MARY LEHMAN,	:	IN THE COURT OF COMMON PLEAS OF
Plaintiff	:	LYCOMING COUNTY, PENNSYLVANIA
	:	
vs.	:	NO. 03-00,589
	:	
DON BREON FORD-JEEP, INC,	:	
Defendant	:	SUMMARY JUDGMENT

Date: May 26, 2005

OPINION and ORDER

Before the court for determination is the Motion for Summary Judgment of Defendant Don Breon Ford-Jeep, Incorporated (hereafter "Don Breon") filed December 30, 2004. The court will deny the motion.

Background

Facts Addressed

The Court finds Lehman has produced evidence from which the following facts could be established. [1] The operative time frame for the underlying facts of this case is September 2000. At that time, Plaintiff Mary Lehman (hereafter "Lehman") was 67 years old. She had been married for 46 years until she and her husband divorced in 1998. Since then, Lehman has been residing by herself in her current home.

Lehman received a flyer in the mail advertising a prize drawing that was being held at the Don Breon automobile dealership. She informed her friend, John Fritz (hereafter "Fritz"), of her intention to attend this drawing the day before it was scheduled. Her purpose in going was to attend a party where she could win a prize at what Lehman referred to as being "my

garage." Fritz was concerned about the possibility that she might get involved in something she could not get out of, so he advised her not to sign anything while she was at the Don Breon dealership.

Although not originally purchased from Don Breon, Lehman chose to have the necessary service performed on her 1990 Lincoln Continental by Don Breon because it was a Ford garage which serviced Lincolns. Lehman had been to the Don Breon dealership on two prior occasions to have her Lincoln Continental serviced.

On September 21, 2000, Lehman went to the Don Breon dealership to attend the advertised prize drawing. Upon arriving, she parked her Lincoln Continental in the same spot she had parked it in when she took it for service. Lehman then entered the dealership section of the building, because that was where the box for the prize drawing was. Upon entering, she was greeted by employees of Don Breon. Lehman remained at the dealership for a period of time awaiting the drawing. She remarked to Don Breon employees that she had liked two vehicles on their lot, one being a 1997 Lincoln Town Car. At some point in time, Lehman entered into an agreement to purchase that 1997 Town Car. The motor vehicle installment sales contract listed the purchase price of the vehicle as $28,000 and Lehman's monthly payment as $498.77. In order to consummate the sale of the Town Car to Lehman, Don Breon obtained financing for Lehman through M&T Bank. The Dealer Credit Application forwarded to M&T Bank states Lehman as having an income of $2,557 per month.

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[1] The record developed and submitted by the parties in relation to the disposition of this Summary Judgment Motion primarily consists of the depositions of Plaintiff Mary Lehman taken December 9, 2004 and John Fritz, a friend of Mary Lehman, also taken on December 9, 2004.

Lehman returned home with her newly-purchased 1997 Lincoln Towncar. Later that evening, around 7:00 p.m., Lehman called Fritz and asked him to come over to her home because she had a surprise. When he arrived she displayed her new acquisition with joy and exuberance, saying how beautiful it was. Concerned over her new extravagance, Fritz inquired if she had purchased it, to which she replied that Don Breon had just given her the car for whatever reason along with a stack of papers. After examining the papers, Fritz informed Lehman that she had indeed purchased the vehicle and that she had signed a contract. After some explaining, Lehman realized that she had done so. Fritz then advised her to call Don Breon to get her Lincoln Continental back.

Lehman called Don Breon that night. She was crying and emotionally distraught; she told them that she could not afford the Towncar and wanted her car back. She further implored them not to sell her vehicle. Don Breon told her not to worry and that it would all be taken care of and to get a good night's sleep. This assuaged her fear and she felt confident that she was going to get her Lincoln Continental back.

On September 22, 2000, Lehman returned to the Don Breon dealership in the morning. She informed them that she wanted her car back. She tried to find her Lincoln Continental at the dealership, but could not. She asked for assistance and was told to wait for five o'clock p.m. At some point, Don Breon agreed to rescind the contract from the day before regarding the Towncar, and Lehman entered into a second contract to purchase a 1996 Ford Taurus for $11,900. When she signed the second contract, Lehman was hot and tired and had put her head down on top of the salesman's desk. The salesman in response had said, "Mary" in a nasty tone of voice, "you're old enough."

Don Breon used the same Dealer Credit Application in submitting the new motor vehicle installment sales contract. The contract stated a new monthly payment of $239.34. Lehman left the dealership with the Taurus and arrived home later that evening.

Lehman never made any payments on the Taurus loan. The car was repossessed and Lehman owes a deficiency amount to M & T. Three months after she dealt with Don Breon in September 2000, Lehman suffered a mental breakdown and was hospitalized. Her mental deterioration had begun before her dealings with Don Breon and was evident in September 2000 to her friend, John Fritz. He had noticed that Leham had good days and bad days, she hallucinated, and at times she did not trust anyone, even him.

Procedural History/Issues

Lehman filed the complaint against Don Breon in this case on August 4, 2003. The scheduling order filed August 23, 2004, cutoff discovery on December 1, 2004 and set the dispositive motion deadline for December 31,2004, the same date the case was to be listed for arbitration. Don Breon's summary judgment motion was filed December 30, 2004. On February 10, 2005 Lehman filed her answer and brief in response together with the deposition of her self and John Fritz. *See*, n.1, *supra*.

In the complaint, Lehman alleges two causes of action against Don Breon. The first is an action to have the September 22, 2000 contract for the purchase of the Ford Taurus voided. Lehman has alleged that the contract was the product of a confidential relationship between her and Don Breon. Lehman has alleged that her incapacity and age prevented her from understanding the implications of a contract for the purchase of a vehicle. The second cause of action is a claim brought under the Pennsylvania Unfair Trade Practices and Consumer

Protection Law, 73 P.S. §201 et seq. Lehman has alleged that Don Breon engaged in unfair and deceptive trade practices by refusing to return her 1990 Lincoln Continental and forcing her to enter into the sales agreement for the 1996 Taurus.

Don Breon asserts that it is entitled to summary judgment and dismissal of both Lehman's causes of action, arguing that Lehman has failed to produce evidence to establish her claims. Don Breon argues that the evidence produced by Lehman fails to demonstrate that there was a confidential relationship between it and Lehman so as to permit the September 22, 2000 contract to be voided. Don Breon further argues that the evidence produced fails to establish that it engaged in unfair or deceptive trade practices with respect to Lehman and the purchase of the Taurus. The issue this Court must determine is whether Lehman has produced evidence which could satisfy the elements necessary to establish each of her claims.

Discussion

Before reaching the merits of the issues, it is appropriate to set forth the standard by which a motion for summary judgment shall be decided. A party may move for summary judgment after the pleadings are closed. Pa. R.C.P. 1035.2. Summary judgment may be properly granted "… when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law." ***Rauch v. Mike-Mayer***, 783 A.2d 815, 821 (Pa. Super. 2001); ***Godlewski v. Pars Mfg. Co.***, 597 A.2d 106, 107 (Pa. Super. 1991). The movant has the burden of proving that there are no genuine issues of material fact. ***Rauch***, 783 A.2d at 821. In determining a motion for summary judgment, the court must examine the record " '… in the light most

favorable to the non-moving party, accepting as true all well pleaded facts in its pleading and giving that party the benefit of all reasonable inferences ….'" ***Godlewski***, 597 A.2d at 107 (quoting ***Banker v. Valley Forge Ins. Co.***, 585 A.2d 504, 507 (Pa. Super. 1991)). Summary judgment will only be entered in cases that are free and clear from doubt and any doubt must be resolved against the moving party. ***Garcia v. Savage***, 586 A.2d 1375, 1377 (Pa. Super. 1991).

Summary judgment may be properly entered if the evidentiary record "… either (1) shows that the material facts are undisputed or (2) contains insufficient evidence of facts to make out a *prima facie* cause of action or defense." ***Rauch***, 783 A.2d at 823-24; *See also,* Pa.R.C.P. 1035.2. If the defendant is the moving party under Pa.R.C.P. 1035.2(2), then "… he may make the showing necessary to support the entrance of summary judgment by pointing to material which indicates that the plaintiff is unable to satisfy an element of his cause of action." ***Rauch***, 783 A.2d at 824. "Conversely, the [plaintiff] must adduce sufficient evidence on an issue essential to [his] case and on which [he] bears the burden of proof such that a jury could return a verdict favorable to the [plaintiff]." ***Ibid***. If the plaintiff fails to establish a prima facie case, then summary judgment is proper as a matter of law. ***Ack. v. Carrol Township***, 661 A.2d 514, 516 (Pa. Cmwlth. 1995).

I. Voidability of the Contract

Lehman has pleaded two theories as to how a confidential relationship existed between her and Don Breon. Her first theory is that because of her economic limitations and infirmities due to age and mental weakness she occupied a position significantly inferior to that of Don Breon. Her second theory is that the tactics employed by Don Breon placed her under duress and allowed Don Breon to wield an undue influence over her decision to purchase the Taurus,

especially given her lack of knowledge regarding automobiles, including the purchasing and financing of them, compared to Don Breon's expertise and experience in the automotive business.

An agreement borne out of a confidential relationship is to be given special scrutiny. ***Paone v. Dean Witter Reynolds, Inc.,*** 789 A.2d 221, 225 (Pa. Super. 2001), *app. denied*, 808 A.2d 572 (Pa. 2002). The normal arm's length bargaining between contracting parties is not assumed when there is a confidential relationship, because the confidential relationship negates the assumption that each party is acting in his own best interest. ***Frowen v. Blank***, 425 A.2d 412, 416 (Pa. 1981). As such, "[a] contract that is the product of a confidential relationship is presumptively voidable …." ***Paone***, 789 A.2d at 226.

"A confidential relationship is any relationship existing between parties to a transaction wherein one of the parties is bound to act with the utmost good faith for the benefit of the other party and can take no advantage to himself from his acts relating to the interest of the other party." ***Biddle v. Johnsonbaugh***, 664 A.2d 159, 161-62 (Pa. Super. 1995). Parties to a confidential relationship must act with scrupulous fairness and good faith toward each other. ***Young v. Kaye***, 279 A.2d 759, 763 (Pa. 1971). Each party must refrain from using his position to the other's detriment and for his own advantage. ***Ibid***.

Pennsylvania courts have found the following to be confidential relationships as a matter of law: trustee and cestui que trust; guardian and ward; attorney and client; and principal and agent. ***Basile v. H & R Block, Inc.***, 777 A.2d 95, 102 (Pa. Super. 2001), *app. denied*, 806 A.2d 857 (Pa. 2002); ***Biddle***, 664 A.2d at 162. What constitutes a confidential relationship in other circumstances cannot be precisely defined. ***Young***, 279 A.2d at 763. "It is not restricted

to any specific association of persons nor confined to technical cases of fiduciary relationship …." ***Ibid***. "Confidential relationships may be formed in a variety of circumstances which 'cannot be reduced to a catalogue of specific circumstances, invariably falling to the left or right of a definitional line.'" ***Paone***, 789 A.2d at 226 (quoting ***Basile***, 777 A.2d at 101). Because of this, Pennsylvania courts "… have been circumspect in limiting the circumstances under which a confidential relationship might be deemed to arise." ***Owens v. Mezzei***, 847 A.2d 700, 709 (Pa. Super. 2004).

The "…existence of a confidential relationship is a question of fact to be established by the evidence." ***Biddle***, 664 A.2d at 162. In order to get a better understanding of what factors are crucial in establishing the existence of a confidential relationship, the following three cases are instructive.

In ***Frowen v Blank***, an eighty-six year old widow sought to have the contract by which she agreed to sell her farm to her neighbor rescinded. 425 A.2d at 415. The Supreme Court found the evidence supported the conclusion that a confidential relationship existed between the elderly woman and her neighbor. ***Id***. at 418. The evidence established that a close social relationship had developed between the elderly woman and her neighbor and his wife. The elderly woman taught them farm related crafts and the defendant neighbor helped her with small chores and drove her to social events like fairs and grange meetings. ***Id***. at 417. The defendant neighbor and his wife would also take the elderly woman out to dinner in order to celebrate her birthday, as it was only one day away from his. ***Ibid***. This relationship went on for over seven years before the sales agreement was entered into, at a bargain price. The widow had not discussed the sale with any other person prior to signing the agreement.

The Supreme Court found there to be a confidential relationship because of the trust the elderly widow had placed in the defendant neighbor. ***Frowen***, 425 A.2d at 418. The woman's age, infirmities, long friendship coupled with the neighbor's position of being an advisor and confidant supported the finding of her dependence or trust justifiably reposed in her good neighbor. ***Ibid***.

The case of ***Young v. Kaye*** involved an equity action to set aside the transfer of 10,000 shares of corporate stock. The corporation's president had been the owner of the stock and had placed it in the name of the corporation's accountant as "nominee" for liability purposes. ***Id***. at 762. The Supreme Court, in setting aside the stock transfer, found the evidence supported the lower courts finding that a confidential relationship existed between the president and the accountant. ***Id***. at 763. This conclusion was reached because several facts established that the relationship was built on the president's inferior knowledge and his trust and reliance upon the accountant.

The president of the corporation had no knowledge regarding federal personal and corporate tax law. ***Young***, 279 A.2d at 763. Instead, he relied upon the apparent expertise and advice of the corporate accountant in relation to not only corporate tax matters, but personal income tax matters as well. Proof of the president's trust in the accountant was evident from the fact that it became routine practice for the president to sign and rely upon letters, income tax returns, financial statements, and other documents prepared by the accountant without question. ***Id.*** at 761. Because of the trust placed in the accountant based upon his knowledge regarding federal tax issues and the president's lack thereof in this situation, the accountant had become the president's advisor/counselor with regard to tax matters.

In ***Basile v. H & R Block, Incorporated***, the plaintiff taxpayer sought recovery of fees and discount payments that had been paid out of her tax refund without her knowledge from defendant tax return preparer asserting that this was a breach of a fiduciary duty which had arisen out of a confidential relationship. 777 A.2d at 98. The Superior Court determined that the taxpayer had presented sufficient evidence to make a prima facie showing that a confidential relationship did exist. ***Ibid***. The evidence presented suggested that the tax preparer engaged in an extended and extensive media ad campaign in which it advertised its expertise in tax matters and the trustworthiness of its services. ***Id***. at 104. The evidence demonstrated that the tax preparer engaged in a conscious effort to court people's trust for its expertise and knowledge and allow it to be their advisor/counselor with regard to tax matters. ***Ibid***. The evidence also demonstrated that the tax preparer knew that many of its customers came from a position of pronounced economic and intellectual weakness. ***Ibid***. It was because of this weakness that the taxpayers placed a high degree of trust in the expertise of the tax preparer to prepare their tax returns and secure their tax refunds. ***Id***. at 106. Here, the evidence demonstrated that the tax preparer sought to act as the taxpayer's advisor/counselor with regard to tax matters and so acted.

The general test for determining the existence of a confidential relationship is whether it is clear that the parties did not deal on equal terms. ***Frowen***, 425 A.2d at 416. The test for determining when parties do not deal on equal terms is when " '… on one side there is an overmastering influence, or, on the other, weakness, dependence or trust justifiably reposed; in both an unfair advantage is possible." ***Id***. at 417 (quoting ***Leedom v. Palmer***, 117 A. 410, 411 (Pa. 1922)). In applying this test, a confidential relationship has been found to exist where one

occupies toward another a position of advisor or counselor such as to reasonably inspire confidence that he will act in good faith for the other's interest. ***Ibid***; ***Basile***, 777 A.2d at 102; ***Biddle***, 664 A.2d at 162. "Those who purport to give advice in business may engender confidential relationships if others, by virtue of their own weakness or inability, the advisor's pretense of expertise, or a combination of both, invest such a level of trust that they seek no other counsel." ***Paone***, 789 A.2d at 226. The essence of a confidential relationship is that there is trust and reliance on one side and a corresponding opportunity to abuse that trust for personal gain on the other. ***Basile***, 777 A.2d at 101.

In applying the test and general principles, the courts in the ***Frowen***, ***Young***, and ***Basile*** decisions looked at a combination of factors in determining whether the evidence demonstrated a confidential relationship. The most relevant to the present case being:

1. The existence of an advisor/counselor relationship.
2. A failure to seek the advice of others.
3. The parties did not deal on equal terms.
4. There was trust and reliance on one side and a corresponding opportunity to abuse that trust for personal gain on the other.

As these factors demonstrate, the focus in determining the existence of a confidential relationship is on the disparity between the positions of the parties. The disparity is to be judged subjectively, and "… may occur anywhere on a sliding scale of circumstances." ***Basile***, 777 A.2d at 102. If "… the requisite disparity is established between the parties positions in the relationship, and the inferior party places primary trust in the other's counsel, a confidential relationship may be established." ***Id***. at 103.

The court finds that Lehman has introduced evidence, which if believed, could establish the existence of a confidential relationship between her and Don Breon under either of her theories. Lehman has produced evidence that could demonstrate Don Breon was her advisor/counselor with regard to the purchase of the Ford Taurus. In the present case, Lehman has produced evidence that she sought no other counsel when she signed the purchase contracts for the Town Car and the Taurus. Her only counsel was subsequent to the purchase of the Towncar when Fritz advised Lehman that she had purchased a car she could not afford and that she should return it and get her original car back. Upon emotionally communicating the desire to Don Breon by telephone, Lehman was told not to worry, that it would be taken care of. Lehman's evidence could result in a finding that she placed a level of trust in Don Breon from their prior dealings, in that she was so satisfied with the service work it had performed on her Lincoln Continental that she regarded it as "her" garage and sought no other to perform service work, but more significantly, such trust that she believed she had been given a car rather than sold one. The first transaction and her discussion with Fritz is evidence she did not understand what was happening when she purchased the Town Car and did not understand automobile purchase contracts. This evidence could support a finding of trust and confidence by Lehman that Don Breon would look out for her interests and also indicates that Lehman was not dealing on equal terms with Don Breon.

Further, Lehman obviously had limited knowledge regarding automobiles and financing. Don Breon was expert in this. As to the Taurus contract, Don Breon was in an even greater position of strength not only from its business expertise, but it had her name on a sales contract she now knew she could not afford and they had her Lincoln Continental. Lehman

was aged, confused, emotionally upset and by the end of the second day when the contract for the Taurus was signed physically and mentally weak and desperate to go home. At this point, she was still without a car as Don Breon had never returned her Lincoln Continental nor told her where it was. This evidence could support a finding of Lehman's weakness and also her dependence and reliance on Don Breon.

The evidence presented could permit a conclusion to be drawn that once Don Breon understood it had become Lehman's advisor/counselor it took advantage of the trust Lehman had placed in it. This can be seen when Don Breon:

a. Learned she was emotionally upset by the first purchase and realization she no longer owned her 1996 Lincoln Continental.

b. Told her not to worry, but to come back and all would be taken care of.

c. Not returning her car to her when she arrived the next morning.

d. Keeping her at the dealership all day until she was physically and emotionally spent.

e. Presenting her a new sales contract for the Taurus at five o'clock when she was weary and distraught.

f. Encouraging her to sign the Taurus contract nastily and saying she was "old enough."

g. Submitting the credit application with an income five times greater then Lehman's actual income.

Accordingly, the motion for summary judgment will be denied as to Lehman's claim to void the September 22, 2000 contract.

II. Unfair and Deceptive Trade Practice Claim

In Count II of the complaint, Lehman has alleged an unfair and deceptive trade practices claim against Don Breon under the Pennsylvania Unfair Trade Practices and

Consumer Protection Law (hereafter "UTPCPL"), 73 P.S. §201-1 et seq. Lehman has brought her claim under the catch-all provision of the UTPCPL. Lehman contends that Don Breon's conduct with respect to the September 22, 2000 contract constituted unfair and deceptive trade practices in two ways. The first being that Don Breon preyed on an elderly and infirm woman by taking advantage of her mental infirmity and drawing her into a contract for something which she could not afford. The second being that Don Breon manipulated Lehman's financial information by falsifying a credit application so that she could obtain financing to purchase the Ford Taurus.

The UTPCPL permits an individual to bring a private cause of action based on a violation of the statute. It provides that:

> Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action to recover actual damages or one hundred dollars ($100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less then one hundred dollars ($100), and may provide such additional relief as it deems necessary or proper. The court may award to the plaintiff in addition to other relief provided in this section, costs and reasonable attorney fees.

73 P.S. §201-9.2(a). The "catch-all" provision of the UTPCPL defines "unfair methods of competition" and "unfair or deceptive acts or practices" as: "Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding." 73 P.S. §201-2(4)(xxi). Therefore, in order to establish a claim under the catch-all provision, one must establish the elements of common law fraud or that he suffered harm as a result of the

deceptive conduct.[1] *See*, ***Commonwealth v. Percudani***, 825 A.2d 743, 747 (Pa. Cmwlth. 2003), *amended by*, 851 A.2d 987 (Pa. Cmwlth 2004); ***Plate Sales v. Marathon Equip. Co***., 2004 Phila. Ct. Com. Pl. LEXIS 49, *3; ***Weiler v. Smithkline Beecham Corp.***, 53 D. & C. 4th 449, 457 (Phil. Cty. 2001).

The first question is whether conduct that takes advantage of an individual's mental infirmity is encompassed by the catch-all provision's definition of deceptive conduct. The UTPCPL does not specifically define deceptive conduct for purposes of the catch-all provision. Where words are undefined by the statute, a court shall construe the words according to their common and approved usage. 1 Pa.C.S.A. §1903(a); ***DeLellis v. Borough of Verona***, 660 A.2d 25, 28 (Pa. 1995); ***Perez v. Bureau of Comm'ns, Elections & Legislation***, 854 A.2d 998, 1000 (Pa. Cmwlth. 2004), *app. denied*, 864 A.2d 1206 (Pa. 2004). A practice is deceptive if it is apt to or tends to deceive. Webster's New Universal Unabridged Dictionary, 516 (1996). Something deceives if: 1) it misleads by a false appearance or statement; deludes or 2) misleads or falsely persuades others. Ibid.

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[1] In 1996, the catch-all provision was amended to read in its present form. The prior catch-all provisions only prohibited "other fraudulent conduct." Accordingly, in order to bring a claim under the pre-1996 catch-all provision, a plaintiff was required to establish the elements of common law fraud. ***Skurnowicz v. Lucci***, 798 A.2d 788, 794 (Pa. Super. 2002); ***Booze v. Allstate Ins. Co.***, 750 A.2d 877, 880 (Pa. Super. 2000).

The 1996 amendment altered the scope of the catch-all provision. "The objective of all statutory construction is to ascertain and effectuate the legislative intent***." Berger v. Rinaldi***, 651 A.2d 553, 557 (Pa. Super. 1994), *app. denied*, 664 A.2d 971 (Pa. 1995). When interpreting a statute, "… the legislature is presumed to have intended to avoid mere surplusage; thus, whenever possible, courts must construe a statute to give effect to every word contained therein." ***Ibid***. Also, "[a] change in the language of a statute ordinarily indicates a change in the legislative intent." ***Commonwealth v. Pierce***, 579 A.2d 963, 965 (Pa. Super. 1990), *app. denied*, 590 A.2d 296 (Pa. 1991).

The addition of the "or deceptive conduct" language must be interpreted as an expansion of the catch-all provision to include conduct other then that which would constitute common law fraud. If not, then the language would be mere surplusage and meaningless. Furthermore, expanding the catch-all provision to include deceptive conduct would further the Legislature's intent by casting a wider net to catch more types of conduct harmful to consumers.

As a general proposition, conduct that takes advantage of an individual's mental infirmity would be encompassed by the catch-all provision's definition of deceptive conduct. An individual with a mental infirmity would not be able to comprehend the consequences of his actions. This inability shrouds the facts of the situation and prevents the individual from seeing them for what they truly are. An individual can then take advantage of the mental infirmity by allowing the fog of delusion to conceal his movements as he takes up a favorable position.

There is evidence from which a jury could conclude that Lehman had a mental infirmity that would have prevented her from comprehending the consequences of her actions in relation to the purchase of the Ford Taurus. However, Lehman must also produce evidence that Don Breon knew or should have known of the mental infirmity. After all, one cannot take advantage of what one does not know to exist. In this regard, the court finds that there is evidence from which the conclusion can be drawn that Don Breon knew or should have known of Lehman's mental infirmity. This can be inferred from the call she made to Don Breon the night she purchased the Lincoln Towncar in which she was emotionally distraught. She exclaimed to Don Breon that she never intended to buy a car and cried for her car to be returned. Lehman's apparent confusion about getting her car back and her physical appearance and demeanor at the second sale, to which required a nasty reprimand to finally get her to sign the contract with the words "you're old enough," all support Don Breon having knowledge of her infirmity. Accordingly, the motion for summary judgment will be denied as to Lehman's unfair and deceptive trade practices claim based upon Don Breon allegedly taking advantage of her mental infirmity.

The second issue is whether falsifying a credit application associated with the purchase of a vehicle is conduct within the catch-all provision's definition of deceptive conduct. The falsifying of a credit application would certainly fall within the ambit of deceptive conduct. By falsifying the information in the application, the perpetrator misleads others regarding the applicant's information.

Don Breon contends that Lehman has failed to produce evidence establishing wrongdoing on its part regarding the credit application. Don Breon argues that the credit application accurately reflects information Lehman relayed to the sales staff. Don Breon argues that Lehman has failed to produce evidence to the contrary. On this issue, Don Breon points to Lehman's deposition testimony in which she states that it is possible that she had filled out the application and that it was possible that the sales staff had obtained the financial information from her. Deposition of Mary Lehman, 68, 71-72. (December 9, 2004).

The court finds that Lehman has presented sufficient evidence from which a jury could conclude that Don Breon falsified the credit application. The credit application indicates Lehman's income as $2,557.60 per month at the time of the purchase. Lehman has testified that her income was $557 per month. Lehman Deposition, 71. Furthermore, Lehman testified that she did not recognize the writing on the application to be hers, except for the information concerning her name and address. Lehman Deposition, 68-69. But even this writing is suspect in her eyes, because she rarely prints and this information, as well as the rest of the application, is printed. Id. at 68, 69. Furthermore, Lehman does not recall talking with the sales staff about the credit application and does not know where they would have gotten the information. Id. at 71.

Lehman acknowledges in her deposition testimony the possibility that the handwriting on the application is hers and that the sales staff obtained the information stated on the application from her. Lehman Deposition, 68, 71-72. However, it being possible does not make it definitive, especially not in the context of a motion for summary judgment. Determining whether the possible is the actual must be left for the jury. Therefore, the motion will be denied as to the unfair and deceptive trade practices claim premised on the falsification of the credit application.

Conclusion

Accordingly, the motion for summary judgment is denied.

ORDER

It is hereby ORDERED that the Motion for Summary Judgment of Defendant Don Breon Ford-Jeep, Incorporated filed December 30, 2004 is DENIED.

BY THE COURT:

William S. Kieser, Judge

cc: Garry Wamser, Esquire
Richard F.Schluter, Esquire
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)