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Minn. Stat. § 480A.08, subd. 3 (2000).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
C2-99-1843**

Patrick J. Sutton,  
on behalf of himself and all others similarly situated,  
Appellant,

vs.

Viking Oldsmobile Nissan, Inc.,  
Respondent.

**Filed July 31, 2001  
Affirmed in part, reversed in part  
Schumacher, Judge**

Olmsted County District Court  
File No. C699281

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Considered and decided by Anderson, G. Barry, Presiding Judge, Schumacher, Judge,  
and Peterson, Judge.

**UNPUBLISHED OPINION****SCHUMACHER, ROBERT H., Judge**

Appellant Patrick J. Sutton, on behalf of himself and all others similarly situated, sued respondent Viking Oldsmobile Nissan, Inc. on a variety of claims, including violation of the Minnesota Motor Vehicle Retail Installment Sales Act, Minn. Stat. § 168.71 (1998); violation of the Prevention of Consumer Fraud Act, Minn. Stat. § 325F.69 (1998); common-law fraud; breach of contract; and breach of fiduciary duty. The district court granted summary judgment in favor of Viking on all counts, and Sutton appealed.

This court reversed summary judgment on the consumer fraud and common-law fraud claims, but otherwise affirmed. *Sutton v. Viking Oldsmobile Nissan, Inc.*, 611 N.W.2d 60 (Minn. App. 2000). Viking sought review from the supreme court, which vacated this court's decision and remanded for consideration in light of *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2 (Minn. 2001). *Sutton v. Viking Oldsmobile Nissan, Inc.*, 623 N.W.2d 247 (Minn. 2001). We affirm in part and reverse in part.

**FACTS**

Sutton bought a used pickup truck from Viking in May 1996. He also purchased a service contract for \$1,495 and disability and term life insurance for \$1,527.69. He financed the transaction with a retail installment contract with Viking.

In the language at issue in this appeal, the contract states that the "Amounts Paid to Others on my behalf" include:

Service contract	\$ <u>1495.00</u>
To public officials	\$ <u>9.50</u>
To Insurance companies	\$ <u>1527.69</u>
Total Amounts Paid to Others	\$ <u>3032.19</u>

Viking did not, however, pay the entire \$3,032.19 to others. Instead, it paid North American Warranty Services \$752 for the service contract and retained \$743. Sutton testified in his deposition that had he known that Viking would keep almost half the cost of the extended service contract as profit, he would have tried to negotiate a lower price; if the dealership had been unwilling to negotiate, he would not have purchased the service contract. As to the \$1,527.69 for insurance, Viking paid the entire amount to American National Insurance Company, and received \$152.77 back as a commission.

### DECISION

In an appeal from a summary judgment, an appellate court reviews whether there are any genuine issues of material fact, and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Statutory interpretation is reviewed de novo. *Sorenson v. St. Paul Ramsey Med. Ctr.*, 457 N.W.2d 188, 190 (Minn. 1990).

The supreme court vacated this court's decision in *Sutton v. Viking Oldsmobile Nissan, Inc.*, 611 N.W.2d 60 (Minn. App. 2000) (*Sutton I*), and remanded the matter for consideration in light of *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2

(Minn. 2001). *Sutton v. Viking Oldsmobile Nissan, Inc.*, 623 N.W.2d 247 (Minn. 2001) (*Sutton II*). We note that *Group Health* affects only the consumer fraud issue, and the remand instructions do not specifically require us to reexamine the other issues. Because *Sutton I* was vacated, we will not only address the consumer fraud issue, but we will reiterate our reasoning on the other issues as well.

1. Sutton argued that the district court erred in granting summary judgment on his claim that Viking violated the Motor Vehicle Retail Installment Contract Act, Minn. Stat. § 168.71 (1998). This act provides in relevant part that "[e]very retail installment contract \* \* \* shall contain all the agreements of the parties." *Id.*, § 168.71(a)(1). Because there was no evidence of an agreement between Sutton and Viking as to the profits Viking would receive, there was no showing that Viking violated the act by failing to include all agreements of the parties in the contract, and the district court properly granted summary judgment.

2. Sutton sued Viking for violation of the Consumer Fraud Act, Minn. Stat. §§ 325F.68-.70 (1998). Acts of consumer fraud include the

act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby.

Minn. Stat. § 325F.69, subd. 1. The attorney general is authorized to investigate and prosecute violation of the consumer fraud act. Minn. Stat. § 8.31, subds. 1, 2 (1998). In addition, "any person" who is injured by a violation of the consumer fraud act may sue

for damages. Minn. Stat. § 8.31, subd. 3a (1998). The consumer fraud act is remedial in nature and will be liberally construed to protect consumers. *Ly v. Nystrom*, 615 N.W.2d 302, 308 (Minn. 2000).

In *Sutton II*, 623 N.W.2d at 247, the supreme court directed this court to consider our decision in *Sutton I*, 611 N.W.2d 60, in light of its decision in *Group Health*, 621 N.W.2d 2. In *Group Health*, the supreme court ruled that because section 8.31, subdivision 3a, authorizes an action for damages only for one injured "by" a violation, it "denotes a causal relationship between the alleged injury and the wrongful conduct that violates the statute." 621 N.W.2d at 13. Therefore, proof of reliance on the wrongful conduct is necessary. *Id.* But rather than the strict showing of direct causation required in a common-law fraud action, the consumer fraud act requires the lesser standard of a "legal nexus" between the injury and wrongful conduct. *Id.* at 14. Further, where an action is brought on behalf of a large number of consumers, it "may be proven by means other than direct evidence of reliance by individual consumers." *Id.* at 15.

Sutton cites his testimony at his deposition that he believed the full amount of the charge for the service and insurance contracts would be paid to others, and that had he known Viking was keeping a large percentage, he would have negotiated the price or declined to purchase them. Viking and amicus Minnesota Automobile Dealers Association contend that appellant's claims of reliance are self-serving and are insufficient to avoid summary judgment. See *Anderson v. Rizza Chevrolet, Inc.*, 9 F.Supp.2d 908, 914 (N.D. Ill. 1998) (rejecting attempt to create fact question as to

proximate cause on federal truth-in-lending claim through "self-serving" affidavit which belied plaintiff's earlier deposition). Here, however, we have appellant's deposition creating a factual issue as to his claim that his damages were caused by Viking's statement that the entire amount he paid for the service contract and insurance would be paid to others. Consequently, under *Group Health*, appellant has presented a genuine issue of material fact as to the consumer fraud claim.

3. Next, we address Sutton's claim that there was a genuine issue of material fact as to common-law fraud. See *Florenzano v. Olson*, 387 N.W.2d 168, 174 n.4 (Minn. 1986) (setting out elements of fraudulent misrepresentation). Because there are genuine issues of material fact as to the reasonableness of Sutton's reliance on the express terms of the contract, whether Viking knowingly and falsely made misrepresentations, and whether Sutton was damaged as a result of the misrepresentation, the district court erred in granting summary judgment on the fraudulent misrepresentation claim.

4. Sutton also argued the district court erred in granting summary judgment on his breach of contract claim. Because there was no showing that Sutton suffered damages from any breach of contract, the district court properly granted summary judgment. See *Lipka v. Minnesota Sch. Employees Ass'n*, 537 N.W.2d 624, 631 (Minn. App. 1995) (holding plaintiff may not recover for breach of contract absent a showing of injury from alleged breach), *aff'd as modified*, 550 N.W.2d 618 (Minn. 1996).

5. Finally, Sutton contends that the district court erred in granting summary judgment on his breach of fiduciary duty claim. We agree with the district court that

because the parties were engaged in an arm's length commercial transaction, rather than a fiduciary relationship, Sutton could not bring an action for breach of fiduciary duty. *See Shema v. Thorpe Bros.*, 240 Minn. 459, 467, 62 N.W.2d 86, 91 (1953) (holding that fiduciary relationship did not exist between parties when they were dealing at arm's length).

**Affirmed in part and reversed in part.**