

DISTRICT OF COLUMBIA COURT OF APPEALS

ROY L. PEARSON, JR. :
 :
 Appellant, :
 :
 v. : Appeal No. 07-CV-000872
 :
 SOO CHUNG, *et al.* :
 :
 Appellees. :

PETITION FOR REHEARING OR REHEARING EN BANC

Appellant, pursuant to D.C. App. R. 35, moves for rehearing or rehearing *en banc*.

The December 18, 2008, decision of the division conflicts with controlling authorities -- including *Tucker v. Beazley*, 57 A.2d 191 (D.C. 1948); *Andolson v. Berlitz Schools of Languages of America, Inc.*, 196 A.2d 926 (D.C. 1964); *Darnell v. Darnell*, 91 U.S. App. 304, 200 F.2d 747 (D.C. Cir. 1952); *Hercules & Co., Ltd. v. Shama Restaurant Corp.*, 613 A.2d 916 (D.C. 1992) and *Ft. Lincoln Civic Association, Inc. v. Ft. Lincoln New Town Corp.*, 944 A.2d 1055 (D.C. 2008) -- and consideration by the full court is therefore necessary to secure and maintain uniformity of this court's decisions on common law fraud and statutory unfair trade practices.

I.

The Defendants Failure To Disclose The "Reasonable" Limitations On Their "Satisfaction Guaranteed" Advertisement Indisputably Violated The Common Law Of Fraud In The District of Columbia

The division failed to address three of the four issues presented by this appeal, by failing to apprehend the issues, appellant's analysis, or the governing law. The resulting conflict with controlling law is best illustrated by the division's approach to the first issue presented on appeal; an approach that the division repeated with respect to two additional issues.

The entire focus of the first issue in Appellant's Brief was on the failure of the trial court to make findings of fact about conduct of the defendants in 2002 that the District of Columbia's

common law of fraud makes material and that Super.Ct. Civ. R. 52(a)¹ requires findings regarding:

1. Whether the trial judge erred as a matter of law in entering judgment for the defendant-merchants on plaintiff's 2005 fraud claim without considering or ruling on whether the defendants' failure to disclose certain material facts to plaintiff in 2002 [i.e., that in the event of a future claim by plaintiff the defendants' 'Satisfaction Guaranteed' advertisement and defendants' conduct in 2002 did not mean the defendants unconditionally guaranteed they would satisfy plaintiff's future claims in a manner satisfactory to the plaintiff] was an omission of a material fact and made 'Satisfaction Guaranteed' a false statement.

Brief of Appellant at ix. Despite this pointed focus on the legal effect of the undisputed conduct of the defendants in 2002, Brief of Appellant at 23-30; Reply Brief at 1-10, in its opinion the division fails altogether to address this issue. Nowhere in its opinion does it acknowledge or rule on the legal effect of the defendants' conduct in 2002 under the District of Columbia's common law of fraud. The division, instead, begins its analysis with events in 2005. Slip op. at 11-17.

To establish, in this fraud and unfair trade practices case, that the defendants had a legal duty, as a result of plaintiff's inquiry and statements in 2002, to disclose to the plaintiff in 2002 whether and how their 'Satisfaction Guaranteed' advertisement was limited in any way, the appellant cited mandatory and binding District of Columbia law. Brief of Appellant at 24 (citing *Andolson v. Berlitz Schools of Languages of America, Inc.*, 196 A.2d 926 (D.C. 1964) and *Tucker v. Beazley*, 57 A.2d 191 (D.C. 1948)); Brief of Appellant at 25 (citing *Darnell v. Darnell*, 91 U.S. App. 304, 200 F.2d 747 (D.C. Cir. 1952)).

In this court's decision in *Andolson v. Berlitz Schools of Languages of America, Inc.*, 196 A.2d 926 (D.C. 1964), it held that a person making a representation (such as "Satisfaction

¹ Super. Ct. Civ. R. 52(a) states in relevant part: "In an action tried on the facts without a jury or with an advisory jury, *the court must find the facts specially* and state its conclusions of law separately. ..." (emphasis supplied)

Guaranteed”) has a duty to make a full disclosure of the facts when the person to whom the representation is directed makes an inquiry or a claim concerning whether there are qualifications or limitations on the representation.

The facts in the *Andolson* case (involving a prospective employer who failed to disclose, in response to an inquiry from a job seeker, that the prospects for the job seeker’s *long term* employment were not good) parallel the undisputed facts of this case. It is undisputed that in July 2002, and again in August 2002, the plaintiff communicated to the defendants the importance to him of knowing whether the defendants took the position that the “Satisfaction Guaranteed” sign they posted was not a representation of a customer-determined guarantee of satisfaction (in which case plaintiff stated his intention to file suit). Brief of Appellant at 10-11 (Supp. R #3 at 178, 179-181 & 183-184 & 348; Plaintiff’s Exhibit 1E and 1F).

Under *Andolson*, plaintiff’s oral July 2002 inquiry (and his August 2002 demand letter) gave rise to a duty on the part of the defendants to affirmatively and unambiguously disclose to plaintiff that his understanding of the sign “Satisfaction Guaranteed” was inaccurate. *Andolson, supra*, 196 A.2d at 927. When the defendants failed to discharge their legal duty to disabuse plaintiff of the view he repeatedly communicated to them in July and August 2002 -- that “Satisfaction Guaranteed” meant the customer determined what would satisfy the customer in the event of a dispute -- the plaintiff was entitled to thereafter interpret the “Satisfaction Guaranteed” advertisement as a customer-determined guarantee of satisfaction. *Id.*

Neither the trial court or the division acknowledged or addressed these undisputed record facts, or ruled they were not material to the resolution of plaintiff’s claim for fraud, or found that the undisputed record facts were not as plaintiff testified and corroborated with trial exhibits.

Appellant’s opening brief carefully distinguished the issue of whether the sign “Satisfaction Guaranteed,” alone, was false, from the issue of whether plaintiff’s inquiry in July

and August of 2002 gave rise to a legal duty on defendants' part to disabuse plaintiff of the understanding of the sign plaintiff communicated to them. Appellant explicitly stated and briefed his contention that the trial judge erred in ruling on only the first issue, and not the second:

The factual error in the trial judge's reasoning is that the plaintiff in this case did not base his common law fraud claim solely on the 'SATISFACTION GUARANTEED' sign the defendants displayed for six years. ***Plaintiff, additionally, based his claim on the defendants' conduct in affirmatively acquiescing, twice in 2002, in plaintiff's interpretation of that sign as an unconditional guarantee of customer-determined satisfaction. That made their sign a false representation, and their failure to disclose their disagreement a material omission.***

Brief of Appellant at 24-25 (emphasis supplied) (citing *Andolson v. Berlitz Schools of Languages of America, Inc.*, 196 A.2d 926 (D.C. 1964) and *Tucker v. Beazley*, 57 A.2d 191 (D.C. 1948)).

The division did not address this issue and appellant's accompanying analysis. It, instead, repeated the trial court's error by addressing only appellant's supplemental argument, which appellant phrased as follows:

Alternatively, or additionally, the trial judge erred in concluding, based solely on the sign 'SATISFACTION GUARANTEED,' that that sign is not an affirmative representation of unconditional customer-determined satisfaction under the common law of the District of Columbia.

Brief of Appellant at 25.

To ensure review of his major argument by this court plaintiff repeatedly preserved the argument in the trial court. Reply Brief at 1 n.1 (providing citations to argument, testimony and documents in the record where plaintiff argued and preserved this issue for appellate review). *E.g., Plaintiff's Motion For Reconsideration* at 15-19 ("The defendants guaranteed in the aftermath of the events of July-August 2002, and by the continued posting of their unqualified "Satisfaction Guaranteed" sign, that there would be no debate on the question of their liability or plaintiff's satisfaction – i.e., the plaintiff-customer would always be right."). The trial judge

acknowledged this issue was fully developed in the trial court. *Order Denying Plaintiff's Motion For Reconsideration* (“The plaintiff’s motion for reconsideration reargues matters that already were presented in his pretrial statement, his trial brief, and his arguments at trial.”)

The *Andolson* standard for determining whether a response that is not wholly responsive to a plaintiff’s inquiry is a false representation has been codified in the Restatement 2nd of Torts, at § 551(1) & (2)(b). It is thus treated as garden variety fraud-by-concealment in every state and federal court in the United States. There is nothing unusual or difficult to understand about it.

Andolson has binding precedential value for an additional reason. This court implicitly ruled in *Andolson* that when a plaintiff presents evidence of his inquiry into the limitations on a representation, and it later turns out all limitations were not revealed, all elements of a claim of fraud (and not just the “false representation” element) have been met. And so this court reversed the judgment and remanded *Andolson* to the trial court with instructions to enter judgment for liability in favor of the plaintiff, and to conduct a trial only on the issue of damages. *Andolson, supra*, 196 A.2d at 927. The same result must follow in this case, which was also tried by bench.

A consumer fraud claim under District of Columbia law has five elements: (1) a false representation; (2) of material fact, (3) knowingly made, (4) with the intent to induce reliance², and (5) a plaintiff who relied on that false representation.

But in *Andolson*, proof of a false representation, of material fact, and that the plaintiff communicated his/ her concern about whether the representation was qualified or limited in any way, was sufficient to prove each element of fraud as a matter of law. In *Andolson* this court did not expressly analyze whether the false representation was also: (3) knowingly made, (4) whether the person making the representation intended to induce the plaintiff to rely on the false representation or (5) whether the plaintiff relied on the false representation. *See Hercules & Co.*,

² *Tucker v. Beazley*, 57 A.2d 191, 194 (D.C. 1948); *Howard v. Riggs Nat’l Bank*, 432 A.2d 701, 706 (D.C.1981).

Ltd. v. Shama Restaurant Corp., 613 A.2d 916, 923 (D.C. 1992) (elements of fraudulent inducement identical to those for fraudulent representation).

The *Andolson* court apparently did not spell out its analysis of those elements because of the earlier decision of the U.S. Ct. of Appeals for the D.C. Circuit in *Darnell v. Darnell*, 91 U.S. App. 304, 200 F.2d 747 (D.C. Cir. 1952). In *Darnell*, a decision that is also binding on this court, the D.C. Circuit held that when the owner of a business makes a false statement about his or her own business, he or she is conclusively presumed to have *knowingly* made the false statement. Thus, because the employer in *Andolson* made a false statement about its own business, as a matter of law he knowingly made a false statement. Because the representation in this case was by an owner of Custom Cleaners, this element of fraud was also established as a matter of law in the trial court.

With respect to the “intent to induce reliance” and “reliance” elements of fraud, this court implicitly concluded in *Andolson* that no reasonable fact finder could fail to find that the employer intended to induce the plaintiff in that case to rely on the false statement made to him. In other words, any other finding would be clearly erroneous.

That same undisputed evidence existed in this case. Because of plaintiff’s oral and written communications to the defendants in July and August 2002, about their “Satisfaction Guaranteed” sign, no reasonable fact finder could fail to find that the defendants intended to induce the plaintiff in this case to rely on the false representation made by the defendants through: (1) their sign and (2) their failure to discharge their legal duty to unambiguously disclose that the defendants, and not the plaintiff, would determine whether plaintiff was satisfied in the event of a complaint.

The same mandatory finding of a false representation, and a much less demanding showing by a plaintiff, was adopted by this court in *Tucker v. Beazley*, 57 A.2d 191 (D.C. 1948).

This court ruled in *Tucker* that the target of a representation is entitled to believe that a representation made by a person is unconditional in any material respect, if it later turns out that there were undisclosed qualifications to the representation that (1) would be material and (2) were peculiarly within the knowledge of the person making the representation.³ *Tucker, supra*, 57 A.2d at 194.

The materiality of the limitations on “Satisfaction Guaranteed,” and the fact that they were “peculiarly known” to the defendants were undisputed facts in this case. Under long established Federal Trade Commission law, as a matter of law *any* limitation on a guarantee is presumptively material. Brief of Appellant at 44. And when, as in this case, no evidence was introduced to rebut that presumption, materiality was established as a matter of law. No limitation could be more material than one that reserves to the promisor, rather than the promisee, the right to determine whether a promised service was satisfactorily performed.

With regard to the defendants’ “peculiar knowledge” of the limitations on “Satisfaction Guaranteed,” that too was an undisputed/admitted fact in the trial court. The defendants’ sworn answers to interrogatories, which were introduced as an exhibit (Appendix at 125), admitted a number of undisclosed material conditions.⁴ Additionally, at the trial defendant Soo Chung

³ The *Tucker* standard for determining whether a statement is a false representation has been substantially codified in § 529 of the Restatement 2d of Torts. Thus, the holding by this court in *Tucker* has also become a rule of general applicability throughout the United States. *E.g., Remeikis v. Boss & Phelps, Inc*, 419 A.2d 986 (1980) (relying on § 529 of the Restatement (2d) of Torts).

⁴ Defendants’ Response to Interrogatory Number 40: “. . .As for paying Plaintiff \$1,150 on June 5, 2005, Defendants state that they were not willing to pay Plaintiff this money because Plaintiff did not have his drop off receipt and refused to complete a lost/damaged item form. Furthermore, based on the quality of Plaintiff’s pants, they clearly are not worth \$1,150 despite Plaintiff’s protestations to the contrary. . . .” (Appendix at 125). The trial court granted plaintiff’s motion to compel the defendants to produce a sample of the alleged “lost/damaged item form” they asserted plaintiff refused to fill out. The defendants then conceded that no such form existed. At trial the defendants added to these three pre-conditions the pre-condition that they had to be satisfied that they were liable for the loss of an item of clothing before they would

admitted the limitation that the defendants had to be satisfied that they were liable for the loss of an item of clothing before they would honor a customer's claim. These ever-changing and undisclosed conditions and limitations, and whether they would or would not be enforced in a given case, were by their nature peculiarly known only to the defendants.⁵

II.
The Defendants Failure To Disclose The Limitations On Their
“Satisfaction Guaranteed” Advertisement Indisputably Violated
D.C. Code § 28-3904(a), (d), (e), (f), (h), (s) and (u)

The legal standards that are binding on this court under *Tucker, supra; Andolson, supra;* and *Darnell, supra*, for determining whether under the common law of fraud a representation is false, material, knowing or was intended to induce reliance, have direct applicability to the

honor a customer's claim. In other words, instead of the *customer-determined* guarantee of satisfaction *Andolson* and *Tucker* require on the undisputed facts of this case, at trial the defendants revealed an illusory *merchant-determined* “guarantee” of satisfaction.

⁵ In the Federal Trade Commission's *Guide Against Deceptive Advertising of Guarantee*, 16 CFR § 239.3, it provides universal protection against undisclosed limitations on a guarantee of satisfaction. The *Guide* explicitly requires that a seller, without any inquiry from a consumer, affirmatively disclose any limitations or conditions on a “Satisfaction Guaranteed” sign:

(a) A seller or manufacturer should use the terms ‘Satisfaction Guarantee,’ ‘Money Back Guarantee,’ ‘Free Trial Offer,’ or similar representations in advertising only if the seller or manufacturer, as the case may be, refunds the full purchase price of the advertised product at the purchaser's request.

(b) An advertisement that mentions a “Satisfaction Guarantee” or a similar representation should disclose, with such clarity and prominence as will be noticed and understood by prospective purchasers, any material limitations or conditions that apply to the ‘Satisfaction Guarantee’ or similar representation

The division opinion states that 16 CFR §239.3(a) applies to the advertising of a product, but not to the advertising of a service. Slip opinion at 15 n.9. Neither 16 CFR §239.3(a) or 16 CFR § 239.3(b) are limited in their scope to products. Part 239 of Title 16 of the Code of Federal Regulations, of which § 239.3 is a part, has five sections: § 239.1, § 239.2, § 239.3, § 239.4 and § 239.5. The first of the five sections explains the purpose and scope of the remaining four sections. It explicitly states that while § 239.2 “applies only to the advertising of product guarantees,” “[t]he other sections of the Guides apply to the advertising of any warranty or guarantee.” (underlining added)

Thus, both 16 CFR §§ 239.3(a) and (b) apply to “Satisfaction Guaranteed” representations that are made regarding services, just as they do with respect to products.

statutory D.C. Consumer Protection Procedures Act (“CPPA”) claims in this appeal. *See Ft. Lincoln Civic Association, Inc. v. Ft. Lincoln New Town Corp.*, 944 A.2d 1055,1065 (D.C. 2008) (plaintiff need not only prove a CPPA “unfair trade practice” by a preponderance of the evidence). It would make no sense to hold that a sign is false for purposes of a hard-to-prove fraud claim, but not false for purposes of the statutorily easier-to-prove CPPA claims.

Proof that “Satisfaction Guaranteed” and “Same Day Service” were false statements -- because they are construed as meaning “Satisfaction Unconditionally Guaranteed” and “Same Day Service Under All Circumstances” in the District of Columbia law of fraud -- satisfies every element of proof required by D.C. Code §§ 28-3904 (a), (d), (e), (f), (h) and (u).⁶

III.
New Trial Is Required For Plaintiff-Appellant On CPPA Claim
Based On “Same Day Service” Sign

The division opinion affirmed the entry of judgment as a matter of law, at the conclusion of plaintiff’s case-in-chief, on a second sign the defendants displayed on the outside of their cleaners, which read “Same Day Service.” Plaintiff presented unchallenged evidence that the

⁶ In addition to the limitations admitted at trial, there were a long list of conditions and limitations on the guarantee of satisfaction written on the back of the receipt given each of defendants’ customers. As the appellant explained in his Reply Brief, whether the defendants actually enforced the conditions on the back of their claim ticket is of no legal consequence. “Even if [the claim they do not enforce the conditions is] true . . . the practice of handing out a claim ticket with “representations” on it about defendants’ services that are not accurate statements of the characteristics and standards of defendants’ services, and that do not disclose that the listed conditions are not enforced, and that constitute an (admitted) offer of services without the intent to provide them as offered, obviously also violates D.C. Code § 28-3904(a), (d), (e), (f), (h) and (u). Thus, whether the defendants enforced the conditions on the back of the claim ticket that was given each customer from January 2000 (Supp. Appendix at 361) through the trial date, or not, their liability under D.C. Code § 28-3904(a), (d), (e), (f), (h) and (u) remains exactly the same. *See also Montgomery Ward Co. v. FTC*, 379 F.2d 666 (7th Cir. 1967).” Reply Brief at 13 n.6. The division opinion did not address this alternative argument, or the analysis of the 7th Circuit when it reviewed an advertised unconditional guarantee of satisfaction, that was contradicted by unenforced written restrictions on the guarantee. The 7th Circuit affirmed a trial court ruling that Montgomery Ward was liable under Federal Trade Commission standards that track those codified in the Consumer Protection Procedures Act, D.C. Code §§ 28-3904(e) & (f).

sign violated D.C. Code § 28-3904 (a), (d), (e), (f) & (h) of the CPPA. During his case-in-chief plaintiff testified that he witnessed a denial of same-day-service to a customer and the disclosure to the customer that same day service is available only for service requests made before 4 pm.⁷ (Supp. Appendix at 255-256) Plaintiff also testified that a sign at the entrance to the cleaners advised customers that the cleaners closed at 6:30 p.m. or 7 p.m., depending on the day. (Supp. Appendix at 256 & 307). Thus, customers attracted by the Same Day Service sign outside the store, learned upon coming in the cleaners, that same day service is not available for 1/4th of each day (3 out of the 12 hours the cleaners is open). That is a classic bait-and-switch.

This evidence clearly made out a *prima facie* case under D.C. Code §§ 28-3904 (a), (d), (e), (f) & (h). D.C. Code § 28-3904(a), for example, prohibits any merchant from representing that the services he is selling have characteristics, or that the services he is selling have benefits, that they do not have. On this record, the judgment as a matter of law on § 28-3904(a) must be reversed and this case remanded for trial on that claim. The same result follows from an analysis of the “Same Day Service” representation when measured against D.C. Code §§ 28-3904 (d), (e), (f) and (h).

Respectfully submitted,



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⁷ The October 1, 2000 amendments to the CPPA, and the accompanying legislative history, make it absolutely clear that the CPPA grants every plaintiff who files suit under the CPPA standing as a private attorney general. Appellant’s Reply Brief at 10-13 and 18-19; *see also* William B. Rubenstein, *On What A ‘Private Attorney General’ Is – And Why It Matters*, 57 Van. L. Rev. 2129, 2143-2150 (2004); *Wexler v. Brothers Entertainment Group, Inc.*, 457 N.W.2d 218 (Minn. App. 1990) (*pro se* attorney is entitled to attorneys fees if he prevails on a consumer protection claim because he is acting as a private attorney general). A plaintiff need not show he was personally “misled, deceived or damaged,” D.C. Code § 28-3904, by an unfair trade practice to recover statutory damages in a fixed amount. D.C. Code § 28-3904 (k)(1).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Petition For Rehearing Or Rehearing En Banc* was mailed, proper postage pre-paid, to:

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