IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 3D23-1343, 3D23-1552

L.T. Case No. 2020-020033-CA-01

FRANCOISE WYNNE,

Appellant,

vs.

DEBORAH FRIEDMANN, et al.,

Appellees,
_____/

APPEAL FROM THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL CIRCUIT, MIAMI-DADE COUNTY

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Appellee Deborah Friedmann ("Friedmann"), is an experienced jeweler who owns Appellee Sabbia, LLC ("Sabbia"), a fine jewelry store. Friedmann and Sabbia deceived Appellant Francoise Wynne ("Wynne"), into purchasing a sapphire ring for hundreds of thousands of dollars more than its fair value. To convince Wynne to buy the ring, Appellees made material and false representations to Wynne. For example, Appellees assured Wynne that she was receiving an "amazing deal," a "tremendous value for the price", and that the ring as priced was a better investment than the "stock market", an "apartment" or "real estate". Appellees made these false representations knowing that the sapphire in the ring had been heat treated, a fact they failed to disclose to Wynne as they were required to do.

Wynne brought a single-count complaint against Appellees which asserted a claim under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). The Appellees defended Wynne's lawsuit by denying that actionable misrepresentations were made and pointing to an after-the-fact "receipt" that they claimed formed a contract (which Wynne never signed and denies entering) under which

Appellees allege Wynne agreed not to return the ring. Despite material disputed facts and law requiring otherwise, the trial court entered summary judgment in favor of Appellees as to Wynne's FDUTPA claim and in favor of Sabbia as to its counterclaim for breach of contract, awarding Sabbia $90,000.00 in damages.

In doing so, the trial court ignored record evidence presented which demonstrated material facts in dispute, FTC regulations governing the sale of jewelry and incorporated into the standards governing deceptive practices in Florida (which required affirmative disclosure of the sapphire's heat treatment), and legal arguments that called for denial of the summary judgment motions.

I. STATEMENT OF THE CASE AND FACTS

A. Course and Proceedings in Lower Court

Wynne brought a single count complaint, which was later amended (the "Complaint"), for damages against Friedmann and Sabbia for violations of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), §§ 501.201-.213, Fla. Stat.. (App 18; R 2029-2036.)[1] Sabbia filed a two-count counterclaim against Wynne alleging breach of contract (Count I) and unjust enrichment (Count II) (App 147; R 117-158.) On October 14, 2022, Sabbia moved for entry of summary judgment against Wynne on its counterclaim for breach of contract. (R 1096; 1927.) On October 17, 2022, Friedmann and Sabbia moved for entry of summary judgment against Wynne on her FDUTPA claim. (R 1967.) Wynne responded in opposition to the motions for summary judgment on January 23, 2023. (App 168-194; R 2871-3273.) A hearing was held by the trial court on the summary judgment motions on February 23, 2023. (App 812.) At the conclusion of the hearing, the trial court made no findings and gave

[1] "App" denotes Appellant's Appendix. The number following "App" represents the page number in Appellant's Appendix. "R" denotes the Record number assigned by the lower court clerk.

no indication how it would rule. (App 846.) On June 26, 2023, the trial court entered summary judgment in favor of Fridmann and Sabbia as to Wynne's FDUTPA claim. (App 1; R 5190 – 5196.) On August 16, 2023, the trial court entered summary judgment in favor of Sabbia on Count I of its counterclaim and awarded damages to Sabbia in the amount of $90,000.00. (App 8; R 5197 – 5206.)

B. Course and Proceedings on Appeal

On July 24, 2023, Wynne appealed to this Court from the June 22, 2023, entry of summary judgment in favor of Friedmann and Sabbia. That appeal was assigned Case Number 3D23-1343. On August 28, 2023, Wynne appealed to this Court from the trial court's August 16, 2023, entry summary judgment in favor Sabbia on Count I of its counterclaim asserting breach of contract against Appellant. The August 28, 2023 appeal was assigned Case Number 3D23-1552.

On August 31, 2023, this Court consolidated both cases under Case Number 3D23-1343. On September 18, 2023, in Case Number 3D23-1552, this Court issued an Order to Show Cause as to why the appeal should not be dismissed as one taken from a non-final, non-

appealable order. A Response to the Order to Show Cause was filed on September 28, 2023.

The Order appealed from in Case Number 3D23-1552 entered summary judgment in favor of Sabbia as to one of its two counterclaims that were pending before the trial court. On November 2, 2023, Sabbia dismissed the sole remaining counterclaim. (R 5223-24.) On November 30, 2023, Wynne filed an Amended Notice of Appeal which referenced Sabbia's dismissal of the remaining claim pending in the trial court. On December 1, 2023, this Court issued an Order discharging the Order to Show Cause.

C. The Complaint and Record Evidence

1. The Complaint

Wynne's Complaint alleged that she was an average consumer who did not possess the specialized knowledge and skill of Friedmann and Sabbia. (App 20.) According to the Complaint, Friedmann and Sabbia repeatedly deceived and affirmatively misled Wynne about the ring and gemstone she was purchasing and violated FDUTPA through the following actions:

a. Knowingly and falsely assuring Ms. Wynne that the ring was a great value for the price of $350,700.00;

b. Knowingly and falsely assuring Ms. Wynne that the ring was a great investment when it was offered for sale at $350,700.00;

c. Knowingly and falsely assuring Ms. Wynne that the ring was a great value for the price of $260,000.00;

d. Knowingly and falsely assuring Ms. Wynne that the ring was a great investment when it was offered for sale at $260,000.00;

e. Knowingly making misrepresentations as to the retail value of the ring by means of an attached, fictitious price of $350,700.00, and deceiving Ms. Wynne as to savings afforded by the purchase of the ring at the substantially lower price of $260,000.00;

f. Selling Ms. Wynne an item that was priced unconscionably high in relation to its fair market value;

g. Failing to disclose to Ms. Wynne that the sapphire in the ring had been heat treated;

h. Misrepresenting to Ms. Wynne the quality, character, treatment, price and value of the ring.

(App 24.) In fact, the Complaint alleged that despite Sabbia's and Friedmann's assurances to the contrary, the ring that was sold to Wynne by Sabbia and Friedmann had an actual fair market value of no more than $45,000.00. (App 6; R 2034.) Evidence developed during discovery supported Wynne's allegations.

2. The Record Evidence

On January 29, 2020, Wynne purchased a sapphire ring from Friedmann and Sabbia for $260,000. (App 658.) Wynne testified in deposition that she was never in the business of purchasing jewelry and that she had never invested in jewelry. (App 209-10.) On the other hand, Friedmann was a professional jewelry dealer, who had been operating Sabbia for 20 years. (App 432-33.) Despite being unfamiliar with the jewelry business and lacking any specialized knowledge, Wynne testified that at the time she purchased the ring, she was aware that heat treatment could negatively affect the value of gemstones. (App 209-10.)

Consistent with the allegations of her Complaint, Discovery revealed that Wynne had never been told by Friedmann or Sabbia that the ring she was purchasing contained a gemstone that had been heat treated:

> Q During the first meeting with Debbie and the subsequent meeting or meetings in December, did she ever tell you that the ring was heat-treated?
>
> A No, never.
>
> Q Did anybody at Sabbia ever tell you that the ring was heat-treated?

A No, never.

***

Q When you subsequently met with Ms. Friedmann, did she ever tell you that the ring was heat-treated?

A Never mentioned.

Q Did anybody else in the store?

A No.

(App 222-23.) Wynne's testimony was uncontroverted because Friedmann could not recall ever telling Wynne that the stone was heat treated:

Q. Did you tell Miss Friedmann prior to the sale that this stone was heat treated?

A. Yes, I believe so.

Q. When you say "believe so," do you think you did, or do you recall saying it?

A. I do not recall.

Q. So you do not recall saying that to her?

MR. BERNHARD: Objection to form.

THE WITNESS: I do not recall whether I said that to her.

(App 635-36.)

Another fact alleged in the Complaint that was amply supported by record evidence is that the stone was heat treated, and that the treatment materially affected its value. For example, Friedmann testified:

> Q. That's Rule 2 so we are going backwards. All right. So was this stone heat treated?
>
> A. Yes.
>
> Q. What's the significance of that?
>
> A. About 95 percent of sapphires are heat treated. If they are not heat treated, they become incredibly valuable. I think Graff had an unheated sapphire. It was over $1 million. So it just becomes significantly more valuable.

(App 440-41.) Wynne's expert, Robert Aretz, a professional certified jewelry appraiser, echoed Friedmann's testimony on this point. (App 789.) According to Mr. Aretz, who conducted an appraisal under the Uniform Standards of Professional Appraisal Practice Standards ("USPAP"), the ring purchased by Wynne had a fair market value at the time of the purchase and at the time of the appraisal, of $45,000.00. (App. 789.)

Beyond failing to disclose to Wynne that the sapphire in the ring was heat treated, Friedmann and Sabbia also repeatedly mislead

Wynne about the quality, character, value, and other material aspects of the ring:

> Q I want to turn now and talk to you about the purchase of the ring in this case. What do you recall about the first time you saw the ring? Let me narrow the question down. Where was the ring located the first time you saw it?
>
> A At the Ritz and in the store.
>
> Q And when you say "the store," is that Sabbia?
>
> A Yes.
>
> ***
>
> Q Do you recall the asking price at the time being $350,700?
>
> A Yes.
>
> Q At the time you first saw the ring at issue in this case, did Ms. Friedmann tell you anything about the quality of the stone in the ring?
>
> MR. BERNHARD: Objection to form.
>
> A Yes.
>
> Q Okay. Did she tell you that the stone was of "exceptional quality"?
>
> A Yes.
>
> MR. BERNHARD: Form.
>
> BY MR. LOUIS:

Q Did she tell you that it was a “rare piece”?

A Yes.

Q Did she tell you that it was “one of a kind”?

MR. BERNHARD: Objection.

A Yes.

BY MR. LOUIS:

Q Did she say anything about its value as an investment?

A Yes.

Q Did she tell you that it was a “great investment”?

MR. BERNHARD: Objection.

A Yes.

BY MR. LOUIS:

Q Did she tell you anything with regards to whether -- how it compared with an investment in the stock market?

MR. BERNHARD: Objection.

A Yes.

BY MR. LOUIS:

Q What did she say?

MR. BERNHARD: Objection.

A She said it's a great investment, it's better than the stock market or real estate, and that I will have it in the family forever and could pass it on to my daughters.

BY MR. LOUIS:

Q Did she say anything about it with regard to being an investment that's better than your apartment?

MR. BERNHARD: Objection.

A Yes.

BY MR. LOUIS:

Q What did she say?

A She knew it was better than the value of an apartment, and she said this is better than an apartment. She even mentioned that she had sold two of her apartments. She said this was definitely a better investment.

Q With regards to all of the things that you just told me that Debbie Friedmann said, are you repeating to us her words, what she said?

A Yes.

Q So she told you it was "one of a kind"?

A Yes, she did.

***

BY MR. LOUIS:

Q You said she told you it was "of exceptional quality." Were those her words?

MR. BERNHARD: Objection.

A Yes.

BY MR. LOUIS:

Q That it was a “rare piece.” Those were her words?

MR. BERNHARD: Objection.

A Yes.

BY MR. LOUIS:

Q That it was a “great investment.” Were those her words?

A Yes.

Q It was “better than the stock market.” Her words?

MR. BERNHARD: Objection.

A Yes.

BY MR. LOUIS:

Q And it was a “better investment than an apartment.” Her words?

MR. BERNHARD: Objection.

A Yes.

BY MR. LOUIS:

Q During this conversation, my understanding was the price of the ring was approximately $350,000; is that correct?

A Yes.

***

Q Did Ms. Friedmann tell you that the ring had a "unique color"?

A Yes.

Q Did she tell you that with regards to the $350,700 asking price, that the ring was a "good deal"?

MR. BERNHARD: Objection.

A Yes.

MR. BERNHARD: Standing objection.

BY MR. LOUIS:

Q Did she also tell you that it was a "great value" with regard to that price?

MR. BERNHARD: Standing objection as to the communications between the two prices.

MR. LOUIS: Okay.

BY MR. LOUIS:

Q Did she also tell you that it was a "great value at that price"?

A Yes.

(App 210-20.) Mention of the apartment by Friedmann occurred because at the time Wynne was considering the purchase of the ring,

she had told Friedmann, who she had known for several years (App 200-06), that she was considering investing in an apartment. (App 216-17.)

After making material misrepresentations to Wynne, Friedman and Sabbia sought to pressure Wynne and bolster the falsehoods being conveyed by telling Wynne that "a client of the Ritz from Minnesota or -- I don't recall exactly which, wanted to buy the ring. And she said, You should make up your mind. It's a beautiful piece. Someone, yes, was going to buy the ring." (App. 220.) But this turned out to be a lie as well. Mrs. Sanders (the person identified by Friedmann as the Minnesota client who intended to purchase the ring (App 200; 699-701)) was deposed and denied any intention to purchase the ring:

> Q. Does it surprise you to hear that Ms. Friedmann has indicated that she believed that you were going to purchase this ring in December or January?
>
> A. Yes. Excuse me.
>
> Q. That would 2019 and 2020.
>
> A. Yes.
>
> Q. Can you think of any reason that you would have given her to believe that to be true?

A. None. Nope.

(App 766-67.)

After misrepresenting the quality and value of the ring (see Declaration of Robert Aretz (App 789-811)), failing to disclose the fact that it was heat treated (explained *infra* in violation of Florida law and FTC regulations), and lying to Wynne about having a competing buyer, Friedmann continued to falsely represent the nature and quality of the stone, and offered to make a "great discount" so that Wynne received a "very special deal" of $260,000.00. (App 222.)

Wynne's testimony about the "investment" and "value" falsehoods was further corroborated by Friedmann's after-the-sale text messages to Wynne, which were sent when Wynne began to express doubts about the purchase. (App 371, 374.) The evidence established that the Appellees were specific and assuring as to why the ring had such a value – that it was "one of a kind", "rare", of "exceptional quality", a better "investment" than an "apartment" or the "stock market" – all these assurances were false. (App 227-29; App 789-811.) Moreover, the Appellees failed to disclose to Wynne that the gemstone in the ring had been heat treated. The relevant FTC regulations which are incorporated into the standards governing

this case under FDUTPA make clear that the Appellees' false representation and their failure to disclose were deceptive as a matter of law.

Wynne was damaged by Friedmann and Sabbia's deceptive practices. She testified that based upon all of the Friedmann's false assurances she believed that the ring she was purchasing had an actual value on the date she purchased it of $350,700 (App 251) and that Wynne could sell it for that price if she wanted to:

> Q When you purchased this ring, based upon Debbie statements to you, is it true that you believed at the time that you were purchasing, that you were purchasing a ring that was worth at least $350,700 in value?
>
> A Yes.
>
> Q And that you could sell it for that price, if you chose to?
>
> A Yes, sir.
>
> Q And Ms. Friedmann never used the word "resale price"?
>
> A No.
>
> Q And she never discussed it being a great deal in terms of retail price?
>
> A No. No.
>
> Q She only spoke to you in terms of actual value; is that correct?

A Yes.

MR. BERNHARD: Objection.

A What it was worth. Value.

(App 254-55.) The evidence developed revealed that what Wynne had been told was false and deceptive. The ring is not worth more than $45,000. (App 789-811.)

The record evidence also established Wynne relied upon the false statements made by the Appellees (App 224; 225-28; 247.) Wynne paid $260,000 for a ring that she was told by the Appellees had a value of $350,700. She also testified that had she known she was being lied to about the quality, character, or value of the ring and gemstone, or had she known the gemstone was heat treated, she would not have made the purchase. (App 224; 247.)

D. The Affirmative Defense and Record Evidence

1. The Affirmative Defense

Sabbia and Friedmann sought to defend the FDUTPA claim under § 501.211(2), Fla. Stat. by alleging that the only claims they conveyed to Wynne were the claims of the manufacturer and the Gem Research Swisslab, without knowledge that they violated FDUTPA.

2. The Record Evidence

In support of their motion for summary judgment, Sabbia and Friedmann identified a letter purportedly written by the manufacturer of the ring that they claimed demonstrated that they were only relying upon the statements of the manufacturer in good faith. (R 2018-19.) However, the record evidence revealed that the letter Sabbia and Friedmann relied upon was not in existence until after completion of the sale. Wynne testified that she did not see a copy of a letter purportedly written by Sylva & Cie until after she filed the lawsuit (R 246-47), and Friedmann admitted that it did not exist until after the sale had been made. (App 246-47.)

Friedmann denied making the false representations that Wynne relied upon in purchasing the ring. (App 695-96; 698.) However, as discussed *supra*, record evidence established that Friedmann knew the sapphire was heat treated, that heat treatment materially affects the value of a sapphire, and that she failed to disclose the fact that the sapphire had been heat treated to Wynne.

E. The Counterclaim and Record Evidence

1. The Counterclaim

Sabbia filed a Counterclaim against Wynne alleging breach of contract. According to Sabbia's Counterclaim, Wynne entered a contract wherein she agreed not to return the ring in exchange for the discount she received. (App 147.) Sabbia identified the "contract" as the receipt it claims Wynne agreed to. (App 147 at ¶147; App 154 (Ex. B).) According to Sabbia, it was damaged by the loss of the $90,700.00 discount it gave to Wynne. (App 148.)

2. The Record Evidence

In her deposition, Wynne denied ever entering the contract alleged to exist by Sabbia:

> Q Okay. The day you were in the store making the purchase, did Debbie ever tell you that there were no refunds?
>
> MR. BERNHARD: Objection.
>
> A No, she did not.
>
> BY MR. LOUIS:
>
> Q Did anybody else in the store ever tell you that there would be no refunds?

MR. BERNHARD: Objection.

A No.

BY MR. LOUIS:

Q And we're talking about the purchase of the ring here, correct?

A Yes.

MR. LOUIS: I'm showing you --I'm going to put it up on the screen here -- what has been identified as Exhibit A-2.

(Wynne Exhibit A-2, Handwritten receipt "no refunds/final sale", was marked for Identification.)[2]

BY MR. LOUIS:

Q Do you see that?

A Yes.

Q Was this given to you from the date you purchased the ring?

A No, it wasn't.

Q Did you see her write this on the date you purchased the ring?

A No, I did not.

Q Did you ever discuss no refunds, final sale with Deborah Friedmann or anybody in the store?

A No, I have not.

[2] Exhibit A-2 is found at App 368.

Q Did you ever agree to "no refunds/final sale" with Debbie Friedmann or anybody else in the store?

A No. No.

Q Did they ever try to give you this receipt or any piece of paper on the date that you purchased the ring?

A No.

(App 232-34; App 244 (" Q Did you ever tell her or agree with her that there would no returns and no refunds? A No.").)

Exhibit A-2 from Wynne's deposition (App 368) is the receipt that Sabbia alleges constituted the contract with Wynne. It is not signed by Wynne and Wynne testified that the first time she ever saw it was when Friedmann sent a text picture of it to her after Wynne had sought to return the ring. (App 239.)

In support of its motion for summary judgment, Sabbia quoted portions of a text message exchange between Friedmann and Wynne that took place after the sale as proof of the consummation of a contract. But the full message Wynne was sent read: "let's meet and discuss in a bit. you made me write no returns yesterday! You don't need an apartment". (App 373-74.) Wynne wrote in response: "I know Debbie. I know. I went to the extreme." (Id.)

During her deposition, Wynne explained that when she wrote "I know Debbie I know" that she was responding to the statement about the apartment, not about returns. (App 238-39.) Wynne testified that she never had seen the 'no returns' receipt when the texts were exchanged and that she was responding to the text about her need for an apartment. (App 239) ("Q And at this point, had you ever been aware of the existence of this so-called receipt? A No, I wasn't. Never seen it."). This is corroborated by the text message exchange. The texts quoted above were sent on January 30, 2020, but it was not until February 3, 2020, that Friedmann texted Wynn a photo of the alleged contract/receipt. (App 370-78.)

The text exchange and testimony makes clear that it was not until days after the first mention of a receipt by Friedmann and days after the purchase was made, that Friedmann first sent to Wynne what Friedmann asserted was a "binding" contract. The record evidence established that there is a material dispute as to whether the proffered receipt was ever in existence at the time of the sale and whether Wynne ever agreed to its terms. Wynne denied both points under oath. (App 232-34; 238-39; 242-44.)

F. The Orders Entering Summary Judgment

1. The Order Entering Summary Judgment on the FDUTPA Claim and Evidence Presented to the Court

The trial court entered summary judgment in favor of Friedmann and Sabbia on June 26, 2023. The trial court based its order upon three perceived deficiencies: 1) an absence of evidence to prove that actionable false or deceptive statements were made (App 4-5); 2) an absence of evidence to prove damages (App 5); and, 3) a finding that Wynne failed to produce evidence disproving Appellees' affirmative defense under § 501.211, Fla. Stat. that they disseminated claims of the manufacturer or wholesaler of the ring in good faith. (App 6.)

a) The lower court's reasoning that the statements were not actionable

The lower court reasoned that the statements made by Friedmann and Sabbia to Wynne were not actionable because:

> The statements "good investment," "high quality," "good deal," among others, are not reflective of the characteristic of the sapphire itself. These statements do not describe the nature of the sapphire. They do not refer to the heated nature of the sapphire.

(App 4.)

After finding that the statements it cited did not relate to the characteristics of the sapphire itself, the Court went on to explain that:

> Because the Plaintiff obtained this knowledge after purchase, and because none of the statements provided described the heated nature of the sapphire at any time before the culmination of the sale, it is unlikely that a reasonable jury would conclude that Plaintiff was deceived into buying the ring at issue. (App 4.)

Further, the trial court explained:

> It takes a sophisticated or knowledgeable buyer to delve into the nature of the piece of jewelry they intend to purchase. Therefore, because the statements described by the Plaintiff do not address or concern the heated nature of the sapphire, Plaintiff failed to establish a cause of action under FDUTPA. (App 4.)

The lower court also found that Wynne had time to perform due-diligence if she wanted, and the fact that she did not runs against the sale being unfair or deceptive. (App 5.)

b) The unaddressed evidence and argument presented to the trial court

In making these findings concerning Wynne's reliance and her due diligence, the court did not address specific record evidence it was presented which established that in making the purchase Wynne

believed and relied upon Friedmann's representations about the nature, quality and value of the ring and stone, and that she relied upon Friedmann's falsehoods and deception in making the purchase of the ring. (App 225-28.) Furthermore, the Court did not address Wynne's deposition testimony, which was also specifically cited to the trial court, that if Wynne had been told that the stone was heat treated, she would not have purchased it because she understood that heat treatment decreases the value of a stone. (App 179; App 224; App 247.) The trial court also did not address Wynne's argument (further discussed *infra*) that Florida law incorporates relevant FTC regulations into the relevant standards governing FDUTPA claims, and the FTC regulations affirmatively required disclosure of the heat treatment of the stone in the ring and misrepresentations about the quality, character, price, and value of a gemstone. (App 170-74.)

Notably, the Court overlooked and did not address Wynne's testimony that before she purchased the ring, she was told by Friedmann that the stone:

- was of "exceptional quality";

- was a “rare piece”;
- was “one of a kind”;
- was a “great investment”;
- was a “better” investment “than the stock market” or real estate;
- was a “better investment” and value “than an apartment”;
- had a “unique color”; and,
- that at a price of $350,700, the ring was a “great value”.

(App 175-78.)

c) The trial court’s reasoning that Wynne could not prove damages under FDUTPA

In finding that Wynne could not prove damages under FDUTPA, the trial court explained:

> [I]t undisputed that the product delivered by SABBIA and Ms. Friedmann was the exact product under the actual contract with Plaintiff. Plaintiff contracted for and received a Ceylon sapphire ring, with a 15-carat natural blue sapphire, 18k yellow gold setting, .99 carats in 78 individual round brilliant-cut diamonds, made by contemporary jewelry artist Sylva & Cie. There is no evidence that Plaintiff received a product different from that for which she contracted. This evidence of difference between product contracted and product delivered is necessary to attempt to show actual damages under FDUTPA and Florida law.

(App 5.) The trial court also reasoned that:

> Plaintiff testified that there was nothing wrong with the jewelry art piece, that there were no external events, inclusions found in the gemstones, or other nonconformity of the product. Motion at *21 and Ex. A at Tr. 517, ln. 25–Tr. 518, ln. 11 (Plaintiff's deposition). Plaintiff testified that she changed her mind on the jewelry purely out of subjective and personal buyer's remorse, not actual damages, problems with the product, or nonconformity with the contract. Motion Ex. A at Tr. 517, ln. 25–Tr. 518, ln. 11 (Plaintiff's deposition); Ex. C at ¶ 48 and 50 (SABBIA affidavit); and Ex. A(15) (actual texts). This evidence goes against actual damages. Plaintiff cannot seek recovery for subjective feelings of remorse, consequential damages, lost profit, or speculative losses. This is a complete bar to Plaintiff's cause of action.

(App 6.)

d) The unaddressed evidence and argument presented to the trial court that deceptive and unfair practice occurred and they were actionable under FDUTPA

In ruling that Wynne could not prove damages under FDUTPA, the trial court did not address several key facts and argument presented to it:

- Friedmann and Sabbia knew, but failed to disclose to Wynne, that the sapphire had been heat treated. (App 173-74.)

- The heat treated sapphire was worth far less than a natural unheated stone. (App 173-74.)
- Friedmann and Sabbia told Wynne that the ring was actually worth more than $260,000.00. (App 177-80.)
- Friedmann and Sabbia made assertions of actual value while knowing that they obtained the ring on consignment and only agreed to pay $161,000.00 to the manufacturer. (App 185; 157; App 442.)
- The description relied upon by the court from the letter provided by the manufacturer was never provided to Wynne, and was written by the manufacturer after the sale had taken place. (App 566-67.)
- That even though she did rely upon Fridmann's and Sabbia's falsehoods, Wynne was not required to prove reliance under FDUTPA. (App. 179; 182-83.)
- That Sabbia and Friedmann violated the relevant FTC regulations. (App. 170-74; 179-80.)

e) The lower court's reasoning that Wynne failed to produce evidence disproving Appellee's affirmative defense

In finding that Wynne failed to produce evidence disproving Sabbia's and Friedmann's affirmative defense, the trial court explained:

> Sylva & Cie's representations about the jewelry art piece purchased match the representations that allegedly violate FDUTPA, supporting the defense that SABBIA and Ms. Friedmann are not subject to recovery under FDUTPA § 501.211(2) as they were disseminating claims of the manufacturer or wholesaler (Sylva & Cie) without knowledge that they violated FDUTPA. As evidence of this, Sylva & Cie wrote a letter providing representations as to the ring that match the representations alleged as improper under the Complaint. Motion Ex. A(10) (actual letter) and Exhibit C at ¶ 43 (SABBIA affidavit). Plaintiff has not provided evidence disproving these representations. This defense is a complete bar to Plaintiff's claim. § 501.211(2), Fla. Stat. (2022).

(App 6.)

f) The unaddressed evidence and argument presented to the trial court that controverted Appellees' affirmative defense

In finding that Wynne failed to produce evidence that could put Appellee's affirmative defense at issue, the lower court did not address the following record evidence and argument that it was directed to:

- That the letter upon which the court relied was written after the purchase was made by Wynne and was not even provided to her until after she filed this lawsuit. (App 188; App 246-47; App 566-67.)
- That Friedmann denies making many of the actionable representations to Wynne. (App 188; 695-99.)
- That Friedmann testified that she was aware that the gemstone in the ring she was selling was heat treated but did not disclose that fact to Wynne, a violation of relevant FTC regulations. (App. 187.)
- That Friedmann admitted that she knew that 95% of sapphires are heat treated and therefore far from being "one of a kind" or incredibly unique and valuable as was being represented to Wynne, the stone was one of many that fall into the majority (95% according to Friedmann) of sapphires. (App 187.)
- That § 501.211(2) only applies when a retailer disseminated falsehoods "in good faith" and that in the face of demonstrable falsehoods and omissions, Friedmann's and

Sabbia's purported good faith was a jury question. (App 187-88.)

2. The Order Entering Summary Judgment on the Breach of Contract Counterclaim

The trial court entered summary judgment in favor of Sabbia against Wynne, and awarded $90,000.00 in damages. To reach this finding, the trial court found that uncontested evidence established 1) there was an enforceable contract (App 10-13), 2) that it was breached (App 13-15), and, that 3) damages were incurred by Sabbia. (App 15.) The order entered by the trial court was virtually verbatim to the proposed order submitted by Sabbia on February 23, 2023 (lower court DE 133),[3] and contained a significant deviation from the record evidence also found in the proposed order.

In concluding that "[t]he Buyer also confirmed in writing that "no returns" was a material term of her contract", the trial court pointed to the text exchange discussed *supra*, where Wynne responded "I know" to a text message from Friedmann. (App 5201-02.) However, the trial court omitted from the order the full text

[3] The proposed order is not contained in the record transmitted to this Court. A motion to supplement the record is being prepared.

exchange, significantly, the line that immediately preceded Wynne's response, where Friedmann wrote "You don't need an apartment". (App 5201-02; 373.) Based upon the edited exchange the court had received from Sabbia (and which it included in its order), the trial court concluded that Wynne "thus confirmed in writing that she made "no returns" a material term of their agreement….The evidence confirms there was an enforceable contract.") (App 13.)

a) The record evidence and argument the trial court did not address

In making these findings, the court did not address the following evidence and arguments that it was specifically directed to:

- That Wynne testified under oath that she never entered into any agreement not to return the ring. (App 190-91.)
- That Wynne testified when she wrote "I know Debbie I know." that she was responding to Friedmann's text that "You don't need an apartment" and not about the returns. (App 190.)
- That Wynne testified that she had never seen the 'no returns' receipt at this point in time. (App 190; 239 ("Q And at this

point, had you ever been aware of the existence of this so-called receipt? A No, I wasn't. Never seen it.").)

- That Wynne's lawsuit was brought under FDUTPA, and the relief available does not include a return and refund – it only includes damages. (App 188.)
- That Sabbia failed to articulate how it was damaged by Wynne seeking to return the ring prior to hiring lawyers to engage with the Appellees. (App 188-89.)
- That Sabbia's confusing theories of damages also rely in part upon inadmissible expert affidavits which discuss retail value and not actual value. (App 189.)
- That the four affidavits produced by Sabbia do not comply with *Daubert* and provide no basis upon which to assess the methodology or reliability of the Appellees' proffered expert opinions – they are classic and inadmissible *ipse dixit* and are completely contradicted by Wynne's expert's opinion as to the fair market value of the ring. (App 189.)
- That the document Sabbia identifies as the contract is a handwritten document that was not signed by Wynne, and that "a contract for the sale of goods for the price of $500 or

more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his or her authorized agent or broker." (App 189.)

- That any attempt to limit one's liability for deceptive or unfair trade practices is contrary to public policy. (App 840.)

I. SUMMARY OF THE ARGUMENT

The trial court failed to consider record evidence that created genuine issues of dispute as to the material facts it concluded were uncontested. The trial court also erroneously ignored key provisions of Florida law against record evidence which required denial of the motions. Such contested issues of fact, and issues of law, went to the core of the trial court's orders and they should be reversed.

II. ARGUMENT

A. Standard of Review

"The standard of review on orders granting final summary judgment is de novo.…Summary judgment is appropriate where the movant shows that there is no genuine dispute as to any material

fact and the movant is entitled to judgment as a matter of law. Genuine disputes are those in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Ibarra v. Ross Dress for Less, Inc.*, 350 So. 465, 467 (Fla. 3d DCA 2022) (citations omitted).

"The 'new' summary judgment standard is construed in accordance with the federal summary judgment standard....Under this standard 'the burden on the moving party may be discharged by 'showing' – that is, pointing out to the [trial] court – that there is an absence of evidence to support the nonmoving party's case.'" *Smith v. Westdale Asset Mgmt., Ltd.*, 353 So. 3d 108, 110 (Fla. 1st DCA 2022) (citation omitted) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

Florida Rule of Civil Procedure 1.510 now mirrors the federal standard. "[T]hose applying new rule 1.510 must recognize the fundamental similarity between the summary judgment standard and the directed verdict standard." *In re Amendments to Florida Rule of Civil Procedure 1.510*, 317 So. 3d 72, 75 (Fla. 2021) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

Thus, when reviewing a summary judgment order, as it would in reviewing an order directing verdict, "[a]n appellate court must evaluate the evidence in the light most favorable to the non-moving party, drawing every reasonable inference flowing from the evidence in the non-moving party's favor…If there is conflicting evidence or if different reasonable inferences may be drawn from the evidence, then the issue is factual and should be submitted to the jury for resolution." *Miami-Dade Cnty. v. Eghbal*, 54 So. 3d 525, 526 (Fla. 3d DCA 2011) (citation omitted).

B. Introduction

The lower court erred in entering summary judgment in favor of Friedmann and Sabbia. Wynne's FDUTPA claim against Fridmann and Sabbia is supported by sound record evidence. In addition, there are genuine disputes of material fact which precluded entry of summary judgment on Sabbia's Counterclaim against Wynne for breach of contract.

C. Entry of Summary Judgment on Wynne's FDUTPA Claim was Improper

The trial court based its order entering summary judgment on the FDUTPA claim, on three perceived deficiencies: 1) that there was no evidence to prove that actionable false or deceptive statements were made (App 4-5); 2) that there was no evidence to prove damages (App 5); and, 3) that Wynne failed to produce evidence disproving Appellee's affirmative defense under § 501.211, Fla. Stat. that it was disseminating claims of the manufacturer or wholesaler of the ring without knowledge. (App 6.)

1. Record Evidence of Material Facts and Law Required Denial of the Motion for Summary Judgment as to the FDUTPA Claim

Wynne brought a single count complaint for damages against Friedmann and Sabbia under the Florida Deceptive and Unfair Trade Practices Act, §§ 501.201-.213, Fla. Stat. (2003). "[A] claim for damages under FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. *Kia Motors Am. Corp. v. Butler*, 985 So. 2d 1133, 1140 (Fla. 3d DCA 2008). "A deceptive practice is one that is 'likely to mislead' consumers."

Rollins, Inc. v. Butland, 951 So. 2d 860, 869 (Fla. 2d DCA 2006). "An unfair practice is one that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Rollins, Inc.*, 951 So. 2d at 869 (internal citation omitted).

"Violations under FDUTPA may be based, among other things, upon any rules promulgated pursuant to the Federal Tra[d]e Commission Act, 15 U.S.C. ss. 41 et seq. and/or the standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts. See § 501.203(3)(a), (b). Since FDUTPA is the state counterpart to the Federal Trade Commission Act, in deciding whether an act or practice may be deemed deceptive, [the Third District has instructed courts to] give due consideration and great weight to the interpretations made by the Federal Trade Commission and the federal courts." *Millennium Communs. & Fulfillment, Inc. v. Office of the AG, Dep't of Legal Affs.*, 761 So. 2d 1256, 1263 (Fla. 3d DCA 2000) (citation omitted).

The FTC has promulgated "Guides for the Jewelry, Precious Metals, and Pewter Industries", which "apply to jewelry industry products, which include, but are not limited to…Gemstones and their

laboratory-created and imitation substitutes". 16 C.F.R. §§ 23.0(a)-(c) (the "Guides"). The Guides are intended to "apply to persons, partnerships, or corporations, at every level of the trade (including but not limited to manufacturers, suppliers, and retailers) engaged in the business of offering for sale, selling, or distributing industry products" and "apply to claims and representations about industry products included in labeling, advertising, promotional materials, and all other forms of marketing, whether asserted directly or by implication, through words, symbols, emblems, logos, illustrations, depictions, product brand names, or through any other means." 16 C.F.R. §§ 23.0(a)-(c). Although § 23.0 explains that the Guides do not confer any rights, the regulations make equally clear that the FTC's Guides are intended to avoid deceptive practices by those in the jewelry business. *Id.*

FDUTPA specifically defines a "[v]iolation of this part" to be a violation of the statute and may be based upon: "(a) Any rules promulgated pursuant to the Federal Trade Commission Act, 15 U.S.C. ss. 41 et seq.; (b) The standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts; or (c) Any law, statute, rule, regulation, or ordinance

which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices." § 501.203(3), Fla. Stat. (2023).

Federal courts have relied upon the Guides in evaluating whether a seller's practices violated unfair or deceptive. *See e.g. Ferreira v. Sterling Jewelers, Inc.*, 130 F. Supp. 3d 471, 477 (D. Mass. 2015) ("It is undisputed that the treatment Ms. Ferreira's emerald received created special care requirements for the gemstone. Therefore, disclosure of the treatment was required under 16 C.F.R. § 23.22(b) in conformity with the direction of note 2 to § 23.1 and the note to § 23.22. It is also undisputed that a treatment or special care disclosure was not provided on the particular webpages that Ms. Ferreira visited, including the description and solicitation webpages, when she purchased the emerald.") (interpreting the Massachusetts version of FDUTPA).

The FTC Guides relied upon in *Ferreira* readily establish that the record evidence concerning Sabbia and Friedmann's conduct supports a finding that they violated FDUTPA:

> **It is unfair or deceptive to misrepresent** the type, kind, grade, **quality**, quantity, metallic content, size, weight, cut, color, **character**, treatment, substance, durability, serviceability, origin, price, **value**, preparation,

> production, manufacture, distribution, **or any other material aspect** of an industry product.

16 C.F.R. § 23.1 (emphasis added). With regard to Sabbia's and Friedmann's failure to disclose to Wynne that the sapphire was heat treated, the Guides also provide:

> **It is unfair or deceptive to fail to disclose that a gemstone has been treated if**:
>
> (a) the treatment is not permanent. The seller should disclose that the gemstone has been treated and that the treatment is or may not be permanent;
>
> (b) the treatment creates special care requirements for the gemstone. The seller should disclose that the gemstone has been treated and has special care requirements. It is also recommended that the seller disclose the special care requirements to the purchaser;
>
> (c) **the treatment has a significant effect on the stone's value.** The seller should disclose that the gemstone has been treated.

16 C.F.R. § 23.24 (emphasis added). Florida law, through incorporation of the FTC regulations, declares deceptive any misrepresentations made as to the quality, value or character of the gemstone in the ring purchased by Wynne, as well as a failure to disclose that the gemstone had been heat treated. In addition to the various false representations made to her about the quality, character and value of the gemstone (App 210-20), Wynne testified

that Sabbia and Friedmann never disclosed to her that the gemstone in the ring was heat treated (App 222-23), and record evidence established that the heat treatment to a gemstone materially, significantly and negatively affects its value. (App 789-811; 440-41.)

2. Record Evidence Established Deceptive Acts by Friedmann and Sabbia

Wynne testified that at no point during her discussions with Sabbia or Friedmann about the purchase of the ring, did they ever inform her that the gemstone had been heat treated. (App 222-23.) This testimony is undisputed by Friedmann. (App 635-36.) Another fact that is amply supported by record evidence is that the sapphire was heat treated, and that treatment materially affected its value. (App 440-41; 789-811.) These two facts together establish a clear violation of FDUTPA because the FTC rules affirmatively required Sabbia and Friedmann to inform Wynne that the sapphire she was purchasing was heat treated. Their failure to do so is designated deceptive and unfair by applicable FTC regulations. 16 C.F.R. § 23.24 ("**It is unfair or deceptive** to fail to disclose that a gemstone has been treated if…the treatment has a significant effect on the stone's value…") (emphasis added); *Millennium Communications &*

Fulfillment, Inc. v. Office of Attorney Gen., Dept. of Legal Affairs, State of Fla., 761 So. 2d 1256, 1263 (Fla. 3d DCA 2000) ("Since FDUTPA is the state counterpart to the Federal Trade Commission Act, in deciding whether an act or practice may be deemed deceptive, we must give due consideration and great weight to the interpretations made by the Federal Trade Commission and the federal courts.")

Beyond failing to disclose to Wynne that the sapphire in the ring was heat treated, Friedmann also repeatedly mislead Wynne about the quality, character, value and other material aspects of the ring by, among other things, representing to her that the stone was of "exceptional quality", a "rare piece", "one of a kind", that it was a "great investment", that "it's better than the stock market or real estate", that it was a better investment "than an apartment". Friedmann understood at the time that Wynne was looking to invest the money she ultimately used to purchase the ring, in an apartment, which is why Friedmann made reference to the value of the ring being greater than an apartment. Friedmann also made specific representations that the ring had an actual value of $350,700 and that at that at that price it was a "great value". (App 212-25.) The representations by Friedmann were false, deceptive, and unfair. In

fact, at the time of the purchase, the ring did not have a value of $350,700, but rather a fair market value of only $45,000. (App 789-811.)

After misrepresenting the quality and value of the ring (see Declaration of Robert Aretz), failing to disclose the fact that it was heat treated (in violation of Florida law and FTC regulations), and lying to Wynne about having a competing buyer (App 220; 699-701; 766-67), Friedmann continued to falsely represent the nature and quality of the stone, and offered to make a "great discount" so that Wynne received a "very special deal" of $260,000.00. (App 222.) These representations and practices engaged in by Sabbia and Friedmann were deceptive and unfair.

3. Record Evidence Established Causation

Under FDUTPA, a plaintiff need not prove that the deceptive acts were relied upon by her, only that the deceptive practice was likely to deceive a consumer acting reasonably in the same circumstances. Reliance is not an element of a claim for damages under the FDUTPA. *Waste Pro USA v. Vision Constr. ENT, Inc.*, 282 So. 3d 911, 917 (Fla. 1st DCA 2019) ("[A] party asserting a deceptive

trade practice claim need not show actual reliance on the representation or omission at issue." (quoting *Carriuolo v. Gen. Motors*, 823 F.3d 977, 984 (11th Cir. 2016))); *Turner Greenberg Assocs. v. Pathman*, 885 So. 2d 1004, 1009 (Fla. 4th DCA 2004) ("[A] demonstration of reliance by an individual consumer is not necessary in the context of FDUTPA."); *State, Office of Attorney Gen., Dep't of Legal Affairs v. Wyndham Int'l, Inc.*, 869 So. 2d 592, 598 (Fla. 1st DCA 2004) ("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.").

Friedmann and Sabbia were specific and assuring as to why the ring had such a value – that it was "one of a kind", "rare", of "exceptional quality", a better "investment" than an "apartment" or the "stock market" – all these assurances were false. (App 227-28; 789-811.) Moreover, the Appellees failed to disclose to Wynne that the gemstone in the ring had been heat treated. Applicable FTC regulations declare the conduct engaged in by Sabbia and Friedmann to be deceptive and unfair. The false representations made and

information withheld by Sabbia and Friedmann is clearly violative of FDUTPA and applicable FTC regulations. Furthermore, whether she needed to prove reliance or not, Wynne did reasonably rely upon the false statements made by Friedmann and Sabbia (App 225-28; 224; 247.) Wynne paid $260,000 for a ring that she was falsely told by Appellees had a value of $350,700, but in reality only had a value of $45,000. Wynne testified under oath that had she known she was being lied to about the quality, character and value of the ring and sapphire, or had she known the sapphire was heat treated, she would not have made the purchase. (App 224; 246-47.)

The FTC Guides which are incorporated into the standards governing this case under FDUTPA and Florida law make clear that the Appellees' false representations and failure to disclose were deceptive, unfair and actionable.

4. Record Evidence Established Damages

"[T]here are only two possible ways to measure actual damages in a FDUTPA claim: (1) the value between what was promised and what was delivered; or (2) the total price paid for a value less good or service." *HRCC, Ltd. v. Hard Rock Cafe Int'l USA, Inc.*, 302 F. Supp.

3d 1319, 1323 (M.D. Fla. 2016). The claims at issue in *HRCC, Ltd.* failed (at the summary judgment stage) because the plaintiff brought forth no evidence of damages. *HRCC, Ltd.*, 302 F. Supp. 3d at 1324 ("Indeed, in a single paragraph, HRCC responded to Defendants' FDUTPA arguments without any mention of damages at all. Moreover, a careful review of the record reveals that HRCC has avoided providing any meaningful evidence that would satisfy the measure of damages needed for a successful FDUTPA claim.")

But here, the record evidence establishes that the actual fair market value of the ring was $45,000.00. Because she was led by Appellees to believe that what she was purchasing had an actual value – not retail value – of $350,700, one measure of damages is the difference between the value that the Appellees told Wynne she was receiving and what she actually received ($305,700). Another measure can be derived by calculating the difference between the price she paid – $260,000 – and the actual value of the ring – $45,000 = $215,000. Both measures were amply supported by record evidence before the trial court. *See e.g. Ft. Lauderdale Lincoln Mercury v. Corgnati*, 715 So. 2d 311 (Fla. 4th DCA 1998) (the unfair and deceptive trade practice was the failure to disclose the car's true

condition; thus, the measure of damages was the difference between the represented condition and the true condition).

Sadovsky v. Hassler, 1996 U.S. App. LEXIS 42622 (5th Cir. Dec. 16, 1996) (involving the sale of the overpriced necklace) is instructive. In that case, the court had no trouble affirming the damages awarded based upon the sale of the overpriced necklace (deemed a great value by the sellers). In doing so, it employed the same measure of damages espoused by Florida courts – the difference between what was promised and what was delivered:

> As noted, the Sadovskys represented at the time of sale that the wholesale value of the necklace was $298,000, that its retail value was $450,000, and that it had been advertised for $750,000 in a magazine. One expert for the Hasslers appraised its wholesale value at $60,000 and retail value at $120,000. Using the 'benefit of the bargain' measure, and either the wholesale or retail figures, the award could have been greater than the $215,000 awarded. In short, the award was not clearly erroneous.

Sadovsky, 1996 U.S. App. LEXIS 42622, at *28-29. Wynne testified that based upon all of the Defendant's false assurances she believed that the ring she was purchasing had an actual value (as opposed to retail value) on the date she purchased it of $350,700 (App 251) and that Wynne could sell it for that price if she wanted to. (App 254-55.)

Of course, as with the plaintiff in *Sadovsky*, what Wynne had been told was false and deceptive. The ring was not worth more than $45,000 (App 789-811) because the sapphire it contained had been heat treated (a fact that was not relayed to Wynne) and was not an untreated gemstone. (App 441) ("About 95 percent of sapphires are heat treated. If they are not heat treated, they become incredibly valuable. I think Graff had an unheated sapphire. It was over $1 million. So it just becomes significantly more valuable.")

The order entering summary judgment on Wynne's Complaint was in error. As shown above, there was ample admissible evidence before the trial court to prove each and every element so that Wynne could prevail at trial. The trial court's order seems to imply that Wynne should have investigated the false statements or that her failure to conduct proper due diligence undermines her claim, but this is not the law in Florida:

> We hold that a recipient may rely on the truth of a representation, even though its falsity could have been ascertained had he made an investigation, unless he knows the representation to be false or its falsity is obvious to him.... the petitioners in this case, as owners of the property being sold, had superior knowledge of its size, condition, and business income. As prospective purchasers, the respondents were justified in relying upon the representations that were made to them although they

> might have ascertained the falsity of the representations had they made an investigation.

Besett v. Basnett, 389 So. 2d 995, 998 (Fla. 1980) (citation omitted).

A plaintiff suing under FDUTPA has a different and lesser burden than one bringing an action for fraud. "Although the trial court found no fraud on Rollins' part, such a finding is not necessary to sustain a violation under the FDUTPA. The legislature specifically provided that great weight was to be given to the federal courts' interpretations of the Federal Trade Commission Act. § 501.204(2). In *D.D.D. Corp. v. Federal Trade Commission*, 125 F.2d 679, 682 (7th Cir. 1942), the court held 'that the false, unfair or deceptive acts defined in the Federal Trade Commission Act need not be such as would constitute fraud.'" *Rollins, Inc. v. Heller*, 454 So. 2d 580, 584 (Fla. 3d DCA 1984) (citation in original).

Regardless, the evidence makes clear that Sabbia and Friedmann possessed superior knowledge and expertise than Wynne and that Wynne was taken advantage of by them through their multiple false statements. Friedmann was and is an experienced and sophisticated owner of a jewelry store, who has worked in the jewelry business for over two decades. (Friedmann November 30, 2021 Depo

at 27:10-28:2.) Wynne has no such special knowledge or experience. (Wynne January 6, 2023 Depo at 9:16 – 16:20.)

Section § 542 of the Restatement of Torts 2d (addressing the opinions of adverse parties to a transaction), explains why the falsehoods made to Wynne are actionable, even if they could be characterized as opinions. Section 542 provides:

> The recipient of a fraudulent misrepresentation solely of the maker's opinion is not justified in relying upon it in a transaction with the maker, unless the fact to which the opinion relates is material, and the maker
>
> (a) purports to have special knowledge of the matter that the recipient does not have, or
>
> (b) stands in a fiduciary or other similar relation of trust and confidence to the recipient, or
>
> (c) has successfully endeavored to secure the confidence of the recipient, or
>
> (d) has some other special reason to expect that the recipient will rely on his opinion.

Rest 2d of Torts, § 542; *see also Presidio Enters., Inc. v. Warner Bros. Distrib. Corp.*, 784 F.2d 674, 682 (5th Cir. 1986) (citing § 542 and explaining that "[t]he 'special knowledge' exception applies typically to the opinions of specialized experts -- such as jewelers, lawyers, physicians, scientists, and dealers in antiques -- where their opinions

are based on concrete, specific information and objective, verifiable facts.").

The record evidence before the trial court falls well within the rule that statements of opinion are actionable when a defendant possesses specialized knowledge that the recipient of the statement does not possess. Indeed, the Restatement provides an example which readily demonstrates that the record evidence adequately supports Wynne's cause of action:

> The complexities and specializations of modern commercial and financial life have created many situations in which special experience and training are necessary to the formation of a valuable judgment. In this case if the one party has special experience or training or purports to have them, the other, if without them, is entitled to rely upon the honesty of the former's opinion and to attach to it the importance that is warranted by his superior competence. The ordinary purchaser of jewelry cannot be expected to know the quality or value of the gems shown to him by a jeweler. He must rely and is therefore justified in relying upon the jeweler's statement that a diamond is of the first water; and, after making allowance for the natural tendency of a vendor to praise his wares, he is justified in relying upon the jeweler's statement of the value of the diamond.

Rest 2d of Torts, § 542 (emphasis added).

In *Sadovsky*, *supra*, the defendant-sellers misrepresented the value of a necklace to the plaintiff-purchasers. Later, the plaintiffs

determined that the necklace was worth far less than what they had been led to believe. Applying Texas law (which is not materially different than Florida law on this point), the court explained that "a misrepresentation of material fact is actionable under the [T]DTPA as long as it is not mere 'puffery' on the part of the salesman….Along this line, Texas courts consider the levels of knowledge of the buyer and seller as well as the buyer's knowledge compared to the seller's….Where a seller has special knowledge about a product that is superior to a buyer's, a representation is much less likely to be treated as mere puffery….In addition, a statement need not be very specific to be actionable; it need only 'convey definite implications' about the product or its attributes." *Sadovsky*, 1996 U.S. App. LEXIS 42622, at *15 (internal citations omitted).

"[B]ecause Mark Sadovsky misrepresented the quality and grade of the necklace, there was evidence to support the jury finding a DTPA violation." *Sadovsky*, 1996 U.S. App. LEXIS 42622, at *17. The court explained that statements by the sellers that the necklace presented "an extraordinary opportunity", and "a phenomenal value", the "opportunity of a lifetime" *Sadovsky*, 1996 U.S. App. LEXIS 42622, at *18, constituted actionable deception and unfair practices

because the statements conveyed a definite implication about the necklace and its attributes – particularly because the seller possessed special knowledge about the necklace. *Sadovsky*, 1996 U.S. App. LEXIS 42622, at *18-22.

The statements that supported a jury finding of liability in *Sadovsky* closely mirror some, and also greatly exceed in egregiousness, of those made in this case. Sabbia and Friedmann possessed specialized knowledge, and misrepresented to Wynne (who did not possess any special knowledge), that the ring was a "once in a lifetime opportunity", an "amazing deal", "tremendous value for the price", a "good deal", a "great value", a "great investment", "superior quality", a "very special deal", and a better investment than an "apartment" or the stock market". Liability in this case is directly in line with the reasoning of the court in *Sadovsky*, the FTC's interpretation related to jewelry sales, the Restatement of Torts 2d and Florida case law.

The trial court was presented with sufficient record evidence to establish damages and to prove each element of the FDUTPA claim, and its order is contrary to the record evidence and applicable law.

D. The Lower Court Erred in Concluding That Sabbia and Friedmann Were Entitled to Summary Judgment on Their Affirmative Defense

In ruling that Sabbia and Friedmann's affirmative defense under § 501.211(2), Fla. Stat. was a complete bar to recovery, the trial court reasoned that the manufacturer's representations "about the jewelry art piece purchased match the representations that allegedly violate FDUTPA, supporting the defense that SABBIA and Ms. Friedmann are not subject to recovery under FDUTPA § 501.211(2) as they were disseminating claims of the manufacturer or wholesaler (Sylva & Cie) without knowledge that they violated FDUTPA" and that Wynne "has not provided evidence disproving these representations."

This conclusion was in error for several reasons.

First, Friedmann testified that she was aware that the gemstone in the ring she was selling was heat treated and that heat treatment affects a gemstone's value negatively. (App 440-41.) This fact was not disclosed to Wynne – a violation of the FTC regulations and FDUTPA.

Second, Friedmann admitted that she knew that 95% of sapphires are heat treated. Far from being "one of a kind", "rare" or incredibly unique and valuable as was being represented to Wynne, the stone was one of many that fall into the majority (95%) of sapphires. (App 440-41.)

Third, § 501.211(2) only applies when a retailer disseminates falsehoods "in good faith". Considering their multiple falsehoods and failure to disclose the gemstone's heat treatment, the evidence readily demonstrated that that Sabbia and Friedmann did not act in good faith, certainly not as a matter of law.

Fourth, the letter upon which the court relied in making its finding was written after the purchase was made by Wynne and was not even provided to Wynne (or Friedmann or Sabbia) until after the purchase was made. (App 246-47.)

Finally, Friedmann denies making many of the actionable representations to Wynne (even though the record evidence supports a finding that she did), including representations that went far beyond the content of the letter from the manufacturer. (App 695-96; 698.)

E. Entry of Summary Judgment on Sabbia's Counterclaim was Erroneous

Sabbia's counterclaim was premised on the existence of a contract under which Wynne supposedly agreed not to return the ring. To prove breach of a written contract, a party must establish "the existence of a contract, a breach thereof and damages flowing from the breach." *Knowles v. C. I. T. Corp.*, 346 So. 2d 1042, 1043 (Fla. 1st DCA 1977). What the trial court accepted as a contract is not a contract. Aside from the fact that Wynne denied entering or agreeing to it, or ever seeing it prior to the sale, the "contract" is a handwritten document that was not signed by Wynne.

"[A] contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his or her authorized agent or broker." § 672.201(1), Fla. Stat. (emphasis added); *see also La Rosa v. Fortier*, 492 So. 2d 425 (Fla. 4th DCA 1986). Wynne raised the statute of frauds as an affirmative defense. (App 165; 189.) The record was devoid of any written contract signed by Wynne, and the evidence

presented to the trial court created a material dispute as to the existence of the contract it relied upon in granting Appellees summary judgment.

Indeed, the record evidence fails to establish that such an agreement was entered, yet the court's order relies on an ambiguous text message, sent days after the purported contract was entered, and is contrary to testimony that casts further doubt on the evidence upon which the court relied. The portion of the message cited by Appellees and quoted in the trial court's order, omits a key portion of the exchange. According to the trial court's order, in response to receiving a text from Friedmann that wrote: "Let's meet and discuss in a bit. You made me write no returns yesterday!", Wynne wrote "I know Debbie I know. I went to the extreme." (App 13.) But the trial court's order omits a key line from the actual exchange. The full message that Wynne was responding to read: "let's meet and discuss in a bit. you made me write no returns yesterday! You don't need an apartment". (App 373-74.)

Regarding the exchange, Wynne testified in deposition that when she wrote "I know Debbie I know." she was responding to the statement about the apartment and not about returns. (App 238-39.)

The text exchange occurred on January 30, 2020. Indeed, it wasn't until days later, on February 3, 2020, that Friedmann first sent Wynne a copy of the "receipt" the trial court relied upon as forming a contract. Wynne testified she had not seen the 'no returns' receipt when she texted "I know Debbie I know", and she was responding to the text about her need for an apartment (App 239) ("Q And at this point, had you ever been aware of the existence of this so-called receipt? A No, I wasn't. Never seen it.").

The record evidence also contains Wynne's explicit denial that she ever agreed in any form that there would be no returns or refunds, or even discussed that with Friedmann prior to the sale. (App 232-34; 244.)

As the text exchange and testimony makes clear – it was not until days after the first mention of a receipt by Friedmann and days after the purchase was made, that Friedmann first sent to Wynne what the trial court found to be a contract. The trial court overlooked record evidence establishing a material dispute whether Wynne ever entered the 'no returns' agreement.

The trial court's order on the counterclaim is also in error for several additional reasons. One glaring reason is the absence of any

evidence that Wynne breached the purported contract by bringing this lawsuit: Wynne's lawsuit is not an action to force a refund for the ring. It is an action under FDUTPA and the relief available does not include a return and refund – it only includes damages. Moreover, the sale did go through, Sabbia received full payment, and the ring was never returned. Sabbia failed to articulate how it was damaged by Wynne *seeking* to return the ring prior to hiring lawyers, and Sabbia admitted that it received payment in full at the time of the sale. Certainly, the fees associated with hiring lawyers could not have accounted for damages because the alleged contract did not contain a fee shifting provision.

Nor was there any basis for the damages awarded. There is no liquidated damages provision in the alleged agreement and absent such a clause, they are not recoverable, nor would they be even if there was a governing contract (there was not) and it contained a liquidated damages clause to dissuade a return of the ring. *See e.g. Humana Med. Plan, Inc. v. Jacobson*, 614 So. 2d 520, 521–22 (Fla. 3d DCA 1992) ("Liquidated damages clauses can be an effective way for parties to estimate their future damages and avoid litigation. However, these clauses can also be drafted in such a way as to act

as a deterrent to any future breach. This use of liquidated damages clauses to compel compliance with contractual terms, has long been rejected.")

Sabbia adduced no evidence it was harmed by Wynne's attempt to obtain a refund by returning the ring. Further, the value placed upon the ring by the trial court relied upon inadmissible expert affidavits which discuss retail value and not actual value. The four affidavits produced by Sabbia do not comply with *Daubert* and provide no basis upon which to assess the methodology or reliability of the Appellees' proffered expert opinions – they are classic and inadmissible *ipse dixit* and are completely contradicted by Mr. Aretz's expert opinion as to the fair market value of the ring.

CONCLUSION

For the reasons set forth herein, this Court should reverse the June 26, 2023 and August 16, 2023 orders entering summary judgment and remand to the trial court for further proceedings.

Dated: December 3, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic mail and through the Florida Court's E-Filing Portal on all counsel on the attached Service List on December 3, 2023.

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CERTIFICATE OF COMPLIANCE FOR COMPUTER GENERATED BRIEF Fla. R. App. P. 9.045

I HEREBY CERTIFY that this brief was prepared using Bookman Old Style 14-point font and that it complies with the word count requirements in the Florida Rules of Appellate Procedure.

By: /s/ Marshall Dore Louis
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