IN THE SUPREME COURT OF GUAM

GUAM,
Plaintiff-Appellant,

v.

MARFEGA TRADING CO., INC.,
dba ISLANDER RENT-A-CAR,
Defendant-Appellee.

Supreme Court Case No. CVA97-011
Superior Court Case No. CV1777-93

OPINION

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Appeal from the Superior Court of Guam
Argued and Submitted on December 10, 1997
Hågatña, Guam

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BEFORE: PETER C. SIGUENZA, Chief Justice; JANET HEALY WEEKS, and BENJAMIN J. F. CRUZ, Associate Justices.

CRUZ, J.:

[1] The trial court granted summary judgment in favor of Defendant-Appellee Marfega Trading Co., Inc., dba Islander Rent-A-Car. Plaintiff-Appellant claims the trial court erred in determining that as a matter of law Defendant-Appellee's practice of charging a 5% fee or tax was not in violation of Guam's Deceptive Trade Practices Act or 11 GCA § 26115. Plaintiff-Appellant seeks reversal of summary judgment in favor of Plaintiff-Appellant. Accordingly, the Court reverses the trial court's decision and grants summary judgment in favor of Plaintiff-Appellant.[1]

FACTUAL AND PROCEDURAL BACKGROUND

[2] The Defendant-Appellee began operation of a car rental service in 1990 with its principal place of business at the A.B. Won Pat International Airport, Guam. There was no published advertising in newspapers nor were any radio or television ads ever prepared or broadcast. However, Defendant-Appellee did post a sign at its booth at the airport that listed its car rental rates. The original sign indicated an additional 5% tax charged for car rentals, but after some inquiries by government agencies the sign was changed to read "Plus Service Charge of 5%."

[3] Deposition testimony given by Elizabeth Marfega, previously the Guam branch manager for Defendant-Appellee, indicated that the 5% fee charged on line 36 of every rental contract was sales tax. She stated that the charge was sales tax--that "we" meaning the employees called it a sales tax.

[4] Lee Arnold, the General Manager for the Defendant-Appellee, testified that the 5% fee was a tax charged by the Government of Guam, a gross receipts tax (hereinafter "GRT"). In explaining this fee to customers, however, he depicted it as a local tax similar to a state's sales tax. The GRT in Guam is in fact a 4%, charge although a 5% fee was charged to customers as a reimbursement of the GRT. Therefore, the 5% fee exceeded the GRT by 1%, which Arnold explained as a necessity since the Defendant-Appellee was paying tax on top of tax.

[5] Teresa Borja was a consumer who rented a car from the Defendant-Appellee as part of the Attorney General's investigation. Ms. Borja made a telephone reservation with the Defendant-Appellee to rent a car at a rate of $45.95 per day. At the time of the reservation the rental agent made no mention of the 5% fee. No rates were posted at the rental location. Although the rental agreement indicated a rental rate of $45.95 per day, when Ms. Borja inquired whether this was the total cost of renting the car, she was told there would be an additional fee because of "tax." When the agreement was executed, however, the only charge indicated on it was the $45.95 daily rate. Upon returning the vehicle, Ms. Borja discovered that a 5% charge was added to the rental price. When Ms. Borja inquired about this charge, the agent explained it as a "surcharge or sales tax." Further inquiry resulted in the agent explaining to Ms. Borja that the charge was "a Guam tax, a service tax, then she said it was a parking fee or tax."

[1] Courts of this jurisdiction have previously granted summary judgment in favor of the appellant after the trial court granted summary judgment in favor of the appellee. *See, e.g.*, *Government of Guam v. Perez*, Civ. Case Nos. 87-053A, 87-055A (D. Guam App. Div. July 8, 1988).

[6] The Defendant-Appellee claims that it was the company's practice to notify customers of this charge initially, whether on the phone or in person, when inquiries were made at the rental location. There were some discrepancies as to what each employee actually called the fee; however, a fact that was recognized by the Defendant-Appellee.

[7] The Plaintiff-Appellant filed a complaint on October 29, 1993 against the Defendant-Appellee Marfega Trading Co., Inc., dba Islander Rent-A-Car and Nissan Motor Corp. alleging violations of Guam's Deceptive Trade Practice Act (hereinafter referred to as "Guam's DTPA"). Nissan Motor Corp. was subsequently dismissed from this action. The complaint alleged that during 1991-1994 the Defendant-Appellant was charging a 5% fee above its advertised prices for car rentals, thus, advertising services with intent not to sell as advertised. The complaint further alleged that the charging of the 5% fee was in violation of 11 GCA § 26115 which makes it unlawful for any entity to advertise or represent to the public that any tax levied is separate and apart from the purchase price. The Defendant-Appellee filed a motion for summary judgment on January 30, 1995 followed by a cross-motion for similar relief filed by the Plaintiff-Appellant on March 31, 1995. The court issued a written Decision and Order on February 5, 1997, granting summary judgment in favor of Defendant-Appellee. A timely notice of appeal was subsequently filed.

DISCUSSION

[8] This case is on appeal based on the Plaintiff-Appellant's claims that the court below erred in finding that the law and the evidence did not support a ruling of summary judgment in its favor. Plaintiff-Appellant presents two main arguments on appeal. First, it contends that the Defendant-Appellant conducted false, misleading or deceptive trade practices in assessing a 5% tax that does not exist in violation of Guam's DTPA. Second, Plaintiff-Appellant argues that the trial court misapplied the law based on Defendant-Appellee's representations that the 5% fee was a government levied tax in violation of 11 GCA § 26115 and 5 GCA § 32201(b)(29).

[9] This Court has jurisdiction over this case pursuant to 48 U.S.C. § 1424-3(d) and 7 GCA §§ 3107(a) and 3108(a). The granting of summary judgment by the trial court is reviewed *de novo*. *Iizuka Corporation v. Kawasho Int'l (GUAM) Inc.,* 1997 Guam 10, ¶7. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." GUAM R. CIV. P. 56(c). No allegations of factual disputes have been raised by either party. Therefore, this Court is faced with the sole task of determining whether the trial court erred as a matter of law in granting summary judgment in favor of the Defendant-Appellee.

I.

[10] Guam's DTPA is found in Title 5 of the Guam Code Annotated, Division 3. Article 2 of the DTPA addresses unlawful deceptive acts and prohibited practices.

> **§ 32201. Deceptive Trade Practices Unlawful.** (a) False, misleading, or deceptive acts or practices, including, but not limited to those listed in this chapter, are hereby declared unlawful and are subject to action by the Attorney General or any person as permitted pursuant to this chapter or other provision of Guam law. A violation consisting of any act prohibited by this title is in itself actionable, and may be the basis for damages, rescission, or equitable relief. The provisions of this chapter are to be liberally construed

> in favor of the consumer, balanced with substantial justice, and violation of such provisions may be raised as a claim, defense, crossclaim or counterclaim.
>
> (b) The term *false*, *misleading*, or *deceptive acts* or *practices* includes, but is not limited to, the following acts by any person or merchant, which acts are hereby prohibited and declared illegal and contrary to public policy if committed by any person or merchant . . .

5 GCA § 32201. The above code section offers a guideline for what constitutes deceptive unlawful trade practices; however, it is not all encompassing. To aid courts further in ascertaining what practices are considered to be deceptive, local law mandates that the courts look to interpretations of the "United States Federal Trade Commission and federal courts to Section 5(c)(1) of the Federal Trade Commission Act (15 U.S.C.A. 45(a)(1)) and the Federal Trade Act." 5 GCA § 32108(c)(A).

[11] Case law has established a three-part test for determining whether a practice is deceptive pursuant to the Federal Trade Commission Act (FTCA). The FTC must show the following: (1) there is a representation, omission or practice; (2) the representation, omission or practice is likely to mislead consumers acting reasonably under circumstances; and (3) the representation, omission or practice must be material. *FTC v. Patriot Alcohol Testers, Inc.*, 798 F.Supp. 851, 855 (D. Mass. 1992); *FTC v. Wilcox*, 926 F.Supp. 1091, 1098 (S.D. Fla. 1995). *See FTC v. Pantron I. Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995). Application of the FTC test to the facts of this case for each representation, omission or practice alleged to be misleading drives this analysis.

A. Direct or Implied Representation, Omission or Practice

[12] The Plaintiff-Appellant contends that these misleading representations were accomplished in two ways -- (1) Defendant-Appellee falsely represented a consumer obligation by the government to pay a 5% tax on the daily rental rate; and (2) Defendant-Appellee misrepresented the total cost of renting a car from itself. The factual basis for the contention that representations were made does not seem to be disputed except, however, the representation that the daily rate alone was the total charge for the car rental.

[13] Plaintiff-Appellant argues that the Defendant-Appellee made affirmative representations that a 5% tax is levied by the government on consumers, similar to a sales tax. Plaintiff-Appellant argues that the facts support a finding that the Defendant-Appellee represented that the 5% charge was a tax imposed by the government. The deposition testimony of Ms. Marfega and Mr. Arnold, and Ms. Borja's affidavit indicate that Defendant-Appellee referred to the charge as "sales tax" or GRT that is levied directly upon the consumer by the government when such is not the case. Clearly, both parties admit that the Defendant-Appellee made the representation that there was a 5% tax charged to customers.

[14] The second part of the Plaintiff-Appellant's argument is that the Defendant-Appellee misrepresented the total daily cost of renting a car. The representation of a flat daily rate to consumers, with a 5% fee added at the time of payment, is purported to constitute a false, misleading and deceptive act on the part of the Defendant-Appellee. The deposition testimony indicated that customers were quoted, either on the phone or in person, a daily rate of $45.95, yet what was ultimately charged was 5% over that amount. Plaintiff-Appellant argues that customers were led to believe the rate was not in excess of $49.95 per day. The Defendant-Appellee argues that information about the 5% fee was not withheld from potential customers. However, evidence of at least one incident was presented where a customer was not initially notified of the additional fee.

[15] The Defendant-Appellee claims that it was the company's policy to advise a customer of the charge when one initially inquired about renting a car. It was not upon her first inquiry, but instead when Ms. Borja went in to pick up the car and asked about whether the $45.95 rental price was the total cost, that she was told by an agent about the 5% tax. The Defendant-Appellee disputes that it ever represented the total cost of a day's rental to be $49.95. However, on at least one occasion this occurred. The Borja affidavit establishes that much.

B. Representations Likely to Mislead Consumers Acting Reasonably Under the Circumstances

[16] Adopting the Defendant-Appellee's assertion, that the Borja incident was an isolated incident or at least a minimally occurring phenomena, to this part of the analysis proves unfruitful as well. In *Wilcox*, a case where the alleged deceptive act or practice was advertising. 926 F.Supp. at 1099. The court rejected a similar argument. *Id.* Citing yet another Federal Trade Commission (FTC) case, the *Wilcox* court demonstrated that judgment in favor of the FTC had been previously granted in a case where the defendant argued that the FTC had produced only a small sample of consumer complaints. *Id*. The court opined:

> [T]he FTC need only to show that a reasonable consumer, upon hearing the advertisement, likely would be mislead [sic] to his detriment. In other words, the FTC is only required to show that it is likely, not that it is certain, that a reasonable consumer would be mislead [sic]. Accordingly, the FTC does not need to show that every reasonable consumer would be mislead [sic] by the advertisements . . . . Indeed, advertisements are illegal if they have a "tendency" or "capacity" to deceive; actual deception of particular consumers need not be proven.

Id. Similarly, in the California case of *People v. Dollar Rent-A-Car Systems, Inc.*, 211 Cal. App. 3d 119, 129 (Cal. Ct. App. 1989) the court held that actual deception is not a requirement, but merely that the public is likely to be deceived.[2] In *Dollar Rent-A-Car*, at issue was a California statute that prohibits the use of untrue or misleading statements in selling real or personal property or personal services. *Id*. at 128. The court found that Dollar misrepresented a collision damage waiver (CDW) provision to limit the customer's collision liability, and found a violation of the statute. *Id*. at 129 The Dollar employees made untrue and confusing representations that caused customers to be misled into believing the CDW was insurance and purchasing it would limit their liability to a specified amount. *Id*. at 127. Many of Dollar's employees were confused about the CDW, as is true in this case with the 5% fee. The Defendant-Appellee's employees often vacillated between calling the fee a tax, sales tax, GRT or a service charge. The effect of this confusion was that it misled customers, regardless of the intent of the employees or the company in general.

[17] Reasonable consumers will look for the best price for any product or service, in conjunction with some requisite level of quality. It is misleading to inform a consumer of a surcharge, over and above an expressed flat rate, after the initial rate is relied upon.

[18] Furthermore, to be told that the extra charge is a government imposed tax is also a misleading proposition. That Defendant-Appellee told customers that the 5% fee was a tax, like sales tax or GRT, which would cause the reasonable consumer to believe that the government requires the 5% fee in

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[2] "The court may order relief 'without individualized proof of deception, reliance, and injury if it 'determines that such a remedy is necessary to prevent the use or employment' of the unfair practice.'" *Dollar Rent-A-Car*, 211 Cal. App.3d at 129 (citations omitted).

addition to the merchant's rental fee. Although the government of Guam does levy a GRT, this is levied upon businesses based on their revenue producing activities and is not a tax on the consumer assessed at the point of sale. The staff was instructed to inform customers that the charge was sales tax. Informing the customers that the 5% fee was sales tax, mandatorily imposed by the government upon the customer, was misleading to the customers.

C. Representations Must Be Material

[19] The question of materiality is not resolved by a bright line rule. In *Pantron*, the court quickly addressed the issue of materiality by presuming that express product claims are material. 33 F.3d at 1095-56. In fact, materiality may often be presumed.[3] In this case, materiality needs to be addressed on many levels. First, it must be ascertained as to whether the fact that one clear case of a misleading representation being made is sufficient to warrant a punishable violation of the DTPA. Appellee contends that this was an isolated incident with Ms. Borja and that employees were instructed to be up front about the 5% fee when customers phoned in. However, the lack of other documented incidents does not mean that other customers were not told that the charge was a tax, be that sales tax or GRT. This implied it was mandatorily imposed by the government. Also, if it is not necessary for it to be demonstrated that several consumers were misled for a practice to be misleading, it is not necessary for it to be demonstrated that many were actually misled for a misleading practice to be considered material.

[20] The second issue of materiality is whether a 5% fee over the total rental cost is material. Five percent of $45.95 is only a couple of dollars per day. However, Defendant-Appellee certainly believed that it was a material amount as it felt a need to recoup the GRT that it paid out to the government for each dollar of revenue. To a consumer, any additional amount of money spent for a product or service is material in choosing which product or service provider to choose. Lastly is the issue of whether it was material that the customers were misled to believe that the fee was government imposed upon the customer, rather than merely the company's practice. Leading customers to believe that the fee was a tax has widespread ramifications as well. As mentioned previously, a tax connotes a mandatory charge imposed by the government. Additionally, the representation that this was "sales tax" created the potential for misleading the public to believe that sales tax applied to all products and services available on the island.

D. Advertising With Intent Not To Sell As Advertised

[21] Another violation of the DTPA which was alleged is that the Defendant-Appellee advertised with intent not to sell as advertised, a violation of 5 GCA § 32201(c)(3).[4] The Plaintiff-Appellant argues that the sign board at the airport, and the phone and in-person representations of the price and the 5% tax constituted advertising. In addition to the three-part FTC test for deceptive practices, the Plaintiff-Appellant must demonstrate that the Defendant-Appellee advertised and did so with the intent not to sell as advertised. The Defendant-Appellee argues that no formal print or broadcast advertising was ever

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[3] "Express claims or deliberately-made implied claims used to induce the purchase of a particular product or service are presumed to be material." *Wilcox*, 926 F.Supp. at 1098.

[4] Section 32201 subsection (c) states that:

> (c) The term false, misleading, or deceptive acts or practices includes, but is not limited to, the following acts committed by merchants. The following acts are hereby prohibited and declared illegal and contrary to public policy when done by any merchant:
>
> (3) Advertising goods or services with intent not to sell them as advertised.

made. Although there was the sign board at the airport; no newspaper, radio or television advertising was conducted. The Plaintiff-Appellant asks the Court to construe advertising as a broad concept through which the public is informed of services or products, which is not limited to those traditional media mentioned above. Citing Black's Law Dictionary, the Defendant-Appellee proposes the following definition for advertisement: "[i]nformation communicated to the public, or to an individual concerned, as by handbills, newspaper, television, billboards, radio."

[22] The Court views the Defendant-Appellee's definition as broader than what the Defendant-Appellee may believe it to be, but it is unnecessary to resolve that dispute. The sign board is analogous to a billboard, albeit on a smaller scale. Even applying the definition which the Appellee espouses, the public display of the sign board is still advertising.

II.

[23] The second issue is whether the trial court misapplied the law in concluding that the Defendant-Appellee's representation that the 5% fee was a government levied tax was not in violation of 11 GCA § 26115. Section 26115 makes it unlawful for any taxpayer to hold out to the public that any tax levied is not part of the purchase price.[5] Also argued is a violation of 5 GCA § 33201(b)(29)[6] that prohibits businesses from performing deceptive acts or practices that mislead a consumer to his detriment. The question becomes whether charging a 5% fee over the purchase or rental price is a misrepresentation that leads to the consumer's detriment. We find this practice to be misleading because it represents that the tax is above the purchase price, rather than an element of the purchase price. Once again, the affidavit of Ms. Borja, who signed the rental contract for a rental price of $45.95/day, demonstrated that she believed this to be the only charge she owed. However, when she returned the car, Ms. Borja discovered the addition of the 5% charge which was explained to her as a service tax or GRT. To tell a customer that the charge is GRT leads the customer to believe that payment of this tax is imposed directly on the consumer by the government, in violation of 11 GCA § 26115 and 5 GCA § 32201(b)(29).

[24] Additionally, a misrepresentation could be found in the sign board at the airport which identified a "5% tax" (from 1991-1992) and a "5% service charge", which was explained as "like a sales tax", (from 1992-1994). The Plaintiff-Appellant contends that the sign represented to consumers that the tax or service charge was not part of the purchase price, but instead appeared to be an additional charge over the purchase price.

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[5] 11 GCA § 26115 provides in relevant part:

> It shall be unlawful for any taxpayer under this Chapter [26 Business Privilege Tax] to advertise, or hold out to the public in any manner, directly or indirectly, that any tax levied hereunder is not considered as an element of the purchase price.

[6] 5 GCA § 32201 5(b)(29) provides:

> (b) The term false, misleading, or deceptive acts or practices includes, but is not limited to, the following acts by any person or merchant, which acts are hereby prohibited and declared illegal and contrary to public policy if committed by any person or merchant:
>
> > (29) Doing any other act which is prohibited by the laws of Guam to mislead a consumer to his detriment or to induce another person to buy or sell goods or services to such person's detriment.

[25] The Defendant-Appellee claims that its practice and representations were not misleading based on Op. Att'y Gen. 84-01 (1983) that it claims stands for the proposition that there is nothing wrong with including information as to the amount of GRT collected. Attorney General's opinions are to be accorded substantial weight, although not controlling on courts. *Mountain View Union High School Dist. v. City Council*, 168 Cal. App. 2d 89, 335 P.2d 957, 960-61 n.2 (Cal. Ct. App. 1959) (holding that an attorney general's opinion as to statutory construction could be a factor considered by the court in applying a statute); *Prescott v. U.S.*, 731 F.2d 1388, 1393 (9th Cir. 1984) (holding that attorney general opinions should be given great weight).

[26] The Attorney General Opinion addressed the question of whether it is "unlawful for a merchant to designate the amount of gross receipts tax arising from a sale of goods or services on an invoice, bill, sales slip, price tag or other document relating to the sale." What the Attorney General opined was that it was lawful to include such information provided that "no additional language is inserted, or verbal representations made, which state or imply that the gross receipts tax is not being passed on to the customers as part of the purchase price." The Appellee could therefore include information about the GRT, so long as it made no representations that it was not part of the purchase price. Appellee argues that this supports its proposition. However, it would seem that the manner in which Appellee referred to the fee, as a "tax" and then followed up by explaining to customers that it was like sales tax, would imply that it was not part of the purchase price. Instead, it was represented as an additional charge over the purchase price, and a government mandated charge at that. Appellee relies on the Attorney General Opinion, but seems to misconstrue its holding and/or the facts at hand.

CONCLUSION

[27] After applying the FTC test to the Defendant-Appellee's practices and representations, we conclude that the Defendant-Appellee has violated Guam's DTPA. Defendant-Appellee made material representations that were potentially, if not actually, misleading to customers. In light of the intent of the DTPA, the Court, after balancing all interests involved, chooses to liberally construe the applicable code sections in favor of the consumer. As to the second issue of a violation of 11 GCA § 26115 and 5 GCA § 32201(b)(29), it is clear in this situation that the Defendant-Appellee misrepresented the inclusion of the GRT as part of the purchase price and, further, misrepresented it as a tax above the purchase price which was imposed by the government. The overall message of the Attorney General Opinion is that if additional language indicates that the GRT is not being passed on to the consumer as part of the purchase price it is a violation of Section 26115. This is what occurred in this situation. Therefore, we hereby reverse the trial court's decision and grant summary judgment in favor of the Plaintiff-Appellant. Reversed and Remanded for proceedings consistent with this opinion.