419, 422 (Kan. Ct. App. 1982); *Commonwealth v. Monumental Props., Inc.*, 329 A.2d 812, 816 (Pa. 1974); *E.F. Hutton & Co., Inc. v. Youngblood*, 708 S.W.2d 865,

The test for a deceptive trade practice claim under either Minn. Stat. §§ 325D.44 or 325F.69 is whether a representation is likely to mislead the customer and the determination of deceptiveness is dependent on whether the activity or representation has the tendency to deceive consumers. See *State v. Directory Publ'g, Inc.*, No. C1-95-1470, 1996 WL 12674, at *4-5 (Minn. App. Jan. 16, 1996). That court stated:

“...The Consumer Protection Statute covers “any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice.” Minn. Stat. § 325F.69, subd. 1 (1994).

* * *

“Deceptive” means “tending to deceive.” American Heritage Dictionary 371 (4th Ed. 2000). Thus, the district court, in using a tendency to deceive standard, has merely defined the statutory term “deceptive,” which is used in the false advertising and consumer protection statutes...”

Id. at *4-5.

Statutes such as Minn. Stat. § 325F.69 were enacted to protect the sophisticated and the unsophisticated consumer alike.³

868 (Tex. Ct. App. 1986) *aff'd* 741 S.W.2d 363 (Tex. 1987). Definitions in these statutes are to be construed in light of their remedial purpose to protect the public. See *Zorba Contractors, Inc. v. Hous. Auth. of City of Newark*, 660 A.2d 550 (N.J. Super. App. Div. 1995). The rule that deceptive trade practice statutes are remedial and must be liberally construed applies to the scope sections of the statute as well as to the substantive provisions. See e.g., *Smith v. Commercial Banking Corp.*, 866 F.2d 576, 582, 583 (3rd Cir. 1989) (applying Pennsylvania law); *Nichols Motorcycle Supply, Inc. v. Dunlop Tire Corp.*, 913 F. Supp. 1088, 1139-1140 (N.D. Ill. 1995) *vacated pursuant to settlement*; *Iadanza v. Mather*, 820 F. Supp. 1371, 1376-1377 (D. Utah 1993).

³ See e.g., *Aurigemma v. Arco Petroleum Prods. Co.*, 734 F. Supp. 1025 (D. Conn. 1990) (capacity to deceive is measured by effect on least sophisticated); *Madsen v. W. Am. Mortgage Co.*, 694 P.2d 1228 (Ariz. App. 1985); *DeSantis v. Sears, Roebuck & Co.*, 148 A.D.2d 36; 543 N.Y.S.2d 228 (N.Y. App. Div. 1989) (deception is measured by its effect on the unthinking and credulous); *People ex rel. Lefkowitz v. Volkswagen of Am., Inc.*, 47 A.D.2d 868, 366 N.Y.S.2d 157 (N.Y. App. Div. 1975); *Vallery v. Bermuda Star Line*,

In this case, Wayzata Nissan has testified that, in its normal course of business, it would have executed a document clearly informing Liabo that she was not bound to purchase the vehicle until and unless she received TILA disclosures. It has misrepresented not only the legal effect of the Delivery Sheet but its present intention regarding the enforcement of that agreement.

Courts in other jurisdictions have adopted statutes similar to Minn. Stat. §§ 325D.44 and 325F.69 and apply the liberal rules of construction called for under Minnesota case law. See e.g., *Texas v. American Blastfax, Inc.*, 164 F.Supp.2d 892, 902 (W.D. Tex. 2001) (misrepresenting the scope of junk fax law); *Williams v. Loftice*, 576 S.W.2d 455, 456 (Tex. Civ. App. 1978) (falsely representing that seller not bound by terms of contract); *Levine v. Baldwin*, 23 Ohio Op.3d 436 (Hamilton Cty. 1981) (contract clause misrepresenting a creditor's right to accelerate upon default); *Preston v. Kelsey*, 1986 WL 5376 (Ohio Ct. App. May 9, 1986) (oral misrepresentation of applicable law and buyer's legal rights). The justification for the common law approach to barring fraud actions on misrepresentation of law is that both parties are presumed to be equally capable of knowing and interpreting the law. See e.g., *City of Aurora v. Green*, 467 N.E.2d 610, 613 (Ill. App. 2 CT. 1984). Minnesota's deceptive trade practice statutes

Inc., 141 Misc. 2d 395, 532 N.Y.S.2d 965 (N.Y. Civ. Ct. 1988); *Quinn v. Aetna Life & Cas. Co.*, 96 Misc. 2d 545, 409 N.Y.S.2d 473 (N.Y. Sup. Ct. 1978); *Geismar v. Abraham & Straus*, 109 Misc. 2d 495, 439 N.Y.S.2d 1005 (N.Y. Dist. Ct. 1981); *RRTM Rest. Corp. v. Keeping*, 766 S.W.2d 804 (Tex. App. 1988); *Chrysler-Plymouth City Inc. v. Guerrero*, 620 S.W.2d 700 (Tex. App. 1981); *Barnhouse Motors Inc. v. Godfrey*, 577 S.W.2d 378 (Tex. Civ. App. 1979); *Spradling v. Williams*, 553 S.W.2d 143 (Tex. Civ. App. 1977), *aff'd*, 566 S.W.2d 561 (Tex. 1978).

were passed in part due to the legislature's recognition that the parties to consumer transactions are not equally sophisticated. *Weigand v. Walser Automotive Groups, Inc.*, 683 N.W.2d 807, 812 (Minn. 2004).

Wayzata Nissan testified that it was Wayzata Nissan's intent, after executing the Delivery Sheet, to request Liabo to execute a Purchase Agreement stating, *inter alia*:

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.

Aff. of D. Sinner ¶ 7, WN App. pp. 30 and 40. If this testimony is accepted, given the undisputed fact that Wayzata Nissan was "arranging credit" for Liabo, then it is fair to conclude that Wayzata Nissan never having provided a "credit disclosure as described in Regulation Z," did not intend the Delivery Sheet to be a "binding contract." It was, therefore, deceptive for Wayzata to represent, contrary to what it subsequently testified was its actual intent, that the Delivery Sheet was binding and to withhold Liabo's deposit when she refused to purchase the vehicle in question.⁴

⁴ Wayzata Nissan argues vigorously that Liabo gave up the right to a refund of her \$1,200 deposit when she declined to purchase the subject vehicle under the 2.9% plan. It errs in making this argument. When Wayzata Nissan informed Liabo that her application for credit was denied, her contractual obligations under the Delivery Sheet ended. The parties then embarked upon a series of negotiations intended to form a new contract. Those negotiations stalled and a second contract was never entered. Negotiations for a contract do not constitute a contract in themselves. *451 Corporation v. Pension System for Policemen and Firemen of the City of Detroit*, 310 N.W.2d 922, 925 (Minn. 1981). Where a condition to performance of an obligation does not take place, no action for alleged breach of that contract will lie. *Id.* In the instant case, the denial of Liabo's loan application ended any obligations she may have had under the Delivery Sheet, giving her an absolute right to a refund of her \$1,200 deposit.

Wayzata Nissan's subsequent conduct also supports the conclusion that Wayzata Nissan did not intend to treat the Delivery Sheet as a binding contract. Wayzata Nissan's own salesperson concluded the contract was not binding. After Liabo was informed that her credit application with respect to the subject vehicle had been denied, Wayzata Nissan's salesperson, Jamie McGregor contacted Liabo and told her that some "newer" cars had recently arrived, that she might qualify for financing those vehicles and that she might be interested in test driving them. Paulette Liabo Deposition, 97: 13-19; WN App. p. 48. McGregor assured her that her \$1,200 deposit could be used with other cars. *Id.*, 90:13-19, App. p. 46. Liabo relied upon these representations and assurances and visited the dealership and test drove the "newer" vehicles. *Id.*, 97:13-19, App. p. 48.

In reality, it appears Wayzata Nissan had only one intent ... to close the deal. To accomplish that purpose, it was willing, when dealing with the Delivery Sheet, to refer to that document as a binding contract, but when dealing with a Purchase Agreement, to claim it was not binding unless TILA disclosures were made. When faced with the possibility of an alternative purchase, McGregor was free to ignore the Delivery Sheet. In short, Wayzata Nissan was willing to adopt whatever position would most likely ensure a sale.

CONCLUSION

The Delivery Sheet executed by the parties is the only contract document existing in this case. If Liabo was bound by anything, it was the terms of that document. The Delivery Sheet indicates a down payment, a balance to finance, and an interest rate. Nothing in the document or the testimony concerning negotiations leading up to the

execution of that document supports the conclusion that the parties contemplated anything other than a sale on credit. Indeed, Wayzata Nissan's representative, D. Sinner, testified that it was Wayzata Nissan's intent to later execute a more fully integrated installment sale contract. If the Delivery Sheet was binding, it was binding only as a sale on credit. As such, Wayzata Nissan was required to provide TILA disclosures and reduce the deal to a writing in compliance with MVRISA. It did not do so.

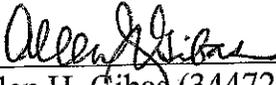
There is, on the other hand, evidence suggesting that Wayzata Nissan did not intend the Delivery Sheet to be binding. Sinner testified that it was Wayzata Nissan's practice, after executing such a document, to then execute a Purchase Agreement stating that if the dealer was arranging credit, the purchase was not valid until TILA disclosures were provided. Another employee, McGregor, informed Liabo the deal had fallen through and worked with her to negotiate the sale of other vehicles.

If the Court concludes either that Wayzata Nissan did not intend the Delivery Sheet to be binding or that it was not in fact binding, it was deceptive for Wayzata Nissan to represent it be, and attempt to enforce it as a binding contract.

In either event, the trial court erred in granting Wayzata Nissan summary judgment.

Respectfully submitted,

ALLEN H. GIBAS, P.A.

By: 
Allen H. Gibas (34472)
1422 West Lake Street, Suite 320
Minneapolis, MN 55402
(612) 821-0528

MANSFIELD TANICK & COHEN, P.A.

By: _____/s/_____
Richard J. Fuller (32669)
1700 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402-4511
(612) 339-4295

Date: June _____, 2005

ATTORNEYS FOR APPELLANT