MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Mike Raisor Auto Group, Inc., et al.,

Appellants-Defendants,

v.

Sidney A. Schroeder, on behalf of himself and others similarly situated,

Appellee-Plaintiff.

June 14, 2021

Court of Appeals Case No. 20A-PL-1718

Interlocutory Appeal from the Tippecanoe Superior Court

The Honorable Randy J. Williams, Judge

Trial Court Cause No. 79D01-1511-PL-49

Bailey, Judge.

Case Summary

[1] Sidney A. Schroeder ("Schroeder") filed a lawsuit against Mike Raisor Auto Group, Inc., Mike Raisor Buick GMC Cadillac, Inc., and Michael V. Raisor (collectively, "Raisor"), alleging liability under the Deceptive Consumer Sales Act (the "Consumer Act") due to the allegedly deceptive act of charging a Document Preparation Fee ("Doc Fee") when selling a vehicle.[1] Upon Schroeder's motion, the trial court certified a class action. Raisor now brings this interlocutory appeal, alleging that the trial court abused its discretion in certifying the class action.[2] Among Raisor's contentions is that a class action is improper under Trial Rule 23 due to a lack of commonality, in that whether the imposition of a Doc Fee amounted to a deceptive act turns on the facts and circumstances specific to each consumer transaction, including the negotiations that actually took place between Raisor and each consumer.

[2] We agree with Raisor. Because the instant claim regarding the imposition of a Doc Fee is not susceptible of generating class-wide resolution, we reverse the order granting class action certification and we remand for further proceedings.[3]

Discussion and Decision

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[1] Schroeder brought additional claims that are not pertinent to this appeal.

[2] We accepted jurisdiction over the interlocutory appeal pursuant to Indiana Appellate Rule 14(C).

[3] Resolving the appeal on this basis, we do not address Raisor's other challenges to certification.

Background

[3] Schroeder brought the Doc Fee claim under the Consumer Act. Therein, Subsection (a) of Indiana Code Section 24-5-0.5-3 provides, in pertinent part, that a "supplier may not commit an unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction." Although Subsection (b) contains a list of acts that amount to deceptive acts, that list does not "limit[] the scope" of the "catchall" language in Subsection (a). Ind. Code § 24-5-0.5-3(b). Here, Schroeder relied on that "catchall" language in alleging that Raisor committed a deceptive act by imposing a Doc Fee. Specifically, he alleged that the Doc Fee was imposed contrary to the Dealer Services Act (the "DSA").

[4] Whereas the DSA is enforced by the Secretary of State, *see* I.C. § 9-32-3-2, the Consumer Act confers a private right of action, *see* I.C. § 24-5-0.5-4. Indeed, the Consumer Act permits recovery where a person relied upon a deceptive act. *Id.* As this Court recently explained, conduct that runs afoul of the DSA may also run afoul of the Consumer Act. *Gasbi, LLC v. Sanders*, 120 N.E.3d 614, 620 (Ind. Ct. App. 2019), *trans. denied*. Importantly, however, a violation of the DSA does not *per se* amount to a violation of the Consumer Act. *Id.*

[5] Here, Schroeder alleged that Raisor violated Section 9-32-13-7 of the DSA and that doing so amounted to a deceptive act under the Consumer Act. The parties agree that the applicable provision of the DSA states as follows:[4]

> It is an unfair practice for a dealer to require a purchaser of a motor vehicle as a condition of the sale and delivery of the motor vehicle to pay a document preparation fee, unless the fee:
>
> (1) reflects expenses actually incurred for the preparation of documents;
>
> (2) was affirmatively disclosed by the dealer;
>
> (3) was negotiated by the dealer and the purchaser;
>
> (4) is not for the preparation, handling, or service of documents that are incidental to the extension of credit; and
>
> (5) is set forth on a buyer's order or similar agreement by a means other than preprinting.

I.C. § 9-32-13-7.

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[4] Our legislature amended this Section, specifying that the amended statute had retroactive application. *See* Pub. L. No. 245-2019, § 4. The Odyssey system shows that, prior to seeking class action certification, Schroeder moved to amend his complaint to reflect the standard in the amended statute. Raisor opposed the motion, contending that applying the amended statute would be unconstitutional. The trial court agreed with Raisor. As to the instant certification proceedings, there appears to be no dispute that, despite the amendment, the applicable statute is the statute in effect at the time of the sale. We will follow the parties' lead. Therefore, our citations to Section 9-32-13-7 refer to the statute in effect prior to the amendment.

[6] In seeking class action certification, Schroeder proposed the following class: "All natural persons who purchased a vehicle from [Raisor] and who were charged a document preparation fee in connection with the transaction, at any time during the period beginning two years before the filing of this lawsuit." Appellants' App. Vol. 2 at 77. The trial court granted Schroeder's motion.

Standard of Review

[7] "Appellate courts reviewing a class certification employ an abuse of discretion standard." *Associated Med. Networks, Ltd. v. Lewis*, 824 N.E.2d 679, 682 (Ind. 2005). "An abuse of discretion occurs when the decision misinterprets the law or clearly contravenes the logic and effect of the facts and circumstances before the court." *Smith v. Franklin Twp. Cmty. Sch. Corp.*, 151 N.E.3d 271, 273 (Ind. 2020). In the context of class certification, the "certification determination will be affirmed if supported by substantial evidence." *Lewis*, 824 N.E.2d at 682.

Trial Rule 23

[8] In deciding whether to certify a class action, the court must apply Trial Rule 23, which is "based upon Rule 23 of the Federal Rules of Civil Procedure[.]" *Id.* at 685. Because our rule is based upon the federal rule, "it is appropriate to consider federal court interpretations when applying the Indiana Rule." *Id.*

[9] Trial Rule 23 specifies that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if" certain requirements are met. One such requirement is the existence of commonality—that is, the litigation must involve "questions of law or fact common to the class[.]" *Id.* As

to the commonality requirement, the U.S. Supreme Court has explained that the claims "must depend upon a common contention[.]" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Moreover, that common contention "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* In other words,

> What matters to class certification . . . is not the raising of common "questions"—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Id. (alteration and emphasis in original) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)); *see also Bell v. PNC Bank, Nat. Ass'n*, 800 F.3d 360, 374 (7th Cir. 2015) (noting that "the mere occurrence of all plaintiffs suffering as a result of a violation of the same provision of law is not enough" to satisfy the commonality requirement).

[10] Ultimately, the commonality requirement relates to the principal purpose of permitting class actions, which is to promote the efficiency and economy of litigation. *See LHO Indpls. One Lessee, LLC v. Bowman*, 40 N.E.3d 1264, 1269 (Ind. Ct. App. 2015). Moreover, the party seeking class certification bears the burden of establishing that the certification requirements have been met. *Id.*

Analysis

[11] Raisor challenges certification, alleging that—*inter alia*—the commonality requirement was not satisfied. According to Raisor, the issue of whether Raisor committed a deceptive act by charging a Doc Fee does not lend itself to class-wide resolution but instead requires a transaction-by-transaction inquiry.[5]

[12] In granting Schroeder's motion to certify a class action, the trial court defined the class as those who "were charged a document preparation fee in connection with the transaction" during a particular timeframe. Appellants' App. Vol. 2 at 16-17. Notably, however, charging a Doc Fee is not *per se* a deceptive act. *See* I.C. § 24-5-0.5-3(b) (setting forth a list of deceptive acts). Moreover, even charging a Doc Fee in violation of the DSA is not *per se* a deceptive act. *Gasbi*, 120 N.E.3d at 620. As Raisor points out on appeal, the defined class would include "those who negotiated" the Doc Fee and even "those with [a Doc Fee] at or below the dealer's actual expenses[.]" Br. of Appellant at 61. In other words, the class would encompass consumer transactions in which the Doc Fee was affirmatively disclosed, discussed, negotiated, and tied to actual expenses. According to Raisor, "[e]ven if Schroeder had evidence on which he could prevail for his individual claim against Raisor, that does not mean Raisor

[5] To the extent Schroeder contends that Raisor waived this argument by failing to raise it below, we disagree. *See, e.g.*, Appellants' App. Vol. 2 at 132 (arguing that the commonality requirement was not satisfied because "each sale is unique, with different variables present" and merely charging a Doc Fee is not *per se* a violation).

should be liable to any other customers," and so this class action ultimately would not "yield answers that materially advance the litigation[.]" *Id.* at 46.

[13] We agree with Raisor. Whether the imposition of a Doc Fee amounted to a relied-upon deceptive act is a question that turns on the circumstances of each consumer transaction. *See* I.C. §§ 24-5-0.5-3(a) (generally proscribing the commission of "an unfair, abusive, or deceptive act, omission, or practice in connection with a consumer transaction"), -4 (providing a cause of action for those who relied upon a deceptive act). Therefore, the instant claim, without more, is not susceptible of generating a class-wide answer "apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350 (quoting Nagareda*, supra*, at 132).[6]

[14] All in all, because of the necessity of transaction-specific inquiries regarding the Doc Fee, a class action would not efficiently advance the instant litigation; the commonality requirement of Trial Rule 23(A) was not satisfied. We therefore reverse the order certifying a class action and remand for further proceedings.[7]

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[6] In defending certification, Schroeder relies on *Ind. Bus. Coll. v. Hollowell*, 818 N.E.2d 943 (Ind. Ct. App. 2004), for the proposition that the commonality requirement is satisfied by showing a common course of conduct. *See* Br. of Appellee at 33-34. Although we acknowledge Schroeder's position, we have determined that the U.S. Supreme Court's *Wal-Mart* opinion contains the more complete discussion of this requirement.

[7] Schroeder points out that Raisor challenged discovery efforts pertaining to class certification, which resulted in the partial denial of Schroeder's motion to compel. According to Schroeder, because Raisor challenged those discovery efforts, principles of estoppel or invited error should apply, precluding Raisor from obtaining reversal due to a failure to satisfy the certification requirements. Schroeder also asks that, if we reverse, we remand for him to conduct "reasonable class discovery to support class certification." Br. of Appellee at 21. We disagree that Raisor should be precluded from obtaining reversal. Moreover, although the issue is not before us, Schroeder's motion to compel was considered by the trial court and partially denied. On remand, if Schroeder wishes to keep pursuing certification, he is not precluded from doing so. However, to obtain

[15] Reversed and remanded.

May, J., and Robb, J., concur

additional discovery, Schroeder must seek discovery in such a manner that, in the event of non-compliance, the trial court is willing to direct Raisor to comply. *See generally, e.g.*, *Beville v. State*, 71 N.E.3d 13, 18 (Ind. 2017) ("Trial courts have broad discretion on issues of discovery.").